To Be Argued By:
Michael J. Kozoriz
Time Requested: 15 Minutes

New York County Clerk's Index No. 155334/12

New York Supreme Court

APPELLATE DIVISION — FIRST DEPARTMENT

MICHAEL CUTAIA,

Plaintiff-Appellant,

against

THE RECTOR, CHURCH WARDENS AND VESTRYMEN OF TRINITY CHURCH IN THE CITY OF NEW YORK, MICHILLI CONSTRUCTION, INC., MICHILLI INC.,

Defendants-Respondents,

and

THE BOARD OF MANAGERS OF THE 160/170 VARICK STREET CONDOMINIUM, PATRIOT ELECTRIC CORP.,

Defendants.

(Additional Caption on the Reverse)

BRIEF FOR DEFENDANTS-RESPONDENTS

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MICHILLI CONSTRUCTION, INC. and MICHILLI, INC.,

Third-Party Plaintiffs-Respondents,

against

A+ INSTALLATIONS CORP.,

Third-Party Defendant-Respondent.

160/170 VARICK STREET CONDOMINIUM, IMPROPERLY NAMED AS BOARD OF MANAGERS OF THE 160/170 VARICK STREET CONDOMINIUM, THE RECTOR, CHURCH WARDENS AND VESTRYMEN OF TRINITY CHURCH IN THE CITY OF NEW YORK,

Second Third-Party Plaintiffs,

against

THE TRAVELERS COMPANIES, INC. d/b/a TRAVELERS INSURANCE COMPANY 485 Lexington Avenue New York NY 10017,

Second Third-Party Defendants.

THE BOARD OF MANAGERS OF THE 160/170 VARICK STREET CONDOMINIUM, THE RECTOR, CHURCH-WARDENS AND VESTRYMEN OF TRINITY CHURCH IN THE CITY OF NEW YORK, MICHILLI CONSTRUCTION, INC. and MICHILLI, INC.,

Third Third-Party Plaintiffs,

against

ATLAS-ACON ELECTRIC SERVICE CORPORATION,

Third Third-Party Defendant.

THE BOARD OF MANAGERS OF THE 160/170 VARICK STREET CONDOMINIUM, THE RECTOR, CHURCH-WARDENS AND VESTRYMEN OF TRINITY CHURCH IN THE CITY OF NEW YORK, MICHILLI CONSTRUCTION, INC. and MICHILLI, INC.,

Fourth Third-Party Plaintiffs,

against

FIRST QUALITY MAINTENANCE II, LLC and ALEXANDER WOLF & SON,

Fourth Third-Party Defendants.

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COUNTER-STATEMENT OF THE QUESTIONS INVOLVED

1. Was the Supreme Court correct in denying the Plaintiff-Appellant's motion for summary judgment as to his Labor Law § 240(1) cause of action?

ANSWER OF THE COURT FROM WHICH APPEAL IS TAKEN

Yes, in denying the Plaintiff-Appellant's motion for summary judgment on his Labor Law § 240(1) cause of action, the Supreme Court correctly held that Plaintiff-Appellant failed to make a prima facie showing that Labor Law § 240(1) was violated or that any such violation was a proximate cause of the injuries alleged.

2. Is the Plaintiff-Appellant entitled to a determination by this Court on appeal that he was not comparatively negligent as a matter of law, particularly where Plaintiff-Appellant made no such showing and sought no such determination from the Supreme Court?

ANSWER OF THE COURT FROM WHICH APPEAL IS TAKEN

No, Plaintiff-Appellant is not entitled to a determination on appeal that he was not comparatively negligent, where there is evidence of plaintiff's comparative fault, and particularly where he sought no such determination from the Supreme Court.

COUNTER-STATEMENT OF FACTS

The Plaintiff-Appellant, Michael Cutaia (hereinafter "Cutaia" or "plaintiff"), was employed as a plumbing mechanic by A+ Installations Corp. when, on March

26, 2012, he alleges to have sustained an electric shock from an exposed Romex wire in the ceiling where he was working, on the 11th floor of 160/170 Varick Street, New York, NY (325).[1]

Defendant-Respondent, The Rector, Church Wardens and Vestrymen of Trinity Church in the City of New York (hereinafter "Trinity Church"), owned the building located at 160/170 Varick Street (920-921). Cutaia's accident happened in tenant space on the 11th floor, occupied by Defendant-Respondent, Michilli Construction, Inc./Michilli, Inc. (hereinafter "Michilli") (450-452).

No one from Trinity Church or Michilli told Cutaia how to perform his work (460).

To perform his tasks in the men's restroom where his accident would later occur, Cutaia used a blue-colored A-frame ladder that he found in the restroom (472-473). The ladder was a fiberglass ladder with metal steps and rubber feet (475-476). He had used that same ladder every day that he worked at the jobsite (472). He did not know who owned the ladder (472).

The restroom floor was made of cement and was level (478-479). Just a few feet from where the accident would later occur, Cutaia set the ladder up in the restroom and was frequently going up and down the ladder, as needed, and the ladder was stable (479-480). The drop ceiling in the restroom was framed out, but

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[1] Citations to the Record on Appeal will be in the form "( )".

there were no ceiling tiles in place yet (482). Lighting in the room was adequate (485-486). Plaintiff observed electrical wiring running through the ceiling, mostly BX cable, but also yellow wires that plaintiff speculated were temporary. These yellow wires were near the copper pipes that plaintiff was cutting (486-488).

After working on the ladder, going up and down it several times for about 30 minutes, plaintiff moved the ladder in the restroom about five to seven feet from its prior location. This time, plaintiff did not set up the ladder in the open and locked position, but rather kept it closed and leaned it against a wall (489-490). Plaintiff leaned the 10-foot A-frame ladder against the wall so that the top was about eight to nine feet high up on the wall. This brought the top of the ladder about one foot beneath the ceiling frame. The base of the ladder was about two feet from the wall (492-494).

Cutaia climbed the ladder and was up on it for five to 15 minutes before he fell (495). The ladder did not move and was "sturdy up against the wall" (501). He described his accident as follows:

> I went up the ladder, I cut the pipe, and then I stayed on the ladder. There's a process. You've got to clean the pipe, flux it, and then stick the T on. So I cut it, I cleaned it, and when I went to go stick the T on, I grabbed the pipe and then I went to grab the other side of the pipe to push it onto the T, and that's when I got electrocuted.

(495-496). "I was on the ladder while I was being electrocuted and then the next thing I remember was getting up off the ground, being on the ground" (507). Cutaia did not know if the ladder had fallen, testifying:

> Q: How did you break away from that pipe? Did somebody have to remove you from it, or did you fly off the ladder, or something else?
>
> A: I don't know. I have no idea. The next thing I know I was on the floor.
>
> Q: Did anybody ever tell you, 'Hey, we had to knock you off of that'?
>
> A: No.
>
> Q: Did the ladder move at all after you found yourself on the ground?
>
> A: I don't know.
>
> Q: Well, the ladder didn't fall on top of you, correct?
>
> A: I don't know. I don't think so. I don't know.
>
> Q: Do you remember seeing the ladder?
>
> A: After the accident?
>
> Q: Yes.
>
> A: No, I don't remember seeing the ladder.

(538-539).

According to Cutaia, a smaller A-frame ladder would not have allowed him to access the pipe in the ceiling. When asked if he inquired about an alternative

means to access the pipes in the ceiling, plaintiff insisted that there was no other way than to lean the ladder against the wall. Only later did he testify that he asked Joe Renna, the project manager for MICHILLI, about an alternative ladder, but then he contradicted himself, testifying that he could not remember if he spoke to Joe Renna about another ladder (501-503). In opposition to Cutaia's motion for summary judgment, Trinity Church and Michilli submitted an Affidavit from Joe Renna denying that he had any such discussion with Cutaia about the ladder available to him as being inadequate for the job or whether there were alternative ladders or scaffolds available (1893-1894). Cutaia's helper, James Alonzo, was present in the restroom when Cutaia set up the ladder and at the time of the accident (503-504). Cutaia did not know if the ladder itself had fallen during or after his electric shock (508).

Joe Renna, the project manager for Michilli, testified that after the accident, he saw an old wooden, eight-foot A-frame ladder laying on the floor. He did not know who owned the ladder, but it did not belong to Michilli (1160-1162). Cutaia's employer, A+ Installations, would bring its own tools for its work (1161). Cutaia was the person in-charge at the site for the work performed by his employer, A+ Installations (1245-1246). On the day of the accident, Cutaia and his assistant were the only employees from A+ Installations present (1246-1247).

As the Supreme Court aptly held in determining Cutaia's motion for summary judgment on his Labor Law § 240(1) claim, Cutaia "has not shown, or even argued, that his injuries were caused by his fall, rather than the electrical shock he received" (25). Therefore, the Supreme Court correctly denied that portion of Cutaia's motion for summary judgment as to his Labor Law § 240(1) cause of action.

Only at a Compliance Conference following the Supreme Court's decision, which granted plaintiff's motion for summary judgment as to his Labor Law § 241(6) cause of action[2], did counsel for Cutaia orally seek clarification of whether the Supreme Court's decision and order can or should be interpreted to mean that Cutaia was free of any comparative negligence. The Supreme Court orally responded that plaintiffs who are successful in obtaining judgment as a matter of law on Labor Law § 241(6) claims are still subject to a comparative negligence charge at trial. Hence, this issue is now a part of Cutaia's appeal, even though it was not an issue presented to the Supreme Court on plaintiff's motion for summary judgment under Labor Law §§ 240(1) and 241(6).

[2] Trinity Church and Michilli withdrew their appeal of the Supreme Court's decision and order granting summary judgment against them on Cutaia's Labor Law § 241(6) claim.

ARGUMENT FOR THE RESPONDENT

POINT I

THE SUPREME COURT'S DECISION AND ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AS TO HIS LABOR LAW § 240(1) CAUSE OF ACTION SHOULD BE AFFIRMED

Cutaia alleges that Trinity Church and Michilli, in their capacities as owner and general contractor, respectively, violated Labor Law § 240, commonly known as the "Scaffold Law," which provides in pertinent part as follows:

> (1) All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the purposes of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.

In order to sustain a cause of action under Labor Law § 240, a plaintiff must first prove that the statute was violated, and that the violation was the proximate cause of the injuries (*see Robinson v. East Med. Ctr., LP*, 6 N.Y.3d 550, 554, 814 N.Y.S.2d 589, 591 [2006]; *Blake v. Neighborhood Hous. Servs. of N.Y. City*, 1 N.Y.3d 280, 771 N.Y.S.2d 484, 803 N.E.2d 757 [2003]). Liability will not be imposed under Labor Law § 240(1) where the worker's actions were the sole proximate cause of his injuries (*see Blake, supra*, 1 N.Y.3d at 290; *Cahill v. Triborough Bridge & Tunnel Auth.*, 4 N.Y.3d 35, 790 N.Y.S.2d 74, 823 N.E.2d

439 [2004]; *Weininger v. Hagedorn & Co.*, 91 N.Y.2d 958, 672 N.Y.S.2d 840, 695 N.E.2d 709 [1998]; *Meade v. Rock-McGraw, Inc.*, 307 A.D.2d 156, 159, 760 N.Y.S. 2d 39 [1st Dep't 2003]).

There is no question that the purpose of Labor Law § 240(1) is to protect construction workers from risks and hazards related to the effects of gravity as a result of height differentials (*see Rocovich v. Consolidated Edison Co.*, 78 N.Y.2d 509, 577 N.Y.S.2d 219, 583 N.E.2d 932 [1991]; *see also Ross v. Curtis-Palmer Hydro-Electric Co.*, 81 N.Y.2d 494, 601 N.Y.S.2d 49, 618 N.E.2d 82 [1993]; *Tsatsakos v. Citicorp.*, 295 A.D.2d 500, 744 N.Y.S.2d 475 [2d Dep't 2002]). However, the Courts have recognized that an accident alone does not establish a Labor Law § 240(1) violation or causation (*see Blake, supra*, 1 N.Y.3d at 288-289).

In other words, it is "designed to protect workers in construction projects against injury from the expected risks of inherently hazardous work posed by elevation differentials at the work site" (*Buckley v. Columbia Grammar & Preparatory*, 44 A.D.3d 263, 841 N.Y.S.2d 249 [1st Dep't 2007]; *see also Scharff v. Sachem Central School District at Holbrook*, 53 A.D.3d 538, 861 N.Y.S.2d 406 [2d Dep't 2008]). "In order for section 240(1) to apply, there must be a significant inherent risk attributable to an elevation differential. The statute does not cover the

type of ordinary and usual peril to which a worker is commonly exposed at a construction site" (*Buckley*, *supra*; *see also Scharff*, *supra*).

In *Nohejl v. 40 West 53rd Partnership*, 205 A.D.2d 462, 462, 613 N.Y.S.2d 909 [1st Dep't 1994], the Appellate Division aptly held:

> A plaintiff in a § 240(1) claim must not only prove that a violation existed, but must also establish that the violation was the proximate cause of the plaintiff's injuries (*Smith v. Hooker Chemical & Plastics Corp.*, 89 A.D.2d 361, 455 N.Y.S.2d 446). Even assuming that plaintiffs have established that the scaffold was defective, plaintiffs have not shown as a matter of law that such a "defect" was the proximate cause of decedent's injuries.
>
> Since there are disputed issues concerning the height and condition of the scaffolding, the IAS court properly determined that material questions of fact exist with respect to whether a violation of Labor Law § 240(1) occurred and, if so, whether the violation was the proximate cause of decedent's fall.

(*Nohejl*, 205 A.D.2d at 462).

In the case at bar, Cutaia has identified no defect whatsoever in the ladder, and in fact, testified that the ladder was steady and sturdy as he was using it throughout the day (501). He admitted to leaning the closed A-frame ladder against a wall in the restroom, which is a misuse of the ladder (583-584). Although plaintiff's expert, Robert Fuchs, P.E., wrote that "[b]ased upon my review of the evidence, Cutaia could not access his work area in the ceiling with the A-frame ladder in an open and locked position" (1848), Mr. Fuchs does not state what "evidence" he is basing his opinion on. In fact, the only such

"evidence" is plaintiff's own self-serving testimony that the area was too small to open the ladder. Mr. Fuchs never visited the location and there is no information as to the actual size or dimensions of the room where the accident occurred. Such an opinion by Mr. Fuchs also begs the question of how a "baker scaffold or man lift" could have been a safer alternative, as he suggests, if the area was too small for an open A-frame ladder.

In *Blake, supra*, the Court of Appeals stated, "[i]n *Weininger v. Hagedorn & Co.*, 91 N.Y.2d 958, 960 (1998), we held that 'Supreme Court erred...in directing a verdict in favor of plaintiff, at the close of his own case, on the issue of proximate cause' where 'a reasonable jury could have concluded that plaintiff's actions were the sole proximate cause of his injuries, and consequently the liability under § 240(1) did not attach'" (1 N.Y.3d at 290). The Court of Appeals went further in stating, "contrary to plaintiff's claim, the Appellate Division has held (both before and after *Weininger*) that a defendant is not liable under Labor Law § 240(1) where there is no evidence of violation and the proof reveals that the plaintiff's own negligence was the sole proximate cause of the accident" (*Id.* at 290).

It is respectfully submitted that there are questions of fact as to whether the ladder being used by Cutaia provided him with proper protection and whether he was the sole proximate cause of his accident when he admittedly leaned the closed

A-frame ladder against a wall (*see Nazario v. 222 Broadway LLC*, 28 N.Y.3d 1054, 43 N.Y.S.3d 251, 65 N.E.3d 1286 [2016]).

In *Nazario*, the Court of Appeals held:

> Plaintiff is not entitled to summary judgment under Labor Law § 240(1). While using an A-frame ladder, plaintiff fell after receiving an electrical shock. Questions of fact exist as to whether the ladder failed to provide proper protection, and whether plaintiff should have been provided with additional safety devices (*see Blake v. Neighborhood Hous. Servs. of N.Y. City*, 1 N.Y.3d 280, 287, 771 N.Y.S.2d 484, 803 N.E.2d 757 [2003]; *Barreto v. Metropolitan Transp. Auth.*, 25 N.Y.3d 426, 13 N.Y.S.3d 305, 34 N.E.3d 815 [2015], *rearg. denied* 25 N.Y.3d 1211, 16 N.Y.S.3d 515, 37 N.E.3d 1159 [2015]).

(*Nazario*, 28 N.Y.3d at 1055).

In *Nazario*, the Court of Appeals reversed a determination by the First Department that the plaintiff there was entitled to summary judgment on his Labor Law § 240(1) cause of action, where he fell from a ladder after having received an electric shock (*see Nazario v. 222 Broadway, LLC*, 135 A.D.3d 506, 23 N.Y.S.3d 192 [1st Dep't 2016]). In connection with the First Department's decision, Justice Tom wrote a concurring opinion in which he disagreed with the majority's ruling in plaintiff's favor, but indicated that he felt constrained to follow recent First Department precedent, which in his opinion, was contrary to precedent established by the Court of Appeals (*see Nazario*, 135 A.D.3d at 511 ["[T]his Court's precedent cannot be reconciled with that of the Court of Appeals, which has made clear that merely because a worker falls from a safety device does not mean that,

under a principle of strict liability, recovery under the statute is available"] [Tom, J., concurring]). Many of the cases that Justice Tom was critical of are those cases relied upon by Cutaia here. The Court of Appeals essentially adopted Justice Tom's opinion in reversing the First Department's award of summary to the plaintiff on his Labor Law § 240(1) claim (*see Nazario*, *supra*, 28 N.Y.3d at 1055; *see also Jones v. Nazareth College of Rochester*, 147 A.D.3d 1364, 46 N.Y.S.3d 357 [4th Dep't 2017]).

In *Jones*, the Appellate Division held:

> Plaintiff commenced this Labor Law and common-law negligence action seeking damages for injuries he sustained when he fell from an A–frame ladder. We conclude that Supreme Court properly denied plaintiff's motion for partial summary judgment on the issue of liability with respect to the Labor Law § 240(1) cause of action. At the time of the accident, plaintiff was using a 10–foot A–frame ladder to install flashing around a duct. The ladder was folded shut and leaning against the wall while plaintiff was using it. Just before the accident, he was using both hands to take a measurement above his head, while standing on "the fourth or fifth rung" of the ladder, which was "at least four feet off the floor." As he extended his tape measure, he felt a strong electric shock to his left arm and he fell off the ladder.
>
> Contrary to plaintiff's contention, we conclude that the court properly denied the motion. "[T]here are questions of fact ... whether ... the ladder, which was not shown to be defective in any way, failed to provide proper protection, and whether ... plaintiff should have been provided with additional safety devices" (*Gange v. Tilles Inv. Co.*, 220 A.D.2d 556, 558, 632 N.Y.S.2d 808; *see Nazario v. 222 Broadway, LLC*, 28 N.Y.3d 1054, 1055, 43 N.Y.S.3d 251, 65 N.E.3d 1286; *Grogan v. Norlite Corp.*, 282 A.D.2d 781, 782–783, 723 N.Y.S.2d 529; *Donovan v. CNY Consol. Contrs.*, 278 A.D.2d 881, 881, 718 N.Y.S.2d 760).

(*Jones*, 147 A.D.3d at 1365).

In conclusion, Cutaia's motion for summary judgment, pursuant to Labor Law § 240(1), was properly denied by the Supreme Court, where Cutaia "has not shown, or even argued, that his injuries were caused by his fall, rather than the electrical shock he received" (25), and because there are material issues of fact as to whether the ladder being used by Cutaia provided him with proper protection and whether he was the sole proximate cause of his accident when he admittedly leaned the closed A-frame ladder against a wall.

POINT II

PLAINTIFF CUTAIA IS NOT ENTITLED TO A DETERMINATION THAT HE WAS NOT NEGLIGENT AS A MATTER OF LAW WHERE HE HAS PROFFERED NO EVIDENCE EXONERATING HIMSELF OF ANY NEGLIGENCE

While the Supreme Court determined that Cutaia was entitled to judgment as a matter of law on his Labor Law § 241(6) claim, such a determination does not preclude the defendants from arguing at trial that Cutaia was comparatively negligent (*see Misicki v. Caradonna*, 12 N.Y.3d 511, 515, 882 N.Y.S.2d 375, 909 N.E.2d 1213 [2009]; *St. Louis v. Town of North Elba*, 16 N.Y.3d 411, 414, 923 N.Y.S.2d 391, 947 N.E.2d 1169 [2011] ["[C]omparative negligence remains a cognizable affirmative defense to a section 241(6) cause of action"]; *Luciano v.*

New York City Housing Authority, 157 A.D.3d 617, 67 N.Y.S.3d 456 [1st Dep't 2018]).

Courts have held, in determining that Labor Law § 241(6) was violated, that a plaintiff was also not negligent as a matter of law (*see Ortega-Estrada v. 215-219 West 145th Street LLC*, 118 A.D.3d 614, 615, 987 N.Y.S.2d 845 [1st Dep't 2014] ["Defendants' challenges to plaintiff's credibility are unpersuasive and although comparative negligence is a viable defense to a Labor Law § 241(6) claim, no evidence of culpable conduct on the part of plaintiff was presented by defendants"]). However, the defendants here have presented evidence of plaintiff's comparative fault, such as using an A-frame ladder in the closed position and working *without protective gloves* in close proximity to electrical wires (505-506), which he knew were present and readily apparent (486-488), at least one of which was uncapped according to plaintiff's version of the facts (*see Lorefice v. Reckson Operating Partnership, L.P.*, 269 A.D.2d 572, 703 N.Y.S.2d 507 [2d Dep't 2000] ["Although the plaintiffs established a prima facie violation of 12 NYCRR 23–1.13(b)(4) by the defendant, there are triable issues of fact as to the defendant's liability, including whether Lorefice was negligent in failing to use an insulated mat which was available on the premises"]).

Cutaia's reliance on *O'Leary v. S & A Elec. Contracting Corp.*, 149 A.D.3d 500, 53 N.Y.S.3d 617 [1st Dep't 2017], for his argument that a violation of 12

NYCRR 23–1.13(b) as the predicate for defendants' liability under Labor Law § 241(6) precludes a concurrent finding of comparative fault, is misplaced. In *O'Leary*, the Appellate Division specifically held that the plaintiff there was not comparatively negligent where he had objected to performing the work in the manner that was required of him, that his supervisors overruled his objections, and that the failure to appreciate the plaintiff's concerns led to his accident and injuries (*O'Leary*, 149 A.D.3d at 502).

Lastly, as Cutaia never specifically petitioned the Supreme Court for a determination that he was not negligent as a matter of law, this issue is not preserved for appellate review and the relief sought by Cutaia should be denied (*see Scheemaker v. State*, 70 N.Y.2d 985, 986, 526 N.Y.S.2d 420, 521 N.E.2d 427 [1988] [holding that state's argument that claimant's failure to use seatbelt should have been considered on issue of her comparative fault in action arising from automobile accident, was not preserved for review, where argument was urged for first time on appeal]; *Wittorf v. City of New York*, 144 A.D.3d 493, 494, 41 N.Y.S.3d 36 [1st Dep't 2016] ["Plaintiff's argument that the evidence was insufficient to warrant a comparative negligence charge, let alone support a comparative negligence finding, is not preserved since she failed to move for a directed verdict on the issue at the close of the evidence . . . and did not object to the comparative negligence charge" [citations omitted]]).

CONCLUSION

Cutaia's motion for summary judgment, pursuant to Labor Law § 240(1), was properly denied by the Supreme Court, holding that Cutaia "has not shown, or even argued, that his injuries were caused by his fall, rather than the electrical shock he received" (25). Similarly, there are material issues of fact as to whether the ladder being used by Cutaia provided him with proper protection and whether he was the sole proximate cause of his fall when he admittedly leaned the closed A-frame ladder against a wall.

Cutaia is further not entitled, on appeal, to a determination that he was not negligent as a matter of law, where the affirmative defense of comparative fault remains viable despite summary judgment in Cutaia's favor under Labor Law § 241(6), particularly where there is evidence of the plaintiff's own negligence.

Lastly, Cutaia is not entitled to a determination that he was not negligent as a matter of law where this issue has not been preserved for appellate review.

Dated: December 28, 2018
New York, New York

Respectfully submitted,

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