

UNITED STATES OF AMERICA BEFORE THE
NATIONAL LABOR RELATIONS BOARD

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REGENCY HOUSE OF WALLINGFORD, INC.,

and

LOCAL 560C, INTERNATIONAL CHEMICAL
WORKERS UNION COUNCIL.
----- x

Case Nos.: 34-CA-9895
34-CA-9915
34-CA-10075
34-CA-10101

**RESPONDENT'S ANSWERING MEMORANDUM OF LAW
TO THE CROSS EXCEPTIONS TO THE DECISION OF THE
ADMINISTRATIVE LAW JUDGE FILED BY COUNSEL FOR THE GENERAL
COUNSEL AND THE CHARGING PARTY**

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PRELIMINARY STATEMENT

Pursuant to Section 102.46(f) of the Rules and Regulations of the National Labor Relations Board ("Board"), the Respondent, Regency House of Wallingford, Inc., (the "Respondent" or "Regency"), files this responsive brief to the cross exceptions taken by Counsel for the General Counsel ("General Counsel") and Local 560C, International Chemical Workers Union Council (the "Union") to the Decision of Administrative Law Judge John McCarrick ("ALJ McCarrick") issued on November 21, 2006. For the reasons set forth below, it is respectfully requested that the Board dismiss both General Counsel's and the Union's Cross-Exceptions in their entirety and grant, in their entirety, those Exceptions filed by Respondent on January 5, 2007.

General Counsel raises a single Cross-Exception to the Decision of ALJ McCarrick; *to wit*, excepting to ALJ McCarrick's finding that any delay in effectuating the rescission of wages did not constitute a denigration of the Union. The Union, in its Cross-Exceptions to the ALJ's Decision, also takes exception

with this holding. However, as set forth by ALJ McCarrick, the delay was inconsequential; in fact, part of any ostensible delay was “attributed to the Union’s consideration of Respondent’s proposal to bargain.” (ALJD p. 12, lines 1-33).^{1/} As set forth in greater detail herein, ALJ McCarrick’s holding should be affirmed as the initial delay in implementing the rescission was mutual and, once resolved, the subsequent delay was *de minimis* and based on the Union’s request that said rescission occur during the middle of a pay week when it could not be effectuated.

Additionally, the Union raises some far-reaching and ill-conceived propositions which must be dismissed by the Board. For example, the Union proposes, perhaps realizing that neither it nor General Counsel proved, or even offered to prove, causation between the alleged unfair labor practices (“ULP’s”) committed by Respondent and employee dissatisfaction with the Union, that Respondent “generally refused to bargain” with the Union prior to November 13, 2001. The Union argues that in such a situation of a “general” refusal to bargain, pursuant to Lee Lumber such a casual connection should be “presumed” rather than proven.^{2/} However, the Complaint in this case alleges a refusal to bargain as of the date on which Respondent withdrew recognition, November 14, 2001, and no earlier. It is too late now to raise these allegations.

^{1/} ALJD shall refer to Decision of Administrative Law Judge John J. McCarrick dated November 21, 2006. Similarly, Tr. shall refer to portions of the Transcript from the underlying matter cited herein; G.C. shall refer to General Counsel’s Exhibits; JT shall refer to Joint Exhibits; and R shall refer to Respondent’s Exhibits.

^{2/} 322 N.L.R.B. 175 (1996).

In Lee Lumber the employer first refused to bargain and subsequently withdrew recognition. Here, it was the withdrawal of recognition that inevitably led to the refusal to bargain. The two (2) situations are wholly distinguishable, as the Board explicitly found in Lee Lumber that when a refusal to bargain leads to a withdrawal of recognition, causation will be presumed. The Board did not opine that a withdrawal of recognition that leads to a refusal to bargain also results in causation being presumed. Such a conclusion is a non sequitur. It would render all withdrawals of recognition a nullity. An employer cannot bargain with an entity that is not recognized as the bargaining representative. The very act of bargaining constitutes recognition.

The Union also proposes in its Cross-Exceptions and supporting brief that an employer may only “gather” evidence that a Union has lost its majority status after contract expiration, not during the term of an initial contract. The Union essentially seeks a new rule that a union cannot be decertified during the term of its initial contract. Section 9(c) of the Act gives employees (who, after all, are the beneficiaries of the Act; it is their rights which must be protected) the right to file a petition for decertification if a union no longer represents a majority of employees. It is well-established Board law that a decertification petition may be filed during the open window period of a contract, that is, more than sixty (60) days but less than ninety (90) days before the expiration date of an existing contract of three (3) years duration or less. The Union’s exhortations that this rule should be altered are neither legally, logically nor pragmatically convincing,

and, if anything, would strip rights from those designed to benefit from the Act: the employees.

Finally, the Union proposes that it be awarded novel and extraordinary relief (for which it cites no precedent) such as costs, fees and expenses for litigating the instant case. The Union bases this request upon no more than its frequent conclusory use of the word "frivolous." In this matter, Respondent withdrew recognition of the Union because a majority of the bargaining unit signed a petition seeking to decertify the Union (the "Petition"). None of the signatories to the Petition were even aware of the purported unfair labor practices the ALJ found tainted the petition. There is no basis for penalizing an employer for acceding to the wishes of its employees. Should the Board ultimately find Respondent to have violated the Act, it is beyond certainty that the remedies developed in its five (5) decades of existence are sufficient to handle the instant situation. In any event, as Respondent's withdrawal of recognition was lawful, any proposed remedies are moot.

STATEMENT OF FACTS

For a full recitation of the relevant facts in this matter, the Board is respectfully referred to the Memorandum of Law in Support of Respondent's Exceptions to the Administrative Law Judge's Decision as submitted to ALJ McCarrick on or about January 5, 2007. It is respectfully requested that same be accepted and incorporated herein.

ARGUMENT

POINT I

ALJ MCCARRICK'S HOLDING THAT THE PASSAGE OF FIVE WEEKS IN IMPLEMENTING THE WAGE RECISSION DID NOT CONSTITUTE DENIGRATION OF THE UNION SHOULD BE AFFIRMED

- A. The Initial Delay In Implementing The Rescission Was Mutual And, Once Resolved, The Subsequent Delay Was *De Minimis* And Based On The Union Requesting Said Rescission During The Middle Of A Pay Week When It Could Not Be Effectuated.

On February 21, 2001, Judge Marcionese issued his decision in a prior case involving the parties herein, in which he found the wage increase implemented by Respondent to be unlawful (Tr.: 26-32) (G.C. Ex. 34). Accordingly, the Union was given the option to demand wage rescission. On March 19, Lori Carver ("Carver"), the Union's Unit Vice President, sent Bill Viola ("Viola"), Respondent's Administrator, a letter setting forth a proposal which would negate the need for rescission (G.C. Ex. 3). If the proposal was not agreed to, the Union expected rescission to go into effect beginning March 26 (G.C. Ex. 3). Respondent subsequently urged Carver to reconsider (G.C. Ex. 4).

On April 12, John Mendolusky ("Mendolusky"), a Union representative, sent Respondent's counsel a letter requesting that the rescission be effective April 16 (G.C. Ex. 7). At no point in that letter did Mendolusky hint that Respondent had, until that point, delayed in rescinding wages. In fact, the letter acknowledges that the parties had been waiting for the Board's "imprimatur"

(G.C. Ex. 35) before effectuating the wage rescission (G.C. Ex. 7). The Board Order (G.C. Ex. 35) was received by the Union on April 12 (G.C. Ex. 7, 8). Viola testified to this fact as well (Tr. 394-395).

On April 30, Viola sent Carver a letter expressing his intention to rescind wages as per the Union's request (G.C. Ex. 12). However, Viola proposed to enter into negotiations for a new CBA instead of rescinding the wages (G.C. Ex. 12). In response, Carver sent Viola a letter, dated May 2, requesting that he hold in abeyance the wage rescission at that time (Tr.: 396; G.C. Ex. 13). Carver admitted this (Tr. 348).

The Union set forth in that letter numerous conditions to be met and, if they were not met, it demanded wages be rescinded effective May 14 (G.C. Ex. 13). Viola testified, however, that wages could not be rescinded effective that day as it was the middle of a payroll week (Tr.: 397). Instead, he rescinded wages at the beginning of the next pay week: May 20 (Tr.: 397).

The foregoing makes evident that Respondent neither delayed nor intended to delay the implementation of the wage rescission. During the course of the foregoing events, Viola was presented with a petition demonstrating that a significant number of employees did not desire rescission (G.C. Ex. 6). He was attempting to work out a compromise by which the Union, Respondent and, most importantly, the employees could be happy (Tr.: 398). When it was clear such a compromise could not be reached (i.e., the conditions set forth in G.C. Ex.

13 would not be met by Respondent), Viola promptly rescinded wages effective the next closest pay week, beginning May 20 (essentially, a six (6) day delay).

Viola testified that it would have been a great burden on his payroll department to recalculate the rescission for only a partial payroll week (Tr.: 413-416). Instead, he opted to make the rescission effective the next week.

Significantly, not one shred of evidence was introduced by General Counsel even tending to indicate that employees in the bargaining unit felt that this alleged delay cast the Union in a negative light in violation of the NLRA or in violation of Judge Marcionese's Order. There was no evidence presented that the rank-and-file employees even knew or believed there was a "delay" in implementing the rescission. Absent such evidence, it cannot be said that there was a delay or that the timing of implementation was a denigration of the Union.

In fact, Judge Marcionese's Order does not mention Respondent casting blame on the Union; only the dicta in his Decision speaks to this issue. Consequently, Respondent could not have violated Judge Marcionese's Order even if it cast blame on the Union.

POINT II

THE UNION'S REQUEST FOR EXTRAORDINARY REMEDY WAS PROPERLY DENIED

The Union argues for a broad, even extraordinary or novel, remedial Order to remedy the ULP's allegedly committed by Respondent herein. Although no support for this argument is found in the Union's brief in support of its Cross-Exceptions, the Union rests its argument that it should be awarded fees and costs for litigating this case on its characterization of Respondent's actions as "contemptuously" violative of Judge Marcionese's Order. However, and as stated in Respondent's brief in support of Exceptions, Respondent's actions can hardly be characterized as "contemptuous." After all, it was the Union's Unit Vice President alone who publicized Respondent's letters (purportedly constituting unfair labor practices); and then solely to persons who did not execute the subject Petition.

Should the Union continue to advance its prior position that it be granted expenses and lost wages for having to prepare for and attend the July 3, 2001 meeting, ALJ McCarrick properly excluded same from Remedy portion of his Decision. The July 3, 2001 meeting was one to discuss the framework or guidelines for future negotiations (Tr. 76, 343, 400, 502, 676). Any finding that the meeting constituted negotiations themselves is contrary to numerous witnesses' testimony. In any event, even assuming the meeting to have constituted negotiations, the proposition that the Union should be awarded costs

and expenses involved in attending those negotiations (even if bad faith bargaining were to be found) is so novel and extraordinary as to never have been awarded in the history of the Act. To award such expenses would, in any case, put an implied burden on employers to agree to a union's demands for fear of additional costs and expenses being incurred if a Union were to allege, and the Board find, bad faith bargaining. This would be contrary to the purpose of the Act, which expressly provides the parties do not have to agree on terms and conditions of employment, they merely have to bargain in good-faith.

The additional remedies proposed by the Union, i.e., (1) an irrebuttable presumption of majority status for an extended period of time; (2) opportunity and access (apparently during working hours) to address groups of employees; and (3) reading the remedial order "directly" to all unit employees and/or including it in their paychecks³/or mailing it to their homes are inapplicable, inappropriate and bear no relation to Respondent's conduct whatsoever.

A. ALJ Edelman's refusal to hear evidence which he previously stated he would accept demonstrated an unprecedented level of bias and partiality against Respondent which irretrievably tainted the instant trial

ALJ Edelman's patently improper evidentiary rulings, witnessed by his unsupportable factual determinations and his refusal to allow Respondent's witnesses to testify (even after stating that he would accept their testimony), prevented Respondent's admissible and highly relevant evidence from being

³ / Interestingly, when Respondent provided just such a memorandum with employees' paychecks to reflect and virtually quote Judge Marcionese's prior Order, it was found to have committed an unfair labor practice.

presented at trial. Although stating he would hear the testimony of a number of Respondent's witnesses as to their reasons for withdrawing from the Union, ALJ Edelman subsequently retracted from that position once the testimony turned favorable to Respondent. ALJ Edelman, in the case at bar, and as set forth herein, has demonstrated a pattern of impropriety and bias which has tainted the record of every matter in which he was involved. *See generally* Fairfield Tower Condominium Assn., 343 NLRB No. 101, fn. 1, 2004 WL 2899842 (December 8, 2004); Dish Network Service Corp., 345 NLRB No. 83, 2005 WL 2452003 (September 30, 2005). As such, the Union's contention that, by taking exception to ALJ Edelman's blatant abuse of his position on the bench, Respondent has set forth a "frivolous" defense is misguided.

In order to ascertain the relevant bargaining unit's actual intent in and reason for withdrawing from the Union, Respondent's counsel intended on eliciting the testimony of each one of its employees. However, Respondent's lawful attempt to assure that the employees' freedom of choice was untainted was rejected outright by ALJ Edelman although this, the essential purpose of the Act, should have been a critical area of inquiry. Even if the employer had acted improperly, if it did not affect the bargaining unit, then it should not prejudice the unit's freedom of choice. ALJ Edelman stated that he would hear the testimony of five (5) of Respondent's employees, what he deemed a representative sample from which he could gauge the entire workforce's motivation. (Tr: 13-18, 582-584). After the hearing the testimony of only one (1)

employee, ALJ Edelman precluded Respondent's counsel from presenting further evidence that its employees desired that *this* Union (not any union or all unions) cease as their collective bargaining representative. (Tr: 347, 596). The employees' intent is especially relevant here, as two (2) petitions to decertify or deauthorize were filed prior to the wage rescission at issue. (R.Ex. 1, J.Ex. 1, Tr: 13). Not only did ALJ Edelman renege on his word, his self-contradictory evidentiary ruling is contrary to Board law. See Deblin Manufacturing Corporation, 208 NLRB 392 (1974). In refusing to consider said relevant evidence, ALJ Edelman's predetermination of his decision and desire to reach this decision worked to the detriment of Respondent's employees' Section 7 rights. Accordingly, it is respectfully requested that the Board find: 1) Respondent's defense concerning ALJ Edelman was not "frivolous;" and 2) that the Petition was properly authenticated and otherwise demonstrated an actual loss of majority.

POINT III

EMPLOYEES ARE ALLOWED TO FILE A PETITION FOR DECERTIFICATION MORE THAN SIXTY BUT LESS THAN NINETY DAYS PRIOR TO THE EXPIRATION OF A THREE YEAR CONTRACT.

A. Respondent Lawfully Withdrew Recognition From The Union Prior To The Expiration Of The Existing Contract.

The Union claims in its Cross-Exceptions that, because of the contractual recognition clause present in the collective bargaining agreement between Respondent and the Union, Respondent may only rely on objective evidence “gathered” after contract expiration, not during the term of the contract, in withdrawing recognition from the Union.

Initially, the Union’s use of the word “gathered” is, as it must be aware, incorrect. Respondent did not “gather” any information before, during or after contract expiration. Rather, Respondent was presented with the Petition asserting that a majority of bargaining unit members no longer wished to be represented by the Union. Once presented with the Petition, Respondent was lawfully allowed to withdraw recognition from the Union. See Levitz Furniture, 333 N.L.R.B. No. 105 (2000).^{4/}

^{4/} The Union’s suggestion that Respondent should have investigated the Petition to determine its authenticity, etc., would tread dangerously close to unlawful interrogation of its employees. Respondent’s reading of Levitz is that an employer can only lawfully withdraw recognition from a Union if there has been an actual loss of majority support. The method by which to determine whether or not there has been an actual loss of support is not unlawful interrogation, but rather a hearing before an ALJ.

The Union is arguing, essentially, that an employer may not rely on evidence of employee disaffection presented to it during the entire three (3) years of an initial contract between parties. As the Cross-Exceptions make readily apparent, the Union is well aware that this is not the present state of Board law. The Union presents no compelling reason why the rule should be changed, a change that would nullify Board law since its inception as well as Section 9(c) of the Act itself.

The Union's reliance on Chelsea Industries, Inc. to support its position is, as it acknowledges, misplaced.^{5/} That case involved a withdrawal of recognition based upon a decertification petition circulated, and observed, by the employer, prior to the end of the Union's certification year. Such a finding is consistent with the Board's long-standing rule that in the absence of unusual circumstances a certified union's majority status must be honored for one year; and a petition filed during the one-year period will ordinarily be barred. See also Americare-New Lexington Health Care Ctr., 316 N.L.R.B. 1226 (1995).

To the contrary, Board law makes clear that an "anticipatory withdrawal of recognition" during the last ninety (90) days of an existing contract is entirely lawful. See Abbey Medical/Abbey Rents, Inc., 264 N.L.R.B. 969 (1982). A decertification petition may be filed during the "window" period, more than sixty (60) days but less than ninety (90) days before the expiration date of an

^{5/} 331 N.L.R.B. No. 184 (2000).

existing contract of three (3) years or less. See Auciello Iron Works, Inc., 317 N.L.R.B. 364 (1995). Such an anticipatory withdrawal of recognition in relation to a future contract is lawful if and only if the employer can demonstrate that, on the date of withdrawal and in the context free of unfair labor practices, the union in fact had lost its majority status, or Respondent's withdrawal was predicated on a reasonable doubt based on objective considerations of the Union's majority status. Id. at 969.^{6/}

It is whether the withdrawal of recognition was effectuated in a context free from unfair labor practices which is presently being litigated and which will ultimately be the determining factor *vis-à-vis* whether Respondent's withdrawal of recognition was lawful. Even if the Board were to endorse the blanket rule proposed by the Union, it could only be applied prospectively.

B. Respondent Did Not "Generally" Refuse To Bargain With The Union.

1. The Union Cannot Now Claim A Refusal To Bargain Since July 3, 2001; That Was Not An Allegation In The Complaint.

The Union further claims in its Cross-Exceptions that Respondent unlawfully engaged in a "general" refusal to bargain and, therefore, that causation between the ULP's and employee disaffection is presumed and need not be proven. The Union, however, misses one most salient point: a refusal to bargain at any time prior to November 14, 2001 (the date of the withdrawal of recognition) was not an allegation before the ALJ. The Union seems to imply in

^{6/} The Abbey case was decided pre-Levitz. Its holding as to anticipatory withdrawals remains good law.

its Cross-Exceptions that Respondent refused to bargain at various times prior to that date, including since the July 3, 2001 meeting between the parties. However, that argument (despite being baseless) was not raised in the Complaint and was not advanced by either General Counsel or the Union at the hearing and cannot be raised at this stage of the proceeding. See Transport Workers of America, 329 N.L.R.B. No. 56 (1999).

2. The Union's Reliance On Lee Lumber In This Respect Is Misplaced.

As stated in Respondent's Exceptions, in cases aside from a general refusal to bargain, "there must be specific proof of a causal relationship between the unfair labor practice and the ensuing events indicating a loss of support." Lee Lumber, *supra*. In cases involving a general refusal to bargain causation is to be presumed. Id.

Acknowledging these propositions, the Union now seeks to place Respondent's overall behavior under the umbrella of a general refusal to bargain such that causation need not be proven. Initially, and as stated previously, with respect to the July 3, 2001 meeting it is far too late for the Union now to allege that to be a refusal to bargain. It was not alleged as such in the Complaint, was not presented in that fashion to the ALJ and, most importantly, Respondent was not afforded the opportunity to rebut the contention.

a) Anticipatory withdrawals are lawful under Board law.

However, the Union does not stop there. The Union further alleges that Respondent generally refused to bargain with the Union by: (a) failing to provide the Union with information in September 14, 2001;^{7/} and (b) failing to meet on November 8, 2001 on contract administration matters. These, too, were not allegations in the Complaint and cannot be raised as such at this point. See Transport Workers, supra.

Once again, in advancing an argument that has in previous cases been refuted by the Board, the Union cites to Board law for propositions not contained therein. The Union sets forth that Lee Lumber stands for the proposition that a Union enjoys majority support, which must be irrebuttably presumed during the entire term of the contractual recognition clause. By extension, the Union contends, an employer cannot rely on evidence presented to it prior to the expiration of the initial contract in deciding whether or not to withdraw recognition.

However, Lee Lumber did not overrule the Abbey line of cases, which explicitly hold anticipatory withdrawals to be lawful. See also R.J.B. Knits, Inc.,

^{7/} Even in a worst-case scenario, it cannot be said that Respondent refused to bargain with the Union on the very day it failed to respond to its information request. Despite the Union's continued belittling of 9/11 ("Since the Employer was so distraught on September 11. . ."; page 8 of the Union's Cross-Exceptions to the Decision of ALJ Edelman), the information request was made a scant three (3) days after that tragedy. Surely in this context Respondent should have been afforded some time to respond to the request. Assuming there to have been a refusal to bargain based on a failure to respond to this information request it could not have occurred until some indeterminate time in the future.

309 N.L.R.B. 201 (1992); Burger Pits, Inc., 273 N.L.R.B. 1001 (1984). In fact, the statement in Lee Lumber that unions enjoy a presumption of majority status while a collective bargaining agreement is in effect is what makes anticipatory withdrawals necessary. Because of the presumption, an employer cannot immediately withdraw recognition during the term of a contract. After all, there is a collective bargaining agreement in place. In response, the Board has allowed to develop the concept of anticipatory withdrawals, a concept that strikes the proper balance between employee and union rights. Nothing in Lee Lumber makes this any less true.

b) **It was Respondent's withdrawal of recognition that led to the refusal to bargain, not vice versa.**

The Complaint in this matter alleges that Respondent failed and refused to bargain with the Union since on or about November 14, 2001. That is the only allegation of a refusal to bargain in the Complaint and it is that date on which recognition was withdrawn. For this reason, the Union's reliance on Lee Lumber is again misplaced.

The facts of Lee Lumber are significant. The parties were about to begin negotiations for a successor collective bargaining agreement when the employer received a decertification petition. Relying on said petition, the employer refused to bargain with the union. The Board found the petition to be tainted by the employer's unfair labor practices and the refusal to bargain to be unlawful. The employer then reversed course and agreed to bargain. Soon after, while

negotiations were ongoing, the employer received yet another decertification petition and soon after that ceased negotiating and again withdrew recognition. All of the above occurred within a time frame of approximately four (4) months.

It was in this context the Board found that the second decertification petition to be tainted by the employer's initial refusal to bargain. In Lee Lumber, the employer's prior refusal to bargain caused the decertification Petition to be tainted. Here the facts are diametrically opposite Lee Lumber. Here, the allegations of the Complaint make clear that it was the Petition, and resulting withdrawal of recognition, that led to the refusal to bargain. If the Union's reasoning was taken to its logical extreme, all withdrawals of recognition would be unlawful. This cannot be the case.

The Union's claim that Respondent generally refused to bargain with the Union, and that causation between ULP's and employee disaffection must be presumed, are flawed. Accordingly, the Union's Cross-Exceptions should be dismissed.

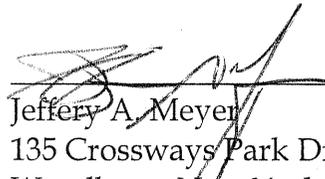
CONCLUSION

WHEREFORE, Respondent respectfully requests that 1) the Cross-Exceptions taken by General Counsel and the Union be dismissed in their entirety; 2) every Exception taken by Respondent be granted; and 3) that Respondent be awarded such other relief as the Board deems just and proper.

Dated: Woodbury, New York
February 2, 2007

Respectfully submitted,

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 34

REGENCY HOUSE OF WALLINGFORD, X
:

Case Nos: 34-CA-9895
34-CA-9915

AND :

INTERNATIONAL CHEMICAL WORKERS :
UNION COUNCIL/UFCW, LOCAL 560C,

STATE OF NEW YORK } X
}SS:

COUNTY OF NASSAU }

Barbara Tsotsos, being duly sworn, deposes and says:

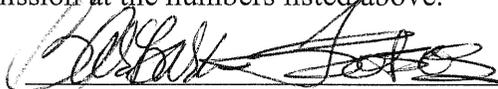
That Deponent is not a party to this action, is over 18 years of age and resides in Merrick, New York.

That on the 2nd day of February 2007, Deponent served one (1) copy of the Respondent's Answering Memorandum of Law to the Cross Exceptions to the Decision of the Administrative Law Judge Filed by Counsel for the General Counsel and the Charging Party to:

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at the addresses designated for that purpose by depositing a true copy thereof, in a sealed, properly addressed wrapper, and placing the same under the exclusive care and custody of Federal Express Delivery Service, prior to the latest time designated by that service for overnight delivery and via facsimile transmission at the numbers listed above.


Barbara Tsotsos

Sworn to before me this
2nd day of February, 2007.


Notary Public

ROSEANN KENNEDY
Notary Public, State of New York
No. 01KE4825968
Qualified in Nassau County
Commission Expires May 31, 20 07