Phillips Lytle LLP

Via U.S. Mail

October 8, 2019

Hon. Andrew G. Ceresia
Rensselaer County Courthouse
80 Second Street
Troy, New York 12180

Re: George W. Criss III, et al. v. The Rensselaer Alumni Association
Index No.: 2019-263996

Dear Judge Ceresia:

As your Honor is aware, currently pending before the Court is defendant's motion to partially dismiss the complaint. As noted in our papers and discussed during the conference on September 20, 2019, following the commencement of this action, defendant duly noticed its trustees necessary to amend Article IV, §1, and IV, §3, to eliminate the alleged violations asserted in claims 3 and 4 of the complaint. Attached is an Affidavit of Kareem I. Muhammad, sworn to on September 27, 2019, with exhibits annexed thereto affirming that proposed by-laws were approved.

We respectfully request leave from the Court to consider the attached Affidavit. For the reasons discussed in the initial papers and the attached Affidavit, we respectfully submit that the complaint should now be dismissed in its entirety.

Respectfully submitted,

Phillips Lytle LLP

By

Marc H. Goldberg

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Enclosure

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cc: Cornelius Murray, Esq., (w/encl.)

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RENSSELAER

GEORGE W. CRISS III, DAVID A. GLOWNY, JOHN A. KROB, THEODORE F. MIRCZAK, JR., JAMES NAPOLITANO, JOSEPH TEMPLIN, PETER VANDERMINDEN, AND PETER VANDERZEE,

Plaintiffs,

- against -

THE RENSSELAER ALUMNI ASSOCIATION,

Defendant.

AFFIDAVIT OF KAREEM I. MUHAMMAD

Index No. 2019-26399
Hon. Andrew G. Ceresia

STATE OF NEW YORK)
) ss.:
COUNTY OF RENSSELAER)

KAREEM I. MUHAMMAD, being duly sworn, deposes and says:

1. I am President of the defendant Rensselaer Alumni Association ("RAA"), in the above-referenced matter. As such, I am fully familiar with the facts stated herein.

2. I make this affidavit in further support of RAA's cross-motion to partially dismiss this complaint.

3. As to the facts contained herein, I know them to be true of my own knowledge, or I have gained knowledge from RAA's business records of certain acts, conditions, or events, which business records were made at or near the time of such act or events, and which records were recorded by, or from information transmitted by, a person with knowledge of such acts, conditions, or events who had a business duty to accurately record such acts, conditions, or events. Any such documents are kept in the course of

RAA's regularly conducted business activity, and it is RAA's regular practice to prepare such documents.

4. Following the commencement of this action, it was brought to my attention that Article IV, § 1 and Article IV, § 3 of the RAA's Bylaws did not comply with the New York Not-For Profit Corporation Law ("N-PCL"), in that the minimum number of Trustees should be five (5) and not three (3), and vacancies on the Board should not be elected by the Executive Committee, rather by the full Board.

5. Pursuant to Article XI of the RAA's Bylaws, the Bylaws may be amended by "approval of two-thirds of the Board provided that thirty (30) days' notice of such amendments has been given to each trustee."

6. Accordingly, I directed that a Notice to Amend the Bylaws of RAA be provided to the Trustees of RAA, which was provided to them on August 27, 2019, in the form attached hereto and incorporated by reference herein as Exhibit A.

7. Following a vote on August 27, 2019, the amendments set forth in Exhibit A, they were adopted by at least a two-thirds of RAA's Board of Trustees.

8. As a result,, it is respectfully submitted that Plaintiffs' (a) third claim of its first cause of action, in which it is alleged that Article IV, §1 of the By-laws violates Education Law § 226(10) and N-PCL § 602(f), and in its (b) fourth claim of its first cause of action that Article IV, § 3 violates the Education Law and N-PCL, are now hereby rendered moot.

9. For the reasons set forth in the initial papers, the complaint should now be dismissed in its entirety.

Kareem I. Muhammad

Sworn to before me this 27th
day of September, 2019:

Mary E. Coonradt
Notary Public

MARY E. COONRADT
Notary Public, State of New York
Qualified in Rensselaer County
No. 01CO6191391
Commission Expires August 11, 2020

2100356.v1

EXHIBIT A

From: **Brian Nock** <brianfnock@gmail.com>
Date: Tue, Aug 27, 2019 at 19:04
Subject: Proposed RAA Bylaw Amendments - September Meeting
To: RAA Board Members <raa-board-members@googlegroups.com>

Good evening, RAA Board,

Please see attached for a proposed revision to our Bylaws from the Governance Committee, with the advice of Counsel.

We will discuss and vote on this in our meetings over the September board weekend, so please review in preparation for the discussion.

- Brian (on behalf of the Governance Committee)

--

--
Kareem I. Muhammad

Revision #1

Article IV, Section 1. Composition - The Board shall be composed of not less than fivethree (53) and not more than thirty-six (36) voting Trustees, as follows:

1. Trustee Officers [elected] (maximum of twelve (12).
2. Trustee Officer Designates (maximum of three (3)
3. Trustees-at-Large [elected] (maximum of seventeen (17).
4. Grand Marshal [ex-officio], or an undergraduate student nominated by the Grand Marshal and approved by the Board.
5. Graduate Council President [ex-officio], or a graduate student nominated by the Graduate Council President and approved by the Board.
6. Faculty Council Chair [ex-officio], or a faculty member nominated by the Faculty Council Chair and approved by the Board.
7. Red and White Student President [ex-officio].

Revision #2

Article IV, Section 3. Vacancy - A Trustee absent from two (2) consecutive meetings will be given a delinquency notice by the Secretary. An ex-officio Trustee or their designate failing to attend a meeting, may be represented at future meetings by an individual appointed by the President. A Trustee absent from three (3) consecutive meetings may be removed from office by the Board without Member action. Members so removed may, upon appeal and explanation at the succeeding Board meeting, be re-elected by a majority vote of the Board. Vacancies of elected Trustee positions shall be filled by a majority vote of the BoardExecutive Committee (see Article VI, Section 1). An individual so elected shall serve until the next Annual Meeting, at which time the Nominating Committee shall

make a nomination to fill the remainder of the unexpired term.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RENSSELAER

GEORGE W. CRISS III, DAVID A. GLOWNY, JOHN A. KROB, THEODORE F. MIRCZAK, JR., JAMES NAPOLITANO, JOSEPH TEMPLIN, PETER VANDERMINDEN, AND PETER VANDERZEE,

Plaintiffs,

- against -

THE RENSSELAER ALUMNI ASSOCIATION,

Defendant.

Index No. 2019-263996

Hon. Andrew G. Ceresia

DEFENDANT'S MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION BY ORDER TO SHOW CAUSE FOR A PRELIMINARY INJUNCTION AND IN SUPPORT OF ITS CROSS-MOTION TO PARTIALLY DISMISS THE COMPLAINT

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The Rensselaer Alumni Association

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– Of Counsel –

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PRELIMINARY STATEMENT

This memorandum is submitted on behalf of defendant, The Rensselaer Alumni Association ("RAA), in opposition to plaintiffs' motion by order to show cause for a preliminary injunction, and in support of RAA's cross-motion to partially dismiss the complaint.

Preliminarily, the lengthy Affidavit of John A. Krob in support of plaintiffs' motion represents a myopic, even egocentric, view of the RAA and lends little assistance or guidance to the Court in determining the only issue before it—whether the RAA properly scheduled the election for September 28, 2019 ("Election"). The facts, stripped of plaintiffs' hyperbole, are not in dispute. Critically, and notwithstanding the tone of plaintiffs' moving papers, the Election was properly noticed. Nevertheless, the New York State Not-for-Profit Corporation Law ("N-PCL"), affords Plaintiffs with the exclusive remedy to challenge elections. The request for a preliminary injunction is simply an improper litigation tactic.

Moreover, since three of the five claims in which Plaintiffs' seek relief in their complaint fail to state a cause of action, they must be dismissed. As to the remaining claims, the RAA has proceeded to amend its By-laws, and therefore once amended, the Complaint should be dismissed in its entirety.

ARGUMENT

POINT I

PLAINTIFFS HAVE FAILED TO MEET THE HEAVY BURDEN OF ESTABLISHING THEIR ENTITLEMENT TO A PRELIMINARY INJUNCTION

"It is well settled that [p]reliminary injunctive relief is a drastic remedy [that] is not routinely granted." *Delphi Hospitalist Servs. LLC v. Patrick,* 163 A.D.3d 1441,1441 (4th Dep't

2018) (alterations in original internal quotation marks and citation omitted); *1234 Broadway LLC v. West Side SRO Law Project*, 86 A.D.3d 18, 23 (1st Dep't 2011). Because it "substantially limits a defendant's rights," a preliminary injunction "require[es] a special showing." *Id.* at 23 . "A movant's burden of proof on a motion for a preliminary injunction is particularly high." *Council of City of N. Y. v. Guiliani*, 248 A.D.2d 1, 4 (1st Dep't 1998). "[A] party seeking the drastic remedy of a preliminary injunction... must establish a clear right to that relief under the law and the undisputed facts upon the moving papers." *1234 Broadway LLC,* 86 A.D.3d at 23 (internal quotation marks and citation omitted); *see also Doe v. Axelrod*, 73 N.Y.2d 748, 750 (1988) (all of the elements of a preliminary injunction must be demonstrated by "clear and convincing evidence"); *O'Hara v. Corporate Audit Co.,* 161 A.D.2d 309, 310 (1st Dep't 1990) (holding that the burden is on the moving party to make a "clear showing of necessity and justification" before a preliminary injunction should issue).

Plaintiffs must present such clear and convincing evidence to establish all three of the following elements for a preliminary injunction: "(1) a likelihood of ultimate success on the merits; (2) the prospect of irreparable injury if the provisional relief is withheld; and (3) a balance of equities tipping in the moving party's favor." *Axelrod*, 73 N.Y.2d at 750, *see also Aetna Ins. Co v. Capasso*, 75 N.Y.2d 860 (1990). Moreover, clear and convincing evidence means just that — evidence. The showing of clear and convincing evidence of each element must be established "through the tender of evidentiary proof" *Delphi Hospitalist Services,* 163 A.D.3d at 1442 (internal quotation marks and citation omitted). Conclusory allegations with no evidentiary detail will not suffice. *See, Genesis II Hair Replacement Studio, Ltd. v. Vallar,* 251 A.D.2d 1082 (4th Dep't 1998). An application for a preliminary injunction must be denied where the moving party fails to submit the requisite "factual evidentiary detail."

Glazer v. Brown, 55 A.D.3d 1385,1385 (4th Dep't 2008)(internal quotation marks and citation omitted). Where a party bears a burden of proof with respect to factual assertions, allegations advanced upon information and belief are not competent evidence. *See Wood v. Nourse,* 124 A.D.2d 1020 (4th Dep't 1986).

Of particular application here, New York State Courts have universally held that when the facts necessary to establish Plaintiffs' causes of action are in sharp dispute, a preliminary injunction must be denied. *Holdsworth v. Doherty,* 231 A.D.2d 930 (4th Dep't 1996); *Sutton, DeLeeuw; Clark & Darcy v. Beck,* 155 A.D.2d 962 (4th Dep't 1989); *Faberge Int'. Inc. v. Di Pino,* 109 A.D.2d 235 (1st Dep't 1985); *Eastman Kodak Co. v. Carmosino,* 77 A.D.3d 1434 (4th Dep't 2010).

A. Plaintiffs have not established that they are likely to succeed on the merits

Plaintiffs have entirely failed to come forward with competent evidentiary proof in order to meet their burden of clear and convincing evidence to show a likelihood of success on the merits for any of their purported cause of action against RAA, let alone, that the Election should be enjoined. There is simply no basis or need for a preliminary injunction. As set forth in the Affidavit of Kareem I. Muhammad, sworn to on September 9, 2019 ("Muhammad Aff."), all of the required procedural predicates to the Election have been met. Thus, the likelihood of the ultimate success on the merits is completely lacking.

In a desperate effort to support an injunction, Plaintiffs spend countless pages discussing the following alleged issues: (a) failure to hold annual meetings; (b) illegal nomination and election processes; (c) illegal and invalid December 2018 election, and (d) an refusal to allow members to bring a legitimate challenge to the election. No matter how they attempt package it, none of their allegations or claims identify ***any*** irregularities with

the Election. Nevertheless, N-PCL § 618 is the exclusive remedy for challenging a not-for-profit's election's validity, and provides the relief, should a challenge be necessary. *See Nat'l Church of God of Brooklyn, Inc. v. Carrington*, No. 509550/17, 56 Misc. 3d 1215 (A), 2017 WL 3481973(Sup. Ct. Kings Cty. Aug. 11, 2017). Furthermore, while RAA denies any irregularity with the December 2018 Election, any challenge to it now is time barred. Challenges to an election's validity under N-PCL § 618 are governed by a four-months statute of limitations pursuant to C.P.L.R § 217, which is measured from the date when the election becomes final. *See* N.Y. C.P.L.R. § 217(Westlaw through L. 2019, ch. 245), *Nat'l Church of God of Brooklyn, Inc., v.* 2017 WL 3481973; *In re Uranian Phalanstery 1st N.Y. Gnostic Lyceum Temple v. Reab*, 155 A.D.2d 302, 303 (1st Dep't 1989); and *Lal v Shri Guru Ravidas Sabha of N.Y. Inc.* No. 4629/08, 20 Misc. 3d. 1133(A), 2008 WL 3521111 (Sup. Ct. Queens Cty. Aug. 7, 2008) (In which the court noted that the proper method to test the validity of an election is ***not within the context of an action*** but rather a special proceeding pursuant to N-PCL 618. Citing *Esformes v. Brinn*, 52 A.D.3d 459 (2d Dep't 2008)).

Moreover, any challenge to the 2018 Election fails since the complaint does not allege compliance with N-PCL § 618, which explicitly requires service upon each of "the persons declared elected" at the contested elections. N.Y. Not-for-Profit Corp. Law § 618 (Westlaw through L. 2019, ch.245).

B. Plaintiffs will not be irreparably harmed.

To succeed on its motion, Plaintiffs must also demonstrate that "preserve[ing] the status quo" so as to prevent injury caused by the alleged conduct sought to be enjoined in the complaint," warrants the grant of this extraordinary relief. *See Hussein Env't. Inc. v. Roxborough Apartment Corp.*, No 114295/07, 17 Misc 3d 1130(A), 2007 WL 4145223 at *3

(Sup. Ct. N.Y. Cty. Nov. 21, 2007); *Olympic Tower Condo v. Cocoziello*, 306 A.D.2d 159, 160 (1st Dep't 2003). Here, Plaintiffs not only seek a change in the status quo (i.e. preventing RAA from proceeding with the Election), it has also failed to show that a change in the status quo is required to prevent some unstated irregularity. In addition, Plaintiffs' claimed "injury" is speculative at best and by no means irreparable. There is nothing that precludes Plaintiffs from ensuring it has sufficient support at the election to vote for or against the slate. In addition, Plaintiffs have a remedy to challenge the Election and the RAA should not be held hostage by a minority group of its members. *See* N.Y. Not-for-Profit Corp. Law (Westlaw through L/ 2019, ch.245).

Given Plaintiffs' inability to establish irreparable harm, as discussed above, any possible success on the merits is irrelevant. *Dist. Council 1707 v. N.Y. Ass'n for New Ams., Inc.*, No. 03 Civ. 9536 RCC, 2003 WL 22871926, at *3 (S.D.N.Y. Dec. 4, 2003) (since the plaintiffs were unable to establish irreparable harm, "[p]laintiffs are not entitled to equitable relief no matter how likely their chance of success on the merit.").

C. The balance of equities do not favor the Plaintiffs

Not only do Plaintiffs lack irreparable harm, but the equities balance heavily against preliminarily enjoining the Election. It is well settled that Plaintiffs' must demonstrate "that a balancing of equities to effect substantial justice . . . warrants the grant of this extraordinary relief." *Hussein Env't. Inc.*, 2007 WL 4145223, at *3. Plaintiffs cannot make this showing. Contrary to Plaintiffs' conclusory assertions otherwise, there is absolutely no proof before this court that that the alleged past conditions complained of, present any immediate or irreparable impact on the Election. The award of a preliminary injunction would afford Plaintiffs preferential treatment that would undermine the public interest of not-for-profit corporations to hold elections; would unfairly disadvantage the RAA who

complied with the requisite requirements to hold the Election, and would create uncertainty on the eve of the Election.

POINT II

THE COMPLAINT SHOULD BE DISMISSED IN PART

Plaintiffs' only enumerated cause of action seeks to find five (5) provisions of the RAA's By-laws in violation of its Charter, the Education Law, and the N-PCL as follows:

> 1. Article III, § 2 stating that Members can only call a special meeting upon the written request of 10% of the RAA's membership, was designed to prevent Members from exercising their right to call special meetings by making it virtually impossible for them to do so ("Claim 1");
>
> 2. Article III, § 4, purporting to define a quorum as 100 Members, violates N-PCL § 608 in that it was not approved in accordance with subdivision (c) thereof, "at a special meeting of members at which the quorum requirements application to the corporation immediately prior to the effective date" of the N-PCL or by the Supreme Court through intervention sought in accordance with subdivision (e) ("Claim 2").
>
> 3. Article IV § 1, purporting to allow a minimum of 3 Trustees violates Education Law § 226(1) and the RAA's Charter, both which require a minimum of 5 Trustees, and violates Education Law § 226(10 and N-PCL § 602(f) since it contravenes the RAA's Charter ("Claim 3").
>
> 4. Article III, §1, Article IV §3, Article V, § (1)(c), and Article VI, § 2 give the Board the sole power to elect Trustees and Officers and fill Board vacancies arising between Annual Meetings, thereby divesting Members of their rights under the RAA Charter to elect Trustees and fill vacancies arising between annual elections and violating Education Law § 226(10 and N-PCL §§ 602(f) and 712(a)(b),(f) ("Claim 4").
>
> 5. Article XI, § 1, to the extent it purports to give the Board the sole power to adopt, amend, or repeal the RAA's bylaws, violates N-PCL § 602, which gives Members the right to do so

as well, and gives Members the power to limit the Board's ability to exercise this right ("Claim 5").

See Exhibit A, ¶ 90.[i] For the reasons discussed herein, Plaintiffs fail to state a claim upon which relief can be granted on Claims 1, 2 and 5, and thus, RAA is entitled to partial dismissal of those claims. As to Claims 3 and 4, the RAA has taken steps to amend the By-laws, and upon approval, those claims would be moot and thus, should be dismissed at that time. *See* Muhammad Aff., ¶¶ 7-9.

A. CLAIMS 1, 2, AND 5 FAIL TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED AND THUS, SHOULD BE DISMISSED

1. Article III, § 2 of the By-laws does not violate the Charter, Education Law or the N-PCL, and thus, Claim 1 has no merit.

Claim 1 alleges that Article III, Section 2 of the By-laws requiring 10% of the membership to call a special meeting violates the Charter and is unlawful, is wholly without merit. Exhibit A, ¶ 90. [1] To the contrary, N-PCl § 603(c) is unequivocal that only ten percent of the total number of votes entitled to cast at such meeting is necessary. N-PCl § 603(c) provides:

> Special meetings of the members may be called by the board and by such person or persons as may be authorized by the certificate of incorporation or the by-laws. In any case, such meetings may be convened by the members entitled to cast ***ten percent of the total number of votes entitled to be cast at such meeting***, who may, in writing, demand the call of a special meeting specifying the date and month thereof, which shall not be less than two nor more than three months form the date of such written demand.

N.Y. Not-For-Profit Corp. Law § 603 (Westlaw through L. 2019, ch. 245). Since Article III, § 2 of the RAA By-laws complies in all respects with the requisite ten percent of

[1] Article III, Section 2 provides in part that the "Secretary shall call such a Special meeting upon written request of the President, or a majority of the Trustees, or ***ten percent (10%) of Members.***" (emphasis added). Exhibit A, at Ex. B.

the total number of votes necessary to be cast at a meeting required by N-PCL § 603, is not in violation of the Charter and the law, and therefore this claim must be dismissed.

2. Plaintiffs fail to state a claim that Defendant violated N-PCL § 608, and thus, Claim 2 has no merit.

Claim 2 alleges that Article III, Section 4 of the By-laws violates N-PCL § 608 since it was "not" approved in accordance with N-PCL N-PCL § 608(c). Like Claim 1, this does not fare any better.

Critically, Plaintiffs ignore the RAA's Board's undeniable authority to amend its By-laws. Under N-PCL § 602(f), a corporation's "by-laws may contain any provision relating to . . . the rights or powers of its members, directors or officers, ***not inconsistent with*** this chapter or any other statute of this state or the certificate of incorporation". N.Y. Not-for-Profit Corp. Law §602.603,608 (Westlaw through L. 2019, ch.245). (emphasis added). Moreover, the RAA's Absolute Charter vests authority ***in the Board*** to, among other things, adopt by-laws. Exhibit A, at Ex. A, ¶2 (emphasis added). In addition, Article XI authorizes the Board to amend the By-laws as follows:

> Section 1. Process-These Bylaws may be amended at a meeting of the Board by approval of two-thirds of the Board provided that thirty (30) days' notice of such amendments has been given to each Trustee. Further modifications may be made to the amendments at such meeting. Any amendment to the Bylaws goes into effect immediately upon its adoption. Amendments to the Bylaws shall be printed in the minutes of the Board.

Exhibit A, at Ex. B, Article XI.

Nothing in the N-PCL is inconsistent with this authority. *See* N.Y. Not-for-Profit Corp Law §§ 602, 603 and 608 (Westlaw through L. 2019, ch.245). Here, the complaint improperly conflates the authority of the Board to amend its By-laws with the quorum requirements of the members. *See* Ex. A ¶¶ 46-59.

Since the Board was authorized to amend the By-laws, which went into "effect immediately upon its adoption," the claim that the Authority failed to meet the N-PCL's quorum requirements at the December 1, 2018 meeting is irrelevant and fatal to Plaintiffs' claim. Accordingly, this claim fails to state a claim upon which relief may be granted, and thus, must be dismissed.

3. Article XI, § 1 does not violate N-PCL § 602, and thus, Claim 5 has no merit.

Finally, Claim 5 alleges that: "Article XI, § 1 to the extent it purports to give the Board the sole power to adopt, amend, or repeal the RAA's by law, violates N-PCL § 602," should also be dismissed. *See* Exhibit A, ¶ 90.

The RAA was chartered under the New York Education Law. Education Law § 216 expressly provides that such organizations may be chartered, "subject to such limitations and restrictions in all respects as the regents may prescribe." In the RAA's Charter, the Board of Regents expressly provided that "[t]he board shall have the power to adopt by-laws, including therein provisions for fixing the terms of trustees, and shall have power also by vote of two-thirds of all the members of the board of trustees, to change the number of trustees, to be not be not more than 25 nor less than 5." *See* Exhibit A, at Ex. A. In addition, Section 216-A(4)(a) of the Education Law provides that if a provision of the not-for-profit law conflicts with a provision of the Education Law, or an act by if an entity such as the RAA under its purview, the Education Law shall prevail. *See* N.Y. Educ. Law § 216-a (Westlaw through L. 2019, ch.245). Accordingly, because the Board of Regents authorized the RAA's board to adopt By-laws, the members do not have such rights under the not-for-profit law.

A historical analysis of the applicable law is instructive. At the time that the RAA was charted, the New York Membership Corporations Law was in effect ("MCL"). *See* Ex. B. The MCL did not provide members with the power to adopt By-laws. Indeed, if an organization wanted its members to have the right, it would have to have provided for it in its By-laws. Members had no inherent right under the MCL. Furthermore, MCL § 8 provided that the by-laws of any such corporation may make provisions, not inconsistent with law or its ***certificate of incorporation***. Consistent therewith, the RAA Absolute Charter provided that only its directors had the authority to adopt bylaws.

In the event the Court finds that the RAA members have a right to adopt, amend or repeal the By-laws, such conclusion must be in accordance with the rights, obligations and requirements set forth in N-PCL §§ 602, 603, 605, and 608.

CONCLUSION

For the foregoing reasons, Plaintiffs' motion for a preliminary injunction should be denied in its entirety and RAA should be granted an order partially dismissing the complaint, together with such other and further relief as to the Court seems just and proper.

Dated: Albany, New York
September 12, 2019

PHILLIPS LYTLE LLP

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Attorneys for Defendant
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[i] Unless otherwise noted, referenced Exhibits are attached to the Affidavit of Marc H. Goldberg, Esq., sworn to on September 12, 2019 ("Goldberg Aff.").