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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

DAVID MOELLER,

Plaintiff/Respondent

v.

FARMERS INSURANCE COMPANY OF WASHINGTON and
FARMERS INSURANCE EXCHANGE,

Defendants/Petitioners.

SUPPLEMENTAL BRIEF OF *AMICUS CURIAE*, NATIONAL ASSOCIATION OF
MUTUAL INSURANCE COMPANIES, IN SUPPORT OF PETITIONERS'
SUPPLEMENTAL BRIEF

Michael R. Nelson
Kymberly Kochis
Jason M. Kurtz
Nelson Levine de Luca & Horst, LLC
One Battery Park Plaza, 32nd Floor
New York, NY 10004
(212) 233-0130

Andrea Holburn Bernarding
WSBA No. 28599
LAW OFFICE OF
ANDREA HOLBURN BERNARDING
1730 Minor Avenue, Suite 1130
Seattle, Washington 98101
(206) 403-4800

Attorneys for National Association of
Mutual Insurance Companies

FILED AS
ATTACHMENT TO FMA'

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Pursuant to Title 13 of the Washington State Court Rules of Appellate Procedure, the National Association of Mutual Insurance Companies (“NAMIC”), submits this supplemental *amicus curiae* brief in support of the positions the Petitioners have taken in this appeal concerning payment of “diminished value” losses and class certification. On June 22, 2010, this Court granted NAMIC’s motion to file an *amicus curiae* memorandum in support of the Petition for Review in the above-captioned matter. By Order of this Court dated July 6, 2010, the Petition for Review was granted.

I. INTEREST OF *AMICUS CURIAE*, NAMIC

Founded in 1895, NAMIC is the largest, most diverse national insurance trade association in the United States. NAMIC represents the interests of its property/casualty insurance company members and their policyholders. NAMIC’s membership includes farm mutual insurance companies, single-state and regional writers, and national insurers operating across North America. Significantly, the more than 1,400 NAMIC members underwrite 41 percent of the automobile and homeowners insurance market and 31 percent of the business insurance market in the United States.

As set forth more fully below, the Court of Appeals’ decision presents an unsupported and illogical creation of a definition of

“diminished value” which raises issues of substantial public importance. Although the Court of Appeals attempted to limit its holding to the specific policy at issue in a footnote, the Court of Appeal’s analysis and decision have far reaching consequences that will impact the insurance and auto industries as a whole. Thus, NAMIC’s interest is sufficiently distinct from that of the Petitioners to warrant its participation as an *amicus curiae*. The consequences of the Court of Appeals’ decision may include confusion for insurers, consumers, repair shops, adjusters and every group that services the insurance and automobile industry. As a result of this confusion, there will be a significant increase in premiums charged by NAMIC member insurers, and paid by Washington residents. Because the issue of “diminished value” coverage has the potential to arise in every case involving damage to an automobile, this is a vital issue for which this Court is requested to provide guidance.

II. STATEMENT OF THE CASE

NAMIC adopts the statement of the case set forth in the Petitioners’ Petition for Discretionary Review.

III. ARGUMENT

A. JUDICIAL CREATION OF “DIMINISHED VALUE” WHICH IS ILLOGICAL AND AN UNWORKABLE CONCEPT

The Court of Appeals' unsupported definition of "diminished value" is premised on false assumptions which, from both a practical and public policy-oriented perspective, will create an unworkable and immeasurable standard. Without citing any support (such as collision industry data, vehicle inspection results or vehicle sales comparisons), the Court of Appeals determined a "vehicle suffers diminished value when it sustains physical damage in an accident, but due to the nature of the damage, it cannot be fully restored to its pre-loss condition. The remaining, irreparable physical damage, such as, for example, weakened metal which cannot be repaired and which results in diminished value." *Moeller v. Farmers Ins. Co. of Wash.*, 155 Wash. App. 133, 142, 229 P.3d 857, 861 (Div. 2 2010). Based on this judicial invention of the meaning of "diminished value", the Court of Appeals goes on to assume that the Plaintiff Moeller sustained "damage that cannot be repaired, e.g., weakened metal" and that Petitioners had not paid for this "diminished value loss." *Moeller*, 155 Wash. App. at 143, 229 P.3d at 862.

The Court of Appeals' definition of "diminished value" does not comport with logic or with well-established collision repair industry standards. It is premised on a concept that after a vehicle has been properly repaired, the vehicle may still have components that will be comprised of weakened metal that cannot be repaired. *Moeller*, 155 Wash.

App. at 138, 229 P.3d at 859. Moreover, this definition has far reaching consequences that include confusion for insurers, consumers, repair shops, adjusters and every group that services the insurance and automobile industries.

Simply stated, vehicles that have been properly repaired do not have components that that are irreparably damaged or have “weakened metal”. The Society for Collision Repair Specialists, an organization comprised of 6,000 collision repair businesses and 58,500 specialized professionals who work with consumers and insurers to repair collision-damaged vehicles, has stated that “a collision repair facility can restore a collision-damaged vehicle to a condition that meets or exceeds its condition prior to the accident in terms of appearance, durability, functionality and safety. Furthermore, the proper restoration of a vehicle does not, in and of itself, diminish its value.” The Diminished Value Debate, Automotive Collision Repair Services Network, http://www.acrsnetwork.com/acrs/html/dv_debate.html (last visited Feb. 3, 2010).

For example, if a vehicle is in an accident and that vehicle’s unibody becomes damaged, the auto repair industry has developed standards as to how to repair the unibody components that have been affected or that should be replaced. It is standard industry practice that

those unibody structural components which are structurally compromised need to be replaced and those components that can be repaired without compromising the vehicle's structural integrity should be repaired.

Introducing a "weakened metal" concept into the post-repair evaluation of a vehicle's value will distort the public's perception of the auto repair industry and consumers' sense of the structural safety of a repaired motor vehicle. It will inappropriately and unnecessarily impact automobile values and introduce unfounded confusion. Furthermore, consumers, automobile dealers, repair shops and insurers, will have no consistent, effective, or clinical way of measuring or evaluating these esoteric "diminished value" damages. Tellingly, widely used market valuation guides, such as Kelley Blue Book and the National Automobile Dealers Association (NADA) book, do not have separate valuation tables for vehicles repaired following an accident. Janet L. Kaminski, Insurance Claim for Car's Diminished Resale Value, State of Conn. Gen. Assembly Office of Legislative Research Report (Jan. 3, 2007), <http://www.cga.ct.gov/2007/rpt/2007-R-0011.htm>. As stated above, the Court of Appeals does not cite any case law, much less any collision industry data, vehicle inspection results or vehicle sales comparisons, that would suggest that every vehicle collision results in irreparable structural damage such as "weakened metal".

Because there are no standards, insurance adjusters and consumers have no way to measure or evaluate this type of hypothetical damage. The confusion and inability to accurately measure the value of the damages will result in increased litigation and, consequently, judicial waste, as well as increased costs to Washington consumers and insurers. Indeed, the Court of Appeals' decision does not specify or distinguish the nature or extent of collision damages that will diminish a vehicle's value, and therefore, it can only be interpreted to mean that all collisions, no matter what the level or significance of the impact is, will result in irreparable physical damage. This judicially created standard will be unsustainable and will lead to potentially absurd results. For example, if a "weakened metal" standard was allowed to stand, then theoretically every car door scraped or slightly dented by a shopping cart or every car roof that requires repair after sustaining hail damage, would qualify for diminished value damages. This unworkable standard will implicate the practices of every auto insurer in the nation as it will significantly impact the way in which insurers evaluate and adjust collision damage claims. On the local level, with the third worst budget deficit in the nation at \$1.1 billion, Washington State can ill afford the tremendous drain on judicial and government resources that would arise from the widespread litigation of the Court of Appeals' new definition of "diminished value". *See Sara*

Murray, States Face Budget Shortfalls of \$26.7 Billion, Wall St. J., Dec. 8, 2010, available at <http://online.wsj.com/article/SB10001424052748704250704576005683169980902.html#printMode>.

Moreover, the Court of Appeals' definition will create unnecessary economic and environmental waste and cause insurance premiums to rise. For example, the definition will likely result in declaring more repairable vehicles as "total losses", which in turn will lead to additional economic and environmental waste and increasing costs (i.e., premium increases) to Washington consumers. Collision industry studies indicate that there is already a high frequency of auto appraisals leading to declarations of total losses.¹ Including "diminished value" as part of the post-collision measure of damages will almost certainly drive the number of "total losses" even higher. If more "total losses" arise out of the Court of Appeals' construction of "diminished value", then more resources and regulatory oversight will need to be diverted to the vehicle scrapping process. One can easily envision that an expanded vehicle scrapping rate may adversely impact the local environment with the disposal of, *inter alia*, more polystyrene parts, mercury switches and batteries and with the

¹ In recent years, the frequency of auto appraisals leading to declarations of total loss has increased from 12.6% to 14.2%. Increasing Total Losses, Diamond Standard, <http://www.diamondstandardparts.com/rtap/rtap.html> (last visited Feb. 3, 2010).

increased potential for leaks from damaged cars' engines, radiators, transmissions, differentials, and fuel tanks.

Even assuming that a collision-damaged vehicle is not totaled after accounting for "diminished value", it is still foreseeable that damaged vehicle parts will be replaced more often than repaired. For example, if a vehicle is in an accident and its quarter panel needs to be repaired, insurers, not inclined to pay immeasurable "diminished value" damages for "weakened metal," will instead replace and not repair the part. This will lead to more car parts winding up in the scrap heap and further threatening of the local environment. "Collision repair shops" will essentially become "collision replace shops." Ultimately, this standard could result in the demise of smaller "mom and pop" auto repair shops as skilled repair technicians become less valuable. These smaller repair shops that rely on being able to repair vehicles will be put out of business by larger factory-like collision shops that will replace all parts on the vehicle and discard parts that could have been repaired.

As the standard set forth by the Court of Appeals would create confusion, create judicial, economic and environmental waste and adversely impact Washington consumers, the Supreme Court should reverse the Court of Appeals' decision.

B. IMPROPER COVERAGE ANALYSIS

Alternatively, this Court should reverse the Court of Appeals' decision because the Court of Appeals employed fundamentally flawed coverage analysis to find that the Farmers' policy at issue covers "diminished value" damages. The Court of Appeals opinion notes that the policy contains the following language:

DEFINITIONS

Accident or occurrence means a sudden event, including continuous or repeated exposure to the same conditions, resulting in **bodily injury** or **property damage** neither expected nor intended by the **Insured person**.

* * *

Damages are the cost of compensating those who suffer **bodily injury** or **property damage** from an **accident**.

* * *

Property damage means physical injury to or destruction of tangible property, including loss of its use.

* * *

Moeller, 155 Wash. App. at 139, 229 P.3d at 860.

The foregoing three definitions referenced by the Court of Appeals as "relevant portions of the policy" are, in fact, policy definitions that are completely irrelevant to claims under the "Collision" coverage part. *Id.*

Only those sections of the policy that concern Coverage G-Collision should have been “relevant” to the Court of Appeals’ decision.²

The Court of Appeals misapplies the above-referenced definitions of “accident” and “property damage”, however, to leap to the erroneous conclusion that “diminished value” is covered under the terms of the policy’s “Collision” coverage part. As set forth in the policy’s “Collision” coverage part, Farmers “will pay for loss to your Insured car caused by collision . . .” to the extent that a “loss” is the “direct and *accidental* loss of or damage to your Insured car, including its equipment.” *Id.* (emphasis added). The Court of Appeals misconstrues the policy’s terms by equating “accidental” with the policy’s definition of “accident”, a term that is only relevant in the context of finding liability coverage under the policy. *Moeller*, 155 Wash. App. at 142, 229 P.3d at 861. The Court of Appeals similarly misreads the policy’s definition of “property damage”. *Moeller*, 155 Wash. App. at 142, 229 P.3d at 862. In misapplying the definitions of “accident” and “property damage”, the Court of Appeals improperly held

² “**Coverage G-Collision** We will pay for loss to your Insured car caused by collision less any applicable deductibles 2. Loss means direct and accidental loss of or damage to your Insured car, including its equipment Our limits of liability for loss shall not exceed: 1. The amount which it would cost to repair or replace damaged or stolen property with other of like kind and quality, or with new property less an adjustment for physical deterioration and/or depreciation **Payment of Loss** We may pay the loss in money or repair or replace damaged or stolen property.” *Id.*

that the alleged “diminished value” is a “loss proximately caused by the collision and thus is covered.” *Moeller*, 155 Wash. App. at 143, 229 P.3d at 862. In sum, the definitions that are erroneously cited are only applicable to liability claims where a third party seeks to recover damages against an insured.

As the Petitioners cogently argue in their supplemental brief, the Court of Appeals is misguided in importing tort concepts into the realm of first party collision coverage. “Cases involving first-party claims under collision coverage are governed solely by the language of the insurance contract and breach of contract law.” *Government Emp. Ins. Co. v. Bloodworth*, No. M2003-02986-COA-R10-CV, 2007 WL 1966022, at *37 (Tenn. Ct. App. Jun. 29, 2007) (“Contract principles and remedies are distinguishable from those sounding in tort.”) (citing *Allgood v. Meridian Sec. Ins. Co.*, 836 N.E.2d 243, 246 (Ind. Sup. Ct. 2005)). Doctrines such as proximate causation and making a party “whole” are relevant under tort law, or in the third party liability coverage context, but not when applying the usual principles of policy construction. *See Allgood*, 836 N.E.2d at 246; *Culhane v. Western Nat’l Mut. Ins. Co.*, 2005 S.D. 97, 704 N.W.2d 287, 296 (2005). In the instant matter, the Petitioners’ obligations are defined by the unambiguous terms of the policy. To “rewrite” the policy’s terms to find that “diminished value” losses are covered damages under

the policy's "Collision" coverage part, such as the Court of Appeals has done in the instant matter, is to violate the well-established rules of contract interpretation.

In a footnote to its decision, the Court of Appeals conceded that Washington courts have not previously analyzed the coverage clause to determine whether "diminished value" is a covered loss and that it relied upon other jurisdictions' interpretations of the clause (specifically that of the Louisiana First Circuit Court of Appeal in *Campbell v. Markel American Ins. Co.*, 822 So. 2d. 617, 623 (La. Ct. App. 1st Cir. 2001)). *Moeller*, 155 Wash. App. at 144 n.8, 229 P.3d at 862 n.8. A more analogous case to the case at bar, however, is *Camden v. State Farm Mut. Auto. Ins. Co.*, 66 S.W.3d 78, 81 (Mo. Ct. App. E.D. 2002), which states that if a policy term is undefined, it should be given its common or usual meaning. The court in *Camden* explained that "[i]t is not necessary to attempt to define direct or accidental loss in that, in the context of the policy, the insurer limits how it may settle such a loss with its policyholders. In other words, if policyholder's car is damaged, i.e., he sustains a loss to his automobile, insurer has the option to pay the policyholder the cash value of his car or pay to repair the vehicle." *Camden*, 66 S.W.3d at 82. The policy's coverage clause must not be read in isolation; rather, it should be understood in the context of the limit of

liability provisions that follow. *See generally Townsend v. State Farm Mut. Auto. Ins. Co.*, 793 So.2d 473, 477 (La. Ct. App. 2d Cir. 2001); Thomas O. Farrish, “Diminished Value” in Automobile Insurance: The Controversy and Its Lessons, 12 Conn. Ins. L.J. 39, 50 (2005-2006). Tellingly, this same reasoning was applied in the *Campbell* decision relied upon by the Court of Appeals, where the Louisiana court held that although the motorcycle policy coverage for direct and accidental loss was broad enough to encompass diminished value, the limitation of liability set forth in the policy did not require the insurer to both repair and pay for diminished value. *Campbell*, 822 So.2d at 623. Thus, even assuming *arguendo*, that the terms of the coverage clause in the Farmers’ policy can somehow be read to “encompass diminished value”, the Petitioners have established, and NAMIC will similarly demonstrate below, that covering “diminished value” losses would contradict the terms of the policy’s limits of liability clause.

C. LIMITS OF LIABILITY CLAUSE ANALYSIS

The Court of Appeals’ interpretation of the subject policy’s limits of liability clause does not correspond with the opinions of the overwhelming majority of other states’ appellate courts. The Farmers’ policy provides in relevant part that, “Our limits of liability for loss shall not exceed: 1. The amount which it would cost to repair or replace

damaged or stolen property with other of like kind and quality, or with new property less an adjustment for physical deterioration and/or depreciation.” *Moeller*, 155 Wash. App. at 139, 299 P.3d at 860. Most courts, when construing a personal auto policy’s terms and conditions, have found the language of the limit of liability clause to be unambiguous. For example, the Alabama Court of Civil Appeals in *Pritchett v. State Farm Mut. Auto. Ins. Co.*, 834 So. 2d 785, 791 (Ala. Civ. App. 2002) (citations omitted) held in relevant part that, “[t]he various definitions of repair do not discuss the concept of value. We do not believe that in its common usage, the term ‘repair’ is understood to encompass the concept of value or require a restoration of value.” Additionally, some courts have noted that the concept of value should not be attributed to the word “repair” because losses in value cannot be repaired; rather, they can only be lessened with money. *O’Brien v. Progressive N. Ins. Co.*, 785 A.2d 281, 290-291 (Del. Sup. Ct. 2001). Moreover, many insurers have successfully argued against claims of ambiguity, whether arising out of the term “repair” or out of that word’s modifier “like kind and quality”, by asserting that the plaintiffs’ construction of those terms would render other portions of the policy inoperative. Specifically, insurers have contended that because the policy provides the insurer a choice between paying for repairs or paying the automobile’s cash value, an obligation to compensate

for lost value would negate this choice. *O'Brien*, 785 A.2d at 287; *see also Pritchett*, 834 So. 2d at 792; *Ray v. Farmers Ins. Exch.*, 200 Cal. App. 3d 1411, 1417, 246 Cal. Rptr. 593, 596 (Cal. Ct. App. 3d Dist. 1988). Accordingly, finding that insurers are not responsible for “diminished value” damages would not only conform Washington courts with the rest of the states but would also signify that the plaintiff’s bar is not placed above consumers in Washington state.

D. IMPROPER CLASS CERTIFICATION FINDING

In addition to seeking reversal of the Court of Appeals’ unsupported finding that Farmers is responsible for paying “diminished value” damages, NAMIC urges this Court to reverse the Court of Appeals’ affirmation of the trial court’s decision to certify a class in this action. *Moeller*, 155 Wash. App. at 150-151, 229 P.3d at 866. Despite the Court of Appeals’ statement that “individual issues may pose management problems for the trial court,” the Court of Appeals upheld class certification. *Moeller*, 155 Wash. App. at 150, 229 P.3d at 865. The class at issue here was certified pursuant to Washington Superior Court Rule 23(b)(3), which requires that the court find that questions of law or fact common to the members predominate over any issues affecting only

individual members, and that a class action be superior to other available methods for the fair and efficient adjudication of the controversy.³

It is notable, however, that in a case strikingly similar to the one at bar, *Schwendeman v. USAA Cas. Ins. Co.*, the Washington Court of Appeals denied certification of the class for failure to meet the CR 23(b)(3) predominance requirement. *Schwendeman v. USAA Cas. Ins. Co.*, 116 Wash. App. 9, 28, 65 P.3d 1, 10 (Div. 2 2003). In *Schwendeman*, the insured brought a putative class action against his insurer claiming that the insurer breached the insurance contract and violated the Consumer Protection Act by repairing cars with aftermarket parts. *Schwendeman*, 116 Wash. App. at 11, 65 P.3d at 2. According to the plaintiff, the issue common to all class members was whether the use of aftermarket replacement parts breached the insurer's obligation to replace damaged parts with parts of "like kind and quality." *Schwendeman*, 116 Wash. App. at 21, 65 P.3d at 7. Plaintiff went on to contend that an examination

³ Superior Court Civil Rules, CR 23(b)(3) provides that a class action may be maintained if:

The court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

of each insured's vehicle would not be necessary because aftermarket parts will always be "inferior in terms of durability, performance, and safety" in comparison to original equipment manufacturer ("OEM") parts. *Id.* Thus, plaintiff argued that use of non-OEM parts can never meet an insurer's obligation to replace damaged parts with parts of "like kind and quality." *Id.* This argument appears analogous to Moeller's contention that collisions always result in irreparable physical damage to an automobile which cannot be repaired and which result in diminished value. *Moeller*, 155 Wash. App. at 142, 229 P.3d at 861. Because the record contained evidence that non-OEM parts could be of "like kind and quality", the court in *Schwendeman* disagreed with the plaintiffs' argument that OEM replacement parts were always needed to meet the "like kind and quality" requirement. Therefore, the court determined that the "like kind and quality" issue would need to be resolved through individual testing of the non-OEM crash replacement parts. *Schwendeman*, 116 Wash. App. at 22, 65 P.3d at 7. Accordingly, the court upheld the trial court's decision to deny class certification because common issues were not predominant. *Id.*; see also *Degenhart v. AIU Holdings, Inc.*, No. C10-5172RBL, 2010 WL 4852200, at *5 (W.D. Wash. Nov. 26, 2010) ("Defendants argue (and the Court tends to agree) that the kind of showing required under Washington law to establish diminished

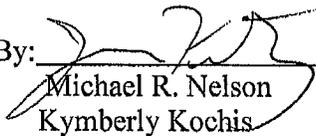
value makes group generalizations about the fact of injury or the amount of damage inappropriate.”). A review of the record in the case at bar (cited extensively in Petitioners’ supplemental brief) will similarly show that not all of the putative class members’ cars sustained post-repair diminution in value. In addition, it is argued above that properly repaired cars do not have components that that are irreparably damaged. Accordingly, resolution of the plaintiffs’ claims of diminished value in the instant matter can only be resolved on a case-by-case basis. Based on the foregoing and the Petitioners’ supplemental brief, the Court of Appeals’ class certification decision should be reversed by this Court.

IV. CONCLUSION

For all of the foregoing reasons, this Court should reverse the Court of Appeals’ decision.

DATED this 4th day of February 2011.

Nelson Levine de Luca & Horst, LLC

By: 

Michael R. Nelson

Kymerly Kochis

Jason M. Kurtz

One Battery Park Plaza, 32nd Floor

New York, NY 10004

(212) 233-0130

Andrea Holburn Bernarding,
WSBA No. 28599
LAW OFFICE OF ANDREA
HOLBURN BERNARDING
1730 Minor Avenue, Suite 1130
Seattle, Washington 98101
(206) 403-4800

Attorneys for National Association of
Mutual Insurance Companies

11 FEB -4 PM 2:04

BY RONALD R. CARPENTER

CERTIFICATE OF SERVICE

CLERK The undersigned, under penalty of perjury, hereby declares as follows:

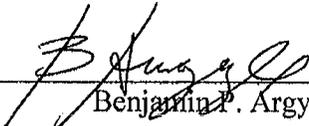
1. I am a citizen of the United States and a resident of Kings County. I am over 18 years of age and not a party to this action.
2. I am employed by the law firm of Nelson Levine de Luca & Horst, LLC. My business address is One Battery Park Plaza, 32nd Floor, New York, New York 10004.

On February 4, 2011, I served a copy of the **Motion to File Supplemental Brief of *Amicus Curiae*, National Association of Mutual Insurance Companies, in Support of Petitioner's Supplemental Brief and the Supplemental Brief of *Amicus Curiae*, National Association of Mutual Insurance Companies, in Support of Petitioner's Supplemental Brief** on the below persons via Federal Express:

Kenneth W. Masters
Wiggins & Masters, PLLC
241 Madison Avenue North
Bainbridge Island, WA 98110
(206) 780-5033

Jill D. Bowman
Stoel Rives LLP
600 University Street, Suite 3600
Seattle, WA 98101
(206) 624-0900
Attorney for Petitioner

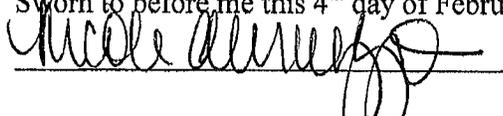
Stephen M. Hansen
Lowenberg, Lopez & Hansen, P.S.
WSBA 15642
950 Pacific Avenue, Suite 450
Tacoma, WA 98402-4441
(253) 383-1964
Attorneys for Respondent



Benjamin P. Argyle

State of New York)
) ss.:
County of New York)

Sworn to before me this 4th day of February, 2011.



NICOLE ABRUZZO
NOTARY PUBLIC, STATE OF NEW YORK
NASSAU COUNTY
LIC. #01AB6182765
COMM. EXP. 03/03/2012

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