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COURT OF APPEALS

STATE OF NEW YORK

MATTER OF KILDUFF,

Respondent,

-against-

No. 192

ROCHESTER CITY SCHOOL DISTRICT,

Appellant.

20 Eagle Street
Albany, New York 12207
October 16, 2014

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

CARA M. BRIGGS, ESQ.
GENERAL COUNSEL, ROCHESTER CITY SCHOOL DISTRICT
Attorneys for Appellant
131 West Broad Street, 2nd Floor
Rochester, NY 14614

ANTHONY J. BROCK, ESQ.
NYSUT OFFICE OF GENERAL COUNSEL
Attorneys for Respondent
800 Troy-Schenectady Road
Latham, NY 12110

Karen Schiffmiller
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: 192, Matter of
2 Kilduff v. Rochester City School District.

3 Counselor, you're on. You can have water
4 before you go on.

5 Do you want any rebuttal time, counsel?

6 MS. BRIGGS: Yes, please, two minutes.

7 CHIEF JUDGE LIPPMAN: Two minutes, sure, go
8 ahead.

9 MS. BRIGGS: Okay, thank you very much.
10 Good afternoon, Cara Briggs on behalf of the
11 Rochester City School District, the appellant in this
12 matter.

13 In reviewing the arguments of both sides,
14 and looking at the language of 3020(1), it's either -
15 - -

16 CHIEF JUDGE LIPPMAN: What's the pur - - -
17 what's the purpose of the - - - of the statute? What
18 - - - forget - - -

19 MS. BRIGGS: There's - - -

20 CHIEF JUDGE LIPPMAN: - - - what it says.

21 MS. BRIGGS: Yes.

22 CHIEF JUDGE LIPPMAN: What were they trying
23 to say?

24 MS. BRIGGS: Here's what we're trying to
25 say. It's - - - it's changing the abilities of

1 school districts and unions' abilities to bargain for
2 disciplinary proceedings. And I know I'm not
3 summarizing it very well, but it is an attempt to
4 reform what was the existing law at that time. What
5 the focus of this statute is, is not in the
6 collective bargaining agreement, it is on the
7 disciplinary proceedings.

8 So as you read the language - - -

9 JUDGE ABDUS-SALAAM: Counsel, isn't - - -
10 isn't the language - - -

11 MS. BRIGGS: Yes, ma'am?

12 JUDGE ABDUS-SALAAM: Isn't the statute
13 designed to give teachers a choice - - -

14 MS. BRIGGS: It - - -

15 JUDGE ABDUS-SALAAM: - - - about how they
16 want to be - - - how they want to go through the
17 disciplinary process that - - -

18 MS. BRIGGS: Yes.

19 JUDGE ABDUS-SALAAM: - - - they either want
20 to have a hearing or they can deal with the
21 collective bargaining agreement. Isn't that
22 basically what it's about?

23 MS. BRIGGS: It is. It - - - it also
24 includes, and again, this is part of why I'm going
25 back to not only the language in the statute, but the

1 legislative history.

2 CHIEF JUDGE LIPPMAN: Yeah, but if the
3 Judge is right that the purpose is - - -

4 MS. BRIGGS: Yes.

5 CHIEF JUDGE LIPPMAN: - - - to give a
6 choice, how does that impact on the case in front of
7 us.

8 MS. BRIGGS: It - - - that is one of the
9 purposes. One of the other purposes is to allow
10 districts and unions to collectively bargain for
11 alternative procedures.

12 JUDGE SMITH: Maybe - - - maybe I - - -
13 what about a narrower question. What's the purpose
14 of the grandfather clause?

15 MS. BRIGGS: The purpose of the grandfather
16 clause is to allow districts and unions who have
17 already collectively bargained for alternative
18 disciplinary procedures, who have found those
19 procedures to be useful and agreeable to both of
20 them, to continue to use them, until such time as
21 they rebargain for something different.

22 JUDGE SMITH: And not - - - not just until
23 such time as the contract expires.

24 MS. BRIGGS: Correct.

25 JUDGE SMITH: And that's - - - that's what

1 the case is about. You say it's - - -

2 MS. BRIGGS: Correct.

3 JUDGE SMITH: - - - for as long as they
4 choose to keep the procedures. He says it's only
5 until the contract runs out.

6 MS. BRIGGS: Exactly.

7 JUDGE SMITH: So why - - - and he says - -
8 - he says if you read the sentence grammatically, the
9 - - - in the statute, it says that it's the - - -
10 it's the contract that has to be renegotiated, not
11 the - - - not the disciplinary procedures. So why
12 isn't he right about that?

13 MS. BRIGGS: He's not right, because if
14 you're focusing - - - essentially, what he's focusing
15 on is subject-verb agreement. If you're making the
16 subject and verb of "was effective on or before
17 September 1st, 1994 and has been unaltered", if you
18 make that agree with the nouns there, then that makes
19 the following phrase superfluous. If you're looking
20 at 3020(1) - - -

21 JUDGE SMITH: The following phrase, which
22 you mean, which has not been reno - - -

23 MS. BRIGGS: "And has been unaltered by
24 renegotiation" - - -

25 JUDGE SMITH: Okay.

1 MS. BRIGGS: - - - "or in accordance" et
2 cetera. So - - -

3 JUDGE SMITH: So why - - - why can't that
4 mean that the existing contract has not been altered
5 by renegotiation?

6 MS. BRIGGS: If the legislature wanted it
7 to mean what the union says it means, the sentence
8 would have ended after "was effective on or before
9 September 1st, 1994".

10 JUDGE SMITH: You're saying that on his
11 reading, the words "which has been altered by
12 renegotiation" add nothing to the sentence?

13 MS. BRIGGS: Correct. And we all know that
14 meaning and effect needs to be given to any verbiage,
15 any language that the legislature includes, so they
16 included that for a reason. We need to assume they
17 included that for a reason.

18 JUDGE ABDUS-SALAAM: What do you think the
19 reason is for the date, September 1st, 1994?

20 MS. BRIGGS: That's when the statute, as I
21 recall, goes into effect. So if - - - if they
22 intended - - - if the legislature intended for any
23 renegotiation of a contract, of any aspect of a
24 contract - - - a pay increase, or just changing the
25 dates - - - to alter the disciplinary practices in

1 the contract, it could be - - -

2 JUDGE ABDUS-SALAAM: But could it also mean
3 that because the statute was going into effect
4 September 1st, 1994, then maybe the school district
5 had just negotiated a contract that went into effect
6 August 30th, 1994. And so, they - - - that contract
7 would already exist; the statute goes into effect
8 September 1st.

9 And don't you think that perhaps they were
10 trying to give that school district that already had
11 a contract in effect, maybe an out to try to
12 renegotiate so that they could come into compliance
13 with the law to give teachers a choice? So they
14 wouldn't be stuck for - - - with a three-year
15 contract with no choice? Is that a possibility?

16 MS. BRIGGS: I don't believe they would
17 have used this language to create that possibility.
18 I think it could have been done more simply.

19 JUDGE SMITH: Well, if - - - if the
20 language weren't there - - -

21 MS. BRIGGS: Yes.

22 JUDGE SMITH: - - - would anything stop - -
23 - I mean, if they renegotiate to take out the
24 disciplinary procedures, then - - - then the statute,
25 yeah - - - then the grandfather clause would not

1 apply on its face, would it?

2 MS. BRIGGS: I'm sorry; I didn't understand
3 the question.

4 JUDGE SMITH: I mean, you've got - - -
5 you've got a contract which says in it, we have
6 alternate disciplinary procedures that don't involve
7 a hearing. That's the kind of contract that was good
8 before 1994, and is not any good after 1994, to
9 simplify it, right?

10 MS. BRIGGS: Yes.

11 JUDGE SMITH: Okay. Now, dur - - - before
12 the contract expires, the union and management want
13 to make a deal to take that out. They take it out.
14 You don't need a - - - yeah. Why - - - the words of
15 the statute which has not been renegotiated don't
16 govern anything, it seems to me, because if - - - if
17 it's taken out, it's taken out. They're not going to
18 - - - no one's going to say you can enforce language
19 that has been taken out.

20 MS. BRIGGS: I am so sorry. I'm still not
21 following.

22 JUDGE SMITH: Okay, okay Sorry.

23 JUDGE READ: Well, let the - - -

24 JUDGE SMITH: Let me rephrase the question.

25 MS. BRIGGS: Okay.

1 JUDGE SMITH: The statute on its face
2 applies to disciplinary procedures contained in a
3 collective bargaining agreement, right?

4 MS. BRIGGS: Yes.

5 JUDGE SMITH: I think what Judge Abdus-
6 Salaam was asking you was suppose - - - shouldn't the
7 - - - the labor and management be able to negotiate
8 to take something out of their contract?

9 MS. BRIGGS: Yes.

10 JUDGE SMITH: But if they've taken it out,
11 it's no longer contained in, and so you've already
12 defeated the grandfather clause. You don't need the
13 language that says, "which has not been altered by
14 renegotiation". You with me? You should be with me
15 - - -

16 MS. BRIGGS: I - - - I - - -

17 JUDGE SMITH: - - - the question is
18 favorable to you.

19 MS. BRIGGS: Thank you, yes. I got it. So
20 - - -

21 JUDGE READ: Can - - - can you tell me what
22 do you point to in the legislative history that
23 supports your position?

24 MS. BRIGGS: If - - - if you look at the -
25 - -

1 JUDGE READ: Because frankly, I found the
2 legislative history not helpful either way.

3 MS. BRIGGS: It - - - it wasn't terribly on
4 point, because frankly, the - - - I don't think the
5 legislature envisioned that this particular conundrum
6 would occur, but if you were to look at the memo for
7 the Governor's Office of Employee Relations. That
8 particular memo contains a sentence that says,
9 "Collective bargaining agreements containing
10 disciplinary procedures which are effective after
11 September 1st, 1994, the employee must be able to
12 elect", et cetera.

13 So that verbiage, the way that sentence is
14 structured - - -

15 JUDGE READ: It's a negative - - - it's a
16 negative implication?

17 MS. BRIGGS: It - - - it talks about
18 collective bargaining agreements containing
19 disciplinary proceedings which are effective. So the
20 - - - the disciplinary proceedings are effective
21 after September 1st, 1994.

22 JUDGE GRAFFEO: So why is your
23 interpretation of these provisions the better
24 resolution?

25 MS. BRIGGS: Unions and districts have

1 bargained - - - you know, in this particular case,
2 we've bargained for our procedure which been - - -
3 has been in effect for quite some time, which has
4 been used for quite some time. And I don't believe
5 that the legislature intended to abridge the ability
6 of districts and unions to continue using something
7 which has been working fairly well until such time as
8 we are both free to negotiate with one another to - -
9 - at the next negotiation of the contract to change
10 those proceedings.

11 JUDGE READ: Of course, they would never -
12 - -

13 MS. BRIGGS: It's something which has been
14 bargained for.

15 JUDGE READ: They would never want to
16 negotiate. I mean, they've - - - they've already got
17 fallback that's pretty good, right, in 3020, so their
18 incentive would never be to negotiate a provision
19 that's less favorable, certainly.

20 MS. BRIGGS: Well, when - - - when we're at
21 the table, when we negotiate, we obtain one benefit
22 by giving up another.

23 JUDGE READ: Yeah.

24 MS. BRIGGS: So this is something which was
25 - - -

1 JUDGE READ: Could be traded off?

2 MS. BRIGGS: Yeah. So this is something
3 which was negotiated for and - - -

4 JUDGE RIVERA: You're saying it's all up
5 for grabs, is that what you're saying?

6 MS. BRIGGS: As part of the negotiation - -
7 -

8 JUDGE RIVERA: Potentially?

9 MS. BRIGGS: - - - process.

10 JUDGE RIVERA: Yes.

11 MS. BRIGGS: But if - - - if it changes
12 going forward, we all know what our constraints are
13 with respect to the manner in which - - -

14 JUDGE RIVERA: Then you know what the law
15 says, yeah.

16 MS. BRIGGS: Yes.

17 CHIEF JUDGE LIPPMAN: Okay, counsel.

18 MS. BRIGGS: Thank you very much.

19 CHIEF JUDGE LIPPMAN: You'll - - - you'll
20 have rebuttal. Let's - - -

21 MS. BRIGGS: Thank you.

22 CHIEF JUDGE LIPPMAN: - - - hear from your
23 adversary.

24 MR. BROCK: Good afternoon, if it would
25 please the court, Anthony Brock on behalf of

1 respondent, Roseann Kilduff.

2 CHIEF JUDGE LIPPMAN: Counsel, the same
3 question that Judge Graffeo asked your adversary:
4 why is your interpretation of this language better,
5 fairer, make more sense? Why?

6 MR. BROCK: It's consistent with the clear
7 language of the statute, it's consistent with the
8 legislative intent in drafting this statute, and it's
9 consistent with the intent of the parties in the
10 collective bargaining agreement that they ended up
11 with.

12 CHIEF JUDGE LIPPMAN: What was the
13 legislative intent and what was the intent of the
14 parties?

15 MR. BROCK: The legislative intent was to
16 speed up the Education Law section 3020-a process, as
17 it existed prior to 1994. And the legislature put in
18 certain things to speed up the process. That
19 included going from a three-person panel to a single
20 hearing officer, which eliminated the need to
21 coordinate three arbitrator calendars with everybody
22 else's calendars.

23 It also put in, for the first time, a
24 requirement that there be a pre-hearing conference
25 within fifteen days of the charges being filed. It

1 also included that the final hearing date take place
2 within sixty days of that pre-hearing conference. It
3 also included - - -

4 JUDGE SMITH: How - - - how does any of
5 this affect - - - how does any of this enlighten us
6 about the meaning of the grandfather clause?

7 MR. BROCK: The grandfather clause is
8 inconsistent with that, because, as you see here, if
9 - - - if you take the district's interpretation that
10 this process was grandfathered from pre-1994 all the
11 way until 2014, you ignore the - - - the effort of
12 the legislature in 1994, and yet again in 2008 - - -

13 JUDGE SMITH: But what you're saying, if I
14 - - - if I understand you - - -

15 MR. BROCK: - - - 2010, and 2012.

16 JUDGE SMITH: - - - you're saying that the
17 wider scope you give the grandfather clause, the less
18 effective the reforms are.

19 MR. BROCK: Correct.

20 JUDGE SMITH: Fair point. What about her
21 argument that - - - that the - - - the phrase on your
22 reading - - - the phrase "which has not been" - - -
23 "which has not been altered by renegotiation" - - -
24 or "has been unaltered by renegotiation" loses all -
25 - - loses all its meaning, might as well be left out

1 of the statute?

2 MR. BROCK: Well, I think if you read
3 3020(1) in its entirety, that it refers to the
4 collective bargaining agreement being unaltered, but
5 you also have to read the two words "provided
6 however", that are right in the middle of that. And
7 the "provided however" takes everything that - - -
8 that comes before it, and modifies it, and requires
9 two things. One, that you give your tenured educator
10 a choice between the two processes, and two, and - -
11 - and going back to the time frames - - -

12 JUDGE SMITH: Let me make sure - - - just
13 be sure I'm following you.

14 MR. BROCK: - - - that any alternate
15 procedure comply with the new requirements - - - time
16 requirements.

17 JUDGE SMITH: Just to be sure I'm following
18 what you're saying. The "provided however" precedes
19 the clause that says from now - - - for anything you
20 negotiate from now on, has to give the employee a
21 choice of a hearing.

22 MR. BROCK: That's right.

23 JUDGE SMITH: Okay. What - - - I still
24 don't quite see how that gives - - - gives meaning on
25 your reading to the words, "which have" - - - in the

1 previous grandfather clause, "and has been unaltered
2 by renegotiation". Do you see what I mean?

3 MR. BROCK: There's unaltered by renego - -
4 -

5 JUDGE SMITH: Do you - - - take a - - -
6 take a pen - - - take a pencil and cross out "and has
7 been unaltered by renegotiation" from the words - - -
8 the clause we're talking about. On your reading of
9 the clause, have I changed the meaning by crossing
10 that out?

11 MR. BROCK: I don't think so. I think you
12 need to read it all in its entirety. And the
13 legislature specifically chose certain words in
14 drafting this. The singular verbs, which could only
15 refer to a collective bargaining agreement and not to
16 the plural, "alternate procedures", and they chose to
17 insert that language "unaltered by renegotiation"
18 after the term "collective bargaining agreement", not
19 after the term, "alternate disciplinary procedures".

20 JUDGE SMITH: Okay, I see - - - I see your
21 grammatical point. It's a - - - it's a strong point.
22 But I'm still not seeing why they put those words in
23 at all on your view.

24 MR. BROCK: On my view? Because it gives
25 the parties that are going to use this process

1 practical information on how to implement it.

2 And let's assume we're - - - you're a
3 district superintendent on September 1st, 1994, and
4 you've got a collective bargaining agreement that is
5 in place until, let's say, August 30th, 1995. You
6 know what to do on August - - - or on September 1st,
7 1994, if you want to bring disciplinary charges. You
8 can use that alternate procedure that is in place.

9 What - - - by using that language, the
10 legislature made it clear to the users of the process
11 that on September 1st, 1994, they didn't know how - -
12 - now have to go out and renegotiate their collective
13 bargaining agreements if they wanted to keep the
14 alternate procedures that were there at that time.

15 But when they did go back to renegotiate,
16 the parties knew that they had to do two things to be
17 consistent with the statute - - -

18 JUDGE SMITH: What do you mean - - -

19 MR. BROCK: - - - give the choice - - -

20 JUDGE SMITH: - - - what do you mean by
21 renegotiate? You mean to negotiate for a new
22 agreement, or negotiate to change the old one?

23 MR. BROCK: I think it's the same thing.
24 When that contract expires, you renegotiate - - -

25 JUDGE SMITH: Isn't she - - - wait, that's

1 her argument, if it's the same thing. You're say - -
2 - you're say - - - you're - - - are you conceding
3 that to negotiate a new contract that's going to
4 succeed the old one is a renegotiation within the
5 meaning of this statute?

6 MR. BROCK: To renegotiate the - - -

7 JUDGE SMITH: In other words, if - - -
8 yeah. Contract ends in 1995. Management and labor
9 sit down, and say, let's make this quick; we're going
10 to give - - - we're going to have a contract
11 absolutely identical with the old one, just change
12 the date. Does the grandfather clause apply to that
13 new contract on your view?

14 MR. BROCK: No.

15 JUDGE SMITH: Okay, why not?

16 MR. BROCK: Because it - - -

17 JUDGE SMITH: Because they - - - they - - -
18 was - - - isn't it a clause that was not altered by
19 renegotiation?

20 MR. BROCK: Once you extend the contract,
21 you've renegotiated every provision.

22 JUDGE SMITH: Okay.

23 MR. BROCK: You've given new life - - -

24 JUDGE SMITH: That's what - - - that's what
25 I thought your position was. Okay.

1 JUDGE GRAFFEO: You mean, once the previous
2 contract expires?

3 MR. BROCK: Yes. Even if you just extend
4 the dates, you've renegotiated and agreed to
5 everything within that contract. And I think - - -

6 JUDGE SMITH: I'm still having a hard time
7 seeing what meaning the clause has.

8 MR. BROCK: The "unaltered by
9 renegotiation" clause?

10 JUDGE SMITH: Yeah, yeah.

11 MR. BROCK: I think when you read all of
12 the language taken together, it refers to two
13 situations. Perhaps a collective bargaining
14 agreement that expired on June 30th, 1994 and had not
15 been fully renegotiated, and then it also applies to
16 those collective bargaining agreements that were
17 going to end sometimes after September 1st, 1994,
18 such as June 30th, 1995.

19 And that, reading everything together, I
20 believe is with - - - why the Appellate Division
21 found that Ms. Kilduff had the right to choose. It's
22 - - -

23 CHIEF JUDGE LIPPMAN: Okay, counselor.
24 Anything else, counsel?

25 MR. BROCK: No, that's it. Thank you, Your

1 Honor.

2 CHIEF JUDGE LIPPMAN: Thanks.

3 Counselor, rebuttal?

4 MS. BRIGGS: Thank you. I know you're all
5 enjoying reading the statute over and over, so I'm
6 going to direct your attention to the fact that it
7 says, "disciplinary procedures contained in" - - -
8 almost parenthetical - - - "contained in a collective
9 bargaining agreement". So we know where those
10 disciplinary procedures are.

11 So throughout this statute, the - - - the
12 focus - - - the real topic is disciplinary
13 procedures, not so much the collective bargaining
14 agreement, just the fact that this is where we find
15 them, and when that collective bargaining agreement
16 is in effect, on or after September 1st, 1994, or is
17 renegotiated on or after September 1st, 1994, those
18 disciplinary procedures - - -

19 JUDGE SMITH: Okay, okay. But if - - - but
20 if you have the right meaning, shouldn't they have
21 written disciplinary procedures contained - - - which
22 are - - - which are contained in a collective
23 bargaining agreement and which have not been altered
24 by renegotiation? In other words, doesn't he have a
25 point that "has" doesn't mean "have"?

1 MS. BRIGGS: Yes, we're talking about the -
2 - - the subject-verb agreement?

3 JUDGE SMITH: Yeah.

4 MS. BRIGGS: So it's either there's subject
5 for disagreement or there's superfluous language.
6 Which is it? So - - -

7 JUDGE RIVERA: But, but - - - I'm sorry.

8 MS. BRIGGS: Yes, go ahead.

9 JUDGE RIVERA: Alternate disciplinary
10 procedures, aren't they - - - I mean, I thought you
11 guys were arguing that they're always in a collective
12 bargaining agreement. They're not independent of the
13 collective bargaining agreement. Is that - - - or am
14 I misunderstanding that part of your arguments?

15 MS. BRIGGS: I'm - - - I'm pointing out
16 that I believe - - -

17 JUDGE RIVERA: No, no, I'm asking you.

18 MS. BRIGGS: No, if they're - - - they're
19 in the collective bargaining agreements - - -

20 JUDGE RIVERA: Right, so why - - - why
21 would I talk about the - - - that referred - - - that
22 covers the conditions of employment that was
23 effective on such-and-such a date. I'm talking about
24 the document that is the vessel for these alternate -
25 - - alternative disciplinary procedures. The

1 procedures are not freestanding.

2 MS. BRIGGS: Exactly. But I'm seeing it
3 the other way. That - - - that the focus is that
4 these are the disciplinary procedures, and this is
5 where you find them in the collective bargaining
6 agreement. This is the vessel which carries them.

7 JUDGE SMITH: The whole - - -

8 JUDGE GRAFFEO: What are - - - what are the
9 negative ramifications of the Appellate Division's
10 decision? What is it that troubles your district so
11 much with the Appellate Division's resolution?

12 MS. BRIGGS: We - - - we have a process
13 that we have been using for years, both sides, as you
14 can tell from the record. The - - - the 3020-a
15 process is actually a longer process than a grievance
16 and arbitration process, because it requires the
17 board of education to proffer charges. It requires
18 the district to enlist New York State's Education
19 Department in assigning a hearing officer, and
20 there's much more to it.

21 JUDGE GRAFFEO: It's a more cumbersome
22 process - - -

23 MS. BRIGGS: It is.

24 JUDGE GRAFFEO: - - - is that what the
25 problem is?

1 MS. BRIGGS: It is. And - - - and it is a
2 process which has been serving both sides well for
3 years. And it is a process which both sides
4 bargained for. There was something which was given
5 up in order to reach this agreement. It's been
6 working for us for years.

7 CHIEF JUDGE LIPPMAN: Okay, counsel.
8 Thanks.

9 MS. BRIGGS: Thank you.

10 CHIEF JUDGE LIPPMAN: Thank you both.

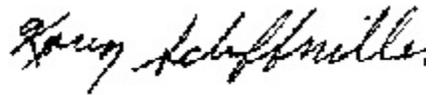
11 (Court is adjourned)

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C E R T I F I C A T I O N

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of Kilduff v. Rochester City School District, No. 192, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: _____

Agency Name: eScribers

Address of Agency: 700 West 192nd Street
Suite # 607
New York, NY 10040

Date: October 24, 2014