

# **FEUDING CO-OP OWNER'S:**

## **What's a Board to Do?**

**Itkowitz PLLC**

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**FEUDING CO-OP OWNERS  
WHAT IS A BOARD TO DO?**

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**ITKOWITZ PLLC  
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## **Feuding Owner’s -- What’s A Board To Do?**

### **I. INTRO**

Here’s a hard truth -- Co-op boards are filled with people who want power, but who are often not comfortable exercising the responsibility that goes with it.

People join their co-op boards because they want to protect their investment and their home, and they want control of what goes on in their building. That is noble. With a board position, however, comes power. And as the old saying goes, with power comes responsibility.

In our practice, we see all too often what happens when people in positions of power on co-op boards refuse to take responsibility and make hard choices about what is going on in their building.

Unfortunately, the failure to act when faced with a problem in the co-op will frequently end up costing the co-op more money, time and hassle in the end.

In these materials, we talk about the rights and responsibilities that shareholders have to each other and how boards can mitigate costly, expensive and time-consuming litigation.



## **II. SOME CASE STUDIES – WHAT TO DO WHEN THE STUFF HITS THE FAN (LITERALLY)**

In this section we offer you two actual case studies. One where the board and the managing agent sat back and did nothing in the face of a very bad situation and ended up paying the consequences for their inaction. The other where the board and the managing agent took action and solved a problem.

### **A. RAW SEWAGE LEAKING DOWN FROM ONE UNIT TO THE OTHER IN A NICE MANHATTAN CO-OP**

We recently represented a shareholder in a fancy Manhattan co-op who was forced to take legal action in her co-op because the board completely refused to deal with its obligations to her and other shareholders.

SEE THE ACTUAL (BUT REDACTED) ATTACHED COMPLAINT IN THE BACK OF THESE MATERIALS.

No less than seven times in a three-month period, water containing raw sewage and human feces leaked into our client’s apartment from the unit above. These floods were extremely damaging to the client’s health, as well as to the apartment itself. The water poured into our client’s kitchen, dining room and library through the ceiling and light fixtures. These floods rendered the apartment unusable, as the flood waters were unduly malodorous and shorted out the electrical system.

The floods occurred because the occupant of the unit one floor over our client’s unit, the mother of the shareholder, was living alone and had become mentally impaired. She was stopping up the toilet with cigarette butts. This was well documented by the building’s superintendent crew.

Our client, obviously, repeatedly complained in writing and otherwise to the managing agent (not Douglas Elliman) and the board.

In response to the early floods, the board and the managing agent sent disaster crews to the apartment to clean and disinfect and to remediate the damage to the apartment. Then, after the third flood, the board and the managing agent simply refused to make the necessary repairs, citing no reason. Neither did the board or the managing agent do anything to attempt to help the obviously ailing shareholder in the apartment causing the floods.

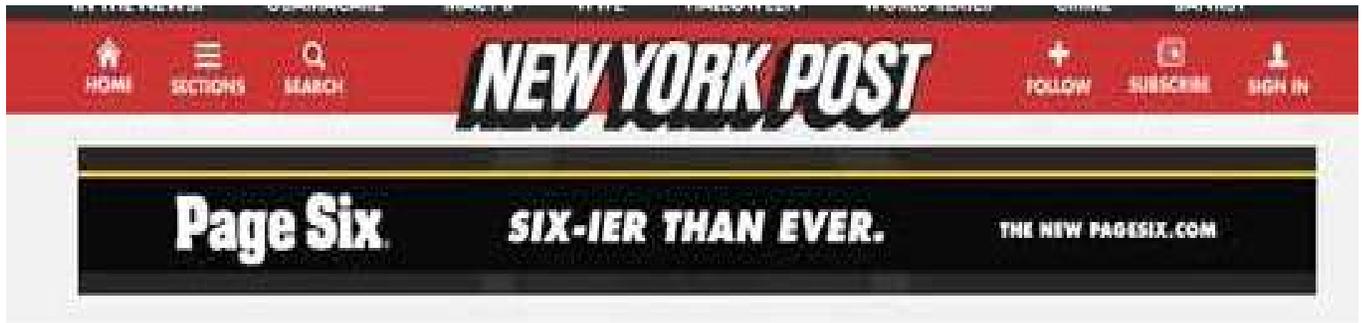
Our client asked for an abatement of maintenance, and her request was refused.

Ultimately, we were forced to sue the upstairs shareholder, the occupant, the board and the managing agent and move for a temporary injunction – which was granted. Insurance companies got involved. There was lengthy discovery (exchange of documents).

In the meantime, on a slow news day, a New York City paper picked up the story from the courthouse, and that managing agent and building were (one would assume) extremely embarrassed by the story.

The case settled before depositions began, with the co-op paying our client for her trouble.

Bottom line, would you like this headline to be in the New York Post about a building you were managing? And this is the literal headline and first few lines of the story:



This story refers to a “condo”, but the unit was a co-op. That’s the press for you.

**B. OLDER LADY SHAREHOLDER WALKING WITH BATHROBE OPEN (AND NOTHING ON UNDERNEATH) AT EXPENSIVE CO-OP BUILDING’S POOL**

We also had a case where an aging professional woman in her sixties was making her fellow shareholders uncomfortable by walking around the coop swimming pool with an open bathrobe. The problem was under the bathrobe was no bathing suit or any other clothing. Fellow shareholders did not appreciate being subjected to the unasked for exhibition, which occurred on a regular basis. At the same time, the woman, who was not in possession of all her previous faculties, was falling behind on her maintenance.

So the Board acted by commencing a nonpayment of maintenance case, on which she defaulted, and ultimately, after protective services was called, she was evicted. Her sons became involved and relocated the woman to a more appropriate environment. Ultimately, the woman’s proprietary lease and shares were sold at a marshal’s auction to a more desirable family.



## **C. COMPARE THE COST OF DOING NOTHING WITH THE COST OF TAKING CARE OF BUSINESS**

### **1. The Cost of Doing Nothing**

In the first example above, with the sewage leak, the cost to the board and the managing agent of doing nothing was:

- Bad press.
- Higher legal fees.
- Forced to pay a settlement to the shareholder.
- Their insurance company was involved in their defense – higher premiums upon renewal?
- Time and energy of board members and managing agent staff.

### **2. The Benefit of Doing Something in a Timely and Responsible Way**

- Discretion in a delicate situation.
- Lower legal fees.
- Problem was resolved with the sale of the unit to a more desirable shareholder.
- Tenants could feel like the board and the managing agent cared about the residents of the building.

### **III. ANATOMY OF A NUISANCE OR NONPAYMENT CASE AGAINST A SHAREHOLDER – WHAT ACTUALLY HAPPENS**

In this section we demonstrate how a case against a shareholder typically proceeds, first in the nonpayment of maintenance context and then in the nuisance context.

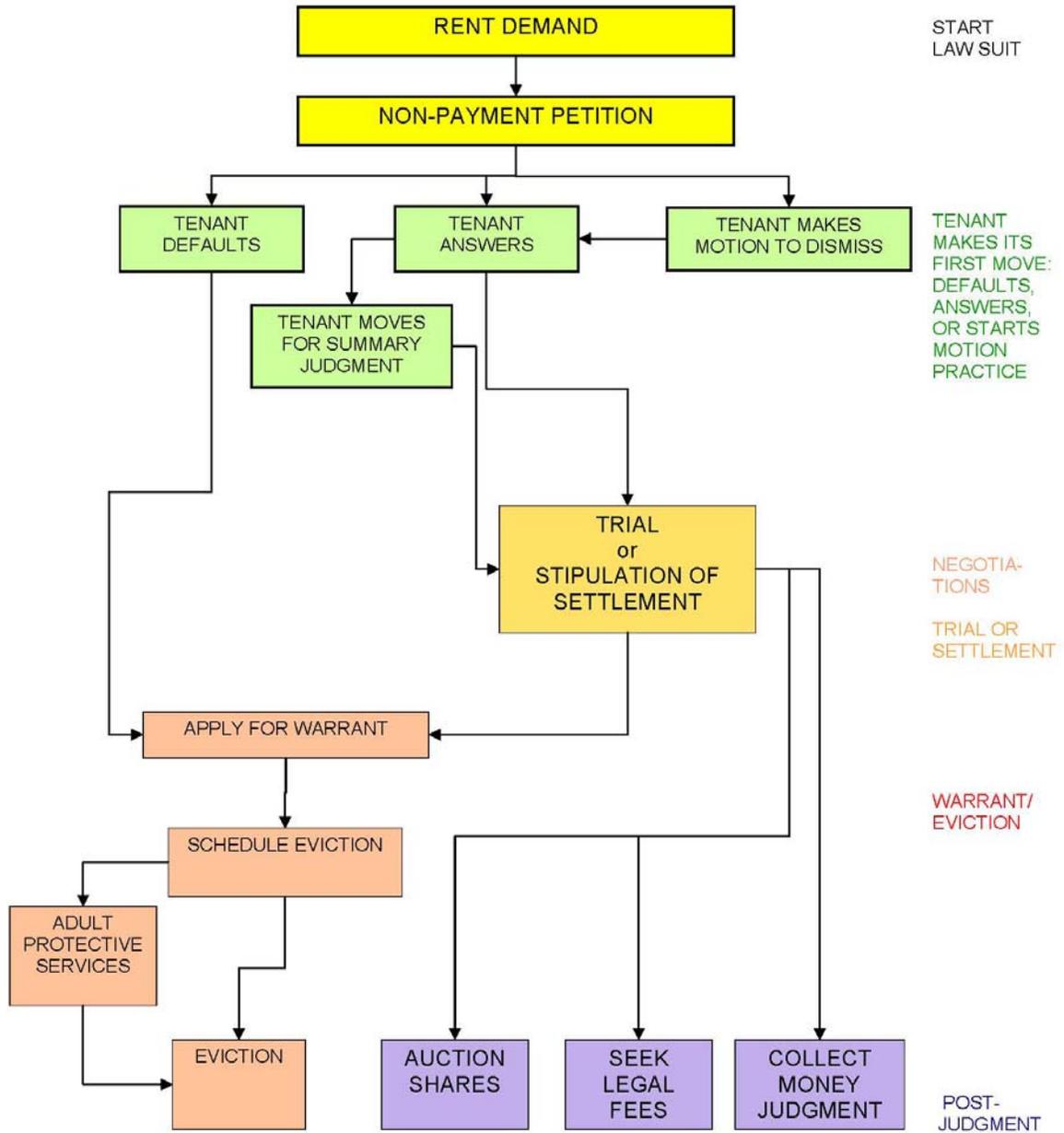
#### **A. NONPAYMENT**

- Predicate Notices
- Nonpayment Summary Proceeding
- Default or Trial
- Marshal
- Auction Shares

#### **B. NUISANCE LAWSUIT**

- Predicate Notices
- Summary Proceeding OR Regular Supreme Court Law Suit
- Default or Trial
- Marshal
- Auction Shares

***SEE THE BELOW FLOW CHART***



THIS IS NOT A GUARANTEE OF HOW YOUR CASE WILL PROCEED / [www.itkowitz.com](http://www.itkowitz.com)



#### IV. **SUGGESTED SOLUTIONS**

##### A. **ACT FAST**

Encourage your board to deal with difficult issues head on. This does NOT mean necessarily to act quickly or impulsively. But at the very least, a board should always be seeking to educate itself.

In our practice, we provide clients with a Legal Project Management Letter whenever they are faced with a decision or a difficult situation. Each Legal Project Management Letter includes a section on:

- (1) **The Facts.** A review of the facts and a synthesis of the "hard" data (such as dates and names, contract provisions, summaries of substantive emails, etc.) with the "soft" information, like the subtleties of board politics.
- (2) **The Law.** A survey of the law relevant to the case, so that everyone understands the shareholders' and the board's rights and responsibilities.
- (3) **The Goals.** A clear restatement of the client's goals, so that we can be sure that the client and the firm have an identical understanding of what success looks like for the board.

- (4) The Options. A presentation of available options. For each option, we provide:
  - (a) Pros.
  - (b) Cons.
  - (c) Time.
  - (d) Cost.
  - (e) Risks.
  - (f) Percentage chance of the option advancing the goals.
- (5) The Money. A frank discussion about the budgetary constraints and of legal fees, and suggestions for fee arrangements that are alternatives to hourly billing.
- (6) A Communications Plan. We establish a communications plan. Especially if there are many people involved in the case at the firm, on the board, at the managing agent, etc.
- (7) A Recommendation. A recommendation for a course of action.

- B. EDUCATE YOURSELF BOARDS ABOUT THE COST OF SITTING ON PROBLEMS AND THE LEGAL PROCESS.
- C. HAVE EMERGENCY CONTACT INFORMATION FOR ALL SHAREHOLDERS, IN CASE A SHAREHOLDER LIVING ALONE NEEDS ASSISTANCE.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

-----X  
[REDACTED],

Plaintiff,

Index No.

-against-

**VERIFIED COMPLAINT**

[REDACTED]

(the names of the last ten defendants being fictitious and unknown to plaintiff, plaintiff intending to designate thereby persons or parties having or claiming to have an interest in or lien upon the described premises),

Defendants.

-----X

Plaintiff [REDACTED] (“Plaintiff”), by its attorneys, Itkowitz

PLLC, as and for its complaint, alleges as follows:

**THE PARTIES**

1. At all relevant times, Plaintiff was and is the owner of 780 of shares of stock, which correspond the unit known as “1A” (the “Apartment”), in the cooperative corporation known as 3 [REDACTED].

2. At all relevant times, [REDACTED] (the “Corporation”) was and is a New York Corporation that owns the building located at [REDACTED]

3. The business of the Corporation is operated and conducted by the

Board of Directors of the Corporation (the “Board”), who is empowered to make business decisions on behalf of the Corporation, provided that such decisions are in the best interests of the Corporation and are not undertaken in bad faith.

4. At all relevant times, Defendant [REDACTED] [REDACTED] (the “Managing Agent”) is and was a New York limited liability company that serves as the managing agent for the Building.

5. Upon information and belief, at all relevant times, Defendant [REDACTED] [REDACTED] was and is the owner of the stock shares that correspond to the apartment known as “2A” (“Apartment 2A”) in the Building.

6. At all relevant times, Defendant [REDACTED] has resided in Apartment 2A. Upon information and belief, [REDACTED] is an elderly woman who suffers from mental illnesses and who does not receive assistance from a caretaker of any kind.

### **FACTUAL BACKGROUND**

7. On or about [REDACTED] Plaintiff, as lessee, and the Corporation, as lessor, entered into a proprietary lease (the “Lease”) concerning, among other things, use and occupancy of the Apartment. Relevant portions of the Lease are annexed hereto as Exhibit “1”.

8. Beginning in or about [REDACTED] and continuing to the present, the Apartment has been repeatedly flooded from Apartment 2A and the floodwaters have contained raw sewage (the “Floods”).

9. During the Floods, water, urine, and human excrement have poured out of the bathroom and kitchen ceilings and through the light fixtures in the

Apartment. The Floods have also effected and damaged the Apartment's dining room and library. Moreover, the Floods have disabled the electrical systems in the Apartment's bathroom and kitchen.

10. The Floods have resulted in significant damage to the Apartment, and have caused Plaintiff to undertake substantial repairs. Such repairs include repainting, repairing the electrical systems.

11. In response to Plaintiff's complaints to the Board and the Managing Agent about at least one of the Floods, either the Board or the Managing Agent sent a disaster recovery crew to clean and disinfect the Apartment. During such clean-up, the Building's superintendent specifically informed Plaintiff that it was not safe to use the bathroom or the kitchen until the crew has completed all of its work.

12. Following either the Board or the Managing Agent's decision to send in the clean-up crew, Plaintiff has complained numerous times to the Board and Managing Agent about continuing Flooding. Neither the Board nor the Managing Agent has taken any action to remediate the Flooding.

13. On [REDACTED]—immediately after Plaintiff had repainted the bathroom ceiling in response to a Flood caused by Apartment 2A—there were further leaks into the Apartment.

14. As such, on [REDACTED], Plaintiff requested that the Board grant her a two month abatement of her maintenance charges.

15. On [REDACTED], the Board refused Plaintiff's request for an abatement of maintenance, and alleged that it had dealt with the Floods "quickly and efficiently."

### The Lease and House Rules

16. Paragraph 3 of the Lease provides, in relevant part, that “[t]he Lessor shall maintain and manage the building as a first-class apartment building . . . .” Exhibit “1” at ¶ 3.

17. Paragraph 4(a) of the Lease states, in relevant part, that “[i]n case the damage resulting from fire or other cause shall be so extensive as to render the apartment partly or wholly untenable, or if the means of access thereto shall be destroyed, the rent hereunder shall proportionately abate until the apartment shall again be rendered wholly tenable . . . .” *Id.* at ¶ 4(a).

18. Paragraph 10 of the Lease states, in relevant part, that “[t]he Lessee, upon paying the rent and performing the covenants and complying with the conditions on the part of the Lessee to be performed as herein set forth, shall, at all times during the term hereby granted, quietly have, hold and enjoy the apartment without any let, suit, trouble or hindrance from the Lessor . . . .” *Id.* at ¶ 10.

19. Paragraph 18(a) of the Lease provides, in relevant part, that “[t]he Lessee shall keep the interior of the apartment . . . in good repair . . . and shall be solely responsible for the maintenance, repair; and replacement of plumbing, gas and heating fixtures and equipment . . . . Plumbing, gas and heating fixtures as used herein shall include exposed gas, steam and water pipes attached to fixtures, appliances and equipment and the fixtures, appliances and equipment to which they are attached, and any special pipes or equipment which the Lessee may install within the wall or ceiling, or under the floor, but shall not include gas, steam, water or other pipes or conduits within the walls, ceilings or floors . . . .”

20. Paragraph 18(c) states, in relevant part, that “[i]f, in the Lessor's sole judgment, any of the Lessee's equipment or appliances shall result in damage to the building or poor quality or interruption of service to other portions of the building, or overloading of, or damage to facilities maintained by the Lessor for the supplying of water, gas, electricity or air conditioning to the building . . . the Lessee shall promptly, on notice from the Lessor, remedy the condition and, pending such remedy, shall cease using any appliance or equipment which may be creating the objectionable condition.”

21. Paragraph 28 of the Lease states, in relevant part, that “[i]f the Lessee shall at any time be in default hereunder and the Lessor shall incur any expenses (whether paid or not) in performing acts which the Lessee is required to perform, or in instituting any action or proceeding based on such Default, or defending, or asserting a counterclaim in, any action or proceeding brought by the Lessee the expense thereof to the Lessor, including reasonable attorneys’ fees and disbursements, shall be paid by the Lessee to the Lessor, on demand, as additional rent.”

22. Item 14 of the **325 Tenants Corporation House Rules** (the “House Rules”) provides, in relevant part, that “[t]oilets and other water apparatus and appliances in the building shall not be used for any purpose other than those for which they were designed, and sweepings, rubbish, rags, or any other article shall not be thrown into water closets. The shareholder in whose apartment damage has occurred, or whose apartment has caused damage outside of the apartment, as a result of misuse or defect of any toilet, washing machine or other apparatus or appliance or for any other cause other than one for which the Corporation is responsible, shall pay the cost of repairing such damage.”

**AS AND FOR A FIRST CAUSE OF ACTION**  
**(Breach of the Implied Warranty of Habitability)**

23. Plaintiff repeats and realleges all of the allegations contained in paragraphs “1” through “24” hereof as if fully set forth herein.

24. The hazardous condition caused by the Floods rendered certain portions of the Apartment dangerous and uninhabitable.

25. The Corporation and the Managing Agent, by failing to respond to several of Plaintiffs’ complaints about ongoing Flooding, breached the implied warranty of habitability.

26. As a result of the Corporation and Managing Agent’s breaches of the implied warranty of habitability, Plaintiff has been damaged in an amount to be determined by the Court, but in no event less than \$50,000.00.

**AS AND FOR A SECOND CAUSE OF ACTION**  
**(Breach of the Covenant of Quiet Enjoyment)**

27. Plaintiff repeats and realleges all of the allegations contained in paragraphs “1” through “26” hereof as if fully set forth herein.

28. The Corporation and the Managing Agent breached their obligations to provide Plaintiff with quiet enjoyment of the Apartment by failing to respond to several of Plaintiffs’ complaints about ongoing Flooding, and by instead requiring or demanding that Plaintiff perform and pay for certain repairs that she is not obligated to perform or pay for under the Lease.

29. As a result of these breaches of the covenant of quiet enjoyment, Plaintiff has been damaged in an amount to be determined by the Court, but in no event less than \$50,000.00.

**AS AND FOR A THIRD CAUSE OF ACTION**  
**(Breach of Contract)**

30. Plaintiff repeats and realleges all of the allegations contained in paragraphs “1” through “29” above as if fully set forth herein.

31. The Corporation is bound by the obligations set forth in the Lease.

32. Plaintiff fully performed all of her obligations under the Lease.

33. The Corporation breached its contractual obligations to Plaintiff under the Lease by failing to maintain the Building as a first-class apartment building, by failing to respond to several of Plaintiffs’ complaints about ongoing flooding, and by instead requiring or demanding that Plaintiff perform and pay for certain repairs that she is not obligated to perform or pay for under the Lease. *Id.* at ¶ 3.

34. The Corporation further breached its contractual obligation under the Lease to provide Plaintiff with quiet enjoyment of the Apartment by failing to maintain the Building as a first-class apartment building, by failing to respond to several of Plaintiffs’ complaints about ongoing flooding, and by instead requiring or demanding that Plaintiff perform and pay for certain repairs that she is not obligated to perform or pay for under the Lease. *Id.* at ¶ 10.

35. The Corporation further breached its contractual obligations to Plaintiff under the Lease by refusing to grant Plaintiff’s request for an abatement of maintenance charges despite the fact that Plaintiff’s Apartment has been rendered partly untenable as a consequence of the Flooding and/or resultant repairs. *Id.* at ¶ 4(a).

36. The Corporation also breached the implied covenant of good faith and fair dealing, acting in a manner as fully described above that was intended to deprive the Plaintiff of her right to receive the intended benefits under the Lease.

37. As a result of this breach of contract, Plaintiff has been damaged in an amount to be determined by the Court, but in no event less than \$50,000.00.

**AS AND FOR A FOURTH CAUSE OF ACTION**  
**(Constructive Partial Eviction)**

38. Plaintiff repeats and realleges all of the allegations contained in paragraphs “1” through “37” above as if fully set forth herein

39. As a result of the Flooding caused by Apartment 2A, Plaintiff has been unable to use portions of her Apartment during the process of cleaning, disinfecting, and repairing the electrical systems in the Apartment, including but not limited to the kitchen, bathroom, dining room, and library.

40. Additionally, as a result of the failure of the Board and the Managing Agent to respond to Plaintiff’s complaints about the Flooding, and/or to remediate such Flooding, Plaintiff has been unable to use portions of her Apartment, including but not limited to the kitchen, bathroom, dining room, and library.

41. As such, Plaintiff has been substantially and materially deprived of the beneficial use and enjoyment of the portions of her Apartment affected by the Flooding.

42. The Corporation’s refusal to respond to Plaintiff’s complaints about the Flooding, and/or to remediate such Flooding, resulted in more than a mere inconvenience to Plaintiff.

43. Plaintiff was therefore constructively evicted from a portion of her Apartment due to the extreme state of disrepair in which the Apartment was left by the Flooding. Plaintiff was then forced to expend her own funds in order to repair the damage caused by the Flooding.

44. As a result of this constructive partial eviction, Plaintiff is entitled to damages resulting from the loss of the use of the portions of her Apartment effected by the Flooding, in an amount to be determined by the Court, but in no event less than \$50,000.00.

**AS AND FOR A FIFTH CAUSE OF ACTION**  
**(Negligence)**

45. Plaintiff repeats and realleges all of the allegations contained in paragraphs “1” through “44” as if fully set forth herein.

46. The Corporation and the Managing Agent each owed a duty to Plaintiff to maintain the Building as a first-class apartment Building, and to remediate Flooding caused by one of the Building’s tenants.

47. The failure of the Corporation and the Managing Agent to respond to Plaintiff’s complaints about the Flooding, and/or to remediate such Flooding constituted a breach of the duties of the Board and the Managing Agent.

48. As the shareholder of Apartment 2A, [REDACTED] owed a duty to Plaintiff to maintain Apartment 2A and its plumbing and related fixtures in good repair.

49. As the occupant of Apartment 2A, [REDACTED] owed a duty to Plaintiff to maintain Apartment 2A and its plumbing and related fixtures in good repair.

50. The Flooding, and the failure of [REDACTED] to remediate such Flooding, constituted breaches of [REDACTED] duties.

51. As a result of this negligence on the parts of the Corporation, the Managing Agent, and E [REDACTED], Plaintiff has been damaged in an amount to be determined by the Court, but in no event less than \$50,000.00.

52. As a result of this negligence on the parts of [REDACTED], Plaintiff is entitled to temporary, preliminary, and permanent injunctions enjoining [REDACTED] from continuing to flood Plaintiff's Apartment.

**AS AND FOR A SIXTH CAUSE OF ACTION**  
**(Trespass to Real Property)**

53. Plaintiff repeats and realleges all of the allegations contained in paragraphs "1" through "52" as if fully set forth herein.

54. [REDACTED] have intentionally and/or recklessly failed to abate the Flooding caused by Apartment 2A.

55. During the Floods caused by Apartment 2A, water, urine, and human excrement have poured out of the bathroom and kitchen ceilings and through the light fixtures in Plaintiff's Apartment.

56. As a result of this trespass into Plaintiff's Apartment, Plaintiff has been damaged in an amount to be determined by the Court, but in no event less than \$50,000.00.

57. As a result of this trespass into Plaintiff's Apartment, Plaintiff is entitled to temporary, preliminary, and permanent injunctions enjoining [REDACTED] from continuing to flood Plaintiff's Apartment.

**AS AND FOR A SEVENTH CAUSE OF ACTION**  
**(Private Nuisance)**

58. Plaintiff repeats and realleges all of the allegations contained in paragraphs "1" through "57" as if fully set forth herein.

59. During the Floods caused by Apartment 2A, water, urine, and human excrement have poured out of the bathroom and kitchen ceilings and through the

light fixtures in Plaintiff's Apartment. The Floods therefore constituted interferences with Plaintiff's Apartment that were substantial in nature and unreasonable in character.

60. [REDACTED] have intentionally failed to abate the Flooding caused by Apartment 2A.

61. As a result of the nuisances caused by [REDACTED], Plaintiff has been damaged in an amount to be determined by the Court, but in no event less than \$50,000.00.

62. As a result of the nuisances caused by [REDACTED], Plaintiff has been damaged in an amount to be determined by the Court, is entitled to temporary, preliminary, and permanent injunctions enjoining [REDACTED] from continuing to flood Plaintiff's Apartment.

**AS AND FOR AN EIGHTH CAUSE OF ACTION**  
**(Attorneys' Fees)**

63. Pursuant to ¶ 28 of the Lease, the Lessor is entitled to reasonable attorneys' fees in any action based on a Lessee's default under the Lease.

64. As a result of the conduct of the Defendants, Plaintiff has incurred and will continue to incur attorneys' fees in enforcing provisions of the Lease.

65. As a result thereof, Plaintiff is entitled to attorneys' fees in an amount to be determined by the Court.

**WHEREFORE**, Plaintiff demands judgment including the following declaratory and equitable relief:

- i. On its first cause of action, compensatory damages in an amount to be determined by the Court, but in no event less than \$50,000.00.

- ii. On its second cause of action, compensatory damages in an amount to be determined by the Court, but in no event less than \$50,000.00.
- iii. On its third cause of action, compensatory damages in an amount to be determined by the Court, but in no event less than \$50,000.00.
- iv. On its fourth cause of action, compensatory damages in an amount to be determined by the Court, but in no event less than \$50,000.00.
- v. On its fifth cause of action, compensatory damages in an amount to be determined by the Court, but in no event less than \$50,000.00, and temporary, preliminary, and permanent injunctions enjoining Defendants [REDACTED] from continuing to Flood Plaintiff's Apartment.
- vi. On its sixth cause of action, compensatory damages in an amount to be determined by the Court, but in no event less than \$50,000.00, and temporary, preliminary, and permanent injunctions enjoining Defendants [REDACTED] from continuing to Flood Plaintiff's Apartment.
- vii. On its seventh cause of action, compensatory damages in an amount to be determined by the Court, but in no event less than \$50,000.00, and temporary, preliminary, and permanent injunctions enjoining Defendants [REDACTED] from continuing to Flood Plaintiff's Apartment.
- viii. On its eighth cause of action, attorneys' fees in an amount to be determined by the Court.
- ix. Costs, disbursements, interest and such other and further relief as to this Court seems just and proper.

Dated: New York, New York

[REDACTED]

## **Jay B. Itkowitz, Founding Partner, Itkowitz PLLC**

Jay Itkowitz has worked as a litigator, a strategist, and a trial lawyer specializing in sophisticated commercial litigation for over 30 years. As the Founding Partner at Itkowitz PLLC, he has represented hundreds of companies, individuals and major real estate companies in New York City. He handles complex trials, jury and non-jury, and appeals in both State and Federal Courts, including Bankruptcy Court. Mr. Itkowitz is admitted to practice in New York State, the U.S. District Court, Southern and Eastern Districts of New York, the U.S. Court of Appeals 2d Circuit, and the United States Supreme Court. Mr. Itkowitz has lectured and authored articles extensively on real estate issues for the New York State Bar Association, New York Law School, Practising Law Institute, the Rent Stabilization Association, Lorman Education Services, Lawline, and the New York Association of Realty Managers, among others. His firm, Itkowitz PLLC, brings together great lawyers, the most advanced legal technology, and innovative legal project management, delivering unmatched value to its sophisticated commercial clients. Mr. Itkowitz is also the managing partner of a number of residential and commercial real estate projects.

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