MICHAEL A. SIRAGUSA
ERIE COUNTY ATTORNEY

COUNTY OF ERIE

MARK C. POLONCARZ
COUNTY EXECUTIVE
DEPARTMENT OF LAW

MICHELLE M. PARKER
FIRST ASSISTANT COUNTY ATTORNEY

JEREMY C. TOTH
SECOND ASSISTANT COUNTY ATTORNEY

September 3, 2013

Mr. Robert M. Graber, Clerk
Erie County Legislature
92 Franklin Street. 4th Floor
Buffalo, New York 14202

Dear Mr. Graber:

In compliance with the Resolution passed by the Erie County Legislature on June 25, 1987, regarding notification of lawsuits and claims filed against the County of Erie, enclosed please find a copy of the following:

File Name:	*Long, Rodney v. Erie County and Erie County Industrial Development Agency*
Document Received:	Notice of Motion
Name of Claimant:	Rodney Long
Claimant's attorney:	Mark H. Cantor, Esq. Bernhardi & Lukasik, PLLC 50 Fountain Plaza, Suite 1260 Buffalo, New York 14202

Should you have any questions, please call.

Very truly yours,

MICHAEL A. SIRAGUSA
Erie County Attorney

By: Michelle M. Parker
Michelle M. Parker
First Assistant County Attorney

MMP:dld
Enc.

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

RODNEY LONG,

Plaintiff,

v.

ERIE COUNTY and
ERIE COUNTY INDUSTRIAL DEVELOPMENT AGENCY,

Defendants.

MOTION FOR LATE NOTICE OF CLAIM

Index No: _____

TO DEFENDANT	:	Erie County and Erie County Industrial Development Agency
MOTION ON BEHALF OF	:	Mark H. Cantor, Esq. Attorney for the Claimant
DATE, TIME, & PLACE OF HEARING	:	To be determined.
SUPPORTING PAPERS	:	Affirmation of Mark H. Cantor, Esq., dated August 29, 2013; Affidavit of Claimant Rodney Long, dated August 29, 2013; Notice of Claim dated August 29, 2013
GROUNDS AND NATURE OF RELIEF REQUESTED	:	An order, pursuant to General Municipal Law § 50(e) granting Claimant leave to serve Late Notice of Claim and/or treat filed claim as timely, and for such other and further relief as the Court may deem just and proper.
NATURE OF ACTION	:	Labor Law.
ORAL ARGUMENT	:	Requested.

PAID NO FEE
09/09/2013 15:53:32
ERIE COUNTY CLERK
RCPT # 13138475
I 2013002487

This paper received at the Erie County Attorney's Office from Richard Fink on the 3rd day of Sept., 2013 at 9:27 a.m./~~p.m.~~

Assistant County Attorney

PLEASE TAKE NOTICE that answering affidavits, if any, must be served on the undersigned attorneys at least seven (7) days before the return date of this Motion, pursuant to CPLR § 2214(b).

Dated: Buffalo, New York
August 29, 2013

Mark H. Cantor, Esq., of Counsel
BERNHARDI & LUKASIK, PLLC
Attorney for Claimant
50 Fountain Plaza, Ste. 1260
Buffalo, New York 14202
Tel: (716) 674-2424

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

RODNEY LONG,

Plaintiff,

v.

ERIE COUNTY and
ERIE COUNTY INDUSTRIAL DEVELOPMENT AGENCY,

Defendants.

ATTORNEY AFFIRMATION

Index No: _____

MARK H. CANTOR, ESQ., affirms the following, upon information and belief, under penalties of perjury:

1. I am an attorney-at-law duly licensed to practice in the State of New York, attorney for the claimant and, as such, am fully familiar with all proceedings had heretofore and all facts and circumstances herein.

2. This affirmation is submitted in support of Claimant's Motion for Leave to File and Serve a Late Notice of Claim as provided for in Section 50(e) of the General Municipal Law.

3. This claim arises from personal injuries sustained by Claimant Rodney Long on November 26, 2012, while hired out by Tradesmen International, Inc. to perform certain construction work at Graphic Controls Acquisition Corp. (hereinafter referred to as "Graphic Controls"), located at 400 Exchange Street, Buffalo, New York 14204 (hereinafter referred to as the "construction site"). At the time of the incident, Mr. Long was working as a construction worker at the construction site in furtherance of a construction project when steel panels located inside a tractor-trailer were caused to fall on him from elevated heights, which caused him to

4. Upon the information set forth in Mr. Long's Affidavit, there exists a meritorious claim and/or cause of action against Erie County and the Erie County Industrial Development Agency (hereinafter referred to as "ECIDA") based upon negligence, and/or upon violations of Sections 200, 240 and 241(6) of the New York State Labor Law, and Part 23, of the New York State Department of Labor Industrial Code Rule, and other applicable sections.

5. Upon information and belief, Erie County and/or ECIDA was the owner of the land, property and/or buildings of 400 Exchange Street, Buffalo, New York 14204, pursuant to the definition of the word "owner" as set forth in § 315 of the Labor Law of New York. *See Celestine v City of New York*, 86 A.D.2d592 (2nd Dept. 1982), *aff'd* 59 N.Y.2d 938 (1983). Attached as **Exhibit A** is a copy of the deed concerning the property mentioned *supra*.

6. When considering an application to file a late Notice of Claim against a municipality or Industrial Development Agency, the Court should take into account a number of factors, including: (a) the reasonableness of the excuse offered for the delay; (b) whether the municipality obtained actual knowledge of the essential facts constituting a claim within the 90-day filing period or within a reasonable time thereafter; and (c) whether the municipality was prejudiced by the applicant's failure to comply with the statute, i.e. file a Notice of Claim within ninety days. N.Y. Gen. Mun. Law § 50-e (McKinney 2013).

7. **No single factor mentioned *supra* is dispositive** and, absent a clear abuse of discretion, the trial court's determination in this regard will not be disturbed, *Schwindt v. County of Essex, 876 N.Y.S.2d 191(3rd Dept. 2009),* and the courts are vested with broad discretion to grant or deny applications for leave to serve a late notice, *see Hall v. Madison Oneida County Bd. of Cooperative Educational Services, 885 N.Y.S.2d 690 (4th Dept. 2009).*

8. The claimant did not file a Notice of Claim against Erie County and/or ECIDA on the mistaken belief that the owner of the land, property and/or buildings at 400 Exchange Street, Buffalo, New York 14204 was some entity other than Erie County and/or ECIDA.

9. The claimant's proffered excuse for the delay mentioned *supra* is reasonable. *See Harris v Dormitory Authority of New York*, 562 NYS2d 781(2nd Dept. 1990) (finding reasonable excuse for plaintiff's failure to timely serve Notice of Claim in personal injury action where plaintiff's attorney erred concerning the identity of a public corporation against which the claim should have been asserted).

10. Upon information and belief, Erie County and/or ECIDA had actual knowledge of Claimant's accident and the circumstances of his injury via notification from the claimant's employer and/or Graphic Controls.

11. In these cases, New York General Municipal Law § 50-e permits the court to strike an equitable balance between a public entity's need for prompt notification of claims against it and the injured party's need and interest in just compensation. *Ferrer v. City of New York*, 567 N.Y.S.2d 734 (1st Dept. 1991). Here, based on Mr. Long's significant injuries and the transitory nature of the condition causing the steel panels to fall on him, the claimant's need for just compensation outweighs the defendants' need for prompt notification. In other words, Mr. Long is in significant need for compensation for his severe injuries. Meanwhile, **the defendants are in no different position today than they were had they been on notice at the expiration of the ninety day period after the accident.**

12. If there was a lack of notice within the initial ninety day period, **this will not prejudice Erie County or ECIDA in any way**. The accident at issue occurred inside a tractor-trailer during a particular task, which is transitory in nature. "It is highly unlikely that the conditions existing at the time of the accident would still have existed had the claim been timely filed." *Ferrer,* 172 A.D.2d at 241; *see also*, *Gorinshek v. City of Johnstown*, 588 N.Y.S.2d 208, 209 (1992); *Riordan v. East Rochester Schools*, 737 N.Y.S.2d 202 (2002); *Blair v. County of Ontario*, 295 A.D.2d 933, 744 N.Y.S.2d 743 (2002). Therefore, the passage of time does not prevent the defendants from investigating this claim, and it is not prejudiced by the delay. *See More v. General Brown Cent. School Dist.,* 691 N.Y.S.2d 850 (4th Dept. 1999).

13. Mr. Long's delay in filing a Notice of Claim has not prejudiced Erie County or ECIDA in any way. The accident occurred just eight months ago, and upon information and belief all material witnesses are still available for further investigation. **There is no evidence that any condition, fact, witness, or piece of evidence was available at the expiration for the ninety day period and is no longer available today.**

14. Erie County and/or ECIDA will ultimately not likely have to pay a judgment, as there will likely be an indemnification agreement between them and Graphic Controls, which further supports the contention that there is no prejudice to the municipality.

15. Pursuant to a lease agreement dated July 1, 2000, between ECIDA and Graphic Controls, Graphic Controls agreed to:

> "at all times protect, indemnify and hold [ECIDA] harmless against all claims (whether under any statute or at common law) for losses, damage, injury,

including death, property damage and liability however caused, other than losses arising from the gross negligence or willful misconduct of [ECIDA], arising during the term of this Agreement upon or about the Project or resulting from, arising out of, or in any way connected with the acquisition, construction, renovation, installation, equipping or operation of the Project, the preparation of the site thereof, the condition of or defects in the Project (including any defects in [ECIDA's] title thereto) or the maintenance, repair, replacement, restoration, rebuilding, remediation, upkeep, use, occupancy, ownership, leasing or subletting of the Project or any portion thereof. [ECIDA] shall not be liable for any damage or injury, including death, to the person or property of [Graphic Controls] or its partners, employees, agents or servants or persons under [Graphic Controls'] control or supervision, or any other person who may be about the Project, due to any act or negligence of any person other than the gross negligence or willful misconduct of [ECIDA]."

Attached as **Exhibit B** is a copy of the lease agreement between ECIDA and Graphic Controls containing the indemnification clause mentioned *supra*, *see* pg. 22-23, ¶ 18.1. Thus, if this motion is granted and Erie County and/or ECIDA are found to be liable, they will likely have the benefit of full indemnification from Graphic Controls and not *in fact* have to pay anything.

16. **The absolute lack of prejudice** provides a sufficient basis for this Court to grant the claimant's leave to file a late Notice of Claim and/or treat the already filed claim as timely.

17. The claimant has provided a Notice of Claim herein which will be served on the defendants along with these papers.

16. **The absolute lack of prejudice** provides a sufficient basis for this Court to grant the claimant's leave to file a late Notice of Claim and/or treat the already filed claim as timely.

17. The claimant has provided a Notice of Claim herein which will be served on the defendants along with these papers.

WHEREFORE, your affiant respectfully requests that this Court, in its discretion, grant Claimant's Notice of Motion to File and Serve a Late Notice of Claim upon the Erie County and the Erie County Industrial Development Agency and/or treat the already served claim as timely, and allow this claim to be paid.

Dated: Buffalo, New York
August 29, 2013

Mark H. Cantor, Esq., of Counsel
BERNHARDI & LUKASIK, PLLC
Attorney for Claimant
50 Fountain Plaza, Ste. 1260
Buffalo, New York 14202
Tel: (716) 674-2424

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

RODNEY LONG

Plaintiff,

AFFIDAVIT

v.

Index No: 2013-001919

ERIE COUNTY and
ERIE COUNTY INDUSTRIAL DEVELOPMENT AGENCY,

Defendant.

RODNEY LONG, being duly sworn, deposes and says:

1. I am the plaintiff in the above matter.

2. I make this affidavit in support of the Notice of Claim dated and filed on August 28, 2013. The facts deposed to herein are true to the best of my knowledge, information and belief save where otherwise stated.

3. On November 26, 2012, I was injured while performing construction work at Graphic Controls Acquisition Corp. (hereinafter referred to as "Graphic Controls"), located at 400 Exchange Street, Buffalo, NY 14204 (hereinafter referred to as the "construction site").

4. That day, I was hired out by Tradesmen International, Inc., my former employer, to Clean Air Technologies Inc. out of Michigan to construct a "clean room" inside one of the buildings at Graphic Controls. A clean room is generally a room that is built within a building to be free of dust and other contaminants for manufacturing purposes or research.

5. There was a tractor-trailer on the construction site that day, containing all the machinery, hardware, nuts and bolts and wires, stacks of large steel panels, and other construction equipment and supplies necessary for construction of the clean room.

6. At some point in the day, someone backed up the tractor-trailer to one of the loading docks at Graphic Controls so everything inside of it could be unloaded and relocated to a large open area within Graphic Controls where the clean room was to be constructed.

7. When I arrived at the construction site, everything was already unloaded from the tractor-trailer except for the steel panels. Employees of Graphic Controls went inside the trailer with their forklifts and unloaded everything from it before I arrived except for the stacks of steel panels – the panels were too long and too big to be unloaded with the forklifts.

8. Before I could start construction of the clean room, I had to manually unload the steel panels from their stacked positions inside the tractor-trailer and relocate them to the area inside Graphic Controls where the room was to be constructed.

9. From what I gathered, we were going to screw all the steel panels together to build the clean room. The wall height of the clean room would have measured about 20 feet from floor to ceiling, and the construction project would have taken me and the other construction workers about three weeks to complete.

10. There were several upper and lower stacks of steel panels located inside the back of the tractor-trailer, and each panel needed to be lowered and removed one at a time from their upper and lower-stacked positions, placed on a cart, and then hauled away to the area where the clean room was to be constructed.

11. The upper stacks of steel panels were positioned approximately 4 feet high atop a lower stack of panels that were approximately 4 feet above ground. The bottoms of the upper-

stacked panels extended from my chest level approximately another 4 feet up over my head or 2 feet 4 inches above me. The panels each weighed approximately 250 pounds and were at least 15 feet long by 4 inches wide by 4 feet high.

12. That day, at approximately 1:30 p.m., disaster struck. As I was trying to lower one of the steel panels from its upper-stacked position with another construction worker, 5 or 6 other panels lined up behind it started falling over like dominoes, knocking each other down one-by-one, repeatedly smashing me in the head. There was a tremendous weight on me, and I was almost crushed to death. I remember blacking out at one point, losing consciousness, and hitting the ground. When I got up, I was completely out of it. Everything was spinning.

13. The safety screws and straps that were in place to secure the panels from falling down were not in place when they fell. I saw one of the other construction workers climb up on top of the upper-stack of steel panels shortly before the accident with the screw gun and remove all the safety screws and straps at once, instead of removing the screws and straps one at a time with each panel that was ready to be lowered.

14. Immediately after the accident, I experienced numbness and tingling in my right arm, pain in my neck and mid back, pain in my ribs, throbbing pain in my head, severe dizziness, ringing in my ears, problems with my vision and was sent to Health Works WNY, LLP for medical screening. Attached as Exhibit C is a copy of the medical report.

15. Immediately after going to Health Works WNY, LLP, I was sent to Transit Imaging & MRI Associates, P.C. for some testing. Attached as Exhibit D is a copy of the report.

16. The very next day, November 27, 2012, I went to Mercy Hospital (Orchard Park Division) for more testing. Attached as Exhibit E is a copy of the report.

17. On December 7, 2012, I began treatment for my head injury with Dr. Leddy at UB Orthopedics & Sports Medicine. He determined that I sustained a severe cerebral concussion, cervical sprain, posttraumatic vertigo, and was unable to work. I was prescribed pain medications to cope with my head injury. Attached as Exhibit F is a copy of the report.

18. On December 31, 2012, an MRI of the brain conducted at the Dent Neurological revealed an abnormal MRI of the brain. Attached as Exhibit G is a copy of the medical report.

19. I have suffered from symptoms of my head injury, including dizziness, double vision, severe migraines, severe tinnitus, poor memory, blackouts, dizziness, headaches, balance problems, memory issues, concentration problems, sleep problems, panic attacks, insomnia, anxiety, mood disorder, shortness of breath, and have been receiving treatment for my head injury, including physical therapy, from several physicians since the accident.

20. I am 55 years old. I graduated from Lakeshore Central High School in 1978. I have been working construction since I was 18 years old. I used to work 50-60 hours per week during the construction season. Since the accident, I have been unable to return to work or do anything physically active that I used to enjoy doing like lifting weights, mountain biking, and walking my dog. I have been ruled completely disabled by my treating physicians.

RODNEY L. LONG

Sworn to before me this 28th
day of August, 2013.

ROSANNE C. ADAMOWICH
Notary Public, State of New York
Qualified in Erie County
My Commission Expires 1/31/2014