At an IAS Term, Part 39 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 11th day of July 2007.

P R E S E N T:

HON. GLORIA M. DABIRI,

Justice.

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SCOTT DESABATO,

Plaintiff,

- against -

Index No. 22682/03

674 CARROLL STREET CORP., WENDY FLEISCHER,

Defendants.

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674 CARROLL STREET CORP.,

Third-Party Plaintiff,

- against -

WENDY FLEISCHER,

Third-Party Defendant.

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WENDY FLEISCHER,

Fourth-Party Plaintiff,

- against -

A.S.U. RENOVATORS INC. and LEONARD Klimak

Fourth-Party Defendant.

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The following papers numbered 1 to 8 read on this motion:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross-Motion and Affidavits (Affirmations) Annexed	1-2, 3-4, 5-6
Opposing Affidavits (Affirmations)	7, 8, 9, 10
Reply Affidavits (Affirmations)	11
Affidavit (Affirmation)	
Other Papers	

Upon the foregoing papers, the defendant/third-party defendant/ fourth-party plaintiff Wendy Fleischer (Fleischer) seeks an order (a) dismissing both plaintiff's complaint and third-party complaint against her, and (b) granting her summary judgment against A.S.U. Renovators, Inc. (A.S.U.) on her claims for breach of contract and contractual indemnification.

Plaintiff Scott DeSabato (DeSabato) cross-moves for summary judgment against Fleischer and 674 Carroll Street Corp. (674 Carroll) on his Labor Law 240(1) claim.

674 Carroll Street Corp. cross-moves for (a) dismissal of plaintiff's complaint against it, and (b) summary judgment on its third-party complaint for common-law and contractual indemnification against Fleischer.

Plaintiff Scott Desabato commenced this action to recover for injuries sustained on September 3, 2002 when he fell through an opening in the floor, while performing construction work in a cooperative apartment located at 674 Carroll Street in Brooklyn. Plaintiff was employed by U.S.A. Brick & Cement Corporation. The owner of the company, Leonard Klimak also did business as A.S.U. Renovators. Defendant Wendy Fleischer, the owner/lessee of the apartment in which the accident occurred, had contracted with A.S.U. to demolish and renovate the apartment. Defendant 674 Carroll Street Corp. (674 Carroll) owned the four-unit building.

DISCUSSION

The Fleischer Motion

Fleischer first seeks to dismiss plaintiff's complaint against her on the grounds that (a) Labor Law §§240 and 241(6) exclude from liability owners of one- and two-family dwellings, and (b) liability under Labor Law §200 requires negligence or the exercise of direct supervision and control over the work being performed.

Labor Law §240 (1) provides, in pertinent part, that:

> "All contractors and owners and their agents, *except owners of one- and two-family dwellings who contract for but do not direct or control the work*, in the erection, demolition, repairing, . . . of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, . . . and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed"

Labor Law §241 provides, in pertinent part that:

> "All contractors and owners and their agents, *except owners of one- and two-family dwellings who contract for but do not direct or control the work,* when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:
>
> . . . [emphasis supplied]

Both statutes exclude from liability owners of one- and two-family dwellings "who contract for but do not *direct or control* the work" (Labor Law §240[1]; §241 [emphasis supplied]). This statutory exemption removes "the burden of strict liability from such owners when they have nothing whatsoever to do with the carrying out of the work" (1980 NY Legis. Ann. at

266; *Public Administrator of Kings County v Barkdull*, 276 AD2d 767 [2000]). "The phrase 'direct or control' is construed strictly" (*Mayen v Kalter*, 282 AD2d 508 [2001]). The phrase "contemplates the situation in which the owner supervises the method and manner of the work, can order changes in the specifications, reviews the progress and details of the job with the general contractor and/or provides the equipment necessary to perform the work" (*Rimoldi v Schanzer,* 147 AD2d 541, 545 [1989]; citing *Duda v Rouse Constr. Corp.,* 32 NY2d 405, 409 [1973]; *Kluttz v Citron*, 2 NY2d 379 [1957]; *see also, McGlone v Johnson*, 27 AD3d 702 [2006]; *Torres v Levy,* 32 AD3d 845 [2006]).

The term "owner" as used in Labor Law §§240 (1) and 241 (6) has been interpreted to include the owner/leasee of an apartment in a multi-unit co-operative apartment building *Maciejewski v 975 Park Avenue*, 37 AD3d 773, 774 [2007]; *Xirakis v 1115 Fifth Avenue Corp.*, 226 AD2d 452, 453-454 [1996]).

Liability for causes of action sounding in common-law negligence and for violations of Labor Law §200 is likewise limited to those who exercise control or supervision over the methods that plaintiff employs in his work, or who have actual or constructive notice of, or are otherwise responsible for, an unsafe condition that causes an accident (*Aranda v Park East Constr.*, 4 AD3d 315 [2004]; *Akins v Baker*, 247 AD2d 562, 563 [1998]). Here, there is no evidence of negligence by Fleischer or that she controlled plaintiff's work. Plaintiff testified when deposed that he received work instructions from Klimak, the principal of the general contractor, A.S.U., whom he had worked with on other jobs. Plaintiff testified that

Klimak supplied him with the tools needed for the job. This testimony was confirmed by Klimak, who also indicated the Fleischer did not instruct him on how the work was to be performed. Fleischer testified that she was at the site infrequently, did not hire subcontractors and did not instruct or supervise workers.

Moreover, Fleischer's intention to use a room in the co-operative apartment as a home-office does not preclude application of the one-family dwelling exemption (*see Putnam v Karaco Industries Corp.*, 253 AD2d 457, 458 [1998], citing *Bartoo v Buell*, 87 NY2d 362 [1996]). In *Bartoo v Buell*, (87 NY2d at 368), the Court of Appeals noted that "when an owner of a one- or two-family dwelling contracts for work that directly relates to the residential use of the home, even if the work also serves a commercial purpose, that owner is shielded by the homeowner exemption from absolute liability of Labor Law §§240 and 241."

As there is no evidence that Fleischer exercised any control or supervision over plaintiff's work or created or had notice of the condition which caused the accident, plaintiff's Labor Law §§240, 241 and 200 and common-law negligence claims against her must be dismissed (*see Ferrero v Best Modular-Homes, Inc.*, 33 AD3d 847 [2006]; *Aranda v Park East Constr.*, 4 AD3d 315 [2004]).

Fleischer next seeks dismissal of 674 Carroll's third-party complaint for common-law and contractual indemnification. "To establish a claim for common-law indemnification, 'the one seeking indemnity must prove not only that it was not guilty of any negligence beyond

the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident' . . . or 'in the absence of any negligence' that the proposed indemnitor 'had the authority to direct, supervise, and control the work giving rise to the injury'" (*Perri v Gilbert Johnson Enterprise, Ltd.,* 14 AD3d 681, 684-685 [2005], [citations omitted]; *see also, Balladares v Southgate Owners Corp.*, 40 AD3d 667 [2007]). As has been noted, there is no evidence that plaintiff's accident was caused in any way by Fleischer's negligence or that she controlled or supervised plaintiff's work. Accordingly, the claim for common-law indemnification is dismissed (*id.; Colozzo v Nation Center Foundation, Inc.*, 30 AD3d 251 [2006]).

Fleischer maintains that there can be no claim for contractual indemnification against her, as the indemnification clause in the proprietary lease is inapplicable under these circumstances. Paragraph 11 of the proprietary lease provides:

> *The lessee* or in the case of unsold shares, the possessor, *agrees to save the lessor harmless from all liability*, loss, damage and expenses arising from injury or property damage *occasioned by the failure of the Lessee to comply with any provision hereof, or due wholly or in part to any act, default or omission of the lessee or of any person dwelling or visiting in the apartment or by the Lessor, its agents, servants or contractors when acting as agent for the Lessee* as in the lease provided. This paragraph shall not apply to any loss or damage when Lessor is covered by insurance which provides for waiver of subrogation against the lessee. [emphasis added]

Fleischer maintains that this clause in the lease serves to indemnify the lessor corporation for liability arising from (a) the failure of the leasee to comply with the lease and (b) the lessee's

act, default or omission or that of any person "dwelling or visiting in the apartment," and that neither a breach of the lease or a default has occurred. Fleischer also argues that the plaintiff was not a "person . . . visiting in the apartment" within the meaning of the lease.

In opposition to this portion of the motion, 674 Carroll maintains that Fleischer failed to comply with paragraph 21(a) of the proprietary lease in not obtaining its written consent before undertaking the renovation project. In this regard, it contends that 674 Carroll's oral consent to the project does not negate the requirement for written consent.

674 Carroll also argues that plaintiff qualifies as a person "visiting in the apartment" and injured as a result of his own "act." In this regard, 674 Carroll points to *Pineda v 79 Barrow Street Owners Corp.*, (297 AD2d 634 [2002]), in which there was an indemnification provision in the proprietary lease similar in language to the one here, and wherein the court granted leave to the lessor to interpose a claim for contractual indemnification.[1]

It is well settled that "[a] party is entitled to full contractual indemnification provided that the "intention to indemnify can be clearly implied from the language and purpose of the entire agreement and the surrounding facts and circumstances" (*Drzewinski v Atlantic Scaffold & Ladder Co., Inc.*, 70 NY2d 774, 777 [1987]). When a party is under no legal duty to indemnify, a contract assuming the obligation must be strictly construed. Moreover, any ambiguity must be construed against the drafter (*151 West Associates v Printsiples Fabric*

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[1]In *Pineda v 79 Barrow Street Owners Corp.*, (297 AD2d 634 [2002]), the Court was not called upon, as here, to determine the viability of the claim in the context of a summary judgment motion. Moreover, unlike this case, in *Pineda* the owner of the co-operative apartment in which the plaintiff was working did not obtain consent from the owners corporation and did not notify it of the work.

Corp., 61 NY2d 732 [1984]; *Diodato v Eastchester Development Corp.*, 111 AD2d 303 [1985]). Courts will construe a contract to provide indemnity to a party for its own negligence only where the contractual language evinces an "unmistakable intent" to indemnify (*Great Northern Ins. Co. v Interior Const. Corp.*, 7 NY3d 412, 417 [2006]).

Paragraph 11 of the proprietary lease holds the lessee liable for all damage occasioned, "in whole or in part," by "any act, default, or omission of the lessee or of any person dwelling or visiting in the apartment or by the lessor, its agents, servants or contractors when acting as agent for the lessee . . ." This language is broad enough to obligate the tenant to indemnify the lessor-landlord for its own negligence and for the negligence of the landlord's agents. The indemnification provision is not limited to the tenant's acts or omissions, fails to make an exception for 674 Carroll's own negligence and does not limit the lessor's recovery under the lessee's indemnification obligation to insurance proceeds (see Gen. Oblig. L. §5-321; *Great Northern Ins. Co. v Interior Const. Corp.*, 7 NY3d at 418; *Yuen v 267 Canal Street Corp.*, ___ AD3d ___, 2007 WL 1842201; *Danielson v Jameco Operating Co.*, 20 AD3d 446 [2005]; *Sanford v Jonathan Woodner Co.*, 304 AD2d 813 [2003]; *Gibson v Bally Total Fitness Corporation*, 1 AD3d 477 [2003]). A lease clause may not be used by a landlord to seek indemnification for its own negligence (*Tormey v City of New York*, 302 AD2d 277 [2003]; *Glen Falls Ins. Co. v City of New York*, 293 AD2d 568 [2002]).

Moreover, it cannot be said that the lease in this case was negotiated at arm's length

by two sophisticated business entities (cf. *Great Northern Ins. Co. v Interior Contr. Corp.*, 7 NY3d 412 [2006]; *Hogeland v Sibley, Lindsay & Curr Co.*, 42 NY2d 153, 158 [1977]; *see also*, *Breakway Farm, Ltd. v Ward*, 15 AD3d 517 [2005]). Further, the language is not clear and direct, so as to express an "unmistakable intent of the parties" that Fleischer indemnify 674 Carroll for its own negligence, if any. Consequently, the indemnification provision is unenforceable[2] because it is ambiguous (*Hogeland*, 42 NY2d at 159) and "because it purports to shift . . . responsibility for third-party claims to the tenant regardless of the landlords own negligence" (*Wolf v Long Island Power Authority*, 34 AD3d 575 [2006]; *Danielson v Jameco Operating Corp.*, 20 AD3d 446 [2005]; *Sanford v Jonathan Woodner Co.*, 304 AD2d 813 [2003]).

With respect to 674 Carroll's claim that Fleischer breached paragraph 21(a) of the lease by failing to obtain written consent for the renovation project, "[t]he record is undisputed that although Fleischer informed the co-op board that she wanted to renovate her apartment, 674 Carroll did not actually provide written consent for the renovation work" (January 10, 2007, Affirmation of William J. Pisarello, Esq. para 11). However, 674 Carroll provided oral consent to the renovation project. The president of 674 Carroll testified that there was no formal procedure or requirements for shareholders seeking to perform renovations, but that prior to commencing construction Fleischer reviewed the plans with the

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[2]Paragraph 4(d) of the lease entitled "Waiver of Subrogation" provides for the lessee to release the lessor from liability for the lessors' own negligence when the lessee's loss is covered by insurance and the lessee's policy contains a Waiver of Subrogation against the landlord.

other shareholders, who "all said, 'Fine'" to the plan. Nor, did any of the shareholders, all of whom reside in the building, voice any concerns during the ongoing demolition and construction. Thus, 674 Carroll by its conduct has waived its right to enforcement of the lease provision requiring that Fleischer obtain written consent (*Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Management, L.P.*, 7 NY3d 96, 104 [2006], citing *Hadden v Consolidated Edison Co.*, 45 NY2d 466, 469 [1978]; *Jacobson v Van Rhyn*, 127 AD2d 743, 744 [1987]; *see also, Cole v Macklowe*, 40 AD3d 396, 399 [2007]; *Bono v Cucinella*, 298 AD2d 483, 483 [2002]; *Haberman v Hawkins*, 170 AD2d 377, 378 [1991]).

Finally, Fleischer seeks judgment on her fourth-party complaint against A.S.U. for contractual indemnification and breach of contract to provide insurance. Paragraph 3.12 of the contract with A.S.U. requires indemnification by A.S.U. for losses "included but not limited to attorneys' fees" caused by the negligence of the contractor, a subcontractor or person employed by them. Article 5 of the contract requires that A.S.U. provide minimum liability coverage in the amount of one million dollars, by naming Fleischer as an additional insured on its liability policy.

Summary judgment on a claim for indemnification is generally premature where "there has been no determination as to the proximate cause of the injury or who was liable for the accident" (*Iurato v City of New York*, 18 AD3d 247, 248 [2005], lv. dismissed 6 NY3d 806 [2006]; *see also, Watters v R.D. Branch Associates, LP*, 30 AD3d 408, 409-410 [2006]; *Hernandez v Two East End Ave. Apartment Corp.*, 303 AD2d 556, 558 [2003]).

Here, A.S.U. agreed to indemnify Fleischer for A.S.U.'s "negligence" and that of its subcontractors and employees (*see Hoverson v Herbert Const. Co.*, 283 AD2d 237 [2001]). Accordingly, Fleischer is entitled to a conditional order for reasonable attorney's fees under this indemnification provision (*Yacovacci v Shoprite Supermarket, Inc.*, 24 AD3d 539 [2005]; *see also, Springstead v Ciba-Geigy Corp.*, 27 AD3d 720 [2006]; *Marinelli v Oceanside Knolls, Inc.*, 253 AD2d 741 [1998]).

An agreement to procure insurance coverage "is clearly distinct from and treated differently from the agreement to indemnify" (*McGill v Polytechnic Univ.*, 235 AD2d 400, 401-402 [1997]; *see also Kinney v Lisk Co.*, 76 NY2d 215, 218 [1990]). A determination of a party's liability for failure to procure insurance as required by a contract "need not await a factual determination as to whose negligence, if anyone's, caused the plaintiff's injuries" (*McGill*, 235 AD2d at 402; *see also Kennelty v Darlind Const., Inc.*, 260 AD2d 443, 445 [1999]; *Mathew v William L. Crow Const. Co.*, 220 AD2d 490, 491 [1995]).

In its opposition, A.S.U. does not address Fleischer's contention that it failed to name her as an additional insured, and offers no proof that it obtained the insurance coverage required. Accordingly, that portion of Fleischer's motion seeking summary judgment on her breach of contract claim is granted (*Lerer v City of New York*, 301 AD2d 577, 578 [2003]; *Khan v Convention Overlook*, 232 AD2d 529 [1996]).

The Plaintiff's Cross-Motion

Plaintiff seeks partial summary judgment against 674 Carroll and Fleischer on his Labor Law 240(1) claim. Plaintiff, testified that he was injured when he fell through a hole in the kitchen floor of Fleischer's fourth floor apartment while removing plaster from the kitchen walls. Plaintiff maintains that the hole was unguarded and unmarked. After falling through the hole and through the sheet rock ceiling of the apartment below, plaintiff was able to break his fall by grabbing onto the floor opening with his arms. Plaintiff testified that he had not seen the opening in the floor and did not know why it was there. On the other hand, plaintiff's employer, Leonard Klimak testified that he had asked plaintiff, that day, to remove pine board flooring in the middle room. Klimak testified that later that day plaintiff telephoned him to say that while removing the flooring, "he went into a closet and slipped his foot between the beams of the floor" and that he was going home. Mr. Klimak testified that when he assigned plaintiff to remove the floor, he told plaintiff that there was "no rush," to "look around," to avoid the gaps as you remove the floor and to put down plywood. While Klimak did not recall whether he looked at the opening where plaintiff said he slipped, Klimak testified that the opening in the ceiling of the apartment below was twelve inches.

"The import of Labor Law §240(1) is undeniably salutory, requiring owners and contractors to provide proper protection to workers employed on a construction site (citations omitted). However, not every hazard or danger encountered in a construction zone falls within the scope of Labor Law §240(1) as to render the owner or contractor liable for an

injured worker's damages (citation omitted), (*Misseritti v Mark IV Const. Co., Inc.*, 86 NY2d 487, 490 [1995]). "Liability pursuant to Labor Law §240(1) 'is contingent upon the existence of a hazard contemplated in section 240(1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein'" (*Balladares v Southgate Owners Corp.*, 40 AD3d at 696, citing (*Narducci v Manhasset Bay Assocs.*, 96 NY2d 259, 267 [2001]). "[W]here a plaintiff 'was exposed to the usual and ordinary dangers of a construction site, and not the extraordinary elevation risks envisioned by Labor Law §240(1) 'the plaintiff cannot recover under the statute (*Toefer v Long Island R.R.*, 4 NY3d 399, 407 [2005] [citation omitted]; *see also, Alvia v Teman Elec. Contracting, Inc.*, 287 AD2d 421, 422 [2001], [a hole in floor of 2 inches by 2.5 inches not an elevation-related hazard]; *Sickler v City of New York*, 15 Misc3d 48 [2007], [24 inch wide hole in floor did not create elevation-related hazard]).

Clearly, a worker's injury resulting from a fall through a floor at a construction site can give rise to liability under Labor Law 240(1) (*see Balladares v Southgate Owners Corp.*, 40 AD3d 667 [2007]; *Cavanagh v Mega Contracting, Inc.*, 34 AD3d 411 [2006]; *Valensisi v Greens at Half Hollow, LLC*, 33 AD3d 693 [2006]; *Brandal v Ram Builders, Inc.* 7 AD3d 655 [2004]; *Campisi v Epos Contracting Corp.*, 299 AD2d 4 [2002]; *Singh v Barrell*, 192 AD2d 378 [1993]; *see also, Justyk v Treibacher Schleifmittel Corp.*, 4 AD3d 882 [2004]). However, the testimony of Klimak as to statements made by the plaintiff raise a question of material fact as to the circumstances of the accident, including the nature of the opening into

which plaintiff fell (*Delahaye v Saint Anns School*, ___ AD3d ___, 836 NYS2d 233 [2007], [inconsistencies as to how the accident occurred precluded summary judgement]; *see also, Garieri v Broadway Plaza*, 271 AD2d 569 [2000]).

The 674 Carroll Street Corp. Cross-Motion

674 Carroll Street seeks summary judgment dismissing the complaint, and summary judgment in its favor on its third-party complaint against Fleischer for contractual indemnification. 674 Carroll fails to establish entitlement to dismissal of the Labor Law §§240 and 241 causes of action.

As previously noted, questions of fact concerning how the accident occurred preclude summary judgment on plaintiff's Labor Law 240(1) cause of action. With respect to the Labor Law section 241(6) claim plaintiff alleges violations of 12 NYCRR 23-1.7(b), 23-1.15, 23-1.16 and 23-1.17 of the Industrial Code. Section 23-1.7(b)(1) which requires that a "hazardous opening" be "guarded by a substantial cover fastened in place or by a safety railing" appears sufficiently specific under plaintiff's version of the events to support the 241(b) cause of action (*Gottsine v Dunlop Tire Corp.*, 272 AD2d 863 [2000]; *see also, Bonse v Katrine Apt. Assoc.*, 28 AD3d 990 [2006]). However, section 23-1.15, which sets forth standards for the construction of safety rails, is inapplicable as no safety rails were provided (*Patridge v Waterloo C.S.D.*, 12 AD3d 1052 [2004], but see *Well v British American Development Corp.*, 2 AD3d 1141 [2003]). Section 23-1.16 has been held to be inapplicable when no safety belts have been provided (*Patridge v Waterloo C.S.D., supra*). For the same

reason section 23-1.17, with respect to life nets, is not pertinent (*see Bennion v Goodyear Tire & Rubber Co.*, 229 AD2d 1003 [1996]). Thus, plaintiff raises an issue of fact sufficient to defeat this aspect of the cross-motion.

Nor, is 64 Carroll entitled to the one- and two-family dwelling exemption of Labor Law §§240 and 241. It is well settled that under these statutes "'[l]iability rests upon the fact of ownership and whether [the owner] had contracted for the work or benefitted from it are legally irrelevant'" (*Coleman v City of New York*, 91 NY2d 821, 822 [1997], citing *Celestine v City of New York*, 59 NY2d 938 [1983], *aff'g* 86 AD2d 592 [1981]; *see also, Otero v Cablevision of New York*, 297 A.D. 632 [2002]; *Pineda v 79 Barrow Street Corp.*, 297 AD2d 634 [2002]). Here, it is undisputed that the building consists of four dwelling units. Moreover, 674 Carroll had knowledge of the work being performed.

However, 674 Carroll makes a *prima facie* showing that it did not exercise, supervise or control the work being performed, and that it had neither actual or constructive notice of the allegedly unsafe condition (*Ross v Curtis-Palmer Hydro-Electronic Co.*, 81 NY2d at 505-506). As no issue of fact has been raised in this regard, summary judgment is granted to 674 Carroll on plaintiff's Labor Law §200 and common-law negligence causes of action.

Finally, 674 Carroll's motion for summary judgment on its third-party complaint for contractual indemnification is denied, as paragraph 11 of the lease agreement is unenforceable (Gen. Oblig. Law 5-321). Accordingly, it is

ORDERED, that those portions of the motion of Wendy Fleischer as seeks summary judgment dismissing plaintiff's complaint and 674 Carroll's third-party complaint against her, and for judgment in her favor on her fourth-party complaint against A.S.U. Renovators, Inc. for breach of contract are granted, and judgment on her fourth-party claim for contractual indemnification is conditionally granted; and it is further

ORDERED, that plaintiff's cross-motion is denied; and it is further

ORDERED, that 674 Carroll Street Corp.'s cross-motion is granted to the extent that plaintiffs Labor Law §200 and common-law negligence causes of action against it are dismissed, and the motion is otherwise denied; and it is further

ORDERED, that counsel appear in the Jury Co-ordinating Part on September 14, 2007 at 9:30 A.M.

E N T E R,

J. S. C.

HON. GLORIA M. DABIRI