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| <b>Escalante v Dakota, Inc.</b>  |
| 2026 NY Slip Op 32013(U)   |
| May 11, 2026   |
| Supreme Court, New York County   |
| Docket Number: Index No. 150697/2020   |
| Judge: Hasa A. Kingo   |
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. HASA A. KINGO PART 65M

Justice

-----X

TOMAS MUNIVE ESCALANTE,
Plaintiff,

INDEX NO. 150697/2020

MOTION DATE N/A

MOTION SEQ. NO. 001

- v -

THE DAKOTA, INC., V. DISALVO CONTRACTING CO,
INC.,

DECISION + ORDER ON
MOTION

Defendant.

-----X

V. DISALVO CONTRACTING CO, INC.

Third-Party
Index No. 595705/2020

Plaintiff,

-against-

MASTER WORKS PAINTING LLC

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61

were read on this motion for SUMMARY JUDGMENT.

By the foregoing documents, plaintiff Tomas Escalante ("Plaintiff") moves pursuant to CPLR § 3025 for leave to file an amended bill of particulars and pursuant to CPLR § 3212 for summary judgment on the issue of liability under Labor Law §§ 240 (1), 241(6) and Rules 12 NYCRR §§ 23-1.5 (c)(3), 23-1.21 (b)(3)(ii), and 23-1.21 (e)(3) of the Industrial Code. Defendants the Dakota, Inc. ("Dakota") and V. DiSalvo Contracting Co., Inc. ("DiSalvo") oppose. For the reasons set forth herein, the motion is granted in its entirety.

DISCUSSION

In this action, Plaintiff seeks damages for injuries incurred when he fell from a ladder while performing sanding work in the course of his employment with non-party Master Works Painting LLC ("Master Works Painting"), as part of a renovation project at 1 West 72nd Street, New York, New York ("Premises"). Defendant Dakota is the owner of the Premises. DiSalvo was the general contractor for the project.

On January 20, 2020, Plaintiff commenced this action by filing a summons and complaint (NYSCEF Doc No. 1, summons and complaint). Defendants DiSalvo and Dakota answered on March 20, 2020 and May 7, 2020, respectively (NYSCEF Doc Nos. 2-3, answers). On August 21, 2020, DiSalvo commenced a third-party action against Master Works Painting (NYSCEF Doc No. 6, third-party complaint). The parties proceeded to discovery, and Plaintiff filed the note of issue on September 8, 2025 (NYSCEF Doc No. 26, note of issue).

Plaintiff now moves pursuant to CPLR § 3025 for leave to file an amended bill of particulars and pursuant to CPLR § 3212 for summary judgment on the issue of liability under Labor Law §§ 240 (1), 241(6) and Rules 12 NYCRR §§ 23-1.5 (c)(3), 23-1.21 (b)(3)(ii), and 23-1.21 (e)(3) of the Industrial Code. In support of the motion, Plaintiff argues that he should be permitted to file an amended or supplemental the bill of particulars to include 12 NYCRR § 23-1.5 (c)(3) as a basis of liability because a supplemental bill of particulars is permitted at any time without leave of court, the proposed supplemental bill of particulars does not contain new factual allegations, raise new theories of liability, and will not surprise or prejudice the defendants (*id.* at 3). Plaintiff also contends that he is entitled to summary judgment because he was not provided with adequate safety devices to protect himself from gravity related risk, and the ladder provided to Plaintiff was defective and caused him to fall (NYSCEF Doc No. 30, mem in support at 2-3).

In opposition to the motion, Dakota argues that issues of material fact exist regarding whether the ladder was defective and whether Plaintiff was the sole proximate cause of the accident (NYSCEF Doc No. 55, Dakota mem in opposition at 5). DiSalvo asserts that material questions of fact exist because Plaintiff's testimony regarding how the fall occurred is inconsistent and the record contains conflicting evidence as to the adequacy of the subject ladder (NYSCEF Doc No. 59, DiSalvo mem in opposition at 2-3). DiSalvo also argues that, because there were no witnesses to Plaintiff's fall, questions of fact exist regarding whether the proximate cause of Plaintiff's alleged injuries was the ladder's purported failure to provide proper protection or some other cause altogether (*id.* at 5). Finally, DiSalvo argues that Plaintiff has not demonstrated that Industrial Code sections 23-1.5 (c)(3), 23-1.21 (b)(3)(ii), and 23-1.21 (e)(3) were violated (*id.* at 7-8).

## DISCUSSION

### Bill of Particulars

“Leave to amend a bill of particulars is ordinarily freely given in the absence of prejudice or surprise, unless the amendment is sought on the eve of trial” (*Alvarado v Beth Israel Med. Ctr.*, 78 AD3d 873, 874 [1st Dept. 2010]; CPLR § 3025 [b]). The CPLR provides that “a party may amend the bill of particulars once as of course prior to the filing of a note of issue” (CPLR Rule 3042 [b]). A plaintiff may also file a supplemental bill of particulars without leave of court at any time, but not less than thirty days prior to trial, but only “with respect to claims of continuing special damages and disabilities” (CPLR Rule 3043 [b]). A supplemental bill of particulars served pursuant to CPLR Rule 3043 (b) is specifically limited in that “no new cause of action may be alleged or new injury claimed” (*id.*). Courts have interpreted the prohibition on new causes of action to also include new theories of liability (*see Orros v Yick Ming Yip Realty, Inc.*, 258 AD2d 387, 388 [1st Dept 1999]).

Service of a supplemental bill of particulars that adds alleged violations of statutes, ordinances, rules, or regulations is permissible where the provisions “merely amplify and elaborate upon facts and theories already set forth in the original bill of particulars, [and] raise no new theory of liability” (*Orros v Yick Ming Yip Realty*, 258 AD2d at 388). Plaintiff seeks to amend the bill of particulars to identify 12 NYCRR § 23-1.5 (c)(3) as an additional Industrial Code section allegedly violated. Section 23-1.5 (c)(3), under General responsibility of employers, provides as follows:

(c) Condition of equipment and safeguards. (3) All safety devices, safeguards and equipment in use shall be kept sound and operable, and shall be immediately repaired or restored or immediately removed from the job site if damaged.

Plaintiff’s original bill of particulars includes allegations that Defendants were negligent in failing to provide Plaintiff with a proper ladder and proper safety equipment, and “in failing to provide and maintain proper and adequate safety devices and/or protection and to properly and adequately equip the said site so as to provide for the safety and well-being of the Plaintiff” (NYSCEF Doc no. 34, bill of particulars ¶ 7). The addition of 12 NYCRR § 23-1.5 (c)(3) as an additional Industrial Code section allegedly violated would merely amplify these allegations and does not raise new theories of liability.

Therefore, the proposed amendment would not result in surprise or prejudice to Defendants and should be permitted (*see Noetzell v Park Ave. Hall Hous. Dev. Fund Corp.*, 271 AD2d 231, 232-233 [1st Dept 2000] [“Plaintiff’s service, without leave of court, of a supplemental bill of particulars identifying 12 NYCRR 23–1.12 (c) was proper under CPLR § 3043(b), since allegations of Code violations merely amplify and elaborate upon facts and theories already set forth in the original bill of particulars and raise no new theory of liability”]). As such, the motion for leave to serve an amended or supplemental bill of particulars is granted.

### **Summary Judgment**

A motion for summary judgment “shall be granted if, upon all the papers and proofs submitted, the cause of action or defense shall be established sufficiently to warrant the Court as a matter of law in directing judgment in favor of any party” (CPLR § 3212[b]). “The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law” (*Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 [1st Dept 2007]). The movant’s burden is “heavy,” and “on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party” (*William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013][internal quotation marks and citation omitted]). Upon proffer of evidence establishing a *prima facie* case by the movant, the party opposing a motion for summary judgment bears the burden of producing evidentiary proof in admissible form sufficient to require a trial of material questions of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). “A motion for summary judgment should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility” (*Ruiz v Griffin*, 71 AD3d 1112, 1115 [2d Dept 2010][internal quotation marks and citation omitted]).

### **Labor Law § 240 (1)**

“Under Labor Law § 240 (1), owners and contractors engaged ‘in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure,’ except certain owners of one- and two-family dwellings, must ‘furnish or erect . . . scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person’ employed in the performance of the labor” (*Rivas v Seward Park Hous. Corp.*, 219 AD3d 59, 63 [1st Dept 2023]; Labor Law § 240 [1]). “The statute protects workers and imposes the responsibility for safety practices on those best situated to bear that responsibility, and therefore the statute should be given a liberal construction” (*id.* [internal citations omitted]). The so-called “scaffold law” imposes absolute liability upon owners, contractors and their agents whose failure to provide proper protection to workers employed on a construction site proximately causes injury to a worker (*id.*; *Wilinski v 334 East 92nd Housing Dev. Fund Corp.*, 18 NY3d 1, 7 [2011]).

Plaintiff testified at a deposition in connection with this matter over the course of two days, June 14, 2023 and October 7, 2024. On the first day of testimony, Plaintiff testified, *inter alia*, regarding how the fall occurred, the condition of the ladder, and the circumstances surrounding his fall. When asked how the accident happened, Plaintiff replied that “[t]he ladder moved and I fell” (NYSCEF Doc No. 35, plaintiff’s dep tr [6/14/23] at 63, ln 17). Plaintiff later added that he “was sanding and fell to the right” (*id.* at 72, ln 4-5). When asked what caused the ladder to fall, he added “I was sanding the ceiling and we were under pressure” (*id.* at 72, ln 12-13). He clarified that he was under a lot of pressure to finish the job quickly (*id.* at 72, ln 14-21). When asked whether any part of the ladder broke or failed when he fell, Plaintiff testified that one of the arms that opens and closes the ladder broke, specifically the right side arm (*id.* at 77-78). He testified that he noticed it was loose before he began working (*id.* at 78, ln 19-20). Plaintiff did not try to tighten the loose arm, but opened the ladder and put it on all four feet (*id.* at 78-79).

Plaintiff testified that the ladder was a “six-foot plastic ladder” that folds when not in use and had four legs on the floor when unfolded (*id.* at 63-64). The ladder was “[d]irty yellow” and Plaintiff described it as “an old ladder” (*id.* at 64, ln 13; 71, ln 3-4). He used that particular ladder because a ladder was required for the task and it was the only available ladder at the time (*id.* at 65, ln 15-16). Plaintiff also testified that the ladder had “rags at the bottom” of the ladder (*id.* at 65, ln 23-24). When asked whether the rags were on the bottom of the legs or something else, Plaintiff clarified that the rags were on all four feet of the ladder (*id.* at 66, ln 4-7), and instead of plastic that covers the feet of the ladder, the feet were covered with rags affixed with duct tape (*id.* at 79, ln 12-14; 80, ln 14).

At the time of his fall, the ladder was in the center of a closet, on an unfinished cement floor, not leaning on any wall, secured or otherwise held in place, and Plaintiff had been working for about 40 minutes before he fell (*id.* at 61, 69). During this time, he moved the ladder several times by coming down and moving it with his hands, no jumping the ladder (*id.* at 70). No one else entered the room during this time and there were no witnesses to Plaintiff’s fall (*id.* at 61, 68). Plaintiff was standing on the ladder for about 15 minutes before the accident happened (*id.* at 69, ln 17).

On the second day of testimony, held more than a year after the first deposition day, Plaintiff testified consistently that he was working alone sanding the ceiling of a closet when the

ladder slipped and fell forward, causing him to fall (NYSCEF Doc No. 36, plaintiff's dep tr [10/7/24] at 48-49). He testified that the ladder fell "because [he] was on top, working" (*id.* at 49, ln 17). The transcript indicates that Plaintiff described the ladder as "[i]t was an old ladder, and it was the only one left, and it had this brass on the legs" (*id.* at 49, ln 25-50, ln 2). He reiterated that the ladder was yellow (*id.* at 49-50, ln 8). Plaintiff testified that what caused the ladder to fall was "that the ladder moved" (*id.* at 51, ln 9-10). He also testified that "the bars that go across" caused the ladder to fall (*id.* at 52, ln 14-15).

To make a prime facie showing of entitlement to summary judgment under Labor Law § 240 (1), a plaintiff must demonstrate that they were injured while engaged in statutorily covered work, the injury sustained is the type of elevation-related hazard to which the statute applies, and plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential (*Rivas v Seward Park*, 219 AD3d at 64; *Sacko v New York City Hous. Auth.*, 188 AD3d 546, 545-546 [1st Dept 2020]). Plaintiff was sanding and then preparing to paint as part of a larger renovation when he fell (NYSCEF Doc No. 35, plaintiff's dep tr [6/14/23] at 55, ln 18-19). He was, therefore, indisputably engaged in statutorily covered work when he fell, and a fall from a ladder is the type of elevation-related hazard to which the statute applies (*see Molina v Chatham Towers, Inc.*, 243 AD3d 482, 483 [1st Dept 2025]; *Sacko v New York City Hous. Auth.*, 188 AD3d at 546-547).

Plaintiff's unrefuted testimony regarding the condition of the ladder and circumstances of his fall is sufficient to make a prima facie showing that his injuries were proximately caused by a violation of Labor Law § 240 (1) (*see Molina*, 243 AD3d at 483). His consistent testimony that the unsecured ladder, which was required for his work and the only ladder available for him to use, moved or slipped while he was standing on it working is sufficient to establish that Defendants failed to provide a safety device that would ensure that the ladder he was instructed to use would remain upright while Plaintiff performed his statutorily covered work (*see Molina*, 243 AD3d at 483 [plaintiff made prima facie showing where evidence established defendant failed to provide a safety device to ensure ladder plaintiff was instructed to use would remain upright while he worked and that plaintiff fell when ladder shifted and fell]; *Sacko*, 188 AD3d at 546-547 ["Plaintiff's testimony established that defendants failed to provide a safety device that would ensure that the ladder he was instructed to use would remain upright while he performed his statutorily covered work, and that he fell off of the ladder when the ladder suddenly shifted and collapsed"]). Although his testimony that the ladder had rags on the feet and a loose brace arm indicates the ladder was defective, Plaintiff is not required to prove that the ladder was defective for the purposes of Labor Law § 241 (1) (*id.*).

In opposition, Defendants fail to raise any issue of material fact. Dakota's assertions that Plaintiff's testimony was inconsistent or unclear regarding are unavailing because Plaintiff's testimony on the first day the ladder "moved," causing him to fall, is not inconsistent with his testimony on the second day that the ladder "slipped," causing him to fall. Plaintiff's second day description of the ladder as "an old ladder, and it was the only one left, and it had this brass on the legs" (*id.* at 49, ln 25-50, ln 2) is not sufficient to raise a material question of fact. Setting aside the possibility that the term "brass" is a scrivener's error, a representation that the legs of the ladder had brass on them does not contradict his testimony that rags were duct taped to the bottom of the

ladder or that the unsecured ladder moved while he was working, causing him to fall.<sup>1</sup> His testimony that there was debris on the floor also does not raise an issue of material fact because he did not indicate that the debris caused him to fall.

DiSalvo's introduction of a photograph that it purports to be the ladder is also insufficient to raise a material issue of fact because DiSalvo's witness testified that he did not take the photograph, did not recall who took the photograph, and was merely "informed" by "somebody" that the latter depicted in the photograph was the ladder involved in the accident (NYSCEF Doc No. 38, Aniolek dep tr at 52-53). This is not sufficient to provide the proper foundation for this photograph, and therefore, the photograph does not constitute admissible evidence sufficient to require a trial of material questions of fact (*Zuckerman v City of New York*, 49 NY2d at 562). Moreover, Plaintiff viewed the photograph at his deposition and testified that it didn't look like the ladder involved in the accident because it was a different color and did not look as old as the ladder that caused him to fall (NYSCEF Doc No. 35, plaintiff's dep tr [6/14/23] at 91).

Assuming *arguendo*, that these purported inconsistencies were persuasive, Defendants have not demonstrated that Plaintiff's conduct was the sole proximate cause of his injuries because neither has produced evidence that adequate safety devices were available, that the plaintiff knew that they were available and was expected to use them, and that the plaintiff unreasonably chose not to do so, causing the injury sustained (*Nacewicz v Roman Cath. Church of the Holy Cross*, 105 AD3d 402, 402-403 [1st Dept 2013]). Therefore, Plaintiff is entitled to summary judgment on liability under Labor Law § 240 (1).

### **Labor Law § 241 (6)**

The purpose of Labor Law § 241 (6) is "to protect workers engaged in duties connected to the inherently hazardous work of construction, excavation or demolition" (*Nagel v D & R Realty Corp.*, 99 NY2d 98, 101 [2002]). Labor Law § 241 (6) is a "hybrid" statute that "reiterates the general common-law standard of care," while imposing a nondelegable duty with respect to compliance with rules of the Commissioner of the Department of Labor which contain specific, positive commands (*Bazdaric v Almah Partners LLC*, 41 NY3d 310, 317 [2024], citing *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 500 [1993]; see also *Rizzuto v L.A. Wenger Contr. Co., Inc.*, 91 NY2d 343, 349-350 [1998] ["we have repeatedly recognized that section 241 (6) imposes a nondelegable duty upon an owner or general contractor to respond in damages for injuries sustained due to another party's negligence in failing to conduct their construction, demolition or excavation operations so as to provide for the reasonable and adequate protection of the persons employed therein"]).

"Thus, an owner or general contractor is vicariously liable without regard to their fault, and even in the absence of control or supervision of the worksite, where a plaintiff establishes a violation of a specific and applicable Industrial Code regulation" (*id.*, citing *Rizzuto.*, 91 NY2d at 348-350 [internal quotes omitted]). However, "[t]he owner or contractor may raise any valid defense to the imposition of vicarious liability under Labor Law § 241 (6), including contributory and comparative negligence" (*Catarino v State of New York*, 55 AD3d 467, 468 [1st Dept 2008]).

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<sup>1</sup> Notably, none of the counsel present asked clarifying questions regarding the existence of "brass" on the ladder.

To meet his summary judgment burden, Plaintiff is required to show that (1) the Industrial Sections cited apply under the circumstances presented (2) Dakota or DiSalvo violated the statute's specific commands, (3) this violation alone, or considered with other undisputed factual evidence, constitutes negligence, and (4) the violation caused Plaintiff's injuries (*Bazdaric*, 41 NY3d at 318). As the general contractor, DiSalvo is subject to liability under Labor Law § 241 (6) for violations of specific and applicable Industrial Code regulations, including any violations perpetrated by its subcontractor Master Works Painting (*Bazdaric*, 41 NY3d 317). Plaintiff's Labor Law § 241 (6) claim is predicated on Defendants alleged violations of Industrial Code sections 12 NYCRR § 23-1.5 (c)(3), 23-1.21(b)(3)(ii) and 23-1.21(e)(3). Each of these provisions sets forth specific commands that are sufficient to support the cause of action alleging a violation of Labor Law § 241 (6) (*see Tuapante v LG-39, LLC*, 151 AD3d 999, 1000 [1st Dept 2017] ["12 NYCRR 23-1.5 (c) (3) is sufficiently specific to support the cause of action alleging a violation of Labor Law § 241 (6)"]).

As cited above, 12 NYCRR § 23-1.5 (c)(3) requires employers to maintain all "safety devices, safeguards and equipment" in "sound and operable" condition, and if damaged "shall be immediately repaired or restored or immediately removed from the job site." Industrial Code section 23-1.21, "Ladders and ladderways," provides the following, in relevant part:

(b) General requirements for ladders.

(3) Maintenance and replacement. All ladders shall be maintained in good condition. A ladder shall not be used if any of the following conditions exist:

(ii) If it has any insecure joints between members or parts.

(e) Stepladders.

(3) Stepladder footing. Standing stepladders shall be used only on firm, level footings. When work is being performed from a step of a stepladder 10 feet or more above the footing, such stepladder shall be steadied by a person stationed at the foot of the stepladder or such stepladder shall be secured against sway by mechanical means.

Plaintiff's uncontroverted testimony that the ladder had a loose brace arm, which broke while he was using the ladder, and that there were rags duct taped to the feet of the ladder is sufficient to demonstrate a violations of 12 NYCRR § 23-1.5 (c)(3) and 12 NYCRR § 23-1.21(b)(3)(ii) that were a cause of Plaintiff's injury. In opposition, neither Defendant has demonstrated that these Industrial Codes are inapplicable to the facts of this case, or that the alleged violation of that provision was not a proximate cause of the plaintiff's injuries. Although the second command set forth in 12 NYCRR § 23-1.5 (e)(3) is not applicable here, the distinct, specific command that "[s]tanding stepladders shall be used only on firm, level footings" is applicable (*Bazdaric*, 41 NY3d at 317). Plaintiff's testimony also demonstrates a violation of 12 NYCRR § 23-1.5 (e)(3) because rags wrapped around the feet of the ladder do not constitute "firm, level footings."<sup>2</sup> Therefore, Plaintiff is entitled to summary judgment on his cause of action under Labor Law § 241 (6).

<sup>2</sup> Although not specifically pleaded, these allegations also constitute a violation of 12 NYCRR § 23-1.5 (b)(4)(ii), which commands that "All ladder footings shall be firm. Slippery surfaces and insecure objects such as bricks and boxes shall not be used as ladder footings."

Accordingly, it is

ORDERED that Plaintiff's motion is granted in its entirety; and it is further

ORDERED that Plaintiff is granted leave to serve and file an amended bill of particulars and the Proposed Amended Bill of Particulars annexed to Plaintiff's motion is deemed served; and it is further

ORDERED that Plaintiff's motion for summary judgment on the issue of liability under Labor Law §§ 240 (1) and 241(6) is granted; and it is further

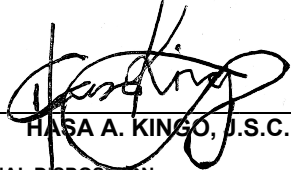
ORDERED that counsel for the Plaintiff shall serve a copy of this order with notice of entry upon the Clerk of the General Clerk's Office, who is directed enter judgment in Plaintiff's favor on the issue of liability; and

ORDERED that such service upon the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-Filing" page on the court's website); and it is further

ORDERED that the appearance before the Court scheduled for May 12, 2026, is canceled as moot; and it is further

ORDERED that a settlement conference shall be held in this matter on June 15, 2025, at 11:00 a.m. in Room 308 at 80 Centre Street, New York, New York.

This constitutes the decision and order of the court.

|                          |                                     |                            |  |
|--------------------------|-------------------------------------|----------------------------|--|
| <u>5/11/2026</u><br>DATE |                                     |                            | <br>HASA A. KINGO, J.S.C. |
| CHECK ONE:               | <input type="checkbox"/>            | CASE DISPOSED              | <input checked="" type="checkbox"/> NON-FINAL DISPOSITION  |
|                          | <input checked="" type="checkbox"/> | GRANTED                    | <input type="checkbox"/> GRANTED IN PART   |
|                          | <input type="checkbox"/>            | DENIED                     | <input type="checkbox"/> OTHER   |
| APPLICATION:             | <input type="checkbox"/>            | SETTLE ORDER               | <input type="checkbox"/> SUBMIT ORDER  |
| CHECK IF APPROPRIATE:    | <input type="checkbox"/>            | INCLUDES TRANSFER/REASSIGN | <input type="checkbox"/> FIDUCIARY APPOINTMENT   |
|                          |                                     |                            | <input type="checkbox"/> REFERENCE   |