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

PRESENT: HON. PAUL G. FEINMAN PART 12

Justice

TIMOTHY BROWN,
Petitioner,

For a judgment Pursuant to Article 78 of the Civil Practice Law & Rules

-against-

THE NEW YORK CITY LANDMARKS PRESERVATION COMMISSION, MICHAEL BLOOMBERG, Mayor of the City of New York, THE NEW YORK CITY DEPARTMENT OF BUILDINGS, SOHO PROPERTIES INC., JANE DOE AND JOHN DOE,
Respondents.

INDEX NO. 110334/2010

MOT. SEQ. NOS. 001 002 & 003

Cross-Motion: ■ Yes ☐ No

The petition, motions bearing sequence numbers 001, 002 and 003, as well as the cross motion filed under motion sequence number 003, are all resolved in accordance with the decision, order and judgment annexed to the short form order filed under motion sequence number 001. The papers considered are recited in the decision, order and judgment.

Dated: JUL 07 2011

J.S.C.

Check one: ■ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION
☐ DO NOT POST ☐ REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM PART 12

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Index Number 110334/2010

Mot. Seq. Nos. 001, 002, 003

DECISION, ORDER AND JUDGMENT

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Papers considered in review of the petition, motions, and cross motion:

	Papers	Document Number
Seq. 001	Notice of Petition & Petition	1
	Record of Proceedings, bound vol. 1-2	2, 3
	CD of vol. 1-14	4
	City Answer to Amended Petition[1]	5
	City Memo of Law in Opposition to Petition	6
	Petitioner Reply Affirmation	7
Suq. 002	Order to Show Cause seeking Preliminary Injunction	1
	City Memo of Law in Opposition	2
	SoHo Affirmation in Opposition to Order to Show Cause	3
	SoHo Memo of Law in Opposition	4
	Petitioner Reply Affirmation	5 *(same as # 9 in m.s. 003)*
Seq. 003	Order to Show Cause seeking dismissal	1

[1] The Amended Petition is included among the documents attached to the Order to Show Cause in Motion Seq. 002.

SoHo Memo of Law	2
Petitioner Notice of Cross Motion to Amend	3
Petitioner Memo of Law in Opposition to Motion	4
SoHo Affirmation in Opposition to Cross Motion	5
SoHo Memo of Law in Opposition to Cross Motion	6
City Memo of Law in Support of Motion/Reply	7
SoHo Reply to Petitioner Memo of Law in Opposition	8
Petitioner Reply Affirmation	9 *(same as # 5 in m.s. 002)*

PAUL G. FEINMAN, J.:

Background

In this proceeding brought pursuant to Article 78 of the New York Civil Practice Law and Rules (CPLR), petitioner Timothy Brown asks the court to annul a determination of the New York City Landmarks Preservation Commission ("LPC" or "the Commission") which denied landmark status to a building located at 45-47 Park Place, New York, New York. The building was built in 1857-1858 and reportedly retains much of its Italian Renaissance-inspired palazzo-style design, a design that was popular in what was, at the time of the building's construction, a textile and dry goods district of Manhattan. The most recent commercial use of the premises was as a Burlington Coat Factory outlet store.

On September 11, 2001, during the terrorist attacks on the World Trade Center, the building was one of between 50 and 60 structures in the surrounding blocks damaged by falling debris. The Burlington Coat Factory never reopened, and that space as well as the adjacent premises known as 49-51 Park Place, also used by Burlington Coat Factory, remained vacant until 2009, when they both were sold. The building at issue in this proceeding is currently owned by nonparty 45 Park Place Partners LLC.[2] The ground floor of the building is currently being

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[2] In light of the court's dismissal on standing grounds, it does not reach the alternative argument that the petition must be dismissed for failure to join a necessary party, 45 Park Place Partners LLC.

used as an overflow prayer space for a nearby mosque. The building is located outside the World Trade Center site on a nearby block.

In 1989 the building was "calendared" by LPC as one of 29 buildings considered for assessment as to whether any were worthy of landmark status. Although a hearing on the 29 buildings was held, no action was taken at that time by the Commission concerning 45-47 Park Place. The building then remained on a "designation calendar" until early 2010, when representatives of the current owner of the building contacted the Commission seeking a final determination by LPC as to the building's status. The Commission then gave notice of a public hearing, which was conducted on July 15, 2010. At the hearing, members of the public were permitted to express their views for and against granting the building landmark status. On August 3, 2010, the Commissioners held a public meeting and voted unanimously against designating the building a landmark, with a final determination issued the next day. It is this determination by LPC denying 45-47 Park Place landmark status which is the subject of this special proceeding.

Discussion

It is important to highlight at the outset that this proceeding is *not* a land use dispute. The legal issue before the court is *not* whether the building may be used as commercial space, a house of worship, a community center, or any other specific use. Rather, as all parties have agreed, this proceeding is only about whether LPC's decision to deny the building located at 45-47 Park Place landmark status was arbitrary and capricious. As all parties have also recognized, in reviewing LPC's determination, the law governing these kinds of proceedings requires the court to accord deference to the agency's weighing of competing evidence.

However, when, as here, a party challenges the standing of the party bringing the proceeding, the court cannot consider the merits of the petition unless it first determines that the petitioner is in fact someone recognized under the law as a proper party to initiate the proceeding. Here, while the court does not question the sincerity of Mr. Brown's belief that he is an appropriate representative of the many first responders who heroically responded to aid the victims of the 9/11 World Trade Center attacks, he does not, as a matter of law, satisfy the legal test for standing to challenge LPC's determination to deny 45-47 Park Place landmark status. Accordingly, the court is compelled to dismiss the entire proceeding without considering the substance of Mr. Brown's claims, no matter how persuasive the arguments may have ultimately proven had they been reached on the merits.

Under the law of New York, judicial review of an administrative determination is done by commencing a proceeding as set forth in CPLR Article 78. The petitioner, Timothy Brown, a former firefighter with the New York City Fire Department, who was one of the heroic first responders at the site of the World Trade Center following the terrorist attacks on September 11, 2001, has brought this proceeding pursuant to CPLR 7803 (3). The petition contends that the determination of the Landmarks Preservation Commission was arbitrary and capricious, that it was contrary to administrative procedure, and made in violation of the rules and regulations governing New York City's landmarks. It seeks a judgment from the court that the determination must be annulled or set aside.[3] The petition names as respondents, The New York City Landmarks Preservation Commission, Mayor Michael Bloomberg, and the New York City Department of Buildings (herein the City respondents), as well as SoHo Properties, the ostensible

[3]The petition also seeks certain items of discovery.

owner of the premises.

The City respondents have answered the petition and pleaded the affirmative defense that the petitioner does not have standing to bring this Article 78 proceeding. Separately, SoHo Properties moves to dismiss the petition based on the petitioner's lack of standing and on the petition's failure to name the actual owner of the premises, 45 Park Place Partners LLC, as a respondent.

Standing is a "threshold issue" (*Saratoga County Chamber of Commerce, Inc. v Pataki*, 100 NY2d 801, 812 [2003]). It must be resolved prior to the court addressing the merits of the petitioner's challenge to the administrative decision (*id.*; *see New York State Assn. of Nurse Anesthetists v Novello*, 2 NY3d 207, 211 [2004]). This is based on the principle under the common law that a court "has no inherent power to right a wrong unless thereby the civil, property or personal rights of the plaintiff in the action or the petitioner in the proceeding are affected" (*Society of the Plastics Indus., Inc. v County of Suffolk*, 77 NY2d 761, 772 [1991] [internal quotation marks omitted]). "If standing is denied, the pathway to the courthouse is blocked" (*Saratoga County Chamber of Commerce,* 100 NY2d at 812), and the matter cannot proceed.

New York has a well-established two-part test for determining whether a party has standing to challenge a governmental action (*see Roberts v Health & Hosps. Corp.*,__ AD3d ___, 2011 NY Slip Op 5882, * 5 [1st Dept. 2011], citing *New York State Assn. of Nurse Anesthetists v Novello*, 2 NY3d at 211). The petitioner must show (1) an "injury-in-fact" and (2) that the alleged injury falls within "the zone of interests or concerns sought to be promoted or protected by the statutory provision under which the agency has acted" (*Roberts v Health & Hosps. Corp.*, *supra* at

*5; *New York State Assn. of Nurse Anesthetists*, 2 NY3d at 211). "Injury-in-fact" means that the petitioner will actually be harmed by the challenged administrative action, in other words that the injury is more than conjectural (*New York State Assn. of Nurse Anesthetists* at 211; *see also Society of the Plastics Indus. v County of Suffolk*, 77 NY2d at 773). It is "special damage, different in kind and degree from the community generally" (*Matter of Sun-Brite Car Wash, Inc. v Board of Zoning & Appeals of the Town of N. Hempstead*, 69 NY2d 406, 413 [1987]; *Society of the Plastics Indus.*, 77 NY2d at 775 n 1). Said differently, it is "personal to the party" (*Roberts v Health & Hosps. Corp.*, *supra*, 2011 N.Y. Slip Op. 5582 at *5).

The "zone of interests" test requires that the petitioner show that the injury-in-fact falls within the zone of interests sought to be promoted or protected by the statutory provision under which the agency has acted (*Society of the Plastics Indus.*, at 773). It ties the injury asserted by the petitioner to the governmental act challenged, and thus limits the universe of persons who may challenge an administrative action (*id.*). The requirement that a petitioner's injury fall within the concerns the statute is designed to protect ensures that a group or individual "whose interests are only marginally related to, or even inconsistent with, the purposes of the statute cannot use the courts to further their own purposes at the expense of the statutory purposes." (*Matter of Transactive Corp. v New York State Dept. of Social Serv.*, 92 NY2d 579, 587 [1998], quoting *Society of the Plastics Indus.*, 77 NY2d at 774).

As conceded by the petitioner, he does not own property in the near vicinity of 45-47 Park Place, nor does he live nearby. Therefore, like the petitioners in *Matter of Heritage Coalition, Inc. v City of Ithaca Planning and Dev. Bd.*, 228 AD2d 862 (3d Dept 1996), *lv denied* 88 NY2d 809 (1996), who did not live in close proximity to the historic landmarked building whose extensive

renovations they sought to challenge, he must establish his standing based on the two-fold test.

Addressing first the injury-in-fact prong of the standing test, petitioner points to *Friends of the Earth, Inc. v Laidlaw Envtl. Serv. (TOC), Inc.*, which holds that persons directly affected by a determination that would result in the diminished aesthetic, recreational, or financial value of an area, have standing to challenge the determination (528 US 167 [2000]). In *Friends of the Earth*, the plaintiff brought suit under the Clean Water Act against a wastewater treatment plant discharging pollutants into a waterway. The Court found that the affidavits and submissions from the individual members of the plaintiff-non-profit corporation established an injury-in-fact, in that the individuals, who had in the past used the affected area for fishing, camping, swimming, and picnicking, would be "directly" and particularly affected by the diminishment in the area's aesthetic and recreational value, as well as by decreased property values, if the defendant was allowed to discharge pollutants into the river (528 US at 182-184). Similarly, in *Matter of Committee to Preserve Brighton Beach and Manhattan Beach, Inc. v Planning Commn. of the City of New York*, cited by the petitioner, the individuals who lived in close proximity to a public park, and an organization dedicated to preserving the neighborhood, were held to have standing to challenge the City's grant of a concession for the construction of a privately owned recreational center in the park (259 AD2d 26 [1st Dept 1999]). The Court held that the individuals' affidavits contained allegations constituting injury-in-fact, in particular that the concession would interfere with their use and enjoyment of the park, reduce the amount of open space, cause noise and traffic and increased contaminants in the air, and obstruct their views of the park from their homes (259 AD2d at 32). In addition, three of the individual petitioners lived in close proximity to the park, and one used it regularly, such that the Court held it was "obvious that many of the alleged

injuries would affect the petitioners in a manner wholly distinct from that of the public at large" (*id.*). Finally, in *Matter of Duke & Benedict, Inc. v Town of Southeast*, also cited by the petitioner, the Court held that the owners of property near the site of a proposed commercial rezoning had standing to sue because they alleged actual or potential noneconomic harm from the environmental impacts of the project, harm that was different from that of the public at large, in particular in that the rezoning would lead to increased traffic and adverse environmental effects on the horse farm and residential portions of the property (253 AD2d 877 [2d Dept 1998]). In all of these cases, the courts found that the plaintiffs and petitioners articulated specific, particular ways in which they would be injured in-fact if the challenged actions were allowed to proceed, and showed that they would be injured in a manner distinct from that of the public at large.

The petitioner argues that he has standing because he was one of the first responders to the site of the World Trade Center on September 11, 2001, following the terrorist attacks that caused the destruction of the Twin Towers (Am. Pet. ¶ 12). He lost nearly 100 friends on that tragic day (Am. Pet. ¶ 12). The events of 9/11 have "deeply shaped" his life (Joshpe Reply Aff. to Mot. to Dism. ¶ 39). In the years since, he has organized and advocated on behalf of survivors and family members of those who died as a result of the attacks and has been a "tireless spokesman for honoring the victims' memory." (Am Pet. ¶ 12). For a period of time after September 11, 2001, he was employed by the Office of Emergency Management, where his duties included "preserving, rehabilitating and restoring physical structures and services in the vicinity of Ground Zero" (Joshpe Reply Aff. to Resp. Ans., Brown Aff. ¶¶ 3-4). Furthermore, as a "volunteer and concerned citizen," he has been a "proponent of restoring and preserving architecturally and historically significant and unique monuments to 9/11." (Joshpe Reply Aff. to Resp. Ans., Brown

Aff. ¶ 5).

Mr. Brown's actions, the selfless acts of his friends who perished on 9/11, as well those of so many others during and after the 9/11 attacks, were unquestionably heroic and commendable. His desire to commemorate the events of that day and the lives of those lost is indeed a laudable one. Yet, in contrast to the movants in *Friends of the Earth*, *Committee to Preserve Brighton Beach*, and *Duke & Benedict, Inc. v Town of Southeast*, petitioner Brown offers a description of what the site of the World Trade Center and the events of 9/11 have meant in his life and his belief that because 45-47 Park Place suffered damage on that day, it has also become a part of the site and a monument to the events of that day. He contends that allowing the building to be demolished would constitute not only a direct injury-in-fact to the building, but also to him, as a "living representative of the historic structures that commemorate the events of that day" (Pet. Memo of Law in Opp. to Mot. to Dism., p 3).

Mr. Brown's claim that his ability to commemorate will be injured, is not yet recognized under the law as a concrete injury that can establish standing. Such an injury, although palpable to Brown, is immeasurable by a court, and therefore qualitatively different from the kinds of tangible injuries accepted in *Duke & Benedict* (increased traffic and detriment to the environment), in *Committee to Preserve Brighton Beach* (reduced open space, increased noise, traffic, air pollution, and obstructed views), and in *Friends of the Earth* (diminished aesthetic, recreational, and property values) to satisfy the injury-in-fact prong of standing. Even assuming that a diminished ability to commemorate the events of 9/11 and the lives lost is an injury, it is one which we as global citizens all share, and is not Mr. Brown's alone.

Although the petitioner contends otherwise, his arguments are more similar to those made

by the petitioners in *Matter of Heritage Coalition, Inc. v City of Ithaca Planning and Dev. Bd.*, *supra*, 228 AD2d 862, in which a town resident and a not-for-profit historic preservation corporation sought to challenge the determination that Cornell University could extensively renovate a landmarked building. None of those petitioners owned property nearby. They contended that they would suffer injury based on their goal of preserving the cultural heritage of the area through advocacy and education related to historic preservation and concerns, on their being county residents who taught at Cornell's College of Architecture, Art and Planning and who were "fond[ly] appreciative" of the building and used certain of its characteristics in their classes, and on the averments of one petitioner that, because of her background and involvement in historic preservation, her "appreciation for the historic importance of" the building was "different from that of the ordinary citizen or resident" (228 AD2d at 863-864). Despite the preservationist goals, the appreciation of the building, and its use as a teaching tool, the Court held that the petitioners did not have standing. Specifically, the Court concluded that a teaching tool did not constitute a "use" sufficient to confer standing. Moreover, the petitioners' appreciation for historical and architectural buildings was held not to "rise to the level of injury different from that of the public at large for standing purposes" (*id.* at 864).

The petitioner argues here that his interest in 45-47 Park Place is far more significant than that of the petitioners in *Heritage Coalition,* because it is based on his "involvement in one of the most historically significant moments in our nation's history and [45-47 Park Place]'s intricate connection to those events" (Joshpe Reply Aff. to Resp. Mot. to Dism. ¶ 38). Even accepting his argument that his interest is more significant than that of the *Heritage Coalition* petitioners, he has not distinguished his potential injury, as he must do by law, from the potential injury suffered

by the general public. To the extent that petitioner argues that the building itself, 45-47 Park Place, should have standing, and that as a representative of the events of 9/11 he speaks on behalf of anything affected by the terrorist attacks, his argument lacks support in the law. Notably, petitioner relies on the dissent in *Sierra Club v Morton*, 405 US 727 (1972) (challenging a proposed development in a national forest). The dissenting opinion of Justice Douglas, noting the growing public awareness of the need to protect the ecology, suggested that there should be a federal rule conferring "standing upon environmental objects to sue for their own preservation" (405 US at 741-742, Douglas, J., dissenting). Justice Douglas contended that it was necessary to open the courts to challenges by inanimate objects "before . . . priceless bits of Americana . . . are forever lost..." (405 US at 750). However, this expansive vision of standing expressed by Justice Douglas some 39 years ago has not become the controlling law, and the petitioner's reliance on it is therefore misplaced.

Petitioner argues that his situation is analogous to at least one of the petitioners in *Matter of Ziemba v City of Troy*, 37 AD3d 68 (3d Dept 2006), *lv denied* 8 NY3d 806 (2007), where the petitioners' standing was challenged when they brought suit to stop the demolition of certain historic buildings and to require an environmental review. The *Ziemba* Court held that the original petitioners, members of a local historic preservation society, had standing because they lived within two blocks of the proposed demolition and could see the historic buildings from their homes (37 AD3d at 71). Most importantly for petitioner Brown's argument, the Court also held that another individual petitioner had standing as a member of a federally recognized band of Mohicans, who lived in the area of the tribe's former territory which included the City of Troy, and who asserted that Native American burial grounds were located underneath the buildings and

might be disturbed if the buildings were demolished. The Court held that this petitioner established an injury-in-fact that was within the zone of interests of the statute and different from that suffered by the public at large (37 AD3d at 72).

The petitioner argues that, analogous to the *Ziemba* petitioner, he seeks to represent those who were lost on September 11, 2001, including his many friends who died in the course of duty, and to protect any remains of the dead which, although not yet discovered over the past decade, might yet be discovered at 45-47 Park Place (Pet. Memo of Law in Opp. to Mot. to Dism. p 14). The analogy is imperfect at best, even setting aside the difference between petitioner Brown, a self-identified representative of the victims of 9/11, and the petitioner in *Ziemba,* a member of a federally recognized Native American tribe. The presence of *known* burial grounds underneath the buildings at issue in *Ziemba* is not the equivalent of *speculation* that there might be human remains at or near 45-47 Park Place. Notably, the petitioner's attorney asserts only that it cannot be said "for certain" that body remains "could be located" on the premises (Reply [Joshpe] Aff. ¶ 33).[4] Although he represents that in 2010 "more human remains were found" that were connected with the events on 9/11, petitioner's counsel does not substantiate this statement or offer anything to suggest that the remains were found even close to the Park Place building (Reply [Josphe] Aff. ¶ 34). A conjectural injury is not sufficient on its own to establish standing (*New York State Assn. of Nurse Anesthetists, supra*, 2 NY3d at 211).

Unaddressed by the petitioner is the 2010 decision, *Matter of Citizens Emergency Comm.*

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[4]The City respondents' Verified Answer indicates that they lack knowledge or information sufficient to form a belief as to the truth of the petitioner's allegation in his Verified Complaint that the building "may yield discoveries related to the events and aftermath of September 11, 2001 that will be lost forever if not preserved" (Ver. Ans. ¶ 16).

to Preserve Preserv. v Tierney, 70 AD3d 576, 576 (1st Dept 2010), *revg* 2008 NY Slip Op 33130U (Sup Ct NY County 2008); *lv denied* 15 NY3d 710 (2010), which is seemingly indistinguishable from this matter. The petitioner in *Citizens Emergency Commission* had argued that its volunteer members had standing to challenge certain actions or inactions of the New York City Landmarks Preservation Commission because they were dedicated to supporting the same objectives as the Commission, that is, to protecting the City's cultural, social, economic, political, and architectural history, as set forth in the Administrative Code of the City of New York. Despite the dedication of the individual members to the City's heritage, the Court did not find that the petitioner had standing, noting explicitly that an "interest" is "not synonymous" with an "injury" (70 AD3d at 576). In other words, the specialized interest of petitioner's members in the preservation of New York City history and culture as expressed in its architecture, is not an injury, let alone an injury-in-fact.

Here, as in *Citizens Emergency Commission*, the petitioner has commendably dedicated himself to the protection of a particularized interest, the history and memory of the events of 9/11. However as *Citizens Emergency Commission* holds, a particularized interest is not the equivalent of an injury-in-fact, and petitioner's desires to commemorate the events of 9/11 and the lives of those who died are not particularized to him but shared by nearly all. Furthermore, his argument that 45-47 Park Place is a monument to 9/11 which will itself suffer injury-in-fact if it is demolished, requires an expansion of standing not yet adopted by any appellate court. Of course, even if Justice Douglas' view in *Sierra Club v Morton* that inanimate objects could assert standing was the law, the building itself was not the target of the 9/11 terrorists, and there is no allegation that the petitioner was at or inside the building, or rescued anyone from it. Because the petitioner

has not established an injury-in-fact under the law, the court need not address the second prong of the standing test, which is that the injury-in-fact falls within the zone of interests sought to be promoted or protected by the statutory provision under which the agency has acted (*see New York State Assn. of Nurse Anesthetists, supra*, 2 NY3d at 211-212).

Conclusion

In conclusion, the court reiterates that it acknowledges the heroism of all the 9/11 first responders, including Mr. Brown, and our collective desire to honor those who perished on September 11, 2001 and the surviving families. The court's decision is not an evaluation of the merits of LPC's decision to deny landmark status to the building, nor of the procedures it used. Nothing in this decision is a determination about freedom of religion, the current or future proposed use of the premises, or the manner in which the memory of the victims and the stories of the survivors of the 9/11 World Trade Center attacks should be preserved. Rather, because the court concludes that Mr. Brown's allegations, accepted as true, establish only that he is an individual with a profound interest in preservation of the building, but not that he has an injury-in-fact as defined by law, he cannot satisfy the legal test for standing. Accordingly, the proceeding must be dismissed.

Inasmuch as the court is dismissing the petition based on petitioner's lack of legal standing, the other branches of the various motions and cross motions seeking discovery, dismissal on other grounds, and to amend the petition are rendered academic.

It is therefore,

ADJUDGED and ORDERED that the petition is denied and the proceeding is dismissed on the ground that the petitioner lacks standing; and it is further

ORDERED to the extent that the motions and cross motions (mot. seq. nos. 002 & 003) seek dismissal on grounds other than standing, seek injunctive relief, or leave to amend the petition, they are denied as academic.

This constitutes the decision, order and judgment of this court.

ENTER,

Paul G. Feinman
J.S.C.

Dated: July 7, 2011
New York, New York

Norman Cordman
Clerk

FILED

JUL 08 2011

COUNTY CLERK'S OFFICE
NEW YORK

Index No: 110334/2010

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

Timothy Brown

Petitioner

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-against-

The New York City Landmarks
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Respondents

DECISION, ORDER & Judgment

FILED

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COUNTY CLERK'S OFFICE

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