STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

ANITA YU, JOHN BOYER, and MARY RAAB,
Plaintiff,

Donald E Shelton

Hon:
Case No. 181 CC

vs.

THE CITY OF ANN ARBOR,
Defendant.

/

IRVIN A. MERMELSTEIN (P52053)
Attorney for Plaintiffs
2099 Ascot St.
Ann Arbor, MI 48103
734-717-0383

M. MICHAEL KOROI (P44470)
Co-Counsel for Plaintiffs
150 N. Main St.
Plymouth, MI 48170
734-459-4040

WOODS OVIATT GILMAN, LLP
BY: DONALD W. O'BRIEN, JR., ESQ.
Pro Hac Vice application pending
Co-Counsel for Plaintiffs
2 State St.
700 Crossroads Bldg.
Rochester, NY 14614
528-982-2802

/

There is no other civil action between these parties arising out of the same transaction or occurrence as alleged in this Complaint pending in this court, nor has any such action been previously filed and dismissed or transferred after having been assigned to a judge, nor do I know of any other civil action, not between these parties, arising out of the same transaction and occurrence as alleged in this Complaint that is either pending or was previously filed and dismissed or transferred or otherwise disposed of after having been assigned to a judge in this court.

COMPLAINT

Plaintiffs Anita Yu, John Boyer, and Mary Raab, for their complaint against the Defendant, City of Ann Arbor, by their attorneys Irvin Mermelstein, Esq., M. Michael Koroi, Esq., and Daniel W. O'Brien, Esq. respectfully allege as follows:

I. PRELIMINARY STATEMENT

1. This is an action commenced against the City of Ann Arbor ("the City") pursuant to MCL § 213.23, Article 10 § 2 of the Michigan Constitution, 42 U.S.C. § 1983 and the Fifth Amendment to the United States Constitution. The plaintiffs herein seek compensatory damages, injunctive relief and a declaration that Ann Arbor Ordinance 2:51.1 ("the Ordinance), enacted to implement the City's mandatory Footing Drain Disconnection Program (FDDP) is unconstitutional and has resulted in a taking of the plaintiffs' private property for public use without due process of law or just compensation.

II. THE PARTIES

2. Plaintiff, Anita Yu, resides at 2362 Georgetown Boulevard., in a home she has owned since at least 1982, in Ward 1 of the City of Ann Arbor.

3. Plaintiffs, John Boyer and Mary Raab, reside at 2273 Delaware Drive , in a home which Plaintiff Mary Raab has owned since 1970, located in Ward 4 of the City of Ann Arbor.

4. The City is a municipal corporation, organized and existing under the laws of the State of Michigan, with an office for the transaction of business located at Larcom City Hall, 301 East Huron Street, Ann Arbor, Michigan 48104.

III. JURISDICTION AND VENUE

5. The Court has subject matter jurisdiction over this matter pursuant to MCL § 600.601(1).

6. Venue is appropriate in this circuit pursuant to MCL § 600.1615.

IV. BACKGROUND

A. The City of Ann Arbor

7. The City is located in the State of Michigan and is the county seat of Washtenaw County. Upon information and belief, the City was founded in 1824 and currently has a population of approximately 115,000 people, making it the fifth largest city in the State of Michigan. In 1960, the population was less than 68,000.

8. Upon information and belief, the City has a total land area of 28.7 square miles. The City is situated on the Huron River and, in general, the west-central and northwestern parts of the City maintain the highest elevation and the lower elevation sections of the City are along the Huron River and to the southeast.

9. The City is governed by a City Council that has eleven voting members: the mayor and ten City Council members. The City is divided into five wards each of which elects two City Council members. The mayor is elected city-wide and is the presiding officer of the City Council.

B. History of the FDDP

10. In the last quarter of the twentieth century, the City experienced significant population growth and corresponding development. Upon information and belief, the City's infrastructure, including its storm and sanitary sewers and drainage facilities, did not keep pace with the rate of development. As a result, there was insufficient capacity during storm events and sanitary sewer overflows ("SSO's") grew more common from the City's Waste Water Treatment Plant into the Huron River.

11. In the 1960's, the City approved plats for subdivisions in southeastern Ann Arbor, including three phases each for the Lansdowne I and Churchill Downs developments. Upon information and belief, the City was well aware at the time that these areas had demonstrable groundwater problems. The Lansdowne I vicinity had a large pond in the middle of the area

(known at the time as "the Cow Pond") because of heavy runoff and groundwater problems during normal spring rains.

12. Construction began in Lansdowne and Churchill Downs around 1966. Groundwater problems persisted at that time.

13. All houses were lawfully constructed with footing drain connections to the sanitary sewer lines; as so constructed, they all passed their inspections and received Certificates of Occupancy. Approximately 20,000 per 1982 single family homes in Ann Arbor were constructed with legal footing drain connections to the sanitary sewer system.

14. In 1982, the Michigan State Building (plumbing) Code was amended to prohibit the connection of footing drains to sanitary sewer lines. This change in the state law did not purport to require removal of pre-existing connections of residential footing drains to the sanitary sewers nor did it require the installation of any alternative methods of drainage or other retrofitting.

15. Groundwater and runoff conditions in many areas of the City (including the subdivisions in which plaintiffs' homes are located had worsened since construction of plaintiffs' homes). In 1997, the engineering firm Black and Veatch conducted a study of the storm sewer system in the City of Ann Arbor. Upon information and belief, this study concluded that there were severe problems in the City of Ann Arbor storm sewer system and made recommendations as to how these problems could be corrected. In its 1997 *Storm Water Master Plan Report* to the City, the Black and Veatch firm listed a number of inadequacies in the then present storm water conveyance system including the age of the system's components, increased flows beyond the system's design capacity, increased runoff resulting from expanding development, sedimentation occurring during construction-related runoff, channel bank erosion, structural failures and the construction of private storm water facilities including detention basins which were not being

adequately maintained. With respect to the Malletts Creek watershed, the Black and Veatch firm specifically recommended that the existing storm water conveyance system be replaced.

16. Upon information and belief, the City rejected the Black and Veatch report and did not undertake any of the recommended actions.

17. Heavy rain events in Ann Arbor in August of 1998 and June of 2000 resulted in surcharging (overcapacity conditions) in the Ann Arnor sanitary sewer system at least partly due to the cracked conditions of the sewers, which promoted and promotes infiltration of storm water into the sanitary sewer system.

18. As a result of the number of homes affected, City residents demanded an end to the sewer backups and, in fact, a class action was commenced on behalf of the affected homeowners. At the same time, the Michigan Department of Environmental Quality (MDEQ) demanded that the City take action to end the overflows.

19. Starting in 2000, MDEQ demanded mitigation of sewer flows from the City to prevent further unpermitted SSO's but did not impose a particular solution, including a sewer system upgrade. Upon information and belief, the City was unwilling to upgrade the sewers due to the anticipated capital expenditures which would be necessary to upgrade the underground infrastructure.

20. The City contracted with Camp Dresser McKee (CDMI) to propose a solution which would satisfy the demands of the MDEQ. In June, 2001, CDMI issued its *Sanitary Sewer Overflow Prevention Study* (*"the Study"*) to the City. The study's recommendation was that the City "take action to remove rain and groundwater inflow sources into the City sanitary sewer system by implementing a comprehensive city-wide footing drain disconnection program within the City of Ann Arbor."

21. Notably, CDMI the study made no representation as to the legality of its recommended alternative and, in fact, urged caution on the part of the City before any formal action was taken before the City undertook to implement the recommendations in *the Study*. For example, in the Section I. entitled "*Additional Decision Influences*," the following assessment was made:

> ***Work on Private Property Causes Concern*** – *For those homeowners that had previously have basement flooding, they generally said that work on their property (basement and lawn) would be acceptable. However, there were some affected homeowners who were very resistant to allowing any work to be performed. There was also a general concern from unaffected homeowners regarding potential work on their property.*

Later on in that same section of *the Study*, the following concern was raised:

> ***Can the City Work on Private Property?–*** *The option of footing drain disconnection was seen as a viable solution only if access to private property could be arranged. The Council was interested in how other communities had handled this issue.*

This concern as to the legal basis for the recommended solution was expressed later in *the Study*, in Section L. entitled "*Final Recommended Program,*" where the following question was raised:

> ***Legal Authority*** – *Can and will the City of Ann Arbor have the legal framework to accomplish the work required on private property?*

Upon information and belief, the City never sought or obtained a definitive legal analysis of its power and authority to enact legislation requiring mandatory FDD's or, if it did, that analysis has never been made public.

22. Upon information and belief, the City negotiated with the MDEQ and persuaded the agency to accept the FDDP as a solution to the ongoing problems with sanitary sewer overflows within the City of Ann Arbor. On September 4, 2003, a consent order was entered between the City and the MDEQ which, among other things, required the City to undertake 155 Footing Drain Disconnects (FDD's) per year for four years for a total of 620 FDD's. By the time

the consent order was entered into, approximately 150 FDD's had already been performed and were not, therefore, "required" by the consent order. This included the FDD's included in the Plaintiffs' homes.

C. The Ordinance

23. On August 20, 2001, the City passed the Ordinance entitled "Program for Footing Drain Disconnect from POTW." (A copy of the ordinance is attached hereto as Exhibit "1.")

24. The Ordinance served four main functions. First of all, the ordinance determined that preexisting, legally permitted and long-standing footing drain connections were "improper." In that regard, the Ordinance authorized the Director of the Utility Department ("Director") for the City to order property owners within a certain "target areas" to correct "improper storm water inflows" from their property or face a monthly fine of One-Hundred Dollars ($100.00).

25. In fact, in the City's latest iteration of its "Homeowner Information Packet" (*v8.4-8/8/2013*), the City included the following item in the "Frequently Asked Questions" section of its website:

> ***Legal Requirements***
>
> *May I choose not to participate in the program? What are the consequences of that?*
>
> Participation in this program is mandated by city ordinance. The FDD program offers Homeowners the opportunity to have the City pay for installation if the work is completed within the schedule of the program. If the homeowner does not comply with the notices to arrange disconnection, a surcharge of $100 per month will be charged to the homeowner for the additional costs associated with handling un-metered footing drain flows into the sewer system. Disconnection is still required and if done after the 90 day notice expires, the disconnection work will no longer be paid by the city.

(A copy of the most recent Homeowner Information Packet is attached hereto as Exhibit "2").

26. Second, the Ordinance allowed the Director to establish a list of private contractors approved to perform work under the program and established a protocol pursuant to which the homeowner would purportedly enter into a direct contractual relationship with a contractor and the City would not be a party.

27. Third, the Ordinance authorized the City to pay for some or all of the approved work subject to the discretion of the Director. The Ordinance and the Homeowners Information Packet delivered to the designated property owners penalizes those homeowners who wish to have their own contractors perform the FDD or to perform the FDD themselves, by reserving the right of the City to deny all or part of the aforesaid subsidy and deprive such homeowner of City services otherwise provided free (such as permitting, inspection, and direct payment of the FDD Contractor) to property owners who selected a pre-qualified" contractor and the accompanying services of CDMI.

28. Finally, the Ordinance made clear that responsibility for maintaining any improvements constructed under the FDDP, including the maintenance of sump pumps and other equipment, the furnishing of water and electricity, the purchase and installation of any backup systems and all necessary repairs would rest with the homeowner, and not the City or the contractor.

D. The FDDP is implemented.

29. Upon information and belief, as of the date of this complaint, more than 2,000 involuntary FDD's have been completed.

30. The City and/or CDMI delivered a Homeowners Packet to Plaintiff, Anita Yu, during or about the first three months of 2003. The Homeowner Packet threatened fines and other actions if Plaintiff Anita Yu failed to give an enforced consent to the entry into her home and

completion of an FDD. The FDD was to be accompanied by the permanent installation of a sump pump and other equipment inside and outside the basement of her home.

31. As required by the Homeowner Packet, plaintiff, Anita Yu, selected Hutzel Plumbing, a Michigan corporation, for FDD work, one of the five "pre-qualified" plumbers to whom her choice was limited by the City under the FDDP to, and did, complete an FDD inside and outside of her home on September 3, and September 4, 2003.

32. As a part of the FDD completed in her home, construction and plumbing work was performed which disconnected her exterior footing drains from the sanitary sewer system, Instead, the required facilities directed ground water and storm water into plaintiff Anita Yu's crawl space through pipes installed through holes drilled through the exterior wall of her home for collection in a sump constructed and installed inside her home as part of the FDD.

33. The groundwater and storm water introduced into the crawlspace by the City or its contractors or independent contractors flows through the pipes drilled through her wall and into the sump throughout the year. The FDD included permanent installation of an electric sump pump to pump water out of the sump, up a vertical pipe approximately eight feet long to be expelled through piping installed through holes drilled through her interior wall and to the exterior of her house for discharge. She currently has no flooding from her sump pump out onto the floor of the crawlspace, by the sump pump runs daily. The sump and sump pump were installed in a location accessible to plaintiff, Anita Yu, only with difficulty as she suffers from a disabling condition that it makes it impossible for her to perform the operation and maintenance mandated by the FDDP and the FDD Ordinance without hiring a contractor at her own cost. Prior to the disconnect, she never experienced any flooding in her basement or crawlspace and had no water flowing into and through her crawl space into a sump pump.

34. Plaintiff, Anita Yu, did not experience a sewer backup before the Ordinance was enacted.

35. Before the disconnect, Ms. Yu had complete peace of mind as a result of the absence of any flooding or other water problems and now she is required to operate and maintain, at her own expense, equipment installed by force of law.

36. The disconnect of Ms. Yu's footing drain was completed *before* the September 4, 2003 entry of the Consent Order between the MDEQ and the City.

37. Plaintiffs, John Boyer and Mary Raab, under threat of compulsion, completed the footing drain disconnect in 2002. Prior to that time, their basement had been dry and they had experienced no flooding, dampness or other water problems in their home. In conjunction with the disconnection of their footing drain, a sump pump was installed in their basement which discharges into their backyard. Since their footing drain was disconnected, their backyard and basement have flooded on a significant and recurring basis. Two flooding events were particularly severe, with the basement living space under water while the sump pumps were fully operational.

38. Mr. and Mrs. Boyer have borne the entire cost of the FDD, including "upgrades" such as a Six-Hundred Dollar ($600.00) backup hydraulic pump that should have been installed initially, together with cleanup costs, electrical costs and the costs of four to six gallons per minute of City water required to run the hydraulic backup during the regular power outages experienced in their home in Ward 4.

39. The disconnect of the Boyer/Raab footing drain was completed *before* the September 4, 2003 entry of the Consent Order between the MDEQ and the City.

E. The Survey

40. In January of 2014, the City released the results of its *2013 Sanitary Sewage Wet Weather Evaluation Project Footing Drain Disconnection (FDD) survey*. According to the survey statistics, 2350 surveys were mailed and 850 responses were received. In particular, the following results were noted:

- Of 850 responses, 134 respondents (16%) reported experiencing sanitary sewage backups prior to FDD/sump pump installation. Of these 134 respondents, 34 of the 134 reported continued sanitary sewage backups and 42 of the respondents who *did not* have sanitary sewage backups before the FDD experienced them afterwards.

- Of the 426 respondents who reported experiencing water flooding/ seepage/ dampness problems before the FDD/sump pump installation, 247 experienced continuing flooding/seepage/ dampness problems after the FDD/sump pump installation.

- The total restoration cost for water flooding/seepage/dampness after the FDD sump pump installation among the 158 respondents was Four-Hundred and Fifty-Six Thousand Dollars ($456,000.00) and the average restoration cost was Three-Thousand, Two-Hundred and Ninety-Seven Dollars ($3,297.00).

- Among the respondents, almost 40% reported some, or a significant increase in, anxiety as a result of the installation of the sump pumps.

V. THE PLAINTIFFS' CLAIMS

41. Because the Plaintiffs' homes were constructed in conformity with the then applicable building code and other relevant standards and the Plaintiffs or their predecessors-in-title received Certificates of Occupancy and/or other necessary approvals from the City, the Plaintiffs acquired vested rights to the footing drains and related storm water and sanitary sewer facilities related thereto.

42. Upon information and belief, the Ordinance was not enacted in response to emergency conditions or some other imminent threat to public health, safety or welfare. Rather,

the Ordinance was enacted by the City in order to facilitate a solution to long-standing and self-created conditions in the least expensive and/or most expedient way possible.

43. The mandatory disconnection of the Plaintiff's footing drains and the forced installation of sump pumps and related equipment constituted a physical intrusion by the City, or others acting on its behalf or in its stead, resulting in a permanent physical occupation of the Plaintiffs' property and a significant interference with the Plaintiffs' use of their property.

44. Moreover, the ongoing and perpetual responsibilities for the operation and maintenance of the sump pumps and related equipment represent an unreasonable financial and personal burden upon the Plaintiffs' use and enjoyment of their property and represent an inappropriate delegation by the City to its citizens of its governmental obligations.

45. The Plaintiffs have suffered damage to their property, have been forced to incur costs and expenses as a direct result of the FDDP and will continue to incur such costs and expenses in the future.

46. In addition, Plaintiffs John Boyer and Mary Raab have incurred costs and expenses attributable to flooding and water damage resulting from the FDDP and, upon information and belief, will continue to incur such costs and expenses in the future.

47. Whereas the Plaintiffs previously enjoyed the peace of mind and repose which comes from having dry basements and no water problems, they have, since the implementation of the FDDP, experienced the inconvenience associated with the installation of the sump pump and related equipment, the ongoing burdens associated with the maintenance and operation of the sump pumps and, in general, the diminution in their quality of life attributable to the FDDP.

48. Due to the City's enactment, implementation and enforcement of the Ordinance, the Plaintiffs' properties have been unreasonably burdened, economically impaired, physically

occupied and/or invaded and otherwise damaged, resulting in the *de facto* or inverse condemnation of the Plaintiffs' properties.

FIRST CAUSE OF ACTION
MCL SECTION 213.23

49. The Plaintiffs' repeat and re-allege Paragraphs One through Forty-Eight as if more full set forth herein.

50. The City, through its enactment, implementation and enforcement of the FDDP Ordinance has taken private property for public use as that term is defined in MCL Section 213.23.

51 In so doing, the City has acted in derogation of the requirements of MCL Section 213.23.

52. Alternatively, if the City had attempted to comply with the requirements of MCL Section 213.23, it would have failed in its burden of proving that the taking was necessary in accordance with Section 213.23 (2) because no public necessity of an extreme sort existed, the property taken will not remain subject to public oversight and the property was not selected on facts of independent public significance or concern, including blight.

53. The City has, therefore, proceeded in violation of law and in violation of the Plaintiffs' constitutional rights.

54. As a result of the foregoing, the Plaintiffs are entitled to just compensation.

SECOND CAUSE OF ACTION
MICHIGAN CONSTITUTION

55. Plaintiffs repeat and re-allege Paragraphs One through Fifty-Four as if more fully set forth herein.

56. Article X, Section 2 of the Michigan Constitution reads, in pertinent part, as follows: "Private property shall not be taken for public use without just compensation therefore being first made or secured in a manner prescribed by law."

57. The City, through its enactment, implementation and enforcement of the FDDP Ordinance, has taken the Plaintiffs' properties without due process or just compensation.

58. The Ordinance represents the City's official policy.

59. As a result of the foregoing, the Plaintiffs are entitled to just compensation.

THIRD CAUSE OF ACTION
FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION

60. Plaintiffs repeat and re-allege Paragraphs One through Fifty-Nine as if more fully set forth herein.

61. The Fifth Amendment to the United States Constitution provides, in pertinent, that private property shall not be taken for public use without just compensation.

62. The City's enactment, implementation and enforcement of the FDDP Ordinance has resulted in the taking of the Plaintiffs' properties without due process or just compensation.

63. As a result of the foregoing, the Plaintiffs are entitled to just compensation.

FOURTH CAUSE OF ACTION
42 U.S.C. SECTION 1983

64. Plaintiffs repeat and re-allege Paragraphs One through Sixty-Three as if more fully set forth herein.

65. The City is a "person" subject to liability under the Federal Civil Rights Act of 1871 (42 U.S.C. Section 1983) for violating the federally-protected rights of others. The enactment, implementation and enforcement of the FDDP ordinance by the City of Ann Arbor has resulted in the violation of the Plaintiffs' federally protected rights, to wit, their right not to have

their property taken without just compensation or due process and their right to be free from mandatory work and physical labor under the Ordinance solely for the supposed benefit of others without pay or protection of law.

66. The enactment, implementation and enforcement of the FDDP Ordinance by the City constitutes a taking of the Plaintiffs' properties by physical invasion and physical occupation without due process or just compensation and the imposition of requirements for mandatory work and physical labor.

67. As a result of the foregoing, the Plaintiffs are entitled to just compensation and to payment for their work, their physical labor and their expenses.

FIFTH CAUSE OF ACTION
INJUNCTIVE RELIEF

68. Plaintiffs repeat and re-allege Paragraphs One through Sixty-Seven as if more fully set forth herein.

69. The Plaintiffs have no adequate remedy at law.

70. In the absence of injunctive relief, the Plaintiffs will continue to (1) endure the physical invasion and physical occupation of their property, (2) assume ongoing and perpetual responsibility for the operation and maintenance of the sump pumps and related equipment installed in their homes for the supposed benefit of others without pay and (3) bear an unreasonable financial and personal burden upon their use and enjoyment of their property.

71. As a result, the Plaintiffs are entitled to injunctive relief, restraining and enjoining the City, its agents, representatives and employees, and all others acting on its behalf or in its stead from taking any further steps to implement or enforce the ordinance.

72. In addition to just compensation, the Plaintiffs are entitled to injunctive relief, requiring the City to reverse, correct and remedy the effects of the unconstitutional taking, and payment for their non-volunteer work and physical labor required by the Ordinance.

SIXTH CAUSE OF ACTION
DECLARATORY JUDGMENT

73. Plaintiffs repeat and re-allege Paragraphs One through Seventy-Two as if more fully set forth herein.

74. The Plaintiffs are entitled to a judgment, declaring that the FDDP Ordinance is unconstitutional, on its face and as implemented, because it authorizes the City to take private property without just compensation therefor and because it allows for such takings without any judicial determination of public use, all in violation of Michigan State Law and the Michigan Constitution, as well as the laws of the United States and the United States Constitution.

SEVENTH CAUSE OF ACTION
ATTORNEYS' FEES

75. Plaintiffs repeat and re-allege paragraphs One through Seventy-Four as if more fully set forth herein.

76. As a result of the facts and circumstances of this matter, the Plaintiffs are entitled to reasonable attorneys' fees as allowed by law.

WHEREFORE, the Plaintiffs Yu Boyer and Raab respectfully request judgment as follows:

A. On their first cause of action, just compensation in accordance with Michigan State Law;

B. On their second cause of action, just compensation in accordance with the Michigan State Constitution;

C. On their third cause of action, just compensation in accordance with 42 U.S.C. Section 1983;

D. On their fourth cause of action, just compensation in accordance with the Fifth Amendment to United States Constitution;

E. On their fifth cause of action, preliminary and permanent injunctive relief restraining and agents, representatives and employees and all others acting on its behalf or in its stead from taking any other further steps to implement, or enforce the FDD Ordinance and granting such other injunctive relief as to the Court may seem just and proper.

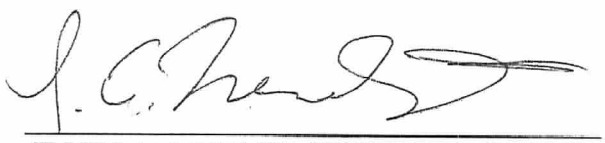
F. On their third cause of action, a declaration that the City of Ann Arbor's FDDP ordinance is unconstitutional, both on its face and as implemented, and declaration further determining their respective rights and responsibilities of the parties;

G. On their seventh cause of action, reasonable attorneys' fees as allowed by law;

H. Such other and further relief as the Court may deem just and proper; and

I. The costs and disbursements of this action.

Respectfully submitted,



IRVIN A. MERMELSTEIN, ESQ (P52053)
Attorney for Plaintiffs
2099 Ascot Street
Ann Arbor, Michigan 48103
734.717.0383
nrglaw@gmail.com

M. Michael Koroi

M. MICHAEL KOROI, ESQ (P44470)
Co-Counsel for Plaintiffs
150 N. Main St.
Plymouth, MI 48170-1236
(734) 459-4040
mmkoroi@sbcglobal.net

by Donald W. O'Brien, Jr.

WOODS OVIATT GILMAN LLP
By: Donald W. O'Brien, Jr., Esq.
Co-Counsel for Plaintiffs
(*Pro Hac Vice* application pending)
2 State Street
700 Crossroads Building
Rochester, New York 14614
585.987.2800
dobrien@woodsoviatt.com

Dated: February 27, 2014
boyer.comp