SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JANUARY 13, 2015

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Sweeny, J.P., Renwick, Andrias, Moskowitz, Manzanet-Daniels, JJ.

13131 The People of the State of New York, Ind. 3120/10
Respondent,

-against-

Ronel Joseph,
Defendant-Appellant.

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Richard M. Greenberg, Office of the Appellate Defender, New York (Eunice C. Lee of counsel), and Weil Gotshal & Manges LLP, New York (Matthew E. K. Howatt of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Diane N. Princ of counsel), for respondent.

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Judgment, Supreme Court, New York County (Laura A. Ward, J.), rendered January 13, 2011, as amended February 3, 2011 and February 22, 2011, convicting defendant, after a jury trial, of burglary in the second and third degrees, attempted escape in the second degree and resisting arrest, and sentencing him, as a second violent felony offender, to an aggregate term of seven years, affirmed.

While monitoring a surveillance camera, a store employee observed defendant entering the two open sidewalk doors leading

to the store's basement and pacing back and forth in the basement with what appeared to be a flashlight. The store was located on the first floor of a seven-floor building, and all of the six floors above it consisted of residential apartments. The basement was accessible only through the sidewalk doors located outside the store, and there was no direct access from the basement to any part of the residential portion of the building, or to the store itself.

After observing defendant, the employee went outside and locked the sidewalk doors, trapping defendant in the basement. Police arrived and, after reviewing the surveillance tape, asked the employee to unlock the doors. The officers then asked defendant to climb out of the basement, and arrested him. As an officer attempted to put defendant into a patrol car he bolted, saying, "I'm not going to jail." After a struggle with the pursuing officer, defendant was subdued. At trial, the defense was that defendant entered the basement to retrieve his cell phone after he dropped it through the open sidewalk doors.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. Defendant was properly

convicted of second-degree burglary, which requires entry into a dwelling (Penal Law § 140.25[2]), based on his entry into the basement of the store located on the ground floor of a small apartment building (*see People v McCray*, 23 NY3d 621 [2014]).

In *McCray*, the Court of Appeals reaffirmed the rule, established in *Quinn v People* (71 NY 561 [1878]), that "if a building contains a dwelling, a burglary committed in any part of that building is the burglary of a dwelling; but an exception exists where the building is large and the crime is committed in a place so remote and inaccessible from the living quarters that the special dangers inherent in the burglary of a dwelling do not exist" (*McCray,* 23 NY3d at 624). Although the inaccessibility requirement appears to have been met, the other condition for application of the exception – namely, that the building in question be "large" - has not.

Stating that the decision in *McCray* did not turn on the size of the building, and that the critical factor is whether there is close contiguity between the residential and nonresidential elements of the building such that the residents of the building would be aware of the burglar's presence, the dissent would reverse the conviction for second-degree burglary because the basement was entirely sealed off and inaccessible from the

residences above. However, in *Quinn*, which is the foundation on which *McCray* stands, there also was no "internal communication" between the shop that was broken into and the living quarters above, and a person had to go into the yard and then up stairs to get from one to another (*Quinn* at 565). Nevertheless, the Court of Appeals affirmed the conviction of first-degree burglary because the shop "was within the same four outer walls, and under the same roof" (*id.*). The Court reasoned that "the essence of the crime of burglary at common law is the midnight terror excited, and the liability created by it of danger to human life, growing out of the attempt to defend property from depredation. It is plain that both of these may arise, when the place entered is in close contiguity with the place of the owner's repose, though the former has no relation to the latter by reason of domestic use or adaptation" (*id.* at 567).

In reaffirming the holding in *Quinn*, the Court of Appeals in *McCray* stated: "These words from almost a century and a half ago are still apt as an explanation of why burglary of a dwelling is a more serious crime than other burglaries: an intrusion into a home, or an overnight lodging, is both more frightening and more likely to end in violence. And it remains true today, as it was in 1878, that these dangers are created in significant degree

when the crime is committed 'in close contiguity' with a 'place of repose' *even though the place of the burglary and the sleeping quarters are not instantly accessible to each other*. When a store owner in his bedroom becomes conscious that there is a burglary in the shop downstairs, or when a hotel guest hears a burglar in the coffee shop across the hall from her room, the special dangers that accompany the burglary of a dwelling are sufficiently present to justify treating the crime as a more serious one than burglary of a building where no one lives" (23 NY3d at 627 [emphasis added]).

Furthermore, in addressing the legislative history of the burglary statutes as it related to *Quinn,* the Court observed that "[w]e interpret the remedy adopted by the 1967 Legislature as reviving *Quinn*'s holding that, in general, burglary of a partly residential building is burglary of a dwelling, even if the burglar enters only the nonresidential part. But we do not interpret it as removing the limitation that the *Quinn* court placed on its own holding: *In large buildings*, situations can arise in which the general rule will not be applied because it does not make sense. That was the law in 1878 and is the law today" (23 NY3d at 629 [emphasis added]).

The apartment building in this case cannot be characterized

as "large" within the meaning of *McCray*. With the residential dwellings located immediately above the store, it cannot be said that there was "virtually no risk" that the people living in the apartments would not "even be conscious" of the presence of a burglar who entered the basement through the sidewalk doors (23 NY3d at 627). Thus, as in *Quinn*, the scenario before us falls within the general rule, not the exception.

Defendant also challenges the sufficiency and weight of the evidence supporting both of his burglary convictions with respect to the element of intent. However, the evidence supports the conclusion that defendant entered the basement with the intent to commit a crime. The jury reasonably rejected defendant's implausible explanation for his behavior.

All concur except Renwick and Manzanet-Daniels, JJ. who dissent in part in a memorandum by Manzanet-Daniels, J. as follows:

MANZANET-DANIELS, J. (dissenting in part)

I would reverse the conviction for second degree burglary.

The Court of Appeals stated, long ago, in *Quinn v People* (71 NY 561 [1878]), and recently reaffirmed the principle in *People v McCray* (23 NY3d 621 [2014]), that where part of a building with residences is "rented to different persons for purposes of trade or commerce," that "part of a dwelling-house may be so severed from the rest of it" as to not qualify as a "dwelling" within the meaning of the burglary statute (*Quinn*, 71 NY at 573). The Court recognized that the purpose for the increased penalty for burglary of a dwelling is to prevent "midnight terror . . . [and] the danger to human life, growing out of the attempt to defend property from depredation" (*id*. at 567)

In *McCray*, the Court of Appeals reaffirmed the "common sense limitation on a literal reading of [the] statute" regarding dwellings, rejecting the prosecution's argument for a strict, literal application of the statute that would have permitted no exceptions (23 NY3d at 628). The Court underscored that where a "crime is committed in a place so remote and inaccessible from the living quarters . . . the special dangers inherent in the burglary of a dwelling do not exist."

In this case, the evidence showed that the basement was

entirely sealed off and inaccessible from the residences above. As the trial court found, "there was no testimony that you could get to the apartments" internally from the basement of the delicatessen. Moreover, there was no testimony that a burglar could access any part of the building from the basement – it was entirely shut off and accessible only via the double doors to the public sidewalk. The basement was the quintessence of "inaccessible," given that it was cut off from the building itself, and accessible only via the public sidewalk. Indeed, the delicatessen workers locked defendant into the vault-like basement while they called the police.

The majority agrees that the inaccessibility requirement has been met in this case, yet nonetheless affirms, reasoning that the Court of Appeals in *McCray* imposed an additional requirement that the building in question be "large" in order to constitute a dwelling.

In my view, there is no support for such an interpretation of "dwelling," either in *Quinn* or in *McCray* itself. *Quinn* and *McCray* did not turn on this distinction; rather, the critical factor was whether there was close contiguity between the residential and nonresidential elements of the building. While a building's size may inform the determination as to whether the

residential elements were accessible, size per se is not a dispositive factor. The critical factor is whether "the people living in the apartments will even be conscious of [the burglar's] presence"; if not, "[s]uch a burglar should be convicted only of third degree, not second degree, burglary" (*McCray*, 23 NY3d at 627). Notably, the Court's analysis of whether the defendant in *McCray* committed second degree burglary by burglarizing a locker room and Madame Tussaud's wax museum, both located within the same hotel complex, focused on the contiguity of those places to the floors containing the guest rooms. The burglary of the locker room easily qualified because the defendant entered and exited the locker room via stairwells which provided a means of reaching the guest floors of the hotel. The Court found that the burglary of the wax museum qualified, though "just barely," because the jury could find that the defendant entered and exited the wax museum via the same stairwell, granting the burglar "ease of access" (23 NY3d at 630). Notably, the Court stated "we might well hold that a burglar who entered Madame Tussaud's from the street, and never entered the stairwell it shared with the hotel, committed only third degree burglary" (*id.*).

While, as the majority notes, there was no internal

communication between the ground-floor shop and the upper floor apartments in the building in *Quinn*, there was, however, an external staircase that permitted access to the upper floors. Here, the burglar was trapped inside a basement vault, which was not connected in any way, internally or externally, with the upper elements of the building. I believe this distinction is an important one in classifying this case within the exception outlined in *McCray*. I would also note that what constitutes a large building in today's era is different from whatever would have been considered a large building in 1878, when *Quinn* was decided.

Consistent with the Court of Appeals' admonition that a conviction for burglary of a dwelling is not authorized where "the burglar neither comes nor readily can come near to anyone's living quarters" (*McCray*, 23 NY3d at 628), I would reverse. I

would in any event urge the Court to clarify whether the size of the building is a necessary criterion in making the determination as to whether a building constitutes a "dwelling."

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 13, 2015

CLERK

Tom, J.P., Sweeny, DeGrasse, Feinman, Gische, JJ.

13652 Esther Hephzibah, Index 116481/10
Plaintiff-Appellant,

-against-

City of New York, et al.,
Defendants-Respondents.

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The Berkman Law Office, LLC, Brooklyn (Robert J. Tolchin of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Emma Grunberg of counsel), for respondents.

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Order, Supreme Court, New York County (Kathryn E. Freed, J.), entered May 30, 2013, which granted defendants' motion to dismiss the complaint for failure to state a cause of action, unanimously affirmed, without costs.

Plaintiff alleges that she suffered injuries when she was knocked over on a crowded sidewalk during the course of a police chase. The complaint alleges that the police action was undertaken negligently, in reckless disregard for the safety of pedestrians and in violation of Police Department rules and regulations regarding pursuit of low-level suspects. Defendants moved to dismiss plaintiff's negligence claim pursuant to CPLR 3211(a)(7) on the ground that she failed to allege that defendants owed her any "special duty." Additionally, defendants

invoked the affirmative defense of governmental immunity, contending that the officer's allegedly negligent attempt to effect an arrest involved the discretionary exercise of reasoned judgment in providing police services to the public.

Supreme Court dismissed the complaint, finding that plaintiff failed to establish that she was owed a special duty. We note that the police conduct at issue clearly involved the exercise of discretion in making an arrest (*see Johnson v City of New York*, 15 NY3d 676, 681 [2010]; *see also McLean v City of New York*, 12 NY3d 194, 202 [2009]). Even if the action is not regarded as an exercise of discretion, to sustain a cause of action where a ministerial act is involved, a plaintiff is required to plead the existence of a special duty (*see Valdez v City of New York*, 18 NY3d 69, 77-78 [2011]; *McLean*, 12 NY3d at 202; *Cuffy v City of New York*, 69 NY2d 255, 260 [1987]), and plaintiff has failed to do so.

Plaintiff advances only conclusory allegations that the officer's conduct violated police department rules and regulations, and thus was not a reasonable exercise of judgment or discretion shielded by governmental immunity (*see e.g. Arias v City of New York*, 22 AD3d 436, 437 [2d Dept 2005]; *cf. Newsome v County of Suffolk*, 109 AD3d 802 [2d Dept 2013]; *Lubecki v City of*

New York, 304 AD2d 224, 233-234 [1st Dept 2003], *lv denied* 2 NY3d 701 [2004]; *Rodriguez v New York*, 189 AD2d 166, 177-178 [1st Dept 1993]). The complaint, as supplemented by plaintiff's bill of particulars, fails to specify any regulation claimed to have been contravened by the officer's actions so as to deprive the City of immunity.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 13, 2015

CLERK

Sweeny, J.P., Andrias, Saxe, DeGrasse, Gische, JJ.

13845 In re Retention/Release of Dean Young, etc., Index 469/13

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Jacobi Medical Center,
Petitioner-Appellant,

-against-

Dean Young,
Respondent-Respondent.

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McAloon & Friedman, P.C., New York (Gina Bernardi Di Folco of counsel), for appellant.

Marvin Bernstein, Mental Hygiene Legal Service, New York (Margo Flug of counsel), for respondent.

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Appeal from order, Supreme Court, Bronx County (Fernando Tapia, J.), entered July 31, 2014, which, insofar as appealed from, denied petitioner's application for the continued retention of respondent under Mental Hygiene Law § 9.39(a), unanimously dismissed, without costs, as moot.

Respondent was involuntarily admitted as a psychiatric patient to petitioner Jacobi Medical Center on July 23, 2014. Jacobi thereafter filed an application pursuant to Mental Hygiene Law § 9.39 for authorization to retain respondent at the hospital, which respondent opposed. After a hearing, the court found that respondent was suffering from a mental illness, but

granted his request to be released from the hospital, finding that inpatient care and treatment were not essential to respondent's welfare. We granted a stay of that order pending appeal.

At oral argument, we were advised that respondent had been released from petitioner hospital a few days prior to argument. However, the parties asked that the matter be heard on the merits pursuant to exception to the mootness doctrine, since the issue of respondent's condition and potential involuntary commitment is likely to arise again.

"Typically, the doctrine of mootness is invoked where a change in circumstances prevents a court from rendering a decision that would effectively determine an actual controversy" (*Matter of Dreikausen v Zoning Bd. of Appeals of City of Long Beach*, 98 NY2d 165, 172 [2002]). Respondent's release from the hospital terminated the controversy represented by this appeal.

Contrary to respondent's contention, this is not the type of case that would warrant an invocation of the exception to the mootness doctrine (*see Hearst Corp. v Clyne*, 50 NY2d 707, 714-715 [1980]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 13, 2015

CLERK

Tom, J.P., Friedman, Acosta, Saxe, Kapnick, JJ.

13925 The People of the State of New York, Ind. 4875/11
Respondent,

-against-

Billy Davis,
Defendant-Appellant.

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Richard M. Greenberg, Office of the Appellate Defender, New York (Leila N. Tabbaa of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Jeffrey A. Wojcik of counsel), for respondent.

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Rena K. Uviller, J. at plea; Eduardo Padro, J. at sentencing), rendered on or about December 12, 2012,

Said appeal having been argued by counsel for the respective parties, due deliberation having been had thereon, and finding the sentence not excessive,

It is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed.

ENTERED: JANUARY 13, 2015

CLERK

Counsel for appellant is referred to § 606.5, Rules of the Appellate Division, First Department.

Tom, J.P., Friedman, Acosta, Saxe, Kapnick, JJ.

13927 The People of the State of New York, Ind. 5733/03
Respondent,

-against-

Juan Vasquez,
Defendant-Appellant.

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Scott A. Rosenberg, The Legal Aid Society, New York (Cheryl Williams of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Luis Morales of counsel), for respondent.

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Judgment of resentence, Supreme Court, New York County (Richard D. Carruthers, J.), rendered October 19, 2011, as amended October 26, 2011, resentencing defendant to a term of 12 years, with 5 years' postrelease supervision, unanimously affirmed.

The resentencing proceeding imposing a term of postrelease

supervision was neither barred by double jeopardy nor otherwise unlawful (*see People v Lingle*, 16 NY3d 621 [2011]), and we do not find the term imposed to be excessive.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 13, 2015

CLERK

Tom, J.P., Friedman, Acosta, Saxe, Kapnick, JJ.

13928 The People of the State of New York, Ind. 793/10
Respondent,

-against-

Evan Turner,
Defendant-Appellant.

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Richard M. Greenberg, Office of the Appellate Defender, New York (Margaret E. Knight of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Alice Wiseman of counsel), for respondent.

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Juan Merchan, J.), rendered on or about October 18, 2010,

Said appeal having been argued by counsel for the respective parties, due deliberation having been had thereon, and finding the sentence not excessive,

It is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed.

ENTERED: JANUARY 13, 2015

CLERK

Counsel for appellant is referred to § 606.5, Rules of the Appellate Division, First Department.

Tom, J.P., Friedman, Acosta, Saxe, Kapnick, JJ.

13930-
13930A-
13930B In re Ramel Anthony S., etc., and Others,

Children Under the Age of
Eighteen Years, etc.,

Canita G.,
Respondent-Appellant,

Good Shepherd Services,
Petitioner-Respondent.

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Joseph V. Moliterno, Scarsdale, for appellant.

Law Offices of James M. Abramson, PLLC, New York (Dawn M. Orsatti of counsel), for respondent.

Steven N. Feinman, White Plains, attorney for the children.

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Orders, Family Court, Bronx County (Joan L. Piccirillo, J.), entered on or about October 17, 2013, which, to the extent appealed from as limited by the briefs, found that respondent mother permanently neglected the subject children, unanimously affirmed, without costs.

While the court erred in admitting certain agency progress notes that were not made at the time of the events reported, or within a reasonable time thereafter (*see* CPLR 4518; *Matter of Dustin H.*, 40 AD3d 995, 996 [2d Dept 2007]), any error was harmless in light of the clear and convincing evidence of

permanent neglect in the remaining progress notes and the testimony adduced at the fact-finding hearing (*see Matter of Joshua Jezreel M. [Dennis M.]*, 80 AD3d 538 [1st Dept 2011]). Such evidence established, among other things, that petitioner referred respondent to a drug treatment program and scheduled visitation. Despite these diligent efforts, respondent failed to consistently visit the children, continued drug use, and relocated multiple times without providing the agency with her address (*see* Social Services Law § 384-b[7][f]; *Matter of Joshua Jezreel M.* at 538-539; *see also Matter of Kimberly Vanessa J.*, 37 AD3d 185, 186 [1st Dept 2007]).

We have considered respondent's remaining arguments and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 13, 2015

CLERK

Tom, J.P., Friedman, Acosta, Saxe, Kapnick, JJ.

13931 The People of the State of New York Ind. 366/05
Respondent, SCI 2015C/05

-against-

Jose Carrasco,
Defendant-Appellant.

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Leonard J. Levenson, New York, for appellant.

Robert T. Johnson, District Attorney, Bronx (Rafael Curbelo of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Elizabeth A. Foley, J.), rendered December 19, 2008, convicting defendant, after a jury trial, of murder in the second degree and robbery in the first degree, and sentencing him to an aggregate term of 25 years to life, unanimously affirmed.

The verdict was not repugnant, and the court properly denied defendant's application to resubmit the case to the jury for further deliberations. In the abstract, a person can commit a robbery, along with an intentional murder not committed in furtherance of the robbery, without also committing felony murder. "If there is a possible theory under which a split verdict could be legally permissible, it cannot be repugnant, regardless of whether that theory has evidentiary support in a

particular case" (*see People v Muhammad*, 17 NY3d 532, 539 [2011]). Defendant's repugnancy argument is unavailing, because it essentially asserts the lack of a reasonable view of the trial evidence to support the jury's mixed verdict, which is a question of factual inconsistency and is not the test for repugnancy (*see id.* at 539-545).

The court properly denied defendant's motion to suppress physical evidence. There is no basis for disturbing the court's credibility determinations. The evidence recovered from defendant's apartment was obtained through the valid consent of a co-occupant with authority over the places where the property was found (*see People v Gonzalez*, 88 NY2d 289, 294 [1996]), or was voluntarily given to the police by a civilian who was not acting as a police agent (*see People v Duerr*, 251 AD2d 161 [1st Dept 1998], *lv denied* 92 NY2d 949 [1998]).

Defendant's statement was not the product of an unlawful arrest. Probable cause was not based solely on an anonymous tip, but on other evidence including the physical evidence lawfully recovered from defendant's apartment, which clearly connected defendant to the crime. Defendant's remaining argument for suppression of his statement is improperly raised for the first time in a reply brief, and we decline to review it in the

interest of justice (*see e.g. People v Napolitano*, 282 AD2d 49, 53 [1st Dept 2001], *lv denied* 96 NY2d 866 [2001]).

Defendant's claim that the testimony of the People's DNA expert violated the Confrontation Clause is without merit (*see People v Meekins*, 10 NY3d 136, 159 [2008]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 13, 2015

CLERK

Tom, J.P., Friedman, Acosta, Saxe, Kapnick, JJ.

13932 The People of the State of New York, Ind. 1167/92
Respondent,

-against-

David Daniel,
Defendant-Appellant.

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Seymour W. James, Jr., The Legal Aid Society, New York (Bonnie C. Brennan of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Diane N. Princ of counsel), for respondent.

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Order, Supreme Court, New York County (Ruth Pickholz, J.), entered on or about December 19, 2011, which adjudicated defendant a level three sexually violent sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

Defendant's admissions provided clear and convincing evidence that supported a 15-point assessment under the risk factor for drug or alcohol abuse (*see People v Watson*, 112 AD3d 501, 502 [1st Dept 2013] *lv denied* 22 NY3d 563 [2014]). In any event, regardless of whether defendant's correct point score is 145 or 130, he would still be a presumptive level three sex

offender, and we find no basis for a downward departure (*see People v Gillotti*, 23 NY3d 841, 861 [2014]). The mitigating factors cited by defendant were adequately taken into account by the risk assessment instrument, and were in any event, outweighed by the seriousness of the underlying crimes.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 13, 2015

CLERK

Tom, J.P., Friedman, Acosta, Saxe, Kapnick, JJ.

13933 The People of the State of New York, Respondent, Ind. 1163/06

-against-

Matthew Erving, Defendant-Appellant.

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Scott A. Rosenberg, The Legal Aid Society, New York (Denise Fabiano of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (David M. Cohn of counsel), for respondent.

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Order, Supreme Court, New York County (Charles H. Solomon, J.), entered on or about January 14, 2011, which adjudicated defendant a level three sexually violent predicate offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court properly applied the presumptive override for a prior felony sex crime conviction, and defendant's completion of a sex offender treatment program while in prison and his relatively minor disciplinary history while incarcerated did not warrant a downward departure. In addition to the underlying sex crime conviction, defendant had two prior felony sex convictions, and all three cases involved similar violent behavior,

demonstrating a serious threat of recidivism (*see e.g. People v Torres*, 90 AD3d 442 [1st Dept 2011], *lv denied* 18 NY3d 809 [2012]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 13, 2015

CLERK

Tom, J.P., Friedman, Acosta, Saxe, Kapnick, JJ.

13934 Robert Rosasco, et al., Index 153666/13
Plaintiffs-Respondents,

-against-

John Cella, as Administrator
of the Estate of Walter Rosasco,
Deceased, et al.,
Defendants-Appellants,

Liana Smith, et al.,
Defendants.

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Gallet Dreyer & Berkey, LLP, New York (Adam M. Felsenstein of counsel), for appellants.

Rafferty & Redlisky, LLP, Pelham (Robert G. Rafferty of counsel), for respondents.

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Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered on or about February 20, 2014, which, inter alia, granted plaintiffs' motion for partition and sale of the subject property, and ordered that the proceeds be held in escrow pending final resolution of the proceeding in Surrogate's Court, unanimously affirmed, without costs.

The motion was properly granted as plaintiffs showed their ownership interest in the property at issue, and that it would be prejudicial to physically divide it (*see* RPAPL 901; *Manganiello v Lipman*, 74 AD3d 667, 668 [1st Dept 2010]). Because the appraisal

annexed as an exhibit to the amended verified complaint was prepared on behalf of defendants, by their agent authorized to make such a statement, it was a party admission (*see Georges v American Export Lines*, 77 AD2d 26, 33 [1st Dept 1980]; *Brusca v El Al Israel Airlines*, 75 AD2d 798, 800 [2d Dept 1980]).

Although there is a related proceeding in Surrogate's Court, that proceeding does not involve partition, and the escrowing of the proceeds of the sale avoided any risk of inconsistent judgments. Furthermore, plaintiffs' pursuit of litigation in various fora with regard to their rights to the property at issue did not rise to the level of "immoral" or "unconscionable" conduct that would give rise to a defense of unclean hands (*Columbo v Columbo*, 50 AD3d 617, 619 [2d Dept 2008]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 13, 2015

CLERK

Tom, J.P., Friedman, Acosta, Saxe, Kapnick, JJ.

13935 The People of the State of New York, Ind. 5110/12
Respondent,

-against-

Jamal Thompson,
Defendant-Appellant.

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Midwin Charles & Associates LLC, New York (Midwin Charles of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Joshua L. Haber of counsel), for respondent.

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Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered January 15, 2014, convicting defendant, after a jury trial, of falsifying business records in the first degree and offering a false instrument for filing in the first degree, and sentencing him to a fine of $750.00 and three days of community service, unanimously affirmed.

Defendant's ineffective assistance of counsel claims are unreviewable on direct appeal because they generally involve matters not reflected in, or fully explained by, the record (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). Accordingly, since defendant has not made a CPL 440.10 motion, the merits of the ineffectiveness claims may not be addressed on appeal. In the alternative, to the extent the

existing record permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]).

Defendant's claim that the evidence supporting the falsifying business records conviction was legally insufficient is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. The evidence demonstrated that defendant made a false entry on a form regarding his purported disposal of a firearm, and that he did so with the intent to commit or conceal his unlawful possession of the firearm (*see* Penal Law § 175.10). The People were not required to establish that defendant committed, or was convicted of, the crime he intended to conceal (*see People v McCumiskey*, 12 AD3d 1145 [2004]; *see also People v Taveras*, 12 NY3d 21 [2009]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 13, 2015

CLERK

Tom, J.P., Friedman, Acosta, Saxe, Kapnick, JJ.

13939 Anthony Mejia, Index 304990/09
Plaintiff-Appellant,

Karen Santos,
Plaintiff,

-against-

Rafael Ramos, et al.,
Defendants-Respondents,

Phyllis G. Taylor
Defendant.

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Wingate Russotti & Shapiro & Halperin, New York (Joseph P. Stoduto of counsel), for appellant.

O'Connor McGuinness, Conte, Doyle, Oleson, Watson & Loftus, LLP, White Plains (Montgomery L. Effinger of counsel), for Rafael Ramos, respondent.

Baker McEvoy Morrissey & Moskovits, P.C., Brooklyn (Colin F. Morrissey of counsel), for Maddy Mbaye and O.C. Service, respondents.

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Order, Supreme Court, Bronx County (Betty Owen Stinson, J.), entered March 26, 2014, which granted defendants' motions for summary judgment dismissing the complaint insofar as it alleged serious injury to plaintiff Anthony Mejia's left knee pursuant to Insurance Law § 5102(d), unanimously modified, on the law, the "significant limitation of use" and 90/180-day injury claims reinstated, and otherwise affirmed, without costs.

Plaintiff was injured on May 10, 2009, when a livery cab in which he was a passenger was involved in a collision with another vehicle. As a result of his injuries, plaintiff underwent arthroscopic knee surgery on July 9, 2009, and two subsequent knee surgeries later that month as a result of a post-surgical infection. Defendants established prima facie that plaintiff did not sustain a serious injury to his knee as a result of the accident by submitting their orthopedist's report finding full range of motion, and concluding that the tears reflected in the operative report were pre-existing degenerative changes (*see Farmer v Ventkate Inc.*, 117 AD3d 562 [1st Dept 2014]; *Batista v Porro*, 110 AD3d 609, 609 [1st Dept 2013]). To the extent plaintiff contends the report itself found abnormalities in the knee, such symptoms, without evidence of some permanent or significant limitation, do not constitute a serious injury under the statute (*see Jno-Baptiste v Buckley*, 82 AD3d 578, 578 [1st Dept 2011]). Contrary to plaintiff's contention, defendants' expert need not review plaintiff's actual MRI films or intra-operative photographs to make a prima facie showing (*see Rosa-Diaz v Maria Auto Corp.*, 79 AD3d 463, 464 [1st Dept 2010]).

In opposition, plaintiff failed to raise a triable issue of fact as to the existence of a "permanent consequential limitation

of use" of the knee. Although the report of his recent examination shows permanency, the persisting limitations noted are not sufficiently meaningful to sustain a permanent consequential limitation claim (*see Arrowood v Lowinger*, 294 AD2d 315, 316 [1st Dept 2002]). Plaintiff did, however, raise a triable issue of fact as to whether he sustained a "significant limitation of use" of the knee by submitting reports from his treating physiatrist and orthopedic surgeon finding significant limitations and positive clinical findings about 1½ months after the accident, and weeks before surgery (*see Thomas v NYLL Mgt. Ltd.*, 110 AD3d 613, 614 [1st Dept 2013]). Plaintiff also raised a triable issue of fact as to causation, since his surgeon concluded that the injuries he observed during surgery were traumatically-induced and causally related to the accident (*see Vargas v Moses Taxi, Inc.*, 117 AD3d 560 [1st Dept 2014]; *Prince v Lovelace*, 115 AD3d 424 [1st Dept 2014]; *Calcano v Rodriguez*, 103 AD3d 490 [1st Dept 2013]). Based on his treatment and review of plaintiff's medical records, the treating physiatrist also opined that the injuries observed during surgery were traumatic in nature and causally related to the accident (*see McSweeney v Cho*, 115 AD3d 572 [1st Dept 2014]; *James v Perez*, 95 AD3d 788, 789 [2012]).

Plaintiff also raised an issue of fact with respect to his 90/180-day claim by submitting medical records showing that he was totally disabled and unable to work from May 11, 2009 through May 15, 2009, and then for about eight months from July 9, 2009 through March 5, 2010, four of which fell within the 180-day statutory period (*see Lopez v Abayev Tr. Corp.*, 104 AD3d 473, 473 [1st Dept 2013]; *James v Perez*, 95 AD3d at 788).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 13, 2015

CLERK

Tom, J.P., Friedman, Acosta, Saxe, Kapnick, JJ.

13940 The People of the State of New York, SCI 125N/08
Respondent,

-against-

Tiffany Mitchell,
Defendant-Appellant.

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Seymour W. James, Jr., The Legal Aid Society, New York (Eve Kessler of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Martin J. Foncello of counsel), for respondent.

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Judgment, Supreme Court, New York County (Anthony J. Ferrara, J., at plea; Ellen Coin, J. at dismissal motion and sentencing), rendered August 12, 2011, convicting defendant of attempted criminal possession of a controlled substance in the fifth degree, and sentencing her to a term of one year, unanimously affirmed.

The court properly exercised its discretion in denying defendant's CPL 210.40 motion to dismiss the information in furtherance of justice. There is no "compelling factor" (CPL 210.40[1]) that would warrant that "extraordinary remedy" (*People v Moye*, 302 AD2d 610, 611 [2d Dept 2003]). On the contrary, defendant failed to comply with her plea agreement as a result of

her subsequent arrests, drug use relapses, and absences from mandated treatment. Moreover, there was evidence of her involvement in a fraudulent unemployment benefits scheme.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 13, 2015

CLERK

Tom, J.P., Friedman, Saxe, Kapnick, JJ.

13942 New York City Parents Union, et al., Index 108538/11
Plaintiffs-Appellants,

-against-

The Board of Education of the City School District of the City of New York, et al.,
Defendants-Respondents,

Harlem Success Academy Charter School, I, et al.,
Intervenor-Defendants-Respondents.

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Advocate for Justice, New York (Arthur Z. Schwartz of counsel), for appellants.

Zachary W. Carter, Corporation Counsel, New York (Tahirih M. Sadrieh of counsel), for Board of Education of the City School District of the City of New York, and Dennis M. Walcott, respondents.

Kirkland & Ellis LLP, New York (Jay P. Lefkowitz of counsel), for Harlem Success Academy Charter School 1, Harlem Success Academy Charter School 4, Ocean Hill Collegiate Charter School, Empower Charter School, New Visions Charter High School for Humanities, Democracy Preparatory Charter School, New Visions Charter High School for Advanced Math and Science, Teaching Firms of America Charter School, Invictus Preparatory Charter School, Summit Academy Charter School, Dream Charter School, Brooklyn Charter School, Inwood Academy for Leadership Charter School, La Cima Elementary Charter School, Coney Island Preparatory Charter School, South Bronx Classical Charter School, Girls Preparatory Charter School, and New York City Charter School Center, respondents.

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Judgment, Supreme Court, New York County (Barbara Jaffe, J.), entered June 19, 2013, dismissing the complaint, unanimously

affirmed, without costs.

Plaintiffs are two public school parent advocacy groups, an advocacy group for poor and working-class people, and parents of children who attend or attended public schools. They contend that defendant Board of Education's (BOE) practice of co-locating charter schools within traditional public schools without requiring them to pay rent violates the Education Law and Article XI of the New York Constitution, and results in an unequal allocation of funding between charter schools and public schools and inequitable treatment of public school students.

The argument that BOE's failure to charge co-located charter schools for their use of public school building facilities violates Education Law § 2853(4)(c) has been rendered moot by the enactment of an amendment to the law, effective April 1, 2014, providing that "[a] school district shall permit any charter school granted approval to co-locate, to use such services and facilities without cost" (*see* L 2014, ch 56, part BB, §1) (*see Matter of Spano v O'Rourke*, 59 NY2d 946, 949 [1983]).

Plaintiffs' remaining statutory claims allege violations of Education Law §§ 2853(3)(a-3) and 2590-h. However, plaintiffs did not exhaust their administrative remedies before seeking judicial review (*see* Education Law § 310[7]), and they have not

demonstrated the futility of pursuing those remedies or another exception to the exhaustion doctrine (*Matter of R.B. v Department of Educ. of the City of N.Y.*, 115 AD3d 440 [1st Dept 2014]).

The constitutional claim fails to state a cause of action since it does not adequately allege "the deprivation of a sound basic education" and "causes attributable to the State" (*New York Civ. Liberties Union v State of New York*, 4 NY3d 175, 178-179 [2005]). Plaintiffs allege that the education provided to traditional public school students is inferior to that provided to co-located charter school students. However, the soundness of a basic education is not measured by comparing the educational opportunities offered by other districts or other schools (*see Reform Educ. Fin. Inequities Today [R.E.F.I.T.] v Cuomo*, 86 NY2d 279 [1995]). The complaint gives examples of poor conditions in four public schools, but it does not allege any "district-wide" failure (*see New York Civ. Liberties Union*, 4 NY3d at 182), and it does not allege that as a result of these conditions the students in these four schools are being deprived of the opportunity to learn "basic literacy, calculating, and verbal

skills" (*see Campaign for Fiscal Equity v State of New York*, 86 NY2d 307, 316 [1995]).

We have considered plaintiffs' remaining arguments and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 13, 2015

CLERK

Tom, J.P., Friedman, Acosta, Saxe, Kapnick, JJ.

13943 The People of the State of New York, Ind. 5192/89
Respondent,

-against-

Mark Ray,
Defendant-Appellant.

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Seymour W. James, Jr., The Legal Aid Society, New York (Natalie Rea of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Andrew E. Seewald of counsel), for respondent.

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Order, Supreme Court, New York County (Robert M. Stolz, J.), entered on or about December 6, 2011, which adjudicated defendant a level two sexually violent offender under the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

Although there was an insufficient basis for the court's assessment of 10 points, not assessed by the risk assessment instrument, under the risk factor for nonacceptance of responsibility, defendant remains a level two offender, and we

find no basis for a discretionary downward departure (*see People v Gillotti*, 23 NY3d 841 [2014]). Defendant's completion of drug programs and abstinence from drug use while incarcerated do not warrant a downward departure under the circumstances of the case.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 13, 2015

CLERK

Tom, J.P., Friedman, Acosta, Saxe, Kapnick, JJ.

13944 The People of the State of New York, Ind. 3436/05
Respondent,

-against-

Isaac Diggins,
Defendant-Appellant.

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Richard M. Greenberg, Office of the Appellate Defender, New York (Rosemary Herbert of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Gina Mignola of counsel), for respondent.

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Robert Mandelbaum, J.), rendered on or about September 16, 2013,

Said appeal having been argued by counsel for the respective parties, due deliberation having been had thereon, and finding the sentence not excessive,

It is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed.

ENTERED: JANUARY 13, 2015

CLERK

Counsel for appellant is referred to § 606.5, Rules of the Appellate Division, First Department.

Tom, J.P., Friedman, Acosta, Saxe, Kapnick, JJ.

13945N Karien Pichardo, Index 110799/10
Plaintiff-Appellant,

-against-

Robin Johnson,
Defendant-Respondent,

New York City Department
of Education, et al.,
Defendants.

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Ballon Stoll Bader & Nadler, P.C., New York (Evan E. Richards of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Marta Ross of counsel), for respondent.

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Order, Supreme Court, New York County (Milton A. Tingling, J.), entered July 29, 2013, which, insofar as appealed from as limited by the briefs, denied plaintiff's motion to amend the complaint, and sua sponte dismissed the complaint as against defendant Robin Johnson, unanimously modified, on the law, the complaint reinstated as against defendant Johnson, and otherwise affirmed, without costs

The court properly denied the motion for leave to amend the complaint because the proposed amendment was lacking in merit (*see e.g. Sharon Ava & Co. v Olympic Tower Assoc.*, 259 AD2d 315 [1st Dept 1999]). Plaintiff sought to assert claims against

defendant Johnson in her individual capacity, but none of the allegations establish that Johnson acted outside the scope of her employment.

Johnson did not move to dismiss the claims against her in her official capacity as principal of the school where plaintiff was a probationary teacher and the court should not have dismissed them sua sponte (*see e.g. Purvi Enters., LLC v City of New York*, 62 AD3d 508, 509 [1st Dept 2009]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 13, 2015

CLERK

Tom, J.P., Friedman, Acosta, Saxe, Kapnick, JJ.

13946N Richon S. Lawrence, Index 308430/12
Plaintiff,

-against-

Hector Santos, et al.,
Defendants.

- - - - - -

Harold Chetrick, Esq.,
Nonparty Appellant,

-against-

The Greenberg Law Firm, LLP,
Nonparty Respondent.

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Harold Chetrick, New York, appellant pro se.

The Greenberg Law Firm, LLP, Purchase (Bill Greenberg of counsel), for respondent.

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Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered September 12, 2013, which, to the extent appealed from, awarded outgoing counsel Harold Chetrick $2000 in fees, unanimously modified, on the law, to increase Chetrick's award to $5000, and otherwise affirmed, without costs.

It is uncontroverted that, when Greenberg took over plaintiff's representation from Chetrick (who had received a $15,000 offer on the case after working on the matter for almost a year), outgoing and incoming counsel agreed that Greenberg

would pay Chetrick $5000 of the contingency fee in the event defendant's carrier agreed to pay plaintiff the full policy amount of $25,000. The case has settled for that amount, and we see no justification for relieving Greenberg from the agreement (*see Oberman v Reilly*, 66 AD2d 686, 687 [1st Dept 1978] *appeal dismissed* 48 NY2d 602 (1979)). Greenberg argues that Chetrick should not be allowed to enforce the agreement because the client discharged him for cause. This argument is untenable, since Supreme Court, after a hearing, determined that Chetrick had not been terminated for cause, and Greenberg has not appealed from that determination.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 13, 2015

CLERK

Tom, J.P., Saxe, Feinman, Clark, Kapnick, JJ.

13986 Randolph J. Scott, Index 652043/11
Plaintiff-Respondent,

-against-

Pro Management Services Group, LLC, et al.,
Defendants,

Remi Laba, et al.,
Defendants-Appellants.

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McCue, Sussmane & Zapfel PC, New York (Kenneth S. Sussmane of counsel), for appellants.

Kordas & Marinis, LLP, Long Island City (Peter Marinis of counsel), for respondent.

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Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered September 25, 2013, which, to the extent appealed from, denied so much of defendants-appellants' motions as sought to dismiss plaintiff's cause of action for unjust enrichment as against them, unanimously affirmed, with costs.

Plaintiff's unjust enrichment claim is direct, and not derivative, because plaintiff suffered the alleged harm individually, and he would receive the benefit of any recovery (*see Gjuraj v Uplift El. Corp.*, 110 AD3d 540, 540 [1st Dept 2013]; *see also Yudell v Gilbert*, 99 AD3d 108, 114 [1st Dept 2012]). Indeed, the amended complaint alleges that plaintiff is

an 11.1% owner of the defendant holding companies and of the companies' trademarks, and that all other owners of the holding companies received revenues, licensing fees, royalties and other consideration for using the companies' trademarks, to plaintiff's exclusion. As plaintiff's claim is direct and not derivative, plaintiff was not required to satisfy the pleading requirements set forth in Business Corporation Law § 626(c) (*cf. Yudell*, 99 AD3d at 115; *see also Marx v Akers*, 88 NY2d 189, 193-194 [1996]). Further, plaintiff's allegations that defendants were enriched by their receipt of revenues and other consideration at his expense, and that it is against equity and good conscience to permit them to retain such consideration without adequately compensating him, are sufficient to state a claim for unjust enrichment (*see Georgia Malone & Co., Inc. v Rieder*, 19 NY3d 511, 516 [2012]).

We have considered defendants' remaining contentions and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 13, 2015

CLERK