SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

APRIL 19, 2016

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Renwick, J.P., Andrias, Saxe, Moskowitz, JJ.

16606 Harvey Rudman, et al., Index 650159/10
Plaintiffs-Appellants,

-against-

Carol Gram Deane, etc., et al.,
Defendants-Respondents.

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Golenbock Eiseman Assor Bell & Peskoe LLP, New York (Jacqueline G. Veit of counsel), for appellants.

Warner Partners, P.C., New York (Kenneth E. Warner of counsel), for respondents.

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Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered on or about July 30, 2014, and amended order, same court and Justice, entered September 24, 2014, which, to the extent appealed from as limited by the briefs, granted defendants' motion for partial summary judgment to the extent of declaring that the managing member of defendant/derivative plaintiff Starrett City Preservation LLC (Preservation) has the power to reallocate the Sharing Ratios of any member of said company once (i) nonparty Starrett City Associates LP (SCA) or

its successors has distributed to Preservation all the distributions that SCA is required to make to its managing general partner and general partner under Sections 3.02 and 3.03 of the SCA partnership agreement, (ii) Preservation has distributed to its members, in accordance with Section 4.2 of its LLC Agreement, any and all distributions it received from SCA, and (iii) such distributions by Preservation are $10 million or more, unanimously modified, on the law, to declare that Preservation's Managing Member has the power to reallocate the Sharing Ratios of any Member once Preservation has distributed to its Members, in accordance with Section 4.2, at least $10 million, and otherwise affirmed, without costs.

"Ambiguity is determined within the four corners of the document" (*Brad H. v City of New York*, 17 NY3d 180, 186 [2011]). Hence, in deciding whether section 3.3 of Preservation's LLC Agreement is ambiguous, we have not considered the extrinsic evidence that plaintiffs urge us to consider, such as the sixteenth amendment to SCA's partnership agreement, organizational charts and tax documents, and correspondence to SCA's limited partners.

"Ambiguity is present if language was written so imperfectly that it is susceptible to more than one reasonable

interpretation" (*id.*). Section 3.3 is susceptible to only one reasonable interpretation – the one that defendants advanced on the motion.

The first sentence of section 3.3 states, "At any time after the Funding Event (as hereinafter defined), the Managing Member may . . . reallocate the Sharing Ratios of all Members in whatever amounts it deems . . . to be appropriate (including . . . assigning a Member a Sharing Ratio of zero)." The second sentence of section 3.3 defines "Funding Event" as "the distribution to Members, in accordance with their then current Sharing Ratios . . ., of at least $10,000,000 in aggregate distributions pursuant to Section 4.2(iv)." Plaintiffs cannot dispute that Preservation has distributed at least $10 million to its members pursuant to section 4.2(iv). (It is true that plaintiff Harold Kuplesky's distributions were based on a Sharing Ratio of 3.49% rather than 11.63%. However, that particular reduction is not at issue on appeal.)

Plaintiffs rely on the last sentence of section 3.3, which says, "All Members acknowledge and agree that the Managing Member's reallocation power . . . is intended to facilitate providing a new management incentive program after the full distribution from the proceeds of a substantial refinancing

pursuant to Section 3.02 or 3.03 of SCA's partnership agreement." However, this is merely a statement of *intention;* it does not actually require the full distribution of proceeds (*see Sengillo v Valeo Elec. Sys., Inc.,* 328 Fed Appx 39, 41-42 [2d Cir 2009]). We have modified the IAS court's declaration accordingly.

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

ENTERED: APRIL 19, 2016

CLERK

Renwick, J.P., Andrias, Saxe, Richter, JJ.

273 DDG Warren LLC, Index 654425/13
Petitioner-Respondent-Appellant,

-against-

Assouline Ritz 1, LLC, et al.,
Respondents-Appellants-Respondents,

Board of Managers of Tribeca Townhomes at
16 Warren St. Condominium,
Respondent-Respondent,

Mei Lim, et al.,
Respondents.

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D'Agostino, Levine, Landesman & Lederman LLP, New York (Bruce H. Lederman of counsel), for appellants-respondents.

Goetz Fitzpatrick, LLP, New York (John B. Simoni, Jr. of counsel), for DDG Warren LLC, respondent-appellant.

Borah, Goldstein, Altschuler, Nahins & Goidel, P.C., New York (Paul N. Gruber of counsel), for respondent.

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Judgment, Supreme Court, New York County (Shlomo Hagler, J.), entered on or about February 5, 2015, insofar as appealed from as limited by the briefs, denying, without prejudice, respondents Assouline Ritz 1, LLC, Lichten Ritz 2, LLC, and 16 Warren St. PH, LLC's request for a fee for the license granted to petitioner pursuant to RPAPL 881, directing petitioner to post a $750,000 bond, and awarding attorneys' fees to all respondents without a time limit, unanimously modified, on the law and the

facts and in the exercise of discretion, to grant respondents' application for a contemporaneous monthly license fee, and to remand the matter to Supreme Court for determination of the appropriate amount of that fee, and, if appropriate, to recalculate the amount of the bond, and otherwise affirmed.

Initially, contrary to petitioner's claim, respondents' appeal is not moot, even though Assouline and Lichten sold the penthouse unit at 16 Warren Street to 16 Warren St. PH before the court granted the license. Respondents confirm that any license fee granted will be awarded to 16 Warren Street PH.

Although the determination of whether to award a license fee is discretionary, in that RPAPL 881 provides that a "license shall be granted by the court in an appropriate case *upon such terms as justice requires"* (emphasis added), the grant of licenses pursuant to RPAPL 881 often warrants the award of contemporaneous license fees (*see e.g. Columbia Grammar & Preparatory Sch. v 10 W. 93rd St. Hous. Dev. Fund Corp.*, 2015 NY Slip Op 31519[U] [Sup Ct, NY County Aug. 13, 2015]; *Snyder v 122 E. 78th St. NY LLC*, 2014 NY Slip Op 32940[U] [Sup Ct, NY County 2014]; *Matter of North 7-8 Invs., LLC v Newgarden*, 43 Misc 3d 623 [Sup Ct, Kings County 2014]; *Ponito Residence LLC v 12th St. Apt. Corp.*, 38 Misc 3d 604 [Sup Ct, NY County 2012]; *Matter of Rosma*

Dev., LLC v South, 5 Misc 3d 1014[A], 2004 NY Slip Op 51369[U] [Sup Ct, Kings County 2004]). After all, "[t]he respondent to an 881 petition has not sought out the intrusion and does not derive any benefit from it . . . Equity requires that the owner compelled to grant access should not have to bear any costs resulting from the access" (*North 7-8 Invs.*, 43 Misc 3d at 628; *see also 25 Tenants Corp. v 7 Sutton Sq. LLC*, 2015 NY Slip Op 30526[U], *3 [Sup Ct, NY County 2015]). In the circumstances presented here, where the granted license will entail substantial interference with the use and enjoyment of the neighboring property during the planned 30-month period, thus decreasing the value of the property during that time, it was an improvident exercise of discretion to postpone until the end of the three-year license period the matter of the fees to which respondents must be entitled.

Petitioner's payment to respondents for development or air rights does not eliminate respondents' rights to a fee for the impact on them as a result of the RPAPL 881 license.

The court had the authority to order a bond (*see e.g. North 7-8 Invs.*, 43 Misc 3d at 633), even though respondents were covered by petitioner's insurance (*see Matter of 125 W. 21st St. LLC v ARC Assoc. G.P. LLC*, 2007 NY Slip Op 31658[U], *7 [Sup Ct,

NY County 2007]). It was particularly appropriate for the court to order a bond since it had postponed the issue of license fees. Since the bond secures both possible damages and the payment of the license fees, in view of our remand for the purpose of awarding license fees to respondent, it may be necessary for Supreme Court to revisit the amount of the bond.

It was not an improvident exercise of discretion for the court to award attorneys' fees to all three sets of respondents, each with its own counsel, instead of limiting them to one set of attorneys' fees. Similarly, it was not an improvident exercise of discretion for the court to decline to set strict temporal limits on the attorneys' fees. However, our decision does not prevent petitioner from arguing to the special referee and/or the court that "fees on fees" are being improperly awarded.

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

ENTERED: APRIL 19, 2016

CLERK

Mazzarelli, J.P., Renwick, Moskowitz, Kapnick, Kahn, JJ.

656-
657 The People of the State of New York, Ind. 4295/11
Respondent,

-against-

Raymond Jones,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Barbara Zolot of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Daniel P. FitzGerald, J.), rendered December 7, 2012, as amended February 27, 2015, convicting defendant, after a jury trial, of burglary in the first degree, robbery in the first degree (two counts) and one count of criminal possession of a weapon in the second degree, and sentencing him, as a second felony offender, to an aggregate term of 15 years, unanimously affirmed.

Defendant did not preserve his claim that the People improperly introduced evidence of his prearrest "selective silence" (*People v Williams*, 25 NY3d 185, 188 [2015]). Defendant had ample opportunity to place the ground of his objection on the record, and neither his general objection, nor his present

speculation as to what transpired at an unrecorded bench conference, suffices to satisfy the preservation requirement. We decline to review this claim in the interest of justice. As an alternative holding, we find that, unlike the situation in *Williams* (*id*. at 191-194), the police testimony at issue did not convey to the jury that defendant had refused to answer questions. Instead, after the officer testified that when stopped by the police defendant volunteered that he had been robbed, the People simply clarified that this unelaborated remark was the totality of defendant's statement.

Defendant likewise failed to preserve his claim that he was entitled to introduce, not for the statement's truth and without revealing its substance, the fact that he made a second statement several hours after his initial statement. Nothing in the record, including the court's summary of an unrecorded bench conference, establishes that defendant ever made an offer of proof that was sufficient to alert the court to this theory of admissibility (*see People v Arroyo*, 77 NY2d 947 [1991]), and we similarly decline to review the claim in the interest of justice. As an alternative holding, we find that defendant has not established the relevance of the fact that the statement was made, or that it was admissible under the theory that the People

opened the door to it.

The court's charge on reasonable doubt was not constitutionally deficient. Although the Criminal Jury Instructions contain the "preferred phrasing," the court's charge, viewed as a whole, conveyed the appropriate principles and did not dilute the standard of proof required (*see People v Cubino*, 88 NY2d 998, 1000 [1996]). To the extent that defendant is arguing that the court should have included the specific language he suggests on appeal, that claim is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we find no basis for reversal.

We have considered and rejected defendant's ineffective assistance of counsel claims relating to the issues we have found to be unpreserved (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]).

Accordingly, we do not find that any lack of preservation may be excused on the ground of ineffective assistance.

We perceive no basis for reducing the sentence.

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

ENTERED: APRIL 19, 2016

CLERK

Acosta, J.P., Renwick, Manzanet-Daniels, Kapnick, Webber, JJ.

762 Balanced Return Fund Limited, et al., Index 600949/09
Plaintiffs-Appellants,

-against-

Royal Bank of Canada, et al.,
Defendants-Respondents.

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Squitieri & Fearon, LLP, New York (Lee Squitieri of counsel), for appellants.

Seward & Kissel LLP, New York (Jack Yoskowitz of counsel), for respondents.

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Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered November 3, 2014, which, to the extent appealed from as limited by the briefs, granted defendants' motion for summary judgment dismissing plaintiff Balanced Return Funds Limited's causes of action for breach of fiduciary duty, fraud, aiding and abetting breach of fiduciary duty and aiding and abetting fraud, unanimously affirmed, with costs.

The motion court correctly found that defendant was not in a fiduciary relationship with plaintiff because they were not in any relationship giving rise to such duties (*see Oddo Asset Mgt. v Barclay's Bank PLC*, 19 NY3d 584, 594 [2012]), because defendant's status as depositary bank for the investors in the subject transaction created only a debtor-creditor relationship

(*see id.* at 592), and because, although not noted by the parties, a fiduciary relationship must exist prior to the transaction complained of and not as a result of it (*see Elghanian v Harvey*, 249 AD2d 206 [1st Dept 1998]).

Defendant was not liable for fraudulent concealment because it lacked a duty to disclose the overvaluation and illiquidity of the investment assets (*see Dembeck v 220 Central Park S., LLC*, 33 AD3d 491, 492 [1st Dept 2006]). It was neither a fiduciary nor possessed of special knowledge in a direct transaction with plaintiff (*see Matter of Merkin v Berman*, 123 AD3d 523, 524 [1st Dept 2014]).

Plaintiff failed to raise an issue of fact by submitting evidence showing that defendant knew it was structuring the transaction to plaintiff's detriment in order to benefit the non-party primary wrongdoer (*compare Yuko Ito v Suzuki*, 57 AD3d 205, 208 [1st Dept 2008] *with Roni LLC v Arfa*, 72 AD3d 413 [1st Dept 2010], *affd* 15 NY3d 826 [2010]). To the extent that the alleged assistance provided to the primary wrongdoer consisted of inaction, it was insufficient to support the aiding and abetting claims (*see Lumen at White Plains, LLC v Stern*, 135 AD3d 600 [1st Dept 2016]). Because substantial assistance and actual knowledge are both essential elements of aiding and abetting claims, it is

unnecessary to address plaintiff's argument that "turning a blind eye" amounts to the requisite actual knowledge, rather than constructive knowledge.

In view of the foregoing grounds for summary dismissal, it is also unnecessary to address the parties' contentions regarding the proximate cause of plaintiff's damages and whether the claims are barred by the in pari delicto doctrine.

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

ENTERED: APRIL 19, 2016

CLERK

Friedman, J.P., Andrias, Moskowitz, Kapnick, Webber, JJ.

848 The People of the State of New York, Ind. 872/11
Respondent,

-against-

Ronald Hechavarria,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Kerry S. Jamieson of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Noah J. Chamoy of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Joseph Teresi, J.), rendered May 6, 2013, convicting defendant, after a jury trial, of robbery in the first and second degrees and criminal possession of stolen property in the fifth degree, and sentencing him to an aggregate term of 15 years, unanimously reversed, on the law, and the matter remanded for a new trial.

The court erred in granting the prosecution's reverse-*Batson* challenge to defense counsel's exercise of two peremptory challenges. "[A]lthough appellate courts accord great deference to trial judges' step three determinations, we conclude that Supreme Court's step three reverse *Batson* ruling was erroneous and that there is no record support for Supreme Court's rejection of defense counsel's [gender]-neutral reasons for striking [two

panelists]. The People simply failed to meet their burden that [gender] discrimination was the motivating factor" (*People v Hecker*, 15 NY3d 625, 661 [2010]).

While the prosecution established a prima facie case of gender-based discrimination in the exercise of peremptory challenges, defense counsel then presented facially gender-neutral reasons for each of the strikes of male prospective jurors at issue. The record fails to support the court's finding that the gender-neutral reasons given for two of these strikes were pretextual. As to one juror, there was no specific basis offered by the prosecutor, found by the court, or discernable from the record upon which to find that the employment-based reason given by counsel was pretextual. As to the other juror, although the court stated that it did not notice the "smirking" demeanor that was part of counsel's offered reason for the strike, the record of the prosecutor's colloquy with the juror tended to corroborate defense counsel's assertion that the juror's assurance of his ability to be fair was hesitant or insincere.

In view of this disposition, we find it unnecessary to reach any other issues, except that we find that the verdict was not against the weight of the evidence.

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

ENTERED: APRIL 19, 2016

CLERK

Friedman, J.P., Andrias, Moskowitz, Kapnick, Webber, JJ.

849 Joan K. Morante, et al., Index 20475/09E
Plaintiffs-Appellants,

-against-

Citywide Mobile Response Corp.,
Defendant-Respondent,

Citywide Ambulance Service, Inc.,
et al.,
Defendants.

_____

David Zevin, Roslyn, for appellants.

Rivkin Radler LLP, Uniondale (Henry M. Mascia of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Alexander W. Hunter, Jr., J.), entered August 5, 2014, dismissing the complaint as against defendant Citywide Mobile Response Corp. pursuant to an order, same court and Justice, entered July 10, 2014, which granted said defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff Joan K. Morante (plaintiff) alleges that, after accompanying her father on a trip in defendant's ambulette, she fell on the steps as she was exiting the ambulette, resulting in the exacerbation of a previously unknown hip condition. Defendant made a prima facie showing of its entitlement to

judgment as a matter of law by demonstrating through expert and documentary evidence that the ambulette was not defective, and that it owed plaintiff no duty to escort her down the ambulette stairs when she took it upon herself to leave, without requesting assistance from the driver (*see Saidoff v New York City Tr. Auth.*, 105 AD3d 726, 727 [2d Dept 2013]).

In opposition, plaintiffs failed to raise a triable issue of fact. Although plaintiff claims that she was injured in a different ambulette, her testimony was clearly contradicted by defendant's "compelling documentary evidence" showing that the ambulette assigned to transport her father was the ambulette involved in plaintiff's accident (*Alvarez v New York City Hous. Auth.*, 295 AD2d 225, 226 [1st Dept 2002]; *see also Glick & Dolleck v Tri-Pac Export Corp.*, 22 NY2d 439, 441 [1968]). Moreover, her claim that the other steps were slippery is insufficient to raise an issue of fact, since she testified that she did not know whether her foot had slipped. In addition, her

testimony that her foot did not have enough "stepping space" is insufficient to raise an issue of fact as to whether the ambulette was defective (*see Pena v Women's Outreach Network, Inc.*, 35 AD3d 104, 108 [1st Dept 2006]).

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

ENTERED: APRIL 19, 2016

CLERK

Friedman, J.P., Andrias, Moskowitz, Kapnick, Webber, JJ.

850-
850A In re Josee L. H.,

A Child Under the Age of Eighteen Years, etc.,

DeCarla L.,
Respondent-Appellant.

Administration for Children's Services,
Petitioner-Respondent.

_____

Law Offices of Randall S. Carmel, Syosset (Randall S. Carmel of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Antonella Karlin of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Marcia Egger of counsel), attorney for the child.

_____

Order, Family Court, New York County (Susan M. Doherty, Referee), entered on or about April 3, 2015, which, after a hearing, changed the permanency goal for the subject child from reunification to placement for adoption, unanimously affirmed, without costs. Appeal from order, same court and Referee, entered on or about April 3, 2015, which limited the mother's communication with her then assigned-counsel to once a week, unanimously dismissed, without costs, as moot.

A preponderance of the evidence supported the finding that a

change in permanency goal to adoption was in the subject child's best interests (*see Matter of Acension C.L. [Jesate J.]*, 96 AD3d 1059 [2d Dept 2012]; *Matter of Amber B.*, 50 AD3d 1028, 1029 [2d Dept 2008]; Family Court Act § 1089[d]).

Notwithstanding the agency's reasonable efforts to assist the mother in accomplishing the permanency goal of reunification of the child with the mother, the mother failed to cooperate. In particular, the mother failed to sign releases and maintain contact with the agency or caseworkers. In addition, the mother was rejected by the State of Indiana, where the child was living with a kinship foster parent, for approval as a resource for the child in Indiana, in connection with the Interstate Compact on the Placement of Children, due to her failure to disclose her current income and street address, as well as an incident at the child's school that resulted in an outstanding felony warrant against the mother for trespass, to which she had never responded. The mother also had failed to obtain regular mental heath treatment (*see Matter of Alexander L. [Andrea L.]*, 109 AD3d 767, 767 [1st Dept 2013], *lv dismissed* 22 NY2d 1056 [2014]; *Matter of Jacelyn TT. [Tonia TT.-Carlton TT.]*, 80 AD3d 1119, 1120-1121 [3d Dept 2011]).

The record does not support the mother's argument that the

court violated her due process rights by refusing to grant her an adjournment of the proceedings where her physical absence was due to her own failure to respond to an outstanding arrest warrant, and her inability to participate by telephone was due to her persistent disruptive and obstreperous conduct during the proceedings (*see e.g. People v Paige*, 134 AD3d 1048, 1052-1053 [2d Dept 2015]).

Finally, the mother's appeal from the order limiting her contact with her court-appointed attorney is moot, as that order specifically was limited to an attorney who has since been relieved as her counsel.

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

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

ENTERED: APRIL 19, 2016

CLERK

Friedman, J.P., Andrias, Moskowitz, Kapnick, Webber, JJ.

851 Tammy Weinstein, et al., Index 105520/11
Plaintiffs-Respondents,

-against-

Jenny Craig Operations, Inc.,
Defendant-Appellant.

_____

Ogletree, Deakins, Nash, Smoak & Stewart, P.C., Morristown, NJ (Peter O. Hughes of the bar of the State of New Jersey, admitted pro hac vice, of counsel), for appellant.

Virginia & Ambinder, LLP, New York (LaDonna M. Lusher of counsel), for respondents.

_____

Order, Supreme Court, New York County (Anil C. Singh, J.), entered January 29, 2014, which, to the extent appealed from as limited by the briefs, held that plaintiffs satisfied the commonality requirement (CPLR 901[a][2]) on their motion for class certification, unanimously affirmed, without costs.

Plaintiffs and the putative class members are current and former non-managerial employees of Jenny Craig Operations, Inc., which operated about 23 non-franchised weight-loss centers in New York, from May 2005 to May 2011. Plaintiffs allege that Jenny Craig regularly underpaid the 751 class members for time worked, by deducting 30 minutes of pay from their paychecks, for every shift they worked, for "break time" that was not taken.

At issue here is whether "there are questions of law or fact common to the class which predominate over any questions affecting only individual members" (CPLR 901[a][2]). Plaintiffs met their burden of satisfying this criteria (*see CLC/CFI Liquidating Trust v Bloomingdale's, Inc.*, 50 AD3d 446, 447 [1st Dept 2008]), "by competent evidence in admissible form" (*Feder v Staten Is. Hosp.*, 304 AD2d 470, 471 [1st Dept 2003] [citations omitted]). The court properly applied New York's liberal class action certification statute (*see City of New York v Maul*, 14 NY3d 499, 508, 512 [2010]) to find that plaintiffs established commonality.

Plaintiffs submitted sworn testimony from four employees and a center director attesting to Jenny Craig's alleged policy of routinely deducting 30-minutes from each employee's shift for a meal break that was not taken. While Jenny Craig's statistical analysis challenged the claimed pervasiveness of the alleged policy, the merits of the claims were not at issue on the motion, and plaintiffs' evidence was sufficient to satisfy the minimal threshold of establishing that their claim was not a sham (*see Kudinov v Kel-Tech Constr. Inc.*, 65 AD3d 481, 482 [1st Dept 2009]; *Brandon v Chevetz*, 106 AD2d 162, 168 [1st Dept 1985]).

Defendant's submission of declarations from current

employees, denying the existence of such a practice, was insufficient to defeat certification (*see Williams v Air Serv. Corp.*, 121 AD3d 441, 442 [1st Dept 2014]). This is especially so given that defendant's statistical analysis of employee time card data provides support for plaintiffs' claim that the practice was routine.

Where, as here, "the same types of subterfuge [were] allegedly employed to pay lower wages," commonality of the claims will be found to predominate, even though the putative class members have "different levels of damages" (*Kudinov*, 65 AD3d at 482 [citation omitted]; *see also Williams* at 442; *Lamarca v Great Atl. & Pac. Tea Co.*, 55 AD3d 487 [1st Dept 2008]). Class action is an appropriate method of adjudicating wage claims arising from an employer's alleged practice of underpaying employees, given that "the damages allegedly suffered by an individual class member are likely to be insignificant, and the costs of prosecuting individual actions would result in the class members having no realistic day in court" (*Nawrocki v Proto Constr. & Dev. Corp.*, 82 AD3d 534, 536 [1st Dept 2011]; *see also Dabrowski*

v Abax Inc., 84 AD3d 633, 635 [1st Dept 2011]; *Pesantez v Boyle Envtl. Servs.*, 251 AD2d 11, 12 [1st Dept 1998]).

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

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

ENTERED: APRIL 19, 2016

CLERK

Friedman, J.P., Andrias, Moskowitz, Kapnick, Webber, JJ.

854 The People of the State of New York, Respondent, Ind. 1002/86 5899/86

-against-

Todd Tilley, Defendant-Appellant.

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Robert S. Dean, Center for Appellate Litigation, New York (Abigail Everett of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Bari L. Kamlet of counsel), for respondent.

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Order, Supreme Court, Bronx County (Seth L. Marvin, J.), entered on or about December 10, 2014, which denied defendant's Correction Law § 168-o(2) petition to modify his sex offender classification, unanimously affirmed, without costs.

Assuming without deciding that the order is appealable, we find that the court properly exercised its discretion in denying any modification of defendant's level three classification. The underlying sex crimes, several of which involved children, were

both numerous and egregious, and defendant has not established that the mitigating factors he cites, such as his age and the absence of postrelease sex crimes, presently warrant a modification.

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

ENTERED: APRIL 19, 2016

CLERK

Friedman, J.P., Andrias, Moskowitz, Kapnick, Webber, JJ.

855-
855A-
855B

Index 102377/11

James J. Harrington,
Petitioner-Respondent,

-against-

Laura Lisa Smith, et al.,
Respondents-Appellants.

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Law Office of Martin D. Novar, New York (Martin D. Novar of counsel), for appellants.

Law Offices of James P. Lynn, New York (James P. Lynn of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Geoffrey D.S. Wright, J.), entered April 21, 2014, awarding petitioner attorneys' fees pursuant to Lien Law §§ 39 and 39-a, unanimously reversed, on the law, without costs, and the judgment vacated. Appeal from order, same court and Justice, entered April 1, 2014, unanimously dismissed, without costs, as subsumed in the appeal from the judgment. Appeal from order, same court and Justice, entered June 13, 2014, which denied respondents' motion to reargue, unanimously dismissed, without costs, as taken from a nonappealable order.

Attorneys' fees were improperly granted pursuant to Lien Law §§ 39 and 39-a, since this was not an action or proceeding to

enforce the lien, and the lien had been discharged without a finding of willful exaggeration (*see Goodman v Del-Sa-Co Foods*, 15 NY2d 191, 195 [1965] [Lien Law § 39-a "is penal in nature, and must be strictly construed in favor of the person upon whom the penalty is sought to be imposed"] [internal quotation marks omitted]; *Wellbilt Equip. Corp. v Fireman*, 275 AD2d 162, 167 [1st Dept 2000]; *Durand Realty Co., Inc. v Stolman*, 197 Misc 208 [Sup Ct, NY County 1949], *affd* 280 Appellant Div 758 [1st Dept 1952]).

Although respondents failed to raise this issue in opposition to the petition, we reach it, because it presents a legal issue that appears on the face of the record and could not have been avoided if raised at the proper juncture (*see Chateau D'If Corp. v City of New York*, 219 AD2d 205, 209 [1996], *lv denied* 88 NY2d 811 [1996]; *Rajkumar v Budd Contr. Corp.*, 77 AD3d 595 [1st Dept 2010]).

No appeal lies from the denial of a motion for reargument (*Espinal v City of New York*, 107 AD3d 411 [1st Dept 2013]).

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

ENTERED: APRIL 19, 2016

CLERK

Friedman, J.P., Andrias, Moskowitz, Kapnick, Webber, JJ.

856 Zoe Ferguson, Index 106855/09
Plaintiff-Respondent, 590607/11
590928/11

-against-

Hess Corporation, et al.
Defendants,

Abro Management Corp.,
Defendant-Appellant.

- - - - -

[And Other Actions]

_____

Newman Myers Kreines Gross Harris, P.C., New York (Adrienne Yaron of counsel), for appellant.

The Perecman Firm, P.L.L.C., New York (Peter D. Rigelhaupt of counsel), for respondent.

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Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered April 28, 2015, which, insofar as appealed from as limited by the briefs, denied the motion of defendant Abro Management Corp. (Abro) for summary judgment dismissing the complaint and cross claims against it, unanimously affirmed, without costs.

Abro's motion was properly denied in this action where plaintiff alleges that she was injured when a metal plate in a sidewalk, adjacent to the premises managed by Abro, flipped up when she stepped on it, causing her to fall into the depression

underneath. The record presents triable issues of fact regarding whether Abro created the dangerous condition, since it had contracted for repairs and performed the sidewalk restoration work itself (*see Church v Callanan Indus.*, 99 NY2d 104, 111 [2002]; *McNeill v LaSalle Partners*, 52 AD3d 407, 411 [1st Dept 2008]).

We have considered Abro's other arguments and find them unavailing.

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

ENTERED: APRIL 19, 2016

CLERK

Friedman, J.P., Andrias, Moskowitz, Kapnick, Webber, JJ.

857 Paul Kleinberg, et al., Index 109371/09
Plaintiffs, 591008/09
590362/10
-against- 590873/12

516 West 19th LLC,
Defendant-Respondent,

The J Construction Company, LLC,
Defendant.
- - - - -
519 West 19th LLC,
First Third-Party Plaintiff,

-against-

I. M. Robbins, P.C.,
First Third-Party Defendant.
- - - - -
J Construction Company, LLC,
Second Third-Party Plaintiff-Respondent,

-against-

Interstate Industrial Corp., et al.,
Second Third-Party Defendants,

KNS Building Restoration Corp.,
Second Third-Party Defendant-Appellant,

Delta Testing Laboratories Inc.,
Second Third-Party Defendant-Respondent.
- - - - -
[And Other Third-Party Actions]

_____

Farrell Fritz, P.C., Uniondale (Aaron E. Zerykier of counsel), for appellant.

Johnson Gallagher Magliery LLC, New York (John M. Magliery of counsel), for respondent.

_____

Order, Supreme Court, New York County (Joan A. Madden, J.), entered on or about January 29, 2015, which, insofar as appealed from as limited by the briefs, denied second third-party defendant's (KNS) motion to dismiss second third-party plaintiff the J Construction Company, LLC's (J Con) remaining claims and all cross claims against it on the ground of spoliation of evidence, unanimously affirmed, with costs.

J Con, the general contractor, discharged any duty it had to advise KNS, the roof installation subcontractor, that litigation over the integrity of the allegedly leaky roof had been commenced by sending KNS a copy of the complaint in the main action, together with a demand that KNS defend and indemnify it in that action. In addition to being intimately familiar with the roof — having installed it — KNS was also involved in the remediation efforts for months after the roof was installed. It was obvious from the facts and from the face of the complaint that the integrity of the roof was at issue. Under the circumstances, J Con was not negligent (*see Kirkland v New York City Hous. Auth.*, 236 AD2d 170, 173 [1st Dept 1997]). Indeed, KNS failed to take

steps to protect itself and J Con, its principal (*see Russo v BMW of N. Am., LLC*, 82 AD3d 643 [1st Dept 2011]). In light of the record of water penetrating into plaintiffs' units for many months and the issuance by the Department of Buildings of violations and directives to repair the roof, the removal and replacement of the roof does not constitute spoliation, because it "was not done in bad faith to harm [KNS's] litigation posture, but rather for purposes of mitigation of damages" (*Yager v Thompson*, 8 Misc 3d 138[A], 2005 NY Slip Op 51286[U], *2 [Appellate Term, 2d Dept 2005]; *see Popfinger v Terminix Intl. Co. Ltd. Partnership*, 251 AD2d 564 [2d Dept 1998]).

Given the extensive evidence of the condition and alleged defects of the roof, and the comprehensive expert reports, KNS failed to show that it has been prejudiced by the destruction of the roof (*see Myers v Sadlor*, 16 AD3d 257 [1st Dept 2005]; *Romano v Scalia & DeLucia Plumbing*, 280 AD2d 658, 659 [2d Dept 2001]).

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

ENTERED: APRIL 19, 2016

CLERK

Friedman, J.P., Andrias, Moskowitz, Kapnick, Webber, JJ.

859 In re Jaci Robert B. A.,

A Child Under the Age of Eighteen Years, etc.,

Kobi R.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

Law Office of Cabelly & Calderon, Jamaica (Lewis S. Calderon of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Jeremy W. Shweder of counsel), for respondent.

Karen Freedman, Lawyers for Children, Inc., New York (Shirim Nothenberg of counsel), attorney for the child.

_____

Order, Family Court, New York County (Clark V. Richardson, J.), entered on or about January 30, 2015, which, after a fact-finding hearing, determined that respondent mother derivatively neglected the subject child, unanimously affirmed, without costs.

A preponderance of the record evidence demonstrated that the mother posed an imminent danger of harm to the subject child, based on the prior orders finding that she had neglected and derivatively neglected her other children, by admitting that she was aware that her paramour had sexually abused one of her children, but continued to be involved with him (*see Matter of*

Keith H. (Logann M. K.), 135 AD3d 483 [1st Dept 2016]).

The instant petition was filed less than one year after the Family Court's finding of neglect as to the subject child's older siblings, and thus the prior findings of neglect were sufficiently proximate in time to the instant proceeding (*see Matter of Noah Jeremiah J. [Kimberly J.]*, 81 AD3d 37, 42 [1st Dept 2010]).

The finding of derivative neglect as to the subject child was also appropriate because the mother's previous behavior demonstrated such an impaired level of parental judgment as to create a substantial risk of harm for any child in her care. The mother's failure to plan apart from her partner, and her noncompliance with her service plan demonstrate that she failed to take appropriate measures to address the issues that led to the prior neglect findings, and "her inability to acknowledge her previous behavior 'supports the conclusion that she has a faulty

understanding of the duties of parenthood sufficient to infer an ongoing danger to the subject child'" (*Matter of Keith H.*, 135 AD3d at 484; *see also Matter of Jasmine B.*, 66 AD3d 420, 420 [1st Dept 2009]).

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

ENTERED: APRIL 19, 2016

CLERK

Friedman, J.P., Andrias, Moskowitz, Kapnick, Webber, JJ.

860 The People of the State of New York, Dkt. 73861/10
Respondent,

-against-

Luis A. Rosario,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Mitchell J. Briskey of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Melanie A. Sarver of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Margaret L. Clancy, J. at dismissal motion; Harold Adler, J. at plea and sentencing), rendered September 12, 2012, convicting defendant of disorderly conduct, and sentencing him to five days of community service, unanimously affirmed.

Because defendant waived prosecution by information, the accusatory instrument was only required to satisfy the reasonable cause requirement of a misdemeanor complaint (*see People v Dumay*, 23 NY3d 518, 522 [2014]). In any event, the superseding

information was sufficiently corroborated by supporting depositions that predated it, but referenced the initial information, which contained identical allegations.

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

ENTERED: APRIL 19, 2016

CLERK

Friedman, J.P., Andrias, Moskowitz, Kapnick, Webber, JJ.

863 The People of the State of New York, Respondent, Ind. 2796/10

-against-

Herbert T. Raveneau, Defendant-Appellant.

_____

Feldman and Feldman, Uniondale (Arza Feldman of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Shannon Henderson of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Judith Lieb, J.), rendered April 2, 2012, as amended April 24, 2012, convicting defendant, after a jury trial, of two counts of robbery in the second degree, and sentencing him to concurrent terms of nine years, unanimously affirmed.

The verdict was based on legally sufficient evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The evidence supports an inference that each victim's injuries resulted from more than mere "petty slaps, shoves, kicks and the like" (*Matter of Philip A.*, 49 NY2d 198, 200 [1980]), and that defendant's actions caused "more than slight or trivial pain" (*People v Chiddick*, 8 NY3d 445, 447 [2007]; *see also People v Guidice*, 83 NY2d 630, 636 [1994]).

The adult victim engaged in an extended struggle with defendant, during which defendant tried to pull the victim's cell phone out of her grasp and her bracelets off her wrist. This caused lacerations and torn-out patches of hair, resulting in pain that lasted for days. Defendant pushed the adult victim's five-year-old son into a metal gate when he tried to come to his mother's aid, causing the child's face to bleed and bruise, and causing him to cry and scream as he held his face. Accordingly, the physical injury element of second-degree robbery was established as to both victims.

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

ENTERED: APRIL 19, 2016

CLERK

Friedman, J.P., Andrias, Moskowitz, Kapnick, Webber, JJ.

865 The People of the State of New York, SCI 2225/12
Respondent,

-against-

Mark Bartley,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (James Wen of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (John Moore, J.), rendered October 31, 2014,

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: APRIL 19, 2016

CLERK

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

Friedman, J.P., Andrias, Moskowitz, Kapnick, Webber, JJ.

866 Eric Alexander, Index 304255/09
Plaintiff-Respondent,

-against-

Hany Alexander,
Defendant-Appellant.

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Hany Alexander, appellant pro se.

Garr Silpe, P.C., New York (Ira E. Garr of counsel), for respondent.

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Order, Supreme Court, New York County (Matthew F. Cooper, J.), entered October 8, 2014, which, to the extent appealed from as limited by the briefs, granted plaintiff's cross motion to modify the payment schedules set forth in the judgment of divorce so as to accelerate his future monthly maintenance payments to defendant to offset the present after-tax value of the equitable distribution payments currently owing by her to plaintiff, unanimously affirmed, without costs.

The court properly determined that it was in the best interests of both parties to modify the payment schedule set forth in the divorce judgment (*see Matter of Shomron v Fuks*, 286 AD2d 587, 591 [1st Dept 2001], *lv denied* 97 NY2d 607 [2001]). The order does not modify the substance of the judgment, as

defendant contends, but simply accelerates the maintenance payments owed to her in exchange for the elimination of her present equitable distribution obligations to plaintiff, which she failed to meet and by her own admission will not meet in the future.

Defendant's remaining, mainly technical, arguments are unpreserved for review and, in any event, without merit (*see Zhao v Brookfield Office Props., Inc.*, 128 AD3d 623 [1st Dept 2015]).

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

ENTERED: APRIL 19, 2016

CLERK

Friedman, J.P., Andrias, Moskowitz, Kapnick, Webber, JJ.

868 The People of the State of New York, Ind. 3925/11
Respondent,

-against-

James Williams,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Lauren J. Springer of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (James Wen 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, Bronx County (Judith Lieb, J.), rendered October 28, 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: APRIL 19, 2016

CLERK

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

Friedman, J.P., Andrias, Moskowitz, Kapnick, Webber, JJ.

869N Catherine Uram, Index 20801/10E
Plaintiff-Respondent,

-against-

Patrick Smith,
Defendant,

Progressive Insurance Company,
Nonparty Appellant.

_____

Morris Duffy Alonso & Faley, New York (Arjay G. Yao of counsel), for appellant.

Richard J. Katz, LLP, New York (Jonathan A. Rapport of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Alexander W. Hunter, Jr., J.), entered May 22, 2015, which denied nonparty appellant insurer's motion to stay the inquest in the action, vacate the default judgment against defendant, entered April 12, 2011, grant leave to permit defendant to appear and answer the complaint, and compel plaintiff to accept the answer, unanimously affirmed, without costs.

Denial of the instant motion was a provident exercise of discretion as plaintiff demonstrated that her counsel forwarded, by U.S. mail, courtesy copies of the pleadings, motion for a default judgment, default judgment order and notice of inquest

(the pleadings in November 2010 and the default judgment order in February 2012) to an address provided in the insurance policy for the insurer's medical billing contractor and that none of the aforesaid documents was ever returned as undeliverable. On two of the occasions, the documents were sent via certified mail, and signed receipts were thereafter received by plaintiff's counsel which indicated the mailings were accepted at the subject address. The insurer acknowledged receiving a mailed copy of the notice of inquest at the subject address in December 2014, yet claims such mailing was its first notice of the instant action. The insurer did not respond to plaintiff's counsel's formal request for a complete copy of its no-fault file, which was sought for the alleged purpose of, inter alia, discerning the time frame wherein the insurer gained knowledge of the action.

On such a record, and in light of the insurer's appreciable delay in responding to the action, we find no basis to disturb the motion court's conclusion that a reasonable excuse for vacating defendant's default was not proffered by the insurer (*see generally* CPLR 5015[a]; *Pina v Jobar U.S.A. LLC*, 104 AD3d 544 [1st Dept 2013]). Accordingly, the motion court appropriately found no need to reach the issue of meritorious defense (*see id.* at 544). While the State has a strong public

policy in favor of deciding matters on the merits (*see generally Navarro v A. Trenkman Estate, Inc.*, 279 AD2d 257 [1st Dept 2001]), defendant's conduct here in failing to appear despite his having been personally served with the pleadings in this action, along with information strongly suggesting he was the negligent driver of the vehicle in which plaintiff was injured, undermines a need to yield to public policy concerns.

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

ENTERED: APRIL 19, 2016

CLERK

Friedman, J.P., Andrias, Moskowitz, Kapnick, Webber, JJ.

870N- Index 650106/11
870NA Naum Freidman,
Plaintiff-Appellant,

-against-

Yakov also known as Jacob Fayenson,
et al.,
Defendants-Respondents,

Korm Realty Inc.,
Nominal Defendant-Respondent.

- - - - -

Jacob Fayenson Revocable Trust,
Counterclaim Plaintiff-Respondent,

-against-

Naum Freidman, et al.,
Counterclaim Defendants-Appellants,

Korm Realty Inc.,
Nominal Defendant-Respondent.

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Tenenbaum Berger & Shivers LLP, Brooklyn (Rebecca A. Crance of counsel), for appellants.

Val Mandel, P.C., New York (Eric Wertheim of counsel), for respondents.

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Order, Supreme Court, New York County (Eileen Bransten, J.), entered December 9, 2013, which, to the extent appealed from as limited by the briefs, found that counterclaim defendant Evgeny Freidman (Evgeny) and nonparty Michael Cohen (a lawyer at counterclaim defendant Tenenbaum & Berger LLP) had engaged in

frivolous conduct and awarded attorneys' fees and costs to defendants, unanimously affirmed, with costs. Order, same court and Justice, entered September 17, 2014, which denied the cross motion of plaintiff-counterclaim defendant Naum Freidman (Naum), Evgeny, and Tenenbaum & Berger (collectively, counterclaim defendants) to disaffirm a Special Referee's report and granted defendants' motion to confirm it, unanimously affirmed, with costs.

The court providently exercised its discretion by finding that Evgeny engaged in frivolous conduct and sanctioning him (*see e.g. Great Am. Ins. Cos. v Bearcat Fin. Servs., Inc.*, 90 AD3d 533 [1st Dept 2011], *lv dismissed* 18 NY3d 951 [2012]; *G&T Term. Packaging Co., Inc. v Western Growers Assn.*, 66 AD3d 563 [1st Dept 2009]). In addition to the episode on which the motion court relied, where Evgeny – a lawyer who was present at Naum's deposition as an observer and a party – launched a profanity-laden attack on the lawyer conducting the deposition, we have, as requested by counterclaim defendants, reviewed the entire deposition transcript and find it replete with instances of conduct "undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another" (22 NYCRR 130-1.1[c][2]). Although Evgeny is a practicing

lawyer, the record shows that he claimed not to know basic legal terms and repeatedly played word games with defense counsel.

The motion court's decision to impose sanctions on Cohen was not an improvident exercise of discretion (*see Great Am. Ins. Cos.*, 90 AD3d at 533).

Counterclaim defendants' argument that the court erred by awarding sanctions without a hearing is unpreserved (*see Martinez v Estate of Carney*, 129 AD3d 607, 609 [1st Dept 2015]), and unavailing (*see id.*).

Counterclaim defendants' contention that the Special Referee should not have admitted defense counsel's redacted invoices in evidence as a business record is also unpreserved (*see e.g. Matter of Carmine G. [Franklin G.]*, 115 AD3d 594 [1st Dept 2014]), and unavailing (*see D.B. Zwirn Special Opportunities Fund, L.P. v Brin Inv. Corp.*, 96 AD3d 447, 448 [1st Dept 2012]). Unlike *135 E. 57th St., LLC v 57th St. Day Spa, LLC* (126 AD3d 471 [1st Dept 2015]), there was an affirmation supporting defendants' fee request, and monthly statements and bills were admitted into evidence.

The court providently exercised its discretion (*see 542 E. 14th St. LLC v Lee*, 66 AD3d 18, 24 [1st Dept 2009]) by awarding $18,530 in attorneys' fees. Block billing, about which

counterclaim defendants complain, "is common practice among law firms" (*Daniele v Puntillo*, 97 AD3d 512, 513 [1st Dept 2012], *lv denied* 20 NY3d 851 [2012]), and does not "render the invoiced amounts per se unreasonable" (*546-552 W. 146th St. LLC v Arfa*, 99 AD3d 117, 123 [1st Dept 2012]). Here, the work performed by defendants' attorneys was more than sufficiently detailed by the billing attorney's credible testimony (*id.*). Furthermore, the Special Referee reduced the amount sought by defendants due to the block billing (*see Matter of Silverstein v Goodman*, 113 AD3d 539, 540 [1st Dept 2014]).

We have considered counterclaim defendants' remaining arguments and find them unavailing.

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

ENTERED: APRIL 19, 2016

CLERK

Sweeny, J.P., Richter, Manzanet-Daniels, Gische, JJ.

496-
497-
498 Ind. 2449/12

The People of the State of New York,
Respondent,

-against-

Rayshawn Singleton,
Defendant-Appellant.

- - - - -

The People of the State of New York,
Respondent,

-against-

Malik Hawkins,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Claudia B. Flores of counsel), for Rayshawn Singleton, appellant.

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

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

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Judgments, Supreme Court, New York County (Edward J. McLaughlin, J. at suppression hearing; Bonnie G. Wittner, J. at jury trial and sentencing), rendered October 24, 2013, reversed, on the law, and the matter remanded for a new trial.

Opinion by Richter, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

John W. Sweeny, Jr., J.P.
Rosalyn H. Richter
Sallie Manzanet-Daniels
Judith J. Gische, JJ.

496-497-498
Ind. 2449/12
Ind. 4095/13

_____x

The People of the State of New York,
Respondent,

-against-

Rayshawn Singleton,
Defendant-Appellant.

- - - - -

The People of the State of New York,
Respondent,

-against-

Malik Hawkins,
Defendant-Appellant.

_____x

Defendants appeal from the judgments of the Supreme Court, New York County (Edward J. McLaughlin, J. at suppression hearing; Bonnie G. Wittner, J. at jury trial and sentencing), rendered October 24, 2013, convicting them of criminal possession of a weapon in the second degree and imposing sentence.

Robert S. Dean, Center for Appellate Litigation, New York (Claudia B. Flores of counsel), for Rayshawn Singleton, appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Dana Poole and Lindsey Richards of counsel), for respondent.

RICHTER, J.

In this prosecution for criminal possession of a weapon in the second degree, the trial court improperly admitted highly prejudicial photographs showing defendants making gang signs while holding a gun different from the one they were charged with possessing. The trial court also erred in allowing the People to introduce Facebook messages sent by defendant Hawkins three months after the charged crime in which he boasted about firing various types of guns during a separate unrelated shooting incident. These photographs and messages were classic propensity evidence and lacked probative value. Even if we were to accept the People's claim that they had some relevance, the trial court abused its discretion in admitting them because the prejudicial impact on the jury greatly outweighed any probative value. Therefore, we reverse defendants' convictions and remand for a new trial.

The evidence at trial established the following. On the night of June 14, 2011, Police Officer Monteith and his partner, Police Officer Perez, were patrolling East Harlem in a police car as part of a team that targeted violent crime and gang activity. The gangs in East Harlem included the AK Boys, the Cash Money Boys, and the Fetti Boys. Officers Monteith and Perez were on "high alert" that evening due to an earlier incident in the area.

As they approached 119th Street and Lexington Avenue, an area near where the Fetti Boys operated, Officer Monteith noticed a group of 3 to 4 young men arguing with another group of 8 to 10 young men. Officer Monteith described the larger group as being "on guard, on alert." As the police car approached, the smaller group walked away from the larger group and headed north on Lexington Avenue.

The officers drove up to 125th Street and circled back onto Lexington Avenue heading south. As they approached 122nd Street, which was the Cash Money Boys' territory, Officer Monteith saw an Oldsmobile double-parked on Lexington Avenue. The officer noticed that the smaller group of men that he had seen at 119th Street, whom the officer recognized as being members of the AK Boys, were congregating around the Oldsmobile. As the police car pulled up, the group of men moved toward the sidewalk, and another man, whom Officer Monteith recognized as Michael Robinson, exited the rear driver's side of the Oldsmobile. The Oldsmobile remained double parked through a cycle of traffic lights, but eventually started to move. The officers flashed their police lights and pulled the Oldsmobile over for blocking traffic.

Officer Perez approached the driver's side of the Oldsmobile, where defendant Singleton was sitting, and Officer

Monteith approached the passenger side, where defendant Hawkins sat. As he approached, Officer Monteith smelled the odor of burnt marijuana, and the officers asked the two men to step out of the vehicle. Officer Monteith searched the car and found a loaded and operable .38 caliber revolver on top of the backseat armrest near a latch that entered into the trunk. The officer also recovered a book bag and identification card from the backseat belonging to Robinson. A surveillance video introduced into evidence showed that before the police arrived at the Oldsmobile, Robinson and another man exited the rear seat of the car, went into a nearby building, and re-entered the vehicle several minutes later.

The police subsequently arrested both defendants, and Robinson, for possessing the revolver found in the backseat. A grand jury returned an indictment charging defendants with two counts of criminal possession of a weapon in the second degree, one for possessing a loaded firearm outside the home or place of business (Penal Law § 265.03[3]), and the other for possessing a loaded firearm with intent to use unlawfully (Penal Law § 265.03[1][b]). After a joint jury trial, defendants were convicted of possessing the firearm outside the home or place of business, but were acquitted of possessing it with the intent to use unlawfully. Prior to the trial, Robinson, who was indicted

separately, pleaded guilty to attempted second-degree weapon possession.

At trial, the court allowed the People to introduce into evidence two photographs extracted from Hawkins's cellular phone that were taken in the two weeks prior to the incident. One photograph shows Singleton and Hawkins together, looking at the camera, with Singleton holding a revolver; both defendants are making gang signs with their hands. The other photograph depicts Hawkins holding a revolver in one hand and making a gang gesture with the other. The People concede that the guns in these photographs are not the same gun, or even the same type of gun, that defendants were charged with possessing. In addition, the court allowed the People to introduce various Facebook messages and postings, from both before and after the charged incident, in which defendants reference their gang affiliation, guns, and acts of violence. The People also introduced testimony from an expert in street lingo who interpreted the meaning of the Facebook messages and postings.

On appeal, defendants challenge the admission of the photographs, the Facebook communications, and the testimony about gang activity given by Officer Monteith. "Under the familiar rule of *People v Molineux* (168 NY 264 [1901]), evidence of uncharged crimes is inadmissible where its only relevance is to

show [a] defendant's bad character or criminal propensity" (*People v Agina*, 18 NY3d 600, 603 [2012]). On the other hand, evidence of a defendant's uncharged crimes may be admissible where it is relevant to a material issue in the case other than propensity, such as intent, motive, knowledge, absence of mistake, common scheme or plan, or identity (*People v Morris*, 21 NY3d 588, 594 [2013]; *Molineux*, 168 NY at 293). "Even when admissible for such purposes, however, the evidence may not be received unless its probative value exceeds the potential for prejudice resulting to the defendant" (*People v Alvino*, 71 NY2d 233, 242 [1987]).

Judged by these principles, the trial court properly exercised its discretion in admitting some testimony about the various gangs operating in East Harlem, and Facebook communications suggesting that defendants were members of a gang (People's Exhibits 3A and 4D). In light of the testimony about the argument between the AK Boys and another group on the Fetti Boys' turf, after which the AK Boys gathered around the Oldsmobile, this evidence was probative of defendants' intent to use the weapon unlawfully (*see e.g. People v Wilson*, 14 AD3d 463 [1st Dept 2005], *lv denied* 4 NY3d 857 [2005] [allowing evidence of the defendant's gang affiliation where it was probative of the defendant's motive and was central to the jury's understanding of

the incident]).[1]

The trial court, however, erred in allowing the People to introduce the two photographs showing defendants holding a gun and making gang signs. There was no evidence that the gun in the photographs had anything to do with the gun found in the car or with any other criminal activity. As previously noted, and as conceded by the People, the gun depicted was not the same gun, or even the same type of gun, as that recovered from the Oldsmobile. The mere fact that defendants were in possession of a different gun in the past is not probative of whether they knowingly possessed the weapon they were charged with possessing. Nor are the photographs probative of defendants' intent to unlawfully use the weapon found in the car. They merely show defendants displaying a gun, and do not depict any unlawful use of the weapon.

This case bears striking similarity to *People v Blair* (90 NY2d 1003 [1997]). In *Blair*, the defendant sought to prove that the drugs found in his closet had been planted by a police informant. The People called a rebuttal witness who testified

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[1] Because defendants were acquitted of possession with intent to use unlawfully, the trial court on retrial shall make an independent assessment of whether this evidence has any probative value as to the remaining possession count, and if so, whether the probative value outweighs any prejudice to defendants.

that the defendant had previously supplied her with drugs retrieved from a back room in the defendant's apartment. The Court of Appeals reversed the defendant's conviction, finding that the prior uncharged crime evidence was inadmissible. The Court noted that the defense at trial was that the defendant never possessed the drugs planted in his closet. Thus, the Court concluded, the testimony about the previous drug transaction did nothing to refute that defense, but merely tended to show the defendant's propensity to sell drugs.

Likewise here, the defense at trial was that defendants did not possess the gun found in the rear of the car. Defendants claimed that they had no knowledge of the gun's presence in the vehicle, and that the weapon belonged to Robinson, who occupied the backseat area where it was found. Thus, as in *Blair*, the photographs of defendants having previously possessed a different gun did not refute their defense, but instead only showed their propensity to possess firearms (*see also People v Mercado*, 120 AD2d 619, 620 [2d Dept 1986], *lv denied* 68 NY2d 759 [1986] [reversing conviction where the court admitted photographs depicting the defendant posing with handguns that where were not used in the commission of the crimes charged]; *People v Seeley*, 74 AD2d 910 [2d Dept 1980] [photograph of the defendant aiming a gun, that was taken months before the charged offense, had no

probative value]).

Even if, as the People argue, the photographs were relevant to the issues in this prosecution, their prejudicial impact far outweighed any probative value. The photographs, particularly in view of the gang gestures depicted and the prominence of the guns displayed, were highly inflammatory, and impermissibly served to arouse the jury's emotions by portraying defendants as dangerous gun-carrying criminals with a propensity for violence. The prejudice caused by the photographs was exacerbated when the prosecutor, in both his opening and closing statements, made explicit reference to them. In his opening, the prosecutor described the two photographs and stated that they showed that defendants "had access to firearms" and "know how to get them." In his summation, the prosecutor displayed the photographs to the jury, and repeated that defendants "have access to guns" and "are aware of where to get them," arguments impermissibly going toward propensity (*see Mercado*, 120 AD2d at 620 [noting that inflammatory nature of photographs was improperly emphasized during prosecutor's summation]). In weighing the probative value against the prejudice, it bears mentioning that there already was significant evidence in the record tying defendants to the gangs operating in East Harlem.

The trial court also erred in allowing the People to

introduce two Facebook messages sent by defendant Hawkins three months after the charged crime. In the first message, Hawkins stated "he was lettin that Lil [s**t] go" and "[ni***s] on my side play wit big toys". The People's street lingo expert testified that Hawkins was talking about shooting weapons, and that "people on his side" were using larger caliber guns. In the second message, Hawkins stated "my [Ni**a] that a was a Lil 25" and "I let go 32's 38's 9's n [s**t]." According to the expert, whereas "Lil 25" referred to a small handgun, Hawkins was shooting larger caliber weapons (i.e., .32 caliber, .38 caliber and 9 millimeter), that were "conducive to more violence, more injuries."

The People concede that Hawkins was not referring to the charged crime in these messages, but to an entirely different incident that occurred months later. Thus, these messages are far too attenuated to have any probative value as to Hawkins's knowledge of the gun found in the car or his intent to use that weapon on the day of the incident (*see People v Cortez*, 22 NY3d 1061, 1071 [2014, Lippman, Ch.J., concurring], *cert denied* __ US __, 135 S Ct 146 [2014] ["evidence of [the] defendant's temporally remote broodings . . . was too attenuated from any act to be relevant, even under some exception to the *Molineux* prohibition"]). Even if we were to accept the People's argument

that Hawkins's messages fell within a *Molineux* exception, the prejudice in admitting them far outweighed any probative value. Allowing the jury to hear Hawkins boasting about a shootout involving several different types of firearms, months after the crime on trial, could have led the jury to convict him based solely on his propensity for gun violence. Thus, defendants' convictions on the weapon charge should be reversed, and the matter remanded for a new trial.

The court properly denied defendants' suppression motions. During a lawful traffic stop, the police acquired probable cause to search defendants' car based on the odor of marijuana (*see e.g. People v Robinson*, 103 AD3d 421 [1st Dept 2013], *lv denied* 20 NY3d 1103 [2013]), and the police did not exceed the proper scope of such a search. The record establishes that the police found the revolver in an area that constituted part of the car's passenger compartment, readily accessible to the occupants, and that did not constitute part of the trunk. We have considered and rejected defendants' remaining arguments on the suppression issue.

In light of our decision to reverse, we need not reach defendants' remaining contentions.

Accordingly, the judgments of the Supreme Court, New York County (Edward J. McLaughlin, J. at suppression hearing; Bonnie G. Wittner, J. at jury trial and sentencing), rendered October 24, 2013, convicting defendants of criminal possession of a weapon in the second degree, and sentencing each of them to a term of five years, should be reversed, on the law, and the matter remanded for a new trial.

All concur.

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

ENTERED: APRIL 19, 2016

CLERK