SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

OCTOBER 13, 2016

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Friedman, J.P., Renwick, Andrias, Gische, Webber, JJ.

1394 Benedict O. Emengo, Index 150733/13
Plaintiff-Appellant,

-against-

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

John and Jane Doe,
Defendants.

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Maduegbuna Cooper LLP, New York (Samuel O. Maduegbuna of counsel), for appellant.

Eric T. Schneiderman, Attorney General, New York (Mark H. Shawhan of counsel), for respondents.

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Order, Supreme Court, New York County (Geoffrey D. Wright, J.), entered on or about October 9, 2015, which granted defendants' motion to dismiss the second amended complaint, unanimously modified, on the law, to deny the motion as to the first, second and sixth causes of action, and otherwise affirmed, without costs.

Plaintiff's allegations are that he is a black man of

Nigerian national origin; was well-qualified for the positions of Deputy Director and Director of the Division of Confidential Investigation (DCI) at defendant New York State Insurance Fund (NYSIF); and that he was refused promotion to these positions, meet the first three elements of his claims for invidious discrimination under the New York State Human Rights Law (State HRL) (*see Askin v Department of Educ. of the City of N.Y.*, 110 AD3d 621, 622 [1st Dept 2013]). Plaintiff also sufficiently alleges the fourth element of his discrimination claim, namely that he was adversely treated because of his race and national origin. Plaintiff states that defendant Mullen, Director of Administration at DCI, told plaintiff that he was an "immigrant" who "should be content" with his current job title, "since, as an immigrant, he would never be promoted beyond" his current title. Plaintiff also claims that defendant Lefkowitz, Director of Personnel at DCI, was previously found to have discriminated against black NYSIF employees. These allegations constitute sufficient evidence of discriminatory animus. Plaintiff also sufficiently alleges that each individual defendant was an "employer" for purposes of his claims, broadly asserting that each individual defendant was a high-ranking manager with, at least inferentially, supervisory powers, including the power to

promote, discipline and terminate employees.

Plaintiff further alleges that there was a long-standing policy of refusing to promote black NYSIF employees above the title of Supervising Insurance Field Investigator, that all of the individual defendants were at least aware of this policy, that all of the individual defendants were aware that plaintiff was being refused promotions in accordance with this policy, and that none of the defendants took any action in response to this conduct. Accordingly, plaintiff has adequately pleaded employer liability, as to all of the individual defendants, under a condonation theory (*see* Executive Law § 296[1][a]; *Matter of State Div. of Human Rights v St. Elizabeth's Hosp.*, 66 NY2d 684, 687 [1985]; *Patrowich v Chemical Bank*, 63 NY2d 541 [1984]).

Plaintiff has also stated a cause of action under the State HRL for retaliation (*see Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 312-313 [2004]; *Fletcher v Dakota, Inc.*, 99 AD3d 43, 51-52 [1st Dept 2012]). Plaintiff claims that on November 14, 2012, he engaged in a protected activity by complaining to NYSIF's Chief Executive Deputy Director that defendants had discriminated against him by failing to promote him. Plaintiff's allegation that, on December 5, 2012, Mullen told him that he would not be receiving any merit pay for 2011 is temporally close

to the protected activity and supports an inference of retaliation, as well as establishing the requisite adverse employment action (*see Blashka v New York Hotel Trades Council & Hotel Assn. of N.Y. City Health Ctr.*, 126 AD3d 503 [1st Dept 2015]; *Treglia v Town of Manlius*, 313 F3d 713, 720 [2d Cir 2002]). In the current procedural posture of a motion to dismiss, any tension between plaintiff's allegation that Mullen denied him merit pay in retaliation for his protected activity, and his allegation elsewhere in the complaint that he was denied merit pay for discriminatory reasons, is not fatal to either claim.

In light of defendants' agreement that plaintiff's claims against the State of New York and NYSIF "rise or fall with his claims against the six individual defendants," plaintiff's claims against the State and NYSIF under the State HRL, including his causes of action for aiding and abetting discrimination, should likewise be reinstated.

Although plaintiff asks us to reinstate his claims under the New York City Human Rights Law (the City HRL) (the third, fourth and fifth causes of action), his appellate briefs fail to address Supreme Court's holding that dismissal of the City HRL claims was required on the independent ground of sovereign immunity, whether

or not the complaint otherwise stated legally sufficient claims for relief under the City HRL. By failing to address this aspect of the decision under review, plaintiff has abandoned his appeal from the dismissal of the City HRL claims.

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

ENTERED: OCTOBER 13, 2016

CLERK

Friedman, J.P., Richter, Feinman, Kapnick, Kahn, JJ.

1876 The People of the State of New York, Ind. 446/13
Respondent,

-against-

Marvin Nowell,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Marisa K. Cabrera of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Michael R. Sonberg, J.), rendered February 14, 2014, convicting defendant, after a jury trial, of three counts of criminal contempt in the first degree and three counts of criminal contempt in the second degree, and sentencing him, as a second felony offender, to an aggregate term of two to four years, unanimously affirmed.

The court complied with the requirements of *People v Buford* (69 NY2d 290 [1987]) before it dismissed a sworn juror, upon a finding that the juror had improperly discussed the case with his girlfriend and had compounded the misconduct by falsely denying it to the court. The court conducted two thorough, probing inquiries of the juror. The particular circumstances of the juror's misconduct warranted, as a matter of practical necessity,

the court's resort to circumstantially reliable information developed during the People's out-of-court contact with the juror's girlfriend. The court did not rely solely on this information, but instead made its own evaluation of the credibility of the juror himself.

We reject defendant's challenges to the sufficiency and weight of the evidence supporting his first-degree contempt convictions. The victim's testimony, taken together with other evidence including phone records, established the elements of first-degree contempt as to each of these convictions. The fact that the jury acquitted defendant of other charges does not warrant a different conclusion (*see People v Rayam*, 94 NY2d 557 [2000]).

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

ENTERED: OCTOBER 13, 2016

CLERK

Friedman, J.P., Richter, Feinman, Kapnick, Kahn, JJ.

1877 Donna Lovell, et al., Index 303930/12
Plaintiffs-Appellants,

-against-

Marc Thompson, et al.,
Defendants-Respondents.

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Anthony J. Cugini, Jr., P.C., Riverdale (Anthony J. Cugini of counsel), for appellants.

Penino & Moynihan, LLP, White Plains (Henry L. Liao of counsel), for respondents.

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Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered March 22, 2016, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendants established prima facie that they did not cause or create the defect in the stairs in their home that allegedly caused plaintiff Donna Lovell to fall and that they had no actual or constructive notice of any such defect (*see Mercer v City of New York*, 88 NY2d 955 [1996]; *Kelly v Berberich*, 36 AD3d 475 [2007], *appeal withdrawn* 8 NY3d 943 [2007]). They submitted evidence that the stairs were built in 1927 and had never been worked on thereafter, that there were no earlier reported incidents or complaints, and that no violations or citations had

been issued with respect to the condition of the stairs. They also submitted their testimony that they used the stairs regularly, that no one had ever before fallen on the stairs, and that on examination immediately after the accident they could find no defect.

In opposition, plaintiffs failed to raise an issue of fact. As to the issue of notice, the motion court was not required to consider their unsworn witness statement since the statement was the only evidence submitted on that issue (*see Briggs v 2244 Morris L.P.*, 30 AD3d 216 [1st Dept 2006]). In any event, the unsworn statement is not probative of whether defendants had notice of the alleged defect.

Nor does plaintiffs' expert affidavit constitute evidence that the stairs were out of compliance with commonly accepted safety standards or practices with respect to handrails and risers and treads, since the expert did not refer to any specific safety standards or practices that are applicable to the subject

stairs and did not say that the absence of a handrail and/or the differential in the dimensions of the risers and treads rendered the stairs inherently dangerous (*see Griffith v ETH NEP, L.P.*, 140 AD3d 451 [1st Dept 2016]).

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

ENTERED: OCTOBER 13, 2016

CLERK

Friedman, J.P., Richter, Feinman, Kapnick, Kahn, JJ.

1878-
1878A In re Desiree M., and Another,

Dependent Children Under Eighteen
Years of Age, etc.,

Aythea M.,
Respondent-Appellant,

Catholic Guardian Services,
Petitioner-Respondent.

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Carol L. Kahn, New York, for appellant.

Magovern & Sclafani, Mineola (Joanna M. Roberson of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Marianne Allegro of counsel), attorney for the children.

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Orders, Family Court, Bronx County (Karen I. Lupuloff, J.), entered on or about June 29, 2015, which, upon a fact-finding determination that respondent mother permanently neglected her son and daughter, terminated her parental rights to the children, and committed their care and custody to the petitioner-agency Catholic Guardian Services and the Commissioner for Social Services for the purpose of adoption, unanimously affirmed, without costs.

Clear and convincing evidence supported the findings of permanent neglect (*see* Social Services Law § 384-b [7]).

The agency expended diligent efforts to strengthen the parental relationship between respondent and the children by discussing with respondent what she needed to do to complete her service plan; attempting to locate kinship resources for the children; referring respondent to mental health treatment, domestic violence counseling, anger management, and parental skills training; assisting respondent in seeking housing, including conducting an expedited home study of a kinship resource; monitoring respondent while the children were temporarily discharged back to her in 2010; and scheduling visitation (*see Matter of Ebonee Annastasha F. [Crystal Arlene F.]*, 116 AD3d 576 [1st Dept 2014], *lv denied* 23 NY3d 906 [2014]). The fact that respondent refused housing assistance and failed to sign releases so that caseworkers could verify her compliance with services rendered the agency's diligent efforts unavailing (*see Matter of Julian Raul S. [Oscar S.]*, 111 AD3d 456 [1st Dept 2013]; *Matter of Kimberly C.*, 37 AD3d 192 [1st Dept 2007], *lv denied* 8 NY3d 813 [2007]).

In addition, clear and convincing evidence demonstrates that respondent permanently neglected the children by failing to plan for their future, because she failed to complete a mother-child program, mental health services and anger management as required

by her service plan, never gained insight into the reasons why the children were placed into foster care or advanced a realistic, feasible plan for their future care during the relevant statutory period (*see Matter of Emily Jane Star R. [Evelyn R.]*, 117 AD3d 646 [1st Dept 2014]; *Matter of Jaileen X.M. [Annette M.]*, 111 AD3d 502 [1st Dept 2013], *lv denied* 22 NY3d 859 [2014]; *Matter of Alpacheta C.*, 41 AD3d 285 [1st Dept 2007], *lv denied* 9 NY3d 812 [2007]; *Matter of Galeann F.*, 11 AD3d 255 [1st Dept 2004], *lv denied* 4 NY3d 703 [2005]). In addition, the record shows that respondent failed to obtain suitable housing for the children and missed a number of scheduled supervised visits with them (*see Matter of Jonathan Jose T.*, 44 AD3d 508 [1st Dept 2007]).

A preponderance of the evidence demonstrated that it was in the children's best interests to terminate respondent's parental rights and free them for adoption (*see Matter of Star Leslie W.*, 63 NY2d 136, 147-148 [1984]; *Matter of Mark Eric R. [Juelle Virginia G.]*, 80 AD3d 518 [1st Dept 2011]). A suspended judgment was not warranted here, because the progress made by respondent in completing a domestic violence class in 2014 and visiting the children in the months preceding the dispositional determination was insufficient to warrant any further prolongation of the

children's unsettled familial status (*see Matter of Chandel B.*, 61 AD3d 546, 547 [1st Dept 2009], citing *Matter of Maryline A.*, 22 AD3d 227, 228 [1st Dept 2005]).

Respondent concedes that she did not preserve the issue of whether it was error for the Family Court not to interview her daughter in camera. If we were to review the issue, we would find that there is no merit to respondent's contention, because Social Service Law § 384-b (3)(k) contains no such requirement (*see Matter of Georges P. [Yvelisse A.]*, 103 AD3d 570, 570 [1st Dept 2013], *lv denied* 21 NY3d 855 [2013], citing *Matter of Jayden C. [Michelle R.]*, 82 AD3d 674, 675 [1st Dept 2011]).

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

ENTERED: OCTOBER 13, 2016

CLERK

Friedman, J.P., Richter, Feinman, Kapnick, Kahn, JJ.

1879 Lisa Cullity, Index 112494/11
Plaintiff-Appellant,

-against-

Fred Posner, et al.,
Defendants-Respondents.

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Profeta & Eisenstein, New York (Fred R. Profeta, Jr. of counsel), for appellant.

The Braunstein Law Firm, PLLC, New City (Michael L. Braunstein of counsel), for respondents.

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Order, Supreme Court, New York County (Paul Wooten, J.), entered July 9, 2015, which, insofar as appealed from as limited by the briefs, granted defendants' motion for summary judgment dismissing plaintiff's cause of action for third-party promissory estoppel, unanimously reversed, on the law, without costs, and the motion denied.

The motion should have been denied as untimely. The motion court's rules required dispositive motions to be filed within 60 days of the filing of a note of issue. Defendant filed the motion papers nine days after the time to do so had expired,

rendering the motion untimely (*see* CPLR 3212[a]; *Brill v City of New York*, 2 NY3d 648 [2004]; *Connolly v 129 E. 69th St. Corp.*, 127 AD3d 617, 618 [1st Dept 2015]). Defendants' failure to address the missed filing deadline or offer, let alone show, good cause for the delay in filing, is fatal to their motion (*see Rahman v Domber*, 45 AD3d 497, 497 [1st Dept 2007]).

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

ENTERED: OCTOBER 13, 2016

CLERK

Friedman, J.P., Richter, Feinman, Kapnick, Kahn, JJ.

1880 The People of the State of New York, Ind. 2650/09
Respondent,

-against-

Mario Castro,
Defendant-Appellant.

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Richard M. Greenberg, Office of the Appellate Defender, New York (Katherine M. A. Pecore of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Matthew B. White of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Barbara F. Newman, J.), rendered August 14, 2013, convicting defendant, after a jury trial, of murder in the second degree, and sentencing him to a term of 25 years to life, unanimously affirmed.

The court's *Molineux* ruling was a proper exercise of discretion. Although the court initially precluded the People from eliciting that defendant had previously committed a burglary with the other two perpetrators of the charged crime, the court properly permitted the People to ask a witness about that incident to clarify testimony elicited on cross-examination. That witness played a similar role in the prior burglary as he did in the burglary in the instant case, namely, planning the incident with the other two, targeting a building with which he

was familiar, and staying away from the scene while the other two committed the burglary. In the absence of this information, the witness's testimony about the manner in which he planned the instant offense with the other two could have seemed confusing or implausible (*see People v Massie*, 2 NY3d 179, 184 [2004]; *People v Rojas*, 97 NY2d 32 [2001]). Nor does it avail defendant to challenge the testimony of another witness, who did not actually refer to any uncharged crimes (*see People v Hernandez*, 137 AD3d 603, 603-604 [1st Dept 2016], *lv denied* 27 NY3d 1133 [2016]; *see People v Enoch*, 221 AD2d 253, 254 [1st Dept 1995], *lv denied* 88 NY2d 965 [1996]). Moreover, any error in the court's ruling was harmless in light of the overwhelming evidence of defendant's guilt, as well as the implausibility of his defense (*see People v Crimmins*, 36 NY2d 230 [1975]).

Defendant did not preserve his contentions that the court should have given an accomplice corroboration charge and that the prosecutor should have corrected a witness's allegedly false testimony, and we decline to review them in the interest of justice. As an alternative holding, we find that there was no need for an accomplice charge, nor was there any "false" testimony to correct, and that any error was harmless in any

event. We have considered and rejected defendant's other argument concerning the court's charge.

We perceive no basis for reducing the sentence, or running it concurrently with defendant's sentence on another conviction.

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

ENTERED: OCTOBER 13, 2016

CLERK

Friedman, J.P., Richter, Feinman, Kapnick, Kahn, JJ.

1881 The People of the State of New York, Ind. 4889/13
Respondent,

-against-

Alejandro Esteban,
Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Thomas Farber, J.), rendered January 6, 2015, as amended February 9, 2015, convicting defendant, upon his plea of guilty, of criminal possession of a weapon in the third degree and sentencing him, as a second felony offender, to a term of from 2 to 4 years, unanimously affirmed.

Defendant's suppression motion was properly denied without a hearing. Although defendant was on notice of the specific basis for his arrest, including that a police officer saw him smoking marijuana in public view, his motion papers did not specifically address these allegations. Instead, his generalized and global denial of criminal activity "was not a sworn allegation of fact sufficient to support a ground for suppression, nor did it create

any factual issue warranting a hearing" (*People v McKinney*, 136 AD3d 604, 604 [1st Dept 2016], *lv denied* 27 NY3d 1153 [2016]).

Defendant's further argument that his trial counsel rendered ineffective assistance by not renewing the suppression motion is unreviewable on direct appeal because it involves matters not reflected in, or fully explained by, the record. In particular, discussions between defendant and his counsel concerning the underlying facts may have impeded counsel's ability to make allegations that would support suppression. Accordingly, since defendant has not made a CPL 440.10 motion, the merits of the ineffectiveness claim 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]).

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

ENTERED: OCTOBER 13, 2016

CLERK

Friedman, J.P., Richter, Feinman, Kapnick, Kahn, JJ.

1882 Mark Ricci, Index 190224/14
Plaintiff-Respondent,

-against-

A.O. Smith Water Products Co., et al.,
Defendants,

Cleaver-Brooks, Inc., sued
herein as Cleaver Brooks Company, Inc.,
Defendant-Appellant.

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Barry, McTiernan & Moore LLC, New York (Suzanne M. Halbardier of counsel), for appellant.

Weitz & Luxenberg, P.C., New York (Alani Golanski of counsel), for respondent.

_____

Order, Supreme Court, New York County (Peter H. Moulton, J.), entered October 19, 2015, which, in this action arising from plaintiff's alleged exposure to asbestos resulting in his contracting mesothelioma, denied the motion of defendant Cleaver-Brooks, Inc. for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs.

The motion court applied the correct standard on the summary judgment motion and properly concluded that Cleaver-Brooks failed to establish entitlement to judgment as a matter of law. The record demonstrates that in support of its motion, Cleaver-Brooks

merely pointed to perceived gaps in plaintiff's proof, rather than submitting evidence showing why his claims fail (*see Koulermos v A.O. Smith Water Prods.*, 137 AD3d 575 [1st Dept 2016]).

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

ENTERED: OCTOBER 13, 2016

CLERK

Friedman, J.P., Richter, Feinman, Kapnick, Kahn, JJ.

1883-
1883A The People of the State of New York,
Respondent,

-against-

Schlesinger Electrical Contractors, Inc.,
Defendant-Appellant.

- - - - -

The People of the State of New York,
Respondent,

-against-

Jacob Levita,
Defendant-Appellant.

Ind. 5802/12

_____

Moskowitz & Book, LLP, New York (M. Todd Parker of counsel), for appellants.

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

_____

Judgments, Supreme Court, New York County (Bruce Allen, J.), rendered February 19, 2015, convicting defendant Schlesinger Electrical Contractors, Inc. (SEC), after a jury trial, of scheme to defraud in the first degree and offering a false instrument for filing in the first degree, and sentencing it to a $10,000 fine, and convicting defendant Jacob Levita, after a jury trial, of scheme to defraud in the first degree, and sentencing him to a conditional discharge for a period of three years, unanimously

reversed, on the law, and the matter remanded for a new trial.

Defendants argue that the court violated their rights under the Confrontation Clause when it allowed, over objection, hearsay testimony that Robert Solomon – a nontestifying codefendant closely associated with SEC – had pleaded guilty "in relation to this case." The testimony was elicited during the redirect testimony of Jeff Deurlein, an executive of Siemens, the company that was SEC's partner in creating a firm (Schlesinger-Siemens, LLC) that the People alleged fraudulently operated without a master electrician in violation of the Administrative Code.

The People argue that the door was opened to this testimony by defense counsel's inquiry of Deurlein on cross-examination as to whether he knew if "anyone on the Siemens side" had been prosecuted. In the People's view, this inquiry misleadingly suggested that only Levita and SEC had been prosecuted, and that they had been selectively prosecuted.

In *People v Reid* (19 NY3d 382 [2010]), the Court of Appeals stated that the inquiry whether a defendant opened the door to the admission of otherwise inadmissible evidence "is twofold – whether and to what extent, the evidence or argument said to open the door is incomplete and misleading, and what if any otherwise inadmissible evidence is reasonably necessary to correct the

misleading impression" (*id.* at 388 [internal quotation marks omitted]). We cannot agree that Deurlein's responses during cross-examination opened the door to the challenged testimony. First, Deurlein testified on cross-examination that he did not know whether anyone at Siemens had been prosecuted. Accordingly, there was no misimpression to correct. Second, even if there had been evidence that no Siemens personnel were prosecuted, and even assuming such evidence could be read to misleadingly suggest that Solomon – not a Siemens employee — had not been prosecuted, this would at most have justified the admission of evidence that Solomon was prosecuted – not evidence that he was convicted based on an in-court admission of guilt.

The admission of Solomon's guilty plea violated the Confrontation Clause (*see Crawford v Washington*, 541 US 36 [2004]). The error was not harmless because "it cannot be said that there is no reasonable possibility that the erroneously admitted [statement] contributed to the conviction" (*People v Cedeno*, 27 NY3d 110, 122 [2016] [internal quotation marks omitted]). This is particularly so as to the corporate defendant. In light of the People's contention that Solomon was an agent of SEC, the evidence that Solomon pleaded guilty effectively precluded an acquittal.

We also agree with defendants that the court erroneously admitted certain bank records, which included Solomon's hearsay representation that he was SEC's vice president, under the business records exception to the hearsay rule. A party seeking to introduce evidence under the exception must demonstrate that "each participant in the chain producing the record, from the initial declarant to the final entrant, [was] acting within the course of regular business conduct" when the record was made (*Matter of Leon RR*, 48 NY2d 117, 122 [1979]). We find that although bank personnel were acting under a business duty when the record was created, the record fails to demonstrate that Solomon was acting under such a duty when he supplied the information at issue.

We have considered and rejected defendants' arguments for dismissal. Since we are ordering a new trial, we find it unnecessary to reach any other issues.

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

ENTERED: OCTOBER 13, 2016

CLERK

Friedman, J.P., Richter, Feinman, Kapnick, Kahn, JJ.

1884 The People of the State of New York, Ind. 3273/05
Respondent,

-against-

Shamont Harris,
Defendant-Appellant.

_____

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

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

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Order, Supreme Court, New York County (Analisa Torres, J.), entered on or about May 11, 2012, which adjudicated defendant a level three sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

Defendant's argument that the court's assessment of points under the risk factor for a prior violent felony was not supported by sufficient documentation is unpreserved and we decline to consider it in the interest of justice. In any event,

we find that the case summary was reliable hearsay that constituted clear and convincing evidence to support this point assessment (*see People v Mingo*, 12 NY3d 563, 572-573 [2009]).

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

ENTERED: OCTOBER 13, 2016

CLERK

Friedman, J.P., Richter, Feinman, Kapnick, Kahn, JJ.

1885 In re Jennifer S.,
Petitioner-Respondent,

-against-

Tony J.,
Respondent-Appellant.

_____

Kenneth M. Tuccillo, Hastings on Hudson, for appellant.

Larry S. Bachner, Jamaica, for respondent.

Karen P. Simmons, The Children's Law Center, Brooklyn (Rohan Grey of counsel), attorney for the child.

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Order, Family Court, Bronx County (Sidney Gribetz, J.), entered on or about June 12, 2015, which granted petitioner's motion for an order of filiation naming respondent-appellant the subject child's father, unanimously affirmed, without costs.

The court properly determined that equitable estoppel prevented appellant from challenging his paternity of the child with DNA testing since the record, including appellant's own testimony, establishes that he had a long-standing bond with the

child, whom he has supported financially and emotionally, and that such testing would not be in the child's best interest (*see* Family Ct Act § 418(a); *Matter of Shondel J. v Mark D.*, 7 NY3d 320 [2006]).

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

ENTERED: OCTOBER 13, 2016

CLERK

Friedman, J.P., Richter, Feinman, Kapnick, Kahn, JJ.

1886 In re the State of New York, Index 30157/14
Petitioner-Appellant,

-against-

Richard L. (Anonymous),
Respondent-Respondent.

_____

Eric T. Schneiderman, Attorney General, New York (Andrew W. Amend of counsel), for appellant.

Marvin Bernstein, Mental Hygiene Legal Service, New York (Sadie Zea Ishee of counsel), for respondent.

_____

Order, Supreme Court, New York County (Bonnie G. Wittner, J.), entered on or about January 15, 2015, which granted respondent's motion to dismiss the petition for the civil management of respondent pursuant to article 10 of the Mental Hygiene Law, unanimously reversed, on the law, without costs, the motion denied, the petition reinstated, and the matter remanded for a probable cause hearing.

Supreme Court, relying on *Matter of State of New York v Donald DD.* (24 NY3d 174 [2014]), found that petitioner failed to state a cause of action. However, based on the subsequent decisions in *Matter of State of New York v Dennis K.* (__ NY3d __, 2016 NY Slip Op 05330 [2016]) and *Matter of State of New York v Jerome A.* (137 AD3d 557 [1st Dept 2016]), the petition alleging a

mental abnormality based on a composite diagnosis of antisocial personality disorder, substance-use disorders, psychopathy and sexual preoccupation, and supported by expert evidence that is not patently deficient, is facially valid and not subject to dismissal prior to a probable cause hearing. Although the court at a probable cause hearing or the factfinder at trial may or may not be convinced by the expert evidence, the evidence was not so deficient as to warrant dismissal of the petition at this early juncture.

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

ENTERED: OCTOBER 13, 2016

CLERK

Friedman, J.P., Richter, Feinman, Kapnick, Kahn, JJ.

1888 The People of the State of New York, Ind. 6436/09
Respondent,

-against-

Victor Guardiola,
Defendant-Appellant.

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Seymour W. James, Jr., The Legal Aid Society, New York (Adrienne M. Gantt of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Sabrina Margret Bierer of counsel), for respondent.

_____

Order, Supreme Court, New York County (Larry Stephen, J.), entered on or about August 1, 2013, which adjudicated defendant a risk level three sexually violent predicate offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

Defendant's prior felony sex crime conviction automatically resulted in an override to risk level three (*see People v Howard*, 27 NY3d 337, 342 [2016]), and the court properly exercised its discretion when it declined to grant a downward departure (*see People v Gillotti*, 23 NY3d 841 [2014]). There were no mitigating factors that were not adequately taken into account by the risk assessment instrument, and the record does not establish any basis for a downward departure. Defendant's participation in sex

offender treatment while in prison was adequately taken into account, and we reject his assertion that he poses a diminished risk of reoffense (*see e.g. People v McNeely*, 124 AD3d 433 [1st Dept 2015] *lv denied* 25 NY3d 908 [2005]).

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

ENTERED: OCTOBER 13, 2016

CLERK

Friedman, J.P., Richter, Feinman, Kapnick, Kahn, JJ.

1891-
1892 The People of the State of New York,
Respondent,

-against-

Michael Horning,
Defendant-Appellant.

Ind. 2637/97

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

Cyrus R. Vance, Jr., District Attorney, New York (Christopher P. Marinelli of counsel), for respondent.

Order, Supreme Court, New York County (Arlene D. Goldberg, J.), entered on or about August 10, 2012, which, upon reconsideration, adhered to its prior order, entered on or about December 22, 2011, which denied defendant's motion for resentencing pursuant to the Drug Law Reform Act of 2005, unanimously affirmed. Appeal from order, same court and Justice, entered on or about December 22, 2011, unanimously dismissed, as subsumed in the appeal from the subsequent order.

The court correctly concluded that defendant, who was convicted of a class A-II drug felony, is not eligible for resentencing under the 2005 Drug Law Reform Act (L 2005, ch 643 § 1). A defendant is ineligible for resentencing under that Act

where he or she is within three years of parole eligibility (*People v Mills*, 11 NY3d 527, 536 [2008]). Moreover, "once a defendant has been released to parole supervision for a class A-II drug felony conviction, he or she no longer qualifies for 2005 [Drug Law Reform Act] relief for that particular conviction" (*id.* at 537).

The fact that defendant may have been eligible for resentencing under another Drug Law Reform Act, applicable to persons convicted of other types of drug felonies, and containing different provisions, does not create eligibility where it does not otherwise exist (*see People v Bustamante*, 124 AD3d 1132, 1133 [3d Dept 2015], *lv denied* 25 NY3d 1070 [2015]), and we have no authority to rewrite the applicable statute. Defendant's equal protection and due process objections to the statutory resentencing criteria are unpreserved (*see Mills*, 11 NY3d at 536) and without merit (*see People v Paniagua*, 45 AD3d 98, 109-110 [1st Dept 2007], *lv denied* 9 NY3d 992 [2007]).

Since the denial of resentencing was correct, this Court has no lawful basis upon which to reduce defendant's sentence to a determinate sentence (*see People v Ramirez*, 120 AD3d 1136 [1st Dept 2014], *lv denied* 25 NY3d 1076 [2014]). Aside from the fact that this is an appeal from the denial of resentencing, and not

from the underlying sentence itself, this Court's discretionary powers do not extend to the imposition of an unlawful sentence (*see People v Rivera*, 90 AD3d 5101 [1st Dept 2010], *lv denied* 18 NY3d 928 [2011]).

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

ENTERED: OCTOBER 13, 2016

CLERK

Friedman, J.P., Richter, Feinman, Kapnick, Kahn, JJ.

1893 The People of the State of New York, Respondent, Ind. 3217/06

-against-

Anthony Perez, 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 (Raymond L. Bruce, J.), entered on or about June 17, 2015, which adjudicated defendant a level three sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The record supports the court's discretionary upward departure to level three. There was clear and convincing evidence to establish aggravating factors that were not otherwise adequately accounted for by the risk assessment instrument (*see People v Gillotti*, 23 NY3d 841, 861-862 [2014]). Although defendant was assessed the maximum amount of points for his criminal history, the risk assessment instrument did not reflect

the serious and violent extent of that history (*see People v Faulkner*, 122 AD3d 539 [1st Dept 2014], *lv denied* 24 NY3d 915 [2015]). Moreover, the instrument did not take into account that, while confined and awaiting trial, defendant sought to have the victim of the underlying offense killed, in the hopes that the charges against him would be dismissed. Furthermore, we conclude that these aggravating factors outweighed the alleged mitigating factors set forth by defendant in opposition to the upward departure to risk level three.

Accordingly, defendant was properly adjudicated a level three offender based on the upward departure, regardless of whether his correct point score is 105, as the court found, or 85, as defendant asserts. In any event, the court correctly assessed points under the risk factor for relationship (strangers) between defendant and the victim.

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

ENTERED: OCTOBER 13, 2016

CLERK

Friedman, J.P., Richter, Feinman, Kapnick, Kahn, JJ.

1894 Awards.com, LLC, et al., Index 603105/03
Plaintiffs-Appellants,

-against-

Kinko's, Inc.,
Defendant-Respondent.

_____

Berg & Androphy, New York (Kurt Emhoff of counsel), and Berg & Androphy, Houston, TX (Samuel E. Doran of the bar of the State of Texas, the District of Columbia and the State of Virginia, admitted pro hac vice, of counsel), for appellants.

Newman Myers Kreines Gross Harris, P.C., New York (Luis G. Sabillon and Olivia M. Gross of counsel), for respondent.

_____

Appeal from judgment, Supreme Court, New York County (Charles E. Ramos, J.), entered March 23, 2015, awarding defendant a principal sum of money against plaintiffs, deemed appeal from judgment, same court and Justice, entered August 27, 2015 (CPLR 5520), awarding defendant a sum of money including interest against plaintiffs, and, so considered, said judgment unanimously reversed, on the law, without costs, and the matter remanded for entry of a resettled judgment in accordance herewith.

Plaintiffs' motion to resettle judgment should have been granted to allow for entry of judgment consistent with both the stipulated order and judgment entered February 10, 2009,

directing entry of judgment for defendant as against plaintiff Inspire Someone, LLC, only, and the order entered June 4, 2014, which confirmed a referee's report recommending the amount of defendant's recoverable legal fees (*see Ansonia Assoc. v Ansonia Tenants Coalition*, 171 AD2d 411 [1st Dept 1991]).

Contrary to defendant's contention, plaintiffs did not waive their appellate objections. While in some of the briefing they referred to themselves collectively as "Awards," there is no evidence that plaintiffs voluntarily and intentionally agreed that plaintiff Awards.com, LLC would indemnify defendant for legal fees (*see Bailey v Peerstate Equity Fund, L.P.*, 126 AD3d 738, 741 [2d Dept 2015]).

Nor is the doctrine of judicial estoppel applicable, since plaintiffs have not asserted in any prior proceeding that they are the same legal entity or that Awards.com had assumed Inspire

Someone's liability under the indemnification agreement with defendant (*see Becerril v City of N.Y. Dept. of Health & Mental Hygiene*, 110 AD3d 517, 519 [1st Dept 2013], *lv denied* 23 NY3d 905 [2014]).

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

ENTERED: OCTOBER 13, 2016

CLERK

Friedman, J.P., Richter, Feinman, Kapnick, JJ.

1895 The People of the State of New York, Ind. 4073/13
Respondent,

-against-

Angel Navarro,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Ben A. Schatz of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Marcy L. Kahn, J.), rendered October 24, 2014, as amended November 20, 2014 and April 1, 2015, convicting defendant, after a jury trial, of criminal possession of a weapon in the second degree (11 counts), criminal possession of a weapon in the third degree (5 counts) and attempted criminal possession of a controlled substance in the third degree, and sentencing him, as a second drug felony offender, to an aggregate term of 12 years, unanimously affirmed.

Defendant's claim that the attorneys who represented him before trial rendered ineffective assistance by filing inadequate motions to controvert a search warrant and suppress evidence is unreviewable on direct appeal because it involves matters not reflected in, or fully explained by, the record, concerning

counsel's choice of suppression issues and the reasoning behind those choices (*see People v Rivera*, 71 NY2d 705, 709 [1988]). Accordingly, since defendant has not made a CPL 440.10 motion, the merits of the ineffectiveness claim 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 has not shown that the motion practice conducted by his attorneys was objectively unreasonable, or that it resulted in unfairness or otherwise caused defendant any prejudice (*see People v Carver*, 27 NY3d 418, 420-421 [2016]). The record does not show any likelihood that motion practice based on the matters defendant cites on appeal would have resulted in a hearing, or that such a hearing would have resulted in the suppression of any evidence. The existing record fails to establish that counsel could have made a colorable argument that the police lacked a reasonable belief that defendant was probably selling "Molly" in the form of the controlled substance MDMA, notwithstanding the ultimate discovery that defendant was actually selling "Molly" in the form of the similar, but then-

legal drug Methylone.

Defendant did not preserve his claim that the court violated the procedures set forth in *People v O'Rama* (78 NY2d 270 [1991]), and, since it is undisputed that counsel had full notice of the jury note in question, there was no mode of proceedings error (*see People v Mack*, 27 NY3d 534, 541-542 [2016]). We decline to review his claim in the interest of justice. As an alternative holding, we reject his claim on the merits. The record establishes that the court fully complied with the *O'Rama* procedures by informing the parties that it proposed to reread its charge on a particular weapon count, including "all the definitions," which plainly encompassed the applicable presumption of intent, which was one of the legal principles applicable to that charge.

Defendant's arguments concerning certain amendments to the indictment are waived and unpreserved, and we decline to review them in the interest of justice (*see People v Udzinski*, 146 AD2d 245 [2d Dept 1989], *lv denied* 74 NY2d 853 [1989]; *see also People v Ford*, 62 NY2d 275 [1984]).

We reject defendant's arguments concerning the sufficiency and weight of the evidence supporting his conviction of attempted criminal possession of a controlled substance. The evidence

supports the conclusion that defendant committed this crime by possessing what he mistakenly believed to be an unlawful drug (*see e.g. People v Sessions*, 181 AD2d 842, 843 [2d Dept 1992], *lv denied* 80 NY2d 837 [1992].

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

ENTERED: OCTOBER 13, 2016

CLERK

Friedman, J.P., Richter, Feinman, Kapnick, Kahn, JJ.

1896 Eve Kleinfeld, Index 158629/14
Plaintiff-Appellant,

-against-

Marnin Rand,
Defendant-Respondent.

_____

Garvey Schubert Barer, New York (Maurice W. Heller of counsel), for appellant.

Borenstein McConnell & Calpin, P.C., Brooklyn (Abraham Borenstein of counsel), for respondent.

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Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered May 1, 2015, which granted defendant's motion to dismiss the complaint for lack of personal jurisdiction, unanimously reversed, on the law, without costs, and the motion denied.

Dismissal of the complaint for lack of personal jurisdiction was improper in this action on defendant's guaranty of a promissory note. Defendant is a New Jersey resident, but he came to New York two or three times – once or twice to negotiate the terms of the note, and once to negotiate his guaranty.

Negotiating the terms of a note constitutes the transaction of business (*see San Ysidro Corp. v Robinow*, 1 AD3d 185, 187 [1st Dept 2003]; CPLR 302[a][1]), and by analogy, so does negotiating the terms of a guaranty of a note.

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

ENTERED: OCTOBER 13, 2016

CLERK

Friedman, J.P., Richter, Feinman, Kapnick, Kahn, JJ.

1897- Ind. 4940/13
1898- 4988/13
1899 The People of the State of New York, 782/14
Respondent,

-against-

Ulysses Jordan,
Defendant-Appellant.

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Robert S. Dean, Center for Appellate Litigation, New York (Benjamin G. Wiener of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Sheila O'Shea of counsel), for respondent.

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Judgments, Supreme Court, New York County (Thomas Farber, J.), rendered September 30, 2014, convicting defendant, upon his pleas of guilty, of attempted murder in the second degree (two counts), assault in the first degree, attempted assault in the first degree, criminal possession of a weapon in the second degree (two counts), burglary in the first degree (four counts), burglary in the second degree, robbery in the first degree, robbery in the second degree, attempted robbery in the first degree and attempted robbery in the second degree (two counts), and sentencing him to an aggregate term of 13 years, unanimously affirmed.

The court properly exercised its discretion in denying youthful offender treatment (*see People v Drayton*, 39 NY2d 580 [1976]). Since defendant was convicted of several armed felonies, youthful offender treatment would require a showing of mitigating circumstances bearing directly on the crime, or relatively minor participation (CPL 720.10[2][a][ii];[3]). We find that neither of those criteria applied to the facts of this case, where defendant was the principal assailant in heinous crimes of violence. In any event, regardless of defendant's eligibility, youthful offender treatment was not warranted.

We perceive no basis for reducing the sentence.

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

ENTERED: OCTOBER 13, 2016

CLERK

Friedman, J.P., Richter, Feinman, Kapnick, Kahn, JJ.

1900 The People of the State of New York, Respondent, Ind. 2258/14

-against-

Shakeem White, Defendant-Appellant.

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Seymour W. James, Jr., The Legal Aid Society, New York (Joanne Legano Ross of counsel), for appellant.

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Judgment, Supreme Court, New York County (Melissa C. Jackson, J.), rendered January 22, 2015, unanimously affirmed.

Application by defendant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1st Dept 1976]). We have reviewed this record and agree with defendant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department on reasonable notice to the respondent within thirty (30) days after service of a copy of this order.

Denial of the application for permission to appeal by the judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

ENTERED: OCTOBER 13, 2016

CLERK

Friedman, J.P., Richter, Feinman, Kapnick, Kahn, JJ.

1901N Suarna Mehulic, M.D., Index 103297/08
Plaintiff-Appellant,

-against-

New York Downtown Hospital,
Defendant-Respondent.

_____

Suarna Mehulic, M.D., appellant pro se.

Epstein Becker & Green, P.C., New York (Robert D. Goldstein of counsel), for respondent.

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Order, Supreme Court, New York County (Shlomo Hagler, J.), entered October 9, 2015, which granted defendant's motion to file certain documents and deposition testimony under seal in connection with its motion for summary judgment, unanimously affirmed, without costs.

The motion was properly granted since all the exhibits at issue were designated confidential pursuant to the confidentiality agreement executed by the parties, and relate to "performance of a medical or a quality assurance review function" (*see* Education Law § 6527[3]; Public Health Law (PHL) § 2805-m; *Mehulic v New York Downtown Hosp.*, 113 AD3d 567, 569 [1st Dept 2014], *lv dismissed* 24 NY3d 976 [2014]).

Contrary to plaintiff's argument, Education Law § 6527(3) and PHL § 2805-m apply to residents as well as to licensed doctors (*see Timashpolsky v State Univ. of N.Y. Health Science Ctr. at Brooklyn*, 306 AD2d 271, 273 [2d Dept 2003], *lv denied* 1 NY3d 507 [2004]; *Roth v Beth Israel Med. Ctr.*, 180 AD2d 434 [1st Dept 1992]; *see also* PHL § 2805-j[1][c]). Nor is their application limited to malpractice suits, since the statutes are intended to encourage candid performance reviews without fear of legal reprisal (*see e.g. Armenia v Blue Cross of W. N.Y., Community Blue*, 190 AD2d 1025 [4th Dept 1993] [applying Education Law § 6527[3] in breach of contract action]; *Shapiro v Central Gen. Hosp.*, 171 AD2d 786 [2d Dept 1991] [applying statute in action alleging libel, slander, and interference with business relations]).

The statutory exception for "statements made by any person . . . who is a party to an action or proceeding the subject matter of which was reviewed at . . . a meeting [when medical or quality assurance review was performed]" (Education Law § 6527[3]; PHL § 2805-m[2]) does not apply because only the hospital, and not any

of the individual doctors who made statements, is a party to this action.

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

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

ENTERED: OCTOBER 13, 2016

CLERK

Tom, J.P., Renwick, Manzanet-Daniels, Gische, Webber, JJ.

1904-
1905 In re Kessiah A.,

A Child Under Eighteen Years of Age,
etc.,

Eriq W.,
Respondent-Appellant,

Roshana A.,
Petitioner-Respondent,

Commissioner of the Administration for
Children's Services,
Petitioner-Respondent.

_____

Law Office of Israel Premier Inyama, New York (Israel P. Inyama of counsel), for appellant.

Kelley Drye & Warren LLP, New York (Jaclyn M. Metzinger of counsel), for Roshana A., respondent.

Zachary W. Carter, Corporation Counsel, New York (Megan E. K. Montcalm of counsel), for Commissioner of the Administration for Children's Services, respondent.

Karen Freedman, Lawyers for Children, Inc., New York (Shirim Nothenberg of counsel), and Grais & Ellsworth LLP, New York (Rachel J. Stanton of counsel), attorney for the child.

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Order, Family Court, New York County (Stewart H. Weinstein, J.), entered on or about December 18, 2014, upon a finding, after a hearing, that respondent willfully violated a two-year order of protection issued June 5, 2014, committed him to the New York City Department of Corrections for a term of six months,

unanimously affirmed, without costs.

The evidence adduced at the hearing demonstrates beyond a reasonable doubt that respondent willfully violated the subject order of protection by sending the child written communications (*see N.A. Dev. Co. v Jones*, 99 AD2d 238 [1st Dept 1984]). A police detective testified that respondent told him he had written both the June 6 letter and the June 10 letter and mailed them to the child. The agency's interception of the letters before the child could read them does not alter the conclusion that respondent violated the order of protection.

Respondent waived his objection as to the sufficiency of the notice provisions of the petition (*see* Judiciary Law § 756; *see also* Family Court Act § 846[b]) by failing to raise it timely (*see Matter of Dyandria D.*, 22 AD3d 354 [1st Dept 2005], *lv denied* 6 NY3d 704 [2006]). In any event, upon review of the petition, we find that it contains on its face the exact warning required by Judiciary Law § 756.

The court did not violate the best evidence rule by admitting photostatic copies of respondent's letters to the child, because the contents of the letters was not at issue (*see Flynn v Manhattan & Bronx Surface Tr. Operating Auth.*, 61 NY2d

769, 771 [1984]; *Billingy v Blagrove*, 84 AD3d 848 [2d Dept 2011]).

Respondent's claim that the order of protection was not served on him is not a basis for reversal, because the June 5, 2014 transcript establishes that respondent consented to the issuance of the order after he was allocuted by the court as to his understanding of its terms, with his assigned counsel present (*see People v Clark*, 262 AD2d 711, 712 [3d Dept 1999], *affd* 95 NY2d 773 [2000]).

Respondent's argument that petitioner never made clear to him the punishment that he could face in the event of a conviction is without merit. Respondent's counsel argued on the first day of the hearing that respondent should not be incarcerated during the proceeding because petitioner was seeking a six-month term.

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

ENTERED: OCTOBER 13, 2016

CLERK

Tom, J.P., Renwick, Manzanet-Daniels, Gische, Webber, JJ.

1906 Marilyn Alvarez, et al., Index 303148/14
Plaintiffs-Respondents,

-against-

Jerome Bryant, et al.,
Defendants-Appellants.

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Shearer PC, Locust Valley (Mark G. Vaughan of counsel), for appellants.

Pollack, Pollack, Isaac & DeCicco, LLP, New York (Kenneth J. Gorman of counsel), for respondents.

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Order, Supreme Court, Bronx County (Howard H. Sherman, J.), entered July 28, 2015, which, in this action for personal injuries arising out of a motor vehicle accident, granted plaintiffs' motion for partial summary on the issue of liability, unanimously affirmed, with costs.

Plaintiffs established their entitlement to judgment as a matter of law on the issue of liability by submitting evidence showing that the vehicle owned by defendant MJJ Service, Inc. and operated by defendant Bryant rear-ended the car in which plaintiffs were passengers. Defendants' opposition failed to raise a triable issue of fact, as they did not proffer a nonnegligent explanation for the accident (*see Chowdhury v Matos*, 118 AD3d 488 [1st Dept 2014]). Defendants' assertion that the

vehicle in which plaintiffs were riding stopped suddenly in an intersection, does not warrant a different determination (*see e.g. Morgan v Browner*, 138 AD3d 560 [1st Dept 2016]; *Malone v Morillo*, 6 AD3d 324 [1st Dept 2004]).

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

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

ENTERED: OCTOBER 13, 2016

CLERK

Tom, J.P., Renwick, Manzanet-Daniels, Gische, Webber, JJ.

1907-
1908 The People of the State of New York,
Respondent,

-against-

Derrick McClassling,
Defendant-Appellant.

Ind. 2885/13

- - - - -

The People of the State of New York,
Respondent,

-against-

Karace Bowens,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Alexandra N. Rothman of counsel), for Derrick McClassling, appellant.

Robert S. Dean, Center for Appellate Litigation, New York (Brittany N. Francis of counsel), for Karace Bowens, appellant.

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

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Judgment, Supreme Court, New York County (Richard D. Carruthers, J.), rendered July 9, 2014, convicting defendant Derrick McClassling, after a jury trial, of criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony drug offender previously convicted of a violent felony, to a term of six years, unanimously affirmed. Judgment,

same court and Justice, rendered August 29, 2014, convicting defendant Karace Bowens, after a jury trial, of criminal sale of a controlled substance in the third degree, criminal possession of a controlled substance in the third degree, criminal possession of a controlled substance in the fourth degree (two counts) and criminal use of drug paraphernalia in the second degree, and sentencing him, as a second felony drug offender previously convicted of a violent felony, to an aggregate term of seven years, unanimously affirmed.

Defendant McClassling's ineffective assistance of counsel claim is unavailing (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]). Given the trial evidence, and even in the absence of an agency defense, counsel's concession that his client committed the crime of fourth-degree criminal facilitation did not constitute a concession that his client was also accessorially liable for the sale charge (*see* Penal Law §§ 20.00, 115.00, 220.39[1]; *People v Watson*, 20 NY3d 182, 189 [2012]). The record fails to support McClassling's assertion that his counsel misunderstood the law regarding the relationship among sale, facilitation, and the agency defense (*compare People v Logan*, 263 AD2d 397 [1st Dept 1999], *mot for lv withdrawn* 94 NY2d 798 [1999]).

The court properly denied defendant Bowens's suppression motion. There is no basis for disturbing the court's credibility determinations, including, among other things, its rejection of the claim that Bowens was subjected to a public strip search.

The court correctly determined that because Bowens's ineffective assistance of counsel claim involved matters outside the record, his CPL 330.30(1) motion was an improper vehicle to raise such a claim (*see People v Giles*, 24 NY3d 1066, 1068 [2014]; *People v Perry*, 266 AD2d 151, 151-152 [1st Dept 1999], *lv denied* 95 NY2d 856 [2000]), and the court properly denied the motion without assigning new counsel (*People v Urbina*, 99 AD2d 552, 553 [1st Dept 2012], *lv denied* 20 NY3d 989 [2012]). A new attorney would not have been able to overcome the rule that a CPL 330.30(1) motion is limited to matters appearing on the record.

We find no basis for reducing Bowens's sentence.

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

ENTERED: OCTOBER 13, 2016

CLERK

Tom, J.P., Renwick, Manzanet-Daniels, Gische, Webber, JJ.

1913 In re Joseph P., and Others,

Dependent Children Under the Age of Eighteen Years, etc.,

Edwin P., et al.,
Respondents-Appellants,

New Alternatives for Children, Inc.,
Petitioner-Respondent.

_____

Larry Bachner, Jamaica, for Edwin P., appellant.

Kenneth M. Tuccillo, Hastings on Hudson, for Michelle F., appellant.

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

Tamara A. Steckler, The Legal Aid Society, New York (Riti P. Singh of counsel), attorney for the children.

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Orders of disposition (one for each child), Family Court, New York County (Susan K. Knipps, J.), entered on or about August 17, 2015, which, upon findings of permanent neglect, terminated the respondent parents' parental rights to the subject children and transferred custody of the children to petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.

The findings of permanent neglect are supported by clear and convincing evidence that the agency made diligent efforts to

strengthen and encourage the parent-child relationship, but that respondents failed to plan for the children's future (*see* Social Services Law § 384-b[7][a], [f]). The agency formulated a service plan, tailored to respondents' needs, including respondent father's cognitive limitations. The plan included regular supervised visitation, individual and group counseling, a parenting skills program, drug testing, assistance in finding suitable housing and, for the father, referrals to substance abuse programs, therapy for anger management issues, and a program to assist him in finding employment (*see e.g. Matter of Marissa Tiffany C-W. [Faith W.]*, 125 AD3d 512, 512 [1st Dept 2015]; *Matter of Adaliz Marie R. [Natividad G.]*, 78 AD3d 409 [1st Dept 2010]). Notwithstanding the agency's diligent efforts, respondent mother did not make sufficient progress to enable the children to return to her. Moreover, she continued to plan with the father, who wholly failed to comply with the plan in significant respects, including addressing his drug abuse and anger management issues. Among other things, despite multiple offers of assistance, respondents did not attend any education and medical appointments for the children, failed to attend counseling consistently, and did not maintain public assistance or find suitable housing (*id.*). They also failed to submit to

drug screens regularly, and the father tested positive for illicit substances. Family Court was entitled to draw the strongest negative inference against the father that the opposing evidence permitted from his failure to testify (*Matter of Alexis C. [Jacqueline A.]*, 99 AD3d 542, 543 [1st Dept 2012], *lv denied* 20 NY3d 856 [2013]).

Given the children's lengthy placement in suitable preadoptive foster homes, where their special needs were met, as well as the substantial concerns regarding respondents' continued failure to address the conditions that led to the children's removal, a preponderance of the evidence shows that termination of respondents' parental rights was in the children's best interests (*see Matter of Star Leslie W.*, 63 NY2d 136, 147-148 [1984]; *Matter of Anthony P. [Shanae P.]*, 84 AD3d 510, 511 [1st Dept 2011]). Although the children are in three separate foster homes, their foster parents are committed to maintaining the children's relationships with one another (*see Matter of Burke H. [Richard H.]*, 134 AD3d 1499, 1502 [4th Dept 2015]). Family Court properly determined that a suspended judgment is not in the best

interests of these children (*see id.*; *see also Matter of Charles Jahmel M. [Charles E.M.]*, 124 AD3d 496, 497 [1st Dept 2015], *lv denied* 25 NY3d 905 [2015]).

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

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

ENTERED: OCTOBER 13, 2016

CLERK

Tom, J.P., Renwick, Manzanet-Daniels, Gische, Webber, JJ.

1914 The People of the State of New York, Ind. 4602/10
Respondent,

-against-

Rudy Perez,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Joshua L. Haber 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 (Bruce Allen, J.), rendered May 12, 2015,

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: OCTOBER 13, 2016

CLERK

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

Tom, J.P., Renwick, Manzanet-Daniels, Gische, Webber, JJ.

1916 The People of the State of New York, Ind. 5711/11
Respondent,

-against-

Roberto Geron,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Thomas Farber, J.), rendered December 11, 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: OCTOBER 13, 2016

CLERK

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

Tom, J.P., Renwick, Manzanet-Daniels, Gische, Webber, JJ.

1917 In re Harry S.,
Petitioner-Appellant,

-against-

Olivia S. A.,
Respondent-Respondent.

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Richard L. Herzfeld, P.C., New York (Richard L. Herzfeld of counsel), for appellant.

Law Office of Lewis S. Calderon, Jamaica (Lewis S. Calderon of counsel), for respondent.

Karen P. Simmons, The Children's Law Center, Brooklyn (Susan M. Cordaro of counsel), attorney for the children.

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Order, Family Court, Bronx County (John J. Kelley, J.), entered on or about November 24, 2015, which, to the extent appealed from as limited by the briefs, after a hearing, denied petitioner father's request for visitation with the children, unanimously affirmed, without costs.

Although denial of visitation is a "drastic remedy," it is warranted where compelling reasons and substantial evidence show that visitation would be detrimental to the child (*Matter of Maxamillian*, 6 AD3d 349, 351-352 [1st Dept 2004]). Here, there is sound and substantial evidence for finding that the father should be denied in person, physical visitation with the children

at the present time. The father has a history of violence against the mother and there is an extant order of protection in favor of the mother and both children. The father made no effort to foster and maintain a relationship with the children during the extended period of time (6 years for the younger child, 5 years for the older) the children lived with relatives abroad, an arrangement that the father himself proposed (*Gregory C. v Nyree S.*, 16 AD3d 142, 143 [1st Dept 2005], *lv denied* 5 NY3d 702 [2005]).

Despite Family Court's determination that physical, in person visitation with their father would have a negative impact on the children's well being, evident in the emotional distress they were exhibiting, the court nonetheless encouraged the father to repair his relationship with the children by, among other things communicating with them by electronic or telephonic means, and sending them gifts. The court specifically ordered the mother to encourage, not discourage, such contact and it also ordered the mother to enroll the children in individual therapy for the purpose of attempting to foster a relationship between them and their father. The court also recommended that the father participate in therapy to address his anger issues and learn how to engage with the children in a positive manner.

Though the father's contact is limited at the present time, it in line with the children's wishes and very strong preferences (*Matter of Tyrone G. v Lucretia S.*, 4 AD3d 205, 206 [1st Dept 2004]). Furthermore, as a court of this state that has made a child custody determination, Family Court retains continuing jurisdiction over its determination (Domestic Relations Law § 76-a[1][a]) and the court left open the possibility of adjusting the father's future access to the children. There is no basis for disturbing the court's determination at this time.

The father's claims of bias are also lacking in merit, as he has failed to point to an actual ruling that stems from "an extrajudicial source" or resulting from "some other basis other than what the judge learned from his participation in the case" (*People v Moreno*, 70 NY2d 403, 407 [1987]).

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

ENTERED: OCTOBER 13, 2016

CLERK

Tom, J.P., Renwick, Manzanet-Daniels, Gische, Webber, JJ.

1918-
1919 The People of the State of New York, Respondent,

-against-

Tysean Saigo,
Defendant-Appellant.

Ind. 3794/12
645/13

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

Judgments, Supreme Court, New York County (Maxwell Wiley, J. at plea on Indictment No. 3794/12; Juan M. Merchan, J. at plea on Indictment No. 645/13 and sentence that covered both pleas), rendered December 6, 2013, unanimously affirmed.

Application by defendant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1st Dept 1976]). We have reviewed this record and agree with defendant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department on

reasonable notice to the respondent within thirty (30) days after service of a copy of this order.

Denial of the application for permission to appeal by the judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

ENTERED: OCTOBER 13, 2016

CLERK

Tom, J.P., Renwick, Manzanet-Daniels, Gische, Webber, JJ.

1920 The People of the State of New York, Ind. 30003/15
Respondent,

-against-

Johnelle Perez,
Defendant-Appellant.

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

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

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Order, Supreme Court, New York County (Eduardo Padró, J.), entered on or about May 7, 2015, which adjudicated defendant a level two sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court properly exercised its discretion when it declined to grant a downward departure (*see People v Gillotti*, 23 NY3d 841 [2014]). The mitigating factors cited by defendant were

adequately taken into account by the risk assessment instrument or outweighed by aggravating factors, including the seriousness of the underlying offense.

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

ENTERED: OCTOBER 13, 2016

CLERK

Tom, J.P., Renwick, Manzanet-Daniels, Gische, Webber, JJ.

1921 Twin City Fire Insurance Company, et al.,
Plaintiffs-Appellants,

-against-

Arch Insurance Group, Inc., et al.,
Defendants-Respondents.

Index 602062/09

Dewey Pegno & Kramarsky LLP, New York (Thomas E. L. Dewey of counsel), for appellants.

Foley & Lardner LLP, New York (Peter N. Wang of counsel), for Arch Insurance Group Inc. and Arch Capital Group Ltd., respondents.

Friedman Kaplan Seiler & Adelman LLP, New York (Lance J. Gotko of counsel), for David McElroy, John Rafferty and Michael Price, respondents.

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered on or about August 21, 2015, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, with costs.

Plaintiffs (collectively, Hartford) seek damages allegedly arising from the departure from their Financial Products Division (HFP) of former senior executives (the individual defendants), who joined defendants Arch Insurance Group, Inc. and Arch Capital Group Ltd. (Arch), HFP competitors, and were followed by more than 60 other former Hartford employees.

There is no evidence that defendants Rafferty and Price breached their fiduciary duty to Hartford or that they told HFP employees to call the hotline at Arch to obtain employment there. There is evidence that defendant McElroy breached his duty of loyalty by sharing confidential information with Arch while still employed by HFP. However, Hartford failed to raise an issue of fact as to whether McElroy's sharing of compensation information was a "substantial factor in causing an identifiable loss" (*see Gibbs v Breed, Abbott & Morgan*, 271 AD2d 180, 189 [1st Dept 2000] [internal quotation marks omitted]).

Hartford failed to raise an issue of fact as to whether Arch provided "substantial assistance" to McElroy in his breach of fiduciary duty (*see Bullmore v Ernst & Young Cayman Is.*, 45 AD3d 461, 464 [1st Dept 2007] [internal quotation marks omitted]). Nor did it submit evidence that Arch had actual knowledge, as opposed to merely constructive knowledge, of McElroy's breach of his fiduciary duty (*id.*).

There is no evidence that Price breached either his confidentiality agreement or Hartford's code of ethics, and there is no evidence that Rafferty ever disclosed any confidential information to Arch. There is evidence that McElroy breached both his confidentiality agreement and the code of ethics.

However, there is no evidence demonstrating "the value of the transactions lost as a result of [that] breach" (*U.S. Re Cos., Inc. v Scheerer*, 41 AD3d 152, 155 [1st Dept 2007]).

Hartford failed to raise an issue of fact as whether Arch intentionally procured McElroy's breach of his confidentiality agreement. Although it claims that it lost renewals of policies as a result of Arch's wrongful conduct, Hartford failed to submit evidence that any specific policy would have been renewed but for that conduct (*see Cantor Fitzgerald Assoc. v Tradition N. Am.*, 299 AD2d 204, 204 [1st Dept 2002], *lv denied* 99 NY2d 508 [2003]).

As to the cause of action for tortious interference with prospective contractual relations, Hartford failed to raise an issue of fact as to whether an Arch employee's allegedly defamatory comment to an unidentified insurance broker – that HFP "was crippled and would not be able to effectively service his business" - was directed at specific, identified, third parties with which HFP had business relationships, for the sole purpose of harming HFP, rather than increasing Arch's profits (*see Carvel Corp. v Noonan*, 3 NY3d 182 [2004]).

There is no evidence that Arch lured the employees away from Hartford by improper means or that the employees' decision to leave HFP was based on anything other than economic considerations (*see Anchor Alloys v Non-Ferrous Processing Corp.*, 39 AD2d 504, 507-508 [2d Dept 1972], *lv denied* 32 NY2d 612 [1973]), and perhaps a desire to follow McElroy, their team leader at HFP.

As to the cause of action for unjust enrichment, Hartford failed to raise an issue of fact as to whether its loss of any policy renewals was attributable to wrongdoing by Arch. Moreover, "[a] company that hires employees away from a competitor by offering them higher salaries is not unjustly enriched thereby" (*see Men Women NY Model Mgt., Inc. v Ford Models, Inc.*, 32 Misc 3d 1236[A], 2011 NY Slip Op 51595[U], *7 [Sup Ct, NY County 2011]).

Hartford failed to submit evidence of lost profits, the measure of damages for the cause of action for misappropriation of trade secrets (*Suburban Graphics Supply Corp. v Nagle*, 5 AD3d 663, 666 [2d Dept 2004]).

We have considered Hartford's remaining contentions and find them unavailing.

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

ENTERED: OCTOBER 13, 2016

CLERK

Tom, J.P., Renwick, Manzanet-Daniels, Gische, Webber, JJ.

1922 The People of the State of New York, Respondent,

Ind. 2858/13

-against-

Craig Peals,
Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Renee A. White, J.), rendered December 17, 2013, convicting defendant, upon his plea of guilty, of assault in the second degree, and sentencing him, as a second felony offender, to a term of three years, unanimously affirmed.

The indictment, which stated all the elements of second-degree assault, was not rendered jurisdictionally defective by the circumstances that it incorrectly alleged that the crime was committed on a certain date, and that defendant was apparently incarcerated on that date (*see People v Iannone*, 45 NY2d 589, 600-01 [1978]). Unlike the situation in *People v Van Every* (222 NY 74 [1917]), where an incorrect date rendered the charge a legal impossibility on its face, here defendant's incarceration

was an extrinsic, evidentiary fact not affecting the facial sufficiency of the indictment.

Defendant's remaining contentions are unpreserved, as well as forfeited by his guilty plea, and we decline to review them in the interest of justice. As an alternative holding, we find them unavailing. In accordance with CPL 200.70, the court properly amended the indictment to replace the errant date with the one reflected in the grand jury minutes, as well as in the bill of particulars and defendant's pretrial motions.

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

ENTERED: OCTOBER 13, 2016

CLERK

Tom, J.P., Renwick, Manzanet-Daniels, Gische, Webber, JJ.

1924 The People of the State of New York, Respondent, Ind. 6827/03 1303/04

-against-

Richard Lebron, Defendant-Appellant.

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

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

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Order, Supreme Court, New York County (Bonnie G. Wittner, J.), entered on or about April 9, 2013, which adjudicated defendant a level three sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

Regardless of whether defendant's correct point score would make him a presumptive level two offender, his prior felony sex crime conviction automatically resulted in an override to level three (*see People v Howard*, 27 NY3d 337, 342 [2016]), and the court properly exercised its discretion when it declined to grant a downward departure (*see People v Gillotti*, 23 NY3d 841 [2014]). Notwithstanding the mitigating factors defendant cites, his two sex crime convictions involved similar conduct that was violent

and predatory, and thereby demonstrated a serious threat of recidivism (*see e.g. People v Torres*, 90 AD3d 442 [1st Dept 2011], *lv denied* 18 NY3d 809 [2012]). In any event, we also find that the court properly assessed 15 points under the risk factor for drug or alcohol abuse, so that defendant qualifies as a level three offender based on his point score as well.

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

ENTERED: OCTOBER 13, 2016

CLERK

Renwick, J.P., Manzanet-Daniels, Gische, Webber, JJ.

1925N- Index 652998/13
1926N In re Unitrin Advantage Insurance 652997/13
Company Kemper A. Unitrin Business,
Petitioner-Appellant-Respondent,

-against-

Professional Health Radiology as assignee
of Anggi Camacho,
Respondent-Appellant.

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Unitrin Advantage Insurance Company
Kemper A. Unitrin Business,
Petitioner-Appellant,

-against-

Professional Health Radiology as assignee
of Nestor Camacho,
Respondent-Respondent.

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Gullo & Associates, LLC, Brooklyn (Cristina Carollo of counsel), for appellant-respondent/appellant.

Gary Tsirelman, P.C., Brooklyn (David M. Gottlieb and Stefan Belinfanti of counsel), for respondent-appellant/respondent.

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Order, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered January 29, 2014, which, to the extent appealed from as limited by the briefs, denied and dismissed petitioner Unitrin's petition to vacate a no-fault master arbitration award dated June 3, 2013, and granted respondent Professional Health Radiology a/a/o Nestor Camacho's counterclaim to the extent of

confirming the award, unanimously affirmed, without costs. Order, same court (Lawrence K. Marks, J.), entered March 14, 2014, which denied Unitrin's petition to vacate a no-fault master arbitration award dated June 3, 2013, granted respondent Professional Health Radiology a/a/o Anggi Camacho's counterclaim to confirm the award, and denied Professional Health's counterclaim for attorney's fees in connection with the court proceeding, unanimously modified, on the law, to grant the counterclaim for attorney's fees, and remand the matter to Supreme Court for further proceedings consistent with this decision, and otherwise affirmed, without costs.

Unitrin failed to establish that it was entitled to deny Professional Health's claims on the ground that Professional Health's assignors, Nestor Camacho and Anggi Camacho, did not appear for independent medical examinations (IMEs) (*see American Tr. Ins. Co. v Clark*, 131 AD3d 840 [1st Dept 2015]). The no-fault regulations include mandatory notice requirements governing insurer requests for both IMEs and examinations under oath (11 NYCRR 65-3.5[e]). The regulations expressly provide that the insurer "shall inform the applicant at the time the examination is scheduled that the applicant will be reimbursed for any loss of earnings and reasonable transportation expenses

incurred in complying with the request" (*id.*). Unitrin failed to establish that the requisite regulatory language was contained within its November 30, 2011 letters sent to the assignors, and, based on the multiple errors committed by Unitrin, it failed to establish inadvertent law office error, or that the cases should be remanded, in the interest of justice, for a new arbitration hearing.

Pursuant to Insurance Law § 5106(a), if a valid claim or portion of a claim for no-fault benefits is overdue, "the claimant shall also be entitled to recover his attorney's reasonable fee, for services necessarily performed in connection with securing payment of the overdue claim, subject to [the] limitations promulgated by the superintendent in regulations." "In a proceeding for judicial review of an award by a master arbitrator, an attorney's fee shall be fixed by the court adjudicating the matter" (*Matter of GEICO Ins. Co. v AAAMG Leasing Corp.*, 139 AD3d 947, 948 [2d Dept 2016]; *see* 11 NYCRR 65-4.10[j][4]). Professional Health, therefore, is entitled to attorney's fees in connection with the Supreme Court proceeding regarding Anggi Camacho, and we remand the matter for further proceedings to determine those fees. Professional Health did not file a cross appeal with respect to the denial of its

counterclaim for attorney's fees in connection with the Supreme Court proceeding regarding Nestor Camacho, and this Court lacks the power to grant the counterclaim (*see Hecht v City of New York*, 60 NY2d 57 [1983]).

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

ENTERED: OCTOBER 13, 2016

CLERK

Mazzarelli, J.P., Acosta, Saxe, Kapnick, Kahn, JJ.

1419 In re Susan Clair, et al., Index 102277/15
Petitioners-Appellants,

-against-

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

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Cuti Hecker Wang LLP, New York (Eric Hecker of counsel), for appellants.

Zachary W. Carter, Corporation Counsel, New York (MacKenzie Fillow of counsel), for respondents.

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Judgment, Supreme Court, New York County, (Manuel J. Mendez, J.), entered February 18, 2016, modified, on the law, to declare that the Accessibility Rules were not violative of Administrative Code § 19-533, and otherwise affirmed, without costs.

Opinion by Kahn, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Angela M. Mazzarelli, J.P.
Rolando T. Acosta
David B. Saxe
Barbara R. Kapnick
Marcy L. Kahn, JJ.

1419
Index 102277/15

_____x

In re Susan Clair, et al.,
Petitioners-Appellants,

-against-

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

_____x

Petitioners appeal from the judgment of the Supreme Court, New York County, (Manuel J. Mendez, J.), entered February 18, 2016, among other things, denying the petition in this hybrid CPLR article 78 proceeding and declaratory judgment action, denying injunctive and declaratory relief, and dismissing the proceeding.

Cuti Hecker Wang LLP, New York (Eric Hecker and Daniel Mullkoff of counsel), for appellants.

Zachary W. Carter, Corporation Counsel, New York (MacKenzie Fillow and Scott Shorr of counsel), for respondents.

KAHN, J.

In this hybrid CPLR article 78 proceeding and declaratory judgment action, petitioners include one natural person owning an "independent" New York City yellow taxicab medallion, which is restricted to use with only one taxicab, and four corporate owners of both independent and "minifleet" medallions, the latter of which authorize the operation of an unlimited number of yellow taxicabs. Petitioners seek annulment of the "Accessibility Rules" (35 RCNY 51-03 [as amended], *et seq.*) promulgated by respondent New York City Taxi and Limousine Commission (TLC), as violative of section 19-533 of the Administrative Code of the City of New York, and as arbitrarily, capriciously and in error of law mandating their conversion to accessible vehicles in the absence of a TLC-approved hybrid electric vehicle which is also accessible to mobility challenged passengers. Petitioners also seek to enjoin respondents City of New York, the TLC and its Commissioner from enforcing the Accessibility Rules and a declaration that those rules violate § 19-533.[1] Respondents cross-move to dismiss the proceeding, claiming, to the extent relevant on this appeal, that petitioners' claims are barred by the applicable statute of limitations and the doctrine of laches.

Careful examination of both the statutory scheme and the

[1] On this appeal, petitioners do not challenge Supreme Court's denial of their motion for class certification.

Accessibility Rules demonstrates that petitioners' claims are without basis and that affirmance is appropriate, albeit on somewhat different grounds.

I. *Historical Background*

In 2005, with the manifest aim of addressing issues of air quality and fuel conservation, and at a time when the TLC had not yet approved any vehicle that could be used with medallions restricted to use with alternative fuel vehicles, which it had already begun to issue pursuant to City Council authorization (*see* Administrative Code § 19-532), the Council enacted Administrative Code § 19-533, entitled "Clean air taxis," which provides as follows:

> "The commission shall approve one or more hybrid electric vehicle models for use as a taxicab within ninety days after the enactment of this law. The approved vehicle model or models shall be eligible for immediate use by all current and future medallion owners. For the purposes of this chapter, a hybrid electric vehicle shall be defined as a commercially available mass production vehicle originally equipped by the manufacturer with a combustion engine system together with an electric propulsion system that operates in an integrated manner."

On April 30, 2014, the TLC promulgated the Accessibility Rules, which prescribed a process under which half of the City's taxi fleet would become wheelchair-accessible within several years. Specifically at issue here are two sections of the Accessibility Rules, the first of which addresses the start date of the TLC's accessibility program (35 RCNY 51-03) and the second of which sets forth requirements for replacement of certain

vehicles being mandatorily retired with accessible vehicles (35 RCNY 58-50). The first provision, section 51-03, defines "Accessible Conversion Start Date," i.e., the date of commencement of the TLC's accessible conversion program, as "the earlier of (1) the date on which there is available an Accessible Taxicab Model that meets . . . the requirements of §19-533 of the Administrative Code . . . or (2) January 1, 2016" (35 RCNY 51-03). The second provision, section 58-50, sets forth the requirements for replacement of vehicles using minifleet and independent medallions being mandatorily retired with accessible vehicles, although the requirements are implemented differently as to those two types of medallions. Under that section, as of the Accessible Conversion Start Date, minifleet medallion owners must replace their vehicles being mandatorily retired with accessible vehicles until at least 50% of their fleets have been replaced with such vehicles (35 RCNY 58-50[a][i]). Independent medallions used by vehicles to be mandatorily retired within a particular period are entered into a lottery in which 50% of those medallions are selected for mandatory replacement of the vehicles using them with accessible vehicles (35 RCNY 58-50[c][i], [iii]).

In a further provision, the Accessibility Rules provide for a "Taxicab Improvement Fund" (*see* 35 RCNY 58-16[g]) and a "Street Hail Livery Improvement Fund" (*see* 35 RCNY 82-17[g]), which

provide grants to medallion owners and licensees required to purchase accessible vehicles. The funds are financed by a $0.30 per ride surcharge, and the total amount of surcharges collected exceeds $40 million. An initial grant of $14,000 per vehicle is awarded to medallion owners and licensees required to convert to accessible vehicles, and an additional grant of $4,000 per year is awarded for each of the four years such a vehicle is required to remain in service.

Significantly, by 2014, the TLC had approved for use numerous alternative fuel vehicles, all but one of which was a hybrid electric vehicle satisfying § 19-533. By January 1, 2016, however, it had not approved any § 19-533 compliant hybrid electric vehicle which was also accessible, because no such vehicle existed.

Petitioners argue that in the absence of an available, accessible vehicle that meets the requirements of Administrative Code § 19-533, the Accessibility Rules are in irreconcilable conflict with the statute, and that the TLC is without authority to mandate that medallion owners replace vehicles being retired with non-hybrid electric wheelchair-accessible vehicles. Although petitioners present a skillful argument that the language of § 19-533, viewed in isolation, suggests such a construction, their argument is incompatible with the language of the statute, its legislative purpose, and with any sensible

assessment of the intent of the City Council in enacting the statutory scheme.

II. *The Statutory Mandate*

The precise directive of § 19-533 is that the TLC "shall approve one or more hybrid electric vehicle models" and that "[t]he approved vehicle model or models *shall be eligible* for immediate use by all current and future medallion owners" (emphasis added). The TLC fulfilled this mandate in 2014 by approving certain hybrid electric vehicles for use as taxicabs and making them eligible for immediate use by medallion owners.

Section 19-533 does not direct that in every case in which a vehicle is to be purchased or leased by a medallion owner, the TLC must make purchase or lease of a hybrid electric vehicle a requirement, however (*see Greater New York Taxi Assn. v New York City Taxi & Limousine Commn.*, 121 AD3d 21, 35 [1st Dept 2014] ["Administrative Code § 19-533 did not require the TLC to limit the entire fleet to hybrid vehicles, or preclude its approval of a non-hybrid for use as taxis"], *affd* 25 NY3d 600 [2015]). Neither does the statute mandate that the TLC take hybrid electric vehicles into account whenever it promulgates a new set of rules. Rather, the legislative intent of § 19-533 was merely "to encourage the use and development of alternative fuel vehicles, including hybrid electric vehicles" (Council of City of NY LL 72/2005, § 1, proposing enactment of Administrative Code §

19-533, eff July 20, 2005). Had the City Council intended for the TLC to *require* hybrid electric vehicles, it could have explicitly done so.

In any event, in 2006, the year after § 19-533 was enacted, the City Council enacted Administrative Code § 19-534. That statute mandated that the TLC develop, approve and implement a plan to increase the number of both clean air and accessible vehicles. Thus, prior to the adoption of the Accessibility Rules, including both sections 51-03 and 58-50, the City Council demonstrated its intent to increase the number of both alternative fuel and accessible taxicab vehicles, rather than to mandate solely the increased deployment of hybrid electric vehicles to the exclusion of other models of alternative fuel and accessible vehicles.

In keeping with this legislative intent, the TLC promulgated sections 51-03, 58-50 and the other aspects of the Accessibility Rules. In those rules, the TLC established a precondition for commencement of the program that encouraged the development of a vehicle that is both compliant with § 19-533 and accessible, consistent with its twin statutory mandates of promoting cleaner air and serving disabled passengers. Recognizing that such a vehicle might not be developed, however, the TLC included language in this rule limiting the time period in which this precondition remained in effect to no later than January 1, 2016,

20 months after the Accessibility Rules were promulgated. In doing so, the TLC rationally promulgated rules providing for a reasonable period of time for the development of an accessible hybrid electric vehicle while ensuring that, at minimum, the TLC's mandate to increase the number of accessible taxicabs would be fulfilled.

Overall, the Accessibility Rules merely provide for the implementation of a taxicab conversion program designed to increase the number of accessible taxicab vehicles to 50% of New York City's taxi fleet by 2020. In furtherance of that purpose, the Accessibility Rules provide for the establishment of two funds, one for taxicabs and one for street hail livery vehicles, to subsidize required conversions of taxicabs and livery vehicles to accessible vehicles and to cover expenses for the required training of taxicab and livery drivers in the operation of accessible vehicles. None of these provisions of the Accessibility Rules is inconsistent with the § 19-533 requirement that the TLC "approve one or more hybrid electric vehicle models for use as a taxicab." Thus, respondents did not violate § 19-533 by promulgating the Accessibility Rules.

III. *Article 78 Relief*

Petitioners claim entitlement to article 78 relief on the grounds that the TLC's promulgation and implementation of the Accessibility Rules were arbitrary, capricious and affected by

errors of law. A review of the agency's actions in this context belies these claims.

In 2013, in furtherance of both the § 19-533 requirement and so much of the TLC's § 19-534 mandate as required it to develop plans to increase the number of clean air vehicles in New York City, the TLC revised its "Taxi of Tomorrow Rules" to permit medallion owners the option to purchase any one of three approved hybrid vehicles in lieu of a TLC-approved non-hybrid vehicle, the Nissan NV200, also known as the Taxi of Tomorrow (*see Greater New York Taxi Assn. v New York City Taxi & Limousine Commn.*, 121 AD3d at 27) and referred to in the Taxi of Tomorrow Rules as the Official Taxicab Vehicle (35 RCNY 67-03[h]).[2] Having promulgated rules that would increase the number of hybrid electric taxicabs in a manner compliant with both § 19-533 and § 19-534, the TLC then promulgated the Accessibility Rules, in furtherance of that aspect of § 19-534 that required a plan to increase the number of accessible vehicles in the New York City taxi fleet.

Closer analysis of five sections of the Accessibility Rules, 35 RCNY 58-50(a)(i), (ii), (c)(i), (ii) and (iii), in particular, illustrates the consistency of the Accessibility Rules with both § 19-533 and § 19-534. Subdivision (a)(i), which applies to

[2] 35 RCNY 67-03(h) defines "Official Taxicab Vehicle ('OTV')," in relevant part, as "the purpose built taxicab for model years 2014 - 2024 manufactured, pursuant to the City's contract with Nissan North America."

minifleet medallions, and subdivision (c)(i), which applies to independent medallions, both provide, in virtually identical language, that beginning on the Accessible Conversion Start Date as mandated by 35 RCNY 51-03, 50% of all unrestricted medallion taxicabs be replaced with an "Accessible Taxicab that meets the requirements of Section 67-05.2 of these Rules."[3]

Subdivisions (a)(ii) and (c)(ii), applicable to minifleet and independent medallions, respectively, provide in nearly identical language that "[f]ollowing the Accessible Conversion Start Date *and beginning at such time that there is available a vehicle qualified for use with an Alternative Fuel Medallion that is also qualified as an Accessible Taxicab under Chapter 67 of these Rules*," 50% of alternative fuel medallions for which a new vehicle is to be placed in service shall be replaced with a vehicle that is both an alternate fuel and accessible vehicle (emphasis added). Those vehicles qualified for use with an Alternative Fuel Medallion include "vehicle[s] powered by compressed natural gas" as well as "hybrid electric vehicle[s]" (35 RCNY 51-03).

Subdivision (c)(iii), which is applicable solely to

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[3] 35 RCNY 67-05.2 sets forth TLC-approved specifications for accessible taxicab models, which specifications include, inter alia, "[capability] of transporting at least one passenger using a common wheelchair" (35 RCNY 67-05.2[3][a][2]) and "not seat[ing] more than five passengers" (35 RCNY 67-05.2[3][a][3]).

independent medallions, provides for a biannual lottery to determine which independent medallions associated with vehicles being retired will be subject to the subdivision (c)(i) requirement (and, once a qualified vehicle is available, the subdivision [c][ii] requirement). Pursuant to subdivision (c)(iii), for vehicles being retired from July 1 to December 31 of a given year, the lottery is to be conducted on or before January 1 of that year, and for vehicles being retired from January 1 to June 30 of a given year, the lottery is to be held on or before July 1 of the preceding year.

While subdivisions (a)(i), (a)(ii), (c)(i) and (c)(ii) all require the replacement of each vehicle being retired with an "Accessible Taxicab," the vehicle model required to be used as a replacement is further delineated by 35 RCNY 67-05.1B(b)(2), which provides that in the case of an unrestricted medallion issued prior to January 1, 2012 that becomes "restricted by law or rule of the Commission to use with an Accessible Vehicle, the owner of such medallion must purchase an [Accessible Official Taxicab Vehicle] or lease such medallion for use with an [Accessible Official Taxicab Vehicle]." An "Accessible Official Taxicab Vehicle ('Accessible OTV')" is defined as an "OTV modified in a manner that is consistent with the City's contract with Nissan North America" (35 RCNY 67-03[a]). Thus, under these rules, the owner of such a medallion is required to purchase, or

lease that medallion for use with, an Accessible Nissan NV200, also known as an Accessible Taxi of Tomorrow. A waiver of this requirement may be sought, however, and, if granted, the medallion owner may replace the vehicle being retired with a TLC-approved accessible vehicle other than the Accessible Nissan NV200 (35 RCNY 67-05.1B[b][2]).

The Accessibility Rules thus facilitate the goal of increasing the number of accessible taxicab vehicles available for passengers with mobility issues while realistically furthering the equally important goal of increasing the number of clean air cabs available in New York City. Moreover, these rules were subjected to the process of public hearings and review prior to their approval and implementation by the TLC. Accordingly, in promulgating these rules, the TLC acted in a rational manner, and consistently with the statutory mandate.

Moreover, the TLC acted in furtherance of both the accessibility and clean air aspects of its statutory mandate by setting forth a regulatory scheme that made the date of commencement of the accessible conversion program contingent upon future development of a combined accessible/hybrid electric vehicle, and by establishing an alternative contingent date of January 1, 2016 for the commencement of the program in the event such a vehicle had not been developed by that date. In doing so, the TLC both provided an incentive for manufacturers to develop

such a vehicle and created an opportunity for the early promotion of both cleaner air and accessibility.

Thus, the TLC did not act arbitrarily and capriciously in promulgating the Accessibility Rules. As these rules are consistent with both § 19-533 and § 19-534, there was no error of law on TLC's part in promulgating them. Therefore, Supreme Court providently denied article 78 relief to petitioners.

IV. *Injunctive Relief*

In order to be entitled to injunctive relief, petitioners were required to show a likelihood of success on the merits and irreparable injury to themselves (*see* CPLR 6301). They have done neither.

Because the Accessibility Rules are compliant with § 19-533 for the reasons stated above, petitioners have failed to show that they would be likely to succeed on the merits were litigation of the instant petition to continue. Petitioners have also failed to demonstrate that they have suffered any prejudice from the unavailability of a hybrid electric accessible taxicab. The Taxicab Improvement Fund is available to reimburse their costs of purchase or lease of an accessible taxicab. Moreover, under the Accessibility Rules, any medallion owner required to replace a retiring medallion vehicle with an accessible vehicle may transfer that requirement to the owner of another medallion who is required to replace a medallion vehicle in the same

calendar year, allowing the medallion owner to purchase or lease a hybrid electric vehicle (35 RCNY 58-50[e][i]). Alternatively, upon obtaining a waiver, a medallion owner may purchase the MV-1 Accessible CNG, an alternative fuel (compressed natural gas) vehicle that is also accessible and which is currently listed among the vehicles qualified for use of a medallion by the TLC (*see* http://www.nyc.gov/html/tlc/html/industry/taxicab_vehicles_in_use.shtml [accessed Sept. 22, 2016]; 35 RCNY 67-05.1B[b][2]).

IV. *Declaratory Relief*

Because the Accessibility Rules did not violate § 19-533 for the reasons stated above, petitioners are not entitled to a declaration to the effect that those rules violated that statute. Therefore, Supreme Court providently denied petitioners' motion for a declaratory judgment.

V. *Timeliness*

Respondents cross-moved to dismiss the petition, claiming that the petition was barred on statute of limitations and laches grounds. Supreme Court dismissed the petition on statute of limitations grounds, without reaching respondents' laches claim, reasoning that the four-month limitations period of CPLR 217(1) began when petitioners received letters from the TLC Chair dated August 17, 2015 notifying them of the selection in the lottery of their independent medallions for inclusion in the conversion program. Although the petition is not barred on either ground,

it must be dismissed due to lack of ripeness of the controversy.

A. *Statute of limitations*

An article 78 proceeding must be commenced within four months after the agency determination in question becomes "final and binding" upon the petitioner (CPLR 217[1]). For purposes of the present analysis, an agency determination becomes "final and binding" when two events have occurred. First, "the agency must have reached a definitive position on the issue that inflicts actual, concrete injury" (*Matter of Best Payphones, Inc. v Department of Info. Tech. and Telecom. of City of N.Y.*, 5 NY3d 30, 34 [2005]). And second, the petitioner must have received notice of that determination (*see* New *York State Assn. of Counties v Axelrod*, 78 NY2d 158, 165-166 [1991]; *90-92 Wadsworth Ave. Tenants Assn v City of N.Y. Dept. of Hous. Preserv. & Dev.*, 227 AD2d 331 [1st Dept 1996]).

In this case, as of December 30, 2015, the date of commencement of this proceeding, implementation of the TLC's conversion program had not yet "inflict[ed] actual, concrete injury" on petitioners, as the program did not commence until January 1, 2016. Petitioners had merely received notice of the selection in the lottery of an independent medallion owned by each of them for inclusion in the conversion program in the August 17, 2015 letters from the TLC Commissioner. Thus, the TLC

determination was not yet "final and binding" on them when they received notification of their selection in the lottery (*cf. New York State Assn. of Counties v Axelrod*, 78 NY2d at 165-166; *90-92 Wadsworth Ave. Tenants Assn. v City of N.Y. Dept. of Hous. Preserv. & Dev.*, 227 AD2d at 332).

Thus, petitioners' article 78 claims were not barred by the four-month statute of limitations at the time the proceeding was commenced, and indeed, were not then ripe. Therefore, dismissal was appropriate, but not on the ground cited by Supreme Court.

B. *Laches*

Respondents also argue that dismissal of the instant petition is warranted based upon the doctrine of laches. Laches is an affirmative defense, which must be so pleaded (*see Kromer v Kromer*, 177 AD2d 472, 473 [2d Dept 1991]). As respondents have failed to serve and file an answer raising this affirmative defense, they are not entitled to rely upon it to support dismissal here.

Accordingly, although we agree with petitioners that the petition is neither time-barred nor subject to dismissal as barred by the doctrine of laches, we agree with the article 78 court that the Accessibility Rules are not violative of § 19-533; that the TLC's action in adopting the Accessibility Rules was neither arbitrary and capricious nor affected by any error of law; that petitioners were not entitled to a preliminary

injunction; that petitioners were not entitled to declaratory relief; and that the petition must be dismissed. We modify solely to declare in respondents' favor.

Accordingly, the judgment of the Supreme Court, New York County, (Manuel J. Mendez, J.), entered February 18, 2016, among other things, denying the petition in this hybrid CPLR article 78 proceeding and declaratory judgment action, denying injunctive and declaratory relief, and dismissing the proceeding, should be modified, on the law, to the extent of declaring that the Accessibility Rules were not violative of Administrative Code § 19-533, and otherwise affirmed, without costs.

All concur.

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

ENTERED: OCTOBER 13, 2016

CLERK