SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JULY 21, 2015

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Tom, Renwick, Gische, JJ.

13455 U.S. Bank, N.A., Index 381515/08
Plaintiff-Respondent,

-against-

Anna Landman,
Defendant-Appellant,

Ken Koren, et al.,
Defendants.

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Howard L. Sherman, Ossining, for appellant.

DelBello Donnellan Weingarten Wise & Wiederkehr, LLP, White Plains (Jacob E. Amir of counsel), for respondent.

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Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered November 13, 2013, which denied the motion of defendant Anna Landman (defendant) to dismiss the complaint, unanimously affirmed, without costs.

This foreclosure action was stayed upon discovery that defendant mortgagee Ken Koren had died shortly before the action was filed in 2008 (*see e.g. Silvagnoli v Consolidated Edison Empls. Mut. Aid Socy.*, 112 AD2d 819, 820 [1st Dept 1985]).

Defendant asserts that the action should have been dismissed because of plaintiff's failure to prosecute. However, plaintiff

commenced proceedings in Surrogate's Court for letters of administration in 2010 and while it was necessary to serve supplemental pleadings upon the discovery of relatives of Koren, plaintiff did so in a timely fashion. The only delay since 2012 has been for the Surrogate's Court to rule, and such delay cannot be attributed to plaintiff. Furthermore, defendant failed to comply with the 90-day demand provision of CPLR 3216.

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

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

ENTERED: JULY 21, 2015

CLERK

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

15471 Gary Smoke, Index 113051/11
Plaintiff-Appellant,

-against-

Windemere Owners LLC, et al.,
Defendants-Respondents.

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Marc Bogatin, New York, for appellant.

Rosenberg Feldman Smith, LLP, New York (Richard B. Feldman of counsel), for respondents.

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Order, Supreme Court, New York County (Milton A. Tingling, J.), entered December 30, 2014, which denied plaintiff's motion for summary judgment as to rent overcharge damages and set the matter down for a hearing, unanimously affirmed, without costs.

The court found defendant Windemere Owners LLC liable for rent overcharges based on its inability to provide adequate documentation for the improvements that were the basis for removing plaintiff's apartment from rent stabilization. However, since the improvements were made more than a decade ago and many years before the building was acquired from Windermere Chateau, Inc., the prior owner, triable issues of fact exist as to Windemere Owners, LLC's ability to rebut the presumption that the inadequately documented overcharges were willful so as to incur

liability for treble damages (*see e.g. Matter of Myers v D'Agosta*, 202 AD2d 223 [1st Dept 1994]; *Matter of Round Hill Mgt. Co. v Higgins*, 177 AD2d 256 [1st Dept 1991]).

The default formula set forth in *Thornton v Baron* (5 NY3d 175 [2005]) is to be used to calculate the overcharge damages.

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

ENTERED: JULY 21, 2015

CLERK

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

15472-
15473 Luissa Chekowsky,
Plaintiff-Appellant,

-against-

Windemere Owners, LLC, et al.,
Defendants-Respondents.

Index 106532/11

Marc Bogatin, New York, for appellant.

Rosenberg Feldman Smith, LLP, New York (Richard B. Feldman of counsel), for respondents.

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered December 30, 2014, granting plaintiff's motion to compel defendants to comply with this Court's order on a prior appeal, which declared that plaintiff is entitled to a rent-stabilized lease (114 AD3d 541 [1st Dept 2014]), solely to the extent of ordering the parties to comply with Supreme Court's order directing that a hearing be held to determine whether the parties are to comply with this Court's order, unanimously reversed, on the law, without costs, this Court's prior order modified, nostra sponte, to declare that plaintiff is not entitled to a rent-stabilized lease, and the motion denied. Order, same court and Justice, entered December 30, 2014, which granted plaintiff's motion for summary judgment on damages solely to the extent of directing a hearing on whether plaintiff

forfeited her right to a rent-stabilized lease, unanimously modified, on the law, to direct a hearing on overcharge damages, and otherwise affirmed, without costs.

On the prior appeal, this Court found defendant Windemere Owners LLC liable for rent overcharges based on its inability to provide adequate documentation for improvements resulting in the removal of plaintiff's apartment from rent stabilization and declared that plaintiff is entitled to a rent-stabilized lease. Unbeknownst to this Court, plaintiff had vacated the premises during the pendency of the proceeding. The record does not explain why this fact was not brought to our attention. In any event, the law does not extend the protection of rent stabilization to a person not using the subject apartment as a primary residence (Administrative Code of City of NY § 26-504 [a] [1] [f] [Rent Stabilization Law]; New York City Rent and Rehabilitation Law [Administrative Code] § 26-403 [e] [2] [i] [10]; *see Friesch-Groningsche Hypotheekbank Realty Credit Corp. v Slabakis*, 215 AD2d 154, 155 [1st Dept 1995]). Furthermore, it would be inequitable to disturb the possessory interest of the current tenant, who was never afforded an opportunity to be heard in the proceedings (CPLR 1001 [a]). Thus, we exercise our discretion to amend this Court's prior order to vacate the declaration that plaintiff is entitled to a renewal lease (CPLR

5015). Plaintiff, who vacated the premises in or about June, 2011, and no longer a tenant, is not entitled to a renewal lease.

To the extent it implicitly denied plaintiff's motion for summary judgment on rent overcharge damages, Supreme Court properly ordered a hearing to determine defendant Windemere Owners LLC's liability for treble damages. Given that the inadequately documented improvements resulting in the de-stabilization of the apartment were made more than a decade ago by the prior owner, defendant Windermere Chateau, Inc., and many years before the building was sold to Windemere Owners LLC, triable issues of fact exist as to the latter's ability to rebut the presumption that the inadequately documented overcharges were willful so as to warrant the award of treble damages (*see e.g. Matter of Myers v D'Agosta*, 202 AD2d 223 [1st Dept 1994]; *Matter of Round Hill Mgt. Co. v Higgins*, 177 AD2d 256 [1st Dept 1991]).

The default formula set forth in *Thornton v Baron* (5 NY3d 175 [2005]) is to be used to calculate the overcharge damages.

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

ENTERED: JULY 21, 2015

CLERK

Acosta, J.P., Saxe, DeGrasse, Richter, JJ.

14989 Albert Dreisinger, Index 308023/10
Plaintiff-Respondent,

-against-

Victor Teglasi, et al.,
Defendants-Appellants.

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Carter Ledyard & Milburn LLP, New York (Christopher Rizzo of counsel), for appellants.

Law Office of Ronald V. DeCaprio, Garnerville (Ronald V. DeCaprio of counsel), for respondent.

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Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered May 30, 2014, which denied defendants' motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without cost, and the motion granted. The Clerk is directed to enter judgment dismissing the complaint.

The issue in this case is whether defendants are entitled to summary judgment dismissing the complaint, where plaintiff alleges that defendants breached an agreement to refrain from objecting to plaintiff's plans or applications to build a residence on a parcel of land adjacent to defendants' property. The parties also dispute whether defendants had an affirmative obligation to assist plaintiff's proposed construction by executing necessary documents. We find that, because plaintiff

failed to demonstrate that defendants' cooperation was required, defendants have not breached the contract and are entitled to summary judgment.

In 2003, the parties each purchased, from the estate of the prior owner, adjacent parcels of real property, located in the Riverdale section of the Bronx, that had been subdivided from a single parcel. Plaintiff acquired an undeveloped portion of the land, and defendants acquired a portion that was already improved with a single-family dwelling.

Before the parties closed on their respective purchases, defendants approached plaintiff about acquiring the rear portion of his lot (the transfer portion). They entered into a written agreement on or about February 13, 2003, pursuant to which defendants would acquire their lot and the transfer portion from the owner, and would bear all costs associated with the necessary applications to government agencies to incorporate the transfer portion into their lot, including obtaining a survey, recording costs, and any transfer tax liability.

Pursuant to paragraph 5 of the agreement, defendants agreed that they would "forward no objection, directly or indirectly, to any plan, application for approval for the construction of[,] and the construction of a residence" on plaintiff's lot. The parties also agreed, in paragraph 9, to "cooperate fully and execute any

documents and take all additional actions that may be necessary or appropriate to give full force and effect to the basic terms of" the agreement.

Plaintiff approached defendants in or around 2005, approximately two years after the closing, and showed defendant Victor Teglasi building plans prepared by an architect. According to plaintiff's deposition testimony, he told Mr. Teglasi that "he should sign whatever papers [plaintiff's] architect needs him to sign." Defendants requested a copy of the architect's plans, but plaintiff refused, stating that defendants "had certain obligations under the agreement" but that plaintiff was not required to provide them with plans. According to plaintiff, defendants refused then and on several subsequent occasions to sign any documents that would enable plaintiff to proceed with the construction. However, the record does not demonstrate that plaintiff presented any documents for defendants to sign, other than an unidentified "waiver."[1]

The parties' dispute escalated over the next several years, during which time plaintiff threatened legal action and withdrew permission for defendants to use a driveway on his property. Defendants, through their attorney, requested blueprints, but

[1] There is no explanation in the record of what rights plaintiff wanted defendants to waive.

plaintiff did not provide them. In 2010, plaintiff's architect prepared an unsigned letter, which plaintiff understood was forwarded to defendants. The letter, as read into the deposition record, stated that "[t]he proposed residence has been designed to comply with all required zoning bulk regulations" and did not use any of defendants' zoning lot area or affect their future development rights. Although plaintiff could not recall at his deposition the size of his lot or the dimensions of the proposed building, he testified that the structure would be two stories and that his architect advised him that the building was within required limits and did not infringe on defendants' property.

Nonetheless, plaintiff could not confirm whether his plans were ever submitted to or approved by any City agency. He "believe[d]" the plans had been submitted to the Department of Buildings, but was not sure if they had been approved. He did not know whether he had obtained a building permit or filed any documents with the Board of Standards and Appeals or the City. Furthermore, he was unsure whether any applications were filed with any City agency, by his architect or any other professional, for erection of a building on his property.

Plaintiff commenced this action in September 2010, seeking specific enforcement of the parties' agreement and damages for breach of contract and fraud. After answering, defendants served

discovery requests seeking copies of the plans. Although no response was received, a note of issue was filed in September 2013.

Defendants moved for summary judgment dismissing the complaint, arguing that they could not have breached the contract because plaintiff had never provided them with any approved plan for defendants' consent. Counsel for defendants represented that he had conducted a Department of Buildings record search and found no application for a new building at plaintiff's property. Defendants argued that they "cannot prevent plaintiff from doing something he has no right to do in the first place," and therefore, there is no "real injury" to plaintiff resulting from any claimed actions by them. Since there is no factual issue requiring trial and no justiciable controversy, defendants argued, the action should be dismissed.

Plaintiff responded that the agreement was clear that, in exchange for plaintiff agreeing to convey a portion of his property to defendants, defendants agreed to cooperate fully, not only by refraining from any objection, but also by affirmatively assisting plaintiff as necessary. He further argued that the agreement does not require him to provide approved plans, or any other document, for defendants' consent, and that the reason he could not file plans or complete construction was that defendants

had refused to sign waivers or cooperate with him.

The court denied defendants' motion, finding that they had failed to meet their initial burden of establishing their entitlement to summary judgment. The court noted that the agreement, which required defendants not to object to plaintiff's construction, "was not contingent upon the plaintiff's presentation of construction plans." Defendants appeal.

Initially, although defendants' arguments on appeal differ from those made in support of their motion, they may be considered by this Court because they present a pure legal issue of contract interpretation, which appears on the face of the record and could not have been avoided if raised below (*see Chateau D'If Corp. v City of New York*, 219 AD2d 205, 209-210 [1st Dept 1996], *lv denied* 88 NY2d 811 [1996]).

"On appeal, the standard of review is for this Court to examine the contract's language de novo" (*Duane Reade, Inc. v Cardtronics, LP*, 54 AD3d 137, 140 [1st Dept 2008]). "Our function is to apply the meaning intended by the parties, as derived from the language of the contract in question" (*id.*; *see also Greenfield v Philles Records,* 98 NY2d 562, 569 [2002]). In interpreting a contract, words should be accorded their "fair and reasonable meaning," and "the aim is a practical interpretation of the expressions of the parties to the end that there be a

realization of [their] reasonable expectations" (*Duane Reade, Inc.*, 54 AD3d at 140 [internal quotation marks omitted]; *see also Gessin Elec. Contrs., Inc. v 95 Wall Assoc., LLC*, 74 AD3d 516 [1st Dept 2010]). Moreover, "a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" (*Greenfield*, 98 NY2d at 569). Although the parties offer conflicting interpretations of a contract, that does not render it ambiguous (*see Bethlehem Steel Co. v Turner Constr. Co.*, 2 NY2d 456, 460 [1957]). Moreover, "where the intention of the parties may be gathered from the four corners of the instrument, interpretation of the contract is a question of law and no trial is necessary to determine the legal effect of the contract" (*id.*).

In this case, notwithstanding the parties' conflicting interpretations of defendants' obligations under the contract, the language is unambiguous and the agreement clearly reflects their intent. In essence, the parties agreed that defendants would receive the transfer portion of the property, assume the costs associated with the transfer, and refrain from objecting to plaintiff's future construction of a residence on his property. Paragraph 5 evinces the parties' understanding that plaintiff intended to build a residence on his undeveloped parcel.

Defendants correctly assert that paragraph 5, read in isolation, creates only a passive obligation to refrain from objecting to plaintiff's plans or applications to construct a residence. However, the contract should be "'read as a whole'" and "'interpreted as to give effect to its general purpose'" (*Insurance Corp. of N.Y. v Central Mut. Ins. Co.*, 47 AD3d 469, 471 [1st Dept 2008], quoting *Empire Props. Corp. v. Manufacturers Trust Co.*, 288 NY 242, 248 [1942]). Paragraph 9 requires the parties to cooperate fully and execute documents as necessary to give effect to the agreement. Although defendants argue that paragraph 9 is mere boilerplate language and does not create additional obligations, the provision should not be read as meaningless (*see Yoi-Lee Realty Corp. v 177th St. Realty Assoc.*, 208 AD2d 185, 190 [1st Dept 1995]). Thus, paragraph 9, when read together with paragraph 5, and considering the contract as a whole – which reflects the parties' understanding that plaintiff desired to construct a home on his portion of the subdivided property – creates at least some affirmative obligation on the part of defendants to provide their consent to the extent it might be required.

Indeed, even defendants acknowledge that "[f]or certain kinds of construction a neighbor's consent may be required."

And, while they argue that the agreement does not require them "to take affirmative steps to assist Plaintiff's development regardless of the negative impacts it might have on their own tax lots," they state that they "were willing to cooperate as long as they were given a basic opportunity to review Plaintiff's construction plans."

Plaintiff has not demonstrated that he was ever required to obtain defendants' consent, so the parties' dispute over the nature of defendants' obligations under the agreement is rendered academic. If defendants' consent is not "necessary or appropriate," then their duty to cooperate pursuant to paragraph 9 is not triggered. Plaintiff has not shown by competent evidence that he ever submitted an application to any government agency, or that his plans actually complied with applicable laws and regulations (aside from statements in an unsigned letter by his architect). Nor has he shown that he ever requested defendants to sign any specific documents other than the cryptic "waiver." Thus, defendants could not have breached their agreement not to object to any application or to cooperate in executing necessary documents. Although plaintiff asserts that he was not required to provide plans to defendants, he was at least required to demonstrate that he needed their consent in

order to proceed with the construction. This he has failed to do. As such, there is no issue of fact requiring trial and defendants are entitled to summary judgment.

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

ENTERED: JULY 21, 2015

CLERK

Mazzarelli, J.P., Sweeny, Gische, Clark, JJ.

15380-
15381 Index 653943/13

MMA Meadows at Green Tree, LLC, et al.,
Plaintiffs-Respondents,

-against-

Millrun Apartments, LLC, et al.,
Defendants-Appellants.

- - - - -

MCAP Robeson Apartments L.P.,
Nominal Party.

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Dechert LLP, New York (Joseph F. Donley of counsel), for Millrun Apartments, LLC, Municipal Capital Appreciation Partners II, L.P., Richard G. Corey and MCAP II Developer LLC, appellants.

Harris, O'Brien, St. Laurent & Chaudhry LLP, New York (Kevin J. O'Brien of counsel), and Ferber Chan Essner & Coller, LLP, New York (Robert N. Chan of counsel), for Municipal Capital Appreciation Partners III, L.P., appellant.

Holland & Knight LLP, New York (Michael T. Maroney of counsel), for respondents.

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Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered November 28, 2014, which, to the extent appealed from, denied the motion of defendants Millrun Apartments, LLC (Millrun), Municipal Capital Appreciation Partners II, L.P. (MCAP II), MCAP II Developer LLC (Developer), and Richard G. Corey (Corey) to dismiss all but Counts IX and XIV as against them and for a stay pursuant to CPLR 7503, and defendant Municipal Capital Appreciation Partners III, L.P.'s

(MCAP III) motion to dismiss Counts IV and VII as against it, unanimously modified, on the law, to grant the motions as to Counts I, VI, and X as against Millrun, Count II as against MCAP II, Counts III, VIII, XII, and XIII as against MCAP II and Corey, Count IV as against Millrun and Corey, Count VII as against MCAP II, Developer, Corey, and MCAP III, and Count XI as against Corey, and otherwise affirmed, without costs.

Contrary to Millrun, MCAP II, Developer, and Corey's contention, section 5.5(C) of the partnership agreement among plaintiffs and Millrun does not require plaintiff MMA Meadows at Green Tree, LLC (MMA) to arbitrate its claims that it was fraudulently induced into paying the third installment of its capital contribution and that MCAP II, Developer, and Corey were unjustly enriched thereby (*see Matter of Bunzl [Battanta]*, 224 AD2d 245 [1st Dept 1996]; *see also Safety Natl. Cas. Co. v Cinergy Corp.*, 829 NE2d 986 [Ind Ct App 2005]).[2] Section 5.5 – including subsection (C) – applies if MMA fails to pay an installment. MMA did not fail to do so.

The motion court properly refused to dismiss the claims against MCAP III in favor of a foreclosure action pending in

[2]The partnership agreement is governed by Indiana law, but New York law is also relevant because Millrun, MCAP II, Developer, and Corey moved to compel arbitration pursuant to CPLR 7503.

Indiana (*see Whitney v Whitney*, 57 NY2d 731 [1982]). The case at bar is "more comprehensive" and "offers more" than the Indiana action (*see AIG Fin. Prods. Corp. v Penncara Energy, LLC*, 83 AD3d 495, 495 [1st Dept 2011] [internal quotation marks omitted]). Indeed, the Indiana court has recognized this by staying the Indiana action in favor of the instant action.

The trustee of certain bonds, who is a party in Indiana but not here, is not a necessary party (*see* CPLR 1001[a]). Since the Indiana action has been stayed, there is no risk of "inconsistent judgments" (*Matter of Red Hook/Gowanus Chamber of Commerce v New York City Bd. of Stds. & Appeals*, 5 NY3d 452, 458 [2005]).

Counts III and XII of the complaint allege that Millrun, MCAP II, and Corey breached the partnership agreement, and Counts VIII and XIII seek indemnification thereunder, although MCAP II and Corey are not parties to the partnership agreement. Count XI alleges that MCAP II and Corey breached the guaranty, although MCAP II is the sole guarantor. Count IV alleges that Millrun, MCAP III, and Corey breached the Loan and Financing Agreement and the Indenture, although none of these defendants is a party to those contracts.[2]

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[2]Although MCAP III is not a party to these contracts, it does not contest that it has an obligation under the Loan and Financing Agreement to act reasonably toward nominal party MCAP Robeson Apartments, L.P. (the Partnership).

Delaware law applies to plaintiffs' attempt to pierce the corporate veils of Millrun (a Delaware limited liability company) and MCAP II and III (Delaware limited partnerships) (*see e.g. Klein v CAVI Acquisition, Inc.*, 57 AD3d 376 [1st Dept 2008]). The record does not support an inference that Millrun and MCAP II and III are sham entities designed to defraud investors and creditors (*see Crosse v BCBSD, Inc.*, 836 A2d 492, 497 [Del 2003]). Nor could MCAP II and Corey be liable as "Designated Affiliates" of Millrun pursuant to section 6.7B of the partnership agreement, since they are not alleged to have performed any services on behalf of the Partnership.

Count IV alleges that it was unreasonable for MCAP III to refuse to rescind the acceleration of the Series A note due to a mere $362 discrepancy in the amount paid. MCAP III contends that it had the contractual right to act as it did. However, the Loan and Financing Agreement, as well as the Trust Indenture, both of which are governed by Indiana law, indicates that MCAP III had the duty to act reasonably toward the Partnership (*see Allison v Union Hosp., Inc.*, 883 NE2d 113, 123 [Ind Ct App 2008]).

We decline to consider MCAP III's argument, improperly raised for the first time in its appellate reply brief, that its

alleged breach of contract caused no damage (*see e.g. Shia v McFarlane*, 46 AD3d 320 [1st Dept 2007]).

Millrun, MCAP II, and Corey contend that Counts I (breach of fiduciary duty), II (aiding and abetting breach of fiduciary duty, alleged as against MCAP II and Corey only), V (constructive fraud), VI (gross negligence), and X (fraud) should be dismissed as duplicative of the contract claims. Since we have found that the contract claims against MCAP II and Corey are not viable, the tort claims cannot be dismissed as duplicative. However, as discussed below, the aiding and abetting claim as against MCAP II fails to state a cause of action.

The partnership agreement is governed by Indiana law, while the Partnership is a Delaware limited partnership. Since the parties cite a plethora of Delaware cases but no Indiana law directly on point or to the contrary as to whether breach of fiduciary duty is duplicative of breach of contract, we will apply Delaware law on this point. The fiduciary duty claim as against Millrun (the general partner of the Partnership) arises out of "the same facts that underlie [Millrun's] contract obligations" (*Nemec v Shrader*, 991 A2d 1120, 1129 [Del 2010]). However, as to MCAP II (the sole member of Millrun) and Corey (who allegedly controls MCAP II and III, Millrun, and Developer), the complaint adequately alleges that they used Partnership

assets to enrich themselves at the expense of plaintiffs (the limited partners of the Partnership) (*see Wallace v Wood*, 752 A2d 1175, 1178, 1182 [Del Ch 1999]).

Delaware law applies to a claim of aiding and abetting a breach of duty by a fiduciary of a Delaware entity (*see Hamilton Partners, L.P. v Englard,* 11 A3d 1180, 1211-1212 [Del Ch 2010]). MCAP II and Corey contend that the third element of the claim, knowing participation in the breach of a fiduciary duty, is insufficiently pleaded (*see Malpiede v Townson*, 780 A2d 1075, 1096 [Del 2001]). We find that the complaint amply alleges affirmative actions taken by Corey to further Millrun's alleged fraudulent scheme, but that it contains no nonconclusory allegations that MCAP II took such actions, alleging merely that MCAP II knowingly assisted Millrun's breaches of fiduciary duty "[b]y way of [its] control over Millrun" (*see Hospitalists of Delaware, LLC v Lutz*, 2012 WL 3679219, *11, 2012 Del Ch LEXIS 207, *42 [Aug. 28, 2012, C.A. No. 6221-VCP]).

Under both Delaware and Indiana law, a fraud claim should be dismissed as duplicative of a contract claim when the fraud claim is "merely a repackaged version" or "a rehash" of the contract claim (*Albert v Alex. Brown Mgt. Servs., Inc.*, 2005 WL 2130607, *7, 2005 Del Ch LEXIS 133, *26 [Aug. 26, 2005, Civ. A. Nos. 762-N, 763-N; *Tobin v Ruman*, 819 NE2d 78, 86 [Ind Ct App 2004]).

Count X, MMA's individual fraud claim arising out of the third installment, is a mere repackaging or rehash of a contract claim and should be dismissed as against Millrun. Count V, plaintiffs' derivative constructive fraud claim arising out of the foreclosure action, is not.

We reject Millrun, MCAP II, and Corey's contention that Count X (MMA's individual fraud claim) is not pleaded with particularity as required by CPLR 3016(b) (*see Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486, 491-492 [2008]). The facts are peculiarly within the knowledge of the parties charged with the fraud.

Neither side cites a Delaware or Indiana case dismissing a gross negligence claim as duplicative of a contract claim. However, the parties have cited Indiana cases about negligence and contract. Count VI should be dismissed as against Millrun because it is doubtful that the acts of which plaintiffs complain would be actionable if there were no contract (i.e. the partnership agreement) (*see Greg Allen Constr. Co., Inc. v Estelle*, 798 NE2d 171, 175 [Ind 2003]).

Since all parties to this appeal agree that the law of unjust enrichment is similar in Delaware, Indiana, and New York, we apply New York law (*see SNS Bank v Citibank*, 7 AD3d 352, 354 [1st Dept 2004]). The existence of express contracts bars

plaintiffs' unjust enrichment claim (*see e.g. IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 [2009]; *Feigen v Advance Capital Mgt. Corp.*, 150 AD2d 281, 283 [1st Dept 1989], *lv dismissed in part, denied in part* 74 NY2d 874 [1989]). In addition, MCAP III has not been, and cannot be, unjustly enriched, because it has not yet received either the accelerated amount of the Series A bond or the default interest, and, if it were to receive such amounts in the future, it would do so pursuant to a court order (*see e.g. Amaranth LLC v JPMorgan Chase & Co.*, 2008 NY Slip Op 33544[U], *23 [Sup Ct, NY County 2008]; *Harris Trust & Savings Bank v John Hancock Mut. Life Ins. Co.*, 767 F Supp 1269, 1284 [SD NY 1991] ["bargained-for benefits cannot be deemed to unjustly enrich a contracting party" (internal quotation marks and brackets omitted)], *mod on other grounds* 71 AD3d 40 [1st Dept 2009], *lv dismissed in part, denied in part* 14 NY3d 736 [2010]).

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

ENTERED: JULY 21, 2015

CLERK

Tom, J.P., Acosta, Andrias, Moskowitz, Clark, JJ.

15575 The People of the State of New York, Respondent, Ind. 1751/10

-against-

Randolph Maxwell, Defendant-Appellant.

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

Randolph Maxwell, appellant pro se.

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 (Juan M. Merchan, J.), rendered December 19, 2011, as amended January 10, 2012, convicting defendant, upon his plea of guilty, of burglary in the second degree and sentencing him, as a persistent violent felony offender, to a term of 12 years to life, unanimously affirmed.

At sentencing, when asked if he would like to be heard, defendant responded: "I feel that my lawyer ... misrepresented me, misled me in having me sign a waiver of appeal." Stating that he faced a life sentence, defendant complained that after doing his own research at the law library he had learned that "I can do all kinds of years and never have an opportunity to appeal anything I found is wrong with my case, and I don't want that." Defendant did not point to any specific misstatements or coercive

conduct by counsel; he argued that "[f]or him to tell me to waive my right to appeal, under no circumstances should you ever tell your client to do something with that dealing with a life sentence and I don't agree with that." Defendant also complained that he had asked counsel to file a CPL 30.30 motion and that counsel falsely responded that he did not have enough time.

The court asked defense counsel if he would like to be heard. With respect to the CPL 30.30 issue, counsel stated that since he had taken over the case there had been numerous adjournments due to plea negotiations and that all but the last adjournment had been on consent. Counsel also stated that to his understanding the time chargeable before his involvement was "minimal" and that the People were "well below any 30.30 dismissal of the indictment based on failure to proceed to trial."

With respect to the waiver of the right to appeal, counsel stated that defendant in fact retained "residual rights of appeal and he can indeed challenge certain aspects of his plea ...[,] which I believe might address some of the concerns he's raising to your Honor." Counsel also stated that had defendant "pled guilty to the top count he would have been exposed to significantly more prison time before he would become eligible for parole, and the District Attorney had conditioned that plea

on his waiving his rights of appeal." Thus, counsel stated that while defendant waived his right to appeal, "it was done in order to avail himself of a lesser prison sentence in order to obtain that plea."

The prosecutor then stated that the People were charged with a little over a month from arrest to arraignment, that the adjournments over the next 16 months were on consent due to plea negotiations, and that from September to late November some but not all of the time was chargeable to the People. He also asserted that defendant's plea was knowing, voluntary and intelligent.

The court observed that despite his complaints, defendant had not expressly asked to withdraw his plea. Nevertheless, addressing the waiver of the right to appeal, the court explained to defendant that it was a condition of the plea deal, and that "it does not mean you can never appeal anything. It means you are waiving your right to appeal certain things." Stating that a large portion of the plea allocution had to do with whether defendant understood the waiver, and that defendant had confirmed that he was willing to waive his right to appeal in exchange for the plea, the court ruled that it would not vacate the plea on the ground that defendant was "somehow deceived or tricked or coerced" into agreeing to the waiver.

With respect to the CPL 30.30 issue, the court explained to defendant that there can be excludable time that is not charged to the People, such as adjournments due to plea negotiations. Noting that there was no written motion and that the CPL 30.30 issue had never been raised before the plea, and that both attorneys had advised the court "that as far as they are concerned, 30.30 is not an issue," the court ruled that "[t]herefore, I'm not going to entertain your motion at this time."

On appeal, defendant argues that, by responding to the court, counsel abandoned his advocate's role and took a position against him, thus providing him with ineffective assistance at a key stage of the proceeding. Accordingly, he asserts that a new hearing on his motion to withdraw his plea must be held, with new counsel assigned to represent him.

"It is well settled that a defendant has a right to the effective assistance of counsel on his or her motion to withdraw a guilty plea" (*People v Mitchell*, 21 NY3d 964, 966 [2013]). "When certain actions or inaction on the part of defense counsel is challenged on the motion, it may very well be necessary for defense counsel to address the matter when asked to by the court. When doing so, defense counsel should be afforded the opportunity to explain his performance with respect to the plea, but may not

take a position on the motion that is adverse to the defendant. At that point, a conflict of interest arises, and the court must assign a new attorney to represent the defendant on the motion." (*id.* at 967 [internal citations omitted]).

Here, defendant never elaborated on his conclusory assertions that counsel made misrepresentations or misled him into agreeing to the waiver, claims that the court found to be patently without merit and contradicted by the record of the plea allocution *(see People v Quintana*, 15 AD3d 299 [1st Dept 2005], *lv denied* 4 NY3d 856 [2005]). Nor did defendant provide any specifics as to the periods of time that could be charged to the People for CPL 30.30 purposes. Counsel's brief responses to defendant's non-specific complaints did not create a conflict of interest (*see People v Nelson*, 7 NY3d 883 [2006]), and defendant was not improperly denied his right to counsel by the court's failure to assign him new counsel to represent him with respect to his challenge to the plea (*People v Lopez-Perez*, 128 AD3d 1093 [2d Dept 2015]; *People v Morgan*, 114 AD3d 995 [3d Dept 2014], *lv denied* 23 NY3d 1040 [2014]).

Counsel's statement that defendant might not understand that he still retained certain residual rights to appeal despite the waiver, and that his concerns might be mitigated if the court explained that to him, was not adverse to defendant's position.

It merely conveyed that if defendant was informed that his waiver did not bar an appeal of all issues, including the voluntariness of the plea, it might affect his view of the waiver. Counsel's factual statement that the waiver was a condition of the People's plea offer, which reduced defendant's sentence and made him eligible for parole at an earlier date, and that he did not believe that there was a basis for a CPL 30.30 motion because all but one of the adjournments since he had taken over the case had been on consent due to plea negotiations, did not go beyond a mere explanation of his performance (*see People v Washington*, __ NY3d __ [2015 NY Slip Op 05511]; *People v Mitchell*, 21 NY3d at 967*; People v Smith*, 249 AD2d 426 [2d Dept 1998], *lv denied* 92 NY2d 906 [1998]). Counsel did not deny that he advised defendant to agree to the waiver or that he refused to make a CPL 30.30 motion. Nor did he refute any specific factual allegation raised by defendant with respect thereto or affirmatively state his belief that defendant had no legal basis for withdrawing his plea.

Defendant's pro se ineffective assistance of counsel claims are unreviewable on direct appeal because they involve matters not reflected in, or fully explained by, the record *(see People v Rivera*, 71 NY2d 705 [1988]; *People v Olsen*, 126 AD3d 515 [1st Dept 2015]). Accordingly, since defendant has not made a CPL

440.10 motion, the merits of the ineffectiveness claims may not be addressed on appeal. In the alternative, to the extent the record permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708 [1998]; *Strickland v Washington*, 466 US 668 [1984]).

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

ENTERED: JULY 21, 2015

CLERK

Mazzarelli, J.P., Andrias, DeGrasse, Feinman, Kapnick, JJ.

12157-
12158

Index 121197/02
121080/02

For The People Theaters of N.Y. Inc., doing business as Fair Theater,
Plaintiff,

JGJ Merchandise Corp., doing business as Vishans Video, also known as Mixed Emotions,
Plaintiff-Respondent,

-against-

The City of New York, et al.,
Defendants-Appellants.

- - - - -

Ten's Cabaret, Inc., formerly known as Stringfellow's of New York, Ltd., et al.,
Plaintiffs-Respondents,

-against-

The City of New York, et al.,
Defendants-Appellants.

_____

Zachary W. Carter, Corporation Counsel, New York (Elizabeth S. Natrella of counsel), for appellants.

Fahringer & Dubno, New York (Herald Price Fahringer of counsel), for JGJ Merchandise Corp., respondent.

Zane and Rudofsky, New York (Edward S. Rudofsky of counsel), for Ten's Cabaret Ltd, Pussycat Lounge, Inc., Church Street Café, Inc., and 62-20 Queens Blvd., Inc., respondents.

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Judgment, Supreme Court, New York County (Louis B. York, J.), entered October 10, 2012, affirmed, without costs.

Opinion by Kapnick, J. All concur except Andrias and DeGrasse, JJ. who dissent in an Opinion by Andrias, J.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Angela M. Mazzarelli, J.P.
Richard T. Andrias
Leland G. DeGrasse
Paul G. Feinman
Barbara R. Kapnick, JJ.

12157-
12158
Index 121080/02
121197/02

_____x

For The People Theaters of N.Y. Inc., doing business as Fair Theater,
Plaintiff,

JGJ Merchandise Corp., doing business as Vishans Video, also known as Mixed Emotions,
Plaintiff-Respondent,

-against-

The City of New York, et al.,
Defendants-Appellants.

- - - - -

Ten's Cabaret, Inc., formerly known as Stringfellow's of New York, Ltd., et al.,
Plaintiffs-Respondents,

-against-

The City of New York, et al.,
Defendants-Appellants.

_____x

Defendants appeal from the judgment of the Supreme Court, New York County (Louis B. York, J.), entered October 10, 2012, declaring the 2001 Amendments to New York City's adult use zoning regulation as to adult eating and drinking establishments and adult video and book stores an unconstitutional violation of the First Amendment and permanently enjoining the City from enforcing the amendments.

Zachary W. Carter, Corporation Counsel, New York (Elizabeth S. Natrella, Leonard Koerner, Robin Binder and Sheryl Neufeld of counsel), for appellants.

Fahringer & Dubno, New York (Herald Price Fahringer, Erica T. Dubno and Nicole Neckles of counsel), for JGJ Merchandise Corp., respondent.

Zane and Rudofsky, New York (Edward S. Rudofsky of counsel), and Mehler & Buscemi, New York (Martin P. Mehler of counsel), for Ten's Cabaret Ltd, Pussycat Lounge, Inc., Church Street Café, Inc., and 62-20 Queens Blvd., Inc., respondents.

KAPNICK, J.

Before this Court is the third consolidated appeal in two matters that were commenced in or about September 2002. These matters, which were previously addressed in *For the People Theatres of N.Y. Inc. v City of New York* (84 AD3d 48 [1st Dept 2011, Acosta, J.]) and *For the People Theaters of N.Y. Inc. v City of New York* (20 AD3d 1 [1st Dept 2005, Nardelli, J.], *mod* 6 NY3d 63 [2005]), pertain to the constitutionality of certain zoning amendments aimed at curtailing adult businesses.

Factual Background

In 1993, the New York City Department of City Planning (DCP) began a comprehensive assessment of the impact of adult establishments on the quality of urban life. DCP's 1994 "Adult Entertainment Study" (DCP Study) concluded that adult entertainment establishments,[1] particularly when concentrated in

[1] The DCP set parameters on what qualified as an "adult entertainment establishment" for purposes of the DCP Study. It stated that

> "an adult entertainment establishment is a commercial use that defines itself as such through exterior signs or other advertisements. Thus, a 'triple-X or XXX' video store is an adult entertainment establishment, but a neighborhood video store that devotes a small area to triple-X videos is not. This self-defining characteristic allowed the survey to focus on those establishments for which there is some

a specific area, tend to produce negative secondary effects such as increased crime, decreased property values, reduced commercial activities, and erosion of community character.

In response to the DCP Study, the City adopted an amended zoning resolution in 1995 (1995 Resolution) that barred any "adult establishment" from all residential zones and most commercial and manufacturing districts, mandating that adult businesses, where permitted, had to be at least 500 feet from houses of worship, schools, and day care centers (Text Amendment N 950384 ZRY [No. 1322]; Amended Zoning Resolution § 32-01[a]; § 42-01[b]).

The 1995 Resolution defined an "adult establishment" as a commercial establishment in which a "substantial portion" of the establishment includes "an adult book store, adult eating or drinking establishment, adult theater, or other adult commercial establishment, or any combination thereof" (Amended Zoning Resolution § 12-10[1]). An "adult book store" was defined as having a "substantial portion" of its "stock-in-trade" in, among other things, printed matter or video representations depicting

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> consensus that the use is adult . . . . The survey was further restricted to three types of such uses: adult video and bookstores, adult live or movie theaters, and topless or nude bars" (DCP Study at 1-2).

"specified sexual activities" or "specified anatomical areas" (§ 12-10[1][a]), and an "adult eating or drinking establishment" was defined as an eating or drinking establishment "which regularly features" live performances or movies "characterized by an emphasis on" "specified sexual activities" or "specified anatomical areas," or whose employees regularly expose "specified anatomical areas" to patrons as part of their employment, and which excludes minors (§ 12-10[b]).[2]

In response to claims from owners and operators of adult establishments that the resolution's operative phrase, "substantial portion," was fatally vague, the Department of Buildings and the City Planning Commission determined that the "substantial portion" provision meant that any commercial establishment with "at least 40 percent" of its accessible floor

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[2] In an action filed by a group of adult establishments, including Stringfellow's, the predecessor in interest of plaintiff Ten's Cabaret, this Court affirmed the motion court's rejection of the plaintiffs' constitutional challenge to the 1995 Resolution (*Stringfellow's of N.Y. v City of New York*, 241 AD2d 360 [1st Dept 1997], *affd* 91 NY2d 382 [1998]). In affirming our order, the Court of Appeals held that the 1995 Resolution was not "purposefully directed at controlling the content of the message conveyed through adult businesses" (91 NY2d at 397) and was "not constitutionally objectionable under any of the standards set forth by the United States Supreme Court in *Renton v Playtime Theaters* [] or by this Court in *Matter of Town of Islip v Caviglia* []" (*id.* at 406). The Court noted that the Federal courts had "upheld similar zoning provisions that regulate commercial facilities devoting a 'substantial portion' of their businesses to adult entertainment" (*id.* at 405).

area or stock used for adult purposes qualified as an adult establishment (*see City of New York v Les Hommes*, 94 NY2d 267, 271 [1999]).

After this 60/40 formula became the governing standard, adult businesses sought to alter their character to ensure that they did not qualify as "adult establishments" within the meaning of the City's zoning law by reducing their adult usage to less than 40 percent of their floor area or stock. Thereafter, the City brought civil proceedings to close establishments that did not comply with the 60/40 standard (*see e.g. City of New York v Desire Video*, 267 AD2d 164 [1st Dept 1999]).

Additionally, in 1998, the City began to bring nuisance proceedings against businesses that it believed were in technical compliance with the 60/40 formula, but were using their nonadult inventory as a "sham." These claims for "sham compliance" were unsuccessful, the Court of Appeals finding that the guidelines must be enforced as written, and that there was nothing in the guidelines to permit considerations such as whether the nonadult stock was stable or unprofitable (*Les Hommes*, 94 NY2d at 273 ["Either the stock is available or accessible, or it is not; either the appropriate amount of square footage is dedicated to nonadult uses, or it is not."]).

Following these failed efforts, the New York City Council

adopted and ratified Text Amendment N010508 ZRY to the 1995 Resolution (the 2001 Amendments) to address the concern that some commercial establishments were subverting the 1995 Resolution by superficially complying with the 60/40 formula but retaining their predominant, ongoing focus on sexually explicit materials or activities.

Specifically, with respect to "adult eating or drinking establishments," the 2001 Amendments removed "substantial portion" from the definition of "adult establishment," providing instead that a venue that "regularly features in any portion of such establishment" live performances characterized by an emphasis on "specified anatomical areas"[3] or "specified sexual activities"[4] and excludes or restricts minors, is covered, regardless of whether it limits those performances to less than 40% of its floor area.

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[3] "Specified anatomical areas" are defined as "(I) less than completely and opaquely concealed: (aa) human genitals, pubic region, (bb) human buttock, anus, or (cc) female breast below a point immediately above the top of the areola; or (ii) human male genitals in a discernibly turgid state, even if completely and opaquely concealed" (§ 12-10[2][c]).

[4] "Specified sexual activities" are defined as "(I) human genitals in a state of sexual stimulation or arousal; (ii) actual or simulated acts of human masturbation, sexual intercourse or sodomy; or (iii) fondling or other erotic touching of human genitals, pubic region, buttock, anus or female breast" (§ 12-10[2][b]).

With respect to adult video and book stores, the 2001 Amendments modified the "substantial portion" standard to provide that nonadult material would not be considered stock-in-trade for the purpose of the "substantial portion" analysis where one or more of the following features were present:

> "(aa) An interior configuration and lay-out which requires customers to pass through an area of the store with 'adult printed or visual material' in order to access an area of the store with 'other printed or visual material';
>
> "(bb) One or more individual enclosures where adult movies or live performances are available for viewing by customers;
>
> "(cc) A method of operation which requires customer transactions with respect to 'other printed or visual material' to be made in an area of the store which includes 'adult printed or visual material';
>
> "(dd) A method of operation under which 'other printed or visual material' is offered for sale only and 'adult printed or visual material' is offered for sale or rental;
>
> "(ee) A greater number of different titles of 'adult printed or visual material' than the number of different titles of 'other printed or visual material';
>
> "(ff) A method of operation which excludes or restricts minors from the store as a whole or from any section of the store with 'other printed or visual material';
>
> "(gg) A sign that advertises the availability of 'adult printed or visual material' which is disproportionate in size relative to a

> sign that advertises the availability of 'other printed or visual material,' when compared with the proportions of adult and other printed or visual materials offered for sale or rent in the store, or the proportions of floor area or cellar space accessible to customers containing stock of adult and other printed or visual materials;
>
> "(hh) A window display in which the number of products or area of display of 'adult printed or visual material' is disproportionate in size relative to the number of products or area of display of 'other printed or visual material,' when compared with the proportions of adult and other printed or visual materials offered for sale or rent in the store, or the proportions of floor area or cellar space accessible to customers containing stock of adult and other printed or visual materials;
>
> "(ii) Other features relating to configuration and lay-out or method of operation, as set forth in rules adopted by the commissioner of buildings, which the commissioner has determined render the sale or rental of 'adult printed or visual material' a substantial purpose of the business conducted in such store. Such rules shall provide for the scheduled implementation of the terms thereof to commercial establishments in existence as of the date of adoption, as necessary" (§ 12-10[2][d]).

Procedural History

In September 2002, plaintiffs For the People Theatres, a movie theater that showed adult films, and JGJ Merchandise Corp., an adult video store, brought an action against the City, seeking a judgment declaring the 2001 Amendments to be facially

unconstitutional and unenforceable, as well as for injunctive relief. In October 2002, plaintiffs Ten's Cabaret and Pussycat Lounge commenced similar actions, which were later consolidated.

On their initial motion for a preliminary injunction, plaintiffs, all of whom had reconfigured their establishments to comply with the 60/40 allocation, argued that, in seeking to amend the 1995 Resolution, the City failed to review the data, or generate any new empirical data, regarding the purported adverse secondary effects of 60/40 establishments, instead improperly relying on the 1994 DCP Study it had used in support of the original zoning restrictions, and that it modified the 60/40 rule so that compliant establishments would be found to be adult establishments for zoning purposes even though they were very different from the 100% entities reviewed in the DCP Study.

In response, the City cross-moved for summary judgment, arguing that a new study was not necessary because the City Council had rationally found that the 60/40 clubs and video/bookstores, as defined in the 2001 Amendments, retained a predominant, ongoing focus on sexually explicit entertainment, notwithstanding their 60/40 configuration, and that the DCP Study had already determined that establishments predominantly focusing on sexually explicit entertainment gave rise to negative secondary effects.

By orders entered September 9, 2003, Supreme Court denied the City's motion for summary judgment, finding that because the 2001 Amendments regulated constitutionally protected expression, the City was required to make an evidentiary showing as to the basis for their adoption, and could not rely on the 1994 DCP report and the studies contained therein, which did not address 60/40 establishments or demonstrate that they would cause secondary effects (*For the People Theatres of N.Y., Inc. v City of New York*, 1 Misc 3d 394 [Sup Ct, NY County 2003], *revd* 20 AD3d 1 [1st Dept 2005], *mod* 6 NY3d 63 [2005]; *Ten's Cabaret v City of New York*, 1 Misc 3d 399 [Sup Ct, NY County 2003], *revd* 20 AD3d 1 [1st Dept 2005], *mod* 6 NY3d 63 [2005]).

The two matters were consolidated for appeal to this Court, which reversed Supreme Court's rulings (20 AD3d at 1). This Court rejected plaintiffs' attempt to "revisit their previous ill-fated argument that there is insufficient evidence to establish a correlation between adult business and adverse secondary effects" (*id.* at 16-17), and found that no new "secondary impacts" study was required absent a showing that the essential nature of the 60/40 businesses had changed (*id.* at 18).

The Court of Appeals, following the United States Supreme Court in *Los Angeles v Alameda Books, Inc.* (535 US 425 [2002]), concluded that the City "was not required . . . to relitigate the

secondary effects of adult uses, or to produce empirical studies connecting 60/40 businesses to adverse secondary effects" (6 NY3d at 83), but nevertheless found that the City had presented evidence raising a triable issue of fact as to the nature of the adult businesses, and remanded to Supreme Court for further proceedings.[5]

On remittitur, the *For the People* and *Ten's* cases were tried separately. At the trials, the City presented evidence regarding the primary adult focus of more than twenty 60/40 bookstores and ten 60/40 clubs.[6]

By order entered April 8, 2010, the trial court upheld the constitutionality of the 2001 Amendments' definitions of "adult establishment" insofar as they concerned "adult bookstores" and "eating and drinking establishments," finding that the City had shown, by substantial evidence, that the "dominant, ongoing focus" of those businesses was on "adult matters" (27 Misc 3d 1079, 1089 [Sup Ct, NY County 2010], *revd* 84 AD3d 48 [1st Dept

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[5] In a dissent joined by two of her colleagues, then Chief Judge Judith S. Kaye argued that the 2001 Amendments constituted a "new law" and that plaintiffs had produced substantial evidence as to the lack of any correlation between the 60/40 operations and negative secondary effects (6 NY3d at 85-87).

[6] The ten 60/40 clubs are Bare Elegance, Lace, Private Eyes, Lace II, VIP Club, Pussycat Lounge, Ten's Cabaret, HQ, Vixen, and Wiggles.

2011]).[7]

Plaintiffs appealed, and this Court reversed, vacating the finding of constitutionality and remanding the matter for further proceedings (84 AD3d at 48). With respect to the *Ten's* plaintiffs' as-applied challenge to the 2001 Amendments, this Court found that "while the 2001 Amendments might be constitutional in most situations, there may be instances where the application of the ordinance might be an unconstitutional abridgment of First Amendment protections," and directed the trial court to set forth its findings of fact as to such a challenge (84 AD3d at 65).

Following the remand, the parties submitted proposed findings of fact, as well as legal memoranda. Rather than submit additional evidence, the City argued that the evidence already in the record showed that all 60/40 establishments continued to have a predominant sexual focus.

By order entered August 30, 2012, Supreme Court held that the 2001 Amendments were facially unconstitutional, and permanently enjoined the City from enforcing them (38 Misc 3d at

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[7] With respect to adult movie theaters, the court held that the City failed to establish that theaters, which limit regularly featured adult entertainment to less than 40% of their customer accessible floor area, have a predominant ongoing focus on adult entertainment. The City did not appeal the rulings concerning movie theaters, and it is not at issue here.

663). As such, the trial court never reached the as-applied challenge. The City now appeals.

Discussion

"A regulation that infringes upon constitutionally protected speech or conduct . . . must be justified by unrelated concerns, and no broader than necessary to achieve its purpose" (6 NY3d at 85, Kaye, C.J., dissenting, citing *Matter of Town of Islip v Caviglia*, 73 NY2d 544, 557-560 [1989]). This standard, otherwise known as "intermediate scrutiny," was applied by the Court of Appeals in resolving the constitutional challenge to the 1995 Resolution in *Stringfellow's* (91 NY2d at 382). However, in the challenge to the 2001 Amendments, the Court of Appeals held that the City did not need to meet intermediate scrutiny, because the 2001 Amendments were merely a clarification or extension of the 1995 Resolution. Therefore, the Court held that the City met its initial burden of showing that the 2001 Amendments were justified "as a measure to eradicate the potential for sham compliance with the 1995 Ordinance, and thus to reduce negative secondary effects to the extent originally envisaged" (6 NY3d at 83). In so holding, the Court accepted the City's argument that the 2001 Amendments were intended to combat the same negative secondary impacts that the 1995 Resolution was meant, but failed, to combat. The Court also found that because the plaintiffs met

their burden to "'furnish[] evidence that disput[ed] the [City's] factual findings,'" the burden shifted back to the City "'to supplement the record with evidence renewing support for a theory that justifie[d] [the 2001 Amendments]'" (6 NY3d at 83, quoting *Alameda*, 535 US at 439).

It is clear that this final burden was meant to require the City to present evidence that supported its theory that because the 60/40 entities' nonadult uses were a sham, the businesses continued to be predominantly sexually focused, and, therefore, a new study showing negative secondary effects of the 60/40 entities was not legally required. To this end, the Court of Appeals held that

> "a triable question of fact has been presented as to whether 60/40 businesses are so transformed in character that they no longer resemble the kinds of adult uses found, both in the 1994 DCP Study and in studies and court decisions around the country, to create negative secondary effects – as plaintiffs contend – or whether these businesses' technical compliance with the 60/40 formula is merely a sham – as the City contends.
>
> "In addressing this factual dispute, we anticipate that the City will produce evidence *relating to the purportedly sham character* of self-identified 60/40 book and video stores, theaters and eating and drinking establishments or other commercial establishments located in the city. This does not mean that the City has to perform a formal study or a statistical analysis, or to

> establish that it has looked at a representative sample of 60/40 businesses in the city. If the trier of fact determines, after review of this evidence, that the City has fairly supported its position on sham compliance – i.e., despite formal compliance with the 60/40 formula, these businesses display a predominant, ongoing focus on sexually explicit materials or activities, and thus their essential nature has not changed – the City will have satisfied its burden to justify strengthening the 1995 Ordinance by enacting the 2001 Amendments, and will be entitled to judgment in its favor. If not, plaintiffs will prevail on their claim that the 2001 Amendments are insufficiently narrow and therefore violate their free speech rights. In that event, plaintiffs will be entitled to judgment and a declaration that the 2001 Amendments are unconstitutional" (6 NY3d at 83-84 [emphasis added]).

This Court's order remanding the cases again after the trials were held on remittitur from the Court of Appeals, further clarified the issue (84 AD3d at 48). We noted that the City had to "establish that the essential characteristics or features of the 60/40 uses are very similar to those adult uses that were previously found to cause secondary effects" (84 AD3d at 59), and that the trial court had to "compare 'self-identified' 60/40 businesses with the adult businesses discussed in the DCP study, other studies and case law so as to determine whether the 60/40 businesses retained a predominant focus on sexually explicit materials" (84 AD3d at 60-61) or were "'so transformed in

character that they no longer resemble the kinds of adult uses found, both in the 1994 DCP Study and in studies and court decisions around the country, to create secondary negative effects'" (*id.* at 55, quoting 6 NY3d at 84).

While acknowledging that the DCP Study primarily addressed "the consequences of *significant concentrations* of adult businesses emphasizing sexually explicit materials and not the particular attributes that caused secondary effects" (84 AD3d at 61 [emphasis added]), this Court drew upon some of the attributes highlighted by the DCP Study to develop criteria for the trial court to rely upon in its analysis. These criteria are: (1) "the presence of large signs advertising adult content[,]" (2) "significant emphasis on the promotion of materials exhibiting 'specified sexual activities' or 'specified anatomical areas,' as evidenced by a large quantity of peep booths featuring adult films[,]" (3) "the exclusion of minors from the premises on the basis of age," and (4) "difficulties in accessing nonadult materials" (84 AD3d at 61-62). We instructed that if the trial court found that most, if not all, 60/40 establishments featured any or all of the first three of these attributes, the City would have met its burden of proof (*id.* at 62 n 12).

While the City's evidentiary burden was light (*see* 6 NY3d at 80), contrary to the position taken by the dissent, this standard

relates specifically to proving, at the outset of the process, the existence of a correlation between the adult establishments and negative secondary effects; as previously discussed, that issue has already been resolved by the Court of Appeals, and thus is not before us. The "very little evidence" standard (6 NY3d at 80 [internal quotation marks omitted]) is not the standard applicable to the City at the trial level, which is what we are reviewing here (*see Alameda*, 535 US at 451, Kennedy J., concurring).

Adult Bookstores and Video Stores

The City argues that the trial court erred in striking down the 2001 Amendments with respect to the definition of adult video and bookstores. It further argues that despite any changes allowing for formal compliance with the 60/40 rule, the identified establishments clearly retain a predominant, ongoing sexual focus. The City relies on evidence showing the exclusion of minors, the promotion and presence of peep booths featuring on-premises viewing of adult material, and the sexually explicit merchandise displayed in the stores. Based on these characteristics, the City contends that these stores resemble the earlier 100% establishments found to cause negative secondary effects and that the court's conclusion otherwise is not supported by a fair interpretation of the record.

Plaintiffs argue that the trial court correctly found in their favor, because the 60/40 businesses no longer resemble their exclusively adult predecessors and do not have a predominant, ongoing focus on adult materials. Plaintiffs urge that nonadult material is readily accessible, signage has been modified to be less graphic, and the presence of peep booths, which are often in the back of the stores, does not create a predominant sexual focus.

First, with respect to the presence of large signs advertising adult content, upon which the DCP study placed special emphasis (*see* 84 AD3d at 61), the evidence shows that 8 of the stores have signs visible from the outside announcing the presence of peep booths or adult materials and that all 12 stores that have peep booths promote them through exterior and/or interior signage. The evidence, however, also shows that most of the signage is not graphic (i.e. none of the stores have "XXX" on the outside of the premises), and there is no evidence that any of the stores have adult signs that are larger than those of nearby nonadult businesses, or even that the signs advertising adult content are large. Further, the evidence shows that the signs, at least at Show World, Exquisite DVD, Blue Door Brooklyn, Video Excitement, Thunder Lingerie, and Amsterdam Video, have been significantly modified, and signs advertising nonadult stock

have been added so as to limit, if not eliminate, any emphasis on adult material. As the trial court, which had the opportunity to visit at least some of the establishments at issue here, observed, "There are almost no garish neon lighted signs, no hard-core sexual images or language on them and the nonadult signage is as prominent as the adult signage, certainly a significant change from the 1994 situation" (38 Misc 3d at 675). Given the foregoing, this Court finds that the signage evidence is not indicative of a predominant sexual focus in most of the stores.

Next, we look at whether there is a significant emphasis on the promotion of materials that exhibit "specified sexual activities" or "specified anatomical areas." It is undisputed that all 13 stores sell such materials, which indicates that the stores are of an "adult nature." It is also clear that although these stores may have reduced their stock of such materials to below the 40% threshold, the materials remain a significant part of the business, and the stores all place a significant emphasis on the promotion of such materials, based on promotional signage, window and interior displays and layouts promoting sexually focused adult materials and activities. With respect to peep booths, the record evidence establishes that 12 of the 13 stores have peep booths for viewing adult films, with 7 of the stores

having "buddy-booths." In terms of quantity, the evidence shows that the 12 stores have anywhere from 7 to 60 booths on premises, with an average of about 17 booths. This evidence supports the City's argument that the stores are predominantly sexually focused; however, promotion of sexually explicit materials is only one of the four relevant factors.

With respect to the exclusion of minors, the evidence shows that only 6 of the 13 stores exclude minors entirely, and at least one other store restricts minors from entering its adult area. There is limited evidence as to the reasoning behind these exclusions; however, at least one of plaintiffs' witnesses testified that minors are excluded because they tend to come in groups and disrupt the store. This evidence is not indicative of a predominant sexual focus in most of the stores, since nearly half of the stores do not restrict the admittance of minors at all.

Finally, as to whether the layout of the store makes it difficult to access nonadult materials, there is nothing in the record to suggest that such a difficulty exists at any of the stores. In fact, there is ample evidence that most of the stores keep the nonadult materials in the front of the stores, making

them easy to access (38 Misc 3d at 670-672).[8]

According due deference to the factual findings of the trial court, this Court finds that three of the four factors tend not to support the City's position, and therefore that the City has not met its burden with respect to the adult video and book stores.

Adult Eating and Drinking Establishments

The City argues that it met its burden of showing that, despite the changes that the identified 60/40 establishments made to conform to the 60/40 rule, the establishments retain a predominant, ongoing focus on sexually explicit activities.

The City further argues that the essential nature of the 60/40 clubs has not changed, because they display a predominant, ongoing focus on sexually explicit activities and specified anatomical areas by virtue of the fact that all of the clubs "regularly feature[]" topless dancing. The evidence shows that topless dancing takes place at all times daily for approximately 16-18 hours a day and that lap dances are provided in both public and private areas of the club. The City contends that this focus

[8] While the dissent takes issue with our "mechanical and mathematical approach" to weighing the enumerated factors, in fact, what we have attempted to do, is separately and fully analyze each of the characteristics that this Court suggested should be considered in making this determination (84 AD3d at 61-62).

on sexually explicit activities and specified anatomical areas is not mitigated by the clubs' nonadult sections where the nonadult use is a restaurant or bar that serves adult-section customers or even where it is independent of the adult business but takes place in a separate part of the premises. Accordingly, the City contends that only three of the clubs offer any independent nonadult use that reduces the predominant, ongoing focus on sexually explicit activities and specified anatomical areas.

Plaintiffs respond that the City cannot prevail merely by showing that the clubs feature topless entertainment on a regular basis. They argue that the changes made to the clubs by reducing the floor space devoted to such entertainment removed the predominant sexual focus linked to the adverse secondary effects found to be caused by the 100% entities. Plaintiffs point out that the nonadult sections either are used to add amenities to the establishment, such as restaurants, pool tables or sports lounges, or operate as live entertainment venues where bands perform.

The evidence adduced by the City makes it clear that the 60/40 clubs regularly feature topless dancing and lap dancing in a substantial portion of their overall space. This, coupled with the evidence regarding some of the clubs' website and newspaper advertisements, certainly goes to the second factor, promotion of

sexually explicit materials, and demonstrates an emphasis on the promotion of materials that exhibit "specified sexual activities" or "specified anatomical areas," which indicates a predominant sexual focus in most of the clubs.[9] However, there was little to no evidence presented as to the other factors,[10] such as the nature of the outward signage (first factor) and the difficulty in accessing the nonadult material, or, in this case, the nonadult section of the club (fourth factor). There was also no evidence presented as to the nature of the pre-1994 or 100% clubs.[11]

The little evidence we do have as to the clubs' signage shows that some clubs refer to themselves as "gentlemen's clubs" or advertise "adult entertainment," "live beautiful models" or "sports cabaret" on their outside awnings. There is no evidence

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[9] Essentially, the regularity of sexually explicit dancing and the promotion thereof is the equivalent of a large quantity of peep booths in the video/book store setting.

[10] While the City suggests that this Court's factors only apply to adult book and video stores, there is no such express limitation in our decision and no reason why the factors cannot be applied to both types of establishments. Moreover, the City had an opportunity to submit more evidence to the trial court after this Court's decision was issued announcing the factors, and it chose not to.

[11] The third factor, which asks whether minors are excluded by age, is moot here, since minors are presumably excluded because alcohol is served at the premises, not because of a focus on adult material.

as to the size of these signs or how they compare to signs advertising nonadult activity or those of surrounding nonadult businesses. This is not enough to show that the signage indicates a predominant sexual focus in most of the clubs.

With regard to layout or difficulty in accessing the nonadult section, the City concedes that some of the clubs have layouts different from those in the 100% clubs, although there is also evidence that some of the clubs have the adult sections on the ground floor and the nonadult sections on the second floor, while other clubs have the nonadult sections operating next door to the adult sections. There is, however, no evidence in the record that these configurations make the nonadult sections difficult to access.

As with the book stores and video stores, satisfaction of one of the factors is not sufficient to meet the City's burden. The City assumes that because the 60/40 clubs regularly feature topless dancing, this automatically means that they retain a predominant sexual focus. However, there is nothing in the prior related decisions that mandates that conclusion. Thus, this Court finds that the City has not met its burden with respect to the adult eating and drinking establishments.

Accordingly, the judgment of the Supreme Court, New York County (Louis B. York, J.), entered October 10, 2012, declaring

the 2001 Amendments to New York City's adult use zoning regulation as to adult eating and drinking establishments and adult video and book stores an unconstitutional violation of the First Amendment and permanently enjoining the City from enforcing the amendments, should be affirmed, without costs.

All concur except Andrias and DeGrasse, JJ.
who dissent in an Opinion by Andrias, J.

ANDRIAS J. (dissenting)

In this protracted litigation, we once again consider the constitutionality of the City's adult use zoning regulations, as amended in 2001.

When the matter was last before this Court, we vacated the trial court's finding, after separate trials, that the 2001 Amendments were constitutional on the ground that the court "did not elaborate on the criteria [underlying its determination]" and "failed to state the particular facts on which it based its judgment" (84 AD3d 48, 59 [1st Dept 2011], *revg* 28 Misc 3d 1079 [Sup Ct, NY County 2010]). Accordingly, we remitted the matter to the court for a decision setting forth its findings as to plaintiffs' facial and "as applied" constitutional challenges, directing the court to reassess the evidence under the "somewhat heightened" standard of review of "intermediate scrutiny" (*id.* at 63).

Simply put, we framed the issue as whether the "self-identified 60/40 businesses" under review displayed a predominant, ongoing focus on sexually explicit materials or activities (*id.* at 60), or whether there had been a significant change in their character that distinguished them from their pre-1995 forbears (*id.* at 63). We also instructed the trial court not to consider evidence that was irrelevant to this issue (*id.*).

On remand, the trial court found that "[g]iven their current arrangements and secondary characteristics, [the adult establishments] no longer operate in an atmosphere placing more dominance of sexual matters over nonsexual ones" (38 Misc 3d 663, 675 [Sup Ct, NY County 2012]). Consequently, the court declared the 2001 Amendments unconstitutional as violative of the free speech provisions of the U.S. and New York State Constitutions and found it unnecessary to reach the "as applied" challenges (*id.*). Giving "due deference" to the findings of the trial court, the majority affirms, holding that the City did not meet its burden of showing that the 60/40 adult establishments under consideration retain a predominant, ongoing focus on sexually explicit activities, thereby resembling their 100% adult predecessors. I disagree.

"The scope of our review of a nonjury trial is as broad as that of the trial judge, and permits us to substitute our own judgment where the evidence fails to support an important element of the trial court's findings" (*Palmer v WSC Riverside Dr., LLC*, 61 AD3d 589, 589 [1st Dept 2009] [internal citations omitted]). Although all litigation must come to an end at some point, it is essential that we carefully balance the City's right to exercise its police power in the public interest against the 2001 Amendments' potential infringement on protected speech.

Accordingly, because I believe that the trial court failed to undertake an adequate analysis of the relevant factors delineated by the Court of Appeals (6 NY3d 63 [2005]) and this Court (84 AD3d at 48), and allowed its improper reconsideration of "negative secondary effects" to permeate its decision, and that the City has sustained its burden as to sham compliance by demonstrating that by and large the essential character of the 60/40 businesses has not changed, even if their physical structure has, I respectfully dissent.

Before 1995, City zoning regulations did not distinguish between adult enterprises and other commercial businesses. This changed after a September 18, 1994 study by the Department of City Planning (DCP) found that adult businesses, which had been rapidly increasing, often had negative secondary impacts such as increased crime rates, decreased property values, and deteriorated community character, and recommended that they be regulated more closely than other commercial uses.

The DCP study led to the 1995 amendments to the City's zoning regulations, which restricted the location of "adult establishments." This included, inter alia, barring adult establishments from residential districts and from manufacturing and commercial districts that also permitted residential development, and requiring that they be located at least 500 feet

from churches, schools, day care centers, and other adult uses (see Text Amendment N 950384 ZRY [No. 1322]; Amended Zoning Resolution § 32-01[a]; § 42-01[b]).

"Adult establishment" was defined in the 1995 Amendments as "a commercial establishment where a 'substantial portion' of the establishment is or includes an adult book store, adult eating or drinking establishment, adult theater, or other adult commercial establishment, or any combination thereof" (Amended Zoning Resolution § 12 10).

An adult book store was defined as a book store that has a "substantial portion" of its stock-in-trade in books, magazines, photographs, films, video cassettes, or other printed matter or visual representations that are "characterized by an emphasis upon the depiction or description of 'specified sexual activities' or 'specified anatomical areas'" (*id.* § 12-10[a]). An adult eating or drinking establishment was defined as an eating or drinking establishment that "regularly features" either live performances that are "characterized by an emphasis on 'specified anatomical areas' or 'specified sexual activities'"; films or other photographic reproductions that are "characterized by an emphasis upon the depiction or description of 'specified sexual activities' or 'specified anatomical areas'"; or "employees who, as part of their employment, regularly expose to

patrons 'specified anatomical areas'"; and "which is not customarily open to the general public during such features because it excludes or restricts minors by reason of age" (*id.* § 12-10[b]). An adult theater was defined as a theater that "regularly features" films or other similar photographic reproductions that are "characterized by an emphasis on the depiction or description of 'specified sexual activities' or 'specified anatomical areas'" or live performances that are "characterized by an emphasis on 'specified anatomical areas' or 'specified sexual activities,'" and "which is not customarily open to the general public during such features because it excludes minors by reason of age" (*id.* § 12-10[c]).

In *Stringfellow's of N.Y. v City of New York* (91 NY2d 382 [1998]), the Court of Appeals held that the 1995 amended zoning resolution did not on its face violate adult establishments' constitutional rights of free expression. The Court found that the 1995 resolution "was not an impermissible attempt to regulate the content of expression but rather was aimed at the negative secondary effects caused by adult uses, a legitimate governmental purpose" (91 NY2d at 399).

The 1995 resolution did not define "substantial portion," but provided that:

"[f]or the purpose of determining whether a

> 'substantial portion' of an establishment includes an adult book store, adult eating or drinking establishment, adult theater, or other adult commercial establishment, or combination thereof, the following factors shall be considered: (1) the amount of *floor area* and *cellar* space accessible to customers and allocated to such *uses*; and (2) the amount of *floor area* and *cellar* space accessible to customers and allocated to such uses as compared to the total *floor area* and *cellar space* accessible to customers in the establishment" (*id.* § 12-10[2][c]).
>
> The resolution also provided that:
>
> "[f]or the purpose of determining ...whether a book store has a 'substantial portion' of its stock in adult materials..., the following factors shall be considered: (1) the amount of such stock accessible to customers as compared to the total stock accessible to customers in the establishment; ans (2) the amount of *floor area* and *cellar* space accessible to customers containing such stock; and (3) the amount of *floor area* and *cellar* space accessible to customers containing such stock as compared to the total amount of *floor area* and *cellar* space accessible to customers in the establishment" (*id.*, § 12-10[2][d])."

To clarify the meaning of the phrase "substantial portion," the Department of Buildings issued Operations Policy and Procedure Notice No. 6/98, which provided that a business would qualify as an adult establishment if "at least 40 percent of the floor and cellar area that is accessible to customers [is] available for adult" materials or if "10,000 or more square feet ... is occupied by an adult use" (*see City of New York v Les Hommes*, 94 NY2d 267, 271 [1999] [internal quotation marks omitted]). Following this edict, adult businesses began to

reconfigure their space so as to comply with the 60/40 formula.

In March 2001, after the City unsuccessfully challenged sham compliance by certain adult establishments on the basis of the Nuisance Abatement Law (*see Les Hommes*, 94 NY2d at 267), DCP filed an application with the City Planning Commission (CPC) to amend the 1995 zoning resolution. In August 2001, the CPC issued a report endorsing the proposed amendments, as modified after public hearings. The report stated that the amendments were intended "to clarify certain definitions in the [1995 resolution], in order to effectuate the [CPC]'s original intent" (*For the Peoples Theaters*, 6 NY3d at 74 [internal quotation marks omitted], i.e. by addressing the attempts by adult establishments to stay in business at their present locations through sham conversions that technically complied with the 60/40 formula but did not alter their character.

The City Council adopted and ratified the 2001 Amendments (Text Amendment N 010508 ZRY), which removed "substantial portion" from the definition of an adult establishment and defined adult establishment as "a commercial establishment which is or includes an adult book store, adult eating or drinking establishment ... or any combination thereof" (Amended Zoning Resolution § 12-10[1]). "Substantial portion" was not removed from the definition of adult video and book stores, but nonadult

material was not to be considered stock for substantial portion analysis if: (1) customers had to pass through adult material to reach the nonadult section; (2) any material exposed one to adult material; (3) nonadult material was only for sale, while adult material was for sale or rent; (4) more adult printed materials were available than nonadult ones; (5) minors were restricted from the entire store or from any section offering nonadult material; (6) signs or window displays of adult material were disproportionate to signs and window displays featuring nonadult material; (7) booths were available for viewing adult movies or live performances; or (8) purchasing nonadult material exposed the buyer to adult material (*id.* § 12-10[2][d]).

In response, plaintiffs commenced these actions seeking a declaration that the 2001 Amendments are unconstitutional.

In determining whether the 2001 Amendments are constitutional, the appropriate starting point is to identify the dispositive issues and the City's burden of proof.

In 2003, the trial court granted plaintiffs summary judgment holding that the 2001 Amendments were unconstitutional (1 Misc 3d 394; 1 Misc 3d 399 [Sup Ct, NY County 2003], *revd* 20 AD3d 1 [1st Dept 2005], *mod* 6 NY3d 63 [2005]). In 2005, we reversed and declared the 2001 Amendments constitutional (20 AD3d at 1). Following the analysis set forth in *City of Los Angeles v Alameda*

Books, Inc. (535 US 425 [2002]), the Court of Appeals modified our reversal and remanded for trial (6 NY3d at 63), framing the sole issue thus:

> "whether 60/40 businesses *are so transformed in character that they no longer resemble the kinds of adult uses found, both in the 1994 DCP Study and in studies and court decisions around the country, to create negative secondary effects*--as plaintiffs contend--or whether these businesses' technical compliance with the 60/40 formula is merely a sham--as the City contends" (6 NY3d at 83 [emphasis added]).

The Court of Appeals rejected plaintiffs' argument that a new study was required, holding that if the character of the businesses are not "so transformed," the negative secondary effects are presumed. The Court explained that "[i]t is th[e] essential character--as adult bookstores or adult video stores or strip clubs or topless clubs--that creates negative secondary effects" (6 NY3d at 81), and thus the City "was not required ... to relitigate the secondary effects of adult uses, or to produce empirical studies connecting 60/40 businesses to adverse secondary effects" (*id.* at 83).

The Court of Appeals also delineated the City's burden of proof, stating:

> "In addressing this factual dispute, we anticipate that the City will produce evidence relating to the purportedly sham character of self-identified 60/40 book and video stores, theaters and eating and drinking establishments or other commercial establishments located in the city. This does not mean that the City

> has to perform a formal study or a statistical analysis, or to establish that it has looked at a representative sample of 60/40 businesses in the city. If the trier of fact determines, after review of this evidence, that the City has *fairly supported its position on sham compliance--i.e., despite formal compliance with the 60/40 formula, these businesses display a predominant, ongoing focus on sexually explicit materials or activities, and thus their essential nature has not changed--the City will have satisfied its burden to justify strengthening the 1995 Ordinance by enacting the 2001 Amendments, and will be entitled to judgment in its favor*. If not, plaintiffs will prevail on their claim that the 2001 Amendments are insufficiently narrow and therefore violate their free speech rights. In that event, plaintiffs will be entitled to judgment and a declaration that the 2001 Amendments are unconstitutional" (*id.* at 84, emphasis added).

On the first remand, the trial court, after separate trials without a jury, held that the 2001 Amendments were constitutional (27 Misc 3d 1079 [Sup Ct, NY County [2010], *revd* 84 AD3d 48 [1st Dept 2011]).[1] When this Court reversed that determination, we identified four factors, derived from the 1994 DCP study, that should be considered in determining whether the adult establishments retained a predominant sexual focus. These were: (1) the presence of large signs advertising adult material; (2)

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[1]The court, however, stated that it was "not convinced that the same holding applies to the two adult movie theaters in this action," finding that "[t]he admittedly large number of peep shows in one theatre and the payment of one admission in both theatres which allows a patron to see all of the movies, both adult and nonadult, do not rise even to the low level of substantial evidence" (27 Misc 3d at 1089]).

the exclusion of minors by reason of age; (3) the sale of materials emphasizing "specified sexual activities" or "specified anatomical areas"; and (4) layouts that made it difficult to access nonadult materials (84 AD3d at 61-62). Furthermore, in addressing the extent of the City's burden under the heightened standard of intermediate scrutiny, we quoted the Court of Appeal's statement that

> "[n]otwithstanding the simplified nature of proof required of municipalities by the United States Supreme Court and the Court of Appeals, '[i]mposing a level of intermediate scrutiny . . . requires more conviction of the connection between legislative ends and means than does the rational basis standard, but only in the sense of 'evidence . . . [that] is reasonably believed to be relevant' to the secondary effects in question' (*For the People*, 6 NY3d at 81 [citations omitted])" (84 AD3d at 63).

Accordingly, in addressing the City's burden, we expressly directed the trial court, on remittitur, to assess the City's proffered evidence as to its claim that 60/40 businesses continued to display a predominant, ongoing focus on sexually explicit materials or activities, and any other evidence offered in support of that claim, keeping in mind that "'*very little evidence is required' to uphold the constitutionality of the 2001 Amendments*" (84 AD3d at 62, quoting *Alameda Books*, 535 US at 541 [emphasis added]). However, we did not obligate the City to submit additional evidence on remand. We simply gave it the

opportunity to do so.

Applying these standards, on the second remand, the City, without submitting new evidence, demonstrated that the "essential nature" of the 60/40 businesses has not changed. Substantial evidence demonstrates that, notwithstanding the present availability of additional amenities or certain non-adult uses of their space, the adult eating and drinking establishments used for illustrative purposes retained a predominant sexual focus. These establishments typically feature topless dancing by multiple dancers on a daily basis for approximately 16 to 18 hours a day (often from noon until 4 a.m.) and in a significant portion of the overall space, with lap dancing provided in both the adult and the nonadult areas. The clubs promote the topless dancing and lap dancing, through longer hours, higher prices, more patrons, and sexually focused advertisements.

At least three of the clubs used the same amount of space for topless dancing as they did before the 60/40 rule, and seven used their nonadult areas either to provide additional amenities for their topless bar customers, such as a coat check, an additional bar or dining area or hallways to the bathrooms, or as additional seating area. Only three offered any viable independent nonadult use. Thus, the nonadult portions of most clubs were either essentially a sham or pretext use because the

space either was empty or was used to support the adult sexual focus.

In addition to understating the evidence demonstrating that the features of these establishments essentially remained the same, the trial court – contrary to the directions of this Court and the Court of Appeals – also considered whether there was evidence that these establishments caused negative secondary effects (*see* 84 AD3d at 59, 63 n 15; 6 NY3d at 83). As a result, it placed undue emphasis on the opinions of plaintiffs' experts, who expounded on that issue. This improper consideration permeated the court's conclusion that the establishments did not have a predominant sexual focus.[2]

The adult bookstores and video stores also retained a predominant focus on sexual materials or activities. The evidence of promotion, based on signage, displays in some front windows and throughout the stores, and layout, combined with the evidence of the presence of large numbers of peep booths and the evidence of the sale of adult sex toys in the nonadult sections

[2]Indeed, in a section captioned "Dicta," the Court made clear its view that the 1994 study should not be applied to determine the actual negative secondary effects of the adult establishments today, and that "[w]ithout an actual study, the 2001 legislation should have been struck down, as urged by the three-judge Court of Appeals' minority opinion in *For the People*, (at 6 NY3d 88)" (38 Misc 3d at 676).

of the stores, demonstrates that most of the stores (at least 11 of the 13) emphasized the promotion of sexual materials over nonadult materials.

The majority holds otherwise.

As to adult eating and drinking establishments, the majority concedes that the evidence adduced makes clear that the 60/40 clubs regularly feature topless dancing and lap dancing in a substantial portion of their overall space, and that coupled with evidence from the clubs websites and ads, this demonstrates a predominant sexual focus. However, stating that this is only one of three relevant factors, the majority finds the amendments unconstitutional because the other two factors, signage and layout, do not tend to support the City's position.

As to the bookstores and video stores, the majority similarly concedes that all stores sell materials that promote "specified sexual activities" or "specified anatomical areas," and that while stock may have been reduced to less than 40% of floor space, all stores place a significant emphasis on these materials through signage and layouts promoting them, with stores having an average of 17 peep booths. While acknowledging that this supports the City's argument that the stores are predominantly sexually focused, the majority finds the amendments unconstitutional because this is only one of four relevant

factors, and the other three, signage, policy towards minors, and layouts, do not tend not to support the City's position.

The majority's mechanical and mathematical approach, under which the predominant sexual focus in the 60/40 businesses' activities is quantitatively outweighed by signage, policies towards minors, and layouts, is inadequate under the dictates of the Court of Appeals and this Court, and elevates the City's burden of proof. In identifying certain factors relevant in assessing the character of the adult establishments, this Court did not call for a mechanical application by which each factor is to be weighted equally and tallied to arrive at a quantitative conclusion. Rather, in terms of how to weigh the relevant factors, by way of example, this Court explained that a finding

> "that most, though not necessarily all, 60/40 establishments (1) exclude minors, (2) have large signs advertising sexually explicit adult materials *and/or* (3) emphasize the promotion of materials exhibiting 'specified sexual activities' or 'specified anatomical areas' over nonadult materials will be *more than enough* evidence to justify the City's 2001 ordinances on the basis of the DCP Study" (84 AD3d at 62 n 12 [emphasis added).

Thus, we recognized that if any one of the factors established that the 60/40 businesses displayed a predominant, ongoing focus on sexually explicit materials or activities, and that there had not been a significant change in their character, it could provide a sufficient basis to hold the 2001 Amendments

constitutional.

Contrary to the view of the majority, the record fairly supports the City's contention that the adult establishments reviewed emphasized sexual activities or materials over nonadult materials.

For example, as to the adult eating and drinking establishments, as the trial court found, Ten's Cabaret regularly staged topless dancing and required a cover charge allowing its patrons to go back and forth between the adult and nonadult sections. The Vixen website emphasized adult entertainment, providing photos of the dancers and describing the theme of the club as fantasy and pleasure. The VIP Club offered lap dances to customers in the adult portion and in private rooms in both the first-floor adult portion of the premises and on the second floor in the nonadult portion. Its website offered photographs of the entertainers. Lace's exterior sign and website advertised it as regularly featuring adult entertainment. Private Eyes's awnings advertised "Adult Entertainment" and "Sports Cabaret and Gentlemen's Club." In HQ, topless dancing was performed on the ground floor on two stages accommodating tables and chairs and an eating area. Wiggles had topless dancing on its stage and featured lap dances in its various rooms, charging between $20 and $200 depending on which rooms they took place in. Bare

Elegance's exterior sign stated, "Bare Elegance Gentlemen's Club and Lounge" and "Live Beautiful Models." The nonadult area contained a bikini bar and an open area with several couches. Lace II, Pussycat and Vixen used the same amount of space for topless dancing as they did before the 60/40 requirement took effect in 1998.

While the clubs may have added certain amenities, they still resembled their 100% predecessors. Indeed, even as to the prior 100% businesses, the DCP study states:

> "Several factors appear to have influenced the recent proliferation of upscale topless clubs in New York. First, responding to the devastating effects of the recession on eating and drinking businesses, some entrepreneurs have retooled their establishments and used topless performances as a successful marketing device to win back their affluent male clientele. Second, the clubs have shed their 'sleazy' reputations and become more mainstream by providing topless entertainment in safe, elegant surroundings furnished with other attractions such as giant closed circuit television screens, pool tables, and air hockey" (1994 DCP Study at 18-19).

Thus, "it is not unreasonable to conclude that an establishment with more than one principal use – for instance, semi-nude dancing and food service – is as liable to produce negative externalities as an establishment wholly devoted to presenting semi-nude dancing" (*Entertainment Prods., Inc. v Shelby County, Tenn.*, 588 Fd 372, 382 [6th Cir 2009], *cert denied* 563 US 835 [2010]).

As to the adult bookstores and theaters, Mixed Emotions's signage promotes private adult preview booths and adult toys and novelties. The store excludes minors. The adult section has 12 peep booths featuring adult movies, and the nonadult section sells sex toys and other sexually explicit merchandise.

Love Shack promotes its nonadult products above a sign promoting viewing booths. The store excludes minors, has eight peep booths featuring adult movies, and sells adult merchandise that is visible from the front nonadult section. Love Shack (Bronx) has at least eight peep booths featuring adult movies, sells adult novelties in the nonadult section, and advertises those items on signs outside the store.

Exquisite DVD publicizes itself as an adult establishment with a peep show sign on the front door, and has two areas containing buddy-style booths for the viewing of adult videos. Blue Door Video (Brooklyn) has seven peep booths for the viewing of adult movies, and sells rubber goods, lotions, and negligees in the nonadult section. Blue Door Video (Manhattan) has 24 peep booths featuring adult material, including 12 buddy-style booths, and sells adult novelties in the nonadult section. Further, in the nonadult section, there is a view of the adult section.

Gotham City Video (West Side) excludes minors, and has 10 buddy-style peep booths for viewing of adult videos. Video

Xcitement has 10 peep booths featuring adult movies, and sells rubber goods, lotions, and leather clothing and harnesses in its nonadult section. Thunder Lingerie has neon signs on the front entrance and over the nonadult section that advertise "peep shows" featuring adult movies. The store restricts minors, and has a front-window display filled with adult novelties. While standing in the nonadult section, customers are able to view the materials in the adult section, as well as large signs announcing the store's 10 peep booths.

Amsterdam Video's window contains sexually explicit merchandise and the nonadult section features adult merchandise. Vihans Video has eight peep booths for viewing of adult movies, which are publicized in neon outside the store. It excludes minors. Former Pride NYC excludes minors, has 12 adult buddy-style peep booths featuring adult films, and sells adult items in its nonadult section.

Show World eliminated its live adult entertainment, stopped advertising live nude movies and "XXX Movies" on the marquee, eliminated "Peep-a live" booths, and revamped its former adult live-show space into a separate establishment (the Laugh Factory) for plays, film festivals, and comedy shows. However, it still has more than 60 peep booths featuring adult films, continues to restrict minors, and has outside signage promoting adult movies

and private viewing booths.

Thus, eight of the stores have signs visible from the outside announcing the presence of peep booths or adult materials, and 12 stores that have peep booths promote them through either exterior and/or interior signage. Six of the stores have restrictions on minors. While plaintiffs argue that apart from "marital aids," which should not be considered adult materials for these purposes, the adult materials are relegated to the less accessible rear of the store, there is no basis for ignoring the presence of sexual aids and toys in the nonadult section as a factor in determining whether a store has a predominant sexual focus.

Even if the signage, due to its size, is not deemed a factor showing a predominant sexual focus, and even if minors are excluded because they are disruptive, that evidence does not outweigh the evidence of the sale of materials emphasizing "specified sexual activities" or "specified anatomical areas." It is undisputed that all of the stores sell such materials. Although the stores may have reduced their stock of such materials to less than the 40% threshold, these materials remain a significant part of their business and the stores all place a significant emphasis on the promotion of such materials, based on promotional signage, window and interior displays and layouts

promoting sexually focused adult materials and activities. Although there is no evidence suggesting "difficulties in accessing nonadult materials" at any of the stores (84 AD3d at 62), the lack of difficulty in accessing such materials, on its own, does little to show that a store lacks a sexual focus.

In sum, the City met its burden of establishing that the book and video stores are not "so transformed in character that they no longer resemble the kinds of adult uses found, both in the 1994 DCP Study and in studies and court decisions around the country to create negative secondary effects" (6 NY3d at 84). This includes evidence that (1) all but one of the stores have numerous peep booths; (2) eight have signs visible from the outside announcing the presence of peep booths and/or adult materials, many of which are in neon; (3) all but one have a large selection of dildos and other sex toys for sale in the non-adult section of the store; (4) six exclude minors from the entire establishment; and (5) in many instances, the adult merchandise is visible from the nonadult areas and in five instances customers have to walk through adult areas to get to nonadult areas. Plaintiff's protestations that the front of some stores contain nonadult material and is the predominant selling space, with adult material relegated to the back, ignores the many front window displays of graphic sexually explicit

merchandise and signs promoting and pointing customers to the adult areas.

Since the 2001 Amendments are facially constitutional, we must determine the Ten's Cabaret plaintiff's "as applied" challenge (see 84 AD3d at 65). Because the record is complete, I do not believe that there is a need to remand in this regard.

Although Ten's Cabaret and Pussycat Lounge adduced a fair amount of evidence showing that their businesses are no longer simply topless clubs, the record supports the finding that they retain a predominant sexual focus. At Pussycat, while the second floor and mezzanine are used for live music entertainment, the first floor features topless dancing on a stage every Monday through Saturday from noon until after midnight, and the club offers VIP suites and private dance areas. At Ten's, which has also been divided into two side-by-side clubs, the adult club has two stages for topless dancing, as well as VIP areas with "champagne rooms" for private lap dances, which are open from the evening until the early morning and which feature between 10 and 25 dancers at any one time.[3] Thus, I find that the City is also

[3]By contrast, the City showed evidence of two 60/40 book stores that do not have these characteristics, and thus are not covered by the amended definition of "adult book store," notwithstanding their 60/40 configuration. Particularly, the evidence showed that Samantha Video and Empire DVD did not, inter alia, (1) have any adult-oriented signs outside their stores; (2)

entitled to a judgment upholding the constitutionality of the 2001 Amendments, as applied.

Accordingly, I would reverse the order on appeal and declare the 2001 Amendments constitutional in all respects.

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

ENTERED: JULY 21, 2015

CLERK

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restrict minors from their premises; (3) offer dildos, rubber goods or lingerie for sale in their nonadult sections; (4) make customers pass through adult areas to get to non-adult areas or pay for their merchandise; or (5) provide peep booths for the viewing of adult films.

Gonzalez, P.J., Renwick, DeGrasse, Manzanet-Daniels, Gische, JJ.

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Index 30178/14
30207/13

In re 381 Search Warrants
Directed to Facebook, Inc., etc.,

- - - - -

Facebook, Inc.,
Petitioner-Appellant,

-against-

New York County District
Attorney's Office,
Respondent-Respondent.

- - - - -

New York Civil Liberties Union and
American Civil Liberties Union,
Amici Curiae.

- - - - -

In re 381 Motion to Compel
Disclosure, etc.,

- - - - -

Facebook, Inc.,
Petitioner-Appellant,

-against-

New York County District Attorney's Office,
Respondent-Respondent.

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New York Civil Liberties Union,
American Civil Liberties Union, Dropbox
Inc., Goggle Inc., Pinterest, Inc.,
Microsoft Corporation, Twitter Inc.,
and Yelp Inc., **Foursquare Labs, Inc.,**
Kickstarter, Inc., Meetup, Inc. and
Tumblr, Inc.,
Amici Curiae.

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Gibson, Dunn & Crutcher LLP, Washington, DC (Thomas H. Dupree, Jr. of the bar of the District of Columbia admitted pro hac vice of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney's Office, New York (Benjamin E. Rosenberg of counsel), for respondent.

New York Civil Liberties Union Foundation, New York (Jordan Wells and Mariko Hirose of counsel), for New York Civil Liberties Union, amicus curiae.

American Civil Liberties Union Foundation, New York (Alex Abdo of counsel), for American Civil Liberties Union, amicus curiae.

Perkins Coie LLP, New York (Jeffrey D. Vanacore of counsel), for Dropbox Inc., Goggle Inc., Pinterest, Inc., Microsoft Corporation, Twitter, Inc., and Yelp Inc., amici curiae.

Holwell, Shuster & Goldberg LLP, New York (Richard J. Holwell of counsel), for Foursquare Labs, Inc., Kickstarter, Inc., Meetup, Inc. and Tumblr, Inc., amici curiae.

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Appeals from order, Supreme Court, New York County (Melissa C. Jackson, J.), entered on or about September 20, 2013, and order, same court (Daniel P. FitzGerald, J.), entered on or August 13, 2014, dismissed, without costs, as taken from nonappealable orders.

Opinion by Renwick, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Luis A. Gonzalez, P.J.
Dianne T. Renwick
Leland G. DeGrasse
Sallie Manzanet-Daniels
Judith J. Gische, JJ.

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Index 30178/14
30207/13

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In re 381 Search Warrants
Directed to Facebook, Inc., etc.,

- - - - -

Facebook Inc.,
Petitioner-Appellant,

-against-

New York County District
Attorney's Office,
Respondent-Respondent.

- - - - -

New York Civil Liberties Union and
American Civil Liberties Union,
Amici Curiae.

- - - - -

In re Motion to Compel
Disclosure, etc.,

- - - - -

Facebook, Inc.,
Petitioner-Appellant,

-against-

New York County District
Attorney's Office,
Respondent-Respondent.

- - - - -

New York Civil Liberties Union, American Civil Liberties Union, Dropbox Inc., Goggle Inc., Pinterest, Inc., Microsoft Corporation, Twitter Inc., and Yelp Inc., **Foursquare Labs, Inc., Kickstarter, Inc., Meetup, Inc. and Tumblr, Inc.,**
Amici Curiae.
_____x

Petitioner appeals from the order of the Supreme Court, New York County (Melissa C. Jackson, J.), entered on or about September 20, 2013, which denied petitioner's motion to quash 381 search warrants requiring petitioner to locate and produce user information and placing petitioner under an order of nondisclosure, and from the order of the same court (Daniel P. FitzGerald, J.), entered on or about August 13, 2014, which denied petitioner's motion to compel the District Attorney's Office of the City of New York, New York County, to disclose the investigator's affidavit submitted by the District Attorney's Office in support of its application for the search warrants.

Gibson, Dunn & Crutcher LLP, Washington, DC (Thomas H. Dupree of the bar of the District of Columbia admitted pro hac vice of counsel), and Gibson, Dunn & Crutcher LLP, New York (Orin Snyder, Alexander H. Southwell and Jane Kim of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney's Office, New York (Benjamin E. Rosenberg and Bryan Serino of counsel), for respondent.

New York Civil Liberties Union Foundation, New York (Jordan Wells, Mariko Hirose and Arthur Eisenberg of counsel), for New York Civil Liberties Union, amicus curiae.

American Civil Liberties Union Foundation, New York (Alex Abdo of counsel), for American Civil Liberties Union, amicus curiae.

Perkins Coie LLP, New York (Jeffrey D. Vanacore of counsel), for Dropbox Inc., Goggle Inc., Pinterest, Inc., Microsoft Corporation, Twitter, Inc., and Yelp Inc., amici curiae.

Holwell, Shuster & Goldberg LLP, New York (Richard J. Holwell, John M. DiMatteo and Daniel M. Sullivan of counsel), for Foursquare Labs, Inc., Kickstarter, Inc., Meetup, Inc. and Tumblr, Inc., amici curiae.

RENWICK, J.

This appeal raises the question of whether an online social networking service, the ubiquitous Facebook, served with a warrant for customer accounts, can litigate prior to enforcement the constitutionality of the warrant on its customers' behalf. Rather than complying with the warrant, the online social networking service moved to quash the subpoena. The motion court summarily rejected the pre-enforcement motion, and Facebook appealed. The New York County District Attorney's Office moved to dismiss the appeal, which we denied. After argument on appeal, we now hold that Facebook cannot litigate the constitutionality of the warrant pre-enforcement on its customers' behalf.

Facebook is an online social networking service with over one billion users worldwide that allows its users to create an online presence to record all manner of life events, opinions, affiliations, and other biographical and personal data. Through Facebook's online website's security settings, users can decide, through a wide variety of options, with whom they wish to share information. Options may vary, from the user who posts information publicly for every user to view, to the user who

restricts the number of users who may view his/her information. Users may comment on items posted by other users, assuming those posting the content have given the viewing user access to the material and permission to comment. Facebook also has a private messaging service that works much like an email account, or text function on a smart phone.

On July 23, 2013, on the application of the District Attorney's Office, Supreme Court issued 381 substantially identical digital search warrants for Facebook accounts. The warrants sought information in 24 separate categories, essentially comprising every posting and action the 381 users identified had taken through Facebook. The warrants were obtained in connection with a large-scale investigation into the fraudulent filing of Social Security disability claims, including claims from a group of retired police officers and firefighters suspected of having feigned mental illnesses caused by the events of September 11, 2001. The application for the warrants was supported by the 93-page affidavit of Senior Investigator Donato Siciliano.

According to the warrants, there was "reasonable cause to believe" that the property to be searched and seized constituted evidence of offenses that included grand larceny in the second

degree, grand larceny in the third degree, filing of a false instrument in the first degree, and conspiracy. Each of the warrants contained a nondisclosure provision, which prevented Facebook from disclosing the warrants to the users. Upon being served with the warrants, Facebook contacted the District Attorney's Office and requested that it voluntarily withdraw them, or, alternatively, consent to vacate the nondisclosure provisions. The District Attorney's Office declined.

Before Supreme Court, Facebook moved to quash the warrants, challenging their broad scope and nondisclosure requirements. The District Attorney's Office defended the warrants as a legitimate governmental action to aid an expansive investigation. Further, the District Attorney's Office justified the confidentiality requirements as necessary to prevent potential defendants from fleeing if they learned of the investigation, destroying evidence outside Facebook's control, or tampering with potential witnesses. The District Attorney's Office also questioned Facebook's legal standing to raise constitutional concerns, contending that Facebook is simply an online repository of data and not a target of the criminal investigation.

Supreme Court denied Facebook's motion to quash and upheld the warrants as issued, requiring Facebook to comply. According

to Supreme Court, Facebook could not assert the Fourth Amendment rights of its users. Facebook had to wait until the warrants were executed and the searches conducted; only then could the legality of the searches be determined. Facebook complied with the warrants, and the District Attorney's Office indicted some of the targeted people.

Facebook filed an appeal from Supreme Court's order, and the District Attorney's Office moved to dismiss the appeal. On September 25, 2014, this Court denied the motion to dismiss. This Court permitted the filing of amicus briefs by the American Civil Liberties Union and several high-profile Internet companies.[1] While allowing Facebook's appeal to survive, the preliminary ruling was without prejudice to the District Attorney's Office's right to reassert challenges to Facebook's "right" to move to quash the warrant pre-enforcement.

We now hold that Supreme Court's summary denial of Facebook's motion to quash the search warrants was proper because there is no constitutional or statutory right to challenge an alleged defective warrant before it is executed. The key role of

[1] Specifically, the ruling gave technology companies, Dropbox Inc., Google, Pinterest, Inc., Microsoft Corporation, Twitter, Inc., and Yelp Inc., permission to file briefs supporting Facebook's position.

the judicial officer in issuing a search warrant is described generally by the Fourth Amendment and more specifically by state statutes. None of these sources refer to an inherent authority for a defendant or anyone else to challenge an allegedly defective warrant before it is executed.

Criminal prosecutions officially begin with an arrest. However, even before the arrest, the law protects citizens against unconstitutional police tactics. The Fourth Amendment stands as the main protector of individual privacy from government intrusion. This protection is prophylactic, as "[t]he Amendment is designed to prevent, not simply to redress, unlawful police action" (*Chimel v California*, 395 US 752, 766 n12 [1969]). Consequently, the specific protections of the Amendment aim to deter violations from occurring in the first place (*id.*).

The U.S. Supreme Court has recognized that the Constitution, through the Fourth Amendment, provides a significant number of ex ante and ex post protections to citizens. For instance, in *United States v Grubbs*, the Supreme Court recognized that: "The Constitution protects property owners not by giving them license to engage the police in a debate over the basis for the warrant, but by interposing, ex ante, the *deliberate, impartial judgment of a judicial officer . . . between the citizen and the*

police . . . and by providing, ex post, a right to suppress evidence improperly obtained and a cause of action for damages" (*United States v Grubbs*, 547 US 90, 99 [2006] [emphasis added] [internal quotation marks omitted]).

The main ex ante protection derives from the Fourth Amendment's Warrants Clause, which states, "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized" (US Const, Amend IV). The Warrants Clause is the main ex ante protection because it establishes the constitutional requirements for a valid search warrant (*id.*). More specifically, under the Warrants Clause, a law enforcement official must swear, under oath, that the information contained within the search warrant is true (*id.*). Like the Fourth Amendment, article 1, § 12 of the New York State Constitution requires an oath or affirmation in support of the warrant.[2] Moreover, the Warrants Clause requires that the search warrant contain statements or facts that form probable cause to perform the search, as well as identify what items the police

[2] The wording of these rights is identical: "and no warrants shall issue, but upon probable cause, supported by oath or affirmation…"

intend to seize and what places the police intend to search (*id.*). Any search warrant that does not contain the aforementioned requirements is per se unconstitutional and may not be issued by the court or executed by the government (*see e.g. People v Gavazzi,* 20 NY3d 907 [2012]).

Whereas the Fourth Amendment provides a general framework, New York's warrant statutes explain the procedural details of who can obtain the warrant, how it can be obtained, when it can be executed, and how a return on the warrant must be filed (*see* CPL § 690.45). Specifically, these statutes are designed to protect the constitutional rights of criminal suspects and defendants, beginning with the initial police investigation of a suspect. In promulgating the requirements of the warrant application, the legislature apparently wanted the judge considering the application to take nothing for granted. Accordingly, the application must include the name of the court where the application is being made, the applicant's name and title, and a request that the court issue a search warrant directing a search and seizure of the designated property or person (*see* CPL 690.35[3][a] and [d]). The warrant application must also provide the judge with "reasonable cause" to believe that evidence of illegal activity will be present at the specific time and place

of the search (*see* CPL 690.35[3][b]) and specify that the property sought constitutes evidence of a specific offense (*see* CPL 690.10[4], 690.35[2][b]).

Furthermore, the U.S. Supreme Court has required that a neutral and detached judicial officer or magistrate determine if a search warrant is valid under the Fourth Amendment (*see Shadwick v City of Tampa*, 407 US 345, 349-350 [1972]). In addition to deciding if the warrant application establishes probable cause, the neutral and detached judicial officer must also ensure the law enforcement official has sworn, under oath, that the information contained within the warrant application is true and that it identifies the places being searched and the items being seized (*see* US Const amend IV). In effect, the neutral and detached judicial officer serves as a constitutional gatekeeper and protects citizens from the actions of an overzealous government (*see Johnson v United States,* 333 US 10, 13-14 [1948] [noting protections of Fourth Amendment include having a neutral and detached judicial officer determine if the government has established enough probable cause to issue a search warrant]).

The motion to suppress is the most important ex post

protection available to citizens.[3] The motion to suppress is vital, because it can lead to the suppression of unconstitutionally seized evidence. Once evidence is suppressed, the government's case could become impossible or significantly more difficult to prove. The reasons for making a motion to suppress can be quite broad. However, in the context of search warrant cases, motions to suppress typically cover several specific areas. For instance, a motion can be made on the ground that the search warrant was not properly executed by the government (*see e.g. People v Sciacca,* 45 NY2d 122 [1978] [warrant to search a car did not authorize entry into garage, where the car was parked, to effectuate the search]). In addition, a motion can be made on the ground that the government lacked probable cause. Even though the neutral and detached judge determined that there was probable cause, the defendant has

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[3] Federal law, namely 42 U.S.C. § 1983, also provides a basis for litigation against local governments and local officers for constitutional violations. Section 1983 does not create any substantive rights (*see Watson v City of Kansas City*, 857 F2d 690, 694 [10th Cir. 1988] [discussing 42 U.S.C. § 1983]). Instead, it merely provides a civil remedy for the violation of a constitutional or federal statutory right *(id.*). In addition, under 42 U.S.C. § 1983, both citizens and non-citizens can file civil suits against state actors who have infringed on their federal or constitutional rights (*see e.g. Stallworth v Shuler*, 777 F2d 1431, 1435 [11th Cir. 1985]). If a § 1983 claim is successful, the plaintiff could receive attorney's fees, compensatory damages, punitive damages, or even a preliminary injunction.

a right to have the appellate court decide whether the judicial officer's rulings were correct (*see e.g. People v Bigelow,* 66 NY2d 417 [1985]). Likewise, a motion to suppress can be made attacking the search warrant itself, if a defendant believes the search warrant is invalid on its face or does not properly describe the place being seized and the property being seized *(see e.g. People v Rainey*, 14 NY2d 35 [1964]; *People v Henley*, 135 AD2d 1136 [4th Dept 1987], *lv denied* 71 NY2d 897 [1988]).

Together, these ex ante and ex post protections typically work to successfully ensure that the government does not exceed its authority when requesting or executing a search warrant. Thus, these protections eliminate any need for a suspected citizen to make a pre-execution motion to quash a search warrant. Indeed, under New York State Criminal Procedure Law, the sole remedy for challenging the legality of a warrant is by a pretrial suppression motion which, if successful, will grant that relief. If the suppression motion is unsuccessful, and the defendant is convicted, appellate relief is limited to raising the issue upon direct appeal from the judgment. Direct appellate review of interlocutory orders issued in a criminal proceeding is not available absent statutory authority (*People v Bautista*, 7 NY3d 838 [2006]). The power of the Court to authorize search

warrants, generally, is set forth in CPL article 690. However, neither CPL 690, nor CPL 450, which sets forth when a criminal appeal can be taken, provides a mechanism for a motion to quash a search warrant, or for taking an appeal from a denial of such a motion (*see Matter of Bernstein*, 115 AD2d 359 [1st Dept 1985], lv dismissed, 67 NY2d 852 [1986]).

Tacitly conceding that neither a defendant nor any other person has the right to move to quash an alleged defective warrant before it is executed -- nor the right to appeal the denial of such a challenge -- Facebook urges this Court to consider its motion to quash the search warrant as analogous to a motion to quash a subpoena, making the order denying its motion appealable. In contrast to warrants, a motion to quash a subpoena, even one issued pursuant to a criminal investigation, may be considered civil by nature, and it results in a final and appealable order, and subject to direct appellate review (*see Matter of Abrams [John Anonymous]*, 62 NY2d 183 [1984]; *see also* CPLR 5701[a]). The Court of Appeals reached this conclusion in *Matter of Abrams,* holding that a motion to quash a subpoena is civil in nature in that the relief sought has nothing inherently to do with criminal substantive or procedural law, and that a motion to quash can arise as easily in the context of a purely

civil lawsuit as in a purely criminal case (*Abrams,* 62 NY2d at 194).

Courts, however, have imposed fairly narrow limits on the use of subpoenas for criminal discovery purposes. Although CPL 610.25 was amended in 1979 to allow the defendant (or the prosecution) to subpoena documentary and other physical evidence prior to trial *(see* L 1979, ch 413, § 3), the Court of Appeals has consistently held that a subpoena may not be used for the purposes of general discovery. Rather, the purpose of a subpoena is "'to compel the production of specific documents that are relevant and material to facts at issue in a pending judicial proceeding'" (Matter of Terry D., 81 NY2d 1042, 1044 [1993], quoting *Matter of Constantine v Leto,* 157 AD2d 376, 378 [3d Dept 1990], *affd* 77 NY2d 975 [1991]; *see also People v Gissendanner*, 48 NY2d 543, 551 [1979]).

Here, the warrants were issued prior to any pending criminal proceeding. Nevertheless, Facebook posits that what makes the warrants here more akin to a subpoena than a traditional warrant is that they were served on Facebook, which required Facebook, rather than law enforcement agents, to be responsible for "seizing" the materials by gathering the data and delivering it to the government. Even if we were to ignore the fact that the

search warrants were issued prior to any pending judicial proceeding, the purported distinction, of service directly upon Facebook, is a distinction without a difference, because it simply cannot be said that quashing the warrants, the relief which Facebook seeks, "although relat[ing] to a criminal matter, . . . does not affect the criminal judgment itself, but only a collateral aspect of it" (*Matter of Hynes v Karassik*, 47 NY2d at 659, 661 n1 [1979] [order unsealing a criminal file for use in an underlying civil case was appealable as a civil order]). Thus, while, for modern technological reasons, the manner in which the materials are gathered may deviate from the traditional, Facebook's reason for seeking to quash the warrants does not. What Facebook ultimately seeks is suppression of the materials obtained from it, a determination that would necessarily impact the subsequent criminal actions.

To accept Facebook's argument is to embrace the notion that a warrant is limited only to traditional search warrants authorizing law enforcement agents to forcibly enter and search physical places. This approach is, however, oblivious to the fact that within the context of digital information, "a search occurs when information from or about a data is exposed to possible human observation, such as when it appears on a screen,

rather than when it is copied by the hard drive or processed by the computer" (Orin S. Kerr, *Searches and Seizures in a Digital World*, 119 Harv L Rev 531, 551 [2005]). It is also hard to imagine how a law enforcement officer could play a useful role in the Internet service provider's retrieval of the specified online information.

Alternatively, Facebook points to the Federal Stored Communications Act (SCA), which provides an Internet Service Provider (ISP) with the express right to contest any order or subpoena served upon it (*see* 18 USC § 2703[d]).[4] Facebook argues that the bulk warrants in the instant case were analogous to one defined under the SCA, in that: (1) it need not be served in person (*see United States v Bach*, 310 F3d 1063, 1065 [8th Cir 2002], *cert denied* 538 US 993 [2003]); (2) it is not immediately executed (*see Hubbard v MySpace, Inc.*, 788 F Supp 2d 319, 321 [SD NY 2011]; (3) no law enforcement presence is required for service of execution pursuant to 18 USC § 2703(g); and (4) the recipient

[4] Specifically, 18 USC § 2703(d) states that "A court issuing an order pursuant to this section [§ 2703 (a) or (6)], on a motion made promptly by the service provider, may quash or modify such order, if the information or records requested are unusually voluminous in nature or compliance with such order otherwise would cause an undue burden on such provider."

of the SCA warrant is commanded to identify, collect, and produce information to the government (18 USC 2703[a]). Thus, according to Facebook, it necessarily follows that Facebook has the right to contest the warrant served upon it, as provided in 18 USC 2703(d). However, as fully explained below, SCA subsection (d), which gives the ISP the right to object, applies only to court orders or subpoenas issued under SCA subsections (b) or (c), disclosure devices which the SCA itself distinguishes from warrants, which are governed by its subsection (a).

Facebook's argument rests on a misinterpretation of the SCA.[5] The SCA is not a catch-all statute designed to protect the privacy of stored Internet communications; instead, it is narrowly tailored to provide a set of Fourth Amendment-like protections for computer communications. The Fourth Amendment to the U.S. Constitution protects the people's right "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" (*see e.g. Katz v United*

[5] The Stored Communications Act, enacted in 1986, is not a stand-alone law but forms part of the Electronic Communications Privacy Act. It is codified as USC §§ 2701-2712, and addresses voluntary and compelled disclosure of stored wire and electronic communications and transaction records held by third-party Internet Service Providers (ISP).

States, 389 US 347 [1967]). However, when applied to information stored online, the Fourth Amendment's protections are potentially far weaker. In part, this is because computer records are stored in a technologically innovative form,[6] raising the question whether they are sufficiently like other records to engender the "reasonable expectation of privacy" required for Fourth Amendment protection.

Furthermore, users generally entrust the security of online information to a third party, an ISP. In many cases, Fourth Amendment doctrine has held that, in so doing, users relinquish any expectation of privacy (*see Smith v Maryland*, 442 US 735 [1979]). The Third-Party Doctrine holds that knowingly revealing information to a third party relinquishes Fourth Amendment protection in that information (see Orin S. Kerr, *The Case for the Third-Party Doctrine*, 107 Michigan L Rev 561 [2009]). While a search warrant and probable cause are required to search one's home, under the Third-Party Doctrine only a subpoena and prior notice (a much lower hurdle than probable cause) are needed to

[6] Unlike the tangible physical objects mentioned by the Fourth Amendment, computer records typically consist of ordered magnetic fields or electrical impulses (see Frederic J. Cooper, *Computer-Security Technology* 11-12 [1995]; A Chandor, The Penguin Dictionary of Computers, 137-138, 255, 256, 381-385 [2nd ed 1988]).

compel an ISP to disclose the contents of an email or of files stored on a server.

The SCA creates Fourth Amendment-like privacy protections for email and other digital communications stored on the Internet. It limits the ability of the federal or state government to compel an ISP to turn over content information and non-content information (*see* 18 USC § 2703). In addition, it limits the ability of commercial ISPs to reveal content information to nongovernment entities (*id.*). The basic premise of the SCA is that customers of ISPs, cell phone companies, and web-based email providers should receive statutory privacy protections for the account, transactional, and content data that these third-party providers maintain on behalf of the customer (*see* 18 U S C § 2707).

Presently, the SCA authorizes three methods for obtaining information from electronic communications service providers:

1. An administrative, grand jury or trial subpoena (*see* §2703[c][2]);

2. A court order issued pursuant to 18 USC § 2703(d); or

3. A search warrant (*see* USC § 2703[a]).

The less privacy protection afforded to the type of record, the less intrusive the legal process required. For instance, in

order to obtain subscriber information, that is, the record of who subscribes to an Internet access account, including the person's name, address and credit card used to establish the account, the police need only issue a subpoena (*see* USC § 2703[c][2]).[7] In order to obtain transaction data such as when an individual accessed her account, what services she used and how long she was online, the police must obtain a court order (*see* § 2703[c][1]). Similar to real time communication, in order to obtain the content of stored communications, police must obtain a search warrant (*see* § 2703[a] & [b]).

We agree with Facebook that the bulk warrants at issue here are analogous to SCA section 2703(a) warrants to the extent they authorized the federal and state government to procure a warrant requiring a provider of electronic communication service to disclose electronic content in the provider's electronic storage. However, contrary to Facebook's allegations, 2703 subsection (d), which gives the ISP the right to object, applies only to court orders or subpoenas issued under subsections (b) or (c). The SCA specifically distinguishes these disclosure devices from

[7] The basic subscriber information listed in 18 USC § 2703[c][2] may also be obtained by using a § 2703[d] order or a § 2703[a] search warrant.

warrants, which are governed by its subsection (a). While an order or subpoena obtained pursuant to (b) or (c) requires only that the government show "specific and articulable facts" that there are "reasonable grounds to believe"[8] the information sought will be "relevant and material," a warrant under subsection (a) requires the government to make the traditional and more stringent showing of "probable cause." Here, a finding of probable cause was made by the reviewing judge, and thus the warrants are akin to SCA warrants, not SCA subpoenas or orders. Thus, Facebook's argument that it has the right to contest the warrants based upon the SCA is contradicted by the express terms of the SCA.

Facebook cannot have it both ways. On the one hand, Facebook is seeking the right to litigate pre-enforcement the constitutionality of the warrants on its customers' behalf. But neither the Constitution nor New York Criminal Procedure Law provides the targets of the warrant the right to such a pre-enforcement challenge. On the other hand, Facebook also wants the probable cause standard of warrants, while retaining the pre-execution adversary process of subpoenas. We see no basis for

[8] This is essentially a reasonable suspicion standard.

providing Facebook a greater right than its customers are afforded.

To be sure, we are cognizant that decisions involving the Fourth Amendment have the power to affect the everyday lives of all U.S. residents, not just criminal suspects and defendants. Our holding today does not mean that we do not appreciate Facebook's concerns about the scope of the bulk warrants issued here or about the District Attorney's alleged right to indefinitely retain the seized accounts of the uncharged Facebook users. Facebook users share more intimate personal information through their Facebook accounts than may be revealed through rummaging about one's home. These bulk warrants demanded "all" communications in 24 broad categories from the 381 targeted accounts. Yet, of the 381 targeted Facebook user accounts only 62 were actually charged with any crime.[9]

Judges, as guardians of our Constitution, play an indispensable role in protecting the rights and liberties of individuals entrenched in the Constitution. Charged with the

[9] A total of 134 people were indicted in this investigation. Sixty-two of those individuals were from the 381 targeted Facebook users. Thus, 319 targeted Facebook users were not indicted.

indispensable responsibility of reviewing warrant applications, they protect the rights and interests of individuals by remaining mindful of the reasonableness embedded in the Fourth Amendment's delicate balance. The procedural rules attendant to the Fourth Amendment's warrant requirement both reasonably protect the innocent and permit investigation of suspected criminal conduct. A judge reviewing a warrant request must always balance the nature and quality of the intrusion on an individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion. Further, this balance invokes carefully weighing the extent to which each level of intrusion in the execution of the warrant is needed. Each level of intrusion involves an implicit assertion by the government that the intrusion is "reasonable" to recover the evidence described in the warrant despite the compromise of the individual's interests in privacy. Ultimately, to be fair and effective, the overall assessment of reasonableness requires the judge reviewing the warrant to carefully evaluate the need for each additional level of intrusion in the process of seizing evidence.

Accordingly, the appeals from the order of the Supreme Court, New York County (Melissa C. Jackson, J.), entered on or

about September 20, 2013, which denied the motion of Facebook, Inc. to quash 381 search warrants requiring Facebook to locate and produce user information, and placing Facebook under an order of nondisclosure, and from the order of the same court (Daniel P. FitzGerald, J.), entered on or about August 13, 2014, which denied Facebook's motion to compel the District Attorney's Office of the City of New York, New York County, to disclose the investigator's affidavit submitted by the District Attorney's Office in support of its application for the search warrants, should be dismissed, without costs, as taken from nonappealable orders.

All concur.

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

ENTERED: JULY 21, 2015

CLERK