

SUPREME COURT, APPELLATE DIVISION  
FIRST DEPARTMENT

**MAY 2, 2017**

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Acosta, J.P., Renwick, Moskowitz, Feinman, Gesmer, JJ.

3153 Gloria Cortes, Index 309222/12  
Plaintiff-Appellant,

-against-

MMC Residential Corp., I., Inc.,  
Defendant-Respondent.

---

Shayne, Dachs, Sauer & Dachs, LLP, Mineola (Jonathan A. Dachs of counsel), for appellant.

Kaufman Borgeest & Ryan LLP, Valhalla (David Bloom of counsel), for respondent.

---

Order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered December 28, 2015, which granted defendant's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion denied.

As the movant on a motion to dismiss the complaint pursuant to CPLR 3212, the burden is on defendant to establish its prima facie entitlement to summary judgment (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Defendant's moving papers did not make a prima facie showing that it was an out-of-

possession landlord (*Winegrad*, 64 NY2d at 853). Defendant also did not make a prima facie showing that MMC is an alter ego of Montefiore (see *Ortiz v Rose Nederlander Assoc., Inc.*, 90 AD3d 454, 454 [1st Dept 2011]).

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

ENTERED: MAY 2, 2017

A handwritten signature in black ink, appearing to read "Susan R. Jones", written in a cursive style. The signature is positioned above a horizontal line.

CLERK

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

270           The People of the State of New York,           Ind. 5149/07  
                    Respondent,

-against-

Willy Ulerio,  
Defendant-Appellant.

---

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Robert Straus, J.H.O. at suppression hearing; Gregory Carro, J. at suppression decision; Daniel P. FitzGerald, J. at trial, motion to set aside verdict and sentencing), rendered November 9, 2012,

Said appeal having been argued by counsel for the respective parties, due deliberation having been had thereon, a decision and order of this Court having been entered on March 24, 2016, holding the appeal in abeyance (137 AD3d 629 [1st Dept 2016]), and upon the stipulation of the parties hereto dated April 12, 2017,

It is unanimously ordered that the said appeal be and the same is hereby withdrawn in accordance with the terms of the aforesaid stipulation.

ENTERED: MAY 2, 2017



CLERK

Acosta, J.P., Andrias, Moskowitz, Gische, Webber, JJ.

2479            The People of The State of New York,            Ind. 1162/13  
                                 Respondent,

-against-

Vicki A. Taylor,  
                 Defendant-Appellant.

---

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Thomas Farber, J.), rendered October 29, 2013,

Said appeal having been argued by counsel for the respective parties, due deliberation having been had thereon, and a decision and order of this Court having been entered on December 15, 2016, holding the appeal in abeyance (145 AD3d 555 [1st Dept 2016]), and upon the stipulation of the parties hereto dated March 8, 2017,

It is unanimously ordered that the said appeal be and the same is hereby withdrawn in accordance with the terms of the aforesaid stipulation.

ENTERED: MAY 2, 2017

A handwritten signature in cursive script, appearing to be "Susan R. Jones", written over a horizontal line.

CLERK

Friedman, J.P., Andrias, Feinman, Kapnick, Gesmer, JJ.

3310 In re Jean Luc Fievet, et al., Index 100494/14  
Petitioners-Appellants,

-against-

New York City Loft Board, et al.,  
Respondents-Respondents.

---

Goodfarb & Sandercock, LLP, New York (Margaret B. Sandercock of counsel), for appellants.

Zachary W. Carter, Corporation Counsel, New York (Claude Platton of counsel), for New York City Loft Board, respondent.

Smith & Shapiro, New York (Harry Shapiro of counsel), for L&B 59 Realty Co., LLC, respondent.

---

Judgment, Supreme Court, New York County (Alexander W. Hunter, Jr., J.), entered February 4, 2015, denying the petition to annul a final determination of respondent New York City Loft Board, dated January 16, 2014, which found that the subject residential units, which qualified as Interim Multiple Dwellings under article 7-C of the Multiple Dwelling Law (the Loft Law) (Multiple Dwelling Law § 281[1]), but were not subject to rent regulation upon the prior owner's purchase of the former tenant's fixtures and rights pursuant to Multiple Dwelling Law § 286(6) and (12), did not become subject to rent regulation by reason of the June 21, 2010 amendment of the Loft Law (Multiple

Dwelling Law § 281[5]), and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

The Loft Board's determination that petitioners' units are not subject to rent regulation was rationally based on the record and not contrary to law (*see Matter of Partnership 92 LP & Bldg. Mgt. Co., Inc. v State of N.Y. Div. of Hous. & Community Renewal*, 46 AD3d 425, 428 [1st Dept 2007], *affd* 11 NY3d 859 [2008]; *Matter of Lower Manhattan Loft Tenants v New York City Loft Bd.*, 104 AD2d 223, 224-225 [1st Dept 1984], *affd* 66 NY2d 298 [1985]).

Petitioners' units, which were undisputedly covered under the Loft Law as originally enacted in 1982, could not be made subject once again to rent regulation by operation of the 2010 amendment to the Loft Law, which was intended to extend Loft Law coverage to a discrete set of buildings and units not formerly covered under the original Loft Law or the 1987 amendment (*see Multiple Dwelling Law § 281[1], [4]-[5]; see also Majority Counsel's Mem, Bill Jacket, L 2010, ch 135 at 9 [the legislation "expands the current Loft Law to include approximately 300 buildings or about 3600 additional units that were not covered by the original Loft Law"] and Sponsor's Mem, id. at 10 [the amendment's effect on the Loft Law as it presently exists will be "(n)one"] [emphasis added]*). Upon the former tenants' sale of

their fixtures and rights in the subject units to a prior owner in 1984 and 1992, respectively, the subject units remained residential and the owner remained "subject to all requirements of the Loft Law and the Loft Board, except that the Unit[s] [are] no longer subject to rent regulation where coverage under Article 7-C was the sole basis for such rent regulation" (*Madeline D'Anthony Enters., Inc. v Sokolowsky*, 101 AD3d 606, 610 [1st Dept 2012] [internal quotation marks omitted]; see also 29 RCNY 2-10[d][2]). However, nothing in the plain language of Multiple Dwelling Law § 281(5) or in the legislative history of the 2010 amendments to the Loft Law suggests a legislative intent to re-regulate units that were properly removed from rent regulation pursuant to Multiple Dwelling Law § 286(6) (see generally *Majewski v Broadalbin-Perth Cent. School Dist.*, 91 NY2d 577, 583 [1998]).

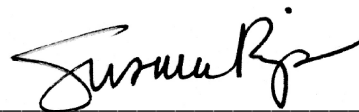
Moreover, the prior owner's undisputed buy-out of all fixtures, improvements, and protected-occupancy rights to petitioners' units prior to petitioners' occupancy of those units permanently excludes those units from ever regaining rent

regulated status (see Multiple Dwelling Law § 286[6]).<sup>1</sup>

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

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

ENTERED: MAY 2, 2017



---

CLERK

---

<sup>1</sup>We note that the Loft Board also found that petitioners are not "protected occupants. . . [with] Article 7-C statutory rights." None of the parties have challenged that determination on appeal.



Sweeny, J.P., Mazzarelli, Moskowitz, Kahn, JJ.

3350 Catherine Moraetis, Index 152829/15  
Plaintiff-Respondent,

-against-

Robert S. Evans, et al.,  
Defendants-Appellants.

---

Pryor Cashman LLP, New York (Shveta Kakar of counsel), for appellants.

The Roth Law Firm, PLLC, New York (Richard A. Roth of counsel), for respondent.

---

Order, Supreme Court, New York County (Nancy M. Bannon, J.), entered January 11, 2016, which, to the extent appealed from, denied defendants' CPLR 3211(a)(7) motion to dismiss plaintiff's gender discrimination claims, unanimously modified, on the law, to dismiss the claim under the New York State Human Rights Law (Executive Law § 296), and otherwise affirmed, without costs.

The court erred in determining that issues of fact exist regarding whether, under the single employer doctrine, the employees of Spring Hill Farm should be counted toward the four-person threshold necessary to state a claim under the New York State and New York City Human Rights Laws. Under that doctrine, liability for certain violations of employment law may be imposed on entities that are a part of a "single enterprise" (*Arculeo v*

*On-Site Sales & Mktg., LLC*, 425 F3d 193, 198 [2d Cir 2005]). The doctrine "has been limited to situations where the plaintiff's employer is a wholly-owned subsidiary, or where the plaintiff's employment is subcontracted by one employer to another . . . entity" (*Conde v Sisley Cosmetics USA, Inc.*, 2012 WL 1883508, \*5, 2012 US Dist LEXIS 72726, \*15 [SD NY, May 23, 2012, No. 11-CV-4010(RJS)] [internal quotation marks omitted]; see e.g. *Cook v Arrowsmith Shelburne, Inc.*, 69 F3d 1235, 1240-1241 [2d Cir 1995]).

Here, neither situation exists, as plaintiff's employer, Edward P. Evans Foundation (the Foundation) was a parent corporation that temporarily owned and controlled its subsidiary, Spring Hill Farm. Further, plaintiff does not allege that Spring Hill Farm made any discriminatory employment decisions, or any decisions at all in connection with her employment. Accordingly, there is no issue of fact as to whether Spring Hill Farm, which employs six full-time employees, and the Foundation, which employs only two full-time employees, can be considered part of a single "employer" for the purposes of satisfying the minimum four-person-in-the-employ requirement set forth in the New York State and New York City Human Rights Law (Executive Law §§ 292[5]; 296; Administrative Code of City of NY §§ 8-102[5]; 8-

107).

Nevertheless, issues of fact remain whether plaintiff has stated a claim under the New York City Human Rights Law on the basis that three members of the Foundation's Scientific Advisory Board were paid by the Foundation and worked for the Foundation, and thus can be considered independent contractors and/or employees of the Foundation for the purposes of satisfying the four-person threshold (see *Pugliese v Actin Biomed LLC*, 2011 NY Slip Op 30912[U], \*6 [Sup Ct, NY County 2011]). This theory does not apply to the claim under the State Human Rights Law, which, unlike the City law, does not provide that independent contractors count towards the four-person threshold.

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

ENTERED: MAY 2, 2017

A handwritten signature in black ink, appearing to read "Susan R.", written over a horizontal line.

CLERK

Friedman, J.P., Sweeny, Moskowitz, Gische, Kapnick, JJ.

3636 Donna Clarke, Index 301746/13  
Plaintiff-Respondent,

-against-

6485 & 6495 Broadway Apartment,  
Inc., et al.  
Defendants,

6485 Apartment Associates, Inc.,  
Defendant-Appellant.

---

Lehrman, Lehrman & Guterman, LLP, White Plains (Mark A. Guterman  
of counsel), for appellant.

Nicholas M. Moccia, Staten Island, for respondent.

---

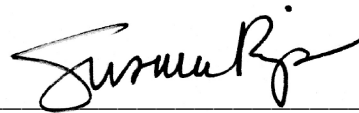
Order, Supreme Court, Bronx County (Lucindo Suarez, J.),  
entered August 23, 2016, which denied defendant 6485 Apartment  
Associates, Inc.'s (defendant) motion for summary judgment  
dismissing the complaint as against it, unanimously reversed, on  
the law, without costs, and the motion granted. The Clerk is  
directed to enter judgment accordingly.

Defendant, the proprietary lessee of the cooperative unit  
above plaintiff's, established prima facie that it was not liable  
for the alleged nuisance to plaintiff caused by excessive noise  
emanating from that unit by demonstrating, through the sublease  
between itself and its subtenant, that it had relinquished

possession and control of the unit (see *Clark v 6485 & 6495 Broadway Apt. Inc.*, 122 AD3d 494 [1st Dept 2014]; see also *Taggart v Costabile*, 131 AD3d 243, 247 [2d Dept 2015]). In opposition, plaintiff failed to raise an issue of fact.

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

ENTERED: MAY 2, 2017

A handwritten signature in black ink, appearing to read "Susan R.", is written above a horizontal line.

CLERK

Acosta, J.P., Mazzarelli, Manzanet-Daniels, Webber, JJ.

3867- Ind. 3755/11  
3868 The People of the State of New York, SCI 245/14  
Respondent,

-against-

Odaine Johnson,  
Defendant-Appellant.

---

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

Darcel D. Clark, District Attorney, Bronx (Dmitriy Povazhuk of  
counsel), for respondent.

---

Judgments, Supreme Court, Bronx County (John Moore, J.),  
rendered May 7, 2015, convicting defendant, upon his pleas of  
guilty, of attempted criminal possession of a weapon in the  
second degree and burglary in the third degree, and sentencing  
him to an aggregate term of seven years, unanimously modified, as  
a matter of discretion in the interest of justice, to the extent  
of reducing the prison component of the sentence for the weapon  
conviction to five years, and otherwise affirmed.

We find that defendant did not make a valid waiver of the right to appeal, and we find the sentence excessive to the extent indicated.

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

ENTERED: MAY 2, 2017

A handwritten signature in black ink, appearing to read "Susan R. [unclear]", written over a horizontal line.

CLERK

Acosta, J.P., Mazzarelli, Manzanet-Daniels, Webber, JJ.

3869 Mario Abreu, Index 159145/12  
Plaintiff-Appellant,

-against-

New York City Police Department,  
et al.,  
Defendants-Respondents.

---

Bleakley Platt & Schmidt, White Plains (Vincent Crowe of  
counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Ingrid R.  
Gustafson of counsel), for respondents.

---

Order, Supreme Court, New York County (Lynn R. Kotler, J.),  
entered on or about September 3, 2015, which, to the extent  
appealed from as limited by the briefs, granted defendants'  
motion to dismiss the cause of action under 42 USC § 1983 as  
against the individual defendants, unanimously reversed, on the  
law, without costs, and the motion denied.

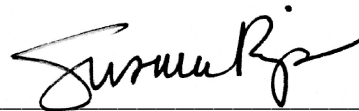
Plaintiff alleges that members of the New York City Police  
Department knocked down the door of his apartment, upon  
information and belief, without a warrant, struck him repeatedly,  
causing him injuries, and wrongfully arrested him, and that each



of the individually named defendants was acting under color of law. These allegations state a cause of action under 42 USC § 1983 (see *Delgado v City of New York*, 86 AD3d 502, 511 [1st Dept 2011]).

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

ENTERED: MAY 2, 2017

A handwritten signature in black ink, appearing to read "Susan R. Jones", written over a horizontal line.

CLERK

Acosta, J.P., Mazzarelli, Manzanet-Daniels, Webber, JJ.

3870           In re Darnel J. P.,  
                  Petitioner-Appellant,

-against-

          Lianna Y. D., et al.,  
          Respondents-Respondents.

---

Geoffrey P. Berman, Larchmont, for appellant.

Daniel R. Katz, New York, for Lianna Yvetta D., respondent.

Zachary W. Carter, Corporation Counsel, New York (Julie Steiner of counsel), for Commissioner of Social Services, respondent.

Grais & Ellsworth LLP, New York (Rachel J. Stanton of counsel), attorney for the child.

---

          Order, Family Court, New York County (Emily M. Olshansky, J.), entered on or about May 19, 2016, which, after a hearing, found that petitioner was equitably estopped from asserting paternity of the subject child and dismissed the paternity petition, unanimously affirmed, without costs.

          The record supports the application of the doctrine of equitable estoppel to preclude petitioner from pursuing his paternity claim (see *Matter of Shondel J. v Mark D.*, 7 NY3d 320, 326-327 [2006]). Petitioner waited almost four years after the child's birth, after having seen the child approximately four times, before commencing the paternity proceeding, during which

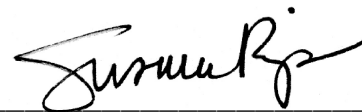
time he failed to communicate with the child or provide any financial support (see *Matter of Cecil R. v Rachel A.*, 102 AD3d 545, 546 [1st Dept 2013]; *Matter of Luis S. v Zoraida L.*, 39 AD3d 377 [1st Dept 2007]). On one occasion, petitioner verbally and physically abused the child's mother in the child's presence, and the mother obtained an order of protection against him. Approximately two weeks later, curiously, petitioner filed the instant petition for paternity (see e.g. *Matter of Ettore I. v Angela D.*, 127 AD2d 6, 16 [2d Dept 1987]).

The child was brought up believing that the mother's husband, whom she calls "Daddy," was her biological father, and identifies members of his extended family as members of her own family (see *Matter of Richard A.M. v Alejandra H.*, 123 AD3d 1129 [2d Dept 2014]). Furthermore, she only knew petitioner as the man who hit her mother. Accordingly, it is not in the child's

best interests to interfere with her relationship with the only father she has ever known (see *Matter of Juanita A. v Kenneth Mark N.*, 15 NY3d 1, 6 [2010]).

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

ENTERED: MAY 2, 2017

A handwritten signature in black ink, appearing to read "Susan R.", written over a horizontal line.

CLERK

Acosta, J.P., Mazzairelli, Manzanet-Daniels, Webber, JJ.

3873- Ind. 7032/02  
3874-  
3875 The People of the State of New York,  
Respondent,

-against-

William Sanford,  
Defendant-Appellant.

---

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

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

---

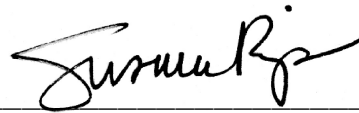
Order, Supreme Court, New York County (A. Kirke Bartley, Jr., J.), entered on or about June 12, 2012, which, to the extent appealed from, denied defendant's CPL 440.46 motion for resentencing on a November 26, 2002 conviction of attempted criminal sale of a controlled substance in the third degree, unanimously affirmed.

The court, which granted resentencing under CPL 440.46(1) on a December 9, 2002 conviction, correctly concluded that defendant was not entitled to resentencing under CPLR 440.46(2) on his class C felony drug conviction. That felony was set forth in a separate charging instrument, was the subject of a separate sentencing proceeding, and was adjudicated in a separate

commitment order from defendant's class B felony, notwithstanding that the sentences ran concurrently, as part of a negotiated global disposition of defendant's pending cases. "The statutory language plainly applies where a defendant is actually committed to custody on a lower level drug felony in the same order that commits him to custody on a B felony, not where an offense for which the defendant has previously been sentenced and committed is merely referenced in the later order" (*People v Anonymous*, 85 AD3d 414, 415 [1st Dept 2011], *lv denied* 18 NY3d 922 [2012]). We may not rewrite the statute to make it fit the particular sequence of events that transpired here.

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

ENTERED: MAY 2, 2017

A handwritten signature in black ink, appearing to read "Susan R. Jones", written over a horizontal line.

CLERK

Acosta, J.P., Mazzairelli, Manzanet-Daniels, Webber, JJ.

3876           The People of the State of New York,           Ind. 3766/14  
                                Respondent,

-against-

Thomas Cruz,  
                Defendant-Appellant.

---

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

Darcel D. Clark, District Attorney, Bronx (Nancy D. Killian of  
counsel), for respondent.

---

An appeal having been taken to this Court by the above-named  
appellant from a judgment of the Supreme Court, Bronx County  
(Ralph Fabrizio, J.), rendered April 29, 2016,

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

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

ENTERED:   MAY 2, 2017



---

CLERK

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

Acosta, J.P., Mazzarelli, Manzanet-Daniels, Webber, JJ.

3878            Keyspan Gas East Corporation,                                Index 604715/97  
                  Plaintiff-Respondent,

-against-

Munich Reinsurance America, et al.,  
                  Defendants,

Century Indemnity Company,  
                  Defendant-Appellant.

---

O'Melveny & Myers LLP, New York (Jonathan Hacker of the bar of the State of Maryland and District of Columbia, admitted pro hac vice, of counsel), for appellant.

Covington & Burling LLP, New York (Jay T. Smith of counsel), for respondent.

---

Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered March 16, 2016, which denied defendant Century Indemnity Company's motion pursuant to CPLR 4404 for judgment notwithstanding the verdict or a new trial, unanimously affirmed, with costs.

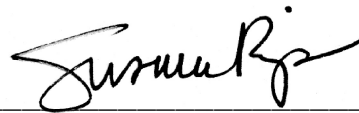
The jury's conclusions that plaintiff's notice of occurrence to defendant was timely, that the property damage began in 1905, and that insurance was only available in the market between 1933 and 1986, are supported by sufficient evidence and are not against the weight of the evidence (see *Cohen v Hallmark Cards*, 45 NY2d 493, 498-499 [1978]).



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: MAY 2, 2017

A handwritten signature in black ink, appearing to read "Susan R. Jones", written in a cursive style. The signature is positioned above a horizontal line.

CLERK

Acosta, J.P., Mazzarelli, Manzanet-Daniels, Webber, JJ.

3879           The People of the State of New York,           Ind. 2625/13  
                                Respondent,

-against-

Eddie Gilyard,  
                Defendant-Appellant.

---

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

---

Judgment, Supreme Court, New York County (Richard D. Carruthers, J.), rendered November 19, 2014, unanimously affirmed.

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

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

service of a copy of this order.

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

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

ENTERED: MAY 2, 2017

A handwritten signature in black ink, appearing to read "Susan R.", written over a horizontal line.

CLERK



plea court to ascertain whether a particular conviction carries mandatory deportation under federal law and advise a defendant accordingly" (*People v Manuel*, 143 AD3d 473, 474 [1st Dept 2016], *lv denied* 28 NY3d 1147 [2017]). In any event, even where deportation is legally mandatory, as a practical matter it still requires the immigration authorities to take the necessary actions, and thus the deportation consequences of defendant's plea could fairly be characterized as likely rather than absolutely certain.

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

ENTERED: MAY 2, 2017

A handwritten signature in black ink, appearing to read "Susan R. Jones", written over a horizontal line.

CLERK

Acosta, J.P., Mazzarelli, Manzanet-Daniels, Webber, JJ.

3881            The People of the State of New York,            Dkt. 65062/11  
   Respondent,

-against-

John Williams,  
Defendant-Appellant.

---

Seymour W. James, Jr., The Legal Aid Society, New York (Harold V. Ferguson, Jr. of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Ross D. Mazer of counsel), for respondent.

---

Judgment, Supreme Court, New York County (Daniel McCullough, J.), rendered December 15, 2011, convicting defendant, upon his plea of guilty, of criminal contempt in the second degree, and sentencing him to time served, unanimously affirmed.

The accusatory instrument was not jurisdictionally defective. Giving the instrument "a fair and not overly restrictive or technical reading" (*People v Casey*, 95 NY2d 354, 360 [2000]), we find "as a matter of common sense and reasonable pleading" (*People v Davis*, 13 NY3d 17, 31 [2009]) that the factual allegations were sufficient to charge defendant with intentionally violating a provision of an order of protection that directed him to stay away from the complainant's place of employment, in that the allegations constituted facts "supporting

or tending to support the charges" (CPL 100.15[3]), and  
"provide[d] reasonable cause to believe that the defendant  
committed the offense . . . ." (CPL 100.40[1][b]).

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

ENTERED: MAY 2, 2017

A handwritten signature in black ink, appearing to read "Susan R. Jones", written over a horizontal line.

CLERK

Acosta, J.P., Mazzairelli, Manzanet-Daniels, Webber, JJ.

3882           The People of the State of New York,           Ind. 5087/13  
  Respondent,

-against-

Jayquan Ward,  
Defendant-Appellant.

---

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

Cyrus R. Vance, Jr., District Attorney, New York (John T. Hughes  
of counsel), for respondent.

---

An appeal having been taken to this Court by the above-named  
appellant from a judgment of the Supreme Court, New York County  
(Ronald Zweibel, J.), rendered February 5, 2015,

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

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

ENTERED:   MAY 2, 2017



---

CLERK

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



Acosta, J.P., Mazzarelli, Manzanet-Daniels, Webber, JJ.

3883N Gary Fragin, Index 652673/14  
Plaintiff-Respondent,

-against-

First Funds Holdings, LLC, formerly  
know as First Funds LLC, et al.,  
Defendants-Appellants.

---

Regosin, Edwards, Stone & Feder, New York (Saul E. Feder of  
counsel), for First Funds Holdings, LLC, Principis Capital LLC,  
Northern Leasing Systems, Inc., Economic Growth Group Inc. and  
Leonard Mezei, appellants.

Bleakley Platt & Schmidt, LLP, White Plains (Richard F. Markert  
of counsel), for Moses & Singer, LLP, appellant.

Frankfurt Kurnit Klein & Selz, PC, New York (Ronald C. Minkoff of  
counsel), for respondent.

---

Order, Supreme Court, New York County (Eileen Bransten, J.),  
entered on or about August 12, 2016, which granted plaintiff's  
motion to compel the production of documents and testimony,  
unanimously modified, on the law, and in the exercise of  
discretion, to refer this matter to a special master for review  
of all of the documents on defendants' privilege log, and  
otherwise affirmed, without costs.

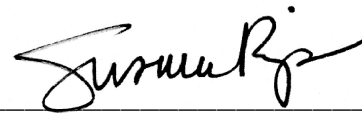
The motion court providently exercised its discretion (see  
*e.g. Those Certain Underwriters at Lloyds, London v Occidental  
Gems, Inc.*, 11 NY3d 843, 845 [2008]) by finding that plaintiff

demonstrated “a factual basis for a showing of probable cause to believe that a fraud ... has been committed” (*Matter of New York City Asbestos Litig.*, 109 AD3d 7, 10 [1st Dept 2013] [internal quotation marks omitted], *lv dismissed* 22 NY3d 1016 [2013]).

The motion court’s original decision at oral argument - to refer all of the documents (not just a sample) to a special master - was sound, and we exercise our independent discretion (*see Those Certain Underwriters*, 11 NY3d at 845) to direct such a course.

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

ENTERED: MAY 2, 2017



---

CLERK



SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Angela M. Mazzarelli, J.P.  
Richard T. Andrias  
Karla Moskowitz  
Judith J. Gische  
Ellen Gesmer, JJ.

2069  
Index 653590/13

x

---

New York University,  
Plaintiff-Appellant,

-against-

Pfizer Inc.,  
Defendant-Respondent.

---

x

Plaintiff appeals from the judgment of the Supreme Court, New York County (Shirley Werner Kornreich), entered February 8, 2016, dismissing the complaint, and bringing up for review an order of the same court and Justice, entered December 21, 2015, which granted defendant's motion to dismiss.

Lerner David Littenberg Krumholz & Mentlik LLP, Westfield, NJ (Stephen F. Roth of the bar of the State of New Jersey, admitted pro hac vice, of counsel), and Kramer Levin Naftalis & Frankel LLP, New York (Michael S. Oberman and Roy H. Wepner of counsel), for appellant.

White & Case LLP, New York (Dimitrios T. Drivas, Christopher J. Glancy, Gregory Little and Robert Counihan of counsel), for respondent.

ANDRIAS, J.

In this action for breach of contract, plaintiff, New York University, seeks to recover from defendant, Pfizer, Inc., as the successor in interest to Sugen, Inc., royalties on the sale of the cancer treatment drug, Xalkori®. Xalkori®, a tyrosine kinase inhibitor (TKR), was approved by the Food and Drug Administration (FDA) in 2011 to target the chemical receptor EML4-ALK, which was discovered by Japanese scientists after Sugen's ownership changed and its research project with NYU had ended. NYU alleges that it is nevertheless entitled to royalties under section 9 of the governing Second Amended Research and License Agreement because Xalkori®'s active ingredient, a small molecule inhibitor drug substance named "crizotinib," was derived from its research and "know-how." In the face of the countervailing reasonable interpretations presented by the parties, which cannot be resolved at this procedural stage, we find that the language in section 9 delineating whether NYU is entitled to royalties under these circumstances is ambiguous, and that the motion court erred in granting Pfizer's motion to dismiss the complaint (see *U.S. Bank Natl. Assn. v Lightstone Holdings LLC*, 103 AD3d 458, 459 [1st Dept 2013]).

Effective as of September 1, 1991, Sugen agreed to sponsor NYU's research into TKRs in human cells, disorders of which are

causative factors for many life-threatening cancers. The goal was to understand the mechanisms underlying the actions of TKRs and how they can be regulated, with NYU, among other things, "to determine the three dimensional structure of the protein tyrosine kinase domain in complex with inhibitors using x-ray crystallography." In return, Sugen received an exclusive worldwide license to use NYU's "Research Technology" for the development, manufacture, use, and sale of drugs that would inhibit TKRs, with Sugen agreeing to pay NYU certain royalties on sales of those drugs.

NYU's research technology included the determination of a three-dimensional crystal structure of the tyrosine kinase domain of the FGFR1, which enabled Sugen to systematically design and efficiently test candidate small molecule compounds as TKR inhibitors. NYU alleges that relying on this "pioneering technology," Sugen decided to pursue small-molecule inhibitors of the "c-Met" receptor, leading to the development of the chemical structure of "SU11274," which was later optimized by Sugen to generate "PHA-665752."

In 1996, in contemplation of Sugen being acquired by a third-party, the parties executed the Second Amended Research and Licensing Agreement. Towards that end, NYU agreed to reduce the royalty rates then due in exchange for the right to royalties on

certain later developed products, and the parties added section 9, captioned "SUGEN Ownership Change," which states:

"[1] In the event that SUGEN is acquired or merged with another company, or that SUGEN acquires or forms a joint venture with another company, then SUGEN may at its option notify NYU that such other company wishes to make a determination as to which targets shall be included under the terms of the Agreement prior to the effective date of any such acquisition, merger, or joint venture, or as soon as possible thereafter. This determination shall be made in good faith by NYU and SUGEN and shall be based on an examination of SUGEN's lab books and other information available to the parties, full access (under appropriate confidentiality agreements) to which will be provided to NYU.

"[2] With respect to targets that were adopted by SUGEN into drug discovery prior to the effective date of the acquisition, merger, or joint venture, SUGEN Products developed based on such targets shall be subject to the license payments described in Section 8 hereto.

"[3] SUGEN Products that are developed based on Receptor targets which were not adopted into drug discovery at the time of the effective date of such acquisition, merger, or joint venture shall be subject to a). a royalty of 2.5% on Net Sales of SUGEN, and/or Corporation Entity, which may be offset by 50% of the royalties paid by SUGEN to third parties (other than MPG), provided that the royalties due to NYU shall not be less than 1.5% of Net Sales of SUGEN and/or Corporation Entity and b). 10% of License Revenues with respect to any SUGEN Product, provided that with respect to such SUGEN Product there exists a Patentable Invention with respect to such target and/or its utility which is derived from or based on the Research Technology, and provided further that such SUGEN Product shall include a product irrespective of whether an IND application is filed with respect thereto within 4 years from the end of the Research Period, or not."

Sugen was acquired by Pharmacia in 1999. Pharmacia was



acquired by Pfizer in 2003. Pfizer then optimized PHA-665752 to develop crizotinib (PF-02341066), and, on December 12, 2005, filed an IND application (a request for authorization from the FDA to administer an investigational drug to humans) for the drug substance as an inhibitor of the c-Met receptor. NYU alleges that information and direction from its drug discovery process led to the design of crizotinib, which was developed from studying and comparing the binding of Sugden's various candidate compounds in complex with the FGFR1 kinase crystals, with c-Met homology models derived from NYU's FGFR1 kinase crystals, and later in complex with a c-Met kinase crystal.

In 2007, EML4-ALK, a mutated form of the "ALK" TKR, was discovered by researchers at a Japanese university unaffiliated with NYU or Pfizer as a cause of non-small cell lung cancer (NSCLC) in a subset of patients. After it determined that crizotinib inhibited the EML4-ALK receptor, Pfizer amended its IND for crizotinib to include clinical studies of lung cancer patients who tested positive for the EML4-ALK receptor. In August 2011, the FDA approved the drug, which Pfizer named Xalkori®. After Pfizer rejected NYU's demand for royalties on sales of Xalkori®, NYU commenced this action.

The dissent finds that because crizotinib was developed based on the receptor c-Met, which was adopted by SUGEN into drug

discovery, any product based on that patentable invention, including Xalkori®, is subject to the royalty provisions of section 8, which are inapplicable because no IND was filed within four years of the end of the Research Period. However, while crizotinib has a nexus to c-Met, the language employed in section 9 does not preclude the finding that crizotinib (and the patents derived from it) also has a relevant nexus to EML4-ALK. Section 9(2) provides that "[w]ith respect to targets that were adopted by SUGEN into drug discovery prior to the effective date of the [change in ownership], SUGEN *Products developed based on such targets* shall be subject to the license payments described in Section 8 hereto" (emphasis added). Although c-Met was adopted into discovery before Sugen was acquired, the Sugen product, Xalkori®, is based on the target EML4-ALK, not c-Met. Thus, we must consider whether NYU is entitled to royalties under section 9(3).

Whether NYU is entitled to royalties under section 9(3) turns on the meaning of the language entitling NYU to royalties on

"SUGEN Products that are developed based on Receptor targets which were not adopted into drug discovery at the time of the effective date of [Sugen's change in ownership] ..., provided that with respect to such SUGEN Product there exists a Patentable Invention with respect to such target and/or its utility which is derived from or based on the Research Technology ...."

Adopting Pfizer's' interpretation that "and/or its utility" is a modifier of "such target," the dissent finds that the only commercially reasonable way to interpret section 9.3 is that the "Patentable Invention" must be related to the "target," which must have been identified as part of the NYU research project prior to the change in ownership, and not to the drug substance found to inhibit the target. Thus, the dissent finds that NYU is not entitled to royalties because Xalkori® was not "derived from or based on the Research Technology" since EML4-ALK and its utility (namely, its association with NSCLC) were discovered by Japanese researchers without benefit of NYU's research technology, and Pfizer did not rely on NYU's confidential information or know-how to discover that crizotinib was an effective EML4-ALK inhibitor.

Although this may be one reasonable interpretation of section 9(3), the disputed language "on its face is reasonably susceptible of more than one interpretation" (*Chimart Assoc. v Paul*, 66 NY2d 570, 573 [1986]; see also *Duane Reade, Inc. v Cardtronics, LP*, 54 AD3d 137, 144 [1st Dept 2008]). The phrase "provided that with respect to such SUGEN Product there exists a Patentable Invention with respect to such target and/or its utility which is derived from or based on [NYU's] Research Technology," implies that the nexus between the invention and the

target need not be direct. It does not require Patentable Inventions on a target per se – which, NYU argues, would be a legally impossible requirement, since a target is an unpatentable product. Thus, the phrase may be reasonably interpreted to provide that any “Sugen Product” containing a “Patentable Invention,” “derived” in part through NYU’s “Research Technology,” may be the source of royalty payments. Xalkori® is a Sugem Product, developed based on the use of a “patentable invention,” crizotinib, which was developed using NYU’s know-how (e.g., X-ray crystallography), “with respect to” the “non-adopted” receptor, ELM4-ALK. In other words, Pfizer’s patents on crizotinib have the requisite nexus to the “utility” of the EML4-ALK receptor because Xalkori(r) is FDA approved only to target that receptor.

To the extent Pfizer, on its own, discovered that crizotinib could treat ELM4-ALK, the discovery of crizotinib was still derived in part through NYU’s research technology. Further, nothing in the plain language of section 9(3) can be read to require that the section only applies to sales of a drug treating a “non-adopted target” discovered by NYU prior to the ownership change or that NYU was obligated to discover the target based on its know-how. In contrast, section 11 of the 1996 Agreement, the only other section that discusses targets, refers to targets

"identified directly by NYU in the course of the NYU Research Project," which can become "Validated Targets." As NYU argues, this shows that when the parties wished to limit the applicability of a section of the 1996 Agreement to targets "identified directly by NYU," they knew how to do so.

Thus, because section 9's language delineating when Pfizer owes NYU royalties with respect to non-adopted targets is ambiguous, we cannot determine on this motion to dismiss that either party's interpretation of the agreement controls as a matter of law.

The dissent's contention that NYU's reading would lead to a commercially unreasonable result because it would obligate Pfizer to pay "a royalty on any drug that targets any receptor that is discovered at any time by anyone," does not withstand scrutiny. NYU's reading reflects the commercially reasonable bargain between NYU and Sugen to reduce NYU's royalties in the short term in exchange for a royalty on certain future products developed by Sugen's successor, even with respect to targets discovered by third parties, as long as the products were based on or derived from NYU technology. Absent that connection, no royalties would be due.

Accordingly, the judgment of the Supreme Court, New York County (Shirley Werner Kornreich), entered February 8, 2016,

dismissing the complaint, and bringing up for review an order of the same court and Justice, entered December 21, 2015, which granted defendant's motion to dismiss, should be reversed, on the law, without costs, the judgment vacated, the motion denied, and the complaint reinstated.

All concur except Moskowitz and Gesmer, JJ.  
who dissent in an Opinion by Moskowitz, J.

MOSKOWITZ, J. (dissenting)

I disagree with the majority that the disputed language is susceptible of more than one interpretation. Rather, I believe that the language in section 9 is unambiguous, and therefore, that the motion court properly dismissed the complaint because NYU is not entitled to royalty payments on the sale of Xalkori®. Therefore, I respectfully dissent.

In 1990, plaintiff New York University (NYU) hired an expert in research relating to tyrosine kinase receptors (TKRs) to serve as chairman of NYU's Department of Pharmacology.<sup>1</sup> In the 1990s, the chairman and his team pioneered research into TKRs and made critical discoveries in targeted cancer therapy, which involves making drugs that attach to and inhibit, or target, specific receptors causing cancer, thereby targeting only cancerous cells while leaving healthy cells unaffected. In 1991, while an NYU employee, the chairman co-formed nonparty SUGEN, Inc., a drug discovery company located in California, to help with the design of drug compounds.

In August 1991, NYU and SUGEN entered into a license agreement in which SUGEN agreed to sponsor and fund a multiyear "NYU research project" in the field of certain "receptors,"

---

<sup>1</sup> TKRs are enzymes in human cells; mutations or defects in TKRs can lead to cancer and other diseases.

including tyrosine kinases, believed to be useful in the development of drugs to treat cancer. In return, SUGEN received an exclusive worldwide license to use NYU's "Research Technology" (NYU "patents and NYU Know-How") for the development, manufacture, use, and sale of drugs that would inhibit any receptor that acts directly or indirectly through tyrosine kinase activity; SUGEN agreed to pay NYU certain royalties on sales of those drugs. "NYU Know-How" is defined in the relevant agreement as preexisting inventions and any information and materials discovered, developed, or acquired in the course of the NYU Research Project.

In 1996, in anticipation of SUGEN's acquisition by another company, the parties amended the agreement to extend the NYU research project to September 2001 and to adjust the royalty payments. In earlier versions of the agreement, all of the royalty obligations had been set forth in section 8. In the 1996 agreement, however, NYU's rights under section 8 were restricted to a specified time frame and the parties added a new section 9, entitled "SUGEN Ownership Change." Section 9 set forth a completely new royalty-bearing category of SUGEN Products; the new category was not limited to the time frame specified in section 8.

As relevant here, section 9 stated that if another company



acquired SUGEN, or if SUGEN merged or entered into a joint venture with another company, SUGEN was empowered to notify NYU that the other company wanted to determine which targets would be included under the terms of the agreement. NYU and SUGEN would then jointly, before the effective date of the ownership change, make the determination "based on SUGEN's lab notebooks and other information available to the parties." Section 9 of the 1996 agreement then provided that, "with respect to targets that were adopted by SUGEN into drug discovery prior to the effective date" (that is, "adopted targets") of the ownership change, SUGEN products developed based on those targets were to be subject to the license payments described in section 8. "SUGEN products," in turn, referred to drugs developed in the research involving TKRs based on adopted targets. According to sections 8 and 9, the SUGEN owner would pay the royalty only if the drug's Investigational New Drug application (IND) was filed with the FDA "within four years from the end of the Research Period" (that is, before September 2005).

By contrast, the "change-of-control" provision of Section 9 provided that SUGEN Products based on receptor targets that were not adopted into drug discovery before the ownership change (that is, "non-adopted targets") were subject to a different set of royalty payments. Specifically, the royalty payments would be

different for non-adopted targets "provided that with respect to such SUGEN product there exists a Patentable Invention with respect to such target and/or its utility which is derived from or based on" NYU's Research Technology, and regardless of whether an IND application with respect to the product was filed within four years of the end of the Research Period. A "Patentable Invention" is a claim in an issued, valid, unexpired patent or a claim in a pending patent application.

Sometime in 1996, during the Research Period, SUGEN "adopted" the target "c-Met" into drug discovery (that is, began to develop drugs targeting c-Met). The related research led to the creation of a substance called crizotinib, a small molecule inhibitor that was able to inhibit multiple targets, including c-Met.

In 1999, Pharmacia acquired SUGEN, and in 2003, Pfizer acquired Pharmacia. On December 12, 2005, more than four years after the Research Period ended, Pfizer filed an IND application for crizotinib; the application listed c-Met among the target receptors for this compound.

In 2007, Japanese scientists discovered a new target - EML4-ALK, a mutated form of the so-called "ALK" TKR receptor - and found that it causes non-small cell lung cancer (NSCLC) in a subset of patients. Pfizer then amended its IND application

relating to crizotinib to include studies of lung cancer patients who tested positive for the newly recognized EML4-ALK receptor, and this receptor became a new target receptor, with crizotinib the subject of a new drug discovery program for treating NSCLC. After Pfizer studies determined that crizotinib would inhibit the EML4-ALK receptor, Pfizer began to develop crizotinib into what would ultimately become Xalkori®, a drug later approved by the FDA for use with patients having metastatic NSCLC and who are tested as being “anaplastic lymphoma kinase (ALK) positive.”

In January 2015, NYU sued Pfizer, alleging that it had failed to comply with section 9 of the 1996 Agreement, which, according to NYU, required Pfizer to pay NYU a royalty on Pfizer’s sales of Xalkori®. Specifically, NYU alleged it was entitled to royalties on sales of Xalkori because Xalkori® was a SUGEN Product whose active ingredient was crizotinib, a patentable invention “with respect to” the “non-adopted” receptor target EML4-ALK, based on NYU Know-How.

Pfizer moved to dismiss for failure to state a claim under the 1996 Agreement. On the motion, Pfizer argued that, based on the plain meaning of the 1996 Agreement, crizotinib was developed based on the “adopted target” c-Met, with the result that a product based on that patentable invention, including Xalkori®, was a product subject only to the royalty provisions of section

8. However, Pfizer noted, the section 8 royalty provisions were not applicable here because no IND was filed within four years of the Research Period. Pfizer further asserted that no royalties were due for Xalkori® under section 9, because even though EML4-ALK was a “non-adopted target,” crizotinib was based on the “adopted target” c-Met. Likewise, Pfizer argued that the use of crizotinib in Xalkori® with respect to EML4-ALK was not derived from or based on NYU Research Technology, as Pfizer had learned, independent of NYU, that crizotinib could inhibit EML4-ALK and developed Xalkori® for that purpose without use of further NYU Know-How.

The motion court granted the motion to dismiss the complaint, finding that it failed to plead a “Patentable Invention with respect to [EML4-ALK] and/or its utility which is derived from or based on the Research Technology,” as section 9 required. On the contrary, the court found, “Xalkori® was not ‘derived from or based on the Research Technology’ because NYU had nothing to do with Xalkori®’s target, EML4-ALK. Further, the court noted, under the plain language of the agreement, NYU was not entitled to royalties for Xalkori® under section 9 because Xalkori® treated EML4-ALK, which Japanese scientists had discovered without the benefit of NYU Know-How.

The court further concluded that section 9 was not ambiguous

and that Pfizer's interpretation of the provision was correct. Indeed, the court noted, had the parties intended the agreement to carry NYU's interpretation, they would not have included the phrase "with respect to such target and/or its utility." Here, because the only "Patentable Invention[s]" pleaded in the complaint were Pfizer patents related to crizotinib, and not to the EML4-ALK target or its utility, the Complaint failed to allege a "Patentable Invention with respect to such target and/or its utility."

Finally, the motion court concluded that the context of section 9's drafting supported Pfizer's interpretation. Specifically, the court found that the parties added section 9 in contemplation of SUGEN's acquisition, to expand the circumstances in which NYU was entitled to a royalty even for products submitted for FDA approval more than four years after the end of the Research Period, but only where the medication targeted a receptor identified as a result of NYU's contributions. The court thus concluded that the only commercially reasonable interpretation of section 9 was that NYU must have contributed to the discovery of Xalkori®'s target.

I agree with the motion court's interpretation of the agreement's language. As is well established in New York law, a contract should be "read as a whole, and every part will be

interpreted with reference to the whole; and if possible it will be so interpreted as to give effect to its general purpose" (*Beal Sav. Bank v Sommer*, 8 NY3d 318, 324-325 [2007] quoting *Matter of Westmoreland Coal Co. v Entech, Inc.*, 100 NY2d 352, 358 [2003]). As is also well established, "[a] contract should not be interpreted to produce a result that is absurd, commercially unreasonable, or contrary to the reasonable expectations of the parties" (*Matter of Lipper Holdings v Trident Holdings*, 1 AD3d 170, 171 [1st Dept 2003] [internal citations omitted]).

Here, I would find that NYU is not entitled to royalties under the plain meaning of the agreement. Xalkori® is not subject to royalties under section 8 of the Agreement because Pfizer filed the IND for crizotinib more than four years after the Research Period ended. Furthermore, because crizotinib was developed based on c-Met, a target "adopted by SUGEN into drug discovery prior to the SUGEN ownership change," section 9 requires that Pfizer's royalty obligation is subject to section 8, which, as just noted, does not apply.

I also believe that we should reject NYU's argument that the last clause of section 9, read alone, allows NYU to receive a royalty on sales of Xalkori®. To begin, as the motion court found, the target must have been identified as part of the NYU Research Project. EML4-ALK was not so identified. EML4-ALK and

its utility (that is, its association with NSCLC) were discovered by Japanese researchers without the benefit of any NYU Research Technology. Moreover, Pfizer did not rely on any NYU confidential information to discover that crizotinib was an effective EML4-ALK inhibitor. Therefore, NYU cannot plead a "Patentable Invention with respect to [EML4-ALK] and/or its utility which is derived from or based on [NYU's] Research Technology," as section 9 requires.

In addition, as the IAS court found, the "Patentable Invention" must be related to the target or its utility, not to the drug found to inhibit the target. Pfizer's patents, however, relate to the drug crizotinib and not the target EML4-ALK or its utility. Indeed, under its plain meaning, the phrase "Patentable Invention with respect to such target and/or its utility," means that the Patentable Invention concerns the target, not solely the medication that affects the target. Had the parties wished to include drugs and their utilities in the phrase, they surely could have added language that would have done so. Likewise, NYU's interpretation obviates the phrase "with respect to such target and/or its utility," thus rendering that phrase meaningless. Of course, courts will avoid reading a contract so that any part is rendered meaningless (see *Two Guys from Harrison-N.Y. v S.F.R. Realty Assoc.*, 63 NY2d 396, 403 [1984];

*GEM Holdco, LLC v Changing World Tech., L.P.*, 127 AD3d 598, 598 [1st Dept 2015]).

Furthermore, for NYU to receive royalties under section 9, the target must have been identified before the SUGEN ownership change. No party disputes that the target EML4-ALK was identified in 2007, eight years after Pharmacia acquired SUGEN. SUGEN could not have adopted or declined to adopt the target EML4-ALK before Pharmacia acquired it, as SUGEN could not have acted on targets that were not even discovered in 1999.

What is more, according to the language of section 9, the "Patentable Invention" must have existed at the time of the SUGEN ownership change. As with the identification of the target before the SUGEN ownership change, discussed immediately above, no party disputes that Pfizer filed its patents years after Pharmacia acquired SUGEN.

Finally, NYU's interpretation of section 9 would lead to a



commercially unreasonable result. Reading the section the way NYU interprets it, Pfizer would owe a royalty on any drug that targets any receptor that is discovered at any time by anyone. This could not be the result that the parties intended.

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

ENTERED: MAY 2, 2017

  
\_\_\_\_\_  
CLERK