SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

SEPTEMBER 20, 2018

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Sweeny, J.P., Manzanet-Daniels, Mazzarelli, Oing, Moulton, JJ.

5954-
5955N Gem Holdco, LLC, et al., Index 650841/13
Plaintiffs,

-against-

Changing World Technologies, L.P.,
Defendants,

CWT Canada II Limited Partnership,
et al.,
Defendants-Respondents,

Ridgeline Energy Services, Inc.,
et al.,
Defendants-Appellants,

____

Catafago Fini LLP, New York (Jacques Catafago of counsel), for appellants.

Schlam Stone & Dolan LLP, New York (Bradley J. Nash of counsel), for respondents.

____

Appeal from order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered on or about June 3, 2016, which granted the motion of defendants-respondents (cross claim plaintiffs) CWT Canada II Limited Partnership, Resource Recovery Corporation and Jean Noelting to hold defendants-appellants (cross claim defendants) Ridgeline Energy Services, Inc. (now

known as RDX Technologies Corporation) and Dennis Danzik (together appellants) in civil and criminal contempt for violating the court's orders dated March 18, 2015 and May 5, 2015, and appeal from order, same court and Justice, entered February 9, 2017, which, among other things, granted the motion of CWT Canada and Resource Recovery to confirm the report of the Special Referee, dated December 13, 2016, and directed the Clerk to enter judgment against appellants, jointly and severally, in the amount of $644,179.76, deemed appeals from judgment, same court and Justice, entered March 7, 2017, and so considered, said judgment unanimously affirmed, without costs.

Although appellants appealed from orders and not the ensuing final judgment, under CPLR 5520(c) this Court has the discretion to deem the notices of appeal as valid and address the merits of the appeals (*see Old Republic Constr. Ins. Agency of N.Y., Inc. v Fairmont Ins. Brokers, Ltd.*, 112 AD3d 456, 456 [1st Dept 2013]; *Robertson v Greenstein*, 308 AD2d 381 [1st Dept 2003], *lv dismissed* 2 NY3d 759 [2004]).

We also decline to bar the appeals based on the fugitive disentitlement doctrine. That doctrine permits a court to dismiss an appeal in civil cases where the party seeking relief is a fugitive evading the law whose absence frustrates the enforcement of a judgment or order (*see People v Edwards*, 117

AD3d 418, 418 [1st Dept 2014]).

The doctrine applies where the fugitive is a former New York resident who changed residency or otherwise fled to another state in a willful and deliberate effort to avoid the jurisdiction of the New York courts; was a resident of another state present in New York when an arrest warrant was issued who fled the state in order to avoid an arrest warrant; or, as in *Wechsler* (45 AD3d 470), was wanted in New York pursuant to a warrant and refused to return to the state for fear of being arrested in defiance of a separate court order directing the fugitive to appear in court. Absent a clear showing that Danzik took improper steps to avoid extradition, the doctrine does not apply where, as here, he never resided in New York, was not present in New York when the arrest warrant was issued, has not appeared in New York to face the arrest warrant, and has not defied a separate order to appear. This more narrow application of the doctrine satisfies all its principal rationales (*see Empire Blue Cross & Blue Shield v Finkelstein*, 111 F3d 278, 280 [2d Cir 1997]). We also note that there is no basis for applying the doctrine to this corporate appellant.

With respect to the merits of the appeals, we find no support in the record for the claim that the motion court deprived appellants of due process by continuing the contempt

hearing after counsel for appellants informed the court that his clients, believing the proceedings were stayed when they filed for bankruptcy, instructed him to provide no further representation.

The Decision and Order of this Court entered Herein on March 8, 2018 is hereby recalled and vacated (*see* M-1845 decided simultaneously herewith).

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

ENTERED: SEPTEMBER 20, 2018

CLERK

Richter, J.P., Manzanet-Daniels, Andrias, Kern, Singh, JJ.

5137 The People of the State of New York, Ind. 2829/14
Respondent,

-against-

Pedro Morales,
Defendant-Appellant.

____

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

Darcel D. Clark, District Attorney, Bronx (Kristina D. Amundsen 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 (Margaret Clancy, J.), rendered April 5, 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.

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

ENTERED: SEPTEMBER 20, 2018

____
CLERK

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

Friedman, J.P., Tom, Kapnick, Kahn, Kern, JJ.

6531 The People of the State of New York, Sci 4992/15
Respondent,

-against-

Nicole Shapiro,
Defendant-Appellant.

____

Hantman & Associates, New York (Robert J. Hantman of counsel), for appellant.

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

____

Judgment of resentence, Supreme Court, New York County (Larry R.C. Stephen, J.), rendered August 3, 2016, revoking defendant's prior sentence of a conditional discharge, and resentencing her to a term of 6 months, unanimously reversed, on the law and the facts, and the matter5 remitted to Supreme Court for a new resentencing hearing.

The attorney who appeared on defendant's behalf at her resentencing told the court that he was not the attorney of record for defendant in this matter, and appeared as a courtesy to the court only because he had been called by the court clerk, although he had represented defendant in other proceedings. Under these circumstances, the court failed to recognize that defendant did not have proper legal representation at the hearing, and, accordingly, we reverse and remit for a new

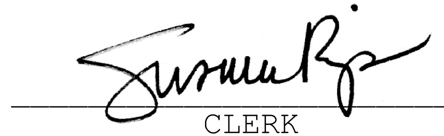
resentencing hearing.

In view of the foregoing, we do not reach defendant's remaining arguments.

The Decision and Order of this Court entered herein on May 10, 2018 (161 AD3d 506 [1st Dept 2018]) is hereby recalled and vacated (*see* M-2752 decided simultaneously herewith).

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

ENTERED: SEPTEMBER 20, 2018



CLERK

Friedman, J.P., Gische, Andrias, Kern, Oing, JJ.

6655-
6656-
6657 Index 111250/11

Daniel Jaquez, et al.,
Plaintiffs-Appellants-Respondents,

Jose Cruz Molina, et al.,
Plaintiffs,

-against-

Union Radio Dispatch, Inc.,
Defendant-Respondent-Appellant.

____

Garvey Cushner & Associates PLLC, White Plains (Lawrence A. Garvey of counsel), for appellants-respondents.

Miguel A. Santiago, Bronx, for respondent-appellant.

____

Judgment, Supreme Court, New York County (Ira Gammerman, J.H.O.), entered March 2, 2017, dismissing the claim of plaintiff Daniel Jaquez, restoring to the plaintiffs other than Jaquez all right, title and interest to their shares as stockholders in defendant, and awarding the plaintiffs other than Jaquez damages, unanimously modified, on the law and the facts, to vacate $7,920 of the award to plaintiff Jose Cruz Molina, $28,800 of the award to plaintiff Ramon Beras, and $31,200 of the award to plaintiff Nelson Benitez, and the matter remanded for a new trial on those portions of the damages claimed by each of Cruz Molina, Beras and Benitez, based on the base fees he paid to other companies during the period of his ouster from defendant, consistent with this

decision, and otherwise affirmed, without costs. Appeals from order, same court and J.H.O., entered January 10, 2017, which determined, after a trial, that defendant terminated plaintiffs' shareholder rights and denied them dividends in violation of its bylaws, and order, same court and J.H.O., entered December 30, 2016, which dismissed plaintiff Jaquez's claims as time-barred and determined that plaintiffs Tatis, Ortiz and Santos were passive shareholders, and order, same court and J.H.O., entered January 10, 2017, which determined that plaintiffs Cruz Molina, Beras and Benitez were entitled to damages for weekly radio dispatch fees based on 48 weeks of work each year, unanimously dismissed, without costs, as subsumed in the appeals from the judgment.

Plaintiff Jaquez's claims, which are based on defendant's breach of its bylaws, were correctly dismissed as untimely under the six-year statute of limitations for contract actions (*see Pomerance v McGrath*, 124 AD3d 481 [1st Dept 2015], *lv dismissed* 25 NY3d 1038 [2015]; CPLR 213[2]). Jaquez was expelled from the corporation in May 2005. This action was commenced in or about October 2011, about five months after the statute of limitations had run.

The court correctly determined that plaintiffs Ortiz, Tatis and Santos are passive shareholders within the meaning of the

corporate bylaws (*see Beardslee v Inflection Energy, LLC*, 25 NY3d 150, 157 [2015]). The bylaws unambiguously provide that a shareholder who has worked for the company for three years may stop working and maintain his or her shareholder rights, but that, after three years of inactivity, the shareholder will stop receiving dividends as an active shareholder. Ortiz, Tatis and Santos presented no evidence that they remained active shareholders.

Defendant was not denied a fair trial as to liability. The court correctly ruled as a matter of law that, under the bylaws, plaintiffs' shareholder rights were improperly terminated, on the undisputed ground that plaintiffs did not receive a disciplinary hearing upon 72 hours' advance notice. The factual basis that defendant sought to establish at trial for ejecting plaintiffs from the corporation was legally insufficient to alter the court's conclusion.

We vacate the indicated portions of the damages awards to plaintiffs Cruz Molina, Beras and Benitez because the court's determination that these plaintiffs were entitled to damages based on each one's having worked as a radio-dispatch taxicab driver for 48 weeks per year is not supported by admissible evidence presented at trial, and because the court unfairly precluded defendant from presenting evidence that these

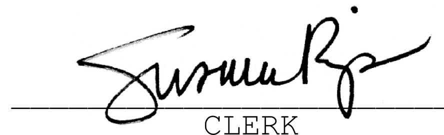
plaintiffs worked for less than 48 weeks per year during the relevant periods. The matter is remanded for a new trial on the indicated portions of these plaintiffs' damages, at which admissible evidence shall be received concerning the number of weeks per year each plaintiff worked as a radio-dispatch taxicab driver during the period of his ouster from defendant, and his damages for base fees paid to other companies during the period of his ouster recalculated based on the resulting findings.

We have considered the parties' remaining arguments for affirmative relief and find them unavailing.

The Decision and Order of this Court entered herein on May 24, 2018 (161 AD3d 626 [1st Dept 2018]) is hereby recalled and vacated (*see* M-3109 decided simultaneously herewith).

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

ENTERED: SEPTEMBER 20, 2018



CLERK

Richter, J.P., Tom, Mazzarelli, Gesmer, Moulton, JJ.

6961-
6961A QBE Americas, Inc., et al., Index 653442/13
Plaintiffs-Appellants,

-against-

ACE American Insurance Company, et al.,
Defendants,

Chartis Specialty Insurance Company, et al.,
Defendants-Respondents.

____

McKool Smith, P.C., New York (Kenneth H. Frenchman of counsel), for appellants.

Bressler, Amery & Ross, P.C., New York (Robert Novack of counsel), for Chartis Specialty Insurance Company, Illinois National Insurance Company and Lexington Insurance Company, respondents.

Ropers Majeski Kohn Bentley PC, New York (Amber W. Locklear of counsel), for Zurich American Insurance Company, respondent.

____

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered August 28, 2014, which, to the extent appealed from, denied without prejudice plaintiffs' motion for partial summary judgment seeking a declaration that defendants Chartis Specialty Insurance Co. and Illinois National Insurance Co. are obligated to pay their defense costs, unanimously affirmed, without costs. The matter is remanded for further proceedings consistent herewith. Order, same court and Justice, entered September 19, 2017, which denied plaintiffs' motion for

partial summary judgment and granted the motions of Chartis, Illinois, and defendants Lexington Insurance Co. and Zurich American Insurance Co. for summary judgment dismissing the claims as against them, unanimously modified, on the law, to deny defendants' motions except with respect to *American Residential Equities, LLC v GMAC Mtge., LLC*; *Bainum v Bank of Am., N.A.*; *Gallagher v Bank of Am., N.A.*; *Robertson v Bank of Am., N.A.*; *Turnbull v Bank of Am., N.A.*; *Ulbrich v GMAC Mtge., LLC; Turner v American Home Mtge. Servicing, Inc.*; and an investigation brought by the Missouri Department of Insurance, Financial Institutions and Professional Registration, to declare that defendants have no obligation to pay defense costs or losses in these matters, and otherwise affirmed, without costs, and the matter remanded for further proceedings consistent herewith.

Plaintiffs are a group of insurance companies who deal in lender-placed insurance, which is insurance a mortgage lender places on a property if the borrower fails to maintain sufficient homeowner insurance. Defendants are primary and excess insurance companies that issued professional liability policies to plaintiffs covering losses arising from claims for actual or alleged wrongful acts in rendering or failing to render professional services.

In more than 50 civil lawsuits filed throughout the country,

plaintiffs are alleged to have charged excessive premiums and/or engaged in various types of misconduct in connection with their lender-placed insurance business. In addition, five states commenced investigations against plaintiffs (together with the lawsuits, "the underlying actions"). Plaintiffs provided notice of the underlying actions to defendants, and after defendants denied coverage, plaintiffs brought this action for breach of contract, anticipatory breach and declaratory relief.

Plaintiffs initially moved pre-discovery for partial summary judgment against Chartis and Illinois seeking payment of defense costs. The motion court denied the motion without prejudice pending further discovery. After discovery, plaintiffs moved for partial summary judgment in their favor, and all four defendants moved for summary judgment dismissing the complaint. The court denied plaintiffs' motion, and granted defendants' motions, concluding that plaintiffs' claims were barred by the Fee Arrangement Exclusion contained in the insurance policies.

The Fee Arrangement Exclusion states that "the Insurer shall not be liable to make any payment for loss and/or defense costs in connection with any claim made against any Insured *alleging*, arising out of, based upon or attributable to any *allegations* that any Insured . . . was a participant or connected in any way in the use of an agreement or other arrangement between *an*

insurance broker or insurance agent and an insurance carrier involving the payment of *increased* fees, commissions or other compensation based on the volume, profitability or type of business referred to the insurance carrier" (emphasis added).

We agree with plaintiffs that the motion court construed the Fee Arrangement Exclusion too broadly. The motion court found the exclusion applicable because the underlying actions "all concern [plaintiffs'] problematic compensation system," and because "the propriety of [plaintiffs' lender-placed] insurance business was at issue." But the relevant question is not whether the underlying actions "concern" plaintiffs' compensation system generally, or whether they place plaintiffs' insurance business "at issue." Rather, the Fee Arrangement Exclusion applies only to claims *alleging*, or arising out of *allegations*, that plaintiffs were connected with the prohibited conduct specifically identified in the exclusion (i.e., an agreement between an insurance carrier and broker/agent involving payment of increased fees or commissions based on volume, profitability or type of business).

In order to determine whether there is coverage for each of the underlying actions, it is necessary to examine the complaints in the lawsuits as well as the documents related to the government investigations. It does not appear that the motion

court conducted the thorough analysis required to determine whether the Fee Arrangement Exclusion bars coverage for each of the underlying actions. Nor do the briefs here contain the detail necessary for a proper analysis of the specific wording contained in the numerous complaints and investigation documents. Therefore, we remand the matter for the motion court, after input from counsel, to conduct a detailed analysis of the allegations contained in the underlying actions to determine whether coverage is barred under the Fee Arrangement Exclusion.

Plaintiffs contend that the Fee Arrangement Exclusion should be limited to agreements between insurance carriers and *independent* insurance agents and brokers. However, the exclusion does not say that (*see Lend Lease [US] Constr. LMB Inc. v Zurich Am. Ins. Co.*, 28 NY3d 675, 682 [2017]).

The subject policies provide that the insurers "shall have the right, but not the duty, to assume the defense of any Claim made against the Insured." However, they also define "Loss" to include "Defense Costs," and obligate the insurers to pay "Loss[es]." Hence, if the underlying actions allege facts that potentially fall within the scope of the coverage, defendants have the obligation to pay plaintiffs' defense costs (*see Federal Ins. Co. v Kozlowski*, 18 AD3d 33, 40-41 [1st Dept 2005]), although they are "entitled to differentiate between covered and

noncovered claims" (*id.* at 41; *see also Lowy v Travelers Prop. & Cas. Co.*, 2000 WL 526702, *2 n1, 2000 US Dist LEXIS 5672, *6 n1 [SD NY May 2, 2000] ["there is no relevant difference between the allegations that trigger an insurer's duty to defend and the allegations that trigger an insurer's obligation to pay defense expenses"]).

Defendants are entitled to a declaration in their favor with respect to the Missouri investigation because that investigation was not a "Claim" within the meaning of the policies, since it merely sought information from plaintiffs.

Defendants are entitled to a declaration in their favor with respect to *Turner*, because that complaint did not allege any "Wrongful Act" of any insured; it made no specific allegations against QBE Insurance Corp.

Defendants are entitled to a declaration in their favor with respect to *American Residential Equities*, *Bainum, Gallagher, Robertson, Turnbull* and *Ulbrich,* because the only arguable Insured named therein is Balboa Insurance Co. or Balboa Insurance Services, Inc., and plaintiffs admitted that QBE Holdings, Inc. never owned (directly or indirectly) more than 50% of the stock of either Balboa entity. In opposition, plaintiffs rely on an email from and deposition testimony by a representative of Chartis. However, "as a general rule, estoppel cannot be used to

create coverage where none exists" (*Federated Dept. Stores, Inc. v Twin City Fire Ins. Co.*, 28 AD3d 32, 38 [1st Dept 2006]), and each insurer has "the right . . . to rely upon the terms of its own contract with its insured" (*State Farm Fire & Cas. Co. v LiMauro*, 65 NY2d 369, 373 [1985]).

Contrary to Zurich's contention, *Tinsley* involved a Claim against an Insured. Newport Management Corp. is an Insured, and a written demand for monetary relief is a Claim. The defendant in *Tinsley* made a written demand for indemnification to Newport.

To the extent Zurich argues that *Burrhus, Christie,* and *Fitzgibbon* did not involve allegations of Wrongful Acts, we reject this argument.

The motion court correctly found that plaintiffs' costs to respond to subpoenas in actions in which they were not sued do not constitute covered Defense Costs. The policies define "Defense Costs" as "reasonable and necessary fees, costs and expenses . . . resulting *solely* from the investigation, adjustment, defense and appeal of a Claim *against the Insured* which is covered under this policy" (emphasis added). Thus, plaintiffs' costs to respond to a subpoena in an action in which they were not sued did not result solely from their defense of an action in which they were sued.

The motion court decided the instant motions (apart from the

issue of the subpoenas) based on the Fee Arrangement Exclusion and did not reach the parties' other arguments. We agree with plaintiffs and Chartis, Illinois and Lexington that, upon remand, the court should consider those arguments.

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

ENTERED: SEPTEMBER 20, 2018

CLERK

Renwick, J.P., Gische, Kapnick, Gesmer, Kern, JJ.

6975-6976 Andrew Sussman, Plaintiff-Respondent, Index 156066/14

-against-

MK LCP Rye LLC, et al.,
Defendants-Appellants.

Mauro Lilling Naparty, LLP, Woodbury (Anthony F. DeStefano of counsel), for appellants.

Meyer Suozzi English & Klein, P.C., Garden City (Kevin Schlosser of counsel), for respondent.

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered July 25, 2017, which denied defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered February 23, 2018, which, upon reargument, adhered to the original determination, unanimously dismissed, without costs, as academic.

In opposition to defendants' prima facie showing that the hotel stairwell from which plaintiff fell was in reasonably safe condition, plaintiff raised an issue of fact by submitting an affidavit by an expert engineer who averred that the stairwell violated National Fire Protection Association (NFPA) No. 101. NFPA No. 101, which was listed in the "Generally Accepted

Standards Applicable to the State Building Construction Code" in effect at the time of the hotel's construction, advocated the construction of a 42-inch-high guardrail along the stairwell. The record shows that the existing guardrail was no more than 32 inches high. A violation of NFPA No. 101, which was "applicable by reference in the [State] Building Construction Code - not incorporation - would constitute some evidence of negligence and may establish a standard of care" (*Lugo v State of New York*, 7 Misc 3d 1027[A], 2005 NY Slip Op 50792[U], *6 [Ct Cl 2005] [footnote and internal citations omitted]; *see Zebzda v Hudson St., LLC*, 72 AD3d 679, 680-681 [2d Dept 2010]).

The cases on which defendants rely are distinguishable because the plaintiffs' experts in those cases did not offer the requisite "concrete proof of the existence of the relied-upon standard as of the relevant time" (*Hotaling v City of New York*, 55 AD3d 396, 398 [1st Dept 2008], *affd* 12 NY3d 862 [2009]; *see also e.g. Schmidt v One N.Y. Plaza Co. LLC*, 153 AD3d 427, 430 [1st Dept 2017]).

Defendants failed to establish prima facie that they did not have constructive notice of a dangerous or defective condition. They argue that the stairwell complied with applicable building codes and that they never received any violations regarding the stairwell. However, their claimed compliance with applicable

building codes is not dispositive of whether they breached their common-law duty of care (*Kellman v 45 Tiemann Assoc.*, 87 NY2d 871 [1995]). Moreover, the existence of a guardrail less than 42 inches high, although not in violation of a particular mandatory code, was obvious and had existed for a sufficient time for defendants to discover and remedy it. Contrary to defendants' argument, plaintiff's inability to identify the cause of his slip or trip on the stairs, which made him lose his balance and go over the rail, is not fatal to his claims, given the evidence supporting his contention that the proximate cause of his injuries was the lack of a 42-inch guardrail. In any event, there can be more than one proximate cause of an accident.

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

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

ENTERED: SEPTEMBER 20, 2018

CLERK

Sweeny, J.P., Webber, Kern, Oing, JJ.

7048 Syncora Guarantee Inc., Index 651258/12
Plaintiff-Respondent,

-against-

Macquarie Securities (USA) Inc.,
Defendant-Appellant,

Alinda Capital Partners LLC, et al.,
Defendants.

____

Gibson, Dunn & Crutcher LLP, New York (Christopher M. Joralemon of counsel), for appellant.

Quinn Emanuel Urquhart & Sullivan, LLP, New York (Maaren A. Shah of counsel), for respondent.

____

Order, Supreme Court, New York County (Anil C. Singh, J.), entered on or about February 14, 2017, which denied the motion of defendant Macquarie Securities (USA), Inc. to dismiss the complaint except to the extent of striking plaintiff’s demands to recover rescissory and punitive damages, unanimously affirmed, without costs.

Plaintiff Syncora Guarantee Inc. issued unconditional and irrevocable financial guaranty insurance policies, guaranteeing the payment of principal and interest on $500 million in bonds, which are backed by income from certain toll bridges and a toll tunnel. Syncora asserts causes of action for fraud and negligent representation against Macquarie, which acted as a financial

advisory services provider in connection with the transaction. Syncora alleges that Macquarie knowingly overstated the income forecasts from the toll properties with the intention of inducing it to guarantee the payments under the bonds. It is undisputed that Syncora continued to receive premiums from the insureds under the policies after learning of the alleged fraud and misrepresentations.

Insurance Law § 3015(b)(1) is not applicable because Syncora does not seek to defeat recovery by the insureds and does not seek rescission of the insurance policies, which it could not do because the policies are unconditional and irrevocable (*see Ambac Assur. Corp. v Countrywide Home Loans, Inc.*, __ NY__, 2018 NY Slip Op 04686, *3 [2018]).

Syncora sufficiently alleges facts from which it can be inferred that it sustained damages arising from the alleged fraud (*see Deerfield Communications Corp. v Chesebrough-Ponds, Inc.*, 68 NY2d 954, 956 [1986]). Any factual questions as to whether the damages it seeks to recover are identical to rescissory damages may not be resolved on this motion to dismiss (*see Ambac Assur. Corp.*, 2018 NY Slip Op 04686, *3).

United States Life Ins. Co. in the City of N.Y. v Blumenfeld (92 AD3d 487 [1st Dept 2012], and 113 AD3d 530 [1st Dept 2014]) do not require dismissal of Syncora's fraud and negligent

misrepresentation claims. There, the insurer sought a declaratory judgment rescinding a life insurance policy on the ground that the insured had made misrepresentations in its application for coverage. The complaint provided no basis for inferring that the insurer had sustained any compensable damages, apart from its rescission claim. Here, in contrast, Syncora alleges it has sustained hundreds of millions of dollars in damages as a result of Macquarie's fraudulent misrepresentations, which induced Syncora to issue the irrevocable policies to third parties.

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

ENTERED: SEPTEMBER 20, 2018

CLERK

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

7053- Index 308820/08
7054 Damary Guzman,
Plaintiff-Respondent,

-against-

Promesa Administrative Services
Organization, Inc., et al.,
Defendants-Appellants.

____

Lewis, Brisbois, Bisgaard & Smith LLP, New York (Meredith Drucker Nolen of counsel), for appellants.

Macaluso & Fafinski, P.C., Bronx (Donna A. Fafinski of counsel), for respondent.

____

Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr. J.), entered on or about November 9, 2017, which denied defendants Promesa Administrative Services Organization, Inc. and Promesa Systems Inc.'s motion for leave to serve a second amended answer and for summary judgment, unanimously reversed, on the law, without costs, the motion granted, and the complaint dismissed. The Clerk is directed to enter judgment accordingly. Appeal from order, same court and Justice, entered on or about September 18, 2017, unanimously dismissed, without costs, as academic.

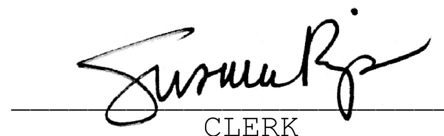
The motion court improvidently denied defendants' motion to amend their answer and dismiss the complaint unless plaintiff amended her Chapter 13 Bankruptcy Petition within 30 days of

service of the order to include this action in her schedule of assets, because plaintiff took an inconsistent position during the bankruptcy proceeding by claiming that she did not have any other legal claims than those listed on her schedule of assets and liabilities which was adopted by the Bankruptcy Court when it confirmed the plan (*see Kleinplatz v Nathan L. Dembin & Assoc., P.C.*, 148 AD3d 431, 431 [1st Dept 2017]; *Horvath v Gumley Haft Kleier Inc.*, 148 AD3d 437 [1st Dept 2017]; *Gray v City of New York*, 58 AD3d 448, 449 [1st Dept 2009], *lv dismissed in part, denied in part* 12 NY3d 802 [2009]).

Since the complaint must be dismissed, the appeal from the September 18, 2017 order denying defendants' motion for summary judgment has been rendered academic (*see Encore Coll. Bookstores, Inc. v City Univ. of N.Y.*, 75 AD3d 442, 443 [1st Dept 2010]).

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

ENTERED: SEPTEMBER 20, 2018



CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David Friedman, J.P.
Judith J. Gische
Marcy L. Kahn
Anil C. Singh
Peter H. Moulton, JJ.

7087-7088-
7089-7089A
Index 654454/15

_______________________________________x

MPEG LA, LLC,
Plaintiff-Respondent,

-against-

Samsung Electronics Co., Ltd.,
Defendant-Appellant.

_______________________________________x

Defendant appeals from a judgment of the Supreme Court, New York County (Shirley Werner Kornreich, J.), entered January 16, 2018, in favor of plaintiff in the total sum of $115,121,061.63 and from orders of the same court and Justice, entered on or about November 28, 2016, on or about May 4, 2017, and August 25, 2017.

Quinn Emanuel Urquhart & Sullivan, LLP, New York (Kathleen M. Sullivan, Michael B. Carlinsky, William B. Adams and Cleland B. Welton II of counsel), and Reed Smith, LLP, New York (Louis M. Solomon of counsel), for appellant.

Windels Marx Lane & Mittendorf, LLP, New York
(Craig P. Murphy, John D. Holden, Philip M.
Taylor and Michaels M. Harary of counsel),
for respondent.

SINGH, J.

The primary issue on this appeal is whether defendant, Samsung Electronics Co., Ltd., could terminate the Agreement Among Licensors (AAL) and Patent Portfolio License (PPL) in October 2015. We find that defendant's unilateral termination of the AAL and the PPL was proper under the plain language of both agreements.

Defendant is one of several parties to four related contracts governing the licensing of a pool of patents necessary to the manufacture of consumer electronic products practicing the Advanced Television Systems Committee (ATSC) Standard for digital television transmissions. As an owner of some patents included in the pool, defendant is both a licensor and a licensee. Plaintiff, MPEG LA, LLC, is the ATSC patent pool's licensing administrator. The ATSC patent pool is governed by four agreements executed virtually simultaneously in September 2007.

The AAL is an agreement among the owners of the patents in the ATSC patent pool, including defendant. Plaintiff is not a signatory to the AAL. However, the AAL provides for the selection of plaintiff as licensing administrator, describes plaintiff's duties, requires that the parties enter into a separate licensing administrator agreement with plaintiff, and requires that each party grant plaintiff a license that allows it

to grant sublicenses.

Section 10.8 of the AAL provides that it shall not "give rise to any obligation on any Party hereto for the benefit of a third party or . . . confer any rights on any third party." "Party" is defined to include any entity that signs the "Agreement," which is, in turn, defined as the AAL, including any attachments or exhibits thereto. A sample licensing administrator agreement and license are attached to the AAL, but not the final, executed versions.

The license from licensor to licensing administrator is the license issued by defendant to plaintiff in accordance with AAL § 2.3. The Licensing Administrator Agreement (LAA) is an agreement between plaintiff and the patent owners, including defendant, that governs plaintiff's role as licensing administrator. The PPL is the sublicense granted by plaintiff to all licensees, including defendant, that dictates the royalties they must pay to plaintiff to use the patents in the patent pool.

On October 5, 2015, defendant sent two termination notices to plaintiff, both of which were effective November 4, 2015. The first notice purported to terminate the PPL pursuant to § 6.4 thereof. The second purported to terminate, pursuant to § 7.2 of the AAL, the AAL, the right of the licensing administrator to grant additional sublicenses pursuant to § 2.3 of the AAL, and

the LAA. Plaintiff refused to accept defendant's termination notices.

On December 30, 2015, plaintiff initiated this suit, seeking damages for breach of contract, as well as a judgment declaring that "Samsung has a continuing obligation to comply with its obligations under the Samsung ATSC Agreements until at least January 1, 2017." Defendant asserted several affirmative defenses, as well as counterclaims for fraudulent inducement, negligent misrepresentation, and a judgment declaring that the October 2015 terminations were effective.

On March 15, 2016, defendant moved to dismiss the complaint on the ground that it had properly terminated the AAL and PPL in October 2015. Plaintiff opposed, and cross-moved for summary judgment on liability, arguing that the October 2015 attempted terminations were ineffective because the AAL could not properly be terminated before 2017 and defendant was required to pay certain royalties within 30 days of termination of the PPL, which it did not do. Both parties argued that the text of the agreements was unambiguous, and did not submit any extrinsic evidence.

Supreme Court denied defendant's motion to dismiss the complaint and granted plaintiff's cross motion for partial summary judgment. The court rejected defendant's "partial

termination" argument, and held that "section 7.2.1 of the AAL only permits Samsung to voluntarily terminate the AAL if Samsung also terminates the LAA," which could not be voluntarily terminated before 2017. The court further held that the PPL was not properly terminated because the AAL prohibited termination of the PPL as long as defendant remained a member of the patent pool. The court reasoned that defendant could not voluntarily terminate the AAL before January 1, 2017 unless the LAA was terminated on another enumerated ground, including termination under section 11.3 of the LAA, and that since the LAA was not terminated, defendant's October 5, 2015 termination of the AAL was ineffective.

After an audit, judgment was entered against defendant in the amount of $115,121,061.63. We now reverse.

I.

As a preliminary matter, we reject defendant's contention that plaintiff does not have standing to sue for breach of the AAL because it is not a party to that agreement. Plaintiff is an intended third-party beneficiary of the AAL, as that agreement explicitly refers to plaintiff and grants it enforceable rights. Accordingly, the AAL's boilerplate exclusion of third-party beneficiaries does not apply to plaintiff, and this action may not be properly dismissed for lack of standing (*Diamond Castle*

Partners IV PRC, L.P. v IAC/InterActiveCorp, 82 AD3d 421, 422 [1st Dept 2011]). In addition, we note that the dispute between the parties concerns defendant's failure to pay royalties under the PPL. Plaintiff is a party to the PPL with the power to enforce defendant's royalty obligations.

II.

We now turn to whether defendant could unilaterally terminate the AAL before 2017.

When engaging in contract interpretation, "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]; *see also Quattro Parent LLC v Zaki*, 160 AD3d 478, 478 [1st Dept 2018]). When the parties have a dispute over the meaning, the court first asks if the contract contains any ambiguity, which is a legal matter for the court to decide (*Ashwood Capital, Inc. v OTG Mgt., Inc.*, 99 AD3d 1, 7-8 [1st Dept 2012]). Whether there is an ambiguity "is determined by looking within the four corners of the document, not to outside sources" (*Kass v Kass*, 91 NY2d 554, 566 [1998]).

Accordingly, we must examine the parties' obligations and intentions as manifested in the entire agreement and seek to afford the language an interpretation that is sensible, practical, fair, and reasonable (*Riverside S. Planning Corp. v*

CRP/Extell Riverside, L.P., 13 NY3d 398, 404 [2009]; *Abiele Constr. v New York City School Constr. Auth.*, 91 NY2d 1, 9-10 [1997]; *Brown Bros. Elec. Contrs. v Beam Constr. Corp.*, 41 NY2d 397, 400 [1977]). This rule is applied “with even greater force in commercial contracts negotiated at arm’s length by sophisticated, counseled businesspeople” (*Ashwood*, 99 AD3d at 7, citing, inter alia, *Vermont Teddy Bear Co. v 538 Madison Realty Co.*, 1 NY3d 470, 475 [2004]). Finally, as the ATSC agreements are interrelated, they must be read together (*PETRA CRE CDO 2007-1, Ltd. v Morgans Group LLC*, 84 AD3d 614, 615 [1st Dept 2011], *lv denied* 17 NY3d 711 [2011]).

The AAL and the LAA each contain a distinct termination provision. Section 7.2 of the AAL permits unilateral termination:

> “Subject to the conditions set forth in this Section 7.2, each Party shall have the right, upon thirty (30) days’ written notice . . ., to terminate with respect to itself all but not less than all of the following: (1) this Agreement; (2) the right of the Licensing Administrator to grant additional sublicenses under its license or sublicense granted by such terminating Party pursuant to Section 2.3 of this Agreement; and (3) the [LAA].”

Section 7.2 also provides that neither party may terminate the agreement from 2007 to 2012, which are the first five years of the agreement. The AAL also sets forth a schedule of early

termination penalties by reducing the terminating party's royalty payments in years six through nine.

Section 11.2.1 of the LAA states in relevant part:

> "At any time after January 1, 2017, each Licensor shall have the right upon thirty (30) days' written notice . . ., to terminate with respect to itself all, but not less than all, of the following: (i) this Agreement; (ii) the right of the Licensing Administrator to grant additional sublicenses under its license or sublicense to the Licensing Administrator granted pursuant to Section 2.3 of the [AAL]; and (iii) the [AAL]."

The LAA also provides for other methods of termination, including termination upon expiration, invalidation, sale, or assignment of all of the licensor's included patents, or upon a determination by two-thirds of pool members that the licensing administrator is in breach, insolvent, or in liquidation.

Based on the clear language of AAL § 7.2, defendant, after September 2012, had a unilateral right to terminate "all but not less than all" of the AAL, LAA and plaintiff's sublicensing right so long as the agreements were terminated simultaneously and defendant accepted a reduced royalty (*see Greenfield v Philles Records*, 98 NY2d 562, 569-570 [2002] [if a contract "on its face is reasonably susceptible of only one meaning, a court is not free to alter the contract to reflect its personal notions of fairness and equity"]).

Contrary to plaintiff's assertion, LAA § 11.2.1 does not prohibit defendant from exercising its termination right under AAL § 7.2. Interpreting the LAA and AAL together, it is clear that defendant has the right to unilaterally terminate (*see PETRA*, 84 AD3d at 615). LAA § 11.2.1 by its plain terms only applies to defendant's termination right after January 1, 2017. The LAA is silent as to defendant's termination right before January 1, 2017. Indeed there is no inconsistency in this interpretation because the provisions "simply apply to different situations" (*Vornado 40 E. 66th St. Member LLC v Krizia SPA*, 135 AD3d 649, 649 [1st Dept 2016]). LAA § 11.2.1 allows for termination after January 1, 2017 without financial consequence, while AAL § 7.2 permits termination before January 1, 2017 and requires defendant to accept a reduction in royalty payments in accordance with the schedule of early termination penalties.

Under plaintiff's construction, there is no circumstance in which defendant may unilaterally terminate pursuant to AAL § 7.2. Sections 10.2, 11.3 and 11.4 of the LAA and section 3.4 of the AAL authorize the administrative committee (of the licensors) to remove plaintiff as licensing administrator, terminate the LAA between plaintiff and the licensors, and then select and enter into an agreement with a new licensing administrator. According to plaintiff, if this condition occurred after September 2012,

defendant could terminate the AAL under section 7.2. However, these sections require a two-thirds vote of the parties that make up the administrative committee. Therefore, defendant cannot plausibly exercise its unilateral right to "terminate with respect to itself" but then be forced to wait for two-thirds of the licensors to agree to cancel plaintiff's role as licensing administrator.

Nor do we accept plaintiff's argument that the LAA may be terminated pursuant to an alternative termination provision, because AAL § 7.2's early termination penalties would never be triggered. For example, under AAL § 3.4 and LAA §§ 10.2 and 11.3, termination on the ground that the licensing administrator is in breach or insolvent is conditioned on entering into a new LAA with a successor licensing administrator. Since the old LAA would immediately be replaced by the new one, there would be no opportunity for defendant to exercise its bargained-for early termination right under AAL § 7.2. Similarly, expiration, invalidation, and assignment of all of a licensor's included patents are separate bases for termination under AAL §§ 7.1 and 9.1.1 and LAA §§ 11.1, 11.4 and 12.2.2 that do not implicate AAL § 7.2.

We note that plaintiff's interpretation that AAL § 7.2 requires the termination of the LAA in order to terminate the AAL

improperly renders AAL § 7.2's recitation of penalties for early termination, between 2012 and 2017, superfluous. If, under plaintiff's construction, AAL § 7.2 required separate termination of the LAA, and the LAA could not be terminated before 2017, then AAL's early termination penalties would never apply.

In short, plaintiff's interpretation fails to give meaning to AAL § 7.2, rendering this section of the AAL superfluous, and must be rejected (*see* *Cara Assoc., L.L.C. v Milstein*, 140 AD3d 657, 658 [1st Dept 2016], quoting *Corhill Corp. v S.D. Plants, Inc.*, 9 NY2d 595, 599 [1961] [the "cardinal rule of construction [is] that a court should not adopt an interpretation which will operate to leave a provision of a contract without force and effect"], *lv dismissed* 27 NY3d 1181 [2016]).

III.

Plaintiff's argument that defendant did not properly terminate all of the agreements is without merit. By letter dated October 5, 2015, defendant unequivocally terminated the relevant agreements:

> "By this letter, and pursuant to § 7.2 of the [AAL}, Samsung gives notice that, effective November 4, 2015, it is terminating with respect to itself (1) the [AAL], (2) the right of the Licensing Administrator to grant additional sublicenses under its license or sublicense granted by Samsung pursuant to Section 2.3 of the [AAL], and (3) the ATSC Licensing Administrator Agreement entered

into pursuant to Section 2.2 of the [AAL].”

Clearly, on this record, defendant sought to terminate the LAA, AAL and plaintiff’s sublicensing right. Defendant’s subsequent letter dated November 30, 2016 does not confirm that defendant only terminated the AAL and the PPL; rather, the November 30, 2016 letter is “without waiver of, or prejudice to, any termination rights previously exercised by [defendant] pursuant to Section 7.2 of the [AAL].” Nor has defendant waived the argument that it gave notice in October 2015 that it was terminating the LAA pursuant to AAL § 7.2 by not raising it below (*see Vanship Holdings Ltd. v Energy Infrastructure Acquisition Corp.*, 65 AD3d 405, 408 [1st Dept 2009] [“So long as the issue is determinative and the record on appeal is sufficient to permit our review, we may consider a new legal argument raised for the first time in this Court”].

Additionally, plaintiff may not rely on alleged representations in Supreme Court, made by defendant’s counsel, that defendant did not terminate the LAA in 2015. “A judicial admission [of a fact] is not itself dispositive but merely evidence of the fact admitted” (*Tullett Prebon Fin. Servs. v BGC Fin., L.P.*, 111 AD3d 480, 482 [1st Dept 2013], *lv denied* 22 NY3d 864 [2014]). As discussed, the record establishes, through the October 2015 letter, that defendant sought to terminate the LAA

pursuant to AAL § 7.2.

Plaintiff's reliance on the doctrine of judicial estoppel, binding defendant to its litigating position in Supreme Court, is misplaced. This doctrine "precludes a party who assumed a certain position in a prior legal proceeding and who secured a judgment in his or her favor from assuming a contrary position in another action simply because his or her interests have changed" (*Wells Fargo Bank N.A. v Webster Bus. Credit Corp.*, 113 AD3d 513, 516 [1st Dept 2014] [internal quotation marks omitted and emphasis deleted] *lv denied* 23 NY3d 902 [2014]). Because defendant did not prevail on its claim in Supreme Court, the doctrine of judicial estoppel does not apply (*id.*; *Kvest LLC v Cohen*, 86 AD3d 481, 482 [1st Dept 2011]).

IV.

Finally, we reject plaintiff's argument that the conditions for terminating the PPL were not properly met.

The PPL's termination provision is very broad, allowing termination at any time, upon 30 days' written notice. Contrary to plaintiff's claim, the requirement that the licensee pay royalties accrued before termination within 30 days is not a condition subsequent to the ability to terminate. "Conditions subsequent are disfavored and are not found to exist unless the intention to create them is clearly expressed" (*Stratis v Doyle*,

176 AD2d 1096, 1098 [3d Dept 1991]; *accord Matter of Matthews Trust No. 1*, 61 AD3d 511, 514 [1st Dept 2009], *lv denied* 13 NY3d 702 [2009]). Here, the PPL does not make termination "subject to" or conditional upon payment of royalties, and instead states that the royalty obligations "survive" termination.
As payment of outstanding royalties is not a condition subsequent to termination, it does not matter whether it was satisfied in order for the termination to be valid.

Accordingly, the judgment of the Supreme Court, New York County (Shirley Werner Kornreich, J.), entered January 16, 2018, in favor of plaintiff in the total sum of $115,121,061.63, should be reversed, on the law, without costs, and the complaint and all counterclaims dismissed. The Clerk is directed to enter an amended judgment accordingly. The appeals from orders, same court and Justice, entered on or about November 28, 2016, on or about May 4, 2017, and August 25, 2017, should be dismissed, without costs, as subsumed in the appeal from the judgment.

All concur.

Judgment Supreme Court, New York County (Shirley Werner Kornreich, J.), entered January 16, 2018, reversed, on the law, without costs, and the complaint and all counterclaims dismissed. The Clerk is directed to enter an amended judgment accordingly. Appeals from orders, same court and Justice, entered on or about November 28, 2016, on or about May 4, 2017, and August 25, 2017, dismissed, without costs, as subsumed in the appeal from the judgment.

Opinion by Singh, J. All concur.

Friedman, J.P., Gische, Kahn, Singh, Moulton, JJ.

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

ENTERED: SEPTEMBER 20, 2018

CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

John W. Sweeny, Jr. J.P.
Rosalyn H. Richter
Richard T. Andrias
Marcy L. Kahn, JJ.

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____x

J.P. Morgan Securities, Inc., et al.,
Plaintiffs-Respondents,

-against-

Vigilant Insurance Company, et al,
Defendants-Appellants.

____x

Defendants appeal from a judgment of the Supreme Court, New York County (Charles Ramos, J.), entered August 14, 2017, awarding plaintiffs sums of money, including prejudgment interest, as against defendant insurers Vigilant Insurance Company, The Travelers Indemnity Company and Federal Insurance Company, National Union Fire Insurance Company of Pittsburgh, Pa., and Liberty Mutual Insurance Company and from the order of the same court and Justice, entered April 17, 2017, as amended by the order of the same court and Justice, entered on or about August 11, 2017.

Holwell Shuster & Goldberg LLP, New York (James M. McGuire, Daniel M. Sullivan and Gregory Dubinsky of counsel), and DLA Piper LLP (US), New York (Joseph G. Finnerty III, Megan Shea Harwick and Eric S. Connuck of counsel), for Vigilant Insurance Company and Federal Insurance Company, appellants.

Kaufman Borgeest & Ryan LLP, New York (Scott A. Schechter, Andrew E. Oldis and Matthew Mawby of counsel), for Liberty Mutual Insurance Company, appellant.

Drinker Biddle & Reath LLP, Philadelphia, PA (David F. Abernethy of the bar of the State of New Jersey and the State of Pennsylvania, admitted pro hac vice, of counsel), and Drinker Biddle & Reath LLP, New York (Marsha J. Indych of counsel), for The Travelers Indemnity Company, appellant.

D'Amato & Lynch, LLP, New York (Kevin J. Windels, Luke D. Lynch and Liza A. Chafiian of counsel), for National Union Fire Inssurance Company of Pittsburgh, PA, appellant.

Clyde & Co. US LLP, New York (Edward J. Kirk, Gabriela Richeimer and Matthew Prutting of counsel), for Certain Underwritters at Lloyd's, London, appellant.

Landman Corsi Ballaine & Ford P.C., New York (William Ballaine of counsel), for American Alternative Insurance Corporation, appellant.

Proskauer Rose LLP, New York (Steven E. Obus and Seth Schaffer of counsel), for respondents.

ANDRIAS, J.

In this insurance dispute arising out of the insured's monetary settlement of a Securities and Exchange Commission proceeding and related private litigation predicated on the insured's violations of federal securities laws, we conclude that defendant insurers should be granted summary judgment declaring that plaintiffs are not entitled to coverage for the portion of the SEC disgorgement payment, $140 million, allegedly representing the improper profits acquired by third-party hedge fund customers, at issue in this appeal.[1]

In 2003, the SEC began an investigation to determine whether Bear Stearns violated securities laws between 1999 and September 2003 by knowingly facilitating "late trading" and deceptive "market timing" for certain hedge fund customers, and affirmatively assisting those customers in evading detection, thereby enabling them to earn hundreds of millions of dollars in profits at the expense of mutual fund shareholders. In 2006, the SEC notified Bear Stearns that it intended to institute civil proceedings against it seeking monetary sanctions of $720 million.

[1]The total disgorgement payment was $160 million. Plaintiffs do not seek coverage for the $20 million portion representing their own ill gotten gains.

In March 2006, after Bear Stearns made a formal offer of settlement, the SEC issued an "Order Instituting Public Administrative and Cease-and-Desist Proceedings Pursuant to Sections 15(b) and 21C of the Securities Exchange Act of 1934, Making Findings and Imposing Remedial Sanctions" in which Bear Stearns, "without admitting or denying the findings [made pursuant to its offer of settlement]," agreed to pay "disgorgement in the total amount of $160,000,000" and "civil money penalties in the amount of $90,000,000." After defendant insurers refused to indemnify Bear Stearns, plaintiffs commenced this action for breach of contract and a declaration that defendants have a duty to indemnify Bear Stearns, asserting that all the claims fall within the definition of "Loss" under the subject insurance policies.

In a prior appeal, this Court held that, as a matter of public policy, Bear Stearns could not seek recoupment of any portion of the $160 million disgorgement payment and dismissed the complaint (91 AD3d 226 [1st Dept 2011]). The Court of Appeals reversed and reinstated the complaint, stating that "the Insurers have not met their heavy burden of establishing, as a matter of law on their CPLR 3211 dismissal motions, that Bear Stearns is barred from pursuing insurance coverage under its policies" (21 NY3d 324, 338 [2013]).

While recognizing that other courts, as a matter of contract interpretation or public policy, have held that the risk of being ordered to disgorge "ill-gotten gains" is not insurable, the Court of Appeals, referencing Bear Stearns's argument that the rule "should apply only where the insured requests coverage for the disgorgement of its own illicit gains," stated that "the documentary evidence does not decisively repudiate Bear Stearns' allegation that the SEC disgorgement payment amount was calculated in large measure on the profits of others" (21 NY3d at 336). With respect to the public policy prohibition barring an insured from seeking indemnification for intentionally harmful conduct, the Court found that "[t]he SEC order, while undoubtedly finding Bear Stearns' numerous securities laws violations to be willful, does not conclusively demonstrate that Bear Stearns also had the requisite intent to cause harm" (21 NY3d at 335).

As to the personal profit exclusion, which bars coverage for claims against the insured "based upon or arising out of the Insured gaining in fact any personal profit or advantage to which the Insured was not legally entitled," the Court found that "[b]ecause Bear Stearns alleges, and the SEC order does not conclusively refute, that its misconduct profited others, not itself, this exclusion does not defeat coverage under CPLR 3211." As to the prior knowledge exclusion in the Lloyd's policy, which

negates coverage for any claim arising from a wrongful act committed before March 21, 2000 (the effective date of the Lloyd's policy) if "any officer" of Bear Stearns, by that date, "knew or could have reasonably foreseen" that such wrongful act could lead to a claim, the Court agreed with the motion court that "'numerous disputed factual assertions remain concerning Bear Stearns' knowledge of the relevant facts prior to March 21, 2000, and whether a person in Bear Stearns' position could have reasonably foreseen that those facts might be the basis of a claim under the Policies' (2010 NY Slip Op 33799[U], *12)."[2]

In the April 2017 order (57 Misc 3d 171), the motion court granted plaintiffs' motions for summary judgment and denied the defendants' motions for summary judgment. The Court found that (i) based on the broad definition in the policy, the $140 million disgorgement payment at issue constituted a covered loss because it represented third-party gains; (ii) the public policy

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[2]In subsequent appeals, this Court held that (1) Bear Stearns's settlements were not adjudications of wrongdoing within the meaning of the dishonest acts exclusion, and that the court should not have dismissed the affirmative defense invoking the public policy against permitting insurance coverage for disgorgement, to the extent it is based on the settlements with the SEC and the NYSE (126 AD3d 76 [1st Dept 2015]); and (2) the insurers' unreasonable delay excused insured's settlement without their consent, and the insurers' repudiation of liability excused insured's alleged breach of its obligation to cooperate (151 AD3d 632 [1st Dept 2017]).

exception for loss arising out of intentionally harmful conduct did not bar coverage because nothing indicated that Bear Stearns deliberately intended to cause injury to mutual fund investors, and the hearsay statements by Bear Stearns's employees that customers' late trading and market timing transactions harmed mutual fund investors were insufficient to raise a triable issue of fact; (iii) the personal profit exclusion did not bar coverage because it applied to claims based upon or arising out of the insured "gaining in fact any personal profit or advantage" to which the insured was not legally entitled and here the profit accrued to third parties and Bear Stearns did not derive any greater compensation for late trading and market timing transactions than it did for other mutual fund trades that it cleared; (iv) the prior knowledge exclusion did not bar coverage because, construing the ambiguous clause in favor of the insured, the term "officer" did not refer to all employees whose job title included the term "officer," but was limited to employees with important executive and managerial duties; and (v) the $140 million settlement, after defendants denied coverage, was reasonable in view of Bear Stearns's exposure and the probability that the SEC would prove its claims. In August 2017, the court amended the order (2017 NY Slip Op 31690[U]), to award plaintiffs prejudgment interest against all defendants because they

wrongfully disclaimed and the first loss triggered each of the policies simultaneously on the day it occurred. The court found that the exhaustion provisions did not apply because Bear Stearns suffered a single large loss which exceeded the limits of each insurer on the very date that it was incurred. In August 2017, judgment was entered in plaintiffs' favor.

We first consider whether or not the insurers should have been granted summary judgment dismissing the complaint because SEC disgorgement is an uninsurable penalty and not a "Loss" covered by the policy.

The primary professional liability policy, to which the excess policies follow form, provides that the Insurers are to "pay on behalf of [Bear Stearns] all Loss which [Bear Stearns] shall become legally obligated to pay as a result of any Claim . . . for any Wrongful Act of [Bear Stearns]." "Loss" is defined as:

> "(1) compensatory damages, multiplied damages, punitive damages where insurable by law, judgments, settlements, costs, charges and expenses or other sums [Bear Stearns] shall legally become obligated to pay as damages resulting from any Claim or Claim(s);
>
> "(2) costs, charges and expenses or other damages incurred in connection with any investigation by any governmental body or self-regulatory organization (SRO), provided however, Loss shall not include:
>
> "(i) fines or penalties imposed by law; or . . .

"(v) matters which are uninsurable under the law pursuant to which this policy shall be construed."

Vigilant argues that there is no coverage because the United States Supreme Court in *Kokesh v Securities and Exchange Commission* (_ US_, 137 S Ct 1635 [2017]) conclusively defined the nature of the SEC disgorgement remedy as a penalty, not a loss, and that the Court of Appeals did not resolve this issue when it reversed to deny the insurers' motions to dismiss.

In *Kokesh,* decided after the Court of Appeals' prior decision reinstating the complaint, the United States Supreme Court held that SEC disgorgement constitutes a penalty, and is therefore subject to the five year statute of limitations of 28 USC § 2462. In so ruling, the Supreme Court reasoned that SEC disgorgement (i) is imposed as a consequence for a wrong committed against the public, rather than a wrong against particular individuals; (ii) is meant to punish the violator and deter others from similar violations; and (iii) in many cases, does not compensate the victims of securities violations; rather, the wrongdoer pays disgorged profits to the district court, which has discretion to determine how and to whom to distribute the money (*id.* at 1643-1644).

The Supreme Court's rationale as to the nature of disgorgement in *Kokesh* applies with equal force to the issue of

whether the disgorgement paid by Bear Stearns, even if representing third-party gains, was a “Loss” within the meaning of the policy and whether public policy bars insurance companies from indemnifying insureds paying SEC disgorgement. In both instances disgorgement is a punitive sanction intended to deter. To allow a wrongdoer to pass on its loss emanating from the disgorgement payment to the insurer, thereby shielding the wrongdoer from the consequences of its deliberate malfeasance, undermines this goal and “and violate[s] the fundamental principle that no one should be permitted to take advantage of his own wrong” (*Biondi v Beekman Hill House Apt. Corp.*, 94 NY2d 659, 664 [2000] [internal quotation marks omitted]). Thus, as SEC disgorgement is a penalty, it does not fall within the definition of “Loss” and there is no coverage.

Plaintiffs argue that even if the Supreme Court’s reasoning behind the holding that disgorgement is a penalty extends beyond the limited context of *Kokesh*, it has no application here because the Court of Appeals has rejected the argument that the instant claim is not a Loss under the policies and has suggested that a disgorgement payment of a third-party gain is recoverable under an insurance policy. However, application of the doctrine of the “law of the case” is not warranted under the particular circumstances before us.

The law of the case is applicable to "legal determinations that were necessarily resolved on the merits in a prior decision" (*Brownrigg v New York City Hous. Auth*., 29 AD3d 721, 722 [2d Dept 2006]). On the prior appeal, the Court of Appeals stated that "the Insurers do not earnestly dispute that the claims fall within the policy's definition of Loss" (21 NY3d at 333), but did not rely on the policy language in denying defendants' motions. Instead it focused on the public policy issue. Furthermore, the doctrine does not apply where a motion for summary judgment follows a motion to dismiss that was not converted to a motion for summary judgment pursuant to CPLR 3212(c)(*see Alvarado v City of New York*, 150 AD3d 500, 500 [1st Dept 2017]; *Rosen v Mosby*, 148 AD3d 1228, 1233 [3d Dept 2017], *lv dismissed* 30 NY3d 1037 [2017]; *191 Chrystie LLC v Ledoux*, 82 AD3d 681, 682 [1st Dept 2011]).

Even if the Court of Appeals' prior determination is viewed as addressing the contractual issue, "while the law of the case doctrine is intended to foster 'orderly convenience' . . ., it is not an absolute mandate which limits an appellate court's power to reconsider issues where there are extraordinary circumstances, 'such as subsequent evidence affecting the prior determination or a change of law'" (*Frankson v Brown & Williamson Tobacco Corp.*, 67 AD3d 213, 218 [2d Dept 2009]; *see also Foley v Roche,* 86 AD2d

887, 887 [1982], *lv denied* 56 NY2d 507 [1982] [holding that where the basis for a prior order had since been overruled by the Supreme Court of the United States and by the Court of Appeals, the law of the case doctrine can be ignored even though the prior order was from a higher court]). Here, the United States Supreme Court's decision in *Kokesh,* characterizing SEC disgorgement as a penalty, represents such a change of law.

In reinstating the complaint, the Court of Appeals stated that "at this CPLR 3211 stage, the documentary evidence does not decisively repudiate Bear Stearns' allegation that the SEC disgorgement payment amount was calculated in large measure on the profits of others" (21 NY3d at 336). By this ruling, the Court suggested that, while public policy bars insurance coverage for the disgorgement of illicit gains, it does not preclude recovery of a disgorgement payment to the extent the payment was based on the gains of third parties. In adopting this view, the Court stated:

> "Moreover, the cases upon which the Insurers rely are distinguishable (*see e.g. Millennium Partners, L.P. v Select Ins. Co.*, 68 AD3d 420 [1st Dept 2009], *appeal dismissed* 14 NY3d 856 [2010]; *Credit Suisse*, 10 AD3d at 528). In each, the insured was barred from obtaining coverage for SEC-ordered disgorgement because the SEC's findings 'conclusively link[ed]' the disgorgement payment to improperly acquired funds in the hands of the insured (*Millennium Partners*, 68 AD3d at 420 [internal quotation marks omitted]; *see also Credit Suisse*, 10 AD3d at 529). In other words, they directly

> implicated the policy rationale for precluding indemnity for disgorgement—to prevent the unjust enrichment of the insured by allowing it to, in effect, retain the ill-gotten gains by transferring the loss to its carrier. In this case, in contrast, Bear Stearns alleges that it is not pursuing recoupment for the turnover of its own improperly acquired profits and, therefore, it would not be unjustly enriched by securing indemnity. The Insurers have not identified a single precedent, from New York or otherwise, in which coverage was prohibited where, as Bear Stearns claims, the disgorgement payment was (at least in large part) linked to gains that went to others. Consequently, at this early juncture, we conclude that the Insurers are not entitled to dismissal of Bear Stearns' insurance claims related to the SEC disgorgement payment" (21 NY3d at 337).

However, *Kokesh* has now provided the missing precedent, establishing that disgorgement is a penalty, whether it is linked to the wrongdoer's gains or gains that went to others. In *Kokesh,* the Supreme Court, emphasizing that when a sanction "can only be explained as . . . serving either retributive or deterrent purposes," it is a "punishment," rejected the SEC's argument that disgorgement is remedial because it simply puts the defendant back in the position "he would have occupied had he not broken the law." The Court explained:

> "The Government's primary response to all of this is that SEC disgorgement is not punitive but 'remedial' in that it 'lessen[s] the effects of a violation' by '"restor[ing] the status quo."' . . . As an initial matter, it is not clear that disgorgement, as courts have applied it in the SEC enforcement context, simply returns the defendant to the place he would have occupied had he not broken the law. *SEC disgorgement sometimes exceeds the profits gained as a result of the*

> *violation. Thus, for example, 'an insider trader may be ordered to disgorge not only the unlawful gains that accrue to the wrongdoer directly, but also the benefit that accrues to third parties whose gains can be attributed to the wrongdoer's conduct.' SEC v. Contorinis, 743 F.3d 296, 302 (C.A.2 2014). Individuals who illegally provide confidential trading information have been forced to disgorge profits gained by individuals who received and traded based on that information—even though they never received any profits. Ibid.; see also SEC v. Warde, 151 F.3d 42, 49 (C.A.2 1998) ('A tippee's gains are attributable to the tipper, regardless whether benefit accrues to the tipper'); SEC v. Clark, 915 F.2d 439, 454 (C.A.9 1990) ('[I]t is well settled that a tipper can be required to disgorge his tippees' profits').* And, as demonstrated by this case, SEC disgorgement sometimes is ordered without consideration of a defendant's expenses that reduced the amount of illegal profit. App. to Pet. for Cert. 43a; see Restatement (Third) § 51, Comment h, at 216 ("As a general rule, the defendant is entitled to a deduction for all marginal costs incurred in producing the revenues that are subject to disgorgement. Denial of an otherwise appropriate deduction, by making the defendant liable in excess of net gains, results in a punitive sanction that the law of restitution normally attempts to avoid'). In such cases, disgorgement does not simply restore the status quo; it leaves the defendant worse off. The justification for this practice given by the court below demonstrates that disgorgement in this context is a punitive, rather than a remedial, sanction: Disgorgement, that court explained, is intended not only to 'prevent the wrongdoer's unjust enrichment" but also "to deter others' violations of the securities laws.' App. to Pet. for Cert. 43a." (137 S Ct at 1644-1645 [emphasis added]).

The United States Supreme Court has thereby made clear that SEC disgorgement is a penalty because it punishes a public wrong, and its purpose is deterrence, whether you are remitting your own ill gotten gains or those you generated for your customers

through violations of the securities law, even if you did not directly share in those profits.

Kokesh has significance beyond the narrow issue of the statute of limitations because the Supreme Court analyzed the fundamental nature and purpose of the SEC's disgorgement remedy, which does not change into some different nature for purposes of insurance coverage. Thus, as defendants argue, *Kokesh* and the longstanding legal principles on which it relied fatally undermine the motion court's holding that the $140 million of the SEC disgorgement remedy that plaintiff seeks to recover is a covered loss under the policies. Indeed, if the $140 million portion of the disgorgement payment Bear Stearns seeks to recover reflects the gains of Bear Stearns's customers rather than of Bear Stearns itself, it makes it more, not less, of a penalty.

The fact that the disgorgement payment was later placed in a Fair Fund for distribution and could be used to offset Bear Stearns's civil liability does not require a different result. The use of disgorged funds to benefit investors is entirely consistent with the SEC's statutory authority, and "does not change the nature of the remedy" (*SEC v First Pacific Bancorp.*, 142 F3d 1186, 1192 [9th Cir 1998], *cert denied* 525 US 1121 [1999]). As the Supreme Court stated in *Kokesh*, simply because "sanctions frequently serve more than one purpose" does not

change the fact that disgorgement orders “are intended to punish” and “represent a penalty” (137 S Ct at 1645; *see also Fishbach Corp.*, 133 F3d 170, 175 [2d Cir 1997] [“Although disgorged funds may often go to compensate securities fraud victims for their losses, such compensation is distinctly a secondary goal”]).

Accordingly, the judgment of the Supreme Court, New York County (Charles Ramos, J.), entered August 14, 2017, awarding plaintiffs sums of money, including prejudgment of the interest, as against defendant insurers Vigilant Insurance Company, The Travelers Indemnity Company, Federal Insurance Company, National Union Fire Insurance Company of Pittsburgh, Pa., and Liberty Mutual Insurance Company, should be reversed, on the law, without costs, plaintiffs’ motion for summary judgment denied, defendants' motions for summary judgment declaring that plaintiffs are not entitled to coverage for the SEC disgorgement payment granted, and it is so declared. The appeals from the order of the same court and Justice, entered April 17, 2017, as amended by the order of the same court and justice entered on or about August 11, 2017, should be dismissed, without costs, as subsumed in the appeals from the judgment.

All concur.

Judgment, Supreme Court, New York County (Charles Ramos, J.), entered August 14, 2017, reversed, on the law, without costs, plaintiffs' motion for summary judgment denied, defendants' motions for summary judgment declaring that plaintiffs are not entitled to coverage for the SEC disgorgement payment granted, and it is so declared. Appeals from order, same court and Justice, entered April 17, 2017, as amended by order, same court and Justice, entered on or about August 11, 2017, dismissed, without costs, as subsumed in the appeals from the judgment.

Opinion by Andrias, J. All concur.

Sweeny, J.P., Richter, Andrias, Kahn, JJ.

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

ENTERED: SEPTEMBER 20, 2018

CLERK