Renwick, J.P., Oing, Singh, Moulton, JJ.

11381 The People of the State of New York, Ind. 2797/15
Respondent,

-against-

Arthur Collins,
Defendant-Appellant.

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Christina A. Swarns, Office of the Appellate Defender, New York (Margaret E. Knight of counsel), for appellant.

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

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Appeal from judgment, Supreme Court, New York County (Mark Dwyer, J.), rendered May 18, 2017, convicting defendant, after a jury trial, of criminal possession of a controlled substance in the fourth degree and escape in the second degree, and sentencing him to an aggregate term of three years, held in abeyance, and the matter remanded to Supreme Court for determination, based upon the evidence presented at the suppression hearing, of the issues raised at the hearing but not determined therein.

On July 24, 2015, two officers were driving in a police car when they received a radio report of a "trespassing in progress" at 1976 Madison Avenue. The officers drove to that address, which was an apartment building. The manager of the building pointed out defendant as the one who had been trespassing. When an officer asked defendant if they could talk to him, defendant continued walking past the officers. The officer told him to "stop," but defendant cursed at him and ran down the block. The

officers chased and caught him, and at one point they all went to the ground. The officers handcuffed defendant.

The officers testified at the hearing that they then "frisked" defendant for weapons "for [their] safety". They patted down his pockets and his "string [k]nap-sack[]" or drawstring bag. When one of the officers patted the bag, he felt a hard object inside. He looked inside and saw a box marked "9-millimeter." The officer pulled out the box, opened it, and saw a round cylindrical object, which he believed was a firearm silencer. A ballistics report later revealed that the object was a "non weapon" barrel extender, which was lawful to possess.

After being driven to the precinct, the officers searched defendant in order to look for weapons or contraband, and to conduct an inventory search for safekeeping of his property. They recovered from his pockets a tin of Altoids containing marijuana, a vitamin bottle with aluminum wraps of crack-cocaine, paper twists of heroin, and a small ziplock bag of cocaine. The officers then placed defendant in a holding cell. Later that evening, when an officer checked the cell, he discovered that defendant was missing. On July 27, 2015, defendant surrendered to a court officer.

Before trial, defense counsel orally moved to suppress the barrel extender and drugs. Defense counsel argued that there was no search warrant, nor were there exigent circumstances for the search.

Supreme Court found that the officers had probable cause to arrest defendant. The court concluded that since defendant's arrest was lawful, "the search incident to the arrest that uncovered the disputed evidence was legal as well."

Initially, we agree with Supreme Court that the police had probable cause to arrest defendant for criminal trespass. On appeal, the People, citing to *People v Gokey* (60 NY2d 309, 312 [1983]) argue that the police search of defendant's drawstring bag was reasonable because there were exigent circumstances. However, Supreme Court did not rule on this issue in denying the suppression motion. Therefore, Supreme Court did not rule adversely against defendant on this point and we may not reach it on this appeal (*People v Harris*, 35 NY3d 1010 [2020]; *see also, People v Vinson*, 161 AD3d 493, 494 [2018]). Accordingly, we hold the appeal in abeyance and remand for determination, based on the hearing minutes, of the issue raised at the hearing, but not decided. At this stage of the appeal, we do not address defendant's remaining contentions.

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

ENTERED: AUGUST 13, 2020

CLERK

Friedman, J.P., Gische, Webber, Gesmer, Oing, JJ.

11570 The People of the State of New York, Ind. 158/15
Respondent,

-against-

German Gomez,
Defendant-Appellant.

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

Darcel D. Clark, District Attorney, Bronx (Christopher Michael Pederson of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Raymond L. Bruce, J.), rendered October 3, 2016, convicting defendant, upon his plea of guilty, of attempted criminal possession of a weapon in the second degree, and sentencing him to a term of two years, affirmed.

Defendant's claim of ineffective assistance of counsel is not reviewable on direct appeal, because the existing record does not make "irrefutably" clear "that a right to counsel violation has occurred" (*People v McLean*, 15 NY3d 117, 121 [2010]). Specifically, the existing record does not reveal the advice concerning the immigration consequences of the plea that defendant actually received from his trial counsel. Rather, the record reflects only counsel's representation to the court that he had discussed all "possible consequences" with defendant, counsel's refusal of the court's offer of additional time to research the plea's immigration consequences, and counsel's

assurance to the court that "[w]e've looked into everything." Without further development of the record by way of a CPL 440.10 motion, it cannot be determined exactly what discussions were had with defendant regarding the immigration consequences of his plea, including whether counsel mis-advised defendant.

Contrary to defendant's argument, his trial counsel's general representations to the court that defendant had been advised of "all possible consequences" of the plea and that "[w]e've looked into everything" do not establish, under binding precedent of the Court of Appeals, that counsel failed to advise defendant that he would be subject to mandatory deportation based on this plea. The Court of Appeals has held repeatedly that

> "the lack of an adequate record bars review on direct appeal not only where vital evidence is plainly absent . . . but wherever the record falls short of establishing conclusively the merit of the defendant's claim . . . . Thus where the record does not *make clear, irrefutably*, that a right to counsel violation has occurred, the claimed violation can be reviewed only on a post-trial motion under CPL 440.10, not on direct appeal" (*McLean*, 15 NY3d at 121 [emphasis added]).

Cases in which the record on direct appeal affords irrefutable proof of counsel's ineffectiveness are "exception[al]" (*People v Nesbitt*, 20 NY3d 1080, 1082 [2013]; *see also People v Bell*, 48 NY2d 933, 934 [1979] [the record on direct appeal "establishes beyond peradventure . . . clear ineffectiveness of counsel"]).

Only a few weeks ago, the Court of Appeals, in holding that a CPL 440.10 motion was required to create a record to support the defendant's claim that he had received ineffective assistance

of counsel, reiterated the principle that review of an ineffectiveness claim on direct appeal requires a record that establishes an irrefutable basis for the claim:

> "Generally, the ineffectiveness of counsel is not demonstrable on the main record but rather requires consideration of factual issues not adequately reflected on that record. By codifying the writ of error coram nobis in CPL article 440, the Legislature crafted a procedure for such scenarios. To that end, article 440 permits defendants to complete the record by putting forth sworn factual allegations in support of a motion to vacate the judgment of conviction and authorizes evidentiary hearings on those motions (CPL 440.10, 440.30), thereby providing a vehicle specifically for the investigation of claims dependent on matters dehors the direct record. Such investigations are vital to a defendant's claim when the record on direct appeal is inadequate to permit the reviewing court to determine whether there was an error that deprived the defendant of the constitutional right to a fair trial. Thus, although there may be some cases in which the trial record is sufficient to permit a defendant to bring an ineffective assistance of counsel claim on direct appeal, in the typical case it would be better, and in some cases essential, that an appellate attack on the effectiveness of counsel be bottomed on an evidentiary exploration by collateral or post-conviction proceeding brought under CPL 440.10" (*People v Maffei* __ NY3d __, 2020 NY Slip Op 02680, *3 [2020] [citations and internal quotation marks omitted]).

In *Maffei*, these principles led the Court of Appeals to reject, as unreviewable on direct appeal, the defendant's claim that his trial counsel had been ineffective in failing to challenge the seating of a juror. The voir dire record in that case showed that the juror in question had stated that he had "[k]ind of made up [his] mind" about the case based on pretrial publicity. Moreover, the same juror had equivocally answered, "I hope so," when asked by the court whether he could consider the

evidence fairly and impartially. Nonetheless, the Court of Appeals held that the *Maffei* defendant's ineffectiveness claim could be asserted only through a CPL 440.10 motion.

In this case, the premise of defendant's ineffectiveness claim is that his trial counsel failed to advise him, as required by *Padilla v Kentucky* (559 US 356 [2010]), that the plea deal that the People were offering him (and that he ultimately accepted) would subject him to mandatory deportation under federal law. As evidence of this alleged ineffectiveness, defendant points only to his counsel's representations to the court at the plea hearing that he had reviewed with defendant "all possible consequences" of the plea for defendant's immigration status and that "[w]e've looked into everything" in that regard. Obviously, these statements do not disclose or describe the advice that defendant actually received. Rather, the claim seems to be that the reference to "all possible consequences" of the plea was inconsistent with the fact that a plea of guilty to the offense to which defendant allocuted (which federal immigration law classifies as an aggravated felony) ostensibly would render him subject to mandatory deportation.[1]

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[1]It bears noting that defendant's plea would not have barred him from seeking to avoid deportation on certain grounds. Under 8 USC § 1231(b)(3)(A), removal of a non-citizen may be restricted if his or her "life or freedom would be threatened in [his or her] country [of origin] because of . . . race, religion, nationality, membership in a particular social group, or political opinion." In our case, defendant's plea to an aggravated felony is not a bar to this form of discretionary relief, because he was sentenced to less than 5 years in prison

Based on this logic, defendant argues that, to establish a *Padilla* violation, he need not make a CPL 440.10 motion supported by direct evidence of the immigration advice he received. We are not persuaded by this argument.

"Where a defendant's complaint about counsel is predicated on factors such as counsel's strategy, *advice* or preparation that do not appear on the face of the record, the defendant must raise his or her claim via a CPL 440.10 motion" (*People v Peque*, 22 NY3d 168, 202 [2013] [emphasis added]). This principle fully applies to claims of ineffectiveness based on alleged *Padilla* violations, as illustrated by the Court of Appeals' rejection of the defendant's attempt to raise a *Padilla* claim on direct appeal in *Peque* (*see id.* ["it was incumbent on defendant to substantiate his allegations about counsel's (immigration) advice below by filing a CPL 440.10 motion, and his failure to file a

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(*see* 8 USC § 1231[b][3][B] [providing that a non-citizen's conviction of an aggravated felony for which the term of imprisonment is at least five years is statutorily ineligible for withholding of removal]). In addition, a non-citizen may apply for relief under the Convention Against Torture (CAT) (8 CFR 1208.16 [CAT withholding]; 8 CFR 1208.17 [CAT deferral]), which is available regardless of whether such applicant has been convicted of an aggravated felony (*see Moncrieffe v Holder*, 569 US 184, 187 n 1 [2013] ["the Attorney General has no discretion to deny relief to a noncitizen who establishes his eligibility (under the CAT). A conviction of an aggravated felony has no effect on CAT eligibility"]). The present record does not disclose whether defendant would have qualified for relief under either of these provisions. These potential avenues of relief, while they certainly would not excuse counsel from advising defendant of the "mandatory" deportation that would likely result from the plea, may well indicate what counsel had in mind when he referred in the plural to the plea's "possible consequences."

postjudgment motion renders his claim unreviewable"]; *see also People v Haffiz*, 19 NY3d 883, 885 [2012]).

We do not agree with defendant's attempt to exempt himself from the necessity of making a CPL 440.10 motion based on his counsel's statements at the plea hearing concerning the off-the-record advice concerning immigration that had been rendered. To reiterate, counsel's statements to the court, on their face, are general in nature and do not purport to describe the contents of the immigration advice that defendant actually received. The statement that defendant had been advised of "all possible consequences" was consistent both with accurate advice that the plea would subject him to mandatory deportation and with inaccurate advice that failed to warn him of that consequence. We cannot, on this record, tell whether the advice actually given was accurate or inaccurate. Certainly, it cannot be said that counsel's statement establishes "irrefutably" (*McLean*, 15 NY3d at 121) that the advice given was inaccurate, as is required to render a CPL 440.10 motion unnecessary. If the requirement of such a motion were so easily avoided, the troubling on-the-record answers of the juror in *Maffei* surely would have sufficed to establish ineffectiveness; yet the Court of Appeals held otherwise. The same result is required here.[2]

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[2]We are bound by the Court of Appeals' holding that an ineffectiveness claim is reviewable upon direct appeal only where the existing record establishes the claim "irrefutably" (*McLean*, 15 NY3d at 121), regardless of any inconsistency with this principle that may appear in the decisions of this Court upon

As defendant does not raise any issues reviewable on direct appeal, we affirm the conviction.

All concur except Gische, J. and Gesmer, J. who dissent in a memorandum by Gesmer, J. as follows:

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which the dissent relies. We are not persuaded by the dissent's efforts to distinguish two of the Court of Appeals decisions (*Maffei* and *Peque*) on which we rely. The basis on which the dissent seeks to distinguish each of those decisions is that here, counsel's on-the-record statements to the court "irrefutably demonstrate[]" that counsel gave defendant inaccurate advice about the consequences of the plea. For the reasons already discussed, those statements do not, in our view, demonstrate — irrefutably or otherwise — that counsel gave defendant ineffective pre-plea advice.

GESMER, J. (dissenting)

I respectfully dissent. Our precedents require that we reverse, hold defendant's conviction in abeyance, and remit the matter to allow defendant the opportunity to move to vacate his plea upon a showing that there is a reasonable probability that he would not have pleaded guilty had counsel made him aware of the deportation consequences of his plea (*People v Disla*, 173 AD3d 555 [1st Dept 2019]; *People v Johnson*, 177 AD3d 484 [1st Dept 2019]; *People v Johnson*, 165 AD3d 556 [1st Dept 2018]; *People v Rodriguez*, 165 AD3d 546 [1st Dept 2018]; *People v Pequero*, 158 AD3d 421 [1st Dept 2018]; *People v Doumbia*, 153 AD3d 1139 [1st Dept 2017]).

At issue is whether the existing record sufficiently demonstrates that defendant was deprived of ineffective assistance of counsel. At defendant's plea hearing, the following colloquy took place:

> THE COURT: I'm also obligated to explain to you that, if you're not a US citizen, you could subject yourself to the following set of circumstances: You could be subject to deportation just because you're not a US citizen, you could lose your right to receive naturalization papers and or, if you were to leave the Country, you could be denied reentry, do you understand what the Court is saying?
>
> THE DEFENDANT: Yes.
>
> THE COURT: [Counsel], do we have any Padilla issues here?
>
> THE [COUNSEL]: I believe - I've spoken to for [sic] [defendant] about all possible consequences.

THE COURT: Possible consequences?

THE [COUNSEL]: Yes.

THE COURT: The Court is prepared to give you more time to research on the outcome here, if you want more time.

THE [COUNSEL]: We've looked into everything, Your Honor. Thank you.

THE COURT: All right. You want to continue with this guilty plea colloquy?

THE [COUNSEL]: Yes.

Defendant then pleaded guilty to attempted criminal possession of a weapon in the second degree (Penal Law §§ 110.00; 265.03[3]), which is considered an "aggravated felony" for immigration purposes (*see* 8 USC § 1101[a][43][E][ii]; 18 USC § 922[g][5][A]). This subjected defendant, a non-U.S. citizen, to mandatory deportation (8 USC § 1227[a][2][A][iii]; *see also People v Corporan*, 135 AD3d 485, 485 [1st Dept 2016][a "plea of guilty to an aggravated felony trigger[s] mandatory deportation under federal law"]). He was also subjected to mandatory immigration detention and mandatory elimination of certain immigration defenses (8 USC § 1226[c][1][B]; 8 USC § 1229b[b][1][B],[C]).

Thus, under federal law, by pleading guilty, defendant subjected himself to the virtual certainty of mandatory deportation (*see People v Peque*, 22 NY3d 168, 191 [2013] ["deportation is a virtually automatic result of a New York

felony conviction for nearly every noncitizen defendant"]).[1] Consequently, defendant's counsel was obligated to inform him of the clear immigration consequences of his guilty plea (*see Padilla v Kentucky*, 559 US 356, 369 [2010] ["when the deportation consequence is truly clear . . . , the duty to give correct advice is equally clear"].

We have consistently held that counsel's representations to the court about counsel's immigration advice to his or her client provides a sufficient basis to determine if that advice is correct (*People v Disla*, 173 AD3d at 556; *People v Johnson*, 177 AD3d at 485; *People v Johnson*, 165 AD3d at 557; *People v Rodriguez*, 165 AD3d at 546; *People v Pequero*, 158 AD3d at 422; *People v Doumbia*, 153 AD3d at 1139). We have further repeatedly held that immigration advice that speaks in terms of possibilities when deportation is a virtual certainty is misadvice supporting an ineffective assistance of counsel finding (*People v Disla*, 173 AD3d at 556; *People v Johnson*, 177 AD3d at 485; *People v Johnson*, 165 AD3d at 557; *People v Rodriguez*, 165 AD3d at 546; *People v Pequero*, 158 AD3d at 422; *People v Doumbia*, 153 AD3d at 1139).

In this case, the immigration consequences that faced defendant as a result of his guilty plea were not "possible" but

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[1] In addition, because of his "aggravated felony" conviction, defendant is ineligible both for asylum (8 USC § 1158[b][2][B][i]) and cancellation of his removal by the Attorney General (8 USC § 1229b[b][1][C]).

virtually certain. Therefore, counsel's statement that he described to defendant "all possible consequences" makes clear that he inaccurately conveyed to defendant the immigration consequences of his plea.[2] In fact, had counsel properly "looked into everything," as he claimed he had done, he would have represented to the court that he advised defendant that he faced mandatory deportation, not "all possible consequences," by pleading guilty. Thus, counsel's on-the-record error "irrefutably" demonstrates that his services were ineffective (*People v McLean*, 15 NY3d 117, 121 [2010]). To find otherwise is to cast aside this Court's own precedent.

The cases cited by the majority are distinguishable and do not support the majority's argument. In *People v Maffei*, __ NY3d __, 2020 NY Slip Op 02680 [2020], the defendant sought review on direct appeal of his claim that his counsel was ineffective for failing to challenge the seating of an allegedly biased juror.

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[2]The majority states in a footnote that defendant's plea might not bar him from pursuing certain narrow grounds for deportation relief. We agree. However, our precedent does not turn on there being absolute certainty that defendant will be deported, but rather whether the deportation is "mandatory" (*People v Disla*, 173 AD3d at 556; *People v Johnson*, 177 AD3d at 485; *People v Johnson*, 165 AD3d at 557; *People v Rodriguez*, 165 AD3d at 546; *People v Pequero*, 158 AD3d at 422) or "a virtual certainty" (*People v Doumbia*, 153 AD3d at 1140). Where a defendant is subject to mandatory deportation, if "defense counsel only ha[d] a duty to inform a noncitizen that there is a risk or possibility that he or she may be deported[,] [s]uch a standard would not only seriously undermine the Sixth Amendment protection to which noncitizen defendants are entitled, but would also conflict with the concept of a truly informed plea agreement" (*People v Doumbia*, 153 AD3d at 1140, citing *Padilla*, 559 US at 373-374).

The Court held that the defendant could not sustain his burden based on the voir dire record alone because it did not reveal the reasons for counsel's decisions, which could "be based on a myriad of factors" outside the record (*id.* at *3), such as "additional statements [made] by the prospective juror" (*id.*), or "what was said between defendant and his counsel or how that conversation may have affected counsel's impression of [the] prospective juror" (*id.* at *4). Thus, the Court held that an "evidentiary exploration" is "especially" appropriate where effectiveness of counsel is based on the defense's acceptance of a prospective juror (*id.* at *3). In contrast, the instant appeal involves a relatively straightforward analysis of an ineffective assistance claim based on a *Padilla* violation, which turns on a single question: did counsel provide clear and accurate advice to defendant regarding his immigration consequences? The record irrefutably demonstrates that he did not, and there are no other matters outside the record that need be examined.

The majority's citation to *People v Peque*, (22 NY3d 168 [2013]) is equally irrelevant. The majority cited to that portion of the opinion in which the Court of Appeals held that defendant Peque could only raise ineffectiveness of counsel by means of a 440 motion because statements made by his counsel on the record at sentencing directly contradicted defendant's complaints about counsel's performance. Therefore, defendant's claim required a factual hearing. In the case at bar, nothing in

the sentencing record contradicts defendant's claim that his counsel was ineffective. Accordingly, the majority's reliance on that case is inapposite.

Finally, the majority fails to explain why the case before us is not governed by the many previous cases from this Court in which we held that we can review and grant an ineffective assistance claim when counsel represented to the plea or sentencing court that he or she advised the defendant as to the possible immigration consequences of the plea when, in fact, the defendant faced mandatory deportation (*People v Disla*, 173 AD3d at 556; *People v Johnson*, 177 AD3d at 485; *People v Johnson*, 165 AD3d at 557; *People v Rodriguez*, 165 AD3d at 546; *People v Pequero*, 158 AD3d at 422; *People v Doumbia*, 153 AD3d at 1139).

Accordingly, I would reverse, because the record makes irrefutably clear that counsel failed to convey to defendant that his deportation was mandatory.

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

ENTERED: AUGUST 13, 2020

CLERK

Manzanet-Daniels, J.P., Gische, Kern, Oing, González, JJ.

11765 The People of the State of New York, Ind. 1139/14
Respondent,

-against-

Lamont Macon,
Defendant-Appellant.

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Christina A. Swarns, Office of the Appellate Defender, New York (Emma L. Shreefter of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Jennifer L. Watson of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Lester B. Adler, J.), rendered June 7, 2016, convicting defendant, after a jury trial, of assault in the second degree, and sentencing him, as a second violent felony offender, to a term of five years, unanimously affirmed.

Defendant allegedly stabbed the mother of his two children, her daughter and her cousin. Defendant was charged, inter alia, with three counts of attempted second-degree murder, two counts of second-degree assault and one count of first-degree assault. The jury acquitted defendant of every charge except one count of second-degree assault, a lesser included offense.

On appeal, defendant challenges the court's instructions and the verdict sheet on the ground that they failed to convey that an acquittal on the top count based on a justification defense necessitated an acquittal of the lesser count.

Where justification is a central issue at trial, the court's

instructions, as a whole, must convey that acquittal of a greater charge precludes consideration of lesser offenses that are based on the same conduct (*People v Velez*, 131 AD3d 129, 130 [1st Dept 2015]). In other words, if a jury finds a defendant not guilty of the top count on a justification defense, deliberations should cease.

The trial court charged the jury, stating in pertinent part, "(I)f you find the defendant not guilty of count two, attempt to commit the crime of Murder in the Second Degree . . . because the People have failed to prove beyond a reasonable doubt that the defendant was not justified, then don't deliberate on count three.[1] You must record a not guilty verdict on count three . . . . If you find the defendant not guilty under count two for some other reason than the lack of justification . . . then proceed to consider and render a verdict on count three." The court's initial instruction, which it repeated on more than one occasion, is consistent with *Velez*. Defendant made no objection to the instructions.

On appeal, defendant contends that his conviction on the lesser count of second-degree assault must be vacated since the verdict sheet made no mention of justification. Verdict sheets in criminal cases, however, may not include substantive instructions absent authorization by CPL 310.20(2) (*People v*

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[1] Counts two and three pertained to the mother of defendant's children. Count two was attempted second-degree murder and count three was second-degree assault.

Miller, 18 NY3d 704, 706 [2012]). Here, defense counsel made no objections when the verdict sheet was reviewed and discussed by the court with the parties.

In prior cases, we reversed convictions in the interest of justice where defendants interposed no objections to jury instructions that failed to comply with *Velez*, even though the claim was unpreserved (*People v Hop Wah*, 171 AD3d 574 [2019]). In *People v Davis* (176 AD3d 634 [2019], *lv denied* 34 NY3d 1157 [2020]), we changed course. The jury in that case similarly found defendant not guilty of the top count, but guilty of the lesser count. Although defendant interposed no objections to the verdict sheet or the jury instructions that were given, defendant appealed on the basis that both the initial and supplemental charges and the verdict sheet did not comply with *Velez*. We "decline[d] to exercise our interest of justice jurisdiction to review these unpreserved claims" (*People v Davis*, 176 AD3d at 635).

Davis is applicable here. The defendant, although afforded multiple opportunities during the two-and-a-half to three-day

charge conference, during trial and prior to deliberations, interposed no objections, and thus, failed to preserve his claims. The judgment is accordingly affirmed.

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

ENTERED: AUGUST 13, 2020

CLERK

Gische, J.P., Kapnick, Webber, Kern, González, JJ.

11832 The Charles Schwab Corporation, et al., Plaintiffs-Appellants, Index 654674/18

-against-

The Goldman Sachs Group, Inc., et al., Defendants-Respondents.

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Friedman Kaplan Seiler & Adelman LLP, New York (Robert S. Smith of counsel), for The Charles Schwab Corporation and Charles Schwab & Co., Inc., appellants.

Kaplan Rice LLP, New York (Howard J. Kaplan of counsel), for TD Ameritrade Holding Corporation, TD Ameritrade Online Holdings Corporation and TD Ameritrade, Inc., appellants.

Cleary Gottlieb Steen & Hamilton LLP, New York (Thomas J. Moloney of counsel), for respondents.

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Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered June 21, 2019, which granted defendants' motion to dismiss the complaint, unanimously reversed, on the law, with costs, and the amended complaint reinstated.

In 1999, plaintiffs, a number of retail brokerage firms, established Epoch, an online investment bank company. Plaintiffs established Epoch in an effort to facilitate the sale of newly-issued securities directly to their customers. Epoch had a distribution agreement with plaintiffs, providing that plaintiffs and their retail customers would be able to participate in Epoch's securities offerings. This distribution agreement did not have a set term, but was terminable upon the happening of certain events that included a change in control in any of the

plaintiffs.

The Goldman Sachs Group, Inc. and Goldman Sachs & Co. LLC (together, Goldman) acquired Epoch from plaintiffs in 2001. Goldman contends that it believed it was investing in a "potentially very valuable new distribution mechanism" for the online sale of securities, and paid $192 million to purchase it. In a 2001 press release, Goldman explained that through the acquisition it would "obtain the exclusive right to distribute equity offerings, including IPOs [initial public offerings], to [plaintiffs]' customers," and that those customers would "receive access to U.S. equity research from Goldman []." The press release noted that plaintiffs had nearly 10 million active accounts and approximately $1 trillion in customer assets. Finally, it summarized that Epoch would provide "exclusive access" to the "important individual investor segment through one of the largest brokerage networks in the United States."

At the time of the acquisition, Goldman and plaintiffs negotiated changes to Epoch's original distribution agreement, which led to the Amended and Restated Distribution Agreement being executed by plaintiffs, Goldman and Epoch on June 12, 2001 (the distribution agreement). The distribution agreement provided, among other things, that Goldman would "invite through Epoch each of the [plaintiffs] to participate in Offerings on the terms set forth herein." The agreement provided for the allocation to plaintiffs of 15% of Goldman's "Fee Retention" in

oversubscribed public offerings, among other things.

It is undisputed that the distribution agreement had no expiration date. Goldman also entered into several other agreements with some of the plaintiffs at the time of the acquisition. While the distribution agreement provided for an "Exclusive Period" during which the parties were bound to work together, this exclusivity period expired on December 15, 2007. Goldman claims that it attempted on numerous occasions to reach a consensual termination of the distribution agreement starting as early as March of 2008, but that no consensual agreement could be reached. The distribution agreement has thus essentially operated as a one-way "option" contract in plaintiffs' favor since 2007.

According to the complaint, Goldman continued to benefit from Epoch, even after the exclusive period expired, in light of the access it granted to individual investors interested in IPOs and secondary public offerings (SPOs). Plaintiffs contend that Goldman was able to promote access to such investors when competing for appointments as lead managing underwriter on IPOs and SPOs, and received a higher dealer concession than it otherwise would have in light of its ability to guarantee allocations. Further, when an offering was undersubscribed, the purchases from plaintiffs' customers helped Goldman to fill the inventory of shares to be issued. They contend that orders from their customers increased the likelihood that the offering would

become oversubscribed, thus allowing Goldman to invoke an over-allotment option to earn additional fees.

In or around 2013, Goldman moved its distribution of IPO shares in-house to its own investment banking arm, rather than continuing to do so through Epoch. At that time, Goldman repurposed Epoch as an underwriter for its insurance and reinsurance businesses and sold the system as part of a spin-off. Plaintiffs contend that Goldman has never claimed that this event affected its obligations under the distribution agreement. In February of 2013, Goldman, Epoch and plaintiffs executed an Assignment, Assumption and Release Agreement (the assignment agreement) through which Goldman reaffirmed the distribution agreement. In April 2018, Goldman's counsel sent plaintiffs a letter stating that it was providing 90 days notice of Goldman's termination of the distribution agreement.

Plaintiffs commenced this action through the filing and serving of a summons and complaint and a proposed order to show cause requesting an application for a preliminary injunction and a temporary restraining order (TRO). The court denied the TRO and declined to hear argument on the preliminary injunction finding, inter alia, that the distribution agreement had no term of duration and was not a contract in perpetuity. With the denial, Goldman discontinued allocating shares to plaintiffs under the distribution agreement.

Plaintiffs filed a first amended complaint shortly

thereafter, alleging breach of contract and an additional claim for declaratory judgment and specific performance. The amended complaint continued to allege that the distribution agreement should last for so long as Goldman was a lead underwriter and bookrunner. In October of 2018, Goldman moved to dismiss, pursuant to CPLR 3211(a)(1) and (a)(7), arguing that (1) because "distribution" agreements with no specified term are "terminable at will" Goldman was entitled to terminate the agreement, and (2) even if the distribution agreement was not so, it continued, at most, for a reasonable term that had long since passed after Goldman stopped receiving a mutual contractual benefit.

The court rejected plaintiffs' allegations of continued benefit to Goldman, finding that the "alleged benefit is merely access to customers, and thus, the ability to sell more shares." It found that the distribution agreement had expired after a reasonable term, at latest when the court denied the motion for a TRO and preliminary injunction in September of 2018.

Plaintiffs contend that the order appealed from should be reversed and the amended complaint reinstated. We agree.

The motion court incorrectly determined as a matter of law that the distribution agreement at issue, which was silent as to duration and had provided defendants with no meaningful contractual benefits since 2007, had continued for a "reasonable time" (*Haines v City of New York*, 41 NY2d 769, 772 [1977]) and that therefore it was properly terminated by defendants. It

incorrectly concluded that it would be "unreasonable for a one-way option to persist so many years after a significant benefit accrues to the defendants."

In *Haines*, New York City agreed to construct and maintain a sewage disposal plant in an area where a reservoir from which the city received water was located. The agreement, entered into in 1924, was prompted by health and safety concerns, namely the city's "need and desire to prevent the discharge of untreated sewage" into a nearby creek that fed the reservoir (*id.* at 770). The agreement did not set a time limit for the city's maintenance obligation. An action was brought against the city in the mid-seventies, some fifty years after the agreement was entered into, and despite the lengthy passage of time the Court of Appeals held that the agreement was still enforceable.

The *Haines* Court rejected both the plaintiff's argument that the agreement's silence as to duration rendered it a perpetual contract, as well as the city's argument that the agreement was terminable at will. Instead, the Court held that, as a general rule, a contract that is silent as to duration will continue for a "reasonable time" (*id.* at 772). The Court further noted that in the absence of an express duration period, courts "may" inquire into the intent of the parties in order to supply the missing term if it may be "fairly and reasonably fixed by the surrounding circumstances and the parties' intent."

Here, Supreme Court failed to examine the surrounding

circumstances as well as the intent of the parties in discerning the original intent of the parties (*Haines* at 772). It improperly determined, as a matter of law, that a "reasonable time" justifying termination of the contract had elapsed and plaintiffs had not made any persuasive arguments to the contrary. In doing so, it relied upon its conclusion that Goldman was no longer receiving a meaningful benefit from the agreement, thus rejecting out of hand plaintiff's allegations in the amended complaint to the contrary.

As this is a motion to dismiss pursuant to CPLR 3211(a)(7), Supreme Court should have afforded the pleadings a liberal construction (*see* CPLR 3026), taken the allegations of the complaint as true, and afforded plaintiff[s] the benefit of every possible favorable inference. A motion court must only determine whether the facts as alleged fit within any cognizable legal theory (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). Whether a plaintiff can ultimately establish its allegations should not be considered in determining a motion to dismiss (*see E.C. I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]). "Under CPLR 3211(a)(1), a dismissal is warranted only if the documentary

evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*Leon*, 84 NY2d at 88).

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

ENTERED: AUGUST 13, 2020

CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David Friedman, J.P.
Dianne T. Renwick
Jeffrey K. Oing
Anil C. Singh, JJ.

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Index 156196/18

_____x

In re West 58th Street Coalition, Inc., et al.,
Petitioners-Appellants,

-against-

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

Petitioners appeal from the judgment of the Supreme Court, New York County (Alexander M. Tisch, J.), entered April 29, 2019, denying the petition to annul a determination of respondents to open a shelter at 158 West 58th Street in Manhattan, and dismissing the proceeding brought pursuant to CPLR article 78.

Rivkin Radler LLP, New York (Jeremy B. Honig and Cheryl F. Korman of counsel), for appellants.

Georgia M. Pestana, Acting Corporation Counsel, New York (Barbara Graves-Poller and Aaron Bloom of counsel), for respondents.

SINGH, J.

We are asked to decide whether respondents properly permitted the opening of an employment shelter for homeless men in midtown Manhattan. We find that respondents rationally determined that the subject building is a Class A multiple dwelling in the "R-2" occupancy group which represents a continuation of a preexisting use group classification and is grandfathered from compliance with the current New York City Building Code (Administrative Code of City of N.Y. [Building Code] § 310.1). However, we conclude that petitioners have rebutted the presumption that the building as currently configured will not endanger the general safety and welfare of the public. Accordingly, we remand this matter to Supreme Court for further proceedings.

The Park Savoy Hotel

The building, formerly known as the Park Savoy Hotel located at 158 West 58th Street in Manhattan (the building), was constructed in 1910 and is nine stories tall, with a penthouse and cellar. In 1942, the Building received a permanent certificate of occupancy (CO) as a new law tenement, single room occupancy (SRO). The CO specified use of the first floor for one apartment and two doctor's offices, the second to ninth floors for 13 SRO rooms with two kitchens on each floor, and the

penthouse for one SRO room.

In violation of the CO, the Building was used as a hotel on the upper floors, with restaurants on the ground floor, from 1994 until 2014. In January 2014, the owner, respondent New Hampton, LLC filed an alteration plan with respondent New York City Department of Buildings (DOB) to convert the Building from an SRO to "transient hotel with commercial first floor." DOB rejected the plan in November 2016, and New Hampton withdrew the application in June 2018.

The Employment Shelter

Thereafter, New Hampton decided to seek permission to use the Building as a shelter. The City referred New Hampton to respondent Westhab, Inc., a nonprofit provider of housing and services for the homeless. On May 1, 2017, Westhab submitted a proposal to respondent Department of Homeless Services (DHS) to operate a shelter in the Building for 150 employed or job-seeking men. In addition to rooms, the shelter would provide residents with food, laundry services, employment services, and housing placement support.

On February 2, 2018, the City published a notice of its intention to enter into a contract with Westhab. The City held public hearings to inform the community of its plans and to hear their input. At the hearings, petitioners expressed their

opposition to the creation of a shelter in their neighborhood. They felt that the neighborhood had been singled out as "a grand social experiment"; the planned project would violate the rights of people "who work all day and pay their taxes" by reducing homeowners' property values; and that the City was putting them "in danger because you're going to put 150 people in a small area, which will increase crime and the threat of crime and danger."[1]

The New York City Building Code

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1 Specifically, petitioners noted that "the prevailing wisdom is [ ] that no neighborhood will take a shelter." They also stated that "it's inevitable that the men will be loitering on the block and blocking entrances to residential buildings and small businesses," and "[w]e deserve better than to be getting picked in a grand social experiment to make a cheap political point." They added that "it's going to degrade the neighborhood . . . and the City is going to lose money because it's undesirable to be in such a neighborhood where there's 150 homeless men." One petitioner also cried stating "I am deeply concerned for the safety of [my] three year old daughter as there are no background checks to weed out the criminals from the 150 men that would likely loiter all throughout the street . . . can I hold you responsible if one of those men harass[es] my daughter? Who will be held accountable when our store gets shoplifted . . . and when my mother-in-law gets thrown to the ground." Another noted that often the homeless population are "people with mental health issues, drug and alcohol issues who are urinating and defecating" on the street, and recounted a situation in which a homeless man in the neighborhood urinated on her and her dog. Petitioners also stated that the City is putting them "in danger because you're going to put 150 people in a small area, which will increase crime and the threat of crime and danger . . . We already have our fair share of mentally ill homeless people just creating havoc, and who are violent in their speech, and it's just scary."

The current New York City Building Code promulgated in 2008 and revised in 2014 (the current Code) supplemented the prior 1968 Building Code (the prior Code). Existing buildings are generally exempt from the provisions of the current Code unless there is substantial renovation or change in use (Administrative Code [Building Code] § 27-120).

The statute enumerates 19 categories of alterations that, under specific circumstances, require a building owner to complete renovations in accordance with the current Code, rather than earlier laws. The current Code also contains grandfathering provisions which allow buildings built prior to 2008 to remain subject to the laws applicable prior to 2008, including the Multiple Dwelling Law (Administrative Code [Building Code] §§ 28-102.4, 27-103). The applicability of the grandfathering provisions depends largely on whether any alteration work results in a change of use or occupancy group classification of a building (Administrative Code [Building Code] § 28-101.4.3[2] [whenever a building undergoes a change in use or occupancy, the building's owner must alter the fire protection system in accordance with the current Code, subject to special provisions for prior code buildings as set forth therein]). The current Code changed the names of certain occupancy groups, replacing "J-2" with the "R-2" occupancy group.

DOB's Assessment of the Building

DOB identified that under the prior Code, the Building was a tenement SRO and therefore in the "J-2" occupancy group. DOB determined that the preexisting occupancy group classification of the Building was equivalent to the "R-2" occupancy group under the current Code, as a Class A multiple dwelling nontransient "apartment hotel" (Administrative Code [Building Code] § 28-310.1.2; Multiple Dwelling Law § 4[8][a]).

DOB gathered facts to determine whether the Building's use and occupancy class would change as a result of the proposed renovations. Relying on the data DHS supplied that residents would remain in the shelter for, on average, well above 30 days, DOB determined that the Building should be classified as an "R-2" "Class A" multiple dwelling under the current Code and the Multiple Dwelling Law. DOB also classified the Building within "Use Group 2" of the Zoning Resolution (Zoning Resolution §§ 12-10, 22-10).

DOB explained that it arrived at the "R-2" classification by analyzing three other employment shelters throughout the City and concluded that the residents at these shelters were unlike residents of other DHS facilities, in part due to Westhab's residents' "unique stability" and "non-transient nature." This fact-intensive inquiry also required DOB to make a specific

assessment of the Building's history, construction, design features, its planned future use and occupancy, as well as the proposed alterations.

In December 2017, New Hampton filed another alteration plan with DOB to amend the Building's number of dwelling units and change its use and occupancy to "R-2 residential: apartment houses." On April 6, 2018, DOB approved New Hampton's plan to maintain the existing single egress from the Building, through the lobby, in conformity with Multiple Dwelling Law §§ 4 and 248. On April 24, 2018, DOB approved Westhab's December 2017 alteration plan. A work permit was issued in May 2018. That same month, DHS issued a "Negative Declaration," stating that the shelter would not generate any significant adverse environmental impact, and the City issued a "Fair Share" statement, finding that the shelter would not significantly alter the concentration of similar facilities or otherwise adversely affect the area.

Petitioners' Article 78 Challenge

On July 2, 2018, petitioners, a number of neighborhood residents and organizations, commenced this article 78 proceeding in Supreme Court. Petitioners argued that, as a shelter, the Building should have been classified in the "R-1" occupancy group under the current Code; that alterations to the Building had been performed illegally and were improperly approved by respondents;

and that the Building was dangerous and a fire trap. In support of the petition, petitioners submitted, among other things, five expert affidavits.[2]

While the proceeding was pending, on September 4, 2018, DOB issued a temporary certificate of occupancy (TCO) for the Building's cellar through fourth floors. DOB conditioned the TCO on New Hampton maintaining two certified fire guards, pending installation of additional sprinklers on each floor and confirming that the building was constructed of fireproof, noncombustible materials. DOB renewed the TCO at 90-day intervals.

Both the City of New York and Westhab served answers denying the petition's material allegations and asserting affirmative defenses. In support of its answer, the City submitted three

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[2] In brief, the experts discussed as follows: (1) Geoffrey K. Clark, an environmental geologist, asserted that the City's environmental review was deficient; (2) Robert Mascali, a former DHS Deputy Commissioner, asserted that the City's Fair Share analysis was deficient; (3) Paul G. Babaktitis, a private investigator and former New York City Police sergeant, mainly discussed anticipated security needs of the shelter; (4) Robert G. Kruper, a fire safety consultant and former captain in the FDNY, averred that the subject building was in violation of the Building and Fire Codes by only having one means of egress, was a potential fire trap, and that the subject building should have been classified as an "R-1" structure due to its transient nature; (5) Robert Skallerup, former Manhattan Borough Commissioner for DOB and a former DHS Deputy Commissioner, concurred with Kruper's findings.

expert affidavits.[3] Westhab also submitted one expert affidavit detailing Westhab's fire safety and security plans.

Supreme Court denied the petition in its entirety and dismissed the proceeding. The court found that there was a rational basis for respondents' decision to open a shelter in the Building and to classify it as an "R-2" under the applicable laws, on the basis that the residents were nontransient and would stay on average for more than 30 days.

Further, since a partial TCO was issued, the court concluded that the Building was safe to be inhabited. The court reasoned that although "respondents did not submit any affirmative evidence from a City representative specifically stating that the building and proposed plans would not 'endanger' 'the general safety and public welfare,' it is not required to do so," under the plain reading of the applicable statutes regarding the issuance of a TCO.

Supreme Court rejected petitioners' core argument that the

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3 In brief, the experts discussed as follows: (1) Donald E. Ehrenbeck, an urban planner, described the environmental review performed by the City; (2) Jackie Bray, DHS First Deputy Commissioner, among other things, discussed the City's Fair Share analysis; (3) Rodney F. Gittens, an architect and DOB's Manhattan Deputy Borough Commissioner, asserted that, because it was not being used transiently, the Building was properly classified as "R-2," and, moreover, it was grandfathered in under the 1968 Code and thus did not need to comply with current Code requirements for more than one means of egress.

Building violated the current Code and was unsafe, and its arguments that the City's fair share and environmental reviews were deficient.[4] The court noted that it was obligated to defer to the City's and its agencies' determinations "even if it were inclined to reach a different result." This appeal ensued.

Discussion

Standing

As a threshold matter, we find that respondents' argument that petitioners lack standing to challenge the opening of the shelter in the Building is without merit. Here, since petitioners live within a few blocks of the proposed shelter, they have standing to raise the safety-based objections concerning it (*see Matter of Committee to Preserve Brighton Beach & Manhattan Beach v Planning Commn. of City of N.Y.*, 259 AD2d 26, 32-33 [1st Dept 1999] [individuals living in close proximity to a public park had standing to challenge agency decision to grant concession for operation of private recreation center there]; *see Matter of Manupella v Troy City Zoning Bd. of Appeals*, 272 AD2d 761, 761-762 [3d Dept 2000] [persons living within 714 feet had standing to raise claims that proposed homeless shelter would adversely impact neighborhood health and safety with increased

[4]Petitioners limit their appeal to the contention that the Building violates applicable codes and is otherwise unsafe.

crime, disruptive conduct, "risk of fire," and decreased real estate values]).

Grandfathering

Petitioners contend that DOB's determination that the current Code's grandfathering provisions should apply to the Building is arbitrary and capricious. We disagree.

It is well settled that reviewing courts may not disturb an agency's determination unless it is arbitrary and capricious, affected by an error of law, or an abuse of discretion (CPLR 7803[3]). In the seminal case of *Kurcsics v Merchants Mut. Ins. Co.* (49 NY2d 451 [1980]), the Court of Appeals explained that

> "[w]here the interpretation of a statute or its application involves knowledge and understanding of underlying operational practices or entails an evaluation of factual data and inferences to be drawn therefrom, the courts regularly defer to the governmental agency charged with the responsibility for administration of the statute. If its interpretation is not irrational or unreasonable, it will be upheld. Where, however, the question is one of pure statutory reading and analysis, dependent only on accurate apprehension of legislative intent, there is little basis to rely on any special competence or expertise of the administrative agency and its interpretive regulations are therefore to be accorded much less weight. If the regulation runs counter to the clear wording of a statutory provision, it should not be accorded any weight" (*id.* at 459 [internal citations omitted]).

It is axiomatic that we defer to an agency's fact-based application of a statute in its specialized area of expertise (*see Matter of Mech. Constrs. Ass'n. of N.Y. v N.Y. City Dept. of Bldgs.*, 128 AD3d 565, 566 [1st Dept 2015] [DOB's determination

was rationally based and entitled to deference]; *Matter of Lite View, LLC v New York State Div. of Hous. & Community Renewal*, 97 AD3d 105, 108 [1st Dept 2012] [applications to reduce or alter dwelling space pursuant to the Rent Stabilization Code are fact-specific and the court appropriately deferred to the Department of Housing and Community Renewal's determination]).

Moreover, we may not "substitute [our] judgment in place of the judgment of the properly delegated administrative officials" (*Matter of Save America's Clocks, Inc. v City of New York*, 33 NY3d 198, 210 [2019][internal quotations marks omitted]). Accordingly, if we find that the determination is supported by a rational basis, we must sustain the agency determination even if the Court concludes that it would have reached a different result (*Matter of Peckham v Calogero*, 12 NY3d 424, 431 [2009]).

We reject petitioners' argument, adopted by the concurrence, that DOB's determination is rooted in the misapplication of pure questions of law. The determination involved specialized "knowledge and understanding of underlying operational practices or entails an evaluation of factual data and inferences to be drawn therefrom" (*Kurcsics*, 49 NY2d at 459 [1980]). Based on the finding that the Building would be used as a nontransient employment shelter, DOB rationally determined that the Building would be classified as a Class A Multiple Dwelling under the

Housing Maintenance Code (Administrative Code [Housing Maintenance Code] § 27-2004[a][8][a]; Multiple Dwelling Law §4[8]) and is thus properly classified as "R-2" under the current Code (Administrative Code [Building Code] § 28-310.1.2) as an "apartment hotel (nontransient)". This classification represents a continuation of the Building's classification under the prior Code, which in turn was a new law tenement SRO, and a Class A Multiple Dwelling "apartment hotel," under the 1942 CO (*see* Multiple Dwelling Law § 4[8][a]). The decision is based on DHS's factual determination that the Building residents, on average, will be occupying the units for more than 30 days, and are thus nontransient.

Petitioners assert that DOB's finding is inconsistent with the function of a shelter as a short-term housing solution. However, the record is replete with factual data that DHS used in reaching its conclusion. For example, in her affidavit, the First Deputy Commissioner for DHS, Jacqueline Bray, states that the single adult men usually stay more than 30 days because DHS must conduct several assessments of each client to determine the most appropriate pathway to permanent housing; develop a housing plan; permit the client to complete several programs in job training and skill development; and take time to get housing vouchers and rental assistance.

Moreover, as explained by DOB's Deputy Borough Commissioner Rodney Gittens, the Building was previously used as an SRO hotel. When the current Code came into effect, permanent residential SROs became classified as "apartment hotels – non transient" (Administrative Code [Housing Maintenance Code] § 27-2004[a][8][a] [defining "apartment hotels" where residents stay 30 days or more as Class A Dwellings]).

In stark contrast, petitioners point to no countervailing evidence regarding the average length of stay in the employment shelter. Petitioners note that the current Code expressly includes "Homeless Shelters" in occupancy group "R-1." We reject petitioners' contention that all shelters are alike and are fundamentally transient. Given the shelter's transitional purpose, supportive housing for employed men, or men seeking employment, DHS rationally concluded, based on its experience with three other similar employment shelters, that residents would remain in the Building for more than 30 days as their "non-transient" or "permanent" residence.

Contrary to the concurrence's contention, DOB did not read the word "transient", mentioned in section 28-310.1.1 (1), into sections (2) and (3) as part of its determination. Rather, it determined that the use of the Building was nontransient and classified the Westhab shelter as a nontransient apartment hotel

(Administrative Code [Building Code] § 28-310.1.2).

We note that the current Code also defines "transient" as "[o]ccupancy of a dwelling unit or sleeping unit for not more than 30 days" (Administrative Code [Building Code] § 28-310.2). Additionally, the current Code expressly states that its provisions are to be read in conjunction with the Multiple Dwelling Law and the Housing Maintenance Code, which describe "permanent residence" as including "apartment hotels," "flat houses" and "bachelor apartments," where single adult men historically received food and laundry services within the "Class A" category (Multiple Dwelling Law § 4[8][a]["permanent residence purposes" "shall consist of occupancy of a dwelling unit by the same natural person or family for [30] consecutive days"]; Administrative Code [Housing Maintenance Code] § 27-2004[a][8][a] ["permanent residence purposes" shall consist of occupancy of a dwelling unit by the same natural person or family for [30] consecutive days or more]). In sum, the statutory scheme, when read in its entirety, supports the DOB classification of the Building as nontransient.

The concurrence misconstrues our role in reviewing agency determinations. DOB is empowered by the City Charter to interpret and enforce the Building Code, the Multiple Dwelling Law and Zoning Resolution (*see* New York City Charter § 643). DOB

rationally designated the Building as "R-2" based on its factual assessment of its nontransient use. In contrast to the concurrence, we decline to substitute our own judgment for that of DOB (*Matter of Save America's Clocks*, 33 NY3d at 210).

Accordingly, we find that DOB rationally concluded that the Building falls in the "R-2" group and is nontransient apartment hotel as its residents will have stays of more than 30 days, on average.

New Hampton's Alteration Plan

Petitioners' argument that in filing the alteration plan for the Building, New Hampton elected to have the Building governed by the current Code is without merit.

The alteration plan states that work will be performed in conformity with the current Code. However, only the work to be done on the first floor is to conform with the current Code, as that work — converting the first floor from a restaurant to offices and recreational space — constituted a change in use requiring adherence to current Code specifications. However, the remainder of the work to be performed in the Building, which simply consisted of painting and the replacement of fixtures, did not require a work permit and was not a change in use.

The election provision to which petitioners refer provides that, "[a]t the option of the owner, . . . an alteration may be

made to a multiple dwelling . . . in accordance with" current or prior Code provisions (Administrative Code § 27-120). By its plain language, the election provision applies to work actually performed – alterations "made" — and not to plans for work. Moreover, a related section provides that work done to only a part of a building — "a space in a building" may be done in compliance with the current Code, while "the remaining portion of the building shall be altered to such an extent as may be necessary to protect the safety and welfare of the occupants" (Administrative Code § 27-118[b]). In short, New Hampton was free to elect to conform to the current Code only for that portion of the work as effected a change in use, while performing work on the remainder of the Building under the prior Code.

The Fire Code & Zoning Resolution

We reject petitioners' contention that section 405 of the Fire Code contemplates that homeless shelters will be classified as "R-1" dwellings (*see* Administrative Code [Fire Code] §§ 29-405.1, 405.4). The Fire Code does not independently designate homeless shelters as "R-1" structures, but instead uses them as an example by referencing the Building Code's classification scheme found in Administrative Code § 28-310.1. As discussed above, DOB rationally classified the Building as an "R-2" dwelling, and the Fire Code's references to the "R-1" group does

not alter this analysis. Moreover, the Fire Department, which is entrusted with interpretation of the Fire Code, approved of the Building's fire protection plan, thereby concurring with DOB's classification of the structure as within the "R-2" group.

Similarly, petitioners' argument that the Building's classification under the Zoning Resolution indicates a change in "Use Group," from "Use Group 2" (residences) to "Use Group 3" (certain types of community facilities) or "5" (hotels primarily used for transient occupancy) is unavailing. First, the Zoning Resolution's use groups dictate only where different types of structures are permitted as-of-right. A structure's classification within a given use group does not control its classification under the Building Code, and vice versa. Hence, even if the Building's change in use from new law tenement SRO to homeless shelter had effected a change in "Use Group" under the Zoning Resolution, this would have no impact on its classification under the Building Code.

Moreover, petitioners' Zoning Resolution "Use Group" contention rests on the same faulty premise as their Building Code arguments: that the Building will be a "transient" residence, and thus definitionally excluded from Zoning Resolution "Use Group 2." In fact, respondents determined that the Building will be a nontransient facility.

In sum, we find that DOB's factual assessment that the Building will continue to fall within the Zoning Resolution "Use Group 2" is rational and is entitled to deference (*see* New York City Zoning Resolution §§ 12-10, 22-12; *Matter of Chelsea Bus. & Prop. Owners' Assn., LLC v City of New York*, 107 AD3d 414, 415 [1st Dept 2013]).

General Safety and Public Welfare Considerations

Finally, petitioners argue that even if the Building is properly grandfathered, their expert affidavits rebut the presumption that its use is consistent with general safety and public welfare.

The main danger identified by petitioners' experts is that the nine-story building has only a single, narrow, winding stairway, which leads to the lobby, and not directly to the street. Petitioners maintain that, in the event of a fire, the narrow stairwell will quickly be overwhelmed by the 150 descending residents, who will impede the entry of firefighters and their equipment, with potentially tragic results.

Respondents counter that the Building is constructed of fireproof materials, has fireproof interior doors, is partially sprinklered, has a standpipe riser and hose system on each floor, and contains smoke and heat detectors wired to an alarm system. They also argue that the Fire Department examined the fire safety

plan and raised no objections. Moreover, the TCO directs that, until the Building is fully sprinklered, New Hampton must maintain at least two certified fire guards on the premises at all times, supporting that there is a detailed fire safety plan approved by the Fire Department in place for the Building.

Further, respondents argue that the issuance of the TCO itself signifies DOB's determination that occupancy will "not in any way jeopardize life or property" (New York City Charter § 645[f]) or "endanger public health, safety, or welfare" (Administrative Code § 28-118.15).

On balance, we find that the competing evidence raises a question of fact which requires a hearing before Supreme Court pursuant to CPLR 7804(h).

We do not agree that the issuance of the TCO reflects DOB's assessment that the temporary occupancy of the Building will not endanger public safety, health or welfare. The TCO "merely creates a rebuttable presumption that a building complies with New York City law" which has been rebutted by petitioners' expert affidavits (*Board of Mgrs. of Loft Space Condominium v SDS Leonard, LLC*, 142 AD3d 881, 882 [1st Dept 2016]). Therefore, the matter is remanded to Supreme Court for further proceedings.

Accordingly, the judgment of the Supreme Court, New York County (Alexander M. Tisch, J.), entered April 29, 2019, denying

the petition to annul a determination of respondents to open a shelter at 158 West 58th Street in Manhattan, and dismissing the proceeding brought pursuant to CPLR article 78, should be modified on the law and the facts, to direct a hearing on whether the Building's use is consistent with general safety and welfare standards, and otherwise affirmed, without costs.

All concur except Oing, J. who concurs in a separate Opinion.

OING, J. (concurring)

The relevant facts are more fully set forth in Justice Singh's writing. While I agree with the decision to remand this proceeding for further consideration of the fire safety issues, and that ultimately the R-2 designation for this building is the correct designation, I write separately because I do not interpret section 310.1.1 as limiting the R-1 designation to occupancies being "transiently" occupied for "a period of less than one month" as set forth in section 310.1.1(1) (*see* Administrative Code of City of NY §§ 28-310.1.1[2] and [3]).

As the record demonstrates, DOB, in reliance on Administrative Code § 28-310.1.1(1), based its R-2 designation for the building on DHS's claim that "the Building is being renovated for use as a homeless shelter for up to 140 single adult men who are employed or actively seeking employment" and who will be "stay[ing] at the shelter for 30 days or more." The R-2 classification applies to occupancies "for permanent resident purposes", i.e., "occupancy . . . for thirty consecutive days or more" (Multiple Dwelling Law § 4[8][a]; Administrative Code § 27-2004[a][8][a]). The majority finds this determination to be rational given that the residents of the shelter will, on average, stay for more than 30 days.

The principle is well settled that "[s]tatutes should be

interpreted in a manner designed to effectuate the legislature's intent, construing clear and unambiguous statutory language so as to give effect to the plain meaning of the words used" (*Matter of Luongo v Records Access Officer, Civilian Complaint Review Bd.*, 150 AD3d 13, 19 [1st Dept 2017], *lv denied* 30 NY3d 908 [2017] [internal quotation marks omitted]). "Where . . . the question is one of pure statutory interpretation, we need not accord any deference to the agency's determination and can undertake its function of statutory construction" (*Matter of DeVera v Elia*, 32 NY3d 423, 434 [2018] [internal quotation marks omitted]). For the reasons that follow, I find that DOB's interpretation of section 310.1's subdivisions cannot be sustained.

Group R-1 occupancy includes the following:

> "1. Residential buildings or spaces occupied, as a rule, transiently, for a period less than one month, as the more or less temporary abode of individuals or families who are lodged with or without meals, including, but not limited to, the following:
>
> "Class B multiple dwellings as defined in Section 27-2004 of the *New York City Housing Maintenance Code* and Section 4 of the New York State Multiple Dwelling Law, where not classified in Group I-1.
>
> "Club houses.
>
> "Hotels (transient)
>
> "Motels (transient)
>
> "Rooming houses (boarding houses--transient)

"Settlement houses

"Vacation timeshares

"2. College or school student dormitories, except for student apartments classified as an R-2 occupancy

"3. Congregate living units owned and operated by a government agency or not-for-profit organization, where the number of occupants in the dwelling unit exceeds the limitations of a family as defined, including, but not limited to, the following:

"Adult homes or enriched housing with 16 or fewer occupants requiring supervised care within the same building on a 24-hour basis

"Fraternity and sorority houses

"Homeless shelters"

(Administrative Code § 28-310.1.1[1]-[3]).

Clearly, Group R-1 comprises three separate categories of residential occupancies. Categories 2 and 3 do not contain the term "transiently" or the phrase "less than one month" (Administrative Code § 28-310.1.1[2] and [3]). Therefore, the "transient" occupancy as it is defined in section 310.1.1(1) is limited to category 1, and should not be read into categories 2 and 3. Indeed, if the municipality intended to apply this temporal limitation to category 2 (college or school student dormitories) and category 3 (congregate living units), the R-1 classification would not have needed three separate categories of residential occupancies. Nor would reading the phrase

"transiently, for a period less than one month" into either category statutorily proper. Pursuant to the antecedent rule of statutory construction, "[r]elative or qualifying words or clauses in a statute ordinarily are to be applied to the words or phrases immediately preceding, and are not to be construed as extending to others more remote" (McKinney's Cons Laws of NY, Book 1, Statutes § 254; *see Matter of T-Mobile Northeast, LLC v DeBellis*, 32 NY3d 594, 608 [2018]).

The shelter at issue clearly does not fall within R-1's category 1 because DOB and DHS have determined based on their review of the facts that the shelter will not be occupied transiently. This determination is entitled to deference. That said, petitioners advance a plausible argument that the shelter is, in fact, a homeless shelter, and, as such, should be classified as R-1 because category 3 clearly lists "homeless shelters." The argument is unavailing.

A "homeless shelter" can only be classified as an R-1 congregate living unit if it fell within that category's definition, i.e., "[c]ongregate living units owned and operated by a government agency or not-for-profit organization, *where the number of occupants in the dwelling unit exceeds the limitations of a family as defined*" (Administrative Code § 28-310.1.1[3] [emphasis added]). Thus, whether a "homeless shelter" should be

given a R-1 classification depends on the number of occupants in the dwelling unit. As is relevant to the issue herein, "family" is defined as "*[n]ot more than three unrelated persons* occupying a dwelling unit in a congregate housing or shared living arrangement . . . ." (Administrative Code § 28-310.2 [Definitions]).

Here, respondents have represented that the number of occupants in the dwelling units will not exceed the limitations of a family as defined. Specifically, Westhab's proposal to DHS provides that "[t]he building consists of 87 individual rooms and bathrooms" and "[t]he 87 rooms will have a total of 150 beds (singles rooms/doubles/triples)." In addition, Jackie Bray, First Deputy Commissioner for DHS, represents "[t]he Shelter will house 140 residents in 87 rooms" and "[t]here will be two clients housed in each room." Based on these representations, the shelter, even if deemed a homeless shelter, does not fall within the purview of R-1's category 3 for congregate living units.

To conclude, I, respectfully, do not agree that the contemplated term of occupancy of the clients at this particular shelter is the determinative factor that excludes the building from an R-1 classification. I do find, however, that this particular shelter cannot be considered a R-1 congregate living unit for the above-noted reasons. Accordingly, under the factual

circumstances of this particular "employment" shelter, DOB's R-2 designation for this building is proper.

Judgment, Supreme Court, New York County (Alexander M. Tisch, J.), entered April 29, 2019, modified, on the law and the facts, to direct a hearing on whether the Building's use is consistent with general safety and welfare standards, and otherwise affirmed, without costs.

Opinion by Singh, J. All concur except Oing, J. Who concurs in a separate Opinion.

Friedman, J.P., Renwick, Oing, Singh, JJ.

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

ENTERED: AUGUST 13, 2020

CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David Friedman, J.P.
Dianne T. Renwick
Judith J. Gische
Angela M. Mazzarelli
Peter H. Moulton, JJ.

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Center for Specialty Care, Inc., et al.,
Plaintiffs-Respondents,

-against-

CSC Acquisition I, LLC, et al.,
Defendants-Appellants.

- - - - -

Garfunkel Wild, P.C., as escrow agent,
Plaintiff-Stakeholder,

-against-

Center for Specialty Care, Inc., et al.,
Defendants-Claimants.

_____x

Defendants appeal from the judgment of Supreme Court, New York County (Andrew Borrok, J.), entered July 30, 2019, awarding plaintiff Center for Specialty Care, Inc. (CSC) the principal amounts of $6,500,000 for breach of the asset purchase agreement (APA), and $613,053.90 for breach of the administrative services agreement (ASA), and awarding plaintiff, 50 East 69th Street Corporation (50 East), $5,885,119.32 for breach of the lease and guaranty agreements.

Kasowitz Benson Torres LLP, New York (Sarmad M. Khojasteh, Marc E. Kasowitz, Daniel R. Benson and Henry B. Brownstein of counsel), for appellants.

Manatt, Phelps & Phillips, LLP, New York (Ronald G. Blum, Prana A. Topper and Andrew Case of counsel), for respondents.

GISCHE, J.

This breach of contract action arises from the failed sale of an ambulatory surgical center (ASC) owned by the Center for Specialty Care (CSC or seller) to defendant CSC Acquisition I (CSC Acquisition). Plaintiff 50 East 69th Street Corp (50 East), is an affiliate of CSC, and the owner of the townhouse where CSC operated its ASC, and where other doctors were subtenants. Both plaintiffs are owned by related family members and/or trusts. Following a bench trial on damages only, Supreme Court awarded plaintiffs the principal sum of $12,998,173.22 and judgment was entered thereon with interest. Defendants appeal from the judgment, contending that the award is grossly disproportionate to the contract price for CSC's assets, the liquidated damages are an impermissible penalty and, in any event, the damages were incorrectly determined.

Liability was the subject of a previous appeal. This Court recently affirmed Supreme Court's entry of judgment in plaintiffs' favor (*Center for Specialty Care, Inc. v CSC Acquisition I, LLC*, ___ AD3d ___, 2020 NY Slip Op 03631 [June 25, 2020]). In addition to finding that defendants had breached the parties' agreements, we also held that the liquidated damages clause was enforceable. This Court expressly recognized that plaintiffs had suffered substantial losses because the

transaction did not close, the damages were proportionate to plaintiffs' "probable loss," and plaintiffs' actual damages were incapable or difficult to precisely estimate at the time of the contract. Although defendants, again, raise arguments that the liquidated damages are a penalty that should not be enforced, the issue of enforceability has been previously decided and will not be addressed in this decision. The issues remaining for consideration on this appeal are only whether the trial court properly determined the damages that resulted from defendants' breaches of contract.

In 2014, CSC decided to sell its ASC and other assets. The family members did not want to immediately sell the iconic townhouse at 69th Street, but they had fallen behind on mortgage payments and wanted to make sure they would not lose this valuable real property. To effectuate these goals, they began soliciting bids from buyers who would be willing to not only purchase the ASC, but would also agree to lease the building from 50 East. At or about this time CSC was paying rent to 50 East of approximately $110,720 a month. After extensive negotiations, in 2015, CSC reached an agreement with CSC Acquisition by which CSC Acquisition would acquire all of CSC's assets, including its medical equipment, furnishings, patient records, web site, as well as various contracts and agreements it had with other

medical professionals who maintained offices at the townhouse. Defendant Midtown Fifth is the sole member of CSC Acquisition, a limited liability company, and defendant Glen Klee Lau, M.D., a surgeon, is the sole manager and member of Midtown (collectively buyer).

The transaction involved three interlocking agreements and a fourth agreement, a personal guaranty. The agreements: 1) secured a long-term tenant able to pay substantial rent and allowed 50 East to continue ownership of the building while meeting its mortgage and other financial commitments, 2) provided for the purchase of CSC's assets, and 3) set up an arrangement by which financially ailing CSC would be able to continue to operate pending closing of the CSC asset sale. The agreements, effective September 1, 2015, cross-reference and reinforce one another.

The dominant or overarching agreement is the asset purchase agreement (APA) between CSC and CSC Acquisition by which CSC Acquisition would acquire CSC's assets, including the practice. The contract price for the purchase was $5 million dollars and required a $500,000 down payment to be held in escrow pending closing. A material term of the APA required that CSC Acquisition obtain the transfer of CSC's existing permit to operate the premises as an ambulatory surgery center, known as a certificate of need (CON). Although the APA was effective as of

September 1, 2015, it provided for a lengthy sale closing date of June 1, 2016. This closing date took into account that the necessary approval by the New York State Department of Health for transfer of the permit, as required under the Public Health Law, might take time to obtain. It was legally impossible for CSC Acquisition to operate the ASC without the permit.

In order to facilitate CSC's application for transfer of the CON to CSC Acquisition, CSC agreed to provide all the necessary information about the ASC. Among the information CSC provided was disclosure about certain health code violations that existed at the premises. For its part, CSC Acquisition agreed that it would "obtain all necessary approvals from the DOH . . . no later than June 1, 2016" and that it would file its [CON] application . . . no later than September 1, 2015. Obtaining all necessary governmental and regulatory approvals, including DOH's approval for transfer of the CON, was a condition for closing. Section 10 (b) of APA provides that the agreement would be terminated "in the event the Buyer fails to obtain all DOH and PHHP [NYS Public Health and Health Planning Council] approvals, without conditions, necessary for it to consummate the transactions contemplated under this Agreement, on or prior to June 1, 2016 (other than if such failure is solely on account of any act or omission of the Seller) . . . ."

Pursuant to the APA, the parties agreed that CSC was not selling, nor was CSC Acquisition acqiring, any interest in any of CSC's cash or cash equivalents existing as of September 1, 2015. It was also contemplated by the parties that from the effective date forward Dr. Lau would not be entitled to receive any earnings until all CSC's expenses were paid, and then only after the APA closing and the transfer of the CON to CSC Acquisition had occurred. To effectuate this understanding, the parties agreed that although Dr. Lau would act as CSC's administrator, he would do so as an independent contractor until such time as CSC Acquisition obtained "a non-contingent, unconditional final approval" of the transaction from DOH. In the interim and until closing, CSC would continue to operate the ASC as its owner. This arrangement was memorialized in the administrative services agreement (ASA) between CSC and Dr. Lau.

Pursuant to the ASA, Dr. Lau agreed to provide CSC with wide-ranging, administrative services from September 1, 2015 until closing. Dr. Lau was not only responsible for making sure all of CSC's accounts payable were paid, he was also obligated to provide CSC with monetary advances on an unsecured basis. These monetary advances, referred to in the ASA as "Working Capital Loans" would be applied and used to pay whatever operating expenses CSC's own earnings did not meet. At closing, CSC would

have to repay these loans with interest, but if the APA was terminated and did not close, then CSC would not be obligated to repay them. Sections 12(b) and (d) of the ASA state that at closing, any profits remaining after the payment of all accrued and unpaid expenses would be paid to Dr. Lau. Neither the APA nor the ASA assure Dr. Lau of any profits during the effective date of the ASA, nor does either agreement assure CSC that it will suffer no operating losses. Section 13(b) of the ASA states, however, "[s]hould a Closing of the APA not take place prior to June 1, 2016 or should the APA otherwise be terminated sooner in accordance with the terms of Section 10(b) or Section 10(d) thereof . . . then CSC shall not be required to repay any Working Capital Loan amounts or any interest thereon."

A third agreement concerning this transaction was a real property lease for the townhouse. The lease, between 50 East and CSC Acquisition, was effective as of September 1, 2015, concurrent with the parties' execution of the APA and ASA, but 50 East later agreed to defer the commencement date to October 1st. The monthly rent was set at $185,000, but the parties later also agreed to a reduced initial rent.

As reflected in Section 1.2 of the lease, it was for a 10-year term, unless extended or sooner terminated. The lease also provides that if the APA "shall terminate for any reason, this

Lease shall terminate simultaneously therewith. . . ." Section 17.2 of the lease provides that in the event of the tenant's breach 50 East can relet the premises for the account of the tenant, and that the tenant is responsible for rent and additional rent until the end of the stated term of this Lease . . . . These lease provisions frame the parties' vigorous disagreement about whether and when the lease ended.

Section 21 of the lease obligated CSC Acquisition to deliver a $6 million security deposit to 50 East on October 1, 2015. Instead of making a cash deposit, CSC Acquisition could provide a $6 million irrevocable letter of credit; or a personal guaranty, plus a $3 million life insurance policy on the life of Dr. Lau, plus an irrevocable letter of credit for $3 million. CSC Acquisition chose the latter option and the four individually named defendants personally guaranteed the lease, including the payment of rent and security deposit.

The security deposit, although set out in the lease, is a cornerstone of CSC's sale to the buyers, as reflected in the following provision of the APA:

> "9. Effects of Termination. (a) The Buyer [CSC Acquisition] recognizes and agrees that it has been selected by the Seller [CSC] as the purchaser of the Assets after a process which involved the examination by the Seller of multiple bids to purchase all or some of such Assets by other third parties which has

> entailed the incurrence by the Seller of significant costs and expenses. As a result of the selection of the Buyer, the Buyer further recognizes and agrees that the Seller is unlikely to be able to engage in another process whereby similar bids will be submitted by such or other third parties should the Closing not take place on or prior to June 1, 2016 and that, in such case, the Seller shall suffer substantial losses and damages which shall be difficult to quantify.
>
> "(b) In light of the provisions of Section 9(a) hereof, the Buyer [CSC Acquisition], the Member [Midtown] and Dr. Lau jointly and severally agree that, should the Closing of this Agreement not take place prior to June 1, 2016 or should this Agreement be terminated sooner in accordance with the terms of Section 10(b) or Section 10(d) hereof, the Buyer, the Member and Dr. Lau shall pay to the Seller, as liquidated damages and not as a penalty, a sum equal to: (i) the Escrow Deposit [$500,000], plus (ii) an amount equal to the security deposit as required to be maintained under the Real Property Lease (the "Security Deposit")."

CSC Acquisition did not file for transfer of CSC's CON by September 1st, nor did it ever obtain the necessary DOH approval, as required under the APA, leaving CSC Acquisition unqualified to complete the purchase of CSC's assets and assume ownership and operation of the ASC. Dr. Lau also failed to assume any of his administrative duties under the ASA. He did not provide CSC with any monetary advances to help it meet its operating expenses. CSC Acquisition failed to deliver security for the lease in any form, and it did not pay the first month's rent or any rent

thereafter. CSC Acquisition never took possession of the premises under the lease.

The parties tried, but failed, to work out their differences to salvage the transaction. Consequently, on November 11, 2015, plaintiffs sent default notices to the defendants. Defendants countered by filing an application with DOH for transfer of CSC's CON in early December 2015. Shortly thereafter, on December 29th, defendants purported to terminate the agreements, citing plaintiffs' refusal to help them obtain the CON. Defendants also made certain demands to reinstate the contracts on more favorable terms, including asking for more time (18 months), to obtain the CON from DOH. Further discussions between the parties also proved unfruitful. On January 6, 2016, plaintiffs notified defendants that the APA, ASA and lease were terminated, with a reservation of rights. CSC remained in operation at the premises, paying rent to 50 East and other expenses. Eventually, in March 2016, plaintiffs closed the ASC, lost the CON at or about that time, and sold the townhouse in November 2017.

Defendants argue that although the asset sale under the APA did not close, it was CSC that breached the APA by assuring CSC Acquisition that DOH would waive the safety code violations that CSC knew were life threatening and needed to be corrected before the DOH would approve transfer of the permit. They also

generally argue, without citing to a particular lease provision, that the lease was contingent upon CSC Acquisition obtaining DOH's approval of the CON. Both issues, however, concern liability, which was resolved against defendants in the prior appeal.

Insofar as the actual calculation of damages, defendants argue that the liquidated damages clause is unenforceable. They also argue that Supreme Court erroneously awarded 50 East damages for a 15-month period after CSC Acquisition repudiated the lease. According to defendants, a surrender by operation of law occurred on December 15, 2015 when 50 East allowed its affiliate (CSC) to continue operations at the townhouse, and significantly reduced CSC's rent. CSC Acquisition contends CSC's actions effectively ended its landlord/tenant relationship and terminated its obligation to pay rent/additional rent due.

Alternative dates proposed by defendants for when the lease should be considered terminated, include: March 31, 2016, the month plaintiffs began marketing the premises for sale; May 12, 2016, when plaintiffs required that all surgeries cease at their ambulatory surgery center; (the sole permitted use under the lease with defendants); or July 31, 2016, the month plaintiffs fully evacuated the premises and surrendered its CON to DOH. The alternative dates are based upon CSC Acquisitions' same theory,

which is that CSC's actions were inconsistent with the landlord-tenant relationship. Each of these proposed termination dates occurred before the sale of the townhouse in November 2017, the date utilized by the trial court in calculating damages. Finally, defendants argue that the trial court should not have awarded CSC damages in the form of lost profits under the ASA.

At the conclusion of the bench trial on damages, the trial court awarded the seller $6.5 million pursuant to the APA's liquidated damages clause. It awarded $5,885,119 to 50 East representing rent due from the inception of the lease (October 1, 2015), through October 31, 2017 (the day before the townhouse was sold), plus interest and penalties, less the rent that CSC paid during that time. With respect to the ASA, Supreme Court awarded damages against Dr. Lau in the amount of $613,054, plus interest. This amount represented CSC's operating losses from October 1, 2015 through January 6, 2016, the date plaintiffs terminated the parties' agreements.

Defendants' arguments concerning the liquidated damages awarded by Supreme Court pursuant to the terms of the APA are indistinguishable from those raised and already decided by this Court with respect to their appeal from the liability judgment. We sustained the contractual provision in the APA fixing damages in the event of breach (*Center for Specialty Care, Inc. v CSC*

Acquisition I, LLC, ___ AD3d ___, 2020 NY Slip Op 03631 [2020]). The provision for liquidated damages is reasonably related to potential harm that was difficult to estimate when the parties made their contract and did not constitute a disguised penalty (*Truck Rent-A-Ctr. v Puritan Farms 2nd*, 41 NY2d 420, 427 [1977]). Since the $6.5 million judgment entered against defendants for breach of the APA is firmly supported by Section 9 of the APA, and defendants raise no argument that it was miscalculated by the trial court, we affirm that part of the trial court's award.

Turning to the damages award for breach of the lease and guaranty, defendants argue the trial court's damages award is incorrect, and that any new award should be limited to the amounts owed under the lease for the period of October 1, 2015 through December 10, 2015, that being when, according to defendants, the lease was surrendered by operation of law. A surrender by operation of law occurs when a landlord takes actions so inconsistent with the landlord-tenant relationship that a legal surrender can be inferred (*see Riverside Research Inst. v KMGA, Inc.*, 68 NY2d 689, 691-692 [1986]). Although defendants have also proposed other dates when the lease was legally surrendered, we find none of plaintiffs' actions on any of those dates, including December 10th, were so inconsistent with the terms of this lease that they resulted in a legal

surrender.

Since a lease is a present transfer of an estate in real property, "[o]nce the lease is executed, the lessee's obligation to pay rent is fixed according to its terms and a landlord is under no obligation or duty to the tenant to relet, or attempt to relet abandoned premises in order to minimize damages" (*Holy Prop. v Kenneth Cole Prods,* 87 NY2d 130, 133 [1995][citation omitted]). Here, as we already held in the prior appeal, CSC Acquisition breached the lease and the landlord, faced with such breach, had three options: "(1) it could do nothing and collect the full rent due under the lease . . . (2) it could accept [CSC Acquisition's] surrender, reenter the premises and relet them for its own account thereby releasing the tenant from further liability for rent, or (3) it could notify the tenant that it was entering and reletting the premises for the tenant's benefit" (*Holy Prop.,* 87 NY2d at 133-134). The right to relet the premises for the tenant's benefit was an express term of the lease in this case.

When CSC Acquisition breached the lease, and 50 East relet the premises to CSC on December 15, 2015, the landlord's actions were wholly consistent with its rights under the law and the lease to relet the premises for the tenant's benefit; this was not a surrender by operation of law. Nor were CSC's other

actions in continuing to operate the ASC inconsistent with the lease because the parties' agreements provided for CSC's ongoing operation of the ASC until closing, subject to Dr. Lau's administrative duties. The continued operation of the ASC before closing was a critical aspect of the transaction, because defendants could not lawfully operate the ASC themselves in the absence of the CON. 50 East's extension of CSC's lease and its acceptance of reduced rent was also consistent with the continued operation of CSC's business. These are not actions from which it can be inferred that a legal surrender of the lease occurred (*see Riverside Research supra*).

We do agree with defendants that their rent obligation only continued until such time as the lease was legally terminated. Supreme Court determined that occurred when the townhouse was sold. We find that that the lease terminated on January 6, 2016, when CSC sent termination notices to the defendants ending the lease and other agreements. 50 East notified defendants in November 2015 that it would be terminating the lease, and then proceeded to act in accordance with that notice by serving a notice of termination dated January 6, 2016. The lease, which was executed simultaneously with the APA, specifically provides (Section 1.2), that if the APA is terminated for any reason, other than closing, the lease will "terminate simultaneously"

with the APA. The lease also expressly provides that CSC Acquisition remains responsible for rent and other applicable charges, less rent recovered from reletting, only "up to the time of such termination . . . or of such recovery of possession of the Premises by Landlord . . . ." Thus, when plaintiffs terminated the parties' agreements, the obligation to pay rent was terminated with it as well.

50 East had no duty to mitigate damages, but by continuing to accept rent from CSC during the same period that defendants were obligated to pay rent, 50 East did so for CSC Acquisition and Dr. Lau's benefit. Supreme Court was correct in crediting the payments CSC made from October 1st until January 6, 2016 to defendants' account. The damages award, however, needs to be recalculated for rents, interest and late fees due less offsets for rent received, all limited to the period ending January 6, 2016. To the extent the trial court made a calculation of damages under the lease and guaranty for any period after January 6, 2016, it was error. We therefore remand this matter to the trial court for a recalculation of damages for breach of the lease and guaranty consistent with this decision.

Turning to the ASA, Dr. Lau argues that he did not make any guarantees that CSC would not suffer any losses, or that the ASC would turn a profit and, therefore, the judgment against him was

in error. Supreme Court did not, however, award CSC lost profits. Rather it awarded CSC operating expenses that were the natural and probable consequence of the breach (*Bi-Economy Mkt., Inc. v Harleysville Ins. Co. of N.Y.*, 10 NY3d 187, 192 [2008]). The ASA obligated Dr. Lau to administer CSC's operations until closing. He was also obligated to make up any shortfall in CSC's receivables by providing monetary advances to keep the business afloat. CSC was having some financial difficulties and these unsecured, working capital loans, would allow CSC to continue operating the ASC by paying its bills and other obligations, including meeting its payroll.

Although these monetary advances were loans that would have to be repaid by CSC at closing, most significantly, they did not have to be repaid if, as was the case here, the APA failed to close. Had the monetary advances been made by Dr. Lau, CSC could have kept whatever monies Dr. Lau loaned CSC to meet its operating expenses. Because Dr. Lau never made any monetary advances to CSC that he was obligated to make, CSC was forced to meet its own expenses. This left CSC in a worse condition than it would have been in had Dr. Lau provided the monetary advances he was required to. CSC was deprived of the benefit of its bargain, which would have allowed it to keep Dr. Lau's monetary advances. We, therefore, find that Supreme Court properly

awarded plaintiff damages in the amount of $613,053.90 against Dr. Lau. This amount reflects net operating losses under the ASA through its date of termination, which under the circumstances would have been loans forgiven for CSC's benefit. Additionally, we find that CSC put forth evidence of its earnings and operating expenses at trial, and that defendants failed to prove CSC's calculations were inaccurate.

In accordance herewith, the judgment of Supreme Court, New York County (Andrew Borrok, J.), entered July 30, 2019, awarding plaintiff Center for Specialty Care, Inc. (CSC) the principal amounts of $6,500,000 for breach of the asset purchase agreement (APA), and $613,053.90 for breach of the administrative services agreement (ASA), and awarding plaintiff, 50 East 69th Street Corporation (50 East), $5,885,119.32 for breach of the lease and guaranty agreements, should be modified, on the law, to the extent that the damages award for breach of the lease and guaranty agreements should be vacated, and the matter remanded for recalculation of damages in accordance herewith, and the judgment otherwise affirmed, without costs.

All concur.

Judgment, Supreme Court, New York County (Andrew Borrok, J.), entered July 30, 2019, modified, on the law, to the extent that the damages award for breach of the lease and guaranty agreements should be vacated, and the matter remanded for recalculation of damages in accordance herewith, and the judgment

otherwise affirmed, without costs.

Opinion by Gische, J. All concur.

Friedman, J.P., Renwick, Gische, Mazzarelli, Moulton, JJ.

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

ENTERED: AUGUST 13, 2020

CLERK