SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

SEPTEMBER 11, 2014

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Sweeny, Moskowitz, Freedman, Kapnick, JJ.

12702 Marta Alvarez, Index 306222/09
Plaintiff-Appellant,

-against-

NYLL Management Ltd., et al.,
Defendants-Respondents.

_____

Hallock & Malerba, P.C., Deer Park (James M. Sheridan, Jr. of counsel), for appellant.

Baker, McEvoy, Morrissey & Moskowitz, P.C., Brooklyn (Marjorie E. Bornes of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Betty Owen Stinson, J.), entered December 17, 2012, which granted defendants' motion for summary judgment dismissing the complaint based on the failure to establish a serious injury within the meaning of Insurance Law § 5102(d), affirmed, without costs.

Defendants made a prima facie showing that plaintiff did not sustain permanent or significant serious injuries to her right shoulder, right knee, and neck as a result of the accident by submitting the expert reports of an orthopedic surgeon and radiologist, and by relying on plaintiff's own medical records

(*see Paduani v Rodriguez*, 101 AD3d 470, 470 [1st Dept 2012]). Defendants' orthopedist found full range of motion in each body part, and their orthopedist and radiologist both concluded that plaintiff's conditions were degenerative in nature. The MRI reports prepared by plaintiff's radiologists found, among other things, that the shoulder MRI showed a bone spur (or growth) causing impingement on the shoulder tendon, that the right knee MRI was "normal," and that the cervical spine MRI showed a degenerative condition. Plaintiff's medical records also included a physician's examination finding full range of motion of the right knee, and the same range of motion in both shoulders shortly after the accident. Further, plaintiff's emergency room records included her acknowledgment of a history of arthritis.

In opposition, plaintiff failed to raise a triable issue of fact with respect to these alleged injuries. Her orthopedic surgeon's conclusory opinion that plaintiff's shoulder, knee and spine conditions were caused by the accident, and not degeneration, was insufficient to raise an issue of fact as to causation. Indeed, the surgeon failed to address or contest the detailed findings of preexisting degenerative conditions by defendants' experts, which were acknowledged in the reports of plaintiff's own radiologists (*Paduani*, 101 AD3d at 471). Moreover, the surgeon's failure to address plaintiff's history of

arthritis, or the earlier, conflicting findings by plaintiff's other physician of normal knee range of motion and the same range of motion in both shoulders, warrants summary judgment dismissing those serious injury claims (*see Santos v Perez*, 107 AD3d 572, 574 [1st Dept 2013]; *Jno-Baptiste v Buckley*, 82 AD3d 578, 578-579 [1st Dept 2011]).[1]

The court properly dismissed plaintiff's 90/180-day claim, as she failed to allege in her bill of particulars that she was incapacitated for at least 90 of the first 180 days following the accident (*Frias v Son Tien Lieu*, 107 AD3d 589, 590 [1st Dept 2013]; *Batista v Porro*, 110 AD3d 609, 609-610 [1st Dept 2013]).

All concur except Moskowitz and Kapnick, JJ. who dissent in part in a memorandum by Moskowitz, J. as follows:

[1]This is evident by the analysis of the motion court and a reading of the doctor's report; an analysis not belied by the dissent's argument to make the report authoritative where it is not.

MOSKOWITZ, J. (dissenting in part)

I agree with the majority that plaintiff has not raised an issue of fact on her 90/180-day claim. However, I believe that plaintiff raised a triable issue of fact as to whether she suffered a serious injury under the permanent, consequential and significant limitation categories of Insurance Law § 5102(d). Therefore, I respectfully dissent.

As the majority notes, defendants made a prima facie showing that plaintiff did not sustain permanent or significant serious injuries to her right shoulder, right knee and neck as a result of the accident by submitting the expert reports of an orthopedic surgeon and radiologist, and by relying on plaintiff's medical records (*see Paduani v Rodriguez*, 101 AD3d 470, 470 [1st Dept 2012]). Defendants' orthopedist found full range of motion in each body part, and their orthopedist and radiologist both concluded that plaintiff's conditions were degenerative in nature. The MRI reports prepared by plaintiff's radiologists found, among other things, that the shoulder MRI showed a bone spur (or growth) causing impingement on the shoulder tendon, that the right knee MRI was "normal," and that the cervical spine MRI showed a degenerative condition. Plaintiff's medical records also included a physician's examination finding full range of motion of the right knee, and the same range of motion in both

shoulders shortly after the accident. Further, plaintiff's emergency room records included her acknowledgment of a history of arthritis.

However, in opposition, plaintiff raised a triable issue of fact through her orthopedic surgeon's opinion that plaintiff's shoulder, knee and spine conditions were caused by the accident, and not by degeneration (*see Perl v Meher*, 18 NY3d 208, 218-19 [2011]).

Plaintiff's treating surgeon evaluated plaintiff approximately two weeks after the accident; he performed arthroscopic surgery on plaintiff's right shoulder in June 2009, finding, among other things, a partial tear. The surgeon also performed surgery on plaintiff's right knee in August 2009. Based on plaintiff's report that she had never sustained injury to her right shoulder and right knee or other parts of her body before the accident, in which she was driving a car that was rear ended, and based upon his exam finding significant limitations of motion, the surgeon opined that defendant had sustained a partial tear to her right shoulder and injuries to her right knee from the accident. Further, the surgeon read an MRI of plaintiff's cervical spine and determined that it showed impingement from the accident.

Plaintiff's treating surgeon also noted her continued difficulty in performing daily activities after the accident, and concluded that her disabilities and restrictions were not degenerative. His physical examination two years later, in July 2011, confirmed continued restriction in plaintiff's cervical spine, right shoulder and right knee (*see Kone v Rodriguez*, 107 AD3d 537 [1st Dept 2013]). The surgeon concluded that continued treatment after December 2009 would have been futile, as plaintiff was not improving and was receiving only temporary relief from acupuncture, chiropractic and physical therapy. Further, he noted, her no-fault benefits had been discontinued (*Ramkumar v Grand Style Transp. Enters. Inc.*, 22 NY3d 905, 906-907 [2013]).

Moreover, the physician who examined plaintiff 10 days after the accident observed in his notes that plaintiff had decreased range of motion in her cervical spine and right shoulder. This observation is also sufficient to raise a triable issue of fact (*see Tsamos v Diaz*, 81 AD3d 546 [1st Dept 2011]).

In light of the evidence presenting issues of fact inappropriate for summary adjudication, I would deny defendants' motion for summary judgment.

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

ENTERED: SEPTEMBER 11, 2014

CLERK

Tom, J.P., Friedman, Saxe, Richter, Clark, JJ.

11828 William DePaul, Jr., et al., Index 113636/09
Plaintiffs-Respondents-Appellants,

-against-

NY Brush LLC, et al.,
Defendants-Appellants-Respondents,

Ruttura & Sons Construction Co., Inc.,
Defendant-Respondent.

- - - - -

NY Brush LLC, et al.,
Third-Party Plaintiffs-Appellants,

-against-

Coastal Electric Construction Corp.,
Third-Party Defendant,

Ruttura & Sons Construction Co., Inc.,
Third-Party Defendant-Respondent.

_____

Malapero & Prisco, LLP, New York (Frank J. Lombardo of counsel), for appellants-respondents/appellants.

Arye Lustig & Sassower, P.C., New York (Mitchell J. Sassower of counsel), for respondents-appellants.

Milber Makris Plousadis & Seiden, LLP, White Plains (David C. Zegarelli of counsel), for respondent.

_____

Order, Supreme Court, New York County (Joan M. Kenney, J.), entered January 2, 2013, which, insofar as appealed from, denied the part of defendants-third-party plaintiffs Holt Construction Corp., Pepsi Cola Bottling Company of New York, Inc., and NY Brush LLC's (collectively, defendants) motion for summary judgment that sought to dismiss the Labor Law § 200 and common-

law negligence claims as against them, granted the part of their motion that sought to dismiss the Labor Law § 241(6) claim as against them, denied the part of their motion that sought summary judgment on their contractual indemnification claim against defendant/third-party defendant Ruttura & Sons Construction Co., Inc., and granted the part of Ruttura's motion for summary judgment that sought to dismiss the aforementioned contractual indemnification claim, unanimously modified, on the law, to deny the part of Ruttura's motion that sought to dismiss the contractual indemnification claim against it, and otherwise affirmed, without costs.

Defendants, who do not dispute that plaintiff's injuries arose from a dangerous condition, failed to demonstrate that they did not have constructive notice of that dangerous condition, a wooden plank that plaintiff testified broke underneath him while he was walking across it; thus they are not entitled to summary judgment dismissing the Labor Law § 200 and common-law negligence claims. Plaintiffs' photographs of the site, taken immediately after the injured plaintiff fell, show three wooden planks lined up end-to-end but unconnected. The job superintendent and the site safety manager of defendant Holt, the general contractor, admitted that these photos showed planks that were wet and rotten, posing a hazard to any workers walking across them.

These Holt employees denied that Holt placed the planks there and testified that they did not see any dangerous condition on the site before the accident. However, they both conducted regular inspections of the whole site, and the site safety manager would have inspected the subject area about an hour before plaintiff fell. Moreover, plaintiff testified that he had seen planks there for three weeks preceding his accident, and the defects observed in the planks would tend to be longstanding. This evidence raises triable issues of fact concerning Holt's constructive notice (*see Picaso v 345 E. 73 Owners Corp.*, 101 AD3d 511 [1st Dept 2012]; *Burton v CW Equities, LLC*, 97 AD3d 462, 462 [1st Dept 2012]). Defendants Brush and Pepsi also failed to demonstrate that they neither created nor had actual or constructive notice of the dangerous condition that caused plaintiff's injuries, since they do not point to any probative evidence on these questions.

Insofar as the Labor Law § 241(6) claim is based on a violation of Industrial Code (12 NYCRR) § 23-1.7(e)(1), it should be dismissed. The accident occurred in an open working area, notwithstanding evidence that workers traversed the plank to get from the street to the job site (*see Dalanna v City of New York*, 308 AD2d 400, 401 [1st Dept 2003]).

Industrial Code (12 NYCRR) § 23-1.11(a) states: "The lumber

used in the construction of equipment or temporary structures required by this Part (rule) shall be sound and shall not contain any defects . . . which may impair the strength of such lumber for the purpose for which it is to be used." While the plank on which DePaul slipped qualifies as dimensional lumber under the regulation, it fails to meet the other specified criteria: it was not used in the *construction* of equipment or a temporary structure, and no equipment or temporary structure *required* by Part 23 has been identified by plaintiffs. A plank fails to meet even the liberal definition of "structure" contained in *Joblon v Solow* (91 NY2d 457, 464 [1998]): "any production or piece of work artificially built up or composed of parts *joined together* in some definite manner" (internal quotation marks omitted and emphasis added). Plaintiffs concede that the lumber was not joined together, and photographs of the location show only loose planks. Simply put, nothing had been constructed from the planks so as to come within the ambit of the regulation. Furthermore, the regulation applies only to a device required to be constructed by another provision of Part 23, as evident from subsections (b) and (c), which discuss, respectively, "[t]he lumber dimensions specified in this Part (rule)" and the nails required "to provide the required strength at all joints." Thus, as in *Purcell v Metlife Inc.* (108 AD3d 431, 432-433 [1st Dept

2013]), plaintiffs have failed to demonstrate that § 23-1.11(a) is applicable, and this claim was properly dismissed (*see Morgan v Neighborhood Partnership Hous. Dev. Fund Co., Inc.*, 50 AD3d 866, 867 [2d Dept 2008]).

Neither defendants nor defendant Ruttura is entitled to summary judgment on defendants' contractual indemnification claim against Ruttura. The subcontract between Holt and Ruttura broadly requires the latter to indemnify defendants for, inter alia, any claims arising from or in connection with Ruttura's performance of the work. The subcontract requires Ruttura to keep its work areas free of debris and unsafe conditions. The accident occurred in an area of the exterior parking lot where Ruttura, the concrete subcontractor, had graded the ground and reinforced it with rebar in preparation for pouring concrete. Thus, plaintiff's accident may be connected with Ruttura's performance of its work insofar as Ruturra may have failed to satisfy its contractual obligation to keep this area clear of debris, such as the concededly hazardous planks. However, as indicated, issues of fact exist as to the extent of defendants' liability for plaintiff's injuries (*see Callan v Structure Tone, Inc.*, 52 AD3d 334, 335 [1st Dept 2008]).

The Decision and Order of this Court entered herein on February 27, 2014 is hereby recalled and vacated (*see* M-1364, M-1586, and M-1593, decided simultaneously herewith).

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

ENTERED:

CLERK

Saxe, J.P., Moskowitz, DeGrasse, Feinman, Clark, JJ.

11904 4 USS LLC, as successor in interest to 40 East 14 Realty Associates LLC, Plaintiff-Appellant, Index 650383/12

-against-

DSW MS LLC, as successor in interest to Retail Ventures, Inc., Defendant-Respondent.

_____

Sullivan & Cromwell LLP, New York (Robert J. Giuffra, Jr. of counsel), for appellant.

Friedman Kaplan Seiler & Adelman LLP, New York (Daniel B. Rapport of counsel), for respondent.

_____

Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered April 25, 2013, which, to the extent appealed from, denied plaintiff's motion for partial summary judgment on the breach of contract cause of action, unanimously reversed, on the law, with costs, the motion granted with respect to the breach of contract cause of action, and the matter remanded for an immediate trial before a referee on the amount of recoverable damages.

On January 27, 2004, nonparties 40 East 14 Realty Associates LLC (40 East), the landlord, and Filene's Basement, Inc. (Filene's), the tenant, entered into a 20-year lease of premises located at 4 Union Square South. Retail Ventures, Inc. (RVI), Filene's then-parent and defendant's predecessor, executed an

"absolute and unconditional guaranty of payment (and not of collection) and of performance" under the lease by a writing dated January 13, 2004. 40 East assigned the lease to plaintiff in April 2009 when it became plaintiff's general member.

Section 16.1 of the lease defined the tenant's failure to pay rent when due as well as the tenant's filing of a voluntary bankruptcy proceeding as "events of default" that would cause the termination of the lease. Section 17.2 (A)(1) and (2) of the lease provided, in pertinent part, that upon such termination, the tenant would be required to pay the landlord "all Fixed Rent, Tax Payments, Operating Payments, Percentage Rent and other items of Rental payable under th[e] Lease by Tenant to Landlord . . . [plus] any deficiency . . . between the Rental for the period which otherwise would have constituted the unexpired portion of the Term and the net amount, if any, of rents collected under any reletting effected" pursuant to the lease.

On May 4, 2009, Filene's, along with its affiliates, filed a voluntary petition for relief under Chapter 11 of the United States Code (11 USC § 101 *et seq.*) in the United States Bankruptcy Court for the District of Delaware. On June 17, 2009, the bankruptcy court issued an asset purchase order authorizing Filene's to assume the lease and assign it to SYL LLC, which succeeded Filene's as the tenant. The following day, plaintiff

and SYL entered into a lease modification, to be discussed below, which constitutes the basis for defendant's opposition to the instant motion for summary judgment. In November 2011, SYL defaulted under the lease by failing to make payments due and by filing its own voluntary petition in bankruptcy. The lease was surrendered by SYL and rejected by the bankruptcy court. On December 1, 2011, plaintiff invoked the guaranty and demanded that RVI pay all sums then due and to become due under the lease. Plaintiff's letter cited SYL's defaults under the lease. By response dated December 7, 2011, defendant, RVI's successor, denied liability on the guaranty, asserting that the modification effectively destroyed "the value of the Lease, rendering it uneconomic and unmarketable, to the detriment of both Tenant, a chapter 11 debtor, and Guarantor." Defendant further asserted that "[s]uch a material and unexpected departure from the original terms of the Lease has the effect, as a matter of law and equity, of abrogating the Guarantee." In a subsequent letter to defendant dated January 23, 2012, plaintiff stated that the amounts it demanded under the guaranty "do not include any additional obligations of Tenant under any modification to the Lease . . . ." Defendant did not respond to that letter and plaintiff brought suit on February 10, 2012. The first cause of action is based on a contract theory; the second is for a

judgment declaring defendant's liability on the guaranty. Plaintiff explicitly states in the complaint: "Through this action, Landlord is not seeking from the Guarantor any additional obligations of Tenant under the Modification, but only the payment of those obligations due and owing under the Lease."

This dispute centers on the application of the third and seventeenth paragraphs of the guaranty. The third paragraph provides:

> "This Guaranty shall be a continuing guaranty, and the liability of the Guarantor hereunder shall in no way be affected, modified or diminished by reason of (a) any assignment, renewal, modification, amendment, or extension of the Lease, or (b) any modification or waiver of or change in any of the terms, covenants and conditions of the Lease by Landlord and Tenant . . . or (f) any bankruptcy, insolvency, reorganization, liquidation, arrangement, assignment for the benefit of creditors, receivership, trusteeship or similar proceeding affecting Tenant, whether or not notice thereof is given to Guarantor."

The seventeenth paragraph of the guaranty provides:

> "Notwithstanding anything to the contrary contained herein . . . Guarantor acknowledges, agrees and covenants that Guarantor shall continue to be liable pursuant to this Guaranty notwithstanding the occurrence of any of the events set forth in subdivisions (a) and (b) of the third paragraph of the Guaranty, provided only that the extent of Guarantor's liability pursuant to this Guaranty shall not be increased by reason of the occurrence of such event(s), except if at the time any such event(s) occur, the Tenant pursuant to the Lease is an Affiliate of Guarantor or if Guarantor has notice of and consents to the occurrence of such event(s), such liability of Guarantor shall be increased accordingly."

SYL was not an affiliate of defendant, the guarantor. Nor did defendant have notice of and consent to the June 18, 2009 modification of the lease. Therefore, by operation of the third and seventeenth paragraphs, defendant's exposure on the guaranty was neither diminished nor increased by the modification.

On the basis of Filene's 2009 defaults, plaintiff made a prima facie showing of its entitlement to summary judgment on the contract cause of action. "On a motion for summary judgment to enforce a written guaranty, all that the creditor need prove is an absolute and unconditional guaranty, the underlying debt, and the guarantor's failure to perform under the guaranty" (*City of New York v Clarose Cinema Corp.*, 256 AD2d 69, 71 [1st Dept 1998]). Defendant opposed summary judgment on the following grounds: (1) the modification "voided the Guaranty as a matter of law, because it materially increased the risk that there would be a call upon the Guaranty and was not the type of commercially-reasonable modification that [defendant] could have anticipated"; (2) "[plaintiff] breached the Guaranty's implied covenant of good faith and fair dealing by engineering the First Modification because [plaintiff] was prohibited from taking any actions that would result in a call upon the Guaranty"; and (3) "under the plain terms of the Guaranty, [defendant] has no liability - the 'extent of' [defendant's] liability could not be increased by

reason of a lease modification, and absent the First Modification, [defendant] would have had no liability because the original Lease would have been assumed by a new tenant without a call upon the Guaranty."

Defendant's arguments miss the mark because they are entirely focused on the modification. The record discloses that the modification was entered into after Filene's defaulted under the lease and after the guarantor's liability had already been triggered. As stated above, the complaint makes it clear that plaintiff is not seeking a recovery for any of the tenant's obligations under the modification. As plaintiff's counsel argued before the motion court, "the guarantor's liability is capped at the amount of the original lease . . . ." Defendant has therefore failed to raise a triable issue of fact with respect to its liability under the contract cause of action.[1]

404 Park Partners, LP v Lerner (75 AD3d 481 [1st Dept 2010]), which the motion court cited, is distinguishable because it involved an issue as to whether a guarantor consented to the terms of a renewed lease, where the guarantor did not sign a new

[1]We note parenthetically that it would not have availed defendant to argue that it was given late notice or even no notice of Filene's default. The second and third paragraphs of the guaranty provide that the guaranty is effective with respect to the relevant defaults whether or not notice thereof is given to the guarantor.

guaranty for the renewed lease. Here, plaintiff is not seeking to recover under a new lease; rather, as noted, it is seeking to recover under the terms of the lease, prior to its modification. The amount of plaintiff's damages should be determined by a referee in light of the jury waiver set forth in the guaranty.

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

ENTERED: SEPTEMBER 11, 2014

CLERK

Saxe, J.P., Moskowitz, Freedman, Gische, Kapnick, JJ.

12438 Retirement Plan for General Employees of the City of North Miami Beach, et al., Petitioners-Appellants, Index 650349/13

-against-

The McGraw-Hill Companies, Inc., Respondent-Respondent.

Wolf Popper LLP, New York (Robert M. Roseman of counsel), for appellants.

Cahill Gordon & Reindel LLP, New York (Brian T. Markley of counsel), for respondent.

Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered May 21, 2013, which denied the petition to inspect respondent's books and records pertaining to the alleged wrongful conduct of its wholly-owned subsidiary, unanimously reversed, on the law, without costs, the petition granted, and the matter remanded for further proceedings consistent herewith concerning the proper scope of inspection.

Petitioners, Retirement Plan for General Employees of the City of North Miami Beach (North Miami Beach) and Robin Stein, are shareholders of respondent The McGraw-Hill Companies, Inc. (McGraw-Hill). Nonparty Standard & Poor's Financial Services LLC (S&P) is a major credit rating agency wholly owned by McGraw-Hill. S&P issues ratings on securities and other investment

products related to those products' default risk; the ratings play a critical role in the economy by driving investment decisions, as many institutional investors have rules that restrict them to investing only in products with high ratings from S&P.

Petitioners allege that under the direction of respondent's chairman and chief executive, S&P undertook a strategy of fraudulently issuing positive ratings on complex financial products such as residential mortgage-backed securities (RMBS), collateralized debt obligations (CDOs), and other similarly packaged mortgage-related products. According to petitioners, this strategy redounded to McGraw-Hill and S&P's benefit because in many instances, debt issuers whose securities S&P rated were also clients of S&P's services. Therefore, petitioners allege, as the complex mortgage-backed securities industry grew, McGraw-Hill's management directed S&P to further provide optimistic credit ratings in an effort to attract more business from the issuers and gain more revenue from those issuers' complex securities. According to petitioners, the mortgage-related securities at the heart of the meltdown would not have been marketed and sold without S&P's high ratings, none of which accurately reflected the securities' actual risk. Petitioners assert that the rosy credit ratings, which S&P knew to be false,

encouraged investment in toxic securities, thus helping to trigger the financial crisis of 2008.

Petitioners note that between August 2007 and November 2007, S&P, along with other major credit rating agencies, came under investigation by several state Attorney Generals' offices and by the United States Securities and Exchange Commission (SEC). These state and federal authorities set out to examine the rating agencies' activities in rating subprime RMBSs and CDOs. Among the main inquiries of the SEC investigation were whether the credit rating agencies complied with their own policies and procedures for initial ratings, the effectiveness of the agencies' conflict-of-interest procedures, and whether conflicts of interest influenced the agencies' ratings — specifically, whether agencies were influenced by receiving compensation from the very issuers and underwriters whose securities they rated.

After conducting its investigation, the SEC issued its conclusions in a July 2008 report. In that report, the SEC found, without attributing conduct to any particular credit rating agency, that the various agencies did not always disclose relevant ratings criteria and that none of them had specific written procedures for rating RMBSs and CDOs. The SEC report also noted, among other things, that although the agencies were required to maintain and enforce policies and procedures designed

to manage conflicts of interest, significant conflicts persisted — for example, the "issuer pays" model for RMBS and CDO offerings.

Similarly, in April 2011, the United States Senate Subcommittee on Investigations issued a report emphasizing credit rating agencies' complicity in the 2008 financial crisis — a crisis partially driven by investments in the subprime mortgage securities market. The Senate subcommittee report concluded that the rating agencies' senior management knew of increasing risks in the mortgage markets, such as lax lending standards, poor quality loans and mortgage fraud. However, the subcommittee stated, instead of using this information to temper their ratings, the agencies continued to issue numerous investment-grade ratings for mortgage-backed securities.

By letter dated November 18, 2011, petitioner North Miami Beach, citing New York Business Corporation Law (BCL) § 624 and the New York common law, made a written demand upon respondent to inspect certain books and records of respondent's board of directors.[1] The demand listed 15 categories of books and records generally relating to the board of directors' oversight and management of S&P, and also relating to the board's independence.

[1] Petitioner Robin Stein did not join North Miami Beach in making the demand until June 22, 2012.

For example, the demand requested records concerning: 1) the board's independence; 2) respondent's policies and procedures regarding the board's oversight of S&P; 3) names of senior employees reporting directly to the board; 4) policies and procedures for issuing credit ratings for RMBSs and CDOs; 5) policies and procedures for addressing and managing conflicts of interest, particularly those arising out of the "issuer pays" model for issuing credit ratings; and 6) the names of repondent's personnel in charge of enforcing a code of business ethics and any other conflict-of-interest policy. North Miami Beach specified the time frame for the production as "January 1, 2002 to the present."

Further, North Miami Beach enumerated the purposes for its demand — among others, to investigate potential wrongdoing and mismanagement by the board of directors; to assess the board's ability to consider impartially a demand for action; to assess policies that the board had implemented to address potential conflicts of interest in S&P's RMBS and CDO business; and to assess policies the board had considered or implemented to address S&P's procedures for issuing RMBS and CDO credit ratings.

Before petitioners commenced this action, the parties engaged in a series of discussions to determine whether they could compromise on the scope of petitioners' demand without any

court intervention. Respondent offered for production all documents required by BCL § 624 — that is, a record of shareholders, shareholder meeting minutes, and profit and loss statements. However, petitioners asserted a demand for additional documents under New York common law, including anything that the board had received or disseminated with respect to credit ratings for RMBSs and CDOs. Petitioners further demanded, also under New York common law, documents pertaining to respondent's policies and oversight of S&P, among other things. Nevertheless, respondent refused to produce any documents that were not required under BCL § 624, asserting that the request for documents under the New York common law was too broad.

Petitioners alleged that, in later discussions, they made clear that they sought only documents that the board had actually received, prepared, reviewed or distributed, and, of those documents, only the ones concerning the board's knowledge about and oversight of S&P. Thus, petitioners stated, respondent was not obliged to conduct an exhaustive firmwide search for documents, as the requested documents were easily identified and easily obtainable. However, respondent still took the position that petitioners were entitled only to documents required under BCL § 624.

When discussions failed to produce any agreement on further

documents to be produced, petitioners filed the petition underlying this appeal. Further, petitioners attached to their memorandum of law a "Schedule A" containing only nine categories of documents and making clear that petitioners sought documents only from board members. Petitioners noted that Schedule A constituted an attempt to narrow their prior demands after the series of discussions with respondent.

Supreme Court denied the petition, finding that petitioners should have first made a demand upon respondent and then, once respondent rejected the demand, should have commenced a shareholders' derivative action rather than filing a petition under BCL § 624. We disagree.

Under New York law, shareholders have both statutory and common-law rights to inspect a corporation's books and records so long as the shareholders seek the inspection in good faith and for a valid purpose (*see Matter of Dwyer v Di Nardo & Metschl, P.C.*, 41 AD3d 1177, 1178 [4th Dept 2007], quoting *Matter of Peterborough Corp v Karl Ehmer, Inc.*, 215 AD2d 663, 664 [2d Dept 1995]). The statutory right supplemented, but did not replace, the common-law right (*see Matter of Crane Co. v Anaconda Co.*, 39 NY2d 14, 19-20 [1976]; *Matter of Steinway*, 159 NY 250, 263-265 [1899]).

Here, petitioners sufficiently showed that they were acting

in good faith and for a proper purpose in seeking to enforce their common-law right to inspect respondent's books and records. Specifically, the petition alleges that petitioners seek to investigate alleged mismanagement and breaches of fiduciary duty by respondent's board of directors in failing to oversee purported wrongdoing by S&P; this alleged wrongdoing, petitioners assert, exposed respondent to substantial potential liability in multiple civil actions and investigations. These allegations form a proper basis for petitioners' request (*see Matter of Crane Co.*, 39 NY2d at 20-21).

Contrary to respondent's contentions, investigating alleged misconduct by management and obtaining information that may aid legitimate litigation are, in fact, proper purposes for a BCL § 624 request, even if the inspection ultimately establishes that the board had engaged in no wrongdoing (*see Matter of Tatko v Tatko Bros. Slate Co.*, 173 AD2d 917, 918 [3d Dept 1991]). Indeed, petitioners identified several reasons for making their demand, including assessment of policies that the board had implemented when issuing credit ratings and investigation of possible wrongdoing by the respondent's board of directors. Each of these purposes adequately justifies petitioners' access to certain board documents. Moreover, because the common-law right of inspection is broader than the statutory right, petitioners

are entitled to inspect books and records beyond the specific materials delineated in BCL § 624(b) and (e) (*see Matter of Ochs v Washington Hgts. Fed. Sav. & Loan Assn.*, 17 NY2d 82, 86-87 [1966]; *see also Rockwell v SCM Corp.*, 496 F Supp 1123, 1126 [SD NY 1980]).

Finally, although petitioners substantially limited the scope of their initial requests by submitting their Schedule A, respondent maintains that the items requested in that schedule are still too broad. On this record, we cannot determine which records are relevant and necessary for petitioners' purposes. A hearing is therefore necessary to determine the proper scope of inspection (*see Matter of Liaros v Ted's Jumbo Red Hots, Inc.*, 96 AD3d 1464, 1465 [4th Dept 2012]; *Tatko*, 173 AD2d at 919). Accordingly, we remand the matter to Supreme Court for that hearing.

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

ENTERED: SEPTEMBER 11, 2014

CLERK

Mazzarelli, J.P., Friedman, Saxe, Manzanet-Daniels, Feinman, JJ.

12628- Index 651324/10
12629 Kimberly Andron,
Plaintiff-Appellant,

-against-

Howard Libby,
Defendant-Respondent.

_____

Mintz & Gold LLP, New York (Scott Klein of counsel), for appellant.

Hirschel Law Firm, P.C., Garden City (Daniel Hirschel of counsel), for respondent.

_____

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered May 15, 2012, which denied plaintiff's motion for summary judgment and for dismissal of the counterclaim, unanimously reversed, on the law, with costs, the motion granted, and the matter remanded for a hearing to determine reasonable attorney's fees. Appeal from order, same court and Justice, entered April 26, 2013, which, upon reargument, adhered to the original determination, unanimously dismissed, without costs, as academic.

Plaintiff brought this action against defendant, her former father-in-law, to enforce his guaranty of a settlement agreement reached in a matrimonial proceeding. Defendant counterclaimed, seeking damages in the form of costs associated with this litigation. The settlement agreement provided in relevant part

that plaintiff, the former wife, who remained an obligor on a mortgage and a line of credit agreement along with her nonparty former husband (hereinafter, the husband), had the right to notify the husband or defendant when there was an "uncured default" in the monthly payments and demand that the default be cured. It also provided that defendant's failure to give notice of the cure within five business days of plaintiff's initial demand, would trigger her right to seek immediate enforcement of the settlement agreement, including, as pertinent here, defendant's payment of her reasonable attorney's fees incurred in the enforcement of the guaranty.

Plaintiff's primary claim is that as of July 2010, the husband's repeated late payments on the mortgage and the line of credit had damaged her credit and resulted in receipt of a bank notice indicating that the former marital residence was at risk of foreclosure. Defendant failed to provide proof of cure of the defaulted payments by July 19, 2010, five business days after her demand. On July 22, 2010, defendant was notified by email that because he had not given timely notice to plaintiff that the defaults had been cured, plaintiff was asserting her right to have the entire equitable distribution payment come due immediately. When no payments were made, plaintiff commenced this litigation. Since commencement of this action, defendant

has paid the accelerated debt and default interest, and the first cause of action is no longer at issue.

The crux of the defense is that while plaintiff admittedly did not receive notice of cure within five days, the accounts were allegedly already up to date or were brought up to date within that five-day period, and that this is sufficient to deny summary judgment. He also argues that there are questions of fact including whether there was an actual default, and the nature of plaintiff's motives in bringing the litigation.

"A party opposing summary judgment may proffer hearsay evidence, but such proof may not be the sole factual basis for denying summary judgment" (*Sunfirst Fed. Credit Union v Empire Ins. Co./All City Ins. Co.*, 239 AD2d 894, 894 [4th Dept 1997] [citations omitted]; *see also Wilbur v Wilbur*, 266 AD2d 535, 536 [2d Dept 1999] [finding that the defendant's deposition testimony as to what her mother told her was "unsubstantiated hearsay" and contradicted by documentary evidence, and therefore insufficient to defeat summary judgment]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Here, pertaining to the line of credit account, defendant avers, and the husband states in a letter emailed on July 23, 2010, that the bank representative informed them that as of July 16, 2010, the line of credit payments were current, with the next payment due on July 25, 2010. Defendant

contends that the statement by the bank representative was the best and only information he could obtain, as he was not a signatory on the accounts at issue and not allowed to obtain copies of the statements. Nonetheless, defendant's affidavit relies only on hearsay evidence that a bank representative had indicated that the line of credit was in good standing. The documentary evidence is to the contrary.

It is not the function of the court to remake an agreement agreed to by the parties, but to enforce it as it exists (*Rowe v Great Atl. & Pac. Tea Co.*, 46 NY2d 62, 69 [1978]). The proper aim of the court is to arrive at a construction that gives meaning to all the language employed by the parties (*see Tantleff v Truscelli*, 110 AD2d 240, 244 [2d Dept 1985], *affd* 69 NY2d 769 [1987]). The parties agreed in the settlement agreement that defendant's failure to cure a default or to give notice that the default had been cured within five business days of plaintiff's demand would trigger plaintiff's right to certain remedies. We cannot ignore the parties' written agreement.

The motion court erred in finding a question of fact as to whether the mortgage was actually in default when plaintiff made her demand. The fact that defendant was told on July 16 that payment of $5,683.50 would bring the accounts up to date, and that his bank statement shows that this payment was made on July

19, establishes that the mortgage payments had in fact been in arrears, and plaintiff was entitled to make her demand. It was, under the circumstances, also error to rely on the hearsay statement of the bank representative to find issues of fact and credibility as to whether the home equity line of credit was in default, as plaintiff claims, or was current. The representative's alleged statement is belied by the bank statements showing that no payment was made on the line of credit as of June 30, 2010, and the payment on July 2, 2010 represents the payment due in June, not the payment due in July as claimed by the husband. The bank statements show that the arrears carried forward even after July. Giving defendant, the nonmoving party, the benefit of every favorable inference, even if he were under the mistaken belief that payment on the line of credit was current, the fact that he paid funds to correct the balance of the outstanding mortgage is sufficient evidence of a default and that plaintiff did not abuse the terms of the settlement agreement when she sought a cure *and proof of the cure*. Accordingly, she is entitled to the enforcement of the guaranty's provision for her reasonable attorney fees to be paid in this litigation.

As for defendant's counterclaim for costs based on his argument that he timely cured any default, as well as paid the

full amount of the equitable distribution sum that plaintiff sought rendering her first cause of action moot, we find that his claim lacks merit. The documentary evidence shows that the husband had a pattern of making late payments on both accounts. This pattern harmed plaintiff's credit history, and it was only by seeking legal assistance that she was able to have the payments made current and to restore her credit rating. Notably, after her attorney intervened, defendant not only brought the mortgage up to date, but paid the accelerated equitable distribution claim. Given this history, we do not find plaintiff's suit to be frivolous nor do we find that it constitutes harassment. Accordingly, the counterclaim should be dismissed (*see* 22 NYCRR 130-1.1[a], [c][2],[3]).

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

ENTERED: SEPTEMBER 11, 2014

CLERK

Friedman, J.P., Acosta, Saxe, Feinman, Gische, JJ.

12685 Lilia Ortiz, Index 112959/11
Plaintiff-Respondent,

-against-

New York City Housing Authority,
Defendants-Appellant.

_____

Cullen and Dykman LLP, New York (Joseph C. Fegan of counsel), for appellant.

Peña & Kahn, PLLC, Bronx (Diane Welch Bando of counsel), for respondent.

_____

Order, Supreme Court, New York County (Anil C. Singh, J.), entered June 14, 2013, denying defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

In this action for personal injuries allegedly suffered by plaintiff when she tripped and fell on the sidewalk adjacent to defendant's residential building, the trial court properly denied defendant's motion. The climatological records establish that it snowed two days prior to plaintiff's accident, the temperature fluctuated within a few degrees above and below the freezing point during the interim period, and there was sixteen inches of accumulated snow and ice on the ground from prior recent storms. Defendant's grounds supervisor attested that the sidewalk had been plowed on the day of the last storm, and that he had last

noted icy conditions at 8:00 a.m. the day before the accident. Plaintiff testified, however, that the sidewalk was not cleared of snow and ice, rather, only a relatively narrow path had been partially cleared and large mounds of snow abutted the path on either side. She further testified that the path was dirty and wet due to runoff from the mounds of snow and that while walking in the pathway, she slipped on a hard, gray, dirty patch of ice that had accumulated in a defect in the sidewalk.

Accepting plaintiff's account for the purposes of this motion (*see Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 493 [1st Dept 2012]), the evidence raises issues of fact as to whether defendant's procedures either created or exacerbated the icy condition that allegedly caused the accident and whether the condition was present for a sufficient period of time within which it could have been discovered and remedied (*see Rodriguez v Bronx Zoo Rest., Inc.*, 110 AD3d 412 [1st Dept 2013]; *Sanchez v City of New York*, 48 AD3d 275, 276 [1st Dept 2008]).

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

ENTERED: SEPTEMBER 11, 2014

CLERK

Sweeny, J.P., Renwick, Andrias, Richter, Kapnick, JJ.

12799- Index 303123/09
12800-
12801-
12802-
12803-
12804-
12805-
12806-
12807 Stanley Cohen,
Plaintiff-Respondent-Appellant,

-against-

Pauline Cohen,
Defendant-Appellant-Respondent.

_____

Wolfson & Carroll, New York (John W. Carroll of counsel), for appellant-respondent.

Law Office of Glenn S. Koopersmith, Garden City (Glenn S. Koopersmith of counsel), for respondent-appellant.

Schpoont & Cavallo LLP, New York (Sandra L. Schpoont of counsel), attorney for the child.

_____

Judgment, Supreme Court, New York County (Barbara Jaffe, J.), entered May 9, 2013, to the extent appealed from, dissolving the parties' marriage, granting plaintiff physical and legal custody of the parties' child, directing plaintiff to pay defendant non-durational maintenance of $26,000 per month, and directing plaintiff to continue to maintain defendant's two $300,000 life insurance policies and to purchase and maintain a $2.5 million life insurance policy naming defendant as sole beneficiary, unanimously modified, on the law and the facts, to

reduce the amount of non-durational maintenance to $22,500 per month and to reduce the amount of life insurance that plaintiff is required to purchase to $1,000,000, and otherwise affirmed, without costs. Appeals from orders, same court and Justice, entered on or about April 16, 2012, May 7, 2012, June 14, 2012, August 14, 2012 and February 5, 2013, unanimously dismissed, without costs, as subsumed in the appeal from the judgment. Order, same court (Matthew F. Cooper, J.), entered on or about May 30, 2013, which awarded defendant attorneys' fees in the sum of $175,000, unanimously affirmed, without costs.

Plaintiff husband, now 79, is a United States citizen. In or around 1990, he established, for his security and investment transactions, Scone Investments, a limited partnership in which he is a general partner. In the mid-1990s, he created the Scone Foundation, which provides financial awards and prizes to artists and archivists.

In 1996, while living in France, plaintiff met defendant wife, now 54, and they moved in together. Defendant, a documentary film maker and assistant director, was a citizen of Belgium and France. In 1998, defendant became pregnant and stopped working. On April 30, 1999, plaintiff created the Second Stanley Cohen Irrevocable 1999 Family Trust (1999 Trust), primarily for the benefit of defendant and their issue, although

his daughter from a previous marriage is also a beneficiary.

On June 7, 1999, the parties executed a prenuptial agreement in France, which provided that upon marriage, each party's premarital property would remain his or her separate property, that property titled in individual names acquired during the marriage would be the property of the person in whose name it was titled, and that jointly titled property acquired during the marriage would be jointly owned marital property. The parties married on June 14, 1999, and on July 10, 1999, their son was born.

In 2001, Scone Investments purchased two apartments in the Galleria, an apartment building in Manhattan. A third apartment in the building was later purchased. In 2002, the 1999 Trust purchased a 4,000-square-foot apartment in Paris.

During the marriage, the parties moved to the United States. They separated in 2006, but plaintiff continued to provide defendant with financial support. Plaintiff commenced this divorce action in March 2009. In a prior appeal (93 AD3d 506 [1st Dept 2012]), this Court affirmed the order of the trial court that held that the French prenuptial agreement was valid.

After a 2011 on-the-record "agreement" was vacated, the parties proceeded to trial in 2012. The trial was bifurcated, with specific days reserved for testimony regarding custody and

other days for testimony about finances. Although defendant was cross-examined during the financial phase of the trial, on May 18, 2011, in the midst of her cross-examination on custody issues, she left New York and returned to Paris. The attorney for the child requested that defendant's testimony on custody be stricken because she was not cross-examined. Plaintiff's attorney requested that all of defendant's testimony, including testimony on finances, be stricken. Defendant's counsel asked for time to permit defendant to appear again. The court provided defendant's counsel with an opportunity to explain her absence, and adjourned the trial to June 6, 2012.

Despite the three-week adjournment, defendant did not return to court, claiming that she was under doctor's orders not to travel. The court refused defendant's request for a further adjournment or to allow her to appear via Skype, and ended the trial on June 7, 2013. The court drew an adverse inference against defendant with respect to custody issues based on her failure to complete her cross-examination, but refused to default her or to strike her testimony in its entirety.

On the record before us, the court properly vacated the parties' 2011 on-the-record agreement. To be enforceable, an open court stipulation must contain all of the material terms and

evince a clear mutual accord between the parties (see CPLR 2104; *Bonnette v Long Is. Coll. Hosp.*, 3 NY3d 281, 286 [2004]; *Thome v Alexander & Louisa Calder Found.*, 70 AD3d 88, 103-104 [1st Dept 2009], *lv denied* 15 NY3d 703 [2010]). The 2011 on-the-record agreement was too incomplete and indefinite to be enforceable, and was merely a non-binding agreement to agree (*see Joseph Martin, Jr., Delicatessen v Schumacher*, 52 NY2d 105, 109 [1981]; *Bernstein v Felske*, 143 AD2d 863, 865 [2d Dept 1988]). The parties disagreed whether the proposal included a waiver of maintenance and they did not finalize the details of the transfer of the 1999 Trust. Other material terms were never agreed upon, and the agreement was subject to the consummation of future conditions and additional agreements.

The agreement also lacked consideration (*see Whitmore v Whitmore*, 8 AD3d 371 [2nd Dept 2004]). Accepting defendant's consent to the divorce in exchange for the financial payments would have been against public policy (*see Charap v Willett*, 84 AD3d 1003 [2nd Dept 2011]). In any event, the parties unambiguously agreed that "whether we hammer out the agreement or not, the divorce will go forward uncontested." There is no merit to defendant's claim that her decision to avoid a public trial on fault grounds constituted consideration because it would have brought up embarrassing and difficult questions for plaintiff

concerning his financial dealings.

The court correctly precluded defendant from introducing evidence of French law on equitable distribution at trial. There is no need for extrinsic evidence because the parties' prenuptial agreement unambiguously precludes equitable distribution (*see Van Kipnis v Van Kipnis*, 11 NY3d 573, 579 [2008]). Contrary to defendant's apparent contention, while the trial court previously held that the parties' prenuptial agreement was enforceable in New York because it was validly executed under French law, it did not rule that French law would apply to the ancillary divorce issues to be tried in this New York action; nor did this Court so rule in affirming the trial court's order.

The court properly considered all the circumstances and the best interests of the child in awarding plaintiff sole legal custody (*see Eschbach v Eschbach*, 56 NY2d 167 [1982]). While the child reported initially that he wanted to move to Paris and live with defendant, and the forensic expert expressed some concern about plaintiff's parenting, the expert also testified as to some serious concerns about defendant, including her suicide attempts and her rigidity. Most significantly, it came to light in May 2012 that defendant had been pressuring and manipulating the child, who was then nearly 13 years old; her contact with him was temporarily suspended, and plaintiff was granted temporary

custody. During a second *Lincoln* hearing (*see Matter of Lincoln v Lincoln*, 24 NY2d 270 [1969]), the child revealed to the court his deep-seated issues with defendant, and the court continued plaintiff's temporary custody. Instead of addressing these serious issues, defendant called two witnesses to attack the child's general veracity. Defendant then elected to return to France before her cross-examination was completed, and the court reasonably drew a strong negative inference as to her credibility and fitness as a parent. Thus, there is a sound and substantial basis in the record for the court's custody determination (*see Matter of James Joseph M. v Rosana R.*, 32 AD3d 725 [1st Dept 2006], *lv denied* 7 NY3d 717 [2006]).

The denial of defendant's request for a further adjournment of the trial after she returned to France was not a clear abuse of the court's discretion, and should not be disturbed (*see Pezhman v Department of Educ. of the City of N.Y.*, 113 AD3d 417 [1st Dept 2014], *lv denied* 22 NY3d 863 [2014], *cert denied* _ US _, 134 S Ct 2303 [2014]). The record fully supports the court's finding that defendant's failure to return to court, despite a three-week adjournment, was of her own making (*see Matter of Steven B.*, 24 AD3d 384 [1st Dept 2005], *affd* 6 NY3d 888 [2006]; *see also Matter of Samida v Samida*, 116 AD3d 779 [2d Dept 2014]). Defendant failed to submit an affidavit explaining her absence on

the May 18th date or on the June 6th date. To the extent she relies on her claim of medical injury, the claim is unavailing, since the unsworn medical note provided to the court was brief and vague (*Gramma v Gramma*, 161 AD2d 899 [3d Dept 1990]). While she now claims that she needed only a two-week adjournment, defendant gave no indication to the court that she would be able to return on a certain date, and her counsel had no knowledge of when she could actually do so.

Defendant also contends that she could not adequately respond to the allegations against her without the *Lincoln* hearing transcripts. However, the record demonstrates that she was well aware of the substance of the child's allegations and that she had every opportunity to address and respond to them, and she has not established that the court abused its discretion in refusing to release the transcripts (*see Matter of Anderson v Harris*, 73 AD3d 456, 458 [1st Dept 2010]). In any event, the two in camera meetings were only one factor in the court's custody determination.

Defendant's net worth statement, excluding housing costs, listed monthly expenses of more than $62,000. She asks that this court restore plaintiff's obligation to pay her non-durational

maintenance of $26,000 per month.[1] Plaintiff asks that the award of maintenance be stricken in its entirety or that the amount and duration of the maintenance be drastically reduced. For the reasons that follow, we find that the award of $26,000 per month in non-durational maintenance is excessive, and should be reduced to $22,500 per month.

Generally, the determination of maintenance is within the sound discretion of the trial court upon consideration of the relevant factors enumerated in Domestic Relations Law § 236(B)(6)(a) and the parties' pre-divorce standard of living (*see Hartog v Hartog*, 85 NY2d 36, 50–51 [1995]; *Morrow v Morrow*, 19 AD3d 253 [1st Dept 2005]). However, "the authority of this Court in determining issues of maintenance is as broad as that of the trial court" (*Reed v Reed*, 55 AD3d 1249, 1251 [4th Dept 2008]; *see also DiNozzi v DiNozzi*, 74 AD3d 866 [2d Dept 2010]).

[1]By order entered October 31, 2013, this Court granted plaintiff's motion for a stay of the judgment on condition that he pay defendant maintenance of $10,000 per month and maintain the life insurance benefiting defendant in the amount of $600,000.

The factors to be considered in awarding maintenance include

> "the standard of living of the parties during the marriage, the income and property of the parties, the distribution of marital property, the duration of the marriage, the health of the parties, the present and future earning capacity of both parties, the ability of the party seeking maintenance to become self-supporting, and the reduced or lost lifetime earning capacity of the party seeking maintenance" (*Alleva v Alleva*, 112 AD3d 567, 568 [2d Dept 2013] [internal quotation marks omitted]).

These factors must be evaluated along with the fact that "[t]he overriding purpose of a maintenance award is to give the spouse economic independence" (*see Bains v Bains*, 308 AD2d 557 [2d Dept 2003]).

Here, defendant had the primary homemaking and child-raising responsibilities during the marriage. The parties enjoyed a lavish lifestyle, both before and, significantly, after their separation, and plaintiff assumed the role of financial provider, acquiescing in defendant's financial dependency. Defendant is not going to receive a distributive award, her own assets are limited, and the record does not contain evidence of the amount of income that she will receive from the 1999 Trust. Defendant also suffers from a mild cognitive impairment that compromises her ability to work, both within and outside of the film industry, and she is incapable of supporting herself at a standard of living approximating the marital standard. While plaintiff asserts that his assets decreased during the recent

financial crisis in the United States, they have presumably rebounded with the recovery of the financial markets. In any event, they are still substantial and, along with plaintiff's annual income, are more than sufficient to provide for defendant's reasonable needs.

On the other hand, defendant made little or no financial contribution to the marriage, and her efforts as a mother were diminished by her manipulation of the child. The costs listed in defendant's statement of net worth were based on her life in New York, including expenses for the child. Defendant failed to provide a specific account of the money she alone required, and the court improvidently made certain assumptions in that regard. Thus, taking into consideration the statutory factors, including the parties' extravagant lifestyle (*see Summer v Summer*, 85 NY2d 1014 [1995]; *Costa v Costa,* 46 AD3d 495, 497 [1st Dept 2007]), defendant's dependence on plaintiff, the absence of a distributive award, and defendant's cognitive impairment insofar as it detrimentally affects her ability to become self-supporting (*see Miceli v Miceli*, 78 AD3d 1023, 1025 [2nd Dept 2012]), an award of non-durational maintenance of $22,500 per month is appropriate.

Plaintiff contends that defendant should not be awarded maintenance because of her refusal to submit to a complete cross-examination, which prevented the court from ascertaining her standard of living at the time of the divorce action, in contrast to the time earlier in the marriage when the parties co-resided. When a party, through no fault of its own, "is deprived of the benefit of the cross-examination of a witness," a court may strike that witness's direct testimony in whole or in part (*Gallagher v Gallagher*, 92 App Div 138, 140 [1904] [internal quotation marks omitted]; *Diocese of Buffalo v McCarthy*, 91 AD2d 213, 220 [4th Dept 1983], *lv denied* 59 NY2d 605 [1983]). Although we do not condone defendant's failure to return to court to complete her cross-examination during the custody phase of the trial, and firmly believe that this conduct must be sanctioned, we find, under the particular circumstances before us, that the court providently exercised its discretion when it drew a negative inference against defendant with respect to custody issues but declined to strike her testimony in its entirety. Among other things, the court was familiar with the parties' lavish standard of living during the marriage and defendant testified and was cross-examined for a number of days during the financial phase of the trial. During this testimony, defendant acknowledged that her food and unreimbursed medical expenses had

decreased, that many of the amounts in her net worth statement reflected the way the parties lived before separating, and that she had reduced her spending on many of these items. Accordingly, plaintiff's claims of prejudice are overstated, and a negative inference with respect to custody was an adequate sanction for defendant's misconduct.

The court properly required plaintiff to maintain a policy of life insurance naming defendant as the sole beneficiary (*see* § 236[B][8][a]; *Hartog*, 85 NY2d at 50). However, in view of our reduction of the maintenance award, and the high premium costs due to plaintiff's advanced age, the amount of additional insurance that defendant is required to purchase should be reduced from $2.5 million to $1 million.

The court properly awarded defendant $175,000 in counsel fees after considering the financial positions of the parties and the circumstances of the case, including the unnecessary

litigation caused by defendant (*see* Domestic Relations Law § 237; *Johnson v Chapin*, 12 NY3d 461, 467 [2009]; *DeCabrera v Cabrera-Rosete*, 70 NY2d 879 [1987]; *O'Shea v O'Shea*, 93 NY2d 187, 193 [1999]).

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

ENTERED: SEPTEMBER 11, 2014

CLERK

Tom, J.P., Sweeny, Moskowitz, Manzanet-Daniels, Gische, JJ.

9194N- Index 102187/11
9195N- 651960/11
9196- 652399/10
9197N &
M-3690-
M-3704-
M-3705 In re Monarch Consulting, Inc., et al.,
Petitioners-Appellants.

-against-

National Union Fire Insurance Company
of Pittsburgh, PA.,
Respondent-Respondent.

- - - - -

In re National Union Fire Insurance
Company of Pittsburgh, PA.,
Petitioner-Respondent,

-against-

Priority Business Services, Inc., formerly
known as Inland Valley Staffing Services, etc.,
Respondent-Appellant.

- - - - -

In re National Union Fire Insurance Company
of Pittsburgh, PA.,
Petitioner-Appellant,

-against-

Source One Staffing, LLC.,
Respondent-Respondent.

_____

Bond, Schoeneck & King, PLLC, Syracuse (Clifford G. Tsan of counsel), for Monarch Consulting, Inc., Elite Management, Inc., Brentwood Television Funnies, Inc., Professional Employer Option, Inc., Recrurrent Software Solutions, Ahill, Inc., The Accounting Group, LLC and Pes Payroll, IA, Inc., appellants.

Anderson Kill & Olick, P.C., New York (Jeffrey E. Glen of counsel), for Priority Business Services, Inc., appellant.

Sidley Austin LLP, New York (Nicholas P. Crowell of counsel), for National Union Fire Insurance Company of Pittsburgh, PA., etc., respondent/appellant.

Anderson Kill & Olick, P.C., New York (Rene F. Hertzog of counsel), for Source One Staffing, LLC., respondent.

_____

Order, Supreme Court, New York County (Jeffrey Oing, J.), entered January 31, 2012, reversed, on the law, without costs, the petition granted, and the cross petition denied. Order and judgment (one paper), Supreme Court, New York County (Shirley Werner Kornreich, J.), entered on or about April 18, 2012, reversed, on the law, without costs, and the petition denied. Order, Supreme Court, New York County (Eileen Bransten, J.), entered July 30, 2012, affirmed, without costs. Appeal from order, same court and Justice, entered August 1, 2011, dismissed, without costs, as academic.

Opinion by Moskowitz, J. All concur except Manzanet-Daniels and Gische, JJ. who dissent in an Opinion by Gische, J.

M-3690 - Monarch Consulting, Inc., et al. v National Union Fire Insurance Company of Pittsburgh, PA.

M-3704 - National Union Fire Insurance Company of Pittsburgh, PA. v Priority Business Services, Inc., etc.

M-3705 - National Union Fire Insurance Company of Pittsburgh, PA. v Source One Staffing, LLC.

Motions to take judicial notice granted.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
John W. Sweeny
Karla Moskowitz
Sallie Manzanet-Daniels
Judith J. Gische, JJ.

9194N-9195N-9196N-9197N &
M-3690, M-3704, M-3705
Index 102187/11
651960/11
652366/10

_____x

In re Monarch Consulting, Inc., et al.,
Petitioners-Appellants.

-against-

National Union Fire Insurance Company
of Pittsburgh, PA.,
Respondent-Respondent.

- - - - -

In re National Union Fire Insurance
Company of Pittsburgh, PA.,
Petitioner-Respondent,

-against-

Priority Business Services, Inc., formerly
known as Inland Valley Staffing Services, etc.,
Respondent-Appellant.

- - - - -

In re National Union Fire Insurance Company
of Pittsburgh, PA.,
Petitioner-Appellant,

-against-

Source One Staffing, LLC,
Respondent-Respondent.

_____x

Petitioners Monarch Consulting, Inc., Elite Management, Inc., Brentwood Television Funnies, Inc., Professional Employer Options, Inc., Recurrent Software Solutions, Ahill, Inc., The Accounting Group, LLC and Pes Payroll, IA, Inc., appeal from the order of the Supreme Court, New York County (Jeffrey Oing, J.), entered January 31, 2012, which denied the petition to stay arbitration and granted the cross petition by National Union Fire Insurance Company of Pittsburgh, PA. (National Union) to compel arbitration.

Respondent Priority Business Services, Inc., appeals from the order and judgment (one paper) of the Supreme Court, New York County (Shirley Werner Kornreich, J.), entered on or about April 18, 2012, which, insofar as appealed from as limited by the briefs, granted National Union's petition to compel arbitration. Petitioner National Union appeals from the order of the Supreme Court, New York County (Eileen Bransten, J.), entered July 30, 2012, which, insofar as appealed from as limited by the briefs, denied its amended petition to compel arbitration, and from the order of the same court and Justice, entered August 1, 2011, which denied its original petition to compel arbitration with leave to replead.

Bond, Schoeneck & King, PLLC, Syracuse (Clifford G. Tsan of counsel), and Roxborough, Pomerance, Nye & Adreani, LLP, Woodland Hills, CA (Nicholas P. Roxborough of the bar of the State of California, admitted pro hac vice, of counsel), for Monarch Consulting, Inc., Elite Management, Inc., Brentwood Television Funnies, Inc., Professional Employer Option, Inc., Recrurrent Software Solutions, Ahill, Inc., The Accounting Group, LLC and Pes Payroll, IA, Inc., appellants.

Anderson Kill & Olick, P.C., New York (Jeffrey E. Glen and Edward J. Stein of counsel), for Priority Business Services, Inc., appellant.

Sidley Austin LLP, New York (Nicholas P. Crowell, Andrew W. Stern and Gazeena K. Soni of counsel), for National Union Fire Insurance Company of Pittsburgh, PA., appellant/respondent.

Anderson Kill & Olick, P.C., New York (Rene F. Hertzog of counsel), for Source One Staffing, LLC., respondent.

MOSKOWITZ, J.

In this appeal, we are called on to decide whether three insureds are compelled to arbitrate their disputes with their workers' compensation insurance carrier even though the carrier failed to file the arbitration agreements, contained in side agreements to the insurance policies, with the California Department of Insurance as California law requires.

We find that, in light of the strong policy under California law of regulating insurance carriers and their agreements with their insureds, the side agreements, along with the arbitration clauses contained in them, are not enforceable because the insurer failed to file them with the Workers' Compensation Insurance Rating Bureau (WCIRB) and the California Department of Insurance (CDI). Thus, the petitions to compel arbitration are dismissed and the cross petitions to stay arbitration are granted.

The Parties

National Union Fire Insurance Company of Pittsburgh, PA. (National Union) is an insurance company licensed in Pennsylvania with its principal place of business in New York. Source One Staffing, Monarch Consulting, Inc. and Priority Business Services, Inc. (collectively, the insureds) are all either California companies or have their principal places of business

in that state.[1]

The California Statutory Insurance Scheme

California law provides for a mandatory insurance program so that employers can compensate workers injured on the job, and employers must buy workers' compensation insurance as a condition of doing business in California (*see* Cal Labor Code § 3700). The state of California has also created a comprehensive system to regulate the insurance companies that provide workers' compensation insurance to employers. To that end, the California legislature grants broad authority to the California Commissioner of Insurance (the Commissioner) and WCIRB to regulate and oversee the form and substance of all workers' compensation insurance plans, including the rates and practices of all insurance companies in the state. The Insurance Code provides that the WCIRB was organized, among other purposes, "[t]o provide reliable statistics and rating information with respect to workers' compensation insurance and employer's liability insurance incidental thereto and written in connection therewith" and "[t]o examine policies, daily reports, endorsements or other evidences

[1] Monarch Consulting, Inc. is only one of the plaintiffs in its action against National Union; the others are Elite Management, Inc., Brentwood Television Funnies, Inc., Professional Employer Options, Inc., Recurrent Software Solutions, Ahill, Inc., The Accounting Group, LLC, and PES Payroll, IA, Inc. "Monarch" will refer to these parties collectively.

of insurance for the purpose of ascertaining whether they comply with the provisions of law and to make reasonable rules governing their submission" (Cal Ins Code § 11750.3).

The law requires workers' compensation carriers, before issuing a workers' compensation insurance policy, to file copies of their insurance policies, endorsements and forms with WCIRB; after a preliminary inspection, the WCIRB then sends the filed documents to the CDI for approval (*see* Cal Ins Code § 11658, *see also* Cal Ins Code §§ 11750.3 and 11735, 10 California Code of Regulations (CCR) §§ 2218 and 2268). The CDI has 30 days in which to reject the filed form or endorsement; should the CDI reject the documents, "it is unlawful for the insurer to issue any policy or endorsement in that form" (Cal Ins Code § 11658[b]). Thus, two regulatory agencies must review and approve all workers' compensation insurance forms; the Commissioner, however, has the exclusive authority to regulate, accept, and reject workers' compensation insurance plans.

The Policies and the Payment Agreements

As required under the various laws regulating insurance in the state of California, the insureds each secured, from National Union, annual workers' compensation insurance policies, the earliest of which went into effect on October 21, 2003 and the latest of which terminated on October 21, 2010 (collectively, the

policies).

After National Union issued the policies, it sent each insured a series of additional agreements and addenda (the payment agreements), governing, among other things, the extension of credit and deferral of certain payment obligations, the timing of those payment obligations, and default and dispute resolution procedures and processes. The payment agreements contained numerous defined terms, including the insureds' "Payment Obligation," defined as "the amounts that [insureds] must pay [National Union] for the insurance and services in accordance with the terms of the Policies, this Agreement, and any similar primary casualty insurance Policies and agreements with [National Union] incurred before the inception date hereof." These amounts included, but were not limited to, "premiums and premium surcharges," "deductible loss reimbursement" and any amount that National Union paid to a claimant on the insureds' behalf.

The payment agreements also provided that, if an insured defaulted under those agreements, National Union could "change any or all unexpired Policies under Loss Reimbursement or Deductible plan to Non-Deductible plans for the remaining term of any such Policy, to become effective after ten days written notice to [the insured]. [National Union] will therewith increase the premiums for those Policies in accordance with our

applicable rate plan."

The payment agreements contained broad arbitration clauses requiring the arbitration of "[a]ny" disputes concerning an insured's payment obligation as well as "[a]ny other unresolved dispute" arising out of the payment agreements. The payment agreements further provided that any arbitration would be governed by the Federal Arbitration Act (FAA) and that the arbitrators "will have exclusive jurisdiction over the entire matter in dispute, including the question as to its arbitrability" and that "any action or proceeding concerning arbitrability, including motions to compel or to stay arbitration, may be brought only in a court of competent jurisdiction in the City, County, and State of New York."

The insureds do not dispute that they executed each of the payment agreements, including all schedules and addenda. For its part, National Union does not dispute that the payment agreements were not attached to the policies and, in fact, were usually issued months after the policies.

In each of the above-entitled actions, a dispute arose between the insureds and National Union when the insureds defaulted on the payment agreements, and National Union demanded arbitration under those agreements. In each case, the insureds resisted arbitration by challenging, among other things, the

payment agreements' arbitration clauses, arguing that they violated California Insurance Code § 11658.

The insureds argued that despite the arbitration clause, the issue was for the courts to decide. Specifically, the insureds asserted that the Federal Arbitration Act (FAA) could not preempt the California Insurance Code for one of two reasons: first, because the challenge is to the arbitration clause itself, rather than to the entire agreement; and, second, because the McCarran-Ferguson Act precludes preemption. In response, National Union argued that neither the payment agreements nor the arbitration clauses constitute policies or endorsements, and thus, there is no requirement that the CDI review them because they are not subject to the same regulation as the policies themselves.

The CDI Directive

On February 14, 2011, the CDI issued a directive to the WCIRB reiterating its position that under "Insurance Code Section 11658, a workers' compensation insurance policy or endorsement shall not be issued by an insurer to any person in this state *unless the insurer files a copy* of the form or endorsement with the rating organization pursuant to subdivision (e) of Section 11750.3." The directive states, "[T]he Insurance Commissioner has prohibited the use of Collateral Agreements, which is

synonymous with the term 'side-agreement,' concerning workers' compensation insurance unless they are attached to the policy." The directive further notes: "The Department is particularly concerned with arbitration provisions contained in unattached collateral agreements and considers such terms unenforceable unless the insurer can demonstrate that the arbitration agreement was expressly agreed to by the insured at the time the policy was issued."

Approximately one year later, the CDI began instituting enforcement actions against insurers who failed to heed its February 2011 directive. One action in particular (*In the Matter of the Licenses and Licensing Rights of Zurich American Insurance Company and Zurich American Insurance Company of Illinois*, File No. DISP-2011-00811) [the *Zurich* Action], involved Zurich American Insurance Company's insurance of six consecutive years of workers' compensation policies and payment agreements to one of its insureds.

By order to show cause, filed on February 27, 2012, the CDI argued in the *Zurich* Action that Zurich American should have filed the agreements with California's insurance regulators because the agreements referred to, modified and superseded the underlying policies. The CDI argued further that, because the agreements had not been filed, they were unenforceable, and it

sought an order from the Insurance Commissioner to that effect. Zurich American responded that the payment agreements were neither policies nor endorsements; rather, they were "non-policy" financial agreements that in no way modified the insurance policies.

On July 11, 2013, the CDI finalized a settlement with Zurich. The settlement stated that Zurich's payment agreements were to be filed with the CDI and the WCIRB, starting from the date of the settlement forward. For its part, Zurich agreed that, as of the settlement date, it would file the documents and comply with the relevant statutes – namely, California Insurance Code § 11658, and CCR, Title 10, §§ 2216 and 2268. The CDI settlement also states, "The [California] Department of Insurance further agrees that its rules and requirements regarding Deductible Agreements would be applied evenly to Zurich *and its competitors on a level playing field basis* . . ." (emphasis added).

The Relevant Codes, Statutes and Laws

California Insurance Code § 11658(a) provides:

> "A workers' compensation insurance policy or endorsement *shall not be issued* by an insurer to any person in this state unless the insurer files a copy of the form or endorsement with the rating organization pursuant to subdivision (e) of Section 11750.3 and 30 days have expired from the date the form or endorsement is received by the commissioner from the rating organization without notice from the commissioner,

> unless the commissioner gives written approval of the form or endorsement prior to that time" (emphasis added).

California Code of Regulations, Title 10, § 2218, elaborates further on the process that must be followed, providing: "(a) All workers' compensation insurance forms must be submitted in duplicate to the [WCIRB] for preliminary inspection. The [WCIRB] shall review such forms and submit them to the Commissioner for final action . . . [;] (b) Workers' compensation rates shall be filed as provided in § 2509.30, et seq, of this Chapter."

Title 10, California Code of Regulations, § 2268 provides:

> "No collateral agreements modifying the obligation of either the insured or the insurer shall be made unless attached to and made a part of the policy, provided, however, that if such agreements are attached and in any way restrict or limit the coverage of the policy, they shall conform in all respects with these rules."

Title 10, California Code of Regulations, § 2252, in turn, provides that "[l]imitation or restriction of coverage for liability under the [California] workers' compensation laws shall be governed by Sections 2253 to 2268, inclusive" (10 CCR § 2252).

As to applicable federal law, the McCarran-Ferguson Act (ch 20, 59 Stat 33 [1945] [codified as amended at 15 USC § 1011 *et seq.*]) (McCarran-Ferguson or the Act) was passed in 1945 in response to the Supreme Court's decision in *United States v South-Eastern Underwriters Assn.* (322 US 533 [1944]). *South-*

Eastern Underwriters held that the business of insurance was part of interstate commerce, thus subjecting the insurance industry to federal regulation. In the wake of that holding, many states feared a federal takeover of insurance regulation, and feared that a takeover would threaten the power of states to tax and regulate the insurance industry (*United States Dept of Treasury v Fabe*, 508 US 491, 499-500 [1993]).

In passing the Act, Congress restored the supremacy of states in insurance regulation:

> "Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States" (*id.* at 500, quoting 15 USC § 1011 [internal quotation marks omitted]).

McCarran-Ferguson further provides, "The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business" (*id.* at 497 n 3, quoting 15 USC § 1012[a]).

Finally, the Act states that "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance . . ." (*id.* at 500-501, quoting 15 USC § 1012[b]). This clause establishes what the United States Supreme Court has

described as a "clear-statement rule" (*Fabe*, 508 US at 507). While the federal government has the authority to regulate insurance, federal laws will be presumed not to reach insurance unless Congress expressly states an intent to do so. Thus, the McCarran-Ferguson Act gives states a dominant role in the regulation of insurance (*see id.* at 500).

The Monarch Action

In the *Monarch* Action, the motion court granted National Union's cross motion to compel arbitration and appoint an arbitrator and denied Monarch's petition to stay the arbitration. In so doing, the court noted that Monarch had executed the payment agreements, with the same arbitration clause, for seven years and therefore could not claim any surprise. Accordingly, the court found that National Union had demonstrated that the parties had an express agreement to arbitrate, and the arbitration clause was therefore enforceable. Further, the court found that an arbitrator should decide whether specific portions of the payment agreements were valid under California law.

The Priority Business Services Action

In the *Priority Business Services* action, the motion court granted National Union's motion to compel arbitration and directed the parties to arbitrate their dispute. Citing the "strong federal policy encouraging arbitration" and the fact that

the business of insurance is commerce within the meaning of the Commerce Clause," the court found that the FAA "applies to this petition and motion" and that the arbitration clause is valid.

Further, the court found "unpersuasive" "Priority's contention that the FAA cannot preempt California Insurance Code § 11658 . . . ." The court noted that the party challenging arbitration must show that application of the FAA would invalidate, impair, or supersede a state law enacted for the purpose of regulating insurance; thus, Priority would have to show an "inherent and direct conflict between California Insurance Code § 11658 and arbitration as a dispute resolution mechanism" (citing *Preston v Ferrer*, 552 US 346, 356 [2008]). However, the court found, Priority could not make such a showing because § 11658 "does not prohibit arbitration in insurance disputes in California," and in fact, does not even address arbitration.

The motion court also rejected the argument that the payment agreements were unenforceable because the insurance companies failed to file them for approval under § 11658. This argument, the court found, went to the merits of the underlying contract dispute; the California insurance laws were not impaired by the agreement to arbitrate. Thus, the court concluded that Priority had failed to show how application of the FAA would invalidate,

impair, or supersede the filing requirement of § 11658.

As to the scope of the arbitration clause, the court found it broad enough to encompass Priority's challenge to the payment agreements. Further, the court noted, Priority had failed to assert fraud, unconscionability, duress, or some other challenge to the agreements' status as a legally binding contract. Thus, the court rejected Priority's assertions that it was challenging the specific provision, rather than the entire agreement. As a result, the court found, an arbitrator, rather than the court, should review Priority's claims.

The Source One Action

In the *Source One* Action, that motion court denied National Union's motion to compel arbitration, finding that National Union had failed to show that the FAA preempted the California Insurance Code and failed to demonstrate that the payment agreements were not "policies" under California law.

Specifically, the court found that the McCarran-Ferguson Act, which effectuated the "federal policy of leaving regulation and taxation of the insurance industry to the States" (*see* 15 USCA § 1011), precluded the FAA from preempting the California Insurance laws. The court noted that under § 1012(b) of McCarran-Ferguson, "no Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for

the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance." In so noting, the court rejected National Union's argument that, because California Insurance Code § 11658 did not "establish a framework for dispute resolution, [] the FAA d[id] not invalidate, impair or supersede" it. The court found,

> "To the extent the arbitration and forum selection clauses are part of an insurance policy within the meaning of the Insurance Code . . . , if the court were to find that arbitration is contractually mandated under the FAA, despite the provisions' undisputed non-compliance with the Insurance Code, then the court would be disregarding the Insurance Code on the basis of the FAA."

Hence, the motion court found, "[National Union] has not shown how mandating arbitration would not invalidate, impair or supersede the Insurance Code" and therefore had not "shown that the McCarran-Ferguson Act allows the FAA to preempt the Insurance Code."

The court dismissed as "inapplicable" National Union's argument that the FAA applied because Source One challenged the payment agreement as a whole and not simply the arbitration and forum selection clauses, citing, inter alia, *Prima Paint Corporation v Flood & Conklin Mfg. Co.* (388 US 395, 403-04 [1967]), for the proposition that "challenges to the validity of the contract, generally, are within the arbitrator's ken, whereas challenges to the arbitration clause are not." The court found

that this argument is dependent on the FAA's supremacy, and therefore, not determinative of the issue in this dispute. The court also rejected National Union's argument that the payment agreements were not policies, finding that, contrary to National Union's argument, the payment agreements did "confirm the indemnity obligations and assumption of risk by [National Union]." However, the court found that the parties had not fully addressed the issue of whether the payment agreements were policies or components of policies within the meaning of the Insurance Code, and thus granted leave to replead.

National Union filed an amended verified petition to compel arbitration and a limited motion to reargue the motion court's holding that the California Insurance Code preempts the FAA under McCarran-Ferguson. The court denied the motion to reargue, finding that it had not overlooked governing law establishing that McCarran-Ferguson did not permit the Insurance Code to preempt the FAA.

The court rejected National Union's argument that the payment agreement was a credit agreement that permitted Source One to defer a significant portion of its premium and claim reimbursement obligations arising under the policies and thus, did not establish or govern the insurer's obligation to pay benefits to injured workers under California law. Indeed, the

court noted, several provisions of the payment agreement reflected National Union's contractual intent to treat it and the policies as part of the same collective agreement.

In reaffirming its decision that the payment agreements were subject to § 11658, the court cited *Ceradyne v Argonaut Ins. Co.* (2009 WL 1526071, 2009 Cal App Unpub LEXIS 4375 [Cal App 4th Dist, June 2, 2009, No. G039873]), in which the California Court of Appeal found that an insurer's failure to file an arbitration and forum selection provision rendered the provision "unenforceable" and found the document containing the provision to be part and parcel of the complete insurance plan offered. The court further noted that "*Ceradyne* is consistent with a directive issued by the [CDI] . . . regarding the kind of workers compensation collateral agreements that are at issue in this matter."

The court distinguished *Grove Lumber & Building Supply, Inc. v Argonaut Insurance Company* (2008 WL 2705169, 2008 US Dist LEXIS 51752 [CD Cal, July 7, 2008, No. SA CV 07-1396 AHS(RNBx)]), a federal case decided before *Ceradyne*, because the payment agreement at issue there included the caveat that it did not change any of the terms or conditions of the policies or of the obligations or duties spelled out in the policies. In the *Source One* action, however, the payment agreement contained no such

language.

Finally, the court rejected, as contrary to the plain language of California's regulations, National Union's argument that only agreements that would "'modify, restrict or limit the *coverage obligation* of the insurer and insured under the policy'" were required to be attached to the policy or filed with the CDI. The court found that "the Payment Agreement is plainly a collateral agreement that modifies the obligations of the parties" and is subject to the filing requirements of § 11658.

The Parties' Positions on Appeal

In these appeals, the three insureds make the same argument regarding the payment agreements – namely, that the agreements are policies or endorsements that should have been filed with the CDI, and that National Union's failure to do so rendered the terms of those agreements unenforceable.

As to the McCarran-Ferguson Act, the insureds' arguments differ somewhat. Monarch argues that McCarran-Ferguson is irrelevant because Monarch is challenging the arbitration clause directly – that is, Monarch does not argue that the payment agreement itself is void, but rather, argues that § 11658 directly applies to the arbitration endorsement itself. Thus, Monarch concludes, the FAA is of no moment. For its part, Priority argues that McCarran-Ferguson prevents the FAA from

preempting § 11658. Finally, Source One argues that McCarran-Ferguson "reverse-preempts" the FAA – that is, the state law will be enforced – and thus, that the parties must comply with California law.[2]

By contrast, National Union argues, as it did in the motion court, that the payment agreements are neither policies nor endorsements, and therefore, it was not required to file the agreements with the CDI. Further, with respect to McCarran-Ferguson, National Union argues that California Insurance Code § 11658 does not establish a framework for dispute resolution, and thus, that the FAA does not invalidate, impair or supersede § 11658.

The McCarran-Ferguson Act

Because the arbitration clause and the payment agreements are void or unenforceable, we find that applying the FAA to mandate arbitration in this case would, in fact, invalidate, impair, or supersede the California Insurance Code. Therefore, the McCarran-Ferguson Act prevents the FAA from preempting the

[2] In its brief, Monarch agrees that McCarran-Ferguson reverse-preempts the FAA. However, Monarch argues, the arbitration clause is unenforceable whether or not the FAA applies because Monarch's challenge runs directly against the arbitration agreement – that is, § 11658 directly applies to the arbitration agreement itself because that section mandates the pre-approval of endorsements. Hence, Monarch is not requesting that we find the arbitration agreement void by virtue of its appearance in a larger, void contract.

Code.

As noted above, "the McCarran-Ferguson Act was an attempt to . . . assure that the activities of insurance companies in dealing with their policyholders would remain subject to state regulation" (*Securities & Exch. Commn. v National Sec., Inc.*, 393 US 453, 459 [1969]; *see* 15 USC § 1011). Courts have established a four-part test to determine whether the McCarran-Ferguson Act precludes application of a federal statute (in this case, the FAA). Under this test, a federal statute is precluded if: (1) the statute does not "specifically relate" to the business of insurance; (2) the acts challenged under the statute constitute the "business of insurance"; (3) the state has enacted laws regulating the challenged acts; and (4) the state laws would be "invalidated, impaired, or superseded" by application of the federal statute (*Dornberger v Metropolitan Life Ins. Co.*, 961 F Supp 506, 516 [SD NY 1997], citing *Merchants Home Delivery Serv., Inc. v Frank B. Hall & Co., Inc.*, 50 F3d 1486, 1489 [9th Cir 1993]).

We agree with the determination of the *Source One* court in this action. First of all, the FAA does not specifically regulate the business of insurance, and an act specifically relating to the business of insurance is the only type of federal legislation that can preempt state insurance law under McCarran-

Ferguson. Furthermore, application of the FAA would modify California law because it would mandate arbitration even though National Union did not, as required by California law, file the payment agreements, and the payment agreements, in turn, contained the arbitration clauses.

Humana Inc. v Forsyth (525 US 299, 310 [1999]) upon which National Union places much reliance, does not compel a result to the contrary. *Humana*, in fact, states, "When federal law does not directly conflict with state regulation and when *application of the federal law would not frustrate any declared state policy or interfere with a State's administrative regime, the McCarran-Ferguson Act does not preclude its application"* (*id.* at 310 [emphasis added]).[3] This language from *Humana* therefore supports the argument that the FAA does not apply to compel arbitration here.

Likewise, *Preston v Ferrer* (552 US 346 [2008]) does not mandate the result that National Union seeks. In *Preston*, the parties disputed whether California courts could invalidate an arbitration clause in a contract in light of the California Talent Agencies Act (Cal Labor Code Ann § 1700 *et seq*.) (*Preston*, 552 US at 350-51). The California courts found in *Preston* that

[3] Notably, in quoting *Humana*, National Union leaves out language that we have italicized above.

the California Labor Commissioner, not the arbitrator, was to determine whether a matter was arbitrable. The United States Supreme Court disagreed, finding that "when parties agree to arbitrate all questions arising under a contract, the FAA supersedes state laws lodging primary jurisdiction in another forum, whether judicial or administrative" (*id.* at 359).

Preston, however, differs from this case in one important way: it does not implicate McCarran-Ferguson. The Act specifically leaves to the states any insurance policy regulation. Here, enforcing the FAA would, in fact, impair the California Insurance Code, as it would require the courts to enforce a provision that had not, contrary to California law, been filed with the WCIRB and the CDI.

The dissent's argument with respect to factors three and four of the four-part McCarran-Ferguson test takes too narrow a view. While the California Insurance Code § 11658 does not provide any prohibition against arbitration, enforcing the arbitration clause in this case would nonetheless undermine the goals of California law relating to workers' compensation insurance by enforcing the arbitration provision in a payment agreement that National Union failed to file. Indeed, the filing requirements are a fundamental underpinning for California's regulation of workers' compensation insurance, and those filing

requirements are intended largely to permit review of arbitration provisions – provisions, as we noted above, with which the CDI has stated that it is "particularly concerned."

Judicial Notice of the Zurich Action Settlement

Monarch, Priority and Source One have each made a motion asking this court to take judicial notice of the settlement in the *Zurich* Action. Appellate courts in this state may take judicial notice of "official court record[s]" in other proceedings (*Kinberg v Kinberg*, 85 AD3d 673, 674 [1st Dept 2011]). Indeed, by order dated December 13, 2012, this Court granted Monarch's motion to take judicial notice of the order to show cause in the *Zurich* Action. Therefore, we also now take judicial notice of the settlement in the *Zurich* Action.

We note that the CDI order to show cause and settlement make clear that the CDI does, in fact, believe that side agreements are subject to regulatory statutes, and therefore, that those agreements are void if insurers fail to file them.[4] We further note that the CDI's interpretation of the Insurance Code receives weight under both California and New York law (*see State Farm Mut. Auto. Inc. Co. v Quackenbush*, 77 Cal App 4th 65, 71, 91 Cal Rptr 2d 381 [Cal Ct App 1999]; *Matter of New York Pub. Interest*

[4] We note that the prospective nature of the settlement is likely attributable to the fact that it was fashioned to make sure that Zurich did not have to pay fines.

Research Group Inc v New York State Dept. of Ins., 66 NY2d 444, 448 [1985]).

The Applicability of Ceradyne Inc. v Argonaut Insurance Company

In resolving this appeal, we must decide the weight that we will afford to *Ceradyne, Inc. v Argonaut Insurance Company* (2009 WL 1526071, 2009 Cal App Unpub LEXIS 4375), an unreported decision from the California Court of Appeal, as that decision is directly on point. On these appeals, the only motion court to address *Ceradyne* was the *Source One* court. In rejecting National Union's dismissal of *Ceradyne* because it was unpublished and thus could not be cited to in California, the *Source One* court noted that "there is no [] rule in New York which prevents the citation of unpublished decisions."

As National Union argues, and the insureds concede, the California Rules of Court prohibit citation to unpublished decisions (Cal Rules of Ct, rule 8.1115). We are not, of course, bound by the California Rules of Court, nor do our own Rules of Court contain any prohibition against citing to unpublished opinions (*cf.* Rules of App Div 1st Dept [22 NYCRR] § 600.10[a][11] ["[d]ecisions not reported officially or in the National Reporter System shall be cited from the most available source"]).

In California, the publication of opinions of the Court of Appeal and appellate division of the superior court is done on a selective basis (Witkin, California Procedure (5th ed. 2008) Appeal, Section 814, page 833). The applicable court rule provides that the default is non-publication; cases must be certified for publication (*id.* at 884). The Rules of Court set forth nine specific circumstances under which cases "should be certified for publication" (Cal Rules of Ct, rule 8.1105). However, the California state courts do not absolutely prohibit citation to unpublished cases. On the contrary, even the California Rules of Court allow citation to unpublished opinions under certain narrow circumstances (neither of which applies here) (*see* Cal Rules of Ct, rule 8.1115[b]).[5]

In this case, we need not adhere to California's Rules of Court regarding unpublished cases. To be sure, New York state courts routinely cite unreported cases of other jurisdictions (*see e.g. Sheila C. v Povich*, 11 AD3d 120, 128-129 [1st Dept 2004]; *People v Gee*, 286 AD2d 62, 69 [4th Dept 2001]).

---

[5] In addition, as at least one California state court has noted, the California Rules of Court do not prohibit citation to unpublished federal cases; state courts may properly cite those cases as persuasive (although not precedential) authority (*Nungaray v Litton Loan Servicing, LP*, 200 Cal App 4th 1499, 1501 n 2, 135 Cal Rptr 3d 442 [Cal App 2d Dist 2011]; *City of Hawthorne v H&C Disposal Co.*, 109 Cal App 4th 1668, 1 Cal Rptr 3d 312 [Cal App 2d Dist 2003]; *see also* Cal Rules of Ct, rule 8.1115[c]).

Other jurisdictions have also considered unpublished California Court of Appeal cases, thus weakening National Union's argument that there is a prohibition against citing unpublished California cases even in jurisdictions other than California (*People v Lara*, 983 NE2d 959, 980, 368 Ill Dec 155, 175-76 [Ill 2012]; *Monsanto Co. v Aetna Cas. & Sur. Co.*, 1990 WL 9496, *2 n 3, 1990 Del Super LEXIS 17, *6 n 3 [Del Super Ct Jan. 19, 1990]). Indeed, National Union's only response to this fact is to note that "[*Lara*] is an opinion of the Supreme Court of Illinois, and not a New York state court case" and that "*Monsanto* . . . is irrelevant because it is from the Delaware Superior Court, not New York." These two statements, of course, are manifestly obvious, but do not controvert the proposition that not all jurisdictions feel it necessary to observe California's prohibition against relying on unpublished California state court cases.

Notably, in none of its briefs on these appeals does National Union argue that *Ceradyne* is distinguishable, or that, if the case had been published, we could not apply it substantively. At the very least, then, we find that *Ceradyne* is persuasive authority, and we will consider its reasoning without

relying on it as controlling authority.[6]

Locke v Aston (31 AD3d 33 [1st Dept 2006]) does not compel a different result. In *Locke*, we noted that the plaintiff had cited to an unpublished California opinion. However, the case to which we referred, *Kearney v Salomon Smith Barney, Inc.* (117 Cal App 4th 446, 11 Cal Rptr 3d 749 [2004]), was actually under review by the California Supreme Court at the time the case came up on appeal, and was "depublished" for that reason (14 Cal Rptr 3d 810 [Cal 2004]). After review, the California Supreme Court issued its own opinion, affirming in part and reversing in part (39 Cal 4th 95, 45 Cal Rptr 3d 730 [2006]).

Whether the Payment Agreements are Endorsements

Even if the payment agreements are not precisely insurance policies, they do qualify as policy endorsements or agreements collateral to the policies; accordingly, National Union should have submitted the payment agreements to the CDI for approval. In point of fact, whether the agreements were more than mere financial documents was the least controversial of all the facts that the motion courts considered in the three cases on appeal. For example, the *Monarch* court made clear its belief that certain

[6] One commentator has opined that the California court rule forbidding citation of unreported cases harks back to an era when only wealthier litigants had access to unpublished opinions (*see* Richard B. Cappalli, *The Common Law's Case Against Non-Precedential Opinions*, 76 S Cal L Rev 755, 757 [2003]).

terms of the payment agreements – namely, the term allowing the insurer to change "any or all" unexpired policies under deductible plans to non-deductible plans for the remaining policy term – rendered them subject to the filing requirements of § 11658. Similarly, the *Source One* court twice rejected National Union's argument that the payment agreements were mere financial documents. Indeed, the *Source One* court went so far as to suggest that the agreements might well constitute actual insurance policies under the law that National Union cited. Even the *Priority* court – the only one of the courts that rejected most of the insureds' arguments outright – did not find that National Union need not have filed the payment agreements; rather, the *Priority* court found that the issue was one that the arbitrators should determine.

We therefore find that National Union has failed to demonstrate that the payment agreements are not policies or endorsements under California law. On the contrary, where, as here, a contract alters large and important parts of the policies' scheme as it was originally issued, it qualifies as an endorsement even if the contract purports to be merely a loan agreement (*see e.g. Montgomery Ward & Co., Inc. v Imperial Cas. & Indem. Co.*, 81 Cal App 4th 356, 375, 97 Cal Rptr 2d 44, 56 [Cal. App 2d Dist 2000]; *see also Haynes v Farmers Ins. Exch.*, 32 Cal

4th 1198, 1218-1219, 13 Cal Rptr 3d 68, 84-85 [2004] [Baxter, J., dissenting]).

Thus, we reject National Union's argument that the payment agreements do not modify the parties' insurance obligations, as this argument bespeaks a myopic view of those obligations. Specifically, National Union seems to suggest that the parties' "payment obligations" apply only to National Union's obligation to provide insurance and the insureds' obligation to pay premiums. But the parties' obligations go further than a simple obligation to pay or be paid. For example, without the payment agreements, the parties' disputes concerning premiums paid are governed by California law and must be raised in a California court. By contrast, under the payment agreements, the parties are obliged to raise those same disputes in New York and under New York law, even though the insureds are all California employers whose employees are predominantly California residents. This requirement certainly modifies the parties' obligations, and in a significant way.

Additionally, the payment agreements modify the parties' obligations under the policies in even more substantive ways. For example, as the *Monarch* court noted, the agreements provide that if the insureds defaulted under the agreements, National Union had the right unilaterally to "change any or all unexpired

Policies" from deductible to non-deductible plans, and to concomitantly increase the premiums. The insureds' payment obligations also included "any amount paid by [National Union] to a claimant on [the insureds'] behalf." These changes directly alter the policies, and indeed, directly implicate the insureds' reasons for obtaining the policies in the first place. To accept National Union's claim that the payment agreements are simply secondary financial documents would require this court to ignore the actual terms of the agreements (*see Ceradyne*, 2009 WL 1526071, *10). Thus, under California law, while the payment agreements probably do not qualify as actual insurance policies, they do qualify as endorsements, and therefore, National Union should have filed them with the WCIRB for review by the CDI.

The Remedy for Failure to File

Although we have decided that National Union was, in fact, required to file the payment agreements, we must still decide the appropriate remedy for the failure to do so. National Union asserts that voiding the arbitration clause is too harsh a remedy, and at any rate, that § 11658 does not call for it.

As we have already stated, the CDI is the entity charged with carrying out California's insurance regulations. Thus, we give substantial weight to the CDI's stated policies regarding

whether a particular agreement need be filed for approval (*see State Farm Mut. Auto. Ins. Co. v Quackenbush*, 77 Cal App 4th 65, 71, 91 Cal Rptr 2d 381, 385 [Cal Ct App 1999]; *see also Automotive Funding Group., Inc. v Garamendi*, 114 Cal App 4th 846, 851, 7 Cal Rptr 3d 912, 915 [Cal App 2d Dist 2003]). We therefore turn for guidance to the CDI directive dated February 14, 2011.

The directive's language makes clear that the appropriate penalty is to refuse to enforce the payment agreements. The directive states that agreements such as the one at issue here "may remain in place but shall be subject to review . . . if . . . unilaterally enforced." Further, with respect specifically to arbitration clauses, the directive states that those clauses are "unenforceable unless the insurer can demonstrate that the arbitration agreement was expressly agreed to by the insured at the time the policy was issued." Of course, the insureds could not have agreed to the arbitration clause when the policies were issued because the payment agreements did not exist at that time. Neither does it appear to matter to the CDI that an insured may have signed multiple payment agreements, each containing an arbitration agreement, over a course of years. On the contrary, the order to show cause in the *Zurich* Action, dated April 6, 2012, alleged that Zurich began issuing the purportedly

unenforceable policies in or about May 2003.

Ceradyne is also instructive on the issue of whether the payment agreements are enforceable. The *Ceradyne* court noted that, based on the statutory language of § 11658(a), "noncompliance with the mandatory review and pre-approval process renders the arbitration provision in the [payment agreement] unenforceable" (*Ceradyne*, 2009 WL 1526071, *11, 2008 US Dist LEXIS 51752, *32). Indeed, as the *Ceradyne* court noted, the language in both § 11658 and 10 CCR § 2218(a) "unequivocally states that all workers' compensation forms must be formally approved" (*id.*). Thus, "[w]orkers' compensation insurance programs are to be closely scrutinized and are highly regulated" (*id.*).

The court noted that, generally speaking, "a contract made in violation of a regulatory statute is void . . . [however], the rule is not an inflexible one to be applied in its fullest rigor under any and all circumstances" (*id.* [internal citations and quotations omitted]). Rather, in "compelling cases," illegal contracts will be enforced in order to "avoid unjust enrichment to a defendant and a disproportionately harsh penalty upon the plaintiff" (*id.*). Whether an illegal contract will be enforced, the court stated, depend upon various factors, including the policy to be advanced in enforcing the law and the particular

facts of the case (*id.*).

Using these factors, the *Ceradyne* court concluded that the arbitration clause was unenforceable because the "review and preapproval safeguards were created to protect both employers and employees" (*id.*). Therefore, "[i]t would defeat the statutory purpose to allow an insurance company to bypass the governmental review process by simply waiting nine months after the policy has gone into effect to introduce additional or modified terms to its insurance program" (*id.*). The court also noted, "It cannot be overlooked that workers' compensation coverage is not optional for the employer" (*id.*).

We further find that, contrary to National Union's urging, the penalty of declining to enforce the arbitration agreements is not too harsh a remedy for failing to file the agreements. California courts addressing other California regulations have determined that, where a statute has been violated, courts should decline to enforce arbitration provisions (*see e.g. Smith v PacifiCare Behavioral Health of California*, 93 Cal App 4th 139, 157, 113 Cal Rptr 2d 140, 162 [Cal App 4th 2001]; *Imbler v PacifiCare of California, Inc.*, 103 Cal App 4th 567, 579, 126 Cal Rptr 2d 715, 724 [Cal App 4th 2002]).

We need not determine whether the insureds challenge the arbitration clause itself, or rather, whether they challenge the

entire agreement. If the payment agreements are void for failure to file them, as the *Ceradyne* court found when it examined the agreements there at issue, then those agreements' terms are also void (*see Rosenthal v Great Western Fin. Sec. Corp.*, 14 Cal 4th 394, 416, 58 Cal Rptr 875, 888 [Cal 1996]).

Even were we to actually determine the issue, we would find that the insureds' oppositions to the petition to compel arbitration raised challenges to the validity of the arbitration clause only and that any challenge to the payment agreements was merely secondary. As the *Ceradyne* court noted when dealing with similar payment agreements, "The insureds never sought to set aside or deem void the other provisions relating to and incorporating the policy" (*Ceradyne*, 2009 WL 1526071, *12, 2009 Cal App Unpub LEXIS 4375, *35). Indeed, as the *Ceradyne* court also noted, it would have served no valid purpose for the insureds to do so, as many of the acceptable policy terms were duplicated in the payment agreements (*id.*).

Further, as National Union concedes, the insureds performed under the payment agreements for years, never challenging any of the agreements' substantive terms. Similarly, apart from their taking issue with the arbitration clauses, the insureds do not dispute that the payment agreements are binding. On the contrary, far from trying to set aside the payment agreements,

the insureds are actually seeking to adjudicate their obligations under those agreements, but wish to do so in a court rather than before an arbitration panel.

In the *Monarch* appeal, National Union notes that, in 2010, the California legislature considered proposed Assembly Bill 2490; that bill would have amended the California Insurance Code to require that workers' compensation dispute resolution agreements, including arbitration clauses, be part of insurance forms or endorsements, and would have required that those agreements be filed with the CDI (*see* Assembly Bill No. 2490, 2009-2010 Reg. Sess. [Cal Feb 19, 2010], available at http://www.leginfo.ca.gov/pub/09-10/bill/asm/ab_2451-2500/ab_2490_bill_20100913_enrolled.html). National Union argues that had such a requirement already existed, there would have been no need to add one; thus, National Union concludes, when the parties executed the payment agreement, the law did not impose any requirement that insurers file the payment agreement or the arbitration clause with the CDI. To be sure, National Union notes, the governor vetoed the bill and it never became law.

This argument, however, lacks merit. Assembly Bill 2490 would have required insurers to include "dispute resolution provision[s]" in the body of the policy or endorsement, and no one disputes that those documents are subject to mandatory filing

with the WCIRB and the CDI. The bill, however, did not speak to the relevant issue here – namely, whether documents such as the payment agreements, which alter the terms of an insurance policy, should be filed for review. Nor did the bill's ultimate failure to be signed into law resolve that issue.

The dissent gives short shrift to the California Court of Appeals' reasoning in *Ceradyne*, stating that the decision is "not instructive" on the point of whether National Union challenges the payment agreements as a whole, or whether it challenges only the arbitration provisions. However, as we have noted, not even National Union takes the position that *Ceradyne* is irrelevant to any of the issues set forth here; instead, National Union merely takes the position that we may not rely on the case because it is unpublished in California.

Similarly, the dissent asserts that *Rent-a-Center, West, Inc. v Jackson* (561 US 63 [2010]) forecloses the California Court of Appeal's reasoning in *Ceradyne* and compels the result that National Union seeks here. *Rent-a-Center*, however, does not affect our analysis, as that case did not change the principle that where a party challenges the validity of an arbitration provision alone, rather than challenging the validity of the whole agreement, the court, and not the arbitrators, decide arbitrability. As we have already noted, the insurers never

sought to deem void any provisions of the payment agreements other than the arbitration provisions. On the contrary, the insureds performed under the agreements, seeking to challenge any of the agreements' provisions only after a dispute arose and the insureds sought to have that dispute adjudicated in a court rather than before an arbitrator.

As the dissent notes, there is a strong public policy in favor of arbitration. Indeed, this Court has reaffirmed its commitment to this policy in numerous decisions (*see e.g. Oxbow Calcining USA Inc. v American Indus. Partners*, 96 AD3d 646, 648 [1st Dept 2012]; *Matter of Kern v Krackow*, 309 AD2d 650, 651 [1st Dept 2003]). We cannot, and do not, repudiate that policy in our decision on these appeals.

However, as previously stated, the California regulatory and statutory scheme requires close scrutiny of workers' compensation insurance programs. Thus, the policy in favor of arbitration must yield to the primacy of California state law and to California's prerogative to regulate its own insurance practices. This conclusion holds particularly true given the CDI's position, as demonstrated in the *Zurich* Action and the settlement of that Action, that any workers' compensation carrier that fails to file a side agreement in California is foreclosed from enforcing any arbitration clause contained in that agreement. Accordingly, the

dissent begs the question when it concludes that the arbitrator must decide the issue of arbitration in the first instance. This conclusion would lead to the anomalous result, even before we actually decided the issue, that National Union may enforce an arbitration clause set forth in a payment agreement even though that payment agreement has never been filed as required by California law – the very outcome that National Union seeks here and that this Court is bound to decide.

Similarly, the dissent's point that the settlement agreement allows binding arbitration, and thus, that the CDI has "no fundamental opposition to arbitration clauses," does not change our analysis. The relevant issue is whether the agreements were filed as mandated by § 11658, and no party disputes that the payment agreements were not filed.

Accordingly, the order of the Supreme Court, New York County (Jeffrey Oing, J.), entered January 31, 2012, which denied the petition by petitioners Monarch Consulting, Inc., Elite Management, Inc., Brentwood Television Funnies, Inc., Professional Employer Options, Inc., Recurrent Software Solutions, Ahill, Inc., The Accounting Group, LLC and Pes Payroll, IA, Inc., to stay arbitration and granted the cross petition by National Union Fire Insurance Company of Pittsburgh, PA. to compel arbitration, should be reversed, on the law,

without costs, the petition granted and the cross petition denied. The order and judgment (one paper) of the Supreme Court, New York County (Shirley Werner Kornreich, J.), entered on or about April 18, 2012, which, insofar as appealed from as limited by the briefs, granted the petition by National Union to compel arbitration, should be reversed, on the law, without costs, and the petition denied. The order of the Supreme Court, New York County (Eileen Bransten, J.), entered July 30, 2012, which, insofar as appealed from as limited by the briefs, denied the amended petition by petitioner National Union to compel arbitration, should be affirmed, without costs. The appeal from the order of the same court and Justice, entered August 1, 2011, which denied National Union's original petition to compel arbitration with leave to replead, should be dismissed, without costs, as academic.

All concur except Manzanet-Daniels and Gische, JJ. who dissent in an Opinion by Gische, J.

GISCHE, J. (dissenting)

Before we even reach the issue regarding whether the Payment Agreements are legally enforceable, the court first needs to determine whether it is the court or the arbitrators that decide the issue. I respectfully dissent because I believe that at this stage of the dispute the arbitrators, and not the court, should decide the gateway issue of whether the Payment Agreements containing the arbitration clauses are enforceable.

In each of the three cases before the court, the insurance companies issued workers' compensation policies to the insureds which covered workers in the State of California. The original insurance policies that were issued were filed with the Workers' Compensation Insurance Rating Bureau (WCIRB) in accordance with California Insurance Code § 11658. Separately made agreements among the parties concerning the insureds' payment obligations under the policies (Payment Agreements) were never filed with the WCIRB. Each of the Payment Agreements contains provisions requiring that all disputes among the parties related to the agreements be resolved by arbitration. The arbitration provisions are broad, reserving for the arbitrators the right to decide all disputes, expressly including any issues regarding arbitrability. Although the insureds seek only to invalidate the arbitration provisions in each of the Payment Agreements, based

on the insurer's failure to file the Payment Agreements with the WCIRB, this necessarily and inextricably implicates the validity of the Payment Agreements as a whole. Consequently, pursuant to the parties' respective Payment Agreements and the United States Arbitration Act (9 USC § 1 *et seq*.)(FAA), the underlying legal issue regarding the validity of the Payment Agreements should be decided by the arbitrators in the first instance.

In each of these cases, the primary provisions of the underlying Payment Agreements extended the time within which the insured was required to pay its premiums conditioned on the posting of collateral. Each Payment Agreement also contained an arbitration clause requiring that any disputes regarding the payment obligations as well as "any other unresolved dispute arising out of this agreement" be arbitrated. The Payment Agreements all state that the arbitrators "will have exclusive jurisdiction over the matter in dispute, including the question as to its arbitrability." Each Payment Agreement also provides that the arbitration "must be governed by the United States Arbitration Act. Title 9 U.S.C. Section 1, et seq."

There is a strong public policy in favor of arbitration. Agreements to arbitrate that fall within the ambit of the FAA must be enforced according to their terms (*see KPMG LLP v Cocchi*, __US__, 132 S Ct 23, 24 [2011]; *Flanagan v Prudential-Bache Sec.*,

67 NY2d 500, 506 [1986]; *Smith Barney Shearson, Inc. v Sacharow*, 91 NY2d 39 [1997]).

The disputes presently before the court involve whether the agreement to arbitrate is valid and who should make that decision. The primary argument by the insureds is that the Payment Agreements are part of the overall workers' compensation insurance policies which, pursuant to California Insurance Code § 11658, must be filed with the WCIRB so that the Commissioner of Insurance can have a 30 day period to review whether the policies comply with applicable law. Because the Payment Agreements were never filed, the insureds argue that the arbitration provisions contained therein are invalid and unenforceable.

FAA § 2 "embodies that national policy favoring arbitration and places arbitration agreements on an equal footing with all other contracts" (*Buckeye Check Cashing, Inc. v Sardegna*, 546 US 440, 443 [2006]). Like any other contract, arbitration agreements may be invalidated by generally applicable contract defenses, such as fraud, duress or unconscionability (*Doctor's Assoc., Inc. v Casarotto*, 517 US 687 [1996]). FAA § 2 provides:

> "A written provision in...contract...to settle by arbitration a controversy thereafter arising out of such contract...or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract...shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the

revocation of any contract" (9 USC § 2).

In interpreting FAA § 2, the Supreme Court of the United States has repeatedly held that where a party's challenge is to the contract as a whole, and not specifically related to the arbitration clause, the issue of the contract's validity is considered by the arbitrator in the first instance (*see Rent-A-Center West, Inc. v Jackson*, 561 US 63 [2010]; *Buckeye Check Cashing, Inc. v Sardegna*, *546 US 440*; *Prima Paint Corp. v Flood & Conklin Mfg. Co.*, 388 US 395 [1967]). As explained by the Supreme Court in its most recent decision on the issue:

> "There are two types of validity challenges under § 2: One type challenges specifically the validity of the agreement to arbitrate, and [t]he other challenges the contract as a whole, either on a ground that directly affects the entire agreement (e.g., the agreement was fraudulently induced), or on the ground that the illegality of one of the contract's provisions renders the whole contract invalid.... [W]e held that only the first type of challenge is relevant to a court's determination whether the arbitration agreement at issue is enforceable. That is because § 2 states that a written provision to settle by arbitration a controversy is valid, irrevocable, and enforceable without mention of the validity of the contract in which it is contained. Thus, a party's challenge to another provision of the contract, or to the contract as a whole, does not prevent a court from enforcing a specific agreement to arbitrate. [A]s a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract" (*Rent-A-Center*, 561 US 70) [internal citations omitted]).

Although the insureds in this case claim that they are only attacking the validity of the arbitration clauses, and that the validity of those clauses should be decided by the court and not the arbitrators, this position does not withstand scrutiny. If the failure to file the Payment Agreements with WCIRB renders the arbitration provisions unenforceable, it would likewise render all other provisions of the Payment Agreements unenforceable for the same reason. Consequently, the impact of the insureds' argument is not limited solely to the arbitration clauses contained within the Payment Agreements. Nor do we know, as the majority suggests, that the insureds have no intention of pursuing a claim that the Payment Agreements are unenforceable in toto once that issue is before an appropriate tribunal.

The difficulty of conceptually, logically and legally separating enforceability of the arbitration clauses from the validity of the Payment Agreements as a whole is manifest. Even the majority's reasoning is based on a conclusion that because the Payment Agreements as a whole are unenforceable, the arbitration provisions contained therein are likewise unenforceable. While I take no position on the majority's legal analysis on the ultimate issue of enforceability, it demonstrates that the insureds' failure to file argument is fundamental to the validity of the entire Payment Agreement and

not just limited to the arbitration clauses.

I also disagree with the majority's conclusion that pursuant to the McCarran-Ferguson Act, inverse preemption precludes application of the FAA. The McCarran-Ferguson Act (15 USC § 1012[b]) provides that no act of Congress shall be construed to invalidate, impair or supercede any State law enacted for the purpose of regulating the business of insurance. Courts will preclude the application of a federal statute if the four following factors are all established: [1] the statute does not "specifically relate" to the business of insurance; [2] the acts challenged under the statute constitute the "business of insurance"; [3] the state has enacted laws regulating the challenged acts; and [4] the state laws would be "invalidated, impaired or "superceded" by application of the federal statute (*Sec. Exch. Commn. v Walzer & Assoc.*, 122 F3d 1057 [2d Cir 1997]; *Merchants Home Delivery Serv., Inc. v Frank B. Hall & Co., Inc.*, 50 F3d 1486, 1489 [9th Cir 1993]).

While I agree with the majority that factors 1 and 2 are satisfied, I disagree with its finding that factors 3 or 4 are satisfied. Neither California Insurance Code § 11658, nor any other provision of the California Workers' Compensation Laws, provide an express or implied prohibition against arbitration in insurance disputes (*see e.g. ESAB Group, Inc. v Zurich, Ins. PLC*,

685 F3d 376 [9th Cir 2012] [recognizing that South Carolina Law invalidating arbitration agreements in insurance policies reverse preempts chapter 1 of the FAA to domestic insurance polies under McCarran-Ferguson Act]; *McKnight v Chicago Title Ins., Co., Inc.*, 358 F3d 854 [11th Cir 2004] [Georgia Arbitration Code excluding arbitration provisions in insurance contracts warranted reverse preemption of FAA under McCarran-Ferguson Act]). The settlement in the Zurich action demonstrates that the California Department of Insurance has no fundamental opposition to arbitration clauses, because the agency approved and expressly agreed that all future forms of the agreements at issue in that litigation would continue to require binding arbitration for the resolution of disputes.

Relatedly, arbitration does not impair the California legal requirement that workers' compensation insurance policies must be filed, thereby providing the Commissioner of Insurance with an opportunity to review the policies, because California law does not restrict the power of an arbitrator to address whether the Payment Agreements in these cases were required to be filed, and if so, what the consequences for the failure to file the

agreements would be (*In re Arbitration between Natl. Union Fire Ins. Co. of Pittsburgh, P.A. v Personnel Plus, Inc.*, 954 F Supp 2d 239 [SD NY 2013]; *Grove Lumber & Bldg. Supply, Inc. v Argonaut Ins Co.*, 2008 WL 2705169, 2008 US Dist LEXIS 51752 [CD Cal, July 7, 2008, SA CV 07-1396 AHS (RNBx)]; *St. Paul Fire & Marine Ins. Co. v Courtney Enter., Inc.*, 270 F3d 621 [8th Cir 2001]).

While acknowledging that the case has no precedential value, the majority finds the reasoning of the California Court of Appeals in the case of *Ceradyne, Inc. v Argonaut Ins. Co.* (2009 WL 1526071, 2009 Cal App Unpub LEXIS 4375 [Cal App 4th Dist, June 2, 2009, No. G039873]) (*Ceradyne*) persuasive and informative. Most of *Ceradyne* addresses the merits of the insured's arguments concerning whether the failure to file a Payment Agreement rendered the arbitration clauses contained therein unenforceable. Because I believe that this court should not reach the merits of the parties' arguments regarding enforceability, I neither agree nor disagree with the reasoning of *Ceradyne* on those issues. The *Ceradyne* Court did not reach the issue of whether the McCarran-Ferguson Act applies. What the *Ceradyne* Court held was that the trial court and not an arbitrator should decide whether arbitration was precluded by the insurance company's failure to file the Payment Agreement. It reasoned that because the insured was only looking to invalidate the arbitration clause, which by

its express terms was severable from the remainder of the agreement, the court should sever and consider the issues of enforceability only as they pertained to the arbitration clauses. In *Rent-A-Center West*, decided after *Ceradyne*, the Supreme Court of the United States held that as a matter of substantive federal law, an arbitration clause is severable from the remainder of the contract, regardless of whether there is an express contractual provision that so provides. Notwithstanding severability, the Supreme Court enforced the arbitration clause to the extent it delegated authority to the arbitrator to decide whether the arbitration clause was enforceable, where the argument of unconscionability affected the entire agreement. I therefore believe that the *Ceradyne* analysis on this point, which is contrary to Supreme Court precedent, is not instructive.

For these reasons I would vote to reverse the order which denied the insurer's motion to compel arbitration and to affirm the orders which denied the insureds' petitions to stay arbitration, and granted the insurer's cross petitions to compel arbitration.

M-3690 - Monarch Consulting, Inc., et al. v National Union Fire Insurance Company of Pittsburgh, PA.

M-3704 - National Union Fire Insurance Company of Pittsburgh, PA. v Priority Business Services, Inc., etc.

M-3705 - National Union Fire Insurance Company of Pittsburgh, PA. v Source One Staffing, LLC.

Motions to take judicial notice granted.

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

ENTERED: SEPTEMBER 11, 2014

CLERK