SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MARCH 12, 2019

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Acosta, P.J., Friedman, Kapnick, Webber, Moulton, JJ.

7508-
7509 S.A. De Obras y Servicios, COPASA, Index 651649/13
651555/12
Plaintiff-Appellant,

-against-

The Bank of Nova Scotia, et al.,
Defendants-Respondents.
- - - - -
Cointer Chile, S.A., et al.,
Plaintiffs-Appellants-Respondents,

-against-

Bank of Nova Scotia, et al.,
Defendants-Respondents-Appellants.
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Wilk Auslander LLP, New York (Jay S. Auslander of counsel), for appellant.

Quinn Emanuel Urquhart & Sullivan, LLP, New York (Stephen A. Broome of counsel), for appellants-respondents.

Sherman & Sterling LLP, New York (Daniel H.R. Laguardia of counsel), for respondents/respondents-appellants.
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Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered January 17, 2018, which granted defendants' motion for summary judgment dismissing the complaint in index no.

651649/13 and the first cause of action in index no. 651555/12, and denied their motion for summary judgment dismissing the sixth cause of action in index no. 651555/12, unanimously modified, on the law, to deny defendants' motion for summary judgment dismissing the complaint in index no. 651649/13 and the first cause of action in index no. 651555/12, and otherwise affirmed, without costs.

These actions arise out of a highway project in Chile. In September 2009, the Chilean government issued a request for proposals (RFP) to improve, maintain, and operate part of a toll road (Route 5, or Ruta 5 in Spanish). Under the terms of the RFP, bidders provided the lowest present value (or VPI[1]) that they would accept in return for building and operating the toll road. The bidder with the lowest VPI would win the bid, and if that bidder was able to form a concession company and build and operate the toll road pursuant to the government's requirements, it would be entitled to receive the revenues from the toll road until such revenues reached the VPI bid, or for 35 years, whichever came first. The Chilean Government required each bidder to submit a bid bond that would be forfeited if a bidder

[1] VPI is an acronym for "Valor Presente de los Ingresos," or present value of revenues.

won the bid but then failed to form the concession company.

S.A. de Obra y Servicios, COPASA (COPASA) (the plaintiff in index no. 651649/13) and Cointer Chile S.A. and Azvi Chile, S.A. Agencia en Chile (the plaintiffs in index no. 651555/12) (together, Cointer) retained defendant Bank of Nova Scotia and Scotiabank Global Banking and Markets (Scotia) as their exclusive financial advisors in connection with the Ruta 5 project.

The parties' March 2010 engagement letter provided that Scotia would be paid only if COPASA and Cointer "successfully reach[ed] financial close"; this payment – called a Success Fee – could not exceed $975,000. The engagement letter also included an exculpatory clause that limited defendants' liability "for any direct loss or damage. . . arising from or in connection with the services provided . . . however the direct loss or damage is caused *including negligence or willful misconduct* by defendant" to 50% of the amount of the Success Fee actually received by [defendant]" (emphasis added).

The engagement letter further described the "proposed core team" that would be working on the Ruta 5 project. This team included a Managing Director (Kelly), a Director (Carneiro), an Associate Director (Mégret), and an Associate (Bodden). As provided in the engagement letter Kelly was to oversee the

engagement assisted by the other three team members.

Defendants' responsibilities included preparation of a bid model. Defendants conceded in their answer that the bid model submitted to plaintiffs was based on an inaccurate assumption that toll revenues would begin to accrue immediately upon commencement of the construction of the highway, as opposed to following the highway's completion. As a result of the error, COPASA and Cointer submitted a bid that undervalued VPI by approximately $82-84 million. Once the error was discovered, COPASA decided to withdraw from the Ruta 5 project.

Cointer and Scotia attempted to salvage the Ruta 5 project by bringing in an additional partner, nonparty SNC Lavalin. In October 2011, Scotia sent Cointer a memo proposing the terms of the new arrangement (October 2011 memo). The October 2011 memo begins, "The information contained in this memo is being provided … for discussion purposes only." It goes on to propose, inter alia, the equity that the various parties would provide for the Ruta 5 project. The October 2011 memo ends with a request to "confirm acceptance of this offer by way of return email." Cointer's president signed the October 2011 memo and it was returned to Scotia. At Cointer's request, Scotia later sent them a copy of the October 2011 memo, signed by Scotia. Defendants

maintain that the October 2011 memo, it was merely an agreement to agree while Cointer asserts that it was an enforceable contract. Scotia subsequently informed Cointer that it would no longer be participating in the project. As a result Cointer had to abandon the project. Both COPASA and Cointer forfeited their shares of the bid bond.

COPASA's sole cause of action, and Cointer's first cause of action, is for breach of the March 2010 engagement letter. COPASA and Cointer allege that Scotia was grossly negligent by providing them with a bid model that undervalued VPI by $82-84 million. Both plaintiffs sued for damages arising from the bid bond they had to forfeit, the profit they would have made if defendants had calculated the VPI correctly,[2] and compensation for the damage caused to their reputations when they had to withdraw from the project.

Scotia moved to dismiss pursuant to CPLR 3211. Supreme Court dismissed the causes of action alleging breach of the March 2010 engagement letter, finding that the allegations did not amount to gross negligence sufficient to overcome the exculpatory

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[2] Plaintiffs assert they would still have been the lowest bidder, and therefore would have been awarded the project, had the defendants calculated the VPI correctly.

clause. Supreme Court converted the motion to dismiss Cointer's sixth cause of action based on the October 2011 memo to a motion for summary judgment and denied that motion.

Both sides appealed. This court modified to reinstate COPASA's complaint and Cointer's first cause of action, and otherwise affirmed (*S.A. de Obras y Servicios, Copasa v Bank of Nova Scotia*, 126 AD3d 582 [1st Dept 2015]). We noted that "[a]t this stage of the litigation, prior to key depositions being held … the contract-based claims for gross negligence should not have been dismissed" (*id.* at 583 [citations omitted]).

Following discovery defendants moved for summary judgment dismissing the complaints on the ground that there was no evidence of gross negligence. Defendants submitted, inter alia, evidence that Scotia spent months working on the bid model; that plaintiffs' own expert conceded that Bodden was qualified to build the model; that Bodden worked in conjunction with Carneiro in building the bid model; that Carneiro checked the model prior to Scotia sending it to plaintiffs; that Scotia worked with plaintiffs to revise the model over a dozen times; and that plaintiffs conceded that the bid model, with the exception of the VPI error, worked exactly as required. Defendants also submitted their expert's report which concluded that Scotia had used

various safeguards designed to reduce the risk of modeling error.

In opposition, plaintiffs submitted, inter alia, undisputed evidence that Scotia failed to follow its own internal audit procedures; that in the weeks leading up to the submission of the bid model, Kelly, the Managing Director, was fired, leaving the remaining personnel in disarray; and that there was conflicting deposition testimony as to whether Mégret served as the secondary modeler for the bid model. Plaintiffs also submitted an expert affidavit which asserted that Scotia's failure to audit the model prior to releasing it to plaintiffs was "an extreme departure" from industry standards for developing and reviewing financial models.

Supreme Court granted defendants' CPLR 3212 motion for summary judgment dismissing the gross negligence claims but denied their motion for summary judgment dismissing the sixth cause of action regarding the October 2011 memo.

We disagree with the conclusion of the Supreme Court regarding the gross negligence claims. The record before us establishes that triable issues of material fact exist as to whether Scotia was grossly negligent in its development of the bid model for the Ruta 5 project. We affirm Supreme Court's denial of Scotia's motion to dismiss the sixth cause of action.

It is well-settled that contractual limitations on liability are generally enforceable (*see Uribe v Merchants Bank of N.Y.*, 91 NY2d 336, 341 [1998]; *Metropolitan Life Ins. Co. v Noble Lowndes Intl.*, 84 NY2d 430, 436 [1994]; *Colnagi, U.S.A., Ltd. v Jewelers Protection Servs., Ltd.*, 81 NY2d 821 [1993]). However, "public policy forbids a party from attempting to avoid liability for damages caused by grossly negligent conduct" (*Obremski v Image Bank, Inc.*, 30 AD3d 1141, 1141-1142 [1st Dept 2006], citing *Sommer v Federal Signal Corp.*, 79 NY2d 540, 554 [1992]). Thus, a gross negligence claim will be sustained where a party's conduct "evinces a reckless disregard for the rights of others or 'smacks' of intentional wrongdoing" (*Colnaghi, U.S.A.*, 81 NY2d at 823-824; *see Food Pageant Inc. v Consolidated Edison Co.*, 54 NY2d 167, 172 [1981] [gross negligence established by evidence of a party's "failure to exercise even slight care"]; *see also* Restatement [Second] of Contracts § 195[1] [intentional or reckless conduct vitiates contractual term limiting liability]).

On a motion for summary judgment the court's role is "to determine whether there is a material factual issue to be tried, not to resolve it" (*Sommer v Federal Signal Corp.*, 79 NY2d 540, 554 [1992]). Where two different conclusions may reasonably be reached from the evidence, a motion for summary judgment should

be denied (*id.* at 555 [citing Siegel, NYPrac §278 at 407 [2nd ed 1991]); *see also Food Pageant, Inc.*, 54 NY2d at 173 ["[w]here the inquiry is to the existence or nonexistence of gross negligence, the ultimate standard of care is different [from ordinary negligence], but the question nevertheless remains a matter for jury determination"]). Plaintiffs have raised an issue of fact as to whether Scotia's conduct in its development of the bid model was grossly negligent. "Whether this indeed is a case of a simple mistake or reckless indifference is for a jury to determine" and summary judgment should have been denied (*Sommer*, 79 NY2d at 555).

Scotia recognized that modeling error and, specifically, the risk that a model does not conform to the tender documents, was one of the "key risks" of its business. Both COPASA's and Scotia's experts agreed that such risks are inherent in the financial advisory business and so an entity in Scotia's position must implement procedures to effectively guard against such risks.

Scotia maintained a Development and Audit Procedure for preparing and assessing financial models. That procedure required a secondary modeler to review the primary modeler's work to identify potential errors and provided that "[e]ach financial

model should be subject to at least three separate internal model audits before bid submission and one audit before financial close." Scotia referred to this internally as a model audit or a "four-eye approach." Bodden, whose colleagues viewed him as "a junior guy needing guidance," was assigned as the primary modeler. There is conflicting testimony about whether a secondary modeler was assigned: Bodden testified that Mégret filled that role, while Mégret stated that there was "no doubt" in his mind that he was not the secondary modeler. For his part Carneiro stated that he did not think that Mégret "formally reviewed the financial model." Carneiro also acknowledged that the four-eye approach was not followed for the Ruta 5 transaction despite it being the "current existing protocol."

As a result of deviation from the four-eye approach Scotia did not detect the modeling error prior to submission of the bid model, and COPASA and Cointer submitted a bid that was substantially lower than they had intended. Plaintiffs have sufficiently alleged that defendants' conduct evinced a reckless disregard for plaintiff's rights insofar as it failed to comply with, or "actively disregarded, its own policies" (*Tillage Commodities Fund, L.P. v SS&C Tech., Inc.*, 151 AD3d 607, 608 [1st Dept 2017] [citations omitted]; *see also Internationale*

Nederlanden (U.S.) Capital Corp. v Bankers Trust Co., 261 AD2d 117, 122 [1st Dept 1999] [sustaining a claim of gross negligence where the defendant made "minor errors of form" that "could have drastic consequences"]).

A second "key risk" identified by Scotia is "departure or absence of an employee." Nevertheless, in the four weeks leading up to the bid submission, Scotia fired Kelly, the Managing Director of the Ruta 5 project; Carneiro was traveling on a different assignment, and then on vacation, and Carmen Lopez, who Carneiro expected would be taking over for him while he was away, was also fired. Thus, in the critical period prior to the bid submission, Scotia's senior team members on the Ruta 5 project were absent (*see Food Pageant,* 54 NY2d 167, 171 [gross negligence established by, inter alia, evidence that defendant left an employee in charge who "lack[ed] the necessary experience, knowledge and expertise to completely perform the functions of his job"]).

Finally, COPASA and Cointer's expert opined that Scotia's conduct represented an "extreme departure" from industry standards for the development of financial models. Specifically, plaintiffs' expert stated that "industry standards and best practices – not to mention Scotia's own Development & Audit

Procedures – required that the Ruta 5 model be subject to multiple internal audits by an experienced financial modeler who had a thorough understanding of the tender document requirements for this particular project." While Scotia's expert concluded to the contrary, and that Scotia had "utilized numerous safeguards," this issue is one for a jury to resolve (*see Southern Wine & Spirits of Am., Inc. v Impact Envtl. Eng'g, PLLC*, 104 AD3d 613, 614 [1st Dept 2013] ["an issue of fact exists as to whether [defendant's] conduct was 'grossly negligent' given plaintiffs' expert affidavit]).

As to the sixth cause of action, on the prior appeal, we found that "[i]ssues of fact exist[ed] as to whether the parties reached a binding preliminary contract giving rise to a duty to negotiate in good faith" (126 AD3d 582, 583 [1st Dept 2015]). The evidence that defendants presented on their current motion was no stronger than the record evidence on the prior motion, and issues of fact exist as to whether the parties reached a binding preliminary contract giving rise to a duty to negotiate in good faith, and, if so, whether Scotia breached it.

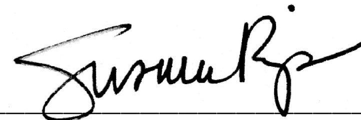
The question of whether a party has negotiated in good faith, "which necessitates examination of a state of mind, is not an issue which is readily determinable on a motion for summary

judgment” (*Credit Suisse First Boston v Utrecht-America Fin. Co.*, 80 AD3d 485, 487 [1st Dept 2011] [internal quotation marks omitted]).

We have considered defendants’ remaining arguments as to the sixth cause of action and find them unavailing.

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

ENTERED: MARCH 12, 2019



CLERK

Friedman, J.P., Richter, Kahn, Oing, Moulton, JJ.

7568 Barry Fox, et al., Index 651786/17
Plaintiffs-Respondents-Appellants,

-against-

12 East 88th LLC,
Defendant-Appellant-Respondent.

Rose & Rose, New York (Paul Coppe of counsel), for appellant-respondent.

Gibson, Dunn & Crutcher LLP, New York (Caitlin J. Halligan of counsel), for respondents-appellants.

Order, Supreme Court, New York County (Gerald Lebovits, J.), entered August 15, 2017, which, to the extent appealed from as limited by the briefs, denied plaintiffs' motion for summary judgment, and denied defendant's cross motion for summary judgment dismissing the complaint, unanimously modified, on the law, to grant defendant's cross motion to the extent of dismissing the first two causes of action and declaring, on the third cause of action, that plaintiffs were in default and thus were not entitled to purchase the apartment at the discounted price, and otherwise affirmed, without costs.

In 1975, plaintiff Barry Fox leased a rent-stabilized apartment at 12 East 88th Street in Manhattan from nonparty Nostra Realty Corp. In 1996, Fox agreed with Nostra to combine

his apartment with a neighboring unit, and to enter into a market rate lease. At the time the units were combined and purportedly deregulated, the building was receiving J-51 tax benefits. In 2008, at Fox's suggestion, Nostra entered into a renewal lease with plaintiff MBE Ltd., an entity wholly owned by Fox, with the understanding that Fox would continue to occupy the apartment. MBE subsequently executed renewal leases, and Fox continued to live in the apartment.

In 2014, defendant purchased the building and informed Fox that the lease would not be renewed. Fox then commenced an action (the related action) against defendant and Nostra, maintaining that the apartment was improperly deregulated in 1996 because the building was receiving J-51 benefits at that time (*see Roberts v Tishman Speyer Props., L.P.*, 13 NY3d 270 [2009]). Several months later, in October 2014, plaintiffs stopped paying rent on the apartment.[1] Defendant and Nostra subsequently sought summary judgment in the related action arguing that, regardless of the earlier receipt of J-51 benefits, the apartment was deregulated in 2008 when the lease was issued in the corporate

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[1] Although plaintiffs allege, in their appellate briefs, that defendant stopped accepting Fox's rent checks, they cite to no record support for that assertion.

name of MBE instead of Fox's name. In October 2016, the court in the related action determined that the unit was rent-stabilized, and referred the calculation of any rent overcharge damages to a special referee.

Meanwhile, in December 2015, defendant undertook a conversion of the building into a condominium, and in a February 2017 amendment to the offering plan, offered a discounted purchase price to tenants in occupancy who were not in default under the terms of their leases. In response, Fox tendered a signed purchase agreement and down payment to defendant. Defendant rejected the purchase agreement and returned the down payment to Fox, stating, inter alia, that Fox was ineligible for the offer because he was in default under his lease for failure to have paid any rent since October 2014.

Plaintiffs then brought this action for breach of contract, declaratory relief, and specific performance directing defendant to execute the purchase agreement and close on the sale of the apartment. Both sides moved for summary judgment, and in a decision entered August 15, 2017, the motion court denied the motions. The court found that the question of whether plaintiffs were in default, and therefore ineligible to buy at the discounted price, was premature because the special referee in

the related action had not yet determined the amount of arrears or overcharges.

On April 3, 2018, this Court reversed the court in the related action, holding that, apart from the J-51 issue, the apartment was not rent-stabilized because, in 2008, Fox had substituted MBE as the sole tenant to the lease, which caused the unit to be deregulated (*Fox v 12 E. 88th LLC*, 160 AD3d 401, 402-403 [1st Dept 2018], *lv denied* 32 NY3d 911 [2018]).

In light of that decision, we find that defendant is entitled to summary judgment in this action. There is no dispute that, at the time of the offering plan and its amendments, plaintiffs were in default since they had failed to pay rent since October 2014. Further, because it is now settled that the unit was not rent-stabilized during the relevant period, there are no overcharges to be assessed against defendant. Thus, plaintiffs were not entitled to purchase the apartment at the discounted price. Contrary to plaintiffs' assertion, the court in the related action did not enjoin defendant from collecting rent. Rather, the court's order merely stayed further proceedings in that action, including the referee's calculation of overcharges or arrears.

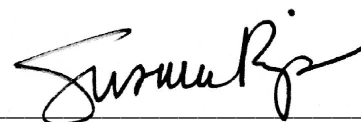
There is no merit to plaintiffs' contention that they cannot

be found to have been in default because there was no judicial declaration of default at the time defendant offered the discounted price. No provision of the offering plan, or its amendments, requires such a judicial declaration. Plaintiffs' reliance upon *Wissner v 15 W. 72nd St. Assoc.* (87 AD2d 120 [1st Dept 1982], *affd* 58 NY2d 645 [1982]) is misplaced. Contrary to plaintiffs' reading, that case does not support the broad proposition that a court determination of ineligibility must have been made prior to a building owner's rejection of a proposed purchaser.

We do not address the merits of plaintiffs' unpreserved claim that the February 2017 amendment to the offering plan was inconsistent with the statute governing condominium conversions. Plaintiffs did not raise this claim below, and we decline to review it in the interest of justice. In light of our conclusion, we need not reach defendant's alternative arguments.

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

ENTERED: MARCH 12, 2019



CLERK

Gische, J.P., Webber, Kern, Singh, JJ.

8655-
8656 The People of the State of New York, Ind. 4718/12
Respondent,

-against-

Scharkey James,
Defendant-Appellant.

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Christina A. Swarns, Office of the Appellate Defender, New York (Eunice Lee of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Maxwell Wiley, J. at suppression hearing; Ronald A. Zweibel, J. at speedy trial motion, jury trial and sentencing), rendered September 1, 2015, convicting defendant of robbery in the first and second degrees, and sentencing him, as a persistent violent felony offender, to an aggregate term of 22 years to life, and order, same court (Ronald A. Zweibel, J.), entered on or about November 7, 2016, which denied defendant’s CPL 440.20 motion to set aside his sentence, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). Testimony elicited at trial was that defendant and another man, later

identified as his cousin Jermaine, approached the husband and wife victims while they were walking on West 87th Street in New York County. Jermaine, with a gun aimed at the husband, directed him to get up against a car. The husband placed his hands against the car and felt the gun press against his back or left side. Defendant then moved the wife closer to the building line and demanded her phone and cash. The wife complied and handed defendant her white iPhone 4 with a pink case and a sum of U.S. currency.

Jermaine, with the gun still pressed against the husband's back, demanded the husband's money. The husband pulled out his wallet and dropped it to the ground. Jermaine took the money out of the wallet. He then demanded the husband's phone. After some hesitation by the husband and prompting by the wife, the husband complied and handed over his phone.

Defendant asserts that he could, at most, be only guilty of third-degree robbery. He argues that his actions could only constitute an unarmed robbery of the wife, actions that were separate from those of his cousin who was robbing the husband at gunpoint a few feet away. The evidence, including defendant's own admissions, overwhelmingly established that defendant and Jermaine were working as a team in robbing both husband and wife,

and had a "community of purpose" (*People v Allah*, 71 NY2d 830, 832 [1988]; *see People v Martinez*, 30 AD3d 353, 354 [1st Dept 2006], *lv denied* 7 NY3d 868 [2006]; *People v Harris*, 271 AD2d 258, 258-259 [1st Dept 2000], *lv denied* 95 NY2d 853 [2000]). That the jury acquitted defendant of robbing the husband does not warrant a different conclusion. Although in performing a weight of the evidence review, we may consider an alleged factual inconsistency in a verdict (*see People v Rayam*, 94 NY2d 557, 563 n [2000]), we nevertheless find it "imprudent to speculate concerning the factual determinations that underlay the verdict" (*People v Horne*, 97 NY2d 404, 413 [2002]; *see also People v Hemmings*, 2 NY3d 1, 5 n [2004]).

The court providently exercised its discretion in admitting portions of defendant's statements that concerned uncharged crimes. We concur that the probative value of this evidence outweighed any prejudicial impact. In his statements, defendant admitted that he and his cousin had planned, but were unable to commit, another robbery immediately before the charged robbery, and that they committed the charged robbery as a substitute for the planned robbery. These statements were probative on the issue of defendant's intent to act in concert with his cousin, particularly where defendant asserted that he did not share his

cousin's intent to commit a gunpoint robbery (*see People v Ingram*, 71 NY2d 474, 479-480 [1988]; *People v Brown*, 164 AD3d 1180, 1181 [1st Dept 2018]). In addition, defendant's offer to help the police buy firearms in exchange for favorable treatment was probative to show the voluntariness of defendant's statement, an issue that the defense did not concede. Defendant did not preserve his claim that limiting instructions were required, and we decline to review it in the interest of justice.

The court properly denied defendant's motion to suppress a showup identification. Initially, we note that identity was never an issue at trial, because defense counsel conceded that defendant was present, arguing instead that defendant did not act in concert with his cousin. In any event, the showup was sufficiently prompt, and the allegedly suggestive overall effect of the circumstances cited by defendant was not significantly greater than what is inherent in a showup itself (*see e.g. People v Gatling*, 38 AD3d 239, 240 [1st Dept 2007], *lv denied* 9 NY3d 865 [2007]).

The court properly denied defendant's speedy trial motion. In order for defendant to prevail on this claim, both of the two periods of delay at issue would have to be includable. We find that the court correctly excluded each period. The 62-day period

of delay during which the victims, who were living in Virginia, were caring for their newborn infant, was correctly excluded as "occasioned by exceptional circumstances" (CPL 30.30[4][g]; *see People v Goodman*, 41 NY2d 888, 889 [1977]; *People v Womack*, 229 AD2d 304 [1st Dept 1996], *affd* 90 NY2d 974 [1997]). The record sufficiently establishes that it would have been unreasonably burdensome for the victims to come to New York to testify during that period (*see People v Brown*, 281 AD2d 325, 327 [1st Dept 2001], *lv denied* 96 NY2d 899 [2001] [witness wearing large, cumbersome cast deemed unavailable]). The court also correctly excluded the 96-day period during which the People's motion for consolidation of defendant's indictment with that of his codefendant cousin was pending (*see* CPL 30.30[4][a]). Although the People ultimately withdrew the motion because their efforts to resolve an issue under *Bruton v United States* (391 US 123 [1968]) proved unsuccessful, there is nothing to suggest that the motion was not made in good faith or that it was frivolous.

The court properly adjudicated defendant a persistent violent felony offender. The court correctly excluded the period during which defendant was incarcerated in federal prison in calculating whether 10 years had elapsed since his two prior violent convictions. In calculating the 10-year period, any

period of time during which defendant was incarcerated for any reason between the time of commission of the previous felony and the time of commission of the present felony was properly excluded (Penal Law § 70.04[1][b][v]; *see People v Cagle*, 7 NY3d 647, 651 [2006]).

We perceive no basis for reducing the sentence.

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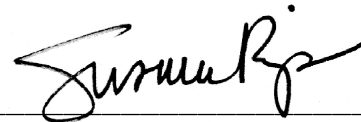
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MARCH 12, 2019



CLERK

Gische, J.P., Webber, Kern, Singh, JJ.

8657 In re Gallo, Adele, etc., et al., Index 100678/13
Petitioners-Appellants,

-against-

The New York City Department of Consumer Affairs,
Respondent-Respondent.

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Davidoff Hutcher & Citron LLP, New York (Howard S. Weiss of counsel), for appellants.

Zachary W. Carter, Corporation Counsel, New York (Melanie T. West of counsel), for respondent.

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Judgment, Supreme Court, New York County (Barbara Jaffe, J.), entered April 12, 2018, denying the petition to annul respondent’s determination, dated October 20, 2014, which conditioned its approval of petitioners’ application to renew their sidewalk café license on their making certain modifications pursuant to 6 RCNY 2-55, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Respondent’s finding that petitioners’ operation of their entire unenclosed sidewalk café in an elevated area higher than the adjoining sidewalk violated 6 RCNY 2-55(b) has a rational basis (*see generally Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck,*

Westchester County, 34 NY2d 222, 231 [1974]).

The rule requires such an elevation to conform to the plans for which a revocable consent was granted before the effective date of the rule (March 27, 2003). The revocable consent granted in 1988 was based on 1987 architectural plans showing that the elevated area would cover a relatively small portion of the outdoor ground. Petitioners' reliance on the parties' course of conduct is unavailing, as estoppel cannot be invoked to preclude a government agency from discharging its statutory duties (*see Matter of New York State Med. Transporters Assn. v Perales*, 77 NY2d 126, 130 [1990]).

The finding that the structure enclosing the outdoor café violates 6 RCNY 2-55(a) also has a rational basis, as the structure is concededly not "removable" (*id.*). Petitioners' arguments that the regulation is inapplicable to that structure are without merit.

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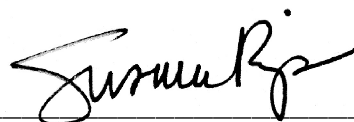

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Gische, J.P., Webber, Kern, Singh, JJ.

8658 In re Satondji F.,

A Person Alleged to be a
Juvenile Delinquent,
Appellant.
- - - - -
Presentment Agency.

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Dawne A. Mitchell, The Legal Aid Society, New York (Raymond E. Rogers of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Diana Lawless of counsel), for presentment agency.

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Order of disposition, Family Court, Bronx County (Peter J. Passidomo, J.), entered on or about December 7, 2017, which adjudicated appellant a juvenile delinquent upon his admission that he committed an act that, if committed by an adult, would constitute the crime of grand larceny in the fourth degree, and placed him on probation for a period of nine months, unanimously affirmed, without costs.

The court providently exercised its discretion when it adjudicated appellant a juvenile delinquent and placed him on probation. This was the least restrictive dispositional alternative consistent with appellant’s best interests and the community’s need for protection (*see Matter of Katherine W.*, 62 NY2d 947, 948 [1984]), in light of appellant’s violent conduct

during the underlying offense, as well as his unfavorable disciplinary and academic record at school and other negative background factors. The court noted probation would provide a more appropriate level of supervision and support than an adjournment in contemplation of dismissal.

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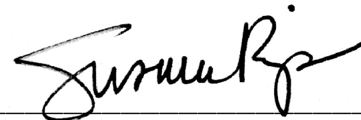

CLERK

Gische, J.P., Webber, Kern, Singh, JJ.

8659 Amalia Morales, Index 301106/14
Plaintiff-Appellant,

-against-

320 E. 176th Street, LLC,
Defendant-Respondent.

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The Altman Law Firm, PLLC, Woodmere (Michael T. Altman of counsel), for appellant.

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

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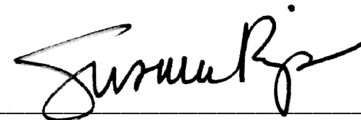
Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered on or about January 31, 2018, which granted defendant's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion denied.

Plaintiff was injured when, while walking down a staircase in defendant's building, her foot struck a hole in the stairs, causing her to fall from the third floor to the second floor. Defendant failed to establish entitlement to judgment as a matter of law by submitting evidence refuting plaintiff's testimony identifying the cause of her fall (*see Johnson v 675 Coster St.*

Hous Dev. Fund, 161 AD3d 635 [1st Dept 2018]; *Figueroa v City of New York*, 126 AD3d 438, 440 [1st Dept 2015]). Defendant's challenge to the credibility of plaintiff's evidence is a matter for resolution by a trier of fact (*see Porteous v J-Tek Group, Inc.*, 125 AD3d 411 [1st Dept 2015]).

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

ENTERED: MARCH 12, 2019



CLERK

Gische, J.P., Webber, Kern, Singh, JJ.

8660-
8660A Underground Utilities, Inc., Index 157356/14
Plaintiff-Appellant,

-against-

Comptroller of the City of New York,
et al.,
Defendants-Respondents.

____

Kostelanetz & Fink, LLP, New York (Claude M. Millman of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Antonella Karlin of counsel), for respondents.

____

Judgment, Supreme Court, New York County (Margaret A. Chan, J.), entered April 25, 2017, dismissing the complaint, unanimously affirmed, with costs. Appeal from order, same court and Justice, entered March 16, 2017, which granted defendants' motion for summary judgment, and denied plaintiff's cross motion for summary judgment, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Plaintiff seeks to recover certain funds retained by defendant Comptroller, pursuant to General Municipal Law § 106 (the retainage), in connection with contracts between plaintiff and the New York City Department of Transportation (DOT). DOT informed plaintiff many times between 1997 and 2003 of its

position that the retainage would not be released to plaintiff because DOT had made substantial overpayments to plaintiff on the contracts. In addition, in 2007, plaintiff requested that the Comptroller release the funds and, in November 2007, the Comptroller denied the request because it had no independent authority to release the retainage without approval from DOT. Plaintiff did not commence this action until 2014, more than six years after the Comptroller's 2007 response. Thus, its tort claims are barred by the applicable three- or six-year statutes of limitations (CPLR 214[3]; CPLR 213[1]; *see Tydings v Greenfield, Stein & Senior, LLP*, 11 NY3d 195, 201 [2008] [six years for accounting and constructive trust]; *Solomon R. Guggenheim Found. v Lubell*, 77 NY2d 311, 317-318 [1991] [three years for replevin]; *Ingrami v Rovner*, 45 AD3d 806, 808 [2d Dept 2007] [three years for unjust enrichment]; *Kaufman v Cohen*, 307 AD2d 113, 118 [1st Dept 2003] [three or six years for breach of fiduciary duty]; *D'Amico v First Union Natl. Bank*, 285 AD2d 166, 172 [1st Dept 2001] [three years for conversion]). The declaratory judgment claim is barred by the six-year statute of limitations (see *Vigilant Ins. Co. of Am. v Housing Auth. of City of El Paso, Tex.*, 87 NY2d 36, 40-41 [1995]).

The complaint was correctly dismissed for the additional

reason, among others, that the Comptroller's refusal to release the retainage was proper in light of the contractual terms that governed the relationship between plaintiff and DOT. Further, the Comptroller's Office's directives stated that the Comptroller may not release the retainage bond, or take any other action with respect thereto, until directed to do so by the contracting agency.

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

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

ENTERED: MARCH 12, 2019

CLERK

Gische, J.P., Webber, Kern, Singh, JJ.

8661-
8662-
8663 Index 651203/13

Francis Carling,
Plaintiff-Appellant-Respondent,

-against-

Kristan Peters,
Defendant-Respondent-Appellant.

____

Francis Carling, New York, appellant-respondent pro se.

Kristan Peters-Hamlin, respondent-appellant pro se.

____

Judgment, Supreme Court, New York County (Jennifer G. Schecter, J.), entered September 8, 2017, which adjudged plaintiff Francis Carling to have judgment against defendant Kristan Peters for $21,213.46, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered on or about August 8, 2017, which denied Carling’s motion to compel disclosure, and appeal from order, same court and Justice, dated February 16, 2016 and entered September 27, 2017, to the extent it granted Peters’s motion to dismiss Carling’s claims for fraud and demand for punitive damages, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Law of the case did not bar dismissal of the fraud claim. Carling asserts that when he first commenced this fee dispute

litigation in the Southern District of New York, Peters moved to dismiss on grounds similar to those asserted in her motion to dismiss below and that her motion in federal court was denied (SD NY, Sept. 14, 2010, No. 10-cv-04573 [VM]). However, the denial of that motion was not even "law" of the SD NY "case" itself, as that case expressly held (*Carling v Peters*, 2013 WL 865822 [SD NY February 6, 2013, at *7]).

The motion court properly dismissed the fraud claim on the ground that it duplicated the contract-based claims. The core allegation is that Peters had no intention of paying Carling in full for his services, and thus cannot stand (*see e.g. Gedula 26, LLC v Lightstone Acquisitions III, LLC*, 150 AD3d 583 [1st Dept 2017]). To the extent the claim arose from other alleged misrepresentations, it still fails, as it alleges no damages that would not be recoverable in a contract action (*see MBIA Ins. Corp. v Credit Suisse Sec. [USA] LLC*, 165 AD3d 108, 114 [1st Dept 2018]).

Carling does not salvage the claim with assertions about Peters's alleged "fraud on the courts," as his complaints derive from her alleged sharp litigation tactics and personal insults against him, not harm done to the courts or the public itself, and his punitive damages demand was, in turn, also appropriately

dismissed. His conclusory request for such damages, moreover, does not mask that his fraud claim is, at its core, no different from, and duplicative of, his contract-based claims (*see id.* at 115).

Because the court could have dismissed the fraud claim on this ground alone, we reject, as academic, Carling's arguments about his need for discovery on the alternative ground for dismissal asserted by the court, namely, that his reliance on Peters's misrepresentations was unreasonable as a matter of law.

Contrary to Peters's contentions on cross appeal, however, Carling was properly granted summary judgment on his account stated claim. To the extent her arguments before us refer to or rely upon her papers in opposition to summary judgment, soundly rejected for untimeliness by the motion court, we do not consider them now (*see e.g. Sean M. v City of New York*, 20 AD3d 146, 149 [1st Dept 2005]). Her own summary judgment motion was deemed moot, but even were we to consider its merits, we would still affirm the judgment in Carling's favor.

Peters's assertions that Carling did little to no work, or was not authorized to do the work he did on the Minnesota matter, are disproven by her own emails with him, and show that it was only on December 18, 2008 that she conveyed he should cease

involvement. However, the bills relevant to his claim concern work done in October, November, and the first half of December, 2008.

Her arguments about the Connecticut matter are not persuasive either. That he never entered an appearance does not mean that he did not, without formally appearing, do billable work. Also, he alleged he is admitted to practice in Connecticut, and Peters offers no proof to support her assertions to the contrary.

She claims she could not have paid him due to the absence of a retainer agreement, but "failure to comply with the letter of engagement rule (22 NYCRR 1215.1) does not preclude . . . recovery of legal fees under a theory of account stated" (*Jaffe Ross & Light, LLP v Mann*, 121 AD3d 480 [1st Dept 2014]; *see also Seth Rubenstein, PC v Ganea,* 41 AD3d 54, 63 [2d Dept 2007]). The record before us shows that, after receiving the benefit of Carling's services, Peters invoked the absence of a retainer agreement in an effort to evade her payment obligations, and the court was right to award him the amounts reflected in his bills.

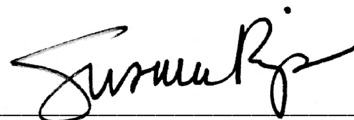
Peters's reliance on Part 137 is misplaced, as 22 NYCRR 137.1 does not apply to "disputes where no attorney's services have been rendered for more than two years" (22 NYCRR

137.1[b][6]). Here, the parties' fee dispute was commenced in 2013, but Carling had ceased rendering legal services to Peters in December 2008.

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

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

ENTERED: MARCH 12, 2019



CLERK

Gische, J.P., Webber, Kern, Singh, JJ.

8664 The People of the State of New York, Ind. 505/14
Respondent,

-against-

Jason Henry,
Defendant-Appellant.

____

Justine M. Luongo, The Legal Aid Society, New York (Eve Kessler of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Noah J. Chamoy of counsel), for respondent.

____

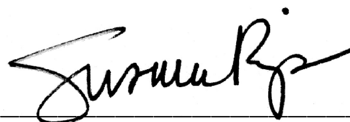
An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Lester B. Adler, J.), rendered August 16, 2016,

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

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

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

ENTERED: MARCH 12, 2019



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

Renwick, J.P., Gische, Webber, Singh, JJ.

8665 In re Tribeca Trust, Inc., et al., Petitioners-Appellants, Index 158483/16

-against-

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

____

Law Offices of Alison Greenberg, LLC, New York (Alison G. Greenberg of counsel), for appellants.

Zachary W. Carter, Corporation Counsel, New York (Aaron M. Bloom of counsel), for respondents.

____

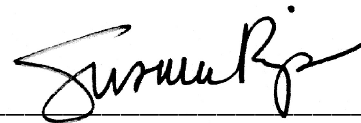
Judgment, Supreme Court, New York County (Erika M. Edwards, J.), entered December 20, 2017, denying the petition to annul respondents' determination, dated June 7, 2016, which denied petitioners' request to calendar for formal consideration a Request for Evaluation (RFE) proposing extensions of the borders of three designated historic districts in the Tribeca area and to remand for the promulgation of new review procedures for such requests, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

The court correctly dismissed the petition to compel the adoption of written procedures for the review and calendaring of RFEs on the ground that "there is no statutory requirement that

the Commission adhere to a particular procedure in determining whether to consider a property for designation" (*Matter of Citizens Emergency Comm. to Preserve Preserv. v Tierney*, 70 AD3d 576, 577 [1st Dept 2010], *lv denied* 15 NY3d 710 [2010]). The calendaring of an RFE by the Commission and/or the chair is a discretionary action based on procedures determined by the Commission; thus, mandamus to compel the Commission to promulgate new procedures is not an available remedy (*see Matter of Williamsburg Ind. People, Inc. v Tierney*, 91 AD3d 538 [1st Dept 2012]; *Matter of Deane v City of New York Dept of Bldgs.*, 177 Misc 2d 687, 694-695 [Sup Ct, NY County 1998]). Nor is there merit in petitioners' contention that the procedures followed by respondents in connection with petitioners' RFE and their determination on the RFE were arbitrary and capricious.

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

ENTERED: MARCH 12, 2019



CLERK

Gische, J.P., Webber, Kern, Singh, JJ.

8666-
8667-
8668-
8669 Index 156487/15

Korea Resolution and Collection Corporation,
Plaintiff-Respondent,

-against-

Hyuk Kee Yoo, et al.,
Defendants-Appellants.

____

Zuckerman Spaeder LLP, New York (Shawn P. Naunton of counsel), for appellants.

Mayer Brown LLP, New York (Jason I. Kirschner of counsel), for respondent.

____

Judgment, Supreme Court, New York County (Manuel J. Mendez, J.), entered November 14, 2017, in favor of plaintiff against defendants, unanimously affirmed, with costs. Appeals from orders, same court and Justice, entered November 30, 2016, and October 30, 2017, which granted plaintiff's motions for summary judgment in lieu of complaint and to confirm the judicial hearing officer's report and recommendation, after an inquest, as to interest on the amounts due, and denied defendants' motion to dismiss the complaint pursuant to CPLR 3211(a)(7), unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

In opposition to plaintiff's motion for summary judgment enforcing a Korean judgment, defendants failed to establish that the Korean court lacked personal jurisdiction over them (*see* CPLR 5304[a][2]). The motion court correctly found that defendants submitted to the jurisdiction of the Busan District Court by appealing the judgment and raising arguments on the merits regarding the validity of the underlying debt (*see CIBC Mellon Trust Co. v Mora Hotel Corp.*, 100 NY2d 215, 223 [2003], *cert denied* 540 US 948 [2003]). Defendants also failed to establish that the Korean intestacy law that rendered them responsible for the debts of their father's estate was repugnant to New York public policy (*see* CPLR 5304[2][b]). Defendants do not dispute that, to avoid liability for the Korean judgment, they could have renounced their inheritance under Korean law but elected not to do so.

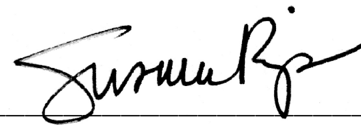
Defendants argue that, in determining the interest on the amounts due, the court erred in applying the postjudgment rate of 24% cited in the Korean judgment until the date of entry in New York, rather than the 9% set forth in CPLR 5004. However, defendants failed to present any evidence rebutting plaintiff's witness's hearing testimony and showing that the interest rate was a "penalty" rather than the default rate set forth under the

terms of the underlying loan, “a clear, unambiguous, and unequivocal expression to pay an interest rate higher than the statutory interest rate until the judgment is satisfied” (*Retirement Accounts, Inc. v Pacst Realty, LLC*, 49 AD3d 846, 847 [2d Dept 2008]).

We have considered defendants’ remaining contentions and find them without merit.

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

ENTERED: MARCH 12, 2019



CLERK

Gische, J.P., Webber, Kern, Singh, JJ.

8670 Albert Deckter, derivatively on behalf of Bristol-Myers Squibb Co., Plaintiff-Appellant, Index 654390/15

-against-

Lamberto Andreotti, et al.,
Defendants-Respondents,

Does 1-10, et al.,
Defendants,

Bristol-Myers Squibb Company, etc.,
Nominal Defendant-Respondent.

____

Robbins Geller Rudman & Dowd LLP, San Diego, CA (Steven F. Hubachek of the bar of the State of California, admitted pro hac vice, of counsel), for appellant.

Kirkland & Ellis LLP, New York (Yosef J. Riemer of counsel), for respondents.

____

Judgment, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered on or about August 30, 2017, dismissing the complaint with prejudice, unanimously affirmed, with costs.

Derivative plaintiff/nominal defendant Bristol-Myers Squibb Co. (BMS) is a Delaware corporation. Therefore, "[t]he issue of whether a pre-suit demand is required or excused is governed by the law of Delaware" (*Wandel v Dimon,* 135 AD3d 515, 516 [1st Dept 2016]). Under Delaware law, appellate review of a lower court's decision to dismiss on the ground that demand was not excused "is

de novo and plenary" (*Brehm v Eisner,* 746 A2d 244, 253 [Del 2000]).

The Court of Appeals has applied an abuse of discretion standard when reviewing a dismissal for failure to make a demand (*see Marx v Akers,* 88 NY2d 189, 192 [1996]). However, *Marx* involved a New York corporation, not a Delaware one (*see Marx v Akers,* 215 AD2d 540 [2d Dept 1995], *affd* 88 NY2d 189 [1996]).

Where, as here, "the subject of a derivative suit is . . . a violation of the Board's oversight duties" (*Wood v Baum,* 953 A2d 136, 140 [Del 2008]), the criteria for determining whether plaintiff's failure to make a pre-suit demand on the board is excused are set forth in *Rales v Blasband* (634 A2d 927 [Del 1993]) (*see e.g. Wood,* 953 A2d at 136; *Wandel,* 135 AD3d at 517). Although plaintiff also alleges that defendants signed BMS's annual reports on U.S. Securities and Exchange Commission's Form 10-K, "the issuance of false or misleading statements in public filings . . . constitute[s] . . . a violation of the Board's oversight duties and thus is governed by *Rales* for purposes of a demand futility analysis" (*Steinberg v Bearden,* 2018 WL 2434558, *8, 2018 Del Ch LEXIS 169, *19 [May 30, 2018, C.A. No. 2017-0286-AGB] [internal quotation marks omitted]).

Under *Rales,* "a court must determine whether . . . the

particularized factual allegations of a derivative stockholder complaint create a reasonable doubt that, as of the time the complaint is filed, the board of directors could have properly exercised its independent and disinterested business judgment in responding to a demand" (634 A2d at 934). The "'mere threat of personal liability . . . is insufficient to challenge either the independence or disinterestedness of directors'" (*id.* at 936). However, "a substantial likelihood" of liability "disables [a director] from impartially considering a response to a demand by" a stockholder (*id.).*

"Where, as here, directors are exculpated from liability except for claims based on fraudulent, illegal or bad faith conduct, a plaintiff must . . . plead particularized facts that demonstrate that the directors acted with scienter, i.e., that they had actual or constructive knowledge that their conduct was legally improper" (*Wood,* 953 A2d at 141 [internal quotation marks omitted]; *see also Security Police & Fire Professionals of Am. Retirement Fund v Mack,* 93 AD3d 562, 565 [1st Dept 2012]).

Even though the complaint alleges that BMS' audit committee and senior management knew about gaps in the company's internal controls, it fails to establish bad faith or scienter where a document submitted by defendants on their CPLR 3211(a)(1) motion

shows that each internal audit report also included specific remedial actions (*see Oklahoma Firefighters Pension & Retirement Sys. v Corbat,* 2017 WL 6452240, 2017 Del Ch LEXIS 848 [Dec. 18, 2017, C.A. No. 12151-VCG]; *In re Qualcomm Inc. FCPA Stockholder Derivative Litig.,* 2017 WL 2608723, 2017 Del Ch LEXIS 106 [June 16, 2017, C.A. No. 11152-VCMR]; *see also Horman v Abney,* 2017 WL 242571, 2017 Del Ch LEXIS 13 [Jan. 19, 2017, C.A. No. 12290-VCS]).

Plaintiff's contention that defendants face a substantial likelihood of liability because they signed 10-K's that contained false statements is also unavailing. It is true that "when directors communicate publicly . . . about corporate matters[,] the *sine qua non* of directors' fiduciary duty to shareholders is honesty" (*Malone v Brincat,* 722 A2d 5, 10 [Del 1998]). However, "to establish liability for misstatements when the board is not seeking shareholder action, shareholder plaintiffs must show that the misstatement was made knowingly or in bad faith" (*In re Citigroup Inc. Shareholder Derivative Litig.,* 964 A2d 106, 135 [Del Ch 2009]; *see also Steinberg,* 2018 WL 2434558 at *10 n 78, 2018 Del Ch LEXIS 169 at *26 n 78). Furthermore, "a board is not required to engage in self-flagellation and draw legal conclusions implicating itself in a breach of fiduciary duty from

surrounding facts and circumstances prior to a formal adjudication of the matter” (*In re Pfizer Inc. Shareholder Derivative Litig.*, 722 F Supp 2d 453, 465 [SD NY 2010] [internal quotation marks omitted]).

Because the court properly dismissed the complaint on the ground that demand was not excused, we need not consider whether plaintiff states claims for breach of fiduciary duty and unjust enrichment.

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

ENTERED: MARCH 12, 2019

CLERK

Gische, J.P., Webber, Kern, Singh, JJ.

8671 In re Jayden T., and Another,

Children Under Eighteen Years of Age, etc.,

Abbigale T. (Deceased),
Respondent,

Administration for Children's Services,
Petitioner-Respondent.

- - - - -

Lesleen T.,
Nonparty Appellant.

____

Law Office of Thomas R. Villecco, P.C., Jericho (Thomas R. Villecco of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Eric Lee of counsel), for respondent.

Karen Freedman, Lawyers For Children, Inc., New York (Shirim Nothenberg of counsel), attorney for the children.

____

Appeal from order, Family Court, New York County (Tamara Schwarzman, Referee), entered on or about November 15, 2017, which suspended visitation between appellant grandmother and the subject children, unanimously dismissed, without costs, as moot.

The grandmother's appeal from the order suspending her visitation with the children has been rendered moot by the adoption of the children by their foster parent (*see Matter of Nitthanean R. [Joy R.]*, 165 AD3d 502 [1st Dept 2018]; *Matter of*

Aliyah B. v Taliby K., 149 AD3d 667 [1st Dept 2017], *lv denied* 29 NY3d 917 [2017]; *Matter of Alexis C. [Jacqueline A.]*, 99 AD3d 542 [1st Dept 2012], *lv denied* 20 NY3d 856 [2013]).

We would dismiss the appeal in any event, because the challenged order was entered on default (*see Matter of Pedro A. v Susan M.*, 95 AD3d 458 [1st Dept 2012]).

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

ENTERED: MARCH 12, 2019

CLERK

Gische, J.P., Webber, Kern, Singh, JJ.

8672 The People of the State of New York, Ind. 3867/13
Respondent,

-against-

Kenneth Singletary,
Defendant-Appellant.

____

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

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

____

Judgment, Supreme Court, New York County (Gregory Carro, J.), rendered May 13, 2015, as amended June 25, 2015, convicting defendant, upon his plea of guilty, of attempted robbery in the first degree and robbery in the third degree, and sentencing him, as a second felony offender, to an aggregate term of five years, unanimously affirmed.

Defendant's challenges to his sentence enhancement are unpreserved, and we decline to review them in the interest of justice. As an alternative holding, we reject them on the merits. Defendant was discharged from a rehabilitation program, based upon his failure to abide by the conditions imposed by the administrators of the program, and was then rearrested. One paragraph of his plea agreement provided that he would receive a

certain sentence if he was discharged from the program for a reason other than committing a new crime. Another paragraph unambiguously informed him that he would receive another sentence if he committed a new crime. To the extent a remark by counsel at the time of the plea could be viewed as creating an ambiguity, the court immediately eliminated any such ambiguity. Notably, the court imposed a sentence that was more lenient than the one contemplated by the provision relating to commission of a new crime.

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

ENTERED: MARCH 12, 2019

CLERK

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

8673 In re Sai Bondalapati, Index 159034/16
Petitioner-Appellant,

-against-

Columbia University, et al.,
Respondents-Respondents.

____

Stewart Lee Karlin Law Group, P.C., New York (Stewart Lee Karlin of counsel), for appellant.

Jackson Lewis P.C., White Plains (Susan D. Friedfel of counsel), for respondents.

____

Judgment, Supreme Court, New York County (Barbara Jaffe, J.), entered on or about February 14, 2018, denying the petition to annul respondents’ determination, dated June 27, 2016, which affirmed the hearing committee’s suspension of petitioner for one semester upon a finding that he engaged in academic dishonesty, and dismissing the hybrid CPLR article 78 proceeding and plenary action for defamation, unanimously affirmed, without costs.

Respondents’ disciplinary determination that petitioner forged an exam booklet was made in accordance with its written disciplinary policy and was rationally based and not arbitrary and capricious (*see Kickertz v New York Univ.*, 110 AD3d 268, 272 [1st Dept 2013]). Petitioner had ample opportunity at the hearing to defend his conduct and explain his actions.

Respondents' rejection of petitioner's explanation as not credible was not irrational. The denial of petitioner's internal appeal also was not irrational; respondents' written policy provided for limited grounds for appeal, none of which availed petitioner.

Petitioner's "due process" challenge is misplaced; a student at a private university is not afforded the "full panoply" of due process rights (*Cavanagh v Cathedral Preparatory Seminary*, 284 AD2d 360, 361 [2d Dept 2001]; *Matter of Mu Ch. of Delta Kappa Epsilon v Colgate Univ.*, 176 AD2d 11, 13 [3d Dept 1992]). Absent State involvement, the only issue for our review is whether respondents substantially complied with their own rules (*Mu Ch.*, 176 AD2d at 13-14; *see also Kickertz*, 110 AD3d at 272; *Cavanagh*, 284 AD2d at 361). Petitioner does not dispute that the subject hearing was conducted in accordance with respondents' written disciplinary policy.

Petitioner's arguments about the sufficiency of the record before the hearing committee or on the internal appeal are without merit.

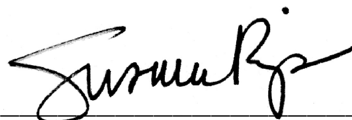
There is nothing shocking or disproportionate about the one-semester suspension imposed (*see Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale &*

Mamaroneck, Westchester County, 34 NY2d 222, 233 [1974]; *Matter of Quercia v New York Univ.*, 41 AD3d 295, 297 [1st Dept 2007]).

Petitioner's defamation claim was correctly dismissed because the subject statements were true (*see Amato v New York City Dept. of Parks & Recreation*, 110 AD3d 439, 440 [1st Dept 2013]), had not been published to any persons outside the university (see*Lipsky v Gonzalez*, 39 Misc 3d 1202[A], 2013 NY Slip Op 50439[U], *5 [Sup Ct, Bronx County 2013]), and were protected by a qualified common interest privilege (*see Present v Avon Prods.*, 253 AD2d 183, 187 [1st Dept 1999], *lv dismissed* 93 NY2d 1032 [1999]; *Lipsky*, 2013 NY Slip Op 50439[U], *5). Petitioner's allegations of malice amount to little more than "mere surmise and conjecture" and are therefore insufficient to overcome this privilege (*see Ashby v ALM Media, LLC*, 110 AD3d 459, 459 [1st Dept 2013] [internal quotation marks omitted], *lv denied* 22 NY3d 860 [2014]).

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

ENTERED: MARCH 12, 2019



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Gische, J.P., Webber, Kern, Singh, JJ.

8674-
8675 Savior Buttigieg,
Plaintiff-Appellant,

Index 153601/13

Doreen Buttigieg,
Plaintiff,

-against-

Marlin Mechanical Corp.,
Defendant-Respondent.

- - - - -

Marlin Mechanical Corp.,
Third-Party Plaintiff,

-against-

Accord Contracting, et al.,
Third-Party Defendants,

Laurmar Associates,
Third-Party Defendant-Respondent.

____

Hach & Rose, LLP, New York (Halina Radchenko of counsel), for appellant.

Law Office of Kevin P. Westerman, Elmsford (Jonathan R. Walsh of counsel), for Marlin Mechanical Corp., respondent.

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (I. Elie Herman of counsel), for Laurmar Associates, respondent.

____

Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered June 26, 2017, which, insofar as appealed from as limited by the briefs, granted the motion of third-party defendant Laurmar Associates (Laurmar) for summary judgment

dismissing plaintiff's Labor Law § 200 and common-law negligence claims, unanimously affirmed, without costs.

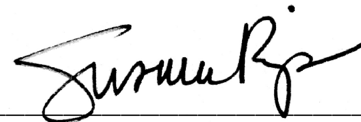
Plaintiff Savior Buttigieg alleges that he was injured when he slipped and fell on construction debris as he was walking down a ramp to a service elevator located in the basement of the hotel where work was being performed. Laurmar submitted evidence showing that defendant Marlin Mechanical Corp., the general contractor on the project, neither created or had constructive notice of the dangerous condition, by demonstrating that Marlin was not responsible for the site at the time of the accident, since it occurred between phases one and two of the project, and that the area was clear of debris when Marlin left the site at the end of phase one over three weeks before the date of the accident (*see Fenton v Monotype Sys.*, 289 AD2d 194 [2d Dept 2001]).

In opposition, plaintiff did not refute Laurmar's showing, and otherwise failed to raise a triable issue of fact. Furthermore, he did not raise the issue of constructive notice

based on a recurring condition in his pleadings (*see Bader v River Edge at Hastings Owners Corp.*, 159 AD3d 780, 781-782 [2d Dept 2018], *lv denied* 31 NY3d 913 [2018]; *see also Vasquez v Nealco Towers, LLC*, 160 AD3d 496 [1st Dept 2018]).

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

ENTERED: MARCH 12, 2019



CLERK

Gische, J.P., Webber, Kern, Singh, JJ.

8676-
8677 The People of the State of New York, Respondent,

SCI 703/16
Ind. 1191/16

-against-

Leonard Pina-Rodriguez,
Defendant-Appellant.

____

Justine M. Luongo, The Legal Aid Society, New York (Heidi Bota of counsel), for appellant.

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

____

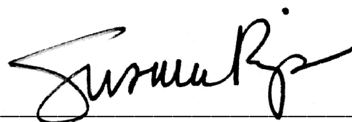
An appeal having been taken to this Court by the above-named appellant from judgments of the Supreme Court, New York County (Larry Stephen, J.) rendered February 22, 2016 and June 8, 2016,

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

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

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

ENTERED: MARCH 12, 2019



CLERK

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

Gische, J.P., Webber, Kern, Singh, JJ.

8678-
8679-
8680 Samuel Yovany Casas Cortez, et al.,
Plaintiffs-Appellants,

Index 24516/13E

-against-

Damon Gersh individually and doing business as Maxons Restorations, Inc., et al.,
Defendants-Respondents,

Forman Mills, Inc.,
Defendant.

- - - - -

[And a Third Party Action]

____

Ginarte Gallardo Gonzalez & Winograd LLP, New York (Timothy Norton of counsel), for appellants.

Ford Marrin Esposito Witmeyer & Gleser, LLP, New York (Caroline McKenna of counsel), for respondents.

____

Appeal from order, Supreme Court, Bronx County (Fernando Tapia, J.), entered August 27, 2018, to the extent it denied plaintiffs' motion to renew an order, same court and Justice, entered September 19, 2017, which granted defendants' motions to dismiss the complaint, unanimously dismissed, without costs.

Plaintiffs are precluded from pursuing this appeal from the denial of the motion to renew, since they did not perfect their prior appeal from the motion to dismiss (*Rivera v Ayala*, 95 AD3d

622, 622-623 [1st Dept 2012]; *Pier 59 Studios, L.P. v Chelsea Piers, L.P.*, 40 AD3d 363, 366 [1st Dept 2007]).

Even if we were to consider plaintiffs' appeal, we would conclude that the motion court did not abuse its discretion in denying the motion for renewal. The alleged new information was submitted in further support of the motion to dismiss the complaint and plaintiffs did not proffer a reasonable justification for failing to present it on the prior motion to reargue (*Farahmand v Dalhousie Univ.*, 96 AD3d 618, 619 [1st Dept 2012]; CPLR 2221[e]).

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

ENTERED: MARCH 12, 2019

CLERK

Gische, J.P., Webber, Kern, Singh, JJ.

8681 Vitac Corporation, Index 652889/17
Plaintiff-Appellant,

-against-

Thomson Reuters (Marketing) LLC,
Defendant-Respondent.

____

Dilworth Paxson LLP, Philadelphia, PA (Lawrence G. McMichael of the bar of the Commonwealth of Pennsylvania, admitted pro hac vice, of counsel), and Dilworth Paxson LLP, New York (Ira N. Glauber of counsel), for appellant.

Satterlee Stephens LLP, New York (James F. Rittinger of counsel), for respondent.

____

Order, Supreme Court, New York County (Eileen Bransten, J.), entered January 16, 2018, which granted defendant's motion to dismiss the complaint pursuant to CPLR 3211, unanimously reversed, on the law, without costs, and the motion denied.

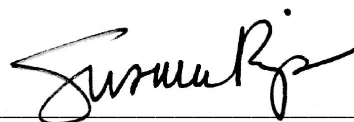
The subject contract, which governed the provision of real-time transcription services over the Internet, did not involve the provision of leasing, servicing, or maintenance of personal property, and therefore did not fall within the ambit of General Obligations Law § 5-903 (*see Donald Rubin, Inc. v Schwartz*, 160 AD2d 53, 57 [1st Dept 1990]).

The termination provision of the contract, which provided both for automatic renewal every 12 months and termination at any

time upon 60 days' notice, is ambiguous, in light of the language of the provision and of the other provisions of the contract read as a whole (*see Matter of Westmoreland Coal Co. v Entech, Inc.*, 100 NY2d 352, 358 [2003]; *Discovision Assoc. v Fuji Photo Film Co., Ltd.*, 71 AD3d 488 [1st Dept 2010]).

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

ENTERED: MARCH 12, 2019



CLERK

Gische, J.P., Webber, Kern, Singh, JJ.

8682 The People of the State of New York, Ind. 3748/16
Respondent,

-against-

Redron Cohen,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Amanda Katherine Regan of counsel), for respondent.

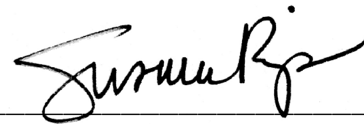
An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Laura A. Ward, J.), rendered May 15, 2017,

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

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

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

ENTERED: MARCH 12, 2019



CLERK

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

Gische, J.P., Webber, Kern, Singh, JJ.

8683 Skiboky Shavar Stora, Index 107715/06
Plaintiff-Appellant,

-against-

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

Marcus Serrano,
Defendant.
\- - - - -
Volunteers of America-Greater New York, Inc.,
Third-Party Plaintiff-Respondent,

-against-

FJC Security Services, Inc.,
Third-Party Defendant-Respondent.

____

Skiboky Shavar Stora, appellant pro se.

Fumuso, Kelly, Swart, Farrell, Polin, & Christesen LLP, Hauppauge (Michelle C. Acosta of counsel), for City of New York, New York City Department of Homeless Services and Volunteers of America-Greater New York, Inc., respondents.

McGaw, Alventosa & Zajac, Jericho (Andrew Zajac of counsel), for FJC Security Services, Inc., respondent.

____

Order, Supreme Court, New York County (Lucy Billings, J.), entered on or about September 19, 2017, which, inter alia, denied plaintiff's motions for a default judgment, to introduce new evidence, and for summary judgment against various defendants, and his cross motion for summary judgment in the third-party

action, and which granted third-party defendant FJC Security Services, Inc.'s motion for sanctions against plaintiff, unanimously affirmed, without costs.

Plaintiff's direct claims against all of the defendants were either dismissed by prior order of this Court (*Stora v City of New York*, 117 AD3d 557 [1st Dept 2014]), resolved in defendants' favor after a 2014 jury trial, pertain to a third-party action which is not at issue on this appeal, or are precluded by the statute of limitations.

The court appropriately denied plaintiff's motion to submit new evidence, because a trial was held on this matter resulting in a defense verdict, and plaintiff made no explanation how the new evidence would have changed that result (*Woori Am. Bank v Winopa Intl. Ltd.*, 63 AD3d 490, 491 [1st Dept 2009]).

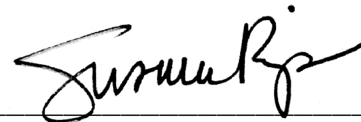
Finally, we agree with the court's imposition of $4000 in sanctions because a prior order notified plaintiff of the possibility of sanctions, he had a reasonable opportunity to be heard in opposition thereto, and his motions practice was

frivolous, lacked legal support and was redundant to matters already decided on the merits (*see* 22 NYCRR 130-1.1).

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

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

ENTERED: MARCH 12, 2019



CLERK

Gische, J.P., Webber, Kern, Singh, JJ.

8684 The People of the State of New York, Ind. 5031/16
Respondent,

-against-

Jeffrey Taylor,
Defendant-Appellant.

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

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

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Michael Obus, J.), rendered August 17, 2017,

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

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

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

ENTERED: MARCH 12, 2019

CLERK

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

Gische, J.P., Webber, Kern, Singh, JJ.

8685N-
8685NA Ginarte, O'Dwyer, et al., Index 158422/12
Plaintiffs-Respondents-Appellants,

-against-

The Law Offices of Rex E. Zachofsky, PLLC, et al.,
Defendants-Appellants-Respondents.

____

Joshua Annenberg, New York, for appellants-respondents.

Robert & Robert, PLLC, Uniondale (Clifford S. Robert of counsel), for respondent-appellant.

____

Order, Supreme Court, New York County (Nancy M. Bannon, J.), entered July 10, 2017, which, inter alia, denied defendants' motion for partial summary judgment on plaintiff's claim for breach of contract, and denied plaintiff's motion to compel discovery, unanimously modified, on the law and the facts, to grant plaintiff's discovery motion, and otherwise affirmed, without costs. Appeal and cross appeal from order, same court and Justice, entered March 29, 2018, denying reargument, unanimously dismissed, without costs, as taken from a nonappealable paper.

Under the Rules of Professional Conduct (22 NYCRR 1200.0) rule 1.5(g)(1), a lawyer may not divide a fee for legal services

with another lawyer who is not associated with the same firm unless, inter alia, the division is in proportion to the services performed by each, and by writing given to the client, each lawyer assumes joint responsibility for the representation (*Samuel v Druckman & Sinel, LLP*, 12 NY3d 205, 210 [2009]). Here, the record does not permit resolution of the claim for breach of contract regarding fee-sharing as a matter of law, given plaintiff's partner's affidavit regarding his firm's participation in the contested Workers' Compensation cases, through staff translations, arranging appointments, and performing various other tasks associated with those cases.

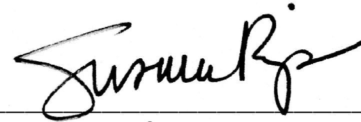
We grant plaintiff's motion to compel defendants to provide access to the Workers' Compensation Board's eCase system with

respect to the cases referred to defendants by plaintiff because the information sought is material and necessary.

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

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

ENTERED: MARCH 12, 2019



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CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Dianne T. Renwick, J.P.
Rosalyn H. Richter
Peter Tom
Ellen Gesmer
Jeffrey K. Oing, JJ.

5576
Index 450170/16

_______________________________________x

In re Letitia James, etc.,
Petitioner-Respondent,

-against-

Carmen Fariña, etc., et al.,
Respondents-Appellants,

The City of New York,
Respondent.
- - - - -
Legal Services NYC, Mobilization for Justice, Inc. and Partnership for Children's Rights,
Amici Curiae.

Common Cause New York,
Amicus Curiae.
_______________________________________x

Respondents Carmen Fariña and New York City Department of Education's appeal from an order of the Supreme Court, New York County (Lynn R. Kotler, J.), entered August 11, 2016, which, insofar as appealed from as limited by the briefs, granted petitioner Public Advocate's application for a summary inquiry pursuant to New York City Charter § 1109, and denied respondents Carmen Fariña and New York City

Department of Education’s motion to dismiss the proceeding as against them.

Zachary W. Carter, Corporation Counsel, New York (Scott Shorr Richard Dearing of counsel), for appellants.

Public Advocate for the City of New York, New York (Molly Thomas-Jensen of counsel), for respondent.

Davis Polk & Wardwell, New York (Anne Burton Walsh of counsel), for Legal Services NYC, Mobilization for Justice, Inc. and Partnership for Children’s Rights, amici curiae.

Milbank, Tweed, Hadley & McCloy LLP, New York (Robert Christopher Almon and David R. Gelfand of counsel), for Common Cause New York, amicus curiae.

OING, J.

Petitioner, Public Advocate of the City of New York Letitia James, makes this application, pursuant to section 1109 of the Charter of the City of New York, seeking to have respondents Carmen Fariña, the former Chancellor of the New York City Department of Education, and the New York City Department of Education (DOE) appear before Supreme Court for a judicial summary inquiry in which petitioner will inquire about their contract for a computer software system, ostensibly designed to manage special education service records and to generate documentation needed to seek Medicaid reimbursement for these services. Petitioner contends that a summary inquiry is warranted to determine the extent of respondents' failures with respect to such issues, and that these failures amount to a "violation or neglect of duty in relation to the property, government or affairs of the city" under Charter § 1109. This appeal presents three issues for us to consider: the constitutionality of section 1109, which has seemingly been decided as such, the scope of a section 1109 judicial summary inquiry, and the exercise of judicial discretion.

The Individuals with Disabilities Education Act (IDEA) requires schools to provide children with disabilities a "free appropriate public education" that enables them to make academic

progress (20 USC § 1400 *et seq.*). To ensure that each child receives the appropriate education, the IDEA requires schools to create an Individualized Education Program (IEP) for each child outlining, among other things, the needs and progress of each child (20 USC § 1414[d]). These "related services" include, but are not limited to, speech therapy, occupational therapy, physical therapy and mental health counseling services. The fundamental objective of providing these related services is to help maximize each child's ability to achieve his or her educational goals.

From the early 1980s through 2013, DOE used a data system called the Child Assistance Program (CAP) to track the related services provided to special education children. CAP was unable, however, to track and document the services actually received. To remedy CAP's admitted inadequacy, in early 2008, DOE sought to implement the Special Education Student Information System (SESIS), and, accordingly, issued a Request for Proposal (RFP) seeking software and IT solutions to support SESIS. The RFP listed a number of objectives for SESIS: simplification of data entry; improving the quality for IEPs by improving the process for creation and review of IEPs; significantly reducing the cost to manage paper-based records; and improving data integrity. In 2009, DOE contracted with Maximus, Inc. for the design and

creation of the software to support SESIS, a software system that, among other things, was supposed to manage the records for children with disabilities and track their IEPs. SESIS was fully implemented at the end of the 2012-2013 school year. Although DOE's contract with Maximus expired in 2015, DOE continues to utilize the its software to support and operate SESIS.[1]

Petitioner, alleging that she has conducted a "lengthy and thorough" investigation, asserts that SESIS is an abject failure in that it does not allow DOE, school officials, teachers and parents to track system-wide compliance or gauge the progress of individual students with IEPs, and it does not supply the necessary documentation the City needs to obtain Medicaid reimbursement, costing the City possibly as much as $100 million per year in lost Medicaid reimbursement. Petitioner asserts that based on conversations with advocates, parents and teachers, SESIS remains difficult to use and is subject to malfunctions, to the detriment of the children in the special education program. There is some anecdotal evidence of SESIS's shortcomings.[2] Petitioner maintains that these problems continue to persist and

[1]All references to SESIS relate to the Maximus computer software.

[2]Brief of Amici Curiae Legal Services NYC, Mobilization for Justice, Inc., and Partnership for Children's Rights.

have not been remedied.

In her affidavit supporting the instant section 1109 application, petitioner alleges that respondents "have neglected and violated their duty to provide legally-mandated services to children with disabilities and to protect the city from wasteful contracts" and they "have failed to meet their obligations under city, state, and federal law to ensure that children with disabilities in New York City are receiving their IEP-mandated services." Petitioner goes on to assert that because of the deficient Maximus computer software supporting SESIS, DOE has no meaningful and comprehensive data about IEP compliance, and, as such, it cannot gauge compliance with state and federal requirements. Petitioner points out that these compliance issues disproportionately affect the City's poor neighborhoods.

Through this summary inquiry, petitioner seeks to gather information concerning how DOE tracks its compliance with IDEA and each child's IEP, how it manages records for children with disabilities, and how it spent over $130 million on a software system that simply does not work as intended. Petitioner also claims that as a result of SESIS's shortcomings DOE has been unable to seek Medicaid reimbursement for the special education services. According to petitioner, her investigation indicates that DOE, on behalf of the City, should be claiming more than

$500 million in Medicaid reimbursements each year, that since 2012 Medicaid reimbursements for services to students with special needs has dropped significantly, and that DOE failed to recoup $356 million in Medicaid reimbursements between 2012 and 2014. Petitioner asserts that the reason for this reimbursement deficiency can be traced back to SESIS. Her claim is that DOE is unable to file for reimbursement in a systematic or organized way as a result of SESIS's inability to provide proper recording documentation each time the students receive their services.

Essentially, the summary inquiry's focus is on respondents' administration of the special education program -- their perceived mismanagement, inefficiency and deficiency. Indeed, petitioner makes a point to note that she is not seeking to convene an inquiry to inquire as to how DOE formulates and reviews a child's IEP, issues that are indisputably educational and pedagogical.

Supreme Court granted petitioner's application, noting that "whether to conduct a section 1109 summary inquiry is a matter within the court's discretion, and 'the decision should not be reviewed except in a case where there is a clear abuse of discretion'" (*Matter of James v Farina,* 53 Misc 3d 704, 706 [Sup Ct, NY County 2016], quoting *Matter of Riches v New York City Council*, 75 AD3d 33, 39 [1st Dept 2010], *appeal dismissed* 15 NY3d

735 [2010]).[3] It held that the summary inquiry is constitutional, and that the matters subject to the inquiry are not educational and pedagogical, which are areas of State control. As to its holding that the inquiry is not limited to matters involving corruption, Supreme Court found that "based upon the legislative history of section 1109, the legislature intended to broaden the category of acts into which a summary inquiry thereunder may be made" (*Matter of James v Farina*, 53 Misc 3d at 717). Supreme Court rejected "respondents' characterization of the enactment of section 1109 in 1936 as simply 'shorten[ing] and streamlin[ing]' the predecessor statute" (*id.*). In exercising its discretion, Supreme Court found that a section 1109 judicial summary inquiry into the above-noted SESIS problems was warranted and would serve some purpose given that respondents were not presently being investigated by any other agency, department or independent third parties, and that the underlying facts concerning SESIS and the Medicaid reimbursement have not yet been fully developed or disclosed to the public. This appeal ensued.

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[3]Supreme Court properly rejected respondents' argument that the application had to be commenced as a special proceeding. Section 1109 merely requires an application be "supported by affidavit to the effect that one or more officers, employees or other persons therein named have knowledge or information concerning such alleged violation or neglect of duty."

On appeal, respondents continue to argue that the inquiry provision is facially unconstitutional because it improperly assigns nonjudicial duties to a Supreme Court Justice, which amounts to an impermissible "public trust" (NY Const, art VI, § 20[b][1] [Supreme Court Justices prohibited from holding "any other public office or trust except an office in relation to the administration of the courts, member of a constitutional convention or member of the armed forces of the United States or the state of New York"]). They also argue that enabling a summary inquiry into educational matters violates the separation of powers doctrine because Supreme Court will encroach on pedagogical matters and educational policies, areas that are exclusively within the State's domain. Although these arguments have been addressed in other cases (*see e.g. Matter of Mitchel v Cropsey*, 177 App Div 663 [2d Dept 1917]; *Matter of Green v Giuliani*, 187 Misc 2d 138 [Sup Ct, NY County 2000]), they are, nonetheless, worthy of discussion.[4]

Respondents' public trust argument is without merit. Courts

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[4]Respondents do not argue that the Chancellor and the DOE are never subject to an 1109 inquiry. Nor can they given the broad language as to who is subject to a section 1109 summary inquiry. In fact, pursuant to section 1109, in addition to "any officer or employee," Supreme Court "may require . . . . any other person to attend and be examined in relation to the subject of the inquiry."

have held that a summary inquiry is judicial in nature (*Mitchel v Cropsey*, 177 App Div at 669; *Green v Giuliani*, 187 Misc 2d at 141-142; *Matter of Leich*, 31 Misc 671 [Sup Ct, Kings County 1900]). Essential to this finding is the fact that

> "[a] justice who acts under section 1534 [section 1109's predecessor] of the charter is called upon to exercise functions much more nearly approaching the judicial. He must determine whether the affidavit makes out a case under the statute; he must decide upon the relevancy of the evidence to the charges contained in the affidavit, and finally, in aid of the examination, he may punish for contempt -- a power essentially judicial"

(*Mitchel v Cropsey*, 177 AD at 669).[5] Indeed, a judicial summary inquiry "controlled" by a Supreme Court Justice has all the hallmarks of a grand jury proceeding, a quintessential judicial proceeding. In that regard,

> "[a] Grand Jury may be empaneled to conduct an investigation into aspects of government operations and issue a report as to its findings. Essentially, in such Grand Jury proceedings a Supreme Court Justice (along with the prosecuting attorney) is limited to the role of a "legal advisor" who does not preside over the proceedings, but rules on questions of law arising during the conduct

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[5]The fact that section 1109 no longer includes contempt power language like that set forth in section 1534, its predecessor, is of no moment. Section 1109, unlike its predecessor, clearly vests jurisdiction over the summary inquiry solely with a "justice of the supreme court," obviating the need to set forth that court's inherent judicial powers.

> of the investigation. The Justice reviews the resulting report to ensure that the report is based on the credible admissible evidence presented to the Grand Jury, and that it provides statutory procedural protections to identified or identifiable persons"

(*Matter of Green v Giuliani*, 187 Misc 2d at 143-144 [internal citations omitted]).

Reliance on *Matter of Richardson* (247 NY 401 [1928]) for a contrary proposition is misplaced. There, the Court of Appeals had to determine the legality of a state law authorizing the Governor to direct a Supreme Court Justice to conduct a proceeding and file a report with the Governor concerning the removal of the Queens Borough President. The Court held that the law authorizing the investigation was an attempt "to charge a justice of the Supreme Court with the mandatory performance of duties non-judicial" and, as such, violated the public trust provision of the State's Constitution (*id.* at 410 [Supreme Court Justice is made a delegate of the Governor and a prosecutor]). Unlike *Richardson*, a section 1109 inquiry does not require a judicial leave of absence, rental of office space, or hiring of staff. The inquiry is public. Critically, a Supreme Court Justice is not subject to the order or the delegate of either the legislative or executive branch of government.

Respondents fare no better with their constitutional

infirmity claim under the separation of powers doctrine. That doctrine is the fundamental foundation to our form of government and exists to prevent one branch of government from unconstitutionally encroaching upon another (*see Mitchel v Cropsey*, 177 App Div at 668-669). Indeed, we have held that

> "[t]he doctrine of the separation of powers is so fundamental to our system of government that the Legislature is precluded from enacting legislation charging the judiciary with the mandatory performance of nonjudicial duties. Just as the other branches of government may not compel the judiciary to perform nonjudicial functions of government, the courts must refrain from arrogating such powers to themselves"

(*Campaign for Fiscal Equity, Inc. v State of New York*, 29 AD3d 175, 185 [1st Dept 2001], *mod on other grounds* 8 NY3d 14 [2006] [internal citation omitted]). Whether a specific section 1109 judicial summary inquiry violates this fundamental constitutional doctrine is a sui generis determination. There can be no dispute that each section 1109 application must be viewed on its own merits based on all relevant factors, and mandates an inquiry devoted to the particular facts and circumstances, requiring a delicate balancing of the equities between the party seeking the summary inquiry and those subject to the inquiry.

We find that a summary inquiry into areas that do not touch upon policy determinations that concern educational or pedagogic

matters, but merely deal with administrative matters, will not violate the separation of powers doctrine (*see Matter of Goldin v Greenberg*, 49 NY2d 566, 569 [1980] [pupil transportation contracts are not "matters strictly educational or pedagogic"]). On the other hand, when questions concern "the wisdom" of an educator in matters purely involving educational policy, Supreme Court must refrain from crossing the constitutional rubicon (*see Matter of Ferrer v Quinones*, 132 AD2d 277, 282-283 [1st Dept 1987]).

Here, despite claims to the contrary, petitioner is not seeking to have Supreme Court entangle itself with any educational or pedagogical priorities, or obtain general oversight over the Chancellor's or DOE's powers or discretion concerning these issues. Further, like the *Goldin* case and unlike the *Ferrer* case, petitioner is not seeking through this inquiry to have Supreme Court involve itself with how the Chancellor or DOE gathers and processes information in formulating or reviewing a child's IEP, or any of the child's other educational metrics. She merely seeks to inquire into respondents' compliance with their duty under the applicable regulations and statutes concerning the provision of special education services, essentially an inquiry concerning the efficacy of respondents' administration of the special education

program. To that end, petitioner's efforts are to create a public record of respondents' means and methods employed in satisfying their obligation to monitor their compliance with the requirement to provide special education services, and their efforts to ensure that the City receives the benefits under the Maximus contract.

These findings also resolve respondents' contention that the subject matter of the present judicial summary inquiry does not involve "any alleged violation or neglect of duty in relation to the property, government or affairs of the city," but one that is within the State's exclusive jurisdiction -- namely, public education (*Lanza v Wagner*, 11 NY2d 317, 326 [1962]). Clearly, this judicial summary inquiry will not have Supreme Court encroach on or supplant the State's power to control educational affairs.[6] Accordingly, we hold that the present section 1109 judicial summary inquiry does not encroach upon the executive or legislative branches of government, and, as such, does not violate the separation of powers doctrine.

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[6]For this reason, the State Constitution's Home Rule provision (article IX, § 2[b][2]), which protects a municipality from State encroachment and interference with its "property, affairs or government" absent a home rule message, has no application to the instant dispute (*see City of New York v Patrolmen's Benevolent Assn. of City of N.Y.*, 89 NY2d 380 [1996]).

With the constitutional questions resolved, we now decide whether the scope of section 1109 encompasses an inquiry into respondents' manner of satisfying their duty in the provision of special education services. The legislature enacted the original judicial summary inquiry provision set forth in section 109 as part of "[a]n Act to Reorganize the Local Government of the City of New York" in response to the rampant corruption of the Boss Tweed era (*see* L 1873, ch 335). It was renumbered in the Greater New York Charter of 1897 to section 1534. In 1936, through the efforts of a Charter Revision Commission for the City (Commission), the judicial summary inquiry provision, which forms the basis of the instant dispute, was amended.[7] For the purpose of this appeal, we need only focus on sections 1534 and 1109.

Section 1534, in relevant part, provides,

> "Any member of the municipal assembly, commissioner, head of department, chief of bureau, deputy thereof or clerk therein, or other officer of the corporation or person, may, if a justice shall so order, be summarily examined upon an order to be made on application based on an affidavit of the mayor or of the comptroller, or any five members of the municipal assembly, or any commissioner of accounts, or of any five citizens who are tax payers, requiring such examination, and signed by any justice of the

[7]The summary inquiry provision was renumbered from section 1534 to section 889, which was later renumbered to the current section 1109.

> supreme court in the first or second judicial departments directing such examination to be publicly made . . . . Such examination shall be confined to an inquiry into any alleged wrongful diversion or misapplication of any moneys or fund, or any violation of the provisions of law, or any want or mechanical qualification of any inspectorship of public work, or any neglect of duty in acting as such inspector, or any delinquency charged in said affidavit touching the office or the discharge or neglect of duty, of which it is alleged in the application for said order that such member of the municipal assembly, head of department, or other aforementioned officer or person, has knowledge or information . . . .”

Early judicial decisions interpreted the scope of this pre-1936 summary inquiry provision to cover issues involving corruption (*see Mitchel v Cropsey*, 177 App Div at 663; *Matter of Leich*, 31 Misc at 671).

In *Mitchel*, the Appellate Division, Second Department vacated Supreme Court’s grant of an application for a summary inquiry of the mayor and officials of the City regarding a railroad contract. In reversing, the Second Department held that the provision was “intended to expose the acts of corruption and raids on the city treasury” and that the issues at hand were “not questions which call for the exercise of the power which long ago the Legislature devolved on justices of the Supreme Court to investigate and expose corruption” (*Mitchel v Cropsey*, 177 App Div at 670, 672).

In *Leich*, the petitioner sought a summary inquiry of city officials into alleged violations of Charter § 1533, which prohibited officials from having an interest in companies doing business with the City. In denying a motion to vacate its order directing a summary inquiry and permitting the inquiry to go forward, Supreme Court reasoned that the section 1534 inquiry provision

> "was passed to help the rent payers and taxpayers of the city to keep watch on the conduct of their officials, and in the hope of enabling them by publicity to prevent official betrayals of trust which had come to be so persistent and common, and were so low, base, vulgar and heartless as to make many believe that we had reached an era when the permanent decay of our civilization had set in" (*Leich*, 31 Misc at 671-672).

Turning to section 1109, it provides, in pertinent part, that

> "[a] summary inquiry into any alleged violation or neglect of duty in relation to the property, government or affairs of the city may be conducted under an order to be made by any justice of the supreme court in the first, second or eleventh judicial district,[[8]] on application of the mayor, the comptroller, the public advocate, any five council members, the commissioner of investigation or any five citizens who are

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[8]The First Judicial District is comprised of New York County. The Second Judicial District includes Kings County and Richmond County. The Eleventh Judicial District includes Queens County and Nassau County.

> taxpayers, supported by affidavit to the effect that one or more officers, employees or other persons therein named have knowledge or information concerning such alleged violation or neglect of duty . . . ."

Section 1109 amended section 1534 by eliminating the excess subject-matter language, namely, wrongful diversion or misappropriation of funds, violations of law, unqualified inspectors of public works, neglectful inspectors of public works, and delinquencies touching a public office or the "discharge or neglect of duty." As such, section 1109 merely provides in its current iteration that a summary inquiry may be had when supported by an affidavit that sets forth "any alleged violation or neglect of duty in relation to the property, government or affairs of the city."

Here, respondents argue that the amendment did not expand the scope of an appropriate summary inquiry, and contend that the original purpose and scope of the provision remains the same, namely, that the inquiry is limited to corruption.[9] Petitioner argues otherwise. She points out that section 1109 no longer

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[9]Reliance on General Municipal Law § 51 to support the proposition that section 1109 is limited to issues of corruption is misplaced. That statute provides for the prosecution in a plenary action of officers for illegal acts (*see Thomas v New York City Dept. of Educ.*, 151 AD3d 412 [1st Dept 2017]). It provides no guidance as to the scope of a section 1109 summary inquiry.

contains explicit or implicit references to corruption or any corruption-related topics, and asserts that the Commission's removal of all such references indicates an intention to broaden section 1109's scope. For support, petitioner relies on commentary by Laurence Arnold Tanzer, the Associate Counsel to the Charter Revision Commission in 1936, concerning the 1936 amendment. According to Tanzer, the original summary inquiry provision was "*broadened* by the new charter" (Laurence Arnold Tanzer, *The New York City Charter Adopted November 3, 1936 With Source Notes, a History of the Charter and an Analysis and Summary of its Provisions*, at 133 [1937] [emphasis added]). He further states:

> "The new charter adds to the persons who may make the application, the president of the council; permits an inquiry into any alleged violation or neglect of duty in relation to the property, government or affairs of the city, and provides for the examination of any officer or employee or any other person on allegations that he has knowledge or information concerning such alleged violation or neglect of duty"

(*id.*). As such, petitioner argues that the present inquiry is within the reach of section 1109. Already finding that the present subject matter of the inquiry does not encroach on the State's exclusive jurisdiction over education, our decision hinges on the interpretation of the scope of "any alleged

violation or neglect of duty."

To begin, the pre-1936 language also included "any violation" and "any . . . neglect of duty." In this situation, section 982(c) of the 1938 Charter, now section 1140, provides that to the extent provisions of the new Charter "are the same in terms or in substance and effect as provisions of law in force when this charter shall take effect," such as the wording in sections 1534 and 1109, the "new" language is not intended to be a "new enactment" but is to be "construed and applied" as continuous of the preexisting law, namely, that section 1109's scope continues to be limited to corruption. The only support for the proposition that the Commission intended to broaden the scope of the inquiry is Tanzer's assertion that "[t]he former provisions for summary investigation are broadened by the new charter" (Tanzer at 133). Tanzer, who, as respondents point out, did not claim to speak for the Commission, fails to explain to what extent the scope of the inquiry was broadened. Instead, he merely noted that the revised language broadened who may be subject to the summary inquiry -- any employee can now be summarily examined in addition to any officer or person. Indeed, a review of Tanzer's report illuminates the following: he did not identify a single new summary inquiry topic, and he did not mention an intention to explicitly expand the summary inquiry

scope from the origins of the original inquiry provision or the judicial interpretation utilized at the time.

On the other hand, since the 1936 amendments, courts continued to interpret the purpose of a judicial summary inquiry to address matters concerning corruption or fraud (*see e.g. Matter of Riches v New York City Council*, 2008 NY Slip Op 32030[u] [Sup Ct, NY County 2008], *affd on other grounds*, 75 AD3d 33 [1st Dept 2010], *supra* [the "sole legislative purpose" of the inquiry provision was to "bring acts of corruption to the public's attention"]; *Bloom v Lindsay*, NYLJ, Jan 8, 1974 at 19, col 1F [Sup Ct, Kings County 1974] [acts of corruption and fraud]*; Devito v Lindsay*, NYLJ, June 10, 1971 at 19, col 4F [Sup Ct, Queens County 1971] [corruption or fraudulent activity]; *Matter of Moskowitz [Lindsay]*, NYLJ, July 7, 1970 at 10, col 6T [Sup Ct, NY County 1970] [acts of corruption]; *Matter of Greenfield v Quill*, 189 Misc 91 [Sup Ct, Kings County 1946] [acts of corruption and raids on the city treasury]).[10]

An expansion of section 1109, however, occurred in 2000. In

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[10]We recognize that these cases along with *Mitchel* and *Leich* are not binding on us, but at the same we cannot cast them aside (McKinney's Cons Laws of NY, Book 1, Statutes § 72[b]; *see Mountain View Coach Lines v Storms*, 102 AD2d 663, 665 [2d Dept 1984]; *see e.g. Church of St. Paul and St. Andrew v Barwick*, 67 NY2d 510, 519 [1986]). They unquestionably serve to provide significant historical and interpretative guidance concerning section 1109's purpose and scope (*id.*).

Matter of Green v Giuliani (187 Misc 2d at 138), Supreme Court expanded the scope of the inquiry provision to cover matters concerning alleged official misconduct. There, the issue involved then New York City Mayor Rudolph Giuliani's repeated statements to the press that disclosed details of the sealed juvenile and criminal record of an unarmed man shot by a New York City police officer in March 2000. The Public Advocate sought a section 1109 summary inquiry against the Mayor alleging that his disclosures were unauthorized and that he might have publicized other similarly sealed information concerning other cases. Through the summary inquiry, the Public Advocate sought to inquire how the Mayor "obtained the information which he made public, whether the information was from sealed records, and whether its release was made without regard to the statutory protection of such records from disclosure under New York State law, in particular, sections 166 and 375.1 of the Family Court Act and CPL 160.55" (*id.* at 140). The motion court, in permitting the summary inquiry to go forward, found that

> "[a]lthough inquiries into financial corruption may have been a primary reason for enacting the summary inquiry provision, the language of the current section 1109 could hardly be broader. It applies to *all forms of official misconduct* and easily encompasses the unauthorized release of the contents of sealed court records"

(*id.* at 150 [internal citation omitted] [emphasis added]).

We agree with *Green* that section 1109's reach includes not only corruption, but "all forms of official misconduct."[11] Arguably, in light of *Green*, section 1109's reach continues to evolve over time to include areas not limited to corruption. The question that remains is whether the section 1109 phrase "any alleged violation or neglect of duty" should be broadened so as to bring within its reach all forms of conduct, including acts that amount to administrative inefficiency, deficiency, or mismanagement. We believe it should not, mindful of the admonition uttered over a century ago:

> "It would be intolerable if . . . all the heads of departments of the city could be haled into court and cross-examined by disaffected taxpayers, or even by some other hostile official, with no result except publicity. It is much better that proceedings of this kind should be confined to the legitimate purposes of the law"

(*Mitchel v Cropsey*, 177 App Div at 672).

Section 1109 is set forth in Chapter 49 of the Charter, entitled "Officers and Employees." Neither that chapter, nor the Charter itself, defines "violation" or "neglect of duty." In the

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[11]The misconduct alleged in *Green* falls within the purview of a violation under section 1109. As the *Green* court pointed out, "access to sealed records is carefully regulated by statute" (187 Misc 2d at 147).

absence of a clear definition, either by statute or case law, we are guided by dictionary definitions because they are "useful guideposts" in determining the meaning of a statutory word or phrase (*Yaniveth R. v LTD Realty Co.*, 27 NY3d 186, 196 [2016]).

The word violation is defined in Black's Law Dictionary as "1. An infraction or breach of the law; a transgression . . . . 2. The act of breaking or dishonoring the law; the contravention of a right or duty" (10th ed 2014). To be clear, the nature of the allegations here are that the Chancellor and DOE have neglected their duties to provide for New York City children with disabilities by utilizing a computer software that does not work. These allegations simply do not translate into a claim that respondents have committed a violation. The crux of this matter then is the meaning of the bedeviling phrase "neglect of duty" and whether the current scope of section 1109 should be expanded to include the present controversy.

"Neglect of duty" is defined as "[t]he omission of one to perform a duty resting upon him. The neglect or failure on the part of a public officer to do and perform a duty or duties laid on him as such by virtue of his office or required of him by law" (Ballentine's Law Dictionary [3d ed 1969]). The word "neglect" means "[t]o omit to do or perform some work, act, or duty, required in one's business or occupation, or required as a legal

obligation, such as that of making a payment . . . . The word does not generally imply carelessness or imprudence, but simply an omission to do or perform some work, duty or act" (Ballentine's Law Dictionary [3d ed 1969]). Given this analysis, the dispositive and critical term that is the focal point of the instant statutory dispute is "omission," and the issue becomes whether one charged with neglect omitted to perform a duty he or she is required to undertake by statute or otherwise. This interpretation makes sense in light of how the phrase "neglect of duty" appears in other provisions of the New York City Charter which address removal of an individual from office or the resolution of disciplinary matters. For instance, the following Charter provisions contain references to neglect of duty:

Charter § 168(b) -- Tribunal for tax appeals:

> "The mayor *may remove* any commissioner from the tribunal for *neglect of duty*, for inability to perform duties because of mental or physical disability, for malfeasance or for any other just cause . . ." (emphasis added).

Charter § 193 – Removal of commission members:

> "A member of the commission other than the chair may be removed by the appointing official only upon proof of official misconduct, *neglect of official duties*, conduct in any manner connected with his or her official duties which tends to discredit his or her office, or mental or physical inability to perform his or her office, or mental or physical inability to perform his or her duties. Before removal, any such member shall receive a copy of the charges and shall be entitled to a hearing on a record by the office of administrative trials and hearings, which shall make

> final findings of fact, recommend a decision and submit such findings and recommended decision to the appointing official for final action" (emphasis added).

Charter § 1116(a) -- Fraud; neglect of duty; willful violation of law relative to office:

> "Any council member or other officer or employee of the city who shall wilfully violate or evade any provision of law relating to such officer's office or employment, or commit any fraud upon the city, or convert any of the public property to such officer's own use, or knowingly permit any other person so to convert it or by *gross or culpable neglect of duty* allow the same to be lost to the city, *shall be deemed guilty of a misdemeanor* . . ." (emphasis added).

Charter § 2602(f) -- Conflicts of interest board:

> "*Members may be removed by the mayor for substantial neglect of duty*, gross misconduct in office, inability to discharge the powers or duties of office or violation of this section . . ." (emphasis added).

Each noted Charter section demonstrates that "neglect of duty" implicates serious improper conduct and can serve as a basis for, at the very least, disciplinary action.[12] We find, under these

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[12]Although not dispositive, other examples of how "neglect of duty" is used in laws governing the City are instructive. For instance, the term appears in the Administrative Code of the City of New York in the following provisions:

Administrative Code, Title 14 Police, § 14-115(a) *Discipline of members*.

"The commissioner shall have power, in his or her discretion, on conviction by the commissioner, or by any court or officer of competent jurisdiction, of a member of the force of any criminal offense, or *neglect of duty*, violation of rules, or neglect or disobedience of orders, or absence without leave, or any conduct injurious to the public peace or welfare, or immoral conduct or

circumstances, that the term “neglect” requires that averments sufficient to plead “neglect of duty” must, at the very least, allege that there was an omission or failure to carry out an official duty.

With these considerations in mind, we find no legal basis to expand section 1109’s reach beyond allegations that clearly fall within the plain meaning of a “violation” or a “neglect of duty,”

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conduct unbecoming an officer, or any breach of discipline, to punish the offending party by reprimand, forfeiting and withholding pay for a specified time, suspension, without pay during such suspension, or by dismissal from the force” (emphasis added).

Administrative Code, Title 15 Fire Prevention and Control, § 15-113 *discipline of members; removal from force*.

“The commissioner shall have power, in his or her discretion on conviction of a member of the force of any legal offense or *neglect of duty*, or violation of rules, or neglect or disobedience of orders or incapacity, or absence without leave, or any conduct injurious to the public peace or welfare, or immoral conduct, or conduct unbecoming an officer or member, or other breach of discipline, to punish the offending party by reprimand, forfeiture and withholding of pay for a specified time, or dismissal from the force” (emphasis added).

Administrative Code, Title 16 Sanitation, § 16-106 *Removal and suspension of employees*.

“The commissioner, in his or her discretion, shall have power to punish any member of the uniformed force who has been guilty of:

1. any legal or criminal offense,
2. *neglect of duty*,
3. violation of rules,
4. neglect or disobedience of orders . . .” (emphasis added).

i.e., allegations of an infraction or contravention of the law or a duty, or the outright omission of performance of a duty. We further hold that petitioner’s allegations of administrative mismanagement, namely, the inefficient governmental administration of a computer software for SESIS are not sufficient bases to support the instant section 1109 judicial summary inquiry application.

Even if we were to find that petitioner sufficiently alleged a violation or neglect of duty, we find that Supreme Court erred in granting the summary inquiry application (*see Matter of Riches v New York City Council*, 75 AD3d at 39 [Supreme Court’s determination reviewed under the abuse of discretion standard]). Petitioner, by her own allegations, conducted a “lengthy and thorough” investigation concerning respondents’ perceived administrative failures, as she is empowered to do so under the Charter. The problems with SESIS have hardly been hidden from public view.[13] The record indicates that DOE has publicly

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[13]Examples include: a March 2016 report by the New York City Independent Budget Office entitled “Data Problems Plague City’s Effort to Claim Medicaid Reimbursement for Services to Students with Special Needs”; an August 2014 Budget and Policy Brief released by the New York City Comptroller entitled “Money Left on the Table -- A Review of Federal Medicaid Reimbursement to the New York City Department of Education”; and the Investigative Fund’s discussion of SESIS in a November 14, 2011 article “Cost Estimate: Bringing in Private Companies to Do Public Work.” Further publicity of the purported SESIS’s

acknowledged SESIS's deficiencies,[14] and that DOE has engaged in substantial remediation efforts, noted in its detailed response to the NYC Comptroller's 2013 SESIS audit.[15] In fact, in its May 2017 NYC Department of Education report, entitled "NYC Department of Education: SESIS Assessment Report," DOE noted the earlier improvements to SESIS and indicated that a multi-agency task force had comprehensively re-evaluated SESIS and had formulated a comprehensive plan of action.[16]

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failures occurred on March 1, 2012. On that date, Michael Mulgrew, the president for the United Federation of Teachers, gave testimony before the New York City Council Committees on Education and Finance concerning DOE's "failure to capitalize on Medicaid reimbursements for special education services" and the fact that "SESIS is plagued with problems." The record also contains several media stories published between 2011 and 2016 covering SESIS, including over a dozen stories in the education news provider, Chalkbeat; a New York Daily News' article, dated June 18, 2011, with the headline "*$79 million special ed program's technical difficulties blamed for delay in kindergarten seating*"; and a New York Times' article, dated March 1, 2016, with the headline "*Thousands of New York City Students Deprived of Special-Education Services.*" Given that petitioner commenced this summary inquiry proceeding on February 8, 2016, some of these examples are dated, but others are not. Suffice it to say, they merely point to the fact that the SESIS issues have been raised and are well documented.

[14]DOE 2015 Annual Report on Special Education.

[15]NYC Comptroller's Audit Report on the Department of Education's Special Education Student Information System, Dated July 22, 2013.

[16]*see* https://perma.cc/8U2K-6XHP (last accessed Feb. 5, 2019).

Unquestionably, an extensive public discourse on this issue has taken place, all of which reflect poorly on the Chancellor, DOE and their administration of SESIS. We are hard-pressed to find what further information a judicial summary inquiry would produce (*see Matter of Riches v New York City Council*, 2008 NY Slip Op 32030[u] [summary inquiry's primary purpose of bringing corruption to the public's attention is no longer necessary where the matter at issue has already received substantial publicity and press coverage]).

We note, however, that Charter § 24 empowers petitioner, as Public Advocate, with extensive and wide-ranging investigatory authority, and authorizes her to hold public hearings. In that regard, Charter § 1123 empowers the Public Advocate to compel attendance of "any council member or other officer or employee of the city" to a convened hearing and failure to appear or testify "shall" result in removal from office or termination of employment. Whether the Public Advocate should pursue this issue and hold public hearings are political questions, which are not for the judiciary to resolve (*see Roberts v Health & Hosps. Corp.*, 87 AD3d 311, 322 [1st Dept 2011], *lv denied* 17 NY3d 717[2011]).

Accordingly, the order of the Supreme Court, New York County (Lynn R. Kotler, J.), entered August 11, 2016, which, insofar as

appealed from as limited by the briefs, granted petitioner Public Advocate's application for a summary inquiry pursuant to New York City Charter § 1109, and denied respondents Carmen Fariña and New York City Department of Education's motion to dismiss the proceeding as against them, should be reversed, on the law and facts, without costs, petitioner's application denied, and respondents' motion to dismiss granted. The Clerk is directed to enter judgment accordingly.

All concur except Renwick, J.P. and Gesmer, J. who dissent in an Opinion by Gesmer, J.

GESMER, J. (dissenting)

I agree with the majority that the summary inquiry sought in this case under New York City Charter § 1109 would not be unconstitutional and would not violate the principle of separation of powers. I also agree that § 1109 is not limited to allegations of corruption, and that a "summary inquiry into any alleged violation or neglect of duty in relation to the property, government or affairs of the City" (New York City Charter § 1109) may be held in relation "to all forms of official misconduct" (*Matter of Green v Giuliani* (187 Misc 2d 138, 150 [Sup Ct, NY County 2000]).

However, I respectfully disagree with the majority to the extent that it would limit § 1109 to allegations of misconduct that are subject to disciplinary action or that constitute a total omission of performance of duty, as their approach would bar summary inquiries into allegations of a substantial failure to perform a duty which has serious and devastating consequences for the City and its citizens, such as the allegations in this case. I also disagree that petitioner has failed to state a claim under § 1109, and that a summary inquiry is not appropriate in this case for other reasons. Therefore, in my view, the motion court did not abuse its discretion in granting the petition, and I would affirm.

The Summary Inquiry Provision Was Never Limited to Corruption

Although I agree with the majority that § 1109 is not limited to allegations of corruption, I disagree with its conclusion that the predecessor provision was so limited, or that the current provision was originally so limited, but has "evolve[d]." I address this historical background because I believe, respectfully, that the majority has misinterpreted it, and that this has led it to misapply the current provision in this case by imposing on its plain language a cramped interpretation that is not supported by any binding authority.

When "statutory language is clear and unambiguous, it should be construed so as to give effect to the plain meaning of the words used" (*People v Williams*, 19 NY3d 100, 103 [2012] [internal quotation marks omitted]). The plain language of the predecessor to the current summary inquiry provision did not limit summary inquiry to allegations of corruption (L 1873, ch 335, article XVI, § 109 [renumbered in 1897 as section 1534 of Title 7]), and there is no binding precedent requiring us to find that it did.

There are only two reported cases addressing the predecessor provision, neither of which is binding on this Court, and neither of which held that the provision was limited to allegations of corruption (*Matter of Mitchel v Cropsey*, 177 App Div 663 [2d Dept

1917][1]; *Matter of Leich*, 31 Misc 671 [Sup Ct, Kings County 1900][2]). To the extent that those decisions suggested in dicta, without citing any authority, that the predecessor provision was adopted in response to, and intended to counter, the corruption of the Boss Tweed era, this Court is not bound by either case.[3] Moreover, even if the historical interpretation in those cases is accurate, that does not necessarily mean that the legislature

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[1]In *Mitchel*, the Second Department rejected a § 1109 application as premature, holding that it did not allege a basis for summary examination since the Board had not yet voted on the pending provision complained of by the petitioner (*id.* at 671-672). The court further found that a summary examination was inappropriate in that case because the applicants had other, more appropriate forms of relief, including a taxpayer lawsuit which had already been commenced and which sought a preliminary and permanent injunction of the proposed action (*id.* at 672).

[2]Because the allegations in *Leich* explicitly concerned corruption and violation of laws, the court had no need to, and did not, reach the issue of whether the provision applied to allegations of misconduct short of outright corruption.

[3]The *Leich* court noted that the provision "should not be narrowed in its scope," and touted its efficacy in promoting "purity and integrity in government. . . by the wholesome vigilance and meddlesomeness of the citizen" (31 Misc at 672). The court's description of the provision's purpose as being to permit citizens to "keep watch on the conduct of their officials" and to "prevent" official misbehavior suggests that the court interpreted the provision to promote governmental transparency and to permit an inquiry to proceed even where no corrupt act had taken place (*id.*). Therefore, the eloquent statement by the *Leich* court, quoted by the majority, about the historic background of the statute does not at all support the majority's contention that the court held that summary inquiries may only be made where corruption is alleged.

intended to limit the procedure only to allegations of corruption. Indeed, the original provision's plain language states that it is applicable to "any delinquency charged. . . touching the office or the discharge or neglect of duty. . . ."

To the extent that my colleagues in the majority find that the current summary inquiry provision was originally intended to be limited to corruption and fraud, I disagree. They appear to reach this conclusion on three bases, each of which I find unpersuasive.

First, the majority appears to argue that § 982(c) of the 1936 Charter requires that we read the current summary inquiry provision to have been originally intended to relate only to corruption because it reads the 1897 summary examination provision as having been so limited, and because some of the words in the predecessor provision appear in the 1936 Charter amendment. I disagree with the former conclusion, as discussed above.

Moreover, the provision as it has existed since 1936 is not "the same in terms or in substance and effect as" the provision enacted in 1897 (1936 Charter § 982[c]). The 1897 provision authorized inquiries into four distinct subjects: 1) "wrongful diversion or misapplication of any moneys or fund"; 2) violations of law; 3) inspectors who were unqualified or committed a

"neglect of duty"; and 4) "any delinquency charged . . . touching the office or the discharge or neglect of duty. . . ."

In contrast, the provision in place since enactment of the 1936 Charter authorizes summary inquiry "into *any* alleged violation or neglect of duty in relation to the property, government or affairs of the city. . ." (emphasis added). The 1936 Charter Commission removed all reference to specific acts of corruption that had appeared in the predecessor provision, left in the phrase "neglect of duty," and replaced "violation of the provisions of law" with "violation. . . of duty." Accordingly, by its plain terms, the summary inquiry provision as it has existed since 1936 is applicable to an even broader range of behavior than was the predecessor provision (*see People v Williams*, 19 NY3d at 103).

Furthermore, the 1936 Charter gave the new title, "Corrupt Practices" to § 887 (formerly a portion of § 1533), which, hewing to the classic definition of corruption, prohibited the giving of money or things of value in consideration for nomination, appointment, election, or employment by the City, and made doing so a misdemeanor. Clearly, "any. . . violation or neglect of duty in relation to the property, government or affairs of the city" is broader than the behavior described as corruption in § 887 of the 1936 Charter.

Second, my colleagues in the majority dismiss the contemporaneous commentary written by the Charter Commission's Associate Counsel, Laurence Arnold Tanzer, which states that the "former provisions for summary investigation are broadened by the new charter" (Tanzer, *The New York City Charter Adopted November 1936 with Source notes, A History of the Charter and an Analysis and Summary of its Provisions Together with Appendices*, at 133 [1937]). In doing so, they note that Tanzer did not identify specific summary inquiry topics that would be permissible under the new provision, and did not refer to the *Mitchel* and *Leich* cases which discussed the predecessor provision.

However, as discussed above, I do not read either case to have limited the predecessor provision to corruption, and it is possible that Tanzer and his colleagues on the Commission did not either. Indeed, Tanzer's placement of his discussion of the provision in the section on "provisions for information regarding the doings of officers and employees" (*id.* at 131), rather than the section addressing "Corrupt Practices" (*id.* at 127), is entirely consistent with the *Leich* court's statement that the provision's purpose is to promote government transparency. Even if the 1936 Charter Commission had read *Mitchel* and *Leich* as the majority does, there was no need for Tanzer to discuss those cases, since the Commission decided not to include in the new

provision any of the references to specific corrupt acts that had existed in the predecessor provision and on which those courts had relied in finding that the earlier provision had its roots in a notoriously corrupt moment in the city's history.

Finally, the majority notes that courts have interpreted the current summary inquiry provision to be limited to corruption and fraud. However, there is no controlling precedent requiring that result. Indeed, this Court in *Matter of Riches v New York City Council* explicitly declined to so hold (*Matter of Riches v New York City Council*, 75 AD3d 33, 37 [1st Dept 2010] ["our decision does not turn on an analysis of the change" in the 1936 summary inquiry provision's language], *appeal dismissed* 15 NY3d 735 [2010]). Rather, we affirmed the motion court's denial of a summary inquiry application on the basis that it was unnecessary because of another ongoing investigation and attendant publicity. Justice Catterson, in a dissent joined by Justice Acosta, noted that "the majority does not dispute that by its plain terms, section 1109 simply is not" limited to corruption, and that it "would be folly to construe section 1109 in the same fashion as its 1873 predecessor when the provision has been amended substantively since 1873" (*Matter of Riches* at 43, 44 [Catterson, J., dissenting]; *see also Matter of Green v Giuliani*, 187 Misc 2d at 149-150 [holding § 1109 not limited to allegations of

financial corruption]).

Ten years earlier, in *Matter of Green v Giuliani*, Supreme Court granted the Public Advocate's request for a § 1109 summary inquiry into public statements made by Mayor Giuliani about Patrick Dorismond's alleged juvenile and adult criminal record after police shot and killed Mr. Dorismond. Mayor Giuliani had argued that § 1109 was limited to allegations of corruption and misapplication of public funds, and was not applicable to the statements he had made, which appeared to contain information obtained from records that should have been sealed (Family Court Act §§ 166, 375.1; CPL 160.50, 160.55, and 720.35). In granting the petition, the court stated:

> "Although inquiries into financial corruption may have been a primary reason for enacting the summary inquiry provision, the language of the current section 1109 could hardly be broader. It applies to all forms of official misconduct and easily encompasses the unauthorized release of the contents of sealed court records.
>
> "It is a fundamental tenet of statutory construction that every word in a statute is to be given effect. Limiting the summary inquiry provision to allegations of financial corruption would, of course do violence to that basic principle of statutory construction" (*Matter of Green*, 187 Misc 2d at 150 [internal citations omitted]).

My colleagues in the majority read *Matter of Green* as an "expansion" of the scope of § 1109. However, the *Matter of Green*

court interpreted the current summary inquiry provision according to its plain language, as I believe this Court should do in this case.

<u>*Matter of Green* Does Not Support the Majority's Position</u>

The majority appears to rely, in part, on *Matter of Green* in reaching its ruling on this case. However, in my view, *Matter of Green* does not support the majority's conclusions for three reasons. First, the majority notes that the misconduct complained of in *Matter of Green* was an appropriate subject of a summary inquiry because it involved an area that is "carefully regulated by statute" (*Matter of Green v Giuliani*, 187 Misc 2d at 147). However, the provision of special education is even more heavily regulated, by both state and federal statutes, than was the access to sealed records at issue in *Matter of Green*. Accordingly, by the majority's own reasoning, the misconduct complained of in this case should be an appropriate subject of a summary inquiry.

Second, to the extent that the majority finds that the misconduct complained of must be subject to disciplinary action or other serious sanction, there was no finding in *Matter of Green* that the Mayor would be subject to any sanction for violation of the juvenile and criminal record sealing statutes. Indeed, the Mayor had argued that confidentiality of the records

at issue terminated upon Mr. Dorismond’s death, and the court held that, even if this were true, a summary inquiry would still be appropriate in that case (*id.* at 149).

Finally, *Matter of Green* also does not support the aspect of the majority’s decision which apparently limits the summary inquiry provision to neglect of duty constituting a *total* failure to carry out an official duty. In *Matter of Green*, the trial court ordered a summary inquiry based on an allegation that the Mayor had violated or neglected his duty to maintain the confidentiality of juvenile or criminal records of only one person, not of all juvenile respondents and criminal defendants. Similarly, here, petitioner does not claim that respondents have failed to provide any New York City children with disabilities with the free and appropriate education to which they are entitled, or that they have failed to obtain any Medicaid reimbursements for services provided to such children. Rather, she alleges, inter alia, that respondents have violated or neglected their duty by failing to provide Individualized Education Plan (IEP)-mandated services to as many as 31%, and possibly more, of such students, by failing to collect hundreds of millions of dollars in Medicaid reimbursements, and by failing to take steps to remedy their inability to collect and maintain crucial data that would permit them to appropriately administer

the provision of special education to over 204,000 children with disabilities in the nation's largest school district.

Petitioner Has Sufficiently Alleged a Violation or Neglect of Duty

The majority asserts that petitioner has not alleged a violation of duty, imposes limitations on the definition of "neglect of duty" under § 1109, and then determines that petitioner's allegations fail to meet that restricted definition. I disagree with all three positions.

First, petitioner repeatedly alleges that respondents have both violated and neglected their duties, which are grounded in various local, state and federal laws and court orders.[4] In my

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[4]In her application to the motion court, petitioner cited state, federal, and local laws and court orders which establish duties that she alleges respondents have violated or neglected, including: (1) the federal Individuals with Disabilities Education Act (IDEA), which requires, inter alia, that: (A) children with disabilities be provided with a "free and appropriate public education," including the provision of necessary services (20 USC § 1412[a][1], [5]), (B) local authorities produce information about the educational needs and achievements of students with disabilities (20 USC § 1414[c][2]), (C) local authorities regularly review IEPs to ensure that the goals for each child are met (20 USC § 1414[d][4]), and (D) children who transfer from one school to another promptly receive their IEP-mandated services (20 USC § 1414[d][2][C][ii]; *see also* 34 CFR 300.323[c][2]; *D.D. v New York City Bd. Of Educ.*, 465 F3d 503, 508 [2d Cir 2006]); (2) the New York Education Law, which requires respondents to produce regular reports evaluating "educational effectiveness" (Education Law § 2590-h[10]-[11]);

view, we should interpret § 1109 by its plain language. "Violation" generally connotes an affirmative act, and "neglect" is generally a failure to act. Petitioner has appropriately alleged both, since, at this pre-inquiry stage, she may not have enough information to know whether it is respondents' acts or failures to act which have resulted in their failure to provide children with services to which they are entitled and to recoup Medicaid reimbursements.

Second, I disagree with the majority's narrowing of the definition of "neglect of duty." First, the majority finds that, in order to qualify for a summary inquiry, the "neglect of duty" alleged must be subject to disciplinary action or more serious sanction. However, this is inconsistent with the majority's statement that "neglect of duty" must be "an omission to do or perform" a duty. Furthermore, the Charter sections cited by the majority do not guide us in defining "neglect of duty" as it is

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(3) so-ordered stipulations issued in *Jose P. v Ambach* (US Dist Ct, EDNY, 79 Civ 270, 1979) and *Jose P. v Mills* (US Dist Ct, EDNY, 96 Civ 1834, 2003), which require New York City to provide regular reports to the plaintiffs' attorneys on compliance with federal law regarding provision of services to children with disabilities; (4) New York City Charter § 333(a), which requires that each agency "monitor the performance of every contractor"; and (5) New York General Municipal Law § 100-a, which establishes a policy that contracts "assure the prudent and economical use of public moneys. . . and. . . facilitate the acquisition of facilities and commodities of maximum quality at the lowest possible cost."

used in § 1109. Charter § 168(b) gives the Mayor broad discretion to remove tax appeals tribunal commissioners for "any" "just cause," of which "neglect of duty" is but one example. Moreover, this section does not define "neglect of duty." Similarly, Charter §§ 193, 1116(a), and 2602(f) do not define the term "neglect of duty." Moreover, Charter §§ 1116(a) and 2602(f) use intensifiers before the term, thus clearly providing that an extreme form of neglect of duty is required to remove an individual from office. Section 1116(a) provides for removal from office and criminal liability for, inter alia, "gross or culpable neglect of duty" by an officer or employee of New York City leading to the loss of public property. Section 2602(f) provides for removal from office of a member of the conflicts of interest board for, inter alia, "substantial neglect of duty."[5]

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[5]In a footnote, the majority also cites Administrative Code of the City of New York Sections 14-115, 15-113, and 16-106, dealing with "neglect of duty" by police, firefighters, and sanitation workers, respectively. These provisions are also inapposite. Since the Charter is comparable to a state or federal constitution, the Administrative Code cannot be used to interpret the Charter (*see* New York City Charter § 28[a] [City Council "shall have power to adopt local laws which it deems appropriate, which are not inconsistent with the provisions of this charter or with the constitution or laws of the United States or this state"]; *see also Revising City Charters In New York State,* New York State Department of State 1998, reprinted 2015, available at https://www.dos.ny.gov /lg/publications/ Revising_City_Charters.pdf [last accessed Feb. 7, 2019]). Even if the Administrative Code provisions cited by the majority could be instructive as to the Charter's definition of "neglect of

I also disagree with the majority to the extent that it holds that a petitioner in a summary inquiry case based on "neglect of duty" must allege a total failure to carry out every aspect of an official duty for three reasons. First, the plain language of § 1109 makes clear that "*any* alleged violation or neglect of duty," without limitation, is subject to summary inquiry (emphasis added). In my view, a failure to fulfill an official duty to any degree that results in significant harm to the City or its citizens is an appropriate subject of a summary inquiry, and petitioner has made such allegations here.

Second, respondents never argued before the motion court that "neglect of duty" is limited in the manner described by my colleagues. Moreover, they never disputed before the motion court petitioner's allegations that they had violated and neglected their duties under state, federal and local law and court order.[6] Instead, they argued only that § 1109 was limited

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duty," each of the cited provisions qualifies that term with the following language: "or any conduct injurious to the public peace or welfare, or immoral conduct. . ., or any breach of discipline" (Administrative Code, Title 14 Police, § 14-115; *see also* New York City Administrative Code, Title 15 Fire Prevention and Control, § 15-113; New York City Administrative Code, Title 16 Sanitation, § 16-106).

[6]On this appeal, respondents argue for the first time that 20 USC § 1414(c)(2) does not explicitly require the production of "computerized compliance data," and do not address any of the other sources of respondents' duties cited by petitioner, or

to allegations of corruption, an argument that my colleagues in the majority and I have unanimously rejected.

Finally, I disagree with my colleagues' severely cramped view of petitioner's allegations as "acts that amount to administrative inefficiency, deficiency, or mismanagement" consisting of "inefficient governmental administration of a computer software for SESIS." Rather, petitioner alleges that respondents have deprived the City's children with disabilities of an appropriate education and have deprived its citizens of federal funds set aside for that purpose.

To reach that global allegation, petitioner alleges that, as a result of respondents' failure to adequately monitor Maximus in the development of the SESIS software or to take any action to remedy its shortcomings: (1) respondents are not capable of producing citywide data about IEPs necessary to ensure that children are receiving IEP-mandated services; (2) service providers can only provide data to respondents about IEPs with a program that is difficult to use and frequently malfunctions, even to the extent of deleting data that has been entered; (3) children who transfer from one school to another are not receiving IEP-mandated services promptly in their new school; and

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dispute her allegation that respondents have violated or neglected their duties under them.

(4) respondents cannot obtain information necessary for the City to obtain Medicaid reimbursement for IEP-mandated services that are provided. She further alleges that, despite being aware of these problems, respondents have failed over a period of years to remedy their inability to track IEP compliance. As a result, New York City children with disabilities are delayed in receiving services to which they are entitled, or are not receiving services at all; over $130 million dollars of the City's funds have been spent on the development of software that fails to do what it was intended to do; and the City has been unable to collect $356 million in Medicaid reimbursements between 2012 and 2014 alone.

The majority's attempt to distinguish between "mismanagement" and the failure to perform a duty sets up a false dichotomy in this case, since petitioner alleges that it is respondents' continuing and uncorrected mismanagement that has resulted in the violation and neglect of their duties. Petitioner alleges that, as a result of respondents' failure to monitor Maximus's development of the SESIS software and their failure to act to remedy the resulting inadequacy of the software to monitor IEP compliance, including by finding some other means of doing so, the DOE

> "cannot gauge compliance with its state and

> federal requirements. The result of this lack of data is all too predictable: non-compliance that is concentrated in poor neighborhoods. This discriminatory and harmful outcome is a direct consequence of DOE and Chancellor Fariña's failure to monitor the contractor and to ensure that the city received the benefit for which it bargained."

If the DOE cannot track compliance with IEPs, then it cannot know whether it is fulfilling its duty. Petitioner has determined that it is not doing so. She has further determined that, nearly three years after the Comptroller issued an Audit Report concluding that SESIS failed to provide information that meets state and federal reporting requirements, the DOE failed to take any action to remedy this, and the problem has persisted.

In my view, petitioner has appropriately pleaded that respondents have violated and neglected their duties under federal, state and local law to provide a free and appropriate education, including mandated services, to New York City children with disabilities (20 USC § 1412[a][1], [5]), and to monitor its contractor (New York City Charter § 333[a]) to "assure the prudent and economical use of public moneys. . . and. . . facilitate the acquisition of facilities and commodities of maximum quality at the lowest possible cost" (New York General Municipal Law § 100-a).

<u>This Matter Has Not Been Sufficiently Illuminated</u>

Finally, I disagree with my colleagues that this Court should reverse the motion court on the basis that a summary inquiry is not appropriate because the matter has been sufficiently illuminated.

First, as we held in *Riches*, the provision is clear on its face that the motion court has discretion to grant or deny a § 1109 petition, and the motion court's determination "should not be reviewed except in a case where there is a clear abuse of discretion" (*Riches*, 75 AD3d at 39). Since the motion court has clearly identified the reasons for its determination and has not abused its discretion,[7] I would affirm on that basis alone.

Second, to the extent that my colleagues in the majority hold as they do today because they are concerned that summary inquiries not be held where only trivial allegations are made, that concern is sufficiently addressed by exercise of the court's discretion, as provided for in § 1109, which requires consideration of whether the subject of inquiry has already been sufficiently illuminated through other means and whether the significance of the interest at stake, and the potential benefits to the City and its citizens of a summary inquiry justify its cost (*see Matter of Riches,* 75 AD3d at 39-40). The fact that, in

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[7]I note that the majority does not identify any way in which the motion court has abused its discretion.

the more than eight decades since the 1936 Charter provision was enacted, only one summary inquiry application has ever been granted before now (*Matter of Green v Giuliani*, 187 Misc 2d at 138) indicates that the courts have exercised their discretion appropriately. In my view, the motion court did so in this case, and there is no reason to believe that courts will not continue to do so going forward.

I concur with the motion court that "the underlying facts concerning SESIS and Medicaid reimbursement remain wholly undeveloped" and "largely unknown to the public-at-large," and that the significance of the interests at stake – the right of children with disabilities to receive mandated services - warrant a summary inquiry. In determining whether to exercise its discretion to conduct a summary inquiry on a properly pleaded application, courts consider two factors:

(1) Whether the subject of inquiry has already been sufficiently illuminated through other means, such as by news media or publicly available reports (*see Matter of Riches,* 75 AD3d at 39-40; *Matter of City of New York* [*Seligman]*, 179 Misc 505, 508 [Sup Ct, Bronx County 1942]), respondents' concession of the facts (*see Matter of Larkin v Booth*, 33 AD2d 542 [1st Dept 1969]; *Matter of Green*, 187 Misc 2d at 151-152; *Matter of Greenfield v Quill*, 189 Misc 91, 95 [Sup Ct, Kings County 1946]),

or an ongoing or recently concluded inquiry into the same subject matter in another forum (*see Matter of Riches,* 75 AD3d at 39; *Matter of City of New York* [*Seligman*], 179 Misc at 507); and

(2) Whether, considering the significance of the interest at stake, the potential benefits to the City and its citizens of a summary inquiry outweigh its cost (*see Matter of Riches,* 75 AD3d at 40; *Matter of Green*, 187 Misc2d at 151; *Greenfield,* 189 Misc at 96; *Matter of City of New York* [*Seligman*], 179 Misc at 507).

Here, there have been no extensive governmental investigations into whether, and/or to what extent, SESIS failed to provide the necessary citywide data to provide New York City children with disabilities a "free appropriate public education," to create an IEP for each child, and to receive appropriate Medicaid reimbursements, and into the DOE's failure to obtain the benefit for which it bargained in the SESIS contract. This is in marked contrast to our determination in *Riches* (75 AD3d at 34-35), where we found that a summary inquiry petition was properly dismissed where the New York City Department of Investigation had issued a report of its findings and an investigation by the United States Attorney's office resulted in grand jury indictments related to the complained of behavior (*see also Seligman*, 179 Misc at 507-508 [denying summary inquiry petition where the New York City Commissioner of Investigation had issued

two reports and a grand jury had issued a presentment and report]).

Furthermore, in *Riches*, the activity complained of was not ongoing (75 AD3d at 35). In contrast, here, the DOE continues to use SESIS, despite its own report that, as of 2016, at least 35% of children entitled to services were not receiving them, as a direct result of the program's inability to provide data necessary to produce IEPs, ensure service provision, and obtain Medicaid reimbursement (*see* New York City Department of Education Local Law 27 of 2015 Annual Report on Special Education, Feb 29, 2016, at 5, 26; Kate Taylor, *Thousands of New York City Students Deprived of Special-Education Services, Report Says*, NY Times, Mar 1, 2016).

As petitioner acknowledges, reports about SESIS were issued by the New York City Comptroller in 2013[8] and the New York City Independent Budget Office in 2016. The DOE issued a brief internal assessment of SESIS in 2016.[9] In addition, in 2012, the President of the United Federation of Teachers (UFT) testified

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[8]The Comptroller also issued a report that addresses Medicaid reimbursement in 2014, but it does not address the problems with SESIS or indeed refer to SESIS at all.

[9]This assessment was presented to the motion court, but had not been published at the time the order appealed from was issued. Petitioner concedes that it is now publicly available.

about SESIS to the New York City Council Committees on Education and Finance. Articles about SESIS were published by the Investigative Fund in 2011 and by the New York Times in 2016.[10]

However, these sources, some of them as much as five years old by the time petitioner filed her request for a § 1109 summary inquiry, have primarily concluded only that SESIS does not work well and that, possibly as a result, DOE did not know the exact number of students who were not receiving services mandated by their IEPs. The reports and articles have not provided answers to all of the questions petitioner sought to explore in a summary inquiry. The DOE itself pointed out the shortcomings of the Comptroller's 2013 report, calling it "premature as SESIS was so new" at the time. The Independent Budget Offices' 2016 report is just three pages long and does not address the extent of DOE's compliance with federal IEP and service provision requirements raised by petitioner. Similarly, the brief testimony of the UFT President focused on SESIS's interference with the DOE's ability to obtain Medicaid reimbursements. Finally, the DOE's internal

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[10]While the majority refers to "over a dozen" articles in the educational newsletter, Chalkbeat, only one, from 2014, is included in the record before us, and it does not mention SESIS at all. Similarly, the record contains only a portion of a June 18, 2011 Daily News article about delays in finding placements for kindergartners with special needs, and it does not mention SESIS. Finally, the 2016 New York Times article was based on the DOE's 2016 report and adds no new information.

2016 SESIS assessment is not equivalent to an independent inquiry about a system that is failing the City's students entitled to special educational services and is preventing the City from collecting millions of dollars in Medicaid reimbursements for services that are being provided.

The majority states that the Public Advocate has "extensive and wide-ranging investigatory authority" under the Charter. However, none of the provisions cited by my colleagues gives the Public Advocate the power to subpoena documents and ask questions of a witness under oath, as would be permitted in a summary inquiry. Charter § 24(f) only permits her to monitor city agencies' public information and service complaint systems, including reviewing complaints, and to make "proposals" to improve those systems. She is only authorized to investigate complaints made directly to her, and is further limited in doing so where another agency or administrative body is required to adjudicate such complaints, or where the conduct complained of could result in criminal sanctions. Charter § 24(g) sets forth the procedures the Public Advocate must follow in investigating complaints made directly to her, which include referring complaints deemed to be valid "to the appropriate agency." Charter § 24(h) permits the Public Advocate to "review" city agency programs and issue reports containing "recommendations."

However, she must provide the agency with a draft of any such report prior to making it public, and include in any publicly issued report the agency's response (Charter § 24[l]). Although Charter § 24(m) permits the Public Advocate to hold public hearings, it does not permit her to ask questions under oath. If she seeks documents from a city agency, she must first ask the agency to give them to her, and, if they refuse, she may ask "an appropriate committee of the council to require the production of such records and documents" (Charter § 24[j]).

Petitioner sought information about: (1) the capacity of SESIS to provide citywide data on DOE compliance with IEPs; (2) how DOE measures its performance in providing services to children with special needs; (3) how DOE measures whether it is meeting the requirements of students' IEPs; (4) how DOE ensures that IEPs are provided to a child's school upon transfer; (5) how DOE ensures that required services are provided to a child immediately or soon after transfer to a new school; (6) problems encountered by service providers who are not based in schools who attempt to use SESIS; (7) an explanation for the cause of the significant drop in Medicaid revenue for services to students with special needs; and (8) what if any steps DOE has taken to enforce the contract with Maximus. These questions constitute an appropriate and targeted inquiry tailored to make all of SESIS's

capabilities and shortcomings public, which will ensure that reforms will be effective. It does not appear that any of petitioner's questions have been adequately answered. Under these circumstances, and consistent with the purpose of the summary inquiry provision to advance transparency in government, I would find that the motion court did not abuse its discretion, and I would affirm.

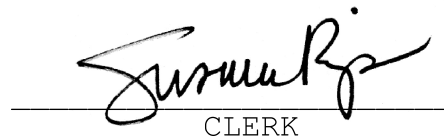
Order, Supreme Court, New York County (Lynn R. Kotler, J.), entered August 11, 2016, reversed, on the law and facts, without costs, petitioner's application denied, and respondents' motion to dismiss granted. The Clerk is directed to enter judgment accordingly.

Opinion by Oing, J. All concur except Renwick, J.P. and Gesmer, J. who dissent in an Opinion by Gesmer, J.

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

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

ENTERED: MARCH 12, 2019



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