SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

FEBRUARY 10, 2017

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Tom, J.P., Friedman, Saxe, Feinman, Kahn, JJ.

2456 Remediation Capital Funding LLC, Index 6524911/11
Plaintiff-Appellant,

-against-

Paul J. Noto,
Defendant-Respondent,

Michal Attia, et al.,
Defendants.

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Sinnreich Kosakoff & Messina LLP, Central Islip (Jarrett M. Behar of counsel), for appellant.

Furman Kornfeld & Brennan LLP, New York (Andrew R. Jones of counsel), for respondent.

_____

Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered August 11, 2014, which granted the motion of defendant Paul J. Noto to dismiss the complaint as against him, and denied plaintiff's cross motion to amend the complaint, unanimously reversed, on the law, with costs, Noto's motion denied, and plaintiff's cross motion granted.

In March 2007, plaintiff made a loan of approximately $6.6 million to nonparty Sheldrake Lofts, LLC (Sheldrake) to finance Sheldrake's purchase of a property in Westchester County.

Plaintiff alleges that Sheldrake presented it with a purchase agreement for the property, providing for a purchase price comprising $1.9 million in cash and a $5 million preferred equity interest in the buyer, which plaintiff was led to believe was the product of arm's-length negotiations. Plaintiff made the loan in reliance on the purported $6.9 million purchase price as an indication of the property's fair market value, without conducting an independent appraisal or other due diligence, because Sheldrake told it that the transaction had to be closed within two weeks. At the closing of the transaction, plaintiff received an opinion letter addressed to it and signed by defendant Noto, the attorney representing Sheldrake and its principal, Ofer Attia, who was the guarantor of the loan. In this letter, Noto opined, inter alia, that "[t]he execution and delivery of the Loan Documents, to my knowledge, after due inquiry, will not violate, conflict with, result in the breach of or constitute a default under any contract, agreement, instrument, judgment, decree, order, statute, rule or regulation to which [Sheldrake] and/or [Attia], as may be applicable, is subject".

After Sheldrake defaulted on the loan, plaintiff learned that the purchase agreement that had been presented to it was a sham, and that Attia had actually purchased the property in 2005

for only $1.9 million, to be paid in installments as distributions from an entity in which the sellers had received an interest. Plaintiff further discovered that, in connection with the 2005 purchase, Attia had entered into a letter agreement with the sellers (the 2005 letter agreement), under which Attia's right to refinance the property was conditioned, in pertinent part, upon Attia maintaining a $2 million cushion of "unencumbered equity" in the property to protect the sellers' interest. Noto had participated in the 2005 transaction as the sellers' attorney, and had signed the 2005 letter agreement in that capacity.

As relevant to this appeal, plaintiff seeks to assert misrepresentation claims against Noto. In the order appealed from, Supreme Court granted Noto's motion to dismiss the original complaint, which asserts a cause of action for fraud against Noto, and denied plaintiff's cross motion to amend its complaint to add a cause of action for negligent misrepresentation, primarily on the ground that plaintiff could not establish justifiable reliance on any alleged misrepresentations, as a matter of law, because it admittedly had not conducted an independent appraisal or any due diligence with respect to the loan transaction. Upon plaintiff's appeal, we reverse.

A sophisticated party is generally required to exercise due

diligence to verify the facts represented to it before entering into a business transaction (*see e.g. Danaann Realty Corp. v Harris*, 5 NY2d 317, 322 [1959]; *Schumaker v Mather*, 133 NY 590, 596 [1892]; *MP Cool Invs. Ltd. v Forkosh*, 142 AD3d 286, 291-292 [1st Dept 2016], *lv denied* 28 NY3d 911 [2016]). The Court of Appeals has recognized, however, that, "where a plaintiff has gone to the trouble to insist on a written representation that certain facts are true, it will often be justified in accepting that representation rather than making its own inquiry" (*DDJ Mgt., LLC v Rhone Group L.L.C.*, 15 NY3d 147, 154 [2010]). In this case, plaintiff alleges that it made the loan to Sheldrake in reliance on Noto's opinion letter, which was specifically addressed to plaintiff, in which Noto opined that the loan transaction would not put either Sheldrake or Attia into breach of any preexisting contract or agreement to which either was a party. Plaintiff alleges that this representation was false, inasmuch as the undisclosed 2005 letter agreement required Attia to maintain a $2 million cushion of "unencumbered equity" in the property in any refinancing, and — given that the true value of the property was only $1.9 million, based on the terms of the undisclosed 2005 transaction — plaintiff's $6.6 million loan to Sheldrake wiped out any such equity in the property.

Like the plaintiffs in *DDJ Mgt.*, plaintiff in this case

"made a significant effort to protect [itself] against the possibility of false[hood]" (*id.* at 156) by obtaining a written opinion letter from Noto, the borrower's attorney, making at least one material representation that, based on the allegations of the complaint, was inconsistent with the actual value of the property. As in *DDJ Mgt.*, on a motion addressed to the sufficiency of the pleadings, it cannot be "h[e]ld as a matter of law that plaintiff[] [was] required to do more" (*id.*), and whether plaintiff was justified in relying on Noto's opinion letter is a question for the trier of fact. The general merger clause in the loan agreement does not afford Noto — who was not a party to the loan agreement — protection from liability for intentional or negligent misrepresentations in an opinion letter he signed and directed to plaintiff, allegedly knowing that they would rely on it; in any event, a general merger clause does not suffice to bar parol evidence of fraud in the inducement (*see Hobart v Schuler*, 55 NY2d 1023, 1024 [1982]). Finally, plaintiff's allegations that Noto prepared the opinion letter at its request, provided the letter to plaintiff, and did so understanding that plaintiff would rely upon it in making the

loan at issue, were sufficient to plead a privity-like relationship for purposes of its claim in the proposed amended complaint for negligent misrepresentation (*see RBS Citizens, N.A. v Thorsen*, 71 AD3d 1108 [2d Dept 2010]).

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

ENTERED: FEBRUARY 10, 2017

CLERK

Andrias, J.P., Moskowitz, Kapnick, Webber, Kahn, JJ.

2719-
2720-
2721 Index 110626/10

Daniel Chambers,
Plaintiff-Appellant,

-against-

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

Consolidated Edison Company of New York, Inc.,
Defendant.

_____

Michael Gunzburg, P.C., New York (Michael Gunzburg of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Susan Paulson of counsel), for respondents.

_____

Order, Supreme Court, New York County (Lynn R. Kotler, J.), entered August 6, 2015, which recalled and vacated a prior order, same court and Justice, entered April 23, 2015, denying the City defendants' motion for summary judgment and plaintiff's cross motion for partial summary judgment on liability, and, upon recall and vacatur, restored the motion and cross motion, unanimously affirmed, without costs. Order, same court and Justice, entered May 12, 2015, which granted the City defendants' motion for summary judgment and denied plaintiff's cross motion for partial summary judgment, unanimously affirmed, without costs. Order, same court and Justice, entered October 20, 2015,

which denied plaintiff's motion to vacate the orders entered May 12, 2015 and August 6, 2015, unanimously affirmed, without costs.

This action seeks recovery for injuries allegedly sustained by plaintiff Daniel Chambers when the front wheel of the bicycle he was riding came into contact with gravel located around a large hole, near a manhole cover.

The court appropriately exercised its inherent authority by correcting its mistake of law in initially denying the summary judgment motion and cross motion as untimely (*see G.F.A. Advanced Sys., Ltd. v Local Ocean LLC*, 137 AD3d 479, 479 [1st Dept 2016]; *McMahon v City of New York*, 105 AD2d 101, 105-106 [1st Dept 1984]). Plaintiff was not prejudiced by the court's action, which allowed the motion and cross motion to be heard on the merits, as he had submitted opposition to the motion and had cross-moved, and oral argument had been held on the motion and cross motion.

The court properly dismissed the action as plaintiff failed to establish that an exception to the prior written notice requirement of Administrative Code of the City of New York § 7-201(c)(2) is at issue here (*see Amabile v City of Buffalo*, 93 NY2d 471, 474 [1999]). The City's ownership of a manhole cover, which allows the City to access the sewer system and water pipes in order to perform maintenance and repairs, does not provide the

City with "a special benefit from that property unrelated to the public use" (*Poirier v City of Schenectady*, 85 NY2d 310, 315 [1995]). Accordingly, it does not fall within the "special use" exception (*see Oboler v City of New York*, 8 NY3d 888, 890 [2007]; *Patterson v City of New York*, 1 AD3d 139, 140 [1st Dept 2003]; *see also Schleif v City of New York*, 60 AD3d 926, 928 [2d Dept 2009]; *ITT Hartford Ins. Co. v Village of Ossining*, 257 AD2d 606, 606-607 [2d Dept 1999]).

Plaintiff's reliance on *Posner v New York City Trans. Auth.* (27 AD3d 542 [2d Dept 2006]) is misplaced. *Posner* involved the use of a manhole by the New York City Transit Authority (NYCTA), for a proprietary function, that is accessing underground cables that fed power to a NYCTA substation (*id.* at 544; *see Huerta v New York City Tr. Auth.*, 290 AD2d 33, 38 [1st Dept 2001][NYCTA's "maintenance of its subway stations is a proprietary function"], *appeal dismissed* 98 NY2d 643 [2002]). Here, the purpose of the

manhole cover was to access the City sewer system, not underground equipment or mechanisms.

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: FEBRUARY 10, 2017

CLERK

Sweeny, J.P., Renwick, Mazzarelli, Manzanet-Daniels, Feinman, JJ.

2725 Pablo Escobar, Index 306873/12
Plaintiff-Appellant, 84204/12

-against-

271 Mulberry Street Company, LLC,
et al.,
Defendants,

285 Lafayette Street Condominium,
et al.,
Defendants-Respondents.

- - - - -

[And a Third-Party Action]

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Gorayeb & Associates, P.C., New York (John M. Shaw of counsel), for appellant.

McMahon, Martine & Gallagher, LLP, Brooklyn (Patrick W. Brophy of counsel), for respondents.

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Order, Supreme Court, Bronx County (Betty Owen Stinson, J.), entered June 17, 2015, which denied plaintiff's motion for partial summary judgment as to liability on his Labor Law § 240(1) claim, unanimously affirmed, without costs.

The motion court should have considered plaintiff's untimely motion for partial summary judgment on liability under Labor Law § 240 (1), as the sudden death of plaintiff's counsel's mother constituted good cause for the seven-day delay in moving for summary judgment. Nonetheless, the motion must be denied on the merits. While plaintiff made a prima facie showing that his

injuries were proximately caused by the failure of a safety device to afford him proper protection from an elevation-related risk, defendants-respondents have raised issues of fact as to whether plaintiff "had adequate safety devices available; that he knew both that they were available and that he was expected to use them; that he chose for no good reason not to do so; and that had he not made that choice he would not have been injured" (*Auriemma v Biltmore Theatre, LLC*, 82 AD3d 1, 10 [1st Dept 2011], quoting *Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 40 [2004]).

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

ENTERED: FEBRUARY 10, 2017

CLERK

Sweeny, J.P., Renwick, Mazzarelli, Manzanet-Daniels, Feinman, JJ.

2751 Adrian T., an Infant, by His Mother and Natural Guardian, Filiberta T., etc., et al., Plaintiffs-Respondents,

-against-

Millshan Realty Co., LLC, et al., Defendants-Appellants.

Index 22004/06

Molod Spitz & DeSantis, P.C., New York (Marcy Sonneborn of counsel), for appellants.

Sim & Record, LLP, Bayside (Sang J. Sim of counsel), for respondents.

Order, Supreme Court, Bronx County (Fernando Tapia, J.), entered April 19, 2016, which denied defendants' motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Defendants established prima facie that exposure to lead did not cause the infant plaintiff's (Adrian) cognitive deficits (*see Veloz v Refika Realty Co.*, 38 AD3d 299 [1st Dept 2007], *lv denied* 9 NY3d 817 [2008]). The record shows that Adrian, who was born in April 1998, had minimal blood lead levels of two to four micrograms per deciliter (ug/dl) between March 1999 and March 2000. He had a single elevated blood lead level of 13 ug/dl in February 2002. Defendants relocated Adrian's family, and, by May

31, 2002, had abated the lead condition. On that date, Adrian's blood lead level was back down to four ug/dl; it was measured at three ug/dl in September 2002 and again in November 2005. The record also shows that Adrian had undisputed speech and language deficits from infancy, well before his first known exposure to lead paint. Adrian continued to receive speech and language therapy and individualized education programs into high school, where he achieved a generally strong academic record, including two years of honors classes. Defendants submitted an expert pediatric neurologist's report, supported by specifically referenced scientific studies, showing that no peer-reviewed study had found a decrement from lead in children with preexisting cognitive deficits, i.e., children with "asymptomatic lead exposure."

Plaintiffs failed to raise a triable issue of fact in opposition (*see id.*). Their neuropsychologist's report carefully tracks Adrian's lifelong cognitive deficits but does not show that any continuing deficits are attributable to his brief exposure to lead in early 2002. The neuropsychologist cites no scientific study to support her assertion that Adrian's exposure to lead "created greater difficulties for him than he would have had . . . if he had not been exposed to lead" (*see Bygrave v New York City Hous. Auth.*, 65 AD3d 842, 847 [1st Dept 2009]).

The report by plaintiffs' pediatric neurologist is also insufficient to raise an issue of fact. The neurologist's core opinion was that Adrian's exposure to lead caused a nearly 10-point drop in his IQ. However, the neurologist failed to show that Adrian's IQ changed at all. He did not measure Adrian's IQ himself; he relied on plaintiffs' neuropsychologist's report. However, he does not cite to any IQ measurement taken before the neuropsychologist examined Adrian, in October 2015, and indeed the record contains no baseline measurement.

Nor did the neurologist identify any scientific studies in support of his opinion. While he listed 11 articles at the end of his report, he did not summarize any of the articles' findings with any particularity, or correlate any of the findings in the articles to any of his own findings. Moreover, defendants' neurologist pointed out that all the articles cited by plaintiff's neurologist were population-based studies, and

explained that Adrian's average recorded blood lead levels of 4.9 ug/dl were so low that he would have been included in the control groups of those studies.

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

ENTERED: FEBRUARY 10, 2017

CLERK

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

3051-
3052 Index 161937/15

Alex Amirkhanian,
Plaintiff-Appellant,

-against-

Ido Berniker, et al.,
Defendants-Respondents.

_____

Fox Rothschild LLP, New York (Daniel A. Schnapp of counsel), for appellant.

Rosenberg Fortuna & Laitman, LLP, Garden City (Anthony R. Filosa of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Shlomo Hagler, J.), entered August 18, 2016, dismissing the complaint pursuant to an order, same court and Justice, entered on or about June 1, 2016, which, to the extent appealed from as limited by the briefs, granted defendants' motion to dismiss the complaint pursuant to CPLR 3211(a)(1) and (7), unanimously affirmed, without costs. Appeal from the order, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Supreme Court correctly determined that, under Real Property Law § 442-d, plaintiff is prohibited from recovering any real estate brokerage commission because of his lack of a New York real estate broker or real estate salesperson license. The referral of a client to a broker in exchange for a share of the

commission earned from a purchase by that client is a service for which a New York real estate broker's license is required (*DSA Realty Servs., LLC v Marcus & Millichap Real Estate Inv. Servs. of N.Y., Inc.*, 128 AD3d 587, 588 [1st Dept 2015]). Plaintiff's argument that he is a "finder" is improperly raised for the first time on appeal, and, in any event, unavailing (*see Futersak v Perl*, 84 AD3d 1309, 1311 [2d Dept 2011], *lv denied* 18 NY3d 943 [2012]).

Equally unavailing is plaintiff's reliance on Real Property Law § 442, which allows a New York licensed real estate broker to split commissions with a real estate broker licensed in another state (Real Property Law § 442[1]; *Roberts v Gin Realty Corp.*, 145 Misc 2d 618, 619 [Sup Ct, NY County 1989]). Here, the documentary evidence refutes plaintiff's allegations that he was a California-licensed broker at the time his services were allegedly performed. Because plaintiff was unlicensed at that time, he cannot recover commissions (*Galbreath-Ruffin Corp. v 40th & 3rd Corp.*, 19 NY2d 354, 362 [1967]).

Supreme Court correctly dismissed plaintiff's tort claims,

because unlicensed individuals cannot evade the licensing requirements by invoking equitable remedies to recover in tort rather than in contract (*see Hartford v Landrich Inv. Co.*, 31 AD2d 616 [1st Dept 1968]).

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

ENTERED: FEBRUARY 10, 2017

CLERK

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

3053 In re Kiara B.,
Petitioner-Appellant,

-against-

Omar R.,
Respondent-Respondent.

_____

Tennille M. Tatum-Evans, New York, for appellant.

_____

Order, Family Court, Bronx County (John J. Kelley, J.), entered on or about December 2, 2014, which denied the petition for a writ of habeas corpus directing respondent to produce the subject child, unanimously affirmed, without costs.

The court properly found that as there was no custody order in place and the mother had no greater right to the custody of the child than the father, the child was not being illegally detained by the father and therefore, the mother did not have a right to habeas corpus relief (Domestic Relations Law § 70).

Moreover, there was an imminent custody petition pending

and, as the court advised, the mother could make an application to advance the court date or make an application on notice for custody so that both parties could be heard as to what should happen with respect to custody on a temporary basis.

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

ENTERED: FEBRUARY 10, 2017

CLERK

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

3057-
3058 The People of the State of New York,
Respondent,

-against-

Clevester Hemphill,
Defendant-Appellant.

Ind. 5990/08

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

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

Judgment, Supreme Court, New York County (Wayne M. Ozzi, J. at jury trial and sentencing; Neil Ross, J. at resentencing), rendered July 12, 2010, as amended July 9, 2015, convicting defendant of two counts of criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony drug offender, to concurrent terms of 7½ years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's determinations concerning identification and credibility.

Review of defendant's claim that the court improperly granted a challenge for cause by the People is statutorily

foreclosed because the People did not exhaust their peremptory challenges (*see* CPL 270.20[2]). Although the People initially used up their challenges, they subsequently withdrew one of them, and thus the court's ruling, even if erroneous, did not give the People an extra challenge. In any event, the court providently exercised its discretion in disqualifying a panelist who failed to give an unequivocal assurance that she could render an impartial verdict, uninfluenced by knowledge or expertise derived from her studies (*see generally People v Arnold*, 96 NY2d 358, 363 [2001]; *see also People v Culhane*, 33 NY2d 90, 108 n 3 [1973]).

The court's *Sandoval* ruling balanced the appropriate factors and was a provident exercise of discretion (*see People v Walker*, 83 NY2d 455, 458-459 [1994]). With reasonable limitations, the court permitted inquiry into matters that were probative of credibility.

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

ENTERED: FEBRUARY 10, 2017

CLERK

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

3060 In re Amy Khoudari, et al., Index 113749/04
Petitioners-Respondents,

-against-

Mary Travis Basset, M.D., M.P.H., etc.,
Respondent-Appellant.

_____

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

Borah, Goldstein, Altschuler, Nahins & Goidel, P.C., New York (Virginia K. Trunkes of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Carol E. Huff, J.), entered April 23, 2015, insofar as appealed from as limited by the briefs, directing that interest on a nuisance abatement charge tax lien on the subject real property would begin to accrue within 20 days of service of notice of entry of said judgment, unanimously reversed, on the law, without costs, the judgment vacated, the matter remanded to Supreme Court for imposition and calculation of interest accrued since imposition of the lien on September 27, 2004, and entry of judgment in favor of respondent accordingly.

Statutory interest, as on the subject tax lien (Administrative Code of City of NY § 17-151) "continues to accrue at the statutory rate until it is satisfied" (*Colgate v Broadwall*

Mgt. Corp., 51 AD3d 437, 438 [1st Dept 2008]). The stay of the proceedings effected in April 2006 did not serve to stay the accrual of interest on the lien (*see NYCTL 1998-2 Trust v McGill*, 138 AD3d 1077, 1079 [2d Dept 2016]; *see also Wiederhorn v Merkin*, 106 AD3d 416 [1st Dept 2013], *lv denied* 21 NY3d 864 [2013]).

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

ENTERED: FEBRUARY 10, 2017

CLERK

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

3061-
3062-
3062A

Index 650376/12

Smart Trike, MNF, PTE, Ltd.,
Plaintiff-Respondent-Appellant,

-against-

Piermont Products, LLC, formerly known as Smart Trike, LLC,
Defendant-Appellant-Respondent,

Robert Kramer, et al.,
Defendants.

_____

Rand Rosenzweig Radley & Gordon LLP, White Plains (Charles L. Rosenzweig of counsel), for appellant-respondent.

Lowenstein Sandler LLP, New York (Jeffrey J. Wild of counsel), for respondent-appellant.

_____

Appeals from order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered December 12, 2014, and order, same court and Justice, entered October 16, 2015, as supplemented by order entered on or about January 29, 2016, deemed appeals from judgment, same court and Justice, entered July 12, 2016, in plaintiff's favor (CPLR 5501[c]), and, so considered, said judgment unanimously affirmed, with costs.

The motion court correctly granted plaintiff summary judgment dismissing the counterclaims except insofar as the plain language of the parties' agreement required plaintiff to provide six months' notice of the termination of the agreement, during

which period defendant was entitled to its earned commissions (*W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]).

Because defendant held more of plaintiff's money than the amount of its own claimed commissions, the motion court correctly found the New Jersey Sales Representatives' Rights Act, pertaining to "unpaid" commissions (*see* NJ Stat Ann 2A:61A-2), inapplicable. The court also correctly concluded that New York Labor Law § 191-c did not apply to defendant, which admitted that it only solicited orders from its headquarters in New Jersey (*see* § 191-a[d]).

The plain language of the contract defeats the counterclaim for lost profits.

We perceive no error in the starting date set by the court for computing prejudgment interest (*see* CPLR 5001).

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

ENTERED: FEBRUARY 10, 2017

CLERK

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

3063 The People of the State of New York, Ind. 2663/13
Respondent,

-against-

Jaysen Dorsey,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Kate Mollison of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Rebecca Hausner 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 March 20, 2014,

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

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

ENTERED: FEBRUARY 10, 2017

CLERK

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

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

3064 Caroline Marshall, Index 704928/13
Plaintiff-Appellant,

-against-

Darrick E. Antell, MD, P.C.,
et al.,
Defendants-Respondents.

_____

The Orlow Firm, Flushing (Thomas P. Murphy of counsel), for appellant.

Law Office of James J. Toomey, New York (Evy L. Kazansky of counsel), for respondents.

_____

Order, Supreme Court, New York County (Geoffrey D. Wright, J.), entered on or about February 29, 2016, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

While defendant nurse owed a duty of care to plaintiff in the ordinary negligence context when she was assisting plaintiff in plaintiff's home after a surgical procedure (*see Weiner v Lenox Hill Hosp.*, 88 NY2d 784, 787-788 [1996]; *Coursen v New York Hosp.-Cornell Med. Ctr.*, 114 AD2d 254, 256-257 [1st Dept 1986]), the evidence does not show that she breached the duty. There is no evidence to indicate that she acted unreasonably in retrieving the blender from the top shelf of the kitchen cabinet. Nor could she have known that an unsecured blade was in the bowl, as

plaintiff did not warn her of the hazard. Under the circumstances presented, it was plaintiff's own negligence in storing the blade and failing to warn that was the sole proximate cause of her injuries (*see Howard v Poseidon Pools, Inc.*, 72 NY2d 972 [1988]).

Absent negligence on the nurse's part, the respondeat superior claim against her employer was properly dismissed (*see Moorhouse v Standard, N.Y.*, 124 AD3d 1, 12 [1st Dept 2014]). Furthermore, since the nurse was acting within the scope of her employment, plaintiff's claim for negligent hiring, supervision, and training fails (*see Karoon v New York City Tr. Auth.*, 241 AD2d 323 [1st Dept 1997]).

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

ENTERED: FEBRUARY 10, 2017

CLERK

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

3065-
3066 In re Cayra M.,
Petitioner-Respondent,

-against-

Fotis B.,
Respondent-Appellant.

_____

Law Offices of Joseph A. Altman, P.C., Bronx (Joseph A. Altman of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Max O. McCann of counsel), for respondent.

_____

Order, Family Court, New York County (Gloria Sosa-Lintner, J.), entered on or about May 14, 2014, which dismissed respondent's objection to an order of filiation entered on his default, unanimously affirmed, without costs. Order, same court and Judge, entered on or about July 23, 2015, which dismissed respondent's objection to the denial of his motion to vacate his default in the paternity proceeding, unanimously reversed, without costs, on the law, on the facts, and in the exercise of discretion, the order of filiation vacated, and the matter remanded for a paternity hearing.

Family Court properly dismissed respondent's initial objection to the order of filiation, because he failed to move to vacate his default. However, Family Court erred in dismissing

the objection to the denial of respondent's subsequent motion to vacate his default. Respondent presented a reasonable excuse for his default — namely, his attorney's approximate 20-minute delay in appearing in Family Court due to an appearance in another court. Petitioners were not prejudiced by the slight delay, and disposition of cases on the merits is preferred as a matter of public policy (*see Fromartz v Bodner*, 266 AD2d 122 [1st Dept 1999]).

Respondent also presented evidence of a meritorious defense. Although the DNA test showed that there was a 99.9% probability that respondent was the child's father, respondent stated that his identical twin brother, who was in the courtroom and was prepared to testify, had sexual relations with petitioner mother during the conception period. The brother's testimony may have rebutted the presumption of paternity provided in Family Court Act § 532(a) and CPLR 4518(d) (*see Matter of Jane PP. v Paul QQ.*,

65 NY2d 994, 996 [1985]), if respondent was also able to demonstrate that he and his brother have identical DNA. Further, the best interests of the subject child are not furthered by a possibly erroneous paternity finding.

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

ENTERED: FEBRUARY 10, 2017

CLERK

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

3067-
3068 Index 652410/13

Geoffrey Varga, et al.,
Plaintiffs-Appellants,

-against-

McGraw Hill Financial, Inc. formerly known as The McGraw-Hill Companies, Inc., etc., et al.,
Defendants-Respondents,

Bear Stearns High-Grade Structured Credit Strategies Master Fund Ltd., et al.,
Nominal Defendants.

_____

Reed Smith LLP, New York (James C. Martin of the bar of the State of California and the Commonwealth of Pennsylvania, admitted pro hac vice, of counsel), for appellants.

Cahill Gordon & Reindel LLP, New York (Charles A. Gilman of counsel), for respondents.

Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York (Martin Flumenbaum of counsel), for Fitch Group, Inc., Fitch Ratings, Inc., and Fitch Ratings Ltd., respondents.

_____

Order, Supreme Court, New York County (Anil C. Singh, J.), entered August 4, 2015, which, inter alia, granted defendants McGraw Hill Financial, Inc., Standard & Poor's Financial Services LLC, Moody's Corporation, Moody's Investors Service Inc., Moody's Investors Service Limited, Fitch Group, Inc., Fitch Ratings, Inc. and Fitch Ratings Limited's (the rating agencies) motion to dismiss the complaint, unanimously affirmed, without costs.

Order, same court and Justice, entered on or about January 13, 2016, which, upon renewal, adhered to the original determination, and denied the part of plaintiffs' motion seeking leave to amend the complaint, unanimously affirmed, without costs.

Plaintiffs allege that the rating agencies fraudulently misrepresented the creditworthiness of certain residential mortgage-backed securities and collateralized debt obligations secured by subprime residential mortgages by assigning them artificially high ratings, and that the nominal defendants (the master funds), in which Bear Stearns High-Grade Structured Credit Strategies (Overseas) Ltd. and Bear Stearns High-Grade Structured Credit Strategies Enhanced Leverage (Overseas) Ltd. (the feeder funds), of which plaintiffs are the joint official liquidators, invested all their capital and were shareholders and/or investors, relied upon those misrepresentations in deciding to invest in those securities and maintain the investments.

Plaintiff's claims were brought more than six years after the last purchase of securities (CPLR 213[8]) and thus are time-barred (*see Prichard v 164 Ludlow Corp.*, 49 AD3d 408 [1st Dept 2008]; *see also CIFG Assur. N. Am., Inc. v Credit Suisse Sec. (USA) LLC*, 128 AD3d 607, 608 [1st Dept 2015], *lv denied* 27 NY3d 906 [2016]).

Plaintiffs' contention that they did not sustain an injury

until after the purchase of the securities, and that therefore the fraud claim could not have accrued before then, is belied by their pleadings, which reflect an understanding that the securities were worth less than their price at the time of purchase (*see Continental Cas. Co. v PricewaterhouseCoopers, LLP*, 15 NY3d 264, 271 [2010]). Plaintiffs' reliance on *New York City Tr. Auth. v Morris J. Eisen, P.C.* (276 AD2d 78 [1st Dept 2000]), is misplaced, since the payments in this case were made at the time of purchase.

To the extent plaintiffs allege "holder" claims, i.e., fraudulent inducement to continue to hold the securities, these claims violate the "out-of-pocket" rule governing damages recoverable for fraud, and are not actionable (*see Bank Hapoalim B.M. v WestLB AG*, 121 AD3d 531, 535 [1st Dept 2014], *lv denied* 24 NY3d 914 [2015], citing *Starr Found. v American Intl. Group, Inc.*, 76 AD3d 25, 27-28 [1st Dept 2010]).

Moreover, plaintiffs lack standing to sue derivatively. The law of the Cayman Islands, which the parties agree governs this issue, generally prohibits derivative actions, and plaintiffs do not allege that they fall within any of the exceptions to the general rule (*see Foss v Harbottle*, [1843] 67 Eng Rep 189, 2 Hare 461; *Johnson v Gore Wood & Co.*, [2002] EWHC 776, 2 AC 1 [HL]; *see also Shenwick v HM Ruby Fund, L.P.*, 106 AD3d 638 [1st Dept

2013]).

Plaintiffs' lack of standing was not cured by the master funds' subsequent assignment of their claims, and the proposed amended complaint by plaintiffs, as assignees, does not relate back to the earlier filed complaint (*see* CPLR 203[f]; *Nomura Asset Acceptance Corp. Alternative Loan Trust v Nomura Credit & Capital, Inc.*, 139 AD3d 519, 520 [1st Dept 2016]; *Southern Wine & Spirits of Am., Inc. v Impact Envtl. Eng'g, PLLC*, 80 AD3d 505 [1st Dept 2011]).

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

ENTERED: FEBRUARY 10, 2017

CLERK

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

3069 Stanley Blasoff, Index 107468/10
Plaintiff-Appellant,

Esther Blasoff,
Plaintiff,

-against-

New York City Health and Hospitals Corporation, et al.,
Defendants-Respondents,

The City of New York, et al.,
Defendants.

_____

The Law Office of Avram E. Frisch LLC, New York (Avram E. Frisch of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Qian Julie Wang of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Frank P. Nervo, J.), entered April 30, 2015, dismissing the complaint as against defendant New York City Health and Hospitals Corporation (HHC) (sued herein as HHC and Bellevue Hospital Center), pursuant to an order, same court and Justice, entered April 1, 2015, which granted HHC's motion to dismiss the complaint as against it, unanimously affirmed, without costs.

Supreme Court properly dismissed the complaint upon plaintiff's failure to obey a court-ordered stipulation in which plaintiff agreed to serve a certificate of merit, as required by

CPLR 3012-a(a), within 10 days, or risk having his complaint dismissed as against HHC. The failure to file a certificate of merit when required "is a pleading defect . . . requiring dismissal [of the complaint] unless plaintiff can establish a reasonable excuse for the default [and] a meritorious cause of action" (*Perez v Lenox Hill Hosp.*, 159 AD2d 251, 251 [1st Dept 1990]), neither of which were established here. Where, as here, a litigant ignores a court order, the court may dismiss the action (CPLR 3126[3]; *Kihl v Pfeffer*, 94 NY2d 118, 123 [1999]).

Plaintiff's remaining arguments are academic and, in any event, unavailing.

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

ENTERED: FEBRUARY 10, 2017

CLERK

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

3070 The People of the State of New York, Ind. 585/15
Respondent, 1012/15

-against-

Howard Sowers,
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 (Ross D. Mazer 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 (Abraham Clott, J.), rendered April 9, 2015,

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

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

ENTERED: FEBRUARY 10, 2017

CLERK

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

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

3072-
3073 Index 650538/08

R.F. Schiffmann Associates, Inc., et al.,
Plaintiffs-Appellants,

-against-

Baker & Daniels LLP, et al.,
Defendants-Respondents.

_____

Carey & Associates LLC, New York (Michael Q. Carey of counsel), for appellants.

Borg Law LLP, New York (Jonathan M. Borg of counsel), for respondents.

_____

Order, Supreme Court, New York County (Arthur F. Engoron, J.), entered on or about December 2, 2015, which, to the extent appealed from, dismissed plaintiffs' breach of contract claim, declined to award late fees, and dismissed all claims as against defendant Weaver Popcorn Company, unanimously modified, on the law and the facts, to award late fees to the extent indicated in this decision, and otherwise affirmed, without costs. Order, same court and Justice, entered May 26, 2016, which awarded plaintiffs $82,202.58, representing principal in the sum of $48,220, plus prejudgment interest at the rate of 9% from February 1, 2004 through December 13, 2012, less costs, as against defendant Baker & Daniels LLP, unanimously modified, on the law and the facts, to award interest at 18% instead of 9%,

and otherwise affirmed, without costs.

Plaintiffs' contention that the trial court (Engoron, J.), improperly disregarded a prior decision of the motion court (Feinman, J.) is unavailing. The motion court found disputed issues of fact, which is hardly the type of finding that required the trial court to rule in plaintiffs' favor.

The very first invoice that plaintiffs presented to Baker & Daniels, dated April 29, 2003, said, "Terms: . . . 1 ½% interest . . . on unpaid balances." This "constituted a sufficient demand to start interest running" (*Davison v Klaess,* 280 NY 252, 258 [1939]). The language about 1.5% interest was repeated on the service invoices that plaintiffs sent on July 29 and October 30, 2003 and January 2 and March 24, 2004, as well as the invoices for interest/late fees that plaintiffs sent on June 11, August 12, and September 10, 2004. The first time defendants indicated they had any problems with plaintiffs' invoices was November 5, 2004, when one member of Baker & Daniels told plaintiff Robert F. Schiffmann that another partner had "some issues he wanted to discuss," which is not a specific objection to the 1.5% monthly late fee (*see Geron v DeSantis,* 89 AD3d 603, 604 [1st Dept 2011]). Although the trial court said that Baker & Daniels "timely objected to plaintiff's interest-on-interest," upon a review of the record, we find no such objection.

Because Baker & Daniels failed to object to late fees in a timely fashion, and because plaintiffs presented at least some evidence of trade practice, namely Baker & Daniels' invoice to its client, Weaver, which said a late fee of 1% per month would be charged, the late fee of 1.5% per month mentioned in plaintiffs' invoices became integrated into the parties' contract (*see Archer Mgt. Servs. v Pennie & Edmonds*, 287 AD2d 343, 344 [1st Dept 2001]; *Morningside Fuel Corp. v Lanius*, 244 AD2d 198 [1st Dept 1997]). The late fee of 1.5% a month (18% a year) is in lieu of – not in addition to – statutory 9% interest (*id.*).

In the absence of an express agreement by Baker & Daniels to pay compound interest, plaintiffs are entitled to only simple interest (*see e.g. Gutman v Savas*, 17 AD3d 278, 279 [1st Dept 2005]). "[M]ere silent acquiescence in [an] account stated [does] not constitute an express promise to pay compound interest" (*Reusens v Arkenburgh*, 135 App Div 75, 77 [1st Dept 1909]).

Plaintiffs' contention that Weaver (the principal) is liable for Baker & Daniels (the agent's) contract is unavailing. Baker & Daniels was an independent contractor rather than an agent subject to Weaver's direction and control (*see Enterprise Press, Inc. v Fresh Fields Mkts., Inc.*, 13 F Supp 2d 413, 415 [SD NY 1998]). Moreover, the fact that plaintiffs sent all of their

invoices to Baker & Daniels – not Weaver – weighs against imposing liability on Weaver (*see id.* at 416).

We have considered plaintiffs' remaining arguments and find that they do not warrant any further modification beyond the extent indicated.

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

ENTERED: FEBRUARY 10, 2017

CLERK

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

3074 The People of the State of New York, Respondent, Ind. 3523/11

-against-

Kimada Dixson, Defendant-Appellant.

_____

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

Kimada Dixson, appellant pro se.

Darcel D. Clark, District Attorney, Bronx (Matthew B. White of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (James M. Kindler, J.), rendered June 3, 2013, convicting defendant, after a jury trial, of robbery in the first degree, and sentencing him, as a second felony offender, to a term of 15 years, unanimously affirmed.

The court properly denied defendant's motion to suppress the victim's identification of defendant in a six-person lineup. The taint of any prior unduly suggestive identification procedures, conducted more than two months earlier, was dissipated by the passage of time (*see People v Perez*, 128 AD3d 465, 465 [1st Dept 2015]; *People v Mathis*, 94 AD3d 428 [1st Dept 2012], *lv denied* 19 NY3d 975 [2012]). The lineup fillers did not differ so much from defendant's appearance or the victim's description of the

perpetrator as to single out defendant unfairly (*see People v Chipp*, 75 NY2d 327, 335 [1990], *cert denied* 498 US 833 [1990]; *compare People v Perkins*, __ NY3d __, 2016 NY Slip Op 08483 [2016] [lineup fillers lacked defendant's very noticeable distinctive hairstyle]).

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348 [2007]). There is no basis for disturbing the jury's credibility determinations, including its evaluation of the victim's testimony that he was certain of the accuracy of his identification of defendant in the lineup but was unable to make an in-court identification almost two years after the incident because his memory had faded. The dangerous instrument element was established by the victim's testimony that defendant placed a large commercial fish hook to his abdomen and threatened to kill him (*see People v Crisp*, 194 AD2d 465 [1st Dept 1993], *lv denied* 82 NY3d 752 [1993]).

We perceive no basis for reducing the sentence.

We have considered the arguments raised in defendant's pro se supplemental brief and find them unavailing.

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

ENTERED: FEBRUARY 10, 2017

CLERK

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

3075 Superior Technology Solutions, Inc., et al., Plaintiffs-Appellants, Index 100856/12

-against-

David Rozenholc, Defendant-Respondent.

_____

Solomon Zabrowsky, New York, for appellants.

Furman Kornfeld & Brennan LLP, New York (Bain R. Loucks of counsel), for respondent.

_____

Order, Supreme Court, New York County (Joan A. Madden, J.), entered October 7, 2015, which granted defendant David Rozhenholc's motion for summary judgment and dismissed the complaint against him for attorney malpractice, unanimously affirmed, without costs.

Defendant has established that the malpractice claim fails for multiple reasons, and plaintiffs have failed to raise any triable issues (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Sabalza v Salgado*, 85 AD3d 436, 437 [1st Dept 2011]). There is no support for plaintiffs' contention that defendant had a duty to renew the lease on their behalf, or to advise them of the need to do so (*see Kaminsky v Herrick, Feinstein LLP*, 59 AD3d 1, 9 [1st Dept 2008], *lv denied* 12 NY3d 715 [2009]). The record demonstrates that defendant's representation was limited to

litigating and negotiating a settlement with respect to the *Yellowstone* action, which defendant brought on plaintiffs' behalf, and that the scope of his services was not transactional. Defendant was not actively representing plaintiffs at the time the lease was negotiated or when the renewal option was to be exercised.

Defendant has also demonstrated that it cannot be shown that any alleged negligence by him was the proximate cause of plaintiffs' damages (*Stolmeier v Fields*, 280 AD2d 342, 343 [1st Dept 2001], *lv denied* 96 NY2d 714 [2001]). Plaintiff Lee's testimony establishes that he knew that notice for the renewal had to be in writing and sent by certified or registered mail to the landlord, and his own affidavits reflect his knowledge that the lease ran until January 31, 2011 with the option to renew. In fact, Lee had renewed a prior lease, identical to the lease at issue, years before he even retained defendant to represent him

in the *Yellowstone* litigation.

We have considered plaintiffs' remaining contentions, and find them unavailing.

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

ENTERED: FEBRUARY 10, 2017

CLERK

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

3076N	Zbigniew Rucinski, et al., Plaintiffs-Respondents, -against- More Restoration Co. Inc., et al., Defendants, Kraus Management, Inc., et al., Defendants-Appellants. [And Six Third-Party Actions]	Index 303087/12 83924/12 83996/12 83739/13 84015/15 84072/15

Lester Schwab Katz & Dwyer, LLP, New York (Stewart G. Milch of counsel), for appellants.

Pollack, Pollack, Isaac & DeCicco, LLP, New York (Brian J. Isaac of counsel), for respondents.

Order, Supreme Court, Bronx County (Betty Owen Stinson, J.), entered January 6, 2016, which, to the extent appealed from, denied the motion of defendants Kraus Management, Inc. and Franklin Kite Housing Development Fund Corporation (hereinafter, defendants) to the extent it sought an order compelling plaintiffs to provide HIPAA-compliant *Arons* authorizations for certain medical personnel who authored reports containing statements concerning how the accident occurred, or so-ordering proposed subpoenas addressed to those medical professionals for depositions limited to that topic, unanimously affirmed, to the extent it denied the motion to compel plaintiffs to provide

authorizations, and the appeal therefrom otherwise dismissed, as premature, without costs.

In this Labor Law § 240(1) action, plaintiff Zbigniew Rucinski alleges that he was struck by a falling object while performing construction work at a building owned and managed by defendants. Conflicting accounts of how plaintiff's accident took place appear in his medical records, and the records, alone, do not clarify how the accident occurred.

Defendants requested that plaintiff provide authorizations pursuant to *Arons v Jutkowitz* (9 NY3d 393 [2007]), so that they could depose the medical providers who created the records, pursuant to proposed subpoenas providing notice that testimony was sought concerning the statements in the medical records about the cause of plaintiff's accident. Plaintiffs objected that the discovery sought concerning hearsay statements was irrelevant.

While the discovery sought is relevant under the broad standard of CPLR 3101 (see *Matter of Kapon v Koch*, 23 NY3d 32, 38 [2014]; *Benavides v City of New York*, 115 AD3d 518 [1st Dept 2014]), the court providently exercised its discretion in denying defendants' request to compel plaintiffs to provide *Arons* authorizations. In *Arons v Jutkowitz*, the Court of Appeals permitted informal interviews of an adverse party's treating physician, provided that a valid authorization has been provided,

and that the attorney makes clear that "any discussion with counsel is entirely voluntary and limited in scope to the particular medical condition at issue" (*id.* at 410, 413-415). Here, defendants sought depositions of plaintiff's medical providers pursuant to CPLR 3101(a)(4), not interviews, and specified that the subject of the depositions was not diagnosis and treatment, but statements recorded in medical records relating to the cause of the accident. Accordingly, there was no need for plaintiff to provide HIPAA-compliant authorizations.

There being no indication that defendants have been issued or served (CPLR 2302[a]), no determination can be made with respect to whether the subpoenas are proper (*see Cuomo v Long Is. Light. Co.*, 71 NY2d 349, 354 [1988]).

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

ENTERED: FEBRUARY 10, 2017

CLERK

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

3077N King Range, Index 151444/12
Plaintiff, 400162/13
400194/13

-against-

The Trustees of Columbia University
in the City of New York, et al.,
Defendants-Respondents.

- - - - -

The Trustees of Columbia University
in the City of New York, et al.,
Third-Party Plaintiffs-Respondents,

-against-

Breeze National Inc., et al.,
Third-Party Defendants.

- - - - -

The Trustees of Columbia University
in the City of New York, et al.,
Second Third-Party Plaintiffs-Respondents,

-against-

Total Safety Consulting, L.L.C.,
Second Third-Party Defendant-Appellant,

City Safety Compliance Corp.,
Second Third-Party Defendant.

- - - - -

Francisca Montero De Ruiz, et al.,
Plaintiffs,

-against-

The Trustees of Columbia University
in the City of New York, et al.,
Defendants-Respondents,

Howard I. Shapiro & Associates
Consulting Engineers, P.C.,
Defendants.

- - - - -

The Trustees of Columbia University
in the City of New York, et al.,
Third-Party Plaintiffs-Respondents,

-against-

Breeze National Inc., et al.,
Third-Party Defendants.

- - - - -

The Trustees of Columbia University
in the City of New York, et al.,
Second Third-Party Plaintiffs-Respondents,

-against-

Total Safety Consulting, L.L.C.,
Second Third-Party Defendant-Appellant,

City Safety Compliance Corp.,
Second Third-Party Defendant.

- - - - -

Sakim Kirby,
Plaintiff,

-against-

Lend Lease (US) Construction
LMB, Inc., et al.,
Defendants-Respondents,

Howard I. Shapiro & Associates
Consulting Engineers, P.C.,
Defendant.

- - - - -

The Trustees of Columbia University
in the City of New York, et al.,
Third-Party Plaintiffs-Respondents,

-against-

Breeze National Inc., et al.,
Third-Party Defendants.

- - - - -

The Trustees of Columbia University
in the City of New York, et al.,
Second Third-Party Plaintiffs-Respondents,

-against-

Total Safety Consulting, L.L.C.,
Second Third-Party Defendant-Appellant,

City Safety Compliance Corp.,
Second Third-Party Defendant.

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Gruvman, Giordano & Glaws, LLP, New York (Charles T. Glaws of counsel), for appellants.

Havkins Rosenfeld Ritzert & Varriale, LLP, Mineola (Mark J. Volpi of counsel), for respondents.

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Order, Supreme Court, New York County (Ellen M. Coin, J.), entered on or about June 13, 2016, which, inter alia, denied the motion of second third-party defendant Total Safety Consulting, L.L.C. (Total Safety) to sever the second third-party action, unanimously affirmed, without costs.

The court properly denied Total Safety's motion. Second third-party plaintiffs Columbia University and Lend Lease provided a reasonable excuse for their late impleader. Total Safety has also not demonstrated that it would be prejudiced because, while the main action was ready for trial, it will have ample time to conduct discovery while summary judgment motions are pending. Furthermore, the third-party actions present questions of law and fact in common with the main action, thereby

making a joint trial preferable (*see e.g. Marbilla, LLC v 143/145 Lexington LLC*, 116 AD3d 544 [1st Dept 2014]; *Wilson v City of New York*, 1 AD3d 157 [1st Dept 2003]).

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

ENTERED: FEBRUARY 10, 2017

CLERK

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

3078N Malou Mananghaya, as Administratrix of The Estate of Tristan Michael Mananghaya, et al.,
Plaintiffs,

-against-

Bronx-Lebanon Hospital Center, et al.,
Defendants.
- - - - -
Napoli Transportation, Inc. doing business as C&L Towing Services Inc.,
Third-Party Plaintiff-Appellant,

-against-

Aggreko, LLC,
Third-Party Defendant-Respondent.
- - - - -
[And Another Third Party Action]

Index 20191/13

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Koster, Brady & Nagler, LLP, New York (Matthew J. Koster of counsel), for appellant.

O'Connor Redd LLP, Port Chester (Hillary P. Kahan of counsel), for respondent.

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Order, Supreme Court, Bronx County (Betty Owen Stinson, J.), entered November 19, 2015, which, insofar as appealed from, denied defendant/third-party plaintiff Napoli Transportation Inc.'s cross motion to compel third-party defendant Aggreko, LLC to respond to its discovery requests numbered 1-3, 5-9, 16-18, 20, 28-40, and 43-49, unanimously modified, on the facts and in the exercise of discretion, to grant the motion as to certain

documents responsive to requests 8, 32, 37, 43, and 45, in accordance herewith, and otherwise affirmed, without costs.

This negligence action arises from the death of Tristan Michael Mananghaya when a 400-ton industrial air cooling unit (chiller) fell on him. At the time of the accident, the decedent was employed by third-party defendant Aggreko, LLC (Aggreko), a chiller-rental company retained by defendant Bronx Lebanon Hospital Center (Bronx Lebanon) to decommission and remove the chiller, which it had previously installed. Aggreko retained Napoli Transportation, Inc. (Napoli), a towing company, to hoist the trailer on which the chiller sat so that materials placed beneath the trailer to level it could be removed.

The motion court did not improvidently exercise its discretion in denying the cross motion to compel as to requests 1-3, 5-7, 9, 16-18, 20, 28-31, 33-36, 38-40, 44, and 46-49. These requests were either irrelevant, overbroad, or sought material already produced. However, in view of the liberal discovery standard, the motion court should have granted Napoli's motion as to certain additional, narrow categories of documents (CPLR 3101; *Osowski v AMEC Constr. Mgt., Inc.*, 69 AD3d 99, 106 [1st Dept 2009]).

With respect to Request 8, the motion court ordered Aggreko to produce "bills of lading and communications with Napoli"

regarding *delivery* of the chiller in June 2012. It should also have ordered Aggreko to produce bills of lading and communications with Napoli regarding *removal* of the chiller in December 2012, as this is when the subject accident occurred.

Additionally, the motion court should have ordered Aggreko to produce, in response to Request 32, the manufacturer operating instructions in effect in 2012 for the chiller at issue, which provided guidance regarding chiller placement, and were expressly referenced in the deposition of Aggreko employee Marlin Mowrey.

In response to Request 37, the motion court should have ordered Aggreko to produce the written job description (of the type described by Mowrey at his deposition) for the role of flagman - assuming any such document exists. This job description is likely to be relevant because the decedent was assigned to act as flagman at the time of his death.

Request 43 concerns the investigative file prepared by Aggreko in connection with the subject accident. Aggreko has withheld the bulk of this file, with the exception of an incident report and photographs, as privileged. But Aggreko has not met its burden of establishing the file's entitlement to protection either by the attorney-client privilege or CPLR 3101(d)(2)'s conditional privilege for trial preparation materials (see *Ambac Assur. Corp. v Countrywide Home Loans, Inc.*, 27 NY3d

616, 624 [2016]; *Ligoure v City of N.Y.*, 128 AD3d 1027, 1028-1029 [2d Dept 2015). Aggreko has not indicated the nature of the documents withheld, the circumstances and timing of their preparation, or even the identity of the attorney allegedly involved in their preparation. Because an attorney's "conclusory assertions," without more, are insufficient to sustain the party's burden (Ligoure 128 AD3d at 1029), the motion court should have ordered Aggreko to produce its investigative file concerning the accident - at least to the extent it includes documents predating the instant litigation.

Finally, the motion court should have ordered Aggreko to produce, in response to Request 45, specifications for all trailers owned by Aggreko and available at its facility in East Linden, New Jersey in December 2012 that were capable of supporting the subject chiller. Such specifications are potentially relevant to whether a different trailer could have

been used that would not have had to be hoisted.

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

ENTERED: FEBRUARY 10, 2017

CLERK

Saxe, J.P., Moskowitz, Gische, Kahn, Gesmer, JJ.

2629 National Restaurant Association, Index 654024/15
Plaintiff-Appellant,

-against-

The New York City Department of Health & Mental Hygiene, et al.,
Defendants-Respondents,

- - - - -

American Heart Association, American Medical Association, Center for Science in the Public Interest, Changelab Solutions, Coalition for Asian American Children and Families, Medical Society of the State of New York, National Association of Chronic Disease Directors, National Association of County and City Health Officials, National Associations of Local Boards of Health, New York Academy of Medicine, New York State Public Health Association, New York State American Academy of Pediatrics, Public Health Association of New York City, Public Health Law Center, and The Food Trust,
Amici Curiae.

_____

Golenbock Eiseman Assor Bell & Peskoe LLP, New York (S. Preston Ricardo of counsel), for appellant.

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

The Richman Law Group, Brooklyn (Kim E. Richman of counsel), for amici curiae.

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Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered February 26, 2016, affirmed, without costs.

Opinion by Gesmer, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David B. Saxe, J.P.
Karla Moskowitz
Judith J. Gische
Marcy L. Kahn
Ellen Gesmer, JJ.

2629
Index 654024/15

_____x

National Restaurant Association,
Plaintiff-Appellant,

-against-

The New York City Department of Health
& Mental Hygiene, et al.,
Defendants-Respondents,

- - - - -

American Heart Association, American Medical Association,
Center for Science in the Public Interest,
Changelab Solutions, Coalition for
Asian American Children and Families, Medical
Society of the State of New York, National
Association of Chronic Disease Directors,
National Association of County and City
Health Officials, National Associations of
Local Boards of Health, New York Academy of
Medicine, New York State Public Health
Association, New York State American Academy
of Pediatrics, Public Health Association
of New York City, Public Health Law Center,
and the Food Trust,
Amici Curiae.

_____x

Plaintiff appeals from the order of the Supreme Court, New York County (Eileen A. Rakower, J.), entered February 26, 2016, deemed a judgment denying the petition, which challenged the Board's promulgation which of the "Sodium Warning Rule," and dismissing the proceeding.

Golenbock Eiseman Assor Bell & Peskoe LLP, New York (S. Preston Ricardo, Jacqueline G. Veit, Elizabeth C. Conway and Alexander K. Parachini of counsel), for appellant.

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

The Richman Law Group, Brooklyn (Kim E. Richman of counsel), and Public Good Law Center, Berkeley, CA (Seth E. Mermin and Thomas Bennigson of counsel) for amici curiae.

GESMER, J.

Salt is both an essential ingredient of our diet and, when consumed in excess, a significant health hazard. Excess consumption of sodium, the primary ingredient of salt, can cause high blood pressure, which is in turn correlated with a higher risk of cardiovascular disease, congestive heart failure and kidney disease, according to the overwhelming consensus among scientists and the federal agencies charged with protecting the nation's health. To address this issue, defendant New York City Board of Health (the Board) adopted a rule requiring certain restaurants to provide factual information to consumers on this issue. That rule is challenged in this appeal by the National Restaurant Association (NRA). We affirm the trial court's rejection of that challenge, since the Board acted legally, constitutionally and well within its authority in adopting this limited yet salutary rule.

The Board is a division of defendant New York City Department of Health and Mental Hygiene (the Department), which is authorized to regulate all matters affecting health in the City of New York, including supervising the control of chronic disease and conditions hazardous to life and health (NY City Charter § 556[c][2]), and supervising and regulating the food supply of the city and businesses affecting public health in the

city, and ensuring that such businesses are conducted in a manner consistent with the public interest (NY City Charter § 556[c][9]). The specific duties of the Board include adding to and altering, amending or repealing "any part of the health code," including by publishing in it "additional provisions for security of life and health" and "[embracing] in the health code all matters and subjects to which the power and authority of the department extends" (NY City Charter § 558[b], [c])

On June 23, 2015, the Department published in the City Record a notice stating its intent to adopt a rule "to require food service establishments to warn diners about menu items containing high amounts of sodium." The notice set out the statement of purpose of the proposed rule, the text of the proposed rule, and the details of a public hearing to be held on July 29, 2015.

By July 29, 2015, the Board had received 94 written comments on the proposed rule, of which 90 supported it. At the public hearing, nine speakers made oral comments to supplement their written submissions. The NRA submitted both written and oral comments.

On September 9, 2015, after considering the oral and written comments, the Board adopted section 81.49 of the New York City Health Code (24 RCNY), entitled "Sodium Warning," which became

effective December 1, 2015 (the Rule). The Rule requires New York City food service establishments that are part of a chain operating 15 or more locations and offer substantially the same menu items at each location (Chain Restaurants) to post a salt shaker icon next to any food item or combination meal containing 2300 mg or more of salt, and the following language explaining the icon's meaning: "the sodium (salt) content of this item is higher than the total daily recommended limit (2300 mg). High sodium intake can increase blood pressure and risk of heart disease and stroke" (24 RCNY 81.49[b][2]). The penalty for a violation of this section is a $200 fine, which became effective on March 1, 2016.

In its notice adopting the Rule, the Board made the following findings, all based on its own research or the comments received: cardiovascular disease is the leading cause of death in New York City; high blood pressure is a major risk factor for cardiovascular disease; the higher an individuals's sodium intake, the higher the individual's blood pressure; the Federal Departments of Agriculture and Health and Human Services recommend that adults consume less than 2300 mg of sodium per day; the average daily consumption of sodium among New Yorkers exceeds 3200 mg; the vast majority of average dietary sodium intake is from processed and restaurant food; chain restaurants

account for more than one-third of all restaurant traffic in New York City; a considerable number of individual or combination items on chain restaurant menus have more than 2300 mg of sodium; and consumers typically underestimate the sodium content of restaurant foods.

The NRA is a business association representing approximately 500,000 member restaurants. Its members include more than half of the Chain Restaurants in New York City that would be affected by the Rule. On December 3, 2015, NRA filed a combined article 78 and declaratory judgment petition challenging the Rule, arguing that it intrudes on the legislative function and thus violates the separation of powers; that it is arbitrary and capricious; that it is preempted by federal law; and that it violates the First Amendment rights of plaintiff's members.

Turning first to the separation of powers argument, we note that there is no case that sets out a simple test for measuring whether action by an administrative agency intrudes on the legislative function. In *Boreali v Axelrod* (71 NY2d 1 [1987]), the Court of Appeals identified four "coalescing circumstances" present in that case, which persuaded it "that the difficult-to-define line between administrative rule-making and legislative policy-making ha[d] been transgressed" (71 NY2d at 11). In *Matter of NYC C.L.A.S.H., Inc. v New York State Off. of Parks,*

Recreation and Historic Preserv. (27 NY3d 174 [2016]), the Court of Appeals described those *Boreali* factors as:

> "whether (1) the agency did more than balanc[e] costs and benefits according to preexisting guidelines, but instead made value judgments entail[ing] difficult and complex choices between broad policy goals to resolve social problems; (2) the agency merely filled in details of a broad policy or if it wrote on a clean slate, creating its own comprehensive set of rules without benefit of legislative guidance; (3) the legislature has unsuccessfully tried to reach agreement on the issue, which would indicate that the matter is a policy consideration for the elected body to resolve; and (4) the agency used special expertise or competence in the field to develop the challenged regulation" (*id.* at 179-180 [internal quotation marks and citations omitted]).

The Court of Appeals has emphasized that the *Boreali* factors are not to be applied rigidly (*NYC C.L.A.S.H.*, 27 NY3d 179-180; *Matter of New York Statewide Coalition of Hispanic Chambers of Commerce v New York City Dept. of Health & Mental Hygiene*, 23 NY3d 681, 696-697 [2014]). Indeed, they "are not mandatory, need not be weighed evenly, and are essentially guidelines for conducting an analysis of an agency's exercise of power" (*Greater N.Y. Taxi Assn. v New York City Taxi and Limousine Commn.*, 25 NY3d 600, 612 [2015]). Rather,

> "[a]ny *Boreali* analysis should center on the theme that 'it is the province of the people's elected representatives, rather than appointed administrators, to resolve difficult social problems by making choices among competing ends.' The focus must be on whether the challenged regulation attempts to resolve difficult social problems in this manner. That task, policymaking, is reserved to the legislative branch" (*Statewide Coalition,* 23 NY3d at 697, quoting *Boreali* at 13).

Here, the Rule does not attempt to solve a social problem by choosing between competing ends; rather, it attempts to give consumers information which will make them better able to make their own nutritional decisions. Thus, consideration of the first *Boreali* factor weighs strongly in favor of deferring to the Department's adoption of the Rule. In fact, as the Court of Appeals explained in *Statewide Coalition*, instruction about health risks is the least intrusive way to influence citizens' decision-making, and, "[i]n such cases, it could be argued that personal autonomy issues related to the regulation are nonexistent and the economic costs either minimal or clearly outweighed by the benefits to society, so that no policymaking in the *Boreali* sense is involved" (*Statewide Coalition,* 23 NY3d at 699).

All regulatory activity necessarily involves some degree of cost-benefit analysis; the question is the extent to which the

agency's "value judgments entailed difficult and complex choices between broad policy goals—choices reserved to the legislative branch" (*id.* at 698). Adopting the Rule did not require the Board to make "value judgments" "entail[ing] difficult and complex choices between broad policy goals"; rather, in this case, "the connection of the regulation with the preservation of health and safety is very direct, there is minimal interference with the personal autonomy of those whose health is being protected, and value judgments concerning the underlying ends are widely shared" (*Statewide Coalition,* 23 NY3d at 699). Notably, the Rule does not restrict or even regulate what Chain Restaurants may offer for sale. In contrast, in *Statewide Coalition*, which rejected the Board's authority to enact the "Portion Cap Rule" prohibiting certain food service establishments from selling sugary drinks in containers larger than 16 fluid ounces, the Court of Appeals found that the Board had made "value judgments" and, unlike here, restricted strictly what could be offered for sale.

Furthermore, the Rule is not a "regulatory scheme laden with exceptions based solely upon economic and social concerns," demonstrating "the agency's own effort to weigh the goal of promoting health against its social cost and to reach a suitable compromise" (*Boreali*, 71 NY2d at 12). The fact that this

uncomplicated rule is applied to some but not all restaurants does not require a finding that the Board engaged in legislative policymaking, since the determination to apply the Rule to national fast food Chain Restaurants is grounded in promoting public health. Indeed, the Rule applies to the same Chain Restaurants as the rule requiring the posting of the calorie content of menu items (Health Code § 81.50), which account for more than one-third of all restaurant traffic in New York City. The Rule's provision that only national Chain Restaurants that offer "substantially the same menu items" at all franchises (Health Code § 81.49[a][2]) are required to comply makes effective administration of the Rule possible.[1]

This contrasts with our holding in *Garcia v New York City Dept. of Health & Mental Hygiene* (144 AD3d 59 [1st Dept 2016]), that the Board's determination to apply a rule requiring that children attending daycare centers be vaccinated against flu only to the larger childcare centers licensed by the Board was "further evidence[]" of improper policy making (144 AD3d at 69). In that case, the challenged rule allowed covered centers to opt out of the rule by paying a fee, giving at least the appearance

[1]The Department does not issue permits to retail food markets. Accordingly, contrary to NRA's claim, the fact that the Rule does not apply to retail food markets is both rational and unremarkable.

that the distinction was based on economic, rather than health, considerations. Here, the application of the Rule to large Chain Restaurants offering substantially the same menu items at all outlets is based on health considerations. As the Board's Notice of Adoption of the Rule notes, nearly one-third of sodium consumed by Americans comes from restaurant food, and recent studies conducted in Philadelphia and New York City have shown, respectively, that the sodium content of meals sold in fast food restaurants increased more than 23% between 1997 and 2010, and that 20% of meals in such establishments contain more than 2300 mg of sodium. Moreover, to the extent that the Board considered the ability of the targeted Chain Restaurants to comply with the Rule and the Department's own ability to administer the Rule, we find that it did so within the acceptable bounds of an administrative agency's necessary authority to make cost-benefit analyses without crossing into legislative policy-making. An administrative rule that could not be complied with or administered would certainly fail as arbitrary and capricious.

In further support of its claim that the Department made prohibited value judgments, the NRA argues that the science behind the federal recommended daily sodium limit of 2300 mg, and the conclusion that high sodium intake can increase blood

pressure and risk of heart disease and stroke is controversial.[2] In support of its claim, plaintiff relies on two 2014 publications that have since been called into question by leading experts in the field because of methodological defects. In contrast, as defendants' expert points out,

> "the most rigorous observational study to date confirmed and documented the benefit of lowering sodium to levels below 2,300 mg per day . . . . In extended follow-up, . . . there was a significant decrease in risk of cardiovascular disease with decreasing sodium intake . . . . These data are consistent with the health benefits of reducing sodium intake to the 1500 to 2300 mg per day range in the majority of the population and are in agreement with current dietary guidelines."

The Centers for Disease Control, American Heart Association (AHA), World Health Organization (WHO), and Academy of Nutrition and Dietetics (AND) all encourage reduction of sodium intake for good health.[3] Other organizations recommend even lower daily limits, with the WHO recommending below 2000 mg per day and the

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[2]Plaintiff's commitment to this argument is undercut by the statement by its own representative at the public hearings on the Rule that "[o]ur members agree with the board that sodium reduction is important to the national discussion on health and wellness."

[3]Ironically, one of plaintiff's experts is a former President of AND, which urges reduction of sodium intake to below the recommended daily limit of 2300 mg.

AHA recommending no more than 1500 mg per day.[4] In light of the consensus concerning the science behind the Rule, we reject plaintiff's argument that the Rule does not advance the social benefit asserted.

The second *Boreali* factor is whether the agency "wrote on a clean slate, creating its own comprehensive set of rules without benefit of legislative guidance," rather than engaging in the "'interstitial' rule making that typifies administrative regulatory activity" (*Boreali*, 71 NY2d at 13). The legislature has given the Department broad authority to regulate restaurants "consistent with the public interest" in order to, among other things, control chronic diseases and exercise control over conditions affecting public health (NY City Charter, § 556[c][2] and § 558). Its broad authority to adopt rules to accomplish these goals is evident in its adoption of prior rules, without specific legislative guidance, requiring restaurants to take steps addressing public health, such as restricting the use of artificial trans fats (Health Code § 81.08), requiring that

[4]The AHA is one of 14 organizations submitting an amicus brief on this appeal. Other amici include the American Medical Association, the New York Academy of Medicine, and the Medical Society of the State of New York. All of the amici concur with the Dietary Guidelines for Americans of the Federal Departments of Agriculture and Health and Human Services, which continue to recommend that adults consume less than 2300 mg per day of sodium.

inspection grades be posted (Health Code § 81.51), and mandating that chain restaurants post the calorie contents of menu items (Health Code § 81.50). These rules have gone unchallenged in the courts of this state.[5] Here, in adopting the Rule, the Board "was not writing on a clean slate in the sense that it has always regulated" restaurants as necessary to promote public health (*Greater N.Y. Taxi Assn.*, 25 NY3d at 611).

The third *Boreali* factor is whether the challenged rule governs an area in which the legislature has repeatedly tried to reach agreement in the face of susbtantial public debate and vigorous lobbying by interested factions. Plaintiff has failed to show that the motion court erred in evaluating this factor. Specifically, plaintiff pointed to four bills. However, each was introduced in the New York State legislature by a single legislator; each was referred to a committee and has received no further consideration; and none of them addressed sodium warning labels in restaurants.[6]

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[5]The calorie content rule was unsuccessfully challenged in the federal courts (*New York State Rest. Assn. v New York City Bd. of Health*, 556 F3d 114 [2d Cir 2009]), which dismissed the petition on the City's summary judgment motion, finding that the rule did not violate the plaintiff's First Amendment rights and was not preempted by the National Labeling and Education Act.

[6]A 2011 bill, which would have required sodium content labeling and a warning on items containing over 800 mg of salt, would have applied only to packaged foods, not foods sold for

Plaintiff also argues that this factor weighs in its favor because the New York City Council considered, in 2011 and 2014, an amendment to the Administrative Code requiring restaurants offering "incentive items" for children to meet certain nutritional standards. However, on each occasion, the proposed legislation was sent to a committee, and no further action was taken, so there is no indication that it was the subject of vigorous debate. Moreover, this proposed legislation is not focused on sodium and does not involve warning labels. Furthermore, "[l]egislative inaction, because of its inherent ambiguity, affords the most dubious foundation for drawing positive inferences" (*NYC C.L.A.S.H.*, 27 NY3d at 184 [internal quotation marks omitted]).

Finally, the fourth *Boreali* factor, whether development of the challenged rule required expertise in the field of health, clearly weighs in defendants' favor, as discussed above.

Accordingly, we find that consideration of the *Boreali* factors indicates that defendants did not exceed their authority

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consumption on premises. A 2015 bill would have required chain restaurants to identify menu items containing more than 2300 mg of salt with a salt shaker icon, but would not have applied to New York City. The third would have banned the addition of salt to any restaurant food, and the fourth would have prohibited restaurants from selling foods containing trans fats and would require menus to include calorie, fat, and sodium content information.

in adopting Section 81.49 of the New York City Health Code.

The court also correctly found that the Rule, which compels commercial speech, does not violate the First Amendment (*see Zauderer v Office of Disciplinary Counsel*, 471 US 626 [1985]; *National Elec. Mfrs. Assn. v Sorrell*, 272 F3d 104, 114 [2d Cir 2001], *cert denied* 536 US 905 [2002]). To the extent the required warning indicates that consumption of sodium higher than the total daily recommended limit is high sodium intake that can increase medical risks, as discussed above, the weight of the scientific evidence in the record shows that it is factual, accurate and uncontroversial. There is no merit to plaintiff's argument that *Zauderer* applies only where the purpose of the requirement is the prevention of consumer deception, and not in cases like this where the requirement is for the purpose of improving consumer knowledge about potential health risks (*see New York State Rest. Assn. v New York City Bd. of Health*, 556 F3d at 133).

In addition, the court correctly concluded that the Rule has a rational basis, and is not unreasonable, arbitrary or capricious. "Administrative rules are not judicially reviewed pro forma in a vacuum, but are scrutinized for genuine reasonableness and rationality in the specific context .... The challenger must establish that a regulation is so lacking in

reason for its promulgation that it is essentially arbitrary" (*New York State Assn. of Counties v Axelrod*, 78 NY2d 158, 166 [1991] [internal quotation marks omitted]). Plaintiff argues that, because the Rule applies only to large fast food Chain Restaurants, it is arbitrary and capricious. However, as discussed above, the Board made the Rule applicable to these Chain Restaurants based on health considerations and for the purpose of making the Rule possible to comply with and administer. Accordingly, this aspect of the Rule has a rational basis.

Plaintiff also argues that the Rule fails to meet its goal because a customer could order items separately, each of which does not by itself exceed 2300 mg of salt, but when consumed together exceed the recommended daily salt limit. However, as plaintiff points out, federal law will soon require that these same Chain Restaurants make the sodium content of each menu item available. Accordingly, the same hypothetical customer can also determine the total sodium content of an a la carte order. Moreover, the fact that a regulation "attempt[s] to address part of a perceived concern ... provides no basis for invalidating the regulation[]" (*Matter of New York State Health Facilities Assn. v Axelrod*, 77 NY2d 340, 350 [1991]).

Finally, for similar reasons as outlined in *New York State*

Rest. Assn. (556 F3d at 123-131), the court properly found that the Rule is not preempted by federal law. The federal Nutrition Labeling and Education Act (NLEA) was enacted in 1990 "to clarify and to strengthen the Food and Drug Administration's legal authority to require nutrition labeling on foods, and to establish the circumstances under which claims may be made about nutrients in foods" (HR Rep No 101-538, at 7 [1990], *reprinted in* 1990 USCCAN 3336, 3337; *see New York State Rest. Assn.*, 556 F3d at 118). Among other things, the NLEA requires the nutritional information labeling found on most foods purchased in grocery stores (21 USC § 343[q]). Plaintiffs' claim that the NLEA preempts the Rule is wrong for two reasons. First, the NLEA's preemption clause (21 USC § 343-1[a]) "shall not be construed to apply to any requirement respecting a statement in the labeling of food that provides for a warning concerning the safety of the food or component of the food" (Pub L 101-535 § 6[c][2], 104 US Stat 2353, 2364 [1990] [21 USC § 343-1 note]; *see New York State Rest. Assn.*, 556 F3d at 123). Since the Rule at issue here constitutes a warning, it is expressly exempted from preemption. Second, in part because 21 USC § 343(q)(5)(A) exempts food served in restaurants from federal labeling requirements pertaining to salt and other nutrients, states and localities "are not preempted from establishing, or put differently, are permitted to

establish any requirement [for restaurants] for nutrition labeling of food that is *not identical* to the requirement of [21 USC §] 343(q)" (*New York State Rest. Assn.*, 556 F3d at 12 [internal quotation marks omitted]).

Accordingly, the order of the Supreme Court, New York County (Eileen A. Rakower, J.), entered February 26, 2016, deemed a judgment denying the petition, which challenged the Board's promulgation of the "Sodium Warning Rule," and dismissing the proceeding, should be affirmed, without costs.

All concur.

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

ENTERED: FEBRUARY 10, 2017

CLERK