SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

DECEMBER 12, 2017

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Sweeny, J.P., Moskowitz, Kahn, Gesmer, JJ.

4544 In re Stephanie Brown, Index 154728/13
Petitioner-Respondent,

-against-

Board of Education of the City School
District of the City of New York, et al.,
Respondents-Appellants.

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Zachary W. Carter, Corporation Counsel, New York (Kathy C. Park of counsel), for appellants.

Heslop & Kalba, LLP, Brooklyn (Garfield A. Heslop of counsel), for respondent.

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Order, Supreme Court, New York County (Milton A. Tingling, J.), entered January 5, 2015, which granted the petition brought pursuant to CPLR article 78 to, among other things, annul respondents' determination, dated January 9, 2013, reaffirming the June 25, 2012 unsatisfactory rating of petitioner's performance for the 2011-2012 school year and the discontinuance of petitioner's probationary service as an assistant principal at Community School 44, and ordered respondents to turn over to petitioner a complete and unredacted copy of the Chancellor's Committee report, unanimously reversed, on the law and the facts,

without costs, the petition denied in its entirety, and the proceeding dismissed.

Petitioner's claim for reinstatement of probationary service is time-barred, because her petition was not filed within four months of her last work day of September 4, 2012 (*see Kahn v New York City Dept. of Educ.*, 18 NY3d 457, 472 [2012]).

Supreme Court erroneously annulled the unsatisfactory rating (U-rating) for the 2011-2012 school year. We have consistently held that a U-rating must be upheld where there is evidence in the record that rationally supports that determination (*see Matter of Murnane v Dept. of Educ. of the City of N.Y.*, 82 AD3d 576 [1st Dept 2011]; *Matter of Brennan v City of New York*, 123 AD3d 607, 608 [1st Dept 2014]). Moreover, a U-rating will be upheld unless a petitioner can demonstrate that it was made in bad faith or in violation of lawful procedure or a substantial right (*see Matter of Richards v Board of Educ. of the City Sch. Dist. of the City of N.Y.*, 117 AD3d 605, 606 [1st Dept 2014]; *Matter of Cohn v Board of Educ. of the City Sch. Dist. of the City of N.Y.*, 102 AD3d 586, 587 [1st Dept 2013]).

A petitioner bears the burden of proving bad faith, and merely asserting it is insufficient to satisfy that burden (*Matter of Witherspooon v Horn*, 19 AD3d 250, 251 [1st Dept 2005]; *Pagan v Board of Educ. of City Sch. Dist. of the City of N.Y.*, 56

AD3d 330, 330-331 [1st Dept 2008]). Speculation or conclusory allegations of bad faith are simply not sufficient to meet that burden (*see Matter of Che Lin Tsao v Kelly*, 28 AD3d 320, 321 [1st Dept 2006]). "Evidence in the record supporting the conclusion that performance was unsatisfactory establishes that the discharge was made in good faith" (*Matter of Johnson v Katz*, 68 NY2d 649, 650 [1986]; *Matter of Richards*, 117 AD3d at 606).

Applying these principles to this case, it is evident that petitioner failed to meet her burden. Petitioner failed to attach the transcript of the hearing to her petition, and did not identify which, if any, of the documents that she submitted were offered as evidence at the hearing. Accordingly, we have no record on which we can evaluate her claims. Therefore, she did not meet her burden of proof and the U-rating should not have been set aside (*see Matter of Rieser v New York City Dept. of Educ.*, 133 AD3d 465, 466 [1st Dept 2015]; *Matter of Storman v New*

York City Dept. of Educ., 95 AD3d 776, 778 [1st Dept 2012], *appeal dismissed* 19 NY3d 1023 [2012]).

There is no basis for turning over the Chancellor's Committee report.

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

ENTERED: DECEMBER 12, 2017

CLERK

Richter, J.P., Kapnick, Webber, Oing, Singh, JJ.

5049 Cheryl Jacobus, Index 153252/16
Plaintiff-Appellant,

-against-

Donald J. Trump, et al.,
Defendants-Respondents.

Butterman & Kahn, LLP, New York (Jay R. Butterman of counsel), for appellant.

LaRocca Hornik Rosen Greenberg & Blaha LLP, New York (Patrick McPartland of counsel), for respondents.

Order, Supreme Court, New York County (Barbara Jaffe, J.), entered January 27, 2017, which granted defendants' motion to dismiss plaintiff's defamation action for failure to state a claim, unanimously affirmed, without costs.

The challenged statements made orally and by Twitter by defendants were nonactionable (*see Silsdorf v Levine*, 59 NY2d 8 [1983], *cert denied* 464 US 831 [1983]).

Whether alleged statements are susceptible of a defamatory meaning imputed to them is, in the first instance, a question of law for the courts to decide (*see Aronson v Wiersma*, 65 NY2d 592, 593 [1985]; *Silsdorf*, 52 NY2d at 13). The alleged defamatory statements are too vague, subjective, and lacking in precise meaning (i.e., unable to be proven true or false) to be actionable. The immediate context in which the statements were

made would signal to the reasonable reader or listener that they were opinion and not fact (*see generally Gross v New York Times Co.*, 82 NY2d 146 [1993]).

Plaintiff's defamation per se claim was correctly dismissed in the absence of actionable factual allegations that tended to disparage her in the way of her profession, trade or business (*see Herlihy v Metropolitan Museum of Art*, 214 AD2d 250, 261 [1st Dept 1995]).

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

ENTERED: DECEMBER 12, 2017

CLERK

Gische, J.P., Kapnick, Oing, Moulton, JJ.

5121 Yolanda Mercedes Polanco Del Marte, et al., Plaintiffs-Appellants, Index 303840/13

-against-

Leka Realty LLC, Defendant-Respondent.

_____

Arnold E. DiJoseph, P.C., New York (Arnold E. DiJoseph, III of counsel), for appellants.

Kerley, Walsh, Matera & Cinquemani, P.C., Seaford (Lauren B. Bristol of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Betty Owen Stinson, J.), entered July 6, 2016, dismissing the complaint, and bringing up for review an order, same court and Justice, entered June 21, 2016, which granted defendant's motion for summary judgment, unanimously reversed, on the law, without costs, the motion denied, and the complaint reinstated.

Plaintiff Yolanda Mercedes Polanco Del Marte alleges that she was injured in May 2013 after she fell as a result of a loose step on a staircase located between the second and third floors of a building owned by defendant.

A defendant moving for summary judgment in a case involving an alleged dangerous condition "has the initial burden of making a prima facie showing that it neither created nor had actual or

constructive notice of the unsafe condition" (*Rosario v Prana Nine Props., LLC*, 143 AD3d 409, 410 [1st Dept 2016]). Upon the defendant establishing prima facie entitlement to judgment as a matter of law, the burden shifts to the plaintiff to raise a triable issue of fact (*Kesselman v Lever House Rest.*, 29 AD3d 302, 303-304 [1st Dept 2006]).

Here, defendant made a prima facie showing that it did not cause or create the loose step, by submitting its property manager's and superintendent's deposition testimony that no repairs were made to the staircase since defendant's acquisition of the building in December 2009. Plaintiff's expert, however, raised a triable issue of fact on this issue.

In response to defendant's expert's opinion that "[a]ny motion in the step[] is imperceptible," plaintiff's expert, who inspected the area approximately one month after the accident, "observed that the tread moved and was unstable." Plaintiff's expert opined that the step had been repaired using a rubber adhesive applied to the tread of the step, that the repair was not conducted properly and was inadequate, and that the "condition had been present for a long period of time." Defendant's expert failed to provide any rebuttal to this opinion, nor did defendant's property manager or superintendent

address plaintiff's expert's claim after it was raised in opposition to defendant's motion for summary judgment. Accordingly, a triable issue of fact exists as to whether defendant caused or created a dangerous condition that proximately caused plaintiff's accident.

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

ENTERED: DECEMBER 12, 2017

CLERK

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

5138 In re Sierra Club, et al., Index 100524/15
Petitioners-Appellants,

-against-

Joseph Martens, etc., et al.,
Respondents-Respondents.

_____

Lippes & Lippes, Buffalo (Richard J. Lippes of counsel), for appellants.

Eric T. Schneiderman, Attorney General, New York (David S. Frankel of counsel), for State respondent.

Bryan Cave LLP, New York (Philip E. Karmel of counsel), for Consolidated Edison Company of New York Inc., respondent.

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Order and judgment (one paper), Supreme Court, New York County (Alice Schlesinger, J.), entered October 7, 2016, denying the petition, inter alia, to annul the water withdrawal permit issued November 21, 2014 by respondent Department of Environmental Conservation (DEC) to respondent Consolidated Edison Company of New York Inc. (Con Ed), and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

On November 21, 2014, DEC granted an initial water withdrawal permit pursuant to article 15, title 15 of the ECL authorizing Con Ed to withdraw water from the East River. That same day, DEC served the permit upon Con Ed, petitioner Sierra

Club, and other persons who had appeared in the DEC proceedings. On March 23, 2015, petitioners brought this article 78 proceeding seeking to annul the permit. In a decision entered October 7, 2016, the petition court granted Con Ed's motion to dismiss the proceeding, concluding that it was both time-barred and without merit.

The court correctly held that the petition was barred by the statute of limitations contained in ECL 15-0905. That section provides that an article 78 proceeding to review a decision made pursuant to article 15 of the ECL must be commenced within 60 days after service of the decision upon the applicant and others who appeared in the proceedings before DEC (ECL 15-0905[1], [2]). Because this proceeding was commenced on March 23, 2015, approximately four months after DEC made the requisite service and well beyond the 60-day limitations period, it is untimely (*see Matter of Spinnenweber v New York State Dept. of Envtl. Conservation*, 120 AD2d 172 [3d Dept 1986]; *Rochester Canoe Club v Jorling*, 150 Misc 2d 321 [Sup Ct, Monroe County 1991], *appeal dismissed* 179 AD2d 1040 [4th Dept 1992], *lv dismissed in part, denied in part* 79 NY2d 1037 [1992]).

We reject petitioners' contention that ECL 15-0903(1) renders the 60-day limitations period in ECL 15-0905(2)

inapplicable to this proceeding.[1] When read in its proper context, ECL 15-0903(1) merely clarifies which set of ECL procedures govern DEC's consideration of permits, and does not abrogate the 60-day limitations period for challenging a permit decision (*see Rochester Canoe Club*, 150 Misc 2d at 325 [ECL 15-0903(1) does not carve out an exception to the 60-day statute of limitations contained in ECL 15-0905(2)]).

The legislative history of both provisions confirms that ECL 15-0903(1) did not eviscerate the 60-day period in ECL 15-0905(2). The predecessor statute of ECL 15-0905, enacted in 1960, was "intended to make the 60-day limit uniform for proceedings under [predecessor to ECL article 15]" (*Matter of Spinnenweber*, 120 AD2d at 175 [reviewing legislative history of ECL 15-0905]; *see* Memorandum of Joint Legislative Committee on Revision of the Conservation Law, *reprinted in* 1960 McKinney's NY Session Laws 1848 [listing disparate prior limitations periods

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[1] ECL 15-0903(1), which falls under the heading "Hearing procedure," provides that the administrative procedures contained in title 9 are not applicable to certain "actions" (such as permit applications, permit renewals, and permit revocation proceedings) that involve, inter alia, article 15, title 15. In contrast, the 60-day limitations period in ECL 15-0905(2) applies to the commencement of a proceeding seeking judicial review of a "decision" by DEC on one of those "actions." Thus, by its plain language, ECL 15-0903(1) addresses the procedures governing the consideration of a permit, not the time frame for challenging a DEC permit "decision."

and explaining that the "[n]ew law makes 60 day time limit uniform"]). When ECL 15-0903(1) was added in 1979, it was part of a "'clean up' measure" that "include[d] no substantive changes to existing law" (Memorandum of State Department of Environmental Conservation, *reprinted in* 1979 McKinney's NY Session Laws 1687-1688; *see Rochester Canoe Club*, 150 Misc 2d at 325).

There is no merit to petitioners' argument that they lacked fair notice that they would be subject to the 60-day limitations period. Contrary to petitioners' view, we find no conflict between ECL 15-0903(1) and 15-0905(2). Further, *Matter of Spinnenweber* and *Rochester Canoe Club*, which were decided in 1986 and 1991 respectively, made clear that ECL 15-0905(2) was intended to make the 60-day limit uniform for proceedings like this one (*see also* Philip Weinberg, Practice Commentaries to ECL 15-0903, 17½ McKinneys Cons Laws of NY 225 [2006] ["[t]he courts have ruled that [ECL 15-0903] . . . refers only to actual hearing procedures before DEC, and not to the statute of limitations"). Thus, petitioners cannot show that they lacked fair notice that they would be subject to the 60-day period.

We have considered petitioners' remaining arguments on the statute of limitations issue and find them unavailing. Because this proceeding is time-barred, we need not reach the merits of the petition.

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

ENTERED: DECEMBER 12, 2017

CLERK

Tom, J.P., Renwick, Gische, Oing, Singh, JJ.

5173 The People of the State of New York, Ind. 1938/10
Respondent,

-against-

Jose Mercado,
Defendant-Appellant.

_____

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

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

_____

Judgment of resentence, Supreme Court, New York County (Thomas Farber, J.), rendered March 10, 2015, resentencing defendant to an aggregate term of 12 years, unanimously affirmed.

Following a remand (125 AD3d 409 [1st Dept 2015]) for resentencing pursuant to *People v Rudolph* (21 NY3d 497 [2013]), the court providently exercised its discretion in denying youthful offender treatment, in light of the extreme seriousness of defendant's multiple violent crimes.

We perceive no basis for reducing the sentence.

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

ENTERED: DECEMBER 12, 2017

CLERK

Tom, J.P., Renwick, Gische, Oing, Singh, JJ.

5175-
5176 In re Andru G., and Others,

Children Under the Age of
Eighteen Years, etc.,

Jasmine C.,
Respondent-Appellant,

The Administration for
Children's Services,
Petitioner-Respondent.

_____

Steven N. Feinman, White Plains, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Ellen Ravitch of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Susan Clement of counsel), attorney for the children.

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Order of disposition, Family Court, New York County (Emily M. Olshansky, J.), entered on or about October 20, 2016, to the extent it brings up for review a fact-finding order, same court and Judge, entered on or about January 21, 2016, finding, after a hearing, that respondent mother neglected the subject children, unanimously affirmed, without costs. Appeal from the fact-finding order unanimously dismissed, without costs, as subsumed in the appeal from the order of disposition.

The finding of neglect is supported by a preponderance of the evidence (*see* Family Ct Act §§ 1012[f][i][B]; 1046[b][i]).

The record shows that the children were subject to actual or imminent danger of injury or impairment to their emotional and mental condition as a result of their exposure to repeated incidents of domestic violence between the mother and other members of the family, including the father of one of the children (*see Matter of Serenity H. [Tasha S.]*, 132 AD3d 508 [1st Dept 2015]; *Matter of Angie G. [Jose D.G.]*, 111 AD3d 404, 405 [1st Dept 2013]). In each of the incidents, all three children were in the apartment and were in imminent danger of physical impairment, since they were in close proximity to violence directed against a family member, even absent evidence that they were aware of or emotionally impacted by the violence (*see Matter of Kelly A. [Ghyslaine G.]*, 95 AD3d 784, 784 [1st Dept 2012]). One incident that occurred during a custody exchange involved the mother and the child's father each pulling on the child. This "single incident" is sufficient for a finding of neglect (*see Matter of Tavene H. [William G.]*, 139 AD3d 633, 634 [1st Dept 2016]).

Family Court also properly found neglect based on the evidence that the mother failed to provide adequate shelter, since she took no steps to remedy the condition of the room she shared with the children, which was cluttered with boxes and plastic bags containing the children's laundry, which she said

she had not washed for one year (*Matter of China C. [Alexis C.]*, 116 AD3d 953 [1st Dept 2014], *lv dismissed* 23 NY3d 1047 [2014]). The mother also medically neglected one of the children by failing to obtain prompt and proper treatment for his dental abscess, while keeping him for an unauthorized four-day visit (*see Matter of Nivek A.S. [Juanita S.]*, 148 AD3d 459 [1st Dept 2017]).

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

ENTERED: DECEMBER 12, 2017

CLERK

Tom, J.P., Renwick, Gische, Oing, Singh, JJ.

5177 Avdyl Berisha, Index 21904/14E
Plaintiff-Appellant,

-against-

209-219 Sullivan Street L.L.C.,
et al.,
Defendants-Respondents.

_____

Morgan Levine Dolan, P.C., New York (Glenn P. Dolan of counsel), for appellant.

Baxter Smith & Shapiro, P.C., Hicksville (Dennis S. Heffernan of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Fernando Tapia, J.), entered July 20, 2016, which, in this Labor Law action, denied plaintiff's motion for partial summary judgment on the issue of liability, unanimously reversed, on the law, without costs, and the motion granted.

Plaintiff is entitled to summary judgment on the issue of defendants' section 240(1) liability where he was injured when the mobile scaffold upon which he was standing wobbled, causing him to fall to the ground. The record establishes that the scaffold had no railings to prevent the fall, there is no evidence that defendants provided an adequate safety device that plaintiff refused to use, and Labor Law § 240(1) imposes no obligation that he affirmatively request one (*see e.g. Vergara v*

SS 133 W. 21 LLC, 21 AD3d 279 [1st Dept 2005]).

In view of the foregoing, the issue of Labor Law § 241(6) liability is academic (*see Jerez v Tishman Constr. Corp. of N.Y.*, 118 AD3d 617 [1st Dept 2014]).

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

ENTERED: DECEMBER 12, 2017

CLERK

Tom, J.P., Renwick, Gische, Oing, Singh, JJ.

5178 David Fitzgerald, et al., Index 153776/14
Plaintiffs-Appellants,

-against-

Marriott International, Inc., et al.,
Defendants-Respondents.

_____

Sacks and Sacks, LLP, New York (Scott N. Singer of counsel), for appellants.

Barry, McTiernan & Moore LLC, New York (Laurel A. Wedinger of counsel), for respondents.

_____

Order, Supreme Court, New York County (Sherry Klein Heitler, J.), entered May 16, 2016, which, insofar as appealed from, granted defendants' motion for summary judgment dismissing the Labor Law § 241(6) claim, and denied plaintiffs' cross motion for partial summary judgment on the issue of liability on the claim, and to amend the bill of particulars, unanimously reversed, on the law, without costs, defendants' motion denied, and plaintiffs' cross motion granted.

Plaintiff David Fitzgerald injured his knee when, during the course of his employment as a steamfitter, he slipped and fell on a piece of mud-covered insulation while walking down a wooden ramp. At the time, he was working the night shift to monitor the heating fans and pipes, and to ensure that there were no problems

with the work that his company had performed earlier that day.

Plaintiff's testimony established that he was engaged in construction work for Labor Law purposes (*see Prats v Port Auth. of N.Y. & N.J.*, 100 NY2d 878, 881-882 [2003]; *Campisi v Epos Contr. Corp.*, 299 AD2d 4, 6 [1st Dept 2002]; *see also Griffin v New York City Tr. Auth.*, 16 AD3d 202 [1st Dept 2005]).

As the motion court determined, 12 NYCRR 23-1.7(d) does not apply, as plaintiff did not slip on a "slippery condition" or "foreign substance" within the meaning of that provision (*see D'Acunti v New York City School Constr. Auth.*, 300 AD2d 107 [1st Dept 2002]; *see also Nankervis v Long Is. Univ.*, 78 AD3d 799 [2d Dept 2010]; *Salinas v Barney Skanska Constr. Co.*, 2 AD3d 619, 622 [2d Dept 2003]). However, 12 NYCRR 23-1.7(e) is applicable, as the ramp constitutes a "passageway" under 23-1.7(e)(1) (*see Conklin v Triborough Bridge & Tunnel Auth.*, 49 AD3d 320 [1st Dept 2008]*; see also Caudill v Rochester Inst. of Tech.*, 125 AD3d 1392 [4th Dept 2015]), and a "working area" under section 23.1.7(e)(2) (*see Maza v University Ave. Dev. Corp.*, 14 AD3d 65 [1st Dept 2004]; *Canning v Barneys N.Y.*, 289 AD2d 32, 34-35 [1st Dept 2001]). The insulation constitutes debris under the regulation. The fact that plaintiff slipped, rather than tripped, on the piece of insulation does not render 12 NYCRR 23-1.7(e)

inapplicable (*see Serrano v Consolidated Edison Co. of N.Y. Inc.*, 146 AD3d 405 [1st Dept 2017], *lv dismissed* 29 NY3d 1118 [2017]; *Lois v Flintlock Constr. Servs.*, LLC, 137 AD3d 446, 447-448 [1st Dept 2016]).

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

ENTERED: DECEMBER 12, 2017

CLERK

Tom, J.P., Renwick, Gische, Oing, Singh, JJ.

5179 The People of the State of New York, Respondent, Ind. 921/13

-against-

Devindra Sewnarine, Defendant-Appellant.

_____

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

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

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Judgment, Supreme Court, New York County (Ruth Pickholz, J.), rendered December 5, 2013, convicting defendant, after a jury trial, of grand larceny in the third degree, welfare fraud in the third degree, and six counts of offering a false instrument for filing in the first degree, and sentencing him to an aggregate term of five years' probation, with $18,000 in restitution, unanimously affirmed.

Defendant's challenge to the court's purported restriction of counsel's voir dire of prospective jurors is unpreserved (*see People v Brown*, 28 NY3d 392, 409 [2016]; *People v Salley*, 25 AD3d 473, 475 [1st Dept 2006], *lv denied* 6 NY3d 838 [2006]), and we decline to review it in the interest of justice. As an alternative holding, we find that after the court's own thorough examination, the court afforded all counsel a fair opportunity to

question panelists about relevant matters (*see e.g. People v Jean*, 75 NY2d 744, 745 [1989]). Although the court asked the parties to keep their inquiries brief, the court did not impose any particular time limit on questioning, and did not improperly curtail any inquiries. Furthermore, defendant has not established any prejudice from any purported restrictions, particularly in light of the court's initial detailed inquiry. By failing to object, by making general objections, and by failing to seek further relief after objections were sustained, defendant failed to preserve any of his challenges to portions of the prosecutor's cross-examination of defendant and summation relating to an allegation that defendant committed mortgage fraud. We decline to review these claims in the interest of justice. As an alternative holding, we find that any error, including the lack of CPL 240.43 notice of intended impeachment, was harmless in light of the court's curative actions, where applicable, and the overwhelming evidence that defendant intentionally committed Medicaid fraud (*see People v Crimmins*, 36 NY2d 230 [1975]).

The court properly denied as untimely defendant's request for a missing witness charge as to the enrollers who helped complete the Medicaid applications at issue. Defendant made this request at the charge conference, after all of the evidence was

presented, even though defendant knew in advance of trial of the role in the case of these enrollers, and knew from the first day of trial that the People did not intend to call them (*see e.g. People v Diaz*, 150 AD3d 423 [1st Dept 2017], *lv denied* 29 NY3d 1125 [2017]). The court also correctly concluded that the enrollers, who worked for private health insurance companies and were not employed by the government, were not under the People's control for purposes of a missing witness charge (*see People v Broadhead*, 36 AD3d 423 [1st Dept 2007], *lv denied* 8 NY3d 919 [2007]; *People v Vargar*, 293 AD2d 359, 359 [1st Dept 2002], *lv denied* 98 NY2d 682 [2002]). In any event, any error in the denial of the instruction was harmless.

While answering the first jury note, the court also answered oral questions raised by the jury, in open court and without objection. Defense counsel had a full opportunity to suggest responses to the oral questions (*see People v O'Rama*, 78 NY2d 270, 277-278 [1991]). A second note, which is at issue on appeal, was presented to the court and merely memorialized the oral questions, as the court had requested. Although the second note was not addressed on the record, there was no mode of proceedings error exempt from preservation requirements (*see People v Mack*, 27 NY3d 534, 537 [2016]; *People v Alcide*, 21 NY3d 687, 692-693 [2013]), and we decline to review defendant's

unpreserved claim in the interest of justice. To the extent that the second note may have left open the possibility that the court's responses to the oral questions did not fully address the jury's concerns, counsel was present when the court advised the jury to put the questions in a note and counsel did not object or request any further measures be taken.

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

ENTERED: DECEMBER 12, 2017

CLERK

Tom, J.P., Gische, Oing, Singh, JJ.

5180 Deutsche Bank National Trust Company, etc., Plaintiff-Appellant, Index 382244/09

-against-

Handel S. Ferguson, Defendant-Respondent,

New York City Transit Adjudication Bureau, et al., Defendants.

_____

Blank Rome LLP, New York (Andrea M. Roberts of counsel), for appellant.

Vivia L. Joseph Law Group P.C., Cambria Heights (Garfield A. Heslop of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered September 23, 2015, which, upon defendant Ferguson's motion, vacated the judgment of foreclosure and sale and the notice of pendency filed October 13, 2009, canceled the auction sale, and dismissed the complaint without prejudice to renewal, unanimously affirmed, with costs.

Defendant established his entitlement to vacatur of the judgment of foreclosure and sale by showing that he was not properly served with the summons and complaint in this action (CPLR 308[2]) and that therefore the court lacked jurisdiction to render the judgment (CPLR 5015[a][4]). In opposition to

plaintiff's prima facie showing of proper service, defendant raised an issue of fact as to the veracity of the affidavit with respect to personal delivery (*see NYCTL 1998-1 Trust & Bank of N.Y. v Rabinowitz*, 7 AD3d 459 [1st Dept 2004]). While defendant's showing would otherwise require a traverse hearing (*id.*), it also demonstrated as a matter of law that the mailing component of CPLR 308(2) was not strictly complied with (*see Gray-Joseph v Shuhai Liu*, 90 AD3d 988, 989 [2d Dept 2011]). The affidavit of service says that the summons and complaint were mailed to defendant's "last known address," without identifying that address. The terms of the mortgage require that notices to defendant be sent to the address of the mortgaged property, unless defendant gives plaintiff notice of a different address. There is no evidence in the record that defendant ever gave plaintiff notice of a different address (*see Washington Mut. Bank v Murphy*, 127 AD3d 1167, 1175 [2d Dept 2015]).

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

ENTERED: DECEMBER 12, 2017

CLERK

Tom, J.P., Renwick, Gische, Oing, Singh, JJ.

5181 The People of the State of New York, Ind. 4793/12
Respondent,

-against-

Luis Bonilla,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Alexander Michaels 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 (Jill Konviser, J.), rendered October 16, 2013,

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: DECEMBER 12, 2017

CLERK

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

Tom, J.P., Renwick, Gische, Oing, Singh, JJ.

5182 C. Louise Hepworth, etc., Index 651730/14
Plaintiff-Respondent,

-against-

Douglas J. Hepworth, et al.,
Defendants-Appellants.

_____

Arnold & Porter Kaye Scholer, LLP, New York (Matthew M. Riordan of counsel), for appellants.

Loeb & Loeb LLP, New York (Paula K. Colbath of counsel), for respondent.

_____

Order and judgment (one paper), Supreme Court, New York County (Nancy M. Bannon, J.), entered September 1, 2016, which, to the extent appealed from as limited by the briefs, granted plaintiff's motion for partial summary judgment, denied defendants' cross motion for partial summary judgment, and declared that the amendments made in October 2013 to the Hepworth Family Residence Trust Agreement were invalid, unenforceable, and null and void ab initio, unanimously reversed, on the law, without costs, the motion denied, the cross motion granted, and it is declared that the amendments are valid and enforceable. The Clerk is directed to enter judgment accordingly.

The issue on this appeal is whether the independent trustee's amendment that gave defendant Douglas J. Hepworth (defendant) input, which he did not have before the amendment, in

removing and appointing an independent trustee is a right or power with respect to trust property (Trust Agreement, Article XI, ¶ 2 [Irrevocability and Amendment] [the independent trustee may amend the trust agreement but "shall" not bestow on plaintiff grantor or defendant "any additional rights or power with respect to the Trust Property"]). If it is, the amendment is invalid; if it is not, it is valid.

It is evident from examining the trust agreement as a whole (*see e.g. Matter of Fields,* 302 NY 262, 272 [1951]) that the trust – created by a then-married couple to benefit their children – was an estate-planning device. If the power to remove and appoint an independent trustee were a right or power with respect to trust property, plaintiff (the grantor) would have retained an impermissible power pursuant to the original, unamended trust agreement, and her gift to the trust would be deemed incomplete (*see e.g. Estate of Vak v Commissioner of Internal Revenue,* 973 F2d 1409, 1414 [8th Cir 1992]; *see* trust agreement, Article II, § C [Distributions to Beneficiaries] independent trustee has absolute discretion as to the amount and time of trust property distributions]). This would defeat the whole purpose of the trust agreement and create an absurd result, which we cannot sanction (*see e.g. Greenwich Capital Fin. Prods.,*

Inc. v Negrin, 74 AD3d 413, 415 [1st Dept 2010]). Thus, by the same token, giving defendant input into removing and appointing an independent tustee, the amendment does not give him "any *additional* rights or power with respect to the Trust Property" (emphasis added).

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

ENTERED: DECEMBER 12, 2017

CLERK

Tom, J.P., Renwick, Gische, Oing, Singh, JJ.

5183 The People of the State of New York, Respondent, Ind. 2524/12

-against-

Venard Lawhorn, Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (Juan M. Merchan, J.), rendered March 11, 2013, convicting defendant, after a jury trial, of grand larceny in the fourth degree and criminal possession of stolen property in the fourth degree, and sentencing him, as a second felony offender, to concurrent terms of two to four years, unanimously affirmed.

The court correctly declined to submit the lesser included offenses of petit larceny and criminal possession of stolen property in the fifth degree. Nothing in the record casts doubt on the People's extensive and uniform evidence establishing that the selling price of the jacket defendant stole exceeded $1000. Accordingly, there was no reasonable view of the evidence that defendant committed the lesser offenses, but not the greater (*see e.g. People v Nashal*, 130 AD3d 480, 482 [1st Dept 2015], *lv*

denied 26 NY3d 1010 [2015]). The speculative possibilities asserted by defendant under which the jacket might have had a value below the statutory threshold do not constitute an "identifiable, rational basis on which the jury could reject a portion of the prosecution's case which is indispensable to establishment of the higher crime and yet accept so much of the proof as would establish the lesser crime" (*People v Scarborough*, 49 NY2d 364, 369-370 [1980]).

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

ENTERED: DECEMBER 12, 2017

CLERK

Tom, J.P., Renwick, Gische, Oing, Singh, JJ.

5184 In re Michelle C.,
Petitioner-Respondent,

-against-

Jerome Alvin M.,
Respondent-Appellant.

_____

Steven N. Feinman, White Plains, for appellant.

Andrew J. Baer, New York, for respondent.

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Order, Family Court, New York County (Monica Shulman, J.), entered on or about January 3, 2017, which, to the extent appealed from as limited by the briefs, granted petitioner mother's motion for modification of a prior order of visitation and denied respondent father visitation with the parties' child at his correctional facility, unanimously affirmed, without costs.

Substantial evidence supports the determination that visitation at the father's correctional facility would be detrimental to the child's welfare and against the best interests of the child (*Matter of Ronald C. v Sherry B.*, 144 AD3d 545, 546 [1st Dept 2016], *lv dismissed* 29 NY3d 965 [2017]). Since the entry of the prior order of visitation, the father was convicted of attempted murder, assault, criminal possession of a weapon and criminal use of a firearm and was sentenced to a maximum of 30

years' imprisonment. The now four-year-old child was born with severe special needs, including hydrocephalus and pervasive special developmental delays. The child's medical condition causes him to suffer from seizures as well as substantive behavioral issues, including tantrums and self-injurious behavior. The child also has physical limitations, and wears braces on both legs to assist in his ability to walk.

Based on the father's extensive prison sentence, the child's severe special needs and the father's lack of awareness and understanding of the child's special needs and behavioral issues, the distance of six hours transport each way to the correctional facility, with the father's aunt with whom the child has no relationship, is not in the child's best interest (*see Matter of Robert SS. v Ashley TT.*, 143 AD3d 1193, 1194 [3d Dept 2016]; *Matter of Leonard v Pasternack-Walton*, 80 AD3d 1081, 1082 [3d Dept 2011]).

The court properly credited the testimony of the mother, pediatrician and social worker regarding the child's condition, including that any sensory change in the child's environment would cause him distress and trigger extreme behavioral issues and the inability to control his impulses, including tantrums and self-injurious behavior (*Matter of Teixeria v Teixeria*, 205 AD2d 545, 546 [2d Dept 1994]). Thus, the court correctly modified the

order of visitation to allow the father continued and regular contact with the child through letter writing, telephone communication and video communication, including requiring the mother to update the father as to the child's medical and educational progress and to assist the child in returning letters to the father on a monthly basis.

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

ENTERED: DECEMBER 12, 2017

CLERK

CORRECTED ORDER - JANUARY 17, 2018

Tom, J.P., Renwick, Gische, Oing, Singh, JJ.

5185 Barbara J. Fried, et al., Index 651461/11
Plaintiffs-Appellants,

-against-

Lehman Brothers Real Estate Associates III, L.P., et al.,
Defendants-Respondents,

John Doe 1 Through 50,
Defendants.

_____

Arthur Russell, New York, and Parker Law Firm, San Francisco, CA (Robert Ted Parker of the bar of the State of California, admitted pro hac vice, of counsel), for appellants.

Weil, Gotshal & Manges LLP, New York (Jonathan D. Polkes of counsel), for Lehman Brothers Real Estate Associates III, L.P., Lehman Brothers Private Equity Advisers, LLC, **and** Real Estate Private Equity, Inc., respondents.

Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York (Richard A. Rosen of counsel), for **Silverpeak Real Estate Partners, L.P., REPE CP ManageCo, LLC, Mark A. Walsh, Mark H. Newman, Brett Bossung, Rodolpho Amboss and Kevin Dinnie**, respondents.

Simpson Thacher & Bartlett LLP, New York (Joseph M. Mclaughlin of counsel), for Michael J. Odrich, Christopher M. O'Meara and Thomas Russo, respondents.

Allen & Overy LLP, New York (Todd S. Fishman of counsel), for Richard S. Fuld, Jr., respondent.

Fried Frank Harris Shriver & Jacobson LLP, New York (Israel David of counsel), for Joseph M. Gregory, respondent.

Proskauer Rose LLP, New York (Mark E. Davidson of counsel), for Erin Callan, respondent.

Cleary, Gottlieb, Steen & Hamilton, New York (Lewis J. Liman of counsel), for Ian Lowitt, respondent.

Judgment, Supreme Court, New York County (Saliann Scarpulla, J.), entered August 25, 2016, dismissing the amended complaint against defendants-respondents, unanimously affirmed, without costs.

The first and second causes of action, alleging fraudulent misrepresentation and gross negligence in misrepresentation, failed to satisfy the pleading requirements of CPLR 3016(b). The allegations of scienter here were not pleaded with the requisite particularity, but are conclusory, and scienter may not reasonably be inferred from the circumstantial evidence relied on by plaintiffs (*see Giant Group v Arthur Andersen LLP*, 2 AD3d 189, 190 [1st Dept 2003]). The related claims against individual defendants were also correctly dismissed.

The third, fourth, and fifth causes of action, which allege breaches of fiduciary duties, are duplicative of the breach of contract claim (*see Nemec v Shrader*, 991 A2d 1120, 1129 [Del 2010]). In addition, with respect to those claims, as well as the sixth cause of action, alleging a breach of fiduciary duty in connection with the waiver of a portion of the management fees, plaintiffs' conclusory allegations of bad faith are not adequate to overcome the exculpatory provision in the parties' contracts, which bar breach of fiduciary duty claims except in cases of fraud, bad faith, willful misconduct or gross negligence (*see*

Wood v Baum, 953 A2d 136, 141 [Del 2008]).

The court correctly dismissed the eighth, ninth and tenth causes of action, which allege that the contracts included unconscionable provisions, as the penalties contained in the contracts are permitted in limited partnership agreements under both Delaware and New York law (*see* 6 Del Code Ann § 17-502[c]; Partnership Law § 121-502[c]).

The breach of contract claim was deficiently pleaded. While plaintiffs alleged, in their breach of fiduciary duty claims and their claim for breach of the covenant of good faith and fair dealing, conduct implicating specific provisions of the relevant contracts, they never pleaded, in those claims or the breach of contract claim, the breach of any specific contractual provisions. The good faith and fair dealing claim is duplicative of the breach of contract claim.

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: DECEMBER 12, 2017

CLERK

Tom, J.P., Renwick, Gische, Oing, Singh, JJ.

5187 Linda Greenstein, et al., Index 805017/16
Plaintiffs-Appellants,

-against-

Sol S. Stolzenberg, D.M.D., P.C., etc., et al.,
Defendants,

Tatyana Berman, D.D.S.,
Defendant-Respondent.

_____

Lufty & Santora, Staten Island (Joseph J. Santora of counsel), for appellants.

Kutner Friedrich, LLP, New York (Michael D. Kutner of counsel), for respondent.

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Order, Supreme Court, New York County (Alice Schlesinger, J.), entered on or about December 28, 2016, which granted the motion of defendant Tatyana Berman, D.D.S. (Berman) to dismiss the complaint as against her as time-barred, unanimously affirmed, without costs.

Dismissal of the complaint as against Berman was proper since the alleged malpractice occurred in 2003 and 2007, and the action was not commenced until January 2016, which was well beyond the applicable statute of limitations (*see* CPLR 214-a). The record establishes that Berman performed root canal work on two separate occasions to address plaintiff Linda Greenstein's emergent pain issues. These root canal therapies constituted

isolated and discrete procedures, and as such, the continuous treatment doctrine does not apply to the treatment of these teeth to toll the statute of limitations (*see Marrone v Klein*, 33 AD3d 546 [1st Dept 2006]).

Plaintiffs' contention that the motion court should have allowed them to conduct further discovery under CPLR 3211(d) so that they could investigate the details of the patient's treatment plan is unavailing. The motion court permitted plaintiffs to depose Berman on the limited issue of continuous treatment, and plaintiffs were also in possession of the patient's complete dental records. Moreover, the patient, who failed to submit an affidavit in opposition to defendant's motion to dismiss, should have facts regarding any treatment plan available to her as the recipient of the allegedly negligent dental services.

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

ENTERED: DECEMBER 12, 2017

CLERK

Tom, J.P., Renwick, Gische, Oing, Singh, JJ.

5188 The People of the State of New York, Ind. 4408/13
Respondent,

-against-

Tishawn Holloway,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Sheila L. Bautista of counsel), for respondent.

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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 February 4, 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: DECEMBER 12, 2017

CLERK

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

Tom, J.P., Renwick, Gische, Oing, Singh, JJ.

5194 The People of the State of New York, Respondent,

-against-

Nelson Genao, Defendant-Appellant.

Ind. 1427/05

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

Cyrus R. Vance, Jr., District Attorney, New York (Sabrina Margret Bierer of counsel), for respondent.

Order, Supreme Court, New York County (Bonnie G. Wittner, J.), entered on or about May 6, 2014, which adjudicated defendant a level three sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court providently exercised its discretion when it declined to grant a downward departure (*see People v Gillotti*, 23 NY3d 841 [2014]). The various mitigating factors cited by defendant, such as his age and lack of a prior criminal record,

were adequately taken into account by the risk assessment instrument, or were outweighed by the seriousness of the underlying sex crimes committed against multiple victims, as young as nine years old, which continued for many years.

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

ENTERED: DECEMBER 12, 2017

CLERK

Tom, J.P., Renwick, Gische, Oing, Singh, JJ.

5195 The People of the State of New York, Ind. 3538/15
Respondent,

-against-

Moises Reyes,
Defendant-Appellant.

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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.

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Gregory Carro, J.), rendered May 11, 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: DECEMBER 12, 2017

CLERK

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

Tom, J.P., Renwick, Gische, Oing, Singh, JJ.

5196N In re The Travelers Indemnity Company of America,
Petitioner-Respondent,

-against-

Olga McGloin,
Respondent-Appellant.

Index 153905/15

Dubow, Smith & Marothy, New York (Steven J. Mines of counsel), for appellant.

Law Offices of Aloy O. Ibuzor, New York (Michael L. Rappaport of counsel), for respondent.

Order, Supreme Court, New York County (Joan B. Lobis, J.), entered September 22, 2016, which granted petitioner's motion to confirm the report by the Special Referee, and permanently stayed arbitration of respondent's underinsured motorist claim, unanimously affirmed, without costs.

Respondent was injured in an automobile accident while driving a vehicle owned and insured by her employers. Through counsel she notified petitioner, the insurer of the vehicle, of her intent to seek underinsured motorist benefits and she commenced an action against the driver of the other vehicle involved in the crash. She subsequently settled the action against the other driver for the limits of his insurance policy without seeking petitioner's consent. Petitioner disclaimed coverage on the ground of the settlement of the action without its consent, in violation of the Supplementary

Uninsured/Underinsured Motorists (SUM) endorsement of the policy, impaired its right to subrogation.

Respondent's assertion that she could not have been aware of provisions of the policy that were never provided to her is unavailing. The SUM endorsement is mandated by regulation (*see* 11 NYCRR 60-2.3; *see also New York Cent. Mut. Fire Ins. Co. v Danaher*, 290 AD2d 783 [3d Dept 2002]), and Rules of Professional Conduct (22 NYCRR 1200.0) rule 1.1 requires an attorney to possess the requisite legal knowledge and skill reasonably necessary to represent a client. Moreover, at the framed-issue hearing before the Referee on the issue of whether respondent should have had knowledge of such provisions, petitioner's technical specialist who handled the claim testified, inter alia, that on claims he has handled in the past, attorneys would call and seek consent before settling cases at the limits of an adverse driver's insurance policy.

However, respondent's counsel who handled her underinsurance claim and lawsuit against the adverse driver did not testify, despite being present at the hearing. Accordingly, the Referee did not err in drawing an adverse inference against respondent on

the factual issue of whether her attorney/agent had actual knowledge of the provisions of the SUM endorsement (*see generally People v Gonzalez*, 68 NY2d 424, 427 [1986]), or in determining that her attorney/agent should have and actually did have such knowledge.

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

ENTERED: DECEMBER 12, 2017

CLERK

Friedman, J.P., Moskowitz, Gische, Kahn, JJ.

4082-
4083 U.S. Bank National Association, etc.,
Plaintiff-Respondent,

-against-

GreenPoint Mortgage Funding, Inc.,
Defendant-Appellant.

- - - - -

Syncora Guarantee Inc., etc.,
Nonparty Respondent.

Index 600352/09

_____

Murphy & McGonigle, P.C., New York (James A. Murphy of counsel), for appellant.

Allegaert Berger & Vogel LLP, New York (Michael S. Vogel of counsel), for respondents.

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Orders, Supreme Court, New York County (Marcy S. Friedman, J.), entered January 28, 2016, modified, on the law, to deny U.S. Bank National Association's motion and to grant defendant's motion as to so much of the complaint as is based on closed-end seconds, and otherwise affirmed, without costs.

Opinion by Moskowitz, J. All concur.

Order filed.

Friedman, J.P., Renwick, Andrias, Moskowitz, Gesmer, JJ.

4429 In re Mental Hygiene Legal Services, Petitioner-Respondent, Index 251095/16

-against-

Anita Daniels, etc., Respondent-Appellant.

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Eric T. Schneiderman, Attorney General, New York (Andrew Rhys Davies of counsel), for appellant.

Marvin Bernstein, Mental Hygiene Legal Service, New York (Sadie Zea Ishee of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Ben R. Barbato, J.), entered December 16, 2016, affirmed, without costs.

All concur except Friedman, J.P. and Andrias, J. who dissent in an Opinion by Friedman, J.P.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David Friedman, J.P.
Dianne T. Renwick
Richard T. Andrias
Karla Moskowitz
Ellen Gesmer, JJ.

4429
Index 251095/16

_____x

In re Mental Hygiene Legal Service,
Petitioner-Respondent,

-against-

Anita Daniels, etc.,
Respondent-Appellant.

_____x

Respondent appeals from the order of the Supreme Court, Bronx County (Ben R. Barbato, J.), entered December 16, 2016, which denied its cross motion to dismiss the proceeding, and granted the petition to the extent of declaring that respondent's failure to provide petitioner with a complete copy of a patient's so-called medical chart in any proceeding pursuant to MHL 9.31(a) violates Mental Hygiene Law (MHL) 9.31(b) when read together with MHL 9.01, MHL 33.16(1), and 14 NYCRR 501.2(a), and ordering respondent, in any action brought pursuant to MHL 9.31(a), to provide petitioner with a complete copy of such medical chart prior to any MHL 9.31(b) hearing.

Eric T. Schneiderman, Attorney General, New York (Andrew Rhys Davies, Anisha S. Dasgupta and Bethany A. Davis Noll of counsel), for appellant.

Marvin Bernstein, Mental Hygiene Legal Service, New York (Sadie Zea Ishee and Maura Klugman of counsel), for respondent.

RENWICK, J.

This article 78 petition was commenced by the Mental Hygiene Legal Service (MHLS), "the oldest legal advocacy program for the institutionalized mentally disabled in the United States" (History of MHLS - New York State Unified Court System, https:www.nycourts.gov/courts/ad2/pdf/mhlsart10/MHLS_history.pdf [accessed June 28, 2017]). Originally named the Mental Health Information Service, the agency's name was changed to MHLS in l986 to more accurately reflect its duties and functions *(id.)*. Since its creation by statute in 1964, MHLS has served as the watchdog of the rights of the institutionalized mentally disabled in New York and has been recognized by the courts as essential to the state's statutorily "protective shield of checks and balances" governing the admission, transfer and retention of psychiatric patients (*see Fhagen v Miller*, 29 NY2d 348, 355 [1972], *cert denied*, 409 US 845 [1972] [internal quotation marks omitted]).

In this article 78 proceeding, MHLS seeks to compel respondent Anita Daniels, in her official capacity as Acting Director of Bronx Psychiatric Center (BPC), to comply with Mental Hygiene Law (MHL) 9.31(b).[1] MHLS contends that the clear

[1] For the purpose of clarity, respondent will be referred to as BPC.

language of the foregoing statute requires that BPC, in a special proceeding pursuant MHL 9.33 to retain a patient in a hospital for involuntary psychiatric care, must provide MHLS a copy of a patient's record, as defined by MHL 9.01, 14 NYCRR 501.2(a), and MHL 33.16(1). Respondent failed to provide a complete copy of the aforementioned record prior to each and every one of the retention hearings. Accordingly, MHLS avers that respondent has failed to perform a duty imposed by law. BPC opposes this petition and cross-moves for its dismissal. Specifically, BPC contends that because MHLS has not suffered injury by the alleged conduct, MHLS lacks standing to bring this proceeding and dismissal therefore is warranted pursuant to CPLR 3211(a)(3). Alternatively, on the merits, BPC contends that the petition must be denied because MHL 9.31(b) does not require the broad disclosure alleged by MHLS.

MHL 9.27 authorizes a hospital to admit a patient involuntarily if three physicians, including a psychiatrist, confirm that the patient is "mentally ill and in need of involuntary care and treatment" (MHL 9.27[a]; *see* MHL 9.27[e]). A person is "in need of involuntary care and treatment" if the patient "has a mental illness for which care and treatment . . . in a hospital is essential to such person's welfare and whose judgment is so impaired" that the person "is unable to understand

the need for such care and treatment" (MHL 9.01). A "mental illness" is defined as "an affliction with a mental disease or mental condition which is manifested by a disorder or disturbance in behavior, feeling, thinking, or judgment to such an extent that the person afflicted requires care, treatment and rehabilitation" (MHL 1.03[20]).

In order to retain a patient involuntarily for more than 60 days, the hospital must obtain a court order so directing, although the patient may remain hospitalized while the application for such an order is pending (MHL 9.33[a]). The hospital must show "that the patient is mentally ill and in need of continued, supervised care and treatment, and that the patient poses a substantial threat of physical harm to himself and/or others" (*Matter of Anonymous v Carmichael*, 284 AD2d 182, 184 [1st Dept 2001] [internal quotation marks omitted]). On the other hand, MHLS has a duty "[t]o provide legal services and assistance to patients or residents and their families related to the admission, retention, and care and treatment of such persons" (MHL 47.03[c]; *see* MHL 47.01[a]). MHLS further has a duty "[t]o initiate and take any legal action deemed necessary to safeguard the right of any patient or resident to protection from abuse or mistreatment" (MHL 47.03[e]).

MHLS brought this article 78 proceeding in August 2016,

seeking a writ of mandamus declaring that BPC had failed to perform its duty pursuant to MHL 9.31(b) and ordering BPC to comply therewith. The petition alleges that BPC's "pattern and practice" in MHL 9.31 retention hearings is "to provide MHLS and the court with . . . inter alia, the admission, transfer or retention application papers and orders, but not the patient's complete clinical record, as defined in MHL 33.03, 33.13, and 33.16," which is "colloquially referred to as the 'medical chart'." An average medical chart consists of one or two binders containing hundreds of pages of documents, and is continually updated with any new documents related to the patient's treatment. Instead, according to the petition, "BPC's practice is to offer the original medical chart into evidence as an exhibit at each . . . retention hearing," without offering any copies to MHLS, and returning the original chart to the hospital ward after the hearing pursuant to MHL 33.13.

Beginning in early 2016, MHLS "began to notice" that the documents in the medical charts introduced by BPC at retention hearings "had been added or removed just prior to the hearing, thwarting [MHLS's] ability to determine with any certainty what the chart contained." The petition further explained that no copies of those exhibits were provided to MHLS or to the court. Accordingly, in March 2016, an MHLS attorney advised BPC's

counsel by email that MHL 9.31 requires BPC "to provide [MHLS] with a copy of the full record of the patient prior to any court proceeding," and MHLS "began requesting copies of patients' medical charts in individual cases."

In an email response on April 12, 2016, BPC's Director of Medical and Legal Affairs, Dr. Makeda Jones-Jacques, simply stated that "there is no problem with MHLS making copies of whatever you need," tacitly denying MHLS's claim that BPC is required to provide a current copy of the chart to MHLS at every retention hearing.

BPC cross-moved to dismiss the proceeding on the grounds that petitioner lacks standing, and that the writ of mandamus does not lie because MHLS does not have a clear legal right to the relief sought. BPC emphasized that MHLS always has full access to medical charts, 24 hours a day, seven days a week, pursuant to MHL 47.03(d).

Supreme Court, by a decision and order dated December 16, 2016, denied BPC's motion to dismiss and granted MHLS's petition for relief. Initially, on the threshold issue of standing, Supreme Court agreed with BPC that MHLS lacked "individual standing." Supreme Court, however, found that MHLS did possess "organizational standing" to maintain the action based on MHLS's statutory mandate. Specifically, the court noted that MHL 9.31

(b) and its disclosure mandate is patently intended to protect the rights of patients in proceedings pursuant to MHL 9.31(a) by ensuring that they are provided with the very records which generally form the basis of any application under MHL 9.31(a). This petition, the court noted "of course, is an extension of that duty." The court further concluded that "the patients who [MHLS] represents – many of who are alleged to be afflicted by psychiatric injuries – have not and will not initiate a proceeding such as this one to compel [BPC] to comply with MHL 9.31(b)."

On the merits of the petition, Supreme Court held that "in failing to provide [MHLS] with a complete copy of a patient's medical chart in any proceeding pursuant to MHL 9.31(a), [BPC] is violating the clear language and legislative intent of MHL 9.31(b), which . . . requires that [BPC] provide copies of the entire chart not just portions thereof prior to the hearing." The court further held that "the petition establishes that the duty imposed by MHL § 9.31(b) is compulsory rather than discretionary and mandates the action – disclosure – sought by [MHLS]." The court concluded that it was "clear that [BFC] has and continues to refuse to abide by the clear unequivocal mandate of the foregoing statute." Supreme Court accordingly ordered that BPC provide MHLS with a complete copy of each respective

patient's medical chart prior to any MHL 9.31 retention hearing. BPC appealed and, as an agency of the State, invoked its right to an automatic stay of the underlying decision pending the outcome of this appeal.

We must first address the threshold question of whether MHLS has standing to maintain this action. Under the two-part test for determining standing, a plaintiff or petitioner must first show "injury in fact," meaning that the plaintiff or petitioner will actually be harmed (in a way distinct from the harm to the general public) by the challenged administrative action; next, a plaintiff or petitioner must show that the asserted injury arguably falls within the "zone of interests" or concerns sought to be promoted or protected by the statutory provision (*see New York State Assn. of Nurse Anesthetists v Novello*, 2 NY3d 207, 211 [2004]). An organizational plaintiff or petitioner must show a harmful effect on at least one of its members such that the member would have standing to sue, that the interests it asserts are germane to its organizational purposes to satisfy the court that it is an appropriate representative of those interests, and that the case would not require the participation of individual members (*id.*; *Rudder v Pataki*, 93 NY2d 273 [1999]).

This Court has found organizational standing under exceptional circumstances involving organizations that were

dedicated to protecting a class of individuals who suffered injuries which certain statutes were intended to guard against, and who could not otherwise act in their own interests. For example, in *Grant v Cuomo* (130 AD2d 154 [1st Dept 1987], *affd* 73 NY2d 820 [1988]), this Court held that organizations concerned with the care and protection of children possess standing to litigate the claim that government social services agencies violated their statutory obligations to provide children protective and preventive services by failing to respond to allegations of child abuse within a 24-hour period, notwithstanding the fact that the organizations only asserted, in general terms, an injury based on the added burden to their resources. This Court found that denying standing would be to exempt from judicial review the government's failure to comply with their statutory obligations. This Court further noted the societal concern with the protection of children, the historic relationship of these organizations to the goals sought by the relevant statutes, the fact that the abused children are not able to seek a judicial remedy, and that the parents or caretakers, the objects of the claims of abuse or maltreatment, would be unlikely to secure a remedy (130 AD2d at 159).

Similarly, in *Mixon v Grinker (*157 AD2d 423 [1st Dept 1990]), this Court found that the Coalition for the Homeless had

standing to sue the City on its own behalf, as well as on behalf of the individuals it represented who were unable to seek a judicial remedy on their own, for its failure to provide medically appropriate housing to individuals with HIV. This Court found that the organization had alleged a specific burden on its resources resulting from the provision of non congregate housing and medical assistance to HIV-infected homeless people caused by the City's failure to provide appropriate housing. This Court noted that the majority of desperately ill homeless individuals cannot, owing to illness, poverty, myriad AIDS-related problems and unfamiliarity with their legal rights and the legal process, seek relief on their own behalf (157 AD2d at 427; *see also Community Serv. Socy. v Cuomo*, 167 AD2d 168, 170 [1st Dept 1990] [standing found for organizations whose members the applicable statute was created to help or who are necessary to insure its effective functioning, and where denial of standing could possibly leave unprotected that part of society most in need of the representation and protection the organizations are able to provide]).

We find that this case involves, as in *Grant v Cuomo* and *Mixon v Grinker*, exceptional circumstances that warrant a finding of standing. To begin, the injury that MHLS asserts falls within the interests or concerns sought to be provided or protected by

the statutory provision that it invokes. Indeed, BFC does not deny that MHL 9.31(a), which MHLS claims entitled its clients to copies of their entire medical records prior to retention hearings, is intended to protect the rights of the patients. Concomitantly, MHLS exists to provide legal assistance to patients of psychiatric centers (MHL 47.01[a]) and has a duty to "initiate and take any legal action deemed necessary to safeguard the right of any patient or resident to protection from abuse or mistreatment" (MHL 47.03[e]). Since BPC's refusal is pervasive and affects each and every one of MHLS's clients and their respective retention hearings, we find that MHLS has alleged a specific and genuine burden on its resources. Under the circumstances, we reject BPC's contention that the patient's rights can be effectively protected in the context of individual retention hearings and post-judgment remedies, such as appeals (*cf. New York County Lawyers' Assn. v State of New York*, 294 AD2d 69 [1st Dept 2002] [clients are not able to protect their own rights to receive effective assistance from attorneys overburdened with excessive caseloads]).

Having found standing, we turn to MHLS's claim that BPC has violated its statutory obligation. We find that MHLS has demonstrated a clear legal right to mandamus relief (*Matter of Brusco v Braun*, 84 NY2d 674, 679 [1994]). MHL 9.31(b) requires

that, upon receipt of a patient's request for a retention hearing under MHL 9.31(a), it shall be the duty of a director of a facility to give a copy of the record of the patient to MHLS. Under MHL 9.01, a record of a patient "shall consist of admission, transfer or retention papers and orders, and accompanying data required by this article and by the regulations of the commissioner." In turn, the regulations of the Office of Mental Hygiene provide, in relevant part, that "case record, clinical record, medical record, or *patient record* means clinical record as such term is defined in section 33.16 of the Mental Hygiene Law, whether created or maintained in writing or electronically" (14 NYCRR 501.2 [emphasis added]). The term clinical record is defined under section 33.16 of the Mental Hygiene Law as "*any* information concerning or relating to the examination or treatment of an identifiable patient or client maintained or possessed by a facility which has treated or is treating such patient or client" (MHL 33.16[a][1] [emphasis added]). Accordingly, we agree with Supreme Court that when read together, these statutory duty and regulatory provisions impose upon BPC a compulsory duty to provide MHLS with a copy of its clients' complete medical charts before their respective retention hearings under MHL 9.31 and 9.33 are held.

In so holding, this Court is mindful, contrary to the

dissent's suggestions, of BPC's justifiable concerns of diverting from its limited resources to provide MHLS with copies of its clients' complete medical charts before any of its clients' retention hearings under MHL 9.31 and 9.33. Nevertheless, we cannot turn a blind eye to the clear legislative mandate that each and every one of the individuals, whom MHLS represents and whom are subject to involuntary retention, receive the representation that the legislature has mandated they receive. Ultimately, as a matter of due process,[2] the detriment that these

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[2] In support of its view that no "due process" concerns are implicated in this case, the dissent cites to a footnote in an affirmation by an assistant attorney general alleging, without any basis other than his 10-year memory, that "[o]n a few occasions in 2007 and 2008, the MHLS office at BPC made the same demand [made in this proceeding], and [Supreme Court] denied MHLS's requests."

Unpublished, unsubstantiated judicial determinations by lower courts, as alleged by the assistant attorney general and relied upon by the dissent, are inappropriate subjects of stare decisis and have no precedential value before this Court. More importantly, the attorney for MHLS clearly assailed the assistant attorney general's allegations as events that never took place. Specifically, in direct response to the allegations, the attorney for MHLS stated:

> "I have been associated with MHLS for 30 years and I don't recall this issue coming up. I don't recall any court ever determining this issue so, if he has something specific or a transcript, I would love to see it because I have no recollection of that happening. And, in fact, I was the principal attorney in charge of the Bronx office when that happened. So I have no idea what he is referring to there. I also think if you read the footnote [where the allegations were made] it seems to be a contradiction because although

patients may experience in not having copies of their charts available at their hearings is of a plainly higher and more compelling nature than the detriment to the hospital in having to undertake additional photocopying responsibilities (*see Addington v Texas*, 441 US 418, 427 [1979] [in a psychiatric civil commitment hearing, "(t)he individual should not be asked to share equally with society the risk of error when the possible injury to the individual is significantly greater than any possible harm to the state"]).

The dissent's position is not persuasive. The dissent argues that neither 14 NYCRR 501.2(a) nor the MHL should be used to derive the definition of "accompanying data" within the meaning of MHL 9.01. According to the dissent, while MHL 9.01 does define a client's "records" to mean his or her "accompanying

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> he says that MHLS made this same demand and this Court denied the demand, he said MHLS never demanded copies of patient's charts in advance of hearings and no Court told us that we have to provide such copies ...."

That the assistant claimed to recall a specific occasion added nothing. Here, no credence can or should be given to the assistant's failed attempt to convince the court below to follow judicial determinations that allegedly took place a decade ago and of which neither opposing counsel nor the court below was aware or acknowledged taking place. Without any transcript, case name, index number, or date, the attorney claimed to recall two instances occurring 10 years before the instant proceeding. If a judicial determination is to have any value one cannot simply claim it to be so without citation.

data," it defers to the Office of Mental Health (OMH) regulations to provide, if any, the meaning of "accompanying data" within the context of retention hearings. Carried to its logical conclusion, the dissent would have us interpret the statute to give the Department of Hygiene the absolute discretion to obviate the statute's requirement to provide a patient with "accompanying data" at a retention hearing. The dissent asserts that this interpretation should be reached because OMH fails to promulgate any regulation that defines "accompanying data" within the context of retention hearings.

This approach, however, is inconsistent with the purpose of Mental Health Law 33.16, which requires BPC to provide an indigent patient with his or her medical records upon request. MHL section 33.16 governs access to, and disclosure of, clinical records held by mental health facilities and is very similar to Public Health Law 18, the general statute, which governs access to other patient information. Specifically, as pertinent here, MHL 33.16 not only defines the term "clinical record," but it also requires a mental health facility to provide a patient with the opportunity, when he or she desires, to inspect his or her clinical records. Mental health facilities also have a general obligation to furnish copies of any clinical record that a patient is authorized to inspect, "within a reasonable time" of a

patient's request (MHL 33.16[b][5]). While a facility may place reasonable limitations on the time, place, and frequency of any inspection of clinical records and may not charge more than 75¢ per page for copying, a facility may not deny a patient access to copies solely because of the patient's inability to pay (MHL 33.16[b][6]). Finally, since the right to access and to copies are subject to the same limitations (*see* MHL 33.16[c] [not applicable here]), the Second Department has held that where a medical health facility finds no reason to deny a patient access to his/her clinical record, the denial of the patient's request for copies of those same records would be arbitrary and capricious (*Matter of Billups v Rizzo*, 228 AD2d 587, 588 [2d Dept 1996]).

The dissent finds nothing significant about the fact that MHL 33.16 requires respondent to furnish an indigent patient with a copy of his or her records within a reasonable time of a patient's request. Instead, the dissent takes the narrow view that this appeal presents the "humdrum issue" of MHLS's rights rather than the patient's rights, and that "petitioner here is not an indigent patient seeking a copy of his or her chart, but MHLS, a state agency with its own budget and employees." What the dissent ignores is that MHLS's duties and the patient's rights are inextricably interwoven. Indeed, the dissent cannot -

- and does not – argue that MHLS's actions here are not made pursuant to and consistent with its duties prescribed by MHL to initiate and take any legal action deemed necessary to safeguard the rights of patients who are the subject of involuntary retention. These patients with mental disabilities are not only the most vulnerable members of our society, but they too are entitled to constitutional and statutory protections.

In light of the parameters of MHL 33.16, to accept the dissent's position – that OMH has total discretion to obviate the need to provide a patient with the "accompanying data" required to be made available at the retention hearing - is to conclude the incongruous: that while indigent patients who are treated by mental health facilities generally have the right to access and to copies of their clinical records, they surrender such rights when the mental health facility seeks to retain the patient for involuntary psychiatric care. To do so would be to ignore the clear mandates of MHL 33.16. The courts are not free to ignore a clear mandate of the legislature.

The dissent's position that BPC will be unduly burdened and its resources wasted by compliance with MHL by providing a copy of a patient's medical records prior to a retention hearing is based on the mere opinion of an assistant attorney general with 10 years of experience in representing BPC in these matters. Of

equally, and arguably greater, import is the position of the MHLS attorney with 30 years of experience in these matters. The MHLS attorney explained to the court below that MHLS's requests are not "hollow" demands, but intended to help assure that the medical testimony adduced against its clients at the retention hearings is accurate, which can only be accomplished by the review of the medical record prior to the proceeding. The dissent's argument that such duties could easily be accomplished by MHLS lawyer's ability to personally inspect the medical records at the health facility misses the reality of the situation. With an unlimited case load and a limited staff of lawyers, MHLS can ill-afford to spend the extra time and effort required to review and copy records at mental health facilities. Nor does MHLS have the required support staff to help accomplish that task, as the experienced MHLS attorney explained to the court below.

Moreover, contrary to the dissent's conclusion, MHLS's endeavor – to ensure that medical testimony adduced against its client at the retention hearing is accurate – is not rendered wasteful by the fact many of the retention proceedings do not reach the hearing stage. Indeed, as the dissent is fully aware, MHLS's legal duties and responsibilities are triggered immediately upon MHLS receiving notice of BPC's intention to

involuntarily retain its clients, and MHLS cannot not safely predict the eventual outcome of each proceeding at its inception. Significantly, the dissent also ignores the representation made to the court below by the experienced MHLS attorney that MHLS has made similar demands to other mental health facilities, like Bronx Lebanon Hospital and North Central Bronx Hospital, which have begun to comply with MHLS's demand that a copy of a patient's medical record be provided to MHLS prior to a retention hearing. Of course, this undermines the dissent's central conclusion that compliance with the request in each retention proceeding would be unduly "burdensome, wasteful and virtually unworkable" to BPC.

Finally, we reject the dissent's conclusion, that, because MHLS has "around-the-clock access to patient records, the copying is not required for its attorneys to review the charts before the hearings" and therefore MHLS' clients' due process rights are not implicated. It is abundantly clear that the medical charts at issue here are a fluid set of documents that the medical staff of the pertinent medical facility are constantly updating during the continuing constant treatment and care of the patient. Thus, MHLS attorneys' right to access the charts, "at any given time," would not assure the attorney that he or she was looking at the very same documents BPC relies on at the retention hearing.

Under the circumstances, this is not a funding issue, and MHLS's "round-the-clock access to patient records" is not the panacea that the dissent describes.

Accordingly, the order of the Supreme Court, Bronx County (Ben R. Barbato, J.), entered December 16, 2016, which denied BPC's cross motion to dismiss the proceeding, and granted the petition to the extent of declaring that BPC's failure to provide MHLS with a complete copy of a patient's so-called medical chart in any proceeding pursuant to MHL 9.31(a) violates MHL 9.31(b) when read together with MHL 9.01, MHL 33.16(1), and 14 NYCRR 501.2(a), and ordering BPC, in any action brought pursuant to MHL 9.31(a), to provide MHLS with a complete copy of such medical chart prior to any MHL 9.31(b) hearing, should be affirmed, without costs.

All concur except Friedman, J.P. and Andrias, J. who dissent in an Opinion by Friedman, J.P.

FRIEDMAN, J.P. (dissenting)

Mental Hygiene Law § 9.31(b) provides, in pertinent part, that, in advance of a hearing to determine whether a psychiatric hospital may retain an involuntarily admitted patient, "[a] copy of . . . [the] notice [of the hearing] and *record* shall also be given [by the hospital] to the mental hygiene legal service" (emphasis added).[1] At issue in this article 78 proceeding, brought by petitioner Mental Hygiene Legal Service (MHLS), the agency charged with representing patients in retention hearings, is whether this provision requires respondent, the acting director of Bronx Psychiatric Center (BPC), in advance of a retention hearing, to provide to MHLS, at BPC's expense, a physical copy of a patient's entire medical chart.[2] Because MHLS has not, in my view, carried its burden, as a party seeking relief in the nature of mandamus, to "establish[] a clear legal right" (*Matter of Council of City of N.Y. v Bloomberg*, 6 NY3d 380, 388 [2006] [internal quotation marks omitted]) to be provided with complete copies of patient charts at BPC's expense, I would reverse the order under review, deny the petition and

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[1] The procedures for retention hearings are more fully described in the majority opinion.

[2] I note that this issue arises because BPC still maintains its patients' medical charts on paper.

dismiss the proceeding. Accordingly, I respectfully dissent from the majority's contrary disposition of this appeal.[3]

Initially — and contrary to the manner in which the majority portrays the case — it is important to note that this dispute is *not* about MHLS's *access* to the complete medical charts of the patients it represents, or its ability to make copies for itself of such charts. Pursuant to Mental Health Law § 47.03(d), MHLS is entitled to access to patient charts "at any and all times," and MHLS — which has offices at BPC — admits that it has always had such around-the-clock access to patient charts, as well as the ability to make copies, *for itself*, of any and all portions of a patient's chart. Thus, the majority's concern that not requiring BPC to copy patient charts for MHLS might somehow deprive patients of "due process," or of "the representation that the legislature has mandated they receive," is unfounded.[4]

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[3] Because I conclude that the petition is without merit even if MHLS has standing to bring this proceeding, I express no opinion on the question of whether MHLS has such standing.

[4] As to whether this matter raises any due process issue, it bears mention that the record contains an affirmation by an assistant attorney general stating: "On a few occasions in 2007 and 2008, the MHLS office at BPC made the same demand [made in this proceeding], and [Supreme Court] denied MHLS's requests." While, as the majority points out, an MHLS attorney stated at a subsequent oral argument that he did not recall any such occasion, the assistant attorney general, in response, represented to Supreme Court that he specifically recalled two instances in which MHLS demanded a complete copy of the chart before a hearing went forward and, in each instance, the court

Further, contrary to the majority's suggestion that a patient might "not hav[e] copies of their charts available at their hearings," it is undisputed that BPC brings the entire original chart to each hearing and enters it into evidence.

Unable to find any support for its conclusion that (in spite of MHLS's own access and ability to make copies) BPC must use its own limited resources to provide MHLS with a complete physical copy of a patient's chart, the majority mistakenly relies on the definition of "clinical record" in Mental Hygiene Law § 33.16. This statute, however, addresses only the access of patients themselves (not MHLS) to their charts, and permits BPC to charge patients able to pay up to 75¢ per page for paper copies (*see* § 33.16[b][6]).[5] As discussed below, the definition of the term

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rejected the demand. That the MHLS attorney stated that he did not "recall this issue coming up" does not contradict the assistant attorney general's statement that he did recall instances in which the issue was raised — a recollection that, on my reading of the record, was substantiated — and certainly does not undermine the assistant attorney general's credibility. Moreover, while I agree that such unreported rulings are not relevant to the statutory and regulatory issues presented, they are appropriately mentioned in connection with the due process issue that the majority claims to arise here, because presumably such an issue would have been evident to Supreme Court on those prior instances.

[5] Unlike the majority, MHLS itself does not contend that section 33.16 is the source of an obligation of BPC to provide MHLS with complete copies of patient charts. If that were MHLS's contention, it would necessarily have to aver its readiness to pay, out of its own budget, the fee BPC charges for paper copies under that statute. Nowhere in the record or in its appellate

"record" for purposes of article 9 of the Mental Hygiene Law (entitled "Hospitalization of the Mentally Ill," in which section 9.31 appears) does not refer to the definition of "clinical record" in section 33.16 (part of article 33). Neither has the commissioner of the Office of Mental Health (OMH) issued any regulation applying the broad definition of the term "clinical record" in section 33.16 to the term "record" as used in article 9 of the Mental Hygiene Law.

In short, as demonstrated below, the majority simply cannot point to any provision of either the Mental Hygiene Law or of the regulations issued thereunder that provides authority for construing section 9.31(b) to require BPC to provide MHLS, at BPC's expense, with a physical paper copy of a patient's entire medical chart in advance of a retention hearing. According to the record, the typical chart comprises one or two binders containing hundreds of pages — often double-sided — of progress notes, medication notes, doctor's notes, and the like. Given that these charts are often lengthy and generally grow longer on a daily basis, and in view of the fact that MHLS already has around-the-clock access to these charts and the ability to make for itself copies of any portions it needs, we should defer to the more limited interpretation given by the commissioner of OMH,

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brief has MHLS expressed such readiness.

in the exercise of administrative discretion, to the term "record" as used in article 9 of the Mental Hygiene Law.

As previously noted, subsection (b) of Mental Health Law § 9.31 ("Involuntary admission on medical certification; patient's right to a hearing") provides, in pertinent part, that "[a] copy of . . . [the patient's] *record* shall . . . be given [MHLS]" by a mental health facility in advance of a retention hearing (emphasis added). Mental Hygiene Law § 9.01 ("Definitions") provides, in pertinent part: "As used in this article: . . . 'record' of a patient shall consist of admission, transfer or retention papers and orders, and *accompanying data required by this article and by the regulations of the commissioner*" (emphasis added).

As just noted, the relevant operative language of section 9.01's definition of "record" is "accompanying data required by this article and by the regulations of the commissioner." It is undisputed that BPC has been complying with its obligation to provide MHLS with copies of "admission, transfer or retention papers and orders" in advance of retention hearings. In this proceeding, we are advised that the commissioner of OMH interprets the "accompanying data" to comprise the medical certificates providing the basis for the patient's admission and requests for transfer or retention, copies of which, it is

undisputed, BPC has always provided to MHLS before retention hearings.[6] Thus, MHLS is entitled to relief on its petition only if some provision of article 9 or of the regulations of OMH (14 NYCRR [Department of Mental Hygiene]) "requires" the production of a copy of the patient's complete medical chart as the "accompanying data" to be given to MHLS before a retention hearing. Again, contrary to the majority's view, no such provision can be found, either in article 9 or in the OMH regulations.

Neither the majority nor MHLS contends that anything in article 9 directly "requires" that MHLS be given a copy of the patient's complete medical chart before a retention hearing. Instead, MHLS argues, with the majority's agreement, that such a requirement can be derived from 14 NYCRR 501.2(a). This regulation — the only regulation that it is contended to furnish support for MHLS's position and the majority's result — provides:

> "For purposes of this Title [14 NYCRR (Department of Mental Hygiene)]:

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[6] Thus, there is no substance to the majority's purported concern that my construction of Article 9 would give OMH "absolute discretion to obviate the statute's requirement to provide a patient with 'accompanying data' at a retention hearing." OMH's reasonable interpretation of the term "accompanying data" in section 9.01 is entitled to deference from a reviewing court (*see Matter of Natural Resources Defense Council, Inc. v New York State Dept of Envtl. Conservation*, 25 NY3d 373, 397 [2015]).

> (a) *Case record*, *clinical record*, *medical record*, or *patient record* means clinical record as such term is defined in section 33.16 of the Mental Hygiene Law, whether created or maintained in writing or electronically. All such records shall use accepted mechanisms for clinician signatures, be maintained in a secure manner, and be readily accessible to [OMH] upon request."

Although overlooked by the majority, 14 NYCRR 501.2(a) refers not to the word "record" — the term used in article 9 of the Mental Hygiene Law — but to the italicized two-word phrases in the provision, as quoted just above. None of those two-word phrases is used in article 9. This confirms that 14 NYCRR 501.2(a) was not intended to define the term "record" as used in article 9.

Mental Health Law § 33.16, to which 14 NYCRR 501.2(a) refers, provides in pertinent part:

> "(a) Definitions. For purposes of this section:
>
> "1. 'Clinical record' means any information concerning or relating to the examination or treatment of an identifiable patient or client maintained or possessed by a facility which has treated or is treating such patient or client . . . ."

The flaw in the majority's reasoning is that neither 14 NYCRR 501.2(a) nor Mental Health Law § 33.16 defines the term "record" for the purpose of prescribing the "accompanying data" of which MHLS must be "given" a copy (implicitly, at the facility's expense) pursuant to Mental Health Law § 9.31(b).[7]

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[7] To repeat myself, reading these provisions as they are written creates absolutely *no* issue of due process, since MHLS

Part 501 of 14 NYCRR, of which 14 NYCRR 501.2 is the definitional section, is entitled "Mental Health Services — General Provisions." Consistent with that title, part 501 deals with the general functions of OMH, and does not contain a single reference to article 9 of the Mental Health Law, to any section of article 9, to retention hearings, or to involuntarily admitted patients. While the definitions set forth in 14 NYCRR 501.2 apply to title 14 in its entirety, it appears that no regulations governing retention hearings pursuant to article 9 of the Mental Health Law have been promulgated. As for Mental Health Law § 33.16, the statute to which 14 NYCRR 501.2(a) refers, that statute is entitled "Access to clinical records," and, as previously discussed, defines the term "clinical record" solely for purposes of setting forth the rules governing access to such material and protecting the privacy of patients in general.[8] Like 14 NYCRR part 501, Mental Health Law § 33.16 does not contain a single reference to article 9, to any specific section of article 9, to

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admits that BPC affords it access to all patient records, and the ability to copy such records for itself, *around the clock*, pursuant to Mental Health Law § 47.03(d). I hesitate to restate this point multiple times, but it deserves emphasis because it constitutes one of the fundamental disagreements between the majority and myself.

[8] As also previously discussed, MHLS does not claim that BPC has denied it access to any part of the records of any patient or the ability to copy such records.

retention hearings, or to involuntarily admitted patients.

The majority's result is not supportable because Mental Health Law § 9.01 — which does define the term "record" as used in section 9.31(b) — incorporates by reference only those OMH regulations, if any, that "require[]" a hospital to provide MHLS with any "accompanying data" in advance of a retention hearing, and neither the majority nor MHLS identifies any such regulation. Section 9.01 does not refer to material "defined" as part of a patient record in OMH regulations for any conceivable purpose, but to material "required" by such regulations to be included in the record to be copied and provided to MHLS in the specific context of a retention hearing under article 9. Nothing in 14 NYCRR 501.2(a) or Mental Health Law § 33.16(a)(1), which define patient records for other purposes, can reasonably be construed to give rise to such a requirement.

The majority resists the conclusion I reach — that MHLS, while entitled to copy for itself any part of a patient chart it needs to represent that patient at a retention hearing, has no right to demand that BPC (or any similar facility) bear the expense of providing MHLS with a copy of the entire chart — essentially by conflating the right of access to the chart (which MHLS has under section 47.03[d], and which the patient has under section 33.16) with MHLS's more limited right, under section

9.31(b), to be "given" by BPC a copy of the "record" as defined by section 9.01. Thus, the majority's statement that my approach is "inconsistent with the purpose of Mental Health Law § 33.16" is a non sequitur, because section 33.16 simply does not address what material a facility is obligated to copy and provide to MHLS, at the facility's expense, before a retention hearing, and no statute or regulation addressing that obligation refers to the definition of "clinical record" in section 33.16.[9] Again, it is undisputed that BPC honors the right of MHLS, under section 47.03(d), to inspect the chart of any patient it represents whenever it wants, and to copy as much of that chart as it sees fit. However, there is simply no provision of law that authorizes this Court to shift from MHLS to BPC the expense of copying an entire patient chart for MHLS's benefit.

The majority distorts the rather humdrum issue presented by this appeal — which of two publicly funded agencies must bear the

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[9] By the same token, "the clear mandates" of Mental Hygiene Law § 33.16, to which the majority refers, have no application to the question presented by this appeal. The irrelevance of section 33.16 to this inquiry is highlighted by the fact that, as previously noted, it authorizes BPC to impose a charge for copying — while no charge is authorized by section 9.31(b) for the copying of the material required to be produced in advance of a retention hearing. Similarly, while section 33.16(b)(5) requires BPC to furnish a patient with a copy of a record "within a reasonable time" of the patient's request, MHLS, as previously noted, is entitled, under section 47.03(d), to inspect a patient's chart and make for itself any copies it wishes at any time of day or night.

expense of copying a patient's entire chart in advance of a retention hearing — by suggesting — groundlessly — that my approach would require "indigent patients . . . [to] surrender . . . [their] rights [to access and copies of their clinical records] when the mental health facility seeks to retain the patient for involuntary psychiatric care." To reiterate, because MHLS has round-the-clock access to each patient's chart and can make whatever copies it wants for itself, no issue of due process arises in this matter. Petitioner here is not an indigent patient seeking a copy of his or her chart, but MHLS, a state agency with its own budget and employees.[10] I fully appreciate that MHLS's resources are limited, but so are those of BPC, and, as a result of the majority's decision, the latter will have to shift resources from patient care to photocopying. Nothing in

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[10] At the risk of stating the obvious, I note that MHLS is not an indigent patient only to highlight the fact that, unlike an indigent patient himself or herself, MHLS can, on the patient's behalf, send an attorney or other employee to a ward or record room at BPC to inspect a chart, and to copy as much of it as may be deemed relevant and necessary, at any time. The majority seems to be suggesting — quite unfairly — that I take the position that MHLS's access to patient records is of no concern to the indigent patients it represents. Obviously, I take no such position. What is utterly irrelevant to the statutory and constitutional rights of an indigent patient, however, is whether the cost, in time and money, of copying his or her chart for MHLS's use at an article 9 hearing comes out of MHLS's budget or BPC's budget. That is the mundane question raised by this proceeding — from which pocket will the state draw the money to pay for photocopying a patient's chart?

the Mental Hygiene Law or relevant regulations warrants this shifting of part of the cost of MHLS's operation to BPC. If there is to be a change in this state of affairs, involving staffing and budgetary allocations, it should be accomplished by legislative action, not by judicial dictate.[11]

I take exception to the majority's groundless attribution to me of the "narrow view" that patients have no interest in MHLS's access to their records, and to the majority's accusation that I "ignore[] . . . that MHLS's duties and the patient's rights are inextricably interwoven." Of course, at a retention hearing, the real party in interest is the patient, and, whatever the extent of BPC's obligation to provide MHLS with copies of patient records, that obligation exists for the patient's benefit. What the majority refuses to see is that the Mental Hygiene Law sets forth different rules for a patient's right of access to his or her chart, depending on whether the patient is acting pro se (or through a representative other than MHLS) (§ 33.16) or, on the other hand, through MHLS as his or her legal representative (§§ 9.31[b], 47.03[d]). In fact, the patient's rights of access to

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[11] Contrary to the majority's assertion, I make no suggestion that the majority is unaware of the budgetary constraints under which BPC operates. Rather, I call attention to the majority's usurpation of the function of allocating the costs of retention hearings between these two contending governmental actors — a function that plainly belongs to the political branches, not to the judiciary.

his records, and to have copies of them made, are significantly greater when MHLS acts on the patient's behalf.[12] There is nothing sinister about this, as MHLS's around-the-clock ability, on behalf of a patient, to inspect his or her records, and to copy for itself as much of the chart as it deems necessary to fulfill its duties, plainly fulfills the requirements of due process of law. Certainly, neither the majority nor MHLS has made even a colorable argument to the contrary.[13]

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[12] Unlike MHLS, patients and their representatives other than MHLS ("qualified person[s]," as defined in Mental Hygiene Law § 33.16[a][6]) are not granted around-the-clock access to charts (*see* § 33.16[b][7] ["A facility may place reasonable limitations on the time, place, and frequency of any inspection of clinical records"]). In addition, as previously noted, a facility is permitted to impose a charge of up to 75 cents per page for copies on qualified persons having the ability to pay (*see* § 33.16[b][6]), but no such charge is authorized for copying by MHLS in § 47.03. Further, a patient's or other qualified person's access to records, unlike that of MHLS, is subject to possible limitation for clinical reasons (*see* § 33.16[c]). The majority refers more than once to the requirement of § 33.16(b)(5) that a facility fulfill "within a reasonable time" the request of a qualified person for a copy of a record. However, the "reasonable time" requirement does not appear in the statute addressing MHLS's rights of access to patient records (§ 47.03) because MHLS, as previously noted numerous times, can make copies of the records for itself at any time of the day or night.

[13] The majority emphasizes MHLS's vague complaint that, in early 2016, its attorneys "began to notice" that documents "had been added or removed" from charts that were entered into evidence at retention hearings "on several occasions." To begin, the attorneys could have noticed such discrepancies at hearings only because they had reviewed the charts before the hearing, at which time they could have copied any significant pages for themselves. Further, if an MHLS attorney notices that material portions are missing from a chart that the hospital offers into

Plainly, in view of MHLS's rights of access and to make copies under Mental Hygiene Law § 47.03(d), OMH's limited interpretation of the material required to be "give[n]" to MHLS before a retention hearing pursuant to § 9.31(b) is rational, reasonable and constitutional. MHLS therefore should prevail in this proceeding only if there is some provision in the Mental Hygiene Law, or in the regulations promulgated thereunder, that requires a facility, through its own employees, to copy a patient's entire chart (which, again, typically comprises hundreds of double-sided pages) for MHLS, and to do so within the very brief time frame (a matter of days) between a patient's request for a retention hearing and the scheduled time of the hearing.[14] Neither MHLS nor the majority has identified any such

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evidence at a hearing, the attorney should raise the matter with the judge, who has the power to resolve the issue as it arises in a particular case. As for new matter added to a chart between the time of MHLS's last review and the hearing, requiring production of a hard copy of the chart in advance of the hearing will not solve this problem, as the majority itself acknowledges that new material is added to a chart each day. Thus, even when BPC, in compliance with the majority's order, produces a copy of a chart to MHLS days in advance of hearing, there will still be new pages of the chart to be brought to the hearing that were not previously produced to MHLS. This being the case, I fail to see the logic of the majority's view, expressed at the end of its opinion, that the unavoidable addition of these new pages somehow turns BPC's failure to provide a complete paper copy of the chart to MHLS in advance of a hearing into a violation of the patient's due process rights.

[14] A facility is required, upon receipt of written notice of a request for a hearing, to "forward forthwith" a copy of the

provision.

Although I would not hesitate to join the majority if MHLS had demonstrated a "clear legal right" (*Bloomberg*, 6 NY3d at 388) to the relief it seeks (which it has not), the record establishes that the requirement the majority unjustifiably imposes on BPC is burdensome, wasteful and virtually unworkable. According to the affirmation of an assistant attorney general having more than 10 years of experience in these matters, article 9 hearings are scheduled for about 30 patients at BPC in a typical week, as previously noted. The affirmation further explains:

> "Many of the charts are voluminous and to prepare copies prior to any potential hearing would require BPC to begin copying at least a week in advance, depending on the current workload of the records department at BPC, the size of the charts, and the number of charts that need to be copied. Even then, to prepare the copies, BPC would also likely need to hire additional staff or arrange overtime, as well as to buy additional machinery to process the copies. And any copy prepared in advance of a hearing would necessarily not contain the most recent medical treatment notes relevant to a patient and would have to be updated again on the date

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request to the appropriate court (Mental Hygiene Law § 9.31[b]), and the court is then required to set a time for the hearing "not later than five days from the date" the court received the notice (§ 9.31[c]). I note that the majority offers no grounds for its apparent belief that the short period between a patient's request for a retention hearing and the scheduled time of the hearing constitutes a "reasonable time" within which BPC should be expected to produce a copy of the entire clinical chart for each patient for whom an article 9 hearing is scheduled during a given week. In this regard, I note that the record reflects that, typically, about 30 article 9 hearings per week are scheduled at BPC.

> of the hearing. Even with additional staff and machinery, however, it is likely not possible to guarantee that the records department would be able to provide new and updated copies of all of the charts on the day of the hearing in time for that day's calendar."

The wastefulness of the requirement imposed by the majority is evident from the fact that, according to the same assistant attorney general, two-thirds of the matters scheduled be heard during a typical week do not proceed to a hearing because they are adjourned or withdrawn. In addition, given the length of the typical chart, it is unlikely that MHLS will require a copy of every single page to represent the patient at the hearing. Requiring MHLS to bear the expense, out of its own budget, of copying patient records provides it with an incentive to copy only the portions of patient charts it actually believes it might need. BPC, as MHLS's adversary in retention hearings, obviously cannot make this determination on MHLS's behalf.

The majority's assertion that it is not wasteful to require the copying of material for a hearing that does not go forward is meritless. Since MHLS has round-the-clock access to patient records, the copying is not required for its attorneys to review the charts before the hearings, and if a hearing ultimately is not held, any copying will have been a waste of time and resources. Further, to reiterate, even for a hearing that does go forward, it is extremely unlikely that more than a few pages

(if that) of these extensive, minutely detailed charts will have a bearing on the question to be determined. My concern for the public fisc — as well as my recognition of the limits of judicial power — preclude me from joining the majority in imposing on BPC a costly new obligation that is unlikely to improve the quality of the representation provided to patients in article 9 hearings, and will certainly not improve the quality of their care.

The majority concludes its opinion by reciting how burdensome it would be for MHLS to copy the patient's entire medical chart for each scheduled article 9 hearing. While I do not dispute that doing this would present a difficult burden for MHLS, I note — once again — that copying so much material, within the severe time constraints imposed by article 9, would be similarly burdensome for BPC. No less than MHLS, BPC "can ill-afford to spend the extra time and effort required" (to quote the majority) to copy so much material. No doubt this is why, after decades of operating under article 9 (and apart from isolated, and unsuccessful, demands made in a few particular cases about a decade ago, as discussed in footnote 4 above), MHLS has only recently sought judicial relief based on its current claims (1) that it needs a complete copy of a patient's entire medical chart to represent that patient in an article 9 hearing and (2) that hospitals are obligated by statute to provide it with a complete

copy of that chart.[15]

In any event, the question presented here is which of two taxpayer-funded public agencies — MHLS or BPC — must bear the burden and expense of the extensive physical reproduction of paper records that MHLS now claims to need — unconvincingly, in my view — under current law, as embodied in duly enacted statutes and duly promulgated regulations. As I have already explained, nothing in the existing statutory or regulatory framework shifts this burden and expense of MHLS's operation from MHLS itself to BPC, requiring BPC to divert its limited resources from the treatment of "the most vulnerable members of our society" to mostly useless photocopying of reams of paper. It is the prerogative of the legislature, not this Court, to effect any change in this situation — and to provide the requisite funding.

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[15] That certain institutions have begun voluntarily providing MHLS with complete copies of medical charts is irrelevant to the question of whether doing so is legally required. The majority's implicit admission that this is a recent innovation (it writes that these institutions "*have begun* to comply with MHLS's demand" [emphasis added]) strongly suggests that compliance with MHLS's request is *not* legally required, given that the majority points to no corresponding change in statutory or regulatory law. Moreover, it appears that the hospitals that provide MHLS with complete copies of the chart may be able to do so because — unlike BPC — they have the resources to maintain their records in electronic form. I further note that it is odd for the majority to suggest that MHLS does not have the resources to "review" patient charts itself, since — whether MHLS reviews the original charts where they are kept or reviews copies of the charts, should they be provided by BPC, in MHLS's own office — MHLS must conduct its own independent review of the records.

It may well be that the simplest solution of this dispute would be for all mental health facilities to be provided with sufficient funding to upgrade to digital record keeping, which would permit complete patient charts to be transmitted electronically or printed out automatically, at far less cost in terms of both time and money than the photocopying of paper documents. As previously noted, some institutions already have undergone this conversion. However, whether to provide funding out of limited public resources for every public mental health facility to do the same is a political determination that should be made by the elected branches of government, which are charged with allocating limited public resources among the myriad needs and wants of society that press upon the state. The solution does not properly lie in a writ of mandamus, "an extraordinary remedy which lies only . . . where there is a clear right to the relief sought" (*Spring Realty Co. v New York City Loft Bd.*, 69 NY2d 657, 659 [1986] [internal quotation marks omitted]). The Court of Appeals has cautioned that "courts must be careful to avoid . . . the fashioning of orders or judgments that go beyond any mandatory directives of existing statutes and regulations and intrude upon the policy-making and discretionary decisions that are reserved to the legislative and executive branches" (*Klostermann v Cuomo*, 61 NY2d 525, 541 [1984]). In affirming the

grant of a writ of mandamus in this case, the majority fails to heed this principle.

For all of the foregoing reasons, I conclude that petitioner has not clearly established (*see Bloomberg*, 6 NY3d at 388) that BPC has "failed to perform a duty enjoined upon it by law" (CPLR 7803[1]), and therefore respectfully dissent from the affirmance of the order appealed from.

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

ENTERED: DECEMBER 12, 2017

CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David Friedman, J.P.
Karla Moskowitz
Judith J. Gische
Marcy L. Kahn, JJ.

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U.S. Bank National Association, etc.,
Plaintiff-Respondent,

-against-

GreenPoint Mortgage Funding, Inc.,
Defendant-Appellant.

- - - - -

Syncora Guarantee Inc., etc.,
Nonparty Respondent.

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Defendant appeals from the orders of the Supreme Court, New York County (Marcy S. Friedman, J.), entered January 28, 2016, which, to the extent appealed from, granted plaintiff's motion for summary judgment dismissing the defense of lack of standing, and denied defendant's motion for summary judgment dismissing the complaint for lack of standing.

Murphy & McGonigle, P.C., New York (James A. Murphy of counsel), for appellant.

Allegaert Berger & Vogel LLP, New York (Michael S. Vogel, David A. Berger, Kevin L. MacMillan, John Craig and Lauren J. Pincus of counsel), and Quinn Emanuel Urquhart & Sullivan, LLP, New York (Philippe Z. Selendy, Andrew R. Dunlap, Sean P. Baldwin and Yalena Konanova of counsel), for U.S. Bank National Association, respondent.

Allegaert Berger & Vogel LLP, New York (Michael S. Vogel, David A. Berger, John S. Craig and Lauren S. Pincus of counsel), for Syncora Guarantee Inc., respondent.

MOSKOWITZ, J.

In this appeal, we are asked to decide whether plaintiff U.S. Bank National Association may pursue its claims for breach of contract against defendant (GreenPoint). We find that although the relevant contracts are unambiguous, the record presents an issue of fact as to whether U.S. Bank has standing to sue under the HELOC (home equity lines of credit) agreements. The record demonstrates as a matter of law, however, that U.S. Bank does not have standing to sue under the CES (closed-end seconds) agreement.

The Background to the Litigation

GreenPoint was in the business of originating, acquiring, and selling residential mortgage loans; it also sold loans to financial institutions for securitization. Between September 2005 and July 2006, GreenPoint sold multiple pools of loans as part of a $1.83 billion securitization; in connection with that securitization, GreenPoint Mortgage Fund Trust 2006-HE1 (the Trust) issued Home Equity Loan Asset-Backed Notes, Series 2006-HE1 (the notes). The notes are residential mortgage-backed securities backed by the 30,000 residential mortgage loans that GreenPoint had originated.

In general, sales of loans involved two types of contracts, a flow agreement and a purchase price and term letter (PPTL).

Initially, to govern the general structure of the transfer, GreenPoint entered into flow agreements, general agreements setting forth GreenPoint's loan warranties and agreement to repurchase loans that materially breached the warranties. The flow agreements, however, did not actually effectuate any loan sales. Rather, to actually sell the loans, GreenPoint entered into the second type of contract – namely, the PPTL. The PPTLs supplied specific terms governing individual trades under the flow agreements — for example, the price and anticipated closing date for the particular trade.

In a PPTL from nonparty Lehman Brothers Bank, FSB (Lehman Bank), dated as of September 12, 2005, Lehman Bank agreed to buy home equity lines of credit (HELOC) from GreenPoint. The letter agreement referenced another contract to be concluded in the future — specifically, a HELOC Revolving Credit Loan Flow Purchase and Sale Agreement between GreenPoint and Lehman Bank that was to be (and was in fact) dated as of September 26, 2005.

GreenPoint and Lehman Bank conducted the sale of loans through an intermediary, nonparty GMAC Mortgage Corporation. GreenPoint as "Seller" and GMAC as "Purchaser" entered into two types of flow agreements. The first agreement was a "Flow Revolving Credit Loan Purchase and Warranties Agreement" for the sale of HELOCs (the HELOC flow agreement). The second agreement

was a "Flow Mortgage Loan Purchase and Warranties Agreement" for the sale of "closed-end second" (CES) lien loans (the CES flow agreement).[1]

The two flow agreements contained loan representations and warranties. GreenPoint also agreed to repurchase, "at the Purchaser's option," any loan that materially and adversely breached the representations and warranties, and, under some circumstances, all loans sold under the flow agreements. Both the HELOC and CES flow agreements contained provisions permitting GMAC to assign the loans, including its repurchase rights.

Section 21 of the HELOC flow agreement governed assignments and stated that the flow agreement was to inure to the benefit of, and was to be enforceable by, the successors and assigns of GMAC. Section 21 further stated:

> "No transfer of a Revolving Credit Loan may be made unless such transfer is in compliance with the terms hereof. . . . [GMAC] may, subject to the terms of this Agreement, sell and transfer one or more of the Revolving Credit Loans [i.e., HELOCs], provided, however, that (i) in the case of a Securitization Transfer or an Agency Transfer, [GMAC] shall have the right to assign its rights under this Agreement into such Securitization Transfer or Agency Transfer after which the issuer or trustee for the issuer of any such Securitization Transfer or Agency Transfer shall be deemed to be a Purchaser or (ii) in the case of any

[1] CES loans differ from HELOCs in that, under a CES, the mortgagor borrows a one-time fixed amount rather than obtaining a line of credit.

> sale or transfer *other than a Securitization Transfer or an Agency Transfer, any transferee will not be deemed to be a Purchaser hereunder binding upon [GreenPoint]* unless such transferee shall agree in writing to be bound by the terms of this Agreement and an original counterpart of the instrument of transfer and an assignment and assumption of this Agreement substantially in the form of Exhibit G hereto executed by the transferee shall have been delivered to [GreenPoint]. [GMAC] also shall advise [GreenPoint] of the transfer" (emphasis added).

The term "Securitization Transfer" is not listed in the definitions section. However, section 28 says that GMAC "may . . . convey the Revolving Credit Loans to securitized trust structures ('Securitization Transfers')."

Section 21 of the CES flow agreement differed from the corresponding section of the HELOC flow agreement. That section in the CES flow agreement provided in pertinent part that GMAC

> "may . . . sell and transfer one or more of the Mortgage Loans, *provided, however*, that the transferee will not be deemed to be a Purchaser . . . unless such transferee shall agree in writing to be bound by the terms of this Agreement[,] and an original counterpart of the instrument of transfer and an assignment and assumption of this Agreement in the form of Exhibit H hereto executed by the transferee shall have been delivered to [GreenPoint]."

Notably, the CES flow agreement, in contrast with the HELOC flow agreement, did not contain any exception for a securitization transfer. In addition, the CES flow agreement required that the transfer had to be "in the form of Exhibit H," not "substantially in the form" of that exhibit.

As noted above, GreenPoint sold the loans, along with the loan servicing obligations, to GMAC as the nominal purchaser. On the same day that the HELOC sale closed, GMAC, Lehman Bank, and GreenPoint entered an "Assignment, Assumption and Recognition Agreement" (AAR) renaming Lehman Bank as the purchaser but leaving the servicing obligations with GMAC.

Lehman Bank, by way of GMAC, acquired a series of loans in trades occurring between September 2005 and August 2006; each trade had its own PPTL, so that there were five PPTLs. Four of the PPTLs, dated as of September 12, 2005, March 7, 2006, March 25, 2006, and April 19, 2006, sold HELOCs. The fifth PPTL, dated as of July 11, 2006, sold both HELOCs and CES loans. The PPTLs gave Lehman Bank the right to assign its rights under the flow agreements. The PPTL dated July 11, 2006 stated:

> "The Purchaser [Lehman Bank] has the right to assign all of its rights under the Purchase Price and Terms Letter, the [HELOC Flow] Agreement, the [CES Flow Agreement], the HELOC Interim Servicing Agreement, the Mortgage Loan Interim Servicing Agreement and/or any of the HELOCs/Mortgage Loans purchased under this Purchase Transaction to any affiliate of the Purchaser or third party."[2]

Moreover, each HELOC PPTL stated that Lehman Bank "may sell the HELOCs either to whole loan purchasers . . . exchange the HELOCs

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[2] As the motion court noted, the parties do not argue that the provisions of the five PPTLs are materially different from one another.

for agency securities . . . or convey the HELOCs to securitized trust structures."

In connection with each loan purchase, GMAC, Lehman Bank, and GreenPoint entered into at least one AAR. In the AARs, GMAC assigned all of its rights as "Purchaser" under the HELOC Flow Agreement, except for servicing rights, to Lehman Bank. Moreover, GreenPoint agreed that Lehman Bank would become the "Purchaser" under the HELOC flow agreement, and all of GreenPoint's representations and warranties as the Seller, including the representations, warranties and covenants to repurchase any mortgage loan, would accrue to Lehman Bank under the AAR. GMAC, Lehman Bank, and GreenPoint later entered into AARs for the four additional batches of HELOCs; these AARs contained the same language as the September 29, 2005 AAR.

In early August 2006, by way of an Assignment and Assumption Agreement dated August 1, 2006, Lehman Bank assigned "all of its right, title[,] and interest in and to the Loans and the Sale/Servicing Agreements," including the two flow agreements, to Lehman Brothers Holdings. GreenPoint was not a signatory to this agreement, and the assignment did not use the assignment agreement language specified in the two flow agreements. Nor was it "substantially in the form of" Exhibit G or H.

Next, Lehman Holdings and nonparty Structured Assets

Securities Corporation (SASCO) entered into a sale and assignment agreement as of August 1, 2006. In that agreement, Lehman Holdings assigned to SASCO all of its rights under the Assignment and Assumption Agreement. SASCO then transferred the underlying loans to the Trust, of which U.S. Bank was the trustee, to effect the securitiziation. GreenPoint was not a signatory to any of those assignments.

The Events Leading to the Litigation

In early 2008, an insurer of the securitization notified U.S. Bank that 963 of the loans did not comply with GreenPoint's representations and warranties. Accordingly, in March 2008, U.S. Bank notified GreenPoint of breaches of several of its representations and warranties with respect to approximately 655 loans. U.S. Bank requested that GreenPoint either cure the breaches or repurchase the allegedly breaching loans.

GreenPoint rejected the request, taking the position that U.S. Bank had not satisfied the express conditions required for it to sue GreenPoint for the repurchase of loans. Specifically, GreenPoint argued that U.S. Bank had not received a valid assignment of Lehman Bank's rights to enforce the flow agreements' remedies for breaches of loan representations and warranties.

In February 2009, U.S. Bank, along with two other entities

who are not parties to this appeal, commenced this action.[3] They asserted two causes of action for breach of contract, seeking specific performance and damages. Greenpoint asserted the affirmative defense that U.S. Bank lacked standing because the rights of a purchaser had not properly been assigned to it.

U.S. Bank moved for partial summary judgment dismissing the affirmative defense of lack of standing, and GreenPoint moved for summary judgment dismissing the complaint on the ground that U.S. Bank lacked standing. The motion court granted U.S. Bank's motion, and denied GreenPoint's motion.

Analysis

To begin, we agree with the motion court that the relevant agreements, considered together, are unambiguous in their requirement that a particular form be used to effect the assignment of Lehman Bank's rights as a purchaser. Indeed, the flow agreements plainly stated that if the stated conditions were not satisfied, then the "transferee will not be deemed to be a Purchaser hereunder binding upon [GreenPoint]." Therefore, extrinsic evidence may not be considered to glean the parties'

[3] The other plaintiffs were Syncora Guarantee Inc. and CIFG Assurance North America, Inc. In 2012, the motion court granted GreenPoint's motion to dismiss Syncora and CIFG's claims against it, and we affirmed that order (*U.S. Bank N.A. v GreenPoint Mrtge. Funding, Inc.*, 105 AD3d 639 [1st Dept 2013], *lv denied*, 22 NY3d 863 [2014]).

intent (*see e.g. Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]; *Waverly Corp. v City of New York*, 48 AD3d 261, 265 [1st Dept 2008]).

Nonetheless, the court held that Lehman Bank was not required to use an assignment form to transfer the loans and its purchase rights under the flow agreements to Lehman Holdings. The court found that, while the CES flow agreement required use of Exhibit H and the HELOC flow agreement required the assignment to be made in "substantially the same form" as Exhibit G unless the assignment of rights was made in a "securitization transfer," the PPTLs expressly authorized Lehman Bank to assign all of its rights under the flow agreements, without limitation, to an affiliate or third party, and did not require use of a specified form to effect an assignment. Thus, the court found that U.S. Bank had standing to bring this suit, and dismissed GreenPoint's affirmative defense alleging lack of standing.

This finding was error. First, no inconsistency exists between the PPTLs and the flow agreements. In fact, the PPTLs expressly anticipated the execution of a flow agreement to govern the transaction; the flow agreement was to supply the loan representations and warranties and establish who could enforce remedies for loans that breached these representations and warranties. Notably, Lehman Bank did not acquire any loans until

after the parties had signed the flow agreement. Moreover, the PPTL specified that the closing documents for the trade would include the flow agreement and its exhibits. Accordingly, Exhibits G and H, attached to and made a part of the flow agreements, provided the required assignment agreement language necessary to convey the status of purchaser.

Second, giving precedence to the PPTLs over the flow agreements, renders meaningless section 21 — the section governing assignments — of each flow agreement. In interpreting a contract a court should favor an interpretation that gives effect to all the terms of an agreement rather than ignoring terms or interpreting them unreasonably (*see e.g. Perlbinder v Board of Mgrs. of 411 E. 53rd St. Condominium*, 65 AD3d 985, 986-87 [internal quotation marks omitted] [1st Dept 2009]). Indeed, "where two seemingly conflicting contract provisions reasonably can be reconciled, a court is required to do so and to give both effect" (*id.* at 987; *see also Lenart Realty Corp. v Petroleum Tank Cleaners, Ltd.*, 116 AD3d 536, 537 [1st Dept 2014]). We have also found that "agreements executed at substantially the same time and related to the same subject matter are regarded as contemporaneous writings and must be read together as one" (*Perlbinder*, 65 AD3d at 987 [internal quotation marks omitted]). Thus, in failing to harmonize the PPTL and the

flow agreement, the motion court essentially read the flow agreement terms out of existence.

What is more, the court's finding otherwise notwithstanding, there is no inconsistency between the assignment provisions of the PPTLs and those in the flow agreements. Rather, the letter agreements state the purchaser's right to assign, and the flow agreements specify how the purchaser is to exercise that right (*see generally Lenart Realty,* 116 AD3d at 537; *Trade Bank & Trust Co. v Goldberg*, 38 AD2d 405, 406 [1st Dept 1972]).[4] Our interpretation of the flow agreement's applicability, however, does not fully resolve the standing issue, because, as noted, there still exists an issue of fact as to whether the relevant transfer was a securitization transfer.

As to the CES flow agreement, that document contains no exception for a securitization transfer. Although the AAR transferred GMAC's rights as purchaser under the CES flow agreement, GreenPoint cannot object to this transfer because it expressly consented to it. But Greenpoint was not a party to any of the later transfers of the CES flow agreement. In addition, the CES flow agreement requires the transfer to be "in the form

[4] Even had the PPTLs been silent, the purchaser would have had the right to assign (*see Ellington v Sony/ATV Music Publ. LLC*, 85 AD3d 438, 439 [1st Dept 2011]).

of Exhibit H," not "substantially in the form of" that exhibit, and neither party disputes that the relevant transfers were not in the form of Exhibit H. Thus, U.S. Bank does not have standing to sue with respect to the CES flow agreement.

U.S. Bank argues that we should affirm the motion court's decision on three alternative grounds — namely, equitable estoppel, waiver, and modification. We reject all of these arguments. With respect to equitable estoppel, U.S. Bank argues that GreenPoint should be equitably estopped from arguing that its representations and warranties were not properly assigned to U.S. Bank. This argument fails for lack of justifiable reliance (*see e.g. Sisler v Security Pac. Bus. Credit*, 201 AD2d 216, 222 [1st Dept 1994], *lv dismissed* 84 NY2d 978 [1994]). Likewise, U.S. Bank's waiver argument fails for lack of evidence that defendant "provided a specific, identifiable promise not to" require compliance with the Flow Agreements (*Massachusetts Mut. Life Ins. Co. v Gramercy Twins Assoc.*, 199 AD2d 214, 217 [1st Dept 1993]). Last, the modification argument, which is based on a theory of partial performance, fails because, for this argument to succeed, the acts of part performance must have been those of the party insisting on the oral contract — in this case, U.S. Bank. But the acts that U.S. Bank alleges to have modified the contract are GreenPoint's, not U.S. Bank's. Additionally, the

acts U.S. Bank alleges are not "unequivocally referable to the alleged oral agreement," as is necessary for a modification argument to succeed (*see Richardson & Lucas, Inc. v New York Athletic Club of City of N.Y.*, 304 AD2d 462, 463 [1st Dept 2003][internal quotation marks omitted]).

Finally, because the motion court found that Lehman Bank was not required to use an assignment form to transfer to Lehman Holdings the loans and purchaser rights under the flow agreements, the court declined to reach the issue of whether the relevant transfer was a "securitization transfer" within the meaning of the HELOC flow agreement. With respect to this question, we find that an issue of fact exists. The HELOC flow agreement does not require an assignment substantially in the form of Exhibit G if the sale and transfer is a securitization transfer. It appears that the documents underlying the transfer were not substantially in the form of Exhibit G. As to whether a securitization transfer occurred, each party supported its position with affidavits by well-credentialed experts, and each expert's opinion has some support in the record. Accordingly, it cannot be determined as a matter of law whether the HELOC assignments were securitization transfers not requiring compliance with section 21 of the flow agreement.

Accordingly, the orders of the Supreme Court, New York

County (Marcy S. Friedman, J.), entered January 28, 2016, which, to the extent appealed from, granted plaintiff U.S. Bank National Association's motion for summary judgment dismissing the defense of lack of standing, and denied defendant's motion for summary judgment dismissing the complaint for lack of standing, should be modified, on the law, to deny U.S. Bank's motion and to grant defendant's motion as to so much of the complaint as is based on closed-end seconds, and otherwise affirmed, without costs.

All concur.

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

ENTERED: DECEMBER 12, 2017

CLERK