SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

OCTOBER 18, 2016

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Sweeny, J.P., Renwick, Webber, Gesmer, JJ.

1785-
1786 In re Barbara Hultay, on behalf of Ronald Staton,
Petitioner-Appellant,

-against-

Mei Wu-Stanton,
Respondent-Respondent.

Index 312771/12

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Cohen Clair Lans Greifer Thorpe & Rottenstreich LLP, New York (Jad Greifer of counsel), for appellant.

Storch Amini & Munves PC, New York (Steven G. Storch of counsel), for respondent.

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Appeals from amended order, Supreme Court, New York County (Laura E. Drager, J.), entered February 4, 2016, and order, same court and Justice, entered February 17, 2016, unanimously dismissed, without costs.

Counsel for both parties agree that the proceeding has abated due to Ronald Stanton's death (*see* CPLR 1015[a]).

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

ENTERED: OCTOBER 18, 2016

CLERK

Corrected Order - October 19, 2016

Tom, J.P., Acosta, Richter, Kapnick, JJ.

15864 The People of the State of New York, Ind. 4155/11
Respondent,

-against-

John Flores,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Sheila O'Shea 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 resentence of the Supreme Court, New York County (Ronald A. Zweibel, J.), rendered **February 5, 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.

ENTERED: OCTOBER 18, 2016

CLERK

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

Renwick, J.P., Andrias, Saxe, Moskowitz, JJ.

16610- Index 653235/13
16611 Phoenix Light SF Limited, et al.,
Plaintiffs-Appellants,

-against-

Merrill Lynch & Co., Inc., et al.,
Defendants-Respondents.

_____

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Charles E. Ramos, J.), entered on or about October 8, 2014,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto filed October 7, 2016,

It is unanimously ordered that said appeal be and the same is hereby withdrawn in accordance with the terms of the aforesaid stipulation.

ENTERED: OCTOBER 18, 2016

CLERK

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

1927 The People of the State of New York, Ind. 4281/11
Respondent,

-against-

Larry McLean,
Defendant-Appellant.

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

Larry McLean, appellant pro se.

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

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Judgment, Supreme Court, New York County (Analisa Torres, J.), rendered January 7, 2013, convicting defendant, after a jury trial, of eight counts of robbery in the first degree, four counts of robbery in the second degree, and two counts of criminal possession of a weapon in the second degree, and sentencing him, as a persistent violent felony offender, to 14 concurrent terms of 25 years to life, unanimously affirmed.

The court properly denied defendant's motion to suppress a showup identification. The showup, which was conducted in close spatial and temporal proximity to the crime, was "part of an unbroken chain of fast-paced events" (*People v Vincenty*, 138 AD3d 428, 429 [1st Dept 2016]), including the arrival, at the location

where defendant was being detained, of a police car transporting three witnesses. The circumstances, viewed collectively, were not unduly suggestive (*see e.g. People v Gatling*, 38 AD3d 239 [1st Dept 2007], *lv denied* 9 NY3d 865 [2007]). Although the better practice, when feasible, is not to conduct a showup before multiple witnesses, or, if possible, to instruct the witnesses not to say anything until afterwards and question them separately, the group identification here was tolerable in the interest of prompt identification, and there is no evidence that the victims influenced each other's identifications (*see People v Love*, 57 NY2d 1023, 1024 [1982]; *People v Wilburn*, 40 AD3d 508 [1st Dept 2007], *lv denied* 9 NY3d 883 [2007]).

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. Ample evidence, including video surveillance, established that defendant was not a hapless bystander forced to become a getaway driver, but an active participant in the robbery.

Defendant's challenge to the legality of the use of his third-degree weapon possession conviction as a violent predicate felony is unavailing (*see People v Smith [McGhee]*, 27 NY3d 652,

670 [2016]).

Defendant's pro se ineffective assistance of counsel claims are unreviewable on direct appeal because they involve matters outside the record (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). Defendant's remaining pro se claims are without merit.

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

ENTERED: OCTOBER 18, 2016

CLERK

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

1928 Rosanne Lovetere, Index 153068/13
Plaintiff-Appellant,

-against-

Meadowlands Sports Complex,
Defendant,

New Jersey Sports & Exposition
Authority, et al.,
Defendants-Respondents.

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Nicole R. Kilburg, New York, for appellant.

Rutherford & Christie, LLP, New York (Meredith Renquin of counsel), for respondents.

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Order, Supreme Court, New York County (Arthur F. Engoron, J.), entered on or about February 5, 2016, which granted the motion of defendants New Jersey Sports & Exposition Authority and New Meadowlands Racetrack, LLC for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendants established entitlement to judgment as a matter of law by submitting deposition testimony, expert opinion, and photographic evidence showing that the alleged hazardous defect in the ceramic floor tile (a "spall") was physically insignificant and trivial. The depth of the defect in a grouted area of the tiled floor measured only three-sixteenths of an

inch, as well as seven-eighths of an inch wide and four inches in length. Moreover, the spall's edges, as compared to the immediate surrounding surface areas, were not dangerously irregular. Plaintiff acknowledged that the lighting enabled her to see the floor area in the six-foot-wide corridor while she walked with family members, and that the alleged defect was not noticeable despite the grouting having a darker color than the surrounding tile. There was also evidence indicating no prior accidents or complaints were reported that involved the subject tiled area of the well-traveled corridor.

In opposition, plaintiff failed to raise a triable issue of fact. The eyewitness testimony regarding how the heel of her shoe had become stuck in the floor and remained there, together with photographic evidence, failed to raise an issue as to whether the subject spall represented an unreasonably dangerous

hazard under all of the circumstances presented (*see Hutchinson v Sheridan Hill House Corp.*, 26 NY3d 66 [2015]; *Myles v Spring Val. Marketplace, LLC*, 141 AD3d 425 [1st Dept 2016]; *Hunter v New York City Hous. Auth.*, 137 AD3d 717 [1st Dept 2016]).

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

ENTERED: OCTOBER 18, 2016

CLERK

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

1929 In re Jaden Blessing R.,

A Dependent Child Under the Age
of Eighteen Years, etc.,

Quashi G.,
Respondent-Appellant,

The Children's Village,
Petitioner-Respondent.

_____

Patricia W. Jellen, Eastchester, for appellant.

Law Office of James M. Abramson, PLLC, New York (Dawn M. Orsatti of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Patricia Colella of counsel), attorney for the child.

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Order, Family Court, New York County (Clark V. Richardson, J.), entered on or about July 27, 2015, which, to the extent appealed from as limited by the briefs, determined that respondent putative father was not entitled to notice pursuant to Social Services Law § 384-c, and that his consent was not required for the adoption of the subject child, and transferred guardianship and custody of the child to petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.

Respondent did not meet the statutory requirements for notice of the termination of parental rights proceedings (*see* Social Service Law § 384-c[2]). Nor is his consent required for the adoption of the child, as the record shows that he failed to contribute to the child's financial support in any meaningful way and failed to maintain regular contact with the child or his custodians (*see* Domestic Relations Law § 111[1][d]; *Matter of William R.C.*, 26 AD3d 229 [1st Dept 2006], *lv denied* 7 NY3d 714 [2006]). Respondent's incarceration did not absolve him of his parental obligations (*see Matter of Jonathan Logan P.*, 309 AD2d 576 [1st Dept 2003]), and he failed to provide any documentation to support his claims of visitation and financial support.

Respondent's remaining arguments, to the extent preserved for our review, are unavailing.

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

ENTERED: OCTOBER 18, 2016

CLERK

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

1930 Jose A. Marino, Index 301809/13
Plaintiff-Appellant,

-against-

Richard Amoah,
Defendant-Respondent.

_____

Law Offices of Alexander Bespechny, Bronx (Alexander Bespechny of counsel), for appellant.

Baker, McEvoy, Morrissey & Moskovits, P.C., Brooklyn (Robert D. Grace of counsel), for respondent.

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Order, Supreme Court, Bronx County (Ben R. Barbato, J.), entered November 25, 2015, which granted defendant's motion for summary judgment dismissing the complaint based on plaintiff's inability to meet the serious injury threshold of Insurance Law § 5102(d), unanimously affirmed, without costs.

Defendant established that plaintiff did not suffer a serious injury to his lumbar spine or right knee as a result of the motor vehicle accident at issue by submitting, inter alia, the affirmed reports of a radiologist and an orthopedist. The radiologist opined that the MRI of the lumbar spine revealed multilevel degenerative disc disease and hypertrophy, and that the MRI of the right knee showed no evidence of traumatic injury (*see Alvarez v NYLL Mgt. Ltd.*, 120 AD3d 1043, 1044 [1st Dept

2014], *affd* 24 NY3d 1191 [2015]). In addition, the orthopedist opined, upon review of plaintiff's medical records, that there was no injury to plaintiff's right knee that was causally connected to the accident.

In opposition, plaintiff failed to raise a triable issue of fact as to whether his lumbar spine condition was causally related to the accident because none of his medical experts addressed or explained the finding of preexisting degeneration present in his own medical records, including the operative report that plaintiff submitted which diagnosed degenerative disc disease. His orthopedist opined, based on plaintiff's medical history, that the accident exacerbated a chronic condition, but failed to explain why the degeneration shown in his own medical records was not the cause of his lumbar spine condition (*see Rivera v Fernandez & Ulloa Auto Group*, 123 AD3d 509 [1st Dept 2014], *affd* 25 NY3d 1222 [2015]; *Alvarez*, 120 AD3d at 1044). Thus, the orthopedist provided "no objective basis or reason, other than the history provided by plaintiff," to opine that the accident aggravated the lumbar condition (*Shu Chi Lam v Wang Dong*, 84 AD3d 515, 516 [1st Dept 2011]), or that any injuries were different from his preexisting degenerative conditions (*see Campbell v Fischetti*, 126 AD3d 472 [1st Dept 2015]).

Regarding plaintiff's right knee, defendant's orthopedist found that plaintiff's own treating surgeon found normal range of motion shortly after the accident. While other physicians who later examined plaintiff found deficits in right knee range of motion, plaintiff's expert, who opined that plaintiff's torn menisci were causally related to the accident, failed to reconcile the later findings of deficits with the earlier findings of normal range of motion (*see Colon v Torres*, 106 AD3d 458, 459 [1st Dept 2013]; *Dorrian v Cantalicio*, 101 AD3d 578 [1st Dept 2012]).

Dismissal of plaintiff's 90/180-day claim was also appropriate since he did not provide medical evidence that supported a finding of a medically determined injury caused by the accident (*see Barry v Arias*, 94 AD3d 499, 500 [1st Dept 2012]).

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

ENTERED: OCTOBER 18, 2016

CLERK

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

1931 The People of the State of New York Ind. 1286/14
Respondent,

-against-

Marcellus McMurray,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Laura A. Ward, J.), rendered February 11, 2015, convicting defendant, after a jury trial, of criminal possession of a weapon in the third degree and attempted assault in the second degree, and sentencing him, as a second felony offender, to an aggregate term of 2 to 4 years, unanimously affirmed.

The court properly denied defendant's application made pursuant to *Batson v Kentucky* (476 US 79 [1986]). The court correctly determined that defendant did not establish a prima facie case of discrimination against black men, a cognizable group under *Batson*. Defendant's claim was based on the prosecutor's peremptory challenge to the first African-American male panelist, and defendant presented neither numerical nor

nonnumerical evidence to raise an inference of intentional discrimination (*see People v Sweeper*, 71 AD3d 439, 440 [1st Dept 2010], *affd* 15 NY3d 925 [2010]; *People v McCloud*, 50 AD3d 379, 381 [1st Dept 2008], *lv denied* 11 NY3d 738 [2008]).

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The weapon possession conviction was supported by evidence from which the jury, which had the opportunity to examine the cane at issue, could have reasonably concluded that it constituted a dangerous instrument (*see People v Carter*, 53 NY2d 113 [1981]) because the manner in which defendant struck the victim rendered the cane readily capable of causing serious physical injury, including serious potential harm to body parts such as the head that were not actually struck. The attempted second-degree assault conviction was supported by evidence warranting the inference that defendant at least intended to cause ordinary physical injury, and came dangerously close to doing so.

Defendant's claim of ineffective assistance based on counsel's failure to request a lesser included offense charge is unreviewable on direct appeal because it involves matters not reflected in, or fully explained by, the record (*see People v*

Rivera, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). Accordingly, since defendant has not made a CPL 440.10 motion, the merits of this ineffectiveness claim may not be addressed on appeal. In the alternative, to the extent the existing record permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]). Defendant's remaining ineffective assistance claim, based on counsel's failure to object to a comment made by the prosecutor on summation, is unavailing because we do not find that comment improper, when viewed in context.

The court provided a meaningful response to a jury note. The jury specifically asked for the elements of the crime, and the court had no obligation to go beyond that specific request

(*see People v Almodovar*, 62 NY2d 126, 132 [1984). Although the court informed the jury that it could send another note if the court did not adequately answer its question, the jury did not do so.

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

ENTERED: OCTOBER 18, 2016

CLERK

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

1932 The People of the State of New York, Ind. 3391/11
Respondent,

-against-

Jose Alvarez,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Harold V. Ferguson, Jr. of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered March 21, 2012, as amended March 23, 2012, convicting defendant, upon his plea of guilty, of criminal sale of a firearm in the first and second degrees and criminal sale of a controlled substance in the first degree, and sentencing him, as a second violent felony offender, to an aggregate term of 22 years, unanimously affirmed.

The court properly denied defendant's motion to reassign counsel, made before defendant pleaded guilty, as defendant stated no grounds for counsel's removal other than defendant's dissatisfaction with the plea offer. Defense counsel did not act as a witness against defendant, when, in discussing the plea offer and his advice that defendant accept it, counsel referred

to the apparent strength of the People's case (*see People v Nelson*, 27 AD3d 287 [1st Dept 2006], *affd* 7 NY3d 883 [2006]). Moreover, counsel's comments "essentially provided information that the court already knew" (*see People v Grace*, 59 AD3d 275, 276 [1st Dept 2009], *lv denied* 12 NY3d 816 [2009]).

Defendant's challenges to his plea allocution do not come within the narrow exception to the preservation requirement (*see People v Conceicao*, 26 NY3d 375, 382 [2015]). Although defendant moved to withdraw his plea, he did so on other grounds, and the sentencing court properly denied that motion after sufficient inquiry (*see People v Frederick*, 45 NY2d 520 [1978]). We decline to review defendant's unpreserved claims in the interest of justice. As an alternative holding, we find that the record as a whole establishes that the plea was knowingly, intelligently and voluntarily made, even though the enumeration of defendant's rights under *Boykin v Alabama* (395 US 238 [1969]) was deficient (*see People v Sougou*, 26 NY3d 1052 [2015]).

Defendant made a valid waiver of his right to appeal, which forecloses review of his excessive sentence claim. Regardless of whether defendant validly waived his right to appeal, we perceive

no basis for reducing the sentence. We have considered and rejected defendant's claim that a new sentencing proceeding is necessitated by an amendment of the judgment that was entirely in defendant's favor (*see People v Covington*, 88 AD3d 486, 486-487 [1st Dept 2011], *lv denied* 18 NY3d 858 [2011]).

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

ENTERED: OCTOBER 18, 2016

CLERK

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

1933 In re Estate of Magda Markowicz, Index 2865/15
Deceased.

- - - - -

Rita Hyman,
Objectant-Appellant,

-against-

Sal Markowicz,
Petitioner-Respondent.

_____

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, Bronx County (Nelida Malave-Gonzalez, J.), entered on or about April 1, 2016,

And said appeal having been withdrawn before argument by counsel for the respective parties; and upon the stipulation of the parties hereto dated September 23, 2016,

It is unanimously ordered that said appeal be and the same is hereby withdrawn in accordance with the terms of the aforesaid stipulation.

ENTERED: OCTOBER 18, 2016

CLERK

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

1934 In re Sania S., and Others,

Dependent Children Under Eighteen Years of Age, etc.,

Marcia McG-W.,
Respondent-Appellant,

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

_____

Richard L. Herzfeld, P.C., New York (Richard L. Herzfeld of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Dona B. Morris of counsel), for respondent.

Patricia L. Moreno, Bronx, attorney for the child Sania S.

Law Office of Cabelly & Calderon, Jamaica (Lewis S. Calderon of counsel), attorney for the child Anthony S.

Aleza Ross, Patchogue, attorney for the child Amya S.

Larry S. Bachner, Jamaica, attorney for the child Patrice H.

Kenneth M. Tuccillo, Hastings on Hudson, attorney for the child Natalie H.

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Order, Family Court, Bronx County (Monica Drinane, J.), entered on or about December 16, 2014, which, among other things, after a fact-finding hearing, found that respondent mother had abused the subject children, unanimously affirmed, without costs.

Petitioner agency satisfied its burden of proving, by a

preponderance of the evidence, that respondent, the children's adoptive mother and biological grandmother, had abused the children within the meaning of Family Court Act § 1012(e)(iii). In particular, the evidence showed that, despite her knowledge that the children were engaging in sexual conduct with each other, respondent failed to implement adequate measures to protect them from further harm and failed to ensure that they obtained appropriate therapeutic treatment (*see Matter of Milagros C. [Rosa R.]*, 121 AD3d 481 [1st Dept 2014]; *Matter of Jaquay O.*, 223 AD2d 422 [1st Dept 1996], *lv denied* 88 NY2d 801 [1996]; *Matter of Tania J.*, 147 AD2d 252 [1st Dept 1989]). The children's out-of-court statements concerning the sexual conduct in the home and respondent's lack of concern when they complained about the oldest child's conduct, were detailed and consistent, and thus served to cross-corroborate each other (*see Matter of Maria Daniella R. [Maria A.]*, 84 AD3d 1384, 1385 [2d Dept 2011]). The children's use of explicit and age-inappropriate vocabulary itself supported the finding that they were engaging in sexual conduct. Moreover, respondent admitted that a treating therapist had informed her that the oldest child had been molested and had reported sexual conduct among the children. Despite this knowledge, respondent failed to ensure that the three oldest

children attended their therapy appointments, and continued to allow an adult male to be present in the home at night. She also acknowledged that she had continued to allow the children's biological mother to care for them after learning that the oldest child had reported that she had watched pornography with the biological mother.

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

ENTERED: OCTOBER 18, 2016

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

1935-
1936 Ind. 3665/11

The People of the State of New York,
Respondent,

-against-

Alexander Santiago,
Defendant-Appellant.

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

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

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Judgment, Supreme Court, Bronx County (Robert Sackett, J.), rendered May 5, 2014, convicting defendant, after a jury trial, of burglary in the third degree, possession of burglar's tools and resisting arrest, and sentencing him, as a second felony offender, to an aggregate term of 2½ to 5 years, unanimously affirmed. The matter is remitted to Supreme Court for further proceedings pursuant to CPL 460.50(5).

The court properly declined to charge third-degree criminal trespass as a lesser included offense of third-degree burglary. Given the interpretation of Penal Law § 140.10(a) set forth in *People v Moore* (5 NY3d 725, 727 [2005]), a violation of that section cannot qualify as a lesser included offense of third-

degree burglary under the impossibility test of *People v Glover* (57 NY2d 61 [1982]). In any event, there is no reasonable view of the evidence that defendant entered the truck in question without larcenous intent. Furthermore, regardless of whether the court should have submitted the lesser offense, there is no reasonable possibility that such submission would have affected the verdict (*see People v Crimmins*, 36 NY2d 230 [1975]). In addition, we note that defendant did not ask for submission of trespass under Penal Law § 140.05, and that his arguments on that subject are unavailing. We also reject defendant's arguments concerning the scope of our review (*see People v Nicholson*, 26 NY3d 813 [2016]).

The admission of the printouts of the GPS location histories did not violate defendant's right of confrontation, because the documents were not testimonial (*see People v Pealer*, 20 NY3d 447, 453 [2013]). Assuming, without deciding, that the records were not admissible as business records, any error in this regard was harmless.

The court properly permitted the People to elicit a prior consistent statement, made before the onset of an alleged motive to falsify, since defendant had implied that aspects of the witness's testimony were recent fabrications intended to

strengthen the People's case (*see e.g. People v Medina*, 9 AD3d 251 [1st Dept 2004], *lv denied* 3 NY3d 739 [2004]). In any event, this evidence carried little prejudice (*see People v Ludwig*, 24 NY3d 221 [2014]), and any error in admitting it was harmless.

Defendant was properly adjudicated a second felony offender based upon a New Jersey drug conviction. The court properly consulted the accusatory instrument (*see generally People v Jurgins*, 26 NY3d 607, 613-614 [2015]), which establishes that the predicate crime involved the sale of cocaine and not marijuana (*see People v West*, 58 AD3d 483 [1st Dept 2009], *lv denied* 12 NY3d 822 [2009]). We perceive no basis for reducing the sentence or directing that it be served as a parole supervision sentence under CPL 410.91.

We have reviewed certain sealed materials and find that they do not warrant granting defendant any relief. We have considered and rejected defendant's remaining claims, including all remaining constitutional arguments.

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

ENTERED: OCTOBER 18, 2016

CLERK

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

1937 Roy E. Hahn, et al., Index 650817/14
Plaintiffs-Appellants,

-against-

The Dewey & LeBoeuf Liquidation Trust, et al.,
Defendants-Respondents.

_____

Bainton Law Group PLLC, New York (J. Joseph Bainton of counsel), for appellants.

Brown Rudnick LLP, New York (James W. Stoll of counsel), for The Dewey & LeBoeuf Liquidation Trust, respondent.

Proskauer Rose LLP, New York (David M. Lederkramer of counsel), for Proskauer Rose LLP, respondent.

Munger, Tolles & Olson LLP, Los Angeles, CA (Bruce Abbott of the bar of the State of California, admitted pro hac vice, of counsel), for Sidley Austin LLP, respondent.

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Order, Supreme Court, New York County (Eileen Bransten, J.), entered August 6, 2015, which, to the extent appealed from as limited by the briefs, dismissed the amended complaint as time-barred, unanimously affirmed, without costs.

In their 2014 complaint, plaintiffs allege, inter alia, legal malpractice in connection with the defendant law firms' erroneous tax advice, which plaintiffs relied upon to their detriment when, in 2012, the Internal Revenue Service assessed promoter penalty fines in excess of $7 million for failure to

register a tax shelter, and denied plaintiffs any protection under the "safe harbor" provisions of IRS Code § 6707.

Supreme Court properly dismissed the complaint as time-barred under the three year statute of limitations applicable to professional malpractice claims (CPL 214[6]). "A legal malpractice claim accrues 'when all the facts necessary to the cause of action have occurred and an injured party can obtain relief in court'" (*McCoy v Feinman*, 99 NY2d 295, 301 [2002], quoting *Ackerman v Price Waterhouse*, 84 NY2d 535, 541 [1994]). Here, defendants established that the causes of action alleging legal malpractice accrued in 2000-01, when they issued opinion letters and rendered advice that plaintiffs were not required to register a tax shelter (*see Ackerman* at 541-543; *Landow v Snow Becker Krauss, P.C.*, 111 AD3d 795, 796 [2d Dept 2013]). Although plaintiffs claim not to have discovered that this advice was incorrect until years later, "'[w]hat is important is when the malpractice was committed, not when the client discovered it'" (*McCoy v Feinman*, 99 NY2d at 301, quoting *Shumsky v Eisenstein*, 96 NY2d 164, 166 [2001]). Therefore, since the plaintiffs did not commence this action until March 2014, more than three years after their claims for legal malpractice accrued, the complaint was properly dismissed as time-barred.

Contrary to plaintiffs' argument, the special facts doctrine is inapplicable. The doctrine generally applies to claims of fraud in sales transactions (*Jana L. v West 129th St. Realty Corp.*, 22 AD3d 274, 277 n2 [1st Dept 2005]). Further, at the time defendants rendered erroneous tax advice, neither the applicable statute of limitations nor precedent establishing the accrual date of malpractice claims (*see Ackerman*, *supra*) were peculiarly within defendants' knowledge (*Jana L.* at 278), and that same information could have been discovered by plaintiffs through the exercise of ordinary intelligence (*id.*).

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

ENTERED: OCTOBER 18, 2016

CLERK

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

1938 The People of the State of New York, Ind. 1372/12
Respondent,

-against-

Anthony White,
Defendant-Appellant.

_____

Jones Day, New York (Sarah D. Efronson of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Ruth Pickholz, J.), rendered September 24, 2012, convicting defendant, after a jury trial, of burglary in the third degree and petit larceny, and sentencing him, as a second felony offender, to an aggregate term of two to four years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. The evidence established that after defendant entered a store from which he had been barred, he stole merchandise belonging to that store. The jury properly rejected defendant's claim that the merchandise found in his possession originated elsewhere.

In connection with the trespass notice that excluded

defendant from the store, the court properly exercised its discretion in admitting limited evidence concerning the prior larceny that led to the trespass notice. This evidence tended to establish the lawfulness of the store's exclusion of defendant from the premises (*see People v Wright*, 255 AD2d 199, 200 [1st Dept 1998], *lv denied* 92 NY2d 1041 [1998]), as well as to complete the narrative and to dispel speculation by the jury, and its probative value exceeded its prejudicial effect, which was minimized by the court's limiting instruction.

Defendant's remaining contentions are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we reject them on the merits. The court properly exercised its discretion in limiting the content of defendant's voir dire of prospective jurors when it precluded questions that were repetitious or confusing, or that delved into matters of law that were thoroughly covered in the court's own voir dire (*see People v Steward*, 17 NY3d 104, 110 [2011]; *People v Boulware*, 29 NY2d 135, 139 [1971], *cert denied* 405 US 995

[1972]). We also find that the court's innocuous remark to the deliberating jury concerning the scheduling of further deliberations was neither coercive nor comparable to an *Allen* charge in any respect.

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

ENTERED: OCTOBER 18, 2016

CLERK

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

1939 The People of the State of New York, Ind. 144/13
Respondent,

-against-

Jonas Acevado also known as
Jonas Acevedo,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Meaghan L. Powers of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Steven Barrett, J.), rendered January 21, 2015, convicting defendant, upon his plea of guilty, of second degree criminal possession of a weapon, and sentencing him to an aggregate term of three and one-half years incarceration and five years of post-release supervision, unanimously affirmed.

Although we do not find that defendant made a valid waiver of the right to appeal, we perceive no basis for reducing the sentence.

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

ENTERED: OCTOBER 18, 2016

CLERK

Corrected Order - October 26, 2016

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

1940 Edward Sawicki, Index 113886/11
Plaintiff-Appellant,

-against-

AGA 15th Street, LLC, et al.,
Defendants-Respondents,

Cole Partners, Inc.,
Defendant.

_____

Perecman Firm, P.L.L.C., New York (Peter D. Rigelhaupt of counsel), for appellant.

Traub Lieberman Straus & Shrewsberry LLP, Hawthorne (Timothy G. McNamara of counsel), for respondents.

_____

Order, Supreme Court, New York County (Donna M. Mills, J.), entered May 13, 2015, which, to the extent appealed from as limited by the briefs, granted defendants AGA 15th Street, LLC (AGA) and Skyward CM LLC's (Skyward) motion for summary judgment dismissing plaintiff's Labor Law § 241(6) claims predicated upon alleged violations of Industrial Code (12 NYCRR) §§ 23-9.2(a), 23-9.5(c), 23-9.5(g), and 23-9.9(c)(4), and denied plaintiff's motion for partial summary judgment on his Labor Law § 241(6) claim predicated on an alleged violation of 12 NYCRR 23-9.5(g), unanimously modified, on the law, to deny **defendants'** motion for summary judgment dismissing the Labor Law § 241(6) claims

predicated on alleged violations of 12 NYCRR 23-9.2(a), 23-9.5(g), and 23-9.9(c)(4), and otherwise affirmed, without costs.

Plaintiff claims that, while he was working at a construction site, he was injured when a Bobcat ran over his left foot. Supreme Court erred in dismissing plaintiff's Labor Law § 241(6) claims on the ground that plaintiff failed to reference any sections of the Industrial Code in either his complaint or bill of particulars, since the bill of particulars clearly alleged that defendants violated Industrial Code (12 NYCRR) §§ 23-9.2(a), 23-9.2(b), 23-9.5(c), 23-9.5(g), and 23-9.9(c)(4).

AGA, the owner of the premises, and Skyward, the construction manager, failed to make a prima facie showing that the Bobcat was not backing up when the accident occurred, as plaintiff testified that the Bobcat backed over his left foot with the left rear wheel of the machine. Nor did defendants show that the Bobcat was equipped with a back-up alarm. The affidavit they submitted was insufficient to satisfy their burden, since the affiant, who was not employed by plaintiff's employer at the time of the accident, did not inspect the Bobcat. Nor did he identify any relevant inspection or maintenance records. Thus, defendants were not entitled to summary judgment on plaintiff's Labor Law § 241(6) claims predicated on alleged violations of 12 NYCRR 23-9.2(a), 23-9.9(c)(4), or 23-9.5(g), and their motion

should have been denied, regardless of the sufficiency of plaintiff's opposing papers (*see Gonzalez v Perkan Concrete Corp.*, 110 AD3d 955, 957 [2d Dept 2013]).

Plaintiff is not entitled to partial summary judgment on the issue of defendants' liability with respect to his Labor Law § 241(6) claim predicated on an alleged violation of 12 NYCRR 23-9.5(g). A violation of the Industrial Code does not establish negligence as a matter of law but is "merely some evidence to be considered on the question of a defendant's negligence" (*Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 522 [1985], *rearg denied* 65 NY2d 1054 [1985]; *see Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 349 [1998]).

Defendants established their entitlement to dismissal of the Labor Law § 241(6) claim predicated upon an alleged violation of 12 NYCRR 23-9.5(c), which requires, in pertinent part, that excavating machines "be operated only by designated persons." The evidence shows that the Bobcat operator was "selected and directed" by his employer to operate the Bobcat and therefore was

a designated person within the meaning of the regulation (12 NYCRR 23-1.4[b][17]; *see Martinez v Hitachi Constr. Mach. Co., Ltd.*, 15 Misc 3d 244, 256-257 [Sup Ct, Bronx County 2006]).

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

ENTERED: OCTOBER 18, 2016

CLERK

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

1941 The People of the State of New York, Ind. 521/12
Respondent,

-against-

Alberto Delgado,
Defendant-Appellant.

_____

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

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

_____

Order, Supreme Court, New York County (Patricia Nunez, J.), entered November 24, 2014, which adjudicated defendant a level one sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court properly designated defendant a sexually violent offender because he was convicted of an enumerated offense, and the court lacked discretion to do otherwise (*see People v Bullock*, 125 AD3d 1 [1st Dept 2014], *lv denied* 24 NY3d 915 [2015]). We decline to revisit our holding in *Bullock*.

Defendant's due process argument is unpreserved and without merit.

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

ENTERED: OCTOBER 18, 2016

CLERK

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

1943 The People of the State of New York, Ind. 2035/10
Respondent,

-against-

Christopher Ezell,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Ramandeep Singh of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Margaret L. Clancy, J.), rendered March 28, 2014, convicting defendant, after a nonjury trial, of murder in the second degree, and sentencing him to a term of 22 years to life, unanimously affirmed.

The court's determination that defendant failed to establish the affirmative defense of extreme emotional disturbance by a preponderance of the evidence was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the court's evaluation of conflicting expert testimony concerning defendant's mental state.

Under the circumstances of the case, defendant's rights under *People v Rosario* (9 NY2d 286 [1961], *cert denied* 368 US 866 [1961]) did not require the prosecutor to turn over to the

defense, in their entirety, direct examination outlines regarding two witnesses, which were prepared, at least in part, during the prosecutor's interviews of those two witnesses. The court's remedy – reviewing the material in camera, identifying the questions that might have incorporated aspects of the witnesses' interview answers, ordering disclosure of those portions of the outline, and according the defense the opportunity to recall those witnesses – was adequate. To the extent that any of the questions in the outline that were not disclosed may have contained traces of information obtained during the witness interviews, defendant has failed to show that he was prejudiced in any manner by the omission (*see People v Martinez*, 22 NY3d 551, 567-568 [2014]).

We perceive no basis for reducing the sentence.

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

ENTERED: OCTOBER 18, 2016

CLERK

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

1944 Miguel Aponte, Index 303070/12
Plaintiff-Appellant,

-against-

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

_____

Mirman, Markovitz & Landau, P.C., New York (David J. Pretter of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Benjamin Welikson of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Mitchell J. Danziger, J.), entered June 17, 2015, which denied plaintiff's motion for partial summary judgment against defendants on the issue of liability, unanimously affirmed, without costs.

The doctrine of res ipsa loquitur does not apply in this case; the doctrine merely permits an inference of negligence to be drawn by the factfinder and summary judgment is warranted only if the facts are undisputed and the inference of negligence is inescapable (*see Morejon v Rais Constr. Co.*, 7 NY3d 203, 207, 209 [2006]). While plaintiff asserts that defendant City's paramedics dropped him while he was strapped into a stair chair and being lifted into an ambulance, the paramedics testified that one of them tripped while moving the stair chair toward a

stretcher, but that the chair never fell to the ground and plaintiff was not hurt. Since the parties provide conflicting accounts of how the alleged accident occurred and whether plaintiff suffered injury as a result thereof, the court correctly denied plaintiff's motion for partial summary judgment (*id.* at 207, 212).

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

ENTERED: OCTOBER 18, 2016

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

1945 The People of the State of New York, Ind. 2843/75
Respondent,

-against-

Enrique Diaz,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Ryan P. Mansell of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Raymond L. Bruce, J.), entered March 18, 2015, which adjudicated defendant a level two sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court properly exercised its discretion when it declined to grant a downward departure. Defendant's assertion that the court improperly failed to follow the three-step procedure set out in *People v Gillotti* (23 NY3d 841, 861 [2014]) is unpreserved and we decline to reach it in the interest of justice. As an alternative holding, we reject it on the merits, as there is no authority requiring the court to articulate its consideration of each step and its conclusions.

Defendant was convicted of an extremely serious crime, for which he was incarcerated for many years. While defendant cites, as a mitigating factor, his allegedly lesser role in the crime than that of his codefendants, this factor was adequately taken into consideration by the risk assessment instrument. Furthermore, his efforts to minimize his involvement are unpersuasive. Defendant's age, 58 years at the time of the hearing, does not warrant a downward departure, nor do any of his alleged ailments indicate an inability to reoffend. We note defendant's entirely unsatisfactory conduct while in prison and his possession of a weapon only a few years before his release, indicating his continued violent character.

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

ENTERED: OCTOBER 18, 2016

CLERK

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

1946 Evlin Ruiz, et al., Index 400269/13
Plaintiffs-Appellants,

-against-

221-223 E. 28th St., LLC,
Defendant-Respondent.

_____

Reingold & Tucker, Brooklyn (Abraham Reingold of counsel), for appellants.

Mischel & Horn, P.C., New York (Scott T. Horn of counsel), for respondent.

_____

Order, Supreme Court, New York County (Richard F. Braun, J.), entered December 15, 2015, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

In support of its motion, defendant submitted evidence that, at the time of plaintiff's accident, there were at least 30 garbage bags piled in three rows about five feet high near a fire hydrant on the sidewalk in front of defendant's building. The bags were "unopened" and "tightened," and there was enough room on the sidewalk for at least one person to pass by, unobstructed. Plaintiff's foot caught on one of the bags, she tripped forward, and she then slipped on what she believed was water, falling forward and injuring her arm.

The foregoing establishes defendant's prima facie entitlement to summary judgment, on the ground that the garbage bags constituted an open and obvious condition and were not inherently dangerous (*see Lazar v Burger Heaven*, 88 AD3d 591, 591 [1st Dept 2011]; *Bisogno v 333 Tenants Corp. Co-Op*, 72 AD3d 555, 556 [1st Dept 2010]; *Rogers v Spirit Cruises*, 195 Misc 2d 335, 336 [App Term, 1st Dept 2003]).

Plaintiffs failed to raise any issue of fact in opposition. The allegation that the sidewalk was wet, causing plaintiff to slip after her initial trip over a garbage bag, does not render defendant liable, absent evidence that defendant created or had notice of any dangerous condition caused by the wetness (*see Bock v Loumarita Realty Corp.*, 118 AD3d 540, 541 [1st Dept 2014]; *Waiters v Northern Trust Co. of N.Y.*, 29 AD3d 325, 326 [1st Dept 2006]; *cf. Torres v New York City Hous. Auth.*, 118 AD3d 540 [1st Dept 2014] [plaintiff slipped on "greasy liquid" leaking from garbage bags]). Plaintiff's contention that the water must have leaked out one of the bags is unsupported by the record and is purely speculative (*see Acunia v New York City Dept. of Educ.*, 68

AD3d 631, 632 [1st Dept 2009]). Plaintiff's contention that she tripped on a "protrusion" from one of the garbage bags likewise finds no support anywhere in the record.

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

ENTERED: OCTOBER 18, 2016

CLERK

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

1947 The People of the State of New York, Ind. 1269/13
Respondent,

-against-

Alain Pryce,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Anita Aboagye-Agyeman of Counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Natalia Bedoya McGinn of counsel), for respondent.

_____

Judgment, Supreme Court New York County (Bruce Allen, J.), rendered August 27, 2013, convicting defendant, after a jury trial, of assault in the third degree, and sentencing him to a term of nine months, unanimously affirmed.

The verdict was supported by legally sufficient evidence and was not against the weight of the evidence (*see e.g. People v Danielson*, 9 NY2d 342, 349 [2007]). There is no basis for disturbing the jury's credibility determinations. The evidence supports the inference that when defendant kicked the victim, he did so with the intent, at least in part, to cause physical injury. The evidence also established that the victim sustained physical injury, resulting in bruising and swelling. The fact that she treated her injury with Tylenol and a warm compress

rather than seeking medical attention does not warrant a different conclusion (*see People v Guidice*, 83 NY2d 630, 636 [1994]).

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

ENTERED: OCTOBER 18, 2016

CLERK

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

1948 The People of the State of New York, Ind. 5284/09
Respondent,

-against-

Ahmad Akbar,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Eunice C. Lee of counsel), for appellant.

_____

Judgment, Supreme Court, New York County (Thomas Farber, J.), rendered August 12, 2013, unanimously affirmed.

Application by defendant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1st Dept 1976]). We have reviewed this record and agree with defendant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department on reasonable notice to the respondent within thirty (30) days after service of a copy of this order.

Denial of the application for permission to appeal by the judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

ENTERED: OCTOBER 18, 2016

CLERK

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

1949 In re Jamal S.,
Petitioner-Appellant,

-against-

Kenneth S., et al.,
Respondents-Respondents.

_____

Carol L. Kahn, New York, for appellant.

Tennille M. Tatum-Evans, New York, for Kenneth S., respondent.

Andrew J. Baer, New York, for Melba P., respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Amy Hausknecht of counsel), attorney for the child.

_____

Order, Family Court, Bronx County (Jennifer Burtt, Ref.), entered on or about June 15, 2015, which, to the extent appealed from as limited by the briefs, denied petitioner father's petition for custody of the subject child, continued a prior order granting custody to respondent paternal grandfather, and granted only supervised visitation to the father, unanimously affirmed, without costs.

The grandfather showed by a preponderance of the evidence that extraordinary circumstances existed, and that it was in the subject child's best interest that he retain custody (*see Matter of Bennett v Jeffreys*, 40 NY2d 543, 548 [1976]; *Matter of Louis*

N. [Dawn O.], 98 AD3d 918, 919 [1st Dept 2012]). The evidence shows that the father is an unfit parent who has persistently neglected the child and has relinquished his parental rights and responsibilities to the grandfather. In particular, the father's contact with the child has not been meaningful and has been sporadic since he lost custody in 2009. He also has an extensive history of violence, and there is evidence that he sexually molested a child. In contrast, the evidence shows that the grandfather and the subject child have a loving bond, and that he takes excellent care of the child.

The father waived any right to a hearing on modification of the visitation order by failing to appear at multiple court appearances. Moreover, there is a substantial basis in the record supporting Family Court's finding that unsupervised visitation with the father is not in the child's best interest.

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

ENTERED: OCTOBER 18, 2016

CLERK

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

1950N Alexander J. Gerschel, et al., Index 651561/10
Plaintiffs-Appellants,

-against-

Craig G. Christensen, et al.,
Defendants-Respondents,

Christensen Law Group, LLP, et al.,
Defendants.

_____

Philippe J. Gerschel, New York, appellant pro se and for Alexander J. Gerschel, Andre R Gerschel and Daniel A. Gerschel, appellants.

Himmel & Bernstein, LLP, New York (Andrew D. Himmel of counsel), for respondents.

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Order, Supreme Court, New York County (Barbara Jaffe, J.), entered December 15, 2015, which granted the motion of defendants Craig G. Christensen and Christensen Capital Law Corporation (defendants) to vacate a default order pursuant to CPLR 5015(a)(1), unanimously affirmed, without costs.

Our previous decision (128 AD3d 455 [1st Dept 2015]) did not preclude defendants from moving to vacate the default order that was entered in the IAS court on that decision. "An issue must be actually litigated for the law of the case doctrine ... to apply" (*People v Grasso*, 54 AD3d 180, 210 [1st Dept 2008]; *see also Bishop v Maurer*, 83 AD3d 484, 484 [1st Dept 2011]). What was at

issue and litigated on the prior appeal was the interpretation of CPLR 1003 and the tolling agreements, *not* the standards for vacating a default judgment.

The motion court providently exercised its discretion by accepting defense counsel's excuse that he failed to make a timely motion to dismiss the amended complaint on behalf of defendants.

Except as to the tenth cause of action, defendants "set forth facts sufficient to make out a prima facie showing of a meritorious defense" (*Bergen v 791 Park Ave. Corp.*, 162 AD2d 330, 331 [1st Dept 1990]). Plaintiffs' claims for legal malpractice, negligence, conversion, unjust enrichment, and constructive trust accrued at the time of their injury; these claims are not subject to a discovery rule (*see e.g. McCoy v Feinman*, 99 NY2d 295, 301 [2002] [malpractice]; *Playford v Phelps Mem. Hosp. Ctr.*, 254 AD2d 471, 471-472 [2d Dept 1998], *lv denied* 93 NY2d 806 [1999] [negligence]; *Vigilant Ins. Co. of Am. v Housing Auth. of City of El Paso, Tex.*, 87 NY2d 36, 44 [1995] [conversion]; *Kaufman v Cohen*, 307 AD2d 113, 127 [1st Dept 2003] [unjust enrichment]; *Knobel v Shaw*, 90 AD3d 493, 496 [1st Dept 2011] [constructive trust]). The statute of limitations for malpractice, negligence, and conversion is three years (*McCoy*, 99 NY2d at 301; *Playford*,

254 AD2d at 471; *Vigilant*, 87 NY2d at 44); that for unjust enrichment and constructive trust is six years (*Knobel*, 90 AD3d at 495-496). Plaintiffs were injured in November 2001, when the Bella Meyer Trust and Francine Meyer de Camaret Trust were dissolved and plaintiffs failed to receive their share of the distributions therefrom. Thus, the statutes of limitation ran either in November 2004 or November 2007, depending on the cause of action. Plaintiffs did not sue until September 2010.

Where "an allegation of fraud is essential to a breach of fiduciary duty claim" (*IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 139 [2009]), the statute of limitations is six years (*id.*), and "[t]he discovery accrual rule ... applies" (*Kaufman*, 307 AD2d at 122). Two of the plaintiffs submitted affidavits saying they did not know until early September 2008 that the trusts had been distributed in 2001. On the other hand, plaintiffs' father submitted an affidavit saying that his sons were aware that distributions had been made by or before 2003. Where, as here, "[i]ssues of fact are created in the affidavits submitted on behalf of the opposing parties" (*Bishop v Galasso*, 67 AD2d 753 [3d Dept 1979]), a defendant can establish a meritorious defense and is entitled to have a default judgment vacated (*id.*).

When a plaintiff alleges fraud or constructive fraud (*cf. Colon v Banco Popular N. Am.*, 59 AD3d 300, 301 [1st Dept 2009]), "[a] cause of action for negligent misrepresentation accrues on the date of the alleged misrepresentation which is relied upon by the plaintiff" (*Fandy Corp. v Lung-Fong Chen*, 262 AD2d 352, 353 [2d Dept 1999]). The complaint does not allege that defendants made any misrepresentation on which plaintiffs relied.

If defendants were plaintiffs' fiduciaries for the relevant period, plaintiffs would be entitled to an accounting "for at least the six years preceding the commencement of this action" (*Knobel*, 90 AD3d at 496). While Mr. Christensen was plaintiffs' fiduciary in November 2001 because he was their attorney-in-fact with respect to the trusts, defendants made a prima facie showing that they were no longer plaintiffs' fiduciaries by September 2004; Mr. Christensen contends that the powers of attorney expired by operation of law when the trusts were dissolved in November 2001.

Since defendants admitted that they breached the amended tolling agreement by failing to pay plaintiffs the $100,000 required thereunder, defendants failed to demonstrate a meritorious defense to the tenth cause of action. However, after the issuance of the order appealed from, the IAS court granted

plaintiffs' motion for summary judgment on that cause of action against defendants and defendant Jeffrey M. Moritz. Thus, it would be academic at this point for us to say that the IAS court should have denied defendants motion to vacate the default order with respect to the tenth cause of action.

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

ENTERED: OCTOBER 18, 2016

CLERK

Tom, J.P., Mazzarelli, Richter, Manzanet-Daniels, Webber, JJ.

2024 The People of the State of New York, Respondent, Ind. 2766/11 2244/13

-against-

Edwin Martinez,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Shannon Henderson of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (John S. Moore, J.), rendered September 25, 2014,

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

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

ENTERED: OCTOBER 18, 2016

CLERK

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

Tom, J.P., Andrias, Manzanet-Daniels, Kapnick, Gesmer, JJ.

816 New Greenwich Litigation Trustee, LLC, as Successor Trustee of Greenwich Sentry, L.P., Plaintiff-Appellant,

-against-

Citco Fund Services (Europe) B.V., et al., Defendants-Respondents,

GlobeOp Financial Services LLC, Defendant.

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New Greenwich Litigation Trustee, LLC, as Successor Trustee of Greenwich Sentry Partners, L.P., Plaintiff-Appellant,

-against-

Citco Fund Services (Europe) B.V., et al., Defendants-Respondents,

GlobeOp Financial Services LLC, Defendant.

Index 600469/09
600498/09

_____

Milberg LLP, New York (Robert A. Wallner of counsel), for appellant.

Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York (Walter Rieman of counsel), for Citco Fund Services (Europe) B.V. and Citco (Canada) Inc., respondents.

Hughes Hubbard & Reed LLP, New York (William R. Maguire of counsel), for PricewaterhouseCoopers Accountants N.V. and PricewaterhouseCoopers LLP, respondents.

_____

Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered May 27, 2014, affirmed, with costs.

Opinion by Tom, J.P. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
Richard T. Andrias
Sallie Manzanet-Daniels
Barbara R. Kapnick
Ellen Gesmer, JJ.

816
Index 600469/09
600498/09

_____x

New Greenwich Litigation Trustee, LLC, as Successor Trustee of Greenwich Sentry, L.P.,
Plaintiff-Appellant,

-against-

Citco Fund Services (Europe) B.V., et al.,
Defendants-Respondents,

GlobeOp Financial Services LLC,
Defendant.

- - - - -

New Greenwich Litigation Trustee, LLC, as Successor Trustee of Greenwich Sentry Partners, L.P.,
Plaintiff-Appellant,

-against-

Citco Fund Services (Europe) B.V., et al.,
Defendants-Respondents,

GlobeOp Financial Services LLC,
Defendant.

_____x

Plaintiffs appeal from the order of the Supreme Court, New York County (Marcy S. Friedman, J.), entered May 27, 2014, which, to the extent appealed from, granted defendants-respondents' motions to dismiss the complaints pursuant to CPLR 3211(a)(1) and (7).

Milberg LLP, New York (Robert A. Wallner of counsel), and Seeger Weiss LLP, New York (Stephen A. Weiss of counsel), for appellant.

Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York (Walter Rieman, Andrew G. Gordon and Gregory F. Laufer of counsel), for Citco Fund Services (Europe) B.V. and Citco (Canada) Inc., respondents.

Hughes Hubbard & Reed LLP, New York (William R. Maguire of counsel), for PricewaterhouseCoopers LLP and PricewaterhouseCoopers Accountants N.V., respondents, and (Sarah L. Cave and Karen L. Goldberg of counsel), for PricewaterhouseCoopers Accountants N.V., respondent.

Kirkland & Ellis LLP, New York (Andrew M. Genser of counsel), for PricewaterhouseCoopers LLP, respondent.

TOM, J.

In this appeal, we are asked to decide whether New York law, rather than Delaware law, applies to this corporate litigation resulting from the never ending saga of Bernard L. Madoff's Ponzi scheme. This appeal also raises issues concerning whether plaintiff's claims are precluded by the doctrine of in pari delicto;[1] whether the court correctly dismissed the claims of implied and contractual indemnification; and whether the forum selection clause in defendant PricewaterhouseCoopers Accountants, N.V.'s (PWC Netherlands) agreement with plaintiff's predecessors in interest is mandatory.

For the reasons set forth below, we find that the motion court correctly applied New York law and properly found that the in pari delicto doctrine mandates dismissal of all causes of action, with the exception of the claims for contribution, which were dismissed on other grounds not before us on this appeal.[2] We also find that the court properly dismissed the

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[1]The in pari delicto doctrine "mandates that the courts will not intercede to resolve a dispute between two wrongdoers" (*Kirschner v KPMG LLP*, 15 NY3d 446, 464 [2010]).

[2]The court dismissed the contribution claims on the ground that the funds' settlement with Bernard Madoff Investment Securities (BMIS) included a release of the funds from "all" actions and claims, and that General Obligations Law § 15-108(c) - which provides "[a] tortfeasor who has obtained his own release from liability shall not be entitled to contribution from any other person" - is a bar to plaintiff's contribution claims. Plaintiff does not dispute this finding on appeal.

indemnification claims on separate grounds, and that the forum selection clause in defendant PWC Netherlands's agreement is mandatory and enforceable.

These two consolidated actions were originally commenced by Greenwich Sentry, L.P. and Greenwich Sentry Partners, L.P. (the funds), private investment limited partnerships operating as feeder funds which, as of November 2008, had about $325 million invested in Bernard L. Madoff Investment Securities, LLC. The funds sustained substantial losses in Madoff's Ponzi scheme, and on November 19, 2010, they filed Chapter 11 bankruptcy petitions in the Southern District of New York.

Plaintiff New Greenwich Litigation Trustee, LLC is successor trustee (Trustee) of the funds' litigation trusts, established in connection with the funds' jointly administered Chapter 11 reorganization plans. Defendants GlobeOp Financial Services LLC (GlobeOp) and Citco Fund Services (Europe) BV (Citco Europe) were administrators of the funds, and defendant Citco (Canada) Inc. was a sub-administrator of the funds. Defendant PWC Netherlands was the funds' outside accountant and auditor for 2005, and defendant PricewaterhouseCoopers LLP (PWC Canada) was the funds' outside accountant and auditor for 2006 and 2007.

The actions were originally commenced as derivative actions on behalf of the funds by limited partners of the funds in February 2009. The funds alleged that the "Fund Defendants" -

which included affiliates of the funds' manager, Fairfield Greenwich Group; individual directors of the manager's affiliates; and the instant Citco defendants - breached their fiduciary duties by failing to conduct adequate due diligence of Madoff Securities, while collecting hundreds of millions of dollars in fees on fictitious assets. The derivative complaints asserted causes of action against the Fund Defendants for breach of fiduciary duty, negligence, unjust enrichment, and accounting; and asserted causes of action against the PWC defendants for professional negligence, breach of contract, and negligent misrepresentation.

The derivative actions were stayed by various orders, as the funds' bankruptcy petition was adjudicated. By order dated December 22, 2011, the bankruptcy court confirmed the funds' Chapter 11 reorganization plan and appointed plaintiff as trustee of the funds' litigation trust.

By order dated July 7, 2011, the bankruptcy court approved settlement of a clawback claim brought by the trustee of Madoff Securities (Madoff Trustee) against the funds, pursuant to which the funds agreed to judgment against them for approximately $200 million for amounts withdrawn from Madoff Securities before it went into bankruptcy. As part of the settlement, the funds also assigned to the Madoff Trustee all of their claims against their manager (the Fairfield Greenwich Group), and against their former

general partner, investment managers, and investment advisors, who are not parties to these actions.

After Supreme Court lifted the stay of the derivative actions in April 2012, the Trustee was substituted for the derivative plaintiffs, and two substantively identical amended complaints, both dated May 11, 2012, were filed on behalf of each Fund.

As against the administrator defendants (i.e., Citco Europe, Citco Canada, and GlobeOp), the Trustee asserted causes of action for breach of fiduciary duty, negligent misrepresentation, negligence and gross negligence, breach of contract, common-law fraud, unjust enrichment, and accounting. As against the PWC defendants, the Trustee asserted causes of action for common-law fraud, negligent misrepresentation, professional negligence (malpractice), breach of contract, and aiding and abetting breach of fiduciary duty. Both complaints asserted against all of the defendants a cause of action for contribution and indemnification for the approximately $200 million consent judgment the funds paid to the Madoff Trustee in settlement of the Madoff Securities clawback claim.

Notably, contrary to the allegations asserted against the funds' manager and administrators in the original derivative complaints, both complaints state that "[t]he Fund was not a culpable participant in the Ponzi scheme, and did not know of the

scheme prior to its December 11, 2008 disclosure."

The Citco defendants and both PWC defendants moved to dismiss the amended complaints pursuant to CPLR 3211, based on the doctrine of in pari delicto. In addition, the PWC defendants sought dismissal based on the forum selection clauses in their administrator agreements with the funds.

Supreme Court granted the dismissal motions. In so doing, the court rejected plaintiff's claim that the internal affairs doctrine requires the application of Delaware law to this litigation and concluded that the in pari delicto doctrine, as interpreted by New York courts, requires dismissal of the claims. The court also rejected plaintiff's assertion of various exceptions to the doctrine. As for the indemnification claims, the court found that these are untenable since plaintiff cannot show that it has "committed no wrong" and cannot show it received the contractually required written consent from the Citco defendants to indemnify the funds. The court also found that the forum selection clause in defendant PWC Netherlands' agreement is mandatory and requires those claims to be heard in Amsterdam. We now affirm.

The parties contend that either Delaware law or New York law should be applied to this litigation. Plaintiff argues that under the internal affairs doctrine, Delaware law governs this matter, including the in pari delicto analysis. Specifically,

plaintiff urges that the claims in these actions involve the internal affairs of the funds which are Delaware partnerships, and that under Delaware law, the claims against the PWC defendants are not barred by the in pari delicto doctrine. However, plaintiff's argument fails.

The internal affairs doctrine is a "conflict of laws principle which recognizes that only one State should have the authority to regulate a corporation's internal affairs - matters peculiar to the relationships among or between the corporation and its *current* officers, directors, and shareholders - because otherwise a corporation could be faced with conflicting demands" (*Edgar v MITE Corp.*, 457 US 624, 645 [1982] [emphasis added]; *see also Culligan Soft Water Co. v Clayton Dubilier & Rice LLC*, 118 AD3d 422 [1st Dept 2014]). Stated another way, "Under the internal affairs doctrine, claims concerning the relationship between the corporation, its directors, and a shareholder are governed by the substantive law of the state or country of incorporation" (*Davis v Scottish Re Group, Ltd.*, 138 AD3d 230, 233 [1st Dept 2016]).

However, as the Delaware Chancery Court explained in *In re American Intl. Group, Inc.* (965 A2d 763, 817 [Del Ch 2009]), the "internal affairs doctrine, although potent, has very specific applications." In particular, the Chancery Court noted that the

doctrine only "governs the choice of law determinations involving matters *peculiar* to corporations, that is, those activities concerning the relationships *inter se* of the corporation, its directors, officers and shareholders" (965 A2d at 817 [internal quotation marks omitted]). Accordingly, "[s]ince the internal affairs doctrine does not apply to those defendants who are not current officers, directors, and shareholders" of the plaintiff corporation (*Culligan Soft Water Co.*, 118 AD3d at 422), as none of the instant defendants are with respect to the funds, the internal affairs doctrine does not apply to the claims asserted against defendants.

Notably, and especially relevant to this case, in *American Intl. Group*, the Chancery Court rejected the application of the internal affairs doctrine to claims against PWC, stating that "[a]lthough PWC's role as an auditor relates to the internal affairs of the corporation, PWC was still a contractual agent employed by AIG to carry out certain contractual duties rather than a part of AIG" (965 A2d at 817; *see also QVT Fund LP v Eurohypo Capital Funding LLC I*, 2011 WL 2672092, *7, 2011 Del Ch LEXIS 97, *24 [Del Ch 2011] [internal affairs doctrine "does not apply where the rights of third parties external to the corporation are at issue, e.g., contracts and torts"][internal quotation marks omitted]). We find this reasoning to be

persuasive and therefore reject the application of the internal affairs doctrine to the instant defendants who are outside administrators and auditors, i.e. contractual agents or third parties external to the funds.

Thus, since Delaware law clearly does not apply here, we apply New York law to these actions. Under New York law, we conclude that application of the in pari delicto doctrine mandates dismissal of all the causes of action save the claims for contribution, which fail on separate grounds not raised before this Court. As the Court of Appeals has explained, "[t]he doctrine of in pari delicto mandates that the courts will not intercede to resolve a dispute between two wrongdoers" (*Kirschner v KPMG LLP*, 15 NY3d at 464). This doctrine "serves important public policy purposes," including "denying judicial relief to an admitted wrongdoer" which "deters illegality," and avoiding "entangling courts in disputes between wrongdoers" (*id*).

Significantly, under the doctrine, the acts of a corporation's authorized agents, such as its officers, are imputed to the corporation "even if [the] particular acts were unauthorized" (*id.* at 465). "Agency law presumes imputation even where the agent acts less than admirably, exhibits poor business judgment, or commits fraud" (*id.*). Further, "the principle that a wrongdoer should not profit from his own misconduct is so strong in New York that . . . the defense

applies even in difficult cases and should not be weakened by exceptions" (*id.* at 464 [internal quotation marks omitted]).

However, an "adverse interest" exception to imputation exists where the agent has "*totally abandoned* his principal's interests and [is] acting *entirely* for his own or another's purposes" (*id.* at 466 [internal quotation marks omitted]). This "most narrow of exceptions" is reserved for those cases in which "the insider's misconduct benefits only himself or a third party; i.e., where the fraud is committed *against* a corporation rather than on its behalf" (*id.* at 466-467).

In this case, plaintiff's claims are precluded under the doctrine of in pari delicto. As the funds' bankruptcy trustee, plaintiff stands in the funds' shoes, and is subject to a defense based on the in pari delicto doctrine to the same extent as the funds (*see In re MF Global Holdings Ltd. Inv. Litig.*, 998 F Supp 2d 157, 189-191 [SD NY 2014][applying the New York in pari delicto doctrine to claim against auditor brought by trustee appointed under Securities Investor Protection Act]; *Buechner v Avery*, 38 AD3d 443, 444 [1st Dept 2007] ["the trustee was precluded from bringing the above tort claims by the doctrine of in pari delicto based upon the cooperation of the management of the bankrupt corporation with defendant third parties in committing the alleged wrongs"]). Thus, the doctrine "prevents

the trustee from recovering in tort if the corporation, acting through authorized employees in their official capacities, participated in the tort" (*MF Global Holdings*, 998 F Supp 2d at 189).

While a claim of in pari delicto sometimes requires factual development and is therefore not amenable to dismissal at the pleading stage (*see Gatt Communications, Inc. v PMC Assoc., L.L.C.*, 711 F 3d 68, 80-81 [2d Cir 2013]), the doctrine can apply on a motion to dismiss in an appropriate case (*Kirschner*, 15 NY3d at 459, n 3), such as where its application is "plain on the face of the pleadings" (*In re Bernard L. Madoff Inv. Sec. LLC*, 721 F 3d 54, 65 [2d Cir 2013]).

Here, it is undisputed that the derivative complaints in these actions pleaded extensive wrongdoing on the part of the funds' management. In particular, the complaints pleaded that the Fund Defendants, which included the various Fairfield Greenwich Group affiliates that managed the funds, their individual directors, and the funds' outside administrators including the Citco defendants, received "hefty" management fees for their experience in selecting and monitoring fund managers, and touted their due diligence "while issuing false reports to investors presenting nonexistent, or, at the very least, highly inflated, profits, and collecting fees based on such fictitious profits." The complaints further alleged that the general

partner "completely abdicated its responsibilities to the Limited Partners and the Fund by failing to perform even minimal due diligence" into the funds' sole custodian, Bernard Madoff Investment Securities, LLC (BMIS), and, among other things, failed to "safely manage the Fund's assets"; perform due diligence; and investigate red flags regarding BMIS. In alleging demand futility, the complaints pleaded that the funds' general partner faced liability for its "total abrogation of its duty of oversight," and "participated in, approved, or permitted the wrongs alleged herein, concealed or disguised those wrongs, or recklessly or negligently disregarded them."

Plaintiff further contends that the court erred in treating the allegations in the derivative complaints as conclusive against the Trustee. Plaintiff also attempts to contrast *Kirschner*, claiming that in *Kirschner* the allegations at issue were contained in the operative complaint, thus constituting formal judicial admissions, while here the allegations are at most informal judicial admissions.

However, an informal judicial admission may be found to be a binding declaration of a "representative or predecessor in interest of a party" (Prince, Richardson on Evidence § 8-201, at 510 [Farrell 11th ed]; *see Matter of Union Indem. Ins. Co. of N.Y.*, 89 NY2d 94, 103 [1996]). In *Morgenthow & Latham v Bank of N.Y. Co.* (305 AD2d 74 [1st Dept 2003], *lv denied* 100 NY2d 512

[2003]), the plaintiff's trustee's allegations made in earlier federal litigation were found by this Court to be informal judicial admissions binding on the plaintiff in the state action. Further, we found such informal judicial admissions to constitute "documentary evidence" within the meaning of CPLR 3211(a)(1), which "flatly contradicted" the allegations of fraud in the complaint, and justified dismissal of the fraud claim (*id.* at 82). In sum, the motion court properly treated the derivative allegations against the funds' management as informal judicial admissions binding on the funds and their Trustee in this litigation.

The conclusory, self-serving testimony offered by plaintiff did not disprove the in pari delicto defense. Nor did it create issues of fact precluding dismissal on the pleadings. In particular, plaintiff cites the testimony of PWC Canada partner Patricia Perruzza, who expressed her view that the funds did not engage in fraud, or wrongful or unreasonable conduct. We agree with the motion court that this testimony and other similar testimony cited by plaintiff is "plainly insufficient to establish that the [in pari delicto] defense is without merit."

Plaintiff incorrectly claims that in pari delicto requires "immoral or unconscionable conduct" by the plaintiff, and that negligence is insufficient. Rather, the true focus of the in pari delicto doctrine is whether the defendant's wrongdoing is at

least equal to that of the plaintiff's. Indeed, the case incompletely quoted by plaintiff actually provides that in pari delicto "requires immoral or unconscionable conduct that makes the wrongdoing of the party against which it is asserted at least equal to that of the party asserting it" (*Stahl v Chemical Bank*, 237 AD2d 231, 232 [1st Dept 1997]). The Court of Appeals, in *Kirschner*, further expounded that "[t]he doctrine's full name is in pari delicto potior est conditio defendentis, meaning '[i]n a case of equal or mutual fault, the position of the [defending party] is the better one'" (15 NY3d at 464 n 4 [internal citation omitted]). The prior derivative complaints alleged that the funds sustained losses due to the Fund Defendants' gross, reckless, bad faith, willful and wrongful mismanagement of the funds' assets, and that the Fund Defendants materially misled the funds. The derivative allegations of the funds' imputed wrongdoing are at least equal to those asserted against the Citco and PWC defendants in the amended complaints.

Nor does it avail plaintiff to argue that because the allegations in the derivative complaints were made "upon information and belief," they do not constitute judicial admissions. The introductory paragraphs of the derivative complaints provide that the allegations are made upon information and belief "based upon, *inter alia*, the investigation conducted by Plaintiff's counsel, including a review of [funds manager]

Fairfield Greenwich Group's publicly issued press releases, interviews with its former employees, the Confidential Offering Memorandum for [the funds], and press articles." However, crucially, the derivative complaints go on to extensively detail, inter alia, how the funds' manager (and its individual officers or directors) represented that it would follow certain due diligence practices, but that it failed to establish and implement adequate controls, and engaged in gross mismanagement, resulting in its failure to ascertain Madoff's fraud, to the detriment of the funds. Thus, the derivative allegations are not fairly characterized as "information and belief" allegations, because they are factual in nature, highly detailed, and are not consistent with the lack of direct knowledge that are ordinarily found in allegations that are truly made on information and belief.

According to plaintiff, the derivative allegations could only bind the derivative plaintiffs and not bind the funds, which were the real parties in interest in the derivative actions. This contention is meritless. Contrary to plaintiff's contention, the "real party in interest" rule "is one of substantive law intended to protect one being sued from having to defend against the same claim a second time because someone other than the petitioner or plaintiff was the owner of the claim and therefore the only person entitled to sue" (*Patel v MacArthur*,

137 Misc 2d 104, 109 [City Ct, Oswego County 1987]). Moreover, "[d]erivative claims against corporate directors belong to the corporation itself" (*Marx v Akers*, 88 NY2d 189, 193 [1996] [internal quotation marks omitted]). Thus, this rule does not support plaintiff's position.

None of the exceptions to the doctrine asserted by plaintiff are applicable. First, plaintiff unpersuasively invokes the "adverse interest" exception to in pari delicto. Specifically, plaintiff asserts that even if the funds' management were deemed to have engaged in misconduct, such misconduct would have benefitted the funds' management at the funds' expense. Application of this narrow exception is not warranted since the funds' management was not acting entirely for its own interest; rather, its conduct enabled the funds to continue to survive and to attract investors (*Kirschner*, 15 NY3d at 466; *Concord Capital Mgt., LLC v Bank of America, N.A.*, 102 AD3d 406 [1st Dept 2013], *lv denied* 21 NY3d 851 [2013]).

Plaintiff next asserts that the court misapplied the "insider" exception to in pari delicto which bars an entity's insiders from invoking the in pari delicto doctrine (*see In re Bernard L. Madoff Inv. Sec. LLC*, 458 BR 87, 123 [Bankr SD NY 2011], *lv denied* 464 BR 578 [SD NY 2011]). Plaintiff argues, as it did below, that Citco was an insider of the funds by virtue of

the fact that a managing partner of a Citco affiliate, Brian Francouer, was at one time a director of the funds' general partner. The motion court correctly rejected this argument. Plaintiff's bare allegation is undoubtedly an insufficient basis on which to attribute insider status to any of the Citco defendants or to transform the claims pleaded against the third parties into claims against the funds' insiders.

Nor is there merit to plaintiff's contention that the "innocent successor" exception to in pari delicto bars that defense against it. Regardless of the Trustee's innocence, it is subject to Bankruptcy Code section 541, which prevents such trustees from bringing any suit that the corporation could not have brought pre-petition. In other words, since the funds could not bring these suits, the Trustee is barred from doing so. Further, the Court of Appeals, in *Kirschner* declined to view the in pari delicto doctrine in a manner that would permit a litigation trustee's claims against third-party auditors to proceed (*see In re MF Global Holdings*, 998 F Supp 2d at 190-191, [applying *Kirschner* to bar claim against auditor brought by Trustee]). We find no basis to hold that Bankruptcy Code section 541 does not subject plaintiff to an in pari delicto defense, as urged by plaintiff. In any event, plaintiff Trustee stands in the shoes of the funds regardless of being an innocent successor.

Plaintiff also challenges the court's dismissal of its

claims for implied and contractual indemnification, arising out of the funds' settlement of Madoff Securities' clawback claims with the Madoff Trustee. Plaintiff hinges its argument on the assertion that the derivative complaints made no admissions of wrongdoing. However, plaintiff may not pursue its claims for implied indemnification, since its assertion that it is innocent of any wrongdoing has already been thoroughly discussed and discounted (*Glaser v Fortunoff of Westbury Corp.*, 71 NY2d 643, 646-647 [1988] [a party may not obtain implied indemnification unless the party has "committed no wrong" or is "not . . . responsible in any degree"] [internal quotation marks omitted). Therefore, the motion court properly dismissed these claims.

As to the contractual indemnification claim, plaintiff maintains that Citco was notified of the settlement, and never opposed it. However, the relevant agreements required prior written consent from Citco for any indemnification, and plaintiff does not, and cannot credibly, assert that Citco's failure to object to the settlement was a sufficient substitute for the prior written consent. Accordingly, the contractual indemnification claims were appropriately dismissed.

The forum selection clause in PWC Netherlands's contract with the funds provides that "[u]nless the parties expressly agree otherwise in writing, all disputes between the Client and the Contractor relating to this Contract will be referred to the

competent District Court of Amsterdam." Plaintiff argues that this forum selection clause is permissive, not mandatory; is not binding on the Trustee, since the funds' manager is the "Client" who commissioned the engagement; PWC Netherlands waived its rights under the forum selection clause by actively litigating in New York; and litigating in Amsterdam would be unreasonable.

These arguments are unavailing. First, the language in the clause requiring a written agreement in order to litigate in a forum *other* than Amsterdam is unequivocal and indicative of the mandatory nature of the parties' agreement (*see Boss v American Express Fin. Advisors, Inc.*, 6 NY3d 242, 246 [2006]). Moreover, plaintiff does not allege that the parties so agreed in writing. Second, the Trustee is bound by the clause, because it stands in the shoes of the funds. Third, PWC Netherlands did not unreasonably delay in seeking dismissal under the forum selection clauses. Finally, plaintiff cites no compelling reason why litigation in Amsterdam would be unreasonable, particularly given that related litigation is already pending there against PWC Netherlands. Therefore, the claims by plaintiff against PWC Netherlands were properly directed to be heard in Amsterdam.

Accordingly, the order of the Supreme Court, New York County (Marcy S. Friedman, J.), entered May 27, 2014, which, to the

extent appealed from, granted defendants-respondents' motions to dismiss the complaints pursuant to CPLR 3211(a)(1) and (7), should be affirmed, with costs.

All concur.

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

ENTERED: OCTOBER 18, 2016

CLERK