SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JULY 30, 2013

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Tom, Sweeny, Renwick, Richter, JJ.

10021 Emily Batista, Index 111496/05
Plaintiff-Respondent,

-against-

The City of New York,
Defendant,

The New York City Housing Authority,
Defendant-Appellant.

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Herzfeld & Rubin, P.C., New York (Miriam Skolnik of counsel), for appellant.

Popkin & Popkin, LLP, New York (Eric F. Popkin of counsel), for respondent.

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Order, Supreme Court, New York County (Carol R. Edmead, J.), entered October 9, 2012, which denied the motion of defendant New York City Housing Authority for summary judgment dismissing the complaint against it, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment in favor of defendant Housing Authority dismissing the complaint.

Defendant Housing Authority made out a prima facie case in support of its motion for summary judgment dismissing the

complaint by producing records maintained in the ordinary course of business that established that the entrance door to the subject building was in good working order on the date plaintiff was assaulted. Plaintiff's burden to rebut a prima facie case for summary judgment entails not simply coming forward with some evidence that the lock was defective but demonstrating that between the time the lock was found to be in good condition when inspected that morning and 3:30 p.m. when plaintiff's assailants entered the premises, the Housing Authority had reason to be aware of the alleged defect in sufficient time to afford it a reasonable opportunity to take corrective action. No such proof has been tendered, and the complaint must be dismissed.

The record includes the deposition testimony of Enos McKoy, the Housing Authority's assistant building superintendent for the building where the assault took place (the premises). McKoy stated that the 13-story building is part of a large development and that he received daily reports regarding the condition of the entry door and lock, which were inspected every morning. If a problem were noted, it was his duty to generate a work ticket for the necessary repair. The report dated March 3, 2005, the date of the assault, was blank, indicating that nothing was wrong with the entry door or lock. Supreme Court properly held that McKoy's authentication of his signature on the document renders it

admissible (*Acevedo v Audubon Mgt.*, 280 AD2d 91, 95 [1st Dept 2001]; *see Miller v Lu-Whitney*, 61 AD3d 1043, 1045 [2d Dept 2009]).

A search for work tickets preceding the incident revealed that repairs to the entry door lock were last performed on October 29, 2004. No work tickets involving the door lock were issued from that date through the last date searched, which was March 7, 2005. In addition, the caretaker's log book showed that no problems were found and no complaints were received concerning the door and lock for the period from March 2 through March 5, 2005.

Plaintiff testified that she lived in the same development as her aunt. On the afternoon of March 3, 2005, she returned home from school by bus, intending to go to her aunt's apartment, which was located on the seventh floor of the building that adjoins the premises. She entered the lobby using her key and went to the elevator. Realizing that it was not running, she decided to go to the premises, which is structurally joined to the building in which her aunt resides, then take the elevator to the seventh floor and walk across to her aunt's apartment. After using her key to enter the lobby of the premises, plaintiff was deterred by the presence of two men, both in their mid-20s, standing in front of the elevator. She stated that she did not

"trust anybody in that building" and declined their invitation to enter the elevator.

Plaintiff went outside and waited until she saw two elderly Hispanic women enter the premises, likewise using a key. While waiting for the elevator with the two women, plaintiff testified that she "heard the popping sound from the front door" and saw the same two men enter. While she did not observe how they gained entry, she stated that "the door is usually broken, like, the lock is a magnet and usually people to get inside the building they would pop the door open." Asked if that was "something a girl can't do," she responded, "Well, I never tried it."

All five persons got onto the elevator when it arrived, and plaintiff pressed the button for the seventh floor. The two elderly women got off on a lower floor, while the two men remained with plaintiff. When the doors opened at the seventh floor, the men physically prevented plaintiff from leaving. At the top floor, they forced her into a stairway leading to the roof, where one of the men assaulted her, while the other restrained her. The attack continued until the men were scared off by the sound of a door, whereupon they fled down the stairs.

Plaintiff's mother gave conflicting testimony concerning how she entered the aunt's building on the date of the assault, first

stating that she used her key and then asserting that she was able to enter without using her key, although she conceded having used her key the day before. While credibility is not a consideration on a motion for summary judgment, it should be noted that her testimony concerns the building in which the apartment occupied by plaintiff's aunt is located, not the adjoining building, the premises in which the assault occurred. Similarly, that plaintiff's mother reported the defective condition to "an Indian guy" in maintenance "at nighttime" on the day her daughter was attacked has no bearing on whether the Housing Authority had prior notice of the allegedly defective lock at the premises.

The record establishes that as of the morning of March 3, 2005, the Housing Authority, as landlord of the premises, had discharged its common-law duty to protect the occupants, having taken the requisite minimal security precautions against reasonably foreseeable criminal acts by providing a locking entry door (*James v Jamie Towers Hous. Co.*, 99 NY2d 639, 641 [2003]). There is no proof contradicting the documentary evidence that the entry door and lock were in good working order at the time they were inspected, which Enos McKoy testified had taken place that morning. Plaintiff herself used a key just prior to the incident, as did the two elderly women who entered immediately

before the two assailants. The only evidence that the lock was malfunctioning at the time the two men gained entry is plaintiff's testimony that she heard a "popping" sound. Even accepting her conclusion that the sound is invariably associated with someone's success in forcing the entry door lock, the record is devoid of evidence that the lock had been rendered defective at some earlier point in time. And even assuming that it was previously tampered with, thereby allowing entry without the use of a key, the material question is whether the condition was "visible and apparent" and existed for a sufficient period of time that Housing Authority employees should have become aware of it and effected remedial measures (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]). Specificity of proof is required. As the Court of Appeals emphasized in *Gordon*, "neither a general awareness that litter or some other dangerous condition may be present nor the fact that plaintiff observed other papers on another portion of the steps approximately 10 minutes before his fall is legally sufficient to charge defendant with constructive notice of the paper he fell on" (*id.* at 838 [internal citation omitted]; *see also Torres v New York City Housing Auth.*, 85 AD3d 469 [1st Dept 2011]).

Crediting testimony that the entry door to the premises could be "popped" open, such evidence does not even serve to

charge the Housing Authority with "a general awareness" of a defective condition. While the witnesses may have known about the practice of gaining entry without using a key, there is no evidence that the Housing Authority was ever informed that the lock could be forced in this manner. In the more than seven years since the filing of plaintiff's bill of particulars, its allegation that such "information was given by numerous tenants, as well as the tenants' association and that the information was received by the housing office and by employees of the housing authority" remains unsupported by any competent proof.

While an assault on a young victim is most disturbing, a possessor of land is not an insurer of the safety of those who come onto its premises (*Nallan v Helmsley-Spear, Inc.*, 50 NY2d 507, 519 [1980]). It remains that plaintiff's injuries were the immediate and proximate result of a criminal attack committed by third parties, for whose actions the landlord is not responsible absent a failure to provide "even the most rudimentary security" of an entry door lock (*Jacqueline S. v City of New York*, 81 NY2d 288, 295 [1993]). In the absence of proof that the Housing

Authority contributed to the injuries sustained by plaintiff, a visitor to its premises, by failing to timely repair a "visible and apparent" defect in its front-door lock, no liability can be imposed (*Gordon*, 67 NY2d at 837).

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

ENTERED: JULY 30, 2013

CLERK

Friedman, J.P., Moskowitz, DeGrasse, Richter, Gische, JJ.

9609 HSBC Bank USA, National Association, Index 152194/12
Plaintiff-Respondent,

-against-

Community Parking Inc.,
Defendant,

Elida Pena,
Defendant-Appellant.

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Joseph A. Altman, P.C., New York (Joseph A. Altman of counsel), for appellant.

Sankel, Skurman & McCartin, LLP, New York (Claudio Dessberg and Janelle B. Rosenbaum of counsel), for respondent.

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Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered September 19, 2012, which granted plaintiff's motion for summary judgment in lieu of complaint against defendants Community Parking Inc. and Elida Pena and directed entry of judgment in the principal amount of $95,000, plus interest from August 24, 2011, unanimously modified, on the law, to deny plaintiff's motion as to defendant Pena, and, upon a search of the record, to grant Pena summary judgment dismissing the complaint as against her, and otherwise affirmed, without costs. The Clerk is directed to enter judgment accordingly.

In 2005, defendant Community Parking Inc. (Community) filed a business credit application (application) with plaintiff HSBC

Bank USA (HSBC) to establish a line of credit in the amount of $95,000. The application was approved and the line of credit granted. However, in 2011, Community defaulted on the application. Seeking payment on the principal amount of the line of credit, as well as interest, HSBC moved for summary judgment in lieu of complaint pursuant to CPLR 3213. HSBC moved, jointly and severally, against Community and defendant-appellant Pena as the guarantor on the application. The application Pena purportedly signed contained a general liability clause stating that "each person signing below personally guarantees all of the indebtedness incurred" by the business.

The motion court granted HSBC's motion, finding that it satisfied its prima facie entitlement to summary judgment by establishing that there was a valid agreement between HSBC and Community and that Pena was the guarantor on the application. In light of the lack of opposition to Pena's motion for reargument of this Court's prior decision and order entered on March 26, 2013 (*see* M-2300 decided simultaneously herewith), and the lack of definitive evidence that Pena intended to be personally bound,

we grant her motion and dismiss the complaint as against her.

The Decision and Order of this Court entered herein on March 26, 2013 is hereby recalled and vacated (*see* M-2300 decided simultaneously herewith).

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

ENTERED: JULY 30, 2013

CLERK

Friedman, J.P., Moskowitz, DeGrasse, Richter, Gische, JJ.

9625N Edward J. Minskoff Index 601640/08
Equities, Inc., et al.,
Plaintiffs-Appellants,

HRH Construction, LLC,
Plaintiff,

-against-

Crystal Window & Door Systems, Ltd.,
Defendant-Respondent,

Crystal Curtain Wall Systems Corp., etc.,
Defendant.

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Wasserman Grubin & Rogers, LLP, New York (Michael T. Rogers of counsel), for appellants.

Farrell Fritz, P.C., New York (Michael F. Fitzgerald of counsel), for respondent.

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Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered May 2, 2012, which, insofar as appealed from, granted defendant Crystal Window & Door Systems, Ltd.'s (Crystal Window) motion in limine to the extent of precluding plaintiffs, Edward J. Minskoff Equities, Inc. (Minskoff) and 270 Greenwich Street Associates, LLC (270 Greenwich), from introducing at trial any evidence of their delay damages, unanimously reversed, on the law, without costs, and the motion denied.

Plaintiff HRH Construction, LLC (HRH), a nonparty to this

appeal and the general contractor of the building under renovation, subcontracted with defendant Crystal Curtain Wall Systems Corp. (CCWS), another nonparty to this appeal, to install window wall systems in the building. CCWS failed to properly perform the subcontract work, and HRH notified CCWS that it was in default. As a result, HRH and CCWS entered into a supplemental agreement in which CCWS agreed to, among other things, provide HRH with a performance guaranty (also referred to as a "completion guaranty") from Crystal Window, CCWS's parent. Crystal Window did, in fact, sign a guaranty letter in which it guaranteed that CCWS would complete the subcontract. Nonetheless, CCWS did not complete the work for HRH. As a result, another subcontractor ultimately completed the job.

This is the second time that this matter has been before us. In the June 30, 2011 order leading to the first appeal, the motion court granted Crystal Window's motion for summary judgment to the extent of dismissing the eighth cause of action for breach of guaranty, finding that Minskoff and 270 Greenwich (collectively, plaintiffs) the developer and the owner of the building, were not entitled to enforce the guaranty because they were not third-party beneficiaries of that agreement. In the decision accompanying its order, the motion court also noted that Minskoff "ha[d] not shown that incidental damages [were] within

the contemplation of the parties."

By order entered February 7, 2012, this Court modified the order (92 AD3d 469 [1st Dept 2012]), finding that the record presented issues of fact as to whether plaintiffs, as owners and developers of the building, were the intended third-party beneficiaries of the guaranty between HRH and Crystal Window. The matter was then remitted to the IAS court.

Plaintiffs moved in limine to preclude certain evidence; in response, Crystal Window cross-moved to preclude evidence regarding consequential damages. The IAS court granted the cross motion, ruling that plaintiffs would be precluded at trial from offering evidence on consequential damages.

We reject Crystal Window's procedural argument that plaintiffs' appeal from the motion in limine order is untimely because they failed to raise the damages issue in the first appeal. On the contrary, because the IAS court's statement regarding consequential damages was dicta, plaintiffs were not aggrieved by the court's conclusion regarding consequential damages and could not appeal from that portion of the order (*see Blum v Valentine*, 87 AD3d 1100, 1101 [2d Dept 2011], *lv denied* 18 NY3d 803 [2012]).

As to the merits, we find that plaintiffs should not be precluded from presenting to the jury evidence regarding

consequential damages. To begin, our modification of the previous order does not constitute the law of the case on consequential damages. We take judicial notice that the briefs and record on the first appeal did not raise this issue (*see Grady v Utica Mut. Ins. Co.*, 69 AD2d 668, 671 n 1 [2d Dept 1979]). Rather, the parties addressed only one issue – namely, whether plaintiffs were third-party beneficiaries of the guaranty. The parties had no reason to address the consequential damages issue on the first appeal; indeed, once the IAS court decided that Minskoff and 270 Greenwich were not third-party beneficiaries, there was no reason for it to resolve the issue of damages. Our decision on the parties' first appeal therefore made no reference to the consequential damages issue.

The terms of the guaranty, moreover, are unambiguous as to Crystal Window's obligations. First of all, the guaranty states, "HRH has requested that [Crystal Window] guaranty completion of the subcontract by CCWS." The guaranty further states that Crystal Window has "no problem on giving such a guaranty and do[es] hereby guarant[ee] the completion of the subcontract by CCWS" and that the guaranty would "terminate upon HRH receiving payment from the Owner for the requisition to be made upon HRH's application of payment for substantial completion" of the subcontract work.

Section 7.2(e) of the subcontract, in turn, specifically requires CCWS to indemnify plaintiffs for any damages caused by "delay" in the "progress of the [w]ork." Likewise, section 12.2 of the subcontract provides that CCWS shall indemnify and defend the contractor and the owner and shall "save them harmless from and against any and all . . . damages, losses [and] liabilities" that might arise "out of any act, error or omission or breach of [c]ontract . . . in connection with the performance of the Work hereunder or otherwise arising out of, in connection with or as a consequence of the performance of the Work hereunder." Paragraph 136 of Rider 2 then provides that "time is of the essence in this commencement, prosecution and completion of the [w]ork" and that CCWS "shall be responsible for all costs arising out of its failure to perform in accordance with these requirements."

When the guaranty and the subcontract are read together (*see Bank of Tokyo-Mitsubishi Ltd. N.Y. Branch v Kvaerner, a.s.*, 243 AD2d 1, 7 [1st Dept 1998]), these provisions show that, in executing the guaranty of completion, Crystal Window knowingly assumed an obligation to pay plaintiffs' delay damages should CCWS default on the subcontract. This conclusion comports with our decision in *Turnberry Residential Ltd. Partner, L.P. v Wilmington Trust FSB* (99 AD3d 176 [1st Dept 2012], *lv denied* 20 NY3d 859 [2013]), decided after the motion court's decision in

this action. In that case, we elucidated the difference between a payment guaranty and a guaranty of completion, stating that while the former guarantees a borrower's debt, the latter guarantees completion of a project should the obligee be unable to complete it (*id.* at 177). Further, we held that the general purpose of a completion guaranty is to give comfort that the project will, in fact, be completed (*id.* at 183).

Here, Crystal Window's guaranty was a completion guaranty, assuring that the subcontract would be fully performed. The subcontract, in turn, recited that not only was time of the essence in completion of the work, but that CCWS was to be responsible for all costs arising out of its failure to timely perform. Thus, consequential damages – that is, damages arising from the delay – are recoverable under both the subcontract and the completion guaranty. Indeed, a finding that plaintiffs may not present evidence of consequential damages would render the guaranty meaningless, since it would, in essence, leave plaintiffs without any remedy for CCWS's long delay in installing the windows – a delay that Crystal Windows agreed, in the completion guaranty, to remedy.

The motion court relied on *Bussanich v 310 E. 55th St. Tenants* (282 AD2d 243 [1st Dept 2001]) to find limitations as to what might be deemed incorporated into an agreement in the

context of a construction contract. *Bussanich* is not analogous to this case, as that case involved a construction contract, and not a completion guaranty. Moreover, in *Bussanich* we held that when an incorporation clause in a construction subcontract incorporates prime contract clauses by reference, the incorporation clauses bind the subcontractor only as to prime contract provisions relating to the "scope, quality, character and manner of work to be performed by the subcontractor" (*id.* at 244). In *Bussanich*, however, the prime contract contained no provisions requiring the subcontractors to indemnify the contractor. Further, the language in the prime contract limited the subcontractors' liability so that they could be held liable only for the work that they were to perform under the subcontracts. *Bussanich* therefore does not limit the terms of a subcontract that may be incorporated by reference into a separately negotiated guaranty of completion. This conclusion

holds especially true where, as here, the guaranty contains no limiting language, but rather, makes clear that Crystal Window guarantees completion "of the subcontract."

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

ENTERED: JULY 30, 2013

CLERK

Mazzarelli, J.P., Acosta, Saxe, Renwick, Clark, JJ.

9204- Index 103913/10
9205- 652476/11
9206 Aetna Life Insurance Company,
Plaintiff-Respondent-Appellant,

-against-

Appalachian Asset Management Corp., et al.,
Defendants-Appellants-Respondents,

Gregory McDonald,
Defendant.

- - - - -

Aetna Life Insurance Company,
Plaintiff-Respondent,

-against-

Christopher McDougal,
Defendant-Appellant.

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Weil, Gotshal & Manges LLP, New York (Jennifer M. Oliver of counsel), for Appalachian Asset Management Corp., appellant-respondent.

O'Hare Parnagian LLP, New York (Robert A. O'Hare Jr. of counsel), for William Messmore, appellant-respondent.

DeCotiis, Fitzpatrick & Cole, LLP, Spring Valley (Gregory J. Bevelock and Alice M. Penna of counsel), for Douglas McBeth, appellant-respondent.

Seward & Kissel LLP, New York (M. William Munno and John J. Galban of counsel), for Sameer Garg, appellant-respondent.

John V. Golaszewski, New York, for appellant.

Bingham McCutchen LLP, New York (Jason D. Frank and Jordan D. Hershman of counsel), for respondent-appellant/respondent.

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Order, Supreme Court, New York County (Charles E. Ramos, J.), entered April 13, 2012, modified, on the law, to deny the motions to dismiss the negligence cause of action as against the individual defendants, and otherwise affirmed, without costs. Order, same court and Justice, entered on or about May 8, 2012, affirmed, without costs.

Opinion by Saxe, J. All concur.

Order filed

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Angela M. Mazzarelli, J.P.
Rolando T. Acosta
David B. Saxe
Dianne T. Renwick
Darcel D. Clark, JJ.

9204
9205
9206

Index 103913/10
652476/11

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Aetna Life Insurance Company,
Plaintiff-Respondent-Appellant,

-against-

Appalachian Asset Management Corp., et al.,
Defendants-Appellants-Respondents,

Gregory McDonald,
Defendant.

- - - - -

Aetna Life Insurance Company,
Plaintiff-Respondent,

-against-

Christopher McDougal,
Defendant-Appellant.

_____x

Cross appeals from the order of the Supreme Court, New York County (Charles E. Ramos, J.), entered April 13, 2012, which, to the extent appealed from, denied defendant Appalachian Asset Management Corp.'s motion to dismiss the complaint as against it, granted defendants Messmore,

McBeth and Garg's motions to dismiss the negligence cause of action as against them, and denied their motions to dismiss the causes of action for violation of § 42-110b (a) of the Connecticut Unfair Trade Practices Act (CUTPA), aiding and abetting Appalachian's alleged breach of fiduciary duty, and recklessness, denied defendant Garg's motion for summary judgment dismissing the complaint as against him, and granted Aetna's motion to consolidate this action with a related action and to file a consolidated amended complaint. Order of the same court and Justice, entered on or about May 8, 2012, which denied Defendant the motion of Christopher McDougal to dismiss the claims for negligence, recklessness, aiding and abetting defendant Appalachian's breach of fiduciary duty, and for a CUTPA violation.

Weil, Gotshal & Manges LLP, New York (Jennifer M. Oliver, Randi W. Singer and Andrey Spektor of counsel), for Appalachian Asset Management Corp., appellant-respondent.

O'Hare Parnagian LLP, New York (Robert A. O'Hare Jr., Jeffrey S. Lichtman, Andrew C. Levitt and Michael Zarocostas of counsel), for William Messmore, appellant-respondent.

DeCotiis, Fitzpatrick & Cole, LLP, Spring Valley (Gregory J. Bevelock, Alice M. Penna and Jeffrey D. Smith of counsel), for Douglas McBeth, appellant-respondent.

Seward & Kissel LLP, New York (M. William Munno, John J. Galban and Celinda Metro of counsel), for Sameer Garg, appellant-respondent.

John V. Golaszewski, New York, for appellant.

Bingham McCutchen LLP, New York (Jason D. Frank, Jordan D. Hershman, Harold S. Horwich and Derek Care of counsel), for respondent-appellant/respondent.

SAXE, J.

Plaintiff Aetna Life Insurance Company alleges that defendants directed and arranged the removal from a trust account held for Aetna's benefit of $48.65 million of high-grade securities that were trading at or near par value, and their replacement with toxic, "sticky" subprime-mortgage-backed securities that were actually worth a small fraction of that amount, which securities had been held in the inventory of Lehman Brothers Holding, Inc. (LBHI). Aetna asserts that defendants did so as part of an effort to prop up Lehman Brothers' financial position in the final days prior to its 2008 collapse. The complaint alleges causes of action for breach of the Connecticut Unfair Trade Practices Act (CUTPA) (Conn Gen Stat § 42-110b[a] *et seq.*); breach of fiduciary duty; negligence; and recklessness. We affirm the determination of the motion court holding that the allegations are sufficient to support each of the causes of action, and modify only to the extent of denying dismissal of the negligence claims against the individual defendants.

According to the complaint in each of the two (subsequently consolidated) actions at issue here, Lehman Re, Ltd., a wholly-owned subsidiary of LBHI, entered into a coinsurance agreement with Aetna, under which Lehman Re agreed to reinsure a block of fully paid-up life insurance policies that had been issued by

Aetna, and to indemnify Aetna for all benefits paid by Aetna on the reinsured policies. In consideration for this indemnification obligation, Aetna paid Lehman Re a premium of $155,667,717, which was deposited in a trust account, to be held for Aetna's benefit. Under a contemporaneously executed trust agreement, Lehman Re, with Bank One Trust Company, as trustee, agreed to manage the assets in the trust account as security for Lehman Re's indemnity obligations. The agreement between Aetna and Lehman Re required Lehman Re to direct the trustee to invest trust account assets in specified types of "eligible securities," defined as cash, certificates of deposit and certain types of investments permitted by the Connecticut Insurance Code; Lehman Re was authorized to withdraw assets from the trust account without Aetna's approval *provided* that the assets were replaced with other qualified assets.

However, Aetna alleges, pursuant to a longstanding investment advisory agreement between Lehman Re and defendant Appalachian Asset Management Corp. -- a company which, like Lehman Re, was also a wholly-owned subsidiary of LBHI -- Appalachian was given the authority to control and manage the assets in the Aetna trust account. That investment advisory agreement, Aetna says, gave Appalachian trading authority over the trust account assets.

The crux of the complaint is that on September 9, 2008, with the real estate market in crisis and the market for mortgage backed securities drying up, Appalachian arranged for the removal from the Aetna trust account of $48.65 million of high grade, CARAT securities that were trading at or near par value. In place of those valuable securities, Appalachian directed the substitution of securities then held in the inventory of LBHI with a purported face value of $44,500,000, issued by Ballantyne Re PLC and backed by subprime residential mortgage loans. Defendants allegedly knew that the Ballantyne Re securities were, in fact, "sticky," or highly illiquid, with an actual value that was a fraction of their face value. They also allegedly knew that the Ballantyne Re securities were not of a quality required of securities maintained in the trust account under the trust agreement. The substitution was allegedly performed without Aetna's knowledge or consent.

Aetna's complaint further provides context for the troubling transaction, explaining that in early 2008, LBHI had recognized its problematic financial position, in that it was over-leveraged, with excessive "sticky" inventory positions that would be difficult to sell without incurring substantial losses or creating a loss of confidence in the inventory remaining on its balance sheet. LBHI was therefore attempting to take steps to

make its financial position appear stronger than it actually was. Additionally, Aetna asserts that J.P. Morgan made a demand on LBHI in September 2008 to post an additional $3.6 billion in collateral to secure certain funding, to which demand LBHI agreed on September 9, 2008, the same date that the substitution was directed.

In any event, the substitution made in Aetna's trust account on September 9, 2008, was allegedly arranged on behalf of LBHI not only to increase the quantity and value of assets on LBHI's books, but to substantially reduce the amount of "sticky" assets on its books at a time when future funding and support were in question.

On September 15, 2008, LBHI filed for bankruptcy protection. Lehman Re commenced liquidation proceedings in Bermuda on September 23, 2008, and Aetna filed a proof a claim for its loss in that proceeding. Aetna's quantified loss was incurred because on September 19, 2008, it determined that the Ballantyne securities then held in its trust account were of a type that it was not permitted to carry on its books as admitted assets, because they did not meet the requirements of Connecticut insurance law. Accordingly, on October 14, 2008, Aetna sold the Ballantyne securities, at a price of $4.8 million, almost $44 million less than the value of the securities in the trust

account for which they had been substituted five weeks earlier.

According to Aetna's complaint, a number of individuals were involved in Appalachian's control and management of the assets in the Aetna trust account. These individuals included: non-appealing defendant Gregory McDonald, an assistant vice president in LBHI's fixed income division; defendant William Messmore, an officer of Appalachian and a member of the insurance products group at LBHI; defendant Douglas McBeth, president and board member of Lehman Re and head of the insurance group at LBHI; and defendant Sameer Garg, board member of Lehman Re and member of the insurance group at LBHI. It is alleged that all these individuals knew that Aetna was the beneficiary of the trust account, and that the assets in the account were required to be invested in a conservative manner, subject to limitations imposed by the trust agreement and the requirements of the Connecticut Insurance Code.

Plaintiff claims that the particular transaction in question was instigated by an email from defendant Christopher McDougal, a vice president in the fixed income division of Lehman Brothers, Inc., another wholly-owned subsidiary of LBHI, in which McDougal designated the specific securities to be removed from Aetna's trust account and the specific securities then held by LBHI to be substituted for them. Shortly after receiving this email from

McDougal, McDonald forwarded it to the trustee and directed the trustee to remove the CARAT securities from the trust account and substitute the Ballantyne Re securities.

In seeking dismissal, Appalachian argued that the alleged facts did not state a violation of CUTPA. It also argued that whatever duty Lehman Re might have owed to Aetna under the coinsurance agreement and trust agreement, Appalachian owed no fiduciary duty to Aetna, and therefore breached no such duty. Indeed, Appalachian argued that it owed no duty at all to Aetna, requiring dismissal of the negligence and recklessness causes of action as well. Appalachian characterizes what happened to Aetna as merely "an arms-length business transaction between two sophisticated entities -- Aetna and non-party Lehman Re -- that resulted in a loss during the height of a terrible economic crisis."

The individual defendants each moved for dismissal as well, arguing, like Appalachian, a lack of any duty. In addition, defendant Garg asserted as a factual matter that he played no role in controlling or managing the assets in the trust account, and, specifically, played no role in the substitution at issue; his motion also sought, in the alternative, summary judgment dismissing the claims against him.

The motion court denied the motions to dismiss, except to

the extent it dismissed the negligence claims as against the individual defendants; it also denied Garg's motion for summary judgment. Aetna's motion to consolidate the separate action it brought solely against Christopher McDougal with the action against Appalachian and the other individual defendants was also granted; in addition to the consolidation of two separate complaints into one complaint, the motion court observed that the proposed consolidated amended complaint sought to add allegations demonstrating that defendants knew or should have known that the Ballantyne Re securities were unsuitable for substitution into the trust account.

Discussion

As an initial matter, we reject Aetna's contention that its service of the consolidated amended complaint renders defendants' appeals moot. While an appeal taken from a denial of a dismissal motion may be moot when that complaint has been superseded by an amended complaint (*see e.g. 100 Hudson Tenants Corp. v Laber*, 98 AD2d 692 [1st Dept 1983]; *Bennett v City of New York*, 65 AD2d 731, 732 [1st Dept 1978]), that is not necessarily the case where the new pleading does not substantively alter the existing causes of action (*see e.g. Anthony J. Demarco, Jr., P.C. v Bay Ridge Car World*, 169 AD2d 808 [2d Dept 1991]). Here, Aetna acknowledged that the consolidated amended complaint, which primarily combined

the complaint against McDougal with that against the remaining defendants, alleged no new claims or theories of recovery, but merely add more detail as to what defendants allegedly knew or should have known about the value of substituted securities. The legal issues raised on these appeals, relating to whether a CUTPA claim lies or whether there is a basis to hold defendants liable in tort given the nature of their relationships with plaintiff, may be fully addressed at this stage based on the pleadings before the motion court, and are not altered by the additional factual allegations.

CUTPA

Defendants all contend that the allegations of the complaints cannot support the CUTPA claim against any defendant. They point out that in *Russell v Dean Witter Reynolds, Inc.* (200 Conn 172, 175, 510 A2d 972, 974 [Conn 1986]), the Connecticut Supreme Court held that "CUTPA does not apply to the purchase and sale of securities," which are covered instead by the Connecticut Uniform Securities Act (CUSA) (Conn Gen Stat § 36-470 *et seq.*).

However, as the motion court observed, the record does not specify exactly how such a "substitution" was carried out. Nothing in the record establishes a purchase or sale of securities. Rather, it appears that, essentially, LBHI arranged to take highly valuable assets from Aetna's account and place

those assets on its own books, while removing from its own books assets that were actually damaging to LBHI's financial position, and purporting to replace Aetna's valuable assets with the toxic ones.

It is true that Connecticut law defines a "sale" of securities to include any "contract of sale of, contract to sell, *or disposition of*, a security or interest in a security for value" (*see* Conn Gen Stat § 36b-3[16][A] [emphasis added]). However, on the record before us, we are unable to conclude, as a matter of law, that the transaction here may accurately be termed such a "disposition" of securities for value, particularly since it appears that LBHI gained both from the removal of the Ballantyne securities and from the addition of the CARAT securities. Indeed, the alleged transaction is arguably closer to a claim of mismanagement, and as such would not fall within the application of CUTPA (*see Mossberg v Union Trust Co.*, 1994 WL 228337, 1994 Conn Super LEXIS 1236 [Conn Super Ct 1994]). We are therefore unable to determine at this juncture, as a matter of law, whether the so-called "substitution" is the type of transaction covered by CUTPA rather than CUSA.

Assuming that CUTPA does apply, we must determine whether the elements of such a claim are sufficiently stated by the complaints.

A cause of action under CUTPA is stated where

> "(1). . . the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise – in other words, it is within at least the penumbra of some common law, statutory, or other established concept of unfairness; (2) . . . it is immoral, unethical, oppressive, or unscrupulous; [or] (3) . . . it causes substantial injury to consumers, [competitors or other business persons]" (*Hartford Elec. Supply Co. v Allen-Bradley Co. Inc.*, 250 Conn 334, 368, 736 A2d 824, 842-843 [1999] [internal quotation marks omitted]).

Contrary to the arguments of defendants McBeth and Garg, Connecticut law does not require that CUTPA claims be pleaded with particularity (*see Macomber v Travelers Prop. & Cas. Corp.*, 261 Conn 620, 644, 804 A2d 180, 196 [2002]). The allegations made here are sufficient to satisfy the test for pleading purposes. They assert more than mere negligence in making a trade; they assert conduct that surely may be deemed unscrupulous, unfair, and violative of the public policy "as it has been established by" Connecticut insurance law and regulations (*Hartford Elec. Supply Co.*, 250 Conn at 843 [internal quotation marks omitted). While any of the defendants are free to take the position in the course of the litigation that, in fact, his (or its) acts were merely negligent, the facts as alleged assert far more.

As to protests by the individual defendants that they may

not be individually liable for CUTPA violations, the Appellate Court of Connecticut observed that a corporate officer who directly engaged in tortious conduct was properly held individually liable for CUTPA violations (*see Cohen v Roll-A-Cover, LLC*, 131 Conn App 443, 469, 27 A3d 1, 18 [2011], *cert denied* 303 Conn 915, 33 A3d 739 [2011]). The reasoning of that case supports the possibility of the individual defendants here being held liable for CUTPA, if they directly engaged in tortious conduct injuring Aetna.

Fiduciary Duty

All of the defendants contend that no breach of fiduciary duty may properly be asserted against Appalachian, and the individual defendants claim that no aiding and abetting such a breach may be pleaded against them, because there was no fiduciary relationship between Aetna and Appalachian, and any such duty owed to Aetna was owed by Lehman Re alone. However, while Aetna did not have a contractual relationship with Appalachian, the allegations permit a finding that Appalachian stepped into Lehman Re's position as created by the trust agreement, knowing of the trust agreement's provisions and limitations, thereby assuming Lehman Re's duties, including the specified obligations regarding the handling of Aetna's trust account. A fiduciary relationship "is characterized by a unique

degree of trust and confidence between the parties, one of whom has superior knowledge, skill or expertise and is under a duty to represent the interests of the other" (*Hi-Ho Tower, Inc. v Com-Tronics, Inc.*, 255 Conn 20, 38, 761 A2d 1268, 1278 [2000] [internal quotation marks omitted). It is alleged that Appalachian, through its representatives, formed a direct relationship with Aetna, in which Appalachian was in the dominant position, asserting influence over Aetna and creating justifiable trust on Aetna's part (*see Alaimo v Royer*, 188 Conn 36, 41, 448 A2d 207, 209 [1982]).

Whether or not the evidence establishes that direct interactions between Appalachian and Aetna over almost a decade defined or adjusted the terms of their relationship, the circumstances as alleged are enough to, at least, avoid dismissal, since they support a possible finding that the fiduciary obligations initially undertaken by Lehman Re were later undertaken by Appalachian. Defendants' assertion that Aetna was unaware of Appalachian's existence until after the complaint was filed may support a finding contrary to Aetna, but allegations that Aetna had numerous communications with Garg and others involved in managing the trust account *on behalf of Appalachian*, and that Aetna was convinced to place its trust and confidence in those managers, preclude dismissal based on Aetna's

claimed unawareness of Appalachian's existence.

The claim of aiding and abetting a breach of fiduciary duty is also upheld as against the individual defendants. Liability for aiding and abetting a breach of fiduciary duty requires establishing the following elements: "(1) the party whom the defendant aids must perform a wrongful act that causes an injury; (2) the defendant must be generally aware of his role as part of an overall illegal or tortious activity at the time that he provides the assistance; (3) the defendant must knowingly and substantially assist the principal violation" (*Halberstam v Welch*, 705 F2d 472, 477 [DC Cir 1983]; *see Efthimiou v Smith*, 268 Conn 499, 505, 846 A2d 222, 226 [2004]).

Here, plaintiff alleges that each individual defendant knew of the substitution and its impropriety, and played some role in effecting the securities swap; whether or not the assistance provided may be categorized as substantial cannot be determined here. McDougal allegedly directed the substitution in question; Messmore, McBeth, and Garg are all alleged to have been aware of Appalachian's actions and to have taken actions substantially assisting the alleged breach of fiduciary duty. The allegation that they participated in controlling and managing the trust account assets is sufficient to satisfy the pleading requirement. Moreover, as to Garg in particular, Aetna states that he,

personally, was specifically informed by Aetna that the trust account must comply with Connecticut insurance regulations.

Negligence and Recklessness

To state a claim for negligence, a plaintiff must sufficiently allege (1) a duty; (2) a breach of that duty; (3) causation; and (4) actual injury (*see RK Constructors, Inc. v Fusco Corp.*, 231 Conn 381, 384, 650 A2d 153, 155 [1994]). In Connecticut, "[a] duty to use care may arise from a contract, from a statute, or from circumstances under which a reasonable person, knowing what he knew or should have known, would anticipate that harm of the general nature of that suffered was likely to result from his act or failure to act" (*see Coburn v Lenox Homes, Inc.*, 186 Conn 370, 375, 441 A2d 620, 624 [1982]), and where a determination is made that the defendant's responsibility should extend to such results (*RK Constructors*, 231 Conn at 386, 650 A2d at 156).

> "[T]he test for the existence of a legal duty of care entails (1) a determination of whether an ordinary person in the defendant's position, knowing what the defendant knew or should have known, would anticipate harm of the general nature of that suffered was likely to result, and (2) a determination, on the basis of a public policy analysis, of whether the defendant's responsibility for its negligent conduct should extend to the particular consequences or particular plaintiff in the case" (*Neuhaus v DeCholnoky*, 280 Conn 190, 217-218, 905 A2d 1135, 1152 [2006] [internal quotation marks omitted]; *see also Assured Guar. [UK] Ltd. v J.P. Morgan Inv. Mgt. Inc.*, 80 AD3d 293, 306 [1st Dept

2010], *affd* 18 NY3d 341 [2011]).

As the motion court held, although Aetna's agreement was with Lehman Re, the allegations permit a finding that Appalachian assumed a duty of care to Aetna in connection with the management of the trust account assets. Appalachian's denial of any duty to manage the assets in a reasonable manner fails to negate the inference that may be drawn from the allegations.

In addition, Connecticut allows for liability in tort of a corporate officer or agent who engages in the tortious conduct (*see Sturm v Harb Dev., LLC*, 298 Conn 124, 133-134, 2 A3d 859, 867 [2010]). Plaintiff's allegations that each of these individual defendants took actions in connection with the substitution that they knew were not reasonably prudent with respect to the management of the trust assets are sufficient to state claims for negligence.

The allegations in the complaint also reasonably support the recklessness cause of action against all defendants (*see Carney v Federal Express Corp.*, 2003 WL 1228080, *2-3, 2003 Conn Super LEXIS 619, *7-9 [Conn Super Ct 2003]). While "[m]erely using the term 'recklessness' to describe conduct previously alleged as negligence is insufficient as a matter of law" (*Angiolillo v Buckmiller*, 102 Conn A pp 697, 705, 927 A2d 312, 319 [2007], *cert denied* 284 Conn 927, 934 A2d 243 [2007]), here plaintiff alleges

that defendants' conduct in participating in the substitution that placed toxic assets into the trust account "involved a risk substantially greater than that which would be necessary to make their conduct negligent," and was "willful, wanton, reckless, highly unreasonable, and involved an extreme departure from ordinary care." Where the facts in the complaint reasonably support a claim of recklessness, they will be considered sufficient, even though they are largely duplicative of the statements in the negligence count (*see Carney*, 2003 Conn Super LEXIS 619, *8-9, 2003 WL 1228080 *3).

Summary Judgment

Garg argues that he is entitled to summary judgment based on his unrebutted affidavit testimony establishing that he had no role in controlling or managing assets in the trust account, played no role in the substitution, was not even aware it had taken place, and was a mere intermediary between plaintiff and LBHI's investment department. He further relies on McDougal's deposition testimony as confirming that he did not direct the substitution, as well as the deposition testimony of LBI's Thomas Rogers, who indicated that Lehman mortgage traders directed substitutions. In addition, Garg maintains that a genuine issue of fact is not raised by the statement of John Sullivan, an employee of plaintiff, that he had "a series of telephone

conferences with Mr. Garg and other individuals whom [he] understood were involved in the management of the Trust Account." Finally, Garg argues that plaintiff failed to make the required showing under CPLR 3212(f) that summary judgment was premature because more discovery is needed.

The motion court properly denied Garg's summary judgment motion as premature, since facts essential to the opposition may exist but could not have then been provided.

Finally, the motion court properly granted Aetna's motion to consolidate the two actions.

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

Accordingly, the order of the Supreme Court, New York County (Charles E. Ramos, J.), entered April 13, 2012, which, to the extent appealed from, denied defendant Appalachian Asset Management Corp.'s motion to dismiss the complaint as against it, granted defendants Messmore, McBeth and Garg's motions to dismiss the negligence cause of action as against them, and denied their motions to dismiss the causes of action for violation of § 42-110b (a) of the Connecticut Unfair Trade Practices Act (CUTPA), aiding and abetting Appalachian's alleged breach of fiduciary duty, and recklessness, denied defendant Garg's motion for summary judgment dismissing the complaint as against him, and

granted Aetna's motion to consolidate this action with a related action and to file a consolidated amended complaint, should be modified, on the law, to deny the motions to dismiss the negligence cause of action as against the individual defendants, and otherwise affirmed, without costs. The order of the same court and Justice, entered on or about May 8, 2012, which denied the motion of defendant Christopher McDougal to dismiss the claims for negligence, recklessness, aiding and abetting defendant Appalachian's breach of fiduciary duty, and for a CUTPA violation, should be affirmed, without costs.

All concur.

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

ENTERED: JULY 30, 2013

CLERK

Friedman, J.P., Renwick, Richter, Feinman, JJ.

10508 In re New York Statewide Coalition of Hispanic Chambers of Commerce, et al., Petitioners-Respondents, Index 653584/12

-against-

The New York City Department of Health and Mental Hygiene, et al., Respondents-Appellants.

- - - - -

The National Alliance for Hispanic Health, The National Congress of Black Women, Inc., The New York Chapter of the National Association of Hispanic Nurses, Maya Rockeymoore, Ph.D., Montefiore Medical Center, The Mount Sinai Medical Center, The New York State American Academy of Pediatrics, District II, The Children's Aid Society, Prevention Institute, The California Endowment, Shape Up America!, Dr. Walter Willett, Comunilife, United Puerto Rican Organization of Sunset Park, The Harlem Health Promotion Center, The Association of Black Cardiologists, Inc., The National Association of Local Boards of Health, The American Public Health Association, The National Association of County and City Health Officials, The Public Health Association of New York City, ChangeLab Solutions, The Public Health Law Center, The Health Officers Association of California, Jennifer Pomeranz of the Rudd Center for Food Policy at Yale University, Prof. Lawrence O. Gostin of the O'Neill Institute for National and Global Health Law at Georgetown University, Prof. Peter D. Jacobson, Prof. Lindsay F. Wiley, Prof. Wendy E. Parmet, Prof. Lance Gable, Prof. Micah L. Berman, The New York State Conference of the National Association for the Advancement of Colored People, The Hispanic Federation, The U.S. Hispanic Chamber of Commerce, The Mexican American Grocers Association, New York City Council Members Maria del Carmen Arroyo, Charles Barron, Fernando Cabrera, Leroy G. Comrie, Jr., Julissa Ferreras, Helen D. Foster, Daniel R. Garodnick, Vincent J. Gentile,

Robert Jackson, Letitia James, Peter Koo, Oliver Koppell, Karen Koslowitz, Melissa Mark-Viverito, Darlene Mealy, Rosie Mendez, Michael C. Nelson, Annabel Palma, Diana Reyna, Donavan Richards, Ydanis Rodriguez, Deborah Rose and Mark Weprin, The Business Council of New York State, Inc., The Bodega Association of the United States, The New York City Hospitality Alliance, The National Supermarket Association, The Food Industry Alliance of New York State, Inc., The Chamber of Commerce of the United States of America, National Black Chamber of Commerce, National Federation of Independent Business, National Association of Manufacturers, Greater Harlem Chamber of Commerce, Staten Island Chamber of Commerce, Manhattan Chamber of Commerce, New York Association of Convenience Stores and The Street Vendor Project, amici curiae.

Michael A. Cardozo, Corporation Counsel, New York (Fay Ng of counsel), for appellants.

Latham & Watkins, LLP, Washington DC (Richard P. Bress of the bar of the District of Columbia, admitted pro hac vice, of counsel), for respondents.

Reese Richman LLP, New York (Kim E. Richman of counsel), for The National Alliance for Hispanic Health, The National Congress of Black Women, Inc., The New York Chapter of the National Association of Hispanic Nurses, Maya Rockeymoore, Ph.D., Montefiore Medical Center, The Mount Sinai Medical Center, New York State American Academy of Pediatrics, District II, The Children's Aid Society, Prevention Institute, The California Endowment, Shape Up America!, Dr. Walter Willett, Comunilife, United Puerto Rican Organization of Sunset Park, The Harlem Health Promotion Center, and The Association of Black Cardiologists, Inc., amici curiae.

Bromberg Law Office, P.C., New York (Brian L. Bromberg of counsel), for The National Association of Local Boards of Health, The American Public Health Association, The National Association of County and City Health Officials, The Public Health Association of New York City, ChangeLab Solutions, The Public Health Law Center, The Health Officers Association of California,

Jennifer Pomeranz of the Rudd Center for Food Policy at Yale University, Prof. Lawrence O. Gostin of the O'Neill Institute for National and Global Health Law at Georgetown University, Prof. Peter D. Jacobson, Prof. Lindsay F. Wiley, Prof. Wendy E. Parmet, Prof. Lance Gable and Prof. Micah L. Berman, amici curiae.

King & Spalding LLP, New York (Ann M. Cook of counsel), for The New York State Conference of the National Association for the Advancement of Colored People, The Hispanic Federation, The U.S. Hispanic Chamber of Commerce and The Mexican American Grocers Association, amici curiae.

Watkins, Bradley & Chen LLP, New York (Clifford Y. Chen of counsel), for New York City Council Members Maria Del Carmen Arroyo, Charles Barron, Fernando Cabrera, Leroy G. Comrie, Jr., Julissa Ferreras, Helen D. Foster, Daniel R. Garodnick, Vincent J. Gentile, Robert Jackson, Letitia James, Peter Koo, Oliver Koppell, Karen Koslowitz, Melissa Mark-Viverito, Darlene Mealy, Rosie Mendez, Michael C. Nelson, Annabel Palma, Diana Reyna, Donavan Richards, Ydanis Rodriguez, Deborah Rose and Mark Weprin, amici curiae.

Featherstonhaugh, Wiley & Clyne, LLP, Albany (James D. Featherstonhaugh of counsel), for The Business Council of New York State, Inc., The Bodega Association of the United States, The New York City Hospitality Alliance, The National Supermarket Association and The Food Industry Alliance of New York State, Inc., amici curiae.

Shapiro, Arato & Isserles LLP, New York (Alexandra A.E. Shapiro of counsel), for The Chamber of Commerce of the United States of America, National Black Chamber of Commerce, National Federation of Independent Business, National Association of Manufacturers, Greater Harlem Chamber of Commerce, Staten Island Chamber of Commerce, Manhattan Chamber of Commerce, and New York Association of Convenience Stores, amici curiae.

Friedman Kaplan Seiler & Adelman LLP, New York (Bruce S. Kaplan of counsel), for The Street Vendor Project, amicus curiae.

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Order, Supreme Court, New York County (Milton A. Tingling, J.), entered March 11, 2013, affirmed, without costs.

Opinion by Renwick, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David Friedman, J.P.
Dianne T. Renwick
Rosalyn H. Richter
Paul G. Feinman, JJ.

10508
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In re New York Statewide Coalition
of Hispanic Chambers of Commerce,
et al.,
Petitioners-Respondents,

-against-

The New York City Department of
Health and Mental Hygiene, et al.,
Respondents-Appellants.

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The National Alliance for Hispanic Health,
The National Congress of Black Women, Inc.,
The New York Chapter of the National Association
of Hispanic Nurses, Maya Rockeymoore, Ph.D.,
Montefiore Medical Center, The Mount Sinai Medical
Center, The New York State American Academy of
Pediatrics, District II, The Children's Aid
Society, Prevention Institute, The California
Endowment, Shape Up America!, Dr. Walter Willett,
Comunilife, United Puerto Rican Organization of
Sunset Park, The Harlem Health Promotion Center,
The Association of Black Cardiologists, Inc.,
The National Association of Local Boards of
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The National Association of County and City Health
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New York City, ChangeLab Solutions, The Public
Health Law Center, The Health Officers Association
of California, Jennifer Pomeranz of the Rudd Center
for Food Policy at Yale University, Prof. Lawrence

O. Gostin of the O'Neill Institute for National and Global Health Law at Georgetown University, Prof. Peter D. Jacobson, Prof. Lindsay F. Wiley, Prof. Wendy E. Parmet, Prof. Lance Gable, Prof. Micah L. Berman, The New York State Conference of the National Association for the Advancement of Colored People, The Hispanic Federation, The U.S. Hispanic Chamber of Commerce, The Mexican American Grocers Association, New York City Council Members Maria del Carmen Arroyo, Charles Barron, Fernando Cabrera, Leroy G. Comrie, Jr., Julissa Ferreras, Helen D. Foster, Daniel R. Garodnick, Vincent J. Gentile, Robert Jackson, Letitia James, Peter Koo, Oliver Koppell, Karen Koslowitz, Melissa Mark-Viverito, Darlene Mealy, Rosie Mendez, Michael C. Nelson, Annabel Palma, Diana Reyna, Donavan Richards, Ydanis Rodriguez, Deborah Rose and Mark Weprin, The Business Council of New York State, Inc., The Bodega Association of the United States, The New York City Hospitality Alliance, The National Supermarket Association, The Food Industry Alliance of New York State, Inc., The Chamber of Commerce of the United States of America, National Black Chamber of Commerce, National Federation of Independent Business, National Association of Manufacturers, Greater Harlem Chamber of Commerce, Staten Island Chamber of Commerce, Manhattan Chamber of Commerce, and New York Association of Convenience Stores and The Street Vendor Project, amici curiae.

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Respondents appeal from the order of the Supreme Court, New York County (Milton A. Tingling, J.), entered March 11, 2013, which, inter alia, granted the petition and declared invalid respondent New York City Board of Health's amendment to New York City Health Code § 81.53 barring the sale of sugary drinks in a cup or container able to contain more than 16 fluid ounces, and enjoined respondents from implementing or enforcing it.

Michael A. Cardozo, Corporation Counsel, New York (Fay Ng, Leonard J. Koerner, Pamela Seider Dolgow, Mark Muschenheim and Jasmine M. Georges of counsel), for appellants.

Latham & Watkins, LLP, Washington DC (Richard P. Bress of the bar of the District of Columbia, admitted pro hac vice, of counsel), for respondents, and James E. Brandt, New York, for The American Beverage Association, respondent.

Weil, Gotshal & Manges LLP, New York (James W. Quinn, Salvatore A. Romanello and Gregory Silbert of counsel), for The National Restaurant Association, respondent.

Mololamken LLP, New York (Steven F. Molo and Ben Quarmby of counsel), for The New York Statewide Coalition of Hispanic Chambers of Commerce and The New York Korean-American Grocers Association, respondents.

Rivkin Radler, LLP, Uniondale (Evan H. Krinick, Barry I. Levy and Brian L. Bank of counsel), for Soft Drink and Brewery Workers Union, Local 812, International Brotherhood of Teamsters, respondent.

Reese Richman LLP, New York (Kim E. Richman of counsel), for The National Alliance for Hispanic Health, The National Congress of Black Women, Inc., The New York Chapter of the National Association of Hispanic Nurses, Maya Rockeymoore, Ph.D., Montefiore Medical Center, The Mount Sinai Medical Center, The New York State American Academy of Pediatrics, District II, The Children's Aid Society, Prevention Institute, The California Endowment, Shape Up America!, Dr. Walter Willett, Comunilife, United Puerto Rican Organization of Sunset Park, The Harlem Health Promotion Center, and The Association of Black Cardiologists, Inc., amici curiae.

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National Supermarket Association and The Food Industry Alliance of New York State, Inc., amici curiae.

Shapiro, Arato & Isserles LLP, New York (Alexandra A.E. Shapiro, Marc E. Isserles and Chetan A. Patil of counsel), for The Chamber of Commerce of the United States of America, National Black Chamber of Commerce, National Federation of Independent Business, National Association of Manufacturers, Greater Harlem Chamber of Commerce, Staten Island Chamber of Commerce, Manhattan Chamber of Commerce, and New York Association of Convenience Stores, amici curiae.

Friedman Kaplan Seiler & Adelman LLP, New York (Bruce S. Kaplan and Yitzchak E. Soloveichik of counsel), for The Street Vendor Project, amicus curiae.

RENWICK, J.

In this hybrid CPLR article 78/declaratory judgment proceeding, we are called upon to decide the constitutionality of the New York City Board of Health's Sugary Drinks Portion Cap Rule. The Sugary Drinks Portion Cap Rule, dubbed the "Soda Ban," prohibits New York City restaurants, movie theaters and other food service establishments from serving sugary drinks in sizes larger than 16 ounces. Like Supreme Court, we conclude that in promulgating this regulation the Board of Health failed to act within the bounds of its lawfully delegated authority. Accordingly, we declare the regulation to be invalid, as violative of the principle of separation of powers.

Factual and Procedural Background

We begin with a background of the regulatory agency and the challenged regulation. Pursuant to New York City Charter § 556, respondent New York City Department of Health and Mental Hygiene (DOHMH), an administrative agency in the executive branch of the City government, is charged with regulating and supervising all matters affecting health in the City, including conditions hazardous to life and health, by, among other things, regulating the food and drug supply of the City, and enforcing provisions of the New York City Health Code.

Respondent New York City Board of Health (Board of Health),

established by NY City Charter § 553, is comprised of eleven individuals with relevant experience who were appointed by the Mayor. Pursuant to NY City Charter § 558, the Board of Health is empowered to amend the Health Code with respect to all matters to which the power and authority of DOHMH extend. This includes Article 81 of the Health Code, which sets forth rules regulating City "food service establishments" (FSEs). The Health Code defines an FSE as "a place where food is provided for individual portion service directly to the consumer whether such food is provided free of charge or sold, whether consumption occurs on or off the premises or is provided from a pushcart, stand or vehicle." Pursuant to a 2010 Memorandum of Understanding (MOU) between the City's DOHMH and the State's Department of Agriculture and Marketing, an FSE is subject to inspection by a local Health Department only if it generates 50% or more of its total annual dollar receipts from the sale of food for consumption on the premises or ready-to-eat for off-premises consumption.

On May 30, 2012, Mayor Michael Bloomberg announced the Portion Cap Rule, a proposed amendment to Article 81, that would require FSEs to cap at 16 ounces the size of cups and containers used to offer, provide and sell sugary beverages. The Mayor's stated purpose of the rule was to address rising obesity rates in

the City. On June 1, 2012, 14 members of the New York City Council wrote to the Mayor opposing the proposal and insisting that, at the very least, it should be put before the Council for a vote. This did not occur.

Instead, on June 12, 2012, DOHMH presented to the Board of Health the proposed amendment to Article 81. The Board voted to allow DOHMH to publish the proposal in the City Record, and thereby provide the public with an opportunity to comment on the proposal in advance of a public hearing. On July 24, 2012, a public hearing was held on the Portion Cap Rule. Of the more than 38,000 written comments received prior to the scheduled hearing, approximately 32,000 (84%) supported the proposal and approximately 6,000 (16%) opposed it. In addition, a petition opposing the proposal, signed by more than 90,000 people, was submitted by New Yorkers for Beverage Choice, a coalition of individuals, businesses, and community organizations.

DOHMH proposed no changes to the initial proposal that was made public in May. Instead, DOHMH provided the Board with a memorandum, dated September 6, 2012, summarizing and responding to the testimony and written comments. In the memorandum, which supported the promulgation of the Portion Cap Rule, DOHMH pointed out, among other things, that "[t]he scientific evidence supporting associations between sugary drinks, obesity, and other

negative health consequences is compelling." In addition, DOHMH pointed out that the proposed rule would have a "material impact" on consumption of sugary drinks because "[p]atterns of human behavior indicate that consumers gravitate towards the default option." Thus, DOHMH concluded "If the proposal is adopted, customers intent upon consuming more than 16 ounces would have to make conscious decisions to do so." With regard to the critics' assertion that the rule would result in economic hardship for certain businesses, the agency responded that the freedom to sell large sugary drinks "means little compared to the necessity to protect New Yorkers from the obesity epidemic."

On September 13, 2012, the Board of Health met for the board members to cast their votes on the Portion Cap Rule. Before the vote, both the Commissioner of Health and several board members echoed DOHMH's comments about the Portion Cap Rule, as expressed in the aforementioned memorandum. In the end, the Board voted to adopt the Portion Cap Rule, and a "Notice of Adoption of an Amendment (§ 81.53) to Article 81 of the Health Code" was published in the City Record on September 21, 2012, to go into effect on March 12, 2013.

As adopted, the Portion Cap Rule limited the maximum self-service cup or container size for sugary drinks to 16 fluid ounces for all FSEs within New York City, and defined "sugary

drink" as a non-alcoholic carbonated or non carbonated beverage that is sweetened by the manufacturer or establishment with sugar or another caloric sweetener, has greater than 25 calories per 8 fluid ounces of beverage, and does not contain more than 50 percent of milk or milk substitute by volume as an ingredient.[1] The rule thus targeted non-diet soft drinks, sweetened teas, sweetened black coffee, hot chocolate, energy drinks, sports drinks, and sweetened juices, but contained carve-outs for alcoholic beverages, milkshakes, fruit smoothies and mixed coffee drinks, mochas, lattes, and 100% fruit juices. In addition, DOHMH announced that the Portion Cap Rule would apply only to those FSEs subject to the agency's inspections under the MOU. As a result, the ban applies to restaurants, delis, fast-food franchises, movie theaters, stadiums and street carts, but not to grocery stores, convenience stores, corner markets, gas stations and other similar businesses.

On October 12, 2012, before the rule went into effect, petitioners commenced this action seeking to invalidate the Portion Cap Rule.[2] Petitioners alleged that the Board's adoption

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[1] The rule set a maximum fine of $200 for each violation.

[2] Petitioners are several interest groups, namely, the New York Statewide Coalition of Hispanic Chambers of Commerce, The New York Korean-American Grocers Association, Soft Drink and Brewery Workers Union, Local 812, International Brotherhood of

of the Portion Cap Rule was ultra vires in that it usurped the role of the City Council and imposed social policy by executive fiat, contending that the Board "may not bypass the legislature, under the guise of public health, and make fundamental policy choices and establish far-reaching new policy programs all by themselves, no matter how well-intentioned they may be."

Supreme Court declared the regulation invalid, primarily on the ground that by adopting the Portion Cap Rule, the Board of Health exceeded its authority and violated the separation of powers doctrine as delineated in *Boreali v Axelrod* (71 NY2d 1 [1989]). It also found that the rule itself was arbitrary and capricious. This appeal ensued.

Discussion

At the outset, we agree with Supreme Court that the starting point for the analysis of whether the subject regulation violates the separation of powers doctrine is the Court of Appeals' landmark decision in *Boreali*. Respondents, however, argue that *Boreali* does not apply to the present case because the Board of Health has been vested with the power to act on any health related manner. This argument rests on a fundamental

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Teamsters, The National Restaurant Association, The National Association of Theatre Owners of New York State, and The American Beverage Association.

misunderstanding of the power of administrative agencies vis-a-vis the legislature. The misunderstanding may be readily clarified.

Respondents correctly point out that local public bodies, such as the Board of Health, may be delegated a broad range of powers which are essentially legislative in nature (*People v Blanchard*, 288 NY 145 [1942]). The Board of Health, however, has no inherent legislative power. It derives its power to establish rules and regulations directly and solely from the legislature, in this case, the City Council (*Under 21, Catholic Home Bur. for Dependent Children v City of New York*, 65 NY2d 344, 356 [1985]; *see also Subcontractors Trade Assn. v Koch*, 62 NY2d 422 [1984]).[3]

The separation of powers doctrine of the State Constitution establishes the boundaries between actions of the legislature and an administrative agency. Because the constitution vests legislative power in the legislature, administrative agencies may only effect policy mandated by statute and cannot exercise sweeping power to create whatever rule they deem necessary. In

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[3] The Charter of the City of New York provides for "distinct legislative and executive branches" *(Under 21, Catholic Home Bur. for Dependent Children,* 65 NY2d at 356). Section 3 designates the Mayor as "chief executive officer of the city," while § 21 vests the exclusive legislative power in the Council. In general, these co-equal branches of government may not unlawfully infringe on each other's prerogatives (*id.; see also Subcontractors Trade Assn.,* 62 NY2d at 422).

other words, "[as] an arm of the executive branch of government, an administrative agency may not, in the exercise of rule-making authority, engage in broad-based public policy determinations (*Rent Stabilization Assn. of N.Y. City v Higgins*, 83 NY2d 156, 169 [1993], *cert denied* 512 US 1213 [1993], citing *Boreali*, 71 NY2d at 9).

Ultimately, the Board of Health has failed to distinguish its action from the action of the analogous administrative body in *Boreali*. As here, the state Legislature in *Boreali* gave the Public Health Council (PHC) broad authority to promulgate regulations on matters concerning public health. Still, *Boreali* held, the scope of the PHC's authority under its enabling statute was deemed limited by its role as an administrative, rather than a legislative body (*Boreali*, 71 NY2d at 9).

We must then examine whether the Board of Health exceeded the bounds of its legislative authority as an administrative agency when it promulgated the Sugary Drinks Portion Cap Rule. *Boreali* illustrates when the "difficult-to-demarcate line" between administrative rulemaking and legislative policymaking has been transgressed. In *Boreali,* the PHC promulgated regulations prohibiting smoking in a wide variety of public facilities following several years of failed attempts by members of the state legislature to further restrict smoking through new

legislation. *Boreali* found the regulations invalid because, although the PHC was authorized by the Public Health Law to regulate matters affecting the public health, "the agency stretched that statute beyond its constitutionally valid reach when it used the statute as a basis for drafting a code embodying its own assessment of what public policy ought to be" (*id.* at 9).

Boreali relied on four factors in finding that the PHC's regulations were an invalid exercise of legislative power. First, *Boreali* found the PHC had engaged in the balancing of competing concerns of public health and economic costs, "acting solely on [its] own ideas of sound public policy" (*id.* at 12). Second, the PHC did not engage in the "interstitial" rule making typical of administrative agencies, but had instead written "on a clean slate, creating its own comprehensive set of rules without benefit of legislative guidance" (*id.*). Third, the PHC's regulations concerned "an area in which the legislature had repeatedly tried — and failed — to reach agreement in the face of substantial public debate and vigorous lobbying by a variety of interested factions" (*id.*). *Boreali* found that the separation of powers principles mandate that elected legislators rather than appointed administrators "resolve difficult social problems by making choices among competing ends" (*id.*). Fourth, *Boreali* found that the agency had overstepped its bounds because the

development of the regulations did not require expertise in the field of health (*id.* at 14).

According to *Boreali*, these "coalescing circumstances," when viewed in combination, paint a portrait of an agency that has improperly assumed for itself "'[t]he open-ended discretion to choose ends,' which characterizes the elected Legislature's role" (*id.* at 10). *Boreali* went on to say that none of the four factors, standing alone, is sufficient for a finding that the administrative agency has violated the separation of powers (*id.*). This characterization indicates to us that, contrary to the Board of Health's suggestion, *Boreali* intended the four factors to be interpreted as indicators of the usurpation of the legislature, rather than a talismanic rule of four required elements that must all be present in every case.

Indeed, one year later, in *Matter of Campagna v Shaffer* (73 NY2d 237, 243 [1979]), the Court explained that "[a] key feature of [the *Boreali*] case . . . was that the Legislature had never articulated a policy regarding public smoking." Subsequently, the courts have consistently held that so long as an action taken by an administrative agency is consistent with the policies contemplated by the legislature, the action taken will survive constitutional scrutiny under the doctrine of separation of powers (*see e.g. Higgins*, 83 NY2d 156; *Matter of Health*

Facilities Assn. v Axelrod, 77 NY2d 340 [1991]; *Matter of Campagna*, 73 NY2d 237).[4]

In any event, we find that all four *Boreali* factors indicative of the usurpation of legitimate legislative functions are present in this case. Turning to the first *Boreali* factor -- balancing competing concerns of public health and economic costs -- the Court found that the PHC's promulgation of comprehensive regulations that banned smoking in some public places was not consistent with the authority provided by the legislature under the public health law to promulgate regulations on matters concerning public health (71 NY2d at 13-14). The Court pointed to the PHC's inclusion of exceptions and exemptions that reflected the agency's own balancing of economic and social implications of the regulations as clear evidence that the regulatory scheme was inconsistent with the agency's legislative authority (*id.*). Specifically, the PHC had exempted certain

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[4] For instance, in *New York State Health Facilities Assn. v Axelrod*, the Court upheld a Medicaid patient access regulation adopted by the PHC, which required new applicants seeking nursing home approval to agree to admit "a reasonable percentage of Medicaid patients" (77 NY2d 340). Such regulation did not exceed the scope of legislative power delegated to the PHC because it was "an appropriate means for achieving legislative ends." This is because the pertinent statutory provisions directed that the PHC should consider a facility's responsiveness to Medicaid patients and take steps designed to prohibit discrimination against Medicaid patients (*id. at 347-348*).

establishments, such as bars and certain restaurants, from the indoor smoking bans (*id.* at 14)). This effort to "[s]trik[e] the proper balance among health concerns, costs and privacy interests . . . is a uniquely legislative function" (*id.*). According to *Boreali*, the presence of exemptions is particularly telling because exemptions typically "run counter to such goals and, consequently, cannot be justified as simple implementations of legislative values" (*id.*). The exceptions did not, therefore, reflect the agency's charge to protect public health but instead reflected the agency's own policy decisions regarding balancing the relative importance of protecting public health with ensuring the economic viability of certain industries (*id.*).

Likewise, in this case, it cannot be said that the Board of Health acted solely with a view toward public health considerations when it adopted exemptions to the Portion Cap Rule. Indeed, during the public comment period and hearings both the DOHMH and the board members themselves indicated that they weighed the potential benefits against economic factors. The Commissioner went as far as to indicate that in addition to promoting health, the ban would help ameliorate obesity-related health care expenditures in New York.

These comments alone do not convince us that the Board of Health considered non-health factors. Rather, we find

particularly probative the regulation's exemptions, which evince a compromise of social and economic concerns, as well as private interests. As indicated, the regulatory scheme is not an all-encompassing regulation. It does not apply to all FSEs. Nor does it apply to all sugary beverages. The Board of Health's explanations for these exemptions do not convince us that the limitations are based solely on health-related concerns.

With regard to the exemption for sugary milk or juice drinks, the agency explained that it is based on the Board's conclusion that they, unlike the covered drinks, have some nutritional benefits. The agency, however, ignores the fact that the "soda ban" does more than just target a specific food category. It also ignores that the Board has never categorized soda and the other targeted sugary drinks as inherently unhealthy. In essence, as the DOHMH acknowledges, it prescribes a mechanism to discourage New Yorkers from consuming those targeted sugary drinks by dictating a maximum single portion size that can be made available in certain food service establishments. Such mechanism necessarily looks beyond health concerns, in that it manipulates choices to try to change consumer norms.

Indeed, since a basic premise of the ban is that New Yorkers consume excessive quantities of sugary drinks, the Board's

decision to regulate only these drinks requires that any health concerns be weighed against consumer preferences for such drinks. Instead of offering information and letting the consumer decide, the Board's decision effectively relies upon the behavioral economics concept that consumers are pushed into better behavior when certain choices are made less convenient. For instance, the regulation makes the choice to drink soda more expensive, as it costs more to buy two 16-ounce drinks than to buy one 32-ounce drink. As a result, the Board necessarily concluded, as a threshold matter, that health concerns outweigh the cost of infringing on individual rights to purchase a product that the Board has never categorized as inherently dangerous. As the intense public debate on the ban bears out, this threshold decision to regulate a particular food is inherently a policy decision.[5] Such decision necessarily reflects a balance between health concerns, an individual consumer's choice of diet, and business financial interests in providing the targeted sugary drinks. In this context, the "Soda Ban" is one especially suited

[5] *See e.g.* New York Times editorial, *A Ban Too Far,* May 31, 2012); Michael M. Grynbaum, *New York Plans to Ban Sale of Big Sizes of Sugary Drinks* , NY Times, May 30, 2012; USA Today editorial, *New York Soda Cap Wouldn't Beat Obesity,* June 3, 2012; Washington Post editorial, *Slurping Less Soda in New York*, June 2, 2012); Paul Whitefield, Los Angeles Times Opinion, Life, *Liberty and the Pursuit of Doughnuts and Big Gulps,* June 01, 2012.

for legislative determination as it involves "difficult social problems," which must be resolved by "making choices among competing ends" (*Boreali*, 71 NY2d at 13).

With regard to the exemption of certain FSE's (i.e., grocery markets, 7-11s, bodegas, etc.), the DOHMH does not deny that the exemption has no relationship to health-related concerns. Still, the agency argues that it was not based on impermissible reasons, but on the agency's allegedly reasonable view that such FSEs cannot be regulated by the Agency under the MOU signed with the state's Department of Agriculture. However, the Board's claim that the MOU tied its hands is belied by the fact that the agency has previously used its regulatory authority to promulgate city-wide health rules that regulate all FSEs (see e.g. 24 RCNY Health Code 181.07) [city-wide regulation of common eating and drinking utensils]; 24 RCNY Health Code 71.05) [city-wide prohibition on the sale of "any food . . . which is adulterated or misbranded"]). Moreover, the MOU envisions "cooperative efforts between the two agencies [to] assure comprehensive food protection" and to avoid gaps in food surveillance." Yet, the agency offers no evidence of any prior attempt to coordinate with the Department of Agriculture on the Portion Cap Rule. The failure to obtain such expansion resulted in a ban that includes exceptions which necessarily favor some businesses and products

at the expenses of others.

Accordingly, the selective restrictions enacted by the Board of Health reveal that the health of the residents of New York City was not its sole concern. If it were, the "Soda Ban" would apply to all public and private enterprises in New York City. By enacting a compromise measure — one that tempered its strong health concerns with its unstated but real worries about commercial well-being, as well as political considerations — the Board necessarily took into account its own non-health policy considerations. Judged by its deeds rather than by its explanations, the Board of Health's jurisdictional rationale evaporates.

The second *Boreali* factor is whether the Board of Health exceeded its authority by writing on "a clean slate" rather than using its regulatory power to fill in the details of a legislative scheme. It cannot be seriously disputed that administrative agencies like the DOHMH play an important role in rule making, particularly in the context of broadly worded legislation that sets out general policy goals and program parameters. In this context, administrative agencies engage in what is known as interstitial rule making. Interstitial rule making is the process of filling in the details of a broad legislative mandate and making that legislation operational

(*Boreali*, 71 NY2d at 13).

Conversely, when an agency's action goes beyond filling in the details of a broad legislative scheme, it exceeds the limits of its authority. This was the case in *Boreali* where there was no legislation authorizing the PHC to regulate smoking in public places. Consequently, the PHC was left to make policy choices that were appropriately for the Legislature. The PHC "wrote on a clean slate, creating its own comprehensive set of rules without benefit of legislative guidance" (*id.* at 13-14). Therefore, *Boreali* held that the PHC's actions were "a far cry from the 'interstitial' rule making" (*id.*).

Similarly, in the case at bar, contrary to the Board of Health's argument, in adopting the Sugary Drinks Portion Cap Rule, the Board did not fill a gap in an existing regulatory scheme but instead wrote on a clean slate. In fact, the Board of Health does not dispute that neither the State Legislature nor the City Council has ever promulgated a statute defining a policy with respect to excessive soda consumption, the purported subject of the regulation. Instead, the agency points to the City Charter's grant of broad authority to the Board of Health to regulate "all matters affecting the health of the City." The Board argues that the Portion Cap Rule fits comfortably within this broad delegation of power to adopt sanitary regulations

dealing with matters affecting the "promotion and protection of health." However, the Board's general jurisdiction statute, although seemingly broad in scope, does not authorize the Board's action.

We think it clear that this general language does not empower the Board of Health to promulgate rules regulating the conduct of the people of the City of New York with respect to all matters having some relation to the public health. If the words of the statute should be so construed, this indeed would be unfettered delegation of legislative power. As *Boreali* explicitly held, "[E]nactments conferring authority on administrative agencies in broad or general terms must be interpreted in light of the limitations that the Constitution imposes" and "[h]owever facially broad, a legislative grant of authority must be construed, whenever possible, so that it is no broader than that which the separation of powers doctrine permits." In fact, the City Charter itself provides that the Board of Health may exercise its power to modify the health code as long as it is "not inconsistent with the constitution," or with the laws of the state and the City Charter (*see* NY City Charter § 558[b]).

In our view, the City Charter's Enabling Act, granting the Board of Health explicit power to establish, amend, and repeal

the Health Code, was clearly intended by the legislature to provide the agency with the discretion to engage in interstitial rule making designed to protect the public from inherently harmful and inimical matters affecting the health of the City (*see e.g. Grossman v Baumgartner*, 17 NY2d 345 [1966] [Court upheld a provision of the Health Code of the City of New York prohibiting, for health reasons, tattooing of a child under 16 years old except by a licensed physician and only for medical purposes]). The general terms employed in the Enabling Act must be construed in relation to the more specific duties imposed and the powers conferred by the act taken as a whole. When thus construed, the general terms are restricted, expressing the true intent and meaning of the legislature. Indeed, although the legislature intended to rely on the Board of Health's expertise in identifying and determining how to regulate inherently harmful matters affecting the health of the City, the Charter provides examples of these general functions when it explicitly grants the agency the power to supervise and regulate the safety of the water and food supplies, as well as the control of diseases (*see e.g.* NY City Charter §§ 556[c][2]; 556[c][7]; 556[c][9]).

If soda consumption represented such a health hazard, then the Sugary Drink Portion Cap Rule would be exactly the kind of interstitial rule making intended by the legislature and engaged

in by the Board of Health in the past. The Board of Health, however, does not claim that soda consumption can be classified as such a health hazard. Rather, the hazard arises from the consumption of sugary soda in "excess quantity." The risks of obesity and developing diabetes and other illnesses are greater in those who drink soda to excess than in those who drink it in moderation or not at all. Thus, since soda consumption cannot be classified as a health hazard per se, the Board of Health's action in curtailing its consumption was not the kind of interstitial rule making intended by the legislature.

With regard to the third factor, *Boreali* placed significance on the fact that the legislature had repeatedly tried to pass legislation implementing indoor smoking bans, yet had failed to do so. In the Court's view, this *Boreali* factor was indicative of the legislature's inability to agree on "the goals and methods that should govern in resolving" the issue (*Boreali*, 71 NY2d at 8). In this context, an agency's attempt to "take it upon itself to fill the vacuum and impose a solution of its own" is improper (*id.*). Significantly, *Boreali* distinguished the case of failed legislative action from mere inaction, to which it did not ascribe the same significance (*id.*). Therefore, mere legislative inaction on a particular issue should not satisfy this factor.

The situation here is similar to that of the smoking ban in

Boreali. Over the past few years, both the City and State legislatures have attempted, albeit unsuccessfully, to target sugar sweetened beverages. For instance, the City Council has rejected several resolutions targeting sugar sweetened beverages (warning labels, prohibiting food stamp use for purchase, and taxes on such beverages).[6] Moreover, the State Assembly introduced, but has not passed, bills prohibiting the sale of sugary drinks on government property and prohibiting stores with ten or more employees from displaying candy or sugary drinks at the "check out counter or aisle."[7] While the Portion Cap Rule

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[6] *See e.g.* New York City Resolution No. 1265 (2012): Resolution calling upon the New York State Legislature to pass and the Governor to sign legislation that would add an excise tax on sugar sweetened beverages; New York City Resolution No. 1264 (2012): Resolution calling upon the United States Food and Drug Administration to require warning labels on sugar sweetened beverages; New York City Resolution No. 0768 (2011): Resolution calling upon the United States Department of Agriculture to authorize New York City to add certain sugary drinks to the list of prohibited goods for City residents who receive Food Stamp assistance.

[7] *See e.g.* Assembly Bill No. A10010: Prohibiting the sale of sugar sweetened beverages at food service establishments and vending machines located on government property; Assembly Bill No. S67004: Relating to imposition of a tax on beverage syrups and soft drinks; Assembly Bill No. A41004: Relating to imposition of a tax on beverage syrups and soft drinks; Assembly Bill No. A06229A: Providing for the sale, availability and distribution of healthy foods and beverages on school property and at school sponsored functions; Assembly Bill No. A10965: Prohibiting the purchase of food items which are not nutritional with food stamp program coupons or other access devices related thereto.

employs different means of targeting the sale of certain beverages than those considered by the legislative bodies, it pursues the same end, and thus addresses the same policy areas as the proposals rejected by the State and City legislatures. This is a strong indication that the legislature remains unsure of how best to approach the issue of excessive sugary beverage consumption.

The final *Boreali* factor in assessing whether the administrative agency has exceeded the bounds of its legislative authority is whether any special expertise or technical competence was involved in the development of the regulation that is challenged. In *Boreali*, the PHC attempted to use its broad legislative grant of authority to improve public health by developing what the Court called a "simple code" that banned indoor smoking and exempted certain groups. No technical competence or agency expertise was necessary to develop the code. That the regulations in question in *Boreali* did not require the agency's specialized expertise indicated to the Court that the agency had engaged in unauthorized policy-making rather than interstitial rule-making.

Likewise, in this case, we do not believe that the Board of Health exercised any special expertise or technical competence in developing the Portion Cap Rule. The deleterious effects (e.g.

obesity) associated with excessive soda consumption are well-known. Moreover, despite the City's argument to the contrary, the Board did not bring any scientific or health expertise to bear in creating the Portion Cap Rule. Indeed, the rule was drafted, written and proposed by the Office of the Mayor and submitted to the Board, which enacted it without substantive changes. Under the circumstances, it cannot be said that the Board of Health's technical competence was necessary to flesh out details of the legislative policies embodied in the Portion Cap Rule. We find, therefore, that this factor, albeit less compelling than the others, also weighs in favor of invalidating the Sugary Drinks Portion Cap Rule.

Conclusion

In sum, we find that under the principles set forth in *Boreali*, the Board of Health overstepped the boundaries of its lawfully delegated authority when it promulgated the Portion Cap Rule to curtail the consumption of soda drinks. It therefore violated the state principle of separation of powers. In light of the above, we need not reach petitioners' argument that the subject regulation was arbitrary and capricious.

Before concluding, we must emphasize that nothing in this decision is intended to circumscribe DOHMH's legitimate powers.

Nor is this decision intended to express an opinion on the wisdom of the soda consumption restrictions, provided that they are enacted by the government body with the authority to do so. Within the limits described above, health authorities may make rules and regulations for the protection of the public health and have great latitude and discretion in performing their duty to safeguard the public health.

Accordingly, the order of the Supreme Court, New York County (Milton A. Tingling, J.), entered March 11, 2013, which, inter alia, granted the petition and declared invalid respondent New York City Board of Health's amendment to New York City Health Code § 81.53 barring the sale of sugary drinks in a cup or container able to contain more than 16 fluid ounces, and enjoined respondents from implementing or enforcing it, should be affirmed, without costs.

All concur.

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

ENTERED: JULY 30, 2013

CLERK