Acosta, P.J., Richter, Kapnick, Kahn, Kern, JJ.

9524 HSBC Bank USA, etc., Index 652793/16
Plaintiff-Respondent-Appellant,

-against-

Merrill Lynch Mortgage Lending, Inc., et al.,
Defendants-Appellants-Respondents.

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O'Melveny & Myers LLP, New York (Pamela A. Miller of counsel), for appellants-respondents.

McKool Smith, P.C., New York (David R. Dehoney and Robert W. Scheef of counsel), for respondent-appellant.

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Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered June 6, 2018, which, to the extent appealed from as limited by the briefs, granted in part and denied in part defendants' motions to dismiss plaintiff's claims for failure to give notice of non-conforming loans, unanimously modified, on the law, to deny the part of the motion seeking to dismiss the claims based on untimely notices of breach, and otherwise affirmed, without costs.

This Court has discretion to consider defendants' arguments under the Pooling and Servicing Agreement (PSA) § 2.03(b), although they were first raised in reply on the motion, because they involve questions of law that can be resolved on the existing record (*see Facie Libre Assoc. I, LLC v SecondMarket Holdings, Inc.*, 103 AD3d 565 [1st Dept 2013], *lv denied* 21 NY3d 866 [2013]).

The motion court correctly found that plaintiff had standing

to assert the breach of notice claims. Defendants' reading of PSA § 2.03(a) contradicts the definition of the Assignment and Assumption Recognition Agreement (AARA) set forth in the PSA. Any conflict must be resolved in favor of that definition, which with regard to this term is more specific (*see Isaacs v Westchester Wood Works*, 278 AD2d 184, 185 [1st Dept 2000]).

Defendants' reading also contradicts the AARA, which should be read together with the PSA (*see Ambac Assur. Corp. v EMC Mtge. LLC*, 121 AD3d 514, 515 [1st Dept 2014] [various agreements governing residential mortgage-backed securitization are "interlocking"]).

Defendants failed to establish by documentary evidence that the notice obligations were not transferred to defendant Countrywide Home Loans, Inc. and thereafter to defendant Bank of America, N.A., because the transfer agreement is not included in the record.

The court correctly found that the sole remedy provision in § 2.03(a) does not apply to the notice claims asserted here (*cf. Ambac Assur. Corp.*, 121 AD3d at 516). When viewed in the context of all the governing agreements, that provision is limited to breaches of representations and warranties. As the motion court found, defendants' interpretation would drastically limit the rights that actually were assigned to plaintiff.

Contrary to the court's conclusion, claims involving the loans referred to in the untimely breach notices relate back to

the claims asserted in the summons with notice. Plaintiff sent two timely notices; the loans referred to in the other notices arose from the same transactions (*see Nomura Home Equity Loan,*

*Inc., Series 2006-FM2 v Nomura Credit & Capital, Inc.*, 133 AD3d 96, 108 [1st Dept 2015], *mod on other grounds* 30 NY3d 572 [2017]).

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

ENTERED: SEPTEMBER 17, 2019

CLERK

Acosta, P.J., Richter, Kapnick, Kahn, Kern, JJ.

9527 In re Richard Arroyo, Index 101125/17
Petitioner,

-against-

James P. O'Neill, etc., et al.,
Respondents.

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Worth Longworth & London, LLP, New York (Howard B. Sterinbach of counsel), for petitioner.

Zachary W. Carter, Corporation Counsel, New York (Lorenzo Di Silvio of counsel), for respondents.

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Determination of respondent Police Commissioner, dated May 4, 2017, which, after a hearing, terminated petitioner's employment as a New York City police officer, modified, on the law, to vacate the penalty of dismissal and forfeiture of his retirement benefits, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Carmen Victoria St. George, J.], entered June 13, 2018), remanded to respondents for determination of a lesser penalty, and the determination otherwise confirmed, without costs.

Petitioner admitted at trial to the theft of $20 from an undercover officer illegally parked near a hydrant and acting intoxicated in the course of an integrity test targeting petitioner's partner. Substantial evidence supports the finding that he also made false statements in the course of an official investigation, in violation of Patrol Guide § 203-08 (*see*

*generally 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180 [1978]). There exists no basis to disturb the credibility determinations of the Hearing Officer (*see Matter of Berenhaus v Ward*, 70 NY2d 436, 443-444 [1987]).

However, under the circumstances presented here, the penalty of termination and forfeiture of his pension shocks our conscience and sense of fairness (*see Matter of Vecchio v Kelly*, 94 AD3d, 545, 546 [1st Dept 2012], *lv denied* 20 NY3d 855 [2013]; *Matter of McDougall v Scoppetta*, 76 AD3d 338 [2d Dept 2010], *appeal withdrawn* 17 NY3d 902 [2011]). Petitioner's conduct, although troubling, was an aberration from his otherwise exemplary career. Petitioner has nearly two decades of police service, prior to which he served in the United States Army for eight years where he was a sergeant in the military police, receiving an honorable discharge. During his tenure with the New York City Police Department, petitioner had no formal disciplinary history, and received a total of 38 medals for "Excellent Police Duty" and "Meritorious Police Duty." Moreover, the loss of petitioner's pension would work a financial hardship on his wife, who is diagnosed with cancer, and their now 10-year-old daughter (*see Matter of Vecchio*, 94 AD3d at 546 [noting that the extreme financial hardship upon the family of the petitioner caused by the loss of a pension was a critical factor in determining whether the deprivation of retirement benefits is shocking to one's sense of fairness, a factor which was notably

missing in *Matter of Harp v New York City Police Dept.* (277 AD2d 147 [1st Dept 2000], *revd* 96 NY2d 892 [2001])]).

The question of whether the penalty is so disproportionate to the misconduct as to shock the conscience requires a case by case factual analysis. While certainly cognizant of the Court of Appeals' jurisprudence set forth in *Matter of Pell v Board of Educ.* (34 NY2d 222 [1974]), and recently reaffirmed in *Matter of Bolt v New York City Dept. of Educ.* (30 NY3d 1065 [2018]), we nonetheless find under the circumstances presented herein that the penalty of dismissal and the deprivation of petitioner's right to his accrued pension are an "affront to our sense of fairness" and "shock[s] the conscience" (*id.* at 1069, Rivera, J., concurring).

All concur except Richter and Kern, JJ. who dissent in part in a memorandum by Richter, J. as follows:

RICHTER, J. (dissenting in part)

I agree with the majority that substantial evidence supports the finding that petitioner made false statements during an official investigation. However, I would confirm respondent Police Commissioner's decision to terminate petitioner's employment as a New York City police officer. In view of petitioner's on-duty theft of money and his subsequent false statements, both of which are offenses involving moral turpitude, the penalty of termination is not so disproportionate to the offense as to shock one's sense of fairness.

Respondent Police Department of the City of New York (NYPD) issued charges and specifications against petitioner Police Officer Richard Arroyo alleging that he (1) failed an integrity test when he took $20 from the car of an individual he thought was a civilian; and (2) made false and misleading statements about the incident during an official NYPD interview. Arroyo pleaded guilty to the first charge, and proceeded to a departmental trial on the second.

The evidence at the trial established the following. NYPD's Internal Affairs Bureau (IAB) conducted an integrity test whereby an undercover officer acted intoxicated while parked illegally near a fire hydrant.[1] NYPD introduced a video of the incident into evidence that clearly depicts the theft. The video shows

[1] An integrity test places a police officer in a lifelike scenario to ascertain whether the officer would act in accordance with the law and NYPD policies.

Arroyo going into the vehicle, taking $55 from the center console, taking a $20 bill and putting it into his left hand, while counting out the remaining $35 and grabbing that with his right hand. After Arroyo took the money, a recording device worn by the undercover recorded Arroyo outside the vehicle counting out $35, not $55. Arroyo was subsequently interviewed by IAB, during which he maintained that he did not count the money inside the vehicle, he gave back all the money he recovered to the owner, and that he never took any money that did not belong to him.

The trial commissioner found Arroyo guilty of the theft charge, based on his guilty plea, and guilty of the false statements charge based on the trial evidence. The trial commissioner concluded that Arroyo had falsely stated at the department interview that he never counted or separated the money inside the car, and only counted it outside the vehicle in the presence of the motorist and other officers. The trial commissioner explained that Arroyo thereby created a false description of events. As a penalty, the trial commissioner recommended that Arroyo be dismissed from the NYPD. The Police Commissioner subsequently approved the findings of guilt on both charges, as well as the penalty of dismissal, and this article 78 proceeding ensued.

It is well settled that an administrative penalty must be upheld unless it is "so disproportionate to the offense, in the

light of all the circumstances, as to be shocking to one's sense of fairness" (*Matter of Pell v Board of Educ.*, 34 NY2d 222, 233 [1974]). In matters of police discipline, the determination of the Police Commissioner as to the appropriate punishment must be given "great leeway" because "it is the Commissioner, not the courts, who is accountable to the public for the integrity of the Department" (*Matter of Kelly v Safir*, 96 NY2d 32, 38 [2001] [internal quotation marks omitted]). The Appellate Division has no interest of justice jurisdiction in reviewing the Commissioner's penalty (*id.*), and, as recently emphasized by the Court of Appeals, "That reasonable minds might disagree over what the proper penalty should have been does not provide a basis for . . . refashioning the penalty" (*Matter of Bolt v New York City Dept. of Educ.*, 30 NY3d 1065, 1068 [2018]).

Applying these principles, the penalty of dismissal is not so disproportionate to the offenses committed here as to shock one's sense of fairness. Police officers hold a vital position of public trust, and must be held to the highest standards of honesty and integrity. Officers are tasked with ensuring the safety and well-being of all members of the public, including those who are intoxicated like the undercover here appeared to be. Officers are also entrusted to safeguard, and properly voucher in appropriate circumstances, any money and evidence they come upon in their official capacity. They are also expected to tell the truth, particularly because they are often called on to

testify under oath at criminal trials and other proceedings.

Here, Arroyo was found guilty of two very serious offenses, steeped in dishonesty, that violated the trust the public places in police officers. Both his on-duty theft of money from an individual he believed was an intoxicated civilian, and his subsequent false statements creating a false narrative of the incident to cover his tracks, are offenses of great moral turpitude that have a "destructive impact" "on the confidence which it is so important for the public to have in its police officers" (*Matter of Alfieri v Murphy*, 38 NY2d 976, 977 [1976]).

The Court of Appeals and this Court have repeatedly upheld the penalty of termination for police officers engaging in the type of corrupt behavior engaged in here. For instance, in *Alfieri*, the Court confirmed a termination penalty in the case of a 15-year veteran of the police department who was charged with shoplifting $4.17. The Court described the officer's theft as a "grave" offense, stating that "[t]he smallness of the value of the property [stolen] does not diminish the moral turpitude thus disclosed" (*id.*; *see also Pell*, 34 NY2d at 234-235 [describing larceny of even small sums of money as "morally grave"]; *Brovakos v Bratton*, 254 AD2d 32 [1st Dept 1998] [upholding the discharge of an officer who wrongfully solicited money and failed to voucher it]).

In *Matter of Harp v New York City Police Dept.* (277 AD2d 147 [1st Dept 2000], *revd* 96 NY2d 892 [2001]), this Court vacated the

penalty of dismissal for a police officer who, like Arroyo, made false or misleading statements at an internal investigation interview. Despite the fact that the officer in *Harp* had 15 years of excellent police service with no prior disciplinary record, and that the false statements made were "of relatively minor significance" (277 AD2d at 148), the Court of Appeals reversed, finding that the penalty did not, as a matter of law, shock the judicial conscience (96 NY2d at 894). The misconduct here — larceny and false statements made to cover up that crime — far exceeds that of the officer in *Harp*. Subsequent to *Harp*, this Court has repeatedly declined to set aside termination penalties for police officers who make false statements (*see e.g. Matter of Smith v Kelly*, 117 AD3d 564, 565 [1st Dept 2014] [lying to federal agents]; *Matter of Alvarez v Kelly*, 2 AD3d 219 [1st Dept 2003] [false statements made in departmental interview]), even where the falsities were made off duty (*see Matter of Kim v Kelly*, 104 AD3d 556 [1st Dept 2013] [making false statements in a mortgage application]).

In vacating the penalty of termination, the majority focuses on Arroyo's lengthy and exemplary career and lack of disciplinary history. In view of the seriousness of Arroyo's misconduct, neither of these factors is sufficient to set aside the Commissioner's decision. Indeed, the Court of Appeals has repeatedly upheld harsh penalties, including termination from employment, for employees with no prior disciplinary record (*see*

*e.g. Matter of Ward v City of New York*, 23 NY3d 1046, 1047 [2014] [revoking master plumbing license despite unblemished record]; *Kelly v Safir*, 96 NY2d at 39-40 [confirming penalty of dismissal despite prior exemplary service and commendations]).

Nor does the loss of pension benefits that automatically flows from Arroyo's dismissal warrant a different result. As the Court of Appeals explained in *Pell*, "Pensions are not only compensation for services rendered, but they serve also as a reward for faithfulness to duty and honesty of performance" (*Pell*, 34 NY2d at 238). *Pell* recognized that the length of employment, loss of retirement benefits, and the effect on an innocent family can all play a role in a court's review of a penalty, but "only in cases where there is absent grave moral turpitude and grave injury to the agency involved or to the public weal" (*id*. at 235). The matter before us, however, is not such a case. Although the forfeiture of the pension will undoubtedly result in hardship for Arroyo, in view of the serious nature of the misconduct, it cannot be said that the penalty imposed shocks the conscience (*Pell*, 34 NY2d at 239*; see Harp,* 96 NY2d at 894*; Kelly v Safir*, 96 NY2d at 39-40; *Matter of Durudogan v City of New York*, 134 AD3d 452, 452 [1st Dept 2015] [confirming the dismissal of a police officer and thereby denying him vested retirement benefits]).

In vacating the penalty, the majority relies upon *Matter of Vecchio v Kelly* (94 AD3d 545, 546 [1st Dept 2012], *lv denied* 20

NY3d 855 [2013]). In that case, which came down before the Court of Appeals's cautionary reminder in *Bolt*, the petitioner police officer was terminated based on, inter alia, charges relating to his improperly taking and possessing nude photographs of an arrestee and a rape victim. The Court sustained those charges, dismissed other unrelated charges, annulled the penalty of termination, and remanded the matter for imposition of a new penalty on the remaining charges. The Court also directed that if the Commissioner still saw fit to adhere to the penalty of termination, the petitioner should be permitted to apply for a vested interest retirement. I believe that *Vecchio* cannot be reconciled with the Court of Appeals' jurisprudence set forth herein, most recently reaffirmed by *Bolt*. Accordingly, I would confirm the Police Commissioner's determination in its entirety, deny Arroyo's article 78 petition and dismiss the proceeding.

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

ENTERED: SEPTEMBER 17, 2019

CLERK

Friedman, J.P., Gische, Webber, Kahn, Oing, JJ.

9112 TRC Master Fund, LLC, Index 654968/16
Plaintiff-Appellant,

-against-

AP Gas & Electric (TX), LLC,
Defendant-Respondent.

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Rubin LLC, New York (Paul A. Rubin of counsel), for appellant.

Bryan Cave Leighton Paisner LLP, New York (Thomas J. Schell of counsel), for respondent.

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Order, Supreme Court, New York County (Nancy M. Bannon, J.), entered March 13, 2018, which granted defendant's motion to dismiss the complaint, unanimously reversed, on the law, without costs, and the motion denied.

Defendant's reading of the agreement, which the motion court accepted, requires a deviation from the express text, impermissibly rendering certain provisions without meaning or effect (*see Vermont Teddy Bear Co. v 538 Madison Realty Co.*, 1 NY3d 470, 475 [2004]). Plaintiff purchased a claim that defendant made in a bankruptcy proceeding filed by a third party. The purchase agreement gives plaintiff the option of demanding immediate payment if at any time prior to emergence from bankruptcy or liquidation the claim becomes impaired. The bankruptcy trustee filed an objection to the claim, which it then withdrew 37 days later. The objection constitutes an impairment under the agreement, triggering plaintiff's right to demand immediate payment under the agreed-to formula, notwithstanding

that the impairment was later removed. The complaint therefore states a valid cause of action and should be reinstated. As acknowledged by plaintiff, but disputed by defendant, upon repayment the claim would belong to defendant.

The Decision and Order of this Court entered herein on April 30, 2019 (171 AD3d 652 [1st Dept 2019]) is hereby recalled and vacated (*see* M-2854 decided simultaneously herewith).

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

ENTERED: SEPTEMBER 17, 2019

CLERK

Sweeny, J.P., Richter, Oing, Singh, JJ.

9461N Ambac Assurance Corporation, et al., Index 651612/10
Plaintiffs-Respondents,

-against-

Countrywide Home Loans Inc., et al.
Defendants-Appellants.

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Williams & Connolly LLP, Washington, DC (Craig D. Singer of the bar of the District of Columbia, admitted pro hac vice, of counsel), and Simpson Thacher & Bartlett LLP, New York (Joseph M. McLaughlin of counsel), for Countrywide Home Loans Inc., Country Wide Securities Corp., and Country Wide Financial Corp., appellants.

O'Melveny & Myers, LLP, New York (Jonathan Rosenberg of counsel), for Bank of America, appellant.

Quinn Emanuel Urquhart & Sullivan, LLP, New York (Kathleen M. Sullivan of counsel), for respondents.

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Order, Supreme Court, New York County (Eileen Bransten, J.), entered January 2, 2019, which denied defendants' various pretrial motions, unanimously modified, on the law, to grant the motions by Bank of America Corp. (BAC) to sever the claims asserted against it and to strike the jury demand on those claims, and otherwise affirmed, without costs.

The court correctly denied the Countrywide defendants' motion seeking dismissal of the fraudulent inducement claim.

As relevant here, Ambac, the monoline insurer, asserts causes of action against the Countrywide defendants for: (a) breaching various representations and warranties about their loan-origination practices and the quality of the loans in the securitizations; and (b) fraudulently inducing Ambac to insure

the securitizations by making precontractual misrepresentations and omissions. In a prior decision in this case (31 NY3d 569 [2018]), the Court of Appeals concluded that damages for Ambac's contract claims were to be measured by the repurchase protocol contained in the parties' agreements (*id.* at 583-584). As for the fraudulent inducement claim, the Court found that the repurchase protocol was not applicable, and that damages should instead be measured "by reference to claims payments made based on nonconforming loans" (*id.* at 581). Thus, as the motion court properly found, the Court of Appeals recognized distinct measures of damages for the fraudulent inducement claim arising separately from the contract claims.[1]

While a fraudulent inducement claim can be dismissed as duplicative of a breach of contract claim if it seeks the "same damages" (*Mosaic Caribe, Ltd. v AllSettled Group, Inc.*, 117 AD3d 421, 422-423 [1st Dept 2014]), the Countrywide defendants here have not established, as a matter of law, that the damages sought in connection with the fraud claim are the same as those sought in connection with the contract claims. Ambac has submitted an affidavit from its expert, unchallenged by the Countrywide defendants, which explains that the damages for the fraud and

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[1] Indeed, at oral argument before the Court of Appeals, counsel for the Countrywide defendants recognized that there was a different measure of damages for the fraud and contract claims. In response to questioning by Judge Garcia, counsel explained that the appropriate measure of damages for the fraud claim was "out-of-pocket loss," and stated that Ambac's expert would have the opportunity to "calculate what the [fraud] damages are."

contract claims are "qualitatively and quantitatively distinct." The expert explains that whereas the contract damages are calculated based on the terms of the contractual repurchase protocol, the fraud damages are determined based on the portion of Ambac's claims payments that flow from nonconforming loans. Thus, according to the expert, the calculation of the fraud damages does not rely in any way on the contractual repurchase price that governs the contract damages calculation.

The expert further explains that the fraud damages differ from the contract damages because they include additional expenses incurred by Ambac that are not recoverable in contract.

In his affidavit, the expert states that he is including the revised damages calculations in a forthcoming supplemental expert report. A motion is currently pending in Supreme Court for leave to serve the new report, which presumably would contain a more detailed explanation of the differences between the contract and fraud damages. In view of the expert affidavit already submitted, and the motion practice in Supreme Court, it is premature to dismiss the fraud claim as duplicative. Thus, denial of the motion to dismiss the fraud claim, without prejudice to renewal after the conclusion of the proceedings below related to the expert affidavit is appropriate.

*MBIA Ins. Corp. v Credit Suisse Sec. [USA] LLC* (165 AD3d 108 [1st Dept 2018]) and *Financial Guar. Ins. Co. v Morgan Stanley ABS Capital I Inc.* (164 AD3d 1126 [1st Dept 2018]) do not require

a different result. In *MBIA*, the court concluded that fraud damages in the form of all claims payments made were not recoverable, and that "repurchase damages" were duplicative of contract damages (165 AD3d at 113-114). Here, Ambac does not seek to recover all claims payments made, nor does it seek repurchase damages under its fraud claim. Instead, it only seeks fraud damages based on claims payments flowing from nonconforming loans, the precise measure sanctioned by the Court of Appeals (*see Ambac*, 31 NY3d at 581 [Ambac's fraud damages should be measured by reference to claims payments based on nonconforming loans]). In *Financial Guar.*, the court merely found, on the specific facts alleged, that the fraud damages duplicated the contract damages (164 AD3d 1126). There was no indication that the plaintiff in that case submitted an expert affidavit explaining any differences between the measures of damages sought by the fraud and contract claims.

Put simply, neither *MBIA* nor *Financial Guar.* stands for the sweeping proposition that, in all residential mortgage-backed security cases, a fraudulent inducement claim brought by a monoline insurer is, as a matter of law, duplicative of contract claims based on the same nonconforming loans.

The court correctly denied Countrywide's motion to determine the population of loans at issue in the breach of contract claim. Regardless of whether there are nonconforming loans to which the repurchase protocol may not be applied because of Ambac's failure

to satisfy the notice requirements for application of the protocol, the protocol is also triggered with respect to any loans for which it can be shown that Countrywide, as originator, sponsor, and servicer of the loans, knew or should have known of the breaches. Thus, triable issues of fact exist in this regard.

The court correctly denied the motion to preclude Ambac from using statistical sampling to prove its breach of contract claims in terms of both liability and damages. While the motion was not procedurally barred, we find that despite the language of the repurchase protocol, RMBS plaintiffs like Ambac are entitled to introduce sampling-related evidence to prove liability and damages in connection with repurchase claims (*see Deutsche Bank Natl. Trust Co. for Morgan Stanley Structured Trust I 2007-1 v Morgan Stanley Mtge. Capital Holdings LLC* , 289 F Supp 3d 484, 493, 496 [SD NY 2018]); *Assured Guaranty Municipal Corp. v Flagstar Bank, FSB* , 920 F Supp 2d 475, 512 [SD NY 2013]; *see also Federal Hous. Fin. Agency for Fed. Natl. Mtge. Assn. v Nomura Holding Am., Inc.*, 873 F3d 85 [2d Cir 2017], *cert denied* - US-, 138 S Ct 2679 [2018][upholding a $806 million RMBS judgment following a bench trial in which statistical sampling featured prominently]).

Under the circumstances here, the court erred in failing to grant defendant BAC's motion to sever the claims asserted against Countrywide from the contingent secondary-liability claims asserted against BAC. Severance of the contingent claims against

BAC should have been granted given that the claims could become moot after the first trial of the primary-liability claims (*see e.g. Wallace v Crisman*, 173 AD2d 322 [1st Dept 1991]). Despite some possible overlap in issues and evidence, the primary issue of whether Countrywide breached or fraudulently induced Ambac to enter the agreements between 2004 and 2006 is sufficiently separate from the key issue in the claim against BAC, which concerns whether Countrywide de facto merged with BAC or became BAC's alter ego through a series of different transactions and conduct in 2008 and later, such that a grant of severance would further convenience by expediting the primary proceedings and avoid the risk of prejudicial spillover.

Finally, the court erred in failing to grant BAC's motion to strike Ambac's jury demand for its secondary-liability claim against BAC. Ambac is not entitled to a jury trial on its claims against BAC because the jury demand, regardless of whether or not it is disallowed by the contractual jury waiver, seeks more than "a judgment for a sum of money only" under CPLR 4101(1). It also seeks a declaration that BAC is Countrywide's successor by virtue

of a de facto merger, which would render BAC jointly liable for

any unpaid "judgment for a sum of money" against Countrywide.

This is an equitable remedy, which must be decided by a court.

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

ENTERED: SEPTEMBER 17, 2019

CLERK

Friedman, J.P., Tom, Kapnick, Kahn, JJ.

9570 Reinaldo Nunez, Index 152329/15
Plaintiff-Respondent,

-against-

Germania Nunez,
Defendant-Respondent,

Danny Budden, at el.,
Defendants-Appellants.

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Cozen O'Connor, New York (Kristin Keehan of counsel), for appellants.

Mitchell Dranow, Sea Cliff, for Reinaldo Nunez, respondent.

O'Connor, McGuinness, Conte Doyle, Oleson, Watson & Loftus, Putnam Valley (Montgomery Lee Effinger of counsel), for Germania Nunez, respondent.

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Order, Supreme Court, New York County (Adam Silvera, J.), entered December 10, 2018, which, in this action for personal injuries sustained in a motor vehicle accident, denied the motion of defendants Danny Budden, Clarke Road Transport Inc., and Ryder Truck Rental Canada (collectively, the Budden defendants) for summary judgment dismissing the complaint as against them, reversed, on the law, without costs, and the motion granted.

The record establishes, as a matter of law, that the subject accident occurred when the left front of the car being driven in the right driving lane by defendant Germania Nunez (in which plaintiff was a passenger) came into contact with the right rear tire of the truck being driven by defendant Budden in the left driving lane, indicating that the Nunez car struck the Budden

truck from behind. Furthermore, the photographs in the record demonstrate that the front of the Nunez car was impacted, not the side of the car, as would have been the case had the collision occurred in the manner described by plaintiff. Accordingly, Budden was not at fault for the collision, and the motion by the Budden defendants for summary judgment dismissing the complaint as against them should have been granted.

All concur except Tom, J. who dissents in a memorandum as follows:

TOM, J. (dissenting)

Based on the photographic evidence in the record as well as discrepancies between the testimony of plaintiff and the defendant truck driver, I would conclude that a trial is necessary to determine the respective liabilities of the parties. In this regard, it is my position that even if the facts adduced at trial do not necessarily completely exonerate the defendant driver of the car, this court cannot, at this juncture, exclude proximate causation and thus comparative negligence on the part of the truck driver (*Lopez v Reyes-Flores*, 52 AD3d 785 [2d Dept 2008]).

The issue to be determined is whether the car hit the truck, or whether the rear of the truck, not having completely entered the left lane yet, struck the car after the car had come to a stop in the middle right travel lane (of traffic). Plaintiff was the passenger in the car that came into contact with the truck. Defendant Budden was the driver of the tractor-trailer.

The undisputed record evidence reflects that the car was pulling out of a parking space in the far-right parking lane towards the two southbound driving lanes on Broadway, which had three lanes in each direction at that location, between 180th and 181st Street, closer to 181st Street. There were two southbound travel lanes (left and right travel lanes) and a parking lane to the far right.

The truck made a right turn from 181st Street into the

southbound traffic lanes on Broadway. An important consideration is the turning radius of this very long trailer, in that as the tractor moved forward in the left travel lane, completing its wide turn, its middle to rear portion pivoting on the "wheel" connecting the trailer to the tractor in the front and on the trailer's rear wheels as they turned on 181st street would progressively advance on the right traffic lane until, after a distance, the tractor-trailer could entirely straighten out in the left traffic lane.

Plaintiff testified in his deposition that Broadway is straight in this vicinity, traffic was light, and the car driver pulled out of her parking spot at no more than five miles per hour, and then came to a stop in the right travel lane. Plaintiff had not seen the truck approaching, but one may surmise that as the passenger it was not unusual that he would not have looked to the car's rear. He testified that he was unaware of the truck's presence until the back of the truck struck the front left corner of the car, which "took the whole bumper and fender with it." He also testified that the impact also knocked the car from a position where it had been angled out into the middle lane to a position where it came to rest facing south. Plaintiff testified that the car had been stopped for about 10 seconds in the right travel lane, waiting for the truck to pass, when the car was hit as the truck followed through on its turn. The defendant driver of the car testified that as she went to pull

out of her parking spot and observing the approaching truck, she braked and had thus stopped for about 7 to 10 seconds to allow the truck to pass when her car was struck.

Defendant Budden testified that the truck, a Freightliner, consisted of a tractor which had 10 wheels and a trailer which had 8 wheels. He described the "box" attached to the "cabin" as 53 feet long, with a "fifth wheel" connecting the two. He testified that as the tractor goes into a turn, the trailer will pivot by means of this wheel attachment. Budden testified that a right turn on a tractor-trailer requires the tractor to "swing wide. . .[,] you need a good amount of space to make a complete wide right turn." As the vehicle goes into a right turn, he testified, the trailer wheels will pass through the right hand lane for about a car length before falling behind the tractor. Budden testified that while turning he directed the tractor as far left as possible so as to afford him the "swing" that he needed for the trailer. He testified that he remained in first gear proceeding at about two miles per hour as he made his turn into the "inside lane, closest to the center lane." When he had been in the left lane for about two car lengths, Budden testified that the right lane seemed clear of vehicles, but that he had been looking straight ahead and that there are blind spots on the right side where the side view mirror will not pick up any visual, including a space about 10 feet behind the doors on the "very back" side of the box car. He felt a light impact as the

truck was hit, and within five or six seconds he pulled to a stop. Budden testified that from the position of the car he concluded that it had driven out from a parking spot at the curb and hit the trailer at a point when the entire tractor was already in the left travel lane and 60 feet beyond the intersection from which he had turned. This portion of Budden's testimony is in stark contrast to plaintiff's testimony as to how this accident occurred. Budden recalled that the car, after the accident, was positioned "perpendicular" across the middle "right" lane and that the front left side of the car was "smashed in," with the bumper, still attached, "pushed in." However, this is contradicted by the photographic evidence.

The point of impact apparently was at the left rear tire on the truck, as depicted in the photos. The photos also indicate that the car's front left fender and bumper, rather than having been pushed into the car's frame as might have occurred if the car ran into the truck, showed that it has been pulled out as might be consistent with the rear of the truck, not yet entirely clear of the middle or right traffic lane, clipping that part of the stopped car and pulling out the left part of its fender. These photos seem to support plaintiff's version as to how the accident occurred. Although the majority views the photos as depicting the front of the car as having been impacted rather than the side of the car, a jury could reasonably find the photos not to be so unequivocal. To the contrary, a jury could

reasonably find the impact to have been consistent with the manner in which I describe the photos, above, which quintessentially presents a material unresolved factual issue. Further, the photos in the record seem to locate the car straddling the middle "right" lane and, in part, the far right parking lane, at what seems to be approximately a 45 degree angle somewhat facing south, which seems to be inconsistent with both parties' descriptions.

The uncertainties and inconsistencies in the record, including the testimony of plaintiff and defendant Budden, and the photographs as to how this accident occurred preclude a summary disposition of the dispute and require a fuller development of the evidence at trial.

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

ENTERED: SEPTEMBER 17, 2019

CLERK

Tom, J.P., Kapnick, Kahn, Singh, JJ.

9574 City of New York, et al., Index 451559/14
Judgment Creditors-Respondents,

-against-

OTR Media Group, Inc.,
Judgment Debtor-Appellant,

Ari Noe,
Person Subpoenaed-Appellant.

_____

Seddio & Associates, P.C., Brooklyn (Frank R. Seddio of counsel), for appellants.

Zachary W. Carter, Corporation Counsel, New York (Jonathan A. Popolow of counsel), for respondents.

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Order, Supreme Court, New York County (Margaret A. Chan, J.), entered December 14, 2017, which denied judgment debtor OTR Media Group, Inc. and person subpoenaed Ari Noe's (together, the OTR parties) motion to vacate or renew an order (same court and Justice), entered on or about April 20, 2016, which found them guilty of civil contempt, adjudged Noe liable for a fine of $250 and attorneys' fees at the rate of $250 per hour in connection with the contempt proceedings, and issued a warrant for Noe's arrest, unanimously reversed, on the facts, without costs, and the civil contempt order, and the arrest warrant for Noe vacated.

CPLR 5015(a) provides that a party may move to vacate a judgment or order on the grounds of, inter alia, newly discovered evidence or fraud, misrepresentation, or other misconduct of an adverse party. However, CPLR 5015 does not "provide an exhaustive list of the grounds for vacatur" (*Goldman v Cotter*, 10

AD3d 289, 293 [1st Dept 2004]). In addition to the grounds specifically set forth in CPLR 5015(a), "a court may vacate its own judgment for sufficient reason and in the interests of substantial justice" (*Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 68 [2003]).

Here, the motion court improvidently exercised its discretion by refusing to vacate its prior order. The interests of justice warrant vacatur because, and as admitted by the City, at the time the contempt order was issued in April 2016, the OTR parties had, in fact, satisfied the subject Schedule A Judgments. If not for the City's misapplication of certain payments made by OTR pursuant to the parties' agreed-upon installment payment

plan, the judgments would have been properly marked as paid and satisfied in full, and the City would not have been entitled to an order of contempt.

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

ENTERED: SEPTEMBER 17, 2019

CLERK

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

9742 David Saunders, Index 302306/09
Plaintiff-Appellant,

-against-

J.P.Z. Realty, LLC, et al.,
Defendants-Respondents,

The Trustees of Columbia University
in the City of New York,
Defendant.

_____

Monaco & Monaco, LLP, Brooklyn (Frank A. Delle Donne of counsel), for appellant.

Malapero Prisco & Klauber, LLP, New York (Michael Driscoll of counsel), for J.P.Z. Realty, LLC, respondent.

Gottlieb Siegel & Schwartz, LLP, New York (Lauren M. Solari of counsel), for Warren Elevator Service Company, Inc., respondent.

_____

Order, Supreme Court, Bronx County (Howard H. Sherman, J.), entered on or about March 27, 2018, which denied plaintiff's motion for summary judgment on the issue of liability, and granted defendants Warren Elevator Service Company, Inc.'s (Warren) and J.P.Z. Realty, LLC's (JPZ) motions for summary judgment dismissing the complaint and cross claims against them, unanimously modified, on the law, to the extent of denying defendant JPZ's motion for summary judgment, and otherwise affirmed, without costs.

Plaintiff was allegedly injured when the interior vertical rise gate of a manually operated freight elevator fell on his head because of a broken chain or master link.

Defendant Warren, which was retained by building owner JPZ

and/or nonparty Despatch Moving & Storage Co., Inc., plaintiff's employer, to inspect and repair the elevator, did not owe a duty of care to plaintiff. It did not have a written contract with JPZ or Despatch, and thus did not undertake a "comprehensive and exclusive" maintenance obligation that "entirely displaced" JPZ's maintenance duties as owner of the building (*see Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140 [2002], quoting *Palka v Servicemaster Mgt. Servs. Corp.*, 83 NY2d 579, 588 [1994]). However, summary judgment should not have been granted to JPZ.

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Failure to meet this burden requires denial of the motion (*id.; Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). In this regard, CPLR 3212(b) provides that a summary judgment motion "shall be supported by affidavit" of a person "having knowledge of the facts" as well as other admissible evidence (*see GTF Mktg. v Colonial Aluminum Sales*, 66 NY2d 965, 967 [1985]). A conclusory affidavit or an affidavit by an individual without personal knowledge of the facts does not establish the proponent's prima facie burden (*see e.g. Vermette v Kenworth Truck Co.*, 68 NY2d 714 [1986]).

The deposition and affidavit of Peter Zuhusky, co-president of defendant JPZ, was insufficient to meet defendant's burden.

Mr. Zukusky did not know if defendant Warren had an agreement for repairs to the elevator with JPZ. He was unsure who paid Warren for service calls, and he did not know whether the interior gate in question was ever inspected. Since he did not have personal knowledge of the facts as required by CPLR 3212(b), JPZ did not meet its burden and its motion for summary judgment should have been denied.

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

ENTERED: SEPTEMBER 17, 2019

CLERK

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

9746 Ambac Assurance Corporation, et al., Plaintiffs-Respondents, Index 651359/13

-against-

Nomura Credit & Capital, Inc., Defendant-Appellant,

Nomura Holding America Inc., Defendant.

_____

Sherman & Sterling LLP, New York (Jefrey D. Hoschander of counsel), for appellant.

Patterson Belknap Webb & Tyler LLP, New York (Henry J. Ricardo of counsel), for respondents.

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Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered September 14, 2018, which denied defendant's motion to compel the production of documents, unanimously affirmed, without costs.

Plaintiff Ambac Assurance Corporation (Ambac) is a Wisconsin-domiciled insurer with headquarters in New York. It deteriorated financially as a result of the crisis in the mortgage industry, and plaintiff Segregated Account of Ambac Assurance Corporation (Segregated) was created in connection with Ambac's statutory rehabilitation under Wisconsin law (*see* Wis Stat §§ 645.31; 645.32). Ambac allocated to Segregated all of its residential mortgage-backed securities policies and claims arising from the policies, including the claims arising from policies it issued on two residential mortgage-backed

securitizations sponsored by defendant Nomora Credit & Capitol, Inc. in 2007, which the Commissioner of Insurance, as the court-appointed Rehabilitator of the Segregated account, has the authority to prosecute.

The Commissioner appointed a Special Deputy Commissioner (SDC) to oversee all activities of Segregated from Ambac's New York offices, and, at the SDC's direction, plaintiffs commenced this action in New York, asserting claims of fraudulent inducement and breach of contract in connection with the policies Ambac issued on the securitizations sponsored by defendant. When defendant demanded the production of certain emails and other documents maintained by the SDC, plaintiffs responded by claiming the statutory privilege held by the Wisconsin Office of the Commissioner of Insurance (OCI) under Wisconsin law (*see* Wis Stat § 601.465). Defendant argued that New York law should be applied because, in adjudicating privilege issues, New York courts must apply the law of the place where the evidence will be introduced at trial or where the discovery proceeding is located. Supreme Court, after engaging in an interest-balancing analysis, determined that the Wisconsin statutory privilege was applicable, and denied defendant's motion to compel. We affirm.

New York courts "routinely apply the law of the place where the evidence in question will be introduced at trial or the location of the discovery proceeding when deciding privilege issues" (*People v Greenberg*, 50 AD3d 195, 198 [1st Dept 2008]

[internal quotation marks omitted], *lv dismissed* 10 NY3d 894 [2008]). However, there are circumstances in which an interest-balancing analysis is properly undertaken to decide whether another state's law should govern the evidentiary privilege (*see Peerenboom v Marvel Entertainment, LLC*, 148 AD3d 531, 532-533 [1st Dept 2017]; *First Interstate Credit Alliance v Andersen & Co.*, 150 AD2d 291 [1st Dept 1989]). This is a case that presents such circumstances (*see Ambac Fin. Servs., LLC v Bay Area Toll Auth.*, 2010 WL 3260146, 2010 US Dist LEXIS 81487 [SD NY 2010] [applying claim of privilege under Wis Stat § 601.465]).

Moreover, as in *Bay Area Toll Auth.*, in this case, the balance of interests favors the application of the statutory privilege. Contrary to defendant's argument, Supreme Court correctly found that, in these circumstances, New York's interest in the full disclosure of information needed to allow a defendant to mount a defense in court is outweighed by Wisconsin's interest, embodied in Wisconsin Statutes § 601.465, in its regulation of insurance. The communications at issue, while relevant to the underlying litigation to the extent they relate to the securitization trusts, certificates and insurances policies, were generated as part of OCI's investigation, regulation, and rehabilitation of Ambac.

Contrary to defendant's contentions, this Court's decision in *Matter of People v PriceWaterhouseCoopers, LLP* (150 AD3d 578

[1st Dept 2017], *lv denied* 29 NY3d 1117 [2017]) should not be read as rejecting any requirement of an interest-balancing analysis in deciding which state's law governs privilege issues where New York is the place of trial and the discovery proceeding. Further, it is distinguishable from the instant case in that it involved the interests of the New York State Attorney General but not those of a governmental agency of a different state, and thus did not implicate real issues of interstate comity.

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

ENTERED: SEPTEMBER 17, 2019

CLERK

Sweeny, J.P., Manzanet-Daniels, Webber, Gesmer, Kern, JJ.

9842 In re Joanne B. Riel, Index 451416/18
Petitioner-Appellant,

-against-

The State of New York Office of Children and Family Services, et al.,
Respondents-Respondents.

_____

Janet Sabel, The Legal Aid Society, New York (Karen Cacace of counsel), for appellant.

Letitia James, Attorney General, New York (Blair J. Greenwald of counsel), for respondents.

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Determination of respondent New York State Office of Children and Family Services, dated March 27, 2018, which, after a hearing, revoked petitioner's license to operate a family day care home, confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [W. Franc Perry, J.], entered January 17, 2019), dismissed, without costs.

The facts are essentially set forth in the dissent and will not be referenced here except where necessary for clarification or amplification.

The first issue to be decided is whether the agency's decision is supported by substantial evidence.

A court's review of an agency determination made after an administrative hearing is limited to whether the challenged determination is supported by substantial evidence (*Matter of O'Rourke v Kirby*, 54 NY2d 8, 14 [1981]). A reviewing court must

defer "to the fact-finding and credibility determinations of the agency" (*Matter of Nelke v Department of Motor Vehs. of the State of N.Y.*, 79 AD3d 433, 434 [1st Dept 2010]). The "substantial [evidence] threshold" is met by the existence of "some credible evidence" (*Matter of Borenstein v New York City Employees' Retirement Sys.*, 88 NY2d 756, 760 [1996][internal quotation marks omitted]).

Respondent Office of Children and Family Services (OCFS) is tasked by statute and regulation with supervision of day care providers. To ensure that children in day care are adequately supervised, OCFS "may make announced or unannounced inspections of the records and premises of any child daycare provider, whether or not such provider has a license from, or is registered with, [OCFS]" (Social Services Law § 390[3][a]). OCFS has the authority to temporarily suspend a day care provider's registration without a hearing based on a finding that the provider prevented OCFS from effectively assessing whether the public health, or an individual's safety or welfare, is in imminent danger by refusing to provide inspectors with access to the child day care program, premises or children during the program's hours of operation (18 NYCRR 413.5[a][3][i]).

There are two different legal determinations and standards between a license suspension and revocation. For a temporary suspension, there must be a finding of "imminent danger" as noted above. For a license revocation, the applicable standard is set

out in Social Services Law § 390(10): "Any violation of applicable statues or regulations shall be a basis to deny, limit, suspend, revoke, or terminate a license of registration."

Petitioner does not contest her suspension and thus the "imminent danger" standard does not apply. That leaves us to consider whether there was substantial evidence to support the agency's determination to revoke petitioner's registration.

18 NYCRR 417.15(b)(10)(i) and 417.15 (b)(10(ii) require petitioner to give the inspector free access to the day care, the children, and program records and to cooperate with the inspector during the inspection. The inspection conducted on February 9, 2018 was conducted on a day and during the hours of operation listed in petitioner's registration. There is no question that petitioner repeatedly asked Inspector Richards to leave, even though there were two children and two adults on site at that time, during the listed hours of operation. It is also uncontroverted that Richards remained in the entryway the entire hour she was on site and was not permitted to enter any other room that formed part of the day care premises. Although petitioner did give Richards a folder with documents upon request, the first document was a blank sign-in sheet, despite there being children and adults present inside the day care.

Petitioner contends that because a "Mommy and Me" program was being conducted during the listed hours of operation, Richards' inspection was inappropriate because no "day care"

services were being provided at that time and thus, the regulations do not apply. This argument fails on several levels.

First, if petitioner's argument is accepted, it would undermine the purpose of the inspection requirement in the regulations. Any provider who is in violation of any regulation can simply claim to any inspector that it is not conducting "day care" at the time of the inspection, thus undermining the child-protective purposes of the inspection regulations.

Second, such an interpretation shifts the burden of determining whether a day care is operating, and which program is being performed at the time of an inspection, to the inspector. To the contrary, by using the stated operating hours as listed in the registration, there can be no question that whatever program is being performed during those hours, compliance with 417.15 is mandated. It must be kept in mind that it is the *provider* who determines what program it will run at a particular time. By making any program run during the hours of operation set forth in the registration certificate subject to the inspection provisions of the regulations, there is certainty to both the agency inspectors and providers as to the applicability of the inspection provisions of the regulations. Such an approach does not add any additional burdens to providers.

In sum, we conclude that substantial evidence supports respondent's findings that petitioner violated relevant regulations regarding the management and administration of her

family day care home. The record clearly shows that petitioner failed to admit an inspector onto the premises to complete an inspection (18 NYCRR 417.15 [b][10][i]), failed to cooperate with the inspector (18 NYCRR 417.15 [b][10][ii]), and failed to operate in compliance with day care laws and regulations (18 NYCRR 417.15 [a][1][ii]; *see Clarke v New York State Off. of Children & Family Servs.*, 91 AD3d 489 [1st Dept 2012]). Contrary to petitioner's contention, she did not properly notify respondent of any changes to her day care program operating hours.

We now turn to the question as to whether the penalty of revocation is fair and proportionate.

An administrative determination should be set aside "only if the measure of punishment or discipline imposed is so disproportionate to the offense, in the light of all the circumstances, as to be shocking to one's sense of fairness" *(Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 233 [1974][internal quotation marks omitted]). "Shocking to one's sense of fairness" is, of course, a "purely subjective" standard. Nevertheless, it can be said that "a result is shocking to one's sense of fairness if the sanction imposed is so grave in its impact on the individual subjected to it that it is disproportionate to the misconduct" (*id.*, at 234).

We lack any discretionary authority or interest of justice

jurisdiction in reviewing the penalty imposed by OCFS, and annulment and remittal to the agency for reconsideration of the revocation would be appropriate only if the penalty violated the rigorous *Pell* standard (*see Matter of Featherstone v Franco*, 95 NY2d 550, 554 [2000]).

We find that the penalty imposed here does not meet the *Pell* standard and does not shock our sense of fairness (*see Matter of Unity Home Care Agency, Inc. v New York State Dept. of Health*, 171 AD3d 419, 420 [1st Dept 2019]; *Simpson v New York State Off. of Children & Family Servs.*, 93 AD3d 588 [1st Dept 2012]). The dissent posits that our decision in *Unity* is distinguishable from the instant case and does not support our conclusion. While the facts in *Unity* are different and the violations more egregious than here, the standard of review of the penalty imposed remains the same, i.e. a challenge to the penalty imposed must meet the *Pell* standard. Here, it is not met.

Both petitioner and our dissenting colleague rely heavily on *Matter of Grady v New York State Off. of Children & Family Servs.* (39 AD3d 1157 [4th Dept 2007]). In *Grady* the Court found the penalty of license revocation was "shocking to one's sense of fairness." The violations there involved two instances of overenrollment of children on separate days and the failure to maintain proper attendance records. Both cases of overenrollment occurred through no fault of the petitioner and were beyond her control. In one case, the overenrollment resulted from an

unanticipated school early release, and the other involved a child being dropped off at day care after petitioner was advised that the child would not be attending that day. The petitioner immediately took action to reduce the overenrollment by contacting the parents to pick up the children dropped off there from the early release. The *Grady* Court also found that revocation would deprive both petitioner and her assistant of their livelihood, the day care being their only source of income. That is not the case here, as will be discussed *infra*. The only similarity to this case is the fact that in both cases, community letters of support were submitted on behalf of petitioners. Notably, the ALJ in this case had these letters before her and they were presumably taken into consideration in arriving at her determination.

Our facts are quite different. Petitioner herself created the situation that caused the violations by unilaterally changing her hours of operation without properly advising OCFS and failing to maintain proper records. When Inspector Richards appeared during the hours of operation listed on petitioner's certificate, she was within her regulatory obligation to conduct an inspection at that time, especially since children and adults were on the premises, a program was actually in progress and she had been handed a blank sign-in sheet. It is of no significance that the "Mommy and Me" program does not have the same requirements as a day care program, because it was being conducted during the hours

listed for day care on petitioner's registration. To hold otherwise would defeat the entire purpose of the inspection requirements, as we noted above.

There is no question that petitioner repeatedly asked Richards to leave and come back later. It does her no credit to lay the blame on the parent who admittedly escalated the standoff and created a hostile situation for Richards by demanding identification, videotaping Richards by holding her cell phone approximately a foot from Richards's face and telling her to leave in a "strong" voice. During this confrontation, petitioner did nothing to defuse the situation. In fact, she continued to ask Richards to leave and come back later.

The fact that Richards was on the premises for approximately one hour is of no moment, and does not, as our dissenting colleague argues, constitute cooperation with the inspection. It is uncontroverted that Richards remained in the entranceway to the apartment and was not permitted to complete her inspection of the premises as required by regulation.

On the issue of deprivation of livelihood, unlike *Grady*, this is not petitioner's sole or even major source of income. In fact, petitioner, in a letter to the Department of Health stated that she was mostly a music and movement teacher, that she essentially worked as a music teacher and taught "Mommy and Me" classes from her day care space. Petitioner testified at her hearing that the play group was "a very part-time enterprise,"

later repeating that "I have a very, very part-time daycare program." Petitioner cannot have it both ways. To now argue that revocation is an overly harsh penalty because it would deprive her of her main source of income simply does not comport with the facts.

In short, we see no reason to disturb the penalty imposed.

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

All concur except Gesmer, J. who dissents in a memorandum as follows:

GESMER, J. (dissenting)

I agree with the majority that substantial evidence supports the Administrative Law Judge's (ALJ) finding that petitioner violated applicable regulations by failing to fully cooperate with the inspection (18 NYCRR 417.15[b][10][i], [ii]). Indeed, petitioner does not contest that finding. However, I would find that the revocation of her day care registration is unduly harsh, particularly given that she had provided nurturing and loving services to children in her community for many years, revocation would deprive her of a good portion of her livelihood, and the lives of the families who relied on her for day care would be disrupted (*see Matter of Grady v New York State Off. of Children & Family Servs.*, 39 AD3d 1157 [4th Dept 2007]). Accordingly, I would remand the matter to respondent for further proceedings to determine a more appropriate penalty.

Under the Social Services Law, family day care homes must be registered with respondent New York State Office of Children and Family Services (OCFS) (Social Services Law § 390[2][b]). These programs are subject to annual inspection (Social Services Law § 390[4][a]), and to "announced or unannounced inspections of the records and premises" (Social Services Law § 390[3][a]). "Any violation of applicable statutes or regulations shall be a basis to deny, limit, suspend, revoke, or terminate a license or registration" (Social Services Law § 390[10]). In New York City, the New York City Department of Health and Mental Hygiene (DOH)

childcare division administers day care registration pursuant to contract (*see McLean v City of New York*, 12 NY3d 194, 197 [2009]).

Petitioner Joanne B. Riel owned and operated a family day care program in her home, which was registered with respondent OCFS for a four-year period commencing October 18, 2015. In her application, she listed the hours of operation of her day care program as 9:00 a.m. to 2:00 p.m. on Tuesdays, Wednesdays and Fridays. In addition, petitioner taught music and operated a "mommy and me" playgroup in her home. It is undisputed that the latter two activities are not required to be registered or licensed.

On February 9, 2018, an inspector came to petitioner's apartment to conduct an annual inspection and to determine whether she had cured violations identified in a January 22, 2018 letter to petitioner from the DOH.[1] Petitioner advised the inspector that she was in the middle of a playgroup with two children and their caregivers, and asked if the inspector could come back at another time to conduct the day care inspection. Nevertheless, she let the inspector into her apartment. The

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[1]The inspector testified that four items are required during an on site follow-up inspection: confirmation that (1) the visitor's log, (2) attendance records, and (3) emergency medical treatment consent forms for specific children were maintained on site; and (4) that monthly fire drills were conducted. She testified that the balance of the items in the letter could be addressed by petitioner's submission of documents by mail, which she had done when she completed and returned the corrective action plan form attached to DOH's letter.

inspector stood in the entrance of the playspace, where she observed two children and two adults, in addition to petitioner. The inspector watched the children participate in a music activity with petitioner and their caregivers for about 15 minutes, and observed that the children seemed happy. Petitioner asked the inspector several times to come back at a later time after she was finished with her "mommy and me" music class.[2] The inspector asked to see petitioner's visitor's log, and petitioner handed it to her,[3] stapled to the top of a folder, which petitioner testified contained her other day care records.

At that point, one of the two adults interrupted, identified herself as a parent, and began videotaping the inspector with her cell phone. The inspector then called her supervisor. When she made the call, the parent stopped videotaping her, and petitioner

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[2]The same inspector had come to her home approximately two weeks earlier, on Wednesday, January 24, 2019 in the afternoon. Petitioner explained that her day care was in operation on Wednesday mornings from 9:30 to 11:30 a.m., and asked that the inspector come back on a Wednesday during those hours to inspect the day care program while it was in operation. After confirming that no children were present that day, the inspector left. Petitioner testified that she returned a call from the inspector's supervisor on January 24, 2018, and left him a message with the same information.

[3]The majority implies that the blank visitor sheets indicated a violation. However, applicable regulations require that any visitor to a family day care center who is not "a day care child, staff person, caregiver, volunteer, household member, employee, parent of a child in care, or person authorized to pick up or drop off a child to the day care program" to sign in upon entry (18 NYCRR 413.2[c][14], 417.8[p]). As petitioner testified, because she had had no visitors as defined by the regulations, the log book contained no signatures.

escorted both caretakers and the children to another part of the apartment, away from the inspector. The supervisor told the inspector to leave without completing the inspection, and she did so.

In all, the inspector was in petitioner's home for an hour. The inspector testified that it was the parent, not petitioner, who interrupted the inspection and created a "hostile situation" by videotaping her and speaking to her in a "strong volume." She also testified that she was not aware at the time of the inspection that petitioner ran a "mommy and me" playgroup that was not required to be registered or licensed by OCFS, and that she did not understand why petitioner had asked her to come back at another time.

By letter dated February 9, 2018, OCFS notified petitioner that her registration was suspended and that they would seek to revoke it, because she failed to cooperate with the inspection that day.[4] Petitioner requested a hearing, which was held on March 9, 2018.

By decision dated March 27, 2018, the ALJ determined that petitioner had failed to cooperate with the inspector and provide her with free access to the premises during the hours of day care operation listed in petitioner's application, that she failed to

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[4]Petitioner does not challenge the suspension. Accordingly, as the majority concedes, the suspension, and the ALJ's finding of "imminent danger" justifying it, are not before us (18 NYCRR 413.5[a][3][i]).

operate in compliance with applicable statutes and regulations because she had not advised OCFS in writing of a reduction in the hours of operation of her day care services,[5] and that, therefore, OCFS properly revoked her registration.

Petitioner then commenced the article 78 proceeding in Supreme Court, which transferred the petition to this Court pursuant to CPLR 7804(g).

Although petitioner's "mommy and me" playgroup is not subject to OCFS oversight, the inspector was entitled to rely on the day care operating hours which petitioner had listed on her application, and petitioner was obligated under the Social Services Law to provide the inspector with "free access to the building, the caregivers, employees and volunteers, the children and any program records" during those times and to cooperate with the inspection (18 NYCRR 417.15[b][10][i], [ii]). However, in my view, the circumstances of this case do not justify revocation for four reasons.

First, petitioner did cooperate with the inspection by admitting the inspector into her apartment, permitting the inspector to remain for an hour and to observe the playgroup, and by handing the inspector the day care documents she understood the inspector to have requested. Indeed, the inspector testified

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[5]In fact, the ALJ did not cite to any regulation requiring a day care operator to advise the agency of any decrease in day care hours (*cf*. 18 NYCRR 417.15[b][2] and [3] [requiring registrant to obtain written approval before *increasing* hours of operation]).

clearly that it was a parent who interrupted her interaction with petitioner, prevented her from looking at any of petitioner's day care records beyond the visitor's log on the top of the folder, and created a "hostile situation" by videotaping her and demanding that she identify herself. I disagree with the majority's statements that petitioner did not permit the inspector to enter other rooms in her apartment or otherwise prevented the inspection from taking place. The inspector testified that she did not leave the entryway because it was her policy to stay by the door in the winter, unless she had plastic bags covering her shoes. She testified that petitioner asked her to "please" come back at another time to complete the inspection. When the inspector asked if petitioner was "obstructing" her, petitioner invited her in. Moreover, while the majority states that petitioner "did nothing to defuse the situation" after the parent interrupted, the inspector testified that petitioner took the children and adults to another part of the apartment after the parent interrupted the inspection.

Second, this case is not at all like the circumstances in *Matter of Unity Home Care Agency, Inc. v New York State Dept. of Health* (171 AD3d 419, 420 [1st Dept 2019]), cited by the majority. There, DOH was prevented from inspecting on four separate occasions between 2009 and 2015, with the result that it was unable to monitor the agency's operations at all for six years.

Third, petitioner presented six extremely enthusiastic letters of support at the hearing, attesting to petitioner's nurturing care for their children. The ALJ found that the parents of children attending her programs are "extremely pleased" with her care of their children. These letters demonstrate that she has provided a valuable service to families in her community for many years, and that those families' lives would be disrupted, and petitioner's livelihood diminished, by revocation of her license (*see Matter of Grady,* 39 AD3d at 1159 [reversing revocation of day care registration based on these facts]).

Finally, petitioner does not challenge the ALJ's findings that she failed to fully cooperate with the inspection. Rather, she only seeks imposition of a less harsh penalty. This indicates that she understands the seriousness of her conduct.

Under these circumstances, there is no "grave moral turpitude" or "grave injury to the agency involved or to the public weal," and it is appropriate for this Court to ameliorate the overly harsh sanction of revocation of petitioner's registration (*Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck,*

*Westchester County*, 34 NY2d 222, 235 [1974]; *see also Matter of Grady*, 39 AD3d at 1158-1159).

Accordingly, I would vote to remand the matter for imposition of a lesser sanction.

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

ENTERED: SEPTEMBER 17, 2019

CLERK

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

9865-
9866 Index 156016/12
653787/12

Home Equity Mortgage Trust
Series 2006-1, et al.,
Plaintiffs-Respondents,

-against-

DLJ Mortgage Capital, Inc.
Defendant-Appellant,

Select Portfolio Servicing, Inc.,
Defendant.

- - - - -

Home Equity Mortgage Trust
Series 2006-5, etc.,
Plaintiff-Respondent,

-against-

DLJ Mortgage Capital, Inc.
Defendant-Appellant,

Select Portfolio Servicing, Inc.,
Defendant.

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Orrick, Herrington & Sutcliffe LLP, New York (Daniel A. Rubens of counsel), for appellant.

Quinn Emanuel Urquhart & Sullivan, LLP, New York (William B. Adams of counsel), for respondents.

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Orders, Supreme Court, New York County (Saliann Scarpulla, J.), entered January 9, 2019, which denied the motion of defendant DLJ Mortgage Capital, Inc. for partial summary judgment and granted plaintiffs' motion for partial summary judgment, unanimously affirmed, with costs.

Plaintiffs, four residential mortgage-backed securities trusts represented by the same trustee, allege breach of contract based on the "repurchase protocol" in the trusts' governing

pooling and service agreements (PSAs). The repurchase protocol states that within 120 days of the earlier of the discovery by defendant, DLJ Mortgage Capital Inc. (DLJ), as "Seller" of the mortgage loans in the trusts, or DLJ's receipt of written notice from any party of a breach of any representation or warranty in the PSAs which "materially and adversely affects" the interest of certificateholders in any mortgage loan, DLJ must cure, substitute, or repurchase that defective loan.

The court correctly denied DLJ's motion for summary judgment seeking dismissal of those claims relating to loans, other than those emanating from the HEMT 2006-1 Trust (HEMT 2006-1), that plaintiffs failed to specifically identify in timely breach notices. The trustee's timely presuit letters, which stated that DLJ had placed defective loans into the trusts "on a massive scale," cited breach rates between 65% and 72% in the trusts, cautioned that the specified defective loans were "just the tip of the iceberg," and stated that its investigation into loans in the trusts was ongoing, put DLJ on notice that the breaches plaintiffs were investigating might uncover additional defective loans for which claims would be made. Therefore, plaintiffs' timely complaints that identified certain breaching loans may be amended to add the claims at issue, as they relate back to the original complaints (*Nomura Home Equity Loan, Inc., Series 2006-FM2 v Nomura Credit & Capital, Inc.*, 133 AD3d 96, 108 [1st Dept 2015], *affd as mod* 30 NY3d 572 [2017]; *Koch v Acker, Merrall &*

*Condit Co.*, 114 AD3d 596, 597 [1st Dept 2014]).

With regard to HEMT 2006-1, for which no timely or "ripe" breach notices were sent, DLJ does not challenge the court's alternative ruling that sufficient evidence was presented to raise an issue of fact as to whether it independently discovered material breaches. This provides a separate ground for finding that the repurchase protocol was triggered for the breaching loans, without regard to the issue of relation back or the issue of whether the Trustee sent a timely breach notice for HEMT 2006-1 (*see U.S. Bank N.A. v GreenPoint Mtge. Funding, Inc.*, 147 AD3d 79, 85 [1st Dept 2016]; *Nomura*, 133 AD3d at 108-109).

The court correctly granted plaintiffs' motion and denied defendant's motion regarding the use of statistical sampling to prove plaintiffs' breach of contract claims for both liability and damages. In 2013, the trustee sought approval from the court for the use of statistical sampling to prove liability and damages for its claims. On November 18, 2013, the court (Schweitzer, J.) ordered that the trustee may use statistical sampling to prove liability and damages, and ordered the parties to meet and confer as to the sample to be used. DLJ noticed an appeal from this order, but failed to withdraw or perfect the appeal. Thereafter, the parties spent four years agreeing on the correct loan files and underwriting guidelines for the sample loans, and engaged in extensive expert discovery. In light of DLJ's failure to pursue an appeal from the court's November 18,

2013 order, and given the extensive discovery already taken place on this issue, we find no reason in this case to disturb the court's decision to permit the use of statistical sampling to prove liability and damages.

To the extent defendant challenges the sample size or the particular loans chosen to be included within the sample, defendant will have a further opportunity to raise those arguments, as the motion court noted that "[i]ssues concerning the sufficiency of the sample itself will be addressed pre-trial in motions *in limine*."

The court correctly granted plaintiffs' motion for summary judgment to the extent that it sought a ruling that the phrase a breach that "materially and adversely" affected the interest of certificateholders, as stated in the repurchase protocol, is not limited to loans in default, and applies to any breach that "materially increased a loan's risk of loss." This Court has held at the summary judgment stage that a loan need not be in default for there to be a breach that "materially and adversely" affected the plaintiff's interest (*MBIA Ins. Corp. v Countrywide Home Loans, Inc.*, 105 AD3d 412, 413 [1st Dept 2013]). The motion court's further conclusion that a breach need only have "significantly increased a loan's risk of loss" is consistent with the plain meaning of the phrase, and still allows for a fact-specific determination at trial (*see Assured* Guar. *Mun. Corp. V Flagstar Bank, FSB*, 892 F Supp 2d 596, 602).

The court correctly concluded that the repurchase price, as defined in the PSAs, applies to liquidated and non liquidated

loans, and thus, includes accrued interest on loans after they have been liquidated (*Nomura*, 133 AD3d at 107).

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

ENTERED: SEPTEMBER 17, 2019

CLERK

**CORRECTED OPINION - SEPTEMBER 17, 2019**

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Rosalyn H. Richter, J.P.
Judith J. Gische
Cynthia S. Kern
**Jeffrey K. Oing**
Peter H. Moulton, JJ.

603468/09
Index 8716-8717-8718-8719

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William Dugan, et al.,
Plaintiffs-Respondents-Appellants,

—against—

London Terrace Gardens, L.P.,
Defendant-Appellant-Respondent.

- - - - -

William Dugan, et al.,
Plaintiffs-Respondents,

—against—

London Terrace Gardens, L.P.,
Defendant-Appellant,

David Blech, et al.,
Respondents.

_____x

Plaintiffs and defendant appeal from the order of the Supreme Court, New York County (Lucy Billings, J.), entered November 22, 2017, which, to the extent appealed from, denied defendant's motion for summary judgment, and granted in part and denied in part plaintiffs' motion for summary judgment. Defendant appeals from the order of the same court and Justice, entered September 11, 2017, which, to the

extent appealed from, expanded the originally certified definition of the class; the order of the same court and Justice, entered November 24, 2017, which granted defendant's motion for payments for interim past and ongoing use and occupancy by respondents David Blech and Margie Chassman, but declined to set the amount, and granted Blech and Chassman's cross motion for summary judgment on their claim for rent overcharge to the same extent as that granted to the class action plaintiffs in the order entered November 22, 2017, and the order of the same court and Justice, entered August 30, 2017, which denied defendant's motion to make certain interim payments to plaintiffs.

Borah Goldstein Altschuler Nahins & Goidel, P.C., New York (Robert D. Goldstein and Paul N. Gruber of counsel), and Proskauer Rose LLP, New York (Richard M. Goldstein and Seth D. Fier of counsel), for appellant-respondent/appellant.

Himmelstein, McConnell, Gribben, Donoghue & Joseph LLP, New York (Ronald S. Languedoc, William Gribben, Kevin R. McConnell and Jesse Gribben of counsel), Emery Celli Brinckerhoff & Abady LLP, New York (Matthew Brinckerhoff of counsel), and Bernstein Liebhard LLP, New York (Joseph R. Seidman, Jr. of counsel), for respondents-appellants/respondents.

RICHTER, J.P.

These four appeals arise from consolidated class action litigations challenging the deregulation of hundreds of apartments at London Terrace Gardens (London Terrace), a 10-building housing complex in Manhattan. Plaintiffs are current and former London Terrace tenants, and defendant London Terrace Gardens, L.P. is the owner of the complex. London Terrace, which consists of approximately 1,000 units, was constructed in 1931, and was originally subject to rent control laws. Pursuant to the 1974 Emergency Tenant Protection Act, upon vacancy, rent controlled apartments in London Terrace became subject to rent stabilization. Since 1974, there has been a mix of rent stabilized and rent controlled apartments in the complex.

Beginning in 1993, defendant began to deregulate apartments in London Terrace. The Rent Regulation Reform Act of 1993 allowed building owners to deregulate rent-regulated apartments where rents and/or occupants' incomes exceeded certain statutory thresholds. However, in 2009, the Court of Appeals made it clear that building owners were not entitled to deregulate units while they were simultaneously receiving tax benefits under New York City's J-51 tax abatement and exemption program (*Roberts v*

*Tishman Speyer Props., L.P.*, 13 NY3d 270, 279-280 [2009]).[1] Further, apartments in buildings receiving these tax benefits "must be registered with the State Division of Housing and Community Renewal (DHCR), and are generally subject to rent stabilization for at least as long as the J-51 benefits are in force (*see* 28 RCNY at 5-03 [f])" (*id.* at 280; *see* Rent Stabilization Law [RSL] [Administrative Code of City of NY] § 26-504[c] [rent stabilization law shall apply to dwelling units in a building receiving J-51 benefits]).

On July 1, 2003, after performing qualifying improvements to the property, defendant began receiving J-51 tax benefits.[2] Prior to that date, defendant had already deregulated approximately 95 apartments in the complex. However, defendant did not, as required by law, return these previously deregulated units to rent regulation. Further, after the J-51 benefits were conferred, defendant continued to deregulate additional apartments, despite the fact that the complex was receiving J-51 benefits. Defendant charged market rents for the deregulated units, did not treat tenants in those units as rent regulated,

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[1] Under the J-51 program, a building owner who makes qualifying improvements to its property is eligible to receive tax abatements and exemptions.

[2] The J-51 benefits ended on June 30, 2014.

did not register the apartments with DHCR, and did not follow the rent laws in calculating the proper rents to be charged.

On November 13, 2009, shortly after *Roberts* was decided, plaintiff William Dugan and nine other London Terrace tenants brought this class action alleging that defendant wrongfully deregulated apartments while receiving J-51 tax benefits, and failed to return previously deregulated apartments to rent stabilization when the J-51 benefits commenced. On December 8, 2009, plaintiff James Doerr brought a separate class action against defendant making similar allegations. In both complaints, plaintiffs alleged that, as a result of defendant's wrongful acts, they were denied rent-regulated status and were charged amounts in excess of the legal rents for their units. Plaintiffs sought, inter alia, a declaration that their apartments are subject to rent regulation, and monetary damages for rent overcharges. Defendant answered and asserted various counterclaims and affirmative defenses, including that the action was barred by the statute of limitations, and that *Roberts* should not be applied retroactively.

The two actions were subsequently consolidated and a class was certified. Plaintiffs then moved to dismiss defendant's counterclaims and affirmative defenses, and sought partial summary judgment seeking, inter alia, a determination of the

proper methodology for calculating the legal rents and the amount of any rent overcharges. Defendant cross-moved for summary judgment seeking, inter alia, dismissal of the complaint on the ground that *Roberts* is not retroactive, dismissal of the complaint as time-barred, and a declaration on the proper methodology to calculate rents. Both plaintiffs and defendant submitted their own proposed method for calculating rents and overcharges. In a decision entered November 22, 2017, the motion court rejected defendant's statute of limitations defense, and concluded that *Roberts* may be applied retroactively. The court also set forth a methodology for calculating the legal rents and the amount of any overcharges. Both plaintiffs and defendant appeal from the motion court's order.

Defendant maintains that when it deregulated the affected units, it was relying in good faith on DHCR's pre-*Roberts* interpretation of the relevant statutes, and that applying *Roberts* under those circumstances would offend due process. At the outset, defendant is collaterally estopped from advancing its due process argument. We rejected this claim in *Matter of London Terrace Gardens, L.P. v City of New York* (101 AD3d 27, 31-32 [1st Dept 2012], *lv denied* 21 NY3d 855 [2013]), a suit where defendant unsuccessfully tried to withdraw from the J-51 program. Although the *London Terrace Gardens* action arose in a different context,

the due process issue decided by the Court there was identical to the one before us now, and defendant had a full and fair opportunity to litigate the issue.

In any event, defendant's argument fails on the merits. In *Gersten v 56 7th Ave. LLC* (88 AD3d 189, 198 [1st Dept 2011]), this Court held that *Roberts* should be applied retroactively because the decision simply interpreted a statute that had been in effect for a number of years, and did not establish a new principle of law. Since then, we have consistently adhered to *Gersten*, and have specifically rejected due process challenges to the retroactivity of *Roberts* (*see Matter of London Terrace Gardens*, 101 AD3d at 31-32; *Roberts v Tishman Speyer Props., L.P.*, 89 AD3d 444, 445-446 [1st Dept 2011] [*Roberts II*]).

Defendant attempts to distinguish *Gersten* and *Roberts II*, on the ground that, unlike the building owners in those cases, defendant explicitly relied on DHCR's interpretation of the decontrol statutes at the time it decided to enter the J-51 program. However, we rejected this very same argument in *Matter of London Terrace Gardens* (101 AD3d at 31-32), and defendant fails to persuasively distinguish that case (*see also Gurnee v Aetna Life & Cas. Co.*, 55 NY2d 184, 192 [1982], *cert denied* 459 US 837 [1982] [where Court of Appeals retroactively applied a judicial decision rejecting the Insurance Department's

interpretation of the statute, stating that a judicial decision construing the words of a statute . . . does not constitute the creation of a new legal principle"). Thus, defendant's challenge to the retroactivity of *Roberts* is unavailing.

On June 14, 2019, New York State enacted the Housing Stability and Tenant Protection Act of 2019 (L 2019, ch 36)(HSTPA), landmark legislation making sweeping changes to the rent laws and adding greater protections for tenants throughout the State.[3] Of relevance to this appeal is Part F of the HSTPA, which amended RSL § 26-516 and CPLR 213-a, which govern claims of rent overcharge and the statute of limitations for bringing such claims. The legislation directed that the statutory amendments contained in Part F "shall take effect immediately and shall apply to any claims pending or filed on or after such date" (HSTPA, Part F, § 7). Because plaintiffs' overcharge claims were pending on the effective date of Part F of the HSTPA, the changes made therein are applicable here (*see Matter of Kandemir v New York State Div. of Hous. & Community Renewal*, 4 AD3d 122 [1st Dept 2004]; *Matter of Pechock v New York State Div. of Hous. & Community Renewal*, 253 AD2d 655 [1st Dept 1998]*; Zafra v Pilkes*, 245 AD2d 218 [1st Dept 1997]).

[3] At the request of this Court, the parties submitted letter briefs on how the HSTPA affects the issues in this appeal.

We reject defendant's contention that the complaint should be dismissed as time-barred. The newly-enacted CPLR 213-a provides that "an overcharge claim may be filed at any time," however "[n]o overcharge penalties or damages may be awarded for a period more than six years before the action is commenced." Likewise, the amended version of RSL § 26-516(a)(2) provides that an overcharge complaint "may be filed with [DHCR] or in a court of competent jurisdiction at any time, however any recovery of overcharge penalties shall be limited to the six years preceding the complaint." Because both of these statutes provide that an overcharge complaint can be brought "at any time," plaintiffs' claims are timely. However, they may recover for overcharges only as far back as November 13, 2003, six years before the commencement date.

Both plaintiffs and defendant raise various challenges to the motion court's methodology for calculating the legal rents and the amount of any overcharges. The HSTPA made significant changes in how rents and overcharges should be determined. RSL § 26-516 now explicitly provides that a court "shall consider all available rent history which is reasonably necessary" to investigate overcharges and determine the legal regulated rent (RSL § 26-516[a], [h]). Thus, with respect to overcharge claims subject to the HSTPA, these provisions resolve a split in this

Department as to what rent records can be reviewed to determine rents and overcharges in *Roberts* cases. In *Taylor v 72A Realty Assoc., L.P.* (151 AD3d 95 [1st Dept 2017], *lv granted* — NY3d — [2018]), the Court unanimously concluded that a court is permitted to examine the entire rental history of an apartment to ensure that landlords do not benefit from having collected an illegal market rent. Other panels of this Court, by split benches, reached a different conclusion, limiting review of the rental history to the four-year period preceding the filing of the overcharge complaint (*see Raden v W 7879, LLC*, 164 AD3d 440 [1st Dept 2018], *lv granted* — NY3d — [2018]; *Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal*, 164 AD3d 420, 424 [1st Dept 2018], *appeal dismissed* 32 NY3d 1085 [2018], *lv granted* — NY3d — [2019]). The new statute resolves this conflict, and makes clear that courts must examine all available rent history necessary to determine the legal regulated rent.

The newly-amended RSL § 26-516(a) also provides that the legal regulated rent for purposes of determining most overcharges "shall be the rent indicated in the *most recent reliable* annual registration statement filed *and served upon the tenant six or more* years prior to the most recent registration statement, . . . plus in each case any subsequent lawful increases and

adjustments"(RSL § 26-516[a] [emphasis showing the added language]).[4] Unlike the previous version, the new statute requires examination of the "most recent reliable" registration statement that was not only filed but also "served upon the tenant" "six or more years" before the most recent statement.

The newly-enacted RSL § 26-516(h) sets forth a comprehensive set of nonexclusive records that a court shall consider in determining legal rents and overcharges. Among the documents a court must examine are: (i) rent registration and other records filed with DHCR or other government agencies, regardless of the date to which the information refers; (ii) orders issued by government agencies; (iii) records maintained by the owner or tenants; and (iv) public records kept in the regular course of business by any government agency. The new statute further provides that "[n]othing [therein] shall limit the examination of rent history relevant to a determination as to . . . whether the legality of a rental amount charged or registered is reliable in light of all available evidence" (RSL § 26-516[h][i]).

The motion court based its methodology for calculating the legal rents and the amount of any rent overcharges on the law in

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[4] Ordinarily, a landlord must file annual registration statements which state the current rent for each rent stabilized apartment, and provide each tenant then in occupancy with a copy of that statement (RSL § 26-517[f]).

effect at the time. That law has changed, and significantly so. In view of the comprehensive changes made by the HSTPA with respect to the proper method of calculating legal rents and overcharges, we must remand the matter to the motion court so that it can, in the first instance, set forth a methodology consistent with the HSTPA. We recognize that this action has been pending for an extended period of time, and that our decision may involve further motion practice. Nevertheless, because the legislature has made changes to the law that directly impact this case, and has made those changes applicable to this pending litigation, a remand is appropriate. The motion court shall give the parties an opportunity to present additional evidence on their respective summary judgment motions with respect to the calculation of rents and any overcharges under the HSTPA.[5]

We find no merit to defendant's claim that applying the amendments to RSL § 26-516 and CPLR 213-a to this pending litigation violates due process. To begin, the legislature expressly made the amendments applicable to pending claims, and

[5] Although some of the motion court's conclusions on the proper methodology were correct under the old law, the HSTPA contains broader language, and the motion court must determine whether those prior rulings are impacted by the new law.

legislative enactments carry "an exceedingly strong presumption of constitutionality" (*Barklee Realty Co. v Pataki*, 309 AD2d 310, 311 [1st Dept 2003] [internal quotation marks omitted], *appeal dismissed* 1 NY3d 622 [2004], *lv denied* 2 NY3d 707 [2004]). Further, it is well settled that absent deliberate or negligent delay, "[w]here a statute has been amended during the pendency of a proceeding, the application of that amended statute to the pending proceeding is appropriate and poses no constitutional problem" (*Matter of St. Vincent's Hosp. & Med. Ctr. Of N.Y. v New York State Div. of Hous. & Community Renewal*, 109 AD2d 711, 712 [1st Dept 1985], *affd* 66 NY2d 959 [1985]; *accord Matter of Kass v Club Mart of Am.*, 160 AD2d 1148 [3d Dept 1990]; *Jonathan Woodner Co. v Eimicke*, 160 AD2d 907 [2d Dept 1990]).

In *Matter of Schutt v New York State Div. of Hous. & Community Renewal* (278 AD2d 58 [1st Dept 2000], *lv denied* 96 NY2d 715 [2001]), this Court found the petitioners' fair market rent appeal untimely based on the four-year statute of limitations in the newly-enacted Rent Regulation Reform Act of 1997 (RRRA). The petitioners argued that applying the RRRA's limitations period to pending cases violated due process because it "depriv[ed] them of the benefit of pre-RRRA rent regulation provisions law more favorable to their claims" (*id.* at 58). The Court found no due process infirmity because "rent regulation does not confer vested

rights" (*id.*, citing *I.L.F.Y. Co. v City Rent & Rehabilitation Admin.*, 11 NY2d 480 [1962]).

Likewise, in *Matter of Brinckerhoff v New York State Div. of Hous. & Community Renewal* (275 AD2d 622 [1st Dept 2000], *lv dismissed* 96 NY2d 729 [2001], *lv denied* 96 NY2d 712 [2001]), this Court applied the newly-enacted four-year limitations period to the petitioners' pending rent overcharge complaints, rejecting their claim that the retroactive application of the amendments denied them due process. The same result should apply here, and we find that defendant's due process rights are not impaired by applying the new amendments to plaintiffs' pending overcharge claims (*see American Economy Ins. Co. v State of New York*, 30 NY3d 136 [2017], *cert denied* — US —, 138 S Ct 2601 [2018]). Finally, to the extent defendant may be asserting a procedural due process claim, our decision to remand this matter for presentation of evidence as to how to calculate rents and overcharges under the HSTPA would obviate such a claim.

Defendant separately appeals from three other orders issued by the motion court. First, defendant challenges a September 11, 2017 order that expanded the originally certified definition of the class. In the initial certification order, the class was defined as "all past and current tenants of London Terrace Gardens who have been charged or continue to be charged

deregulated rents during defendant's receipt of J-51 tax benefits." In the class expansion order, the class was redefined as "all past and current tenants of London Terrace Gardens who have resided in units that were deregulated during defendant's receipt of J-51 tax benefits." Thus, whereas the original class included only tenants who were charged deregulated rents *during the J-51 period*, the proposed new class would encompass tenants who moved in after the J-51 benefits period ended and reside in apartments that, at some point in the past, had been wrongfully treated as deregulated.

CPLR 902 provides that a class action "may be altered or amended before the decision on the merits." However, that provision also states that "[an] action may be maintained as a class action only if the court finds that the prerequisites under [CPLR] 901 have been satisfied." Those requirements are generally referred to as "numerosity, commonality, typicality, adequacy of representation and superiority" (*City of New York v Maul*, 14 NY3d 499, 508 [2010]). CPLR 902 further requires the court to consider a range of factors before certifying a class.

Here, the motion court improvidently exercised its discretion in expanding the class. The court's order failed to analyze whether class action status was warranted based on the criteria set forth in CPLR 901 and CPLR 902. Conducting that

analysis ourselves, we find that the redefined class represents such a fundamental change in the theory of plaintiffs' case that expansion of the class would be improper. When the class was originally certified, plaintiffs maintained, and the court agreed, that its members were tenants who received deregulated leases while the complex was receiving J-51 benefits. The expanded class, however, would include tenants who never lived in the complex during defendant's receipt of J-51 benefits, and who received regulated leases for their tenancies. Thus, the legal issues for this group of tenants are separate and distinct from those of the original class.

In determining whether an action should proceed as a class action, the court must consider the "extent and nature of any litigation concerning the controversy already commenced by . . . members of the class" (CPLR 902[3]). This class action litigation was commenced over nine years ago, and has spawned expansive motion practice. Expanding the class to add members whose tenancies involve different legal issues from the original class would be inefficient at this late stage of the litigation and would unduly prejudice defendant. Thus, the court's order expanding the class should be reversed, and the class shall

remain as originally certified.[6]

Next, defendant appeals from a November 24, 2017 order wherein the motion court ordered the payment of interim past and ongoing use and occupancy by the tenants residing in Apartment 16ABEF, but failed to set the amount.[7] This apartment was created in 2005 by combining Apartments 16AB and 16EF, both of which were exempt from rent stabilization at the time defendant began receiving J-51 benefits in July 2003. We modify the court's order to the extent of requiring payment of interim past and ongoing use and occupancy in the amount of $11,075 per month. This amount represents the sum of the respective rents for Apartments 16AB and 16EF at or around the time the J-51 benefits began.[8] Although it is undisputed that Apartment 16ABEF, and the two apartments that were combined to form it, were all improperly treated as deregulated while the building was receiving J-51

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[6] Although the number of class members in the originally certified class may be impacted as a result of the statutory amendments, the definition of the class should remain the same.

[7] Defendant had previously commenced a summary nonpayment proceeding against these tenants, and the tenants answered and alleged rent overcharges. The summary proceeding was then consolidated with the class action.

[8] Defendant submitted a January 31, 2004 security deposit report indicating that the monthly rent for Apartment 16AB was $5,575, and a lease dated June 17, 2003 showing the monthly rent for Apartment 16EF was $5,500.

benefits, for the reasons discussed above, we vacate that part of the motion court's order setting forth the methodology for calculating the legal rents and the amount of any overcharges. The matter is remanded for the court to set forth a methodology for calculating rents and overcharges for Apartment 16ABEF consistent with the HSTPA.

Finally, defendant appeals from an August 30, 2017 order wherein the motion court denied its motion to make certain interim payments to plaintiffs in an effort to mitigate any ultimate award of prejudgment interest. Defendant sought to condition its payments on the requirement that plaintiffs repay some or all of those amounts if the court ultimately found in defendant's favor on the issues of liability or the amounts of any overcharges owed to a particular plaintiff. The motion court properly denied the relief requested by defendant. The court was not required to fashion a remedy outside of the CPLR, or grant a motion that addressed only defendant's concerns. To the extent this conclusion may be inequitable, defendant's remedy lies not with this Court, but with the legislature.

Accordingly, the order of the Supreme Court, New York County (Lucy Billings, J.), entered November 22, 2017, which, to the extent appealed from, denied defendant's motion for summary judgment, and granted in part and denied in part plaintiffs'

motion for summary judgment, should be modified, on the law, to vacate that part of the order setting forth the methodology for calculating the legal rents and the amount of any overcharges, and otherwise affirmed, without costs, and the matter remanded for the court, after further submissions from the parties, to set forth a methodology for calculating rents and overcharges consistent with the HSTPA; the order of the same court and Justice, entered September 11, 2017, which, to the extent appealed from, expanded the originally certified definition of the class, should be reversed, on the law, without costs, and the class should remain as originally certified; the order of the same court and Justice, entered November 24, 2017, which granted defendant's motion for payments for interim past and ongoing use and occupancy by respondents David Blech and Margie Chassman, but declined to set the amount, and granted Blech and Chassman's cross motion for summary judgment on their claim for rent overcharge to the same extent as that granted to the class action plaintiffs in the order entered November 22, 2017, should be modified, on the law and the facts, to set the amount of interim past and ongoing use and occupancy at $11,075 per month, and to vacate that part of the order setting forth the methodology for calculating the legal rents and the amount of any overcharges, and otherwise affirmed, without costs, and the matter remanded

for the court, after further submissions from the parties, to set forth a methodology for calculating rents and overcharges consistent with the HSTPA; and the order of the same court and Justice, entered August 30, 2017, which denied defendant's motion to make certain interim payments to plaintiffs, should be affirmed, without costs.

All concur.

Order, Supreme Court, New York County (Lucy Billings, J.), entered November 22, 2017, modified, on the law, to vacate that part of the order setting forth the methodology for calculating the legal rents and the amount of any overcharges, and otherwise affirmed, without costs, and the matter remanded for the court, after further submissions from the parties, to set forth a methodology for calculating rents and overcharges consistent with the HSTPA; order, same court and Justice, entered September 11, 2017, reversed, on the law, without costs, and the class should remain as originally certified; order, same court and Justice, entered November 24, 2017, modified, on the law and the facts, to set the amount of interim past and ongoing use and occupancy at $11,075 per month, and to vacate that part of the order setting forth the methodology for calculating the legal rents and the amount of any overcharges,

and otherwise affirmed, without costs, and the matter remanded for the court, after further submissions from the parties, to set forth a methodology for calculating rents and overcharges consistent with the HSTPA; and order, same court and Justice, entered August 30, 2017, affirmed, without costs.

Opinion by Richter, J.P. All concur.

Richter, J.P., Gische, Kern, Oing, Moulton, JJ.

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

ENTERED: SEPTEMBER 17, 2019

CLERK