SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

FEBRUARY 13, 2014

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Sweeny, Richter, Manzanet-Daniels, Clark, JJ.

11704 The People of the State of New York, Respondent, Ind. 5766/10

-against-

Phillip L. Stevens,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Arlene D. Goldberg, J.), rendered October 6, 2011, as amended October 19, 2011, convicting defendant, after a jury trial, of criminal mischief in the third and fourth degrees and petit larceny, and sentencing him, as a second felony offender, to consecutive terms of 2 to 4 years, 1 year, and 1 year, unanimously modified, on the law, to the extent of directing that the three sentences be served concurrently, and otherwise affirmed.

The verdict was not against the weight of the evidence (*see*

People v Danielson, 9 NY3d 342, 348 [2007]). There is no basis for disturbing the jury's credibility determinations.

With respect to the petit larceny conviction, the evidence supports the conclusion that defendant disposed of the victim's property under circumstances rendering it unlikely that she would recover it (*see* Penal Law § 155.00[3]; *People v Kirnon*, 39 AD2d 666, 667 [1972], *affd* 31 NY2d 877 [1972]). With respect to the fourth-degree criminal mischief conviction, based on an incident where defendant seized the victim's phone during a violent altercation, the evidence supported the conclusion that defendant, with intent to prevent the victim from communicating a request for emergency assistance, intentionally removed telephonic equipment while the victim was seeking emergency assistance (*see* Penal Law § 145.00[4][a]). With respect to the third-degree criminal mischief conviction, there was ample evidence, including testimony by the victim and a police officer, as well a photograph, to support the conclusion that defendant damaged, beyond repair, a television valued in excess of $250 (*see People v Garcia*, 29 AD3d 255, 263-264 [1st Dept 2006], *lv denied* 7 NY3d 789 [2006]).

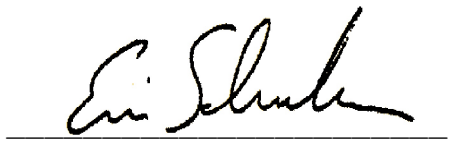
Defendant did not preserve his challenges to the prosecutor's summation, and we decline to review them in the

interest of justice. As an alternative holding, we find no basis for reversal (*see People v Overlee*, 236 AD2d 133 [1st Dept 1997], *lv denied* 91 NY2d 976 [1998]; *People v D'Alessandro*, 184 AD2d 114, 118 [1st Dept 1992], *lv denied* 81 NY2d 884 [1993]). Although some of the prosecutor's remarks were improper, the court's curative actions were sufficient to prevent prejudice.

As the People concede, Penal Law § 70.35 requires that the sentences for the misdemeanor convictions run concurrently with the sentence for the felony conviction.

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

ENTERED: FEBRUARY 13, 2014



CLERK

Gonzalez, P.J., Sweeny, Richter, Manzanet-Daniels, Clark, JJ.

11705 In re Jerzy Maksymowicz, Index 91458/01
Petitioner-Appellant,

-against-

Richard Weisman,
Defendant-Respondent.

_____

Jerzy Maksymowicz, appellant pro se.

_____

Appeal from order, Supreme Court, Bronx County (Howard H. Sherman, J.), entered on or about December 14, 2012, which declined to sign an order to show cause, unanimously dismissed, without costs, as taken from a nonappealable order.

Supreme Court's refusal to sign the subject order to show cause is not appealable (CPLR 5701[a][2]; *see e.g. Naval v American Arbitration Assn.*, 83 AD3d 423 [1st Dept 2011]).

In any event, the court properly declined to sign the order since petitioner sought to enforce a prior order, dated February 2, 2006, which contains no directive that petitioner may enforce. Rather, the order merely approved the sale of the property at issue by the coguardian of the owner and guardian of the property. It did not require that the property be sold, nor did it recognize that petitioner was entitled to proceeds from the sale of that property. Furthermore, the court correctly observed

that petitioner is collaterally estopped from raising his arguments in light of an order, in related proceedings, in which the court canceled and discharged petitioner's mechanic's lien on the same property; that order was affirmed by this Court (*see Weisman v Maksymowicz*, 109 AD3d 768 [1st Dept 2013]).

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

ENTERED: FEBRUARY 13, 2014

CLERK

Corrected Order - March 27, 2014

Gonzalez, P.J., Sweeny, Richter, Manzanet-Daniels, Clark, JJ.

11706-
11706A Index 652666/11

LFR Collections LLC, etc.,
Plaintiff-Respondent,

-against-

The Matthews **Law** Firm, et al.,
Defendants-Appellants.

Powers & Santola, LLP, Albany (Michael J. Hutter of counsel), for appellants.

Mayer Brown LLP, New York (Kathryn M. Throo of counsel), for respondent.

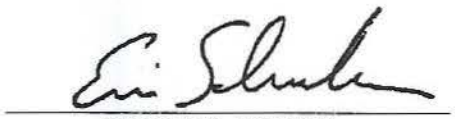
Judgment, Supreme Court, New York County (Barbara R. Kapnick, J.), entered June 1, 2012, awarding plaintiff the total sum of $2,550.863.76, and bringing up for review an order, same court and Justice, entered on or about March 19, 2012, which granted plaintiff's motion for summary judgment in lieu of complaint, unanimously affirmed, without costs. Order, same court and Justice, entered on or about January 29, 2013, which denied defendants' motion to renew, unanimously affirmed, without costs.

The broad waivers in the note and guaranty are effective to bar defendants from asserting any claim or setoff "of any nature" (*Red Tulip, LLC v Neiva*, 44 AD3d 204, 209-210 [1st Dept 2007], *lv denied* 13 NY3d 709 [2009]). Here, where plaintiff had sole discretion as to whether to make any loans under the line of

credit, and where the partially unfunded loan requests were made at a time when, under the loan documents, defendants were not permitted to make such requests, there is no basis for avoiding the waiver in the documents (*see Bank Leumi Trust Co. of N.Y. v D'Evori Intl.*, 163 AD2d 26, 29-31 [1st Dept 1990]).

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

ENTERED: FEBRUARY 13, 2014



DEPUTY CLERK

Gonzalez, P.J., Sweeny, Richter, Manzanet-Daniels, Clark, JJ.

11707 The People of the State of New York, Ind. 840/11
Respondent,

-against-

Jorge Molina,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Eve Kessler of counsel), for appellant.

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Patricia Nunez, J.), rendered on or about January 19, 2012,

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

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

ENTERED: FEBRUARY 13, 2014

CLERK

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

Gonzalez, P.J., Sweeny, Richter, Manzanet-Daniels, Clark, JJ.

11708- Index 350072/05
11708A Susan Angel,
Plaintiff-Appellant,

-against-

Christopher O'Neill,
Defendant-Respondent.

_____

Susan Angel, appellant pro se.

Treuhaft & Zakarin, LLP, New York (Miriam Zakarin of counsel), for respondent.

_____

Order, Supreme Court, New York County (Matthew F. Cooper, J.), entered September 4, 2012, which denied plaintiff's motions for orders directing defendant to pay damages for her eviction, setting aside a 2008 finding of alienation, and directing defendant to pay $49,000 to the Rudolph Steiner School, unanimously affirmed, without costs. Order, Family Court, New York County (Mary E. Bednar, J.), entered on or about December 19, 2012, which denied plaintiff's objection to the Support Magistrate's October 9, 2012 order dismissing her petition to modify the child support award, unanimously affirmed, without costs.

There is no basis for setting aside the finding of alienation. Plaintiff did not appeal from either the 2008 order

in which the finding was made or the 2010 judgment of divorce. In any event, none of the evidence she presented undermines the finding.

There is no reason to reinstate maintenance at this time. "'The purpose of maintenance is to give the recipient spouse a sufficient period to become self-supporting'" (*Naimollah v De Ugarte*, 18 AD3d 268, 271 [1st Dept 2005]; *see* Domestic Relations Law § 236[B][6][a]). The parties' marriage lasted only two years, plaintiff received temporary maintenance for approximately 1½ years, and, although she has a great earning capacity, she is apparently unwilling to work.

Defendant has no obligation to pay for the parties' child's private school, as various interim orders and the judgment of divorce determined.

There is no basis for awarding plaintiff damages in connection with her eviction from her apartment. The record demonstrates that the eviction was unrelated to any claimed support issues.

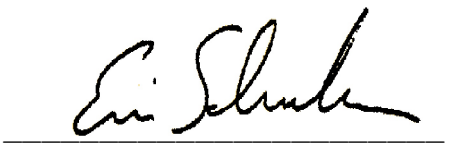
Plaintiff failed to meet her burden of establishing a substantial change in circumstances warranting an upward modification in child support since she failed to submit credible evidence of her income, assets or means of support (*see Matter of*

Sullivan v Sullivan, 22 AD3d 415 [1st Dept 2005]). Plaintiff also failed to demonstrate any efforts she has made to find employment commensurate with her training and experience (*O'Brien v McCann*, 249 AD2d 92 [1st Dept 1998]). Moreover, the child's alleged needs exceeded her actual reasonable needs (*see Matter of Erin C. v Peter H.*, 66 AD3d 451 [1st Dept 2009], *lv denied* 15 NY3d 704 [2010]).

We have considered plaintiff's remaining contentions and find them unavailing.

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

ENTERED: FEBRUARY 13, 2014



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Gonzalez, P.J., Sweeny, Richter, Manzanet-Daniels, Clark, JJ.

11710 Wadsworth Condos LLC, etc., Index 600899/09
Plaintiff-Respondent,

-against-

Dollinger Gonski & Grossman, et al.,
Defendants-Appellants,

EM Design Group, Inc., et al.,
Defendants.

_____

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

Marc M. Coupey, New York, for respondent.

_____

Order, Supreme Court, New York County (Louis B. York, J.), entered January 25, 2013, which, insofar as appealed from, denied the Dollinger defendants' motion for summary judgment dismissing the complaint as against them, unanimously affirmed, with costs.

Defendants preserved the defense that plaintiff lacked the capacity to sue derivatively on behalf of its co-tenant-in-common by asserting the defense in their answer (*see* CPLR 3211[a][3], 3211[e]; *see also Security Pac. Natl. Bank v Evans*, 31 AD3d 278 [1st Dept 2006], *appeal dismissed* 8 NY3d 837 [2007]). However, plaintiff adequately alleged injuries to the common entity and the futility of a demand thereon.

Plaintiff's belatedly asserted grounds for alleging legal

malpractice may be entertained since they involve no new factual allegations and no new theories of liability, and there is little or no basis on which defendants could claim surprise or prejudice (*see generally Alarcon v UCAN White Plains Hous. Dev. Fund Corp.*, 100 AD3d 431 [1st Dept 2012]; *Valenti v Camins*, 95 AD3d 519 [1st Dept 2012]). The new claims raise issues of fact whether defendants were negligent in their legal representation of the tenants-in-common, and whether, but for the alleged negligent representation, the tenants-in-common would have been able to avoid the extensive delays in project construction that resulted in the loss of the construction loan, construction delay expenses, and increased attorneys' fees. The tenants-in-common retained defendants initially to advise them with respect to a stop work order issued by the Department of Transportation (DOT) that prohibited further demolition until an appropriate permit was secured from DOT or the Department of Buildings. Rather than trying to secure a permit or obtain a definitive statement of the ownership of the retaining wall sought to be demolished, defendants reviewed a survey and deed and accepted DOT's position that the wall was on city property, and entered into what became protracted negotiations with DOT. In moving for summary judgment, defendants did not submit an expert legal opinion as to

the ownership of the wall (which is not clear from the record) or whether the failure to seek a demolition permit rather than engage in negotiations constituted negligence, issues that are beyond the ken of the ordinary person (*see Nuzum v Field*, 106 AD3d 541 [1st Dept 2013]; *Cosmetics Plus Group, Ltd. v Traub*, 105 AD3d 134, 141 [1st Dept 2013], *lv denied* 22 NY3d 855 [2013]).

As to the conflict of interest claim, while plaintiff was aware that defendants were representing the co-tenant-in-common, issues of fact exist whether defendants' actions on behalf of the co-tenant-in-common were in conflict with the interests of the tenants-in-common, particularly since the tenant-in-common management agreement called for unanimous consent on material changes in the project. For example, an affidavit submitted by plaintiff says that plaintiff was not given notice of the switch from a condominium project to a rental project, which the co-

tenant-in-common undertook while being advised by defendants.

We have considered defendants' remaining arguments and find them unavailing.

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

ENTERED: FEBRUARY 13, 2014

CLERK

Gonzalez, P.J., Sweeny, Richter, Manzanet-Daniels, Clark, JJ.

11711 The People of the State of New York, Ind. 1728/11
Respondent,

-against-

William Prieto,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Joanne Legano Ross of counsel), for appellant.

_____

Judgment, Supreme Court, New York County (Richard D. Carruthers, J. at plea; Jill Konviser, J. at sentencing), rendered on or about December 7, 2011, unanimously affirmed.

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

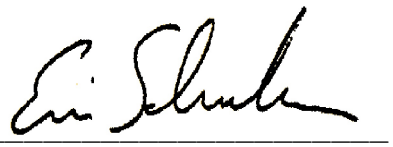
Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department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

service of a copy of this order.

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

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

ENTERED: FEBRUARY 13, 2014



CLERK

Gonzalez, P.J., Sweeny, Richter, Manzanet-Daniels, Clark, JJ.

11712 In re Eric M.,

A Person Alleged to
be a Juvenile Delinquent,
Appellant.
- - - - -
Presentment Agency

_____

Tamara A. Steckler, The Legal Aid Society, New York (Mark Dellaquila of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Victoria Scalzo of counsel), for presentment agency.

_____

Order, Family Court, Bronx County (Sidney Gribetz, J.), entered on or about October 24, 2012, which adjudicated appellant a juvenile delinquent upon his admission that he committed the act of unlawful possession of a weapon by a persons under 16, and imposed a conditional discharge for a period of 12 months, unanimously reversed, as an exercise of discretion in the interest of justice, without costs, the delinquency finding and dispositional order vacated, and the matter remanded to Family Court with the direction to order an adjournment in contemplation of dismissal nunc pro tunc to October 24, 2012.

The court improvidently exercised its discretion in adjudicating appellant a juvenile delinquent and imposing a conditional discharge, since this was not the least restrictive

available alternative. Instead, an adjournment in contemplation of dismissal would have sufficiently served the needs of appellant and society (*see e.g. Matter of Osriel L.*, 94 AD3d 523 [1st Dept 2012]). This was the 11-year-old appellant's first conflict with the law. Appellant admitted his guilt of possession of a BB gun. He was enrolled in afterschool programs and, pursuant to an ACD, the court could have directed the probation department to monitor his school attendance and impose appropriate terms and conditions.

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

ENTERED: FEBRUARY 13, 2014

CLERK

Gonzalez, P.J., Sweeny, Richter, Manzanet-Daniels, Clark, JJ.

11713 Mizpeh Walcott, Index 104880/05
Plaintiff-Respondent,

-against-

The New York and Presbyterian Hospital, et al.,
Defendants-Appellants,

Barry Shaktman, M.D.
Defendant.

_____

Martin Clearwater & Bell LLP, New York (Stewart G. Milch of counsel), for appellants.

Alexander J. Wulwick, New York, for respondent.

_____

Order, Supreme Court, New York County (Alice Schlesinger, J.), entered May 29, 2013, which, to the extent appealed from as limited by the briefs, denied the motion of defendants The New York and Presbyterian Hospital, s/h/a The New York and Presbyterian Hospital and New York Presbyterian Hospital, and Eva Fischer, M.D., for summary judgment dismissing the complaint as against them, unanimously affirmed, without costs.

In this medical malpractice action, defendant Eva Fischer, M.D., and another doctor performed two "back-to-back" surgeries on plaintiff, Mizpeh Walcott, at New York Hospital. Plaintiff alleges that, during the course of Dr. Fisher's hernia repair

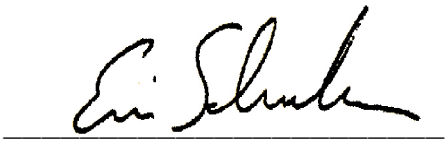
surgery, either a certain brand of gauze known as "Kling gauze," or some other kind of material, was left in her abdomen, causing a massive infection several weeks after the surgery. Plaintiff bases her claim on an odor which emanated from her stomach, and prompted a return visit to Dr. Fischer, at which time, plaintiff and her daughter testified to seeing Dr. Fischer remove foul-smelling gauze from plaintiff's abdomen. Dr. Fischer denied leaving Kling gauze inside plaintiff and testified that such gauze does not exist in the operating room. Based on that testimony, defendants' expert opined that no "Kling" gauze was used during the operation and that the infection plaintiff suffered was a risk of the surgery, not caused by any departure on the part of Dr. Fischer.

Defendants failed to make out their prima facie entitlement to summary judgment since their expert did not address the testimony of plaintiff and her daughter that they saw foreign material being removed from plaintiff's abdomen weeks after her surgery (*see King v St. Barnabas Hosp.*, 87 AD3d 238, 247 [1st Dept 2011]; *Sharp v Weber*, 77 AD3d 812, 814 [2nd Dept 2010]). In

any event, the same deposition testimony, together with plaintiff's expert, sufficiently raised triable issues of fact in opposition to the motion (*see Dallas-Stephenson v Waisman*, 39 AD3d 303, 306-307 [1st Dept 2007]).

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

ENTERED: FEBRUARY 13, 2014



CLERK

Gonzalez, P.J., Sweeny, Richter, Manzanet-Daniels, Clark, JJ.

11714 Carnegie Associates, Ltd., Index 603113/09
Plaintiff-Appellant,

-against-

United National Funding LLC, et al.,
Defendants-Respondents.

_____

The Law Office of Michael T. Yonker, New York (Michael T. Yonker of counsel), for appellant.

The Griffith Firm, New York (Edward Griffith of counsel), for United National Funding, Philip Neuman and Georgia Merkel, respondents.

Drinker Biddle & Reath LLP, New York (Michael D. Rafalko of the bars of the Commonwealth of Pennsylvania and the State of New Jersey, admitted pro hac vice, of counsel), for Eric Miller and Crump Group, Inc., respondents.

_____

Order, Supreme Court, New York County (Barbara R. Kapnick, J.), entered July 12, 2012, which, to the extent appealed from as limited by the briefs, granted defendants' motions to dismiss plaintiff's RICO claims and its breach of contract claim as against defendant Crump Group, Inc., and denied plaintiff's cross motion to amend the complaint, unanimously affirmed, with costs.

Neither Crump, nor its officer defendant Miller, were signatories to the contract which was between plaintiff and defendant United National Funding LLC (UNF). Accordingly, Crump cannot be held liable on any breach of the contract.

Plaintiff makes three fraud based allegations in support of its RICO claims: (i) UNF's failed performance under the written letter agreement was part of an overarching plan by defendants to defraud plaintiff and others; (ii) defendants used the mail and wires to do so; and (iii) there was an indication that defendants may have engaged in a similar scheme in the past. The fact that insurance applications were processed through the mail, and that various telephone conversations and emails with Crump and/or UNF representatives allegedly confirmed that plaintiff would receive 60% of the commissions is insufficient to establish a fraudulent scheme or otherwise convert a breach of contract claim into a fraud claim. The deposition testimony of a UNF representative in an unrelated matter stating that he has placed insurance policies through Crump in the past and that he might owe money with respect to that business, is also insufficient to establish indicia of past or future racketeering.

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

ENTERED: FEBRUARY 13, 2014

CLERK

Gonzalez, P.J., Sweeny, Richter, Manzanet-Daniels, Clark, JJ.

11715 The People of the State of New York, Ind. 5644/83
Respondent,

-against-

James Fountain,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Lorraine Maddalo of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Yuval Simchi-Levi of counsel), for respondent.

_____

Order, Supreme Court, New York County (Roger Hayes, J.), entered on or about September 14, 2009, which adjudicated defendant a level three sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court properly exercised its discretion in declining to grant a downward departure to level two (*see People v Cintron*, 12 NY3d 60, 70, *cert denied sub nom. Knox v New York*, 558 US 1011 [2009]; *People v Johnson*, 11 NY3d 416, 418, 421 [2008]). Defendant's egregious criminal record, including the underlying sex crime, defendant's prior sex crimes against children, and his

homicide convictions, outweighs the factors he cites in support of a downward departure.

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

ENTERED: FEBRUARY 13, 2014

CLERK

Gonzalez, P.J., Sweeny, Richter, Manzanet-Daniels, Clark, JJ.

11716 The People of the State of New York, Ind. 3753/99
Respondent,

-against-

Devon Simmons,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Naomi C. Reed of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Daniel P. FitzGerald, J.), rendered February 17, 2012, resentencing defendant to an aggregate term of 18 years, with 5 years' postrelease supervision, unanimously affirmed.

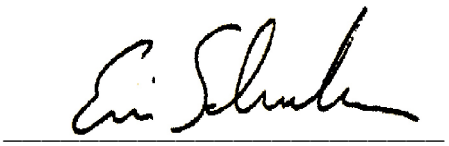
The resentencing proceeding imposing a term of postrelease supervision was neither barred by double jeopardy nor otherwise

unlawful (*People v Lingle*, 16 NY3d 621 [2011]).

We perceive no basis for reducing the term of postrelease supervision.

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

ENTERED: FEBRUARY 13, 2014



CLERK

Gonzalez, P.J., Sweeny, Richter, Manzanet-Daniels, Clark, JJ.

11717 In re The Board of Managers of Artisan Lofts Condominium,
Petitioner-Respondent,

-against-

Herbert Moskowitz, et al.,
Respondents-Appellants.

Index 153585/13

Peluso & Touger, LLP, New York (Robert Moore of counsel), for appellants.

Wolf Haldenstein Adler Freeman & Herz, LLP, New York (Rachael G. Ratner of counsel), for respondent.

Order, Supreme Court, New York County (Joan M. Kenney, J.), entered June 6, 2013, which granted petitioner a license to enter respondents' adjoining property in order to take steps to protect respondents' property during renovations to the facade and roof of petitioner's building, unanimously reversed, on the law, with costs, the order vacated, the petition denied, and the proceeding dismissed.

In determining whether or not to grant a license pursuant to Real Property Actions and Proceedings Law § 881, courts generally apply a standard of reasonableness (*see e.g. Mindel v Phoenix Owners Corp.*, 210 AD2d 167 [1st Dept 1994], *lv denied* 85 NY2d 811 [1995]). Courts are required to balance the interests of the

parties and should issue a license "when necessary, under reasonable conditions, and where the inconvenience to the adjacent property owner is relatively slight compared to the hardship of his neighbor if the license is refused" (*Chase Manhattan Bank [Natl. Assn.] v Broadway, Whitney Co.*, 57 Misc 2d 1091, 1095 [Sup Ct, Queens County 1968], *affd* 24 NY2d 927 [1969]).

Here, it is clear that petitioner has failed to make a showing as to the reasonableness and necessity of the scaffolding device referenced in the order, a "swing scaffold," which would need to be attached to respondents' building. While the parties agree that a limited license for petitioner to protect respondents' property is reasonable, they sharply disagree over the extent of access for any other purpose. Until that dispute is resolved, the order was premature.

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

ENTERED: FEBRUARY 13, 2014

CLERK

Gonzalez, P.J., Sweeny, Richter, Manzanet-Daniels, Clark, JJ.

11718 In re June Persaud, Index 103995/12
Petitioner,

-against-

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

_____

Audley Seymour Foster, Mount Vernon, for petitioner.

Eric T. Schneiderman, Attorney General, New York (Brian A. Sutherland of counsel), for New York State Office of Children and Family Services, respondent.

_____

Determination of respondent New York State Office of Children and Family Services, dated July 11, 2012, which affirmed the denial of petitioner's application for a group family day care license, unanimously 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 [Joan B. Lobis, J.], entered February 6, 2013), dismissed, without costs.

The determination to deny petitioner's application for a group family day care license is supported by substantial evidence (*see generally 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180-181 [1978]). The record shows that the agency considered each of the factors enumerated in

article 23-A of the Correction Law (*see Matter of Arrocha v Board of Educ. of City of N.Y.*, 93 NY2d 361, 364 [1999]; *Mattter of Boatman v New York State Dept. of Educ.*, 72 AD3d 1467 [3d Dept 2010]), and rationally concluded that petitioner's recent federal conviction for conspiracy to commit bank and wire fraud, in connection with which crime she admitted to falsely verifying the employment of applicants for mortgages, in a scheme to defraud banks, bears a "direct relationship" to the duties and responsibilities of a group family day care provider, including accurate record keeping (*see* Correction Law §§ 752 and 753; *Matter of Al Turi Landfill v New York State Dept. of Envtl. Conservation*, 98 NY2d 758, 761-762 [2002]; *Matter of Association of Surrogates & Supreme Ct. Reporters Within City of N.Y. v State of N.Y. Unified Ct. Sys.*, 48 AD3d 228 [1st Dept 2008]).

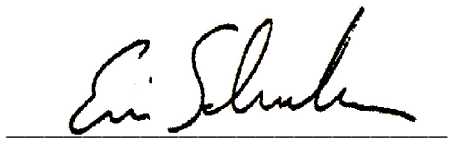
The agency properly considered the certificate of relief from disabilities issued to petitioner, which certificate only creates a presumption of rehabilitation (*see* Correction Law § 753[2]; *Matter of Dempsey v New York City Dept. of Educ.*, 108 AD3d 454, 455 [1st Dept 2013]). This presumption is but one of the eight statutory factors enumerated in Correction Law § 753, and the fact that the agency "gave greater weight to the statutory factors adversely affected by the fact and

circumstances of [petitioner's] conviction . . . [does] not afford a basis . . . to conclude that factors favorable to petitioner were not considered" and this Court may not re-weigh the factors (*Arrocha* at 366-367).

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

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

ENTERED: FEBRUARY 13, 2014



CLERK

Gonzalez, P.J., Sweeny, Richter, Manzanet-Daniels, Clark, JJ.

11719- Ind. 599/10
11719A The People of the State of New York, SCI 153/10
Respondent,

-against-

Luis Torres,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Eve Kessler of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Marc I Eida of counsel), for respondent.

_____

Appeals having been taken to this Court by the above-named appellant from judgments of the Supreme Court, Bronx County (Ethan Greenberg, J.), rendered on or about December 2, 2010,

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

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

ENTERED: FEBRUARY 13, 2014

CLERK

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

Tom, J.P., Andrias, Saxe, Freedman, Richter, JJ.

10891 In re Perlbinder Holdings, LLC, Index 103231/12
Petitioner-Appellant,

-against-

Meenakshi Srinivasan, etc., et al,
Respondents-Respondents.

_____

Kaufman Friedman Plotnicki & Grun, LLP, New York (Howard Grun of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Jane L. Gordon of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Joan B. Lobis, J.), entered March 27, 2013, denying the petition to annul a resolution of respondent Board of Standards and Appeals of the City of New York (BSA), dated June 19, 2012, which upheld a decision of the New York City Department of Buildings (DOB) that revoked petitioner's permits for an outdoor advertising sign, and to annul violations issued by DOB, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously reversed, on the law and the facts, without costs, the petition granted to the extent of annulling BSA's resolution, and the matter remanded to BSA for further proceedings consistent herewith.

Petitioner contends that the revocation of the permits for a large advertising sign on its property was improper because

petitioner constructed the sign in good-faith reliance on a 2008 determination of the Manhattan Borough Building Commissioner that the sign was a permissible replacement for a similar sign that was removed when a building on the property was demolished. In upholding the revocation of the permits, BSA concluded that it could not consider the issue of petitioner's good faith under its appellate jurisdiction. This was incorrect.

Under NY City Charter § 666(6)(a), BSA is empowered to hear and decide appeals from DOB determinations. Section 666(7) provides that in determining such appeals, BSA may "vary . . . any rule or regulation or the provisions of any law relating to the construction . . . of buildings or structures . . . where there are practical difficulties or unnecessary hardship in the way of carrying out the strict letter of the law, so that the spirit of the law shall be observed, public safety secured and substantial justice done." In its resolution, BSA failed to appropriately address this charter provision, despite a request by petitioner. Indeed, to the extent that petitioner sought relief based on its good-faith reliance, petitioner's appeal before BSA was, in effect, a request for a variance. Thus, the matter must be remanded to BSA, in its appellate capacity, to determine whether petitioner is entitled to a variance applying

the factors set forth in § 666(7). Because the record was not fully developed as to these criteria, before either BSA or Supreme Court, BSA shall permit the parties to make further submissions.

The record establishes as a matter of law that petitioner relied in good faith upon the 2008 determination. In deciding whether to grant a variance on remand, BSA must consider, along with the § 666(7) factors, petitioner's good-faith reliance. In *Matter of Pantelidis v New York City Bd. of Stds. & Appeals* (43 AD3d 314 [1st Dept 2007], *affd* 10 NY3d 846 [2008]), we affirmed a decision of the Supreme Court (10 Misc 3d 1077[A], 2005 NY Slip Op 52249[U] [Sup Ct, NY County 2005]), which held that BSA was required to consider the petitioner's good-faith reliance on a later-rescinded permit when considering the petitioner's application for a variance, and our decision was upheld by the Court of Appeals. Here, as in *Pantelidis*, BSA is required to consider petitioner's good-faith reliance in adjudicating petitioner's appeal (*see also Jayne Estates v Raynor*, 22 NY2d 417, 423 [1968] [good-faith reliance on invalid permit should be considered in determining whether variance applicant has suffered unnecessary hardship]).

Petitioner's claim that no variance is required because the

new sign was a permissible replacement for a previous sign on the property is without merit because the new sign is in a different location and position (*see* Zoning Resolution § 52-83). In view of our conclusion that the matter must be remanded to BSA, any determination as to whether the DOB violations are enforceable is premature.

The Decision and Order of this Court entered herein on October 29, 2013 (110 AD3d 611 [1st Dept 2013]) is hereby recalled and vacated (*see* M-6123 decided simultaneously herewith).

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

ENTERED: FEBRUARY 13, 2014

CLERK

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

11313 Debra Watson, Index 15852/06
Plaintiff-Respondent,

-against-

Jade Luxury Transportation Corp., et al.,
Defendants-Appellants,

Derek Gonzalez, et al.,
Defendants.

_____

Marjorie E. Bornes, Brooklyn, for appellants.

Goidel & Siegel, LLP, New York (Steven E. Cohen of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Mark Friedlander, J.), entered on or about July 8, 2013, which granted plaintiff's motion to set aside a jury verdict finding no liability on the part of defendants, and directed a new trial on the issue of liability, affirmed, without costs.

This case arises from a two-car accident in the Bronx at the intersection of Inwood Avenue and Goble Place between a livery car driven by defendant Francisco Carrero, in which plaintiff was a rear-seat passenger, and a white Honda driven by defendant Derek Gonzalez. Gonzalez defaulted and has never testified, and plaintiff did not witness the accident. Carrero's testimony constituted the sole evidence relating to the circumstances of

the collision.

At his pretrial deposition, Carrero testified that he was driving north on Inwood Avenue, a one-way street. Gonzalez entered the intersection on Goble Place from the west, and faced a stop sign, giving Carrero the right of way into the intersection. Carrero stated that his view of the intersection and of Gonzalez's car were unobstructed as he approached the intersection, and that he first saw the white Honda before he (Carrero) entered the intersection. At trial, however, Carrero repeatedly testified that his view of traffic entering the intersection from Goble Place on the west was obstructed by a truck parked on the south side of Goble Place and that he did not see the white Honda until after he had passed the truck. At that point, he testified that, although he tried, he was unable to avoid a collision. The jury was made aware of the inconsistencies between Carrero's deposition and trial testimony through extensive impeachment with readings from his deposition.

The jury found no negligence on the part of Gonzalez. They also found that Carrero was negligent, but his negligence was not a substantial factor in causing the accident.

We agree with the dissent that, in the usual case, "'[t]he issue of whether a defendant's negligence was a proximate cause

of an accident [injuries] is separate and distinct from the negligence determination. A defendant may act negligently without that negligence constituting a proximate cause of the accident [injuries]'" (*Fisk v City of New York*, 74 AD3d 658, 659 [1st Dept 2010], quoting *Ohdan v City of New York*, 268 AD2d 86, 89 [1st Dept 2000], *lv denied* 95 NY2d 769 [2000], *appeal dismissed* 95 NY2d 885 [2000]). Moreover, "[w]here the verdict can be reconciled with a reasonable view of the evidence, the successful party is entitled to the presumption that the jury adopted that view" (*Rodriguez v New York City Tr. Auth.*, 67 AD3d 511, 511 [1st Dept 2009]). However, in those cases where "'the issues of negligence and proximate cause are so inextricably interwoven as to make it logically impossible to find negligence without also finding proximate cause,'" the verdict must be set aside (*Dessasore v New York City Hous. Auth.*, 70 AD3d 440, 441 [1st Dept 2010], quoting *McCollin v New York City Hous. Auth.*, 307 AD2d 875, 876 [1st Dept 2003]; *see Fisk v City of New York*, 74 AD3d at 660; *Lora v City of New York*, 305 AD2d 171, 172 [1st Dept 2003]).

Based on these principles, we cannot agree with the dissent's contention that there is a rational basis for the jury's finding that the negligence attributed to Carrero was not

a proximate cause of the accident.

Review of the evidence adduced at trial does not reveal a single plausible scenario by which Gonzalez could have been free from negligence and Carrero negligent, without such negligence being a substantial factor in causing the accident.

The fact that Gonzalez was not negligent practically eliminates the scenario to which Carrero testified at his deposition, namely, that Carrero had a clear view of the intersection and of the white Honda at all times, since it is difficult, if not impossible, to see how in such a scenario Carrero could have been negligent but not have caused the accident.

This leaves the scenario to which Carrero testified at trial, namely, that a truck blocked his view of the white Honda until Carrero was passing the truck, at which point it was impossible for him to avoid the collision. Since the jury found that Gonzalez was not negligent, Carrero's negligence could have taken one or more of several forms, any or all of which would lead a rational jury to the inescapable conclusion that his negligence was the proximate cause of the accident (*see Cohen v*

Hallmark Cards, 45 NY2d 493, 499 [1978]). Thus, the jury's findings are irreconcilable, and Supreme Court providently set the verdict aside as inconsistent (*Fisk,* 74 AD3d at 660).

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

DeGRASSE, J. (dissenting)

I dissent because it was an abuse of discretion for the trial court to have set aside the jury's verdict on the ground that it was "inconsistent." This case involves a collision in an intersection between a livery car that was operated by defendant Francisco Carrero and another car that was operated by defendant Derek Gonzalez. Carrero, the only witness at trial, testified that Gonzalez's approach into the intersection was regulated by a stop sign and Carrero's approach was not regulated by any traffic control device. Carrero also testified that Gonzalez did not stop at the stop sign. Nonetheless, the jury found that Gonzalez was not negligent. The jury also found that Carrero was negligent but that his negligence was not a proximate cause of the accident. In setting aside the verdict, the court opined that a rational jury could not have consistently determined that negligence on Carrero's part was not a proximate cause of the accident.

"As a general proposition, a finding of negligence is not inconsistent with a finding of no proximate cause" (*Pimpinella v McSwegan*, 213 AD2d 232, 233 [1st Dept 1995], citing, *Palsgraf v Long Is. R.R. Co.*, 248 NY 339 [1928]). This seems to be particularly true in cases involving motor vehicle collisions

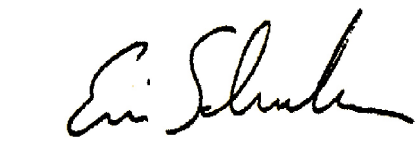
(*see e.g. McCulley v Sandwick*, 43 AD3d 624 [3d Dept 2007], *appeal dismissed* 9 NY3d 976 [2007]; *Skowronski v Mordino*, 4 AD3d 782 [4th Dept 2004]; *Inserro v Rochester Drug Coop*, 258 AD2d 923 [4th Dept 1999]), *see also Martinez v New York City Tr. Auth.*, 41 AD3d 174 [1st Dept 2007].

A contention that a jury verdict is inconsistent must be reviewed in the context of the trial court's charge, a matter the majority does not address (*Lundgren v McColgin*, 96 AD2d 706 [4th Dept 1983]; *see also Mars Assoc., Inc. v New York City Educ. Constr. Fund*, 126 AD2d 178, 188 [1st Dept 1987], *lv dismissed* 70 NY2d 747 [1987]). Here, there is a rational basis for the jury's finding that the negligence attributed to Carrero was not a proximate cause of the accident. The jury was charged that under the Vehicle and Traffic Law, Gonzalez, the driver of the vehicle that approached the stop sign, was obligated to stop and yield the right of way to vehicles on the dominant roadway, i.e. Carrero's. The court also charged the jury that Carrero had the right to assume that Gonzalez would comply with the applicable provisions of the Vehicle and Traffic Law. Regardless of its finding that Gonzalez was not negligent, the jury could have rationally concluded that the accident would not have occurred had he yielded the right of way as he was required and expected

to do. That would be a reasonable view of the evidence sufficient to support the jury's verdict particularly because Gonzalez did not testify in person or by deposition. Where "an apparently inconsistent or illogical verdict can be reconciled with a reasonable view of the evidence, the successful party is entitled to the presumption that the jury adopted that view" (*Skowronski v Mordino*, 4 AD3d at 783 [internal quotation marks omitted]). Here, the presumption has not been rebutted. As a result, although required to, the majority does not give due deference to the jury's role as fact-finder (*see DaBiere v Craig*, 284 AD2d 885 [3d Dept 2001]). Since a valid line of reasoning supports the jury's verdict and it is supported by a fair interpretation of the evidence, I would reverse the order entered below and reinstate the jury's verdict (*see Rivera v 4064 Realty Co.*, 17 AD3d 201, 203 [1st Dept 2005], *lv denied* 5 NY3d 713 [2005]).

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

ENTERED: FEBRUARY 13, 2014



CLERK

Sweeny, J.P., Andrias, Freedman, Richter, Clark, JJ.

11670 Jahira Gutierrez, etc., et al., Index 15630/94
Plaintiffs-Respondents,

-against-

824 South East Boulevard Realty, Inc.,
Defendant-Appellant,

Rudolfo Murcia,
Nonparty-Appellant.

_____

Law Office of Manuel D. Gomez, P.C., New York (Manuel D. Gomez of counsel), for appellants.

Barton LP, New York (Stephen M. Lasser of counsel), for respondent.

_____

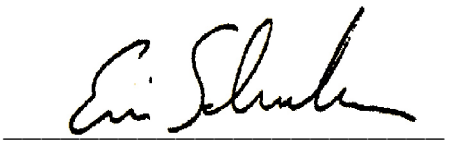
Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered December 31, 2012, which denied defendant and nonparty Murcia's motion to release Murcia's restrained funds, unanimously reversed, on the law, and the motion granted to the extent of remanding for proceedings consistent with this opinion, without costs.

At oral argument, plaintiffs' counsel acknowledged that he had received documentation concerning the reverse mortgage obtained by nonparty Murcia on property that Murcia contends belongs to him personally. A hearing should be held to ascertain whether the proceeds of that reverse mortgage, which have been

restrained, are for Murcia's personal property or for property owned by the corporation that was a defendant in the underlying lead-paint case. Although plaintiffs argue that the court has some unspecified equitable power to restrain these funds even if they belong to Murcia personally, they cite no authority for this argument.

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

ENTERED: FEBRUARY 13, 2014



CLERK

Acosta, J.P., Andrias, Saxe, Freedman, Feinman, JJ.

11721 The People of the State of New York, Ind. 1212/12
Respondent,

-against-

Bernard K. Stokes,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Gregory Carro, J.), rendered on or about November 14, 2012,

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

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

ENTERED: FEBRUARY 13, 2014

CLERK

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

Acosta, J.P., Andrias, Saxe, Freedman, Feinman, JJ.

11723 Saul Gabriel Rivera, etc., et al., Index 350505/09
Plaintiffs-Appellants,

-against-

The Roman Catholic Church of
St. Helena, et al.,
Defendants-Respondents.

_____

Burns & Harris, New York (Jennifer Shafer of counsel), for appellants.

Leahey & Johnson, P.C., New York (Joanne Filiberti of counsel), for respondents.

_____

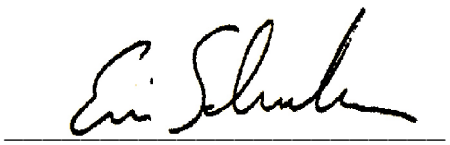
Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered September 13, 2012, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Summary judgment was properly granted to defendants in this action where the infant plaintiff was injured when he collided with a stairway railing during a game of tag. Plaintiff's own testimony as to how the accident occurred demonstrates that no

additional supervision could have prevented his injury (*see Esponda v City of New York*, 62 AD3d 458, 460 [1st Dept 2009] *see also Lizardo v Board of Educ. of the City of N. Y.*, 77 AD3d 437 [1st Dept 2010]).

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

ENTERED: FEBRUARY 13, 2014



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Acosta, J.P., Andrias, Saxe, Freedman, Feinman, JJ.

11724 The People of the State of New York, Ind. 1281/03
Respondent,

-against-

Bernard Gardner,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Kristina Schwarz of counsel), for appellant.

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

_____

Judgment of resentence, Supreme Court, New York County (Bruce Allen, J.), rendered January 18, 2012, resentencing defendant, as a second felony offender, to a term of 13 years, with 5 years' postrelease supervision, unanimously affirmed.

The resentencing proceeding imposing a term of postrelease supervision was neither barred by double jeopardy nor otherwise unlawful (*see People v Lingle*, 16 NY3d 621 [2011]).

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

ENTERED: FEBRUARY 13, 2014

CLERK

Acosta, J.P., Andrias, Saxe, Freedman, Feinman, JJ.

11727 Robinson B. Lacy, Index 350692/97
Plaintiff-Respondent,

-against-

Elizabeth Lacy,
Defendant-Appellant.

_____

Richard Lee Wallace, New York, for appellant.

Law Offices of Adria S. Hillman, New York (Adria S. Hillman of counsel), for respondent.

_____

Order, Supreme Court, New York County (Matthew F. Cooper, J.), entered October 12, 2002, which, to the extent appealed from as limited by the briefs, denied defendant wife's motion for child support arrears and granted plaintiff husband's cross motion to terminate his child support obligations due to the child's emancipation, unanimously affirmed, without costs.

The evidence establishes that pursuant to the parties' divorce settlement agreement, which requires plaintiff to pay defendant child support until the children become emancipated and defines emancipation as including having a "[p]ermanent residence away from the residence of the Wife," plaintiff was properly relieved of his child support obligations (*Rocchio v Rocchio*, 213 AD2d 535, 536-537 [2d Dept 1995]). The motion court correctly

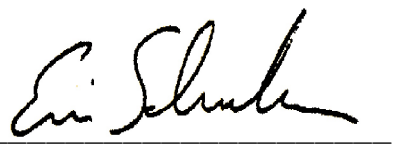
determined that the parties' youngest son, the only unemancipated child, continuously resided with plaintiff, who has been paying the majority of the child's expenses, including educational and medical costs, since May 2011. Contrary to defendant's argument, the child's residence with defendant in New York is not a temporary residence akin to a college dormitory. Although he attends college in New York, he has resided with plaintiff during at least one summer vacation, receives mail at his father's residence, and obtained a New York City driver's license listing his father's address. In contrast, he has visited defendant's home in Connecticut sporadically, during portions of his college vacations. In addition, both parties acknowledge that the child prefers to live in New York.

Defendant is not entitled to child support arrears for additional child support expenses. She does not dispute that she failed to submit adequate documentation in the form of receipts or other firsthand evidence to substantiate her claims or to state with any specificity which expenses warrant reimbursement, as required by the settlement agreement (*Hermann v Hermann*, 278 AD2d 200, 200-201 [1st Dept 2000]). In any event, as the motion court found, plaintiff reimbursed defendant for numerous expenses

and tried to decipher the voluminous lists of expenses she provided to determine which ones were legitimate expenses requiring reimbursement.

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

ENTERED: FEBRUARY 13, 2014



CLERK

Acosta, J.P., Andrias, Saxe, Freedman, Feinman, JJ.

11729 The People of the State of New York, Ind. 2074/09
Respondent,

-against-

Carlos DeLaRosa, etc.,
Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Richard D. Carruthers, J.), rendered on or about November 18, 2009, unanimously affirmed.

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

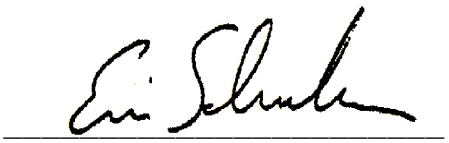
Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department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

service of a copy of this order.

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

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

ENTERED: FEBRUARY 13, 2014



CLERK

Acosta, J.P., Andrias, Saxe, Freedman, Feinman, JJ.

11731 Johanna Dibitetto, Index 304822/08
Plaintiff-Appellant,

-against-

Robert Ferriello,
Defendant-Respondent,

[And A Third-Party Action]

_____

Law Office of Judah Z. Cohen, PLLC, Woodmere (Judah Z. Cohen of counsel), for appellant.

Morris E. Matza, New York, for respondent.

_____

Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered on or about November 23, 2012, which, insofar as appealed from, granted defendant's cross motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendant established entitlement to judgment as a matter of law in this action where plaintiff was allegedly injured when, while walking on the sidewalk in front of defendant's home, she fell after her foot became stuck in a depression in the grassy area between the concrete sidewalk and the curb. Defendant, as the owner and resident of a one-family home adjacent to the area where plaintiff fell, submitted evidence showing that he did not cause or create the subject depression (*see* Administrative Code

of City of New York § 7-210[b]; *Troncoso v City of New York*, 306 AD2d 208 [1st Dept 2003]).

In opposition, plaintiff failed to present nonhearsay evidence in admissible form sufficient to raise a triable issue of fact as to whether defendant caused or created the condition *(see Waiters v Northen Trust Co. of N.Y.*, 29 AD3d 325, 327 [1st Dept 2006]; *see also Kane v Estia Greek Rest.*, 4 AD3d 189, 190 [1st Dept 2004]).

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

ENTERED: FEBRUARY 13, 2014

CLERK

Acosta, J.P., Andrias, Saxe, Freedman, Feinman, JJ.

11733 The People of the State of New York, Ind. 49311C/05
Respondent,

-against-

Arthur Richardson,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Steven J. Miraglia of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Diane A. Shearer of counsel), for respondent.

_____

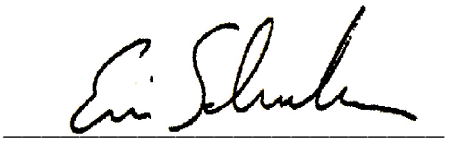
Judgment, Supreme Court, Bronx County (Seth L. Marvin, J. at suppression hearing; Michael A. Gross, J. at plea and sentencing), rendered September 7, 2007, convicting defendant of criminal possession of a weapon in the third degree, and sentencing him, as a second felony offender, to a term of two years, unanimously affirmed.

Regardless of whether defendant made a valid waiver of his

right to appeal, we conclude that the hearing court properly denied defendant's suppression motion. There is no basis for disturbing the court's credibility determinations.

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

ENTERED: FEBRUARY 13, 2014



CLERK

Acosta, J.P., Andrias, Saxe, Freedman, Feinman, JJ.

11734 In re Shawntay S.,

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

Stephanie R.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

Andrew J. Baer, New York, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Suzanne K. Colt of counsel), for respondent.

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

_____

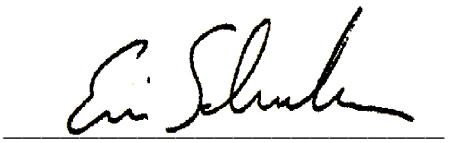
Order of fact-finding and disposition, Family Court, Bronx County (Sarah P. Cooper, J.), entered on or about March 8, 2013, which, to the extent appealed from as limited by the briefs, determined, after a hearing, that respondent mother neglected the subject child, unanimously affirmed, without costs.

The determination that respondent neglected the child is supported by a preponderance of the evidence, which shows that respondent refused to take the child home upon his discharge from the hospital, where he had received psychiatric treatment, and, that despite petitioner's caseworkers' and a hospital social

worker's attempts to discuss the child's future psychiatric needs with her, respondent requested that he be placed in foster care and refused to make alternative plans for him (*see Matter of Nyia L. [Egipcia E.C.]*, 88 AD3d 882, 883 [2d Dept 2011]; *Matter of Jalil McC. [Denise C.]*, 84 AD3d 1089 [2d Dept 2011]; *see also Matter of Clayton OO. [Nikki PP.]*, 101 AD3d 1411 [3d Dept 2012]). Contrary to respondent's contention, her refusal to allow her son back into her home and her failure otherwise to plan for his care manifested an intention to abdicate her parental responsibilities, which placed the child at imminent risk of impairment (*see Matter of Lamarcus E. [Jonathan E.]*, 94 AD3d 1255, 1257 [3d Dept 2012]).

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

ENTERED: FEBRUARY 13, 2014



CLERK

Acosta, J.P., Andrias, Saxe, Freedman, Feinman, JJ.

11735 Ramonita Soto, Index 309492/10
Plaintiff-Appellant,

-against-

2780 Realty Co., LLC, et al.,
Defendants-Respondents.

_____

Bernstone & Grieco, LLP, New York (Matthew A. Schroeder of counsel), for appellant.

Keane & Bernheimer, PLLC, Hawthorne (Jason M. Bernheimer of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered December 18, 2012, which granted defendants' motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion denied.

Plaintiff alleges that she slipped and fell as she descended the stairs in the apartment building in which she lived. According to plaintiff, defendants' worker had recently mopped the staircase and did not place any cones or warning signs to alert people to the wet condition of the stairs. Furthermore, the worker did not warn plaintiff of the wet stairs when she passed him in the hallway on her way to the stairwell. Under these circumstances, defendants failed to establish as a matter of law that sufficient warning of the condition of the stairs was

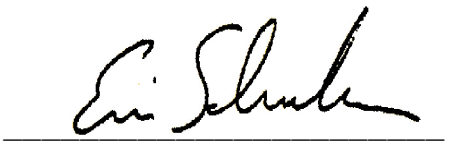
provided. Contrary to the motion court's finding, it cannot be stated that the mere presence of defendants' worker in the hallway outside the stairwell with a mop and bucket constituted sufficient warning to others that the staircase had just been mopped and the stairs were wet. The record shows that the worker was simply standing in the hallway and not mopping, and the hallway floor was not wet. There were also no warning cones in the hallway before the entrance to the stairwell, as was defendants' standard practice, and plaintiff did not detect the odor of any floor cleaner that would have made her suspect that the staircase had just been mopped (*compare Rivero v Spillane Enters., Corp.*, 95 AD3d 984 [2d Dept 2012]).

Defendants' contention that the wet stairs constituted an open and obvious hazard or danger obviating the duty to warn is unavailing. A finding that a condition is open and obvious requires that the condition "be of a nature that could not reasonably be overlooked by anyone in the area whose eyes were open" (*Westbrook v WR Activities-Cabrera Mkts.*, 5 AD3d 69, 71 [1st Dept 2004]). Moreover, although some hazards may be "technically visible," if their "nature or location" makes them "likely to be overlooked," then the facts do not compel the conclusion that such hazards or conditions are open and obvious

(*id.* at 72). Here, plaintiff testified that the lighting in the stairwell over the steps was dim, and defendants' superintendent confirmed that there was no light provided over the steps, but only over the landings. Accordingly, since the liquid or wetness on the steps was of a transparent nature, and the illumination of the steps upon which plaintiff slipped was dim, and there is no evidence establishing that plaintiff actually knew that the steps were wet or had just been mopped, it cannot be said as a matter of law that the wet condition of the stairs was open and obvious (*see e.g. Cafarella v 2180 Realty Corp.*, 102 AD3d 404 [1st Dept 2013]).

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

ENTERED: FEBRUARY 13, 2014



CLERK

Acosta, J.P., Andrias, Saxe, Freedman, Feinman, JJ.

11736 In re Sheri Roberts, Index 403020/11
Petitioner-Appellant,

-against-

John B. Rhea, etc., et al.,
Respondents-Respondents.

_____

The Bronx Defenders, Bronx (Runa Rajagopal of counsel), for appellant.

Kelly D. MacNeal, New York (Andrew M. Lupin of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Lucy Billings, J.), entered October 18, 2012, denying the petition to annul respondent's determination, dated July 13, 2011, which denied, after a hearing, petitioner's remaining family member grievance, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously vacated, the petition treated as one transferred to this Court for de novo review, and, upon such review, respondent's determination, unanimously confirmed, the petition denied, and the proceeding dismissed, without costs.

The petition, having raised an issue of substantial evidence, should have been transferred to this Court pursuant to CPLR 7804(g). Accordingly, we will "treat the substantial evidence issues de novo and decide all issues as if the

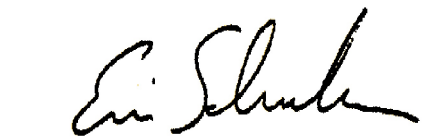
proceeding had been properly transferred" (*Matter of Jimenez v Popolizio*, 180 AD2d 590, 591 [1st Dept 1992]).

The record demonstrates that the challenged determination is supported by substantial evidence. After giving consideration to the time, nature, and extent of petitioner's conduct and to factors that might indicate a reasonable probability of favorable future conduct, including evidence of rehabilitation and participation in social services, the Housing Authority rationally determined that the evidence was insufficient to warrant overlooking petitioner's class A felony drug conviction, which rendered her otherwise ineligible for public housing (and remaining family member status) until six years after her sentence is completed (*see e.g. Matter of Faison v New York City Hous. Auth.*, 283 AD2d 353 [1st Dept 2001]).

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

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

ENTERED: FEBRUARY 13, 2014



CLERK

Acosta, J.P., Andrias, Saxe, Freedman, Feinman, JJ.

11737 The People of the State of New York, Ind. 1426/00
Respondent,

-against-

Miguel Ramirez,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Laura Lieberman Cohen of counsel), for appellant.

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

_____

Judgment of resentence, Supreme Court, New York County (Michael J. Obus, J.), rendered June 14, 2012, resentencing defendant to an aggregate term of 22 years, with 5 years' postrelease supervision, unanimously affirmed.

The resentencing proceeding imposing a term of postrelease supervision was neither barred by double jeopardy nor otherwise unlawful (*see People v Lingle*, 16 NY3d 621 [2011]).

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

ENTERED: FEBRUARY 13, 2014

CLERK

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

9697 Nomura Asset Capital Corporation, et al., Plaintiffs-Respondents, Index 116147/06

-against-

Cadwalader, Wickersham & Taft LLP, Defendant-Appellant.

_____

Cravath Swaine & Moore LLP, New York (David R. Marriott of counsel), for appellant.

Constantine Cannon LLP, New York (Amianna Stovall of counsel), for respondents.

_____

Order, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered on or about January 13, 2012, modified, on the law, to grant the motion with respect to that part of the cause of action alleging that defendant failed to properly advise plaintiffs, and otherwise affirmed, without costs.

Opinion by Richter, J. All concur except Friedman, J.P. who dissents in part in an Opinion.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David Friedman, J.P.
John W. Sweeny, Jr.
Dianne T. Renwick
Rosalyn H. Richter, JJ.

9697
Index 116147/06

_____x

Nomura Asset Capital Corporation, et al.,
Plaintiffs-Respondents,

-against-

Cadwalader, Wickersham & Taft LLP,
Defendant-Appellant.

_____x

Defendant appeals from the order of the Supreme Court, New York County (Melvin L. Schweitzer, J.), entered on or about January 13, 2012, which denied its motion for summary judgment dismissing the first cause of action.

Cravath Swaine & Moore LLP, New York (David R. Marriott and Evan R. Chesler of counsel), for appellant.

Constantine Cannon LLP, New York (Amianna Stovall and Joel A. Chernov of counsel), for respondents.

RICHTER, J.

In this legal malpractice action, plaintiffs allege that defendant law firm failed to provide them with the appropriate legal advice, and rendered a legal opinion without performing the necessary due diligence, in connection with the securitization of a pool of commercial mortgage loans. When one of the loans went into default, the trustee of the trust holding the mortgages brought an action against plaintiffs in federal court alleging that they had breached various warranties in the securitization agreements. Plaintiffs maintain that the alleged breach of the warranties was the result of the law firm's malpractice leading up to and during the securitization process. Plaintiffs claim that they were forced to settle the federal lawsuit for millions of dollars, and that they would not have suffered these damages but for the law firm's negligence. The motion court denied the law firm's motion for summary judgment dismissing the malpractice cause of action. We now modify to dismiss that part of plaintiffs' claim alleging that the law firm failed to provide appropriate legal advice, and to limit plaintiff's claim that the law firm did not perform the requisite due diligence before rendering its legal opinion on the securitization.

In the mid-1990s, plaintiff Nomura Asset Capital Corporation (Nomura) was an industry leader in originating and securitizing

commercial mortgage loans. Securitization is a process whereby a group of commercial mortgage loans are pooled together, sold to a special purpose entity, and transferred to a trust. Fractional interests in the pool of mortgages are then sold to investors in the form of securities, known as commercial mortgage backed securities (CMBS). As the mortgage loans are paid back, the investors receive their share of the principal and interest payments received from the borrowers.

Nomura typically securitized its commercial mortgage loans through REMIC trusts,[1] which enjoy certain federal income tax benefits (*see* 26 USC § 860D). In order to qualify as a REMIC trust, the pool of mortgages must satisfy a set of stringent tests. The Internal Revenue Code requires that substantially all of the assets in a REMIC trust be "qualified mortgages and permitted investments" (26 USC § 860D[a][4]). A "qualified mortgage," as relevant here, must be "principally secured by an interest in real property" (26 USC § 860G[a][3][A]). Treasury regulations provide that one way of meeting the "principally secured" requirement is if the "fair market value of the interest in real property securing" the mortgage loan is "at least equal to 80 percent of the adjusted issue price" of the loan, either on

[1] "REMIC" stands for "real estate mortgage investment conduit" (26 USC § 860D[a]).

the date the loan is originated or at the time the REMIC sponsor contributes it to the trust (26 CFR 1.860G-2[a][1][I], [a][5]).

Thus, to satisfy REMIC requirements, the fair market value of the real property must be at least 80% of the amount of the loan (the 80% test). For example, if the mortgage loan is $100,000, the real property securing the loan must be worth at least $80,000. The 80% test is expressed as an 80% value-to-loan ratio (VTL). Mortgage lenders typically use a loan-to-value ratio (LTV) in assessing whether to make a loan. An 80% VTL is equivalent to a 125% LTV. Thus, to meet the 80% test for REMIC purposes, the LTV must be 125% or less.

REMIC real property has a specific definition under the regulations, and consists of "land or improvements thereon, such as buildings or other inherently permanent structures thereon" (26 CFR 1.856-3[d]). The term includes "structural components of such buildings," such as wiring, plumbing, and central heating and air-conditioning machinery, but excludes items that are "accessory to the operation of a business," like machinery, office equipment, refrigerators, and furnishings (*id.*).

Nomura retained defendant Cadwalader, Wickersham & Taft LLP (Cadwalader), a leading law firm in the securitization field, to advise Nomura on the legal and tax aspects of its CMBS program. In addition to providing advice, Cadwalader acted as

securitization counsel for many of Nomura's securitizations, drafted the relevant documents, and rendered legal opinions. Among the Cadwalader lawyers advising Nomura and working on the securitizations were Anna Glick, a corporate partner, Charles Adelman, a tax partner, and Lisa Post-Gershon.

This litigation involves Nomura's Series 1997-D5 Securitization (the D5 Securitization), which consisted of a pool of 156 mortgage loans worth approximately $1.8 billion in the aggregate. Cadwalader drafted the securitization documents, including the Pooling and Servicing Agreement (PSA) and Mortgage Loan Purchase and Sale Agreement (MLPSA). The transaction closed on October 24, 1997 when, pursuant to those agreements, Nomura sold the loans to its subsidiary, plaintiff Asset Securitization Corporation (ASC) (collectively Nomura). ASC then transferred the mortgages into a trust (the D5 Trust), and securities representing interests in the trust were sold to investors. LaSalle Bank National Association (LaSalle) acted as the trustee.

The PSA and MLPSA contain various representations and warranties made for the benefit of the investors, two of which are relevant here. In the Qualified Mortgage Warranty, Nomura represented that each of the loans in the trust was a "qualified mortgage" for REMIC purposes. As noted earlier, a mortgage qualifies as REMIC-eligible if it satisfies the 80% test, i.e.,

if the loan is 80% secured by real property. In a separate warranty, the 80% Warranty, Nomura similarly represented that the real property securing each mortgage loan, as evidenced by a recent appraisal, had a fair market value of at least 80% of the principal amount of the loan at the time the mortgage was originated or included in the trust.

One of the largest mortgages in the D5 Securitization was a $50,000,000 loan made on August 28, 1997, and secured by Doctors Hospital of Hyde Park, an acute care facility in Chicago (the Doctors Hospital Loan). Prior to the loan's closing, Nomura hired an appraiser who valued the hospital at $68,000,000, using the income capitalization approach, which focuses on the income the asset will likely generate, and considers both tangible and intangible assets of a going concern, i.e., an operating business. The appraiser's $68,000,000 figure was allocated as follows: land valued at $3,000,000, building and improvements valued at $27,960,000, equipment valued at $9,640,000, and intangibles valued at $27,400,000. The appraiser also used the cost approach, which assesses the value of the land as vacant along with the depreciated replacement costs of the improvements and equipment. Under that methodology, the property was valued at $40,600,000 (comprised of the value of the land, building and improvements, and equipment, but not the intangibles).

The appraiser did not conduct a detailed inventory of the hospital's equipment, but based the equipment value on a typical figure for similar acute care hospitals. Because REMIC real property includes some, but not all, equipment, one cannot ascertain from the appraisal whether any of the $9,640,000 equipment value constitutes real property for REMIC purposes. Based on the face of the appraisal, the only certain REMIC real property is the land, building and improvements, which total $30,960,000. The loan here was $50,000,000, so to be REMIC-eligible it needed to be secured by 80% REMIC real property, or $40,000,000. Since the $30,960,000 figure is less than $40,000,000, it would not satisfy the REMIC 80% test. Even if one were to view all of the equipment as being REMIC-eligible, the resulting value, $40,600,000, would come perilously close to not being REMIC-eligible.

On October 24, 1997, the closing date for the D5 Securitization, Cadwalader, acting as securitization counsel, rendered an opinion stating, inter alia, that the D5 Trust was eligible for treatment as a REMIC trust for federal income tax purposes (the Opinion Letter). On that same date, Cadwalader also sent a letter to LaSalle and various rating agencies confirming that those entities could rely on its opinion that the trust was REMIC-qualified. In the Opinion Letter, Cadwalader

identifies the categories of documents it relied upon in rendering its opinion, including the PSA, the MLPSA, and the various prospectuses. The Opinion Letter also states that as to any material facts not known to Cadwalader, it relied upon statements and representations made by Nomura. It is undisputed that Cadwalader did not review the appraisal for the Doctors Hospital Loan before rendering its opinion.

In the spring of 2000, Doctors Hospital filed for bankruptcy, and the loan defaulted. On June 1, 2000, the Special Servicer of the securitization gave Nomura written notice that the Doctors Hospital Loan was not REMIC-qualified because it failed the 80% test, and demanded that Nomura repurchase the loan. The Special Servicer noted that the appraisal valued the real property at only $30,960,000, which was substantially less than the requisite $40,000,000.

When Nomura refused to repurchase the loan, LaSalle brought suit in federal court alleging that Nomura had breached the Qualified Mortgage Warranty and the 80% Warranty. The District Court granted summary judgment to Nomura and dismissed the action (*LaSalle Bank Natl. Assn. v Nomura Asset Capital Corp.*, 2004 WL 2072501, 2004 US Dist LEXIS 18599 [SD NY 2004]). On appeal, the Second Circuit modified, stating, inter alia, that issues of fact exist as to whether the Doctors Hospital Loan was secured by at

least 80% REMIC real property (424 F3d 195, 208 [2d Cir 2005]). In July 2006, before trial, Nomura settled the federal action for $67.5 million, and repurchased the loan.

Nomura commenced this action asserting that Cadwalader committed legal malpractice, which caused Nomura to settle the federal lawsuit. In the complaint, Nomura alleges that (i) Cadwalader failed to adequately advise Nomura about the applicable REMIC regulations (the advice claim); and (ii) Cadwalader failed to perform the necessary due diligence before issuing its Opinion Letter stating the trust was REMIC-qualified (the due diligence claim).[2] The motion court denied Cadwalader's motion for summary judgment, finding issues of fact as to whether the law firm's advice was deficient, whether the Opinion Letter was issued without sufficient due diligence, and whether Cadwalader's representation of Nomura in the D5 Securitization proximately caused Nomura damages. Cadwalader appeals, and we now modify to dismiss the advice claim and to limit the due diligence claim. Although we do not accept all of Nomura's arguments, we deny summary judgment on the due diligence claim, finding an issue of fact raised by a critical document focused on by the trial court.

[2] The complaint included several other claims of malpractice, all of which have been withdrawn or dismissed.

To sustain a cause of action for legal malpractice, a plaintiff must show "(1) that the attorney was negligent; (2) that such negligence was a proximate cause of [the] plaintiff's losses; and (3) proof of actual damages" (*Brooks v Lewin*, 21 AD3d 731, 734 [1st Dept 2005]), *lv denied* 6 NY3d 713 [2006]). To show negligence, the plaintiff must establish "that the attorney failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession" (*Dombrowski v Bulson*, 19 NY3d 347, 350 [2012] [internal quotation marks omitted]). To establish proximate cause, the plaintiff is required to demonstrate that "but for" the attorney's negligence, it "would have prevailed in the underlying matter or would not have sustained any ascertainable damages" (*Brooks v Lewin*, 21 AD3d at 734).

In the advice claim, Nomura alleges that Cadwalader did not advise it of a basic REMIC principle — that the appraisals of the collateral securing the mortgage loans had to separately value the real property, as that term is defined by the REMIC regulations. In its motion for summary judgment, Cadwalader submitted testimony of Charles Adelman and Anna Glick, two of the attorneys who worked on the D5 Securitization. Adelman testified that he advised Nomura that (i) loans in a REMIC-eligible trust must be secured by real property with a value of at least 80% of

the loan amount; (ii) real property for REMIC purposes includes land, buildings and permanent structures; (iii) only real property can be considered, and personal property does not count; and (iv) the REMIC 80% test is best proved by an independent third-party appraisal that should separately measure the real property components of the asset.[3] In that regard, Nomura was instructed that an appraisal of REMIC real property should exclude the going-concern value of an operating business. It is undisputed that this is a correct statement of the REMIC rules.

Glick testified that she and Adelman had numerous discussions with Nomura's securitization team about REMIC requirements. She submitted an affidavit stating that before the D5 Securitization closed, Cadwalader provided Nomura with "detailed advice" as to how to satisfy the 80% test. As part of that advice, Glick told Nomura to add together the value of what was plainly REMIC real property, such as land and structural improvements. If that sum amounted to at least 80% of the loan amount, the 80% test would be met. If not, Glick advised Nomura

[3] The dissent incorrectly states that the majority agrees that Cadwalader advised Nomura that it could include, as REMIC real property, the "intangible interests inextricably linked to the real property." Even Cadwalader on appeal does not argue that it provided that specific advice to Nomura, and the record contains no support for the dissent's conclusion that such advice was given.

that it should make further inquiries to determine whether the loan met the 80% test. Adelman also advised Nomura that it should consult with Cadwalader if it had any questions about a particular loan.

Perry Gershon, a former vice president of Nomura who was in charge of the D5 Securitization, confirmed that Cadwalader properly advised Nomura of the REMIC rules. He testified that prior to the D5 Securitization, Cadwalader told him, and he understood, that a REMIC loan needed to be secured by real property worth at least 80% of the loan, that real property includes land and buildings, but not personal property, and that the appraisals of the collateral securing the mortgage loans in the trust had to separately value the real property.

The testimony of Adelman, Glick and Gershon satisfied Cadwalader's prima facie burden on summary judgment showing that the allegedly missing advice was in fact given to Nomura (*see Stolmeier v Fields*, 280 AD2d 342, 343 [1st Dept 2001], *lv denied* 96 NY2d 714 [2001] [rejecting failure to advise claim where the client's own deposition testimony showed he was aware of the advice]). Contrary to the motion court's conclusion, we find nothing inconsistent in Gershon's testimony. Gershon's alleged inability to succinctly articulate the REMIC rules during his deposition, which took place more than 10 years after the advice

was given, does not refute his unrebutted testimony that Cadwalader advised him of the relevant rules at the time of the D5 Securitization. Nor does the fact that Gershon is married to one of the Cadwalader attorneys who worked on the transaction, standing alone, raise an issue of fact. At his deposition, Gershon made clear that his wife's employment at Cadwalader had no bearing on how he viewed the litigation. Nomura's current argument to the contrary would only be based on speculation. In any event, even if we were to discount Gershon's statements, the unchallenged testimony of Adelman and Glick shows that the proper REMIC advice was given.

Because Cadwalader met its prima facie burden on summary judgment, the burden shifted to Nomura "to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Nomura failed to satisfy that burden. It points to no documentary evidence directly refuting the testimony of Adelman, Glick and Gershon that the proper REMIC advice was given. Nor did any witness testify that Cadwalader specifically failed to advise Nomura that the appraisals for the D5 Securitization had to separately value the real property components of the asset in question.

Nomura relies on isolated sections of deposition testimony from some employees suggesting that they may not have been fully familiar with the REMIC rules. For example, Christopher Tokarski, a member of Nomura's securitization team, testified that he was unaware of the 80% test. He claimed to not know much about appraisals, or that appraisals could include a real property and a personal property component. Nomura points to no evidence, however, that Tokarski's alleged lack of understanding was attributable to anything Cadwalader said to Nomura.

Similarly, Barry Funt, Nomura's former general counsel, appears to have mistakenly believed that the REMIC regulations would always be satisfied if Nomura originated loans in accord with its own underwriting guidelines.[4] But Nomura does not contend on appeal that it requested Cadwalader to review or provide advice about its underwriting guidelines. Moreover, Funt testified that Anna Glick gave him a primer on REMIC rules, and does not challenge her testimony that she advised Nomura properly. Merely because a Nomura employee may have failed to

[4] Nomura's underwriting guidelines required an LTV ratio of less than 80%. Since, to be REMIC qualified, a loan must have an LTV ratio of less than 125%, complying with the underwriting guidelines would often result in loans satisfying the REMIC 80% test. However, that is not true in all cases because the value of a property for underwriting purposes may not be the same as the value of the property for REMIC purposes.

understand certain REMIC principles, does not, absent more, raise an issue of fact as to whether the advice was given in the first place. Funt's testimony, and that of the other Nomura employees, is insufficient to rebut Cadwalader's detailed showing that it advised Nomura of the REMIC rules. Thus, the motion court should have granted summary judgment dismissing the advice claim.

Nomura also alleges that Cadwalader committed malpractice by failing to conduct the necessary due diligence before rendering its opinion that the D5 Trust was REMIC-qualified. In particular, Nomura contends that Cadwalader should have reviewed the underlying appraisals for all of the properties included in the D5 Securitization, and independently confirmed that they were based on real property values that satisfied REMIC requirements. According to Nomura, a review of the appraisal for the Doctors Hospital Loan would have shown a real property valuation of only $30,960,000, approximately $10 million less than the $40 million needed to be REMIC-qualified.

Cadwalader maintains that it was not required to review all of the appraisals, and was instead entitled to rely on Nomura's representations in the securitization documents that the 80% test was satisfied. Perry Gershon testified that the scope of Cadwalader's duties did not include review of the appraisals, and that the REMIC opinion was to be based on information provided to

Cadwalader by Nomura. Gershon explained that Nomura did not ask or expect Cadwalader to review the appraisals, and he specifically told Cadwalader not to independently verify the accuracy of Nomura's representations unless specifically requested. Barry Funt confirmed that understanding, testifying that he never directed Cadwalader to review the appraisals, and did not expect Cadwalader to look at every one of them. Moreover, in light of Nomura's sophistication in the securitization field, and its knowledge of the REMIC rules, Cadwalader cannot be faulted for not undertaking a de novo review of all of the appraisals to determine REMIC-eligibility.

Cadwalader also submitted affidavits from experts in the CMBS and REMIC fields opining that Cadwalader followed the accepted practice of CMBS attorneys in relying on Nomura's representations and not reviewing all of the appraisals. For example, Michael Weinberger, a partner at Cleary Gottlieb Steen & Hamilton LLP who practices in the CMBS field, stated that customarily it is the role of the client, not securitization counsel, to examine the appraisals of the collateral securing the loans. James M. Peaslee, a REMIC expert at Cleary Gottlieb, agreed, stating that it is not standard practice for securitization counsel to look at appraisals absent a specific request from the client. Based on these opinions, along with the

fact that Nomura specifically requested Cadwalader not to review the appraisals, we conclude that Cadwalader had no generalized duty to review the underlying appraisals for all of the loans in the securitization.

The opinion rendered by Nomura's expert, Arthur Norman Field, does not raise an issue of fact as to whether Cadwalader should have reviewed all of the appraisals. Field opines on the general practice of rendering closing opinions, but has no expertise in REMIC issues. He has never practiced in the securitization or REMIC fields, has never advised a client on REMIC matters, and has never studied the standards governing tax attorneys with respect to REMIC opinions. Nor does Field sufficiently address one of the most critical facts here — that Nomura specifically instructed Cadwalader to not review the appraisals.

Although we reject Nomura's due diligence claim to the extent it asserts that Cadwalader had a generalized duty to review all of the appraisals, that does not end the inquiry. Adelman testified that reviewing an appraisal would be appropriate if Cadwalader received any information that would have caused it to question whether the loan satisfied the 80% test. James M. Peaslee, one of Cadwalader's experts, agreed, stating that securitization counsel should not simply rely on a

client's representations if it saw something inconsistent with them. Even the dissent concedes that if Cadwalader received information that would call into question the REMIC-eligibility of one of the loans, it had the duty to make further inquiry and raise the issue with Nomura. Thus, both Cadwalader and the dissent acknowledge that if "red flags" are raised about a client's representations, further inquiry would be warranted.

We cannot conclude as a matter of law that no such "red flags" were raised. On September 30, 1997, several weeks before Cadwalader issued its Opinion Letter, Nomura faxed Cadwalader a document describing the "Deal Highlights" of the Doctors Hospital Loan. The fax cover sheet indicates that the document was sent directly to Lisa Post-Gershon, one of the Cadwalader attorneys working on the transaction. The fax headers show that only a single 39-page document was transmitted. Thus, the document was sent alone, and was not part of some larger document production.

Viewing the evidence in the light most favorable to Nomura, we find that a jury could reasonably conclude that the "Deal Highlights" document, on its face, contains warning signs that the Doctors Hospital Loan may not have qualified for REMIC treatment. Although one section of the document shows an appraised value of $68,000,000, which, at first glance, suggests that the loan would be REMIC-eligible, the totality of the other

information contained therein raises questions as to whether the $68,000,000 figure constituted only REMIC real property.

On the very first page, the document describes the loan as being "secured by the land, building, and *operations* of the property known as Doctor's Hospital" (emphasis added). It also identifies the collateral as "[t]he land, building and property management (*operations*)" of the hospital (emphasis added). According to the advice given to Nomura by Cadwalader, real property for REMIC purposes includes land, buildings and permanent structures. Critically, Cadwalader also advised Nomura that, for REMIC purposes, it should exclude the going-concern value of an operating business. Thus, the fact that the loan was secured by "operations" could reasonably be viewed as an indication that Nomura had obtained an appraisal that included non-REMIC-qualified property. At the very least, the document made clear that Nomura's valuation figure was based on items other than land, buildings and structures.

That the $68,000,000 figure might include a substantial amount of non-REMIC-eligible property becomes clearer in subsequent pages of the "Deal Highlights" document. The section titled "Appraised Value" sets forth a $40,600,000 alternate valuation based on the cost approach, which focuses not on operations, but on the land, buildings and improvements, and

equipment. As noted by the motion court, this amount is dangerously close to the $40,000,000 needed for REMIC eligibility, and thus raises questions as to whether the loan should have been included in the securitization.

Indeed, Adelman conceded that he would typically inquire further if a valuation came close to REMIC-eligibility, and that his practice was to request the underlying appraisal if he believed further inquiry was required. It is undisputed that Cadwalader made no further inquiry and did not request the appraisal. The dissent ignores Adelman's testimony on this point, and provides no persuasive reason to support its conclusion that the $40,600,000 appraisal figure does not constitute a "red flag" as a matter of law. Instead, the dissent points to the alternate $68,000,000 valuation contained in the document to argue that no warning signs were present. But the dissent cannot escape the fact that the Deal Highlights document also contains the $40,600,000 figure, a potential "red flag" apparent from the face of the document itself.

The dissent argues that no unusual scrutiny needed to be given to the Doctors Hospital Loan because other loans in the securitization were also income-producing going-concern

businesses.[5] But a potential "red flag" exists not solely based on the going-concern status of the Doctors Hospital but because the Deal Highlights document indicates that the loan was secured, in part, by "operations," suggesting that some of the loan collateral was not REMIC-qualified. In any event, that the Doctors Hospital was partially secured by "operations" is not the only basis for our conclusion that further inquiry into the loan may have been warranted. Moreover, the dissent's focus on other loans in the securitization misses the mark. The question here is not, as the dissent frames it, whether the Doctors Hospital Loan was different from the other loans. Rather, the proper inquiry is whether Cadwalader has met its burden of establishing, as a matter of law, that the Deal Highlights document contained no "red flags" to suggest that the loan was not REMIC-qualified. We find that Cadwalader has not satisfied its burden.

[5] The dissent points to certain statements made by Nomura's REMIC expert about "occupied" and "unoccupied" properties, and "intangible elements" of property value that are "inextricably linked" to the real property, to support its conclusion that there was nothing unusual, based on the information Cadwalader received, about the Doctor's Hospital Loan. Although there is no dispute about what the expert said, we disagree that there was nothing unusual about this loan. The dissent fails to appreciate that the Deal Highlights document showed that Nomura's appraised value may have included non-REMIC real property and contained an alternate valuation that brought it perilously close to the REMIC threshold. It is this information that sets the Doctors Hospital Loan apart from the other loans in the securitization.

Relying on testimony from Anna Glick, the dissent excuses Cadwalader's inaction by suggesting that Nomura, which had in its possession the underlying appraisal, should itself have raised any potential REMIC issues with Cadwalader. The dissent's conclusion that Cadwalader should be allowed to escape liability due to "Nomura's own oversight" is inconsistent with the dissent's acknowledgment that Cadwalader could not ignore warning signs in the Deal Highlights document if it saw any. It also ignores the testimony of Cadwalader's lead partner Charles Adelman, and its expert James M. Peaslee, that a lawyer cannot blindly rely on a client's representations if the lawyer sees something inconsistent with them. By shifting the blame here to Nomura alone, the dissent, in effect, is proposing that a law firm that has a knowledgeable client should, as a matter of law, be excused from its document review obligations.

The dissent's recitation of Adelman's testimony is misleading. Although Adelman testified that no "red flag" was presented with respect to the Doctors Hospital Loan, he was not talking about the "Deal Highlights" document. In fact, Cadwalader points to no evidence that Adelman, or anyone at Cadwalader, even read the document. Despite having been given the opportunity by the motion court to specifically address the document, Cadwalader failed to submit an affidavit from Adelman,

or any of Cadwalader's lawyers. Thus, it is unknown whether Cadwalader read the document and overlooked the potential "red flags," interpreted all of the information therein to be consistent with the REMIC rules, or merely filed it away. Nor did Cadwalader, in its submissions to the motion court, address the fact that the document referenced the $40,600,000 cost-approach valuation that came dangerously close to the REMIC threshold.

If Cadwalader did not fully analyze the "Deal Highlights" document, there may be a reason for this decision. But the record before us sheds little light on the central question of what happened after the document was faxed to Cadwalader. In light of Cadwalader's role as securitization counsel, a jury might reasonably conclude that Cadwalader should have read a document separately sent by its client relating to one of the largest loans in the securitization, and then made a follow-up inquiry about the Doctors Hospital Loan.

Having no convincing response to the significance of the "Deal Highlights" document, the dissent resorts to chastising the majority for addressing the document at all. In the dissent's view, because Nomura's appellate brief did not discuss the

document at length, we should essentially ignore it.[6] The dissent overlooks the fact that, although not the primary focus of Nomura's brief, the "Deal Highlights" document was critical to the motion court's conclusion that issues of fact exist as to whether Cadwalader ignored "red flags." It is the role of this Court to address not only arguments made in appellate briefs, but also to review the conclusions and reasoning of the lower courts.

It is not surprising that Nomura did not rely solely on this document, because its main appellate argument, which we reject, was that Cadwalader had a duty to review all of the underlying appraisals, regardless of any "red flags." Although Nomura hoped to prevail on a broader theory, which could have made it much easier for them to prevail at trial, we uphold the due diligence claim on a more limited basis. The dissent fails to recognize that the majority is doing what courts routinely do on summary judgment motions — narrowing the issues for trial. The dissent apparently believes that because the majority rejects Nomura's claim that Cadwalader had a generalized duty to review all of the appraisals, we should ignore altogether the portion of the motion

[6] The dissent places undue emphasis on the extent to which the "Deal Highlights" document was mentioned by the parties at oral argument. In any event, there can be no dispute that the document was the subject of questioning by the bench. Moreover, given the inevitable time constraints, no conclusion can or should be drawn from what is covered in oral argument.

court's decision that addressed the "Deal Highlights" document. Ultimately, it is for the trier of fact, not this Court, to decide whether Cadwalader met its duty of care upon receipt of the document, taking into account the potential problems it showed and the overall expertise of the client.

Cadwalader's reliance on the Opinion Letter to escape all liability is unavailing. The letter states that Cadwalader was relying on Nomura's representations as to "facts material to [the opinion that] were not known to [Cadwalader]." It further makes clear that Cadwalader's "knowledge" means "actual awareness . . . of . . . information by any lawyer in our firm actively involved in the [D5 Securitization]." Since there are questions of fact as to the circumstances under which Cadwalader received the "Deal Highlights" document, and what Cadwalader knew about the Doctors Hospital valuation, it cannot be said as a matter of law that the disclaimers in the Opinion Letter insulate Cadwalader from the malpractice alleged.[7]

Finally, Cadwalader argues that Nomura cannot establish

[7] Cadwalader unpersuasively argues that the due diligence claim should be dismissed on standing grounds because the Opinion Letter was not addressed to Nomura. The Opinion Letter was issued on behalf of Nomura, who was Cadwalader's client at the time. Furthermore, Nomura alleges that it suffered injury as a result of the lack of Cadwalader's due diligence before rendering the opinion.

proximate cause because the Doctors Hospital Loan was in fact REMIC-qualified. Cadwalader contends that the loan was secured by the requisite 80% REMIC real property, and that Nomura made formal judicial admissions of that alleged fact in the federal action. These contentions lack merit. In the appraisal obtained before the securitization closed, the only readily apparent REMIC real property amounts to only $30,960,000, which is plainly less than the required $40,000,000. Although a subsequent appraisal obtained after the deal closed indicates that the loan was REMIC-qualified, that merely presents a question of fact for a jury.

There is no merit to Cadwalader's contention that Nomura made formal judicial admissions that the loan qualified for REMIC treatment. Cadwalader points to only two alleged admissions made in the federal action. First, during an oral argument, Nomura's counsel stated that the appraisal evidences that the loan was secured by sufficient REMIC real property. Second, a point heading in one of Nomura's memoranda of law states that the fair market value of the interest in real property with respect to the Doctors Hospital Loan was at least 80% of the amount of the loan. These statements constitute, at most, informal judicial admissions that provide some evidence of the facts admitted, but that are not conclusively binding on Nomura (*see Baje Realty Corp. v Cutler*, 32 AD3d 307, 310 [1st Dept 2006]). They lack the

formality required to constitute formal judicial admissions (*see GJF Constr., Inc. v Sirius Am. Ins. Co.*, 89 AD3d 622, 626 [1st Dept 2011] [concurrence by Richter, J.]). We have considered Cadwalader's remaining arguments on causation and find them unavailing.

In concluding that the malpractice cause of action against Cadwalader should be dismissed in its entirety, the dissent misperceives that the majority is reaching out to create an issue of fact. We emphatically reject this contention, and it does not become true simply because the dissent continually repeats it. As noted, the motion court, in its decision, addressed the significance of the Deal Highlights document in denying Cadwalader's motion for summary judgment. In light of the motion court's reliance upon this critical document, it is disingenuous for the dissent to accuse the majority of creating fact issues for trial. In upholding Nomura's malpractice claim on a narrow basis, we fully adhere to our role of "issue-finding, rather than issue-determination" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505 [2012] [internal quotation marks omitted]).

Accordingly, the order of the Supreme Court, New York County (Melvin L. Schweitzer, J.), entered on or about January 13, 2012, which denied defendant's motion for summary judgment dismissing the first cause of action, should be modified, on the law, to

grant the motion with respect to that part of the cause of action alleging that defendant failed to properly advise plaintiffs, and otherwise affirmed, without costs.

All concur except Friedman, J.P. who dissents in part in an Opinion:

FRIEDMAN, J.P. (dissenting in part)

The majority opinion is something of an anomaly. Although it affirms the denial of the motion by the defendant law firm, Cadwalader, Wickersham & Taft, LLP (Cadwalader), for summary judgment dismissing a cause of action for malpractice, the majority rejects — correctly, in my view — each of the appellate arguments made by Cadwalader's former clients, plaintiffs Nomura Asset Capital Corporation and an affiliated entity (collectively, Nomura), for the existence of a triable issue as to whether Cadwalader committed malpractice in advising Nomura on the subject transaction, a securitization of 156 commercial loans that closed in 1997. Thus, the majority explains in detail the record facts that lead it to conclude, as a matter of law, that Cadwalader provided Nomura with proper legal advice and (by Nomura's own choice) was not generally responsible for conducting due diligence for the transaction. Nonetheless, the majority finds that the matter must be sent to trial based solely on one document setting forth the "Deal Highlights" of one of the 156 securitized loans — a document that Nomura did not include among the more than 1,200 exhibits it submitted with its original opposition to the summary judgment motion, that Nomura did not show to either of the two experts it retained to opine on the applicable standard of care (whose respective reports therefore

do not refer to it), that Nomura barely touched upon in its appellate brief, and that neither side mentioned at its own instance at oral argument before us.[1]

I cannot fault the parties for having failed to anticipate the epochal significance with which the majority invests the Deal Highlights document. As more fully discussed below, that document has nothing in it to indicate that the loan with which it deals was more likely to be inappropriate, under the applicable body of law, for inclusion in the securitization than any of the other 155 loans with which it was being securitized. While there is indeed a document in the record that arguably should have alerted an attentive professional to the possible

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[1]The Deal Highlights document is part of the record only because the motion court, having seen it briefly discussed in the transcript of the deposition of one fact witness, asked the parties to submit a copy of it while the summary judgment motion was sub judice. Thus, in their original submissions on the motion, neither side thought the Deal Highlights document — to which the majority ascribes outcome-determinative significance — to be of sufficient importance to warrant inclusion in the record. While it is true, as the majority states, that the Deal Highlights document was "the subject of questioning by the bench" at the argument of this appeal, the fact is that this "questioning" consisted of only one question that made reference to the document, and counsel — understandably, in a case involving such an extensive record — answered the question under the misapprehension that the justice was referring to a different document, namely, the prospectus for the securitization. This misunderstanding — which, regrettably, was not corrected — again highlights that the parties themselves have attached no significance to the document.

existence of a problem with the loan, that document — an appraisal of the property securing the loan — was not provided to Cadwalader before the securitization closed because Nomura had not retained Cadwalader to review appraisals of the properties that secured the loans.[2] In my view, therefore, Cadwalader is entitled to summary judgment dismissing Nomura's legal malpractice claim in its entirety.

According to the majority, the Deal Highlights document, which Nomura faxed to Cadwalader about three weeks before the closing, was a "red flag" that should have alerted Cadwalader to the possibility that the loan it described (hereinafter, the Doctor's Hospital loan) might disqualify the securitization for favorable tax treatment as a Real Estate Mortgage Investment Conduit (REMIC). In summary, to qualify for inclusion in a REMIC securitization under federal tax law, the $50 million Doctor's Hospital loan (which had been made to an operating acute-care hospital of that name) was required to be secured by real property with a value of at least $40 million when all elements

[2]The former Nomura executive who had been in charge of the subject securitization, Perry Gershon, was asked the following question at his deposition in this matter: "Nomura did not ask, expect or want Cadwalader to review the appraisals underlying the property securing the loans in the [securitization]; correct?" To this question, Gershon responded: "Correct." As the majority correctly holds, Cadwalader had no general obligation to conduct due diligence that its client did not want it to perform.

of personal property were excluded from the appraisal, so that the ratio of the value of the secured real property to the value of the loan (the VTL ratio) would be at least 80%. The majority reasons that the Deal Highlights document was a red flag because, although it stated that the value of the hospital securing the loan was $68 million (a figure that would yield a VTL ratio of 136%, far more than the required 80 %), the document also stated that the valued loan collateral included, in addition to the land and building, the hospital's operations as a going concern, with no breakout of the value of the real property alone.

If I agreed with the majority that, on this record, the information in the Deal Highlights document could reasonably be found to constitute a "red flag" that should have prompted Cadwalader to make further inquiry, I would join in affirming the denial of summary judgment. After all, even while they took the position (with which the majority agrees) that Cadwalader was not responsible for conducting due diligence, Cadwalader's expert witnesses and its senior REMIC partner, Charles Adelman, Esq., agreed in their testimony that it would have been appropriate for the firm to raise an issue with Nomura if any information came to Cadwalader's attention that reasonably put in question the qualification of any of the loans for REMIC treatment. Nothing in the record, however, supports the majority's conclusion — a

conclusion that Nomura itself has not asked us to draw — that the Deal Highlights document, merely because it stated that the appraisal included the hospital's value as a going concern, should have alerted Cadwalader to a potential problem with the loan, given that Cadwalader had already properly advised the client about the REMIC rules (as determined by the majority). To reiterate, if there was any red flag in this case, it was a document that Nomura, but not Cadwalader, had in its possession when the securitization closed, namely, the August 1997 appraisal of the hospital, which had been prepared as the basis for the underwriting of the Doctor's Hospital loan.[3]

At this point, it is useful to recapitulate what the record establishes, as the majority and I for the most part agree, about the advice Cadwalader gave Nomura about the REMIC rules. Cadwalader properly advised Nomura: (1) that, for the securitization to qualify for REMIC tax treatment, each loan was required to have a VTL ratio of at least 80%; and (2) that, in determining a loan's VTL ratio, only the value of the mortgaged real property itself (meaning the land, its structural improvements and intangible interests inextricably linked to the real property) could be considered, while the value of any

[3]Cadwalader did not represent Nomura in the origination of the Doctor's Hospital loan.

personal property (tangible or intangible) deemed by the Internal Revenue Service to be separable from the real property had to be excluded.[4] In view of the complexity of determining which intangible interests and physical personal property could be included in the real-property value figure, Cadwalader advised Nomura to ascertain, at the outset, a value for assets that were "plainly real property (such as land and structural improvements, or 'sticks and bricks')" and then to "inquire further" if those items alone did not meet the REMIC 80% threshold.[5]

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[4]Nomura's REMIC expert, Thomas J. Biafore, Esq., agreed that intangible interests "inextricably linked" to the real property could be included in the value of the real property for REMIC purposes, so this point is uncontroverted. Whether or not the majority wishes to acknowledge the point that some intangible interests may be included in a real property valuation for REMIC purposes is irrelevant, as even Nomura's REMIC expert agrees that this is the case. Moreover, the majority mischaracterizes my position on the advice Cadwalader gave Nomura about how to choose loans for a REMIC, as established by the record. As described in the sentences in the text immediately following this footnote, and in footnote 5, the record establishes that Cadwalader advised Nomura that ("to be prudent," as stated in Cadwalader's letter to the motion court addressing the Deal Highlights document) it should exclude personal property and intangible interests of any kind (whether or not "inextricably linked" to real estate) from the valuation of mortgaged real property in conducting its own due diligence on loans being considered for REMIC securitization. As discussed more fully below, the record establishes that Nomura failed to do this in the case of the Doctor's Hospital loan and, before the closing, Cadwalader had no information in its possession to indicate that such a failure had occurred.

[5]Cadwalader partner Ann Glick states in her affidavit:

"Prior to the [securitization's] closing, Cadwalader

It is undisputed that Nomura, having been advised as described above, did not raise any question with Cadwalader about the Doctor's Hospital loan's REMIC eligibility while the securitization was being put together. Rather, Nomura provided Cadwalader with the bottom-line, $68 million income-based valuation the appraiser had placed on the hospital, a figure that appeared in a table of financial data on each loan that was to be appended as a supplement to the securitization prospectus, as well as in the Deal Highlights document. The $68 million valuation was not broken down into different components in the prospectus supplement (just as it was not in the Deal Highlights document), but this was no different than the information provided to Cadwalader for any of the other loans. In each case, Cadwalader was given a bottom-line valuation figure for the property securing the loan.

> provided detailed advice to Nomura regarding how to satisfy the 80% Test. As part of that advice, a rule of thumb communicated by Cadwalader to Nomura was that the value of what was plainly real property (such as land and structural improvements, or 'sticks and bricks'), should be added up by Nomura to see if it amounted to at least 80% of the loan amount. If those items alone satisfied the 80% Test (and they usually did), then the 80% Test would be satisfied. If not, then Nomura needed to inquire further to determine whether the loan met the 80% Test."

Ms. Glick's testimony on this point, which she reiterated at her deposition, is uncontroverted.

Further, that Doctor's Hospital was an operating, income-producing business did not serve to distinguish it from the properties securing any of the other loans. Contrary to the majority's unfounded implication that the other loans may have been secured by property that did not produce income (such as raw land, empty buildings or owner-occupied homes), Mr. Adelman, Cadwalader's senior REMIC partner, testified without contradiction that loans included in REMICs are invariably secured by income-producing properties:

> "All of the loans in a REMIC, to one degree or another, are income generating properties. They all are. There is no raw land in a REMIC. So, to that extent, one commercial property is much like another in terms of its analysis, in terms of its cash flow, its debt service coverage."

Thus, there is no warrant for the portentous significance the majority ascribes to the statement in the Deal Highlights document that the loan collateral included the hospital's "land, building and operations"; the same was true of every other loan in the securitization. Stated otherwise, while it is true that the inclusion of "operations" in the collateral of the Doctor's Hospital loan meant that less than 100% of the mortgaged property's value constituted REMIC-qualified real estate, the same could be said of every one of the 156 loans.

To understand why each of the loans in the securitization

was secured by property that included both REMIC-qualified and non-REMIC-qualified elements of value, it should be borne in mind that, as acknowledged by Mr. Biafore, Nomura's REMIC expert, an occupied (or "stabilized") property will have a higher value than it would if it were unoccupied (or "dark"). Hence, the value of a stabilized property (which all of the relevant properties were) necessarily includes intangible elements of going-concern value. As previously discussed, those intangible elements of value are includable in the value of the real property for REMIC purposes only to the extent they are "inextricably linked" to the real property. Thus, in the case of *any* mortgaged stabilized property, "some of the loan collateral [will] not [be] REMIC-qualified," to paraphrase language used by the majority. The question is always whether enough of the value is REMIC-qualified to reach the required 80% VTL ratio. Based on the information Nomura provided to Cadwalader, there was nothing unusual about Doctor's Hospital in this regard.

I reject the majority's assertion that I "fail[] to appreciate" the significance of the Deal Highlights document's supposed revelation that the hospital's appraised value "may have included non-REMIC real property." To reiterate, since each of the 156 loans was secured by an occupied, income-producing property, the appraised value of each of those properties — not

Doctor's Hospital alone — included elements of value that were not REMIC-qualified. Thus, the majority is simply incorrect in stating that this issue somehow "sets the Doctor's Hospital Loan apart from the other loans in the securitization."[6]

In glibly stating that "[t]he question here is not . . . whether the Doctor's Hospital Loan was different from the other loans," the majority elides the question that emphatically is the subject of this appeal. To reiterate, that question is whether, on this record, Cadwalader had any information about the Doctor's Hospital loan that placed its REMIC-qualification in question to a greater degree than any of the other 155 loans. If not, the implication of the majority's position is — in spite of the portions of its opinion that appear to indicate otherwise — that Cadwalader was obligated to conduct due diligence concerning the REMIC-qualification of each of the 156 loans, notwithstanding Nomura's decision not to retain the law firm for that purpose.

Mr. Adelman also testified that he reviewed the property valuations that Nomura had provided to him to satisfy himself

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[6]As to the "alternate valuation" of Doctor's Hospital set forth in the Deal Highlights document, while I address that point more fully at a later point in this opinion, here it will suffice to say that, as reflected in the Deal Highlights document, Nomura's appraiser concluded that the appropriate appraisal methodology was the one that yielded a value of $68 million, which was far from "perilously close" to the $40 million figure required for REMIC purposes.

that none of the loans raised an apparent REMIC problem. While he acknowledged that the valuation figures provided to him were not broken down into real-property and non-real-property elements, Mr. Adelman stated that, based on his experience, he made a judgment as to whether each total valuation figure was likely to include sufficient REMIC-qualified real property to meet the 80% threshold. He testified that, in his experience, it would have been extremely unlikely for real property to account for less than $40 million of the $68 million total valuation the appraiser had placed on Doctor's Hospital.[7] Mr. Adelman testified that, based on his assessment of the high likelihood that the appraised value of the hospital included at least $40 million of real property value, and in view of his knowledge that Nomura, which had chosen to do its own due diligence for this transaction, had been properly advised of the REMIC requirements, he thought it unnecessary to inquire further about the Doctor's Hospital.[8] Notably, when the motion court

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[7]Again, the hospital's real property value had to be at least $40 million to comply with the REMIC requirement that the value of the mortgaged real property be at least 80% of the value of the $50 million loan.

[8]Mr. Adelman testified as follows:

> "I formed a judgment that a loan [*sic*] was valued at $68 million. Even in my experience and judgment, even if it consisted of a significant part of some

invited Cadwalader to comment on the Deal Highlights document, defense counsel submitted a letter drawing attention to this testimony by Mr. Adelman, as well as to the aforementioned testimony by Ms. Glick, among other evidence, to establish that nothing in the document gave Cadwalader any reason to question Nomura's representation that the Doctor's Hospital loan met the threshold 80% VTL ratio. Neither Nomura nor the majority points to any contrary testimony in the record.[9]

> personal property as well as real property, that it was — would not have been consistent with high [*sic*] experience that the real property portion was less than $40 million or putting it another way, it was not apparent on its face that someone, anyone who was involved in the valuation process, in the due diligence process or at Nomura did not do their job.
>
> "No red flag was raised that this loan might have had an unusual amount of personal property, so that no red flag raised that caused me to inquire further."
>
> Shortly thereafter, he further testified:
>
> "It was my judgment that the ratio between personal property and real property on a loan of $50 million supported by an aggregate valuation of [$]68 million would have been. It would have been highly unusual for it to have resulted in a real property value of less than $40 million for a going business in a particular building and location."

[9]While it is true, as the majority states, that "it is unknown whether Cadwalader read the [Deal Highlights] document" or, if anyone at the firm did read the document, how that person interpreted it, I fail to see why this makes any difference to the outcome of this appeal. Neither do I see why the majority considers it significant that Cadwalader did not submit an

What Cadwalader did not, but Nomura did, have in its possession at the time of the securitization, was the actual August 1997 appraisal of Doctor's Hospital that had served as the basis for the underwriting of the loan. That appraisal, unlike the Deal Highlights document, breaks down the $68 million valuation figure into the following components:

"Allocation of Value

Land	$ 3,000,000
Building and Site Improvements	27,960,000
Equipment	9,640,000
Intangibles	27,400,000
Total	$68,000,000"

On its face, this appraisal values the "sticks and bricks" to which Ms. Glick referred at only $30,960,000. According to Ms. Glick's uncontradicted testimony, because this figure was less than 80% of the loan value, it should have prompted Nomura, based

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affidavit from one of its attorneys concerning what the firm did with the document after receiving it. Since it is undisputed that Cadwalader received the document about three weeks before the closing, if there really were a red flag in the document, Cadwalader could not defend itself on the ground that nobody in the office actually read it. My view, however, is that the document contained no red flag, as a matter of law. Again, I find it remarkable that the majority apparently sees nothing odd in the fact that the able counsel for each side, in the extensive discovery that has been conducted in this action, did not expend more effort to ascertain what Cadwalader did with the Deal Highlights document after receiving it. It appears that the majority perceives a significance in this document that has been invisible to the parties and their counsel up to this point in the litigation.

on the advice Cadwalader had given it (as found by the majority), to ask Cadwalader to undertake a further analysis to determine whether the Doctor's Hospital loan qualified for inclusion in a REMIC securitization.[10] Arguably, if this appraisal had been in Cadwalader's possession at the time of the securitization, there would be a triable issue of fact as to whether the applicable standard of care required Cadwalader to make further inquiry to determine whether the Doctor's Hospital loan in fact had a REMIC-qualifying VTL ratio. It is undisputed, however, that Nomura never gave anyone at Cadwalader a copy of the appraisal up to the time of the closing, and nothing in the record supports an inference that the firm had any reason to ask to see the appraisal. Nonetheless, the majority decides this appeal as if Cadwalader had the appraisal in hand when the securitization

[10]That the appraisal valued the land and building, by themselves, at less than $40 million does not necessarily mean that the loan was not REMIC-qualified. As previously discussed, intangible values "inextricably intertwined" with the real property, and equipment that would be deemed to qualify as fixtures under the REMIC rules, would be included in the value of the real property for purposes of determining whether the requisite 80% VTL ratio was satisfied. Indeed, Nomura argued in subsequent litigation that a sufficient amount of the value the appraiser attributed to "Equipment" and "Intangibles" could be allocated to real property to reach the 80% VTL ratio threshold. However, the extent to which the intangibles and equipment included in Doctor's Hospital's valuation were classifiable as real property for REMIC purposes could not be determined from the face of the appraisal upon which the loan was underwritten.

closed.

The majority fails to come to grips with the lack of any information in the Deal Highlights document that might have materially distinguished the Doctor's Hospital loan from the other loans being packaged in the securitization. As previously stated, each of the 156 loans was secured by a property that was the site of an income-producing, going-concern business; and, in any event, Cadwalader was aware of the general nature of the Doctor's Hospital property independent of the Deal Highlights document. Contrary to the majority's assertion that it is somehow "misleading" for me to rely on Mr. Adelman's testimony about the absence of any "red flag" because "he was not talking about the 'Deal Highlights' document," I make no implication that the quoted testimony refers to that document (which apparently was not shown to the witness). Mr. Adelman's uncontradicted testimony is nonetheless fatal to Nomura's claim, however, because what the witness was discussing is the very same information that the majority finds so damning when set forth in the Deal Highlights document — that the property securing the loan was an operating, income-producing hospital, the going-concern value of which was part of the security for the loan. Mr. Adelman, whether or not he or anyone else at Cadwalader read the Deal Highlights document, was well aware of this information,

and, as previously discussed, he explained, under oath, why it did not constitute a red flag. This explanation is not contradicted anywhere in the record.[11]

Notably, Nomura's theory, as articulated by its REMIC expert, Mr. Biafore, and its expert on the standard of care for the preparation of legal opinion letters, Arthur Norman Field, Esq. (neither of whom ever saw the Deal Highlights document), is that Cadwalader was obligated to review the appraisal report for the property securing each loan (although Nomura had instructed it not to do so) and would have been alerted to a problem with the Doctor's Hospital loan from the appraisal of that property. While the Doctor's Hospital appraisal report, unlike the Deal Highlights document, contained a breakdown of the bottom-line $68 million valuation figure into its different elements — and I agree that the appraisal's valuation breakdown arguably would have constituted the proverbial "red flag," given that it

[11]It is true, as the majority notes that Mr. Adelman and one of Cadwalader's legal experts conceded, that "a lawyer cannot blindly rely on a client's representations if the lawyer sees something inconsistent with them." The majority fails, however, to identify anything in the information Nomura provided to Cadwalader before the closing of the securitization that was inconsistent with Nomura's representation that the Doctor's Hospital loan met the 80% REMIC threshold. As more fully discussed below, an alternative valuation of the property referenced in the Deal Highlights document does not change this conclusion.

attributed only $30.96 million of the property's value to elements that plainly qualified as real property for REMIC purposes — Nomura chose not to provide the appraisal report to Cadwalader. To reiterate, the majority specifically rejects Nomura's theory that Cadwalader, notwithstanding Nomura's exclusion of due diligence from the scope of its retention, was obligated to review each appraisal report even in the absence of any indication of a potential problem with a particular loan. As previously discussed, none of the information about Doctor's Hospital that Nomura provided to Cadwalader, including the information set forth in the Deal Highlights document, gave an indication of a possible REMIC problem with the Doctor's Hospital loan.

The majority also fails to come to grips with Ms. Glick's uncontradicted testimony that she advised Nomura to alert Cadwalader if the stand-alone value of the land and building ("sticks and bricks") of the property securing any loan did not equal at least 80% of the amount of the loan. This advice, combined with the breakdown of the valuation of Doctor's Hospital in the appraisal report (which valued the land, building and site improvements at only $30.96 million) — a valuation breakdown that Cadwalader never saw before the closing, because Nomura chose not to provide it with the appraisal report — should have prompted

Nomura to bring the loan to Cadwalader's attention and to ask it to undertake further analysis to determine whether the loan was, in fact, suitable for inclusion in a REMIC. Given that Nomura, for reasons of its own, chose not to have Cadwalader conduct general due diligence, Nomura should not be permitted to hold Cadwalader liable for what was Nomura's own oversight, in spite of its having received advice sufficient to allow it to spot the issue when conducting its own due diligence.

The majority asserts that my view that Nomura should not be allowed to hold Cadwalader liable for Nomura's own oversight is "inconsistent with the dissent's acknowledgment that Cadwalader could not ignore warning signs in the Deal Highlights document if it saw any." There is no inconsistency in my views. Again, the majority is ignoring the fact that Nomura's oversight was in overlooking a "warning sign[]" — the breakdown of the valuation into its different elements — that was present in the appraisal report, which Nomura chose not to provide to Cadwalader, but was *not* present in the Deal Highlights document or any other document with which Cadwalader had been provided. And, to reiterate, Ms. Glick's uncontradicted testimony establishes that Cadwalader's advice to Nomura should have sufficed to enable the sophisticated finance professionals at Nomura to perceive the "warning sign[]" in the appraisal report. In sum, Nomura, having been duly

advised by Cadwalader of what to look for in choosing loans for inclusion in the securitization, chose to perform its own due diligence. This being the case, Nomura should not be allowed to recover from Cadwalader for a loss that was caused by Nomura's own negligence in performing that due diligence — negligence that consisted in overlooking a warning sign in a document that Nomura had chosen not to provide to Cadwalader.

The majority makes much of the fact that the Deal Highlights document mentioned that one of two alternative methodologies for appraising Doctor's Hospital, the cost approach, yielded a value of $40.6 million, which was just above the $40 million figure the value of the real estate had to reach to satisfy the 80% REMIC threshold.[12] However, the Deal Highlights document stated that the ultimate "appraised value" of Doctor's Hospital was the $68 million figure yielded by the capitalized income approach, reflecting the professional appraiser's conclusion that the income approach, rather than either of the two alternatives, was the appropriate methodology.[13] This was consistent with the

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[12]Although not mentioned by the majority, the Deal Highlights document states that the other alternative appraisal methodology, the comparable sales approach, yielded a value figure of $64 million.

[13]The appraisal report explains that, under the cost approach, "property is valued based upon the market value of the land, as vacant, to which the depreciated replacement cost of the

uncontradicted testimony of Mr. Gershon, the former Nomura executive who supervised the securitization, to the effect that "[i]t is the income approach as opposed to the cost approach that's generally indicative of the value of an asset, particularly for REMIC purposes." Notably, Mr. Biafore, Nomura's REMIC expert, quoted this testimony in his affidavit, and did not express any disagreement with it. Further, as previously discussed, Mr. Adelman explained that, in his judgment, there was no need for further inquiry about the Doctor's Hospital loan because, in his experience, there was a very high likelihood that a $68 million appraisal figure for a property would include at least $40 million of real property value within the meaning of REMIC.

The majority accuses me of "ignor[ing]" Mr. Adelman's testimony that it was his practice to make further inquiry if the valuation figure given to him by a client came close to the 80% minimum VTL ratio required by the REMIC rules. While I of course acknowledge this testimony, it does not change the fact that the operative valuation figure for Doctor's Hospital that Nomura provided to Cadwalader — based on the advice of the professional appraiser Nomura had retained — was $68 million, far above the

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improvements and equipment is added."

minimum $40 million real-estate valuation that was needed for REMIC purposes. The majority identifies nothing in the record to put in question the view of Nomura's appraiser that the relevant appraisal methodology was the income approach that yielded the $68 million valuation. Again, even Nomura's REMIC expert raised no objection to this view when he quoted Mr. Gershon's testimony expressing it. Indeed, not even Nomura itself, when asked by the motion court to address the Deal Highlights document, made any argument that the alternative $40.6 million "cost" valuation rejected by the appraiser was a "red flag" indicating a potential REMIC problem.

The weight that the majority places on the Deal Highlights document is odd when one considers that Nomura itself thought that document worth only two fleeting references in its appellate brief. The majority's vastly understated concession that the Deal Highlights document was not "the primary focus of Nomura's brief" cannot hide the fact that this document — which, to reiterate, neither side mentioned at its own instance at oral argument on appeal, which was only made part of the record at the motion court's request, and which Nomura did not show to its expert witnesses — was not any kind of focus of Nomura's arguments, primary or otherwise, either here or before the motion

court.[14] Plainly, Nomura's brief does not suggest the majority's apparent view that the Deal Highlights documents is the one piece of evidence in this extensive record on which the outcome of the appeal should hinge. Rather, Nomura argued that Cadwalader failed to give it proper advice about the REMIC rules and that it was Cadwalader's job to conduct due diligence to confirm that each securitized loan had a REMIC-qualifying VTL ratio — arguments that the majority expressly rejects, and with good reason. Although the majority asserts that "Nomura did not rely solely on th[e] [Deal Highlights] document," it is closer to the truth to say that Nomura did not rely on this document at all, and certainly did not point to it as the "red flag" perceived by the majority.[15] Moreover, the majority overstates the importance

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[14]The first reference to this document in Nomura's brief is a record citation in the facts section offered as partial support for the statement that Nomura sent Cadwalader "detailed information about the characteristics of each loan." The brief's second reference to the document is in a brief quotation from the motion court's decision. Given that Nomura's respondents' brief barely touches on the Deal Highlights document, Cadwalader can hardly be faulted for not referring to that document in its reply brief.

[15]In the brief letter it submitted in response to the motion court's inquiry regarding the Deal Highlights document, Nomura nowhere referred to that document as a red flag. Rather, Nomura asserted that the Deal Highlights document (1) "highlights the fact that Cadwalader was well aware that the D5 Securitization included a loan secured by a free standing acute care hospital" and (2) "further demonstrates that none of the other advisors retained by [Nomura] . . . addressed the REMIC regulations and/or

of the Deal Highlights document to the motion court's decision. That document was not the linchpin of the motion court's denial of Cadwalader's summary judgment motion, as it is of the majority's decision. There is no indication in the motion court's decision that it would have reached a different result had Cadwalader not been provided with the Deal Highlights document, nor did the motion court — or, for that matter, Nomura's eminent counsel — describe it as "critical," as the majority does.

The majority's grounding of its decision on the Deal Highlights document, after rejecting all of Nomura's arguments on the issue of whether malpractice occurred, no doubt comes as a surprise to both parties. That Nomura relied primarily on a "broader theory" did not preclude it from making a secondary argument that Cadwalader's liability could be predicated on its receipt of the Deal Highlights document. It is of course true that a skilled advocate, rather than making every conceivable argument in support of the client's position, generally strives

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whether the [Doctor's Hospital loan] was 80% secured by real property within the meaning of those regulations." As to the first point, Cadwalader does not claim to have been unaware that Doctor's Hospital was "a free standing acute care hospital." As to the second point, Cadwalader does not argue that it should have been granted summary judgment on the ground that Nomura should have looked to other advisors for advice on the Doctor's Hospital loan's compliance with REMIC regulations.

to focus the court's attention on the client's strongest arguments. This only makes it more surprising that the majority decides the appeal based on an argument that Nomura's counsel apparently found not worth making to us, even as a backup. In deciding the appeal on this ground, the majority is not merely "narrowing the issues for trial" (as it claims), but is itself creating, and treating as the sole ground for disposition (unlike the motion court), a new issue that neither of the parties has raised.[16]

If the Deal Highlights document could reasonably be viewed as a "red flag" that should have prompted further inquiry by Cadwalader, I would concur in the majority's determination, notwithstanding that the parties and their able counsel apparently overlooked this document's significance. I cannot

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[16]While the majority takes umbrage at my statement that it has created the issue on which it is deciding the appeal, I think that this is a fair characterization, given the scant attention paid to the Deal Highlights document in Nomura's appellate brief, and given that, at oral argument, (1) the document was referenced in only one question from the bench, (2) that reference was misunderstood by the attorney to whom it was addressed (Cadwalader's counsel), and (3) Nomura's counsel did not subsequently make use of, or even mention, the document in her argument. I agree that is impossible to cover exhaustively every facet of a case as complex as this one at oral argument, but the majority's giving outcome-determinative effect to a single document that was not even mentioned in either side's presentation — even after a justice referred to it in a question — is, to say the least, unusual in the extreme.

see, however, that counsel for either side made any mistake in placing little or no weight on the Deal Highlights document, which, so far as can be determined from this extensive record, did not contain any information that would have materially distinguished the Doctor's Hospital loan from the other 155 loans involved in the securitization. If Cadwalader was obligated to make further inquiry about Doctor's Hospital based only on the knowledge that the hospital was a going concern and that the law firm had not been given a breakdown of the appraised value into real-estate and non-real-estate elements, Cadwalader would have been obligated to make further inquiry about every one of the 156 loans — essentially, to conduct the due diligence for which its highly sophisticated investment-banking client had deliberately declined to engage it. It is troubling that the majority's decision requires a law firm to stand trial for malpractice in failing to perform a function for which, as is undisputed, its highly sophisticated client, in order to minimize the costs of the transaction, deliberately chose not to engage it.

For the foregoing reasons, I would reverse the order

appealed from and grant Cadwalader's motion for summary judgment dismissing the first cause of action in its entirety. Accordingly, I respectfully dissent from the contrary result reached by the majority.[17]

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

ENTERED: FEBRUARY 13, 2014

CLERK

[17]Since I find that the record establishes that Cadwalader did not commit malpractice, I find it unnecessary to reach Cadwalader's arguments that the conduct complained of did not proximately cause any damage to Nomura.