SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JANUARY 24, 2017

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

2075N-
2076N In re Mark S. Goldstein,
Nonparty Appellant,

-against-

William D. Zabel,
Nonparty Respondent.

Index 91812/13

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Sullivan Papain Block McGrath & Cannavo P.C., New York (Brian J. Shoot of counsel), for appellant.

Schulte Roth & Zabel LLP, New York (Marcy Ressler Harris of counsel), for respondent.

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Orders, Supreme Court, Bronx County (Howard H. Sherman, J.), entered March 23, 2015, which, to the extent appealed from as limited by the briefs, fixed nonparty appellant's guardianship commission at $100,000, unanimously affirmed, with costs.

This appeal calls upon us to consider the relationship between the Surrogate's Court Procedure Act and article 81 of the Mental Hygiene Law where the order and judgment originally appointing a guardian in an Article 81 proceeding directs that the guardian "shall" be compensated in accordance with the

guidelines set forth in SCPA 2307. We find that when the motion court awarded a final fee, it appropriately considered whether application of those guidelines would result in compensation that was not reasonable, given the very short duration of the guardianship and notwithstanding that the guardian satisfactorily performed his services. We hold that, regardless of the plan initially established for an article 81 guardian's compensation in the order and judgment of appointment, under Mental Hygiene Law § 81.28 the court has and retains the authority to modify its plan to insure that the guardian's compensation is reasonable under the circumstances of a particular case. The motion court, in judicially settling the guardian's account by awarding him compensation of $100,000, instead of the almost $700,000 fee that would have resulted from the strict application of SCPA 2307, providently exercised its discretion and it did not violate the doctrine of law of the case.

The underlying article 81 proceeding was commenced by three petitioners who sought the appointment of a guardian for Celia Ascher. The petitioners, Neil Smollett (Ascher's great-nephew by marriage, who lives outside the United States), William D. Zabel, Esq. (the attorney who prepared her will), and Theodore J. Luty (a trusted friend), claimed that Ascher, then 93 years old, was

no longer able to attend to her own care or manage her financial affairs. Zabel sought to be appointed the guardian of Ascher's property, and Luty sought appointment as the guardian of her person. Nonparty appellant, Mark S. Goldstein, Esq., an attorney and certified public accountant, was originally appointed the court evaluator to investigate the claims in the petition (MHL § 81.09). Goldstein prepared a report and participated in the testimonial hearing that ensued. It was determined that Ascher, a Holocaust survivor, had been hospitalized and then moved to a nursing home. She suffered from outbursts, had dementia, and was believed to be a danger to herself. She was a widow, had no close relatives, and had significant assets. After adjudicating Ascher an incompetent person, the court considered who would be best suited to be her guardian. Taking into account Ascher's physical and mental state, as well as her finances, the court decided that Luty and Goldstein would serve as co-guardians of the person and that Goldstein would be Ascher's temporary guardian of the property. The property Goldstein was ordered to manage and safeguard was believed to be extensive, given that Ascher had been a very successful art curator and collector of fine art. During her lifetime, Ascher had acquired, then donated millions of dollars' worth of original paintings to a museum in

New York, and there was reason to believe she still possessed valuable artwork and other objets d'art in her apartment. Despite having several offshore accounts, Ascher was in arrears in paying bills, and she owed millions of dollars in unpaid taxes. The trial court, in its decision and order dated February 5, 2014, in which it found that Ascher was in need of a guardian of the person and property, directed that the co-guardians' compensation would be "as is provided under § 2307 of the Surrogate[']s Court Procedure Act and as approved by the Court." The court did not, however, specify in that order, or in the order of appointment dated February 13, 2014, how Goldstein would be compensated for serving as Ascher's temporary property guardian.

During the period in which he served as temporary guardian, Goldstein secured Ascher's cash assets, securities and millions of dollars of personal property, including valuable artwork. He performed an inventory of her apartment and hired a guard to protect its valuable contents, since the apartment was empty and had no security system. Among its contents were eight of the paintings that Ascher had previously donated to a museum in Denmark, pursuant to an agreement under which she retained a life estate. Goldstein had necessary repairs made to the plumbing in

Ascher's apartment and secured some valuables in a safe deposit box. He also began to investigate issues related to Ascher's medical care. The record reflects that Goldstein took his appointment seriously, and swiftly performed tasks that safeguarded Ascher's assets. He served as Ascher's temporary guardian from February 13, 2014 until March 20, 2014, a period of a little over one month.

Thereafter, the trial court appointed Goldstein as Ascher's full guardian of her person and property, including any life estate, an apparent reference to the paintings that were in her apartment. Although there is some disagreement between Goldstein and nonparty respondent, Zabel, about whether that artwork was insured and the Danish museum refused to make arrangements for the art's safe transport, the actions Goldstein took with respect to the storage and safekeeping of those pieces were within the powers enumerated in his order of appointment. In addition to being the property guardian, Goldstein was also designated the person whose decisions about Ascher's medical care would be "conclusive and determinative." In its order and judgment of appointment entered March 5, 2014, the court set Goldstein's compensation in accordance with SCPA 2307 and ordered him to obtain a $21 million bond. Once he obtained the bond and filed

his commission on March 20, 2014, Goldstein qualified as Ascher's full guardian. Ascher died three weeks later, on April 8, 2014, and Zabel was appointed the preliminary executor of her estate on May 6, 2014.

In August 2014, Goldstein sought to have his final account judicially approved. Since the order appointing him as temporary guardian had not provided for any compensation, Goldstein prepared an affirmation of the services he had provided during the time in which he served in that capacity. For that time period, Goldstein sought compensation based upon quantum meruit, providing the number of hours he worked and information about his customary fee. Goldstein stated that he had spent a total of 187.8 hours serving as Ascher's temporary guardian, and that, based upon his usual rate of $495 per hour, $92,961 plus disbursements of $474.50 should be approved. Although Goldstein was awarded the lesser sum of $64,450 plus disbursements for the temporary guardianship, that award is not challenged on appeal.

As Ascher's full guardian, however, Goldstein sought a commission of $695,106.58. In his final account, Goldstein indicated that the accounting was for the period January 31, 2014 through April 30, 2014, which encompasses both the time he served as full guardian and the time he served as temporary guardian.

Goldstein provided the referee appointed to review the final accounting with several bank statements beginning December 2013. In reporting her calculations to the court, the referee confirmed the mathematical accuracy of the fees Goldstein sought to have approved, based upon Ascher's total assets of $33,055,329.13 during the entire accounting period (i.e., whether Goldstein served as temporary or full guardian). Goldstein did not include the offshore accounts, but included the paintings in which Ascher had maintained a life estate.

Although he did not maintain any time records for the period in which he served as Ascher's full guardian (i.e., starting March 20, 2014), Goldstein provided a narrative description of what services he had provided from the date he qualified until Ascher's death. Among the services identified by him were his efforts to obtain the bond that the trial court had ordered, investigating Ascher's offshore accounts and tax related matters, locating statements concerning those accounts, contacting Zabel, arranging a medical consult for Ascher, researching alternative residential facilities for her, and preparing his final account. Zabel, by now the executor, filed objections to the final account, vigorously contesting the commission Goldstein sought as excessive and, in some cases, duplicative of the fees he sought

as Ascher's temporary guardian.

The motion court judicially settled the final account by order entered March 11, 2015. In a separate order, issued in conjunction therewith, the court lauded Goldstein's efforts in immediately preserving Ascher's assets, noting that the assets were of a "substantial and varied" nature and that had Ascher lived a for a longer period of time, the tasks to be fully resolved by the guardian "were truly daunting and required unique abilities." The motion court, however, found that the $695,106.58 Goldstein was seeking would be an "extraordinary commission . . . which in the context of a permanent Guardianship which lasted less than three weeks is neither reasonable nor justifiable." The court stated that "mechanical application of the formula fixed in the Judgment of appointment" was unwarranted where it resulted either in inadequate compensation or, as in this case, "an unjustifiable windfall which would not constitute reasonable compensation for the tasks completed." In setting Goldstein's fees as temporary guardian, the court accepted Goldstein's recitation of the hours he spent, as set forth in his affirmation of services, but used the lower hourly fee $350. Goldstein contends that the $100,000 fixed as compensation for his services as Ascher's permanent property guardian is

inadequate. Goldstein does not explain how the compensation is inadequate. Instead, his principal argument is that the amount the motion court approved of is not what he expected to receive when he accepted the court's appointment as Ascher's full guardian. He also argues that in the absence of any finding of misfeasance by him, there was no basis for the motion court to deny him the full commission to which he was "entitled to" applying the guidelines of SCPA 2307.

In an article 81 proceeding, one or more guardians will be appointed "to satisfy either personal or property management needs of an incapacitated person," taking into account "the personal wishes, preferences and desires of the person, and . . . afford[ing] the person the greatest amount of independence and self-determination and participation in all the decisions affecting such person's life" (Mental Hygiene Law §81.01). When first enacted, the Mental Hygiene Law specified that in setting a plan for the reasonable compensation of a guardian, the court could utilize a compensation plan "similar" to the guidelines used by Surrogate's court for setting the commission for a trustee:

> "(a) The court shall establish, and may from time to time modify, a plan for the reasonable compensation of the guardian. The plan for compensation of the

> guardian may be similar to the compensation of a trustee pursuant to section two thousand three hundred nine of the surrogate's court procedure act; however, the plan must take into account the specific authority of the guardian to provide for the personal needs and/or property management for the incapacitated person" (L 1992, ch 698, §81.81).

SCPA 2309 sets forth the commission of trustees under wills of persons dying, or lifetime estates established after August 31, 1956, setting annual commissions according to a schedule that is different from SCPA 2307. In appointing Goldstein, the court did not use SCPA 2309, but used 2307. SCPA 2307 is best described as awarding "commissions" on a sliding scale; the smaller the estate, the larger a percentage the fiduciary appointed will receive as a fee, but with a larger estate, the percentage is smaller.

In 2004, the Mental Hygiene Law was amended and currently provides as follows:

> "(a) The court shall establish, and may from time to time modify, a plan for the reasonable compensation of the guardian or guardians. The plan for compensation of such guardian must take into account the specific authority of the guardian or guardians to provide for the personal needs and/or property management for the incapacitated person, and the services provided to the incapacitated person by such guardian.
>
> "(b) If the court finds that the guardian has failed to discharge his or her duties satisfactorily in any respect, the court may deny or reduce the compensation

which would otherwise be allowed" (Mental Hygiene Law §81.28)

Thus, although the Mental Hygiene Law, as originally enacted, encouraged courts to consider a compensation plan similar to the guidelines set forth in the SCPA after the statute was amended in 2004, all references to the SCPA were eliminated. The Mental Hygiene Law does not provide any formula or guideline for the court to follow in setting compensation for an Article 81 guardian, nor does it refer to such compensation as a "commission." The only requirement is that the court "must take into account the specific authority of the guardian or guardians to provide for the personal needs and/or property management for the incapacitated person, and the services provided to the incapacitated person by such guardian" (Mental Hygiene Law § 81.28). This is because oftentimes it is difficult to predict at the inception of a guardianship proceeding the full extent of the work to be performed or the services a guardian will be called upon to provide (*see* Supreme Court of the State of New York Appellate Division: Second Judicial Dep't, Best Practices, Guardianship Proceedings, Second Judicial Department, April 15, 2005, http://www.nycourts.gov/courts/ad2/pdf/BestPracticesHandbook_1.pd

f, at 5 [accessed December 23, 2016]). Moreover, in an article 81 proceeding, a guardian is appointed to manage the financial affairs of someone who is incapacitated, not deceased, requiring the court to fix a guardian's compensation so that it provides the person appointed with reasonable compensation, but not a windfall at the incapacitated person's expense. Such compensation should, therefore, be related to and commensurate with the guardian's efforts and "not necessarily related to the dollar value of the ward's assets" (*Matter of Lindsay*, 276 AD2d 451, 452 [1st Dept 2000]). It is within the court's discretion to determine what constitutes "fair and reasonable compensation" based upon the nature of the appointment (*Lindsay* at 453; *see also Matter of Frank C. [Hyman]*, 102 AD3d 683, 685 [2d Dept 2013]). This Court has the discretion to disturb a determination of the Supreme Court if it improvidently exercised its discretion in reducing the commission originally awarded (*see Frank C. [Hyman]* at 685; *see also Matter of Joshua H.* [*Grace N.*], 80 AD3d 698 [2d Dept 2011], *lv denied* 16 NY3d 711 [2011]).

At the outset, we reject Goldstein's argument that the court was required to find misfeasance or misconduct on his part in order to deny him a full commission calculated under the SCPA. Under the Mental Hygiene Law, Goldstein is entitled to no more

than "reasonable compensation" for his services, and there is no mathematical formula in the mental hygiene law that the motion court failed to apply or disregarded. A court may, and in this case did, with respect to Goldstein's services as temporary guardian, choose to compensate a guardian in quantum meruit, using an hourly rate (*Matter of Arnold O.*, 256 AD2d 764, 766 [3d Dept 1998]). Whether using the hourly rate approved by the court of $350 per hour or using his usual hourly rate of $495, Goldstein was well compensated for his time.[1]

A related argument indirectly mounted by Goldstein is that he is entitled to a commission for the entire time that he managed Ascher's property. Whether this means the accounting period of January 31, 2014 through April 30, 2014, or from February 13, 2014 until April 8, 2014 (the date of Ascher's death), the result would be that Goldstein's compensation (commission) overlapped with the compensation that was set in quantum meruit for his services as Ascher's temporary guardian.

In rejecting a calculation of Goldstein's compensation on a commission basis, as the original appointment order and judgment

[1]This is true, even assuming Goldstein worked 10-hour days during the 20-day period from March 20 through April 8, 2014 in which he served as Ascher's full time guardian: $495/hr x 10 hrs x 20 days = $99,000.

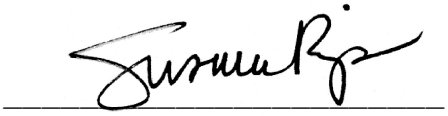
provides, the motion court did not, as Goldstein argues, violate the doctrine of the law of the case. Under the doctrine of law of the case, the parties or those in privity are "preclud[ed] [from] relitigating an issue decided in an ongoing action where there previously was a full and fair opportunity to address the issue" (*Town of Massena v Healthcare Underwriters Mut. Ins. Co.*, 40 AD3d 1177, 1179 [3d Dept 2007]). The merits of Goldstein's fee application were never adjudicated by the court that issued the original order and judgment appointing him, and it was only when he sought approval of his compensation that the issue arose. In any event, the doctrine of the law of the case does not and cannot apply to this Court, or prevent us from reviewing an order before us on appeal to decide whether it was improvidently made (*see People v Evans*, 94 NY2d 499, 503 n 3 [2000]).

Since the motion court set forth the factors it considered in deciding not to fix Goldstein's compensation in accordance with the guidelines set forth in the SCPA, taking into account not only the duration of his appointment but also the skills he employed in handling the issues that he was confronted with, the motion court did not improvidently abuse its discretion in fixing

such fees at $100,000 plus disbursements for Goldstein's services as a full guardian during the three-week period of his appointment.

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

ENTERED: JANUARY 24, 2017



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Friedman, J.P., Renwick, Feinman, Gische, Kapnick, JJ.

2138 The People of the State of New York, Ind. 4903/12
Respondent,

-against-

Wilson Laboriel, also known as Wilson Labriel, also known as Labriel Wilson,
Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered June 25, 2013, as amended July 24, 2013, convicting defendant, after a jury trial, of criminal sale of a firearm in the second degree, six counts of criminal sale of a firearm in the third degree and four counts of criminal possession of a weapon in the second degree, and sentencing him to an aggregate term of 30 years, unanimously modified, on the law, to the extent of directing that all of the sentences run concurrently with each other, and otherwise affirmed.

Defendant's standard form motion for assignment of new counsel did not contain the specific factual allegations of serious complaints about counsel necessary to trigger the court's obligation to make a minimal inquiry (*see People v Porto*, 16 NY3d

93, 100-101 [2010]). Although the court accorded defendant several opportunities to be heard, defendant failed to amplify his conclusory complaints about his attorney with any case-specific allegations.

The court properly denied defendant's suppression motion, in which he claimed that there was no probable cause for the issuance of a search warrant for his Facebook account. The affidavit in support of the warrant demonstrated that there was sufficient information to support a reasonable belief that evidence of the charged weapons crimes could be found in defendant's Facebook page, particularly in light of a pattern of Facebook connections among other members of the weapons-trafficking operation. Defendant's claim regarding the execution of the warrant is unpreserved, as well as unreviewable for lack of a sufficient record (*see People v McLean*, 15 NY3d 117, 119 [2010]; *People v Kinchen*, 60 NY2d 772, 773-774 [1983]; *see also People v Abrew*, 95 NY2d 806, 808 [2000]). In any event, the Facebook evidence was a minor component of the People's overwhelming case, and any error in receiving this evidence was harmless (*see People v Crimmins*, 36 NY2d 230 [1975])

The sentences imposed on the individual counts were lawful, but, as the People concede, the court could not legally run defendant's sentence for second-degree criminal sale of a firearm

consecutively to his sentences for third-degree sale and second-degree possession relating to conduct occurring on January 2, 2012.(*see* PL 70.25[2]; *People v Brown*, 21 NY3d 739 [2013]; *People v Alford*, 14 NY3d 846 [2010]). We decline to exercise our authority to remand for a restructuring of the sentence. We note that the People fail to adequately set forth how they would have the sentences restructured. As modified, we do not find the sentence excessive.

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

ENTERED: JANUARY 24, 2017

CLERK

Renwick, J.P., Moskowitz, Kapnick, Kahn, Gesmer, JJ.

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Good Hill Master Fund L.P., et al.,
Plaintiffs-Respondents,

-against-

Deutsche Bank AG,
Defendant-Appellant.

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Cahill Gordon & Reindel LLP, New York (Charles A. Gilman of counsel), for appellant.

Wilk Auslander LLP, New York (Alan D. Zuckerbrod of counsel), for respondents.

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Judgment, Supreme Court, New York County (O. Peter Sherwood, J.), entered July 21, 2016, awarding plaintiffs, after a nonjury trial, the sum of $22,142,221.13, with prejudgment interest at the rate of 21% from August 18, 2009 through date of entry of judgment in the sum of $68,061,305.71, and awarding plaintiffs attorneys' fees and litigation expenses in the sum of $3,750,000.00, for a total sum of $93,953,526.84, and awarding plaintiffs postjudgment interest at the statutory rate on the counsel fees and litigation expenses, and at the rate of 21% on the remainder of the judgment ($90,203,526.84) until the date payment of the judgment is complete, and bringing up for review

an order, same court and Justice, entered November 27, 2015, which, among other things, precluded, in limine, one of defendant's experts from testifying, and orders, same court and Justice, entered February 3, 2016, and, as amended, March 30, 2016, unanimously affirmed, with costs. Appeals from the foregoing orders, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

This action arises out of a dispute between defendant Deutsche Bank, AG and plaintiffs Good Hill Master Fund L.P. and Good Hill Master Fund, H.L.P. (collectively, Good Hill), two hedge funds. In October 2007, nonparty Bank of America Securities, LLC issued notes to fund a securitization backed by $10.3 billion worth of residential mortgage-backed securities; the notes relevant to this action were classified in tranches designated A1 through B13. That same month, Good Hill bought, at par, all of the notes designated B6 through B12 for a total of approximately $54 million. Only the B6 notes were investment grade. No other entity invested in the securitization, and Bank of America retained the rest of the notes.

In early 2008, Good Hill and Deutsche Bank executed credit default swap agreements that referred to the B6 notes. In those agreements, Deutsche Bank bought protection again one of three

risks: a writedown or forgiveness of the principal, a failure to pay principal, and an interest shortfall. If any of these three events occurred, Good Hill would be obliged to pay Deutsche Bank. The relevant swap agreements included, among other things, a 2002 International Swaps and Derivatives Association, Inc. (ISDA) Master Agreement (ISDA Master Agreement) and 2003 ISDA Credit Derivatives Definitions.

Under the terms of the swap agreements, Deutsche Bank paid Good Hill $12.8 million up front and $1.5 million in total monthly payments. In exchange, "[i]f a Floating Amount Event occurs, then . . . Seller [Good Hill] will pay the relevant Floating Amount to Buyer [Deutsche Bank]." A "floating amount event" included a "writedown" of the B6 notes, defined as "the forgiveness of any amount of principal by the holders of the [B6 Notes] pursuant to an amendment to the Underlying Instruments [the Indenture underlying the securitization] resulting in a reduction in the Outstanding Principal Amount." Because Good Hill might have been required to pay the floating amount if certain events occurred, it posted collateral up front. If the market value of the B6 notes fell, Deutsche Bank could demand more collateral, and if it rose, Good Hill could demand the return of some collateral.

Further, Section 9.1(b)(iii) of the 2003 ISDA Credit Derivatives Definitions provided, in relevant part, that the parties "may act with respect to such business in the same manner as each of them would if such Credit Derivative Transaction did not exist, regardless of whether any such action might have an adverse effect on ... the position of the other party to such Credit Derivative Transaction or otherwise."

By April 2009, the market had declined dramatically, and the B6-B12 notes were downgraded to well below investment grade. In an effort to mitigate its own risks in the declining market, Bank of America decided to unwind and terminate the securitization. It thus offered to buy back Good Hill's notes, because they were the only tranches that Bank of America did not own. Bank of America rejected Good Hill's initial asking price of $.70 on the dollar; the parties ultimately negotiated a price of $.29 on the dollar for the entire "stack" of B6 through B12 notes.

In July 2009, before finalization of the repurchase of the notes, Good Hill tried to persuade Bank of America to treat the cancellation as a redemption, which would not have constituted a floating amount event, and would not have triggered any obligation to pay Deutsche Bank under the swap agreements. Bank of America, however, refused to treat the cancellation of the

notes as a redemption.

Good Hill then asked Bank of America to allocate the total purchase price for the stack of B6 through B12 notes so that the B6 notes would be paid at 100% of par, and the remaining tranches little to nothing. This action would result in no floating amount due to Deutsche Bank, as the principal forgiven would be zero. After further negotiation, Good Hill and Bank of America ultimately agreed to an 83% allocation to the B6 notes, meaning that only 17% of the principal of the B6 notes would be forgiven.

Good Hill and Bank of America completed the repurchase on August 14, 2009. On August 17, 2009, Bank of America cancelled the B6 through B12 notes along with terminating the securitization, and forgave total principal of 71% of the notes based on the 29% tender price.

On August 24, 2009, Deutsche Bank advised Good Hill that a floating amount event – namely, a writedown – had occurred. Under the swap agreements, Deutsche Bank was required to calculate the floating amount based solely on the basis of reports prepared by the entity that serviced the loans. However, Deutsche Bank stated that it could not rely on the servicer report because the principal paid on the B6 notes was "allocated in a manner that appears to be potentially arbitrary and

inconsistent with our understanding of the market valuation of the certificates prior to such allocation."

On September 14, 2009, Good Hill sent Deutsche Bank two "Collateral Return Amount Demand" notices in which it calculated that Good Hill owed Deutsche Bank a payment of approximately $5 million. Therefore, Good Hill stated, it was entitled to return of approximately $22 million in excess collateral it had posted.

Ultimately, in a letter dated December 4, 2009, Deutsche Bank disputed Good Hill's reliance on a certain servicer report, stating that there was "no legitimate basis" for the allocation, and that it was "contrary to the market valuation" of B-6 through B-12 notes. Further, Deutsche Bank stated that it had "serious concerns that the arbitrary allocation was designed to minimize the Floating Amount payments due from Good Hill," and therefore, that it would not return Good Hill's collateral unless it received information demonstrating the propriety of the allocation methodology.

Good Hill then commenced this action, alleging two counts of breach of contract – one for each hedge fund – based on Deutsche Bank's failure to return the collateral. Deutsche Bank asserted defenses and counterclaims, alleging that Good Hill breached its obligations under the swap agreements to act in good faith and in

a commercially reasonable manner, and that as a result, Deutsche Bank had no obligation to return the collateral.

At trial, Deutsche Bank sought to introduce testimony from Kimberly Summe, who was the General Counsel of the ISDA from September 10, 2001 to December 31, 2007. Summe was the author of the 2002 ISDA Master Agreement and 2003 ISDA Credit Derivatives Definitions, including Section 9.1(b)(iii), and a purported expert in understanding the ISDA marketplace with respect to Section 9.1(b)(iii). Deutsche Bank represented that Summe would testify that Section 9.1(b)(iii) allowed the parties to transact in the B6 notes, but does not alter the obligation to act in good faith and in a commercially reasonable manner; nor did the section offer a "safe haven" for a party's transactions involving the B6 notes merely because the party engaged in a credit default swap.

Good Hill moved to preclude Summe's testimony, and in an order entered November 27, 2015, the court granted the motion because contract interpretation is "a task reserved to the court and is well within the ken of judges."

In a decision after trial, entered February 3, 2016, the trial court concluded that Good Hill had acted in good faith and in a commercially reasonable manner, and that Deutsche Bank had

breached the swap agreements by, among other things, refusing to return Good Hill's collateral under those agreements. The court also reasoned that section 9.1[b][iii] of the swap agreements expressly permitted Good Hill to act as it did – that is, "to trade in the [B6 notes] without regard to the existence of the swap or any adverse effect it might have on Deutsche Bank's position in the swap."

We find no basis to disturb the court's determination that Deutsche Bank breached the credit default swap agreements at issue here (*Frame v Maynard*, 83 AD3d 599, 601-602 [1st Dept 2011]; *see also Thoreson v Penthouse Intl.*, 80 NY2d 490, 495 [1992]). As the trial court found in awarding judgment in Good Hill's favor, Good Hill negotiated at arm's length with Bank of America to sell six tranches of notes the Bank had previously sold Good Hill at $.29 on the dollar, so that the Bank of America could unwind and terminate a securitization in the then-declining mortgage market. Bank of America's resulting writedown of the B6 notes would trigger a negative credit event under the swap agreements. As a result, Good Hill negotiated with Bank of America to forgive only 17% of the principal amount, resulting in a smaller payout to Deutsche Bank under the swap agreements, as opposed to forgiving principal of 71% across the board on all the

tranches of notes based on the $.29 purchase price. Bank of America was free to accept or reject that 83% allocation and had rejected several prior proposals from Good Hill that would have resulted in no payment or an even smaller payment to Deutsche Bank.

Thus, contrary to Deutsche Bank's contentions, in negotiating this allocation, however aggressively, Good Hill acted in good faith and in a commercially reasonable manner, and Deutsche Bank failed to meet its burden of proving that Good Hill breached implied covenants of good faith and fair dealing (*Dalton v Educational Testing Serv.*, 87 NY2d 384, 389 [1995]; *see Tractebel Energy Mktg., Inc. v AEP Power Mktg., Inc.*, 487 F3d 89, 98 [2d Cir 2007]).

Nor did section 9.1(b)(iii) of the 2003 Credit Derivatives Definitions proscribe Good Hill's conduct. As noted above, that section states, in relevant part, that the parties "may act with respect to such business in the same manner as each of them would if such Credit Derivative Transaction did not exist, regardless of whether any such action might have an adverse effect on . . . the position of the other party to such Credit Derivative Transaction or otherwise." The trial court correctly reasoned that the provision permits Good Hill to transact business

involving the B6 notes, and pursue its own interests, even if it might have an adverse effect on defendant. The court, in citing Good Hill's arm's length transaction with Bank of America, did not adopt such a liberal reading of the provision as to suggest that it would allow Good Hill to act in bad faith to evade its obligations under the swap agreements.

Likewise, the trial court properly granted Good Hill's motion to preclude certain expert testimony proffered by defendant on the interpretation of section 9.1(b)(iii). While the section is confusing, its interpretation is not a matter beyond the ken of a typical fact-finder. Nor does it involve issues of such scientific or technical complexity that require an expert explanation to allow the court to understand it (*Hendricks v Baksh*, 46 AD3d 259 [1st Dept 2007]; *Ortiz v City of New York*, 39 AD3d 359, 360 [1st Dept 2007], *lv denied* 9 NY3d 803 [2007]). Moreover, while Deutsche Bank frames the issue as one of market customs and practice, the issue is, as the trial court noted, a matter of contract interpretation, and "expert witnesses should not be called to offer opinion as to the legal obligations of parties under a contract; that is an issue to be determined by the trial court" (*Colon v Rent-A-Center*, 276 AD2d 58, 61 [1st Dept 2000]; *see also Northeast Restoration Corp. v T.A. Ahern*

Contrs. Corp., 132 AD3d 552 [1st Dept 2015]).

Further, the court properly awarded prejudgment interest at 21% under sections 9(h)(i)(I) and 14 of the ISDA 2002 Master Agreements. The relevant rate was contractually defined as equal to the cost of funds, as certified by the "relevant payee," plus 1% per annum (ISDA 2002 Master Agreement § 14). Good Hill certified that the cost of funds was 20%, the interest rate on loans from third-party investors.

The result does not change because the relevant payee was a special purpose vehicle formed by Good Hill solely for administrative purposes to segregate the funds and costs that investors incurred at the time of Deutsche Bank's breach. Indeed, the chief financial officer of Good Hill Partners, LP submitted a certification in support of the 21% rate, and this certification is still meritorious despite the fact that Good Hill formed a special purpose vehicle.

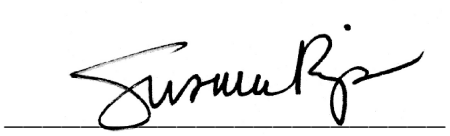
Deutsche Bank's argument that Good Hill could have obtained a more favorable rate is unavailing, as section 14 of the 2002 ISDA Master Agreement states that the default rate shall be certified "without proof or evidence of any actual cost." While the resulting judgment is large relative to the original award, "this is no reason to depart from the legal principle that

contracts must be enforced according to the language adopted by the parties" (*NML Capital v Republic of Argentina*, 17 NY3d 250, 267 [2011]).

Moreover, as the cost of funds may be certified by the relevant payee "without proof or evidence of any actual cost," there was no basis for discovery or further briefing.

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

ENTERED: JANUARY 24, 2017



CLERK

Renwick, J.P., Saxe, Gische, Webber, JJ.

2380 Yvette Torres-Martinez, Index 300882/10
Plaintiff-Appellant,

-against-

Macy's, Inc., et al.,
Defendants-Respondents.

_____

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

Lester Schwab Katz & Dwyer, LLP, New York (Stewart G. Milch of counsel), for Macy's, Inc., respondent.

Babchik & Young, LLP, White Plains (Matthew J. Rosen of counsel), for ThyssenKrupp Elevator Corporation, respondent.

_____

Order, Supreme Court, Bronx County (Kenneth L. Thompson, J.), entered on or about June 12, 2015, which granted defendants' motions for summary judgment dismissing the complaint and all cross claims against them, unanimously affirmed, without costs.

Defendants established prima facie that they had no notice of the allegedly defective condition of the escalator, and plaintiff failed to raise a triable issue of fact. Macy's operations manager and ThyssenKrupp's elevator mechanic both testified that they did not receive any reports of the escalators shaking or stopping and starting before the date of plaintiff's accident; nor did anyone, including plaintiff, before her July

2009 accident, observe the escalators stop and start several times in succession (*see Santoni v Bertelsmann Prop., Inc.*, 21 AD3d 712 [1st Dept 2005]). The printout submitted by plaintiff's expert in support of his opinion was unauthenticated and therefore inadmissible as evidence of any previous accidents on the escalators (*see Vasquez v The Rector*, 40 AD3d 265, 266-267 [1st Dept 2007]). In any event, the bareboned printout did not indicate that the prior incidents were similar to or caused by the same or similar contributing factors causing this accident (*Gjonaj v Otis El. Co.*, 38 AD3d 384 [1st Dept 2007]; *Chunhye Kang-Kim v City of New York*, 29 AD3d 57, 60-61 [1st Dept 2006]). The fact that Macy's made service calls to ThyssenKrupp on January 15, 2009 and February 15, 2009, because the escalator from the basement to the main level was not running, does not raise an issue of fact as to notice, since there is no evidence that those calls were occasioned by the type of malfunctioning plaintiff describes (*see id.*).

Defendant's expert opined that the accident, as described by plaintiff, was a mechanical impossibility, since it would have resulted in a catastrophic failure of the running or driving mechanisms, which would have required a significant repair, and the escalator would not have continued to run without observable

problems following the accident, when it was inspected by ThyssenKrupp or the Department of Buildings. Plaintiff's expert's opinion that the accident was proximately caused by a defective step chain and a lack of proper and adequate preventative maintenance is speculative and conclusory (*see Santoni*, 21 AD3d at 714-715; *Bazne v Port Auth. of N.Y. & N.J.*, 61 AD3d 583 [1st Dept 2009]).

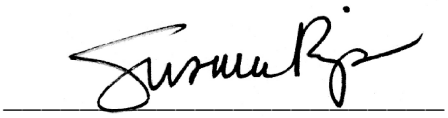
The doctrine of res ipsa loquitur, which would permit a fact finder to infer negligence based upon the sheer happening of the event, is inapplicable. Plaintiff claims that the escalator skidded and shook causing her to fall forward. The evidence in this record establishes that the elevator never operated in this manner either before or after the alleged accident. Plaintiff was able, after her fall, to ride the escalator up to the next level without any further escalator malfunction. Without more, this proof is insufficient to establish that the event is of a kind that ordinarily does not happen in the absence of negligence (*Birdsall v Montgomery Ward* and Co., 109 AD2d 969 [3rd Dept 1985], *affd* 65 NY2d 913 [1985] [isolated incident of escalator bumping is insufficient to support doctrine of res ispa loquitur]). Res ipsa loquitur is also unavailable because there is evidence that plaintiff fell after misstepping on the

escalator, creating the possibility that plaintiff could have contributed to her own injury (*see Cortes v Central El., Inc.*, 45 AD3d 323, 324 [1st Dept 2007]; *Braithwaite v Equitable Life Assur. Soc. Of U.S.*, 232 AD2d 352 [2nd Dept 1996]). In any event, the doctrine may not be applied against Macy's, which ceded all responsibility for the daily operation, repair, and maintenance of the escalator to ThyssenKrupp via a full-service contract (*see Ezzard v One E. Riv. Place Realty Co., LLC*, 129 AD3d 159, 165 [1st Dept 2015]).

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: JANUARY 24, 2017



CLERK

Sweeny, J.P., Renwick, Andrias, Kahn, Gesmer, JJ.

2835 Anthony Galante, et al., Index 15645/06
Plaintiffs-Respondents,

-against-

New York City Housing Authority,
Defendant-Appellant.

_____

Herzfeld & Rubin, P.C., New York (Sharyn Rootenberg of counsel), for appellant.

Coiro, Wardi, Chinitz & Silverstein, Bronx (Joseph T. Coiro of counsel), for respondents.

_____

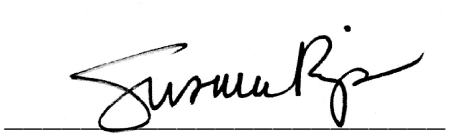
Order, Supreme Court, Bronx County (Barry Salman, J.), entered April 16, 2015, which denied defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

The motion court properly concluded that the doctrine of res ipsa loquitur precludes the award of summary judgment in defendant's favor in this action where plaintiff was injured when the elevator in which he was riding came to a sudden and abrupt stop. Elevator malfunctions ordinarily do not occur in the absence of negligence (*see e.g. Ezzard v One E. Riv. Place Realty Co., LLC*, 129 AD3d 159, 163 [1st Dept 2015]), and defendant has failed to demonstrate as a matter of law that it lacked exclusive control over the subject elevator at the time of the accident.

Defendant's argument that vandalism was the cause of the elevator's malfunction, lacks support in the record, and there is no evidence that plaintiff's actions played a role in the cause of the accident.

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

ENTERED: JANUARY 24, 2017



CLERK

Sweeny, J.P., Renwick, Andrias, Kahn, Gesmer, JJ.

2836 In re Clifford W. C., III,

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

Clifford C., also known as
Clifford W. C., II,
Respondent-Appellant,

Graham-Windham Services
to Families and Children,
Petitioner-Respondent.

_____

Larry S. Bachner, Jamaica, for appellant.

Carrieri & Carrieri, P.C., Mineola (Ralph R. Carrieri of counsel), for respondent.

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

_____

Order of fact-finding and disposition (one paper), Family Court, New York County (Clark V. Richardson J.), entered on or about October 22, 2015, insofar as it determined, after a hearing, that respondent father had abandoned the subject child, unanimously affirmed, without costs.

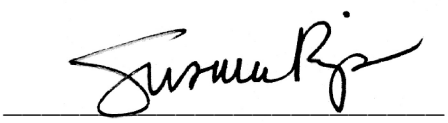
The father's abandonment of the child was established by clear and convincing evidence that the father failed to maintain contact with the child or with petitioner agency for at least the six-month period prior to the filing of the petition, although he

was able to do so and was not discouraged from doing so by the agency (Social Services Law § 384-b[5][a]; *see Matter of Ruben J.R.*, 303 AD2d 238 [1st Dept 2003], *lv denied* 100 NY2d 507 [2003]). The father testified that he was informed by a letter in 2012, before the relevant six-month period, that the child was placed into foster care following the death of the child's mother. The father admitted that his only effort to determine the child's whereabouts and welfare was a single letter to the agency sent at an unspecified time, requesting that his parental rights be transferred to his mother and sister, and a call by his mother to the agency. Family Court properly found that this minimal effort was insufficient to overcome the presumption of an intent to forgo parental rights (*see Matter of Annette B.*, 4 NY3d 509, 514-515 [2005]). The father's argument regarding the admission of the agency case notes is unpreserved and, in any event, unavailing.

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

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

ENTERED: JANUARY 24, 2017



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Sweeny, J.P., Renwick, Andrias, Kahn, Gesmer, JJ.

2837 Cornell Curry, Index 113228/03
Plaintiff-Appellant,

-against-

Common Ground Community, H.D.F.C.,
Defendant-Respondent.

_____

Cornell Curry, appellant pro se.

Kellner Herlihy Getty & Friedman, LLP, New York (Jeanne-Marie Williams of counsel), for respondent.

_____

Appeal from order, Supreme Court, New York County (Marcy S. Friedman, J.), entered October 22, 2003, which denied plaintiff's motion for summary judgment upon his default in appearance at oral argument, and sua sponte dismissed the action pursuant to an order, Supreme Court, Kings County (Muriel Hubsher, J.), entered on or about December 18, 2002, precluding plaintiff from taking any further legal steps in any jurisdiction regarding his 1993 eviction from defendant's premises, unanimously dismissed, without costs, as filed in violation of court orders, and it is ordered that plaintiff is enjoined from commencing any further lawsuits against this defendant, and from filing any further motions or appeals relating to his 1993 eviction, without prior approval of this Court or the Administrative Judge of the Supreme

Court, New York County, and that any violations will be subject to contempt and imposition of sanctions to be determined by the Administrative Judge after appropriate procedures.

Plaintiff's appeal violates the December 18, 2002 order, as well as two other orders, including an order of this Court (M-5011, December 14, 2004), which effectively barred plaintiff from filing any papers in this matter without prior judicial approval.

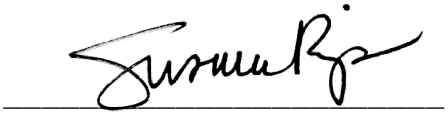
Were we to reach the merits of the appeal, we would affirm. The December 18, 2002 order is binding on plaintiff, because he voluntarily submitted to the jurisdiction of the Kings County court by commencing a lawsuit seeking affirmative relief there (*see Matter of Track Artist Mgt. v Quigley*, 309 AD2d 680, 680 [1st Dept 2003], *lv denied* 1 NY3d 506 [2004]).

Given plaintiff's "continuous and vexatious litigation," an order enjoining him from further litigation against this

defendant, to the extent indicated, is warranted (*see Banushi v Law Off. of Scott W. Epstein*, 110 AD3d 558, 558 [1st Dept 2013]; *Novel v Salzberg*, 253 AD2d 684 [1st Dept 1998], *lv denied* 92 NY2d 816 [1998], *cert denied* 527 US 1007 [1999]).

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

ENTERED: JANUARY 24, 2017



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Sweeny, J.P., Renwick, Andrias, Kahn, Gesmer, JJ.

2838 In re Sarah Yarmak, Index 651840/15
Petitioner-Appellant,

-against-

Penson Financial Services Inc.,
Respondent-Respondent.

_____

The Law Office of James C. Kelly, New York (James C. Kelly of counsel), for appellant.

Mayer Brown LLP, New York (Mark G. Hanchet of counsel), for respondent.

_____

Order and judgment (one paper), Supreme Court, New York County (Jeffrey K. Oing, J.), entered November 30, 2015, denying the petition to vacate an arbitration award, confirming the award, which dismissed petitioner's claims against respondent, and dismissing the petition, unanimously affirmed, without costs.

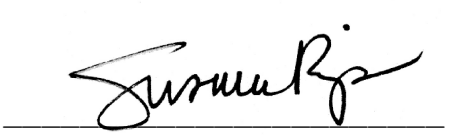
Even if the arbitrators' dismissal of petitioner's claims prior to the completion of her case in chief violated Financial Industry Regulatory Authority (FINRA) Manual rule 12504, which provides that dismissals at such an early juncture are "discouraged," the arbitrators were entitled to interpret the rule (FINRA Manual rule 12409). In any event, any error in interpretation is a mere error of law that does not provide a basis for vacatur (*see Wien & Malkin LLP v Helmsley-Spear, Inc.*,

6 NY3d 471, 479 [2006], *cert dismissed* 548 US 940 [2006]). The same holds true with respect to the arbitrators' application of the Texas statute of limitations pursuant to the choice of law clause in the parties' agreement.

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

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

ENTERED: JANUARY 24, 2017



CLERK

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

2839 The People of the State of New York, Ind. 331/13
Respondent,

-against-

Eric Goding,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Marcy L. Kahn, J.), rendered November 1, 2013, convicting defendant, after a jury trial, of robbery in the first degree, robbery in the second degree (two counts) and criminal possession of a weapon in the second degree (two counts), and sentencing him, as a persistent violent felony offender, to an aggregate term of 20 years to life, unanimously affirmed.

The verdict was supported by legally sufficient evidence and was not against the weight of the evidence (*People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility findings. Defendant was linked to the crime by a combination of eyewitness testimony regarding his participation and physical evidence recovered from his bedroom.

The court providently exercised its discretion in denying defendant's challenge for cause. The panelist at issue unequivocally stated that she would be impartial (*see People v Arnold*, 96 NY2d 358, 363 [2001]), and her justifiable annoyance at some of defense counsel's questions did not demonstrate bias against the defense.

Defendant did not preserve his challenge to the court's handling of a juror's midtrial request to speak with the court (*see People v Garay*, 25 NY3d 63, 67 [2015]), and we decline to review it in the interest of justice. As an alternative holding, we find no basis for reversal. Defense counsel consented to the court's initial, private colloquy with the juror, followed by a further inquiry in the presence of defendant and his counsel, and this procedure did not violate any right of defendant under the circumstances.

The court correctly ruled that the People would be able to introduce recorded telephone calls made by defendant while incarcerated in the event that defendant raised a defense that rendered these calls relevant. Defendant did not establish any basis for excluding these calls (*see People v Johnson*, 27 NY3d 199 [2016]; *see also People v Simmons*, __AD3d__, NY Slip Op 08311 [2016]). Defendant did not preserve his claim that he was

entitled to notice that his calls would not only be recorded, but also shared with the prosecutor, and we decline to review it in the interest of justice. As an alternative holding, we find it unavailing (*see People v Dickson*, 143 AD3d 494 [1st Dept 2016]).

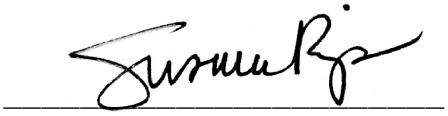
Defendant's third-degree weapon possession conviction was properly used as a violent predicate felony (*see People v Smith [McGhee]*, 27 NY3d 652, 670 [2016]).

Defendant's ineffective assistance of counsel claims are unreviewable on direct appeal because they involve matters not reflected in, or fully explained by, the record (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). Accordingly, since defendant has not made a CPL 440.10 motion, the merits of the ineffectiveness claims may not be addressed on appeal. In the alternative, to the extent the existing record permits review, we find that defendant received

effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]).

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

ENTERED: JANUARY 24, 2017



CLERK

Sweeny, J.P., Renwick, Andrias, Kahn, Gesmer, JJ.

2840 Zaida De La Rosa, Index 311384/11
Plaintiff-Appellant,

-against-

Richard Okwan, et al.,
Defendants-Respondents.

_____

Mitchell Dranow, Sea Cliff, for appellant.

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

_____

Order, Supreme Court, Bronx County (Betty Owen Stinson, J.), entered on or about November 5, 2015, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendants established prima facie that plaintiff did not sustain a serious injury involving a "permanent consequential" or "significant" limitation of use of her cervical or lumbar spine or right shoulder (*see* Insurance Law § 5102[d]). Their orthopedist concluded, based on physical examination and review of plaintiff's medical records, that plaintiff sustained no injuries as a result of the low-speed accident (*see generally Toure v Avis Rent A Car Sys.*, 98 NY2d 345 [2002]; *Spencer v Golden Eagle, Inc.*, 82 AD3d 589 [1st Dept 2011]). Their

orthopedic expert opined, based on plaintiff's own MRI report finding bony impingement and her surgeon's operative report finding hypertrophic synovitis in the shoulder, that plaintiff did not suffer any traumatic shoulder injury, but had a chronic condition. Defendants' expert in emergency medicine opined that the records of plaintiff's emergency room visits demonstrated that plaintiff sustained no significant injury as a result of the accident. Moreover, plaintiff's deposition testimony demonstrated that she walked home after the accident and did not seek any treatment for the following three days.

In opposition, plaintiff failed to raise an issue of fact as to any permanent consequential limitation in use of her spine, since she provided no proof of any recent findings of limitations (*see Vega v MTA Bus Co.*, 96 AD3d 506 [1st Dept 2012]; *Ortiz v Salahuddin*, 102 AD3d 617, 618 [1st Dept 2013]). Nor did her medical evidence raise an issue of fact as to any significant limitation in use (*see Vasquez v Almanzar*, 107 AD3d 538 [1st Dept 2013]). Plaintiff's experts' conclusory statements that her shoulder injury was caused by the accident failed to address the findings of bony impingement and large anterior spur found in her own physicians' MRI and operative reports and to explain why those conditions were not the cause of her shoulder condition

(*see Alvarez v NYLL Mgt. Ltd.*, 120 AD3d 1043, 1044 [1st Dept 2014], *affd* 24 NY3d 1191 [2015]; *Kone v Rodriguez*, 107 AD3d 537, 538 [1st Dept 2013]).

Plaintiff's 90/180-day claim is refuted by the allegations in her bill of particulars (*see Mena v White City Car & Limo Inc.*, 117 AD3d 441 [1st Dept 2014]). Moreover, plaintiff failed to substantiate her claimed loss of work with proof that her absences from work were medically determined (*see Nicholas v Cablevision Sys. Corp.*, 116 AD3d 567 [1st Dept 2014]).

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

ENTERED: JANUARY 24, 2017

CLERK

Sweeny, J.P., Renwick, Andrias, Kahn, Gesmer, JJ.

2841 Gary Drummond, Index 310192/10
Plaintiff,

-against-

Andres Perez, et al.,
Defendants-Appellants,

Lawrence Williams,
Defendant-Respondent.

_____

Majorie E. Bornes, Brooklyn, for appellants.

Adams, Hanson, Rego, Kaplan & Fishbein, Yonkers (Jeffrey A. Domoto of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered February 3, 2015, which granted defendant Lawrence Williams's motion for summary judgment dismissing the complaint and all cross claims as against him, unanimously affirmed, without costs.

This action arises from a motor vehicle accident in which defendant Williams, who was turning left from an eastbound lane in an uncontrolled intersection, and defendant Perez, who had initially parked in a westbound lane and was backing across the intersection, collided. Perez testified that he only looked in his rear-view mirror before backing up.

The record demonstrates as a matter of law that Perez, who

failed to turn his head to look behind him before backing across the intersection, to make sure that he could do so safely, was negligent (*see* Vehicle and Traffic Law § 1211[a]; *Ortiz v Lynch*, 105 AD3d 584 [1st Dept 2013]; *Gill v Braasch*, 100 AD3d 1415 [4th Dept 2012]; *Garcia v Verizon N.Y., Inc.*, 10 AD3d 339 [1st Dept 2004]). Contrary to the argument advanced by Perez and defendant NYLL Management, Ltd., the owner of the vehicle Perez was driving, Perez did not have the right of way under Vehicle and Traffic Law § 1141, because his vehicle was not coming from the "opposite direction" as Williams was making his left turn. Neither did Perez have the right of way under Vehicle and Traffic Law § 1140, because he was backing up, which is not permitted "unless such movement can be made with safety and without interfering with other traffic" (Vehicle and Traffic Law § 1211[a]).

Perez and NYLL's contention that Williams was comparatively negligent in failing to use reasonable care or to take evasive measures to avoid the accident is purely speculative and therefore insufficient to raise an issue of fact (*see Garcia*, 10 AD3d at 340). Williams was not required to anticipate that a vehicle would enter the intersection against the direction of traffic (*see Vatter v Gibson*, 228 AD2d 581 [2d Dept 1996]). In

addition, Williams testified that he did not see Perez's vehicle backing up until after he had started his turn and had crossed the first lane on the westbound side.

Perez and NYLL argue that Williams contributed to the accident by driving with unlighted head lamps after sunset (*see* Vehicle and Traffic Law § 375[2][a]). However, since Perez testified that he did not turn to look behind him before backing up, Perez and NYLL failed to show that any failure on Williams's part to turn on his headlights was a substantial factor in causing the accident. Whether Perez would have seen the head lamps on Williams's turning vehicle had they been lighted is a matter of speculation.

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

ENTERED: JANUARY 24, 2017

CLERK

Sweeny, J.P., Renwick, Andrias, Kahn, Gesmer, JJ.

2842 & M-6579 Kelly Ann Junior, et al., Plaintiffs-Appellants, Index 102435/12

-against-

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

Hudsonview Terrace, Inc., et al., Defendants.

_____

Robert A. Katz, New York, for appellants.

Zachary W. Carter, Corporation Counsel, New York (Max O. McCann of counsel), for respondents.

_____

Order, Supreme Court, New York County (Margaret A. Chan, J.), entered June 30, 2014, which granted defendants' motions for summary judgment dismissing the complaint as against them, unanimously affirmed, without costs.

Following the reasoning of the Federal District Court in its dismissal of plaintiff's federal due process claim (*see Junior v City of New York*, 2013 WL 646464, 2013 US Dist LEXIS 10702 [SD NY 2013]), Supreme Court correctly held that defendant Housing Preservation and Development Corp. (HPD) did not violate plaintiffs' due process rights under the state constitution. As plaintiffs do not dispute that HPD properly calculated their rent shares pursuant to the formula set by the U.S. Department of

Housing and Urban Development (HUD) (*see* 42 USC § 1437f[t][1][A]), which does not factor in economic hardship, plaintiffs do not have a property interest in obtaining increased rental subsidies based on their alleged economic hardship. Since HPD has no discretion in calculating plaintiffs' shares of the rent payments, a hardship hearing would have been futile. The court properly declined to fashion an equitable remedy to address any perceived inequities that result from the application of the HUD formula.

Further, while HPD provides an opportunity for an informal hearing with participating tenant families in certain situations, such as where there are questions regarding the determination of the family's annual or adjusted income, family unit size, or whether a family is residing in a unit with more bedrooms than is appropriate for the size of the family (*see* 24 CFR 982.555[a][1]), plaintiffs have not identified any HUD or HPD rule or regulation that requires landlords to make available to tenants their submissions to HPD in connection with HPD's rent reasonableness determinations, which involve the total contract rent paid by HPD to the landlord of a Section 8 assisted unit. Thus, HPD did not violate plaintiffs' due process rights by not providing them with the opportunity to review defendant

Hudsonview Terrace, Inc.'s submissions on its rent increase requests.

The claim that HPD failed to provide plaintiffs with adequate information about their enhanced vouchers accrued in 2003, when plaintiffs became eligible for the enhanced vouchers, and was therefore time-barred by 2012, when plaintiffs asserted it.

Plaintiffs lack standing to assert the claim that Hudsonview Terrace breached its Housing Assistance Payment Agreement with HPD. Even if the claim were properly alleged based on evidence that Hudsonview Terrace has offered rent concessions to certain non-voucher tenants allowing them to pay lower rents than those paid by enhanced voucher tenants living in comparable apartments, plaintiffs failed to show that those rent concessions affect the

rent that they are charged for their units or the rent share amount that they are required to pay pursuant to the HUD formula.

M-6579 ***Kelly Ann Junior v The City of New York***

Motion to supplement record denied.

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

ENTERED: JANUARY 24, 2017

CLERK

Sweeny, J.P., Renwick, Andrias, Kahn, Gesmer, JJ.

2843 The People of the State of New York, SCI 1833/14
Respondent,

-against-

Shakira Bonet,
Defendant-Appellant.

_____

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

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

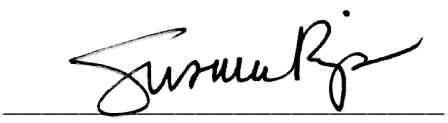
_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Larry Stephen, J.), rendered May 19, 2015,

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: JANUARY 24, 2017



CLERK

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

Sweeny, J.P., Renwick, Andrias, Kahn, Gesmer, JJ.

2844-
2844A In re Kayla S.,

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

Eddie S.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

The Bronx Defenders, Bronx (Saul Zipkin of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Melanie T. West of counsel), for respondent.

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

_____

Order of disposition, Family Court, Bronx County (Robert D. Hettleman, J.), entered on or about June 16, 2015, to the extent it brings up for review a fact-finding order, same court and Judge, entered on or about June 2, 2015, which found that respondent had sexually abused the subject child, unanimously affirmed, without costs. Appeal from the fact-finding order, unanimously dismissed, without costs, as subsumed in the appeal from the order of disposition.

Regardless of whether the Family Court improperly took

judicial notice of certain facts, the child's in-court testimony regarding the sexual abuse respondent inflicted upon her was sufficient to support the abuse finding by a preponderance of the evidence (*see* Family Ct Act § 1046[b][i]; *Matter of Shirley C.-M.*, 59 AD3d 360, 360 [1st Dept 2009]; *Matter of Anjoulic J.*, 18 AD3d 984, 987 [3d Dept 2005]). The child's testimony did not require corroboration (*see Matter of Marelyn Dalys C.-G. [Marcial C.]*, 113 AD3d 569, 569 [1st Dept 2014]). In any event, the testimony was corroborated by the child's medical records, which included her similar account of the abuse, as well as by the child protection specialist's testimony (*see Matter of Dayanara V. [Carlos V.]*, 101 AD3d 411, 412 [1st Dept 2012]). The testimony of respondent's witnesses, who did not witness the incident, did not explain his conduct or rebut the evidence of his culpability (*see Matter of Jani Faith B. [Craig S.]*, 104 AD3d 508, 509 [1st Dept 2013]). Family Court properly drew a negative

inference against respondent for failing to testify at the hearing (*id.*; *Matter of Jonathan Kevin M. [Anthony K.]*, 110 AD3d 606, 607 [1st Dept 2013]).

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

ENTERED: JANUARY 24, 2017

CLERK

Sweeny, J.P., Renwick, Andrias, Kahn, Gesmer, JJ.

2845 The People of the State of New York, Ind. 2891/14
Respondent,

-against-

Jose Quezada,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Mitchell J. Briskey of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Ann M. Donnelly, J.), rendered May 19, 2015, convicting defendant, after a jury trial, of grand larceny in the fourth degree and criminal possession of stolen property in the fourth degree, and sentencing him, as a second felony offender, to concurrent terms of two to four years, unanimously affirmed.

The court correctly declined to submit any lesser included offense not requiring value in excess of $1,000, because there was no reasonable view of the evidence, viewed most favorably to defendant, that the total value of the merchandise he stole failed to satisfy that threshold. The total value of the stolen property was established by way of a document from the store's cash register reflecting the prices of the stolen items on the

day of the crime. Neither trial counsel's assertion that the jury might "feel" that the value was lower, nor defendant's speculative claim, made for the first time on appeal, that some of the goods might have been on sale, constitutes the necessary reasonable view of the evidence to warrant submission of a lesser included offense (*see People v Gonzalez*, 92 AD3d 510 [1st Dept 2012], *lv denied* 18 NY3d 994 [2012]).

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

ENTERED: JANUARY 24, 2017

CLERK

Sweeny, J.P., Renwick, Andrias, Kahn, Gesmer, JJ.

2846 Philip Tanen, Index 652205/10
Plaintiff-Appellant,

-against-

Douglas Elliman, LLC, et al.,
Defendants-Respondents.

_____

Moritt Hock & Hamroff, LLP, New York (David A. Schrader of counsel), for appellant.

Littler Mendelson, P.C., New York (A. Michael Weber of counsel), for respondents.

_____

Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered November 4, 2015, which, to the extent appealed from as limited by the briefs, denied plaintiff's motion for summary judgment on the cause of action for breach of contract, and granted defendants' motion for summary judgment dismissing that cause of action, unanimously modified, on the law, to deny defendants' motion, and otherwise affirmed, without costs.

The August 2009 letter agreement is ambiguous as to whether the independent contractor status established therein for plaintiff was intended to be in effect for the same stated term as the extended term of a pre-existing agreement to which plaintiff was not a party or whether plaintiff's previous status as an at-will employee was intended to be carried forward (*see*

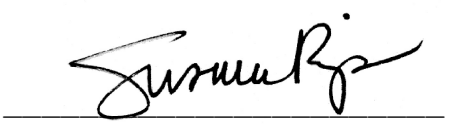
South Rd. Assoc., LLC v International Bus. Machs. Corp., 4 NY3d 272, 278 [2005]). The extrinsic evidence cited by the parties, including an affidavit by one of defendants' former managing directors, an affidavit by a signatory to the letter agreement (plaintiff's former father-in-law), and plaintiff's own deposition testimony, does not resolve the ambiguity.

The letter agreement is also ambiguous in providing that plaintiff's compensation will consist of a percentage of commissions received by defendants, without addressing whether plaintiff will be compensated for sales initiated during his tenure (or during the term, if any, of his independent contractor status) but not closed until afterwards. The extrinsic evidence cited by the parties does not resolve this ambiguity.

In light of the foregoing, it is premature to consider the amount of commissions due to plaintiff for sales that closed after his termination.

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

ENTERED: JANUARY 24, 2017



CLERK

Sweeny, J.P., Renwick, Andrias, Kahn, Gesmer, JJ.

2849 Robert Shapiro, Index 653571/14
Plaintiff-Appellant,

-against-

Gabriel Ettenson, et al.,
Defendants-Respondents.

_____

Kilhenny & Felix, New York (James M. Felix of counsel), for appellant.

Carter Ledyard & Milburn LLP, New York (Stephen M. Plotnick of counsel), for respondents.

_____

Order and judgment (one paper), Supreme Court, New York County (Kelly O'Neill Levy, J.), entered September 2, 2015, insofar as appealed from as limited by the briefs, declaring, inter alia, that nonparty ENS Health, LLC's operating plan is valid, that the capital call was valid, and that defendants were authorized to reduce plaintiff's salary by majority vote, unanimously modified, on the law, to vacate the declaration that defendants were authorized to set their own salaries and reduce plaintiff's salary by majority vote, and otherwise affirmed, without costs.

Plaintiff argues that ENS Health, LLC's operating agreement is invalid because its adoption was not unanimous. However, New York Limited Liability Company Law § 402(c) provides that the

operating agreement may be adopted by "the vote of a majority in interest of the members entitled to vote thereon." Plaintiff contends that the parties had an oral agreement regarding unanimity on this issue. However, Limited Liability Company Law § 417 requires a written operating agreement, and where there is no operating agreement or the operating agreement fails to address issues in dispute, the default provisions under the Limited Liability Company Law govern (*see e.g.* Limited Liability Company Law §§ 401[a]; 408[a]; *Doyle v Icon, LLC*, 135 AD3d 642 [1st Dept 2016]; *Matter of Eight Swords, LLC*, 96 AD3d 839 [2d Dept 2012]).

As the operating agreement explicitly provides that a member's participating interest may be reduced proportionally if the member fails to make a requested additional capital contribution, defendants were acting in accordance with the agreement when they issued their "Notice of Call for Additional Capital Contributions from Members."

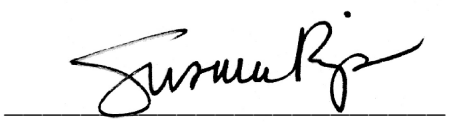
However, the defendants' action in setting salaries for themselves and setting plaintiff's salary at zero is precluded by

section 9.01 of the operating agreement.

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

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

ENTERED: JANUARY 24, 2017



CLERK

Sweeny, J.P., Renwick, Andrias, Kahn, Gesmer, JJ.

2850-
2851 The People of the State of New York,
Respondent,

-against-

Luis Borja,
Defendant-Appellant.

Ind. 137/14

Seymour W. James, Jr., The Legal Aid Society, New York (Joanne Legano Ross of counsel), for appellant.

Judgment, Supreme Court, New York County (Charles Solomon, J.), rendered April 29, 2014, unanimously affirmed.

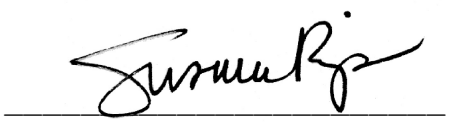
Application by defendant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1st Dept 1976]). We have reviewed this record and agree with defendant's assigned counsel that there are no non-frivolous points which could be raised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

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

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

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

ENTERED: JANUARY 24, 2017



CLERK

Sweeny, J.P., Renwick, Andrias, Kahn, Gesmer, JJ.

2855 In re Gerald St. Louis, Index 101197/15
Petitioner,

-against-

William J. Bratton, etc., et al.,
Respondents.

_____

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

Zachary W. Carter, Corporation Counsel, New York (Qian Julie Wang of counsel), for respondents.

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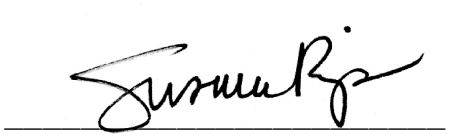
Determination of respondent Police Commissioner, dated March 25, 2015, which approved the findings of the Assistant Deputy Commissioner of Trials that petitioner police officer was guilty of two departmental infractions, and imposed the recommended penalty of forfeiture of three vacation days, unanimously 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 November 24, 2015), dismissed, without costs.

Substantial evidence supports the findings that petitioner improperly stopped a vehicle and frisked the subject driver (*see generally 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180-181 [1978]). Neither petitioner nor his partner

could point to a meaningful basis for believing the driver possessed a weapon or contraband (*see e.g. Matter of Felix R.*, 265 AD2d 227 [1st Dept 1999]). There exists no basis to disturb the credibility determinations of the Assistant Deputy Commissioner of Trials (*see Berenhaus v Ward*, 70 NY2d 436, 443-444 [1987]).

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

ENTERED: JANUARY 24, 2017



CLERK

Sweeny, J.P., Renwick, Andrias, Kahn, Gesmer, JJ.

2856 The People of the State of New York, Ind. 6051/11
Respondent,

-against-

William Fabre,
Defendant-Appellant.

_____

Andrew Mancilla, New York, for appellant.

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

_____

Judgment, Supreme Court, New York County (Jill Konviser, J.), rendered February 28, 2014, convicting defendant, after a jury trial, of robbery in the second degree and criminal impersonation in the first degree, and sentencing him, as a second felony offender, to an aggregate term of 11 years, with 5 years' postrelease supervision, unanimously modified, as a matter of discretion in the interest of justice, to the extent of reducing the prison term for the robbery conviction to 8 years, and otherwise affirmed.

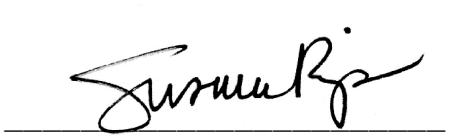
Defendant's legal sufficiency claim is unpreserved, and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. The conduct of defendant and his codefendants, during an incident where they

detained the victims while impersonating police officers, satisfied the element of force under the principles set forth in *People v Smith* (22 NY3d 1092 [2014]).

We find the sentence excessive to the extent indicated.

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

ENTERED: JANUARY 24, 2017



CLERK

Sweeny, J.P., Renwick, Andrias, Kahn, Gesmer, JJ.

2858 Robert Booth, Index 158714/12
Plaintiff-Appellant,

-against-

Ilo Milstein also known as
Ilo Milton,
Defendant-Respondent.

_____

Raymond Schwartzberg & Associates, PLLC, New York (Raymond Schwartzberg of counsel), for appellant.

Sweetbaum & Sweetbaum, New Hyde Park (Brian J. Daly of counsel), for respondent.

_____

Order, Supreme Court, New York County (Arlene P. Bluth, J.), entered November 6, 2015, which, in this action for personal injuries sustained in a motor vehicle accident, granted defendant's motion for summary judgment dismissing the complaint on the threshold issue of serious injury within the meaning of Insurance Law § 5102(d), unanimously affirmed, without costs.

Defendant established entitlement to judgment as a matter of law by showing that plaintiff did not sustain a serious injury to his lumbar spine. Defendant submitted, inter alia, the affirmed report of a neurologist, who found full range of motion and normal test results, and opined that plaintiff's injuries had resolved (*see Birch v 31 N. Blvd., Inc.*, 139 AD3d 580 [1st Dept

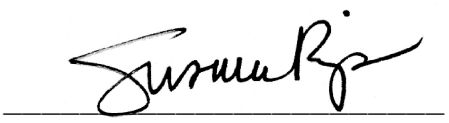
2016]; *Alvarez v NYLL Mgt. Ltd.*, 120 AD3d 1043, 1044 [1st Dept 2014], *affd* 24 NY3d 1191 [2015]).

In opposition, plaintiff failed to raise a triable issue of fact. Plaintiff did not submit recent evidence of limitations in his lumbar spine (*see Haniff v Khan*, 101 AD3d 643, 644 [1st Dept 2012]), and although plaintiff's chiropractor found limitations upon examination approximately two years after the accident, he did not reconcile those findings with earlier findings of normal or near normal range of motion made by another treating physician (*see Colon v Torres*, 106 AD3d 458 [1st Dept 2013]; *Jno-Baptiste v Buckley*, 82 AD3d 578 [1st Dept 2011]).

In view of the foregoing, the issue of liability is academic (*see Angeles v Versace Inc.*, 124 AD3d 544, 545 [1st Dept 2015]).

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

ENTERED: JANUARY 24, 2017



CLERK

Sweeny, J.P., Renwick, Andrias, Kahn, Gesmer, JJ.

2859N Datalot, Inc., Index 158869/12
Plaintiff/Defendant-Appellant,

-against-

Winum Enterprises, LLC, doing
business as Leads 2 Profits,
Defendant/Plaintiff-Respondent.

_____

Klein Moynihan Turco LLP, New York (John E. Greene of counsel), for appellant.

Koss & Schonfeld, LLP, New York (Simcha D. Schonfeld of counsel), for respondent.

_____

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered on or about March 14, 2016, which denied plaintiff's motion to limit the scope of damages recoverable by defendant on its counterclaim for breach of contract, unanimously affirmed, without costs.

Plaintiff's argument that paragraph 10 of the parties' agreement, "Warranty/Limitation of Liability," unambiguously precludes defendant from recovering damages for lost profits on any potential claim was rejected in a prior order, from which no appeal was taken, in which the motion court found the provision ambiguous as to whether the limitation of liability was limited to breach of warranty or applied to any cause of action, and the

issue may not be relitigated (*Glynwill Invs. v Shearson Lehman Hutton*, 216 AD2d 78 [1st Dept 1995]).

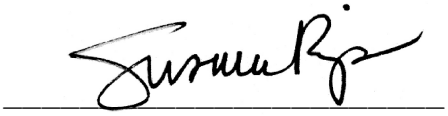
Plaintiff's argument that the motion court erroneously imposed upon it the burden of proving that an award of lost profits was not fairly within the contemplation of the parties when the agreement was made is without merit (*see Awards.com v Kinko's, Inc.*, 42 AD3d 178, 183 [1st Dept 2007], *lv dismissed* 9 NY3d 1025 [2008]). Plaintiff bore the burden of making its prima facie case on its own motion. The court's ruling is not irreconcilable with defendant's bearing the burden of proof at trial. In any event, the agreement explicitly mentions lost profits, thereby establishing that lost profits were within the contemplation of the parties when the agreement was entered into (*see Ashland Mgt. v Janien*, 82 NY2d 395 [1993]). Plaintiff's argument that damages for lost profits are purely speculative was

rejected by the court in the prior order (*see Glynwill*, 216 AD2d at 79).

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: JANUARY 24, 2017



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Sweeny, J.P., Renwick, Andrias, Kahn, Gesmer, JJ.

2860 In re Calvin Brooks, Ind. 1184/14
[M-4137] Petitioner,

-against-

Cyrus R. Vance, Jr., etc., et al.,
Respondent.

_____

Calvin Brooks, petitioner pro se.

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

Eric T. Schneiderman, Attorney General, New York (Michael J. Siudzinski of counsel), for Hon. Ellen Biben, respondent.

_____

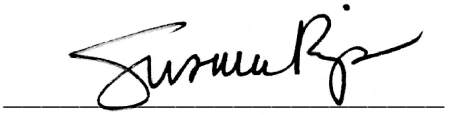
The above-named petitioner having presented an application to this Court praying for an order, pursuant to article 78 of the Civil Practice Law and Rules,

Now, upon reading and filing the papers in said proceeding, and due deliberation having been had thereon,

It is unanimously ordered that the application be and the same hereby is denied and the petition dismissed, without costs or disbursements.

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

ENTERED: JANUARY 24, 2017



CLERK

Acosta, J.P., Richter, Mazzarelli, Kapnick, Gesmer, JJ.

1956 The People of the State of New York Ind. 4447/12
Appellant,

-against-

Sergey Aleynikov,
Defendant-Respondent.

_____

Cyrus R. Vance, Jr., District Attorney, New York, NY (Elizabeth Roper of counsel), for appellant.

Marino, Tortorella & Boyle, P.C., New York (John D. Tortorella and Kevin H. Marino of the bar of the State of New Jersey, admitted pro hac vice, of counsel), for respondent.

_____

Order, Supreme Court, New York County (Daniel P. Conviser, J.), entered on or about July 6, 2015, as amended July 7, 2015, reversed, on the law, the motion denied, the verdict reinstated, and the matter remanded for sentencing.

Opinion by Richter, J. All concur.

Order filed.

CORRECTED ORDER - JANUARY 24, 2017

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Rolando T. Acosta, J.P.
Rosalyn H. Richter
Angela M. Mazzarelli
Barbara R. Kapnick
Ellen Gesmer, JJ.

1956
Ind. 4447/12

_____x

The People of the State of New York,
Appellant,

-against-

Sergey Aleynikov,
Defendant-Respondent.

_____x

The People appeal from the order of the Supreme Court, New York County (Daniel P. Conviser, J.), entered on or about July 6, 2015, as amended July 7, 2015, which, to the extent appealed from as limited by the briefs, granted defendant's motion for a trial order of dismissal to the extent of setting aside the jury's verdict convicting him of unlawful use of secret scientific material.

Cyrus R. Vance, Jr., District Attorney, New York, NY (Elizabeth Roper, Daniel Holmes and Jeremy Glickman of counsel), for appellant.

Marino, Tortorella & Boyle, P.C., New York (John D. Tortorella, Kevin H. Marino of the bar of the State of New Jersey, admitted pro hac vice, John Boyle and Erez Davy of counsel), for respondent.

RICHTER, J.

Defendant was formerly employed by Goldman Sachs as a computer programmer. Prior to leaving Goldman to work for a potential competitor, defendant made a digital copy of Goldman's proprietary computer source code by uploading and saving it to a hard drive of a server located outside the Goldman network. After surreptitiously uploading the source code, defendant transferred copies of it to several of his personal computing devices, and subsequently shared it with his new employer. As a result, defendant was charged with unlawful use of secret scientific material (Penal Law § 165.07). After a jury convicted defendant of this crime, the trial court set aside the verdict.

In this appeal, we are asked to decide whether defendant's actions constitute legally sufficient evidence to establish that he made a "tangible reproduction or representation" of the source code, and did so with the "intent to appropriate . . . [its] use," within the meaning of the unlawful use statute. We conclude that, viewed in the light most favorable to the People, the evidence was legally sufficient as to both of these elements. Accordingly, we reverse the trial court's decision, reinstate the jury's verdict and remand the matter for sentencing.

The evidence at trial, which is largely undisputed, established the following. In May 2007, Goldman hired defendant

as a computer programmer to write and maintain software for the company's high-frequency trading system. High-frequency trading entails the use of computers to make very rapid decisions concerning pricing of securities, and to quickly generate trades and orders. It is a competitive business that depends in large part on the speed with which information can be processed to seize fleeting market opportunities. High-frequency trading can be very lucrative, earning Goldman about $300 million in profits in 2009.

The infrastructure that supported Goldman's high-frequency trading business was based on a system the firm had purchased in 1999. Since that purchase, Goldman has regularly updated the system by incorporating new pieces of software into it. As a programmer at Goldman, defendant had access to the source code that ran the high-frequency trading system. Source code is a set of computer instructions written in a human-readable programming language. Defendant's programming duties included copying source code from Goldman's source code repository, modifying and testing it, and then integrating it into the existing software.

Because the high-frequency source code was so valuable, Goldman took a variety of steps to safeguard its secrecy. These measures included physical security of the corporate building, a limit on the number of people who had access to the software, and

the creation of an information security group responsible for ensuring that Goldman's systems were not vulnerable to attack. Further, every Goldman employee signed confidentiality and nondisclosure agreements wherein they acknowledged that they could not use Goldman's confidential information for their own purposes. Goldman programmers were forbidden from copying Goldman's source code outside of Goldman's network. Although employees were allowed to work from home, they had to use remote access or a firm laptop to ensure that all the source code stayed within the Goldman network.

In the spring of 2009, defendant was hired by Teza Technologies, a startup high-frequency trading firm. At that time, Teza had no software, connectivity or equipment for high-frequency trading activities, but hoped to build a system from scratch and be operational by the end of 2009. Teza hired defendant as a systems architect for its new trading platform. His annual salary was $1.2 million, about three times his salary at Goldman. At the end of May 2009, Teza's principal sent defendant an email emphasizing that the company had less than six months to launch the new system, and that the group developing the system had to "move fast."

Defendant ended his employment with Goldman on June 5, 2009. Later that month, Goldman's information security department

noticed unusual activity while reviewing a report generated by Goldman's computer monitoring systems. Specifically, the monitoring report showed that on June 1, 2009 and June 5, 2009, large amounts of data had been uploaded from the Goldman network to a Germany-based "subversion website," which is a website designed to allow a user to move, copy and store source code. Although Goldman's security system normally would block access to such websites, it somehow missed this one.

The monitoring report indicated that the transfers were made from defendant's work computer. Examination of defendant's computer showed that on his last day of work, he executed a program he had written to copy thousands of proprietary files from Goldman's source code repository. The files transferred that day included components of Goldman's high-frequency trading platform that would be highly valuable to any competitor. The files were compressed into smaller files called "tarballs," encrypted, and then uploaded onto the German subversion website.

Goldman's investigation revealed that the program defendant used to transfer the files had been backdated to make it seem two years older than it really was. The investigation also revealed that after running the program, defendant deleted it from his work computer, along with his "bash history," which is a list of the most recent commands a user has typed into his computer.

According to testimony at trial, deleting a bash history is not common, and there is no reason why a user would do so.[1] Police in Germany located the server of the subversion website, removed the hard drives and made forensic copies of them. A search of the information on those drives revealed that an individual with the username "saleyn" had uploaded information onto the server and then later retrieved it. Defendant had used this same username — which consists of his first initial and the first five letters of his last name — as his personal email address. The investigation further showed that by the end of June 2009, defendant had placed some source code into a "repository" account that Teza had created on a third-party website. A review of that code revealed that it was based upon the Goldman high-frequency trading programs that defendant had copied to the German server.

On July 3, 2009, defendant was arrested by the Federal Bureau of Investigation (FBI); Teza immediately terminated his employment. A search of two personal computers and a digital storage device found in defendant's home revealed that all three contained data from Goldman. When questioned by the FBI,

[1] Because Goldman's systems periodically created a copy of each user's bash history, investigators were able to uncover defendant's conduct that day, as well as his attempts to cover it up.

defendant at first denied transferring any proprietary information from Goldman. Upon further inquiry, however, defendant made a series of incriminating statements. In particular, defendant admitted that (i) he uploaded material from Goldman to the German server; (ii) he specifically chose that server because it was not blocked by Goldman's security system; (iii) he subsequently downloaded the material from the German server to his home computer and other storage devices; and (iv) he purposely erased the encryption software, the tarballs and his bash history because he knew his actions had violated Goldman's security policies.

In February 2010, defendant was charged in a federal indictment with transferring the Goldman source code in violation of, inter alia, the National Stolen Property Act (18 USC § 2314). On December 10, 2010, defendant was convicted following a jury trial in the District Court for the Southern District of New York. Defendant subsequently appealed his conviction to the Court of Appeals for the Second Circuit. On April 11, 2012, the Second Circuit reversed the conviction, concluding that defendant's actions did not violate the federal statute (*see United States v Aleynikov*, 676 F3d 71 [2d Cir 2012]).

In September 2012, defendant was charged in a New York County indictment with two counts of unlawful use of secret

scientific material (Penal Law § 165.07) (one count based on defendant's transfer of data on June 1, 2009, and the other based on his June 5, 2009 transfer), and one count of unlawful duplication of computer related material in the first degree (Penal Law § 156.30[1]). These state charges were based on the same conduct that led to his federal prosecution.[2] On April 8, 2015, defendant proceeded to a trial before a jury. At the close of the People's case, defendant moved, pursuant to CPL 290.10, for a trial order of dismissal as to all counts of the indictment; the court reserved decision on the motion.[3]

The jury returned a verdict of guilty on the count of the indictment charging unlawful use of secret scientific material arising from the June 5, 2009 transfer. The jury could not reach a unanimous verdict on the unlawful use count based on the June 1, 2009 transfer, and acquitted defendant of unlawful duplication of computer related material in the first degree.[4] In a decision entered on or about July 6, 2015, as amended July 7, 2015, the trial court granted defendant's motion for a trial order of

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[2] In a pretrial decision, the trial court concluded that the state prosecution was not barred by double jeopardy.

[3] Defendant periodically renewed his motion during jury deliberations.

[4] Those two counts are not at issue in this appeal.

dismissal as to the two counts of unlawful use. The court concluded that the evidence was insufficient to show that: (i) defendant made a "tangible reproduction or representation" of the source code; and (ii) he acted with the "intent to appropriate . . . the use of" the source code. The People appeal from the court's order to the extent it dismissed the unlawful use count related to the June 5, 2009 transfer. We now reverse.

Under CPL 290.10(1)(a), a court may grant a motion for a trial order of dismissal when the "trial evidence is not legally sufficient to establish the offense charged." "Legally sufficient evidence" is defined as "competent evidence which, if accepted as true, would establish every element of an offense charged and the defendant's commission thereof" (CPL 70.10[1]). In reviewing the legal sufficiency of the evidence, "all questions as to the quality or weight of the evidence must be deferred, the inquiry being whether the competent evidence, if accepted as true, establishes every element of the offense charged" (*People v Carrion*, 165 AD2d 671, 672 [1st Dept 1990]). In deciding the motion, the court must view all of the evidence in the light most favorable to the People (*People v Simon*, 157 AD2d 508, 512 [1st Dept 1990]).

Applying these principles, we conclude that the evidence at trial was legally sufficient to establish defendant's guilt of

unlawful use of secret scientific material. That statute, which became part of the Penal Law in 1967, provides:

> "A person is guilty of unlawful use of secret scientific material when, *with intent to appropriate to himself or another the use of secret scientific material*, and having no right to do so and no reasonable ground to believe that he has such right, he makes a *tangible reproduction or representation of such secret scientific material* by means of writing, photographing, drawing, mechanically or *electronically reproducing or recording* such secret scientific material"

(Penal Law § 165.07 [emphasis added]). In his motion for a trial order of dismissal, defendant did not challenge the People's proof that he electronically reproduced the source code. Nor did he claim that the source code did not constitute "secret scientific material," as that term is defined in Penal Law § 155.00(6). Rather, as relevant here, he argued that he did not make a tangible reproduction of the source code and that he lacked the requisite intent.

Although there is a dearth of case law interpreting this provision, the legislative history reveals why it was added to the Penal Law. The Temporary Commission on Revision of the Penal Law and Criminal Code explained that prior to the statute's enactment, "a person who [stole] the blueprints of a secret process, commit[ted] larceny[, but] one who surreptitiously [made] a photographic copy of such blueprint, leaving the

original in its proper place, [did] not commit larceny because he [was] not stealing 'property'" (1967 NY Legis Ann at 21; *see* William C. Donnino, Practice Commentary, McKinney's Cons Laws of NY, Book 39, Penal Law § 165.07 at 200 ["In the absence of the unlawful use crime, the photographing [of a document containing a secret scientific formula] would not be a crime since it does not represent a traditional taking of the 'property'"]).

With this context in place, we turn to the arguments advanced by the People on this appeal. First, the People contend that, contrary to the trial court's conclusion, the evidence was sufficient to establish that defendant made a "tangible reproduction or representation" of the source code. The Penal Law does not define "tangible." In construing the meaning of this term, we are guided by well-settled principles of statutory construction. "[C]ourts are obliged to interpret a statute to effectuate the intent of the Legislature" (*People v Williams*, 19 NY3d 100, 103 [2012]). "'As the clearest indicator of legislative intent is the statutory text, the starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereof'" (*People v Golo*, 26 NY3d 358, 361 [2015], quoting *Majewski v Broadalbin-Perth Cent. School Dist.*, 91 NY2d 577, 583 [1998]).

We must "presum[e] that lawmakers have used words as they

are commonly or ordinarily employed, unless there is something in the context or purpose of the [statute] which shows a contrary intention" (*People v Finley*, 10 NY3d 647, 654 [2008] [internal quotation marks omitted]). Further, Penal Law provisions "must be construed according to the fair import of their terms to promote justice and effect the objects of the law" (Penal Law § 5.00), and courts should "dispense with hypertechnical or strained interpretations" of penal provisions (*People v Versaggi*, 83 NY2d 123, 131 [1994] [internal quotation marks omitted]).

Where, as here, a word is not defined by statute, dictionary definitions serve as "useful guideposts" in determining the word's meaning (*People v Ocasio*, __NY3d__, 2016 NY Slip Op 07105 [2016] [internal quotation marks omitted]). Black's Law Dictionary defines "tangible" as "[h]aving or possessing physical form; CORPOREAL[;] [c]apable of being touched and seen; perceptible to the touch; capable of being possessed or realized" (Black's Law Dictionary [9th ed 2009]).[5] The People and defendant are in essential agreement that the term "tangible" means something having "physical form and characteristics" (*see e.g. People v Barden*, 117 AD3d 216, 231 n 5 [1st Dept 2014]

[5] Although Black's Law Dictionary also defines "tangible" as "[c]apable of being understood by the mind," the People, on appeal, do not argue that this definition should be used to determine the legal sufficiency of the trial evidence.

[defining "tangible property"], *reversed on other grounds* 27 NY3d 550 [2016]). The heart of their dispute is whether defendant made a "tangible reproduction or representation" of Goldman's source code when he copied and saved the code onto the hard drive of the German server. We conclude that he did.

The testimony of the People's witnesses at trial established that defendant created a copy of the source code that physically resided on the server's hard drive, a physical medium. Mirko Manske, a German law enforcement officer, described how police removed "physical" hard drives from the German server. Other witnesses testified that computer data can be physically present on various storage media, including hard drives. FBI Agent Michael McSwain explained that source code that is stored on a computer's hard drive "takes up physical space" on the hard drive. Navin Kumar, a computer engineer at Goldman, testified that when computer files are stored on a hard drive or compact disk, they are "physically present on that hard drive or [compact disk]." In fact, Kumar stated that data can be "visible" in the "aggregate" when stored on a medium such as a compact disk. Kumar explained that although source code in its abstract sense as intellectual property does not have physical form, a "representation" of the source code is "concrete."

Despite this testimony, defendant argues that he did not

make a "tangible reproduction or representation" of Goldman's source code because the source code remained in an intangible state even when defendant saved it onto the server's hard drive. The relevant question, however, is not whether the source code itself was tangible, but whether defendant made a tangible *reproduction* of it, which he unquestionably did when he copied it onto the server's "physical" hard drive where it took up "physical space" and was "physically present" (*see People v Barden*, 117 AD3d at 231 n 5 [although a credit card number is intangible, it can be reduced to a tangible medium in the form of an imprinted plastic credit card]; *United States v Zhang*, 995 F Supp 2d 340, 349 [ED Pa 2014] ["information stored in computer hardware has a physical manifestation"]; *see also* Penal Law §§ 156.00[2], [3] [both a "(c)omputer program" and "(c)omputer data" can exist "in any form, including magnetic storage media, punched cards, *or stored internally in the memory of the computer*" [emphasis added]).

There is no merit to defendant's argument that the unlawful use statute could not have been intended to criminalize his conduct because it was enacted in 1967, long before the advent of the technology used by defendant to copy Goldman's proprietary information. Whether the legislature envisioned the specific type of technology that exists today is not dispositive of this

appeal. The statute was drafted with broad generalized language that fits squarely into today's digital world (*see People v Russo*, 131 Misc 2d 677, 681, 683 [Suffolk County Court 1986] [concluding that in drafting the unlawful use statute, the legislature provided an "an elastic . . . definition" for "secret scientific material" so as to include a "computer program" within its ambit]). It proscribes making tangible reproductions or representations of secret scientific material not only by means of "writing, photographing [and] drawing," but also by "mechanically or *electronically reproducing or recording* [the] material" (Penal Law § 165.07 [emphasis added]). There is no dispute that defendant's copying of the source code here was accomplished by "electronically reproducing" the code.

The trial court's apparent belief that the source code had to have been printed on paper in order to be tangible is at odds with the language of the statute. The statute merely requires a "tangible reproduction or representation" of the secret material, and is silent as to the medium upon which the reproduction or representation will reside. Thus, the fact that defendant made the reproduction onto a physical hard drive, rather than onto a piece of paper, is of no consequence. Both are tangible within the meaning of the unlawful use statute. It would be incongruous to allow defendant to escape criminal liability merely because he

made a digital copy of the misappropriated source code instead of printing it onto a piece of paper (*see Thyroff v Nationwide Mut. Ins. Co.*, 8 NY3d 283, 292 [2007], quoting *Kremen v Cohen*, 337 F3d 1024, 1034 [9th Cir 2003] ["'It would be a curious jurisprudence that turned on the existence of a paper document rather than an electronic one'"]).

The natural extension of the trial court's position is that even if defendant had copied the source code onto a compact disk or a thumb drive, and walked out of Goldman's premises with that device, he still would not have violated the unlawful use statute because no paper was involved. Such a result makes little sense because a compact disk and a thumb drive are both unquestionably tangible. The trial court's position also ignores the trial evidence that a hard drive can be taken out of the server, and thus has a physical presence independent of the computer in which it was housed.

Although no reported decision has addressed the meaning of the term "tangible" within the meaning of Penal Law § 165.07, the Court of Appeals' decision in *People v Kent* (19 NY3d 290 [2012]) is instructive. In *Kent*, the defendant was charged with procuring and possessing child pornography on his computer. The evidence showed that some of the images and videos had been downloaded onto the defendant's computer. The Court upheld the

defendant's conviction relating to these items because "[the] defendant downloaded and/or saved the video and the images, thereby committing them to the allocated space of his computer" (*id.* at 304). The Court also observed that a "hard drive" is "tangible" (*id.* at 301), and described the "tangibility of [a computer] image" as "its permanent placement on [a] hard drive and [the] ability to access it later" (*id.* at 302). Thus, *Kent* supports our conclusion that a "tangible reproduction or representation" of source code is made when it is saved to a physical medium, such as a hard drive.

Defendant's reliance on *Thyroff v Nationwide Mut. Ins. Co.* (8 NY3d 283 [2007], *supra*) is misplaced. In *Thyroff*, the Court concluded that the common-law tort of conversion can apply to electronic data stored on a computer, which the Court described as "intangible property" (*id.* at 292-293). First, it does not appear that the parties in *Thyroff* actually litigated the question of whether electronic data is tangible or not. In any event, the fact that the Court described electronic data as "intangible" does not undermine our conclusion here. Regardless of whether the source code itself is intangible, defendant unquestionably made a tangible reproduction of it, within the meaning of the unlawful use statute.

The Second Circuit's reversal of defendant's federal

conviction under the National Stolen Property Act (18 USC § 2314) does not change the result. That federal statute makes it a crime, as relevant here, to "transmit[], or transfer[] in . . . foreign commerce any goods, . . . knowing the same to have been stolen." The Second Circuit did not address the precise question presented here — whether defendant made a "tangible reproduction or representation" of the source code. Thus, the Second Circuit's interpretation of the federal statue, which has different elements from the unlawful use statute here, has no bearing on whether the trial evidence was sufficient to sustain the jury's verdict (*see Hartnett v New York City Tr. Auth.*, 200 AD2d 27, 32 [2d Dept 1994] ["A federal decision contrary in principle is not binding upon a State court in respect of a State statute"] [internal quotation marks omitted], *affd* 86 NY2d 438 [1995]).

Nor does the reasoning underlying the Second Circuit's decision call into question our conclusion here. In finding that defendant's conduct did not violate the National Stolen Property Act, the Second Circuit concluded that the source code transferred by defendant was "intangible property," and therefore was not a "stolen" "good" within the meaning of the federal statute (*see United States v Aleynikov*, 676 F3d at 78). As discussed earlier, the relevant inquiry under the unlawful use

statute is not whether the source code itself was tangible, but whether defendant made a tangible reproduction of it, which the evidence shows that he did.

We reject defendant's alternative argument that the trial evidence did not establish that he uploaded Goldman's source code to the hard drives of the German server. Although no Goldman source code was found on the hard drives at the time they were examined, there was ample proof that defendant had in fact uploaded the source code to them. First, defendant made statements admitting that he had done so. Next, transmission logs showed that the source code was uploaded to the German server, and subsequently downloaded to defendant's home computer. Finally, when defendant's home devices were examined, Goldman's source code was found on them.

Contrary to the trial court's conclusion, the evidence was legally sufficient to establish that defendant possessed the requisite mens rea. To sustain a conviction under the unlawful use statute, defendant must have acted with the "intent to appropriate to himself or another the use of" Goldman's source code (Penal Law § 165.07). Under Penal Law § 155.00[4], a person "appropriate[s]" property by exercising control over the property either (i) "permanently" or (ii) "for so extended a period or under such circumstances as to acquire the major portion of its

economic value or benefit" (*see People v Jennings*, 69 NY2d 103, 118 [1983] [the concept of "appropriate" connotes a purpose to exert permanent or virtually permanent control]).

In finding the People's proof lacking, the trial court focused only on the second prong of the definition of "appropriate," and failed to appreciate the first prong, which refers to the intent to "permanently" exercise control. Here, the People's proof at trial permits a rational inference that defendant intended to exercise permanent control over the use of Goldman's source code, as opposed to a short-term borrowing. The People presented evidence that defendant surreptitiously uploaded the source code to the German server, downloaded it onto several personal computing devices, and then shared it with his new employer, a potential competitor of Goldman. The evidence further showed that defendant took multiple measures to cover up his illicit transfer of the data. Further, the record contains no evidence that defendant ever tried to return the misappropriated source code to Goldman, or to delete it from his or his new employer's devices.

Because the evidence was sufficient to show defendant's intent to exercise permanent control, the People correctly argue that they were not required to prove the second prong of the definition of "appropriate," i.e., that defendant intended to

acquire the major portion of the economic value or benefit of the source code. Nor was it necessary for the People to prove that defendant intended to deprive Goldman of the use of the source code. The unlawful use statute only requires the intent to "appropriate" the use of the secret scientific material and does not require any intent to "deprive." Further, the statute does not require that defendant intend to appropriate the source code itself, but only the *use* of the code.

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

Accordingly, the order of the Supreme Court, New York County (Daniel P. Conviser, J.), entered on or about July 6, 2015, as amended July 7, 2015, which, to the extent appealed from as limited by the briefs, granted defendant's motion for a trial order of dismissal to the extent of setting aside the jury's verdict convicting him of unlawful use of secret scientific

material, should be reversed, on the law, the motion denied, the verdict reinstated, and the matter remanded for sentencing.

All concur.

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

ENTERED: JANUARY 24, 2017

CLERK