



distribution of certain films. On July 29, 2004, prior to investing about \$40.1 million in Melrose's class B notes and equity, defendants Marathon Structured Finance Fund, L.P. (Marathon) and NewStar Financial Inc. (NewStar) executed a subscription agreement, in which they, inter alia, waived all claims against, and agreed not to sue, Paramount in connection with their investment.<sup>1</sup>

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<sup>1</sup> The relevant contract language is as follows:

"4. General Representations and Warranties of Investor. The Investor represents and warrants to, and agrees and covenants with the Issuer and Manager as of the date hereof, and as of each date it makes any capital contribution or funds any draws under the Notes, as follows:

. . .

"(s) The Investor acknowledges that none of the Relevant Parties [i.e., Paramount] has made any express or implied representation, warranty, guarantee or agreement, written or oral, to the Issuer or the Investor: . . . (iii) that the Covered Pictures or Index Pictures will perform in any particular manner, will achieve any level of return or amount of revenue or license fees or will be favorably received by exhibitors or by the public, or will be distributed in any particular manner or that any such distribution will be continuous . . . or (vi) that any Covered Picture or Index Picture will be marketed according to any particular marketing plan or distributed according to

On July 30, 2004 and October 13, 2004, respectively, defendants Munich Re Capital Markets New York, Inc. (Munich Re) and Allianz Risk Transfer AG (Allianz), entered into total swap returns pursuant to which they received all payments that their counterparties - signatories of the subscription agreement - were entitled to receive as a result of the investment. Between 2006 and 2007, Munich Re and Allianz acquired the class B notes and/or equity from these counterparties, which necessarily included the acquisition of those counterparties' obligations under the

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any particular release pattern (including so called 'wide releases') in the United States or in any other territory, other than as expressly set forth in Section 10 of the Revenue Participation Agreement.

. . .

"[(t)] The Investor acknowledges and agrees . . . (ii) that the Investor waives and releases all claims against Paramount, Viacom Inc. or any of their affiliates arising out of, or in connection with, the offering of the Securities. . . . The Investor waives and releases Paramount, Viacom Inc. and their affiliates from liability arising out of the matters described in paragraph (s) above [together with the above waiver language, the 'Waiver Provision'], and agrees that in no event shall it assert any claim or bring any action contradicting acknowledgments and agreements in this paragraph or in Paragraph (s) above ['Covenant Not to Sue']."

subscription agreement. Munich Re and Allianz concede that they are bound by the subscription agreement to the same extent as Marathon and NewStar.

On December 2, 2008, defendants filed suit in the United States District Court for the Southern District of New York to recoup losses on their investment. Defendants alleged in the federal action that Paramount misrepresented its intent to "pre-sell" foreign territories in distributing the films, in order to reduce its costs and minimize risk. Following the trial, the district court concluded that defendants' claims were precluded as a matter of law under the waiver provision of the subscription agreement. The district court decided the case under the waiver provision and not under the covenant not to sue, which was not raised by either party.

The district court found that there was no fraud or intent to mislead on Paramount's part, and that the evidence proved the truth of Paramount's representations. The district court also found that defendants are highly sophisticated and knew what they were doing with respect to their investment. Accordingly, the district court entered judgment in Paramount's favor.<sup>2</sup>

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<sup>2</sup> Defendants have appealed to the Second Circuit and, as of the date of their briefs, are awaiting a date for oral argument.

Paramount commenced the state court action asserting one cause of action, based on defendants' alleged breach of the covenant not to sue and seeking compensatory damages of not less than \$8 million, which represents its attorneys' fees incurred in the federal action, plus interest. Paramount does not invoke the waiver provision. Defendants moved to dismiss the complaint on the ground that the decision of the district court is res judicata.

Under the doctrine of res judicata, a final judgment on the merits of an action by a court of competent jurisdiction "is binding upon the parties and their privies in all other actions or suits on points and matters litigated and adjudicated in the first suit or which might have been litigated therein" (*Israel v Wood Dolson Co.*, 1 NY2d 116, 120 [1956], citing *Good Health Dairy Prods. Corp. v Emery*, 275 NY 14, 17 [1937]). Res judicata is designed to "relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication" (*Allen v McCurry*, 449 US 90, 94 [1980]).

"Additionally, under New York's transactional analysis approach to res judicata, once a claim is brought to a final conclusion, all other claims arising out of the same transaction

or series of transactions are barred, even if based upon different theories or if seeking a different remedy" (*Matter of Hunter*, 4 NY3d 260, 269 [2005] [internal quotation marks and citation omitted]).

Notwithstanding the foregoing, we must consider the fact that New York is a permissive counterclaim jurisdiction (CPLR 3011).

"Our permissive counterclaim rule may save from the bar of res judicata those claims for separate or different relief that could have been[,] but were not interposed in the parties' prior action. It does not, however, permit a party to remain silent in the first action and then bring a second one on the basis of a preexisting claim for relief that would impair the rights or interests established in the first action" (*Henry Modell & Co. v Minister, Elders & Deacons of Ref. Prot. Dutch Church of City of N.Y.*, 68 NY2d 456, 462 n2 [1986]).

In *Classic Autos. v Oxford Resources Corp.* (204 AD2d 209 [1st Dept 1994]), "[t]he doctrine of res judicata did not bar plaintiff's right to sue for return of its [] payment . . . where it had failed to include a counterclaim for money damages in a prior lawsuit involving the same transaction . . . [and] allowing plaintiff's claim . . . to proceed to disposition on the merits will [not] upset any right or interest of either party" (*id.* at 209-210). While we agree with plaintiff that the relief it seeks

in this action (i.e., attorneys' fees incurred in the federal action) would not "impair the rights or interests established" in the federal action, meaning that New York's permissive counterclaim rule would save it from the traditional bar of res judicata, the inquiry does not end there where the prior action was adjudicated in a compulsory counterclaim jurisdiction.

Despite the parties' arguments to the contrary, we find that plaintiff's claim for breach of the covenant not to sue is a compulsory counterclaim under the Federal Rules of Civil Procedure (FRCP) rule 13(a). It existed at the time plaintiff served its answer to the complaint in the federal action and "arises out of the transaction or occurrence that is the subject matter" of defendants' federal claim(s) (FRCP rule 13[a][1][A]; see *Petrie Method, Inc. v Petrie*, 1989 WL 47709, \*2 [ED NY Apr. 26, 1989], quoting *Harris v Steinem*, 571 F2d 119, 123 [2d Cir 1978] [the claims "are so logically connected that considerations of judicial economy and fairness dictate that all the issues be resolved in one lawsuit"]). To litigate it in the federal action would not have required adding another party over whom the district court could not acquire jurisdiction (FRCP rule 13[a][1][B]). Moreover, none of the exceptions to the rule apply (*id.* rule 13[a][2]).

While there is no binding precedent which holds that state courts must apply FRCP 13(a) (*accord Swergold v Cuomo*, 99 AD3d 1141, 1144 [3d Dept 2012], *lv denied* 20 NY3d 859 [2013]), in *RA Global Servs., Inc. v Avicenna Overseas Corp.*, 843 F Supp 2d 386, 390 [SD NY 2012], the district court held that “when the forum in which the prior litigation occurred was a compulsory counterclaim jurisdiction . . . notions of judicial economy and fairness require that a party be precluded from bringing all claims that it earlier had the opportunity - exercised or not - to assert as counterclaims.”

Further, the Court of Appeals has provided clear guidance on this issue in *Gargiulo v Oppenheim* (63 NY2d 843, 845 [1984]), stating in dicta, “For purposes of the disposition of this appeal we assume, without deciding, that under the procedural compulsory counterclaim rule in the Federal Courts (FRCP rule 13[a] [in 28 USC, Appendix]) claim and issue preclusion would extend to bar the later assertion in the present State court action of a contention which could have been raised by way of a counterclaim . . . .”

Based on the foregoing, we conclude that the later assertion

in a state court action of a contention that constituted a compulsory counterclaim (FRCP rule 13[a]) in a prior federal action between the same parties is barred under the doctrine of res judicata (see *Gargiulo*, 63 NY2d at 843; *RA Global Servs., Inc. v Avicenna Overseas Corp.*, 843 F Supp 2d at 390).

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

ENTERED: JULY 21, 2016

  
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CLERK



7803[1], [3]). An agency action is arbitrary and capricious "when it is taken without sound basis in reason or regard to the facts" (*Matter of Peckham v Calogero*, 12 NY3d 424, 431 [2009]). In reviewing an agency's application of its own regulations, courts "'must scrutinize administrative rules for genuine reasonableness and rationality in the specific context presented by a case'" (*Matter of Murphy v New York State Div. of Hous. & Community Renewal*, 21 NY3d 649, 654-655 [2013] quoting *Kuppersmith v Dowling*, 93 NY2d 90, 96 [1999]).

The NYCHA Management Manual requires that a remaining family member grievant must remain current in use and occupancy to pursue the grievance (NYCHA Management Manual, ch 1, subd XII[D][2][b]). This Court has upheld that requirement (*Matter of Garcia v Franco*, 248 AD2d 263, 265 [1st Dept 1998], *lv denied* 92 NY2d 813 [1998]). However, in this case, NYCHA's application of that rule to petitioner, and its resulting dismissal of her remaining family member grievance, was arbitrary and capricious. NYCHA failed and refused to recalculate use and occupancy based on petitioner's income, notwithstanding that the NYCHA Management Manual requires that it do so, during the pendency of a remaining family member grievance, in order for it to determine use and occupancy as the lower of the tenant of record's rent or the rent

rate based on the income of the remaining occupant (Manual, at ch 1, subd XII[D][2][b]).<sup>1</sup> NYCHA also failed and refused to provide petitioner with information and documents necessary for her to apply for funds to pay the arrears in use and occupancy. As a result, it was impossible for petitioner to meet the condition precedent to a hearing.

This case is distinguishable from our decision in *Garcia*, since, there, NYCHA staff had offered to, and did, assist a remaining family member grievant in preparing an application to the Department of Social Services for financial assistance to pay use and occupancy arrears (248 AD2d at 264). In contrast, here, there is no evidence that NYCHA ever offered to or did assist petitioner in her efforts to obtain financial assistance to pay use and occupancy arrears. NYCHA and the dissent assert that, at the proceedings before the NYCHA Hearing Officer, petitioner did not submit documentation of her claims that NYCHA staff: (1) declined to recalculate the use and occupancy based on her income, as the NYCHA Manual requires; (2) refused to provide her

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<sup>1</sup>The dissent asserts that NYCHA is "under no obligation to recalculate and reduce the rental of a unit on behalf of an occupant who has not submitted proof or requested recalculation." This is simply not true in the case of a remaining family member grievant during the pendency of the grievance, according to the NYCHA Management Manual.

with documentation necessary for her to obtain financial assistance (including the exact sum due); and (3) refused to accept partial payment. However, NYCHA did not dispute those claims before the Hearing Officer, who included these facts in her decision, but then overlooked them in dismissing petitioner's grievance. Accordingly, NYCHA's actions in this case placed petitioner in a "'Catch-22' situation" (*Garcia*, 248 AD2d at 264; see also *Matter of Aponte v Olatoye*, 138 AD3d 440, 443 [1st Dept 2016]), such that she could not proceed with her grievance hearing without paying use and occupancy, but she could not pay use and occupancy without information and documentation from NYCHA, and could not obtain a recalculation of use and occupancy based on her income, even though the NYCHA Management Manual requires this. The Hearing Officer's failure to consider these facts made the dismissal of petitioner's grievance arbitrary and capricious.

This Court appreciates NYCHA's efforts to fulfill its important mandate to provide decent, safe, and sanitary housing for low-income families in New York City, and its authority to promulgate and carry out standards and processes in keeping with federal law for determining eligibility for such housing (Public Housing Law § 2; 24 CFR § 960.202[a]). However, here, the result

of NYCHA's rigid application of one rule while failing to follow others had the result of denying a hearing to a young single parent who alleges she lived much of her life in the subject apartment and whose child has allegedly always lived there. Assuming she proves her claims at the hearing, and meets income and other reasonable criteria, this result would do little to fulfill the agency's mandate. As the Court of Appeals has recently recognized, succession rules serve the statutory purpose of subsidized housing by "facilitat[ing] the availability of affordable housing for low-income residents and...temper[ing] the harsh consequences of the death or departure of a tenant for their ... family members" (*Matter of Murphy v New York State Div. Of Hous. & Community Renewal*, 21 NY3d at 653).<sup>2</sup>

The article 78 court need not have reached the due process issue, since NYCHA had already determined that petitioner was entitled to a hearing on her grievance, but denied it solely because she failed to pay use and occupancy.

Although the merits are not before us, we will address them

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<sup>2</sup>The dissent attempts to distinguish *Murphy* from this case, noting, inter alia, that *Murphy* involved Mitchell-Lama housing, rather than NYCHA. However, we reference *Murphy* only with regard to its discussion of the purpose of succession rules and the standard of review of administrative determinations.

because the dissent has done so. From the record on this appeal, it appears that petitioner has made a prima facie "reasonable showing" that she resided in the subject apartment with NYCHA's knowledge, and may, therefore, qualify for remaining family member status (*Matter of Henderson v Popolizio*, 76 NY2d 972, 974 [1990]). As this Court has previously held, "While estoppel is not available against a government agency engaging in the exercise of its governmental functions...NYCHA's knowledge that a tenant was living in an apartment for a substantial period of time can be an important component of the determination of a subsequent [remaining family member] application" (*Matter of Gutierrez v Rhea*, 105 AD3d 481, 485 [1st Dept 2013], *lv denied* 21 NY3d 861 [2013]; *see also Henderson*, 76 NY2d at 974; *Matter of McFarlane v New York City Hous. Auth.*, 9 AD3d 289, 291 [1st Dept 2004]). The Court of Appeals, citing the NYCHA Management Manual, has held that a person who makes a "reasonable showing" of residency in a NYCHA unit with a family member for a substantial period of time with NYCHA's knowledge or permission is entitled to a hearing on remaining family member status (*Henderson v Popolizio*, 76 NY2d at 974 citing NYCHA Management Manual, ch VII, subd E[1][a]); *see also Matter of Russo v New York City Hous. Auth.*, 128 AD3d 570, 571 [1st Dept 2015] [noting

that certain circumstances may relieve a remaining family member claimant of the requirement of written consent to occupancy]; *Matter of McFarlane*, 9 AD3d at 291 [NYCHA's knowledge that a remaining family member claimant has lived in the unit for a substantial period of time without written permission is an important component of determination of remaining family member status]). Indeed, the Manual specifically cites "[e]ntries in the tenant folder that permission to reside in the household was requested..." as an example of a "reasonable showing" that a person is residing in NYCHA housing with NYCHA's knowledge or permission (*Henderson*, 76 NY2d at 974 quoting NYCHA Management Manual, ch VII, subd E[1][b][1])).

Petitioner's claim in this matter is virtually identical to that of the petitioner in *Gutierrez v Rhea*, in which this Court determined that NYCHA's failure to notify the petitioner or his mother that their application to add him to his mother's lease had been denied, and failure to evict the petitioner following the denial, entitled the petitioner to a hearing on remaining family member status after his mother's death (*Gutierrez*, 105 AD3d at 485). Here, petitioner has consistently claimed, and

submitted documentation supporting her claim,<sup>3</sup> that she lived in the subject apartment with her grandmother from in or about 2003, when petitioner was approximately 14, until her grandmother passed away on February 25, 2012, and has remained in the apartment since.<sup>4</sup> Petitioner has further consistently claimed that the subject apartment is the only home her son, born in 2008, has ever known; in fact, his birth certificate lists the subject apartment as petitioner's address. Petitioner claims that she believed, until on or about June 6, 2012, that NYCHA had granted her and her son permanent resident status. This claim is supported by the record, which contains no documentation

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<sup>3</sup>The dissent's assertion that petitioner's claim that she resided in the apartment for a number of years with her grandmother is supported only by her "bare assertion" is wrong. The applications to add her to the household, as well as her son's 2008 birth certificate, her employment documents from 2006-2012, and a handwritten letter from her grandmother dated September 21, 2009 also support her claims.

<sup>4</sup>The dissent notes that the Project Grievance Summary, which records NYCHA's first level review denial of petitioner's remaining family member grievance, alleges that petitioner's grandmother was "listed...as a single occupant of her apartment from 2005 until her death in 2012." However, none of the tenant affidavits are included in the record, and the Project Grievance Summary also erroneously states that petitioner's grandmother never sought permission for petitioner to reside with her. That statement is flatly contradicted by the two additional family member request forms dated April and December 2008, which are in the record, as the dissent acknowledges.

indicating that petitioner or her grandmother were ever notified of NYCHA's denial of either of her grandmother's two 2008 requests to add petitioner and her son as permanent residents of the subject apartment, and no claim or indication that NYCHA ever commenced administrative proceedings to terminate the tenancy following either denial of her grandmother's requests, as required by the Management Manual.<sup>5</sup> To be clear, we do not hold that petitioner has proved her claims; only that she has made a sufficient "reasonable showing" to entitle her to prove them at a hearing.

The dissent claims that such a hearing would be "futile" because petitioner and her grandmother never obtained written permission for petitioner to reside in the apartment, citing, inter alia, *Matter of Hawthorne v New York City Hous. Auth.* (81 AD3d 420, 421 [1st Dept 2011]). However, neither that case nor any of the others cited by the dissent involved petitioners who

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<sup>5</sup>The NYCHA Management Manual provides that the Housing Manager "indicates his/her decision... on the Permanent Residency Permission Request form... and returns a copy to the tenant" (R73, NYCHA Management Manual, ch 1, subd XI[B][2][b][3]). It further provides that, if additional persons in the household fail to vacate within 15 days after notification of denial of such a request, "staff will commence administrative proceedings to terminate the tenancy" (NYCHA Management Manual at XI[B][2][b][5]).

claimed or proved that they resided with a relative who was a primary tenant, with NYCHA's knowledge, for a substantial period of time prior to the tenant's death, as in this case. The cases cited by the dissent involved legitimate reasons for denial of remaining family member status, other than the bare fact that NYCHA had not given written permission for the petitioner to reside in the unit, including lack of a qualifying relationship to the primary tenant (*id.*), and failure to meet the requirement of one year or more of residency prior to the primary tenant's death or departure (*Matter of Diop v New York City Hous. Auth.*, 135 AD3d 665 [1st Dept 2016]; *Matter of Vereen v New York City Hous. Auth.*, 123 AD3d 478 [1st Dept 2014]; *Matter of Adler v New York City Hous. Auth.*, 95 AD3d 694 [1st Dept 2012], *lv dismissed* 20 NY3d 1053 [2013]; *Rosello v Rhea*, 89 AD3d 466 [1st Dept 2011]; *Matter of Echeverria v New York City Hous. Auth.*, 85 AD3d 580 [1st Dept 2011]; *Matter of Torres v New York City Hous. Auth.*, 40 AD3d 328 [1st Dept 2007]). Some of the cases cited by the dissent explicitly acknowledge that whether NYCHA "knew or implicitly approved" of the petitioner's residency, even in the absence of written consent, is a consideration where the petitioner had not obtained written permission to reside in the unit (*Echeverria*, 85 AD3d at 581; *Matter of Filonuk v Rhea*, 84

AD3d 502, 503 [1st Dept 2011]). Furthermore, the petitioners in at least four of the cases cited by the dissent were granted a remaining family member grievance hearing, even though they did not have written permission to reside in the subject apartment (see *Diop*, 135 AD3d at 665; *Vereen*, 123 AD3d at 478; *Matter of Abdil v Martinez*, 307 AD2d 238 [1st Dept 2003]; *Matter of Kolarick v Franco*, 240 AD2d 204 [1st Dept 1997]).<sup>6</sup> The dissent cites to *Rosello* for the proposition that NYCHA “may not be estopped from denying [remaining family member] status even if it... was aware of petitioner’s occupancy” (*Rosello*, 89 AD3d at 466). However, *Rosello*, like the Court of Appeals case on which it relies, *Matter of Schorr v New York City Dept. of Hous. Preserv. & Dev.* (10 NY3d 776 [2008]), involved a petitioner who failed to meet the requirement that she reside with the primary tenant for a particular length of time prior to the tenant’s death or departure in order to qualify for remaining family member status. That is not the case here. Accordingly, the dissent’s belief that the absence of written permission from

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<sup>6</sup> *Abdil* and *Matter of Kolarick* also predate this Court’s decision in *Matter of McFarlane*, in which we recognized that “a showing that the Authority knew of, and took no preventive action against, the occupancy by the tenant’s relative, could be an acceptable alternative for compliance with the notice and consent requirements” (9 AD3d at 291).

NYCHA to reside in the unit ends the inquiry is incorrect.

Under the circumstances of this case, NYCHA's dismissal of the grievance before a hearing on the merits was arbitrary and capricious, and the proceeding is remitted to NYCHA for a hearing. Petitioner shall cooperate with NYCHA so that it can set use and occupancy at the lower of the rent paid by her grandmother, or a rent rate based on her verified current income (NYCHA Management Manual, ch 1, subd XII[D][2][b]), and petitioner shall pay use and occupancy at the rate then set pending the determination of her grievance. In view of this decision, the article 78 court's holding that petitioner had a due process right to a hearing is rendered academic.

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

TOM, J.P. (dissenting)

In this article 78 proceeding, petitioner seeks to annul a determination of respondent New York City Housing Authority (NYCHA), dated September 10, 2013, which dismissed her remaining family member (RFM) grievance on the ground that she was not current in use and occupancy and thus was not entitled to a third-tier administrative hearing on her claim. Because NYCHA's dismissal of petitioner's grievance has a rational basis - petitioner failed to pay outstanding use and occupancy charges as required by respondent NYCHA's rule (NYCHA Management Manual, ch VII, § IV [E] [1] [c] [2]) and the evidence in the record shows that NYCHA never granted written permission for petitioner to reside in the tenant of record's apartment - I would reverse Supreme Court's grant of the petition and would dismiss the proceeding (*see Matter of Henderson v Popolizio*, 76 NY2d 972 [1990]; *Matter of Garcia v Franco*, 248 AD2d 263 [1st Dept 1998], *lv denied* 92 NY2d 813 [1998]).

Petitioner's grandmother, the late Jovita Texidor, was the sole tenant of record in the subject apartment at 1365 Fifth Avenue. Texidor lived in the apartment from at least January 2002 until her death on February 25, 2012. According to the Project Grievance Summary, dated October 4, 2012, Texidor listed

herself as a single occupant of her apartment from 2005 until her death in 2012. Petitioner alleged she had moved into Texidor's apartment in 2003 and was under the impression that her grandmother had added her to the family composition, yet the report stated that Texidor never obtained permission for petitioner to be added to her household.

Petitioner filed a RFM grievance in 2012 to determine whether she qualified to succeed to Texidor's lease. As is provided in NCYHA's Management Manual, but without regard to whether petitioner had paid use and occupancy for the apartment, petitioner was granted an informal hearing before the Project Manager. The Project Manager determined that petitioner was not a legal occupant of the apartment because she was never part of the family composition and had not obtained NYCHA's permission to live in the household, and that management had no knowledge of her residing in the apartment. He thus concluded she was not eligible to succeed to the lease.

Petitioner was then granted a second opportunity to be heard on the claim before the Borough Manager, who agreed with the disposition of the Project Manager but permitted petitioner to appeal to a hearing officer, which she did. Petitioner was notified on January 11, 2013 that her request for a hearing was

granted, that she had the right to present witnesses and to be represented by counsel. She was warned that the Hearing Officer reserved the right to dismiss the grievance "in the event that you are not up to date in payment of the appropriate rent or use and occupancy at the time of the hearing."

Although the hearing was initially scheduled for April 12, 2013, it was adjourned to May 15, 2013. On that day, petitioner appeared before the Hearing Officer. NYCHA moved to dismiss petitioner's grievance because she was not current in her payment of use and occupancy. The evidence in the record shows that at the time petitioner owed \$1,941.60 at the rate of \$323.60 per month, for a total of six months, and she had made only one payment of \$323.60 in the seven months prior to the hearing. Petitioner stated she had the money to pay the outstanding rent but had not paid it because she believed her mother had done so.

The Hearing Officer adjourned the hearing to June 27, 2013 in order to give petitioner time to get an attorney and to make payment of use and occupancy. She also explained to petitioner that "[p]aying use and occupancy gives you the right to present the case to me" and instructed that "if you want a hearing and if you want to pursue your claim, the use and occupancy has to be paid."

The hearing was adjourned again to August 20, 2013. On that day, petitioner had still not paid the use and occupancy and the balance had risen to \$2,912. The Hearing Officer reminded petitioner that she had been given an adjournment to pay the use and occupancy and consult with an attorney. Petitioner, who was still pro se, agreed.

The Hearing Officer then stated that NYCHA was again moving to dismiss the grievance on the grounds that the use and occupancy had not been paid. Petitioner stated that she "lost [her] job at that time," and prior to that she brought pay stubs to see if the rent could be minimized based on what she was making from December to February, and her request was declined. Petitioner stated that she got a job that July that makes enough money to pay the current amount, and that she had to go on the 26th to obtain her checks. Petitioner brought no documentation in support of her claims.

Petitioner was sworn in, and testified that she made one payment on April 6th, which was the last time she had a job. She became employed again in July and stated that she was trying to get a "one-shot deal on August 26th for the amount of \$2000" and that she had the other \$912. Notably, the only documents that petitioner submitted at her hearing were documents showing she

had applied for assistance from the Human Resources Administration (HRA), not documents showing HRA had approved a "one-shot deal." There is no documentation in the record to support petitioner's bare allegations that NYCHA refused to recalculate her use and occupancy based on her income, would not accept partial payments and did not provide petitioner with the documentation regarding the monies owed, or that it did not consider her application for financial relief including a "one-shot deal."

The Hearing Officer dismissed petitioner's grievance based on her failure to pay use and occupancy. NYCHA issued its final determination on September 10, 2013, dismissing the grievance.

The NYCHA Management Manual requires that a person seeking RFM status must remain current in use and occupancy to pursue a grievance or be entitled to a third-tier administrative hearing (Management Manual, ch 1, subd XII[D][2][b], XII[D][5][b]). This requirement has been upheld by the Court of Appeals and this Court (*see Matter of Henderson*, 76 NY2d at 974; *Matter of Hawthorne v New York City Hous. Auth.*, 81 AD3d 420, 420-421 [1st Dept 2011]; *Garcia*, 248 AD2d at 264).

Here, the evidence established that petitioner failed to remain current in her payment of use and occupancy, despite

repeated written and in-person warnings of the requirement to do so, and despite being given at least eight months to pay the use and occupancy owed. Accordingly, NYCHA's determination was made on a rational basis.

Initially, the majority's focus on the purported merits of petitioner's grievance sidesteps the central issue raised by this appeal, namely, whether NYCHA rationally dismissed petitioner's grievance for failure to be current in use and occupancy. This is not surprising since the inquiry as to the use and occupancy requirement is not in the majority's favor. The simple fact is that despite being given repeated opportunities and significant time to pay the outstanding use and occupancy petitioner failed to do so. Thus, dismissal of the grievance was rational.

It is significant to note that petitioner was given two opportunities to present her claim at two informal hearings as well as ample time to work out payment of use and occupancy in advance of the formal hearing. Yet, petitioner made only one payment in the nine months prior to the dismissal date, and although she offered to pay \$912 and admitted at her hearing that with her new job, she had "enough money to pay [the Housing Authority] the amount that they were asking for," petitioner nevertheless has not made a single payment since April 2013.

What makes the majority believe petitioner will pay use and occupancy at this point?

Contrary to the majority's contention, the application of the rule requiring payment of use and occupancy to petitioner was not arbitrary and capricious. Nor can NYCHA's upholding of the rule be considered unfairly "rigid." To the contrary, petitioner was given multiple chances and lengthy adjournments in order to enable her to pay use and occupancy. She failed to do so.

Nor is this case distinguishable from our decision in *Garcia*. As in *Garcia*, petitioner was warned of the requirement to pay use and occupancy and there is no evidence in this record about whether NYCHA offered to assist petitioner in preparing an application for financial assistance. The record evidence only shows that petitioner applied to the HRA for assistance.

However, the majority relies on petitioner's unsubstantiated and unsupported claims that NYCHA failed and refused to recalculate use and occupancy based on her income so as to reduce the rent affordable to petitioner, and failed and refused to provide petitioner with information and documents necessary for her to apply for funds to pay the arrears. This is a meritless claim since NYCHA is under no obligation to recalculate and reduce the rental of a unit on behalf of an occupant who has not

submitted proof or requested recalculation. Petitioner submitted no documentation or other evidence to corroborate her bare claim that NYCHA refused to recalculate use and occupancy (see NYCHA Manual at ch 1, subd XII[D][2]). Moreover, a recalculation may even show that petitioner, with income, may be charged a higher rate of use and occupancy than the deceased tenant's last rent. In fact, it appears the majority would require NYCHA to disprove allegations that have not been proved by petitioner in the first instance, an impossible standard. While the majority faults the Hearing Officer for mentioning these allegations and not crediting them, the Hearing Officer had a rational basis to reject these claims, namely, petitioner failed to provide documentation or any admissible proof to support any of the claims. Although petitioner included a letter from her employer and a W-2 statement as exhibits to her article 78 pleadings, NYCHA asserts that petitioner did not present these documents at the hearing or actually provide any evidence that the documents had been submitted to management for review. Further, the only documents that petitioner submitted at her hearing were documents showing she had applied for assistance from HRA, not documents showing HRA had approved a "one-shot deal." On appeal, she now claims that she received a one-shot deal from the HRA, but NYCHA

would not accept the check. However, contrary to her present claim, petitioner asserted in her article 78 pleadings that HRA denied her request for assistance with repayment of her arrears. There is absolutely no proof to show that HRA ever approved a one-shot deal or that NYCHA refused to accept the check, other than her inconsistent statements. Accordingly, there is nothing in the record to support a finding that NYCHA's actions placed petitioner in a "'Catch-22' situation" (*Garcia*, 248 AD2d at 264).

In any event, in *Garcia* this Court rejected the idea that a petitioner who does not receive assistance from HRA was caught in a "Catch-22" situation, holding "what may be required of a lawful tenant in residence may, a fortiori, also be required of a possibly illegal occupant who would prefer to live rent free while litigating her right to possession through the 3-tiered administrative review process and into the courts" (*Garcia*, 248 AD2d at 265). Here, petitioner has offered no evidence that would entitle her to RFM status before two levels of administrative reviews.

The majority's reliance on *Matter of Murphy v New York State Div. of Hous. & Community Renewal* (21 NY3d 649 [2013]) is entirely misplaced. Initially, *Murphy* concerns Mitchell-Lama housing, and not housing administered by NYCHA, which is a

separate housing program with different rules and requirements. More specifically, the Mitchell-Lama program does not contain the written permission requirement contained in NYCHA's Management Manual (see *Murphy*, 21 NY3d at 653). Further, *Murphy* concerned the petitioner's mother's "technical noncompliance for a single year" (*id.* at 655) to file an income affidavit, and did not concern the requirement to pay use and occupancy, a requirement that has been repeatedly upheld by the courts. The requirement to pay use and occupancy is not impacted by *Murphy's* instruction that succession rules in subsidized housing are meant to "facilitate the availability of affordable housing for low-income residents and to temper the harsh consequences of the death or departure of a tenant for their . . . family members" (*id.* at 653). Nor is this a case where a hyper-technical application of the law prevents an otherwise meritorious claimant from obtaining succession rights as a RFM (see *id.* at 653-655).

The majority's assertion that the Court of Appeals has held that a person who makes a "reasonable showing" that he or she has been residing with the tenant of record for a substantial period of time with NYCHA's knowledge is entitled to a grievance hearing (citing *Henderson* at 974) is inaccurate. In this regard, the majority conspicuously fails to fully quote *Henderson* and

conveniently ignores that *Henderson* and NYCHA's Management Manual (Ch VII subd E[1][b]) also require a petitioner to "continue to pay 'use and occupancy' after the tenant's death" (*Henderson* at 974), a condition precedent petitioner clearly failed to meet. Thus, regardless of the merits of petitioner's claim regarding her residency, she has not made a reasonable showing that she continued to pay use and occupancy, and she is not entitled to a hearing.

In addition, NYCHA policy requires a tenant to make a written request to the manager to have a relative or other family member become either a legally authorized permanent household member or a co-tenant. Thus, to qualify as a RFM, one must have obtained written permission from NYCHA to reside in the apartment (see NYCHA Management Manual, ch VII[E][1][a]). This policy has been consistently enforced by this Court as far back as our holding in *Matter of Kolarick v Franco* (240 AD2d 204 [1st Dept 1997]) and has been repeatedly upheld since that time (see *Matter of Diop v New York City Hous. Auth.*, 135 AD3d 665 [1st Dept 2016]; *Matter of Vereen v New York City Hous. Auth.*, 123 AD3d 478 [1st Dept 2014]; *Matter of Adler v New York City Hous. Auth.*, 95 AD3d 694 [1st Dept 2012], *lv dismissed* 20 NY3d 1053 [2013]; *Matter of Echeverria v New York City Hous. Auth.*, 85 AD3d 580,

581 [1st Dept 2011]; *Matter of Filonuk v Rhea*, 84 AD3d 502 [1st Dept 2011]; *Matter of Torres v New York City Hous. Auth.*, 40 AD3d 328 [1st Dept 2007]; *Matter of Abdil v Martinez*, 307 AD2d 238 [1st Dept 2003]).

Even assuming *arguendo* that petitioner was entitled to a third hearing, such a hearing would indeed be futile because petitioner never obtained written permission to be part of the household (*Hawthorne*, 81 AD3d at 421) and was never named on affidavits of income for the household. Chapter 1, subdivision XII[A][1] of the NYCHA Management Manual sets forth that in order to acquire RFM succession rights a person must have “lawfully enter[ed]” the apartment by, *inter alia*, obtaining written permission from the Housing Manager. In addition, the Management Manual requires an RFM claimant to show “continuous occupancy” for not less than one year before the tenant vacates the apartment or dies. To show continuous occupancy, the claimant must be named on all affidavits of income from the time she or he lawfully entered the apartment (NYCHA Management Manual, ch 1, subd XII [A][2]). Petitioner could never meet these standards. Further, as noted, even if NYCHA had knowledge that petitioner was residing in the apartment, it cannot be estopped from enforcing its rules (*see Matter of Schorr v New York City Dept.*

*of Hous. Preserv. & Dev.*, 10 NY3d 776, 779 [2008] ["It is well settled that estoppel cannot be invoked against a governmental agency to prevent it from discharging its statutory duties"] [internal quotation marks omitted]; *Rosello v Rhea*, 89 AD3d 466 [1st Dept 2011]).

The majority's reliance on *Matter of Gutierrez v Rhea* (105 AD3d 481 [1st Dept 2013], *lv denied* 21 NY3d 861 [2013]) is misplaced. In *Gutierrez*, no issue was raised regarding a grievance hearing and the failure to pay use and occupancy, which is the main issue in the present case. Nevertheless, unlike this case, the evidence as to the petitioner's residence in *Gutierrez* was substantial and included that the tenant listed the petitioner and his income on multiple annual income affidavits for the apartment, and named him as a person living in the apartment. In addition, NYCHA violated a number of its own internal rules, failed to act on the application to add petitioner to the lease, and conducted a criminal background check on him but never notified him he had to vacate the apartment. Thus, the factual issues in *Gutierrez* are different from the instant case.

The majority incorrectly asserts that none of the cases I cite involve "petitioners who claimed or proved that they resided

with a relative who was a primary tenant, with NYCHA's knowledge, for a substantial period of time prior to the tenant's death, as in this case." In fact, in *Henderson* the petitioner stated that he had been the tenant's common-law husband for many years, had signed the lease with her, and they both had resided in the apartment prior to her death (76 NY2d at 973). Further, other cases I cited from this Court involved petitioners who claimed to have lived in the apartment for years without written consent (see e.g. *Abdil v Martinez*, 307 AD2d at 240).

The fact that certain cases I cited involved petitioners who were granted a grievance hearing even though they did not have written permission to reside in the subject apartment is inconsequential, because, those cases did not involve the failure to pay use and occupancy which once again, is the central issue in the instant case (see *Diop*, 135 AD3d at 665 ["The fact that petitioner may have paid rent for the premises does not warrant a different determination"]; *Vereen*, 123 AD3d at 479 ["Petitioner's payment of use and occupancy cannot change an unauthorized occupant's status and cannot be deemed a substitute for written permission"]; *Kolarick*, 240 AD2d at 204 ["Nor is respondent estopped from denying petitioner tenancy status by having accepted rent from him after his mother died"])).

As for petitioner's due process claim, which the article 78 court found to have merit, the Court of Appeals' holding in *Henderson* controls and we are required to find no merit to the claim. As occurred in *Henderson*, petitioner in this case was given two levels of administrative review at informal hearings. The Court of Appeals found that NYCHA is not required to "grant a formal hearing to every person who makes a bare assertion that he or she is the [RFM] of a deceased tenant but is unable to make a preliminary showing that the claim is reasonably based" (76 NY2d at 974). Further, the Court of Appeals specifically found there had been no denial of due process where the petitioner had an informal hearing at which he "had the opportunity to present his side of the case," adding that "[f]undamental fairness does not require that he be afforded a third opportunity to be heard on the claim" (*Henderson*, 76 NY2d at 975). Similarly here, petitioner had two opportunities to be heard on her claim and thus was afforded due process.<sup>1</sup>

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<sup>1</sup>It must be noted that Supreme Court's attempt to distinguish between the informal hearing afforded the petitioner in *Henderson* and what it refers to as the "informal settlement" given to petitioner in this case fails. While the informal first and second tier review afforded to petitioner in this case did not have the various safeguards of a formal hearing, there is nothing to indicate that the informal hearing provided in *Henderson* was any different, and NYCHA states that the informal

A third hearing on petitioner's claim would be futile as it is undisputed that she never obtained written permission to reside in the apartment and was not an authorized occupant of the apartment for a one-year period before her grandmother's death (see *Matter of Echeverria*, 85 AD3d at 581). Relatedly, the majority appears to conclude that NYCHA determined that petitioner was entitled to a hearing on her grievance because her claim had merit. However, there is nothing in the record to support such a conclusion.

Finally, the majority's direction that petitioner pay use and occupancy pending the determination of her grievance recognizes the validity of that requirement. However, at the same time the majority's holding fails to recognize NYCHA's rational and proper application of that rule to petitioner.

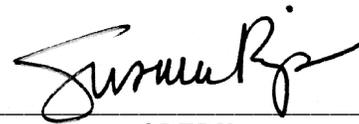
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hearing referenced in *Henderson* is the same informal hearing provided to petitioner here.

Accordingly, the petition should be denied and respondent's determination reinstated.

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

ENTERED: JULY 21, 2016



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reinstatement and monetary damages.

The City moved to dismiss the complaint on the ground that Labor Law § 740 is inapplicable to public employees. The City also argued that, even if plaintiff had asserted a claim under Civil Service Law § 75-b (the Public Sector Whistleblower Law), it would fail because his allegations did not satisfy the statutory prerequisites. In response, plaintiff amended his complaint, repeating his original factual allegations to assert an improper termination claim under Civil Service Law § 75-b, for which he sought only monetary damages.

Supreme Court granted the City's motion to dismiss the amended complaint on the grounds that: (i) the notice of claim did not give the City adequate notice of plaintiff's Civil Service Law § 75-b claim because the statute was not cited and "improper termination" could be premised on a myriad of state and federal statutes or common law, each of which would require different inquiries during the investigation; and (ii) plaintiff waived his right to pursue the Civil Service Law § 75-b claim because he elected to initially commence the action pursuant to Labor Law § 740 but withdrew that claim.

The motion court erred in finding that, by commencing this action pursuant to Labor Law § 740, plaintiff waived his right to

assert a retaliatory termination claim under Civil Service Law § 75-b (see *Hanley v New York State Exec. Dept., Div. for Youth*, 182 AD2d 317 [3d Dept 1992]). Accordingly, we must consider whether a notice of claim is required for a Civil Service Law § 75-b claim that seeks monetary relief and, if so, whether plaintiff's claim is barred because he did not cite § 75-b in his notice of claim.

General Municipal Law § 50-e(1)(a) requires service of a notice of claim within 90 days after the claim arises "[i]n any case founded upon tort where a notice of claim is required by law as a condition precedent to the commencement of an action or special proceeding against a public corporation." General Municipal Law § 50-i(1) precludes commencement of an action against a city "for personal injury, wrongful death or damage to real or personal property alleged to have been sustained by reason of the negligence or wrongful act of such city," unless a notice of claim has been served in compliance with section 50-e.

In *Yan Ping Xu v New York City Dept. of Health* (77 AD3d 40 [1st Dept 2010]), this Court, following *Mills v County of Monroe* (59 NY2d 307 [1983], *cert denied* 464 US 1018 [1983]), held that a notice of claim was required for a Civil Service Law § 75-b claim. In *Mills*, the Court of Appeals held that an employment

discrimination claim brought against a county under the Human Rights Law is subject to County Law § 52(1)'s notice-of-claim requirement.

In *Rose v New York City Health & Hosps. Corp.* (122 AD3d 76, 81 [1st Dept 2014]), we recognized that *Mills* was governed by County Law § 52(1), which applies to a much broader scope of cases than does General Municipal Law §§ 50-e and 50-i.<sup>1</sup> Nonetheless, we held that “we [were] constrained by *Xu* to hold that a party bringing a whistleblower claim, and seeking the full range of remedies, must file a notice of claim pursuant to General Municipal Law §§ 50-e and 50-i, even though the whistleblower statute is not a tort statute and technically does not fall within the categories described in General Municipal Law § 50-i.”

Thereafter, in *Margerum v City of Buffalo* (24 NY3d 721 [2015]), the Court of Appeals held that the notice of claim

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<sup>1</sup> County Law § 52(1) applies to: “Any claim or notice of claim against a county for damage, injury or death, or for invasion of personal or property rights, of every name and nature, and whether casual or continuing trespass or nuisance and any other claim for damages arising at law or in equity, alleged to have been caused or sustained in whole or in part by or because of any misfeasance, omission of duty, negligence or wrongful act on the part of the county, its officers, agents, servants or employees, must be made and served in compliance with section fifty-e of the general municipal law....”

requirements of General Municipal Law §§ 50-e and 50-i did not apply to the firefighters' disparate treatment racial discrimination claim under the New York State Human Rights Law. In reaching this determination, the Court stated succinctly that "[h]uman rights claims are not tort actions under 50-e and are not personal injury, wrongful death, or damage to personal property claims under 50-i. Nor do we perceive any reason to encumber the filing of discrimination claims" (*Margerum*, 24 NY3d at 730).

In light of *Margerum*, we now find that a notice of claim is not required for a Civil Service Law § 75-b claim. As with the Human Rights Law claims that were the subject of *Margerum*, Civil Service Law § 75-b claims are not tort actions under 50-e and are not personal injury, wrongful death, or damage to personal property claims under 50-i, and there is no reason to encumber the filing of a retaliatory termination claim.

While it is true that in *Xu* we rejected the pro se plaintiff's argument that a retaliatory firing suit is parallel to an employment discrimination claim under Human Rights Law § 296, in so ruling we cited *Rigle v County of Onondaga* (267 AD2d 1088, 1088-1089 [4th Dept [1999], lv denied 94 NY2d 764 [2000]) and *Roens v New York City Tr. Auth.* (202 AD2d 274 [1st Dept

1994]), both of which followed *Mills*, which involved the broader County Law notice of claim statute. Furthermore, Civil Service Law § 75-b shares significant similarities with the Human Rights Law.

The legislature passed the Human Rights Law to “eliminate and prevent discrimination in employment” (Executive Law § 290; see also *Matter of North Syracuse Cent. School Dist. v New York State Div. of Human Rights*, 19 NY3d 481, 494 [2012]). Section 75-b (and Labor Law § 740) are similarly concerned with the “protection [of] public and private employees” (Letter from Dept of Soc Servs, July 27, 1984 at 1, Bill Jacket, L 1984, ch 660). Notably, in *Tipaldo v Lynn* (76 AD3d 477 [1st Dept 2010], *affd* 26 NY3d 204 [2015]), this Court observed that retaliatory termination claims are analogous to the Human Rights Law for purposes of compensation because § 75-b, Labor Law § 740 and the Human Rights law all have “the goal of remediating adverse employment actions which, if allowed, would undermine an important public policy” (*Tipaldo*, 76 AD3d at 482).

Even if one was required, the notice of claim filed by plaintiff was sufficient to allow the City to investigate his Civil Service Law § 75-b claim, even though it did not cite the section.

A notice of claim must set forth “the nature of the claim,” “the time when, the place where and the manner in which the claim arose,” and “the items of damage or injuries claimed to have been sustained” (General Municipal Law § 50-e [2]). General Municipal Law § 50-e does not require “those things to be stated with literal nicety or exactness” (*Brown v City of New York*, 95 NY2d 389, 393 [2000] [internal quotation marks omitted]; see also *DeLeonibus v Scognamillo*, 183 AD2d 697, 698 [2d Dept 1992] [“courts have not interpreted the statute to require that a claimant state a precise cause of action . . . . The Legislature did not intend that the claimant have the additional burden of pleading causes of action and legal theories . . . in the notice of claim, which must be filed within 90 days of the occurrence”]). Rather, the test of the notice’s sufficiency is whether it includes information sufficient to provide a municipal authority with an opportunity to investigate the claim (see *Brown*, 95 NY2d at 393; *Rosenbaum v City of New York*, 8 NY3d 1, 10-11 [2006]). “In passing on the sufficiency of a notice of claim in the context of a motion to dismiss, courts are not confined to the notice of claim itself” (*D’Alessandro v New York City Tr. Auth.*, 83 NY2d 891, 893 [1994]; *Luke v Metropolitan Transp. Auth.*, 82 AD3d 1055, 1056 [2d Dept 2011] [“In making a determination on

the sufficiency of a notice of claim, a court must look to the circumstances of the case, and is not limited to the four corners of the notice of claim[ ]”).

Civil Service Law § 75-b forbids retaliatory or personnel action concerning, inter alia, compensation, promotion, transfer, or evaluation of performance, by public employers against their employees who disclose to a governmental body information regarding violations of regulations that would present a specific danger to public health or safety (Civil Service Law § 75-b [1] [d]; [2][a]). Here, while the plaintiff did not specifically reference the “whistleblower” claim, the notice of claim included enough information for the City to investigate the § 75-b claim.

In his notice of claim, plaintiff asserted that the nature of his claim was: “IMPROPER TERMINATION, FRAUD, FALSE CERTIFICATION, CONSPIRACY, FRAUDULENT INDUCEMENT, COERCION TO SUBMIT FALSE CLAIMS AND/OR DEFRAUD THE CITY OF NEW YORK and/or THE STATE OF NEW YORK, DISCRIMINATORY PRACTICES, CORRUPT PRACTICES, VIOLATION OF PROCEDURAL DUE PROCESS, [AND] VIOLATION OF CITY OF NEW YORK RULES, REGULATIONS AND EMPLOYMENT PRACTICES.” He also asserted that he was terminated from his position as a “manager (MI) at the Department of Homeless and a certified fire safety director,” and that the “basis of the termination was

improper and/or illegal," namely that he "had, inter alia, refused to make false certifications, participate on [sic] ongoing fraud, and engage in an already existing conspiracy and in corrupt practices." The City was certainly aware that plaintiff's job duties at the Department of Homeless Services (DHS) required him to inspect homeless shelters and to certify that they were safe. Therefore, a further investigation (including a 50-h hearing) would have uncovered that plaintiff refused to certify false statements about the safety of homeless shelters he inspected, that he complained to his supervisors about it, and that he was terminated after doing so (see *Brazill v Elmont Union Free School Dist.*, 2010 NY Slip Op 32383[U], \*3 [Sup Ct, Nassau County, Aug. 25, 2010]). Additionally, the City fails to establish what prejudice, if any, it suffered as a result of the purported defect in the notice of claim, which clearly alerted it to plaintiff's claim that his termination was improper.

The City argues that the amended complaint must nevertheless be dismissed because plaintiff failed to state a cause of action under Civil Service Law § 75-b<sup>2</sup>. The City asserts that although

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<sup>2</sup>The requirement that an employee first make a good faith effort to inform the "appointing authority" is set forth in Civil

plaintiff allegedly advised his immediate supervisor and an Assistant Commissioner of the alleged violations, these individuals were not the "appointing authority" at DHS, and plaintiff never alleged that he reported the alleged government misconduct to a governmental body outside of DHS. These arguments are unavailing.

Civil Service Law § 75-b(2) (a) provides: "A public employer shall not dismiss ... a public employee ... because the employee discloses to a governmental body [certain violations]." Pursuant to § 75-b(1) (c) (i), the definition of "[g]overnmental body" includes "an officer, employee, agency, department, division, bureau, board, commission, council, authority or other body of a public employer." The use of the term "a governmental body," which includes "a public employer," rather than "another" government body or "another" public employer, suggests that an employee is protected if he reports internally and/or externally.

Civil Service Law § 75-b(2) (b) (the now repealed provision) stated: "For purposes of this subdivision, an employee who acts pursuant to this paragraph [requiring a good faith effort to

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Service Law § 75-b(2) (b), which was repealed on December 28, 2015, after the order appealed was rendered; however, plaintiff concedes that § 75-b(2) (b) is applicable because it was in effect at the time he commenced the action.

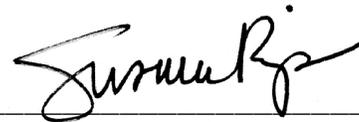
first inform an 'appointing authority'] shall be deemed to have disclosed information to a governmental body under paragraph (a) of this subdivision." That text also suggests that an employee need not also report to an external agency. Similarly, the legislative history states that "[t]he employee receives the same protection when giving this notice [to the appointing authority] as if he or she had disclosed information to a governmental body" (see Mem of State Executive Dept, 1984 McKinney's Sess Laws of NY at 3389).

The Court of Appeals has also instructed that "courts should use their discretion in determining whether the overall actions of the plaintiff constitute a good faith effort to report the misconduct" (*Tipaldo v Lynn*, 26 NY3d at 212). Here, the overall efforts of plaintiff constitute a good faith effort to report the alleged misconduct. Plaintiff complained not only to his supervisor but also to the Assistant Commissioner about DHS' attempts to cover up unsafe conditions at homeless shelters (see *Medina v Department of Educ. of the City of N.Y.*, 35 Misc 3d 1201[A], \*3 [Sup Ct, NY County 2012] ["[I]nternal complaints to the plaintiff's supervisor will be held sufficient to satisfy Civil Service Law § 75-b absent a showing by the agency defendant

as to why the complaint to the supervisor was insufficient, or that the petitioner could have or should have notified someone else in order to obtain corrective action“]).

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

ENTERED: JULY 21, 2016

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Tom, J.P., Mazzairelli, Manzanet-Daniels, Kapnick, Kahn, JJ.

1470- Index 652323/14

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1472-

1472A Hoyt David Morgan,  
Plaintiff-Respondent,

-against-

Worldview Entertainment  
Holdings, Inc., et al.,  
Defendants,

Worldview Entertainment  
Partners VII, LLC, et al.,  
Defendants-Appellants.

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Quinn McCabe LLP, New York (Matthew S. Quinn of counsel), for  
Worldview Entertainment Partners VII, LLC and Molly Conners,  
appellants.

Schenck, Price, Smith & King, LLP, New York (Ryder T. Ulon of  
counsel), for Maria Cestone, appellant.

Winslett Studnicky McCormick & Bomser LLP, New York (Usher  
Winslett of counsel), for respondent.

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Orders, Supreme Court, New York County (Eileen A. Rakower,  
J.), entered February 3, 2015, which, to the extent appealed  
from, denied defendants Molly Conners's and Maria Cestone's  
motions to dismiss the complaint as against them, and continued  
the temporary restraining order prohibiting defendant Worldview  
Entertainment Partners VII (Partners VII) from transferring any  
assets to the extent of \$2.7 million, unanimously modified, on

the law, to grant Conners's and Cestone's (together the individual defendants) motions to dismiss the tortious interference with contract cause of action as against them, and otherwise affirmed, without costs. Orders, same court and Justice, entered May 14, 2015, which granted orders of attachment of the property of Partners VII in the amount of \$2.7 million, unanimously affirmed, without costs.

Plaintiff was the chief financial officer of defendant Worldview Entertainment Holdings Inc. (Worldview Inc.), a movie production company wholly owned by defendant Worldview Entertainment Holdings LLC (Worldview LLC). When his employment with Worldview Inc. was terminated, plaintiff and Worldview Inc.'s then chief executive officer, Christopher Woodrow, signed a separation agreement (the agreement). Plaintiff alleges that Worldview Inc. failed to pay him the monies and other consideration owed to him pursuant to the agreement.

The motion court providently exercised its discretion in granting the orders of attachment of the property of Partners VII (see *VisionChina Media Inc. v Shareholder Representative Servs., LLC*, 109 AD3d 49, 59 [1st Dept 2013]). Plaintiff's allegations that Partners VII, a nondomiciliary (see CPLR 6201[1]), was the only investment vehicle producing revenue for defendants and that

it would receive funds from the film's distributor and distribute them to investors no later than 90 days thereafter are sufficient to establish an identifiable risk, based on Partners VII's financial position (see *General Textile Print. & Processing Corp. v Expromtorg Intl. Corp.*, 862 F Supp 1070, 1073 [SD NY 1994]). The amount of the attachment is supported by evidence of the value of plaintiff's recoupment and the value of his credit as an executive producer on the film *Birdman*.

The complaint and supporting documentary evidence are sufficient to demonstrate, for purposes of the attachment, that Woodrow was authorized to bind Worldview Inc.'s "affiliates" to the agreement and that Partners VII was an "affiliate" within the meaning of the agreement (see *Credit Index v RiskWise Intl.*, 192 Misc 2d 755, 760 [Sup Ct, NY County 2002], *affd* 296 AD2d 318 [1st Dept 2002]).

The complaint adequately alleges a cause of action for breach of contract against the individual defendants under the theory that they are "affiliates" of Worldview Inc. (see *Wachter v Kim*, 82 AD3d 658, 662 [1st Dept 2011]). The term "affiliates" is not defined within the agreement, and neither its meaning, nor whether the parties intended for the individual defendants to be bound under the agreement, can be discerned on this pre-answer

motion to dismiss (*id.*).

However, the cause of action for tortious interference with contract fails as against the individual defendants, since the complaint does not even allege "either malice on the one hand, or fraudulent or illegal means on the other" (*Foster v Churchill*, 87 NY2d 744, 750 [1996]) so as to defeat the defense of economic justification (*id.*; see *Hoag v Chancellor, Inc.*, 246 AD2d 224, 227 [1st Dept 1998]; see also *E.F. Hutton Intl. Assoc. v Shearson Lehman Bros. Holdings*, 281 AD2d 362, 362 [1st Dept 2001], *lv denied* 97 NY2d 603 [2001]).

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

ENTERED: JULY 21, 2016

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twelve years it had previously imposed on defendant's conviction of conspiracy in the second degree (upon which he was ineligible for youthful offender treatment, for the reasons stated in our original decision).

On the present appeal, defendant concedes that the resentencing court complied with this court's narrow direction under *Rudolph* to consider whether to treat him as a youthful offender on the assault conviction. He challenges the sentence imposed as excessive, however, and argues that this court should modify his sentence on that count in the interest of justice, either to adjudicate him a youthful offender or otherwise to reduce the term of his incarceratory sentence.

When a defendant enters a guilty plea and validly waives his right to appeal, that waiver precludes any appellate challenge to the harshness of the sentence imposed (*People v Lopez*, 6 NY3d 248, 256 [2006]). We previously determined that defendant had made a valid waiver of his right to appeal in connection with his guilty plea, which foreclosed our consideration of his claim regarding the sentence imposed on his conspiracy conviction (131 AD3d at 892). Our remand for the limited purpose of *Rudolph* compliance constituted a "narrow exception" to the general rule of *Lopez* barring any challenge to the excessiveness of a sentence

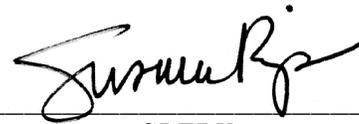
by a defendant who had validly waived the right to appeal as part of a guilty plea proceeding (see *People v Pacherille*, 25 NY3d 1021, 1023 [2015]). It had no impact on the validity or effectiveness of defendant's waiver of his right to appeal, however, which was validly negotiated as part of the plea agreement. That waiver bars any challenge now to the excessiveness of the resentencing or to the resentencing court's exercise of discretion in denying youthful offender treatment (*id.*).

The cases cited by defendant are inapposite, as they involve waivers of the right to appeal that either were followed by a resentencing under conditions unknown at the time of the guilty plea and original sentence (*People v Tausinger*, 21 AD3d 1181, 1183 [3d Dept 2005]), or were found on appeal not to have been knowing, voluntary and intelligent (*People v Flores*, 134 AD3d 425 [1st Dept 2015]). Here, although the court at resentencing was not performing a ministerial function and could have imposed a lesser sentence (*id.* at 426-427), defendant received the same bargained-for, ten-year term the court had imposed originally. "As defendant 'knew the maximum exposure [he] could face upon pleading guilty,' his valid appeal waiver precludes his present challenge to his resentencing as harsh and excessive" (*People v*

*Sofia*, 62 AD3d 1159, 1160 [3d Dept 2009], quoting *People v Lococo*, 92 NY2d 825, 827 [1998]). Under these circumstances, there was no need for any additional waiver of defendant's right to appeal with respect to the count remanded.

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

ENTERED: JULY 21, 2016

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SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Angela M. Mazzarelli, J.P.  
Rolando T. Acosta  
Karla Moskowitz  
Rosalyn H. Richter, JJ.

16434  
Ind. 3825/06

x

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The People of the State of New York,  
Respondent,

-against-

Ricardo Jimenez,  
Defendant-Appellant.

x

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Defendant appeals from an order, Supreme Court, Bronx County (Robert A. Sackett, J.), entered March 4, 2014, which denied his CPL 440.10 motion to vacate a judgment of conviction rendered August 16, 2007.

Richard M. Greenberg, Office of the Appellate Defender, New York (Anastasia Heeger, Rosemary M. Herbert and Anant Kumar of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Noah J. Chamoy and Joseph N. Ferdenzi of counsel), for respondent.

MAZZARELLI, J.P.

Sean Worrell was shot and killed in a Bronx movie theater in July 1989. Defendant was arrested shortly after the shooting based on a police interview with Esco Blaylock, a teenager who claimed to have witnessed the shooting, but he was released after Blaylock stopped cooperating with the authorities. After that, the case went cold and remained that way for nearly 10 years. The investigation was revived after Andrew O'Brien, who was serving a 30-year federal sentence for his involvement in a murderous drug gang, told FBI agents who were interviewing him in connection with their ongoing investigation of the gang that he was with Worrell when Worrell was killed, and was prepared to assist in bringing the perpetrator to justice. O'Brien was eventually contacted by a New York City police detective from the cold case squad, who, based on the information he gathered from O'Brien, reopened the case. Defendant was rearrested in August 2006.

At trial, both Blaylock and O'Brien testified that they saw defendant argue with Worrell on the popcorn line, exit the movie theater, and then, minutes later, return with a gun to shoot Worrell in one of the auditoriums. Blaylock, who was working at the concession stand on the night of the homicide, recognized the shooter as "Leon," a person he knew from the neighborhood and saw

regularly. He testified that he recalled describing "Leon" to the police on the day of the incident as a light skinned man who "appeared to be black," with a flat top haircut and a gold cap on a tooth. Indeed, the detective who originally investigated the homicide (retired by the time of trial), confirmed that a DD-5 report he prepared on the date of the shooting, after having interviewed Blaylock, noted that Blaylock had described the perpetrator as a male black who appeared Puerto Rican and could mimic a Jamaican accent. Another witness who testified at trial was Mike Centeno, who was stationed as a security guard near the concession stand on the night of the shooting. Centeno testified that he saw a person with "light-skin like myself" come running out of an auditorium holding a gun after shots were heard inside the same room. Centeno described himself as "Spanish," but also stated that he "assumed" the shooter was a "[l]ight-skinned [b]lack person." Detective Michael Serrano testified that the DD-5 he prepared in connection with his interview of Centeno immediately after the shooting memorialized Centeno's having told him that the person he saw fleeing the auditorium was a black male of dark complexion.

Another witness who testified at trial was Kevin Morrissey. Morrissey testified that he became acquainted with defendant in 2006 when they were housed in the same jail. Morrissey had a

paralegal certificate and fashioned himself a jailhouse lawyer. He stated that defendant approached him for help with his case, and that in doing so he volunteered that he had shot someone at a Bronx movie theater after getting into an argument with that person. Morrissey acknowledged that the reason he was in jail was because on five separate occasions he had attempted to purchase cars using phony checks and that it would be fair to characterize him as a professional con man.

Defendant was convicted of second-degree murder and sentenced to a term of 22 years to life. On direct appeal to this Court, he argued that the verdict was against the weight of the evidence, that the court erred in denying his request for a justification charge, that the prosecutor made improper remarks in summation, that his constitutional speedy trial rights were violated, and that the sentence was excessive. This Court unanimously affirmed defendant's conviction (71 AD3d 483 [1st Dept 2010], *lv denied* 15 NY3d 752 [2010]), observing, with respect to the weight of the evidence:

"Two witnesses (one of whom was acquainted with defendant) having no connection with each other identified the same person and gave essentially similar accounts of the incident. Moreover, defendant's confession to an informant contained significant details that confirmed the informant's credibility" (71 AD3d at 483).

This appeal is from the denial of defendant's motion to vacate his conviction pursuant to CPL 440.10. The grounds for vacatur were actual innocence, failure to turn over exculpatory and impeachment material pursuant to *Brady v Maryland* (373 US 83 [1963]), prosecutorial misconduct, and ineffective assistance of counsel. The actual innocence claim was based on the statements of two people who claimed to have been in the movie theater on the night Worrell was killed but who did not testify. Defendant claims that both witnesses told an investigator hired by appellate counsel that the person who shot Worrell either had brown or black skin, and that defendant, whose photograph they were shown, was not that man. Defendant complained of multiple *Brady* violations based on the prosecution's failure to turn over materials that he claimed would have significantly assisted his trial counsel in impeaching the People's witnesses. For example, he presented documents that he claimed demonstrated that O'Brien had been promised that the United States Attorney's Office that prosecuted him for his gang involvement would seek a reduction of his 30-year sentence in exchange for his cooperation against defendant. He also claimed that the prosecution should have disclosed Morrissey's involvement in several federal trials, which would have revealed that he had a history of serious mental illness and that he had acted as an informant in the past.

Additionally, defendant contended that Morrissey and O'Brien had significant criminal histories beyond what had been disclosed to him before trial. He also argued that several significant documents relating to the police investigation were either not turned over at all or were not produced to the defense until the eve of trial or during jury selection.

The prosecutorial misconduct claim was based on the District Attorney's allegedly having allowed trial witnesses to offer false testimony at trial. Finally, defendant asserted that his trial counsel was ineffective because he failed to seek dismissal of the indictment based on the 17 years that had passed between the homicide and the filing of charges; failed to properly handle a suppression hearing; failed to cross-examine O'Brien and Blaylock on certain prior inconsistent statements; failed to call certain witnesses; failed to argue that Worrell had actually been killed by his own friends' "friendly fire"; and failed to move for a mistrial when the prosecutor misstated certain facts.

Supreme Court denied defendant's motion without a hearing. Even assuming that CPL 440 permits a free-standing actual innocence claim based on evidence other than DNA, the court stated, the proffered witness statements did not "deviate from the description provided by all of the eyewitnesses to the argument and the shooting: that the shooter spoke with a Jamaican

accent and had brown skin.” As to defendant’s *Brady* claim, the court concluded that the additional impeachment evidence pertaining to Morrissey and O’Brien was cumulative of whatever had been disclosed and that any failure by the prosecution to turn over material was not willful. The court also held that certain information that defendant asserted was exculpatory or impeachment material could have been discovered independently by him based on material that was disclosed. With respect to Morrissey’s mental condition, the court credited the prosecutor’s statement in an affirmation that she met with Morrissey on several occasions and had no reason to believe he had any mental issues. The court also found that there was no evidence that defendant could point to that would suggest that the People had agreed to help O’Brien seek a reduction in his sentence, and that evidence related to O’Brien’s unrelated racketeering and conspiracy case was collateral to defendant’s case. Finally, the court determined that defendant’s claims of prosecutorial misconduct were conclusory and that he had received the effective assistance of counsel.

In *People v Hamilton* (115 AD3d 12 [2d Dept 2014]), the Second Department recognized a freestanding claim of actual innocence as a ground on which a defendant may challenge his conviction under CPL 400.10(1)(h). That section provides for

vacatur of a judgment of conviction that "was obtained in violation of a right of the defendant under the constitution of this state or of the United States."

The *Hamilton* court reasoned that,

"[s]ince a person who has not committed any crime has a liberty interest in remaining free from punishment, the conviction or incarceration of a guiltless person, which deprives that person of freedom of movement and freedom from punishment and violates elementary fairness, runs afoul of the Due Process Clause of the New York Constitution," and also "violates the provision of the New York Constitution which prohibits cruel and unusual punishments" (115 AD3d at 26).

We agree with the Second Department that CPL 440.10(1)(h) embraces a claim of actual innocence. If depriving a defendant of an opportunity to prove that he or she has not committed a crime for which he or she has been convicted is not a "violation of a right . . . under the constitution of this state or of the United States," then that section of the statute is virtually hollow. Both constitutions guarantee liberty through their due process clauses, and a wrongful conviction represents the ultimate deprivation of liberty. Notably, the People do not contest the applicability, in theory, of *Hamilton* to this case.

Nevertheless, defendant did not clear the threshold set by the *Hamilton* court as necessary to gain a hearing on an actual innocence claim, because he did not present "a sufficient showing of possible merit to warrant a fuller exploration by the court"

(*id.* at 27 [internal quotation marks omitted]). This is the sole articulation in *Hamilton* of a standard governing when a hearing is warranted on such a claim. However, this specific standard for actual innocence claims should be considered in light of, and alongside, the more general standard applicable on any motion to vacate a conviction brought under CPL 440.10. Thus, statements of fact supporting the motion must be sworn (*People v Simpson*, 120 AD3d 412, 412 [1st Dept 2014] ["[W]here a CPL 440.10 motion is based upon the existence or occurrence of facts, the motion papers must contain sworn allegations of such facts CPL 440.30[1][a])", *lv denied* 24 NY3d 1046 [2014]). Further, hearsay statements in support of such motions are not probative evidence (see *People v DeVito*, 287 AD2d 265, 265 [1st Dept 2001], *lv denied* 97 NY2d 753 [2002], *cert denied* 5437 US 821 [2002]) [holding that the defendant was not entitled to vacatur of conviction based on newly discovered evidence that was comprised in part of an affidavit based on hearsay].

Defendant's claim that he is actually innocent is based on the existence of two proposed witnesses. The first witness, Maxine Littlejohn, lives in Kingston, Jamaica, and was interviewed by a private investigator working for the defense. The investigator stated in an affidavit that Littlejohn confirmed that she had accompanied Worrell, O'Brien and others to the

movies on the night Worrell was shot, and that she had witnessed the shooting. Upon viewing a photo of defendant from 1989, Littlejohn stated that she had never seen him. Further, she described the shooter as "tall," "brown" and Jamaican, noting that he "spoke with a Jamaican accent." The second witness on whom defendant now relies is Dean Beckford, who also was at the theater with Worrell and the others. Beckford submitted an unsworn statement in support of defendant's motion that reads, in its entirety: "[Defendant] was not the perp in 1989 at the Batman movie to my recollection. He was a black individual."

Quite simply, this evidence is insufficient to warrant a hearing on actual innocence. The Littlejohn statement, recounted in the affidavit by defendant's investigator, is patent hearsay. In any event, Littlejohn is not subject to the jurisdiction of the courts of this State, and defendant offers no assurance that she would voluntarily appear to testify at a hearing or at a new trial. As stated, the Beckford statement is unsworn. We recognize that *Hamilton* anticipates the admission at an actual innocence hearing of "all reliable evidence, including evidence not admissible at trial based upon a procedural bar—such as the failure to name certain alibi witnesses in the alibi notice" (115 AD3d at 27). However, even were an unsworn statement to be considered admissible under this relaxed standard, we find that

there is nothing inherently reliable about either the Littlejohn statement or the Beckford statement. Both were given many years after the shooting, contain a lack of detail tending to explain why their recollections can be considered accurate, and were made at the specific behest of an agent for defendant.

Further, even if true, the statements do nothing to negate the competing evidence that a jury has already heard, weighed, and relied on to convict defendant. In addition to the general concept recognized in *Hamilton* that a claim for actual innocence is found in CPL 440.10(1)(h), we adopt the proposition, also articulated in that case, that "[m]ere doubt as to the defendant's guilt, or a preponderance of conflicting evidence as to the defendant's guilt, is insufficient, since a convicted defendant no longer enjoys the presumption of innocence, and in fact is presumed to be guilty" (115 AD3d at 27). Applying that standard, even were Littlejohn and Beckford to testify at a new trial, their testimony that defendant was not the person who shot Worrell would, at best, only compete against the testimony of Blaylock and O'Brien, who testified that they saw defendant shoot Worrell. Moreover, while there was certainly some confusion at trial over the complexion of the perpetrator (especially during the testimony of Centeno, the security guard), the proposed evidence that the shooter was black does nothing to resolve it.

Indeed, Blaylock testified at trial that the perpetrator (whom he identified as defendant) was a light-skinned man but "appeared to be black."

Further, Littlejohn's statement that the shooter was Jamaican is not necessarily inconsistent with Blaylock's having told Detective Serrano that the shooter could put on a Jamaican accent. Most importantly, Morrissey's testimony did not depend on any description of defendant's skin tone. As this Court observed in affirming defendant's conviction, "[D]efendant's confession to an informant contained significant details that confirmed the informant's credibility" (71 AD3d at 483). Again, the new evidence, even assuming it presents "a preponderance of conflicting evidence as to . . . defendant's guilt" (*Hamilton*, 115 AD3d at 27), is, standing alone, insufficient to raise a question of actual innocence.

To the extent defendant questions the credibility of some witnesses at trial, we disagree that such credibility issues would, in light of the new evidence, warrant a hearing on actual innocence. Many criminal trials feature witnesses whose credibility is challenged and procedures such as identification that are less than perfect. However, we give great deference to the jury's ability to resolve these issues. Were we to recognize a stand-alone actual innocence claim, a hearing would be

warranted only where the proffered evidence, accepted as true, raised serious doubt about the defendant's guilt. Indeed, in *Hamilton*, the court ordered a hearing upon the defendant's showing that the principal witness against him had recanted, coupled with evidence of a credible alibi (115 AD3d at 27). Neither of those things exists in this case;, nor does anything of a qualitatively similar nature.

We note that defendant's proffered evidence supporting his actual evidence claim is not all the new evidence that would necessarily come out at a hearing. For example, the People claim that they would offer the testimony of Christopher Cordero, who was working at the theater on the night of the shooting. In 2006, Cordero was shown a photograph of defendant and identified him as being one of the people involved in the argument at the concession stand on the night of the homicide. The People also state that a former girlfriend of defendant's told police investigators that defendant attempted to procure a false alibi from her by imploring her to say, if asked, that he was with her at the time of the shooting. To be sure, defendant asserts that this evidence is refutable. However, it demonstrates that, for each new witness who defendant claims can unequivocally establish his innocence, there is another who can raise serious doubt about it, to say nothing of witnesses who actually testified at trial.

We now turn to the alleged *Brady* violations. To prevail on a *Brady* claim, “a defendant must show that (1) the evidence is favorable to the defendant because it is either exculpatory or impeaching in nature; (2) the evidence was suppressed by the prosecution; and (3) prejudice arose because the suppressed evidence was material” (*People v Garrett*, 23 NY3d 878, 885 [2014] [internal quotation marks omitted]). “Where . . . the defense did not specifically request the information, the test of materiality is whether there is a reasonable probability that had it been disclosed to the defense, the result would have been different - i.e., a probability sufficient to undermine the court’s confidence in the outcome of the trial” (*People v Hunter*, 11 NY3d 1, 5 [2008] [internal quotation marks omitted]). However, where, as here, the defense has made a specific request for particular exculpatory information, the information is material if there is a “reasonable possibility” that, had the material been disclosed, the result would have been different (*People v Bond*, 95 NY2d 840, 843 [2000] [internal quotation marks omitted]). Further, a prosecutor has a duty to learn of any favorable evidence known to others in the prosecutor’s office (see *People v Steadman*, 82 NY2d 1 [1993]), as well as others acting on the government’s behalf, including police agencies (*Kyles v Whitley*, 514 US 419, 437-438 [1995]; *People v Wright*, 86

NY2d 591, 598 [1995]).

Defendant's *Brady* claims, for the most part, involve material that the prosecution concedes was not produced. Accordingly, most of the claims can be decided as a matter of law. With respect to Morrissey, defendant argues that non-disclosure of Morrissey's federal conviction history, as well as examples of his mendacity in testimony he supplied in those federal trials, deprived him of crucial impeachment material. He also claims that his appellate defenders, in reading transcripts of federal trials in which Morrissey testified, discovered that Morrissey had serious mental health issues, although he was never found incompetent to testify.

With respect to the federal crimes themselves, they are similar to the crimes that were disclosed and that Morrissey admitted established him as a con artist. Accordingly, evidence of the federal crimes is cumulative, and it cannot be said that it is possible that its injection into the trial would have changed the outcome. This applies also to any false testimony Morrissey may have given in those trials, since his basic untrustworthiness was evident and undisputed. The transcripts from the federal trials in which Morrissey was involved and that were not disclosed undoubtedly contained references to mental illness. However, defendant had an opportunity to become aware

of defendant's possible mental illness from another source that his trial counsel clearly knew about. Counsel cross-examined Morrissey about a case that was pending against him in Queens County at the time of defendant's trial, and defendant concedes that the public court file in the Queens case contained an "After Care" letter stating that Morrissey has "Schizophrenia, Undifferentiated Type," and that the court jacket from that case reflected that Morrissey was examined in a February 2007 competency hearing. Accordingly, defendant had independent access to the impeachment material he now claims the prosecution failed to disclose. The People therefore were relieved of their own obligation to produce it (*see People v Doshi*, 93 NY2d 499, 506 [1999]).

Regarding O'Brien, the prosecutor stated that she had inadvertently failed to turn over transcripts of his testimony in the trial involving his gang activity. The prosecutor asserts that she received this material from the United States Attorney's Office less than a week before trial, within a voluminous quantity of other materials. The undisclosed testimony detailed O'Brien's involvement in crimes he had committed as a gang member, including attempted murder. Further, it contained admissions by O'Brien of extensive drug use. Defendant also complains that he was not provided with an FBI report, prepared

after O'Brien was interviewed by New York City and federal law enforcement personnel about the many crimes he was involved in and many of which he had knowledge. The report contains a highly detailed recounting of the facts surrounding many of those crimes. However, it has a mere three lines about Worrell's murder, stating only: "O'Brien said this individual was killed in the Bronx, White Stone Movie Theatre, and his mother lived on 45th Street in Brooklyn." Defendant contends that the report could reflect the fact that O'Brien was not forthcoming about the murder of Worrell because he knew far less about it than he let on at defendant's trial.

We agree with the motion court that none of these materials, had they been available to the defense before the trial, had a reasonable possibility of changing the outcome. The FBI report that defendant asserts contained a suspiciously cursory description of Worrell's murder is not material. The report was primarily about O'Brien's involvement in gang activity and the people who traveled in the same orbit with him. At one point in the interview he was asked to identify photographs of approximately 40 of those people. One of them was Worrell, and O'Brien gave the same short description of him as he gave for each of the other people. There is no indication that it would have been appropriate, in the context of the interview, for

O'Brien to describe Worrell's murder in detail or to offer that he had witnessed it.

Defense counsel's cross-examination of O'Brien amply elicited the unsavory elements of his character, manifested by his racketeering conviction, which, by his own admission at trial, involved a conspiracy to distribute narcotics, a conspiracy perpetuated by murder where necessary. Further, the cross-examination revealed O'Brien's convictions, shortly before Worrell's murder, for weapons and drug possession. Any further impeachment material would merely have been cumulative, and as such, cannot be considered material for purposes of finding a *Brady* violation (see *People v Nelson*, 63 AD3d 629, 630 [1st Dept 2009], *lv denied* 13 NY3d 861 [2009]).

Defendant claims that the motion court failed to analyze his *Brady* claims on a collective basis, which we agree is the appropriate standard (see *Kyles v Whitley*, 514 US at 436). However, while our discussion of the foregoing *Brady* claims herein is necessarily taken item by item, we do not lack confidence that the trial's outcome would have been the same had the material, viewed collectively, been produced (see *id.* at 453). *Wearry v Cain* (\_\_ US \_\_, 136 S Ct 1002 [2016]), which suggests that undisclosed evidence of even seemingly marginal utility can undermine confidence in a jury's guilty verdict, is

inapposite. In *Wearry*, “[t]he State’s trial evidence resemble[d] a house of cards, built on the jury crediting” a main witness’s testimony that the defendant committed the murder over the defendant’s alibi evidence (*id.* at 1006). Indeed, the *Brady* material that was not disclosed in *Wearry* tended to directly call into question the very story that the main witness told on the stand. Here, by contrast, the People introduced three witnesses with no connection to each other, one of whom testified that defendant confessed to him, and there was no alibi evidence. Further, the *Brady* material that defendant complains was not disclosed did not, as in *Wearry*, directly challenge the People’s theory.

The same, however, cannot be said for the issue of O’Brien’s possible deal to testify in this case. The prosecutor, when disclosing him as a witness, volunteered only that O’Brien was serving a 30-year sentence in federal prison for an unrelated murder and had asked her for a letter that “he can have put in his file stating that he testified for the Bronx District Attorney’s Office.” At trial, the prosecutor asked O’Brien, “What is your understanding of what if anything I can or will do for you in exchange for you testifying here today for us?” O’Brien replied, “Well, my understanding is that you’ll just tell the Federal prosecutors that I cooperated with ya’ll and that’s

it." O'Brien also confirmed that he was "a sentenced prisoner" with "18 years to go."

Defendant asserts that the prosecutor violated her *Brady* obligations by failing to disclose the plea agreement O'Brien entered into in 1997, which obligated him to cooperate with authorities investigating and prosecuting crimes of which he had knowledge, copies of letters written by O'Brien to a federal judge seeking a further sentence reduction in part in the interests of justice, and an email from the prosecutor to the Assistant United States Attorney before defendant's trial stating that she was aware that O'Brien was seeking a sentence reduction in federal court.

The prosecutor denies that she even knew what a federal Rule 35 motion was at the time of defendant's trial, much less that she knew the U.S. Attorney would make one if O'Brien testified against defendant. However, the prosecutor, instead of merely placing a letter in O'Brien's "file," wrote a letter to the U.S. Attorney a few months after defendant's conviction, detailing O'Brien's cooperation and praising him for his assistance. While none of these things establishes that the Bronx prosecutor knew there was a quid pro quo in place for O'Brien's testimony, defendant has made a sufficient showing to warrant a hearing on the issue. Were defendant to establish at a hearing that the

prosecutor knew that O'Brien had been given a specific quid pro quo for his testimony, it could be concluded that there is a reasonable possibility that had the jury been aware of that fact, its verdict would have been different, thus requiring reversal of the conviction and a new trial (see *People v Vilardi*, 76 NY2d 67 [1990]). While O'Brien was not the only witness to inculcate defendant, applying this standard is consistent with the goal of providing a meaningful remedy for *Brady* violations that suggest prosecutorial misconduct (*id.* at 75-76 ["We have long emphasized that our view of due process in this area is, in large measure, predicated both upon 'elemental fairness to the defendant,' and upon concern that the prosecutor's office discharge its ethical and professional obligations"]).

None of the other *Brady* issues raised by defendant warrants reversal, much less a hearing. For example, the 1996 handwritten note relaying a telephone message from a Detective Carbone, who was investigating O'Brien's gang activity, and referring to both the 1989 shooting at the Bronx theater, and to O'Brien as "our perp," was apparently obtained by defense counsel before trial, given that counsel made explicit reference to the note during O'Brien's cross-examination. In any event, the note is too equivocal and vague in its language to constitute material that potentially calls into question defendant's guilt or even

O'Brien's credibility as a witness.

The ballistics evidence presented by defendant is similarly equivocal. The People give a reasonable explanation for the voucher numbers that defendant now claims were not disclosed, that is, that the numbers are associated with a homicide that occurred nearly two months after the murder at issue, and that the cartridge cases recovered at the later crime scene were compared for investigative purposes to the cartridge cases recovered at the movie theater. Defendant offers nothing but speculation in claiming that the "Ballistics Unit Case Worksheet," which lists voucher numbers from both homicides, establishes that additional ballistics evidence was recovered at the scene of Worrell's murder that was not turned over to the defense. Finally, we perceive no *Brady* issue with respect to material that was disclosed no later than during jury selection, since defendant fails to specify how the material might reasonably have altered the trial's outcome had it been furnished in a more timely manner. In any event, defendant could have raised the issue on direct appeal, but failed to do so.

We find no basis for determining that the prosecutor knowingly elicited perjurious, as opposed to inconsistent, testimony from any of the People's witnesses (see *People v Kitchen*, 162 AD2d 178 [1st Dept 1990], *lv denied* 76 NY2d 941

[1990])). Further, the testimony at issue was subjected to cross-examination based on those inconsistencies, so the jury had an opportunity to reject it (see *People v Johnson*, 6 AD3d 226, 228 [1st Dept. 2004], *lv denied* 3 NY3d 642 [2004], 3 NY3d 708 [2004])).

Finally, we find that defendant received effective assistance under the state and federal standards (see *People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]). Defendant has not shown that any of counsel's alleged deficiencies fell below an objective standard of reasonableness, or that, viewed individually or collectively, they deprived him of a fair trial or affected the outcome of the case. There is no reason to believe that any of the additional pretrial and trial measures that he claims should have been taken by counsel had any reasonable hope of success.

Accordingly, the order, Supreme Court, Bronx County (Robert A. Sackett, J.), entered March 4, 2014, which denied defendant's CPL 440.10 motion to vacate a judgment of conviction rendered August 16, 2007, should be reversed, on the law, and the motion granted to the extent of remanding the matter for a hearing on whether the People committed a violation pursuant to *Brady v Maryland* (373 US 83 [1963]) by not disclosing the terms of an agreement to assist in a sentence reduction for People's witness

Andrew O'Brien, if such an agreement existed.

All concur except Acosta, J. who concurs in  
the result only.

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

ENTERED: JULY 21, 2016

  
CLERK