14-4101-cv

To Be Argued By:
CYNTHIA S. ARATO

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

DOCTOR FRED L. PASTERNACK,

Plaintiff-Appellant,

—against—

LABORATORY CORPORATION OF AMERICA HOLDINGS,
a/k/a LABCORP, CHOICEPOINT, INC.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR PLAINTIFF-APPELLANT

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A. *Landon* Embraces Appellees' Conduct

Appellees contend that *Landon v. Kroll Lab. Specialists, Inc.*, 22 N.Y.3d 1 (2013), applied a duty of care solely in the area of specimen collection and testing and that application of that duty beyond those confines would result in a significant extension of precedent. (LexisNexis ("ChoicePoint") Br. ("CP") 22-286; LabCorp Br. ("LC") 18, 23-26). Their arguments distort the facts, reasoning, and holding of *Landon*.

First, Appellees are incorrect that Landon is a case of little significance, with little reach. (CP 18-19, 25 n.8; LC 22). *Landon* resolved issues of first impression for New York's highest court—whether and in what circumstances a test administrator owes a duty of care to its test subjects—and its strenuous dissent proves that it was an opinion of sweeping application. *Landon*, 22 N.Y.3d at 9-11 (criticizing the majority's "new cause of action" that "opens the door to a host of allegations . . . in areas too numerous to contemplate.").[1]

[1] Pasternack neither waived his appeal of the district court's denial of his motion for reconsideration nor applied an incorrect standard of review. (CP 17). Pasternack sufficiently raised reconsideration in his opening brief. (*See* Pasternack Br. ("Br.") 32; *see also id. at* 23-32, 32-40). In addition, where the denial of reconsideration "was essentially an affirmance on the merits," which is the case

Second, *Landon* was not limited to specimen handling and laboratory testing. The plaintiff alleged that Kroll (1) used an inappropriately low cutoff level to interpret his test results; (2) failed to perform confirmatory testing; (3) failed to disclose in its report that its cutoff level was below the recommended levels; and (4) failed to disclose in its report that its testing methodology heightened the potential for false positives. *Landon*, 22 N.Y.3d at 4-5. The Court of Appeals held that Kroll owed Landon a duty of care regarding all of these acts and omissions. *Id.* at 6-7.

ChoicePoint next argues that *Landon* is inapplicable because it did not address the precise facts of Pasternack's drug test. (CP 22-23). But *Landon* announced a broad duty of care to drug test subjects—that duty does not depend on whether the defendant was a laboratory or an administrator (*id.* 23, 45), or whether the problematic report was a false positive or refusal to test (*id.* 46). The duty depends on the five factors that the Court analyzed, each of which demonstrates that Appellees owe Pasternack a duty of care. *Landon*, 22 N.Y.3d at 6-7. (Br. 27-31).

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here (*see* A-271), this Court "review[s] the merits of the argument *de novo*." *Bayerische Landesbank v. Aladdin Capital Mgmt. LLC*, 692 F.3d 42, 52 n.3 (2d Cir. 2012) (internal quotation marks omitted). In any event, this Court must review the district court's two earlier decisions *de novo*, as ChoicePoint concedes (CP 19-20), and in light of *Landon*, regardless of the district court's reconsideration ruling. *See Tischmann v. ITT/Sheraton Corp.*, 145 F.3d 561, 564 (2d Cir. 1998).

1. Profound, Potentially Life-Altering, Consequences. Appellees do not deny that a false refusal report "will have profound, potentially life-altering, consequences for a test subject," just like the false positive report that Kroll issued in *Landon*. 22 N.Y.3d at 6. At most, ChoicePoint chastises Pasternack for engaging in "inadmissible speculation and conjecture" about "public policy considerations" and "moral consequences" in raising this factor. (CP 29). But courts are *supposed* to make such judgments in determining a duty of care. *Tenuto v. Lederle Labs.*, 90 N.Y.2d 606, 612 (1997) (New York courts "resolve legal duty questions by resort to common concepts of morality, logic and consideration of the social consequences of imposing the duty"); *see also Landon*, 22 N.Y.3d at 6-7 (describing the "strong policy-based considerations" for recognizing a drug tester's duty).

2. Launching a Force or Instrument of Harm. ChoicePoint argues that it should owe no duty to Pasternack because the FAA and ALJ made their own determinations regarding Pasternack after ChoicePoint wrongfully reported him as a refusal. (CP 44-45, 46, 47). In other words, ChoicePoint argues that its negligence should be excused because other actors were available to correct its error. Yet, *Landon* has rejected that argument: even though it was the probation department—not Kroll—that ultimately decided to initiate court proceedings to have Landon incarcerated, the Court found that Kroll owed a duty to its test subject

because its report "launched a force or instrument of harm." 22 N.Y.3d at 6. The same is true here. LabCorp failed to give Pasternack the required warning that would have stopped him from leaving the testing facility, and ChoicePoint then issued an unauthorized report labeling him a refusal to test, which together led to the FAA's revocation of his airman's certificates. (Br. 27-28, 30-31).

The FAA, moreover, did not correct Appellees' mistakes. It, too, wrongfully found Pasternack a refusal to test, just as the probation department in *Landon* found that Landon violated the terms of his probation. Pasternack eventually was vindicated but only after a lengthy court battle involving two trips to the D.C. Circuit. As *Landon* demonstrates, just because the FAA also got it wrong is not a reason to immunize Appellees from their own negligent acts.

3. Appellees Are in the Best Position to Prevent the Harm. ChoicePoint argues that "the FAA and the ALJ were in the best position" to prevent the harm to Pasternack. (CP 45). This argument is belied by *Landon* for the reasons above.

4. The Harm Is Not Remote or Attenuated. ChoicePoint belittles Pasternack for contending that it knew his name. (CP 47). Pasternack noted this fact to highlight that he was part of "a known and identifiable group," *Palka v. Servicemaster Mgmt. Servs. Corp.*, 83 N.Y.2d 579, 589 (1994)—namely the

employees of Northeastern whom Appellees were hired to test. There is no dispute that he meets this factor.[2]

5. No Apparent Statutory Remedy. LabCorp contends that Pasternack has an adequate remedy under the Federal Aviation Act ("FAAct") because he ultimately got his license restored through administrative proceedings. (LC 32). This Court has rejected this argument before—when LabCorp asserted it in *Drake v. Laboratory Corporation of America Holdings*, 458 F.3d 48 (2d Cir. 2006) ("*Drake IV*"). As the Court held, "[t]he administrative remedies of the FAAct provide only for the FAA to issue an order of compliance, and bring suit to enforce it. They do not provide injured parties with any further redress, such as compensation for attendant harm to a[n] individual who has been wronged by the failure to comply." *Id.* at 64. Here the FAAct provides no remedy for Pasternack's economic injuries, including lost income, and the fees and costs he incurred pursuing his administrative remedies.

B. Appellees' Remaining Arguments Fail

ChoicePoint contends that *Braverman v. Bendiner & Schlesinger, Inc.*, 121 A.D.3d 353, 990 N.Y.S.2d 605 (2d Dep't 2014), proves that *Landon* is of limited

[2] ChoicePoint implies that it was unaware of the harm that would flow from reporting Pasternack a refusal. (CP 46). Yet the DOT Regulations provide that refusing a test is tantamount to a positive test result or worse (Br. 29), and under the FAA regulations, refusal to submit to a drug test is grounds for revocation of an airman's certificate. *See* 14 C.F.R. § 120.11(b). Federal law requires ChoicePoint to know these rules. (Br. 8).

reach. (*See* CP 23-25). In *Braverman*, the Appellate Division declined to find that a laboratory had a duty to label a positive drug result as appropriate for clinical, but not forensic, purposes. But the Court did so for two reasons absent here. First, the plaintiffs' claim was "unsupported by reference to statutory, regulatory, or professional standards." *Id.* at 611. Second, the plaintiff had not alleged, and could not allege, that the report was false or suspect. *Id.* at 611-12. Accordingly, the Court found that the plaintiff's complaint was about "the mere denial of a benefit." *Id.* at 612. In contrast to *Braverman*, Pasternack's claim *is* based on regulatory (and professional, *see infra* 12-14) standards. And Pasternack is challenging neither the denial of some gratuitous benefit nor a correct positive test report. He is challenging (1) conduct that lulled him into believing there were no issues with his temporarily leaving the testing facility, when federal guidelines mandated that LabCorp inform him otherwise; and (2) ChoicePoint's reporting him a refusal to test, when federal regulations expressly forbid it from doing so.[3]

ChoicePoint also relies on an assortment of inapposite DOT Regulations, none of which bear on *Landon*'s broad duty of care:

- ChoicePoint relies on the omission of "employees" from Section 40.123(e), which states that MROs "must act to investigate and correct

[3] These are not "heightened duties," as LabCorp contends, relying on *Farash v. Continental Airlines, Inc.*, 574 F. Supp. 2d 356 (S.D.N.Y. 2008). (*See* LC 26). The plaintiff there complained that an airline moved him from a first-class aisle to a first-class window seat and then gave him "inferior service" on the flight. *Id.* at 359, 368-69. The case is inapposite.

problems where possible and notify appropriate parties (e.g., HHS, DOT, employers, service agents) where assistance is needed . . . ." (CP 36). This provision does not identify parties to whom ChoicePoint owes a duty; it provides that when the MRO needs assistance from others, it must notify them, so that the assistance will be provided. If anything, then, it illustrates the need for MROs to conduct accurate and complete investigations, which serves to protect test subjects from the consequences of erroneous test results. In any event, its list of parties is non-exclusive.[4]

- Section 40.123(d), which disclaims a doctor-patient relationship between MROs and test subjects, does not immunize ChoicePoint from common-law negligence regarding erroneous reporting. (CP 36). At most, it bars Pasternack from suing ChoicePoint for malpractice.

- Section 40.355(o), which makes the "the employer subject to enforcement action" by the DOT, does not shift ChoicePoint's civil liability to Northeastern. (CP 39). In fact, the DOT Regulations bar test administrators like ChoicePoint from requiring employees to waive their civil claims, 49 C.F.R. § 40.355(a) (ADD-27), which "suggests that negligence claims may be brought." *See Drake IV*, 458 F.3d at 61.

Finally, throughout their briefs, Appellees conflate distinct negligence concepts: the threshold legal question whether a defendant owes a *duty of care* to the plaintiff; the factual determination of what *standard of care* the defendant must

[4] ChoicePoint also concludes, with no analysis, that the duty to investigate is "too vague" to support a negligence claim. (CP 37). But ChoicePoint's citation to *Logan v. Bennington College Corp.*, 72 F.3d 1017 (2d Cir. 1995), is inapt. There, the Court rejected plaintiff's negligence claim because it was "a contract claim masquerading as a tort"—not because the duty was "too vague." *Id.* at 1029. Finally, ChoicePoint argues that *Guzman v. Hazen Plaza Housing Development Fund Co.*, 69 N.Y.2d 559 (1987) (cited at Br. 40), is inapplicable because it involved language from a statute and not a regulation and relied on cases that also involved statutory language. (*See* CP 38 n.12). That is immaterial. Vagueness turns on the language at issue; not where that language is found. *Guzman* demonstrates that courts regularly enforce provisions like Section 40.123(e).

exercise; and whether that standard was breached. *See Cregan v. Sachs*, 65 A.D.3d 101, 109, 879 N.Y.S.2d 440, 446 (1st Dep't 2009) ("whether a duty of care is owed in the first instance is a question for the court," while the standard of care is established through evidence, including expert opinion (internal quotation marks omitted)).

For example, Appellees contend in their "duty" arguments that Pasternack cannot "premise" his claim solely on federal regulations. Yet the primary basis of Pasternack's negligence claims, and Appellees' corresponding duty, is the common law, as construed by *Landon*; the Regulations and Guidelines establish Appellees' standard of care. As ChoicePoint at one point correctly acknowledges, Pasternack's claims are "rooted in New York common law, even though he alleges that the purported standards of care for his claim[s] stem from the DOT regulations and guidelines." (CP 40).[5]

II. THE LACK OF A PRIVATE RIGHT OF ACTION IS IRRELEVANT

LabCorp argues that the lack of a private right of action under the DOT Regulations and Guidelines precludes Pasternack's claims. (LC 16-20; *see also* LC 25, 33; *see also* CP 29). That is wrong.

[5] In any event, courts routinely recognize actionable duties that spring directly from statutes, regulations and ordinances. (*See* Br. 36-37). *See also Goodyear Tire & Rubber Co. v. Kirk's Tire & Auto Servicecenter of Haverstraw, Inc.*, No. 02 Civ. 0504 (RCC), 2005 WL 550940, at *3 (S.D.N.Y. Mar. 9, 2005) (federal OSHA regulations give rise to duty). LabCorp fails to meaningfully refute these cases. (*See* LC 20).

As an initial matter, Pasternack is not asserting a private right of action under the DOT Regulations and Guidelines. He has not asserted his claims under these federal standards, and his claims, which are brought under state common law, require him to establish elements that are not present in the federal regulatory scheme, such as duty, breach and causation.

Moreover, under New York law, the lack of a private right of action under a statute or regulation does not bar negligence claims based on violations of those same rules. *See Uhr v. E. Greenbush Cent. Sch. Dist.*, 94 N.Y.2d 32, 42 (1999) (holding that there was no private right of action for a violation of a state statute; separately analyzing whether plaintiff had demonstrated the existence of a duty under New York common law and relying on special case law regarding municipal actors to find no common-law duty).

In fact, in the *Drake* cases—in which this Court held that there is no private right of action under the DOT Regulations—the Court expressly authorized the type of negligence claim that Pasternack asserts here.

Drake involved two litigations. In the first, the plaintiff asserted claims against his employer directly under the DOT and FAA drug testing regulations. The district court dismissed the claims because the regulations do not afford a private right of action, and this Court affirmed. *Drake v. Delta Air Lines, Inc.*, 147

F.3d 169 (2d Cir. 1998); *Drake v. Delta Airlines, Inc.*, 923 F. Supp. 387 (E.D.N.Y. 1996).

The plaintiff then commenced a new action, in which he asserted common-law causes of action, including negligence, against a number of defendants involved in his drug test, including LabCorp. Specifically, the plaintiff alleged that the defendants were negligent because they committed numerous mistakes that violated the DOT Regulations, other federal regulations and "industry standards and protocols." *Drake IV*, 458 F.3d at 54. The defendants argued that the claims were preempted by the Federal Aviation Act and that, because "[t]here is no private right of action to enforce FAA drug testing regulations," the plaintiff "should not be permitted to recast his allegations of regulatory violations as putative state law claims." Appellants Br., 2005 WL 5165546 (Apr. 5, 2005).

The district court rejected those arguments and certified an appeal to this Court, which affirmed. *Drake IV*, 458 F.3d 48; *Drake v. Lab. Corp. of Am. Holdings*, 290 F. Supp. 2d 352 (E.D.N.Y. 2003). This Court held that plaintiffs can bring state-law negligence claims premised on violations of DOT-issued standards despite the lack of a private right of action. *Drake IV*, 458 F.3d at 62-65. In fact, the lack of a private right of action was a significant reason for allowing the negligence claims to proceed. *Id.* at 64. As the Court explained, "[w]hen states provide remedies for violations of FAA regulations, they are in effect responding

to the FAAct's express invitation to fill the gaps in its deliberately incomplete remedial scheme." *Id.* The Court, accordingly, concluded that there was "no persuasive reason . . . to deprive aggrieved employees of legal recourse against persons involved in the commercial enterprise of testing for drugs who would otherwise apparently enjoy immunity from liability despite their alleged failure to comply with federal law." *Id.* at 65.

This Court, moreover, did not allow the negligence claim to proceed because it was "independent from the DOT Regulations," as LabCorp states. (LC 17-18). To the contrary, those regulations were integral to the claim and provided the requisite standard of care. As this Court explained, "state common law plays no role in determining whether the defendants-appellants have breached the duties established by the federal regulations. The claim, instead, is that if such federal duties have been breached, there are state law causes of action for relief." *Drake IV*, 458 F.3d at 63-64. Thus, the Court authorized Drake to proceed with his negligence claims only to the extent they claimed violations of the federal standards, and it rejected those claims to the extent they relied on substantive state law, or common-law procedures and protocols, for the standard of care. *Id.* at 65-66.

For these reasons, the lack of a private right of action is no impediment to Pasternack's negligence claim. To the contrary, as *Drake IV* holds, the claim fills the gap in the FAAct's intentionally incomplete scheme.[6]

III. THE DOT REGULATIONS AND GUIDELINES PROVIDE THE STANDARD OF CARE

Once the duty is established, the next question is determining the applicable standard of care—"the care which the law's reasonably prudent man should use under the circumstances of a particular case." *Schipani v. McLeod*, 541 F.3d 158, 162 (2d Cir. 2008) (internal quotation marks omitted); *see Drake v. Lab. Corp. of Am. Holdings*, No. 02-C-V1924 (FB)(RML), 2007 WL 776818, at *2-3 (E.D.N.Y. Mar. 13, 2007) (on remand, holding that defendants owed plaintiff a common-law duty of care and thus allowing plaintiff to proceed with negligence claims alleging violations of DOT regulations). Because Pasternack's case involves a federally mandated drug test, the DOT Regulations and Guidelines supply the standard. *See Drake IV*, 458 F.3d at 63-66; *Cipriano v. State*, 171 A.D.2d 169, 173, 574 N.Y.S.2d 848, 851 (3d Dep't 1991) (defendant satisfied duty of care by complying

[6] LabCorp cites *Alfaro v. Wal-Mart Stores, Inc.*, 210 F.3d 111 (2d Cir. 2000), to support its private-right-of-action arguments. (LC 19). No regulatory scheme was implicated in that case, so it is unclear how it relates to the private-right-of-action issue. At most, LabCorp relies on it for the unremarkable proposition that a district court should not impose "a duty *beyond* reasonableness" or a "*heightened*" duty beyond that of reasonable care. (*Id.*). But LabCorp has not suggested that the federal regulations and guidelines impose unreasonable requirements on commercial actors in the drug-testing arena.

with DOT guidelines); *Ferguson v. Hanson Aggregates New York, Inc.*, 103 A.D.3d 1174, 1175, 959 N.Y.S.2d 326, 327-28 (4th Dep't 2013) (federal mine safety regulations relevant to whether mine owner breached common-law duty to employee to provide safe workplace); *see also* Br. 39 n.15 (citing cases holding that violations of federal, state and local regulations are evidence of negligence); CP 40 (conceding "that Pasternack can premise his negligence claim on DOT regulations and guidelines").[7]

ChoicePoint and LabCorp nevertheless contend that *Landon* requires that Pasternack base his claim on so-called "industry-wide" standards and not the governing federal rules. (CP 19; LC 21, 24-25). As an initial matter, that is empty semantics. The DOT and FAA regulations and guidelines are mandatory in the federal drug testing industry. Accordingly, every laboratory and test administrator engaged in the federal drug testing regime—including ChoicePoint and LabCorp—must follow them. In other words, they *set* the industry standards in the first place. *Drake IV*, 458 F.3d at 65 ("The FAA and DOT regulations prescribe a comprehensive set of 'standards and components' to be included in a federally regulated drug testing program."). And *Drake IV* requires their use. *Id.* at 65-66.

[7] LabCorp suggest that Pasternack cannot rely on a violation of the DOT Guidelines, because those guidelines cannot "be used to interpret the legal requirement[s] of the actual [Regulations]." (LC 18). Pasternack is not using the Guidelines to interpret the Regulations. The Guidelines—in addition to the Regulations—are relevant evidence of the standard of care and LabCorp's negligence.

Contrary to LabCorp's contention, moreover, the allegations in *Landon* were not "independent of any government regulations or guidelines" or "violations of" the same. (LC 12, 24). Rather, the plaintiff expressly alleged violations of federal and state regulatory guidelines and standards—he sued Kroll for violating guidelines issued by the United States Department of Health and Human Services Substance Abuse and Mental Health Service Administration ("SAMSHA") and New York State Department of Health Laboratory standards, and for failing to disclose information reflected in SAMSHA's proposed federal guidelines. 22 N.Y.2d at 4-5. In any event, even if the alleged misconduct in *Landon* could be characterized as violating "industry-wide," as opposed to regulatory, standards, there is nothing in the Court of Appeals' broad policy-based opinion suggesting that it would draw an empty and arbitrary line between industry-wide standards and standards that the federal government requires the industry to follow.[8]

ChoicePoint also incorrectly contends that, because a regulatory violation is merely "some evidence" of negligence, Pasternack must allege something beyond

[8] LabCorp's attempt to distinguish *Warshaw v. Concentra Health Services*, 719 F. Supp. 2d 484 (E.D. Pa. 2010), and *Balistrieri v. Express Drug Screening, LLC*, No. 04-C-0989, 2008 WL 906236 (E.D. Wis. 2008), is misplaced. LabCorp contends these cases allowed negligence claims only because the claims did not rely on regulatory violations. (LC 19; *see also* CP 28). In *Warshaw* the court found it "unnecessary . . . to specify whether or not the federal standards define[d the] duty in whole or in part." 719 F. Supp. 2d at 506 n.13. The actionable negligent acts in *Balistrieri* were alleged violations of the DOT Regulations, the DOT Guidelines and guidelines issued by the Federal Railroad Administration. 2008 WL 906236, at *13.

a regulatory violation to state a valid claim. (*See* CP 40-41). Yet, "some evidence" simply means that, unlike a violation of a statute, which constitutes negligence *per se*, a regulatory violation is not conclusive of the standard of care. *See Jones v. Spentonbush-Red Star Co.*, 155 F.3d 587, 595 (2d Cir. 1998) (violation of federal regulation "is simply evidence of the standard of care, the violation of which may be accepted or rejected as proof of negligence by the trier of fact according to the sum total of all the evidence"); *Juarez v. Wavecrest Mgmt. Team Ltd.*, 88 N.Y.2d 628, 645 (1996) ("[A] regulation of an administrative agency is merely some evidence to be considered on the question of a defendant's negligence," which is "governed by a standard of reasonableness"); *Nichter v. Hartley*, 192 A.D.2d 842, 844, 596 N.Y.S.2d 865, 867 (3d Dep't 1993) (school bus driver's manual was "evidence (albeit nonconclusive) of the standard of care, akin to an institutional or industry-wide safety rule, that the triers of fact might find appropriate"). This means that a jury will ultimately be free to make the liability determination it believes is appropriate; it does not mean Pasternack has failed to plead a valid claim.

IV. PASTERNACK PROPERLY ALLEGED THAT CHOICEPOINT AND LABCORP BREACHED THEIR DUTIES OF CARE

Appellees contend that this Court can determine as a matter of law, on this appeal, that neither breached their duties to Pasternack. Appellees' arguments

misstate Pasternack's claim and/or ask this Court to make premature rulings at the pleading stage based on supposed facts outside the record.

ChoicePoint argues that it cannot have breached any duty to Pasternack because it supposedly did not issue an unauthorized report deeming Pasternack a refusal to test. Regarding the report's issuance, ChoicePoint argues that it merely provided "advice and information" to Northeastern, as the federal regulations allow. (CP 39).[9] The argument is absurd: ChoicePoint did not simply offer up "advice" or "information;" it officially reported Pasternack to both Northeastern *and the FAA* as a "refusal to test," just as if Pasternack had adulterated a specimen. (A-125 ¶¶ 38, 40).[10]

Regarding its authority, ChoicePoint ignores that the DOT Regulations barred it from making a refusal-to-test determination based on Pasternack's departure. Instead, it takes a "no harm, no foul" approach, arguing that because Pasternack was indisputably a "refusal to test" when he left the facility, it does not matter who reported him as such. ChoicePoint even goes so far as to contend that LabCorp should have stopped Pasternack's test on the spot, as soon as he left,

[9] Without explanation, ChoicePoint quotes Section 40.355(j), which provides certain exclusive exceptions to the general rule barring MROs from making refusal-to-test determinations. (CP 38). Critically, those exceptions do not include the scenario at issue here—*i.e.*, a test subject leaving the collection facility. If anything, therefore, Section 40.355(j) reinforces that ChoicePoint was not supposed to make the determination that it did.

[10] In any event, that is a question for the trier of fact.

given his departure. (CP 43). Yet the governing regulations prohibited ChoicePoint from issuing this report or from making its own determination that Pasternack was a refusal, especially after his employer had allowed him to resume his test. *See* Procedures for Transportation Workplace Drug and Alcohol Testing Programs: Drug and Alcohol Management Information System Reporting, 68 Fed. Reg. 43946-01, 43952 (July 25, 2003) (instructing employers that a refusal occurs if "the employee leaves the collection site *without permission*" (emphasis added)). *See also* 49 C.F.R. Pt. 40, App. H (same).

LabCorp, which did resume Pasternack's test, takes the opposite position. It claims that it was right to not warn Pasternack that leaving would be deemed a refusal, on the grounds that this "would have been wrong" because the D.C. Circuit has since confirmed that Pasternack did not refuse his test. (LC 3; *see* LC 29-30).

Finger pointing aside, both Appellees breached their duties to Pasternack. ChoicePoint did so by issuing a report it had no authority to release, by failing to include sufficient information about its designation,[11] and by refusing to recognize that Pasternack's employer had allowed his test to resume, something the employer

[11] ChoicePoint contends that Pasternack waived this argument and that there is no federal regulation requiring it to have supplied this additional information. (CP 23 n.6). On waiver, Pasternack argued this positon in his brief. (*See* Br. 28). On the merits, ChoicePoint's argument is too clever for its own good. There is no federal regulation detailing how an MRO should report on Pasternack in this setting because MROs are not supposed to issue such a report in the first place. Where MROs are allowed to report subjects as refusals, they must provide "the reason for the refusal determination." 49 C.F.R. § 40.163(c)(9).

clearly had the authority to do. LabCorp did so because the Guidelines required it to warn Pasternack of the consequences of his departure (even if, as LabCorp now contends, those consequences were less absolute than its warning would have conveyed), so that he could make an informed decision regarding his conduct and not become the unwitting victim of a complicated regulatory regime. (ADD-50).[12]

Finally, LabCorp contends that a July 2014 DOT publication establishes that LabCorp did not have to tell Pasternack of the potential consequences of leaving the facility. (LC 21). But the DOT issued that publication seven years after Pasternack's drug test, at the same time that it reversed course and eliminated the warning requirement from the DOT Guidelines. *See* DOT Urine Specimen Collection Guidelines (July 2014), http://www.dot.gov/sites/dot.gov/files/docs/Urine_Specimen_Collection_Guidelines_July3_2014_A.pdf, § 8.4. The Guidelines that were in effect in 2007 required collectors to "specifically tell the employee that he or she is not permitted to leave the collection site and if they do so, that it will be considered a refusal to test." (ADD-50). Any subsequent revisions to the DOT standards are irrelevant. *See McCormack v. Mt. Sinai Hosp.*, 88 A.D.2d 947, 947, 451 N.Y.S.2d 443, 444 (2d Dep't 1982) (violation of

[12] LabCorp's post-hoc arguments are particularly hypocritical. Pasternack's pleading demonstrates that LabCorp understood that it was required to warn Pasternack in accordance with the federal rules, which is why its employee lied to the FAA about the reasons she failed to do so. (A-172 ¶ 33). And it has never been LabCorp's position that it gave Pasternack permission to leave; its own brief argues that it did not. (*See* LC 21-22).

hospital's "manuals and other written rules" in place at time of alleged malpractice were evidence of negligence, but manuals and rules issued eight years later were not relevant). In any event, the 2014 publication continues to recommend that collectors inform the test subject that leaving the facility "could lead an employer to determine that a refusal occurred," which demonstrates that it likely remains the industry practice to do so. And the publication does not address—let alone alter—the other regulatory requirements that LabCorp violated. (*See* A-175 ¶ 46).

V. CHOICEPOINT AND LABCORP CAUSED PASTERNACK'S INJURIES BECAUSE THE FAA'S ACTIONS WERE REASONABLY FORESEEABLE FROM THEIR NEGLIGENCE

Appellees contend they should escape liability because the FAA was the final actor who caused Pasternack's injuries. (CP 44-48; LC 26-30). Yet it is settled New York law that a negligent defendant remains liable even when a later actor intervenes, as long as the later actor's conduct is "a normal or foreseeable consequence of the situation created by the defendant's negligence." *Derdiarian v. Felix Contracting Corp.*, 51 N.Y.2d 308, 315 (1980); *accord Stagl v. Delta Airlines, Inc.*, 52 F.3d 463, 473 (2d Cir. 1995). (*See* Br. 41).

Appellees argue that they merely "set[] a series of events in motion" or "contributed to the setting" for the FAA's action. (CP 48; LC 27). Putting aside that causation is ordinarily an issue reserved for the trier of fact, *Derdiarian*, 51 N.Y.2d at 315, the argument applies only when "the intervening act was divorced

from and not the foreseeable risk associated with the original negligence," "do[es] not flow from the original negligence," and was "an unrelated act . . . [that] cause[d] injuries not ordinarily anticipated." *Id.* at 315-16. *See Rodriguez v. Pro Cable Servs. Co. Ltd. P'ship*, 266 A.D.2d 894, 895, 697 N.Y.S.2d 440, 442 (4th Dep't 1999) (plaintiff fell off a ladder while inspecting a roof that defendants damaged; defendants not liable because the accident "was a different kind of risk from that created by defendants' negligence in damaging the roof and was not a foreseeable consequence of defendants' negligence").

Where, however, the subsequent act is reasonably foreseeable, the defendant remains liable and cannot be said to have merely set the condition for the subsequent event. *Williams v. Utica Coll. of Syracuse Univ.*, 453 F.3d 112, 120-21 (2d Cir. 2006) ("[W]here a defendant's negligence significantly increased the chances of an injury and that very injury occurred, there [is] (in the absence of any other explanation) enough evidence of causation-in-fact to allow a jury to find such causation. *But for* the negligence, a jury could conclude, the harm would not have come about."); *White v. Diaz*, 49 A.D.3d 134, 139, 854 N.Y.S.2d 106, 110 (1st Dep't 2008); *Lapidus v. State*, 57 A.D.3d 83, 96, 866 N.Y.S.2d 711, 721 (2d Dep't 2008) (defendant liable because plaintiff "never would have been placed in the position" of risk if not for defendant's conduct).

Here, the risk that the FAA would wrongly revoke Pasternack's certificates was precisely the foreseeable risk created by the defendants' negligence. *See Derdiarian*, 51 N.Y.2d at 316 (where plaintiff was injured when a driver negligently crashed into a roadside worksite where defendant had left a kettle of boiling liquid enamel, defendant liable because "the risk of the intervening act occurring [wa]s the very same risk which render[ed] the actor negligent"); *see also Zuchowicz v. United States*, 140 F.3d 381, 390 (2d Cir. 1998) ("[I]f (a) a negligent act was deemed wrongful *because* that act increased the chances that a particular type of accident would occur, and (b) a mishap of that very sort did happen, this was enough to support a finding by the trier of fact that the negligent behavior caused the harm."). LabCorp through its conduct allowed Pasternack to leave the collection facility without knowing that he was supposed to remain or risk being deemed a refusal. (A-169-70 ¶¶ 19-25). ChoicePoint sent the FAA a report that said—without elaboration—that Pasternack was a "refusal to test—without which the FAA would never had taken any action in the first place. (A-125 ¶ 38). It was a normal or foreseeable consequence of each of these errors that Pasternack would suffer the loss of his certificates.[13]

[13] Appellees cases are not to the contrary. (*See* LC 27-28). In *Falsetta v. Ronzoni Foods Corp.*, 234 A.D.2d 259, 651 N.Y.S.2d 56 (2d Dep't 1996), the risk that was foreseeable (that a car would become stuck in a parking lot) was different from the risk that occurred (that someone would become pinned between two vehicles while trying to move that car). In *Hoenig v. Park Royal Owners Inc.*, 249 A.D.2d 57,

LabCorp also separately tries to shift the blame to Pasternack, contending that he knew or should have known based on his contemporaneous or past experience as an AME and MRO that drinking water would help him complete the test and that leaving the facility constituted a refusal to test. (LC 30-32; *see also* CP 8). These factual arguments are improper at this stage—particularly to the extent LabCorp relies on administrative findings that were nullified by the D.C. Circuit.[14]

VI. PASTERNACK PLED VALID GROSS NEGLIGENCE AND NEGLIGENT MISREPRESENTATION CLAIMS

A. Gross Negligence

LabCorp complains that Pasternack's gross negligence claim closely mirrors his negligence claim. (LC 34). This is not surprising, since a gross negligence claim requires all the elements of negligence plus "conduct that evinces a reckless disregard for the rights of others or 'smacks' of intentional wrongdoing." *Am. Tel.*

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671 N.Y.S.2d 55 (1st Dep't 1998), the court held that the defendants' negligence did not contribute to the accident at all. In *Paul v. Bank of Am. Corp.*, No. 09-CV-1932 (ENV) (JMA), 2011 WL 684083 (E.D.N.Y. Feb. 16, 2011), the court dismissed the case because, as a matter of public policy, New York bars claims for negligence claims based on a wrongful arrest; causation was not the issue. *See id.* at *3-4.

[14] They are also wrong. Being an AME has nothing to do with drug testing (*see* A-166 ¶ 9; 14 C.F.R. § 183.21). Pasternack, moreover, has never claimed that LabCorp had a duty to explain the physiology of drinking water; his contention is that LabCorp failed to instruct him, under the "shy bladder" procedures, that he was to stay at the facility for three hours and produce a specimen within that time period. (A-169 ¶ 19).

& Tel. Co. v. City of New York, 83 F.3d 549, 556 (2d Cir. 1996) (internal quotation marks omitted). Pasternack pleaded this extra element for his gross negligence cause of action by alleging that LabCorp acted with "reckless disregard" for his rights "by failing to comply with the clear mandates of the DOT Regulations and the DOT Guidelines." (A-176 ¶ 52).

B. Negligent Misrepresentation

LabCorp asserts that Pasternack cannot establish the requisite duty because he has not alleged privity of contract or a relationship approaching privity. (LC 35). That standard applies only in commercial settings involving arms-length business transactions. *Eiseman v. State*, 70 N.Y.2d 175, 188 (1987). Otherwise, the plaintiff can allege (1) the defendant's "knowledge or its equivalent that the information is desired for a serious purpose," that the plaintiff intended to rely and act on it, and that if the information was false or erroneous the plaintiff would be injured; and (2) that the parties stood in a relationship whereby the plaintiff had a right to rely on the defendant and the defendant owed the plaintiff a duty of care. *Id.* at 187-88. Certainly, LabCorp knew that the information it conveyed to Pasternack was for a serious purpose (assuring his compliance with drug testing standards) and it knew or should have known that Pasternack would rely on LabCorp's information and that Pasternack stood to be injured if the information was erroneous (for example, by lulling Pasternack into believing he could leave the

facility when the consequences for leaving can be draconian). As the company that ran a federally sanctioned collection facility, moreover, LabCorp stood in a position of authority, such that Pasternack had the right to rely on it, and, as set forth above, LabCorp owed Pasternack a duty of care.

LabCorp also argues that Pasternack cannot allege reliance because he "had already determined that he was going to leave the LabCorp Facility" when he spoke to Montalvo. (LC 37-38). But Pasternack did not leave the facility until after he spoke to Montalvo to make sure that leaving was all right; Montalvo asked him when he would return; and they discussed who should keep his CCF form. Based on Montalvo's response, Pasternack did not realize there was a risk of a negative consequence. Although Montalvo told him she had to let his employer know, she did not say she needed the employer's permission; that there was a risk his employer would not approve; or that he could be deemed a refusal. (A-170 ¶¶ 22-24).

Nor is LabCorp correct that Pasternack left before he knew "how Northeast [sic] would instruct LabCorp to proceed." (LC 38). LabCorp's argument presumes that Pasternack understood that Northeastern would instruct LabCorp; but that is not what he alleges. To the contrary, he alleges that LabCorp told him only that it would inform Northeastern of what Pasternack was doing (*e.g.*, leaving because he was unable to produce a sufficient specimen and coming back). (A-170

¶ 22). LabCorp gave Pasternack no indication that its communication was anything other than routine in this setting.

VII. PASTERNACK ADEQUATELY PLED HIS FRAUD CLAIM

A. LabCorp Ignores Controlling Authority

Pasternack's contends that LabCorp made false statements about him upon which the FAA relied when it revoked Pasternack's airman's certificates and AME designation. (*See* A-172-73, A-179-80 ¶¶ 32-36, 66-71). The New York Court of Appeals permits fraud claims based on such third party reliance, and that has long been the law in New York. (*See* Br. 42-44).

LabCorp ignores the Court of Appeals' precedent, arguing instead that "[w]ithin this Circuit . . . [m]istatements made to a third-party do not give rise to a fraud claim." (LC 39). Pasternack respectfully submits that this Court's prior holdings are incorrect as a matter of New York law and—particularly because the district courts are divided over which Court to follow—this Court should revisit these decisions. (*See* Br. 44-47).

B. LabCorp's Other Arguments Are Meritless

LabCorp first argues that Pasternack has not pled fraudulent intent because he has not alleged "concrete benefits" that LabCorp sought to gain. (LC 41-42). To establish the requisite "strong inference" of fraudulent intent, however, a plaintiff may allege facts that either (a) "show that defendants had both motive and

opportunity to commit fraud," or (b) "constitute strong circumstantial evidence of conscious misbehavior or recklessness." *Lerner v. Fleet Bank, N.A.*, 459 F.3d 273, 290-91 (2d Cir. 2006) (internal quotation marks omitted).

The "concrete benefits" issue relates to the "motive" prong, *see Chill v. Gen. Elec. Co.*, 101 F.3d 263, 268 (2d Cir. 1996); it does not apply to Pasternack's allegations of "conscious misbehavior or recklessness," which LabCorp does not challenge and which are sufficient. *See S. Cherry St., LLC v. Hennessee Grp. LLC*, 573 F.3d 98, 109 (2d Cir. 2009) ("conscious recklessness" is "a state of mind approximating actual intent"); *In re Scholastic Corp. Sec. Litig.*, 252 F.3d 63, 76 (2d Cir. 2001) ("Where the complaint alleges that defendants knew facts or had access to non-public information contradicting their . . . statements, recklessness is adequately pled . . . .").

Specifically, Pasternack alleges that Montalvo knew that her statements were false because she was the one who interacted with him. (*See* A-169-73 ¶¶ 18-27, 33-35). And Pasternack demonstrated Montalvo's consciousness in other ways, by explaining why she would have intentionally lied to the FAA: "to shield both LabCorp and herself from blame" for violating the governing regulations and guidelines and to "induc[e] the FAA . . . to conclude that Dr. Pasternack precluded LabCorp from fulfilling its obligations." (A-172, A-179-80 ¶¶ 33, 68).

LabCorp next attacks causation and contends that the FAA "determined that [Pasternack] 'refused to test' because he left the LabCorp Facility, not because he was on the phone or uncooperative." (LC 43). In support, LabCorp cites to an NTSB decision which quotes from an amended FAA order issued months after the fact, and to the ALJ's own findings. Neither of these decisions cite to the FAA's original revocation order, in which the FAA found that Pasternack failed to follow Montalvo's instructions and talked on his phone during the collection process, just as Montalvo had falsely stated. (*See* A-180 ¶ 69 (alleging that the FAA relied on Montalvo's false statements that Pasternack was on his phone and rushed out of the facility, and her failure to disclose that he told her he would return)). Moreover, when the FAA subsequently tried to defend its revocation in the administrative proceedings, it contended that Pasternack had "refused" his test because he did not have permission to leave, which was bound up in Montalvo's false statements that Pasternack was disruptive and rushed out of the facility. *See Pasternack v. Huerta*, 513 F. App'x 1, 2 (D.C. Cir. 2013). Thus, even if the FAA did not revoke Pasternack's licenses and certificates on the independent ground that he was allegedly uncooperative, as LabCorp contends, Montalvo's statements were inextricably intertwined with the FAA's views regarding his departure from the

testing facility. What the FAA relied upon is a question of fact that cannot be resolved at the pleading stage.[15]

CONCLUSION

For the foregoing reasons and the reasons stated in Pasternack's opening brief, this Court should reverse the district court's judgment and vacate the district court's Orders.

Dated: New York, New York
February 9, 2015

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[15] LabCorp incorrectly asserts that Pasternack failed to allege what statement Montalvo made other than true statements on the CCF form. (LC 44; *see* A-172-73 ¶¶ 33-35).

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENT, AND TYPE STYLE REQUIREMENT

1. The undersigned counsel of record for Plaintiff-Appellant Fred L. Pasternack certifies pursuant to Fed. R. App. P. 32(a)(7)(C) that the foregoing brief contains 6,998 words, excluding the parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii), according to the Word Count feature of Microsoft Word 2010.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Time New Roman.

Dated: February 9, 2015

/s/ Cynthia S. Arato
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