SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

DECEMBER 1, 2009

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Saxe, Catterson, McGuire, Acosta, JJ.

1318 Commercial Insurance Company of Newark, New Jersey,
Plaintiff-Respondent,

-against-

Ronald Popadich, et al.,
Defendants,

Chetan Mangat,
Defendant-Appellant.

Index 105397/06

Koenig & Samberg, Mineola (Arnold Koenig of counsel), for appellant.

Lewis Johs Avallone Aviles, LLP, Melville (Elizabeth A. Fitzpatrick of counsel), for respondent.

Order, Supreme Court, New York County (Marylin G. Diamond, J.), entered July 1, 2008, which, upon defendant Mangat's motion for reargument, adhered to a prior order granting plaintiff summary judgment, unanimously affirmed, with costs.

Plaintiff insurer seeks a declaration that it owed no duty to defend or indemnify defendant Popadich, the insured, in personal injury actions commenced against him by the other defendants, including Mangat. By his own admission, Popadich, on two dates in February 2002, ran down 27 pedestrians with his automobile on the streets of Manhattan. Plaintiff had appointed counsel to represent Popadich in a Kings County action that ended with an award of summary judgment determining that Mangat's

injuries were caused by Popodich's negligence. That result does not collaterally estop plaintiff in this action because the Kings County action did not involve the issue of intentional conduct (*see Color by Pergament v O'Henry's Film Works*, 278 AD2d 92 [2000]). In addition, plaintiff and Popadich are not in privity, as their interests ceased to be identical and instead became adversarial when plaintiff proceeded to defend Popadich under a reservation of rights and subsequently denied coverage (*see Public Serv. Mut. Ins. Co. v Goldfarb*, 53 NY2d 392, 401 [1981]). Contrary to Mangat's apparent contention, plaintiff could not have caused Popadich's counsel in the Kings County action to raise the issue of whether Popadich had committed an intentional tort (*see Farm Bur. Mut. Auto. Ins. Co. v Hammer*, 177 F2d 793, 801 [4th Cir 1949], *cert denied sub nom. Beverage v Farm Bur. Mut. Auto. Ins. Co.*, 339 US 914 [1950]); *cf. Pavia v State Farm Mut. Auto. Ins. Co.*, 82 NY2d 445, 452 [1993] ["under established agency principles [insurer] may fairly be required to act in the insured's best interests"]).

The statements made by Popadich after his arrest support summary judgment in plaintiff's favor. In particular, the transcript of his confession, which he signed and the accuracy of which was sworn to by a detective, shows that Popadich admitted that he had driven his vehicle into Manhattan on two occasions with the purpose of running over as many people as possible. That confession is not hearsay, and is admissible against Mangat

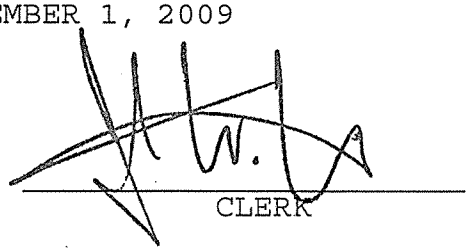
as a declaration against interest (*see Basile v Huntington Util. Fuel Corp.*, 60 AD2d 616, 617 [1977] ["Unlike an admission, which may be used only against the party who made it or against his privies in interest, a declaration against interest may be introduced in evidence by or against any one"] [internal quotation marks omitted]).

Finally, when construing an insurance policy, the tests to be applied are common speech and the reasonable expectation of an ordinary person (*see Ace Wire & Cable Co. v Aetna Cas. & Sur. Co.*, 60 NY2d 390, 398 [1983]). Here, the automobile liability policy issued by plaintiff provides no coverage for bodily injury that "[m]ay reasonably be expected to result from the intentional or criminal acts of any covered person" or "[i]s in fact intended by any covered person." "Thus, there is no insurance coverage under the terms of the policy if the resulting injury could reasonably be expected from the conduct. The court must look at the transaction as a whole in determining whether an accident has occurred" (*Allstate Ins. Co. v Ruggiero*, 239 AD2d 369, 370 [1997][internal citation omitted]). Based on the evidence, Mangat's injuries were to be reasonably expected by Popadich when he drove his vehicle through the streets of Manhattan with the purpose of causing as much harm to as many people as possible.

Accordingly, plaintiff was not obligated to defend or indemnify him.

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

ENTERED: DECEMBER 1, 2009



CLERK

Tom, J.P., Friedman, Nardelli, Buckley, Richter, JJ.

1418 The People of the State of New York, Appellant, Ind. 2237/08

-against-

James O. Boothe, Defendant-Respondent.

Andrew M. Cuomo, Attorney General, New York (Hannah Stith Long of counsel), for appellant.

Stillman, Friedman & Shechtman, P.C., New York (Paul Shechtman of counsel), for respondent.

Order, Supreme Court, New York County (Lewis Bart Stone, J.), entered on or about December 19, 2008, which, to the extent appealed from, dismissed those counts of the indictment alleging insurance fraud in the first degree, scheme to defraud in the first degree and falsifying business records in the first degree, unanimously modified, on the law, to the extent of reinstating the scheme to defraud and falsifying business records counts, and otherwise affirmed.

The court properly dismissed the insurance fraud count. The People allege that defendant, as chief operating officer of a managed health care provider, caused marketing plans containing false statements to be kept on file by the provider and submitted to contracting government agencies, enabling the provider to obtain Medicaid reimbursements to which it was not entitled. Penal Law § 176.30 prohibits fraudulent insurance acts involving thefts or attempted thefts in excess of $1 million. Under Penal Law § 176.05(1), a fraudulent insurance act, as relevant here,

consists of the presentation with fraudulent intent of a false written statement in connection with a policy for either commercial or personal insurance. It is undisputed that conduct involving health insurance does not come within that definition. Although in 1998 the Legislature added a provision defining fraudulent health care insurance acts (Penal Law § 176.05[1]), it neglected at that time to do anything to criminalize those acts. It left intact Penal Law § 176.30, and the other degrees of insurance fraud, which only criminalized fraudulent insurance acts.

It is plain from the statutory definitions that fraudulent *insurance* acts and fraudulent *health insurance* acts involve different conduct, that the latter type of conduct is not included in the former, and that only the former type is criminalized in Penal Law article 175. It should be noted that subsequent to the conduct alleged in this case, the Legislature enacted a separate health care fraud statute (Penal Law article 177).

"A statute must be read and given effect as it is written by the Legislature, not as the court may think it should or would have been written if the Legislature had envisaged all the

problems and complications which might arise" (*Lawrence Constr. Corp. v State of New York*, 293 NY 634, 639 [1944]). Regardless of whether the Legislature intended to criminalize the newly defined category of fraudulent health insurance acts at the time it defined those acts, and regardless of whether its failure to do so was an oversight, "courts are not to legislate under the guise of interpretation" (*People v Finnegan*, 85 NY2d 53, 58 [1995], *cert denied* 516 US 919 [1995]; *see also People v Tychanski*, 78 NY2d 909 [1991]). While the Legislature's definition of certain conduct, accompanied by its neglect to criminalize that conduct, may have rendered the definition useless, the fact remains that the conduct in question was never criminalized under the statute at issue. Accordingly, defendant's alleged conduct did not constitute the crime of insurance fraud.

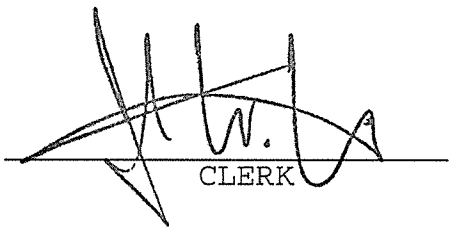
However, the court should not have dismissed the count alleging scheme to defraud (*see* Penal Law § 190.65). Although there may have been no evidence before the grand jury that defendant personally obtained any property from the scheme, the evidence and the instructions to the grand jurors would support an accessorial theory of liability.

The court also erred by dismissing three counts alleging falsifying business records in the first degree (Penal Law § 175.10). Under the circumstances alleged, the marketing plans were writings "kept or maintained by an enterprise for the purpose of evidencing or reflecting its condition or activity"

(Penal Law § 175.00[2]). The health care provider was required to maintain these records, as well as to file them with certain government agencies. Accordingly, the fact that defendant was also charged with offering a false instrument for filing (Penal Law § 175.35) in connection with these plans did not preclude prosecution for the separate act of fraudulently keeping them.

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

ENTERED: DECEMBER 1, 2009



Tom, J.P., Sweeny, Moskowitz, Acosta, Abdus-Salaam, JJ.

1583 The People of the State of New York, Ind. 1084/06
Respondent,

-against-

Miguel Concepcion,
Defendant-Appellant.

Robert S. Dean, Center for Appellate Litigation, New York (Jonathan M. Kirshbaum of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Stanley R. Kaplan of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Michael Gross, J. at hearing; John W. Carter, J. at jury trial and sentence), rendered November 23, 2007, convicting defendant of robbery in the first degree (four counts), robbery in the second degree (two counts) and criminal possession of a weapon in the second degree, and sentencing him, as a second violent felony offender, to an aggregate term of 20 years, unanimously affirmed.

The court properly denied defendant's suppression motion. Under the particular circumstances, the single-photo showup conducted at a police station did not create a substantial likelihood of irreparable misidentification. Even assuming, without deciding, that this procedure was inappropriate under *People v Riley* (70 NY2d 523 [1987]) because of its location, notwithstanding the fact that it occurred approximately an hour after the crime, we nevertheless conclude that it was confirmatory of an untainted identification the victims had

already made (*see e.g. People v Gilbert*, 295 AD2d 275 [2002], *lv denied* 89 NY2d 558 [2007]). The victims had already pointed defendant out to the police, on the street, immediately after the robbery. Although it was a different team of officers who chased defendant, arrested him and recovered the robbery weapon, the circumstances, including the very specific and accurate description provided by the victims before the photo showup, preclude any reasonable possibility that defendant was not the same person the victims had identified. In any event, any error was harmless in view of the overwhelming circumstantial evidence, independent of identification testimony, establishing defendant's guilt.

Defendant's challenges to the prosecutor's summation are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits (*see People v Overlee*, 236 AD2d 133 [1997], *lv denied* 91 NY2d 976 [1998]; *People v D'Alessandro*, 184 AD2d 114, 118-119 [1992], *lv denied* 81 NY2d 884 [1993]). To the extent there were improprieties, they did not deprive defendant of a fair trial. We similarly reject that portion of defendant's ineffective assistance of counsel claim that relates to the absence of objections to the prosecutor's summation.

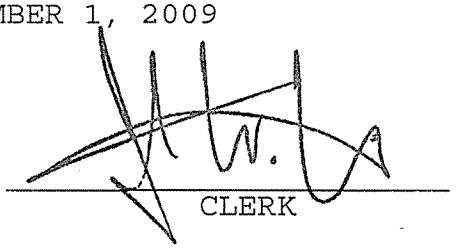
Defendant's ineffective assistance of counsel claims are unreviewable on direct appeal because they involve matters

outside the record concerning counsel's strategic decisions (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). The record suggests that counsel had strategic reasons for the conduct challenged on appeal, relating to the fact that defendant's defense emphasized claims of deliberate misidentification and police misconduct rather than simple mistaken identity. On the existing record, to the extent it permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]).

We perceive no basis for reducing the sentence.

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

ENTERED: DECEMBER 1, 2009



CLERK

Tom, J.P., Sweeny, Moskowitz, Acosta, Abdus-Salaam, JJ.

1584 Marie Yva Jean-Louis, Index 106048/08
Plaintiff-Appellant,

-against-

Hilton Hotels Corporation, et al.,
Defendants-Respondents.

Chapman Zaransky, LLP, Mineola (Michael B. Zaransky of counsel), for appellant.

Jackson Lewis LLP, New York (Diane Windholz of counsel), for respondents.

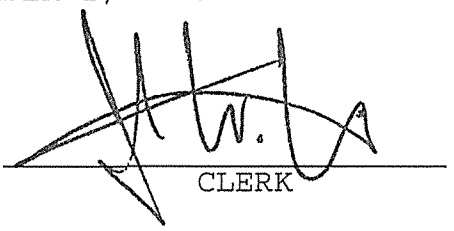
Order, Supreme Court, New York County (Michael D. Stallman, J.), entered September 25, 2008, which granted defendants' motion to dismiss the second cause of action of the complaint, unanimously affirmed, without costs.

The court properly dismissed the second cause of action wherein plaintiff alleges that defendants negligently trained, managed and/or supervised employees who confined her to an office for an hour and did not allow a union representative to be present while discussing her complaint that her supervisor inequitably distributed work based on her ethnicity and religious beliefs. This claim is barred by the exclusive remedy provisions of the Workers' Compensation Law (*see* Workers' Compensation Law § 11; § 29[6]; *Burlew v American Mut. Ins. Co.*, 63 NY2d 412, 416 [1984]), and contrary to plaintiff's contention, the cause of action did not allege facts sufficient to invoke the intentional tort exception to the Workers' Compensation Law. Even if the alleged conduct could be reasonably construed to be in

furtherance of defendants' interest, "[t]he complaint. . .did not contain requisite allegations that [defendants] had knowledge of, or acquiesced in, the tortious conduct of [their employees]" (*Velasquez-Spillers v Infinity Broadcasting Corp.*, 51 AD3d 427, 428 [2008]).

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

ENTERED: DECEMBER 1, 2009



CLERK

Tom, J.P., Sweeny, Moskowitz, Acosta, Abdus-Salaam, JJ.

1585 In re Davion A., and Others,

Children Under The Age of
Eighteen Years, etc.,

Marcel A.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

Howard M. Simms, New York, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Edward F.X. Hart of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Judith Stern of counsel), Law Guardian.

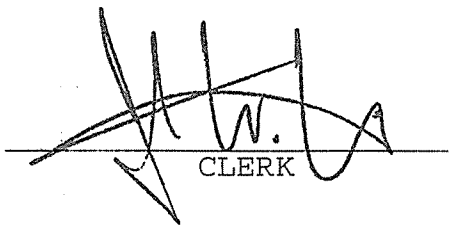
Order of disposition, Family Court, New York County (Susan K. Knipps, J.), entered on or about June 24, 2008, which, following a fact-finding hearing determining that respondent father had neglected his children, released them to the custody of their mother under the supervision of petitioner, unanimously affirmed, without costs.

The finding of neglect was supported by a preponderance of the evidence showing that respondent inflicted excessive corporal punishment on one of the children (*see Matter of Devante S.*, 51 AD3d 482 [2008]) and engaged in acts of domestic violence against the children's mother in their presence (*see Matter of Elijah C.*, 49 AD3d 340 [2008]), which impaired or created an imminent danger of impairing their physical, emotional or mental well-being. No

basis exists for disturbing the court's findings of fact and assessment of credibility, which are supported by the record (*see Matter of Fernando S.*, 63 AD3d 610 [2009]).

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

ENTERED: DECEMBER 1, 2009



Tom, J.P., Sweeny, Moskowitz, Acosta, Abdus-Salaam, JJ.

1586 In re Lutgarda Hernandez, Index 405628/07
Petitioner,

-against-

Department of Housing Preservation
and Development,
Respondent.

William E. Leavitt, New York, for petitioner.

Michael A. Cardozo, Corporation Counsel, New York (Sharyn Rootenberg of counsel), for respondent.

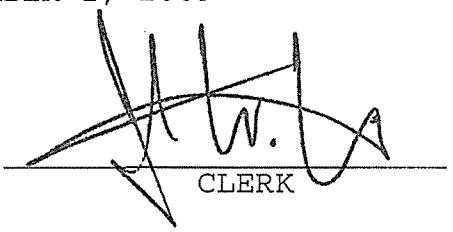
Proceeding pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, New York County [Marylin G. Diamond, J.], entered November 29, 2007), challenging respondent's determination, dated March 19, 2007, terminating petitioner's section 8 rent subsidy, unanimously dismissed as moot, without costs.

After the proceeding was transferred to this Court, we were advised, by respondent's brief, that respondent modified its determination terminating petitioner's rent subsidy so as to reinstate the subsidy, retroactive to May 1, 2007, upon certain conditions. Petitioner's reply brief does not contend that the conditions are unduly burdensome; in any event, the deadlines for meeting the conditions passed before the date of oral argument

without petitioner having sought a stay (*cf. Matter of Citineighbors Coalition of Historic Carnegie Hill v New York City Landmarks Preserv. Commn.*, 2 NY3d 727 [2004]). Therefore, even if this Court were to vacate the original determination, our decision would have no practical effect.

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

ENTERED: DECEMBER 1, 2009



CLERK

Tom, J.P., Sweeny, Moskowitz, Acosta, Abdus-Salaam, JJ.

1587-
1588-
1589 In re Rosa R.,

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

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

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

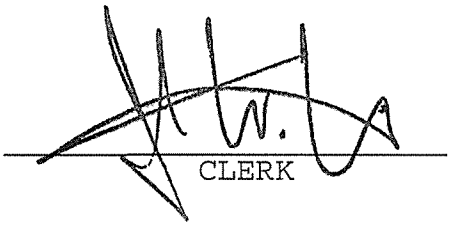
Order, Family Court, Bronx County (Clark V. Richardson, J.), entered on or about August 26, 2008, which denied appellant's application to seal the record of her prior adjudication as a juvenile delinquent, unanimously affirmed, without costs. Appeal from order of disposition, same court (Alma Cordova, J.) entered on or about October 24, 2006, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that she had committed an act which, if committed by an adult, would constitute the crime of assault, and imposed a conditional discharge, unanimously dismissed, without costs, as abandoned.

The court properly exercised its discretion in denying appellant's application made pursuant to Family Court Act § 375.2 to seal the records of her juvenile delinquency adjudication. Given the serious nature of the underlying assault, the interest

of justice would not be served by sealing these records (*see Matter of Carlton B.*, 268 AD2d 368 [2000]). Appellant's interests are adequately protected by the general confidentiality of Family Court records and the fact that juvenile delinquency adjudications do not entail civil disabilities (*see* Family Ct Act § 380.1). Sealing these records could potentially impede their use by law enforcement agencies for legitimate purposes in the event appellant engaged in further criminal activity.

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

ENTERED: DECEMBER 1, 2009



Tom, J.P., Sweeny, Moskowitz, Acosta, Abdus-Salaam, JJ.

1590 The People of the State of New York, Ind. 560/06
Respondent,

-against-

David Lazado,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (David Crow of counsel), and Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York (Elizabeth Gallagher McCabe of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Dana Levin Gosnell of counsel), for respondent.

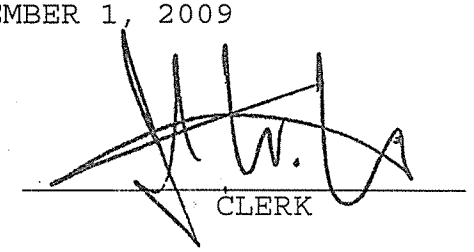
Judgment, Supreme Court, Bronx County (Troy K. Webber, J. at motions; Seth Marvin, J. at plea and sentence), rendered September 28, 2006, convicting defendant, upon his plea of guilty, of attempted promoting prison contraband in the first degree, and sentencing him, as a second felony offender, to a term of 1½ to 3 years, unanimously affirmed.

Defendant made a valid waiver of his right to appeal, which forecloses his suppression claim. The court did not conflate the right to appeal with the rights automatically forfeited by pleading guilty, but separately explained that the waiver of the

right to appeal was in consideration for the plea (*see People v Lopez*, 6 NY3d 248 [2006]). As an alternative holding, we also reject defendant's suppression claim on the merits.

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

ENTERED: DECEMBER 1, 2009



CLERK

Tom, J.P., Sweeny, Moskowitz, Acosta, Abdus-Salaam, JJ.

1592 Laverne M. Leonard, Index 113232/07
Plaintiff-Appellant,

-against-

Gateway II, LLC, et al.,
Defendants-Respondents,

Gateway Security Services, Inc.,
Defendant.

Tapalaga & Associates, P.C., New York (Gabriel Tapalaga of counsel), for appellant.

Stein Farkas & Schwartz LLP, New York (Esther E. Schwartz of counsel), for respondents.

Order, Supreme Court, New York County (Jane S. Solomon, J.), entered December 17, 2008, which granted the motion by the Gaetano defendants, Gateway Condominium and Manhattan Property Managers Realty to dismiss the complaint against them, unanimously affirmed, without costs.

The court properly dismissed the breach of contract claims against all defendants except Gateway II, since plaintiff was not in privity with any of the other defendants (*see generally Residential Bd. of Mgrs. of Zeckendorf Towers v Union Sq.-14th St. Assoc.*, 190 AD2d 636, 637 [1993]). The purchase agreements were unequivocally executed by Gaetano solely on behalf of Gateway II, and plaintiff points to no other contracts involving any other defendant. Plaintiff's assertion that Schedules A and B in the purchase agreements represent contracts with defendants Gaetano & Associates and Gateway Condominium, respectively, has no merit. Schedule A is merely a set of architectural drawings

prepared by Gaetano & Associates. It is not a contract of any kind. Schedule B is an unsigned sample of a contract that the seller in the purchase agreements (Gateway II) included as an example of one the buyer (plaintiff) might have to obtain. It does not bind Gateway Condominium in any way. Nor is plaintiff a third-party beneficiary of these non-contracts. Even if these schedules could be considered contracts with Gaetano & Associates and Gateway II (Schedule A) and with Gateway Condominium (Schedule B), they would be insufficient to render plaintiff a third-party beneficiary thereunder (*see Edge Mgt. Consulting, Inc. v Blank*, 25 AD3d 364, 368-369 [2006], *lv dismissed* 7 NY3d 864 [2006]), and would in no way obligate Gaetano & Associates and Gateway Condominium to perform Gateway II's obligations under the purchase agreements.

The court also properly dismissed the second cause of action for fraud against all defendants, as this is no more than a restatement of plaintiff's breach of contract claim, without alleging a breach of duty owed to plaintiff independent of the purchase agreements (*see Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 389 [1987]).

Plaintiff's third cause of action for fraudulent inducement was also properly dismissed, as plaintiff cannot establish reasonable reliance on any of the alleged promises made to her, such as tax abatements and certain services, because the purchase agreements expressly state that plaintiff did not rely on any promises not contained therein. While this provision would

expressly allow for reliance on matters contained in the Offering Plan, plaintiff has not pointed to any provision of the Plan, or of any prior Offering Plan, which might have included the promises upon which she claims to have relied. She cannot claim reasonable reliance on provisions in the Offering Plan that she never saw and apparently never asked to see (*see UST Private Equity Invs. Fund v Salomon Smith Barney*, 288 AD2d 87, 88 [2001]; *Rodas v Manitaras*, 159 AD2d 341, 342-343 [1990]; *see also Valassis Communications v Weimer*, 304 AD2d 448, 449 [2003], *appeal dismissed* 2 NY3d 794 [2004]).

Plaintiff's fourth cause of action for tortious interference with prospective contracts was properly dismissed, as plaintiff has failed to allege that such interference was effected by unlawful means or egregious conduct, such as conduct engaged in for the sole purpose of harming plaintiff (*see Carvel Corp. v Noonan*, 3 NY3d 182 [2004]).

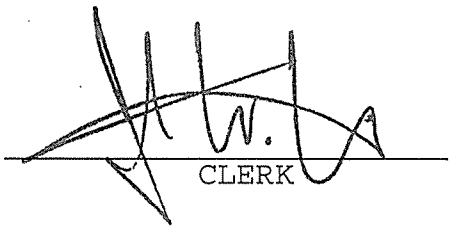
Plaintiff's fifth cause of action, except to the extent the court permitted a portion of it to proceed as a breach of contract claim against Gateway II, asserts claims relating to alleged harm to the Condominium as a whole, not plaintiff individually. As such, plaintiff lacks standing to make these claims (*see Abrams v Donati*, 66 NY2d 951 [1985]; *Di Fabio v Omnipoint Communications, Inc.*, 2009 NY App Div LEXIS 7049, *4, 2009 WL 3210142, *2).

Plaintiff's assertion that discovery is necessary in order to oppose defendants' motion is based on nothing more than

unsubstantiated hope of discovering something relevant to her claims, and is an insufficient reason to deny the motion (*see Kennerly v Campbell Chain Co.*, 133 AD2d 669, 670 [1987]). Nor have defendants waived their right to dismissal pursuant to CPLR 3211(e), as the only documents on which defendants rely are the purchase agreements, which are the foundation of plaintiff's own claims. In any event, defendants clearly asserted as affirmative defenses that plaintiff lacked privity with all defendants but Gateway II, and that the complaint fails to state a cause of action, the very grounds upon which dismissal is premised in this case.

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

ENTERED: DECEMBER 1, 2009



Tom, J.P., Sweeny, Moskowitz, Acosta, Abdus-Salaam, JJ.

1594 The People of the State of New York, Ind. 1624/07
Respondent,

-against-

James McCullough,
Defendant-Appellant.

Robert S. Dean, Center for Appellate Litigation, New York (Abigail Everett of counsel), and Chadbourne & Parke LLP, New York (Kimberly Zafran of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Craig A. Ascher of counsel), for respondent.

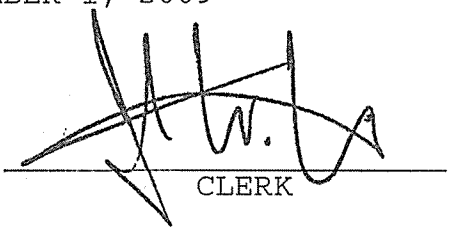
Judgment, Supreme Court, New York County (Lewis Bart Stone, J.), rendered April 28, 2006, convicting defendant, after a jury trial, of criminal possession of marijuana in the first degree, and sentencing him, as a second felony drug offender, to a term of 4½ years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's determinations concerning credibility, including its rejection of defendant's testimony. In this controlled delivery case, defendant's course of conduct warranted the conclusion that he knew the boxes he received contained a large quantity of marijuana (*see People v Reisman*, 29 NY2d 278, 285 [1971]). The evidence clearly established that defendant was the intended recipient of the boxes, rather than merely accepting them for someone else in his capacity as building superintendent. Moreover, when a detective subsequently approached and identified himself, defendant immediately

disclaimed ownership of the boxes, even though the detective had said nothing about the boxes, which defendant had already placed in the basement of the building.

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

ENTERED: DECEMBER 1, 2009



CLERK

Tom, J.P., Sweeny, Moskowitz, Acosta, Abdus-Salaam, JJ.

1595 In re Hawa Diallo,
Petitioner-Respondent,

-against-

Mohammed Diallo,
Respondent-Appellant.

Carol Lipton, Brooklyn, for appellant.

Sanctuary for Families, Inc., New York (Lisa S. Vara-Gulmez of counsel), for respondent.

Appeal from order, Family Court, Bronx County (Alma Cordova, J.), entered on or about March 14, 2008, which, after a fact-finding hearing, granted petitioner an order of protection for one year, unanimously dismissed as moot, without costs.

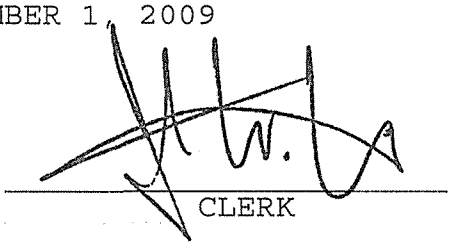
Because the order of protection has expired, this appeal is moot (*see Matter of Jamal A. v Valentina V.*, 46 AD3d 389 [2007]; *Wibrowski v Wibrowski*, 256 AD2d 172 [1998]). Although respondent maintains that the matter should be reviewed inasmuch as the issuance of the order would have enduring and serious consequences, here, there is an absence of any permanent and significant stigma that might adversely affect respondent in future proceedings (*see Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 713-14 [1980]; *compare Matter of S. Children*, 231 AD2d 573 [1996], *lv denied* 89 NY2d 809 [1997], *cert denied* 521 US 1125 [1997]).

Were we to reach the merits, we would find that in light of

the court's credibility findings, the determination to issue the order of protection was not against the weight of the evidence (*see Matter of F.B. v W.B.*, 248 AD2d 119 [1998]).

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

ENTERED: DECEMBER 1, 2009



CLERK

Tom, J.P., Sweeny, Moskowitz, Acosta, Abdus-Salaam, JJ.

1596 Seth A. Mensah, Index 107302/08
Plaintiff-Appellant,

-against-

Polytechnic University, et al.,
Defendants-Respondents,

Kennedy Space Center,
Defendants.

Seth A. Mensah, appellant pro se.

Bivona & Cohen, P.C., New York (Ian H. Kaufman of counsel), for Polytechnic University, respondent.

Freeman Lewis LLP, New York (Alexander Linzer of counsel), for Belcan Corporation, respondent.

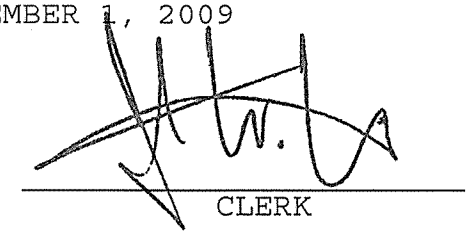
Order, Supreme Court, New York County (Jane S. Solomon, J.), entered December 4, 2008, which denied plaintiff's motion for an order directing defendant Polytechnic University to grant him a bachelor of science degree in aerospace and mechanical engineering and a doctorate degree in aerospace engineering, and granted Polytechnic's and defendant Belcan Corporation's cross motions to dismiss the complaint as against them, unanimously affirmed, without costs.

The court lacked personal jurisdiction of Polytechnic and Belcan because plaintiff pro se served them by mail (CPLR 311[a]). In addition, the complaint, which seeks compensation for the appropriation of a design for a "submarine spaceship," fails to state a cause of action against Belcan because it does not indicate Belcan's role in either the design or the manufacture of any submarine spaceship or any connection between

Belcan and plaintiff's alleged damages. The complaint also fails to state a cause of action against Polytechnic because plaintiff's factual allegations pertaining to Polytechnic are "either inherently incredible or flatly contradicted by documentary evidence" (*Kliebert v McKoan*, 228 AD2d 232, 232 [1996], *lv denied* 89 NY2d 802 [1996]).

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

ENTERED: DECEMBER 1, 2009



CLERK

Tom, J.P., Sweeny, Moskowitz, Acosta, Abdus-Salaam, JJ.

1597 In re Krista Martino, Index 402711/07
Petitioner-Appellant,

-against-

Southbridge Towers, Inc.,
Respondent,

New York State Division of Housing
and Community Renewal,
Respondent-Respondent.

Cardozo Bet Tzedek Legal Services, New York (Paris R. Baldacci of counsel), for appellant.

Andrew M. Cuomo, Attorney General, New York (Robert C. Weisz of counsel), for DHCR respondent.

Order and judgment (one paper), Supreme Court, New York County (Edward, H. Lehner, J.), entered January 14, 2008, which denied petitioner's application to annul respondent Division of Housing and Community Renewal's (DHCR) denial of her appeal from a housing company's rejection of her application for succession rights to an apartment, and granted DHCR's cross motion to dismiss the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

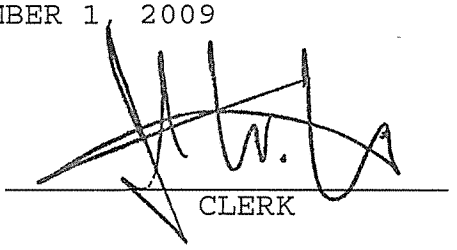
The determination that petitioner did not have the right to succeed to the subject apartment upon the death of the tenant of record has a rational basis. The housing company was never notified in writing that petitioner had assumed occupancy in the apartment (*see* 9 NYCRR 1727-3.6), and when the tenant of record died on January 6, 1999, the only credible evidence that the apartment was petitioner's primary residence was the affidavit of

income filed by the tenant of record in April 1998 listing petitioner as a resident of the apartment. Accordingly, even accepting petitioner's claim that she should be considered disabled, she failed to demonstrate that the unit was her primary residence for the required time period (*see* 9 NYCRR 1727-8.2[a][5]; 9 NYCRR 1727-8.3[a] [two years, or one year if a disabled person]; *Matter of Greichel v New York State Div. of Hous. & Community Renewal*, 39 AD3d 421 [2007]; *Matter of Johnson v State of N.Y. Div. of Hous. & Community Renewal*, 213 AD2d 345 [1995]). Contrary to petitioner's argument, the listing of her name on the affidavit of income filed in April 1998 did not establish her occupancy of the apartment in 1997.

We have considered petitioner's remaining contentions, including that she was denied due process in the proceedings before DHCR, and find them unavailing.

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

ENTERED: DECEMBER 1, 2009



CLERK

Tom, J.P., Sweeny, Moskowitz, Acosta, Abdus-Salaam, JJ.

1598 The People of the State of New York, Respondent,
-against-
Mark Eneh, Defendant-Appellant.

Ind. 19858/05
23694/05
3664/07

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

Judgment, Supreme Court, Bronx County (Albert Lorenzo and Eugene Oliver, J. at pleas, and Eugene Oliver, J. at sentence), rendered on or about January 10, 2008, unanimously affirmed.

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

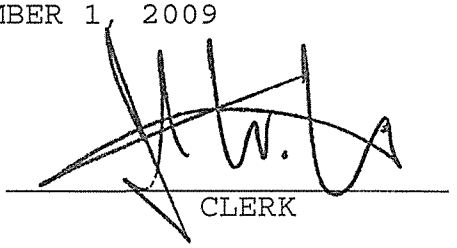
Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department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

Denial of the application for permission to appeal by the

judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

ENTERED: DECEMBER 1, 2009



CLERK

Tom, J.P., Sweeny, Moskowitz, Acosta, Abdus-Salaam, JJ.

1601 The People of the State of New York, Ind. 5063/06
Respondent,

-against-

John Brandt,
Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Mugambi Jouet of counsel), for appellant.

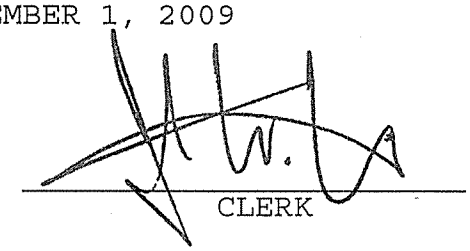
Robert M. Morgenthau, District Attorney, New York (Aaron Ginandes of counsel), for respondent.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Carol Berkman, J.), rendered on or about April 9, 2008,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon,

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

ENTERED: DECEMBER 1, 2009



CLERK

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

Tom, J.P., Sweeny, Moskowitz, Acosta, Abdus-Salaam, JJ.

1603 Devorah Smilow, etc., Index 108183/08
Petitioner-Appellant,

-against-

New York City Department of Finance Parking Violations Adjudications Division, et al.,
Respondents-Respondents.

Weiss & Lurie, New York (Mark D. Smilow of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Dona B. Morris of counsel), for respondents.

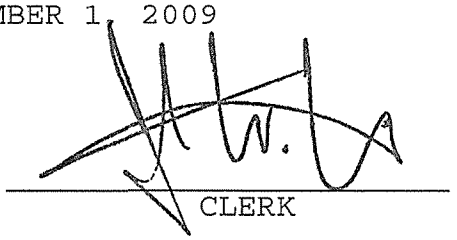
Order, Supreme Court, New York County (Marylin G. Diamond, J.), entered January 9, 2009, which granted respondents' motion to dismiss an article 78 proceeding challenging a parking ticket, unanimously affirmed, without costs.

Petitioner alleges that the ticket was personally served on her by respondent police officer, who falsely stated on the ticket that the vehicle's operator refused to provide identification; she pled not guilty through the Web site of respondent Department of Finance Parking Violations Bureau, arguing that the ticket was jurisdictionally defective because, among other reasons, it did not identify the operator of the vehicle; an administrative law judge rejected her arguments and upheld the $115 fine; her "representative," who is the registered owner of the vehicle, paid the fine and filed an administrative appeal; and PVB, after a hearing, upheld the ALJ's decision. Petitioner does not allege, and it does not otherwise appear,

that she was present at the hearing. Having failed to pursue the administrative appeal herself, and as no legal support is cited for her underlying premise that a vehicle operator can be "vicariously represented" at a PVB hearing by the vehicle's owner, petitioner failed to exhaust her administrative remedies, and therefore may not challenge PVB's determination.

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

ENTERED: DECEMBER 1, 2009



CLERK

Tom, J.P., Sweeny, Moskowitz, Acosta, Abdus-Salaam, JJ.

1604N Creative Designs International, Ltd., Index 600361/09
Plaintiff-Appellant,

-against-

Bella Products Pty, Ltd.,
Defendant-Respondent.

Feder Kaszovitz LLP, New York (R. Jeffrey More of counsel), for appellant.

Edwards Angell Palmer & Dodge LLP, New York (Peter C. Schechter of counsel), for respondent.

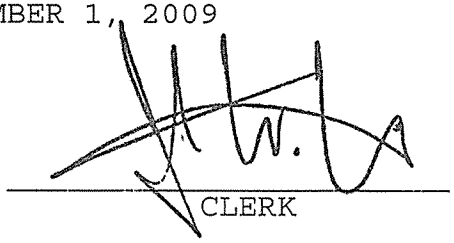
Appeal from order, Supreme Court, New York County (Richard B. Lowe III, J.), entered June 1, 2009, which denied plaintiff's motion for a preliminary injunction to stay proceedings in an action between the parties pending in the Federal Court of Australia, unanimously dismissed as moot, without costs.

After the instant appeal was perfected, the Australian court granted plaintiff's motion to stay all proceedings in the Australian action pending resolution of the action in Supreme Court. Plaintiff thus having obtained the injunctive relief it requested, a determination of this appeal would not affect the rights of the parties (*see Matter of Johnson v Pataki*, 91 NY2d 214, 222 [1997]). We note that none of the exceptions to the

mootness doctrine exist here (*see Matter of Hearst Corp v Clyne*, 50 NY2d 707, 714-715 [1980]).

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

ENTERED: DECEMBER 1, 2009



CLERK

Mazzarelli, J.P., Sweeny, Catterson, Freedman, Roman, JJ.

1605 The People of the State of New York, Ind. 2976/07
Respondent,

-against-

Kevin Williams,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Marc Krupnick of counsel), for respondent.

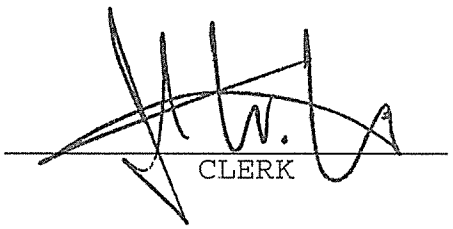
Judgment, Supreme Court, New York County (William A. Wetzel, J.), entered February 4, 2008, convicting defendant, after a jury trial, of operating a motor vehicle while under the influence of alcohol, and sentencing him to a term of 1 to 3 years, unanimously affirmed.

The court properly admitted evidence that defendant refused to take a breathalyzer test (*see People v Thomas*, 46 NY2d 100 [1978]). The evidence established that defendant did, in fact, refuse, in that he would not take the test unless the police complied with a precondition that was unacceptable under the circumstances. In any event, any error in admitting the evidence was harmless in view of the overwhelming evidence of

intoxication, independent of the refusal (*see People v Crimmins*, 36 NY2d 230 [1975]).

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

ENTERED: DECEMBER 1, 2009



Mazzarelli, J.P., Sweeny, Catterson, Freedman, Roman, JJ.

1606 V. Barile, Inc., Index 103859/09
Petitioner-Appellant,

-against-

Ricardo Morales, Acting Chairman of the New York City Housing Authority, et al.,
Respondents-Respondents.

Michael C. Marcus, Long Beach, for appellant.

Sonya M. Kaloyanides, New York (James E. Bayley of counsel), for respondents.

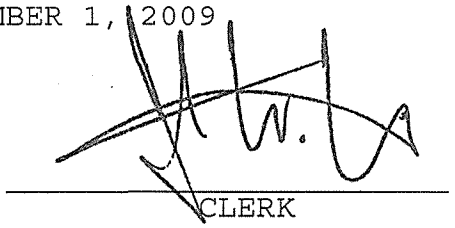
Order and judgment (one paper), Supreme Court, New York County (Joan A. Madden, J.), entered May 26, 2009, which denied petitioner's application to annul respondents' determination rejecting petitioner's bids on two contracts, and dismissed the petition, unanimously affirmed, without costs.

Respondents' bidding requirement that bidders have a certain minimum amount of net liquid assets is rationally related to the minimum financial resources necessary to perform the contracts, and, indeed, petitioner does not appear to argue otherwise. To hold, as petitioner urges, that respondent's use of only that measure resulted, at least in petitioner's case, in an arbitrary rejection of a responsive bid by a responsible bidder would be to

substitute our judgment for that of respondents (*see Matter of P & C Giampilis Constr. Corp. v Diamond*, 210 AD2d 64, 66 [1994]; *see generally Flacke v Onondaga Landfill Sys.*, 69 NY2d 355, 363 [1987]). We have considered petitioner's other arguments and find them to be unavailing.

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

ENTERED: DECEMBER 1, 2009



CLERK

Mazzarelli, J.P., Sweeny, Catterson, Freedman, Roman, JJ.

1607-
1607A Carolyn Curiel, Index 102326/06
Plaintiff-Appellant,

-against-

Loews Cineplex Theaters, Inc., etc.,
Defendant-Respondent.

Lopez Romero & Montelione, P.C., New York (Richard J. Montelione of counsel), for appellant.

Carroll, McNulty & Kull, LLC, New York (Emilio F. Grillo of counsel), for respondent.

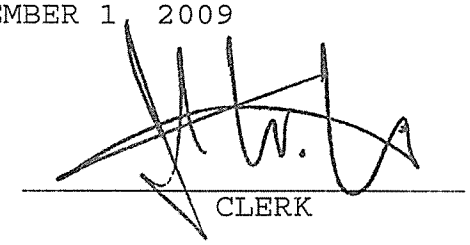
Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered August 28, 2008 (the first order), which, in an action for personal injuries sustained in a slip and fall in the lobby of defendant's movie theater, inter alia, conditionally denied plaintiff's cross motion to strike defendant's answer, unanimously affirmed, without costs. Order, same court and Justice, entered February 11, 2009 (the second order), which, insofar as appealable, denied a second motion by plaintiff to strike defendant's answer, unanimously affirmed, without costs.

With respect to the first order, there has been no showing that the delay was willful, contumacious, or the result of bad faith, and, in the absence of any substantive prejudice to plaintiff caused by the delay, a conditional order was a proper exercise of discretion (*see Gibbs v St. Barnabas Hosp.*, 61 AD3d 599, 600 [2009]). With respect to the second order, the motion court properly fixed a strict schedule for completing the

deposition (*see id.*). We have reviewed plaintiff's other arguments, including those relating to the branch of her motions that sought to amend the caption, and find them to be unavailing.

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

ENTERED: DECEMBER 1, 2009



CLERK

Mazzarelli, J.P., Sweeny, Catterson, Freedman, Roman, JJ.

1608 In re Irene C.,

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

Reina M.,
Respondent-Appellant,

Catholic Guardian Society and Home Bureau,
Petitioner-Respondent.

Steven N. Feinman, White Plains, for appellant.

Magovern & Sclafani, New York (Marion C. Perry of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Patricia Colella of counsel), Law Guardian.

Order, Family Court, New York County (Sara P. Schechter, J.), entered on or about March 31, 2008, which, insofar as appealed from as limited by the briefs, upon a finding of permanent neglect, terminated respondent mother's parental rights to the subject child and committed custody and guardianship of the child to petitioner agency and the Commissioner of the Administration for Children's Services for the purpose of adoption, unanimously affirmed, without costs.

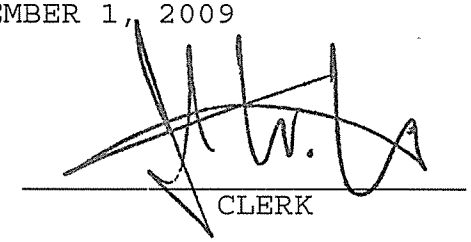
Respondent's contention that the petition was defective in that it did not specify the steps taken by the agency to strengthen the parent-child relationship (Family Court Act § 614[1][c]), is unpreserved as respondent never moved to dismiss

the petition on such grounds (*see e.g. Matter of Gina Rachel L.*, 44 AD3d 367 [2007]). Were we to review it, we would find that the allegations were more than sufficient to put respondent on notice of the nature of the proceedings against her.

Furthermore, the evidence at the hearing was clear and convincing with respect to both the agency's diligent efforts and respondent's failure to plan for her daughter. The evidence showed that the agency made diligent efforts at reunification through referral of respondent to parenting-skills workshops, domestic violence programs, counseling programs, and arranging scheduled visitations (*see Gina Rachel L.*, 44 AD3d at 368). Despite these efforts, respondent continued to deny responsibility for her past neglect of her daughter and lacked insight into her duties as a parent (*see Matter of S. Children*, 210 AD2d 175 [1994], *lv denied* 85 NY2d 807 [1995]).

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

ENTERED: DECEMBER 1, 2009



CLERK

Mazzarelli, J.P., Sweeny, Catterson, Freedman, Roman, JJ.

1610 The People of the State of New York, Ind. 4078/07
Respondent,

-against-

Keith Plummer,
Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Joseph M. Nursey of counsel), and Friedman Kaplan Seiler & Adelman LLP, New York (Andrew S. Pak of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Melissa Pennington of counsel), for respondent.

Judgment, Supreme Court, New York County (Robert Stolz, J.), rendered February 26, 2008, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree and criminal possession of a controlled substance in the third and seventh degrees and sentencing him, as a second felony offender, to an aggregate term of 6 years, unanimously affirmed.

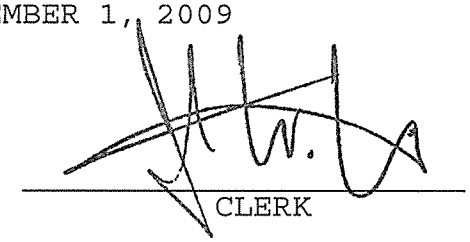
The People made a sufficiently particularized showing of an overriding interest justifying the court's closure of the courtroom during the testimony of two undercover officers (*see People v Ramos*, 90 NY2d 490, 498-500 [1997], *cert denied sub nom. Ayala v New York*, 522 US 1002 [1997]). Each officer established that he expected to resume undercover operations in the specific area of defendant's arrest in the very near future. The officers also had pending cases and took precautions to avoid being recognized. Accordingly, there was a substantial probability that each officer's safety and effectiveness would be jeopardized

by his testimony in open court (*see People v Jones*, 96 NY2d 213, 220 [2001]).

The court's *Sandoval* ruling balanced the appropriate factors and was a proper exercise of discretion (*see People v Hayes*, 97 NY2d 203 [2002]; *People v Walker*, 83 NY2d 455, 458-459 [1994]). The court precluded elicitation of the underlying facts of defendant's convictions, and it only permitted the People to identify a few of these convictions. We conclude that the number of convictions permitted was not excessive in light of defendant's extensive record and the court's steps to limit prejudice.

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

ENTERED: DECEMBER 1, 2009



CLERK

Mazzarelli, J.P., Sweeny, Catterson, Freedman, Roman, JJ.

1611-
1611A In re Joyce A-M. and Another,

Children Under The Age
of Eighteen Years, etc.,

Yvette A.,
Respondent-Appellant,

The Administration for
Children's Services,
Petitioner-Respondent.

Steven N. Feinman, White Plains, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Ronald E. Sternberg of counsel), for respondent.

Adam M. Brown, Bronx, Law Guardian.

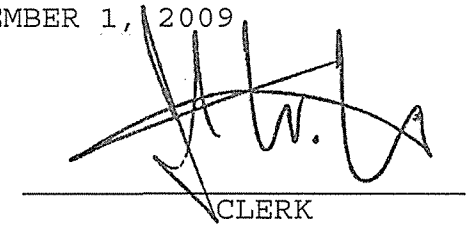
Order of disposition, Family Court, Bronx County (Clark V. Richardson, J.), entered on or about September 26, 2008, placing the subject children in petitioner's custody until completion of the next permanency hearing, upon a fact-finding determination of neglect, unanimously affirmed insofar as it brings up for review the fact-finding determination, and the appeal therefrom otherwise dismissed as moot, without costs. Appeal from fact-finding order, same court and Judge, entered on or about September 26, 2008, unanimously dismissed, without costs, as superseded by the appeal from the order of disposition.

The placement is moot as the date scheduled for the next

permanency hearing has passed (*see Matter of Stephon Elijah G.*, 63 AD3d 640 [2009]). The finding of neglect is supported by a preponderance of the evidence showing that respondent failed to timely pick up the children from day care, necessitating police involvement to ensure their safety, and had been found guilty of neglect in prior, separate proceedings.

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

ENTERED: DECEMBER 1, 2009



CLERK

Mazzarelli, J.P., Sweeny, Catterson, Freedman, Roman, JJ.

1612 Carlos Figueroa, Index 21134/06
Plaintiff-Appellant,

-against-

Alexander Sanchez,
Defendant-Respondent.

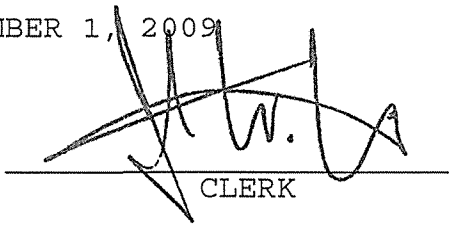
Carlos Figueroa, appellant pro se.

Appeal from order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered on or about February 26, 2008, dismissing this case, unanimously dismissed, without costs.

Due to his incarceration, plaintiff defaulted by failing to appear at a preliminary conference (22 NYCRR 202.27). The only remedy for plaintiff's default in these circumstances is not an appeal, but rather a motion in Supreme Court to vacate the default (*see Campos v New York City Health & Hosps. Corp.*, 307 AD2d 785, 786 [2003]). In the present posture of the case, there is no appealable order for this Court to review. Finally, we note that plaintiff claims that he made numerous attempts to communicate with the court about his appearances that were not addressed.

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

ENTERED: DECEMBER 1, 2009



CLERK

Mazzarelli, J.P., Sweeny, Catterson, Freedman, Roman, JJ.

1613 The People of the State of New York, Ind. 851/07
Respondent,

-against-

Charles Stenson,
Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Alexandra Keeling of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Patricia Curran of counsel), for respondent.

Judgment, Supreme Court, New York County (Arlene R. Silverman, J.), rendered May 28, 2008, convicting defendant, after a jury trial, of burglary in the second degree (three counts), criminal mischief in the second degree, and criminal mischief in the fourth degree (two counts), and sentencing him to an aggregate term of 4 years, unanimously affirmed.

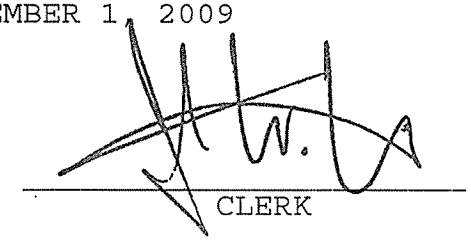
The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's determinations that defendant is the person depicted in a series of surveillance videotapes.

Under the exacting standard that must be satisfied before the extraordinary remedy of dismissal of the indictment is warranted (*see People v Darby*, 75 NY2d 449, 455 [1990]), we find no impairment of the integrity of the grand jury proceeding. The People's questioning of witnesses and instructions to the grand jury were appropriate, and any defects did not warrant dismissal.

We perceive no basis for reducing the sentence or directing that it be served concurrently with the sentence for defendant's other conviction.

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

ENTERED: DECEMBER 1, 2009



CLERK

Mazzarelli, J.P., Sweeny, Catterson, Freedman, Roman, JJ.

1614 The People of the State of New York, Ind. 6841/06
Respondent,

-against-

Charles Stenson,
Defendant-Appellant.

Robert S. Dean, Center for Appellate Litigation, New York (William A. Loeb of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Nicole Coviello of counsel), for respondent.

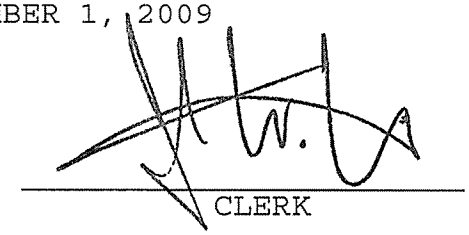
Judgment, Supreme Court, New York County (Richard D. Carruthers, J.), rendered March 26, 2008, convicting defendant, after a jury trial, of burglary in the second degree and grand larceny in the fourth degree, and sentencing him to an aggregate term of 8 years, unanimously affirmed.

The court properly admitted testimony that defendant possessed credit cards that had been last seen in the premises where the burglary occurred, even though a motion court had dismissed the counts of the indictment relating to the cards. This evidence clearly linked defendant to the burglary and, contrary to defendant's argument, we find nothing in *People v Resek* (3 NY3d 385 [2004]) to suggest that otherwise admissible uncharged crimes evidence is necessarily rendered inadmissible by a dismissal of charges relating to the conduct at issue. Here, the counts relating to the credit cards were dismissed, with leave to re-present, due to technical gaps in the proof before the grand jury. The dismissal cannot be viewed as "clearing"

defendant of possessing the credit cards (*compare Resek*, 3 NY3d at 390) or creating any unfairness about using that possession as proper uncharged crimes evidence. Defendant's argument that the trial jury should have been told about the dismissal is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we likewise reject it on the merits.

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

ENTERED: DECEMBER 1, 2009



CLERK

Mazzarelli, J.P., Sweeny, Catterson, Freedman, Roman, JJ.

1615 In re Nicole Banks,
Petitioner-Respondent,

-against-

Richard Penney-Richards,
Respondent-Appellant.

Julian A. Hertz, Larchmont, for appellant.

Jenner & Block LLP, New York (Tarsha A. Phillibert of counsel), for respondent.

Karen P. Simmons, The Children's Law Center, Brooklyn (Barbara H. Dildine of counsel), Law Guardian.

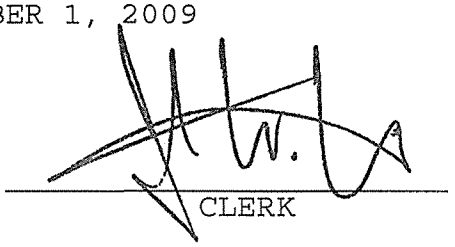
Order, Family Court, New York County (Myrna Martinez-Perez, J.), entered on or about January 21, 2009, which granted petitioner mother a five-year order of protection upon findings that respondent father committed family offenses including, inter alia, acts constituting assault in the second and third degrees, unanimously affirmed, without costs.

No basis exists to disturb Family Court's findings crediting petitioner's testimony that respondent committed numerous acts of violence against her, some causing her physical injury and in the presence of the child, and warranting a five-year order of protection (*see Matter of Melissa Marie G. v John Christopher W.*, 57 AD3d 314 [2008]; *see also Matter of Everett C. v Oneida P.*, 61

AD3d 489, 489 [2009]; *Matter of Hazel P.R. v Paul J.P.*, 34 AD3d 307 [2006]).

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

ENTERED: DECEMBER 1, 2009



CLERK

Mazzarelli, J.P., Sweeny, Catterson, Freedman, Roman, JJ.

1616 The People of the State of New York, Ind. 3325/05
Respondent,

-against-

Segundo Medina,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Martin M. Lucente of counsel), for appellant.

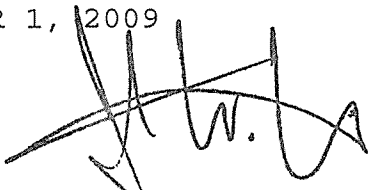
Robert M. Morgenthau, District Attorney, New York (Mary C. Farrington of counsel), for respondent.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Daniel FitzGerald, J.), rendered on or about May 3, 2007,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon,

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

ENTERED: DECEMBER 1, 2009



CLERK

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

Mazzarelli, J.P., Sweeny, Catterson, Freedman, Roman, JJ.

1617-
1617A Millennium Partners, L.P., Index 601878/07
Plaintiff-Appellant,

-against-

Select Insurance Company,
Defendant-Respondent,

Twin City Fire Insurance Company,
Defendant.

Lowey Dannenberg Cohen & Hart, P.C., White Plains (Peter D. St. Phillip, Jr. of counsel), for appellant.

Edwards Angell Palmer & Dodge LLP, New York (Ira G. Greenberg of counsel), for respondent.

Judgment, Supreme Court, New York County (Marcy S. Friedman, J.), entered March 13, 2009, dismissing the complaint as against defendant Select Insurance Company, pursuant to an order, same court and Justice, entered March 10, 2009, which granted defendant's motion for summary judgment, unanimously affirmed, with costs. Appeal from the aforesaid order unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

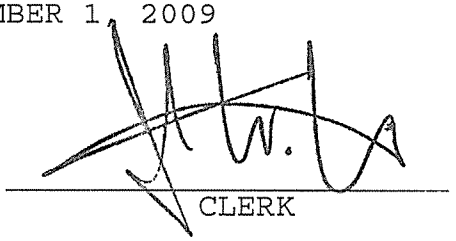
As the motion court found, the findings recited in the SEC's cease and desist order to which plaintiff consented and in the assurance of discontinuance it entered into with the Attorney General of the State of New York, which provided, inter alia, for the disgorgement by plaintiff of $148 million, "conclusively link the disgorgement to improperly acquired funds," notwithstanding that plaintiff consented and agreed to these orders "without

admitting or denying the findings [t]herein" (*see Vigilant Ins. Co. v Credit Suisse First Boston Corp.*, 10 AD3d 528 [2004]). The fact that no judgments resulted from the negotiated settlements in which these findings were made does not affect the validity of the findings (*see Reliance Group Holdings v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 188 AD2d 47, 55 [1993], *lv dismissed in part, denied in part* 82 NY2d 704 [1993]).

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

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

ENTERED: DECEMBER 1, 2009



CLERK

Mazzarelli, J.P., Sweeny, Catterson, Freedman, Roman, JJ.

1618 In re Michael San Filippo, Index 117280/07
Petitioner,

-against-

The New York City Department of Buildings, et al.,
Respondents.

McMillan, Constabile, Maker & Perone, LLP, Larchmont (Stewart A. McMillan of counsel), for petitioner.

Michael A. Cardozo, Corporation Counsel, New York (Janet L. Zaleon of counsel), for respondent.

Determination of respondents, dated August 31, 2007, which, after a hearing, nullified petitioner's master electrician's license, unanimously confirmed, the petition denied, and this proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Paul G. Feinman, J.], entered on or about May 14, 2008), dismissed, without costs.

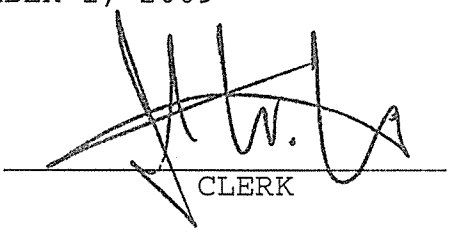
The administrative determination had a rational basis, since petitioner failed to demonstrate that all the work he performed in the trade was supervised by a licensed master or special electrician (*see Matter of Auringer v Department of Citywide Admin. Servs. of City of N.Y.*, 28 AD3d 381 [2006]; *Matter of Reingold v Koch*, 111 AD2d 688 [1985], *affd* 66 NY2d 994 [1985]).

Petitioner's remaining arguments are unpreserved for our

review, as he failed to raise them at the hearing before the Electrical License Board.

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

ENTERED: DECEMBER 1, 2009



CLERK

Mazzarelli, J.P., Sweeny, Catterson, Freedman, Roman, JJ.

1623N Yuen Lin Lee, Index 306201/06
Plaintiff-Respondent,

-against-

Kwok Wai Lee,
Defendant-Appellant.

Alexander K. Yu, New York, for appellant.

Jerald D. Kreppel, New York, for respondent.

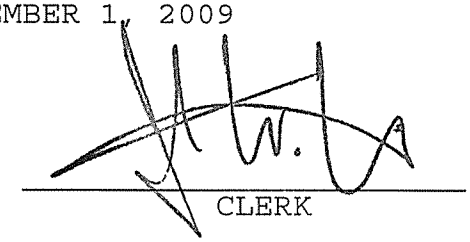
Appeal from order, Supreme Court, New York County (Laura Visitacion-Lewis, J.), entered July 30, 2008, which, inter alia, sua sponte so-ordered a stipulation between the parties' former attorneys that vacated a judgment of divorce, and denied, as moot, plaintiff's motion to vacate the judgment of divorce, unanimously dismissed, without costs, as taken from a nonappealable order.

The issue raised by defendant on appeal -- that the March 2007 stipulation vacating the January 2007 judgment of divorce was in various respects inaccurate and defective and should not have been so-ordered by the motion court -- is not properly before this Court, since neither party moved on notice to have the stipulation so-ordered and defendant never moved to vacate the stipulation once it was so-ordered (*see Rowley v Amrhein*, 64 AD3d 469, 470 [2009]; *Sholes v Meagher*, 100 NY2d 333 [2003]). We note that defendant did not file papers in opposition to plaintiff's motion to vacate the judgment of divorce, the record does not contain a transcript of any oral argument that may have

been heard on the return date of that motion, and the record is otherwise insufficient to permit review of the motion court's implicit finding that the stipulation is valid and enforceable (*see Hladun-Goldman v Rentsch Assoc.*, 8 AD3d 73, 73-74 [2004]).

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

ENTERED: DECEMBER 1, 2009



CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Richard T. Andrias, J.P.
David B. Saxe
John W. Sweeny, Jr.
Eugene Nardelli
Helen E. Freedman, JJ.

580
Index 600823/07

x

Joel Thome,
Plaintiff-Appellant,

-against-

The Alexander & Louisa Calder Foundation, etc., et al.,
Defendants-Respondents.

x

Plaintiff appeals from an order of the Supreme Court, New York County (Charles E. Ramos, J.), entered April 29, 2008, which granted defendants' motion to dismiss the complaint and denied plaintiff's cross motion for summary judgment.

Richard A. Altman, New York for appellant.

Sidley Austin LLP, New York (Saima S. Ahmed, Steven M. Bierman and Elizabeth P. Williams of counsel), for respondents.

SAXE, J.

This appeal arises our of plaintiff's efforts to obtain from defendant, the Alexander & Louisa Calder Foundation, a positive response, or any response, to his submission seeking its authentication of two theatrical stage sets and related material in his possession (the Work) that he claims were the work of renowned artist Alexander Calder. It raises the question of whether a private foundation such as this has any legal obligation either to the public at large or to owners of art work to authenticate that work.

The Calder Foundation is a private foundation formed in 1988 under New York's Not-for-Profit Corporation Law. According to its 2004 tax return, the Foundation was formed for the principal purpose of "cataloguing all the works produced by the artist Alexander Calder and making his works available for public inspection in order to facilitate art education and research." Defendant Alexander S.C. Rower is the Foundation's chairman and director, and the remaining individual defendants are trustees of the Foundation. All the individual defendants are related to Alexander Calder by blood or marriage.

By mid-2007, the Foundation had documented more than 17,000 of Calder's works for publication in its catalogue raisonné, an annotated, illustrated comprehensive listing of the artist's

work. "A catalogue raisonné is regarded as a definitive catalogue of the works of a particular artist; inclusion of a painting in a catalogue raisonné serves to authenticate the work, while non-inclusion suggests that the work is not genuine" (*Kirby v Wildenstein*, 784 F Supp 1112, 1113 [SD NY 1992]).

Plaintiff's complaint sets out the history and circumstances surrounding the creation of the work at issue here, and for purposes of this CPLR 3211 motion, we accept the factual recitation as true (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]). In the 1930s, Alexander Calder created a stage set, which later was destroyed, for a 1936 production of Erik Satie's musical composition *Socrate*. In 1975, plaintiff, a musician, composer and conductor of contemporary music, had a conversation with composer Virgil Thomson, who directed the 1936 production of *Socrate*. The two men discussed the possibility of re-creating the Calder set and mounting a new theatrical production of the piece. Thomson contacted Calder about the possibility of a revival, and Calder responded favorably.

Plaintiff asserts that when Calder came to New York from his home in France in October 1975 in connection with an exhibition of his work at the Whitney Museum, he discussed the plans for the re-creation of the set not only with plaintiff, but with a number of others, including Calder family members, two of whom are

defendants in this action. The Whitney Museum was in possession of the drawings for the original 1936 theater set, and an architect was hired to prepare working plans. In July 1976 Calder's dealer brought the completed plans to Calder, who reviewed and approved them, writing on the plans, "Dear Joel I have looked at the drawings & find them OK, and think everything OK, & construction can begin when you are ready." A professor of fine arts was appointed by Calder's dealer to carry out the construction of the re-created set, and at Calder's request, to construct in addition a second set, one-third smaller than the original, to fit smaller prosceniums. The two sets and a maquette -- a small-scale model of the work -- were then completed, at plaintiff's expense.

Calder died in November 1976, before the date that had been arranged for him to see and have his photograph taken with the completed sets, and before the production was performed. The performance was postponed; the production was successfully staged in New York a year later. Plaintiff has kept the sets and the maquette since then.

In 1997, plaintiff, in need of funds, decided to sell the Work. He submitted the necessary documentation to the Foundation for its authentication and inclusion in the Foundation's Calder catalogue raisonné. His complaint explains that without a

catalogue raisonné number from the Foundation, the Work is "essentially unmarketable," since in the art world, refusal or failure to include a work in the artist's catalogue raisonné is tantamount to a determination that the work is not authentic.

On September 15, 1997, the Foundation sent plaintiff a postcard acknowledging that it had received his materials and stating that it had "everything necessary to consider these works for inclusion in the catalogue raisonné." In 1998, plaintiff alleges, further documentation on the Work was submitted to the Foundation, which the Foundation similarly acknowledged receiving; plaintiff does not elaborate on the nature of, or the need for, this additional documentation.

Plaintiff also asserts that he had a conversation with defendant Alexander S.C. Rower in November 1997, in which Rower stated that the Work would be included in the catalogue raisonné "in a manner to be determined," and the two discussed and agreed upon the descriptive wording, "given the issues raised by its uniqueness in Calder's oeuvre." According to plaintiff, Rower stated that the main set would be described as a "recreation" and that the second, smaller set would be described as a "new catalogue creation."

However, without explanation, the Calder Foundation did not include the Work in the catalogue raisonné. Over the years since

then, plaintiff has received offers for the sets, contingent on their authentication by the Foundation and the assignment to them of catalogue raisonné numbers, but he had been unable to complete the proposed sales because the Foundation has not taken that step. Indeed, according to plaintiff's affidavit, in 2005, one of the potential buyers re-submitted the set materials to the Foundation, and "people at the Foundation" told his broker/appraiser that "they had a file on the Work, but that numbers would not be issued."

By summons and complaint dated March 14, 2007, plaintiff commenced this action, seeking, inter alia, a judgment declaring the Work to be an authentic work of and by Alexander Calder; a mandatory injunction compelling the Work's inclusion in the catalogue raisonné; and damages for breach of contract, tortious interference with prospective business advantage, and product disparagement. Defendant moved to dismiss the complaint on the grounds that the complaint failed to state any cause of action and was time-barred. Further, defendants Mary Calder Rower, Sandra Calder Davidson, and Shaun Davidson moved to dismiss on the ground that, as non-compensated trustees of a qualified charitable foundation, they are immune from liability. Plaintiff cross-moved for an order converting defendants' motion to a motion for summary judgment and granting summary judgment to him,

asserting that there could be "no question as to the authenticity" of the Work.

The motion court granted defendants' dismissal motion, and denied leave to replead. We agree with the court's dismissal of the complaint, concluding that the facts as alleged fail to state a cause of action. The allegations evoke our sympathy for plaintiff and some puzzlement at the lack of a formal response. Many, if not all, of the legal issues raised here might have been avoided had the Foundation provided plaintiff with some explanatory response to his submission. However, determination of this appeal turns on neither of those reactions. As defendants contend, and plaintiff does not dispute, it turns on whether a duty is owed to plaintiff by any of the defendants that would entitle him to any of the relief seeks -- whether based on the Foundation's not-for-profit status, or its explicit or implicit promises or assertions, or its unique position as the sole arbiter of whether work will be included in Calder's catalogue raisonné. We discern no such duty on defendants' part, and therefore no enforceable right of plaintiff to relief against them.

While plaintiff challenges the Foundation's failure to respond *either way* to his submission, his first two causes of action, the first seeking a judgment declaring the Work to be an

authentic work of and by Alexander Calder, and the second seeking a mandatory injunction compelling the Work's inclusion in the catalogue raisonné, are based upon the contention that he is absolutely entitled to the Work's authentication and its inclusion in the Calder catalogue raisonné. However, when all plaintiff's allegations are accepted as true, he has not established a right to either form of relief.

Mandatory Injunction Compelling the Work's Inclusion in the Foundation's Catalogue Raisonné

Initially, we find no support for the proposition that our courts may by mandatory injunction affirmatively compel a private entity such as the Calder Foundation to include a particular work in its catalogue raisonné based solely on the court's independent finding that the work is authentic.

Catalogues raisonnés are generally undertaken by a scholar who has studied the artist's work, a dealer with expertise in that artist's work, or the artist's estate, or some combination of them (*see* Michael Findlay, *The Catalogue Raisonné*, in Spencer, The Expert Versus The Object: Judging Fakes and False Attributions in the Visual Arts [Ronald D. Spencer, ed], at 57 Oxford Univ Press 2004]). While in some instances more than one such catalogue of a particular artist's work may be created, in the case of a contemporary artist whose estate owns the

reproduction rights to his or her works, the estate will have the right to preclude other authorities from publishing competing catalogues raisonnés of that artist's work (*see* Peter Kraus, *The Role of the Catalogue Raisonné in the Art Market*, in The Expert Versus the Object, *supra*, at 69). However, regardless of whether an entity owns the artist's reproduction rights and consequently the unique entitlement to publish that artist's catalogue raisonné, the creation of a catalogue raisonné is a voluntary act, and neither its issuance nor its contents are controlled by any governmental regulatory agency (*id.*). Nor is there any guarantee that the art world will accept the validity and reliability of a catalogue raisonné; indeed, catalogues may be rejected or ignored as unreliable (*id.*). Whether the art world accepts a catalogue raisonné as a definitive listing of an artist's work is a function of the marketplace, rather than of any legal directive or requirement. As a consequence, neither the creation of such a catalogue nor its inclusion or exclusion of particular works creates any legal entitlements or obligations.

Assuming the truth of plaintiff's assertion that the Foundation has been accepted by the art world as the body to create an authoritative Calder catalogue raisonné, that fact alone does not give a court the right to dictate what the

Foundation will include in that catalogue, just as no court has the authority to compel a scholarly author of a treatise on Calder to include a listing or discussion of a particular work. Unless plaintiff can establish an independent legal right to have the Work included in the catalogue, such as an enforceable contractual promise to include it, there can be no injunction mandating the Work's inclusion.

Importantly, the injunctive relief plaintiff seeks is an order compelling the authentication of the Work; he does not seek an order compelling merely a response. In any event, however, as a practical matter, plaintiff's factual allegations establish that the Foundation's non-response to his submission was in fact a rejection of the submission. At some point after the elapse of a reasonable amount of time, the failure to issue an affirmative response, and indeed the failure to include the Work in the catalogue raisonné, had to be read as a refusal to include the Work in the catalogue. Indeed, plaintiff himself asserted that after the broker/appraiser working for one of the collectors interested in purchasing the sets re-submitted the documentation to the Foundation, he was told that "they had a file on the Work, but that numbers would not be issued." Thus, it may reasonably be inferred that plaintiff received, indirectly or by inaction, the Foundation's response; he just wants a different response.

However, he is not entitled to it.

Declaration of Authenticity by the Court

The judgment plaintiff seeks declaring that the Work is the authentic work of Alexander Calder is also inappropriate in these circumstances.

"Authentication is the process by which art experts -- academic or independent art historians, museum or collection curators, art dealers, or auction house experts -- attribute a work of visual art ... to a particular artist" (Spencer, *Introduction*, The Expert versus the Object, *supra*, at xi [italics removed]). While questions of authenticity typically arise when someone asserts that a work purporting to be an original is actually a copy, they can also arise where works were created in collaboration with others and where work was subsequently altered by another, even sometimes where an alteration was prompted by an attempt at restoration (*see* Du Boff, *Controlling the Artful Con: Authentication and Regulation*, 27 Hastings LJ 973, 978-979 [1975-1976]). It may also happen that where an artist designs a work and provides a scale model to a facility such as a foundry that will construct a full-sized version from the design, if the artist dies before the full-sized work is actually constructed, the final product may not be amenable to authentication (*see Andre Emmerich Gallery, Inc. v Segre*, 1997 WL 672009 [SD NY

1997]; *AE Liquidation Corp. v Segre*, 2000 WL 204525 [SD NY 2000]).

"[T]he process of authentication of visual art depends chiefly on the scholarship of art experts" (Spencer, *Introduction*, The Expert versus the Object, *supra*, at xi). Since art authentication involves the exercise of the expert's informed judgment, it is highly subjective, and even highly regarded and knowledgeable experts may disagree on questions of authentication (*see* Levy, *Liability of the Art Expert for Professional Malpractice*, 1991 Wis L Rev 595, 596 [1991]).

Simply put, determinations of the authenticity of art work are complex and highly subjective assertions of fact. As such, disputes concerning authenticity are particularly ill-suited to resolution by declaratory judgment. The law cannot give an art owner a clear legal right to a declaration of authenticity when such a declaration by definition will not be definitive.

Declaratory judgments are a means to establish the respective legal rights of the parties to a justiciable controversy (*see* CPLR 3001; *see generally* 43 NY Jur 2d Declaratory Judgments §§ 4, 22). "The general purpose of the declaratory judgment is to serve some practical end in quieting or stabilizing an uncertain or disputed jural relation either as

to present or prospective obligations" (*James v Alderton Dock Yards*, 256 NY 298, 305 [1931]; *see* Siegel, NY Prac § 436, at 738 [4th ed]). While fact issues certainly may be addressed and resolved in the context of a declaratory judgment action (*see* Siegel, NY Prac § 436, at 739, citing *Rockland Power & Light Co. v City of New York*, 289 NY 45 [1942]), the point and the purpose of the relief is to declare the respective legal rights of the parties based on a given set of facts, not to declare findings of fact. Consideration of some typical types of declaratory judgments, such as declarations regarding the validity of a foreign divorce, the applicability of an insurance policy to a claim, and the constitutionality of a statute (*see* Siegel, NY Prac § 437, at 740-741), helps illustrate both the value of declaratory judgments in appropriate circumstances and their inapplicability in the present context.

Professor Siegel has remarked that the declaratory judgment action has been employed as a way to resolve a relatively unique dispute where the plaintiff is "unable to find among the traditional kinds of action one that will enable her to bring it to court" (*see id.* at 742, citing *Kalman v Shubert*, 270 NY 375 [1936]). In *Kalman*, the plaintiff, who had composed five operettas, sought a judgment declaring that the defendant did *not* have a contractual right to perform the operettas. The issue

arose because, although he had not yet performed plaintiff's operettas, the defendant claimed to have a contractual right to perform them, based on the plaintiff's written offer to enter into a contract allowing the defendant to perform the operettas upon payment of a royalty of $100 per week for each week an operetta was performed. The plaintiff contended that the offer had never been accepted, so there was no contract (270 NY at 376-377). The Court of Appeals reversed the dismissal of the action, explaining that while most forms of relief would not be available unless the defendant actually performed the works, the plaintiff needed the affirmative relief of a declaratory judgment "to quiet a disputed jural relation as to both present and prospective obligations" (*id.* at 378).

At first blush, the present case may seem similarly to call out for declaratory relief because no other form of relief seems applicable. However, the crucial difference is that, here, what plaintiff seeks is actually a finding of fact, namely a finding by the court that the Work is an authentic Calder. Not only would this be a highly unusual use of a declaratory judgment, but it would not accomplish the very purpose of the cause of action - that of resolving the parties' respective legal rights. Even if such a declaration could be said to affect plaintiff's rights, or at least have potential monetary value to him, it would have no

impact at all on any rights of defendants, but would merely stand, at best, as a record that the Foundation's assessment of the Work was disputed.

Moreover, because of the procedures and processes by which our civil litigation is decided, courts are not equipped to deliver a meaningful declaration of authenticity. For such a pronouncement to have any validity in the marketplace or the art world, it would have to be supported by the level of justification sufficient to support a pronouncement by a recognized art expert with credentials in the relevant specialty. For example, in the French legal system, declarations of authenticity are reportedly made by courts, but they are based on more than a determination of which side's expert is the more credible. In addition to the parties' disputing experts, the French court appoints its own neutral expert who possesses the necessary expertise (*see* Reeves, *Establishing Authenticity in French Law*, in The Expert versus the Object, *supra*, at 228). In contrast, in our legal system, courts have neither the education to appropriately weigh the experts' opinions nor the authority to independently gather all available appropriate information; we can only base our conclusions on the evidence the parties choose to present to us, and our findings as to a party's entitlement to relief are generally made according to a preponderance of the

evidence standard. So, any declaratory judgment of authenticity a court issued would amount to a statement that the preponderance of the evidence submitted to it supported a finding that the work at issue was genuine. Even if we considered declaratory relief to be proper in this context, such a limited determination would, in any event, be of no value. Indeed, it would be similar to a mere advisory opinion.

This is not to say that courts do not address the issue of authenticity. Courts are often required to issue findings as to art works' authenticity as an element of claims, such as those brought by dissatisfied buyers, seeking money damages from sellers or appraisers, or rescission of art sales. However, in these actions, the relief awarded by the court binds only the parties to the transaction, and does not attempt to affect the art market generally. Although it is possible for a court's pronouncement regarding a work's authenticity to have an impact on the work's market value, any such impact would be an incidental effect of the decision rather than its central purpose.

Consideration of some specific cases in which issues of authenticity arose helps to frame the nature of the problems inherent in court determinations relating to authenticity.

The case of *Greenwood v Koven* (880 F Supp 186 [SD NY 1995])

describes a dispute among a buyer, a seller, and Christie's auction house regarding the authenticity of a pastel purportedly by twentieth century French painter Georges Braque. The seller of the pastel had provided documentation that it had been purchased from the gallery that served as Braque's exclusive dealer, and two of the auction house's art experts who specialized in impressionist and modern drawing and painting and who were considered specialists on Braque concluded that the work's authenticity was unquestionable. However, shortly after the sale, the successful bidder raised questions about the pastel's authenticity, demanding written verification of the work's authenticity by a scholar. Christie's contacted the individual in France who holds the "droit moral" for Braque -- the artist's heir or designee who, under French law, possesses the legal authority to authenticate which works were done by the artist (*id.* at 189). That individual informed the auction house that the pastel could not be recognized as a work by Braque and that a certificate of authenticity would not be issued. The District Court granted summary judgment requiring the seller to return the sale proceeds, rejecting the seller's claims that the auction house had acted improperly and dismissing the seller's claims against the buyer. The court itself was not called upon to decide whether the work was actually by Braque; the buyer's

entitlement to rescind the sale was based on the terms of the contracts.

The buyers were not granted rescission in the case of *Greenberg Gallery, Inc. v Bauman* (817 F Supp 167 [D DC 1993], *affd* 36 F3d 127 [DC Cir 1994]), where they claimed that the seller had sold them a forgery of a Calder work, and sued on fraud and contract claims. The trial court, upon hearing the opinions of the parties' competing experts, rejected the view of the plaintiffs' expert that the work was not the authentic work, and therefore dismissed the complaint. Its conclusion was based largely on its view that the plaintiffs' expert, Klaus Perls, who had been Calder's exclusive dealer and was an acknowledged preeminent expert on Calder's work, had conducted too cursory an examination of the sculpture to warrant the adoption of his opinion that the work was inauthentic.

It is the aftermath of the *Greenberg Gallery* decision that illustrates the inability of our legal system to provide a definitive determination of authenticity such as is sought by plaintiff here. While the district court in *Greenberg Gallery* rejected the opinion of the plaintiffs' expert, Klaus Perls, because it considered his examination of the work insufficient, the art marketplace has proved to be of a different view: As a consequence of his opinion, the work's value has been assessed to

be negligible (*see* Spencer, *Authentication in Court: Factors Considered and Standards Proposed*, in The Expert versus the Object, *supra*, at 189).

The point is that a declaration of authenticity would not resolve plaintiff's situation, because his inability to sell the sets is a function of the marketplace. If buyers will not buy works without the Foundation's listing them in its catalogue raisonné, then the problem lies in the art world's voluntary surrender of that ultimate authority to a single entity. If it is immaterial to the art world that plaintiff has proof that the sets were built to Calder's specifications, and that Calder approved of their construction, then it will be immaterial to the art world that a court has pronounced the work "authentic." Plaintiff's problem can be solved only when buyers are willing to make their decisions based upon the Work and the unassailable facts about its creation, rather than allowing the Foundation's decisions as to what merits inclusion in its catalogue raisonné to dictate what is worthy of purchase.

We therefore conclude that, even assuming the truth of plaintiff's assertions of fact, he is not entitled to a declaration of authenticity.

Breach of Contract

In his cause of action for breach of contract, plaintiff

does not claim that the Foundation had a contractual obligation to authenticate the Work, but rather that the contractual obligation breached by the Foundation was simply to respond to his submission within a reasonable amount of time. He relies on the Foundation Web site's invitation to the public to submit applications for possible inclusion in the Calder catalogue raisonné, reasoning that that constitutes an offer to enter into a unilateral contract, which is accepted by the submission of documentation regarding a work, thereby forming a binding contract. The terms of that contract, he asserts, are that the Foundation agrees to investigate and to render, within a reasonable time, a determination as to the authenticity of any work for which documentation is submitted.

The motion court correctly concluded that these allegations fail to state a cause of action for formation and breach of a binding contract. For a contract to be created, regardless of whether it is bilateral or unilateral, "there must be a manifestation of mutual assent sufficiently definite to assure that the parties are truly in agreement with respect to all material terms" (*Matter of Express Indus. & Term. Corp. v New York State Dept. of Transp.*, 93 NY2d 584, 589 [1999]). For an invitation to constitute an offer, it must be plain and clear enough to establish the intended terms of the proposed contract

(*Schenectady Stove Co. v Holbrook*, 101 NY 45, 48 [1885]; *S.S.I. Invs. v Korea Tungsten Min. Co.*, 80 AD2d 155, 161 [1981], *affd* 55 NY2d 934 [1982], citing 9 NY Jur, Contracts, § 21). The asserted language of the Foundation Web site inviting or encouraging art owners to submit their materials for possible inclusion in the catalogue is too vague to establish the terms of a contract that would be formed by acceptance of that invitation through the act of sending in such materials. Nor does the language of the Web site manifest any intent that the Foundation will be bound by its receipt of any such submission. Similarly, the form acknowledgment sent by the Foundation to plaintiff, informing him that the Foundation received his submission, does not contain any language indicating, or reinforcing, any intent to form a binding contract.

Furthermore, plaintiff fails to allege that his submission was in response to the Web site's invitation, or indeed that the Web site even existed at the time of his submission.

Even if we agreed that the allegations make out a claim that the Foundation had a contractual obligation to explicitly respond to plaintiff's submission, we would find that the claim is untimely. Although the accrual date may be difficult to state with precision, the failure to respond occurred, and the claim therefore accrued, a reasonable time after the 1997 submission --

years beyond the six-year limitations period (CPLR 213[1]) for this contract action commenced in 2007. Nor does a subsequent identical request from the same party start the limitations period running again (*see e.g. Taggart v State Farm Mut. Auto. Ins. Co.*, 272 AD2d 222 [2000]).

Promissory Estoppel

We also reject plaintiff's claim that his alleged conversation with Alexander S.C. Rower in November 1997 creates grounds for relief under the doctrine of promissory estoppel. Even accepting that a "clear and unambiguous promise" is made out by Rower's alleged statement that the Work would be included in the catalogue raisonné "in a manner to be determined," in which the main set would be described as a "recreation" and the second, smaller set as a "new catalogue creation" (*see 99 Realty Co. v Eikenberry*, 242 AD2d 215, 216 [1997]), neither the complaint nor plaintiff's affidavit alleges or supports an inference of detrimental reliance, another element necessary to make out a cause of action for promissory estoppel (*Emigrant Bank v UBS Real Estate Sec., Inc.*, 49 AD3d 382, 384 [2008]; *Rosenberg v Home Box Off., Inc.*, 33 AD3d 550 [2006], *lv denied* 8 NY3d 804 [2007]).

Product Disparagement

Of all plaintiff's causes of action, the tort of product disparagement most closely describes the crux of his claims, that

defendants' failure to authenticate and list the Work reflects their purposeful effort to prevent him from selling it at its true market value in order to benefit themselves.

> "[P]roduct disparagement is an action to recover for words or conduct which tend to disparage or negatively reflect upon the condition, value, or quality of a product or property, and ... the elements which must be proven are: (1) falsity of the statement; (2) publication to a third person; (3) malice (express or implied); and (4) special damages" (44 NY Jur 2d Defamation and Privacy § 273 [footnotes omitted]).

"[H]istorians trace its ancestry to the common-law tort of slander of title," which was eventually extended to apply to the disparagement of the quality of property (*see Ruder & Finn v Seaboard Sur. Co.*, 52 NY2d 663, 670 [1981]). Product disparagement has been applied in cases involving assertions that artwork was inauthentic or forged (*see e.g. Kirby v Wildenstein*, 784 F Supp 1112 [SD NY 1992]); *Hahn v Duveen* (133 Misc 871 [1929]).

In *Hahn v Duveen* (133 Misc 871 [1929]), the plaintiff was permitted to proceed with the claim against an art expert based on the expert's published assertion that a painting the plaintiff owned was not authentic; the statement had caused negotiations for the sale of the painting to be suspended and potentially affected future sale possibilities. In *Kirby v Wildenstein* (784 F Supp 1112, 1114 [SD NY 1992]), a product disparagement claim

was brought by a painting's owner against an art expert engaged to verify the work's authenticity, who, after examining the work, "concluded that the Painting was either 'skinned,' meaning that it had suffered the removal of paint through overcleaning, or a copy." Although it was ultimately decided that the painting would be listed in the catalogue raisonné as authentic -- with the notation that it had been damaged by an abusive restoration and cleaning -- the plaintiff thereafter found that he was unable to sell the painting. While the court dismissed the product disparagement claim in *Kirby* on the pleadings, that result was due to the plaintiff's failure to plead special damages; the court did not reach the question of whether the other elements of product disparagement were made out (784 F Supp at 1114, 1117).

The difficulty of applying the product disparagement cause of action to the assertions made in the present case is that plaintiff here has alleged no affirmative publication of a false statement to third persons. Rather, he relies on the assertion that the defendants' actions "in refusing to authenticate the Work tend to disparage and reflect negatively on the Work and its quality, condition, and value." The contention that defendants remained silent when they should have spoken has never been held to satisfy the requirement of a statement published to a third party.

Nevertheless, as some commentators have suggested, as a practical matter, the denial of authentication is arguably indistinguishable from a direct assertion of inauthenticity. One writer has observed:

> "For persons with an interest in a work of art purportedly by a particular artist, it is naturally of importance that the work be included in that artist's catalogue raisonné. A common practice among authors and editors of catalogues raisonnés who deem a work inauthentic is to respond to an applicant for inclusion with the seemingly innocuous and ambiguous statement that the work 'will not appear in the forthcoming catalogue,' rather than directly stating that the work is not by the artist. The view among these authors and editors is that this approach will insulate them from a claim of product disparagement. It is my view that a court would decide there is little, if any difference between the direct and indirect opinion concerning the work's authenticity. The art market clearly understands that a refusal to publish a work in a catalogue raisonné is a decision that the work is inauthentic."

(*See* Spencer, *Authentication in Court: Factors Considered and Standards Proposed*, in The Expert versus the Object, *supra*, at 191 [footnote omitted]). Another commentator has similarly remarked that

> "[w]hen a catalogue concludes a work is not unauthentic (*sic*), they often do not say so directly, but rather inform the applicant that 'the work will not appear in the forthcoming catalogue.' Of course, such indirect language does nothing to mask the clear implication of the catalogue's rejection. Therefore, even when a catalogue does not expressly disclaim a work, as some do, non-publication can be 'publication' for the purpose of art disparagement."

(*See* Orenstein, Comment, *Show Me the Monet: The Suitability of Product Disparagement to Art Experts*, 13 Geo Mason L Rev 905, 915 [2005] [footnotes omitted]).

There is no question that adopting this approach and treating the Foundation's non-response as a publication asserting the Work's inauthenticity to the world at large would constitute a substantial expansion of the law. Yet the fact that non-inclusion in a catalogue raisonné is understood in the art world as a conclusion that the work is not authentic (*see Kirby v Wildenstein*, 784 F Supp at 1113) tends to support the application of the cause of action in circumstances such as these.

However, we need not come to a conclusion on that point in this case because the claim must in any event fail on statute of limitations grounds.

The statute of limitations for product disparagement, a species of defamation and slander of title, is one year (CPLR 215[3]; *American Fed. Group v Edelman*, 282 AD2d 279 [2001]). The claimed tortious conduct occurred by 1998, when defendants had failed to authenticate the Work and issue catalogue raisonné numbers; even if the claim did not accrue until plaintiff incurred the special damages resulting from his inability to complete the proposed sales in 2004 or 2005 because the Foundation had not authenticated the Work, it certainly had

accrued by 2005, at the latest. The continued inaction by the Foundation, and plaintiff's ongoing pleas to the Foundation that it issue catalogue raisonné numbers, do not keep re-setting the clock for purposes of the running of the limitations period.

Tortious Interference

Plaintiff's cause of action for tortious interference with prospective business advantage was also correctly dismissed; nor may he amend his pleading to claim in the alternative a cause of action on a theory of tortious interference with contract, since the pleaded facts do not include the existence of a valid contract between plaintiff and a third party (*see Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 424 [1996]). A claim for tortious interference with prospective business advantage must allege that: (a) the plaintiff had business relations with a third party; (b) the defendant interfered with those business relations; (c) the defendant acted with the sole purpose of harming the plaintiff or by using unlawful means; and (d) there was resulting injury to the business relationship (*Carvel Corp. v Noonan*, 3 NY3d 182, 189-190 [2004]; *NBT Bancorp v Fleet/Norstar Fin. Group*, 87 NY2d 614 [1996]; *Hoesten v Best*, 34 AD3d 143, 159 [2006]). Plaintiff has not alleged any facts suggesting that defendants violated the law or undertook actions with the sole purpose of harming him; indeed, by plaintiff's own theory of the

case, defendants acted with the intent of benefitting themselves. Plaintiff has also failed to allege any facts suggesting that defendants' actions were criminal or independently tortious.

Moreover, the tortious interference claim is barred by the three-year statute of limitations (CPLR 214[4]; *Buller v Giorno*, 28 AD3d 258, 258-259 [2006]). The time on that claim begins to run when the defendant performs the action (or inaction) that constitutes the alleged interference. It does not commence anew each time the plaintiff is unable to enter into a contract, unless the defendant takes some further step. Accordingly, like his the breach of contract claim, plaintiff's tortious interference cause of action accrued when the Foundation failed to issue the numbers for the catalogue raisonné, thus purportedly injuring plaintiff in his ability to sell the Work (*see Kronos, Inc. v AVX Corp.*, 81 NY2d 90, 94 [1993]; *American Fed. Group.*, 282 AD2d at 279). Even where, as here, the claim is based entirely on the assertion that the defendants' action (or inaction) had a negative effect on contractual relationships that plaintiff might later have had, the subsequent injuries alleged do not affect the timeliness issue (*Johnson v Nyack Hosp.*, 891 F Supp 155, 166 [SD NY 1995]).

Officers' and Trustees' Duties

Plaintiff's vaguely pleaded violation of officers' and

trustees' duties also fails to state grounds for relief. To the extent plaintiff relies on the assertion that the individual defendants have a fiduciary duty to the Foundation, there is no basis in the allegations to support a claim that any of the defendants owed a fiduciary duty to *plaintiff* (*see Granat v Center Art Galleries-Hawaii, Inc.*, No. 91 Civ 7252, 1993 WL 403977, *6, 1993 US Dist LEXIS 14092, *17-18 [SD NY 1993], citing *Mechigian v Art Capital Corp.*, 612 F Supp 1421, 1431 [SD NY 1985]), and, absent that, plaintiff has no cause of action for the alleged breach of such a duty (*see Hyman v New York Stock Exch., Inc.*, 46 AD3d 335, 337 [2007]; *New York Pepsi-Cola Distribs. Assn. v Pepsico, Inc.*, 240 AD2d 315 [1997]). The bare allegations that the individual defendants declined to authenticate the Work in an effort to acquire the Work themselves, in breach of their duty of loyalty to the Foundation, cannot form the basis for a breach of duty claim asserted by plaintiff.

Plaintiff also confusingly claims that the individual defendants, as officers of a not-for-profit corporation that is the sole arbiter of the authenticity of purported Calder works, breached their duty to act in good faith in the discharge of their duties, by failing to examine the submitted Works and decide issues of authenticity in good faith based upon

appropriate scholarly input. Here, too, the individual defendants' alleged breach of a duty plaintiff claims they owe the Foundation as its officers cannot form the basis of a claim asserted by plaintiff, and neither the Foundation's status as a not-for-profit charitable organization nor its asserted position as the sole authority for determining the authenticity of claimed Calder works alters that fact.

Plaintiff cites no authority for the proposition that any entity other than the Attorney General has the right to take action against a not-for-profit based upon a claimed violation of its legal obligations (*see* Not-for-Profit Corporation Law § 112). Neither the Foundation's tax status nor case law allowing charities unique enforcement rights for charitable subscriptions (*see I. & I. Holding Corp. v Gainsburg*, 276 NY 427, 433 [1938]; *Matter of Versailles Found. [Bank of N.Y.]*, 202 AD2d 334 [1994]) gives plaintiff any rights here. Such "privileges" as are enjoyed by charitable foundations are not accompanied, as plaintiff contends, by a general legal responsibility, enforceable by the public at large, to act at all times in the public interest and avoid actions that could appear self-serving. In the event there is proof of misconduct or bad faith on the part of the Foundation, the Attorney General may, in his discretion, take appropriate remedial action.

As to the claim that defendants have some kind of legal obligation arising out of the Foundation's position as the sole recognized Calder authority -- even accepting plaintiff's assertion that he has no alternative means of obtaining authentication -- plaintiff has no entitlement to the relief he seeks. Having the status of the de facto sole arbiter of authenticity of an artist's work is not automatically coupled with a legal obligation to take any particular steps regarding authentication. As stated previously, legal obligations must be grounded in contractual duties, tort duties or statutory duties, none of which are established here.

Even if the breach of officers' and trustees' duty claim were viable, it would be barred by the statute of limitations, which is six years from the date of the alleged breach (CPLR 213[1]). Since the essence of plaintiff's claim is that the individual defendants breached their duties when they failed to cause the Foundation to issue catalogue raisonné numbers, the claim would have accrued by 1998.

Civil Conspiracy

In his cause of action for "civil conspiracy," plaintiff alleges that defendants engaged in a "common scheme or plan to deprive [him] of his absolute right to sell the Work." However, as the motion court stated, New York does not recognize an

independent cause of action for civil conspiracy (*Zachariou v Manios*, 50 AD3d 257 [2008]; *Bronx-Lebanon Hosp. Ctr. v Wiznia*, 284 AD2d 265, 266 [2001], *lv dismissed*, 97 NY2d 653 [2001]). Since none of plaintiff's tort claims are viable and timely, those claims cannot form the basis for a civil conspiracy cause of action (*see Linden v Moskowitz*, 294 AD2d 114, 115 [2002], *lv denied* 99 NY2d 505 [2003]).

Conflict of Interest/Donnelly Act

Plaintiff suggests that the Foundation's failure to authenticate the Work as requested can only be attributed to an effort by defendants to decrease the value of the Work so that they may ultimately acquire it more cheaply. This assertion lies at the heart of the cause of action denominated "conflict of interest." Specifically, plaintiff alleges that defendants themselves own and deal in works by Calder and that they wanted to obtain the Work for themselves. In refusing to authenticate the Work, he reasons, defendants sought to manipulate the market for Calder works. On appeal, plaintiff also alleges that the cause of action is supported by New York General Business Law § 340 *et seq.*, known as the Donnelly Act, which is New York's antitrust statute.

A plaintiff alleging a claim under the Donnelly Act must identify the relevant product market, allege a conspiracy between two or more entities, and allege that the economic impact of that conspiracy was to restrain trade in the relevant market (*Newsday, Inc. v Fantastic Mind*, 237 AD2d 497 [1997]). Plaintiff has failed to allege either a conspiracy between two or more entities or that any such conspiracy had the economic impact of restraining trade.

Recently, in another lawsuit against an artist's foundation arising from a refusal to authenticate, claims were permitted to proceed under both the federal Sherman Act and the Donnelly Act (*see Simon-Whelan v The Andy Warhol Foundation for the Visual Arts, Inc.*, No. 07 Civ 6423, 2009-1 Trade Cases P 76,657, 2009 WL 1457177, 2009 US Dist LEXIS 44242 [SD NY 2009]). The plaintiff owned a painting that was allegedly one of several made from an acetate created and chosen by Andy Warhol and that had previously been authenticated. He contended that the Andy Warhol Authentication Board, which is responsible for authenticating Warhol works, and the Andy Warhol Foundation for the Visual Arts, which publishes the Warhol catalogue raisonné, refused to authenticate the work, in furtherance of a conspiracy to

artificially reduce competition in the market for Warhol works, in order to raise the value of Warhol works owned by the Warhol Foundation and to ensure that galleries and museums chose the Foundation's works.

In holding that the complaint in *Simon-Whelan* successfully stated a claim for an illegal market restraint and monopolization, the district court cited a number of alleged facts: that the Board made unsolicited suggestions to owners of Warhol works that they should submit their works for authentication; that such policies as the Board has regarding authentication were inconsistently applied; that the Board reversed prior determinations authenticating works; that the Board refused to authenticate works that the Foundation had previously attempted to purchase; and that, unlike other such boards, which are composed of well qualified and well known independent experts, the Warhol Board is made up of individuals who lack experience and who are not independent of the Warhol Foundation (2009 WL 1457177 at *5, 2009 US Dist LEXIS 44242 at *17-18).

Plaintiff's complaint here contains virtually none of the allegations that made the restraint of trade claim viable in the

Simon-Whelan case. Rather, he relies on the assertion that the Foundation owns Calder works to infer that the Foundation must be refusing to authenticate the Work in order to be able to purchase it at some future date for a fraction of its worth as a Calder piece. This speculative conclusion is insufficient to state a cause of action under the Donnelly Act.

The claim is in any event untimely. The statute of limitations for such a claim is four years (General Business Law § 340[5]). All elements of the alleged wrongful conduct had already occurred in 1997 and 1998, when defendants declined to issue catalogue raisonné numbers, and thus, according to plaintiff, engaged in manipulation of the market. In fact, it is difficult to divine how plaintiff can argue that the cause of action accrued at a later date, since the gravamen of this cause of action is not, as plaintiff suggests on appeal, the damage he sustained when he was unable to complete a sale, but the manipulation of the market through the disparagement of the Work - disparagement that defendants communicated, according to plaintiff, by remaining silent about the Work's authenticity.

Qualified Immunity

Lastly, the complaint could not proceed in any event against the individual defendants, who are entitled to qualified immunity pursuant to Not-for-Profit Corporation Law § 720-a, in view of

the affidavit by the Foundation's chairman and director, Alexander S.C. Rower, establishing that they served without compensation, and because, as provided by CPLR 3211[a][11], there is no "reasonable probability" that their conduct constitutes gross negligence or was intended to cause harm. There is no dispute that the Foundation is a § 501(c)(3) organization under the Internal Revenue Code. Although Rower is not, as plaintiff notes, the chief financial officer of the Foundation -- it does not appear that the Foundation has a CFO -- he is its chairman and director, and the CPLR does not require that it be the CFO who submits a letter. Rather, the CPLR states only that the evidence "may consist" of a letter from the CFO. In any event, the complaint fails to provide any specific allegations supporting the bare suggestion that the individual defendants acted with gross negligence or with an intent to harm (*see Rabushka v Marks*, 229 AD2d 899, 900 [1996].

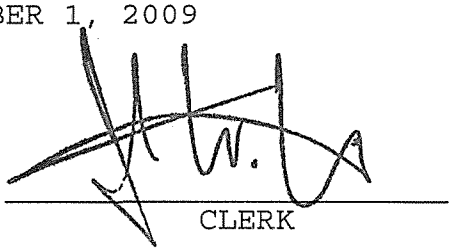
Accordingly, the order of the Supreme Court, New York County (Charles E. Ramos, J.), entered April 29, 2008, which granted defendants' motion to dismiss the complaint and denied plaintiff's cross motion for summary judgment, is deemed to be an appeal from the judgment, same court and Justice, entered May 29, 2008 (CPLR 5501[c]), dismissing the complaint, and so considered, said judgment should be modified, on the law, to declare, with

respect to plaintiff's first cause of action, that plaintiff is not entitled to the declaration he seeks, and otherwise affirmed, without costs.

All concur.

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

ENTERED: DECEMBER 1, 2009



CLERK