SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

FEBRUARY 14, 2013

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Mazzarelli, J.P., Andrias, Acosta, Moskowitz, Abdus-Salaam, JJ.

7211 In re Solvieg McAuley, Index 109386/09
Petitioner-Appellant,

-against-

Raymond Kelly, etc., et al.,
Respondents-Respondents.

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Jeffrey L. Goldberg, P.C., Lake Success (Jeffrey L. Goldberg of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Inga Van Eysden of counsel), for respondents.

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Judgment, Supreme Court, New York County (Eileen A. Rakower, J.), entered May 4, 2010, denying the petition, inter alia, to annul respondents' determination, which denied petitioner's application for accident disability retirement benefits, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously reversed, on the law, without costs, the judgment vacated, the petition granted to the extent of annulling the determination of the Board of Trustees of the New York City Police Department Pension Fund, Article II, and the matter remanded to the Board of Trustees for further proceedings.

Petitioner, a police officer (now retired), responded to the World Trade Center (WTC) to provide assistance following the September 11, 2001 attacks. She was assigned to rescue, recovery and clean up operations in the vicinity of the WTC and worked approximately 75 hours over five days between September 11 and 27, 2001. A triage form filled out on September 15, 2001 showed that petitioner was coughing and complaining of rib pain.

In December 2001, petitioner began coughing up bloody sputum. On February 11, 2002, she complained of difficulty breathing, chest pain, a cough, and congestion as a result of exposure to debris, smoke and or particulate matter in the air at the WTC, and the Police Department (NYPD) approved line of duty injury status for her. Petitioner was admitted to the hospital, where testing revealed a 3.5-centimeter mass in the basal segment of her right lung, obstructing the right lower-lobe bronchus. On March 2, 2002, petitioner underwent a thoracotomy to remove the carcinoid tumor.

On June 22, 2005, petitioner retired from the NYPD. Although she was approved for the Police Commissioner's application for ordinary disability retirement (ODR), the Board of Trustees denied her application for accident disability retirement (ADR) by virtue of a tie vote based on reports of the Medical Board finding that her respiratory disability was caused

by the surgery performed to remove the tumor and that the tumor was not the result of her service at the WTC site.[1]

Ordinarily, a claimant filing for ADR benefits has the burden of proving causation in an administrative proceeding. However, Administrative Code of City of NY § 13-252.1(1)(a) creates a presumption in favor of ADR benefits for police officers who performed rescue, recovery or cleanup operations at specified locations, including the WTC, stating:

> "Notwithstanding any provisions of this code or of any general, special or local law, charter or rule or regulation to the contrary, if any condition or impairment of health is caused by a qualifying World Trade Center condition as defined in section two of the retirement and social security law, it shall be presumptive evidence that it was incurred in the performance and discharge of duty and the natural and proximate result of an accident not caused by such member's own willful negligence, unless the contrary be proved by competent evidence."

To qualify for the presumption, a claimant must have participated in operations at one of the enumerated locations for "any period of time within the forty-eight hours after the first airplane hit the towers" or "a total of forty hours accumulated any time between September eleventh, two thousand one and September twelfth, two thousand two" (Retirement and Social

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[1]Under New York City pension rules, police officers qualifying for ODR benefits generally get one half of their final salaries, which is taxable. Those qualifying for ADR get three quarters of their final salaries tax-free.

Security Law § 2[36][g][i], [ii]). Petitioner fulfills this requirement. A claimant must also suffer from a statutorily defined qualifying condition, including "new onset diseases resulting from exposure as such diseases occur in the future including cancer" (Retirement and Social Security Law § 2[36][c][v]). The issue is whether petitioner fulfills this requirement.

Although the WTC presumption is not a per se rule mandating enhanced accidental disability retirement benefits for first responders in all cases, the Pension Fund bears the initial burden of coming forward with affirmative credible evidence to disprove causation (*see Matter of Bitchatchi v Board of Trustees of the N.Y. City Police Dept. Pension Fund, Art. II*, __ NY3d __, 2012 NY Slip Op 08566, *6 [Dec. 13, 2012]). Credible evidence "proceeds from a credible source and reasonably tends to support the proposition for which it is offered" and "must be evidentiary in nature and not merely a conclusion of law, nor mere conjecture or unsupported suspicion" (*Matter of Meyer v Board of Trustee of N.Y. City Fire Dept., Art 1-B Pension Fund*, 90 NY2d 139, 147 [1997]). The petitioner "carrie[s] no burden to offer any evidence of causation," and the Board may not "deny ADR benefits by relying solely on the absence of evidence tying the disability to the exposure" or "rely on petitioner's deficiencies to fill

its own gap in proof" (*Bitchatchi*, 2012 NY Slip Op 08566 at *8, 6, 8).

In *Bitchatchi*, the Court of Appeals affirmed this Court's determinations in *Matter of Macri v Kelly* (92 AD3d 53 [1st Dept 2011]) and *Bitchatchi* (86 AD3d 427 [1st Dept 2011]) affirming Supreme Court decisions finding that no credible evidence rebutted the presumption that the petitioner's qualifying medical conditions were caused by work at the WTC. The Court reversed our determination in *Matter of Maldonado v Kelly* (86 AD3d 516 [1st Dept 2011]) affirming a finding of no causal relationship between WTC work and cancer based on the short amount of time between September 2001 and the discovery of the petitioner's tumor in November 2001. The Court of Appeals explained:

> "Under the statutory burden of proof, we believe the Board of Trustees did not satisfactorily rebut the presumption with credible evidence. Petitioner's cancerous tumor grew from the size of a walnut to a softball between September 2001 and November 2001. The Board and the courts below focused on the equivocal nature of the evidence submitted by petitioner in his attempt to demonstrate that the cancer was aggravated by his WTC exposure. In particular, they rejected the opinion of Dr. Sung provided in two letters as speculative and conjectural. But in light of the presumption, petitioner carried no burden to offer any evidence of causation. Simply put, the Board could not rely on petitioner's deficiencies to fill its own gap in proof" (2012 NY Slip Op 08566 at *7-8).

Here, petitioner advised the Board that she did not smoke. The record shows no history of cancer before petitioner's WTC

exposure and the Medical Board cited no credible evidence to the contrary. Rather, in recommending that petitioner's application for ADR be denied, the Medical Board, in its report dated December 12, 2008, stated:

> "9. It is the opinion of the Article II Medical Board that although Retired Police Officer McAuley was exposed to World Trade Center dust, the size of her tumor, namely 3.5cm., discovered a few months following her exposure, (hemoptysis bloody sputum) which is a typical sign of carcinoid tumor dating to December 2001, make it impossible that the tumor is related to her exposure. This is so because it would take a tumor of this size and this grade malignancy a much longer time to have developed and become clinically evident. She had an uneventful surgical procedure and delivered a normal child subsequently. In summary, the officer has had a successful thoracotomy and a right lower lobectomy with subsequent mild pulmonary insufficiency and is considered to be disabled for Ordinary Disability Retirement but not World Trade Center related disability."

However, as in *Maldonado*, this conjecture, based on the size of the tumor alone, does not suffice to rebut the WTC presumption. Petitioner's tumor was discovered on February 14, 2002 by a CT chest scan. While she complained of chest pains once in 1999, there is no record of treatment for a lung condition until she complained of pulmonary issues on September 15, 2001 and December 23, 2001.

Respondents argue that because the Board of Trustees' determination was reached by a tie vote, the court may not set aside the denial of ADR unless it can conclude as a matter of law

that the disability was the natural and proximate result of a service-related incident. However, this too was rejected in *Bitchatchi*. As the Court of Appeals explained, "The Board misapprehends the significance of the WTC presumption. When the Board fails to rebut the presumption, the WTC statute presumes causation and contemplates the award of ADR benefits — even if the claimant offers no medical proof" (2012 NY Slip Op 08566 at *7).

Accordingly, because the record contains no affirmative credible evidence supporting the determination that petitioner's carcinoid lung tumor and pulmonary disease were not incurred in the line of duty, we reverse, and hold that petitioner is entitled to ADR benefits pursuant to the WTC presumption, which respondents failed to rebut. Since petitioner has been receiving ODR benefits in the interim, the matter is remitted to the Board for a recomputation of the appropriate level of benefits.

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

ENTERED: FEBRUARY 14, 2013

CLERK

Mazzarelli, J.P., Moskowitz, Manzanet-Daniels, Román, JJ.

8058 Magnum Real Estate Services, Inc., Index 107850/06
Plaintiff-Respondent-Appellant,

-against-

133-134-135 Associates, LLC, et al.,
Defendants-Appellants-Respondents.

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Sills Cummis & Gross P.C., New York (Mark E. Duckstein of counsel), for appellants-respondents.

Coritsidis & Lambros, PLLC, New York (Jeffrey A. Gangemi of counsel), for respondent-appellant.

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Order, Supreme Court, New York County (Barbara R. Kapnick, J.), entered December 12, 2011, which denied defendants' motion for summary judgment dismissing the complaint, and denied plaintiff's cross motion for summary judgment as to the first, second and third causes of action, modified, on the law, to dismiss the first and second causes of action, and otherwise affirmed, without costs.

The written agreement upon which plaintiff seeks a success fee and certain real estate broker's commissions is unenforceable as vague, since the agreement fails to set the price or compensation to be received by plaintiff. Nor does it provide for a means to calculate same (*see Matter of 166 Mamaroneck Ave. Corp. v 151 E. Post Rd. Corp.*, 78 NY2d 88, 91-92 [1991]). As such, the IAS court should have granted defendants summary

judgment on the two breach of contract claims.

With regard to plaintiff's claim for unjust enrichment, it was properly permitted to proceed, as there was no enforceable agreement regarding the same subject matter (*cf. IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 [2009]). Moreover, fact issues preclude dismissal as to defendants Joseph Tahl and Tahl Propp Equities, LLC, as both apparently dealt directly with plaintiff on this transaction, and both are alleged to have benefitted from the transaction (*see Georgia Malone & Co., Inc. v Rieder*, 86 AD3d 406 [2011]).

All concur except Moskowitz, J. who dissents in part and concurs in part in a memorandum as follows:

MOSKOWITZ, J. (dissenting in part and concurring in part)

I dissent to the extent the majority (1) dismisses the breach of contract claims as vague and unenforceable; (2) permits the unjust enrichment claims to proceed; and (3) retains the claims against defendant Tahl individually. Although the agreement here is hardly a model of clarity, the parties do not dispute the meaning of its salient terms. Thus, I would not dismiss the breach of contract claims as vague and unenforceable. However, because the parties' accountants disagree as to how to interpret the applicable financial documents and because the record is devoid of financial documents upon which the parties relied, summary judgment is not warranted. I would also dismiss the claims against defendant Tahl individually.

Plaintiff Magnum Real Estate Services, Inc. is a licensed real estate broker. On May 18, 2001, Magnum entered into a contract to purchase four mixed-use investment properties in Harlem for a purchase price of $1.9 million. In October 2001, Magnum assigned the contract of sale to 133-134-135 Street LLC (Street), a single-purpose limited liability company that defendants Joseph Tahl, Tahl-Propp Equities, and Tahl Propp Manhattan North Investors II, LLC (TPMNI II) allegedly control. In consideration for that assignment, Magnum received $85,000. The closing on Street's purchase of the properties occurred on or

about October 10, 2001. Plaintiff claims it was supposed to have received additional consideration for the assignment that the parties memorialized in a memorandum to "Sony" that Tahl drafted, dated November 16, 2001 (the Post-Script). The Post-Script states in relevant part:

> "The above payment of $85,000 is a partial payment. You also will be compensated with a portion of re-finance proceeds **at closing of the re-financing above our total cost basis**, including acquisition and renovation cost, **upon the successful renovation, lease-up and re-financing of these properties**. It is expected that the above-payment plus a portion of re-finance proceeds will total $250,000 plus leasing commissions of about $75,000, for a total compensation of $325,000" (emphasis added).

Both parties agree, as the language of the Post-Script indicates, that plaintiff was to receive payment once the properties showed a profit above defendants' total cost basis. As defined in the Post-Script, total cost basis is, essentially, the money defendants spent purchasing, renovating, leasing and refinancing the buildings.

Eventually, Street transferred three of the four properties to three other single purpose entities so that a separate company owned each property (collectively with Street, the Owners). Defendant Owners commenced renovations to improve the properties and refinanced several times to pay for those renovations. The last refinancing was in 2006. By the end of 2008, when

renovations were substantially complete, defendant Owners had invested nearly $2 million in the renovations. In 2010 and 2011, during the pendency of this action, defendants sold the properties for $5,734,776.50.

Plaintiff then commenced this action for, among other things, breach of contract, asserting that it never received any refinance proceeds even though defendants refinanced the properties several times. It also asserted a cause of action for breach of a brokerage agreement, alleging that defendants refused to allow it to provide the contracted-for brokerage services for the apartments in the buildings.

Defendants moved for summary judgment dismissing the complaint, arguing that the properties always operated at a loss and they could no longer refinance after 2008 because the downturn in the real estate market left negative equity in the properties. Defendants contend that, minus the initial acquisition and closing costs of $2,123,676.00, the renovation costs of $2,655,295.77, operating losses of $2,619,915.74 and net depreciation of $1,180,244.77, they suffered an aggregate loss during ownership of $483,866.24. In support of their motion, defendants submitted the testimony of their accountant, Warren Schneider. According to Schneider, the post-2006 financial documents indicate that the properties continued to operate at a

loss until defendants sold them.

In opposition and in support of its cross motion, plaintiff submitted an affidavit from its expert, certified public accountant Barry Leon. In his affidavit, Leon states that the properties yielded cash-out refinancing proceeds of approximately $2 million in 2006 and that defendants had recouped all the monies they put into the properties by the end of 2006. Despite plaintiff's expert's opinion, however, the financial documents in the record indicate that the properties operated at a loss for at least the years 2002, 2003, 2004, 2005 and 2006, at least when comparing rent rolls to operating expenses. Plaintiff concedes that in 2006, the properties incurred $861,755 in operating costs and received only $588,069 in rents.

Although neither party submitted the post-2006 financial documents, they certainly exist because the accountants for both parties relied on those documents in rendering their opinions. Given the differing opinions of the accountants, both based on financial documents that are not part of the record, there is a question of fact precluding an award of summary judgment to either party. The parties agree on the Post-Script agreement's salient terms, i.e., that plaintiff was to receive $250,000 if defendants made enough money to recover their total cost basis. This means that plaintiff is entitled to refinancing proceeds

only if, in fact, the investment yielded a profit. Thus, it is irrelevant that the agreement does not define the term "portion" or the means to calculate plaintiff's portion. The money is either there or it is not. Because it is not clear whether the properties yielded a profit, the motion court properly denied summary judgment to both parties.

It follows from the foregoing that plaintiff's claims for unjust enrichment should have been dismissed. It is axiomatic that a claim for unjust enrichment cannot stand where there is a contract governing the same subject matter (*see IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 [2009]).

I agree with the majority's decision to the extent it dismissed plaintiff's claims for brokerage fees. Plaintiff alleges that defendants thwarted its ability to earn commissions by refusing to allow plaintiff to perform brokerage services. Defendants contend that they stopped using plaintiff as a broker after receiving complaints. Even assuming the Post-Script constitutes a brokerage agreement, it lacks definite terms and therefore was terminable at will (*see Rooney v Tyson*, 91 NY2d 685, 689-692 [1998]). Moreover, plaintiff has not claimed that it procured any tenants for the properties without receiving a commission. Accordingly, the motion court should have granted summary judgment to defendants and dismissed the second cause of

action for $75,000 in broker fees.

Finally, I would dismiss the claim against defendant Tahl. There is nothing in the record to indicate that Tahl intended to bind himself personally and plaintiff has not asserted allegations to pierce the corporate veil (*see Matias v Mondo Props. LLC*, 43 AD3d 367, 368 [1st Dept 2007]).

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

ENTERED: FEBRUARY 14, 2013

CLERK

Tom, J.P., Mazzarelli, Moskowitz, Abdus-Salaam, Feinman, JJ.,

8757 In re Joan Hansen & Company, Inc., Index 106654/11
Petitioner-Respondent,

-against-

Everlast World's Boxing
Headquarters Corp., et al.,
Respondents-Appellants.

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Schlacter & Associates, New York (Jed R. Schlacter of counsel), for appellants.

Phillips Nizer LLP, New York (George Berger of counsel), for respondent.

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Judgment, Supreme Court, New York County (Geoffrey D. Wright, J.), entered October 6, 2011, confirming an arbitral award, unanimously affirmed, with costs.

Respondents Everlast World's Boxing Headquarters Corp. and Everlast Worldwide, Inc. (Everlast) did not default by failing to timely answer the petition or by moving to vacate the arbitral award instead of filing a cross petition to dismiss (*see* CPLR 404; 7502[a][iii]). Indeed, Everlast's motion to vacate did not prejudice any substantial right belonging to petitioner (*see* CPLR 2001).

The arbitrators committed no misconduct (*see* CPLR 7511[b][1][i]) when they did not require petitioner to disclose its representation agreements with its other licensors. Everlast

failed to show by clear and convincing evidence that those agreements were necessary to prove their defense (*Financial Clearing & Servs. Corp. v Katz*, 172 AD2d 290 [1st Dept 1991]).

The arbitrators did not exceed their power (*see* CPLR 7511[b][1][iii]) by affording the word "termination" a different construction from the one that Everlast urged. To be sure, even by common usage, the words "termination" and "expiration" are not generally synonymous. Rather, the word "termination" connotes severance of a relationship before the natural expiration of a term certain, while the word "expiration" connotes an ending occurring upon the passage of time. Courts have both tacitly and explicitly accepted these constructions (*see Remco Maintenance, LLC v CC Mgt. & Consulting, Inc.*, 85 AD3d 477, 480-81 [1st Dept 2011][court draws a distinction between "natural expiration of the term of agreement," on the one hand, and termination under notice of cancellation or breach, on the other]; *see also Matter of Paul*, 95 AD3d 1647, 1648 [3d Dept 2012][referring to "expiration" of two-year period while referring to "termination" as a specific event contingent on court approval]; *accord In re Turner*, 326 BR 563, 575 [Bkrtcy WD Pa 2005]; *In re Morgan*, 181 BR 579, 584 [Bkrtcy ND Ala 1994]; *Piedmont Interstate Fair Assn. v City of Spartanburg*, 264 S.E.2d 926, 927 [S.C. 1980]).

Moreover, reference to paragraph VI(3)(e) – the only

paragraph that the parties asked the arbitrators to interpret – suggests that the parties did not consider the two words to be synonymous. Specifically, in that paragraph, the parties' provide that "in the event of termination of this Agreement," petitioner would be entitled to certain fees after the termination. However, in paragraph IV, the agreement states that it was to expire on December 31, 2004 at the latest, unless one of the parties terminated it earlier upon the occurrence of certain enumerated events. Thus, there existed no uncertainty as to the date for the expiration of the agreement. If the parties understood "termination" to be synonymous with "expiration," they would have had no need to use the conditional phrase "in the event of termination," as the agreement was already set to expire automatically on a predetermined date. Therefore, the arbitrators' construction was not irrational and, despite Everlast's assertions otherwise, did not effectively rewrite the parties' agreement (*see Matter of National Cash Register Co. [Wilson]*, 8 NY2d 377, 383 [1960]).

Everlast argues that no evidence supports the arbitrators' interpretation of the parties' agreement. However, this argument is unavailing, because "[m]anifest disregard of the facts is not a permissible ground for vacatur of an award" (*Wien & Malkin LLP v Helmsley-Spear, Inc.*, 6 NY3d 471, 483 [2006], *cert dismissed*

548 US 940 [2006]; *see also e.g. Matter of New York City Tr. Auth. v Transport Workers Union of Am., Local 100*, 14 NY3d 119, 125 [2010]). At any rate, the record does contain evidence supporting the arbitrators' decision.

We have considered the parties' remaining contentions and find that they are unavailing.

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

ENTERED: FEBRUARY 14, 2013

CLERK

Tom, J.P., Andrias, Freedman, Román, Gische, JJ.

8955- Index 651951/10
8955A U.S. Bank National Association, etc.,
Plaintiff-Appellant,

-against-

Lightstone Holdings LLC, et al.,
Defendants-Respondents,

Wachovia Bank, N.A.,
Defendant.

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Venable LLP, Baltimore, MD (Gregory A. Cross of the bar of the State of Maryland, admitted pro-hac vice, of counsel), for appellant.

Kasowitz, Benson, Torres & Friedman LLP, New York (David M. Friedman of counsel), for Lightstone Holdings LLC and David Lichtenstein, respondents.

Meister Seelig & Fein LLP, New York (Stephen B. Meister of counsel), for Line Trust Corporation Ltd. and Deuce Properties Ltd., respondents.

Cleary Gottlieb Steen & Hamilton LLP, New York (Howard S. Zelbo of counsel), for Bank of America, N.A., Merrill Lynch Mortgage Lending, Inc., U.S. Bank National Association, etc., Debt II ESH, L.P., Debt-U ESH, L.P. and KeyBank National Association, respondents.

Buchanan Ingersoll & Rooney PC, New York (Kristi A. Davidson of counsel), for KeyBank National Association, respondent.

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Order, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered September 7, 2011, which granted defendants' motion to dismiss the complaint, unanimously reversed, on the law, without costs, and the motion denied. Order, same court and

Justice, entered September 6, 2011, which denied plaintiff's motion seeking declaratory relief, unanimously affirmed, without costs.

This case involves a dispute between two sets of creditors, Senior Lenders (plaintiff) and Junior or Mezzanine Lenders, as to who has priority to payments personally guaranteed by defendants Lightstone and Lichtenstein but capped at $100 million, under Loan and Guaranty Agreements (made to both sets of lenders) and an Intercreditor Agreement (IC Agreement), in the event of default by the borrowers.

There are provisions in the various agreements, all of which were executed on the same day, that are not fully consistent with each other. "It is a cardinal rule of contract construction that a court should avoid an interpretation that would leave contractual clauses meaningless. Stated otherwise, courts are obliged to interpret a contract so as to give meaning to all of its terms" (*150 Broadway N.Y. Assoc., L.P. v Bodner*, 14 AD3d 1, 6 [1st Dept 2004] [internal quotation marks omitted]).

Here, while the court correctly found that the Guaranty Claims were excluded from the general subordination provisions of the IC Agreement, section 6(b), which specifically applies to Guaranty Claims, still allows Junior Lenders to collect on such claims only if the Senior Lender is not also exercising rights

against the Guarantors. Section 6(b), however, provides an exception to the limit on a Junior Lender's right to enforcement, so long as the right is being exercised in connection with any Junior Lender pursuing its rights under section 15(q) of the IC Agreement.

Pursuant to section 15(q), which applies "[f]or as long [as] any Junior Loan remains outstanding," Senior Lender and Junior Lenders agreed that the $100 million Guaranty Cap "shall be applied on a ratable pro rata basis among each of the Junior Loans," and that, "[n]otwithstanding anything to the contrary which may be contained in th[e] [IC] Agreement," each Junior Lender could commence and prosecute a Guaranty Claim, as well as retain any recovery therefrom, so long as it complied with section 15(q).

The parties agree that there was only one guaranty pot, and that it was capped at $100 million. Thus, if the Junior Lenders are correct and section 15(q) constituted a waiver by the Senior Lender of its rights to any claim on the Guaranty Cap, then section 6(b)'s Guaranty Cap subordination language is superfluous. If, however, the Senior Lender is correct and section 15(q) applies only to Junior Lenders, then that section's language allowing Junior Lenders to actually collect Guaranty Claim monies is rendered superfluous. Moreover, while it may be

true that section 15(q) could reference only those amounts the Junior Lenders are entitled to collect when all of Senior Lender's debts have been satisfied, the Junior Lenders' interpretation - that Senior Lender contracted away its right to the Guaranty Cap - is equally plausible.

Because the IC Agreement's clauses concerning the lenders' rights to prosecute and collect on Guaranty claims are "ambiguous, [they] cannot be construed as a matter of law, and dismissal . . . [was] not appropriate" (*China Privatization Fund (Del), L.P. v Galaxy Entertainment Group Ltd.*, 95 AD3d 769, 770 [1st Dept 2012] [internal quotation marks omitted]).

Furthermore, no reading of the IC Agreement gives the Junior Lenders an exclusive right to bring claims against the Guarantors, or granted them exclusive rights to the Guaranty Cap. Accordingly, the motion court erred in finding that plaintiff

lacked standing to bring its claims against the Guarantors.

We have considered the remaining arguments and find them unavailing.

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

ENTERED: FEBRUARY 14, 2013

CLERK

Sweeny, J.P., Saxe, DeGrasse, Abdus-Salaam, Feinman, JJ.

9218 The People of the State of New York, Respondent, Ind. 2174/04

-against-

William Lopez, Defendant-Appellant.

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Steven Banks, The Legal Aid Society, New York (Lawrence T. Hausman of counsel), for appellant.

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

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Order, Supreme Court, New York County (Charles H. Solomon, J.), entered on or about May 11, 2010, which denied defendant's CPL 440.46 motion for resentencing, unanimously affirmed.

Since no material facts were contested, the resentencing court was not required to conduct an evidentiary hearing (*see People v Anonymous*, 85 AD3d 414 [1st Dept 2011], *lv denied* 18 NY3d 922 [2012]). The court complied with the resentencing statute when defendant was "brought before the court and given an opportunity to be heard" (*id.* at 414). Giving a defendant an opportunity to be heard is mandatory, but the taking of testimony is not. Here, the court permitted defendant to make an extensive oral statement, and it considered written submissions from the witnesses whom defendant had sought to call. Defendant received a full opportunity to inform the court of factors supporting his

resentencing motion.

The court properly exercised its discretion in concluding that substantial justice dictated denial of resentencing, given defendant's very extensive history of felony convictions and parole violations, and his use of narcotics while in prison. These factors outweighed the favorable factors cited by defendant.

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

ENTERED: FEBRUARY 14, 2013

CLERK

Sweeny, J.P., Saxe, DeGrasse, Abdus-Salaam, Feinman, JJ.

9220 The People of the State of New York, Respondent, SCI 21744C/05 Ind. 58892C/05

-against-

Kelvin Vazquez, Defendant-Appellant.

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Richard M. Greenberg, Office of the Appellate Defender, New York (Margaret E. Knight of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Christopher J. Blira-Koessler of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Martin Marcus, J.), rendered February 24, 2010, convicting defendant, after a jury trial, of robbery in the second degree, and sentencing him, as a second felony offender, to a term of 13 years, concurrent with a term of 1 to 3 years for violation of probation, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). Defendant's argument in this regard rests primarily on inferences he seeks to draw from his acquittals on the other counts of the indictment. In performing weight of evidence review, we may consider the jury's verdict on other counts (*see People v Rayam*, 94 NY2d 557, 563 n [2000]). Nevertheless, we find that the mixed verdict here does not warrant a different result. "Where a jury verdict is

not repugnant, it is imprudent to speculate concerning the factual determinations that underlay the verdict . . .” (*People v Horne*, 97 NY2d 404, 413 [2002]; *see also People v Hemmings*, 2 NY3d 1, 5 n [2004]).

Defendant’s principal ineffective assistance of counsel claims are unreviewable on direct appeal because they involve counsel’s strategic choices and other matters not reflected in, or not fully explained by, the record (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). Among other things, the record is inconclusive as whether trial counsel actually requested submission of third-degree robbery. Although there were postverdict proceedings having some bearing on the ineffective assistance claims, those proceedings did not shed sufficient light to obviate the need for a CPL 440.10 motion.

To the extent the existing record permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]). Defendant was indicted for, among other things, felony murder and first-degree robbery, and there was ample evidence to support those charges. Trial counsel’s strategy was to assert that, after a hypothetical unidentified party committed the more serious charges, defendant engaged in separate criminal conduct

against the surviving victim that only constituted second-degree robbery. Although this theory was speculative, counsel's strategy was successful, in that the jury acquitted defendant of all the charges except second-degree robbery.

Nevertheless, defendant faults his counsel for failing to request a charge of third-degree robbery as a lesser included offense. Assuming, without deciding, for purposes of this appeal, that counsel never requested submission of third-degree robbery, we conclude that defendant has not established that counsel reasonably should have requested that charge, that the court would have submitted that charge, or that there is a reasonable probability that the jury would have convicted defendant of that charge.

There was no reasonable view of the evidence that defendant was a latecomer who only committed the limited criminal act he posits, and the jury's verdict acquitting him of the more serious charges does not, by itself, establish the existence of such a reasonable view (*cf. Rayam*, 94 NY2d at 561-563]). Furthermore, defendant's theory in support of the lesser offense is essentially that he engaged in different acts from the acts forming the basis for the greater offense, and it is questionable whether this would have warranted submission of the lesser (*see People v Nieves*, 136 AD2d 250, 258-259 [1st Dept 1988]). We note

that submission of second-degree robbery, which was already in the indictment, did not present the same issues as submission of a lesser offense.

Accordingly, a reasonably competent attorney could have concluded that a request for third-degree robbery would be futile, and such a request might well have been correctly rejected by the court. Finally, the jury's verdict convicting defendant of second-degree robbery does not warrant the assumption that, if given the option, the jury would have gone further and convicted defendant of only third-degree robbery. Therefore, the present, unexpanded record fails to satisfy either the reasonableness or prejudice prongs contained in either the state or federal standards.

Defendant was not deprived of his right to effective, conflict-free representation by his attorney's conduct in relation to defendant's eve-of-trial request for new counsel. Counsel's permissible defense of his own performance did not create a conflict (*see People v Nelson*, 27 AD3d 287 [1st Dept 2006], *affd* 7 NY3d 883 [2006]; *see also United States v Moree*, 220 F3d 65, 70-72 [2d Cir 2000]).

We have considered and rejected defendant's challenge to the

court's suppression ruling, including his related claim of ineffective assistance, and his arguments concerning his adjudication as a second felony offender. We perceive no basis for reducing the sentence.

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

ENTERED: FEBRUARY 14, 2013

CLERK

Sweeny, J.P., Saxe, DeGrasse, Abdus-Salaam, Feinman, JJ.

9221 Nancy Schiano, Index 603610/08
Plaintiff-Respondent,

-against-

Marina, Inc., et al.,
Defendants-Appellants,

Glenn Schlossberg,
Defendant.

_____

Sills Cummis & Gross P.C., New York (Katherine M. Lieb of counsel), for appellants.

Ballon Stoll Bader & Nadler, P.C., New York (Rudy A. Dermesropian of counsel), for respondent.

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Order, Supreme Court, New York County (Judith J. Gische, J.), entered May 2, 2012, which, to the extent appealed from, denied defendants' motion for summary judgment dismissing the cause of action for breach of employment agreement as against Marina Inc. and Jump Apparel Co. Inc. and the cause of action for breach of shareholders' agreement as against Helen S. Brown, as executrix of the estate of Mark Brown, unanimously modified, on the law, to grant the motion as to the cause of action for breach of employment agreement, and otherwise affirmed, without costs.

Plaintiff's employment agreement states, "The term of this Agreement shall commence on the date Employee [plaintiff] commences full time employment with the Company [Marina] . . ."

Plaintiff's own deposition testimony shows that she never commenced full-time employment with Marina. She was employed by Jump, and she knew it. She attempted to have Marina established as a company independent of Jump, but she did not succeed in doing so.

The Overhead, Credit and Expense Agreement between Jump and Marina does not help plaintiff; it specifically states that Marina "shall bear sole financial responsibility for direct overhead expenses which shall include . . . payroll of Company Employees and employee fringe benefits."

Even if, arguendo, there were a triable issue of fact whether plaintiff commenced full time employment, it would not help plaintiff because the employment agreement would have expired by the time plaintiff was terminated in August 2008. The agreement, as amended in 2001, states that its term "shall continue until November 1, 2003." Over the years, changes were made in the material terms of the contract. For example, plaintiff's pay decreased by 10% around 2002 and went back up to its original amount in 2004. In 2005, her base pay was decreased, but she received an expense account. Furthermore, starting in 2004, plaintiff no longer spent 100% of her time on the Marina division of Jump. Due to these material changes, the employment agreement would not have automatically renewed after

November 1, 2003 (*see Curren v Carbonic Sys., Inc.*, 58 AD3d 1104, 1108 [3d Dept 2009]). Plaintiff's employment would have become at-will, and her termination would not constitute a breach of contract (*see e.g. Goldman v White Plains Ctr. for Nursing Care, LLC*, 11 NY3d 173, 177-178 [2008]).

Jump's guarantee of Marina's payment obligation under the employment agreement expired on December 4, 2002. Since the breach of employment agreement cause of action relates to the period from November 1, 2003 onward, even if the agreement had commenced or had automatically renewed, Jump would not be liable as a guarantor (*see generally H. Muehlstein & Co. v Sternberg*, 111 AD2d 635 [1st Dept 1985]).

Plaintiff contends that Jump should be held liable because defendants exercised dominion and control over Marina. However, she did not cross appeal from the motion court's rejection of her attempt to pierce the corporate veil. Therefore, she may not make a piercing-the-corporate-veil argument now (*see Hecht v City of New York*, 60 NY2d 57 [1983]; *Whitfield v JWP/Forest Elec. Corp.*, 223 AD2d 423 [1st Dept 1996]).

The cause of action for breach of shareholders' agreement is premised upon Brown's decedent's refusal to value plaintiff's 5% interest in Marina and failure to compensate her for her shares. However, under the circumstances of this case, plaintiff was not

entitled to a contractual valuation. Upon her termination, she was contractually deemed to have offered her shares for sale to Marina and the other shareholders. As plaintiff acknowledged at her deposition, her sole remedy for the corporation's and the other shareholders' failure to purchase her shares was liquidation and dissolution of the corporation and distribution of the net proceeds. Distribution of the net proceeds of liquidation could arguably be construed as compensation for plaintiff's shares. Therefore, the breach of shareholders' agreement cause of action survives to the extent that Marina shall be liquidated and dissolved, and the net proceeds of liquidation shall be distributed to each shareholder, pro rata. There may be some net proceeds, since Marina's tax returns from 2000 through 2002 listed total assets of $3,500.

Contrary to defendants' contention, plaintiff was not required by the shareholders' agreement to move for dissolution of Marina.

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

ENTERED: FEBRUARY 14, 2013

CLERK

Sweeny, J.P., Saxe, DeGrasse, Abdus-Salaam, Feinman, JJ.

9222-
9223 Robert Callahan, et al.,
Plaintiffs-Respondents,

-against-

Hugh L. Carey, etc., et al.,
Defendants-Appellants.

- - - - -

Louise F. Eldredge, et al.,
Plaintiffs-Respondents,

-against-

Edward I. Koch, etc., et al.,
Defendants-Appellants.

- - - - -

In re The Council of the City of New York,
Petitioner-Respondent,

-against-

The Department of Homeless Services
of the City of New York, et al.,
Respondents-Appellants.

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41494/82
403154/11

_____

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

The Legal Aid Society, New York (Steven Banks of counsel), for Robert Callahan, et al., and Louise F. Eldredge, et al., respondents.

Elizabeth R. Fine, New York (Jeffrey P. Metzler of counsel), for The Council of the City of New York, respondent.

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Appeals having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Judith J. Gische, J.), entered March 16, 2012,

And said appeals having been argued by counsel for the

respective parties; and due deliberation having been had thereon,

It is unanimously ordered that the order so appealed from be and the same is hereby affirmed for the reasons stated by Judith J. Gische, J., without costs and disbursements.

ENTERED: FEBRUARY 14, 2013

CLERK

Sweeny, J.P., Saxe, DeGrasse, Abdus-Salaam, Feinman, JJ.

9224 In re Jordan Anthony H.,

A Child Under Eighteen
Years of Age, etc.,

Melissa Ann S.,
Respondent-Appellant,

Leake and Watts Services, Inc.,
Petitioner-Respondent.

_____

Dora M. Lassinger, East Rockaway, for appellant.

Law Offices of James M. Abramson, PLLC, New York (Dawn M. Orsatti of counsel), for respondent.

Karen P. Simmons, The Children's Law Center, Brooklyn (Barbara H. Dildine of counsel), attorney for the child.

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Order of disposition, Family Court, Bronx County (Fernando H. Silva, J.), entered on or about February 17, 2012, which, following a fact-finding determination that respondent mother abandoned her child, terminated her parental rights to the child, and transferred guardianship and custody of the child to petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.

The agency established by clear and convincing evidence that respondent abandoned her child by failing to contact the child or the agency during the six-month period immediately preceding the filing of the petition, although able to do so, and that she was

not discouraged from doing so by the agency (Social Services Law § 384-b[5][a]; *Matter of Annette B.*, 4 NY3d 509, 513-514 [2005]).

The court properly concluded that the child's best interests would be better served by termination of respondent's parental rights than by issuing a suspended judgment, because there was no evidence that she had a realistic and feasible plan to provide an adequate and stable home for the child (*see Matter of Donelle Thomas M.*, 4 AD3d 137, 138 [1st Dept 2004]).

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

ENTERED: FEBRUARY 14, 2013

CLERK

Sweeny, J.P., Saxe, DeGrasse, Abdus-Salaam, Feinman, JJ.

9225 The People of the State of New York, Respondent, Ind. 1446/07

-against-

Jamel Parker, Defendant-Appellant.

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Anthony L. Ricco, New York, for appellant.

Robert T. Johnson, District Attorney, Bronx (Justin J. Braun of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Judith Lieb, J.), rendered January 6, 2011, convicting defendant, after a jury trial, of robbery in the second degree and criminal possession of a weapon in the fourth degree, and sentencing him to an aggregate term of 3½ years, unanimously affirmed.

Defendant's ineffective assistance of counsel claims are unreviewable on direct appeal because they involve matters not reflected in, or not fully explained by, the trial record (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). 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 Taylor*, 1 NY3d 174, 175-176 [2003]; *People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]).

Defendant asserts that his trial counsel's impeachment of the victim by way of prior inconsistent statements was deficient. However, counsel questioned the victim at length about his grand jury testimony, and effectively argued that inconsistencies between that testimony and his trial testimony undermined his credibility. We conclude that counsel's conduct of the trial met an "objective standard of reasonableness" (*Strickland*, 466 US at 688). In any event, we also conclude that regardless of whether counsel should have taken the additional impeachment measures set forth by defendant in his present argument, counsel's failure to take those measures, viewed individually or collectively, did not have a reasonable probability of affecting the outcome and did not deprive defendant of a fair trial (*id.* at 694).

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

ENTERED: FEBRUARY 14, 2013

CLERK

Sweeny, J.P., Saxe, DeGrasse, Abdus-Salaam, Feinman, JJ.

9227 Guy Masiach, Index 116008/09
Plaintiff-Appellant,

-against-

420 West Investors, LLC,
Defendant-Respondent.

_____

Andrew J. Spinnell, New York, for appellant.

Starr Associates LLP, New York (Shaun W. Pappas of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Debra A. James, J.), entered March 1, 2012, dismissing the complaint pursuant to an order, same court and Justice, entered June 21, 2011, which granted defendant's cross motion for summary judgment dismissing the complaint, and denied plaintiff's motion to strike or preclude as moot, unanimously affirmed, with costs.

We find that the express language of the offering plan, incorporated by reference into the purchase agreement entered into by the parties, limits defendant's obligation under the purchase agreement to making repairs, or alternatively, recompensing for repairs made (*see 430 W. 23rd St. Tenants Corp. v 23rd Assoc.*, 155 AD2d 237, 238 [1st Dept 1989]). To construe the purchase agreement otherwise would, in effect, render the express language of the offering plan meaningless (*see Diamond*

Castle Partners IV PRC, L.P. v IAC/InterActiveCorp, 82 AD3d 421, 422 [1st Dept 2011]). Accordingly, plaintiff's claims seeking rescission of the purchase agreement and monetary damages for loss of rental income are barred by the express language of the offering plan.

In addition, to the extent plaintiff argues that defendant fraudulently misrepresented that it would make repairs under the agreement, such an allegation is insufficient to state a claim for fraudulent inducement (*see Sass v TMT Restoration Consultants Ltd.*, 100 AD3d 443, 443 [1st Dept 2012]).

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

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

ENTERED: FEBRUARY 14, 2013

CLERK

Sweeny, J.P., Saxe, DeGrasse, Abdus-Salaam, Feinman, JJ.

9228-
9229 In re Cheyenne J.,

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

Christian J.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent,

Tamek S.,
Respondent.

_____

Richard L. Herzfeld, P.C., New York (Richard L. Herzfeld of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Elizabeth I. Freedman of counsel), for Administration for Children's Services, respondent.

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

_____

Appeal from order of protection, Family Court, New York County (Susan Knipps, J.), entered on or about October 13, 2010, which, among other things, directed that respondent father stay away from the mother and her home, and refrain from communicating with her by any means, until December 1, 2010, unanimously dismissed, without costs, as moot. Appeal from permanency hearing order (same court and Judge), entered on or about December 2, 2009, unanimously dismissed, without costs, as

abandoned.

Since the order of protection being challenged has expired by its own terms, the appeal is moot (*see Matter of Louis N. [Dawn O.]*, 98 AD3d 918 [1st Dept 2012]; *Matter of Brandon M. [Luis M.]*, 94 AD3d 520 [1st Dept 2012]). Were we to reach the merits, we would find that the Family Court's order was authorized by Family Court Act § 1056 in the context of a neglect proceeding based on allegations of domestic violence in the child's presence, and that appellant's evidentiary objection is unpreserved. Moreover, the mother's testimony corroborated the statements in the 18 domestic incident reports admitted into evidence.

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

ENTERED: FEBRUARY 14, 2013

CLERK

Sweeny, J.P., Saxe, DeGrasse, Abdus-Salaam, Feinman, JJ.

9230- Index 650717/10
9231 Aurora A. Tambunting, et al.,
Plaintiffs-Appellants,

-against-

Jose Tambunting, et al.,
Defendants-Respondents,

Board of Managers of the 30 East
85th Street Condominium,
Defendant.

_____

Moses & Singer LLP, New York (Robert J. Semaya of counsel), for appellants.

Guy S. Halperin, New York, for respondents.

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Order, Supreme Court, New York County (Milton A. Tingling, J.), entered on or about April 5, 2011, which granted defendants Jose Tambunting, Miguel Tambunting and Jose Tambunting, Jr.'s motion to dismiss the second and fourth causes of action as against them, and order, same court and Justice, entered on or about January 13, 2012, which, upon renewal, adhered to the original determination, unanimously affirmed, with costs.

Plaintiffs allege in support of the second and fourth causes of action that they revoked the powers of attorney they had given their father, who nevertheless transferred their interests in an apartment to their brothers, and that the brothers knew that their father was without authority to effect the transfer. These

causes of action cannot be sustained, because plaintiffs failed to record their alleged revocations in the county where the powers of attorney, which contained the power to convey real property, were recorded (*see* Real Property Law §§ 294[1]; 326).

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

ENTERED: FEBRUARY 14, 2013

CLERK

Sweeny, J.P., Saxe, DeGrasse, Abdus-Salaam, Feinman, JJ.

9232 The People of the State of New York, Respondent, Ind. 2012/10

-against-

Cyrus Morris, Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Cassandra Mullen, J.), rendered February 14, 2011, convicting defendant, after a jury trial, of grand larceny in the fourth degree, and sentencing him, as a second felony offender, to a term of 2 to 4 years, unanimously affirmed.

The court properly exercised its discretion in denying defendant's request to recall a police officer for the purpose of inquiring about an alleged inconsistency between a witness's testimony and a written summary of the witness's statement to the officer that was signed by the witness, but prepared by the officer. The purported inconsistency was not material to the case, it had little or no probative value, and defendant's assertion that, if recalled, the officer would have given testimony beneficial to the defense is speculative. In any

event, the defense was able to alert the jury to the alleged inconsistency (*see generally People v Pryor*, 5 AD3d 222 [1st Dept 2004], *lv denied* 3 NY3d 661 [2004]). Since defendant never claimed he was constitutionally entitled to recall the officer, his constitutional claim is unpreserved (*see People v Lane*, 7 NY3d 888, 889 [2006]) and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits (*see Delaware v Van Arsdall*, 475 US 673, 678-679 [1986]).

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

ENTERED: FEBRUARY 14, 2013

CLERK

Sweeny, J.P., Saxe, DeGrasse, Abdus-Salaam, Feinman, JJ.

9233 Evangelina Ortiz, Index 301607/10
Plaintiff-Respondent,

-against-

The City of New York,
Defendant,

Juan R. Reinosa, et al.,
Defendants-Appellants.

_____

Miranda Sambursky Slone Sklarin Verveniotis, LLP, Elmsford (Michael D. Neri of counsel), for appellants.

Kagan & Gertel, Brooklyn (Irving Gertel of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered March 15, 2012, which, to the extent appealed from as limited by the briefs, denied the Reinosa defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Appellants failed to demonstrate as a matter of law that the alleged defect, at the location where plaintiff testified she tripped on a raised portion of the sidewalk, was trivial. The photographs provided by appellants in support of their motion are unclear in the record.

Based on plaintiff's testimony, it is also not clear whether

or not she tripped on a portion of the sidewalk abutting appellants' property or on the pedestrian ramp, for which the City of New York is responsible (*see Gary v 101 Owners Corp.*, 89 AD3d 627 [1st Dept 2011]).

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

ENTERED: FEBRUARY 14, 2013

CLERK

Sweeny, J.P., Saxe, DeGrasse, Abdus-Salaam, Feinman, JJ.

9234 Raymond Bell, Index 120453/03
Plaintiff-Appellant, 590995/04

-against-

Charles Kandler, et al.,
Defendants-Respondents.

[And Third-Party Actions]

_____

Eric H. Green, New York (Marc Gertler of counsel), for appellant.

Devereaux, Baumgarten, New York (Michael J. Devereaux of counsel), for respondents.

_____

Order, Supreme Court, New York County (Carol Edmead, J.), entered September 16, 2010, which, to the extent appealed from, granted so much of defendants' cross motion for summary judgment as sought dismissal of plaintiff's Labor Law § 202 cause of action, unanimously reversed, on the law, without costs, and the motion denied.

In this action to recover damages arising from plaintiff's fall while washing exterior windows of a commercial building, triable issues of fact exist as to whether (1) defendant building owner required tenants and subtenants to clean the windows on their leased premises (*see* Labor Law § 202); (2) the owner, by lack of objection, either informally approved or permitted window washing by its tenants' and subtenants' hired workers, including

plaintiff, who testified that he washed windows in the building on almost a monthly basis since the late 1980's; (3) the owner informally approved of, if not directly recognized, third-party defendant Baltz's subtenancy, such that the lease terms at issue would then be binding upon Baltz; (4) the owner had installed and provided notice of tilt-in windows in Baltz's subleased premises before plaintiff's accident, such that a safe means was provided for washing the windows from inside the building, rather than from the exterior (*see id.*); and (5) the anchor hooks on the building's facade complied with the relevant Industrial Code provisions (*see* 12 NYCRR 21.3[b], [d], [h], [i]; 21.6[a], [c], [k]).

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

ENTERED: FEBRUARY 14, 2013

CLERK

Sweeny, J.P., Saxe, DeGrasse, Abdus-Salaam, Feinman, JJ.

9235 The People of the State of New York, Ind. 5464/10
Respondent,

-against-

Martin Ramos,
Defendant-Appellant.

_____

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

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

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (A. Kirke Bartley, Jr., J.), rendered on or about June 8, 2011,

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

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

ENTERED: FEBRUARY 14, 2013

CLERK

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

Mazzarelli, J.P., Friedman, Manzanet-Daniels, Román, Clark, JJ.

9237 The People of the State of New York, Respondent, Ind. 1887/10

-against-

Jose Marte, Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Deborah L. Morse of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Thomas Farber, J. at suppression motion; Analisa Torres, J. at jury trial and sentencing), rendered January 3, 2011, convicting defendant of two counts of robbery in the second degree, and sentencing him, as a second felony offender, to concurrent terms of five years, unanimously affirmed.

The court properly denied defendant's motion to suppress identification testimony, without granting a hearing pursuant to *People v Rodriguez* (79 NY2d 445 [1992]). Defendant did not dispute the People's contention that defendant was sufficiently known to the victim so as to render the photo identification merely confirmatory, and there was no factual issue requiring a hearing (*see e.g. People v Rodriguez*, 47 AD3d 417 [2008], *lv denied* 10 NY3d 816 [2008]; *People v Murray*, 247 AD2d 292 [1st

Dept 1998], *lv denied* 92 NY2d 857 [1998]).

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 credibility determinations.

The court properly exercised its discretion in admitting evidence that the victim experienced difficulty sleeping following the incident, and that he began seeing a psychiatrist. This evidence was relevant to prove that the victim was brutally beaten during the robbery, especially where a defense witness described the incident as a brief fistfight not resulting in injuries.

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

ENTERED: FEBRUARY 14, 2013

CLERK

Mazzarelli, J.P., Friedman, Manzanet-Daniels, Román, Clark, JJ.

9238 William Riviera, Index 309161/09
Plaintiff-Appellant,

-against-

MTA Bus Company,
Defendant-Respondent.

_____

Sim & Record, LLP, Bayside (Sang J. Sim of counsel), for appellant.

Marulli, Lindenbaum, Edelman & Tomaszewski, LLP, New York (David N. Simon of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered May 18, 2012, which, in an action for personal injuries sustained when the bus in which plaintiff was riding stopped suddenly, causing him to be thrown from his seat, granted defendant's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion denied.

The record presents disputed issues of fact precluding the application of the emergency doctrine on this motion. Plaintiff testified that he first observed the tractor-trailer to the left of and close to defendant's bus, one and a half to two minutes before the bus suddenly stopped, and that the bus was traveling "a little quicker" than normal speed. Such testimony, combined with the bus driver's admission that being cut-off by another

vehicle was a regular occurrence at the accident location, raised triable issues of fact as to whether the bus driver's actions contributed to the accident and whether he could have avoided the accident (*see Edwards v New York City Tr. Auth.*, 37 AD3d 157 [1st Dept 2007]).

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

ENTERED: FEBRUARY 14, 2013

CLERK

Mazzarelli, J.P., Friedman, Manzanet-Daniels, Román, Clark, JJ.

9239 In re Michael M.,

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

Maritza H.,
Petitioner-Appellant,

Saint Dominic's Home,
Respondent-Respondent,

Administration for Children's
Services,
Respondent.

_____

Israel P. Inyama, New York, for appellant.

Warren & Warren, P.C., Brooklyn (Ira L. Eras of counsel), for Saint Dominic's Home, respondent.

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

_____

Order, Family Court, Bronx County (Karen I. Lupuloff, J.), entered on or about May 18, 2011, which, following a hearing, dismissed, with prejudice, the petition for custody of the subject child, unanimously affirmed, without costs.

Family Court providently exercised its discretion in finding that petitioner, the child's paternal grandmother, did not establish the requisite extraordinary circumstances to seek custody (*see* Domestic Relations Law § 72[2][a]). Further, the record amply supports Family Court's determination that it is in

the child's best interests to deny custody to petitioner (*see Matter of Amber B.*, 50 AD3d 1028, 1029 [2d Dept 2008]). The record shows that the foster mother had provided a positive environment for the child, had tended to his special needs, and had expressed a desire to adopt the child, while petitioner had not seen the child for five years. The child, who had been in the foster home for five years, also had no desire to have contact with the petitioner and sought to be adopted (*see Matter of Geneva B. v Administration for Children's Servs.*, 73 AD3d 406, 406 [1st Dept 2010]).

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

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

ENTERED: FEBRUARY 14, 2013

CLERK

Mazzarelli, J.P., Friedman, Manzanet-Daniels, Román, Clark, JJ.

9240 Eric Berrios, Index 21193/06
Plaintiff-Appellant,

-against-

735 Avenue of the Americas, LLC, et al.,
Defendants-Respondents.

_____

Pollack, Pollack, Isaac & DeCicco, New York (Brian J. Isaac of counsel), for appellant.

McGaw, Alventosa & Zajac, Jericho (James K. O'Sullivan of counsel), for respondents.

_____

Judgment, Supreme Court, Bronx County (Stanley Green, J.), entered June 10, 2011, which, after a jury trial, inter alia, awarded plaintiff $375,000 for past pain and suffering, $225,000 for future pain and suffering for three years, $225,000 for past lost earnings, and $375,000 for future lost earnings for three years, unanimously affirmed, without costs.

Plaintiff, who was injured when he fell off a scaffold in the course of his employment as a journeyman carpenter on a construction project, had an average pre-accident salary of $76,000 per year. With the exception of a brief, part-time job, he had not worked since the accident. Accordingly, the jury's award of $225,000 for past lost earnings for five years was supported by a valid line of reasoning (*see Cohen v Hallmark Cards, Inc.*, 45 NY2d 493, 499 [1978]). Based upon the evidence

presented at trial, the jury could have rationally concluded that plaintiff's injuries initially incapacitated him from employment, but that, as time progressed, he became more able to work, and calculated their award on that basis. Such an analysis does not involve improper speculation into the jury's thoughts (*compare Dessasore v New York City Hous. Auth.*, 70 AD3d 440 [1st Dept 2010]). Additionally, based on the evidence presented at trial, the award for future lost earnings is not inadequate.

The trial court did not commit reversible error in charging the jury as to plaintiff's duty to mitigate damages by reasonably seeking and pursuing vocational rehabilitation (*see Bell v Shopwell, Inc.*, 119 AD2d 715 [2d Dept 1986]). The charge given was supported by plaintiff's own physician, who testified that plaintiff was able to work in a sedentary or part-time position.

Plaintiff's hospital record was properly admitted as a business record (CPLR 4518[a]). As plaintiff concedes, the statement at issue regarding how he landed when he fell was germane to his medical diagnosis or treatment. Its admission was therefore proper (*see Williams v Alexander*, 309 NY 283, 287 [1955]).

In the absence of any evidence regarding the frequency and nature of the change in plaintiff's contribution to household services and that plaintiff retained, or intended to retain,

anyone to replace his contribution to household services, the Court properly excluded expert testimony as to the value of such loss (*see Schultz v Harrison Radiator Div. General Motors Corp.*, 90 NY2d 311 [1997]).

Finally, without the benefit of the CPLR 3101(d) exchange at issue, this Court cannot determine whether the trial court abused its discretion in allowing defendant's economist to testify as to the use of certain factors in analyzing the claim for lost earnings.

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

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

ENTERED: FEBRUARY 14, 2013

CLERK

Mazzarelli, J.P., Friedman, Manzanet-Daniels, Román, Clark, JJ.

9241 National Union Fire Insurance Company of Pittsburgh, PA, et al., Plaintiffs-Appellants-Respondents,

-against-

Greenwich Insurance Company, Defendant/Third-Party Plaintiff-Respondent-Appellant,

-against-

Erie Insurance Company, Third-Party Defendant-Respondent.

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Law Offices of Beth Zaro Green, Brooklyn (Steven G. Adams of counsel), for appellants-respondents.

Law Offices of Todd M. McCauley, LLC, New York (David F. Tavella of counsel), for respondent-appellant.

Smith, Sovik, Kendrick & Sugnet, P.C., Syracuse (Kenneth T. Boyd of counsel), for respondent.

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Order, Supreme Court, New York County (Anil C. Singh, J.), entered February 14, 2012, which, insofar as appealed from, denied plaintiffs' motion for summary judgment, denied defendant/third-party plaintiff's motions for summary judgment, and granted third-party defendant's motion for summary judgment dismissing the third-party complaint, unanimously modified, on the law, to grant plaintiffs' motion and declare that defendant is obligated to reimburse plaintiffs for their defense and settlement costs in the underlying personal injury action, with

interest, and otherwise affirmed, without costs.

The additional insured endorsement of the policy that defendant issued to nonparty (to this action) Associated (the Greenwich policy) applies only if there is a written contract or agreement. Defendant contends that the only written contract in effect at the time of Draper's injury was for material only and thus inapplicable. This argument is unavailing; the contract clearly states, "This Agreement contains the terms and conditions under which Contractor [*i.e.*, Associated] agrees to provide materials *and/or perform services*" (emphasis added). Contrary to defendant's claim, the contract is not ambiguous. Hence, extrinsic evidence such as deposition testimony cannot be considered, especially since the contract contains a merger clause and a no-oral-modification clause (*see e.g. Cornhusker Farms v Hunts Point Coop. Mkt.*, 2 AD3d 201, 203-204 [1st Dept 2003]).

The additional insured endorsement in the Greenwich policy applies to bodily injury caused, in whole or in part, by Associated's acts or omissions or the acts or omissions of those acting on Associated's behalf in the performance of Associated's ongoing operations for plaintiff NVR, Inc. The phrase "caused by" "does not materially differ from the . . . phrase, 'arising out of'" (*W & W Glass Sys., Inc. v Admiral Ins. Co.*, 91 AD3d 530

[1st Dept 2012]). In turn, the phrase "arising out of" focuses "not on the precise cause of the accident but the general nature of the operation in the course of which the injury was sustained" (*Regal Constr. Corp. v National Union Fire Ins. Co. of Pittsburgh, PA*, 15 NY3d 34, 38 [2010] [internal quotation marks omitted]). Defense counsel admitted below that the underlying personal injury action arose out of an accident that occurred while Draper was acting on behalf of Associated in the performance of its ongoing operations. Thus, the condition set forth in the additional insured endorsement was satisfied, and summary judgment should have been granted in plaintiffs' favor (*see e.g. Hunter Roberts Constr. Group, LLC v Arch Ins. Co.*, 75 AD3d 404 [1st Dept 2010]); it is not necessary to try the issue of causation.

"[I]n the event of a breach of the insurer's duty to defend, the insured's damages are the expenses reasonably incurred by it in defending the action after the carrier's refusal to do so . . ." (*Sucrest Corp. v Fisher Governor Co.*, 83 Misc 2d 394, 407 [Sup Ct, NY County 1975], *affd* 56 AD2d 564 [1st Dept 1977]). Defendant did not respond to plaintiffs' letters; however, Associated (defendant's insured) refused tender on June 30, 2008, and sent a copy of this letter to defendant. Under the circumstances of this case, defendant is responsible for NVR's

defense costs from June 30, 2008. NVR is entitled to interest from the date it paid each legal bill (*see La Pierre, Litchfield & Partners v Continental Cas. Co.*, 32 AD2d 353, 356 [1st Dept 1969]). Plaintiffs are also entitled to interest on the settlement from the date of payment (*see Sucrest*, 83 Misc 2d at 406).

Defendant/third-party plaintiff contends that Associated is an additional insured under the policy that third-party defendant issued to Mr. Draper d/b/a Draper Construction (the Erie policy), specifically, paragraph 4 of "Who Is An Insured." However, this language covers only vicarious liability (*see e.g. Long Is. Light. Co. v Hartford Acc. & Indem. Co.*, 76 Misc 2d 832, 836 [Sup Ct, Nassau County 1973]; *Huber Engineered Woods, LLC v Canal Ins. Co.*, 364 NC 413, 700 SE2d 220, 221 [2010] [adopting the dissenting opinion of the NC Court of Appeals]; *Garcia v Federal Ins. Co.*, 969 So 2d 288, 289, 291-292, 294 [Fla 2007]; *Transportation Ins. Co. v George E. Failing Co.*, 691 SW2d 71, 73 [Tex App 1985]; *Canal Ins. Co. v Earnshaw*, 629 F Supp 114, 120 [D Kan 1985]). In *Draper*, NVR alleged that Associated was negligent; it did not allege that Associated was vicariously liable for Draper's negligence. Hence, Associated is not an additional insured under the Erie policy (*see e.g. Garcia*, 969 So

2d at 289, 292; *Transportation Ins.*, 691 SW2d at 73; *Canal*, 629 F Supp at 120).

In light of the foregoing, it is not necessary to consider the applicability of the contractual liability and employers' liability exclusions of the Erie policy.

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

ENTERED: FEBRUARY 14, 2013

CLERK

Mazzarelli, J.P., Friedman, Manzanet-Daniels, Román, Clark, JJ.

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BDCM Fund Adviser, L.L.C., formerly known as Black Diamond Capitol Management, L.L.C., et al.,
Plaintiffs-Appellants,

-against-

James J. Zenni, Jr., et al.,
Defendants/Counterclaim Plaintiffs-Respondents,

-against-

BDCM Fund Adviser, L.L.C., formerly known as Black Diamond Capitol Management, L.L.C., et al.,
Counterclaim-Defendants-Appellants.

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BDCM Fund Adviser, L.L.C., formerly known as Black Diamond Capitol Management, L.L.C., et al.,
Plaintiffs-Appellants-Respondents,

-against-

James J. Zenni, Jr., et al.,
Defendants-Respondents-Appellants.

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Mintz Levin Cohen Ferris Glovsky and Popeo, P.C., New York (Robert I. Bodian of counsel), for appellants/appellants-respondents.

Storch Amini & Munves PC, New York (Bijan Amini of counsel), for respondents/respondents-appellants.

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Order, Supreme Court, New York County (Eileen Bransten, J.), entered May 30, 2012, which, to the extent appealed from as

limited by the briefs, granted defendants' motion for summary judgment dismissing the remaining claims in the 2008 action, granted defendants' motion for sanctions to the extent of holding plaintiffs in civil contempt, granted in part defendants' motion to dismiss in the 2011 action the causes of action for breach of contract, tortious interference with prospective business relations, and unfair competition, and denied defendants' motion to dismiss those claims, as well as the defamation per se cause of action, in their entirety, unanimously modified, on the law, to the extent of dismissing the tortious interference and unfair competition claims concerning BTV, UMW and Paragon Outcomes, and otherwise affirmed, without costs. Judgment, same court and Justice, entered June 20, 2012, dismissing the complaint in the 2008 action and awarding defendants $490 in costs and disbursements, unanimously affirmed, without costs. Order, same court and Justice, entered April 30, 2012, which denied plaintiffs' motion to vacate the note of issue and certificate of readiness in the 2008 action, unanimously affirmed, without costs.

In 2006, plaintiff Stephen H. Deckoff bought out the ownership interests of defendant James J. Zenni, Jr. in defendant Black Diamond Capital Management, L.L.C. (BDCM), an alternative asset management firm, pursuant to a Membership Interest

Redemption Agreement (MIRA). Anticipating that Zenni would establish a competing asset management fund, the MIRA set forth the parameters under which Zenni could compete with BDCM, including parameters relating to Zenni's promotion of his role in BDCM's success.

With respect to the claims in the 2008 action, the court correctly found that defendants did not breach section 25 (b) of the MIRA by distributing marketing materials to potential investors that referenced BDCM's performance track record (PTR) without having provided plaintiffs with copies of relevant portions in advance of publication. Under section 25 (b), Zenni's marketing and related materials could "utilize" in "whatever form [he] chooses," BDCM's PTR of all funds and investment vehicles, provided that Zenni not "change or modify any of the information contained within [the PTR]" and that he deliver to BDCM a copy of the specific portion of any material containing or referencing the PTR prior to his publication of the material. Defendants substantially complied with section 25 (b), and any failure to provide advance copies of the additional portions of the marketing materials cited by plaintiffs does not give rise to a breach of contract claim, since most of the material was either backup material that defendants were allowed to disclose without advance clearance, or otherwise did not

contain or reference the PTR. To the extent portions of the marketing materials referencing gross realized internal rates of return contained or referenced the PTR but were not disclosed in advance, this de minimis failure to comply with the MIRA is insufficient to support a cause of action for an injunction or damages. Nor did any of the marketing materials cited by plaintiffs, including those referencing investment multiples, "change or modify any of the information contained within" the PTR.

The court also correctly concluded that defendants did not breach section 31 of the MIRA by disclosing confidential information. Defendants established a prima facie case for summary judgment based on affidavits asserting that all of the information disclosed in the marketing reports came from sources that were not confidential under the MIRA, such as Zenni's own accumulated knowledge, and plaintiffs failed to raise a triable issue of fact. Even if defendants' use of information relating to the imminent sale of a company, which was apparently disclosed to them by an investment bank contractually obligated to keep the information confidential, did not fit within an exception to the MIRA, this disclosure does not support a breach of contract claim because there is no evidence that it caused plaintiffs any damage.

The court correctly dismissed the claim brought under Delaware's Uniform Deceptive Trade Practices Act (6 Del C) § 2532(a)(2) and (3). Those subsections only address claims where there is a likelihood of confusion caused by the use of trademarks or similar marks, or misleading trade names (*see Delaware Solid Waste Auth. v E. Shore Envtl., Inc.*, 2002 WL 537691, *5, 2002 Del Ch LEXIS 34, *18 [Del Ch, March 28, 2002, No. CIV-A-1472-K]), which is not alleged here. The claims under subsections (a)(5), (8) and (12) also fail to the extent they are based on the same evidence that was insufficient to support the breach of contract claims, and because plaintiffs did not establish any issue of fact as to whether the alleged disclosures created a likelihood of confusion or damages.

The court properly held plaintiffs in civil contempt for violating a confidentiality order, which clearly expressed an unequivocal mandate, thereby prejudicing defendants (*see Matter of McCormick v Axelrod*, 59 NY2d 574, 583 [1983]).

The court properly denied the motion to vacate the note of issue and certificate of readiness in the 2008 action, since there was no outstanding discovery (*see Cathers v Barnes*, 8 AD3d 215, 215 [1st Dept 2004]). To the extent plaintiff had filed a pending application to compel production and extend the discovery cutoff date, the court denied the motion and held that discovery

was closed. There is no basis to disturb the court's determination (*id.*).

With respect to the claims in the 2011 action, the court correctly dismissed plaintiffs' cause of action for breach of the nondisparagement clause in section 33 of the MIRA with respect to three potential investors (BTV, UMW and Paragon Outcomes). The complaint failed to specify what disparaging statements were in the marketing materials sent to these investors, and alleged only that these investors came away with a particular impression that led them not to invest with plaintiffs. The court properly dismissed the claims with respect to two other companies (Portfolio Advisors and NEPC), because plaintiffs failed to allege damages (*see generally VLIW Tech., LLC v Hewlett-Packard Co.*, 840 A2d 606, 612 [Del Sup 2003]). Indeed, both companies invested in plaintiffs' funds despite reviewing the allegedly disparaging materials.

The court properly sustained the breach of contract cause of action with respect to the claim against Quartilium. In that case, the complaint specified the disparaging statements defendants allegedly made to the potential investor, and alleged that the company did not invest in BDCM as a result. The court also properly sustained the slander per se claims relating to defendants' alleged statement to two other potential investors

that plaintiffs were being investigated by the SEC for insider trading. Plaintiffs' allegations were sufficiently specific (*see Glazier v Harris*, 99 AD3d 403, 404 [1st Dept 2012]), and the alleged statement could adversely affect plaintiffs in their trade, business or profession (*see Macklem v Pearl*, 2011 WL 2200037, *4, 2011 US Dist LEXIS 61287, *9 [ND Ill, May 31, 2011, No. 10-C-830]).

The court, however, erred to the extent it sustained the tortious interference with prospective business relations and unfair competition claims with respect to BTV, UMW and Paragon Outcomes. Plaintiffs failed to allege any conduct that was actionable on a basis independent of the interference claim (*see Commerce Natl. Ins. Services, Inc. v Buchler*, 120 Fed Appx 414, 419 [3d Cir Del 2004]). Indeed, as noted above, plaintiffs failed to identify any disparaging statements made to these investors. The court properly dismissed these claims with respect to Quartilium, given that plaintiffs offered only a vague and conclusory allegation that BDCM had a reasonable probability of a business relationship with this company (*see Vigoda v DCA Prods. Plus*, 293 AD2d 265, 266 [1st Dept 2002]; *see also Agilent Tech., Inc. v Kirkland*, 2009 WL 119865, *7, 2009 Del Ch LEXIS 11,

*19-21 [Del Ch, Jan. 20, 2009, No. 3512-VCS]).

We have considered the parties' remaining arguments for affirmative relief and find them unavailing.

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

ENTERED: FEBRUARY 14, 2013

CLERK

Mazzarelli, J.P., Friedman, Manzanet-Daniels, Román, Clark, JJ.

9248 Mary Imbriale, etc., Index 116744/08
Plaintiff-Respondent, 590234/10
590352/10

-against-

Richter & Ratner Contracting Corp., et al.,
Defendants-Appellants,

Empire Projects, Inc.,
Defendant.

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Richter & Ratner Contracting Corp., et al.,
Third-Party Plaintiffs-Appellants,

-against-

Competition Architectural Metals, Inc.,
Third-Party Defendant-Respondent.

[And Another Third-Party Action]

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Malapero & Prisco, New York (Frank J. Lombardo of counsel), for appellants.

Rappaport Glass Levine & Zullo, LLP, Hauppauge (Michael G. Glass of counsel), for Mary Imbriale, respondent.

Milber Makris Plousadis & Seiden, LLP, White Plains (James K. Baden of counsel), for Competition Architectural Metals, Inc., respondent.

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Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered June 8, 2012, which, to the extent appealed from as limited by the briefs, denied the motion by defendants/third party plaintiffs Richter & Ratner Contracting Corp. (R&R), Ana Tzarev New York, LLC (ATNY), 24 West 57th APF, LLC, and 24 West

57th Street Realty, LLC (collectively, 24 West 57th) to renew plaintiff's motion for summary judgment as to liability under Labor Law § 240(1), granted plaintiff's motion to sever the third party complaint from the main action, and denied defendants/third party plaintiffs' motion for summary judgment on their claims for common-law and contractual indemnification against third-party defendant Competition Architectural Metals, Inc. (Competition), unanimously modified, on the law, to grant ATNY and 24 West 57th summary judgment on their third-party claim for common law indemnification, and otherwise affirmed, without costs.

The alleged new facts offered by defendants in support of renewal of plaintiff's motion for summary judgment as to liability under Labor Law § 240(1) do not change the prior determination (*see* CPLR 2221[e][2]). Defendants argued that the decedent's tool bag, which until recently had been in the decedent's wife's possession, contained suction cups that could have anchored the top of the decedent's ladder to the glass wall against which the otherwise unsecured ladder had been leaning before it slid and collapsed. However, they failed to adduce any evidence that the decedent knew that the suction cups could be used to anchor the top of the ladder to the glass or that he had been directed or knew he was expected to use the suction cups for that purpose (*see Gallagher v New York Post*, 14 NY3d 83, 88-89

[2010]; *Pietrowski v ARE-East Riv. Science Park, LLC*, 86 AD3d 467 [1st Dept 2011]; *Paz v City of New York*, 85 AD3d 519 [1st Dept 2011]).

The court properly severed the third-party action from the main action so as to avoid undue delay of the determination of damages in the main action (*see* CPLR 1010; *Cross v Cross*, 112 AD2d 62, 64 [1st Dept 1985]). Given that an issue of fact exists as to whether any negligence on the part of defendant/third-party plaintiff R&R, the general contractor, contributed to the causation of the accident, the court also properly denied R&R's motion for summary judgment on the third-party claims for common-law and contractual indemnification against Competition, the subcontractor that employed plaintiff's decedent. However, defendants/third-party plaintiffs ATNY and 24 West 57th, the tenant and owner of the property, respectively, were entitled to summary judgment on their third-party claims for common law indemnification, inasmuch as Competition neither rebutted the

evidence of its own negligence nor adduced any evidence of negligence on the part of either ATNY or 24 West 57th.

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

ENTERED: FEBRUARY 14, 2013

CLERK

Mazzarelli, J.P., Friedman, Manzanet-Daniels, Román, Clark, JJ.

9249 In re Nicholas B.,

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

Michelle B.,
Respondent-Appellant,

St. Dominic's Home,
Petitioner-Respondent.

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Neal D. Futerfas, White Plains, for appellant.

Warren & Warren, P.C., Brooklyn (Ira L. Eras of counsel), for respondent.

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

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Order, Family Court, New York County (Douglas E. Hoffman, J.), entered on or about April 23, 2012, which, upon a fact-finding determination that respondent-appellant mother suffers from a mental illness, terminated her 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 reversed, on the law, without costs, the finding of mental illness and the order of disposition vacated, and the petition dismissed.

Petitioner did not meet its burden of proving by clear and

convincing evidence that the mother is mentally ill within the meaning of Social Services Law § 384-b(4)(c) and 6(a) (*see Matter of Dochingozi B.*, 57 NY2d 641, 642-643 [1982]; *Matter of Tatesha M.G. [Sonia E.]*, 4 AD3d 429 [2d Dept 2004]). Although the evidence shows that the mother may have used some poor judgment in the past, this does not establish by clear and convincing evidence that she is presently and for the foreseeable future unable, by reason of mental illness, to provide proper and adequate care for the child (*id.*). Petitioner's own records contradict petitioner's expert testimony that the mother was noncompliant with mental health treatment. Indeed, petitioner's records show that, after the mother was fully compliant with the mental health therapy provided by petitioner, she was evaluated and found not to be in need of any further counseling or psychotropic medications. Additionally, the expert's opinion that the mother would unlikely be able to care for her son in the

foreseeable future is contradicted by evidence of the mother's efforts to secure placement for her son in an appropriate school environment, her participation in parenting classes, and her research on her son's ADHD diagnosis.

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

ENTERED: FEBRUARY 14, 2013

CLERK

Mazzarelli, J.P., Friedman, Manzanet-Daniels, Román, Clark, JJ.

9250 The People of the State of New York, Ind. 5398/10
Respondent,

-against-

Monica Amador,
Defendant-Appellant.

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

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

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Edward McLaughlin, J.), rendered on or about April 26, 2011,

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

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

ENTERED: FEBRUARY 14, 2013

CLERK

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

Mazzarelli, J.P., Friedman, Manzanet-Daniels, Román, Clark, JJ.

9251 Colgate Scaffolding & Equipment Corp., Plaintiff-Appellant, Index 306283/11

-against-

Albrecht, Viggiano, Zureck & Company, P.C., doing business as AVZ Tech, Defendant,

Microsoft Corporation, Defendant-Respondent.

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Terrence O'Connor, P.C., Bronx (Terrence J. O'Connor of counsel), for appellant.

Orrick, Herrington & Sutcliffe LLP, New York (Lisa T. Simpson of counsel), for respondent.

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Order, Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered March 26, 2012, which granted defendant Microsoft Corporation's motion to dismiss the complaint as against it, unanimously affirmed, without costs.

The complaint fails to state a cause of action for negligent misrepresentation as against Microsoft. There is no indication that Microsoft knew that plaintiff was considering the purchase of Microsoft products and related services from defendant Albrecht, Viggiano, Zureck & Company, P.C. d/b/a AVZ Tech (AVZ), or even knew of plaintiff's existence, when it made the alleged misrepresentation about the qualifications of AVZ (*see Sykes v*

RFD Third Ave. 1 Assoc., LLC, 15 NY3d 370, 373 [2010]). Plaintiff's allegation that it had relied on AVZ's repetition of the same misrepresentation in AVZ's proposal of a contract between AVZ and plaintiff does not establish privity, or a relationship approaching privity, between Microsoft and plaintiff at the time Microsoft made the alleged misrepresentation (*see Westpac Banking Corp. v Deschamps*, 66 NY2d 16, 19 [1985]). Likewise, plaintiff's argument that it had become a customer of Microsoft subsequent to the alleged reliance on the misrepresentation does not establish that Microsoft made the misrepresentation to plaintiff as a known party (*see McGill v General Motors Corp.*, 231 AD2d 449, 450 [1st Dept 1996]).

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

ENTERED: FEBRUARY 14, 2013

CLERK

Mazzarelli, J.P., Friedman, Manzanet-Daniels, Román, Clark, JJ.

9252 Front, Inc., Index 111597/11
Plaintiff-Respondent-Appellant,

-against-

Philip Khalil, et al.,
Defendants-Appellants-Respondents.

- - - - -

Philip Khalil,
Third-Party Plaintiff-Appellant,

-against-

Jeffrey A. Kimmel, et al.,
Third-Party Defendants-Respondents.

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The Marantz Law Firm, Rye (Neil G. Marantz of counsel), for appellants-respondents/appellant.

Meister Seelig & Fein LLP, New York (Jeffrey A. Kimmel of counsel), for respondent-appellant.

Traub Lieberman Straus & Shrewsberry LLP, Hawthorne (Lisa L. Shrewsberry of counsel), for respondents.

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Order, Supreme Court, New York County (Donna M. Mills, J.), entered May 25, 2012, which, to the extent appealed from, granted defendants' motion to dismiss the complaint as against defendant James O'Callaghan for lack of personal jurisdiction, granted the motion as to defendant Eckersley O'Callaghan Structural Design (EOC) (with O'Callaghan, the UK defendants) to the extent of referring the issue of long-arm jurisdiction pursuant to CPLR 302(a), granted the motion to dismiss the first cause of action

as against defendant Philip Khalil, denied the motion to dismiss the fifth through eleventh causes of action, and denied the motion to disqualify third-party defendants from serving as counsel for plaintiff in the main action, and granted third-party defendants' motion to dismiss the third-party complaint, unanimously modified, on the law, to deny defendants' motion to dismiss the complaint as against the UK defendants for lack of personal jurisdiction, and to grant the motion to dismiss the tenth and eleventh causes of action as against the UK defendants, and otherwise affirmed, without costs.

The complaint alleges that Khalil, an employee of plaintiff, and employees of EOC, including O'Callaghan, worked together to use plaintiff's confidential and proprietary information to divert work for Apple Inc., including a project for the Apple Store on Broadway in Manhattan, from plaintiff to Khalil and EOC. These allegations are sufficient to establish that the UK defendants transacted business in New York, through Khalil as their agent, and therefore to invoke jurisdiction over them pursuant to CPLR 302(a)(1) (*see New Media Holding Co. LLC v Kagalovsky*, 97 AD3d 463 [1st Dept 2012]).

The allegations also are sufficient to establish that the UK defendants engaged in tortious conduct in New York, again acting through Khalil as their agent, and therefore to invoke

jurisdiction pursuant to CPLR 302(a)(2) (*see Small v Lorillard Tobacco Co.*, 252 AD2d 1, 17 [1st Dept 1998], *affd* 94 NY2d 43 [1999]). This is so despite the motion court's dismissal of the conspiracy claim (the first cause of action) as against Khalil (*see Reeves v Phillips*, 54 AD2d 854 [1st Dept 1976]).

We do not find that subjecting the UK defendants to jurisdiction in New York would offend due process (*see Kreutter v McFadden Oil Corp.*, 71 NY2d 460, 466 [1988]).

The allegations that the UK defendants were aware that Khalil was plaintiff's full-time employee, and hired him and caused him to breach his duty to plaintiff, inter alia, by inducing him to disclose plaintiff's confidential and proprietary information, state a cause of action for tortious interference with plaintiff's business relationship with Khalil (*see Zimmer-Masiello, Inc. v Zimmer, Inc.*, 159 AD2d 363, 366 [1st Dept 1990], *lv dismissed* 76 NY2d 772 [1990]).

The complaint alleges that Khalil used plaintiff's resources to do work for EOC, including accessing and forwarding to the UK defendants confidential information such as the amount of plaintiff's bids on pending contracts, as well as "innovative technical details" and "specialty glass details" that plaintiff had "custom-designed and developed" for several specified projects. These allegations state causes of action for unfair

competition and misappropriation of trade secrets (*see Eagle Comtronics v Pico Prods.*, 256 AD2d 1202, 1203 [4th Dept 1998]; *Sylmark Holdings Ltd. v Silicone Zone Intl. Ltd.*, 5 Misc 3d 285, 287 [Sup Ct, NY County 2004]).

The complaint alleges aiding and abetting breach of fiduciary duty with the requisite particularity (*see* CPLR 3016[b]; *Stewart Tit. Ins. Co. v Liberty Tit. Agency, LLC*, 83 AD3d 532, 533 [1st Dept 2011]; *National Westminster Bank v Weksel*, 124 AD2d 144, 149 [1st Dept 1987]).

The causes of action for a constructive trust and an accounting must be dismissed as against the UK defendants since plaintiff concededly had no fiduciary relationship with them (*see Krinos Foods, Inc. v Vintage Food Corp.*, 30 AD3d 332 [1st Dept 2006]; *Bouley v Bouley*, 19 AD3d 1049, 1051 [4th Dept 2005]). However, the complaint states causes of action for a constructive trust over any monies or other property that may be identified as having flowed from Khalil's usurpation of business opportunities from plaintiff and for an accounting from Khalil (*see Poling Transp. Corp. v A&P Tanker Corp.*, 84 AD2d 796, 797 [2d Dept 1981]; *Bouley*, 19 AD3d at 1051).

Plaintiff's counsels' status as third-party defendants is not a sufficient basis for disqualifying them (*see Aryeh v Aryeh*,

14 AD3d 634, 634 [2d Dept 2005]).

As to the third-party complaint, an absolute privilege attaches to the statements made by plaintiff's counsel in the April 2011 letters, because they were issued in the context of "prospective litigation" (*see Sexter & Warmflash, P.C. v Margrabe*, 38 AD3d 163, 174 [1st Dept 2007]; *Vodopia v Ziff-Davis Publ. Co.*, 243 AD2d 368 [1st Dept 1997]). Even viewed in the liberal light required on a motion to dismiss pursuant to CPLR 3211, the third-party complaint and the documentary evidence fail, absent the libel claims, to allege the "malice" or use of "improper or illegal means" required to state a cause of action for tortious interference with business relations (*see Amaranth LLC v J.P. Morgan Chase & Co.*, 71 AD3d 40, 47 [1st Dept 2009], *lv dismissed in part, denied in part* 14 NY3d 736 [2010]).

We have considered defendants' remaining arguments for affirmative relief, including their contentions as to the cause of action for injunctive relief, and find them unavailing.

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

ENTERED: FEBRUARY 14, 2013

CLERK

Mazzarelli, J.P., Friedman, Manzanet-Daniels, Román, Clark, JJ.

9253 In re Rosemary V., and Another,

Dependent Children Under the
Age of Eighteen Years, etc.,

Jorge V.,
Respondent-Appellant,

Administration for Child Services,
Petitioner-Respondent.

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Law Offices of Randall S. Carmel, Syosset (Randall S. Carmel of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Susan Paulson of counsel), for respondent.

Lisa H. Blitman, New York, attorney for the children.

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Order of fact-finding and disposition, Family Court, Bronx County (Fernando H. Silva, J.), entered on or about March 20, 2012, which, to the extent appealed from as limited by the briefs, after a fact-finding hearing, determined that respondent father had neglected the subject children, unanimously affirmed, without costs.

The finding of neglect was supported by a preponderance of the evidence (*see* Family Ct Act §§ 1012[f][i][B]; 1046[b][i]). The testimony at the hearings demonstrated that the father had left the 9- and 10-year-old children home alone at night so that he could engage in a narcotics transaction, which resulted in his

arrest. Further, during the five or six hours that the father was in police custody, he took no steps to ensure the safety of the children, during which time they locked themselves out of the apartment and went to a stranger's apartment for help. Given the imminent danger of physical or mental impairment to the children, the finding of neglect was appropriate even though the children were not actually harmed (*see Nicholson v Scoppetta*, 3 NY3d 357, 369 [2004]). Based on the father's failure to testify, the court was allowed to draw the strongest inference against the father that the opposing evidence permitted (*see Matter of Commissioner of Social Servs. v Philip De G.*, 59 NY2d 137, 141 [1983]).

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

ENTERED: FEBRUARY 14, 2013

CLERK

Mazzarelli, J.P., Friedman, Manzanet-Daniels, Román, Clarke, JJ.

9255 Probate Proceeding, Will of Reva Katz, Deceased. File 497/08

- - - - -

Barbara Fortgang, et al.,
Petitioners-Respondents,

-against-

Dr. Jeffrey I. Katz,
Objector-Appellant.

_____

Jack Dashosh, Sea Cliff, for appellant.

Goldfarb Abrandt Salzman & Kutzin LLP, New York (Michael S. Kutzin of counsel), for respondents.

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Order, Surrogate's Court, New York County (Kristin Booth Glen, S.), entered on or about September 28, 2012, which granted petitioners' motion for summary judgment dismissing objector's objections to probating the will, unanimously affirmed, without costs.

In opposition to the self-proving affidavits submitted by petitioners establishing the decedent's competency at the time her will was executed (*see Matter of Schlaeger*, 74 AD3d 405 [1st Dept 1995]), objector submitted a medical opinion to the contrary by a doctor who had never examined decedent and based her opinion solely on medical records (*see Matter of Estate of Van Patten*, 215 AD2d 947, 949 [3d Dept 1995], *lv denied* 87 NY2d 802 [1995]). Moreover, the decedent was examined shortly before she executed

the will by a psychiatrist hired by her trust and estates lawyer and was found competent.

The fact that the decedent's lawyer was referred to her by petitioners is insufficient to raise an issue of fact as to undue influence *(see Matter of Walther*, 6 NY2d 49, 54-55 [1959]). Moreover, the decedent adequately explained in the will her exclusion of objector therefrom.

Objector failed to identify any knowing misstatement by petitioners to support his objection based on fraud.

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

ENTERED: FEBRUARY 14, 2013

CLERK

Mazzarelli, J.P., Manzanet-Daniels, Román, Clark, JJ.

9256 Valerie Guntur, Index 114688/09
Plaintiff-Appellant,

-against-

Jetblue Airways Corporation,
Defendant-Respondent.

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Michael P. Lagnado, New York, for appellant.

Alimonti Law Offices, White Plains (Lydia S. Antoncic of counsel), for respondent.

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Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered October 7, 2011, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendant airline established its entitlement to judgment as a matter of law in this action where plaintiff alleges that she was injured when she slipped and fell on "wet icy dirt" while boarding defendant's aircraft, after her flight had been delayed due to inclement weather. Defendant submitted, inter alia, climatological records showing that plaintiff's accident occurred during an ongoing storm, during which its duty to remedy a dangerous condition caused by the storm was suspended (*see Pippo v City of New York*, 43 AD3d 303, 304 [1st Dept 2007]; *Blackwood v New York City Tr. Auth.*, 36 AD3d 522 [1st Dept 2007]). Defendant

had no obligation to provide a constant remedy for tracked-in or leaking water during the storm, and showed that it took reasonable precautions to address wet conditions by laying a carpet runner along the jetbridge and placing a canopy over the aircraft door (*see Pomahac v TrizecHahn 1065 Ave. of Ams., LLC*, 65 AD3d 462, 464-466 [1st Dept 2009]; *Solazzo v New York City Tr. Auth.*, 21 AD3d 735 [2005], *affd* 6 NY3d 734 [2005]).

Plaintiff's opposition failed to raise a triable issue of fact. Contrary to plaintiff's argument, the testimony of defendant's employee, stating that the precipitation was "[o]n and off," that day does not raise a triable issue since it does not show that plaintiff's accident occurred during "a significant lull in the storm," or a reasonable time after the storm had ceased (*Pipero v New York City Tr. Auth.*, 69 AD3d 493, 493 [1st Dept 2010]; *see Ioele v Wal-Mart Stores*, 290 AD2d 614, 616 [3d Dept 2002]). Indeed, the employee also testified that the rain

or snow ended "well into midnight the next morning."

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

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

ENTERED: FEBRUARY 14, 2013

CLERK

Mazzarelli, J.P., Friedman, Manzanet-Daniels, Román, Clark, JJ.

9257 The People of the State of New York, Ind. 9717/98
Respondent,

-against-

Danny Williams,
Defendant-Appellant.

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

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

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Judgment of resentence, Supreme Court, New York County (Michael J. Obus, J.), rendered October 14, 2010, as amended November 9, 2010, resentencing defendant, as a second violent felony offender, to an aggregate term of 15 years, with 5 years' postrelease supervision, unanimously affirmed.

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

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

ENTERED: FEBRUARY 14, 2013

CLERK

Mazzarelli, J.P., Friedman, Manzanet-Daniels, Román, Clark, JJ.

9258N- Index 603751/09
9258NA MBIA Insurance Corporation,
Plaintiff-Appellant,

-against-

Credit Suisse Securities (USA) LLC, et al.,
Defendants-Respondents.

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Patterson Belknap Webb & Tyler LLP, New York (Erik Haas of counsel), for appellant.

Orrick, Herrington & Sutcliffe LLP, New York (John Ansbro of counsel), for respondents.

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Orders, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered May 29 and August 16, 2012, which, to the extent appealed from, denied plaintiff's motion insofar as it sought a commission permitting it to serve subpoenas to obtain nonparty, financial disclosure and testimony from the employers of 400 nonparty, out-of-state borrowers of residential mortgage loans, and sought to serve subpoenas on out-of-state borrowers who participated in reduced documentation loan programs, unanimously affirmed, without costs.

This is an action for fraud and breach of contractual representations and warranties by plaintiff, a financial guaranty insurance provider, against defendants, the sponsor, underwriter and servicer of a transaction in which thousands of residential

mortgage loans were consolidated into a pool and transferred to a trust formed to issue mortgage-backed securities. None of the parties served as the originator of the underlying mortgage loan transactions or had any direct relationship with any borrower.

Supreme Court correctly denied plaintiff's motion for an open-ended commission to take the deposition and obtain document disclosure, including, among other things, personal investment and bank account statements and personal income tax returns, from nonparty residential mortgage borrowers in every state except New York, three United States territories and the District of Columbia, since plaintiff failed to make a "strong showing of necessity and demonstrate that the information . . . is unavailable from other sources" (*Williams v New York City Hous. Auth.*, 22 AD3d 315, 316 [1st Dept 2005], quoting *Gordon v Grossman*, 183 AD2d 669, 670 [1st Dept 1992]). Since the parties offer conflicting interpretations of the warranties and representations found in the parties' insurance agreement, the relevance of the requested material is, at best, still yet to be established. Furthermore, in seeking extensive amounts of duplicative, personal and confidential financial information from over five years ago, the discovery request constitutes an undue burden and expense on the responding nonparties (*see U.S. Bank N.A. v GreenPoint Mtge. Funding, Inc.*, 94 AD3d 58, 64 [1st Dept

2012]). Plaintiff's contention that this discovery is material and necessary to its fraud and breach of contract claims because it could potentially yield evidence that a borrower fraudulently or negligently misrepresented the financial information provided on his or her mortgage loan application is not supported by particularized factual allegations specific to any of the borrowers selected for this disclosure.

For the same reasons, the court properly denied plaintiff's motion to the extent that it sought an open-ended commission to serve subpoenas on the employer of each borrower.

While plaintiff argues that every other court has permitted nonparty discovery of this nature, we find those cases to be distinguishable based on differences in the parties' governing agreements or the defendants' direct relationship with the borrowers as originator of the mortgage loans, and in any event, since all of the orders cited by plaintiff are from a trial level state or federal court, they do not constitute binding authority and need not be followed.

Denial is proper for the additional reason that plaintiff has failed to demonstrate that a commission is "necessary or convenient" (CPLR 3108), by neglecting to include "allegations that the proposed out-of-state deponent would not cooperate with a notice of deposition or would not voluntarily come within this

State or that the judicial imprimatur accompanying a commission will be necessary or helpful" (*Reyes v Riverside Park Community [Stage I], Inc.*, 59 AD3d 219, 219 [1st Dept 2009][internal quotation marks omitted]).

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

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

ENTERED: FEBRUARY 14, 2013

CLERK

Mazzarelli, J.P., Acosta, Freedman, Richter, Gische, JJ.

9369 Medical Buildings Associates, Inc., Index 105724/11
Plaintiff-Appellant,

-against-

Abner Properties Company,
Defendant-Respondent.

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Sperber Denenberg & Kahan, P.C., New York (James C. Mantia of counsel), for appellant.

Belkin Burden Wenig & Goldman LLP, New York (Magda L. Cruz of counsel), for respondent.

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Order, Supreme Court, New York County (Paul Wooten, J.), entered August 3, 2012, which, to the extent appealed from as limited by the briefs, directed plaintiff-tenant to file an undertaking equal to three months rent as a condition to granting the tenant's order to show cause for a *Yellowstone* injunction, unanimously modified, on the law, the facts and in the exercise of discretion, to reduce the undertaking to one month's rent, and otherwise affirmed, without costs.

The undertaking in the amount of three months rent was "excessive" given the inadequate proof and otherwise speculative arguments offered by the landlord as to potential damages (*see generally Visual Equities v Sotheby's, Inc.*, 199 AD2d 59 [1st Dept 1993]; *Access Med. Group, P.C. v Straus Family Capital Group, LLC*, 44 AD3d 975 [2d Dept 2007]). Not only do factual

issues exist as to which party was at fault for the delays in curing the claimed violations, but the record shows the tenant has expended considerable sums of money which have added appreciable value to the premises (*see generally Kuo Po Trading Co. v Tsung Tsin Assn.*, 273 AD2d 111 [1st Dept 2000]; *WPA/Partners v Port Imperial Ferry Corp.*, 307 AD2d 234 [1st Dept 2003]). Nonetheless, one month's rent would reflect an appropriate undertaking, as it would be rationally related to the potential damages in the event the injunction is found to have been unwarranted (*see 3636 Greystone Owners v Greystone Bldg.*, 4 AD3d 122 [1st Dept 2004]; *Ithilien Realty Corp. v 180 Ludlow Dev. LLC*, 80 AD3d 455 [1st Dept 2011]) inasmuch as the tenant acknowledged a potential cost of $20,000 to cure, that almost one year has transpired since the notice to cure was served, and the building remains subject to potential violations.

The tenant's demand for a hearing on the undertaking issue

is unavailing as the record affords an adequate basis to determine an appropriate undertaking.

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

ENTERED: FEBRUARY 14, 2013

CLERK