SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

DECEMBER 7, 2017

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Acosta, P.J., Mazzarelli, Kapnick, Webber, JJ.

5154-
5155 Daniel G. Hickey, Jr., Index 153640/13
Plaintiff-Respondent,

-against-

Steven E. Kaufman, P.C., et al.,
Defendants-Appellants.

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Wilson Elser Moskowitz Edelman & Dicker LLP, New York (Patrick J. Lawless of counsel), for Steven E. Kaufman, P.C., Steven E. Kaufman and Andrew H. Kaufman, appellants.

Furman Kornfeld & Brennan LLP, New York (A. Michael Furman of counsel), for Spiegel, Brown, Fichera & Cote, LLP and Donald D. Brown, Jr., appellants.

Gold Benes, LLP, Bellmore (Melissa B. Levine of counsel), for respondent.

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Order, Supreme Court, New York County (Shlomo S. Hagler, J.), entered October 9, 2015, which granted plaintiff's motion for leave to amend the complaint and denied defendants' motions to dismiss the complaint as against them as moot, unanimously affirmed, without costs. Order, same court and Justice, entered on or about February 3, 2017, which denied defendants' motions to dismiss the amended complaint as against them, unanimously reversed, on the law, without costs, and the motions granted.

The Clerk is directed to enter judgment dismissing the amended complaint.

Given the Legislature's 2005 amendment of CPLR 3211(e) (*see Lucido v Mancuso*, 49 AD3d 220, 228-229 [2d Dept 2008], *appeal withdrawn* 12 NY3d 813 [2009]), plaintiff was not required to support his motion to amend the complaint with an affidavit of merit (*MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 500 [1st Dept 2010]). However, even viewed in the light of older precedent requiring an affidavit of merit on a motion to amend (*see e.g. Bonanni v Straight Arrow Publs.*, 133 AD2d 585, 588 [1st Dept 1987]), the court providently exercised its discretion in finding that plaintiff's verification of the proposed amended complaint and his affidavit in opposition to defendants' motions to dismiss the original complaint, which affidavit was annexed as an exhibit to the proposed amended complaint, satisfied the requirement of an affidavit of merit. Plaintiff was not required to explain his approximately six-month delay in moving to amend the complaint (*compare Oil Heat Inst. of Long Is. Ins. Trust v RMTS Assoc.*, 4 AD3d 290 [1st Dept 2004] [2½ year delay]; *Heller v Louis Provenzano, Inc.*, 303 AD2d 20 [1st Dept 2003] [motion made more than six years after commencement of action, four years after filing of note of issue, more than four years after first trial, and more than 1½ years after decision on prior appeal]).

The fact that defendants expended time and expense in briefing their replies on their motions to dismiss the original complaint and preparing for oral argument is not the kind of prejudice required to defeat an amendment (*see Jacobson v Croman*, 107 AD3d 644 [1st Dept 2013]).

Nevertheless, the amended complaint must be dismissed, because plaintiff's claim that, but for defendants' negligence, he would have recovered the full $3 million that he was owed during the bankruptcy filed by nonparty Majestic Capital, Ltd., consists of "gross speculations on future events" (*Sherwood Group v Dornbush, Mensch, Mandelstam & Silverman*, 191 AD2d 292, 294 [1st Dept 1993]; *see also Heritage Partners, LLC v Stroock & Stroock & Lavan LLP*, 133 AD3d 428 [1st Dept 2015], *lv denied* 27 NY3d 904 [2016]; *Turk v Angel*, 293 AD2d 284 [1st Dept 2002], *lv denied* 100 NY2d 510 [2003]).

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

ENTERED: DECEMBER 7, 2017

CLERK

Richter, J.P., Gische, Kern, Oing, JJ.

3501 The People of the State of New York, Respondent, Ind. 1224/12

-against-

Tulsie Singh,
Defendant-Appellant.

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

Queens County District Attorney's Office, Kew Gardens (Jonathan Yi of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Troy K. Webber, J.), rendered September 25, 2015, convicting defendant, upon his plea of guilty, of attempted course of sexual conduct against a child in the second degree, and sentencing him to a term of 10 years' probation, unanimously affirmed.

The court properly denied defendant's motion to dismiss the indictment on the ground of preindictment delay (*see People v Singer*, 44 NY2d 241 [1978]; *People v Taranovich*, 37 NY2d 442, 445 [1975]). Based on the record regarding the unwillingness of the victim to testify before the grand jury, the People sufficiently explained the 4½-year delay between first detaining defendant and ultimately initiating the prosecution after the victim became able to testify. The evidence before the motion court established that the determination to delay the prosecution was

made in good faith and not to gain a tactical advantage (*see People v Vernace*, 96 NY2d 886, 888 [2001]). We have considered and rejected defendant's remaining arguments on this issue.

Defendant's constitutional speedy trial claim regarding the delay between the indictment and the guilty plea is unreviewable because defendant has not provided the minutes of any of the relevant adjournments (*see People v Olivo*, 52 NY2d 309, 320 [1981]; *People v Arroyo*, 93 AD3d 608 [1st Dept 2012], *lv denied* 19 NY3d 957 [2012]). To the extent that the present record permits review, we find no violation of defendant's constitutional right to a speedy trial (*see Taranovich*, 37 NY2d at 445). Defendant has not established what portion of the delay was caused by the People, or that he was prejudiced by any delay.

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

ENTERED: DECEMBER 7, 2017

CLERK

Richter, J.P., Mazzarelli, Kahn, Moulton, JJ.

4949 In re Legend S.,
Appellant,

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

Edwin Gould Services for Children,
Petitioner-Appellant,

Tawana T., et al.,
Respondents-Respondents.

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Andrew J. Baer, New York, for Legend S., appellant.

John R. Eyerman, New York, for Edwin Gould Services for Children and Families, appellant.

Elisa Barnes, New York, for Tawana T., respondent.

Tennille M. Tatum-Evans, New York, for Terrell S., respondent.

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Order, Family Court, New York County (Jane Pearl, J.), entered on or about March 29, 2016, which, after a fact-finding hearing, dismissed the petition filed by Edwin Gould Services for Children (EGS), to declare a child permanently neglected, unanimously affirmed, without costs.

Respondents Tawana T. and Terrell S. are the parents of the subject child, L., born November 30, 2008. The child was born prematurely, and, upon discharge from the hospital was placed directly into foster care, on March 6, 2009, as a result of findings and orders determining he is a neglected child. On that

date, the Commissioner of Social Services transferred responsibilities for the child's foster care placement to EGS. The child has lived with the same foster mother since March 6, 2009, and she seeks to adopt him.

On March 20, 2015, EGS filed a petition for commitment of the child, alleging that the child was a permanently neglected child as defined in Social Services Law § 384-b, and seeking termination of parental rights. We affirm Family Court's dismissal of the petition on grounds of EGS's failure to prove, by clear and convincing evidence, that the parents, for a period of at least one year following the date the child came into EGS's care, substantially and continuously or repeatedly failed to plan for the child's future (*see* Social Services Law § 384-b[7][a]; *Matter of Star Leslie W.*, 63 NY2d 136 [1984]).

The obligation to plan requires parents "to take such steps as may be necessary to provide an adequate, stable home and parental care for the child within a period of time which is reasonable under the financial circumstances available to the parent. The plan must be realistic and feasible, and good faith effort shall not, of itself, be determinative. In determining whether a parent has planned for the future of the child, the court may consider the failure of the parent to utilize medical, psychiatric, psychological and other social and rehabilitative

services and material resources made available to such parent" (Social Services Law § 384-b[7][c]).

EGS and the attorney for the child (AFC) do not specify the one-year period during which the parents allegedly failed to plan for the chils's future. They contend that the parents did not complete certain mandated services. Specifically, caseworker Calliste testified that after their four other children were removed from their home due to a domestic violence incident, both parents failed to participate in random drug testing, and the father did not complete counseling. However, the period of alleged noncompliance was shorter than the statutory one-year period (*see* Social Services Law § 384-b[7][a]).

With respect to the period during which the parents undisputedly did comply with the service plan, EGS and AFC argue that, notwithstanding such cooperation, they failed to gain insights into their own behavior that led to the child's removal at the outset, as well as their mental health issues. EGS did not meet its burden to prove this as a basis for a finding of permanent neglect. The evidence at trial included testimony that the mother completed all mandated services, and sought out additional services on her own initiative. As to the father, the very limited testimony relied on by EGS to prove his failure to gain insights ("I just wanted to comply"), is insufficient to

meet EGS's high burden. Moreover, because it is not possible, on the record before us, to determine why the child was removed from the parents' care in 2009, it cannot be said that EGS has proven, by clear and convincing evidence, that the parents failed to gain insights into the behavior that led to that removal. Likewise, in the absence of a more complete explanation in the record of the parents' mental health issues, it is not possible to conclude that they lack insight into their own mental health.

Nor has EGS met its burden to prove the parents failed to plan for the child's future by failing to secure adequate housing. EGS and AFC do not adequately address the evidence that certain housing-related issues were beyond the family's control, such as strict shelter rules regarding maximum occupancy. The parents' application to obtain NYCHA housing was denied because of some unspecified reason related to the father. Although the lack of housing is a concern that the parents must address, given the dearth of information about why the NYCHA application was denied, and what other housing subsidies might be available to the parents, we cannot conclude, on this sparse record, that the failure to secure adequate housing, without more, constitutes a sufficient basis for a finding of permanent neglect.

"[T]ermination of parental rights is a drastic event" (*Matter of Medina Amor S.*, 50 AD3d 8, 16 [1st Dept 2008], *lv*

denied 10 NY3d 709 [2008]). Although we recognize that the child has never lived with his parents and has spent his entire life in foster care, we cannot reverse for that reason alone. In this case, the court properly dismissed the petition because EGS failed to satisfy its burden of proof.

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

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

ENTERED: DECEMBER 7, 2017

CLERK

Manzanet-Daniels, J.P., Mazzarelli, Kapnick, Webber, JJ.

5150 The People of the State of New York, Respondent,

-against-

Ivan Jones,
Defendant-Appellant.

Ind. 2540/12

Dechert LLP, New York (Andrew A. Spievack and Benjamin E. Rosenberg of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Emily A. Aldridge of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Margaret L. Clancy, J.), rendered June 6, 2014, convicting defendant, after a jury trial, of robbery in the second degree, and sentencing him, as a second felony offender, to a term of 11 years, unanimously affirmed.

Defendant did not preserve his claim that the evidence was legally insufficient to establish that the victim's injury occurred in the course of a robbery, and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits. We also reject defendant's preserved challenge to the sufficiency of the evidence establishing that the injury rose to the level of "physical injury" (Penal Law § 10.00[9]), and find that the verdict was not against the weight of the evidence as to either issue (*see People v Danielson*, 9

NY3d 342, 348-349 [2007]).

Initially, we find no basis for disturbing the jury's credibility determinations. Defendant's acquittal of other charges does not warrant a different conclusion (*see People v Rayam*, 94 NY2d 557 [2000]). Viewing the evidence as a whole, "including proof adduced by the defense" (*People v Hines*, 97 NY2d 56, 61 [2001]), we conclude that the evidence supports the conclusion that the victim's choking injuries were inflicted in the course of the robbery. The victim's testimony that she had difficulty swallowing for two weeks after the incident as the result of being choked supports a finding of physical injury (*see People v Greene*, 70 NY2d 860, 862 [1987]).

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

ENTERED: DECEMBER 7, 2017

CLERK

Manzanet-Daniels, J.P., Mazzarelli, Kapnick, Webber, JJ.

5151 Hertz Vehicles, LLC, etc., Index 154319/15
Plaintiff-Respondent,

-against-

Dariel Cepeda, et al.,
Defendants,

Innovative Health Chiropractic, P.C.,
Defendant-Appellant,

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Law Office of Gregory A. Goodman, P.C., Hauppauge (Gregory A. Goodman of counsel), for appellant.

Robyn M. Brilliant, P.C., New York (Barry Montrose of counsel), for respondent.

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Order, Supreme Court, New York County (Joan M. Kenney, J.), entered on or about March 8, 2017, which, to the extent appealed from, denied defendant Innovative Health Chiropractic, P.C.'s request for attorneys' fees, unanimously affirmed.

Defendant Innovative argues that, as the assignee of the rights of the no-fault claimants in the underlying automobile accident to whom it provided medical treatment, it successfully defended itself in this declaratory judgment action and thus should recover attorneys' fees just as an insured may recover attorneys' fees upon successfully defending itself against an action brought by its insurer for a judgment declaring that the insurer had no duty to defend or indemnify it (*see U.S.*

Underwriters Ins. Co. v City Club Hotel, LLC, 3 NY3d 592, 597-598 [2004], citing *Mighty Midgets, Inc. v Centennial Ins. Co.*, 47 NY2d 12, 21-22 [1979]). This argument is unavailing.

The insured in the circumstances described above may recover attorneys' fees because "an insurer's duty to defend an insured extends to the defense of any action arising out of the occurrence, including a defense against an insurer's declaratory judgment action" (*U.S. Underwriters*, 3 NY3d at 597-598).

There is no such duty in this case, as Innovative is not an insured to which Hertz owes a duty to defend. Although Innovative was assigned the claimants' rights for reimbursement of no-fault benefits, the claimants were only passengers in the insured vehicle at the time of the accident, and were not parties to whom Hertz owed a duty to defend (*Fiduciary Ins. Co. Of Am. v Medical Diagnostic Servs., P.C.*, 150 AD3d 498 [1st Dept 2017] *citing U.S. Underwriters*, 3 NY3d at 597-598).

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

ENTERED: DECEMBER 7, 2017

CLERK

Manzanet-Daniels, J.P., Mazzarelli, Kapnick, Webber, JJ.

5152 In re Tyler Y.,

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

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

Zachary W. Carter, Corporation Counsel, New York (Emma Grunberg of counsel), for presentment agency.

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Order of disposition, Family Court, New York County, (Stewart H. Weinstein, J.), entered on or about February 4, 2016, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed an act that, if committed by an adult, would constitute the crime of assault in the third degree, and placed him on probation for 12 months, unanimously reversed, as an exercise of discretion in the interest of justice, without costs, the delinquency finding and dispositional order vacated, and the matter remanded to Family Court with the direction to order an adjournment in contemplation of dismissal nunc pro tunc to February 4, 2016.

Although we find appellant's challenges to the sufficiency and weight of the evidence unavailing, we conclude that an adjournment in contemplation of dismissal would have been the least restrictive dispositional alternative consistent with

appellant's needs and the community's need for protection (*see Matter of Katherine W.*, 62 NY2d 947 [1984]), and we exercise our interest of justice jurisdiction accordingly.

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

ENTERED: DECEMBER 7, 2017

CLERK

Manzanet-Daniels, J.P., Mazzarelli, Kapnick, Webber, JJ.

5156 The People of the State of New York, Respondent,

-against-

Robert O'Connor, Defendant-Appellant.

Ind. 4230/86

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

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

Order, Supreme Court, New York County (Patricia M. Nuñez, J.), entered on or about July 7, 2016, which adjudicated defendant a level three sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court providently exercised its discretion when it declined to grant defendant's request for a downward departure to level two (*see People v Gillotti*, 23 NY3d 841 [2014]). Defendant's prior felony sex crime conviction automatically resulted in an override to a risk level three, regardless of any point assessments, and there were no mitigating factors that were not adequately taken into account by the risk assessment instrument, or that outweighed the seriousness of the underlying offense.

Although the People obtained records of defendant's prison sex offender treatment by serving a subpoena on the Department of Correction and Community Supervision that was neither court-ordered nor on notice to defendant, we find that, to the extent there was any violation of the Health Insurance Portability and Accountability Act of 1996 (Pub L 104-191, 110 US Stat 1936) and its accompanying privacy rules (45 CFR parts 160, 164), or of any applicable CPLR provisions, there is no basis for a remand for further proceedings. In seeking a downward departure from his presumptive risk level, defendant relied, in part, on his completion of sex offender treatment as a mitigating factor, and as such, he affirmatively put his treatment at issue, and thus waived his claims that the records were improperly obtained (*see People v Vazquez*, 148 AD3d 601, 602 [1st Dept 2017]).

In any event, we find the error harmless. The court had ample grounds on which to deny the downward departure, including defendant’s failure to truly accept responsibility.

We decline to revisit our determination in *Vazquez*, and we find unpersuasive defendant's attempts to distinguish that case.

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

ENTERED: DECEMBER 7, 2017

CLERK

Manzanet-Daniels, J.P., Mazzarelli, Kapnick, Webber, JJ.

5157-
5157A

Ind. 3954/14
4620N/15

The People of the State of New York,
Respondent,

-against-

Brian Lopez,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Diane N. Princ of counsel), for respondent.

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Appeals 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 December 22, 2015, and a judgment of the same court (Michael Sonberg, J.), rendered February 16, 2016,

Said appeals 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 judgments so appealed from be and the same are hereby affirmed.

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

ENTERED: DECEMBER 7, 2017

CLERK

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

Manzanet-Daniels, J.P., Mazzarelli, Kapnick, Webber, JJ.

5158 George Patton, Index 152184/15
Plaintiff-Respondent,

-against-

Taszo Coffee, LLC,
Defendant-Appellant.

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Law Offices of Tobias & Kuhn, New York (Alexander Statsky of counsel), for appellant.

Greenberg Law P.C., New York (Jennifer A. Shafer of counsel), for respondent.

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Order, Supreme Court, New York County (Barbara Jaffe, J.), entered March 20, 2017, which, to the extent appealed from as limited by the briefs, denied defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendant failed to meet its initial burden to show that it did not own the bench from which plaintiff fell, and that its employees did not place it at the accident location prior to the accident (*see Torres v City of New York*, 32 AD3d 347, 348 [1st Dept 2006]). Any inconsistencies in plaintiff's testimony as to

the location of the accident raise credibility issues, which must be resolved by the trier of fact (*see Aller v City of New York*, 72 AD3d 563, 564 [1st Dept 2010]).

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

ENTERED: DECEMBER 7, 2017

CLERK

Manzanet-Daniels, J.P., Mazzarelli, Kapnick, Webber, JJ.

5159 Harry Mohinani, et al., Index 653229/12
Plaintiffs-Respondents,

-against-

Tzlila Charney, etc., et al.,
Defendants-Appellants.

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Olshan Frome Wolosky LLP, New York (Thomas J. Fleming of counsel), for appellants.

Eaton & Van Winkle LLP, New York (Robert K. Gross of counsel), for respondents.

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Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered March 14, 2016, which, to the extent appealed from, denied defendants' motion to dismiss the breach of contract, fraudulent inducement, breach of fiduciary duty, and accounting claims, unanimously affirmed, with costs.

Contrary to defendants' contention, the complaint alleges the existence of an enforceable agreement. It is clear that Charney agreed to provide plaintiffs with equity in defendant LHC Club LLC in exchange for their $4.5 million investment, and the specific terms governing plaintiffs' rights are not so indefinite as to render the agreement unenforceable (*see Cobble Hill Nursing Home v Henry & Warren Corp.*, 74 NY2d 475, 482-483 [1989], *cert denied* 498 US 816 [1990]). Nor is the agreement as alleged "inherently incredible" (*see M & B Joint Venture, Inc. v Laurus*

Master Fund, Ltd., 49 AD3d 258, 260, 262 n 2 [1st Dept 2008], *mod on other grounds* 12 NY3d 798 [2009]; *Jamaica Pub. Serv. Co. v Compagnie Transcontinentale De Reassurance*, 282 AD2d 227 [1st Dept 2001]).

Defendants failed to demonstrate as a matter of law that the complaint does not state a claim for fraudulent inducement. An issue of fact exists whether plaintiffs had "knowledge of New York real estate or United States laws, customs or business practices with respect to real estate or investments" (*Roni LLC v Arfa*, 18 NY3d 846, 849 [2011] [internal quotation marks omitted]). Thus, an issue of fact exists whether plaintiffs were sophisticated parties who can be charged with heightened due diligence obligations (*see ACA Fin. Guar. Corp. v Goldman, Sachs & Co.*, 25 NY3d 1043, 1046-1047 [2015]; *HSH Nordbank AG v UBS AG*, 95 AD3d 185, 194-195 [1st Dept 2012]). Questions exist whether the alleged statements and omissions that induced plaintiffs to invest their money pertained to matters peculiarly within Charney's knowledge, and, thus, whether plaintiffs could have discovered them even with the exercise of due diligence (*see ACA Fin. Guar. Corp.*, 25 NY3d at 1044-1045; *HSH Nordbank AG*, 95 AD3d at 194-195; *see also Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486, 491-492 [2008]). To the extent some branches of the fraud claim may be duplicative of the breach of contract claim

(*see Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 389-390 [1987]), it would be premature to dismiss them at this juncture.

The complaint alleges a fiduciary relationship between Charney, as the promoter of a real estate investment opportunity, and plaintiffs, as passive investors in the project (*see Roni*, 18 NY3d at 848).

In view of their alleged fiduciary relationship with Charney and their allegations that Charney did not provide a full accounting even after protracted discovery, plaintiffs are entitled to pursue their claim for an equitable accounting and related costs (*see Adam v Cutner & Rathkopf*, 238 AD2d 234 [1st Dept 1997]).

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

ENTERED: DECEMBER 7, 2017

CLERK

Manzanet-Daniels, J.P., Mazzarelli, Kapnick, Webber, JJ.

5160 Ambac Assurance Corporation, et al., Index 651359/13
Plaintiffs-Respondents,

-against-

Nomura Credit & Capital, Inc.,
Defendant-Appellant,

Nomura Holding America Inc.,
Defendant.

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Shearman & Sterling LLP, New York (Matthew L. Craner of counsel), for appellant.

Patterson Belknap Webb & Tyler LLP, New York (Peter W. Tomlinson of counsel), for respondents.

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An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Marcy S. Friedman, J.), entered June 3, 2015,

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

It is unanimously ordered that the order so appealed from be and the same is hereby affirmed, with costs, for the reasons stated by Friedman, J.

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

ENTERED: DECEMBER 7, 2017

CLERK

Manzanet-Daniels, J.P., Mazzarelli, Kapnick, Webber, JJ.

5161 Christopher Moscione, Index 156835/13
Plaintiff-Respondent-Appellant,

-against-

QPII-43-23 Ithaca Street LLC, et al.,
Defendants-Appellants-Respondents,

Vantage Properties, LLC, et al.,
Defendants-Respondents.

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Ahmuty, Demers & McManus, Albertson (Glenn A. Kaminska of counsel), for appellants-respondents.

Burns & Harris, ESQS, New York (Blake G. Goldfarb of counsel), for respondent-appellant.

McGaw, Alventosa & Zajac, Jericho (Ross P. Masler of counsel), for Vantage Properties NY, LLC I/S/H/A, Vantage Properties, LLC, and Vantage Management Services, LLC, respondents.

Gottlieb Siegel & Schwartz, LLP, New York (Lauren M. Solari of counsel), for Guardsman Elevator Co., Inc., respondent.

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Order, Supreme Court, New York County (Carol R. Edmead, J.), entered August 8, 2016, which granted plaintiff's motion for spoliation sanctions to the extent of reserving for the trial court the decision whether to direct an adverse inference against defendants QPII-43-23 Ithaca Street LLC and Cooper Square Realty Inc., denied QPII and Cooper Square's motion for summary judgment dismissing the complaint and all cross claims against them, granted defendants Vantage Properties, LLC, and Vantage Management Services, LLC's motion for summary judgment dismissing

the complaint and all cross claims against them, and granted Guardsman Elevator Co., Inc.'s motion for summary judgment to the extent of dismissing the complaint as against it, unanimously modified, on the law and the facts, to the extent of directing the trial court to give an adverse inference charge as stated herein, and otherwise affirmed, without costs.

Plaintiff, a former United Parcel Service driver, was injured when the door to an elevator at the premises where he was making a delivery closed on him and failed to re-open.

The record demonstrates that defendants Vantage Properties, LLC, and Vantage Management Services were no longer the managing agents of the building at the time of the accident. Thus, there is no basis for holding them liable for plaintiff's injuries (*Armstrong v Ogden Allied Facility Mgt. Corp.*, 281 AD2d 317, 318 [1st Dept 2001]).

Defendant Guardsman Elevator's maintenance contract provided unambiguously that Guardsman was not responsible for the elevator door; therefore, extrinsic evidence may not be considered (*W.W.W. Assoc. v Giancontieri*, 77 NY2d 157 [1990]). Moreover, the record demonstrates that Guardsman took steps to alert the owners and managing agents of the building to the deteriorating condition of the elevator, preparing a proposal for the elevator's modernization, which was rejected.

The record presents issues of fact as to what defendants QPII-43-23 Ithaca Street LLC and Cooper Square Realty Inc., the owner and managing agent, respectively, of the building at the time of the accident, knew about the condition of the elevator. They had received Guardsman's modernization proposal, and there is evidence that they had notice of a problem with the elevator door.

On the record here, the motion court should have directed the trial court to give an adverse inference charge against QPII and Cooper Square as a sanction for spoliation. After numerous delays in scheduling an inspection of the elevator, plaintiff's counsel and expert arrived at the premises on the appointed date only to learn that the elevator had been torn out by the new building owner just days earlier. Although QPII and Cooper Square no longer owned or managed the premises by that time, they had undertaken the coordination of the inspection, and they should have advised the new owner to preserve the evidence until the inspection was concluded (*see generally Castiglione v Village*

of Ellenville, 291 AD2d 769 [3d Dept 2002]).

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: DECEMBER 7, 2017

CLERK

Manzanet-Daniels, J.P., Mazzarelli, Kapnick, Webber, JJ.

5162 In re Giannis F.,

A Child Under Eighteen
Years of Age, etc.,

Manny M.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent,

Vilma C.,
Respondent.

_____

Law Firm of Wayne F. Crowe, Jr., P.C., Bronx (Wayne F. Crowe, Jr. Of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Aaron M. Bloom of counsel), for respondent.

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

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Order of disposition, Family Court, Bronx County (Carol R. Sherman, J.), entered on or about March 18, 2014, which, to the extent it brings up for review a fact-finding order, same court and Judge, entered on or about December 16, 2013, found that respondent Manny M. was a person legally responsible for the subject child when he sexually abused her, unanimously affirmed, without costs.

Respondent failed to preserve for appellate review his argument that he was not a person legally responsible for the

child (*see Matter of Alijah S. [Daniel S.]*, 133 AD3d 555 [1st Dept 2015], *lv denied* 26 NY3d 917 [2016]), and we decline to consider it.

Were we to consider it, we would find that the record supports the determination that respondent, the subject child's older half-brother, was a person legally responsible for the child under Family Court Act § 1012(g) (*see Matter Trenasia J. [Frank J.]*, 25 NY3d 1001, 1005-1006 [2015]; *Matter of Yolanda D.*, 88 NY2d 790, 796 [1996]). The child testified that respondent repeatedly sexually abused her over a period of nearly four years, and that her mother did not believe her when she disclosed his conduct to her, resulting in a neglect finding against the mother (*see* 134 AD3d 457 [1st Dept 2015]). Although respondent was a minor when he began abusing his half sister, who is five years younger than he, the statutory definition of a "person legally responsible" does not exclude minors (Family Ct Act § 1012[g]), and minor siblings can fall within its ambit (*see Matter of Catherine G. v County of Essex*, 3 NY3d 175, 180 [2004];

Matter of Mary Alice V., 222 AD2d 594 [2d Dept 1995], *lv denied* 87 NY2d 811 [1996]). Furthermore, respondent had reached the age of majority when some of the acts of sexual abuse took place.

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

ENTERED: DECEMBER 7, 2017

CLERK

Manzanet-Daniels, J.P., Mazzarelli, Kapnick, Webber, JJ.

5163 The People of the State of New York, Ind. 2786/14
Respondent,

-against-

Olivia Carter,
Defendant-Appellant.

_____

Rosemary Herbert,, Office of the Appellate Defender, New York (Sharmeen Mazumder of counsel), for appellant.

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Gregory Carro, J.), rendered July 15, 2015,

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

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

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

ENTERED: DECEMBER 7, 2017

CLERK

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

Manzanet-Daniels, J.P., Mazzarelli, Kapnick, Webber, JJ.

5164 Ryan Rodriguez, et al., Index 158806/12
Plaintiffs-Respondents,

-against-

Columbia Pictures Industries, Inc.,
Defendant-Appellant,

Toys R Us-Delaware Inc., etc., et al.,
Defendants.

_____

Strongin Rothman & Abrams, LLP, New York (Lena Davydan and Howard F. Strongin of counsel), for appellant.

Purcell & Ingrao, P.C., Mineola (George F. Sacco of counsel), for respondents.

_____

Order, Supreme Court, New York County (Joan A. Madden, J.), entered on or about July 26, 2016, which, insofar as appealed from, denied defendant Columbia Pictures Industries, Inc.'s motion for summary judgment dismissing the common-law negligence and Labor Law § 200 claims as against it, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Plaintiff Ryan Rodriguez was injured while working on the set of a movie for which defendant was the production company. Defendant demonstrated prima facie that it is entitled to benefit, as plaintiff's "special employer," from the exclusive

remedy doctrine of the Workers' Compensation Law (*see* Workers' Compensation Law § 11; *Fung v Japan Airlines Co., Ltd.*, 9 NY3d 351, 358-359 [2007]).

In opposition, plaintiff failed to raise an issue of fact.

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

ENTERED: DECEMBER 7, 2017

CLERK

Manzanet-Daniels, J.P., Mazzarelli, Kapnick, Webber, JJ.

5166 The People of the State of New York, Respondent, Ind. 1143/95

-against-

Van Phu Bui, Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Desiree Sheridan of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (James J. Wen of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Albert Lorenzo, J.), entered on or about December 3, 2014, which adjudicated defendant a level three sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court properly assessed points for a history of drug or alcohol abuse, based upon defendant's admission to probation officials (*see e.g. People v Kelly*, 69 AD3d 498 [1st Dept 2010]) that he periodically abused alcohol and was smoking marijuana at the time of the underlying offense. There was clear and convincing evidence of such abuse, satisfying the standard set forth in *People v Palmer* (20 NY3d 373, 378-379 [2013]).

The court providently exercised its discretion when it declined to grant a downward departure (*see People v Gillotti*, 23

NY3d 841 [2014]). The mitigating factors cited by defendant were adequately taken into account by the risk assessment instrument, or were outweighed by the egregiousness of the underlying crime.

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

ENTERED: DECEMBER 7, 2017

CLERK

Manzanet-Daniels, J.P., Mazzarelli, Kapnick, Webber, JJ.

5167 The People of the State of New York, Respondent, Case 4232S/16

-against-

Brett Bernstein, Defendant-Appellant.

Pappalardo & Pappalardo, LLP, Scarsdale (Jill K. Sanders of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Michael J. Yetter of counsel), for respondent.

Order, Supreme Court, New York County (Larry R.C. Stephen, J.), entered on or about March 31, 2017, which adjudicated defendant a level three sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The record supports the court's discretionary upward departure to a level three sex offender adjudication (*see People v Gillotti*, 23 NY3d 841, 861-862 [2014]). "[T]he level suggested by the [risk assessment instrument (RAI)] is merely presumptive and a SORA court possesses the discretion to impose a lower or higher risk level if it concludes that the factors in the RAI do not result in an appropriate designation" (*People v Mingo*, 12 NY3d 563, 568 n. 2 [2009], *see also People v Johnson*, 11 NY3d 416, 421, [2008]).

There was ample evidence to support aggravating factors not adequately accounted for in the RAI (*see e.g. People v Vives*, 57 AD3d 312 [1st Dept 2008]). The court properly based its upward departure on a combination of aggravating factors, including defendant's solicitation of various forms of child pornography from his two separate 14-year-old students, and defendant's text messages to them which contained illicit sexual content. The People submitted to the court 70 to 80 pages of text messages between defendant and one of the victims in which defendant "solicited naked pictures and naked videos" from her. These text messages which contained abhorrent sexual content, indicate that defendant presents an increased risk of harm or re-offense so as to warrant an upward departure. Further, defendant, who was in a position of trust and authority as their teacher, also pressured the victims to not disclose their communications and to delete the text messages he sent.

Contrary to the defendant's contention, the People sustained their burden of identifying and proving aggravating factors that were not adequately taken into account by the risk assessment instrument and that tended to establish a higher likelihood of re-offense or danger to the community.

Moreover, the mitigating factors cited by defendant were accounted for in the risk assessment instrument and were outweighed by the seriousness of his conduct (*People v Velasquez*, 143 AD3d 583 [1st Dept 2016]).

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

ENTERED: DECEMBER 7, 2017

CLERK

Manzanet-Daniels, J.P., Mazzarelli, Kapnick, Webber, JJ.

5168 John Walsh, Index 300849/13
Plaintiff-Appellant,

-against-

Miriam Michelson,
Defendant-Respondent.

_____

Barasch McGarry Salzman & Penson, New York (Dominique Penson of counsel), for appellant.

Collins, Fitzpatrick & Schoene, LLP, White Plains (Ralph F. Schoene of counsel), for respondent.

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Order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered September 27, 2016, which granted defendant's motion for summary judgment dismissing the complaint, unanimously modified, on the law, to deny the motion as to plaintiff's claim under General Municipal Law § 205-a, and otherwise affirmed, without costs.

Plaintiff firefighter was injured while attempting to fight a fire that had originated in defendant's apartment. Issues of fact exist as to whether defendant was negligent in leaving a warming tray/hot plate plugged into a timer, in the "on" position, when she left her apartment to go to a friend's home for dinner. The Fire Marshall concluded that the fire originated in the area of the warming tray/hot plate and timer. Although the motion court correctly concluded that defendant's alleged

negligence was not a proximate cause of plaintiff's injuries, General Municipal Law § 205-a imposes liability where there is a practical or reasonable connection between a statutory or code violation and the firefighter's injury or death (*see Zanghi v Niagara Frontier Transp. Commn.*, 85 NY2d 423, 441 [1995]). Plaintiff's expert fire investigator opined that, by leaving the apartment with the electrical heating devices on, defendant delayed the discovery of the fire and allowed it to grow and spread. Accordingly, there is a sufficient connection between defendant's alleged negligence and plaintiff's injury (*see Giuffrida v Citibank Corp.*, 100 NY2d 72, 80-81 [2003]; *Driscoll v Tower Assoc.*, 16 AD3d 311, 312 [1st Dept 2005]). The court also improperly found that the New York City Fire Code (Administrative Code of City of NY tit 29, ch 2) § FC 305.4 was inapplicable to the facts of this case. That section is not limited to "combustible waste," but expressly includes "combustible material." Moreover, while combustible waste that has economic value to a premises is considered combustible material (*see* New

York City Fire Code [Administrative Code of City of NY tit 29, ch 2] § FC 202), combustible material is not so limited, but is any material capable of combustion. The materials in defendant's kitchen were clearly combustible.

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

ENTERED: DECEMBER 7, 2017

CLERK

Manzanet-Daniels, J.P., Mazzarelli, Kapnick, Webber, JJ.

5169 The People of the State of New York, Respondent, Ind. 4626/12

-against-

Marc Mompoint, Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Steven R. Berko of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Renee A. White, J.), rendered March 12, 2013, as amended April 8, 2013, convicting defendant, upon his plea of guilty, of grand larceny in the fourth degree (three counts) and identity theft in the first degree, and sentencing him to concurrent prison terms of one to three years, unanimously affirmed.

Defendant's challenges to his plea are unpreserved, and they do not come within the narrow exception to the preservation requirement (*see People v Conceicao*, 26 NY3d 375, 382 [2015]). We decline to review these claims in the interest of justice. As an alternative holding, we find that the record as a whole establishes that the plea was knowingly, intelligently and

voluntarily made, notwithstanding any deficiencies in the plea colloquy. (*see People v Tyrell*, 22 NY3d 359, 365 [2013]; *People v Harris*, 61 NY2d 9, 16-19 [1983]).

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

ENTERED: DECEMBER 7, 2017

CLERK

Manzanet-Daniels, J.P., Mazzarelli, Kapnick, Webber, JJ.

5172 In re Brandi Simmons, Ind. 662/15
[M-4774] Petitioner, OP 120/17

-against-

Hon. Judith Lieb, etc., et al.,
Respondents.

_____

Brandi Simmons, petitioner pro se.

Eric T. Schneiderman, Attorney General, New York (Alissa S. Wright of counsel), for Hon. Judith Lieb, respondent.

Darcel D. Clark, District Attorney, Bronx (Nicole Neckles of counsel), for Darcel D. Clark, respondent.

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

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

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

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

ENTERED: DECEMBER 7, 2017

CLERK

Tom, J.P., Renwick, Manzanet-Daniels, Kapnick, JJ.

4281 Central Park Sightseeing LLC, Index 656416/16
Plaintiff-Respondent,

-against-

New Yorkers for Clean, Livable & Safe Streets, Inc. doing business as NYCLASS, et al.,
Defendants-Appellants,

Edward A. Sullivan, et al.,
Defendants.

_____

Gibson, Dunn & Crutcher LLP, New York (Randy M. Mastro of counsel), for appellants.

Einbinder Dunn & Goniea LLP, New York (James A. Goniea of counsel), for respondent.

_____

Order, Supreme Court, New York County (Arthur F. Engoron, J.), entered February 22, 2017, modified, on the law and the facts, to limit the applicability of the injunction to the named defendants and those acting in concert with the named defendants; to modify subsection (3) to prohibit defendants from knowingly approaching within nine feet of another person in the loading/unloading areas without that person's consent; to clarify that subsection (6) shall not apply to legal advice; and otherwise affirmed, without costs.

Opinion by Manzanet-Daniels, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
Dianne T. Renwick
Sallie Manzanet-Daniels
Barbara R. Kapnick, JJ.

4281
Index 656416/16

_____x

Central Park Sightseeing LLC,
Plaintiff-Respondent,

-against-

New Yorkers for Clean, Livable &
Safe Streets, Inc. doing business
as NYCLASS, et al.,
Defendants-Appellants,

Edward A. Sullivan, et al.,
Defendants.
_____x

Defendants New Yorkers for Clean, Livable & Safe Streets, Inc., Jill Carnegie, Edita Birnkrant, Stacy Monterosa and Michael Dolling appeal from the order of the Supreme Court, New York County (Arthur F. Engoron, J.), entered February 22, 2017, which granted plaintiff's motion for a preliminary injunction to the extent of enjoining and restraining defendants "and/or anyone else who becomes aware of this Decision and Order" from (1) "physically blocking, impeding, or obstructing any persons from seeking or taking, or providing ... a lawful horse-carriage ride disembarking from Central Park South"; (2) "physically touching, pushing, shoving, or grabbing any

such persons or horses"; (3) "yelling or shouting at, or aggressively accosting, any such persons, or any carriage horses, from a distance of less than nine feet"; (4) "physically blocking, impeding, or obstructing the progress of any such horse-carriage ride"; (5) "handing literature to persons situated within a horse carriage"; and (6) "counseling, facilitating, aiding, or abetting any other person from doing such things [sic]."

Gibson, Dunn & Crutcher LLP, New York (Randy M. Mastro, Caitlin Halligan, Akiva Shapiro, Gabriel K. Gillett, William J. Moccia and Timothy Sun of counsel), and Cahill Gordon & Reindel LLP, New York (Joel Kurtzberg and Peter J. Linken of counsel), for appellants.

Einbinder Dunn & Goniea LLP, New York (James A. Goniea and Michael Einbinder of counsel), for respondent.

MANZANET-DANIELS, J.

In this case, we are asked to balance the First Amendment rights of animal rights protestors against the government's interest in maintaining public safety and the safe flow of traffic on its public streets and byways. The government's significant interest warrants upholding the challenged injunction insofar as it prohibits protestors from blocking, impeding, or obstructing the passage of horse carriages throughout the park roads and onto the City streets (sometimes aggressively, spooking the horses), and from blocking, impeding, or obstructing customers from seeking, taking or disembarking from horse carriages. We similarly uphold the prohibition on leafletting of any passenger in a horse carriage, as valid in furtherance of public safety. However, a blanket prohibition on leafletting and a so-called "floating buffer zone" are not permissible under First Amendment jurisprudence. Accordingly, we modify the injunction to establish a nine-foot buffer zone at the loading/unloading areas, and to prohibit any person from knowingly approaching another person in the loading/unloading areas without consent for the purpose of handing a leaflet or bill or displaying a sign or engaging in oral protest or education of the other person. This modification strikes the appropriate balance between the First Amendment rights of the

protestors and the rights of customers and other pedestrians to avoid unwelcome approaches.

Plaintiff (CPS) is a business that, inter alia, offers residents and tourists horse-drawn carriage rides in Central Park. Sixty-eight horse-drawn carriages operate in Central Park. CPS owns eight of them and is affiliated with 32 independent carriage owners and operators. CPS books carriage rides both for independent owners/operators affiliated with CPS and for the horse-drawn carriages in which CPS has an ownership interest. Customers may purchase tickets online in advance, at a nearby store location, or from the drivers.

Defendant New Yorkers for Clean, Livable & Safe Streets, Inc. d/b/a NYCLASS is an animal rights organization that protests against the horse-and-carriage industry, among other things. The individually named defendants have participated in animal rights demonstrations in the zones where carriage operators and drivers pick up and drop off customers. The individual defendants are estimated to have engaged in such protest activity between 10 and 40 times over a five-month period.

The horse-drawn carriages line up at the curb on the north side of Central Park South at four designated horse-drawn carriage zones, including Columbus Circle and Fifth Avenue's Grand Army Plaza. The drivers line up next to the curb at each

of the locations with the line typically extending along the street in a southeast direction. When customers or potential customers approach the line of carriages, they are generally directed to the first available horse-drawn carriage at the front of the line.

Defendants' protest activities are targeted generally to the public, and specifically to CPS's drivers and CPS's customers and potential customers. Plaintiff maintains that defendants "harass[]," "threaten[] and intimidat[]" and assault customers and drivers, as well as physically block horse-drawn carriage paths and create a safety danger by running after the carriages in traffic and spooking the horses. Defendants maintain that their protest activities are protected by the First Amendment.

Plaintiff commenced this action alleging public nuisance, tortious interference with contractual relations, and tortious interference with prospective economic advantage, and contemporaneously moved for the entry of a preliminary injunction, relying on, inter alia, video evidence of defendant's protest activities. The videos showed, inter alia, protesters harassing, yelling obscenities at, and threatening and intimidating drivers, customers, and potential customers, including those with young children; obstructing customers and potential customers from boarding horse carriages; blocking the

passage of horse carriages; and engaging in loud and aggressive behavior in close proximity to the horses, spooking them and endangering public safety.

The court granted plaintiff's motion for a preliminary injunction to the extent of enjoining and restraining defendants "and/or anyone else who becomes aware of this Decision and Order" from

> "1. physically blocking, impeding, or obstructing any persons from seeking or taking, or providing ... a lawful horse-carriage ride disembarking from Central Park South ...;
>
> "2. physically touching, pushing, shoving, or grabbing any such persons or horses;
>
> "3. yelling or shouting at, or aggressively accosting, any such persons, or any carriage horses, from a distance of less than nine feet (... three yards...);
>
> "4. physically blocking, impeding, or obstructing the progress of any such horse-carriage ride;
>
> "5. handing literature to persons situated within a horse carriage; and
>
> "6. counseling, facilitating, aiding, or abetting any other person from doing such things."

The court made it clear that "[b]oth sides agree that defendants can protest, including picket, hold signs, hand out literature, bear witness, and raise their voices," noting that "the content of the speech is not at issue here; the manner of delivery is."

Plaintiff established a likelihood of success on its cause of action for a public nuisance. The evidence, which includes videos, demonstrates that the protestors blocked paths and chased after moving horse-drawn carriages and that their loud and aggressive behavior frightened the horses, making them nervous and more likely to start, and creating a hazard to all involved; this evidence satisfies the public harm element of the cause of action (*see People v Rubenfeld*, 254 NY 245 [1930]; *New York ex rel. Spitzer v Cain*, 418 F Supp 2d 457, 483-484 [SD NY 2006]). There is also ample evidence that plaintiff has sustained a "special injury" beyond that suffered by the community at large (*compare 532 Madison Ave. Gourmet Foods v Finlandia Ctr.*, 96 NY2d 280, 292 [2001]). Indeed, defendants have targeted plaintiff's business, encouraging seated passengers to leave their horse-drawn carriages and either not pay for their rides or ask for their money back, and telling one driver, "You might as well go back to the stables now. You're not going to do any business."

Plaintiff established a likelihood of success on the merits of its cause of action for tortious interference with contractual relations (*see Hannex Corp. v GMI, Inc.*, 140 F3d 194, 206 [2d Cir 1998]). The fact that a portion of plaintiff's horse-drawn carriage business is pre-purchased online and passengers approach carriages with vouchers in hand demonstrates both the existence

of valid contracts and defendants' awareness of the contracts. As for passengers who book rides directly with carriage drivers, they surely have entered into contracts for services by the time their carriages have begun to move.

While, as defendants argue, the cancellation of pre-purchased tickets pursuant to the terms of the contract cannot support a cause of action for tortious interference with a contract (*see Jack L. Inselman & Co. v FNB Fin. Co.*, 51 AD2d 924, 925 [1st Dept 1976], *affd* 41 NY2d 1078 [1977]), plaintiff's claims are not based solely on those contracts.

The tortious nature of defendants' conduct is demonstrated by, inter alia, their yelling at drivers and customers and potential customers while standing near horses, blocking access to carriages, and physically touching people – actions that appear on defendant Jill Carnegie's own list of "DON'T's" for her fellow protestors. Defendants' reliance on *McGill v Parker* (179 AD2d 98 [1st Dept 1992]) is misplaced. Plaintiff's allegations of tortious interference are specific, and the content of defendants' written material and speech are not at issue.

Plaintiff established irreparable harm by showing defendants' interference with its "right to carry on a lawful business without obstruction" (*see David Harp Rest. Mgt. v Cromwell*, 183 AD2d 423, 423 [1st Dept 1992]) and the danger that

defendants' conduct poses to public safety and order (*see Schenck v Pro-Choice Network of W. N.Y.*, 519 US 357, 376 [1997]; *People v Anderson*, 137 AD2d 259, 271 [4th Dept 1988]).[1]

The balance of the equities weighs in plaintiff's favor. Absent injunctive relief, plaintiff's business would continue to be harmed, and its drivers, customers, and potential customers, and members of the public would continue to be subjected to harassing and potentially dangerous conduct. Defendants will sustain no irreparable harm, since the injunction neither prevents them from exercising their First Amendment right to protest what they perceive to be a form of animal cruelty nor affects their message (*compare Elrod v Burns*, 427 US 347, 373 [1976]).

The injunction is content-neutral, and therefore we must ask "whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest" (*Madsen v Women's Health Ctr., Inc.*, 512 US 753, 765 [1994]), here, the government's interest in public safety and

[1]Plaintiff's lost profits are arguably calculable, by extrapolation from its estimate of the average number of daily walk-up passengers' rides for each horse-drawn carriage (*see e.g. Wolf St. Supermarkets v McPartland*, 108 AD2d 25, 33 [4th Dept 1985], *lv dismissed* 68 NY2d 833 [1986]). They accordingly are compensable by money damages and cannot serve as the basis for a finding of irreparable harm (*GFI Sec., LLC v Tradition Asiel Sec., Inc.*, 61 AD3d 586 [1st Dept 2009]).

order.

A "floating buffer zone" would, as defendant points out, make it "quite difficult for a protestor who wishes to engage in peaceful expressive activities to know how to remain in compliance with the injunction" and presents a "substantial risk" that much more speech will be burdened than necessary to protect public safety and order (*Schenk*, 519 US at 378). We accordingly modify paragraph 3 of the injunction to prohibit any person from knowingly approaching within nine feet of another person in the loading/unloading zone, without that person's consent, for the purpose of handing a leaflet or bill or displaying a sign or engaging in oral protest or education of such other person (*see Hill v Colorado*, 530 US 703 [2000]).[2]

Public sidewalks, streets, and ways are the "quintessential" public fora for free speech, and leafletting, signs, and displays are time-honored methods of communication enjoying First Amendment protection (*id.* at 715 [internal quotation marks omitted]). Nonetheless, the Supreme Court has consistently recognized "the interests of unwilling listeners in situations

[2]In *Hill*, the Supreme Court upheld a Colorado statute providing substantially the same regulation of speech-related content as constitutional. While this case involves review of an injunction, not a statute, we believe that *Hill* is nonetheless instructive.

where the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure" (*id.* at 718 [internal quotation marks omitted]). We believe the instant injunction, as modified, respects the First Amendment rights of defendant protestors while recognizing the rights of carriage passengers to be free of unwanted intrusions.

The nine-foot zone represents a "conversational distance," allowing normal communication (*id.* at 726-727). The prohibition on "oral education and protest" ensures that casual conversation is not within the ambit of the injunction (*id.* at 721-722). Notably, the "knowingly approaches" requirement would allow a protestor to stand still while a passenger walks or rides past without running afoul of the injunction (*id.* at 713 [internal quotation marks omitted]). A leafletter might stand in the path of pedestrians and proffer his or her literature, which the pedestrian can choose to accept or decline (*id.* at 727). Finally, it is to be noted that those standing in place with signs would remain unaffected by the injunction (*id.*).

We draw a distinction between protestors in the loading and unloading zones, and those who follow the horses along the carriage roads and onto the surrounding streets. The First Amendment does not require that protestors be permitted to disrupt traffic, spook horses, and endanger public safety in

order to convey their message. Courts have recognized a distinction between leafletting on public sidewalks and handing leaflets to the occupants of moving vehicles; the latter may be prohibited due to valid safety concerns posed by handing literature to persons on public roadways (*see e.g. Contributor v City of Brentwood, Tenn.*, 726 F3d 861 [6th Cir 2013] [upholding portion of city ordinance that prohibited sale or distribution of literature to the occupant of any motor vehicle on a street in order to further "the goals of traffic safety and flow"]; *Gonzalez v City of New York*, ____ F Supp 3d ___, 2016 WL 5477774, 2016 US Dist LEXIS 134474 [SD NY Sept. 29, 2016] [rejecting First Amendment challenge to arrest for disorderly conduct for obstructing traffic]; *Cosac Found., Inc. v City of Pembroke Pines*, 2013 WL 5345817, 2013 US Dist LEXIS 135647 [SD Fla. Sept. 21, 2013] [upholding ordinance prohibiting solicitation or canvassing on roadways as exercise of significant government interest in regulating traffic flow and preventing injury to pedestrians and motorists]). Defendants have ample alternative channels of communication open to them through protest and leafletting in the pick-up/drop-off zones and on the surrounding public sidewalks (*see Contributor*, 726 F3d at 865-866).

As the United States Supreme Court has recognized, "When clear and present danger of . . . interference with traffic upon

the public streets, or other immediate threat to public safety, peace, or order, appears, the power of the state to prevent or punish is obvious" (*Cantwell v State of Connecticut*, 310 US 296, 308). The government has "a strong interest in ensuring the public safety and order, in promoting the free flow of traffic on public streets and sidewalks, and in protecting the property rights of its citizens" (*Madsen*, 512 US at 768).

Finally, the injunction is overbroad inasmuch as it purports to limit the free speech not only of defendants, but also of "anyone else who becomes aware of this [d]ecision and [o]rder." We accordingly modify to make it applicable to defendants and "those acting in concert with the named parties" (*Madsen*, 512 US at 775-776 [internal quotation marks omitted]).

Accordingly, the order of the Supreme Court, New York County (Arthur F. Engoron, J.), entered February 22, 2017, which granted plaintiff's motion for a preliminary injunction to the extent of enjoining and restraining defendants "and/or anyone else who becomes aware of this Decision and Order" from (1) "physically blocking, impeding, or obstructing any persons from seeking or taking, or providing ... a lawful horse-carriage ride disembarking from Central Park South"; (2) "physically touching, pushing, shoving, or grabbing any such persons or horses"; (3) "yelling or shouting at, or aggressively accosting, any such

persons, or any carriage horses, from a distance of less than nine feet"; (4) "physically blocking, impeding, or obstructing the progress of any such horse-carriage ride"; (5) "handing literature to persons situated within a horse carriage"; and (6) "counseling, facilitating, aiding, or abetting any other person from doing such things [sic]," should be modified, on the law and the facts, to limit the applicability of the injunction to the named defendants and those acting in concert with the named defendants; to modify subsection (3) to prohibit defendants from knowingly approaching within nine feet of another person in the loading/unloading areas without that person's consent; to clarify that subsection (6) shall not apply to legal advice; and otherwise affirmed, without costs.

All concur.

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

ENTERED: DECEMBER 7, 2017

CLERK