SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

OCTOBER 7, 2008

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Lippman, P.J., Gonzalez, Sweeny, Catterson, DeGrasse, JJ.

4196 The People of the State of New York, Ind. 6779/01
Respondent,

-against-

Nemencio Franco,
Defendant-Appellant.

Robert S. Dean, Center for Appellate Litigation, New York (Barbara Zolot of counsel), and Milbank, Tweed, Hadley & McCloy LLP, New York (Mehrnoosh Bigloo of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Elizabeth Squires of counsel), for respondent.

Order, Supreme Court, New York County (Edward J. McLaughlin, J.), entered on or about June 5, 2007, which denied defendant's motion to be resentenced under the Drug Law Reform Act of 2004, unanimously affirmed.

The court properly recognized the degree of discretion it possessed (*compare People v Arana*, 32 AD3d 305 [2006]), and providently exercised it. There is no basis for disturbing the court's determination that resentencing was not warranted,

particularly in view of the serious aggravating factors surrounding the underlying crime (*see e.g. People v Vasquez*, 41 AD3d 111 [2007], *lv dismissed* 9 NY3d 870 [2007]).

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

ENTERED: OCTOBER 7, 2008

CLERK

Lippman, P.J., Gonzalez, Sweeny, Catterson, DeGrasse, JJ.

4197-
4197A In re Gloria Marie S. and Another

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

Alex S.,
Respondent-Appellant,

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

Leilani Marie C.,
Respondent.

Nancy Botwinik, New York, for appellant.

Rosin Steinhagen Mendel, New York (Carmen Restivo of counsel), for Leake & Watts Services, Inc., respondent.

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

Orders, Family Court, Bronx County (Allen Alpert, J.), entered on or about May 2, 2007, which denied respondent father Alex S.'s motion to vacate a prior dispositional order entered on or about July 11, 2006, which, upon his default in appearing at the underlying fact-finding and dispositional hearings, terminated his parental rights to the subject children on the ground of abandonment and committed their custody to petitioner and the Commissioner of the Administration for Children's Services for the purpose of adoption, unanimously affirmed, without costs.

Appellant's motion to vacate his default was properly denied because he failed to present a reasonable excuse for his failure to appear for the fact-finding and dispositional hearings and a meritorious defense to the petition to terminate his parental rights (*Robert B. v Tina Q.*, 40 AD3d 473 [2007]). The proferred excuse was that he had also missed a prior appearance on May 2, 2006, at which the July 11 date was set, and neither his attorney nor the court notified him of the adjourned date. His reason for failing to attend the May 2 court date, of which he concededly had notice - lack of funds for travel from Brooklyn to the Bronx - is unsubstantiated and thus insufficient as a reasonable excuse for vacating a default (*Matter of Cornelius G.*, 2 AD3d 283 [2003], *lv dismissed* 2 NY3d 759 [2004]). Even if lack of funds had been the true reason for his failure to appear on May 2, 2006, he provided no reason why he did not advise either his lawyer, the court or the petitioning agency of his inability to attend (*see Matter of Damian Richard A.*, 49 AD3d 458 [2008]). Appellant's additional contentions that his attorney lost contact with him following the May 2 court date and thus was unable to notify him of the July 11 adjournment date, that he was homeless as of May 2006, and that because he had a received a slip from the court notifying him of an appearance date in the related neglect proceeding scheduled for July 27, 2006, he assumed that

the next court date for the termination proceeding would be that date as well, are equally unpersuasive.

Assuming appellant had offered a reasonable excuse for his failure to attend the July 11, 2006 proceedings, he nonetheless failed to make the requisite showing that he possessed a meritorious defense to warrant vacatur of his default. His affidavit in support of vacatur instead contains generalized and conclusory statements to the effect that he has "never abandoned [his] children," that he has been "trying to do what was asked of" him by petitioner "from the time [his] children were placed" in the agency's care, that he has "attended therapy [and] parenting skills" classes, and that he has "visited [his] children whenever possible," even though the agency's "caseworkers made it clear to [him] that they did not want [him] to attend visits at the agency . . . treat[ing him] with contempt whenever [he] saw them." These bare allegations, devoid of any detail or substantiation, are insufficient to establish a meritorious defense to the allegation of abandonment (*see Matter of Violet Crystal F.*, 270 AD2d 163 [2000]; *see generally Peacock v Kalikow*, 239 AD2d 188, 190 [1997]). In contrast, the evidence adduced at the fact-finding hearing demonstrated that appellant's three contacts with the children within the six-month period preceding the filing of the petition were insubstantial and

supported a finding of abandonment under Social Services Law § 384-b(4)(b),(5)(a) (*Matter of Candice K.*, 245 AD2d 821, 822 [1997]).

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

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

ENTERED: OCTOBER 7, 2008

Lippman, P.J., Gonzalez, Sweeny, Catterson, DeGrasse, JJ.

4198 The People of the State of New York, Respondent, Ind. 009/05

-against-

Ricardo Calderon, Defendant-Appellant.

Patricia D. Levan, New York, for appellant.

Robert M. Morgenthau, District Attorney, New York (Dana Poole of counsel), for respondent.

Judgment, Supreme Court, New York County (William A. Wetzel, J.), rendered December 21, 2006, convicting defendant, after a jury trial, of conspiracy in the second degree, criminal possession of a controlled substance in the first degree and criminal sale of a controlled substance in the first degree, and sentencing him to concurrent terms of 6 to 18 years, 9 years and 9 years, respectively, unanimously affirmed.

Defendant did not preserve his challenges to the legal sufficiency of the evidence and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits. We further find that the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's determinations concerning credibility, including its rejection of defendant's testimony that a certain transaction involved real estate rather than drugs. Intercepted telephone

conversations, surveillance, and the large amount of cash seized from him after one transaction demonstrated defendant's participation in a conspiracy with the other narcotics traffickers (*see generally People v Rodriguez*, 180 AD2d 446 [1992], *lv denied* 79 NY2d 1006 [1992]). Similarly, even though the drugs were not recovered, there was ample proof of the weight and content of the drugs that defendant possessed and sold, based on the wiretapped telephone conversations containing coded references to the heroin deal being arranged and the amount of money to be paid, the amount of money seized from defendant, and the testimony of an experienced narcotics investigator as to the usual price of one-half kilogram of heroin.

The court properly denied defendant's speedy trial motion. The court correctly excluded the period during which defense motions were under consideration by the court (*see* CPL 30.30[4][a]). The People's delay in responding to defendant's omnibus motion was reasonable in light of the motion's complexity. Defendant's claim of unreasonable delay in providing grand jury minutes is both unpreserved and unsupported by the record. The court also properly excluded a period during which a necessary witness was unavailable due to a serious illness. The court conducted an evidentiary hearing on this branch of the motion, and the investigator's testimony was more than enough to establish that he had been unavailable during the period in

question (*see People v Goodman* 41 NY2d 888 [1977]; *People v Martinez*, 268 AD2d 354 [2000], *lv denied* 94 NY2d 922 [2000]), without the need for any documentary proof. Similarly, we find the court's evidentiary rulings at the speedy trial hearing to be proper exercises of discretion.

Defendant's challenge to the sufficiency of the evidence before the grand jury is not reviewable on appeal (*see* CPL 210.30[6]), and his other claim regarding the grand jury presentation is meritless.

The court properly denied defendant's suppression motion. The hearing evidence clearly established probable cause.

Defendant received effective assistance of counsel (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]). Defendant has not established that he was prejudiced in any way by his counsel's demeanor and style of trying the case, or by the court's reactions to that conduct (*see e.g. People v Martinez*, 35 AD3d 156, 157 [2006], *lv denied* 8 NY3d 924 [2007]). There is no merit to defendant's suggestion that, at a proceeding that occurred long before trial, the court deprived him of the opportunity to retain different counsel if he chose to do so.

Defendant's related claim that he was deprived of a fair trial by the court's admonitions to defense counsel and its

overall conduct of the trial is unpreserved (*see People v Royster*, 43 AD3d 758, 760 [2007], *lv denied* 9 NY3d 1009 [2007]; *People v Jenkins*, 25 AD3d 444, 445 [2006], *lv denied* 6 NY3d 834 [2006]), and we decline to review it in the interest of justice. None of the conduct of which defendant complains was unduly prejudicial, and the court repeatedly instructed the jury not to allow its admonitions to prejudice them against defendant, instructions that the jury is presumed to have followed (*see People v Davis*, 58 NY2d 1101, 1104 [1983]).

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

ENTERED: OCTOBER 7, 2008

CLERK

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on October 7, 2008.

Present - Hon. Jonathan Lippman, Presiding Justice
Luis A. Gonzalez
John W. Sweeny, Jr.
James M. Catterson
Leland DeGrasse, Justices.

The People of the State of New York, Ind. 3975/03
Respondent,

-against- 4199

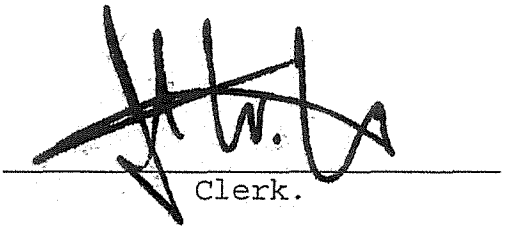
Rasheen Crawford, etc.,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Caesar Cirigliano, J.), rendered on or about August 8, 2005,

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

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

ENTER:



Clerk.

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

Lippman, P.J., Gonzalez, Sweeny, Catterson, DeGrasse, JJ.

4200 Selena S. Harris, Index 103988/05
Plaintiff-Appellant,

-against-

Ariel Transportation Corp., et al.,
Defendants-Respondents.

Popick, Rutman & Jaw, LLP, New York (Rick J. Rutman of counsel), for appellant.

DeBrosse & Studley, LLP, Jamaica Estates (Mitchell J. Studley of counsel), for Ariel Transportation Corp. and Fallou Diop, respondents.

O'Connor Redd, LLP, White Plains (Alak Shah of counsel), for Paul Bardolf, respondent.

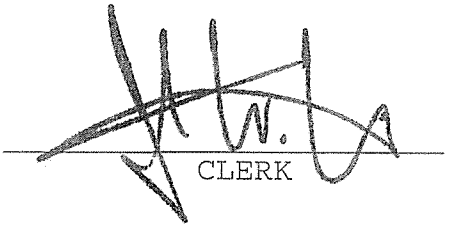
Order, Supreme Court, New York County (Deborah A. Kaplan, J.), entered August 1, 2007, which granted defendants' motions for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Based on specifically detailed reports from a specialist in rehabilitative medicine, two neurologists and two orthopedic surgeons, diagnosing plaintiff with resolved cervical sprain/strain and full cervical and lumbar ranges of motion, defendants met their initial burden of demonstrating, prima facie, that plaintiff had not sustained a serious injury within the meaning of Insurance Law § 5102(d). Plaintiff did not meet her consequent burden because her medical submissions did not satisfy the requirement that there be some objective basis for

finding a significant injury or impairment *(see Scheer v Koubek*, 70 NY2d 678, 679 [1987]). The affidavit of her chiropractor cited cervical muscle spasms resulting in a decreased range of motion of the cervical spine, and chronic neck pain and stiffness. Medical testimony concerning observations of a spasm may constitute objective evidence in support of a serious injury; however, the spasm must be objectively ascertained *(see Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 357 [2002]). The affidavit did not cite any objective basis for the chiropractor's conclusion that plaintiff suffered from muscle spasms or the test performed that induced the spasm. It also did not identify the objective tests utilized in deriving the measurements of the limitations of motion. The affirmation of plaintiff's neurologist was insufficient to raise a triable issue of fact in that it did not explain the factual basis for the conclusion that the limitations of motion were causally related to the accident, where the examination took place two years after the accident.

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

ENTERED: OCTOBER 7, 2008



CLERK

Lippman, P.J., Gonzalez, Sweeny, Catterson, DeGrasse, JJ

4201 The People of the State of New York, Respondent, Ind. 5326/06

-against-

Lawrence Linton, Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Martin J. Foncello of counsel), for respondent.

Judgment, Supreme Court, New York County (Roger S. Hayes, J.), rendered June 29, 2007, convicting defendant, after a jury trial, of robbery in the first degree, and sentencing him, as a second violent felony offender, to a term of 14 years, unanimously affirmed.

The court properly exercised its discretion in admitting negative identification evidence (*see People v Wilder*, 93 NY2d 352 [1999]), consisting of the victim's inability to identify anyone from a large group of photographs. Although the photos were unavailable, there was sufficient trial testimony to establish the probative value of the victim's failure to make an identification. In any event, any error in this regard was harmless (*see People v Crimmins*, 36 NY2d 230 [1975]).

Defendant did not preserve his claim that the prosecutor made an improper summation argument suggesting that defendant's

prior record showed criminal propensity, and we decline to review it in the interest of justice. As an alternative holding, we find that the comment did not deprive defendant of a fair trial, particularly since, shortly after the remarks at issue, the court gave a curative instruction that defendant's record was a matter for the jury's consideration in evaluating defendant's credibility as a witness, followed by a more specific instruction, in its final charge, that the prior record was not evidence of predisposition. Accordingly, we also reject defendant's ineffective assistance of counsel claim relating to this issue.

We perceive no basis for reducing the sentence.

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

ENTERED: OCTOBER 7, 2008

Lippman, P.J., Gonzalez, Sweeny, DeGrasse, JJ.

4202 Decana Inc., et al., Index 604247/02
Plaintiffs-Appellants-Respondents, 590776/04

-against-

Spyro C. Contogouris, et al.,
Defendants,

North Fork Bank, et al.,
Defendants-Respondents-Appellants.

[And a Third-Party Action]

- - - - -

The New York State Land
Title Association,
Amicus Curiae.

Watson, Farley & Williams (New York) LLP, New York (Alfred E. Yudes, Jr. of counsel), for appellants-respondents.

Lazer, Aptheker, Rosella & Yedid, P.C., Melville (Joseph C. Savino of counsel), for North Fork Bank, respondent-appellant.

Skadden, Arps, Slate, Meagher & Flom LLP, New York (Thomas E. Fox of counsel), for Eastside Holdings LLC, respondent-appellant.

Stempel Bennett Claman & Hochberg, P.C., New York (Richard L. Claman of counsel), for amicus curiae.

Order, Supreme Court, New York County (Bernard J. Fried, J.), entered October 9, 2007, which granted North Fork Bank's motion for summary judgment to the extent of dismissing the eighth and twelfth causes of action, unanimously modified, on the law, the mortgage issued by North Fork Bank declared valid, summary judgment granted dismissing the ninth, tenth and eleventh causes of action as well, and otherwise affirmed, without costs. The Clerk is directed to enter judgment dismissing the action as

against North Fork Bank.

The president and sole director of plaintiff Decana was properly found to have actual authority to mortgage corporate property (*see* Business Corporation Law § 911; *Odell v 704 Broadway Condominium*, 284 AD2d 52, 56-57 [2001]). Although a ruling in this respect was unnecessary, we note there was also apparent authority based on a corporate resolution and opinion letter of counsel. Since the real property used as collateral was worth several times the amount of the loan, and was non-recourse, there was little reason for the lender bank to care about the personal finances of the president and director, the purpose of the loan or other nonessential matters. Nor did the circumstances give rise to a duty to inquire into the scope of the claimed authority (*see generally 1230 Park Assoc., LLC v Northern Source, LLC*, 48 AD3d 355 [2008]). Dismissal of the cause of action for a declaration required that the court declare in favor of the bank, and we modify accordingly (*Lanza v Wagner*, 11 NY2d 317, 334 [1962], *cert denied* 371 US 901 [1962]).

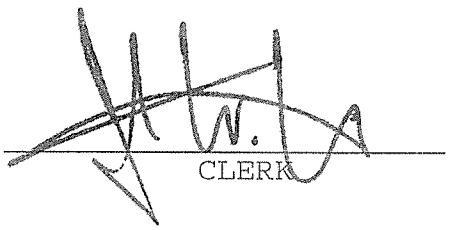
Because the mortgage was valid, the bank was not liable for aiding and abetting breach of fiduciary duty, fraud, conversion or commercial bad faith based on the corporate president and director's obtaining of the loan and mortgage. Any subsequent diversion of the loan proceeds is a separate matter. In any event, plaintiffs failed to show that the bank had actual

knowledge of these tortious acts (*see International Strategies Group, Ltd. v ABN AMRO Bank N.V.*, 49 AD3d 474 [2008]), and, with respect to commercial bad faith, failed to show its actual participation in unlawful activity (*see Prudential Bache Sec., Inc. v Citibank, N.A.*, 73 NY2d 263, 276 [1989]).

We have considered plaintiffs' other contentions and find them unavailing.

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

ENTERED: OCTOBER 7, 2008



Lippman, P.J., Gonzalez, Sweeny, Catterson, DeGrasse, JJ.

4203 The People of the State of New York, Ind. 3279C/05
Respondent,

-against-

Jesus Sanchez, etc.,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Andrew S. Holland of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Albert Lorenzo, J., at plea; John P. Collins, J., at sentence), rendered September 28, 2006, convicting defendant, upon his plea of guilty, of criminal sale of a controlled substance in or near school grounds, and sentencing him, as a second felony offender, to a term of 3½ years, unanimously affirmed.

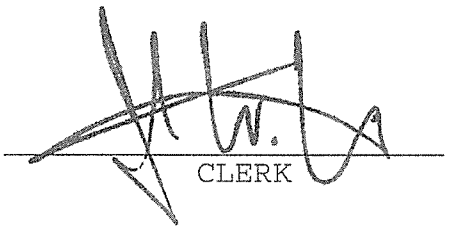
Defendant made a valid waiver of his right to appeal; the court elicited such a waiver as part of the plea agreement, and separately from the rights automatically forfeited by a guilty plea (*see People v Lopez*, 6 NY3d 248, 256-257 [2006]). The waiver forecloses appellate review of defendant's claim that the period of post-release supervision imposed should be reduced because the court allegedly intended to impose the minimum permissible supervision term. Although a challenge to the voluntariness of a plea survives an appeal waiver, the record

establishes that the plea was knowing, intelligent and voluntary. In particular, defendant was informed of the precise post-release supervision term he was facing. Moreover, on appeal he does not seek vacatur of the plea, but only reduction of the supervision term in the interest of justice.

In any event, defendant's claim is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits. The record does not support defendant's claim that the court intended to impose the minimum permissible term of post-release supervision, or that it made any such statement to defendant.

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

ENTERED: OCTOBER 7, 2008



Lippman, P.J., Gonzalez, Sweeny, Catterson, DeGrasse, JJ.

4204-
4204A The People of the State of New York, Respondent, Ind. 3248/03 2691/04

-against-

Sullyann Saez,
Defendant-Appellant.

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

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

Judgment, Supreme Court, Bronx County (Caesar D. Cirigliano, J.), rendered July 15, 2005, convicting defendant, after a jury trial, of two counts of assault in the first degree, and sentencing her to concurrent terms of 18 years, unanimously affirmed. Judgment, same court (Lawrence H. Bernstein, J.), rendered July 19, 2005, convicting defendant, upon her plea of guilty, of assault in the second degree, and sentencing her to a consecutive term of 4 years, unanimously modified, on the law, to the extent of reducing the period of post-release supervision from 3½ years to 3 years, and otherwise affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's determinations concerning credibility, including its

resolution of inconsistencies in testimony and its rejection of defendant's justification defense.

Defendant's argument concerning a reference during trial to her pretrial incarceration is indistinguishable from an argument that this Court rejected on the similarly situated codefendant's appeal (*People v Melendez*, 50 AD3d 485 [2008], *lv denied* 10 NY3d 961 [2008]), and there is no reason to reach a different result here.

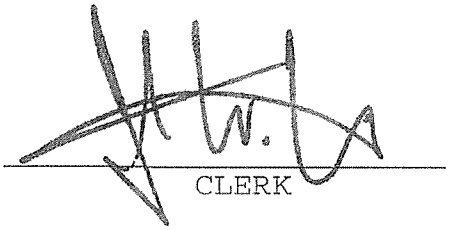
By failing to object, by making generalized objections, or by failing to request further relief after the court took curative actions, defendant failed to preserve her other claims of prosecutorial misconduct and we decline to review them in the interest of justice. As an alternative holding, we find that the challenged conduct did not deprive defendant of a fair trial (*see People v D'Alessandro*, 184 AD2d 114, 118-119 [1992], *lv denied* 81 NY2d 884 [1993]). To the extent that the prosecutor's summation contained improprieties, the court's curative instructions sufficed to prevent any prejudice.

We perceive no basis for reducing the sentence. However, as the People concede, the maximum period of post-release supervision permitted for defendant's second-degree assault

conviction, given the date of the crime's commission, was three years (*see* § 70.45[2]).

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

ENTERED: OCTOBER 7, 2008



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Lippman, P.J., Gonzalez, Sweeny, Catterson, DeGrasse, JJ.

4205 The People of the State of New York, Respondent, Ind. 1684/06

-against-

Robert Johnson, Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (John Schoeffel of counsel), and Akin Gump Strauss Hauer & Feld LLP, New York (Jacob J. Waldman of counsel), for appellant.

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

Judgment, Supreme Court, New York County (William A. Wetzel, J.), rendered September 18, 2006, convicting defendant, after a jury trial, of burglary in the second degree, and sentencing him, as a second violent felony offender, to a term of 8½ years, unanimously affirmed.

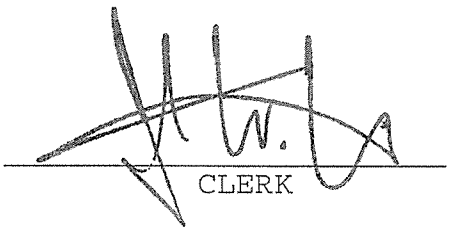
By failing to make a clear and unequivocal request to represent himself (*see People v McIntyre*, 36 NY2d 10, 17 [1974]), defendant did not express the "definitive commitment to self-representation" that would trigger the need for a full inquiry by the court as to whether it should permit him to proceed pro se (*see People v LaValle*, 3 NY3d 88, 106 [2004]; *compare People v Rodriguez*, 46 AD3d 396, 397 [2007], *lv denied* 10 NY3d 844 [2008]). Defendant's expression of a desire to represent himself was linked to meritless requests for, among other things, an adjournment in order to prepare for such self-representation,

which the court appropriately denied, whereupon defendant abandoned his request to proceed pro se (*see People v Gillian*, 8 NY3d 85, 88 [2006]; *People v Payton*, 45 NY2d 300, 314 [1978], *revd on other grounds*, 445 US 573 [1980]; *People v McClam*, 297 AD2d 514, 514 [2002], *lv denied* 99 NY2d 537 [2002]). Defendant never stated or indicated that, even without an adjournment, he still wanted to represent himself.

Defendant's challenges to isolated portions of the court's main and supplementary jury instructions are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits. When viewed in context, neither of the instructions at issue could have misled the jury as to the requisite burden of proof or the jury's function with regard to lesser included offenses (*see People v Umali*, 10 NY3d 417, 426-427 [2008]).

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

ENTERED: OCTOBER 7, 2008



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Lippman, P.J., Gonzalez, Sweeny, Catterson, DeGrasse, JJ.

4207 The People of the State of New York, Respondent, Ind. 5878/05

-against-

Raymond Gomez, Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Sara M. Zausmer of counsel), for respondent.

Order, Supreme Court, New York County (Carol Berkman, J.), rendered May 10, 2006, convicting defendant, upon his plea of guilty, of criminal possession of a controlled substance in the fourth degree, and sentencing him, as a second felony drug offender whose prior felony conviction was a violent felony, to a term of 5 years, unanimously affirmed.

The court properly denied defendant's suppression motion without a hearing since the allegations contained in his motion papers, when considered in light of the specific information that was provided by the People concerning the basis for his arrest, failed to raise a material factual dispute requiring a hearing (*see People v Jones*, 95 NY2d 721, 725 [2001]). Even if defendant's papers could be viewed as disputing the claim that the police observed him to be in possession of drugs, his remaining assertions were too conclusory to address the People's

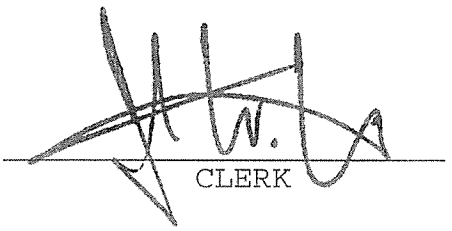
detailed explanation that defendant was lawfully under arrest for criminal trespass (*see e.g. People v Anderson*, 306 AD2d 54 [2003], *lv denied* 100 NY2d 578 [2003]) prior to any search and seizure, regardless of whether the drugs were in open view.

The court also properly declined to entertain defendant's "supplemental motion" for a *Mapp* hearing, which was based on additional factual allegations and made two days after the denial of his suppression motion. CPL 255.20(2) requires that all pretrial motions be made within the same set of motion papers whenever practicable absent a showing of prejudice. Defendant offers no explanation for his failure to make his new allegations in support of the first motion.

We perceive no basis for reducing the sentence.

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

ENTERED: OCTOBER 7, 2008



Lippman, P.J., Gonzalez, Sweeny, Catterson, DeGrasse, JJ.

4208 In re Rascarmi G.,

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

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

Michael A. Cardozo, Corporation Counsel, New York (Elizabeth S. Natrella of counsel), for presentment agency.

Order of disposition, Family Court, Bronx County (Juan M. Merchan, J.), entered on or about December 4, 2007, which adjudicated appellant a juvenile delinquent, upon a fact-finding determination that he committed acts which, if committed by an adult, would constitute the crimes of assault and menacing in the third degrees, and placed him on probation for a period of 12 months, unanimously affirmed, without costs.

The court's finding, which rejected appellant's justification defense was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The victim's testimony was corroborated by that of a disinterested eyewitness, and

appellant's own testimony failed to support his claim of justification.

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

ENTERED: OCTOBER 7, 2008

CLERK

Lippman, P.J., Gonzalez, Sweeny, Catterson, DeGrasse, JJ.

4209 Louis Romeo,
Plaintiff,

Index 100055/05
590248/05

-against-

Robert Malta, et al.,
Defendants.

- - - - -

Robert Malta,
Third-Party Plaintiff,

Chelsea Tomato, Inc., doing
business as Intermezzo Restaurant,
Third-Party Plaintiff-Appellant,

-against-

The Travelers Indemnity Company
of Connecticut,
Third-Party Defendant-Respondent.

[And Other Third-Party Actions]

Law Offices of Peter P. Traub, New York (Joseph F. Sullivan and Peter P. Traub of counsel), for appellant.

Lazare Potter & Giacovas LLP, New York (Yale Glazer of counsel), for respondent.

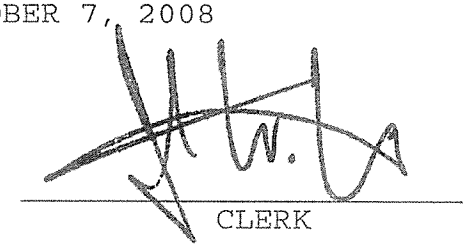
Judgment, Supreme Court, New York County (Debra A. James, J.), entered July 10, 2007, dismissing the third-party action seeking a judgment declaring that third-party defendant Travelers Indemnity Company of Connecticut is obligated to defend and indemnify its insured, defendant/third-party plaintiff Chelsea Tomato, Inc., in the underlying personal injury action, unanimously affirmed, without costs.

The record establishes that employees of Chelsea Tomato knew

about the accident on the day it happened, as plaintiff in the underlying action fell while descending a staircase in the restaurant and was removed from the scene via ambulance. However, Chelsea Tomato did not notify Travelers until some nine months later. This is as a matter of law an unreasonable delay, which is not excused by Chelsea Tomato's professed belief that the accident was plaintiff's fault and would result in no liability to itself (*see Tower Ins. Co. of N.Y. v Lin Hsin Long Co.*, 50 AD3d 305, 307-308 [2008]).

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

ENTERED: OCTOBER 7, 2008



CLERK

Lippman, P.J., Gonzalez, Sweeny, Catterson, DeGrasse, JJ.

4210 The People of the State of New York, Ind. 3253/04
Respondent,

-against-

David Canty,
Defendant-Appellant.

Noah A. Kinigstein, New York, for appellant.

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

Judgment, Supreme Court, New York County (Philip M. Grella, J. at hearing; Arlene R. Silverman, J. at jury trial and sentence), rendered December 3, 2004 convicting defendant of criminal possession of a controlled substance in the fourth degree, and sentencing him, as a second felony offender, to a term of 3½ to 7 years, unanimously affirmed.

The court properly denied defendant's suppression motion. There is no basis for disturbing the court's credibility determinations, which are supported by the record (*see People v Prochilo*, 41 NY2d 759, 761 [1977]). The evidence established that the officer saw defendant drinking from what the officer recognized as a beer bottle, in a public place, in violation of the Open Container Law (Administrative Code of City of NY § 10-125[b]). When defendant fled, the police were entitled to

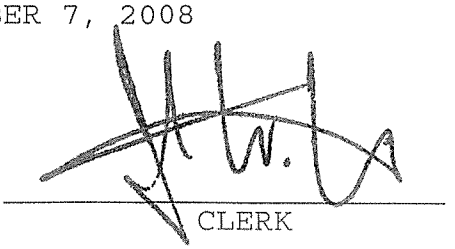
pursue and arrest him (*see People v Neely*, 18 AD3d 394 [2005], *lv denied* 5 NY3d 808 [2005]; *People v Delgado*, 4 AD3d 310 [2004]), *lv denied* 2 NY3d 798 [2004]). Defendant's remaining suppression arguments are without merit.

The court's *Sandoval* ruling balanced the appropriate factors and was a proper exercise of discretion (*see People v Hayes*, 97 NY2d 203 [2002]). The court permitted only a limited inquiry into defendant's extensive record. The probative value of his prior drug conviction, on the issue of credibility, outweighed any prejudicial effect.

Defendant did not preserve his claim that the verdict was based on legally insufficient evidence, and we decline to review it in the interest of justice. As an alternative holding, we reject that argument on the merits. We also find that the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis, apart from speculation, to reject the testimony of the People's expert regarding the quantity of drugs that defendant possessed.

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

ENTERED: OCTOBER 7, 2008



CLERK

Lippman, P.J., Gonzalez, Sweeny, Catterson, DeGrasse, JJ.

4211 The People of the State of New York, Respondent, Ind. 3433/06

-against-

Ronald Randolph, Defendant-Appellant.

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

Judgment, Supreme Court, New York County (Michael J. Obus, J.), rendered on or about March 8, 2007, unanimously affirmed.

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

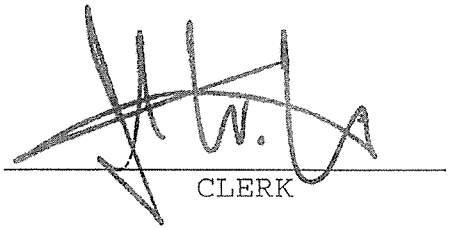
Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that court or to a Justice of the Appellate Division of the Supreme Court of this Department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

Denial of the application for permission to appeal by the

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

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

ENTERED: OCTOBER 7, 2008



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At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on October 7, 2008.

Present - Hon. Jonathan Lippman, Presiding Justice
Luis A. Gonzalez
John W. Sweeny, Jr.
James M. Catterson
Leland DeGrasse, Justices.

Nurije Mehmeti,
Plaintiff-Respondent,

Index 27361/03

-against-

4213

The Coca Cola Bottling Company of New York, Inc., et al.,
Defendants,

East Tremont Food Corp.,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, Bronx County (Wilma Guzman, J.), entered on or about December 27, 2007,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated September 15, 2008,

It is unanimously ordered that said appeal be and the same is hereby withdrawn in accordance with the terms of the aforesaid stipulation.

ENTER:

Clerk.

Lippman, P.J., Gonzalez, Sweeny, Catterson, DeGrasse, JJ.

4214 The People of the State of New York, Ind. 6138/05
Respondent,

-against-

Rashad McNair,
Defendant-Appellant.

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

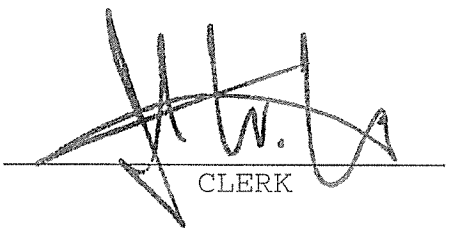
Robert M. Morgenthau, District Attorney, New York (Marc Krupnick of counsel), for respondent.

Judgment, Supreme Court, New York County (Carol Berkman, J.), rendered May 31, 2006, convicting defendant, upon his plea of guilty, of forgery in the second degree, and sentencing him to a term of 90 days, unanimously affirmed.

Since defendant did not move to withdraw his guilty plea, and since this case does not come within the narrow exception to the preservation requirement (*see People v Lopez*, 71 NY2d 662 [1988]), his challenge to the validity of the plea is unpreserved and we decline to review it in the interest of justice.

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

ENTERED: OCTOBER 7, 2008



CLERK

Lippman, P.J., Gonzalez, Sweeny, Catterson, DeGrasse, JJ.

4215N Montica G. Meza, Index 109666/04
Plaintiff-Respondent,

-against-

Proud Transit Inc.,
Defendant,

John Karlyg,
Defendant-Appellant.

Marjorie E. Bornes, New York, for appellant.

Clay M. Evall, New York, for respondent.

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered February 22, 2008, which, to the extent appealed from, denied the motion to vacate the default judgment against defendant Karlyg, unanimously reversed, on the law, without costs, the motion granted, and the complaint as against defendant-appellant dismissed. The Clerk is directed to enter judgment accordingly.

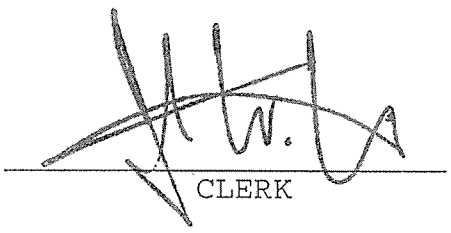
At the time of his car accident with plaintiff, Karlyg lived in Pennsylvania and had a Pennsylvania driver's license. A few months later, he moved to New York. Two years after the accident, plaintiff -- not knowing that Karlyg had moved to New York -- brought this action and attempted to serve Karlyg pursuant to Vehicle and Traffic Law § 253(2). The postal service returned the summons and complaint with the envelope marked "unable to forward." Pursuant to the statute, plaintiff

subsequently filed the envelope. However, this did not satisfy the statute, which requires an envelope marked "refused" or "unclaimed." Because plaintiff did not properly serve Karlyg, the court never obtained jurisdiction over him, so the complaint must be dismissed as against him (*see e.g. Ross v Hudson*, 303 AD2d 393 [2003]; *Bingham v Ryder Truck Rental*, 110 AD2d 867 [1985]).

Plaintiff's argument that Karlyg is estopped because he failed to comply with Vehicle and Traffic Law § 505(5) is unavailing. The statute has no extraterritorial effect for non-New York license holders. Thus, there is no authority for the position that a person holding a *Pennsylvania* (as opposed to a New York) driver's license would be required to report a change of address to the New York Commissioner of Motor Vehicles within ten days of changing his address.

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

ENTERED: OCTOBER 7, 2008



CLERK

Lippman, P.J., Gonzalez, Sweeny, Catterson, DeGrasse, JJ.

4216N Sujeiri Humphrey, Index 15893/05
Plaintiff-Appellant,

-against-

Ramon Cartagena,
Defendant,

Vaul Trust, et al.,
Defendants-Respondents.

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

Bivona & Cohen, P.C., New York (Kevin J. Donnelly of counsel), for respondents.

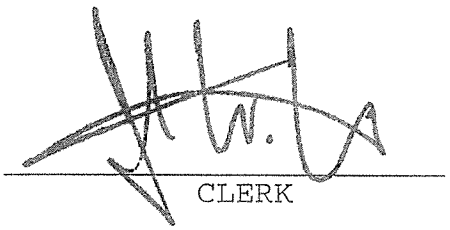
Order, Supreme Court, Bronx County (Howard R. Silver, J.), entered on or about February 11, 2008, which granted defendants' motion to compel plaintiff to appear for a supplemental independent medical examination to consist of urodynamic testing, unanimously affirmed, without costs.

Plaintiff, who voluntarily underwent urodynamic studies by her own physician without adverse effects, failed to make a prima facie showing that a repeat urodynamic study would pose a serious threat to her health (*see Chavoustie v New York Hosp.-Cornell Med. Ctr.*, 253 AD2d 702 [1998], *lv denied* 93 NY2d 805 [1999]). Her doctor's conclusory assertion that a repeat procedure was "contraindicated" because it would cause discomfort and could cause infection or exacerbate her condition was insufficient to

constitute such a showing (*see Thomas v Mather Mem. Hosp.*, 162 AD2d 521, 523 [1990]).

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

ENTERED: OCTOBER 7, 2008



CLERK

Saxe, J.P., Nardelli, Buckley, Catterson, JJ.

3502 Mother Zion Tenant Association, et al.
Petitioners-Appellants,

-against-

Shaun Donovan, Commissioner of New York City Department of Housing Preservation & Development,
Respondent-Respondent,

Mother Zion Associates, L.P.,
Respondent.

Index 402239/06

Raun Rasmussen, Legal Services for NYC, New York (Edward Josephson of counsel), for appellants.

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

Order and judgment (one paper), Supreme Court, New York County (Marilyn Shafer, J.), entered May 21, 2007, which denied petitioner tenant association's application for an injunction compelling respondent Commissioner of the New York City Department of Housing Preservation and Development (HPD) to convene an appraisal panel and promulgate rules for the determination of an appraised value, and for a declaration that respondent Mother Zion Associates, LP, the owner of the housing project in which the tenants reside (Owner), is subject to Local Law 79 of 2005 (Administrative Code of City of NY § 26-801 *et seq.*), and dismissed the proceeding, unanimously affirmed, without costs.

For the purpose of aiding low-income families obtain decent and affordable housing, Section 8 of the United States Housing Act of 1937 (codified as 42 USC § 1437f) provides for rent subsidies to owners of multiple dwelling rental properties, either through vouchers issued to individual tenants or through project-based programs. In order to entice owners to develop Section 8 housing, in the 1960s Congress enacted legislation offering developers below-market interest rates and mortgage insurance for 40-year mortgages (12 USC § 1715l, § 1715z-1; *see Forest Park II v Hadley*, 336 F3d 724, 728 [8th Cir 2003]). However, owners had a right to prepay the federal mortgages and exit the Section 8 program after 20 years (*see Forest Park II* at 728). Subsequent legislation required owners opting out of the Section 8 program to give one year's notice to the United States Department of Housing and Urban Development (HUD), the appropriate state and local agencies, and the affected tenants (*see* 42 USC § 1437f[c][8]; 12 USC § 4106), and provided for "enhanced voucher assistance" for tenants (42 USC § 1437f[t]) and other incentives, including restructuring of mortgage debt and increased rents, to induce owners to remain in the Section 8 program or to enable tenants to remain in their apartments after an owner exits the program. Thus, the federal Section 8 program is a voluntary one, based on incentives.

In August 2005, the New York City Council enacted, over a

mayoral veto, Local Law 79 (Administrative Code of City of NY § 26-801 *et seq.*), which provides, inter alia, that owners of "assisted rental housing," including Section 8 and Mitchell Lama programs, must provide tenants and HPD with one year's notice of intent to withdraw from such an assisted housing program (§ 26-802[a]; § 26-801[f]), and grants the tenants, through a tenant association or qualified entity approved by HPD, a right of first opportunity to purchase the building at an "appraised value" set by a three-member "advisory panel" or a right of first refusal to purchase at the price offered by a bona fide purchaser approved by HPD (§§ 26-804[a]-[d]; 26-805[a], [c], [e]; 26-806[a], [b], [d]; 26-801[k], [n], [o]); the Local Law does not specify whether the appraised value is to be based on the building's worth as assisted rental housing or unencumbered property that can be let at market rates or otherwise developed. Local Law 79 thus forces an owner to choose between remaining in Section 8 or offering to sell the building at a rate determined by appraisers.

In the early 1980s, well before the enactment of Local Law 79, Owner obtained a 40-year, low-interest, HUD-backed mortgage to construct the subject 76-unit apartment building, and entered into a 20-year Housing Assistance Payment (HAP) contract that set rents and provided for tenants to pay up to 30% of gross household income for rent, with the remainder to be subsidized by HUD payments. On or about March 1, 2006, shortly after Local Law

79 became effective, Owner notified the tenants of its building that it would avail itself of federal opt-out provisions and would not renew its Section 8 contract upon expiration on March 31, 2007. The tenants formed the Mother Zion Tenant Association (Tenant Association), which notified Owner and HPD that the tenants wished to invoke the right of first opportunity set forth in Local Law 79. However, HPD and Owner took the position that Local Law 79 is preempted by federal and state laws. Petitioners then commenced this proceeding to, inter alia, declare that Owner is subject to Local Law 79.

By operation of the Supremacy Clause of article VI of the US Constitution, federal law can supersede state or local laws (*Hillsborough County v Automated Med. Labs., Inc.*, 471 US 707, 712-713 [1985]). Congressional intent to preempt state or local law may be evinced (1) by express language in a federal statute, (2) implicitly, where the federal legislation is so comprehensive in scope that it fully occupies the field of its subject matter jurisdiction (field preemption), or (3) implicitly, where the state or local law actually conflicts with the federal law (conflict preemption) (*see id* at 713; *Drattel v Toyota Motor Corp.*, 92 NY2d 35, 42-43 [1998]). An actual conflict arises when either compliance with both federal and local laws is physically impossible or when the local law stands as an obstacle to the accomplishment of the full congressional purposes and objectives

(*Hillsborough County*, 471 US at 713; *Guice v Charles Schwab & Co.*, 89 NY2d 31, 39 [1996], *cert denied* 520 US 1118 [1997]).

The fact that Local Law 79 and the federal laws pertaining to Section 8 have as their general aim the provision of affordable housing for low-income people does not, as petitioners suggest, resolve the preemption question (*see Forest Park II*, 336 F3d at 732). Similarly, the historical exercise of state and local powers to regulate housing is not dispositive on the issue of actual conflict. Local Law 79, which requires owners to either remain in Section 8 or sell their property to the tenants at a rate set by a panel of appraisers, actually conflicts with the federal regime of an entirely voluntary program with inducements to encourage owners to remain in Section 8 (*see id.* at 731-734).[1] Indeed, Local Law 79 was enacted, in part, with the aim of nullifying the federal provision allowing for an owner's voluntary withdrawal. Petitioners' characterization of the Local Law as affording "additional protections" does not disguise that actual conflict with the federal laws. The City Council could enact safeguards not inconsistent with the federal laws; for example, supplemental vouchers or tax breaks to make remaining in the program even more enticing than the federal inducements would certainly be permissible. However, converting

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[1]The parties agree that the express preemption provision of the Low-Income Housing Preservation and Resident Homeownership Act (LIHPRHA) (12 USC § 4101 *et seq.*) does not apply here.

a voluntary federal program into a mandatory one would frustrate congressional objectives (*id.* at 733-734 ["Any state statute that forces owners to remain in a federally subsidized program from which Congress has authorized withdrawal would eviscerate the method Congress chose to implement the federal low-income housing scheme"]). In fact, Local Law 79 would have the effect of discouraging owners from embarking on new Section 8 housing developments, which would also run afoul of congressional goals.

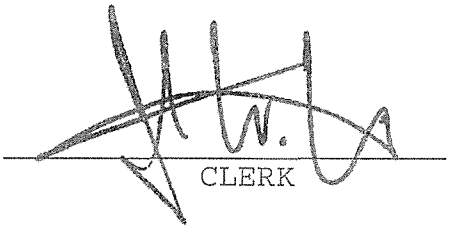
The fact that Local Law 79 offers owners a choice between remaining in Section 8 and selling to the tenants does not, as petitioners contend, render the local provision noncompulsory. Under that law, owners are divested of all other options, including maintaining the building as a market rent property; furthermore, the tenants' purchase price is artificially set by a panel of appraisers.

Petitioners' cases do not warrant a finding that Local Law 79 is consistent with federal law. In *Rosario v Diagonal Realty, LLC* (8 NY3d 755, 764 [2007], *cert denied* __ US __, 128 S Ct 1069 [2008]), the Court of Appeals held that Congress's repeal of the "endless lease" provision of Section 8 did not preempt application of state rent regulation laws of general applicability requiring owners to renew stabilized leases on the same terms as the expiring contracts, because legislative and regulatory language expressly contemplated that state and local

laws would continue such protections. At issue in *TOPA Equities, Ltd. v City of Los Angeles* (342 F3d 1065 [9th Cir 2003]) was a local rent regulation law applicable to all apartment owners, not just owners who opted out of federal programs. Petitioners' state court cases involved antidiscrimination laws (*see Commission on Human Rights & Opportunities v Sullivan Assoc.*, 250 Conn 763, 739 A2d 238 [1999]; *Attorney General v Brown*, 400 Mass 826, 511 NE2d 1103 [1987]; *Franklin Tower One, LLC v N.M.*, 157 NJ 602, 725 A2d 1104 [1999]). To the extent *Kenneth Arms Tenant Assoc. v Martinez* (2001 US Dist LEXIS 11470 [ED Cal 2001]) can be read as conferring on states an unfettered ability to impose restrictions greater than those imposed by federal law, we decline to follow it and find the Eighth Circuit's reasoning in *Forest Park II* (336 F3d 724), more persuasive.

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

ENTERED: OCTOBER 7, 2008



CLERK

Mazzarelli, J.P., Andrias, Saxe, Friedman, Acosta, JJ.

4077 Horizon Inc., et al., Index 600305/05
Plaintiffs-Respondents-Appellants,

-against-

Shimon Wolkowicki, etc., et al.,
Defendants-Appellants-Respondents.

Friedman, Harfenist, Kraut & Perlstein, Lake Success (Steven Jay Harfenist of counsel), for appellants-respondents.

Bohmart & Sacks, P.C., New York (Joel K. Bohmart of counsel), for respondents-appellants.

Order, Supreme Court, New York County (Richard B. Lowe, III, J.), entered January 25, 2008, which, insofar as appealed from as limited by the briefs, denied defendants' motion for summary judgment dismissing the first through fourth causes of action (except as to Wolkowicki's and S&R Medallion Corp.'s alleged guaranty of repayment of funds transferred by plaintiffs to New York Real Estate Group, Inc. [NYREG]), and sixth through eighth causes of action and granted plaintiffs' cross motion pursuant to CPLR 3126 to preclude defendants from offering evidence on piercing the corporate veil, unanimously modified, on the law and the facts, to grant the cross motion only to the extent of directing an adverse inference charge against defendants on the issue of piercing the corporate veil, and otherwise affirmed, without costs.

Plaintiffs seek to recover $1.8 million paid to defendant NYREG pursuant to alleged oral loan agreements. As a preliminary matter, the court correctly found that factual issues preclude summary judgment dismissing plaintiffs' claim that NYREG's corporate veil should be pierced and its principal, defendant Wolkowicki, held personally liable for the corporation's obligations. Wolkowicki ignored the corporate form by transferring monies in and out of NYREG without any documentation or formalities; this allegedly injured plaintiffs by creating a labyrinth of persons and entities through which to pursue their funds (*see Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 141 [1993]; *Forum Ins. Co. v Texarkoma Transp. Co.*, 229 AD2d 341 [1996]). In any event, we agree that a discovery sanction was warranted, given defendants' failure, despite four orders, to produce checks and other financial documents essential to proving the claim for piercing the veil. Contrary to defendants' argument that the motion for sanctions was untimely, plaintiffs preserved their objection to the failure to produce in their note of issue (*see Magee v City of New York*, 242 AD2d 239 [1997]; *cf. Escourse v City of New York*, 27 AD3d 319 [2006]). However, because the party seeking discovery is also the party bearing the burden of proof on the issue, and because the evidence is peculiarly within defendants' custody, we find that an adverse inference charge is a more appropriate sanction.

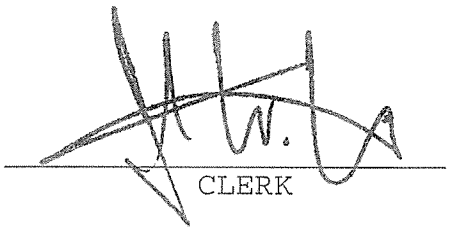
The motion court erroneously found issues of fact as to Bezpalco's apparent authority to bind Wolkowicki based upon the overheard telephone conversation between them. However, there is a triable issue of fact as to whether Wolkowicki was the alter ego of NYREG and there is ample evidence that Bezpalco was NYREG's agent. Therefore, in the event NYREG's corporate veil is pierced, Wolkowicki will be personally liable for NYREG's debt and plaintiff's argument that Bezpalco was also Wolkowicki's agent is beside the point. Thus, plaintiff's claims for breach of contract and implied contract, money had and received and unjust enrichment were correctly sustained. Further, because there are still viable claims against Wolkowicki, and because the transfer of 50% of the stock in S&R was made to his wife, for nominal consideration, while Wolkowicki faced a conviction for insurance fraud and a $1 million penalty, the claims under the Debtor and Creditor Law were correctly sustained (*see Matter of Shelly v Doe*, 249 AD2d 756 [1998]).

Finally, plaintiffs' claim that other defendants guaranteed the loan to NYREG is unsupported by a writing (*see* General Obligations Law § 5-701). Plaintiffs allege that the promissory notes reflecting the guaranty were stolen, and offer the testimony of their agent, Oleg Pogrebnoy, as to the contents

thereof. The court properly refused to consider this parol evidence (*see generally Schozer v William Penn Life Ins. Co. of N.Y.*, 84 NY2d 639 [1994]).

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

ENTERED: OCTOBER 7, 2008



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Tom, J.P., Friedman, Buckley, Acosta, Freedman, JJ.

4175 The People of the State of New York, Respondent,

-against-

Jeff Godbold, etc., Defendant-Appellant. Ind. 4239N/06

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

Robert M. Morgenthau, District Attorney, New York (Jonathan Lenzner of counsel), for respondent.

Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered March 27, 2007, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree and criminal possession of a controlled substance in the third degree and sentencing defendant to an aggregate term of 2 years, unanimously affirmed.

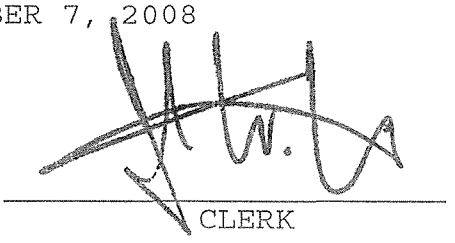
The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's determinations concerning credibility. We do not find the undercover officer's account of the transaction to be implausible, and we reject defendant's remaining arguments concerning the weight of the evidence.

The court properly permitted the People to elicit evidence of uncharged drug sales to other persons that occurred while the officer was in defendant's apartment. This evidence was highly

relevant to establish defendant's accessorial liability and refute his claim that the codefendant was the only seller (*see People v Carter*, 77 NY2d 95, 107 [1990], *cert denied* 499 US 967 [1991]; *People v Jackson*, 39 NY2d 64, 68 [1976]). The uncharged crime evidence also completed the officer's narrative and was inextricably interwoven with the instant offense (*see People v Vails*, 43 NY2d 364, 368-69 [1977]; *People v Gines*, 36 NY2d 932 [1975]). Defendant's claim that the court should have given the jury a limiting instruction as to this evidence, and his related challenge to the prosecutor's summation, are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we find no prejudice to defendant in either regard.

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

ENTERED: OCTOBER 7, 2008



CLERK

Tom, J.P., Friedman, Buckley, Acosta, Freedman, JJ.

4176 Barbara Barrios, Index 23575/04
Plaintiff-Respondent,

-against-

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

- - - - -

JT Magen & Co., Inc.,
Third-Party Plaintiff-Respondent,

-against-

Donaldson Acoustics Co., Inc.,
Third-Party Defendant-Appellant.

Gorton & Gorton LLP, Mineola (John T. Gorton of counsel), for appellant.

Sacks and Sacks, LLP, New York (Scott N. Singer of counsel), for JT Magen & Co., Inc., respondent.

Order, Supreme Court, Bronx County (Alexander W. Hunter, Jr., J.), entered September 27, 2007, which, to the extent appealed from as limited by the brief, denied third-party defendant's motion for summary judgment dismissing the Labor Law § 200 and § 241(6) claims, unanimously modified, on the law, to dismiss the Labor Law § 241(6) claim, and otherwise affirmed, without costs.

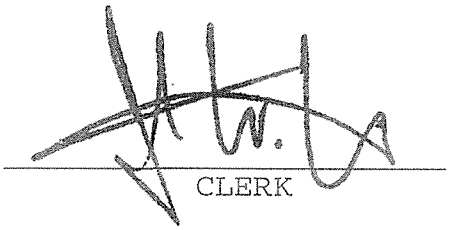
That part of the motion that sought dismissal of the Labor Law § 200 claim was premature, since, as a result of the failure of all defendants to engage in discovery, the identity of the defendant that supervised and controlled the freight elevator

into which plaintiff was loading door bucks was within defendants' exclusive knowledge (*see* CPLR 3212[f]).

However, the Labor Law § 241(6) claim should have been dismissed because the Industrial Code (12 NYCRR) sections cited by plaintiff as predicates for this claim are inapplicable. The accident occurred on a loading dock or work area, not a "passageway, walkway, stairway, or other thoroughfare" (12 NYCRR 23-2.1[a][1]; *see Waitkus v Metropolitan Hous. Partners*, 50 AD3d 260 [2008]). A freight elevator is not a "material hoist" as contemplated by the Code (12 NYCRR 23-6.1(d), 6.3(e)(3); 23-1.4[33]; *see Lindstedt v 813 Assoc.*, 238 AD2d 386 [1997], *lv dismissed* [1997], *affg in pertinent part* 167 Misc 2d 273 [1996]).

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

ENTERED: OCTOBER 7, 2008



CLERK

Tom, J.P., Friedman, Buckley, Acosta, Freedman, JJ.

4177-
4178 In re Jenifer W.,
Petitioner-Respondent,

-against-

Jonathan L.,
Respondent-Appellant.

Jonathan L., appellant pro se.

Jenifer W., respondent pro se.

Order, Family Court, New York County (Ruth Jane Zuckerman, J.H.O.), entered on or about September 1, 2006, as supplemented by order, same court and J.H.O., entered on or about February 27, 2007, which, to the extent appealed from, awarded primary physical custody to petitioner mother, unanimously affirmed, without costs.

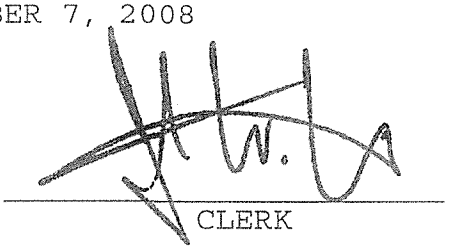
"[I]n reviewing relocation and other custody issues, deference is to be accorded to the determination rendered by the factfinder, unless it lacks a sound and substantial basis in the record" (*Yolanda R. v Eugene I.G.*, 38 AD3d 288, 289 [2007]). This record reveals that with respect to the custody issues, the court properly considered the children's best interests (*see Matter of Tropea v Tropea*, 87 NY2d 727, 739-741 [1996]). A preponderance of the evidence supports the court's award of physical custody to the mother, who had established a stable home for the children in New Jersey. The father's concerns were

addressed by the court's disposition, which, among other things, awarded him legal custody and precluded the mother from moving the children's primary residence more than 15 miles farther from his residence.

We have considered the father's remaining contentions and find them without merit.

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

ENTERED: OCTOBER 7, 2008



CLERK

Tom, J.P., Friedman, Acosta, Freedman, JJ.

4179 Gloria Esther Monge, as Administratrix of the Estate of Antonio Negron, et al., Plaintiffs-Appellants, Index 24852/98

-against-

Queens-Long Island Medical Group, P.C., et al., Defendants-Respondents,

Wayne Odinsky, D.P.M., et al., Defendants.

Sullivan Papain Block McGrath & Cannavo P.C., New York (Stephen C. Glasser of counsel), for appellants.

Bartlett McDonough Bastone & Monaghan, LLP, White Plains (Edward J. Guardaro, Jr. of counsel), for Queens-Long Island Medical Group, P.C., respondent.

Leahey & Johnson, P.C., New York (Peter James Johnson, Jr. of counsel), for Eligio Quijano, M.D., respondent.

Order, Supreme Court, Bronx County (Howard R. Silver, J.), entered January 19, 2006, which, to the extent appealed from, granted the motion and cross motion by defendants Queens-Long Island Medical Group (QLIMG) and Quijano for summary judgment dismissing the complaint against them, unanimously affirmed, without costs.

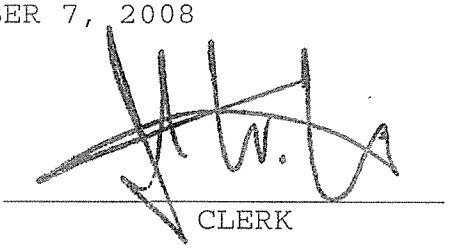
The submissions by QLIMG and Quijano, including deposition transcripts, medical records and expert affirmations, established a prima facie defense to this medical malpractice action,

entitling them to summary judgment if not rebutted (*see Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). In reaching their conclusions, the experts properly relied on the deceased plaintiff's medical records and history. In contrast, plaintiffs' expert's conclusory affirmation failed to identify the basis for his belief that Dr. Quijano's failure to perform a vascular bypass in November 1996 was ultimately responsible for the decedent's below-the-knee amputation. Another surgeon performed bypass surgery in January of 1997, which surgery was unsuccessful. Moreover, plaintiffs' expert failed to address the December 1996 angiogram films and evidence of sufficient blood flow and circulation in the foot, as well as the decedent's risk factors for bypass surgery. Plaintiffs thus failed to meet their burden in opposing the motions for summary dismissal (*see id.*; *Margolese v Uribe*, 238 AD2d 164, 166-167 [1997]).

We have considered plaintiffs' remaining arguments and find them unavailing.

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

ENTERED: OCTOBER 7, 2008



CLERK

Tom, J.P., Friedman, Buckley, Acosta, Freedman, JJ.

4181 The People of the State of New York, Respondent, Ind. 2634/04

-against-

Dwayne Christie, Defendant-Appellant.

David R. Kliegman, Kew Gardens, for appellant.

Robert T. Johnson, District Attorney, Bronx (Mary Jo L. Blanchard of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Joseph J. Dawson, J.), rendered March 22, 2007, convicting defendant, after a jury trial, of attempted assault in the first degree and criminal possession of a weapon in the second degree, and sentencing him to concurrent terms of 5 years, unanimously affirmed. The matter is remitted to Supreme Court, Bronx County, for further proceedings pursuant to CPL 460.50(5).

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's determinations concerning credibility. Defendant's accessorial liability could be readily inferred from the complete chain of events (*see e.g. People v Marte*, 7 AD3d 405 [2004], *lv denied* 3 NY3d 677 [2004]). When viewed in the context of the surrounding circumstances, including motive, the only reasonable explanation for defendant's use of the words "Bust it" was that

he was directing his companion to shoot the victim (*see People v Martinez*, 8 AD3d 8 [2004], *lv denied* 3 NY3d 677 [2004]).

Defendant argues that he was deprived of a fair trial by alleged prosecutorial misconduct occurring at numerous points in the proceedings. However, the only issues that he has arguably preserved are those that were the subject of his mistrial motions. In each instance, the court provided a suitable remedy that prevented the alleged misconduct from causing any prejudice, and it properly exercised its discretion in denying a mistrial (*see People v Santiago*, 52 NY2d 865 [1981]). By failing to object, by making generalized objections, by failing to request further relief after objections were sustained, or by raising issues for the first time in a CPL 330.30 motion to set aside the verdict, defendant failed to preserve any of his other prosecutorial misconduct claims, and we decline to review them in the interest of justice. As an alternative holding, we likewise conclude that the court's curative actions sufficed to prevent any prejudice.

We perceive no basis for reducing the sentence.

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

ENTERED: OCTOBER 7, 2008

Tom, J.P., Friedman, Buckley, Acosta, Freedman, JJ.

4182 The People of the State of New York, Ind. 1129/06
Respondent,

-against-

Heriberto Gomez,
Defendant-Appellant.

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

Judgment, Supreme Court, New York County (Gregory Carro, J.), rendered on or about September 26, 2006, unanimously affirmed.

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

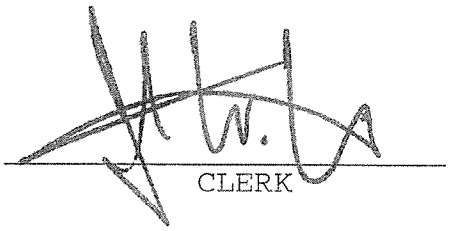
Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that court or to a Justice of the Appellate Division of the Supreme Court of this Department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

Denial of the application for permission to appeal by the

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

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

ENTERED: OCTOBER 7, 2008



CLERK

Tom, J.P., Friedman, Buckley, Acosta, Freedman, JJ.

4184 The People of the State of New York, Respondent, Ind. 17/06

-against-

Allen Walker, Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (Robert H. Straus, J.), rendered October 10, 2006, convicting defendant, upon his plea of guilty, of two counts of criminal possession of stolen property in the fourth degree, and sentencing him, as a second felony offender, to concurrent terms of 2 to 4 years, unanimously affirmed.

The court properly denied defendant's suppression motion. The information in a police radio report, based on an anonymous 911 call reporting criminal behavior, combined with the officer's observation of the suspicious behavior of defendant, who matched the detailed description of one of the suspects at the location, provided the officer with, at least, a founded suspicion that criminality was afoot, permitting him to exercise the common-law

right of inquiry (*see People v Moore*, 6 NY3d 496, 499-500 [2000]; *People v Casimey*, 39 AD3d 228 [2007], *lv denied* 8 NY3d 983 [2007]). Since the officer was justified in engaging in a level two inquiry that would have permitted him to ask accusatory questions, he was similarly justified in asking defendant for additional identification when the identity card defendant initially produced from his wallet did not include an address. We note that a valid address would have been important had it become necessary to locate defendant for further investigation. The request for further identification was a continuation of the lawful common-law inquiry, and there is no merit to defendant's suggestion that the encounter had become a level-three seizure.

After the officer requested additional identification, defendant pulled out a second wallet, looked inside, and then quickly put it away. This conduct heightened the officer's suspicion and provided further justification for the officer's request to examine the wallet, which defendant voluntarily turned over, leading to the discovery of stolen credit cards.

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

ENTERED: OCTOBER 7, 2008

CLERK

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on October 7, 2008.

Present - Hon. Peter Tom, Justice Presiding
David Friedman
John T. Buckley
Rolando T. Acosta
Helen E. Freedman, Justices.

Thomas W. D'Antonio, Index 112433/06
Plaintiff-Respondent,

-against- 4185

Gary Hiller, et al.,
Defendants-Appellants,

Mercury Beach Maid, Inc.,
Defendant.

An appeal having been taken to this Court by the above-named appellant from an order and judgment of the Supreme Court, New York County (Karla Moskowitz, J.), entered on or about February 27, 2007,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated September 10, 2008,

It is unanimously ordered that said appeal be and the same is hereby withdrawn in accordance with the terms of the aforesaid stipulation.

ENTER:

Clerk.

Tom, J.P., Friedman, Buckley, Acosta, Freedman, JJ.

4186-
4186A In re Mark C.,
Petitioner-Appellant,

-against-

Jasmin H.,
Respondent-Respondent.

- - - - -

In re Jasmin H.,
Petitioner-Respondent,

-against-

Mark C.,
Respondent-Appellant.

Tilem & Campbell, LLP, White Plains (Peter H. Tilem of counsel), for appellant.

Julian A. Hertz, Larchmont, for respondent.

Orders, Family Court, New York County (Karen I. Lupuloff, J.), entered on or about July 20, 2007, which, after a fact-finding hearing, denied Mark C.'s petition for an order of protection and granted Jasmin H.'s petition for similar relief, unanimously affirmed, without costs.

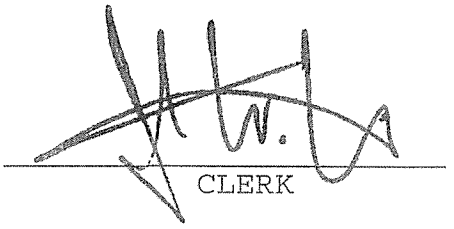
Mark C. failed to establish, by a fair preponderance of the evidence, that Jasmin H. had committed the acts he alleged to have occurred when she arrived at school to pick up their son from court-ordered visitation. On the other hand, Jasmine H. did establish, by a preponderance of the evidence, that Mark C. had committed the criminal offenses of harassment in the second

degree, disorderly conduct and attempted assault in the third degree. The record provides no basis for disturbing the court's credibility determinations (*see Matter of Peter G. v Karleen K.*, 51 AD3d 541 [2008]).

Family Court providently exercised its discretion in foreclosing Mark C.'s attempt to cross-examine Jasmin H. about a prior complaint of sexual abuse allegedly committed against the parties' daughter, as the details of that complaint were irrelevant to the charges at issue in the instant petition and cross petition, and were well beyond the scope of the direct examination (*see People v Petty*, 17 AD3d 220 [2005], *lv denied* 5 NY3d 793 [2005]; *People v Melcherts*, 225 AD2d 357 [1996], *lv denied* 88 NY2d 881 [1996]).

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

ENTERED: OCTOBER 7, 2008



CLERK

Tom, J.P., Friedman, Buckley, Acosta, Freedman, JJ.

4187 Carmen Rosa, Index 18343/98
Plaintiff-Respondent,

-against-

New York City Transit Authority, et al.,
Defendants-Appellants,

Jean Pierre Frito, et al.,
Defendants-Respondents.

Wallace D. Gossett, New York (Steve S. Efron of counsel), for appellants.

Pollack, Pollack, Isaac & DeCicco, New York (Brian J. Isaac of counsel), for Carmen Rosa, respondent.

Judgment, Supreme Court, Bronx County (Patricia Anne Williams, J.), entered April 17, 2007, which, to the extent appealed from as limited by the brief, apportioned 40% liability for plaintiff's injuries to defendants New York City Transit Authority and Manhattan and Bronx Surface Transit Operating Authority (the Transit Authority) and awarded plaintiff $650,000 for past pain and suffering, unanimously modified, on the law and the facts, to reduce the award to $610,000 pursuant to General Obligations Law § 15-108(a) and otherwise affirmed, without costs. The Clerk is directed to enter an amended judgment accordingly.

Since the testimony of the driver of the car and the driver of the bus owned by defendant Bravo Bus Service was uncontroverted that the car struck first plaintiff, who was

standing on the sidewalk, and then Bravo's bus, which was further down the road, the court did not err in not including Bravo on the verdict sheet (*see Koechlin v Weintraub*, 27 AD3d 219 [2006]). Further, counsel for the Transit Authority told the jury in summation that the evidence showed that Bravo's bus was parked properly (*see Gale P. Elston, P.C. v Dubois*, 18 AD3d 301, 303 [2005]).

In view of the Transit Authority's failure to act diligently to procure its proposed witnesses to testify about its efforts to identify the bus driver involved in the accident, the trial court's preclusion of the Transit Authority from calling such witnesses did not rise to the level of an abuse of discretion (*see Mayorga v Jocarl & Ron Co.*, 41 AD3d 132, 134 [2007], *appeal dismissed* 9 NY3d 96 [2007]; *Paek v City of New York*, 28 AD3d 207, 208 [2006], *lv denied* 8 NY3d 805 [2007]; *Shmueli v The Corcoran Group*, 29 AD3d 309 [2006]).

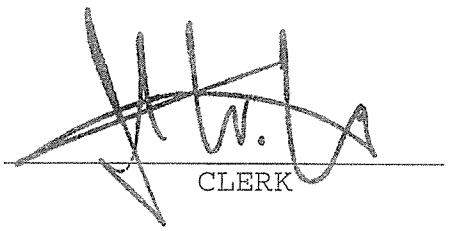
The award of $650,000 for past pain and suffering does not deviate materially from what is reasonable compensation under the circumstances (*see* CPLR 5501[c]). Plaintiff suffered five fractured bones, was hospitalized for approximately three months, and complained of pain from the 1997 accident through the 2006 trial.

The parties to the appeal have stipulated to the reduction of the award to reflect the settlement by Bravo of the action

against it in the amount of $40,000, a setoff mandated by General Obligations Law § 15-108[a] (*see Vazquetelles v Gordon Co.*, 192 AD2d 322 [1993], *lv dismissed* 81 NY2d 1067 [1993]).

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

ENTERED: OCTOBER 7, 2008



CLERK

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on October 7, 2008.

Present - Hon. Peter Tom, Justice Presiding
David Friedman
John T. Buckley
Rolando T. Acosta
Helen E. Freedman, Justices.

The People of the State of New York,
Respondent,

Ind. 4540C/05
31691C/05

-against-

4188
4188A

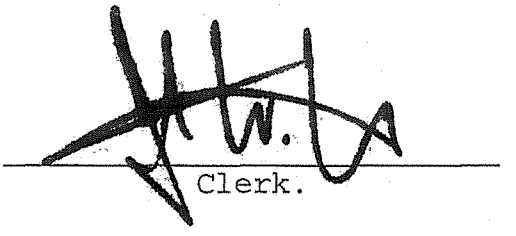
Michael Raso,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment and judgment of resentence of the Supreme Court, Bronx County (Richard Lee Price, J.), rendered on or about May 31, 2007 and October 2, 2007,

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

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

ENTER:



Clerk.

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

Tom, J.P., Friedman, Buckley, Acosta, Freedman, JJ.

4189 Ace Fire Underwriter's Insurance Company, etc., et al., Plaintiffs-Appellants, Index 600133/06

-against-

ITT Industries, Inc., etc., et al., Defendants,

Liberty Mutual Insurance Company, Defendant-Respondent.

Siegal & Park, Mt. Laurel, NJ (Melvin R. Shuster, of the Bar of the State of Pennsylvania, admitted pro hac vice, of counsel), for appellants.

Twomey, Hoppe & Gallanty, LLP, New York (Michael A. Twomey of counsel), for respondent.

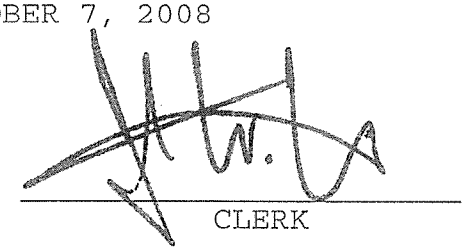
Order, Supreme Court, New York County (Herman Cahn, J.), entered July 17, 2007, which, insofar as appealed from in this declaratory judgment action seeking a judicial determination as to insurance coverage, granted defendant Liberty Mutual Insurance Company's motion to dismiss the complaint as against it, and directed entry of judgment in its favor, unanimously affirmed, with costs.

The motion court, after examining the submitted documentary evidence, appropriately concluded that plaintiffs could not, as a matter of law, maintain a claim for contribution as against Liberty Mutual (*see Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 [1999], *affd* 94 NY2d 659 [2000]; CPLR 3211[a][7]). The evidence establishes that plaintiffs and Liberty Mutual were

not co-insurers of the same risk during the same period of time (*see Pennsylvania Manufacturers' Assn. Ins. Co. v Liberty Mut. Ins. Co.*, 39 AD3d 1161 [2007], *lv denied*, 9 NY3d 810 [2007]; *HRH Constr. Corp. v Commercial Underwriters Ins. Co.*, 11 AD3d 321, 323 [2004], *lv denied* 5 NY3d 705 [2005]).

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

ENTERED: OCTOBER 7, 2008



CLERK

Tom, J.P., Friedman, Buckley, Acosta, Freedman, JJ.

4190-
4191 The People of the State of New York, Ind. 38583C/05
Respondent,

-against-

Randy Tillman,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Karen Swiger of counsel), for respondent.

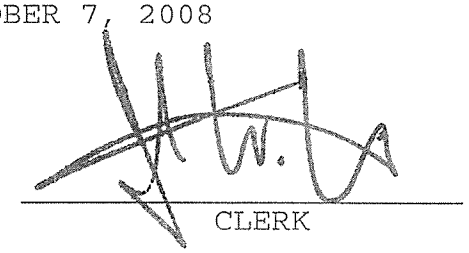
Judgment, Supreme Court, Bronx County (Michael Gross, J.), rendered November 13, 2006, as amended December 1, 2006, convicting defendant, after a jury trial, of assault in the second degree, and sentencing him, as a second felony offender, to a term of 6 years, unanimously affirmed.

The court properly denied defendant's request to charge the jury on justification since there was no reasonable view of the evidence, viewed in the light most favorable to the defendant, to support that charge (*see People v Cox*, 92 NY2d 1002 [1998]). The evidence established that, at the time of the assault, the victim was unarmed and backing away, and there was no evidence to the

contrary. A justification charge would have called upon the jury to speculate as to an alternative scenario.

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

ENTERED: OCTOBER 7, 2008



CLERK

Tom, J.P., Friedman, Buckley, Freedman, JJ.

4192 Madison-68 Corp., Index 112820/04
Plaintiff-Appellant,

-against-

David Malpass, et al.,
Defendants-Respondents.

Belkin Burden Wenig & Goldman, LLP, New York (Edward Baer of counsel), for appellant.

Tarter Krinsky & Drogin LLP, New York (Andrew N. Krinsky of counsel), for respondents.

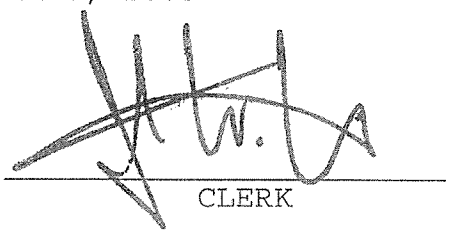
Order, Supreme Court, New York County (Ira Gammerman, J.H.O.), entered March 17, 2008, which, insofar as appealed from in this action for unpaid rent, denied plaintiff's motion to set aside the trial and restore the case to the trial calendar for assignment to a Supreme Court Justice, unanimously affirmed, without costs.

The record demonstrates that plaintiff consented to the trial by the Judicial Hearing Officer. Plaintiff participated during the course of the entire trial, was fully aware of the issues being adjudicated, and did not voice an objection until after trial and after the Judicial Hearing Officer informed the

parties that he was going to rule substantially in defendants' favor.

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

ENTERED: OCTOBER 7, 2008



CLERK

Tom, J.P., Friedman, Buckley, Acosta, Freedman, JJ.

4193 The People of the State of New York, Respondent, Ind. 57293C/04

-against-

Kevin Wighfall, Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Nancy E. Little of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Marc A. Sherman of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Seth L. Marvin, J. at hearing; Robert G. Seewald, J. at plea and sentence), rendered June 14, 2006, convicting defendant of attempted criminal possession of a controlled substance in the fourth degree, and sentencing him, as a second felony offender, to a term of 2½ to 5 years, unanimously affirmed.

The record does not establish that defendant made a valid waiver of his right to appeal (*see People v Moyett*, 7 NY3d 892 [2006]). Nevertheless, the court properly denied defendant's suppression motion. The police observed defendant in a New York City Housing Authority building, to which access was restricted to residents and guests. Defendant was standing in the lobby for approximately two minutes for no apparent reason, looking at mailboxes. This behavior was sufficiently suspicious, and inconsistent with that of a resident or guest, to provide the

police with an objective credible reason to ask defendant why he was in the building. Defendant's admission that he did not know anyone in the building and had no legitimate reason to be there raised the level of suspicion, justifying, at least, a further inquiry. The further inquiry produced an inconsistent and demonstrably false response about visiting a nonexistent tenant, and provided probable cause to arrest defendant for criminal trespass.

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

ENTERED: OCTOBER 7, 2008

CLERK

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on October 7, 2008.

Present - Hon. Peter Tom, Justice Presiding
David Friedman
John T. Buckley
Rolando T. Acosta
Helen E. Freedman, Justices.

The People of the State of New York, Ind. 3532/06
Respondent,

-against- 4194

Fred Duran,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Edward J. McLaughlin, J.), rendered on or about September 11, 2007,

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

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

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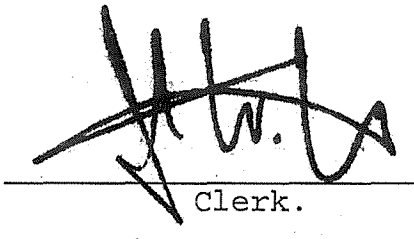


Clerk.

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

Tom, J.P., Friedman, Buckley, Acosta, Freedman, JJ.

4195N Applehead Pictures LLC, Index 602606/07
Plaintiff-Respondent,

-against-

Ronald O. Perelman,
Defendant-Appellant.

Cohen Lans LLP, New York (Deborah E. Lans of counsel), for appellant.

Susman Godfrey L.L.P., New York (Jacob W. Buchdahl of counsel), for respondent.

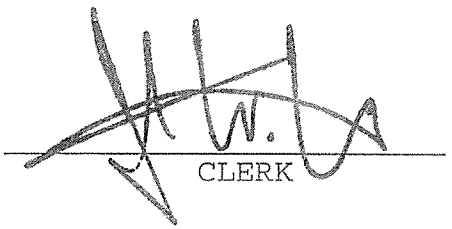
Order, Supreme Court, New York County (Debra A. James, J.), entered March 3, 2008, which denied defendant's motion to disqualify plaintiff's law firm, unanimously affirmed, with costs.

In order to disqualify the firm representing plaintiff in this breach of contract action, defendant had to demonstrate an attorney-client relationship between the firm and plaintiff's principal, and the existence of a conflict of interest between plaintiff and its principal in connection with the matter being litigated (see DR 5-105 [22 NYCRR § 1200.24]). Defendant's evidence, consisting of a hearsay internet report, an informal e-mail and a breakfast meeting, was insufficient to establish any separate attorney-client relationship between the firm and plaintiff's principal (*see Solow v Grace & Co.*, 83 NY2d 303 [1994]).

We have considered defendant's remaining arguments and find them without merit.

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

ENTERED: OCTOBER 7, 2008



CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David B. Saxe, J.P.
Eugene Nardelli
John T. Buckley
James M. Catterson, JJ.

3501-3501A
Index 601272/06

In re: Comverse Technology, Inc.,
Derivative Litigation

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Leonard Sollins, et al.,
Plaintiffs-Appellants,

-against-

Comverse Technology, Inc.,
Nominal Defendant-Respondent.

Plaintiffs appeal from an order of the Supreme Court, New York County (Richard B. Lowe III, J.), entered August 14, 2007, which granted the motion to dismiss the complaint, and a judgment, same court and Justice, entered October 28, 2007, dismissing the shareholders' derivative action.

Milberg LLP, New York (Benjamin Y. Kaufman, Neil A. Fraser and Todd L. Kammerman of counsel), and Schiffrin Barroway Topaz & Kessler, LLP, Radnor, PA (Eric Zagar of counsel), for appellants.

Dickstein Shapiro LLP, New York (Howard Schiffman of counsel), and Dickstein Shapiro LLP, Washington, DC (Eric A. Bensky of counsel), for respondent.

SAXE, J.

This appeal involves the concept of demand futility in the context of shareholder derivative litigation. Specifically, the question presented is whether appointment by a board of directors of a special committee to inquire into the challenged conduct by directors and take whatever steps it deemed necessary to rectify the problem, and whether the actions taken by the committee establish as a matter of law that before this litigation began, the board showed itself willing to take the appropriate corrective measures, rendering the litigation unnecessary.

Facts

On March 18, 2006, the Wall Street Journal published an article reporting on an SEC investigation exploring the possibility that grants of stock options to high-level employees at approximately a dozen large corporations were being illegally backdated (Forelle and Bandler, *The Perfect Payday*, Wall Street Journal, March 18, 2006, at A1). While proper stock option grants set the option price as of the dates the options are granted, backdated option grants give their recipients the right to purchase company stock at the lower price at which the stock had sold on an earlier date. This practice, the Wall Street Journal article explained, can earn millions of extra dollars for the grantee executives, because when grantees sell stock obtained

with backdated stock options, they earn not only any increase in the market value of the stock between the time the option was granted and the time the stock is sold, but also the windfall created by the difference between the stock's value on the date the option was actually awarded and its lower value on the date to which the option was backdated.

A variety of violations of law may result from the practice of awarding backdated options. Typically, companies grant options under a shareholder-approved plan filed with the SEC that states that any stock options awarded will carry the stock price on the day the company awards them; under these circumstances, the use of any different date and price could constitute securities fraud. In addition, when options are priced below the stock's fair market value on the day they are awarded, the recipient receives a value that is equivalent to extra pay; yet these backdated options are not acknowledged as an additional cost to the company, which consequently may be overstating its profits (*id.*).

The Wall Street Journal article described the Journal's own analysis, the results of which strongly suggested that backdating of stock options was a widespread practice. Among the companies whose questionable stock option grants were named in the article was the nominal defendant here, Comverse Technology, Inc.

Specifically, the article discussed two stock option grants awarded to Comverse founder and CEO Jacob "Kobi" Alexander that purportedly were issued on dates on which the price of Comverse stock dipped briefly.

As plaintiffs allege in this shareholder derivative action, the investigation by the Wall Street Journal in the weeks preceding its publication of the article set in motion the events leading to this action. After receiving inquiries from the Wall Street Journal in early March 2006, Comverse held a number of meetings with in-house counsel, and ultimately, on March 10, 2006, Comverse's board of directors formed a special committee to investigate the timing of the company's stock option grants and to take appropriate action to deal with any problems uncovered. The committee was comprised of two directors, one of whom, Ron Hiram, had been a director and compensation committee member since June 2001, which included part of the period in which the granting of backdated options is alleged to have occurred. On March 14, 2006, a press release issued by Comverse announced the formation of the special committee and the possibility that the company might need to revise previous years' financial statements. On March 16, 2006, the committee formally interviewed Alexander, who admitted that, with the assistance of defendant David Kreinberg, at various times Comverse's CFO, vice

president of finance and vice president of financial planning, and defendant William F. Sorin, a director and corporate secretary of Comverse, he had backdated option grants. The committee soon thereafter interviewed Kreinberg and Sorin as well.

Complaint

This shareholders' derivative action was commenced on April 11, 2006. At that time, Comverse's board consisted of defendants Kobi Alexander, William F. Sorin, Itzik Danzinger, John H. Friedman, Sam Oolie, and Ron Hiram, as well as nonparty Raz Alon. The complaint names as defendants a number of current and former Comverse officers and directors, as well as the company's auditor, and seeks restitution and money damages against each defendant, on behalf of Comverse and its shareholders.

The complaint alleges that, beginning in 1991, Kobi Alexander and David Kreinberg, with the assistance of William F. Sorin, repeatedly awarded themselves backdated stock options, despite the company's approved option plan authorizing the award of options with an exercise price not less than the fair market value of the company's common stock on the date of the option.

Sorin is said to have orchestrated the paperwork by which the approval of the compensation committee was obtained for the backdated option grants; the compensation committee signed the

necessary consents forwarded to them by Sorin, despite the use of an "as of" date earlier than the date on which it actually approved the option grants. To conceal the improper backdating, some of the individual defendants caused proxy statements to be disseminated that falsely reported the dates of stock option grants, representing that they were granted at fair market value during the relevant period. In addition, when asked directly about the reports pointing toward backdating, defendants Alexander, Kreinberg and Sorin initially falsely stated that Comverse had simply acted quickly on the dates on which Comverse stock prices dipped, so as to provide for and obtain board approval for stock option grants on those dates.

As to those defendants who were members of the company's compensation committee, John H. Friedman, Ron Hiram, and Sam Oolie, it is alleged that they failed to fulfill their fiduciary obligation to administer the company's stock option plans and instead, as a practical matter, ceded the administration of option plans to Alexander and Kreinberg. It is alleged that the compensation committee knowingly or recklessly approved these backdated stock options engineered by Alexander beginning in 1991.

Finally, the complaint asserted that a demand of the board of directors would have been futile because the backdating of

options is so egregious that it could not have been the product of sound business judgment.

Comverse successfully moved to dismiss the complaint on the ground that plaintiffs had not complied with the requirement of Business Corporation Law § 626(c) that the complaint "set forth with particularity the efforts of the plaintiff to secure the initiation of such action by the board or the reasons for not making such effort." This appeal followed.

Discussion

"Derivative claims against corporate directors belong to the corporation itself" (*Auerbach v Bennett*, 47 NY2d 619, 631 [1979]), since "[t]he remedy sought is for wrong done to the corporation," and the recovery sought is for "the benefit of the corporation" (*Isaac v Marcus*, 258 NY 257, 264 [1932]). The Court of Appeals has "historically been reluctant to permit shareholder derivative suits, noting that the power of courts to direct the management of a corporation's affairs should be exercised with restraint" (*Marx v Akers*, 88 NY2d 189, 194 [1996] [internal quotation marks and citation omitted]). In fact, the requirement of Business Corporation Law § 626(c) that the complaint in a shareholders' derivative action set forth with particularity either "the efforts of the plaintiff to secure the initiation of such action by the board or the reasons for not making such

effort" is intended to balance the right of a board to manage the corporation's business with the need for shareholders to be able to safeguard the company's interests when its officers or directors fail to discharge their responsibilities (*see Bansbach v Zinn*, 1 NY3d 1, 8 [2003]).

The controlling case in New York on demand futility establishes that there are three types of circumstances in which shareholders may proceed with derivative claims in the absence of a demonstrated attempt to persuade the board to initiate an action itself (*see Marx v Akers*, 88 NY2d 189, 195 [1996]). The complaint must allege with particularity that "(1) a majority of the directors are interested in the transaction, or (2) the directors failed to inform themselves to a degree reasonably necessary about the transaction, or (3) the directors failed to exercise their business judgment in approving the transaction" (*Marx v Akers*, 88 NY2d at 198).

The initial question is therefore whether plaintiffs' allegations support their assertion that a majority of the board was so interested or so culpable regarding the complained-of conduct that it would have been futile to demand that the board take legal action to make the company whole.

Interest

Under New York law, a director may be interested under

either of two scenarios: self-interest in the transaction or loss of independence due to the control of an interested director (*see Bansbach v Zinn*, 1 NY3d at 11, citing *Marx v Akers*, 88 NY2d 189). The self-interest of Alexander and Sorin is undeniable and undisputed. We agree with plaintiffs that the requisite self-interest is shown also as to director Itzik Danziger by the allegation that he was a recipient of backdated options worth millions of dollars, whether or not he took part in the actual backdating process.

However, the board as it existed at the time the action was commenced was composed of seven individuals, and we are not convinced that the allegations of the complaint establish that any directors other than the three previously mentioned fall into the category of "interested" under *Marx v Akers*. Plaintiffs claim that directors Oolie, Hiram and Friedman personally benefitted from the backdating scheme, in that they approved false financial statements as members of the audit committee and approved the backdated options as members of the compensation committee, and then sold some of their own shares of Comverse stock at prices that were artificially inflated due to the backdating and false financial statements. However, the alleged benefit obtained from selling Comverse stock does not appear to differ from a benefit that may have accrued to Comverse

shareholders generally. "Directors are self-interested in a challenged transaction where they will receive a direct financial benefit from the transaction which is different from the benefit to shareholders generally" (*Marx v Akers* at 202).

Failure to Stay Informed

We agree with plaintiffs that the allegations are sufficient to satisfy the second ground for demand futility described in *Marx v Akers*. "Demand is excused because of futility when a complaint alleges with particularity that the board of directors did not fully inform themselves about the challenged transaction to the extent reasonably appropriate under the circumstances" (*Marx v Akers* at 200). The complaint alleges with particularity that the board and its compensation committee failed to exercise reasonably appropriate oversight of the stock option granting process, not even informing themselves to a reasonable degree about the dates assigned to company stock option grants, and approving backdated option grants without reviewing or taking any note of the date on which they were ostensibly awarded or to whom the options were given. Specifically, it is asserted that "unanimous written consents" for grants of stock options were sometimes presented to the compensation committee for signature more than a month after the grant date, in circumstances where the stock price had risen dramatically in the intervening period,

and yet were approved unquestioningly. The compensation committee members often approved option grants orally, in direct violation of the company's bylaws. In addition, the compensation committee had a list of individuals who received option grants in 2001 that contained more than two dozen names of individuals who were not Comverse employees but ostensibly received grants totaling 250,000 options; it is claimed that these options were placed by Alexander in a "slush fund" for later use. Yet not even a cursory check or inquiry was made by the compensation committee; nor was that list even compared against the list of Comverse employees. Even a minimal review would have prompted members of the board and the compensation committee to perform some sort of additional inquiry into the corporation's use of option grants. The allegations therefore establish that there were grounds for inquiry by these directors and officers, and that no inquiry was made, rendering demand futile under the second test of *Marx v Akers*.

While the magnitude of the illegal transactions here is not nearly that of the $900 million scheme considered in *Miller v Schreyer* (257 AD2d 358 [1999]), we nevertheless consider applicable that decision's ruling that a demand is properly considered futile when "[i]n view of the illegal purpose of the transactions, their magnitude and duration, their timing, and the

identity of their beneficiary, the matter should have come to the attention of senior management even on a rudimentary audit" (*id.* at 362).

Failure to Exercise Business Judgment

The third test of *Marx v Akers* holds that demand on the Board is excused because of futility when "the challenged transaction was so egregious on its face that it could not have been the product of sound business judgment of the directors" (88 NY2d at 200-201). The business judgment rule "bars judicial inquiry into actions of corporate directors taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes," not actions taken in furtherance of illegitimate purposes (*see Auerbach v Bennett*, 47 NY2d at 629).

Although the courts of this state have not yet addressed this issue with regard to backdated stock options, it is instructive that Delaware courts have expressly held that backdating stock options is so egregious that it could not have been the product of the sound business judgment of the directors (*see Ryan v Gifford*, 918 A2d 341, 354, 355-356 [Del. Ch. 2007]; *see also Matter of Tyson Foods Inc. Consol. Shareholder Litig.*, 919 A2d 563, 592 n74 [Del. Ch. 2007]).

We agree with these Delaware courts: the approval of a

decade's worth of backdated stock options simply does not qualify as a legitimate exercise of business judgment. As the motion court observed, passively rubber-stamping the acts of the active corporate managers does not exempt directors from culpability, and the business judgment rule does not protect them (*see Barr v Wackman,* 36 NY2d 371, 381 [1975]).

Ramification of Appointment of Special Committee

Despite its conclusion that plaintiffs sufficiently pleaded with particularity facts establishing at least two prongs of the *Marx v Akers* demand futility test, the motion court concluded that demand futility was not established, because by the time the action was commenced, the corporation had appointed a special committee to conduct its own investigation into the backdating of options, which indicated the board's willingness to take the actions necessary to protect the interests of the corporation.

We disagree with the motion court's reasoning. First, the mere creation of a special committee does not in itself necessarily establish the board's willingness to take all the necessary and appropriate steps to obtain the relief available. Indeed, in a case where a corporation did not even seek dismissal but merely sought a stay of shareholder derivative litigation pending the investigation by its appointed special litigation committee, this Court specifically observed that the mere

creation of the committee did not alone justify a stay of the shareholder derivative action (*see Katz v Renyi*, 282 AD2d 262 [2001]).

Here, director Ron Hiram, one of the two appointed members of the special committee, was a director and member of the compensation committee for part of the period at issue, and he allegedly failed to take any steps reasonably necessary to oversee the awarding of options. His appointment as one of the two members of the special committee arguably creates a conflict at the outset, calling into question the committee's ability to fully investigate the conduct of all potentially liable parties.

In any event, in arguing that the appointment of the special committee definitively shows that a demand to the Board would not have been futile, Comverse relies upon case law from other jurisdictions (*see e.g. Matter of Infosonics Corp. Derivative Litig.*, 2007 US Dist LEXIS 66043, 2007 WL 2572276 [SD Cal 2007]; *Matter of Ferro Corp. Derivative Litig.*, 2006 US Dist LEXIS 11608, 2006 WL 2038659 [ND Ohio 2006], *affd* 511 F3d 611 [6th Cir 2008]), in which approaches to the demand futility issue differ greatly from that adopted in *Marx v Akers*. In this jurisdiction, it is *Marx v Akers* that provides the framework for determining whether demand futility has been established.

In addition, the actual steps taken by the special committee

fail to establish Comverse's entitlement to dismissal of this action. While it is true that the special committee was promptly appointed once the board was made aware of the Wall Street Journal's planned exposure of wrongdoing within Comverse, and the committee promptly took certain steps to obtain admissions from the perpetrators of the scheme and to remove them from the board, the complaint's allegations call into question the special committee's willingness to take appropriate actions to protect the company and obtain recompense. For example, although Comverse had obtained the resignations of Alexander, Kreinberg and Sorin by May 1, 2006, it continued to retain these individuals as advisors. It was only when the SEC filed civil charges against the three in August 2006, and the United States Attorney for the Eastern District of New York instituted a criminal prosecution against these men, accusing them of conspiracy to violate the federal securities laws' anti-fraud, wire fraud and mail fraud provisions and demanding restitution in the amount of $51 million, that Comverse severed all remaining ties to them and terminated all agreements with them. Moreover, when director Itzik Danziger, who had allegedly received backdated stock options worth millions of dollars, resigned from the board in September 2006, he was allowed to keep his unexercised backdated options.

Plaintiffs, on behalf of the corporation, contend that relief should be sought not only against the three directors who carried out the scheme, but also against others whose acts or omissions constituted a breach of their fiduciary obligations to the corporation and caused it financial injury. Yet the three directors who carried out the scheme have been the sole focus of the special committee's actions. Defendants argue that since the special committee has shown a willingness to take action against those placed highest in the corporate order, there can be no question that it would fairly consider the possibility of suing less senior individuals, former directors and officers, and the company's outside auditors. However, nothing in the record supports this bare assertion. There is no indication that the special committee showed a willingness to go beyond its initial acts of questioning and ultimately removing the three who planned and carried out the scheme -- acts that in any event the board was essentially forced to take in the wake of the initial reporting and the subsequent SEC investigation and criminal prosecutions against those individuals.

Defendants assert that it is not for the shareholders to decide which directors to sue, inasmuch as "the decision whether and to what extent to explore and prosecute [claims against corporate directors] lies within the judgment and control of the

corporation's board of directors" (*Auerbach v Bennett*, 47 NY2d at 631). However, once the plaintiffs have made a showing that the directors not only failed to inform themselves to a degree reasonably necessary about the challenged conduct, but indeed failed to exercise their business judgment when they rubber-stamped the transactions, the board and its chosen committee members will not be fully shielded by the tenets of the business judgment rule (*id.*). "[T]he rule shields the deliberation and conclusions of the chosen representatives of the board only if they possess a disinterested independence and do not stand in a dual relation which prevents an unprejudicial exercise of judgment" (*id.*). Since the allegations of the complaint raise legitimate questions as to the committee's disinterested independence, defendants' reliance on the directors' discretion in choosing the direction of litigation does not create grounds for dismissal of the complaint here.

In conclusion, the picture presented in the complaint is that of a special committee taking a tepid rather than a vigorous approach to the misconduct and the resultant harm. Under such circumstances, the board should not be provided with any special protection. Therefore, because we cannot conclude that the appointment of the special committee, and the steps it has so far undertaken, establish as a matter of law the board's willingness

to take appropriate action to protect the interests of the corporation, we hold that the grant of Comverse's motion to dismiss this shareholder derivative action pursuant to CPLR 3211 was erroneous.

Accordingly, the judgment of the Supreme Court, New York County (Richard B. Lowe III, J.), entered October 28, 2007, dismissing this shareholders' derivative action, should be reversed, on the law, without costs, and the complaint reinstated. The appeal from the order of the same court and Justice, entered August 14, 2007, which granted the motion to dismiss the complaint should be dismissed, without costs, as subsumed within the appeal from the judgment.

All concur.

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

ENTERED: OCTOBER 7, 2008