SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

OCTOBER 6, 2015

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

15322- Index 603284/09
15323-
15324 United States Fire Insurance Company,
Plaintiff-Appellant-Respondent,

-against-

Nine Thirty FEF Investments, LLC, et al.,
Defendants-Respondents-Appellants.

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Strasburger & Price, LLP, Dallas (Michael Keeley of the bar of the State of New Mexico and the State of Texas, admitted pro hac vice, of counsel), for appellant-respondent.

K&L Gates LLP, New York (Gerald A. Novack of counsel), for respondents-appellants.

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Judgment, Supreme Court, New York County (Jeffrey K. Oing, J.), entered February 25, 2014, awarding damages to defendants, unanimously reversed, on the law, and it is declared that exclusion x of the financial institution bonds issued by plaintiff excludes coverage for defendants' losses. Appeals from order and judgment (one paper), same court and Justice, entered

October 1, 2013, and order, same court (Richard B. Lowe, III, J.), entered June 22, 2011, unanimously dismissed, without costs, as subsumed in the appeals from the final judgment. The Clerk is directed to enter judgment accordingly.

Defendants, Nine Thirty FEF Investments, LLC (FEF) and Nine Thirty VC Investments, LLC (VC), were formed to invest and trade in securities. In 2005 and 2006, VC Investments opened accounts with Bernard L. Madoff Investment Securities LLC (Madoff Securities) pursuant to "Customer Agreements" referring to Madoff Securities as "the 'Broker.'" In 2008, VC and FEF obtained financial institution bonds from plaintiff.[1]

Each bond contains exclusion x, which states: "This bond does not cover: . . . (x) loss resulting directly or indirectly from any dishonest or fraudulent act or acts committed by any non-Employee who *is* a securities . . . broker" [emphasis added]). In addition to exclusion x, each bond contains rider 9 (the Outside Investment Advisor Rider), whereby plaintiff agreed to indemnify defendants for "[l]oss resulting directly from the dishonest acts of any Outside Investment Advisor, named in the

[1]A financial institution bond is insurance issued to banks and other financial institutions to protect against losses caused by theft and dishonest investment advisors and the like.

Schedule below, solely for their duties as an Outside Investment Advisor, on behalf of the Insured." The schedule mentioned in the rider includes Madoff Securities as an Outside Investment Advisor.

The rider defines "Outside Investment Advisor" as "any firm, corporation or individual named in the Schedule for the . . . Outside Investment Advisor [Rider], and an employee, officer or partner of such Outside Investment Advisor." The rider excludes "[l]oss resulting from any acts by an Outside Investment Advisor acting in any capacity other than on behalf of the Insured." It also states, "Nothing herein contained shall be held to vary, alter, waive or extend any of the terms, conditions, provisions, agreements or limitations of the Bond, other than as stated herein."

On December 11, 2008, the Securities and Exchange Commission (SEC) filed a complaint against Mr. Madoff and Madoff Securities (together, Madoff). It alleged that Madoff Securities was both a broker dealer and an investment adviser. It also alleged that Madoff had "committed fraud through the investment adviser activities of" Madoff Securities. Later that month, defendants notified plaintiff that they were making claims under the bonds. In early 2009, Madoff was charged with, inter alia, investment

advisor fraud. Shortly thereafter, he pleaded guilty.

On October 28, 2009, plaintiff denied defendants' claims because, among other reasons, "Madoff Securities was acting as a broker in its dealings with [defendants]. As a result, there can be no coverage under the Outside Investment Advisor Rider. Similarly, Exclusion (x) of the Bond excludes coverage for any losses incurred by the Insureds."

Plaintiff commenced the instant declaratory judgment action, alleging, among other things, that defendants' claims were not covered under rider 9 because "the losses claimed by [defendants] did not result directly from the dishonest acts of Madoff Securities acting solely as an outside investment advisor . . . Rather, the losses resulted from the dishonest acts of Madoff Securities acting, at least in part, as a broker." It also alleged that defendants' losses were excluded by exclusion x. After issue was joined and discovery undertaken, plaintiff moved for summary judgment.

In an order entered June 22, 2011, the court granted the motion to the extent of dismissing defendants' counterclaims for attorneys' fees, and otherwise denied it.

The court noted plaintiff's argument "that there is no coverage under the Bonds, because [defendants'] losses were not

caused by . . . Madoff . . . acting solely as an outside investment advisor." It rejected this argument, saying, "Rider 9 defines an 'Outside Investment Advisor' as any firm, corporation, or individual named in the Schedule . . . Rider 9 does not . . . require that those entities . . . only be investment advisors."

The court found that, "while the language of Rider 9 is clear, an ambiguity exists when read with Exclusion (x)." Similarly, the court found that, while exclusion x was clear by itself, "its meaning is unclear when read with Rider 9." The court said that the issue of whether defendants' losses "are precluded by Exclusion (x) because Madoff is also a registered securities broker . . . cannot be resolved on these motions for summary judgment." We disagree.

Exclusion x excludes coverage for losses "resulting directly or indirectly from any dishonest or fraudulent act or acts committed by any non-Employee who *is* a securities . . . broker" (emphasis added). It does not provide that the non-employee must have been "acting as" a securities broker. It is undisputed that Bernard Madoff was not defendants' employee (as that term is defined in the bonds) and that Mr. Madoff Investment Securities LLC was a registered broker-dealer during the entire period in

which it dealt with defendants (*see Jacobson Family Invs., Inc. V National Union Fire Ins. Co. Of Pittsburgh, PA*, 129 AD3d 556 [1st Dept 2015]).

It bears mentioning that defendants knew how to delete an exclusion. For example, riders 2, 8, and 19-20 provide that certain exclusions do not apply to the coverages created by those riders. If defendants had wanted the broker exclusion to be inapplicable to outside investment advisers (rider 9), they should have said so.

Alternatively, if defendants had added outside investment advisers to the policy's definition of "Employee," the broker exclusion would have been inapplicable because that exclusion applies only to "non-Employees." Defendants knew how to expand the definition of "Employee" – rider 3 of each policy does so by adding employees of Jacobson Family Investments and Nine Thirty Capital Management.

The Outside Investment Advisor Rider (Rider 9) does not mention exclusion x and does not contradict or alter the exclusion's clear and unambiguous terms (*see McGinley v Odyssey Re [London]*, 15 AD3d 218 [1st Dept 2005]). Further, our interpretation of exclusion x does not leave Rider 9 "without

force and effect" (see *Consolidated Edison Co. of N.Y. v Allstate Ins. Co.*, 98 NY2d 208, 221-222 [2002] [internal quotation marks omitted]). The bonds could still provide coverage for losses resulting directly from the dishonest acts of outside investment advisers who are not brokers. Defendants did not show that all — or even the majority — of the outside investment advisers listed on Rider 9 were also brokers. Accordingly, our interpretation of the bonds does not render them illusory (*see Associated Community Bancorp, Inc. v St. Paul Mercury Ins. Co.*, 118 AD3d 608 [1st Dept 2014]).

The court, however, correctly determined that defendants are not entitled to attorneys' fees, as plaintiff's rescission claims, although unavailing, do not evince bad faith (*see Sukup v State of New York*, 19 NY2d 519, 522 [1967]).

We have considered the defendants' remaining contentions for affirmative relief and find them unavailing.

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

ENTERED: OCTOBER 6, 2015

CLERK

Gonzalez, P.J., Sweeny, Renwick, Saxe, Feinman, JJ.

15613 Michael I. Knopf, et al., Index 113227/09
Plaintiffs-Appellants, 15074/11

-against-

Michael Hayden Sanford, et al.,
Defendants-Respondents.

[And Another Action]

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Berry Law PLLC, New York (Eric W. Berry of counsel), for appellants.

Katsky Korins LLP, New York (Adrienne B. Koch of counsel), for respondents.

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Order, Supreme Court, New York County (Milton A. Tingling, J.), entered December 24, 2014, which granted that part of defendants' motion to cancel certain notices of pendency, and sub silentio denied that part of defendants' motion for costs and sanctions, unanimously modified, on the law, to remand for further proceedings on defendants' motion for costs and sanctions, and otherwise affirmed, without costs.

Supreme Court had jurisdiction to cancel the notices of pendency. Although this Court previously extended the subject notices (110 AD3d 502 [1st Dept 2013]), this does not render them immune to subsequent motions to cancel pursuant to CPLR 6514 (*see e.g. Bowery Boy Realty, Inc. v H.S.N. Realty Corp.*, 55 AD3d 766

[2d Dept 2008], *lv denied* 11 NY3d 715 [2009]).

The notices of pendency were properly cancelled because plaintiffs failed to show that money damages would be inadequate (*see Hoffmann Invs. Corp. v Yuval*, 33 AD3d 511 [1st Dept 2006]). Whether defendants are able to pay such damages is irrelevant to the determination of whether they are the appropriate remedy (*see American Cities Power & Light Corp. v Williams*, 189 Misc 829, 835-836 [Sup Ct, NY County 1947] ["The adequacy of the legal remedy for damages does not depend on the collectibility of the claim"]; *cf. Bertoni v Catucci*, 117 AD2d 892, 895 [3d Dept 1986]).

Furthermore, the cancellation of the notices of pendency was mandatory pursuant to CPLR 6514(a). CPLR 6514(a) provides, in relevant part, that "[t]he court, upon motion of any person aggrieved and upon such notice as it may require, shall direct any county clerk to cancel a notice of pendency, if service of a summons has not been completed within the time limited by section 6512." CPLR 6512 provides that a notice of pendency is only effective if a summons is served upon the defendant within 30 days after filing. Here, plaintiffs failed to serve defendant Pursuit Holdings, LLC within this 30-day period. "Nail-and-mail" substitute service was ineffective because that method of service

is only appropriate for serving individuals, not corporate entities (*see Napic, N.V. v Fverfa Invs.*, 193 AD2d 549 [1st Dept 1993]; *Lakeside Concrete Corp. v Pine Hollow Bldg. Corp.*, 104 AD2d 551 [2d Dept 1984], *affd* 65 NY2d 865 [1985]).

Since defendants moved to cancel the notices of pendency pursuant to CPLR 6514, and not CPLR 6515, the posting of an undertaking was not required (*see Lessard Architectural Group, Inc., P.C. v X & Y Dev. Group, LLC*, 88 AD3d 768, 770 [2d Dept 2011]; *Reingold v Bowins*, 34 AD3d 667, 668 [2d Dept 2006]).

The motion court did not address defendants' motions for costs and sanctions pursuant to CPLR 6514-c. Despite the lack of subjective bad faith on the part of plaintiffs, costs and expenses could be properly awarded pursuant to CPLR 6514(c)(*see e.g. Lunney & Crocco v Wolfe*, 180 AD2d 472, 472 [1st Dept 1992] [affirming CPLR 6514(c) "costs and expenses" award "despite the lack of subjective bad faith on the part of the petitioner"]; *see also Josefsson v Keller*, 141 AD2d 700 [2nd Dept 1988] [awarding defendants over $39,000 in "costs and expenses" under CPLR 6514©]; *Tucker v Mashomack Fish and Game Preserve Club.*, 199 AD2d 957 [3rd Dept 1993] [damages attributable to improperly filed lis pendens not reduced by higher sale price ultimately realized by vendor, after vacatur, than was expected under proposed sale

aborted by filing]). We therefore remand for a determination as to whether the award of costs and expenses are warranted under the circumstances of this case pursuant to CPLR 6514(c).

The Decision and Order of this Court entered herein on July 2, 2015 is hereby recalled and vacated (*see* M-3726 decided simultaneously herewith).

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

ENTERED: OCTOBER 6, 2015

CLERK

Gonzalez, P.J., Mazzarelli, Sweeny, Richter, Manzanet-Daniels, JJ.

15766 The People of the State of New York, Ind. 1653/12
Respondent,

-against-

Wilson Salazar,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Marianne Stracquadanio of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Joseph C. Teresi, J.), rendered April 22, 2013, convicting defendant, after a jury trial, of criminal possession of marijuana in the first degree, and sentencing him to a term of 3½ years, unanimously affirmed.

Defendant did not preserve his claim that the prosecution discriminated against "Hispanic males" in its exercise of peremptory challenges. Defense counsel, who made no reference to the ethnicity of his client or of any jurors or prospective jurors, failed to articulate such a claim (*see People v Stephens*, 84 NY2d 990 [1994]), and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. Regardless of whether the protections of *Batson v Kentucky* (476 US 79 [1986]) extend to groups defined by both

ethnicity and gender, defendant did not produce "evidence sufficient to permit the trial judge to draw an inference that discrimination ha[d] occurred" (*Johnson v California*, 545 US 162, 170 [2005]), and there was nothing to prevent defendant from making a record to support a claimed prima facie case of discrimination.

The verdict was supported by legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There was ample evidence, including evidence of defendant's consciousness of guilt, to support the conclusion that he knowingly exercised dominion and control over a marijuana-growing operation in the basement of a building where he was employed as the superintendent.

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

ENTERED: OCTOBER 6, 2015

CLERK

Gonzalez, P.J., Mazzarelli, Sweeny, Richter, Manzanet-Daniels, JJ.

15768-
15769 In re Baby Girl A., also known as Kalynn A., etc.,

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

Veronica A.,
Respondent-Appellant,

-against-

Commissioner of Social Service of The City of New York,
Petitioner-Respondent.

_____

Daniel R. Katz, New York, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Antonella Karlin of counsel), for respondent.

Karen Freedman, Lawyers for Children, Inc., New York (Shirim Nothenberg of counsel), attorney for the child.

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Order of disposition, Family Court, New York County (Douglas E. Hoffman, J.), entered on or about March 6, 2014, to the extent it brings up for review an order, same court and Judge, entered on or about March 5, 2014, which granted petitioner agency's motion for summary judgment finding that respondent mother had derivatively neglected the subject child, unanimously affirmed, without costs. Appeal from the March 5, 2004 order unanimously dismissed, without costs, as subsumed in the appeal from the

order of disposition.

The agency made a prima facie showing of derivative neglect as to the subject child based on prior orders, issued nine months before the commencement of this proceeding, finding that the mother and father had neglected two older children who suffered unexplained, serious injuries while in their care (*see Matter of Camarrie B. [Maria R.]*, 107 AD3d 409, 409 [1st Dept 2013]; *Matter of Matthew O. [Kenneth O.]*, 103 AD3d 67, 76 [1st Dept 2012]). Moreover, the most recent permanency hearing order found that continued placement of the subject child's siblings was in their best interests. In addition, following an evidentiary hearing on the agency's application to suspend unsupervised visitation, the Family Court found that the mother not only had failed to take steps towards distancing herself from the abusive father, but had continued to see him and allowed him to have unsupervised access to the baby in violation of a protective order.

In opposition, the mother failed to raise a triable issue of fact regarding whether conditions had changed so that she had gained sufficient insight and self discipline to safely parent

her child (*Matter of Jayden C. [Luisanny A.]*, 126 AD3d 433, 434 [1st Dept 2015]).

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

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

ENTERED: OCTOBER 6, 2015

CLERK

Gonzalez, P.J., Mazzarelli, Sweeny, Richter, Manzanet-Daniels, JJ.

15770 The People of the State of New York, Ind. 4712/10
Respondent,

-against-

Joseph Kastner,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Ross D. Mazer of counsel), for respondent.

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Judgment, Supreme Court, New York County (Jill Konviser, J. at speedy trial motion; Daniel P. FitzGerald, J. at jury trial and sentencing), convicting defendant of two counts of scheme to defraud in the first degree, and sentencing him to concurrent terms of one year, unanimously affirmed.

The court properly denied defendant's speedy trial motion. The period from November 16 to December 6, 2010 was correctly excluded as a reasonable time to prepare after the court's decision on defendant's motions (*see* CPL 30.30[4][a]; *People v Davis*, 80 AD3d 494 [1st Dept 2011]). The period from January 18 to February 1, 2011 was also correctly excluded since defense counsel actively participated in setting the adjourned date and

sought a longer adjournment for his own convenience (*see* CPL 30.30[4][b]; *People v Matthews*, 227 AD2d 313 [1st Dept 1996], *lv denied* 88 NY2d 989 [1996]).

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

ENTERED: OCTOBER 6, 2015

CLERK

Gonzalez, P.J., Mazzarelli, Sweeny, Richter, Manzanet-Daniels, JJ.

15771 Platinum Equity Advisors, LLC, Index 653709/13
Plaintiff-Appellant,

-against-

SDI, Inc.,
Defendant-Respondent,

TD Bank, N.A.,
Defendant.

_____

Brown Rudnick LLP, Hartford, CT (Dylan P. Kletter of the bar of the State of Connecticut, admitted pro hac vice, of counsel), for appellant.

Miller & Wrubel P.C., New York (Joel M. Miller of counsel), for respondent.

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Order, Supreme Court, New York County (Eileen Bransten, J.), entered July 28, 2014, which denied plaintiff's motion for a preliminary injunction to enjoin defendant SDI, Inc. from pursuing pending litigation in Pennsylvania, unanimously affirmed, with costs.

The court properly found that plaintiff had not shown, by clear and convincing evidence, a likelihood of success on the merits (*see Gilliland v Acquafredda Enters., LLC*, 92 AD3d 19, 24 [1st Dept 2011]). As the court noted, plaintiff could not enforce the forum selection clause in the stock purchase agreement (SPA) at issue, because it was a nonsignatory to the

SPA and was not "closely related" to the signatory (*Freeford Ltd. v Pendleton*, 53 AD3d 32, 39 [1st Dept 2008][internal quotation marks omitted], *lv denied* 12 NY3d 702 [2009]).

Plaintiff's irreparable harm arguments fail (*see Gilliland*, 92 AD3d at 24), because they are premised on the erroneous belief that it is entitled to enforce the SPA.

Under the rule of comity, the balance of the equities weighs against plaintiff (*see Gilliland*, 92 AD3d at 24), which essentially seeks a collateral appeal from the orders of a Pennsylvania court (*cf. Indosuez Intl. Fin. v National Reserve Bank*, 304 AD2d 429, 430 [1st Dept 2003] ["comity was not implicated because there was no possibility of treading on the legitimate prerogatives of the foreign jurisdictions to which [the] defendant had repeatedly turned"]).

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

ENTERED: OCTOBER 6, 2015

CLERK

Gonzalez, P.J., Mazzarelli, Sweeny, Richter, Manzanet-Daniels, JJ.

15772 Raymond Obiotta, Index 309033/09
Plaintiff-Appellant,

-against-

Dukes System Corp., et al.,
Defendants-Respondents,

Carolyn Gardner, et al.,
Defendants.

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Law Offices of Rommel Daniel, New York (Bryan Brockington of counsel), for appellant.

Rivkin Radler LLP, Uniondale (Henry Mascia of counsel), for respondents.

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Order, Supreme Court, Bronx County (Edgar G. Walker, J.), entered January 2, 2014, granting the motion of defendants Dukes System Corp. and Jesus Baello for leave to file a late motion for summary judgment and, upon doing so, granting summary judgment dismissing the complaint and all cross claims against them, unanimously affirmed, without costs.

Defendants acknowledged that their motion for summary judgment was filed 21 days after the expiration of the time period provided in CPLR 3212(a) as a result of an error by their attorney in calendaring the deadline. The motion court did not improvidently exercise its discretion in finding good cause for

the delay based on the detailed affidavit by counsel concerning the error *(see Gonzalez v 98 Mag Leasing Corp,* 95 NY2d 124, 128-129 [2000]).

The court also properly granted the motion for summary judgment. Defendant Baello, the driver of the truck, testified that his truck was stopped when the vehicle that was towing plaintiff's vehicle crossed the double yellow line into oncoming traffic, and swerved to avoid hitting his truck, causing plaintiff's vehicle to collide with the truck. In opposition, plaintiff failed to present evidence sufficient to raise a triable issue of fact as to defendants' negligence. Contrary to plaintiff's argument, Baello's alleged failure to take evasive action was not the proximate cause of the accident (*see Garcia v Verizon N Y,* Inc, 10 AD3d 339, 340 [1st Dept 2004]).

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

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

ENTERED: OCTOBER 6, 2015

CLERK

Gonzalez, P.J., Mazzarelli, Sweeny, Richter, Manzanet-Daniels, JJ.

15773 In re Neil S.,
Petitioner-Respondent,

-against-

Valynda G.,
Respondent-Appellant.

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Leslie S. Lowenstein, Woodmere, for appellant.

Bruce A. Young, New York, for respondent.

Steven N. Feinman, White Plains, attorney for the child.

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Order, Family Court, New York County (Ivy I. Cook, Referee), entered on or about April 3, 2012, which, inter alia, granted the petition to modify a prior custody order by awarding petitioner father sole custody of the subject child with bimonthly supervised visitation with respondent mother, unanimously affirmed, without costs.

A sound and substantial basis in the record exists for the court's determination to modify the prior custody order to insure the child's best interests (*see Eschbach v Eschbach*, 56 NY2d 167 [1982]; *Matter of James Joseph M. v Rosana R.*, 32 AD3d 725 [1st Dept 2006], *lv denied* 7 NY3d 717 [2006]). The father sought custody of his young son after the child reported that he had

been sexually and physically abused while in his mother's care. The court properly considered the totality of the evidence, including a forensic report finding that the child could suffer significant emotional stress if returned to his mother, and the testimony of multiple witnesses that the father was ably meeting the child's medical and educational needs. There is no basis to disturb the court's assessment of the credibility of the witnesses and particularly of the character and temperament of the parents (*see Matter of Irene O.*, 38 NY2d 776, 777 [1975]).

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

ENTERED: OCTOBER 6, 2015

CLERK

Gonzalez, P.J., Mazzarelli, Sweeny, Richter, Manzanet-Daniels, JJ.

15774 The People of the State of New York, Ind. 685/13
Respondent,

-against-

Jose Encarnacion-Cross,
Defendant-Appellant.

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Law Office of Lawrence M. Fisher, New York (Stephen Preziosi of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Lee M. Pollack of counsel), for respondent.

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Judgment, Supreme Court, New York County (Renee A. White, J. at motions; Rena K. Uviller, J. at jury trial and sentencing), rendered November 21, 2013, convicting defendant of criminal possession of a controlled substance in the first degree, and sentencing him to a term of eight years, unanimously affirmed.

The court properly denied defendant's suppression motion on the ground that he lacked standing to challenge the search of the livery cab in which he was a passenger. Defendant provided no sworn allegations of fact to establish he had a reasonable expectation of privacy in the back seat of the cab, where the police found a bag containing drugs. The automatic standing rule set forth in *People v Millan* (69 NY2d 514 [1987]) did not apply, because since the People did not, at any stage of the

proceedings, rely solely on the automobile presumption contained in Penal Law § 265.15(3) to establish defendant's guilt (*see People v Cheatham*, 54 AD3d 297 [2008], *lv denied* 11 NY3d 854 [2008]). Moreover, at trial the People did not rely on the presumption at all, and the court gave no such instruction to the jury.

Defendant did not preserve his claims regarding events that transpired during jury deliberations, and there were no mode of proceedings errors exempt from preservation requirements (*see People v Hanley*, 20 NY3d 601, 604-605 [2013]; *People v Agramonte*, 87 NY2d 765, 770 [1996]). We decline to review these unpreserved claims in the interest of justice. As an alternative holding, we find no basis for reversal.

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

ENTERED: OCTOBER 6, 2015

CLERK

Gonzalez, P.J., Mazzarelli, Sweeny, Richter, Manzanet-Daniels, JJ.

15775 The People of the State of New York, Ind. 2623/10
Respondent,

-against-

John Thomas,
Defendant-Appellant.

_____

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

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

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Judgment, Supreme Court, New York County (Larry Stephen, J. at plea; Ronald A. Zweibel, J. at sentencing), rendered September 21, 2011, convicting defendant of attempted rape in the first degree and attempted intimidating a victim or witness in the third degree, and sentencing him, as a second felony offender, to an aggregate term of 10 years, unanimously affirmed.

The court properly exercised its discretion in denying defendant's plea withdrawal motion. When defendant asserted that he had not been taking his psychiatric medication at the time of his plea, the sentencing court gave him a sufficient opportunity to advance his claim that his purported mental impairment affected the voluntariness of his plea. During the plea allocution, defendant, who had pleaded guilty on prior occasions,

was rational and coherent, and assured the court that he understood the meaning of his plea and was pleading guilty of his own free will. The record establishes that the plea was voluntary and not the product of defendant's claimed lack of medication (*see People v Massa*, 12 AD3d 177 [1st Dept 2004], *lv denied* 4 NY3d 746 [2004]; *People v Beals*, 2 AD3d 329, 329-330 [1st Dept 2003], *lv denied* 2 NY3d 761 [2004]). The plea minutes indicate that defendant was reluctant to plead guilty, but that the court accorded him a sufficient opportunity to confer with counsel and consider whether to go forward with the plea. Further, these minutes do not contain anything to suggest that defendant was mentally ill or unable to understand the proceeding.

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

ENTERED: OCTOBER 6, 2015

CLERK

Gonzalez, P.J., Mazzarelli, Sweeny, Richter, Manzanet-Daniels, JJ.

15776 In re Diamonte V.,

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

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

Zachary W. Carter, Corporation Counsel, New York (Rebecca L. Visgaitis of counsel), for presentment agency.

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Order of disposition, Family Court, Bronx County (Sidney Gribetz, J.), entered on or about July 15, 2014, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that she committed an act that, if committed by an adult, would constitute the crime of assault in the third degree, and placed her on probation for a period of nine months, unanimously affirmed, without costs.

The court properly exercised its discretion in denying appellant's request for an adjournment in contemplation of dismissal, and instead adjudicating her a juvenile delinquent and placing her on probation. Appellant pushed a sidewalk vendor to the ground and repeatedly punched her, causing injuries. Although this is appellant's first encounter with the juvenile

justice system, the record demonstrates a history of violent attacks against other people stemming from emotional and anger management issues. Given these circumstances, we agree that probation is the least restrictive dispositional alternative consistent with appellant's needs and the community's need for protection (*see Matter of Katherine W.*, 62 NY2d 947 [1984]). The record supports the court's conclusion that probation was necessary to ensure appellant's successful participation in a rehabilitation program.

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

ENTERED: OCTOBER 6, 2015

CLERK

Gonzalez, P.J., Mazzarelli, Sweeny, Richter, Manzanet-Daniels, JJ.

15777 SFR Holdings Ltd., et al., Index 652367/12
Plaintiffs-Appellants,

-against-

John Rice, et al.,
Defendants-Respondents.

_____

Stevens & Lee, P.C., New York (Constantine D. Pourakis of counsel), for appellants.

Brody, O'Connor & O'Connor, New York (Scott A. Brody of counsel), for respondents.

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Order, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered on or about December 3, 2014, which, to the extent appealed from as limited by the briefs, granted defendants' motion to dismiss the fraudulent inducement cause of action as to defendants Capstone Capital Group I, LLC, Capstone Trade Partners, Ltd., and Capstone Business Credit LLC (collectively the Capstone Operating Entities), and granted defendants' motion to dismiss the fraud, unjust enrichment, actual fraudulent conveyance, constructive fraudulent conveyance, breach of contract, declaratory judgment, and attorney's fees causes of action, unanimously modified, on the law, to deny the motion to dismiss the fraud cause of action as to defendants Rice, Ingrassia, Capstone Capital Management Inc., Capstone Cayman

Special Purpose Fund LP, and Capstone Special Purpose Fund LP, and otherwise affirmed, without costs.

As the motion court correctly found, in determinating whether plaintiffs' complaint alleges direct or derivative claims, the relevant analysis is "[w]ho suffered the alleged harm . . . [and] who would receive the benefit of any recovery or other remedy" (*Tooley v Donaldson, Lufkin, & Jenrette, Inc.*, 845 A2d 1031, 1033 [Del 2004]; *Yudell v Gilbert*, 99 AD3d 108, 110 [1st Dept 2012] [adopting test set forth in *Tooley*]). Here, plaintiffs' fraud claim was properly brought as a direct claim, as the plaintiffs individually suffered the alleged harm and would benefit from any recovery (*see Fraternity Fund Ltd. v Beacon Hill Asset Mgt. LLC*, 376 F Supp 2d 385, 409 [SD NY 2005]).

Plaintiffs sufficiently stated a cause of action for fraud as against defendants Rice, Ingrassia, Capstone Capital Management Inc., Capstone Cayman Special Purpose Fund LP, and Capstone Special Purpose Fund LP (*see Zanett Lombardier, Ltd. v Maslow*, 29 AD3d 495, 495 [1st Dept 2006]).[1] Plaintiffs alleged that these defendants defrauded them by inducing their investment

[1]We note that plaintiffs do not dispute defendants' contention that the motion court correctly dismissed this claim as to defendants Beasty and Olson.

in funds by promising that the funds would only invest in short-term, liquid asset-based loans, that these defendants improperly caused the funds to invest in real estate, and that these defendants repeatedly failed to disclose and actively concealed the real estate investments. Plaintiffs claim that, had they known about the real estate investments, they would have never invested with these defendants, or they would have redeemed much earlier than they did, thereby sparing them loss.

As the allegations in the complaint are not directed at the Capstone Operating Entities, plaintiffs' request to reinstate the fraud and fraudulent inducement claims as to these entities is unavailing.

The motion court correctly dismissed the breach of contract and declaratory judgment causes of action, since the contracts at issue do not specifically prohibit the investments or in-kind distribution at issue. In addition, because it is undisputed that a valid contract exists governing this dispute, "the cause of action for unjust enrichment is untenable" (*G & G Invs. v Revlon Consumer Prods. Corp.*, 283 AD2d 253, 253 [1st Dept 2001]).

The motion court correctly dismissed plaintiffs' claims for actual and constructive fraudulent conveyances, and for attorney's fees. Even under plaintiffs' choice-of-law analysis,

the claims are governed by the law of the Cayman Islands and Delaware, as that is where the injury occurred (*see Elmaliach v Bank of China Ltd.*, 110 AD3d 192, 202 [1st Dept 2013]), and plaintiff failed to plead the claims under those laws.

Plaintiffs' request for leave to amend the complaint is academic or unavailing.

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

ENTERED: OCTOBER 6, 2015

CLERK

Gonzalez, P.J., Mazzarelli, Sweeny, Richter, Manzanet-Daniels, JJ.

15778 The People of the State of New York Ind. 1989/11
Respondent,

-against-

Dwinel Monroe,
Defendant-Appellant.

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

Dwinel Monroe, appellant pro se.

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

_____

Judgment, Supreme Court, New York County (Renee A. White, J. at initial suppression hearing; Daniel P. FitzGerald, J. at independent source hearing, jury trial and sentencing), rendered February 24, 2012, convicting defendant of attempted robbery in the second degree, and sentencing him, as a second felony offender, to a term of seven years, unanimously affirmed.

The record supports the court's determination that, notwithstanding a suppressed identification procedure, the victim had an independent source for his identification of defendant (*see Neil v Biggers*, 409 US 188, 199-200 [1972]; *People v Williams*, 222 AD2d 149 [1996], *lv denied* 88 NY2d 1072 [1996]). Among other things, the victim provided an unusually detailed and

accurate description of defendant. Furthermore, the showup identification, which had been suppressed solely on Fourth Amendment grounds, was not unduly suggestive.

The court was not required to make a further inquiry into defendant's "interest" in representing himself, because defendant never "clearly and unequivocally" invoked his right to do so (*see People v LaValle*, 3 NY3d 88, 106 [2004]). To the extent defendant may have expressed such an interest, the record demonstrates that he abandoned it.

Defendant's pro se ineffective assistance of counsel claims are unreviewable on direct appeal because they involve matters not reflected in, or fully explained by, the record (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). Accordingly, since defendant has not made a CPL 440.10 motion, the merits of the ineffectiveness claims may not be addressed on appeal. In the alternative, to the extent the existing record permits review, we find that defendant received

effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]).

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

ENTERED: OCTOBER 6, 2015

CLERK

Gonzalez, P.J., Mazzarelli, Sweeny, Richter, Manzanet-Daniels, JJ.

15779 The People of the State of New York, Ind. 2411/13
Respondent,

-against-

Brandon LaTempa,
Defendant-Appellant.

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

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

_____

Judgment, Supreme Court, New York County (Laura A. Ward, J.), rendered January 13, 2014, convicting defendant, after a jury trial, of criminal possession of a weapon in the third degree and menacing in the second degree, and sentencing him, as a second felony offender, to an aggregate term of 2½ to 5 years, unanimously affirmed.

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

including its evaluation of inconsistencies in testimony.

We perceive no basis for reducing the sentence.

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

ENTERED: OCTOBER 6, 2015

CLERK

Gonzalez, P.J., Mazzarelli, Sweeny, Richter, Manzanet-Daniels, JJ.

15780 In re Hui C.,
Petitioner-Appellant,

-against-

Jian Xing Z.,
Respondent-Respondent.

_____

Neal D. Futerfas, White Plains, for appellant.

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

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Order, Family Court, New York County (Marva A. Burnett, Referee), entered on or about February 13, 2015, which, after a fact-finding hearing, dismissed the petition for an order of protection and vacated a temporary order of protection, unanimously affirmed, without costs.

Although the record does not reflect that petitioner gave written consent to have the Referee determine her petition, as required by CPLR 4317(a), petitioner implicitly consented by actively participating in the proceedings before the Referee, including by testifying, submitting photo exhibits, and cross-examining respondent, without challenging the Referee's jurisdiction (*see e.g. Matter of Carlos G. [Bernadette M.]*, 96 AD3d 632, 633 [1st Dept 2012]).

The Referee properly determined that petitioner failed to

prove by a fair preponderance of the evidence that respondent's alleged conduct established any alleged family offense (*see Matter of Iskritsa O. v Steven Michael U.*, 123 AD3d 444 [1st Dept 2014]; Family Court Act § 832). There is no basis to disturb the Referee's decision not to credit petitioner's account of events (*id.* at 445).

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

ENTERED: OCTOBER 6, 2015

CLERK

Gonzalez, P.J., Mazzarelli, Sweeny, Richter, Manzanet-Daniels, JJ.

15782 The People of the State of New York, Ind. 2665/09
Respondent,

-against-

Dwayne Hemans,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Ramandeep Singh of counsel), for respondent.

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Order, Supreme Court, Bronx County (Harold Adler, J.), entered on or about August 13, 2012, which summarily denied defendant's CPL 440.10 motion to vacate a judgment of conviction rendered on June 28, 2010, unanimously reversed, on the law, and the matter remanded for an evidentiary hearing.

Initially, we reject the People's argument that we should decline to hear this appeal, for which leave to appeal has been granted by a Justice of this Court, on the ground that defendant has been deported and is unable to appear in court (*see People v Badia*, 106 AD3d 514 [1st Dept 2013], *lv denied* 22 NY3d 1154 [2014]; *see also People v Ventura*, 17 NY3d 675 [2011]).

In his pro se CPL 440.10 motion, which was supplemented by an affirmation from new counsel, an additional affidavit from

defendant, exhibits and a memorandum of law, defendant alleged that plea counsel, although aware that defendant was not a United States citizen, never advised him that his plea to attempted criminal possession of a weapon in the second degree would have deportation consequences, and that had he known of such consequences, he would not have pleaded guilty. Notes from plea counsel indicated that she was aware of his status but did not indicate that she advised him of the immigration consequences of his plea.

Attempted criminal possession of a weapon in the second degree (Penal Law §§ 110.00; 265.03[1][b]) is a "crime of violence" under 18 USC § 16 and an aggravated felony triggering removal under 8 USC §1227(a)(2)(A)(iii). Because the immigration consequences of defendant's guilty plea were clear, counsel was obligated to advise him of that fact when counseling him about whether to plead guilty (*Padilla v Kentucky*, 559 US 356 [2010]).

Defendant raised sufficient questions of fact concerning the

effectiveness of counsel's assistance to warrant a hearing (*see People v Chacko*, 99 AD3d 527 [1st Dept 2012], *lv denied* 20 NY3d 1060 [2013]).

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

ENTERED: OCTOBER 6, 2015

CLERK

Gonzalez, P.J., Mazzarelli, Sweeny, Richter, Manzanet-Daniels, JJ.

15783 The People of the State of New York, Ind. 117/13
Respondent,

-against-

Lynn Wiggins,
Defendant-Appellant.

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Seymour W. James, Jr., The Legal Aid Society, New York (Joanne Legano Ross of counsel), for appellant.

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Judgment, Supreme Court, New York County (Michael J. Obus, J.), rendered on or about May 9, 2013, unanimously affirmed.

Application by defendant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1st Dept 1976]). We have reviewed this record and agree with defendant'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 6, 2015

CLERK

Gonzalez, P.J., Mazzarelli, Sweeny, Richter, Manzanet-Daniels, JJ.

15785 In re Fred Harris, Index 401861/13
[M-2426] Petitioner,

-against-

New York City Police
Department, et al.,
Respondents.

_____

Fred Harris, petitioner pro se.

Zachary W. Carter, Corporation Counsel, New York (Elizabeth S. Natrella of counsel), for New York City Police Department, respondent.

Kenneth P. Thompson, District Attorney, Brooklyn (Maria Park of counsel), for Kellie Muse, respondent.

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

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

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

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

ENTERED: OCTOBER 6, 2015

CLERK

Mazzarelli, J.P., Renwick, Manzanet-Daniels, Gische, JJ.

15022 Lorraine Muth, etc., Index 301314/10
Plaintiff-Respondent,

-against-

Wali Mohammad, M.D., P.C., et al.,
Defendants,

Howard M. Rombom, PhD, P.C.,
Defendant-Appellant.

_____

Martin Clearwater & Bell LLP, New York (Iryna S. Krauchanka, Jeffrey A. Shor and Ryan M. Donihue of counsel), for appellant.

Kramer & Dunleavy, LLP, New York (Lenore Kramer of counsel), for respondent.

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Order, Supreme Court, Bronx County (Stanley Green, J.), entered September 22, 2014, which denied the motion of defendant Howard M. Rombom, PhD, P.C. (Rombom P.C.) for summary judgment dismissing the complaint as against it, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Rombom P.C.'s staff psychologist, nonparty Nicholas Radcliffe, Ph.D., examined and evaluated plaintiff's decedent on three separate occasions in January 2008, for a Workers' Compensation examination and evaluation. Decedent was seeking an evaluation linking his depressive disorder to an injury he had

sustained six years earlier, in order to have benefits reinstated. On February 22, 2008, three weeks after his last visit to Dr. Radcliffe, decedent committed suicide by shooting himself with a shotgun.

Although a psychologist-patient relationship existed between decedent and Dr. Radcliffe (*see e.g. Bazakos v Lewis*, 12 NY3d 631, 634 [2009]; *Lee v City of New York*, 162 AD2d 34, 36 [1st Dept 1990], *lv denied* 78 NY2d 863 [1991]), Ronbom P.C. is not liable to plaintiff, since Dr. Radcliffe exercised his professional medical judgment in his examination and evaluation of decedent, including his determination whether to inquire about decedent's access to firearms (*see Park v Kovachevich*, 116 AD3d 182, 190-191 [1st Dept 2014], *lv denied* 23 NY3d 906 [2014]; *see also Schrempf v State of New York*, 66 NY2d 289, 295 [1985]). Furthermore, the choices Dr. Radcliffe made were not a proximate

cause of decedent's suicide, an event which occurred three weeks after he last visited with Radcliffe (*see Eckman v Cipolla*, 77 AD3d 704 [2d Dept 2010]).

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

ENTERED: OCTOBER 6, 2015

CLERK

Mazzarelli, J.P., Sweeny, Saxe, Richter, Manzanet-Daniels, JJ.

15683 Deutsche Bank National Trust Company, etc., Plaintiff-Appellant, Index 111658/08

-against-

Judy Tanibajeva, et al., Defendants,

Board of Managers of the 225 East 86th Street Condominium, Defendant-Respondent.

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Eckert Seamans Cherin & Mellott, LLC, White Plains (Geraldine A. Cheverko of counsel), for appellant.

Adam Leitman Bailey, P.C., New York (Jeffrey R. Metz of counsel), for respondent.

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Order, Supreme Court, New York County (Arthur F. Engoron, J.), entered on or about December 13, 2013, which denied plaintiff's motion for summary judgment against defendant Board of Managers of the 225 East 86th Street Condominium (Board), and granted summary judgment to the Board dismissing the action without prejudice to plaintiff's re-bringing an action on the subject note and mortgage, unanimously affirmed, with costs.

There was no procedural bar to the motion court's granting summary judgment to defendant, which did not move for that relief, on plaintiff's motion for summary judgment (CPLR 3212[b];

McDougal v Apple Bank for Sav., 200 AD2d 418, 419 [1st Dept 1994]).

As the owner of the unit upon which plaintiff seeks to foreclose, the Board has standing to challenge any element of plaintiff's claims, including the assignment and delivery of the note and mortgage, to establish its affirmative defense that plaintiff lacks standing (*see generally Combs v Ocwen Loan Servicing, LLC*, 2014 NY Slip Op 33362[U], *3 [Sup Ct, Kings County 2014]). In light of the fact that the purported assignment of the mortgage note to plaintiff by defendant New Century Mortgage Corporation took place after the effective date of New Century's bankruptcy plan, which terminated its officers and placed all of its assets into a liquidating trust, the Board established, as a matter of law, that plaintiff does not have standing by virtue of the alleged assignment (*In re New Century TRS Holdings, Inc.*, 407 BR 576, 585-586 [D Del 2009]; *see Hymas v Deutsche Bank Natl. Trust Co.*, 2013 WL 6795731, *5, 2013 US Dist LEXIS 179164, *13 [D Nev, Dec. 16, 2013], 2:13-cv-1869-RGJ-GWF]). Significantly, the impossibility of such an assignment was noted in several cases in which Deutsche Bank was *also* a party (2013 WL 6795731, 2013 US Dist. LEXIS 179164; *see also Deutsche Bank Nat. Trust Co. v Williams*, 2012 WL 1081174, *3-5, [D Haw, Mar 29,

2012, US Dist. LEXIS 43968, *7-15 No. 11-00632 (JMS/RLP)]). Thus, plaintiff was plainly aware, both through the rulings in other cases and specifically in this case, of the New Century bankruptcy and plan. The Board also established that the assignment and allonge were "robosigned" by employees of plaintiff's servicer (Countrywide), rather than by authorized agents of the alleged assignor, thus rendering the alleged assignment a nullity.

In light of the cursory affidavit plaintiff submitted in support of its claim to have received physical delivery of the note prior to the commencement of this action, as well as its failure to advance an explanation as to how the note and mortgage could have properly been delivered to it after the bankruptcy plan had been approved and the assets of New Century transferred to the trustee in bankruptcy, plaintiff failed to establish that it has standing by virtue of delivery (*see US Bank N.A. v*

Faruque, 120 AD3d 575, 577 [2d Dept 2014]; *Deutsche Bank Natl. Trust Co. v Barnett*, 88 AD3d 636, 638 [2d Dept 2011]). The motion court therefore properly granted summary judgment to defendant.

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

ENTERED: OCTOBER 6, 2015

CLERK

Friedman, J.P., Saxe, Richter, Manzanet-Daniels, JJ.

15110- Index 652183/13
15111-
15112 Theodore F. Schroeder, et al.,
Plaintiffs-Appellants-Respondents,

-against-

Pinterest Inc.,
Defendant-Respondent,

Brian S. Cohen, et al.,
Defendants-Respondents-Appellants.

_____

Montgomery McCracken Walker & Rhoads, LLP, New York (Sidney S. Liebesman of counsel), for appellants-respondents.

Jenner & Block LLP, New York (Brian J. Fischer of counsel), for respondents-appellants.

Quinn Emanuel Urquhart & Sullivan, LLP, New York (William B. Adams of counsel), for respondent.

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Judgment, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered July 29, 2014, bringing up for review orders, same court and Justice, entered July 11, 2014 and July 25, 2014, modified, on the law, to grant the Cohen defendants' motion as to the promissory estoppel claim, to deny the Cohen defendants' motion as to the misappropriation of trade secrets/ideas and breach of fiduciary duty claims, and otherwise affirmed, without costs. Appeals from the aforesaid orders, dismissed, without costs, as subsumed in the appeals from the judgment.

Opinion by Richter, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David Friedman, J.P.
David B. Saxe
Rosalyn H. Richter
Sallie Manzanet-Daniels, JJ.

15110-15111-15112
Index 652183/13

_____x

Theodore F. Schroeder, et al.,
Plaintiffs-Appellants-Respondents,

-against-

Pinterest Inc.,
Defendant-Respondent,

Brian S. Cohen, et al.,
Defendants-Respondents-Appellants.
_____x

Cross appeals by plaintiffs and defendants Brian S. Cohen and New York Angels, Inc. from the judgment of the Supreme Court, New York County (Melvin L. Schweitzer, J.), entered July 29, 2014, and from the order, same court and Justice, entered July 25, 2014, and appeal by plaintiffs from the order, same court and Justice, entered July 11, 2014, which, to the extent appealed from as limited by the briefs, granted defendant Pinterest's motion to dismiss the complaint as against it, and granted the Cohen defendants' motion to dismiss the complaint to the extent of dismissing the causes of action for misappropriation of trade secrets/ideas and

breach of fiduciary duty, and denied the motion as to the causes of action for misappropriation of skills and expenditures and promissory estoppel.

Montgomery McCracken Walker & Rhoads, LLP, New York (Sidney S. Liebesman, Richard L. Scheff, Charles Palella and Steven Pachman of counsel), for appellants-respondents.

Jenner & Block LLP, New York (Brian J. Fischer, Andrew H. Bart and Alison I. Stein of counsel), for respondents-appellants.

Quinn Emanuel Urquhart & Sullivan, LLP, New York (William B. Adams, Michael B. Carlinsky and Benjamin J. Gildin of counsel), for respondent.

RICHTER, J.

In this action, plaintiff Theodore F. Schroeder and two companies founded by him, plaintiffs Rendezvoo LLC (Rendezvoo) and Skoop Media Associates, Inc. (Skoop Media), allege that defendants Brian S. Cohen, New York Angels, Inc. (NY Angels), and Pinterest Inc. (Pinterest) stole and illegally used Schroeder's confidential ideas, technology and business plans in developing the popular website, Pinterest.com. According to plaintiffs, Schroeder conceived of a novel web application that would allow Internet users to share information about themselves by posting interests, ideas and pictures to their interface boards, a concept very different from then-existing popular social network sites like Facebook, MySpace and Friendster.

Schroeder and two friends embarked on the project and later invited Cohen, an investor and self-proclaimed "entrepreneurial mentor," to join the group. Plaintiffs allege that after learning all about Schroeder's ideas, technology and business plans, Cohen absconded with them, and gave them to Pinterest, which then used the information to develop its own highly-successful website. After subsequently learning that Cohen played a material role in the early stages of the Pinterest website, plaintiffs brought this action for, inter alia, breach of fiduciary duty, misappropriation and unjust enrichment.

The facts alleged in the complaint are as follows. In 2005, while attending Columbia Law School, Schroeder and a law school classmate, nonparty Brandon Stroy, developed an idea for a social network bulletin board where users could share their physical locations with their friends over the Internet. According to plaintiffs, no such website existed at the time. Lacking technological expertise, Schroeder taught himself computer programming, and spent more than 2,000 hours learning the necessary programming skills to develop the idea into a web application. Another law school classmate, nonparty William Bocra, came on board to further develop the idea and prepare a business model for the project.

Eventually, the three entrepreneurs formalized the project by forming Rendezvoo, a limited liability company in which Schroeder held a 65% interest, with Stroy and Bocra each holding a 17.5% interest. Schroeder was given a majority interest in the company because the idea was originally his, and because he was solely responsible for developing the web application and all technical processes. Schroeder was named president of Rendezvoo and was tasked with overseeing the day-to-day activities of the company, and performing all technical work in developing Rendezvoo's website. Under Rendezvoo's operating agreement, all members of the company owed each other fiduciary duties, and were

expressly prohibited from unilaterally taking any corporate opportunities.

In 2006, the first version of Rendezvoo's web application, Rendezvoo.com, was released to the public. Schroeder had both originated the concepts underlying the website and developed all of its technical aspects. Shortly after the release, Schroeder and his friends decided to redesign the website to allow users to share not only their physical locations but also any interests they had. Rendezvoo's business plan described the website as a place "where people meet to share opinions, views, items and tastes on a variety of subjects – products, services, events, politics, economics – nearly anything of human interest."

Schroeder rebuilt the web application to reflect this expanded scope, and in August 2006, the new concepts were introduced in an "alpha release" to the website's existing user community. This second version of Rendezvoo.com included bulletin boards for users to post their interests, and also featured an infinite scroll to make it easier for users to browse

large amounts of data.[1] By mid-2006, Schroeder had invested over 5,000 hours developing Rendezvoo's web applications, and delayed his legal career to focus solely on generating additional interest in the website.

Excited about their endeavor, Schroeder, Stroy and Bocra began to look for additional capital to further advance the Rendezvoo website. They were eventually introduced to Cohen, an investor affiliated with NY Angels, a not-for-profit corporation that provided capital to entrepreneurs starting new businesses.[2] In January 2007, the three men met with Cohen and shared with him Rendezvoo's concepts, business model and business plan; by this time, the Rendezvoo website had more than 5,000 users. Cohen told the men that although he was happy to meet with them again, he did not "get the concept" of people being interested in viewing other people's interests.

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[1] Infinite scrolling allows users to peruse a website's content on a seemingly single long page, instead of having to open separate pages to retrieve additional content. According to the complaint, when the second version of Rendezvoo.com was released, the concept of infinite scrolling was in its infancy, and standard web technologies provided inefficient ways to browse large amounts of data.

[2] The complaint describes NY Angels as an independent consortium of "angel investors" in New York City that works with entrepreneurs. According to the complaint, at all material times, Cohen was an officer of NY Angels, and was acting in furtherance of NY Angel's business and within the scope of his authority as an officer.

At a subsequent meeting later that month, Cohen and the three men discussed reformulating Rendezvoo.com to focus solely on new ideas, products and services. Schroeder and his friends agreed to narrow the website's scope, and Schroeder developed the Launchbed platform, a web application based on the original concepts of the second version of Rendezvoo.com. The initial branding statement described the new platform as a "user community where people and companies can launch new products, services, ideas, and media in order to ignite word-of-mouth efforts and receive targeted feedback." In March 2007, Schroeder provided the Launchbed business model to Cohen, who reacted positively to the new project.

In May 2007, Schroeder, Stroy and Bocra asked Cohen to become a partner in Rendezvoo. Under the proposal, Schroeder would reduce his ownership interest to 46% and Stroy, Bocra and Cohen would each own 18%. Despite lacking technical training and skills, Cohen accepted the offer and became Rendezvoo's Chairman and Chief Executive Officer. Cohen agreed to be bound by the restrictive covenants contained in Rendezvoo's operating agreement, including not taking Schroeder's ideas or using Rendezvoo's work product. Cohen's addition to Rendezvoo was never formally memorialized, and plaintiffs allege that the parties routinely ignored corporate formalities at Cohen's

direction.[3]

At Cohen's urging, Schroeder, Stroy and Bocra took down the Rendezvoo.com website to concentrate on the more narrowly-focused Launchbed platform. They created a prototype for the new site, and rebranded it as Skoopwire.com, a direct-to-consumer news wire connecting businesses to bloggers, sophisticated consumers and journalists wanting easy access to information about new products and services before they were covered in the mainstream media. Thus, Skoopwire.com was a narrower version of Rendezvoo.com; whereas Rendezvoo.com users could post anything of interest to them, Skoopwire.com was focused solely on new product launches. Schroeder developed a technology plan for the Skoopwire website, which included information about the architecture and platform for the site, as well as customer data analysis. Schroeder shared that technology plan with Cohen, and also taught him about the social networking niche in which both the Rendezvoo and Skoopwire websites existed.

In June 2007, the four men formed Skoop Media, with Schroeder named as President, and Cohen serving as Chairman and Chief Executive Officer. Again, corporate formalities were

[3] Cohen also promised to contribute $20,000 to the project, yet never paid despite repeated calls to contribute.

ignored by the parties.[4] In July 2007, the Skoopwire website was "privately launched" for "testing, customer review and analysis" by "family members, friends and others," including focus groups. The information gathered was used to further develop and refine the website. The focus groups returned favorable results, and the parties planned to release the Skoopwire website to the general public.

Things, however, did not go as planned. Plaintiffs allege that Cohen was upset with what he perceived to be Stroy's lack of involvement in the project. Cohen believed that he should have a greater ownership interest in Skoop Media than his equal 18% share with Stroy, and was displeased with Schroeder's desire to protect Stroy's interest. Cohen balked at Schroeder's attempt to finalize a shareholder's agreement that included Stroy as an owner. The tension between Cohen and Schroeder grew greater, and Cohen continued to press for Stroy's ouster and a greater stake in Skoop Media.

According to the complaint, Cohen's actions caused significant strains among the four partners and effectively deadlocked the project. By early 2008, the parties began contemplating a liquidation of Skoop Media. Plaintiffs allege

[4] Rendezvoo remained intact, and was never dissolved or merged into Skoop Media.

that in an effort to conceal his plan to steal Schroeder's ideas, technology and business plans, Cohen stated in an email that he was "saddened that such a marvelous idea and execution is lost forever." In fact, plaintiffs claim that Cohen purposely deadlocked the endeavor "so he could steal the core ideas for himself and freeze out Schroeder from reaping any benefits."

A proposed liquidation agreement circulated among the partners provided that each would not "develop, pursue, or otherwise work on . . . an entity or business reasonably related to the purposes, goals, aims and business models" of Rendezvoo or Skoop Media. Schroeder's requests to have the others sign the liquidation agreement went unanswered. Although the agreement was never executed, Cohen sent a July 1, 2008 email to Schroeder stating: "I have absolutely NO interest in PROFITING from your specific design work on Skoopwire." Plaintiffs allege that in mid-2008, Cohen "abandoned" Rendezvoo and Skoop Media. Although the Skoopwire website was never officially released to the general public, Skoop Media, like Rendezvoo, was never dissolved.

In 2009, Cohen met Pinterest founders Ben Silbermann and Evan Sharp at a business school competition at New York University. Silbermann and another Pinterest founder, Paul Sciarra, had previously formed Cold Brew Labs, Inc., a mobile shopping start-up, and were in the process of developing a mobile

shopping application called Tote. Tote, however, was not successful, and by early 2010, Cold Brew Labs altered its plans and instead created Pinterest.com, a social commerce application where "curating and sharing collections of products" was made "dead simple." According to the complaint, this radical change in focus was the result of Cohen's stealing Schroeder's ideas and technology and giving that information to Pinterest's founders.

Pinterest.com was launched in March 2010. The website allows users to pull images from elsewhere on the Internet and generate pins which are compiled into various topic boards. Each pin also functions as a link to its original Internet source, such as a blog post, an article, or a shopping site where users can immediately purchase the item pictured. Users have the ability to view both the most popular pins on the site as well as the boards that other users have created. The website also allows users to "like" pins and "re-pin" items "creating a microcosm of image-sharing based solely on user-created content."

Upon seeing Pinterest.com, Schroeder noticed that it was nearly identical to the second version of his Rendezvoo website. Specifically, plaintiffs allege that key similarities include:

- the ability for users to "post their interests for their friends and the other users of the site to see;"
- the ability to "connect things that mattered to a user with other users," and "provid[e] a place for a product

or event promoter to gain visibility for its product;"

- a primary business model of "product discovery through friends," whereby new product launches would be covered by users and shared with friends, "thereby igniting word of mouth about the product launch;"
- an "infinite scroll" user interface technique;
- the use of a "board" as both the main user interface, and for each user's profile page; and
- a pink and purple color scheme "to attract female users."

According to the complaint, it was not until March 2012 that Schroeder became aware of Cohen's scheme to steal his ideas. At that time, Schroeder read an article wherein Cohen "bragged about being Pinterest's 'first investor,'" and described how he met Pinterest's founders in 2009, shortly after he allegedly deadlocked the Rendezvoo and Skoopwire projects. Plaintiffs allege that, in that article, Cohen falsely stated that he did not know where the concept of "pinning on Boards" came from, and claimed that the Pinterest website "came out of nowhere." The complaint further alleges that Pinterest's founders knew that the ideas given to them by Cohen were not his own.

In June 2013, after learning that Cohen played a material role in the early stages of the Pinterest website, plaintiffs commenced this action against Cohen, NY Angels (together, the Cohen defendants) and Pinterest. The complaint asserts causes of

action for: (1) unjust enrichment (against all defendants); (2) misappropriation (against all defendants); (3) misappropriation of skills and expenditures (against all defendants); (4) promissory estoppel (against Cohen); (5) breach of fiduciary duty (against Cohen); and (6) aiding and abetting breach of fiduciary duty (against Pinterest). The complaint seeks, inter alia, compensatory damages of more than one million dollars and a constructive trust over the earnings derived by defendants from Pinterest.

In September 2013, Pinterest and the Cohen defendants separately moved, pursuant to CPLR 3211, to dismiss the complaint. By order entered July 11, 2014, the motion court granted Pinterest's motion in its entirety and dismissed the complaint as against it. By order entered July 25, 2014, the motion court granted the motion of the Cohen defendants to the extent of dismissing the causes of action for breach of fiduciary duty, misappropriation and unjust enrichment. The court, however, denied dismissal of the causes of action for misappropriation of skills and expenditures, and promissory estoppel. Judgment was entered on July 29, 2014, and this appeal followed.

In the fifth cause of action, plaintiffs allege that Cohen breached his fiduciary duties. The parties agree that because

the companies here are both Delaware entities, that state's law governs this claim. Under Delaware law, this cause of action requires proof of two elements: (1) the existence of a fiduciary duty; and (2) breach of that duty by the defendant (*Beard Research, Inc. v Kates*, 8 A3d 573, 601 [Del Ch 2010]). With respect to the first element, it is beyond dispute that an officer or director of a Delaware corporation owes fiduciary duties to both the company and its shareholders (*Agostino v Hicks*, 845 A2d 1110, 1122 n54 [Del Ch 2004]). Likewise, unless the operating agreement provides otherwise, a manager of a Delaware LLC owes fiduciary duties to both the LLC and its members (*William Penn Partnership v Saliba*, 13 A3d 749, 756 [Del 2011]; *CMS Inv. Holdings, LLC v Castle*, 2015 WL 3894021, *18, 2015 Del Ch LEXIS 169, *64-65 [Del Ch June 23, 2015]).

As to the second element, fiduciaries may not use their positions of trust and confidence to further their private interests (*Carsanaro v Bloodhound Techs., Inc.*, 65 A3d 618, 637 [Del Ch 2013]). The core of the fiduciary duty is the notion of loyalty, and a fiduciary must always act in a good faith effort to advance the interests of those to whom the duty is owed (*U.S. WEST, Inc. v Time Warner Inc.*, 1996 WL 307445, *21, 1996 Del Ch LEXIS 55, *64-65 [Del Ch June 6, 1996]). A breach of the duty occurs when the fiduciary commits "an unfair, fraudulent, or

wrongful act, including misappropriation of trade secrets, misuse of confidential information, . . . or usurpation of the employer's business opportunity" (*Beard Research*, 8 A3d at 602).

Judged by these standards, we conclude that the lower court erred in dismissing the breach of fiduciary duty claim against Cohen. The complaint alleges that, as Chairman and Chief Executive Officer of both Rendezvoo and Skoop Media, Cohen owed fiduciary duties to both companies and to Schroeder, a fellow shareholder and member. Further, the complaint sets forth facts alleging that Cohen breached those duties by intentionally deadlocking the Rendezvoo and Skoopwire projects, stealing confidential and proprietary ideas, technology and business plans related to the projects, and providing that information to Pinterest. These allegations sufficiently state a cause of action for breach of fiduciary duty under Delaware law (*see Beard Research*, 8 A3d at 602).

Cohen argues that the fiduciary duty claim is not viable because he was no longer affiliated with Rendezvoo or Skoop Media in 2009, when he allegedly gave Pinterest the confidential information. To prevail on a breach of fiduciary duty claim, plaintiffs must show "an actual, existing fiduciary relationship between the plaintiff and the defendants at the time of the alleged breach" (*Omnicare, Inc. v NCS Healthcare, Inc.*, 809 A2d 1163, 1169 [Del Ch 2002], *appeal dismissed in part, revd in part*

818 A2d 914 [Del 2003]). Thus, for example, a director who has resigned or has been terminated no longer owes fiduciary duties to the company (*see Dionisi v DeCampli*, 1995 WL 398536, *8-10, 1995 Del Ch LEXIS 88, *21-28 [Del Ch 1995]; *In re Walt Disney Co. Derivative Litig.*, 907 A2d 693, 758 [Del Ch 2005], *affd* 906 A2d 27 [Del 2006]).

Viewed in the light most favorable to plaintiffs, and giving them the benefit of all reasonable inferences, the complaint sufficiently alleges that Cohen was still an officer of Rendezvoo and Skoop Media at the time of the alleged breach. The complaint specifically states that Cohen took on the positions of Chairman and Chief Executive Officer of both companies and held himself out to the public as such. There is no allegation in the complaint that Cohen ever resigned his positions, or relinquished his ownership interests in either entity. The complaint does not, as Cohen asserts, state that Rendezvoo and Skoop Media "ceased functioning." To the contrary, the complaint states that neither company was dissolved, and although the parties contemplated a dissolution of Skoop Media, a proposed liquidation agreement was never executed.

In seeking dismissal, Cohen relies on isolated language in the complaint stating that he "abandoned" Rendezvoo and Skoop Media in 2008, the year before the alleged breach, and that the others involved in the project "moved on" with their lives. At

this early stage of the proceedings, we decline to ascribe the significance urged by Cohen to the word "abandoned." Plaintiffs' allegation that Cohen "abandoned" the companies does not lead to the inescapable inference that he resigned from or gave up his ownership interests in them. An equally plausible reading is that Cohen "abandoned" the companies by purposely causing a deadlock and withdrawing his support from the projects. Simply put, Cohen's status with the companies at the time of the alleged breach is a disputed issue of fact that cannot be resolved on this pleading motion (*see Dionisi*, 1995 WL 398536 at *8, 1995 Del Ch LEXIS 88 at *22 ["Determining whether a director or officer has resigned is a question of fact determined by the circumstances of each case"]).[5]

Even if Cohen prevails on his claim that he left the two companies prior to his allegedly providing the information to Pinterest, a breach of fiduciary duty claim could still lie under Delaware law. "A former director . . . breaches his fiduciary duty if he engages in transactions that had their inception *before* the termination of the fiduciary relationship or were founded on information acquired *during* the fiduciary

[5] Cohen cites to *Dionisi* for the proposition that even where there is no written resignation, fiduciary duties cease when a director "effectively" resigns. *Dionisi*, however, was a decision rendered after trial. Here, any questions as to whether Cohen "effectively" resigned cannot be resolved on this preanswer dismissal motion.

relationship" (*BelCom, Inc. v Robb*, 1998 WL 229527, *3, 1998 Del Ch LEXIS 58, *9 [Del Ch LEXIS 58 [Del Ch April 28, 1998] [emphasis in original]). Here, plaintiffs contend that Cohen's breach of fiduciary duties had its inception prior to his alleged abandonment of the companies. Specifically, the complaint states that Cohen intentionally caused the project to deadlock for the express purpose of stealing confidential information. According to the complaint, Cohen acquired this information while he was unquestionably a fiduciary, and subsequently gave it to Pinterest, a competitor, to advance his own interests. These allegations are sufficient to state a cause of action for breach of fiduciary duty under Delaware law (*see BelCom*, 1998 WL 229527 at *3, 1998 Del Ch LEXIS 58 at *8-9).

In the sixth cause of action, plaintiffs allege that Pinterest aided and abetted Cohen's breach of fiduciary duty. To prevail on this claim, plaintiffs must allege: "(1) a breach by a fiduciary of obligations to another, (2) that the defendant knowingly induced or participated in the breach, and (3) that plaintiff suffered damage as a result of the breach" (*Kaufman v*

Cohen, 307 AD2d 113, 125 [1st Dept 2003]).[6] A defendant knowingly participates in the breach of fiduciary duty when he or she provides "substantial assistance" to the fiduciary, which occurs "when a defendant affirmatively assists, helps conceal or fails to act when required to do so, thereby enabling the breach to occur" (*id.* at 126).

An essential prerequisite to proving this cause of action is that the defendant must have known of the fiduciary duty (*see People v Coventry First LLC*, 13 NY3d 108, 115 [2009]). Indeed, actual knowledge of the breach of the duty is required, and constructive knowledge will not suffice (*Brasseur v Speranza*, 21 AD3d 297, 299 [1st Dept 2005]). Further, a plaintiff must plead this cause of action with particularity; conclusory allegations are insufficient (*see* CPLR 3016[b]; *Front, Inc. v Khalil*, 103 AD3d 481, 483 [1st Dept 2013], *affd* 24 NY3d 713 [2015]; *Roni LLC v Arfa*, 72 AD3d 413, 413-414 [1st Dept 2010], *affd* 15 NY2d 826 [2010]).

Applying these principles, we conclude that the claim against Pinterest for aiding and abetting Cohen's breach of fiduciary duty was properly dismissed. Plaintiffs failed to

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[6] The parties rely on New York law to resolve the aiding and abetting cause of action. We need not decide whether New York or Delaware law governs this claim since the elements, as relevant to this case, are essentially the same under both states' laws (*compare Kaufman*, 307 AD2d at 125 with *In re Rural Metro Corp. Stockholders Litig.*, 88 A3d 54, 80 [Del Ch 2014], *appeal dismissed* 105 A3d 990 [Del 2014]).

assert with the requisite particularity facts alleging that Pinterest had actual knowledge of Cohen's alleged breach and knowingly participated in it. The complaint contains no specific allegation that Pinterest was actually aware of Cohen's involvement with Rendezvoo and Skoop Media, let alone that he was a fiduciary of the companies. That omission is fatal to this cause of action (*see Coventry First*, 13 NY3d at 115 [a claim that the defendants knowingly induced a breach of fiduciary obligations necessarily fails if defendants did not know of the duty]).

Plaintiffs rely on a number of statements in the complaint to support their argument that Pinterest had knowledge of Cohen's breach. For example, the complaint states that Pinterest's founders did not come up with the idea behind the Pinterest website themselves, but received it from Cohen, knowing that the idea was not Cohen's own. The complaint further states that Cohen and Pinterest's founders agreed that Cohen would share the idea with them and provide capital. Neither of these allegations, however, fairly suggests that Pinterest's founders actually knew that Cohen was a fiduciary or that his passing along the idea breached a fiduciary obligation. In sum, the complaint's conclusory allegations are insufficient to sustain the aiding and abetting cause of action (*see Roni LLC v Arfa*, 72 AD3d at 413-414 [conclusory allegations in complaint do not give

rise to an inference that the defendants had actual knowledge of the breach]; *Brasseur v Speranza*, 21 AD3d at 299 [bare allegations that the defendant knew or should have known of breach of fiduciary duty insufficient to sustain claim]; *Kaufman v Cohen*, 307 AD2d at 125-126 [absence of facts in complaint to infer that the defendants had actual knowledge of the fiduciary relationship]).[7]

The motion court properly dismissed the cause of action for unjust enrichment as against Pinterest.[8] To state a claim for unjust enrichment, a plaintiff must allege that: "(1) the [defendant] was enriched, (2) at [plaintiff's] expense, and (3) that it is against equity and good conscience to permit the [defendant] to retain what is sought to be recovered" (*Georgia Malone & Co., Inc. v Rieder*, 19 NY3d 511, 516 [2012] [internal quotation marks omitted]). Further, "a plaintiff cannot succeed

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[7] Although we affirm dismissal of the aiding and abetting cause of action, we reject Pinterest's alternative argument that the complaint does not sufficiently allege that plaintiffs suffered damages proximately caused by the breach. In general, issues of proximate cause are for the trier of fact, and Pinterest's contention is unavailing at this procedural juncture (*see Overseas Shipholding Group, Inc. v Proskauer Rose, LLP*, 130 AD3d 415 [1st Dept 2015]). Both *Laub v Faessel* (297 AD2d 28 [1st Dept 2002]) and *R.M. Newell Co. v Rice* (236 AD2d 843 [4th Dept 1997], *lv denied* 90 NY2d 807 [1997]), upon which Pinterest relies, are distinguishable because they decided the proximate cause issue on summary judgment motions.

[8] On appeal, plaintiffs do not challenge the court's dismissal of this cause of action as against the Cohen defendants.

on an unjust enrichment claim unless it has a sufficiently close relationship with the other party" (*id.*). Although contractual privity is not required, there must be a relationship between the parties that is not "'too attenuated'" (*id.*), and that "could have caused reliance or inducement" (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011]).

Here, the complaint contains no facts showing that plaintiffs had any relationship or connection to Pinterest, let alone the "sufficiently close relationship" necessary to sustain this claim (*Georgia Malone*, 19 NY3d at 516, citing *Sperry v Crompton Corp*, 8 NY3d 204 [2007]). Plaintiffs do not allege that Schroeder, or either of the corporate plaintiffs, had any contact with Pinterest or its founders (*see Boardman v Kennedy*, 105 AD3d 1375 [4th Dept 2013] [dismissing unjust enrichment claim where the plaintiff and the defendant had no dealings with each other]). The complaint alleges only a relationship between plaintiffs and Cohen, and a separate relationship between Cohen and Pinterest, which is "too attenuated" (*Georgia Malone*, 19 NY3d at 516), and insufficient to "have caused reliance or inducement" (*Mandarin Trading*, 16 NY3d at 182).

In the second cause of action, plaintiffs allege that Cohen and Pinterest misappropriated trade secrets related to the Rendezvoo and Skoopwire projects. To prevail on a claim for misappropriation of trade secrets, a plaintiff must demonstrate:

"(1) that it possessed a trade secret, and (2) that the defendants used that trade secret in breach of an agreement, confidential relationship or duty, or as a result of discovery by improper means" (*North Atl. Instruments, Inc. v Haber*, 188 F3d 38, 43-44 [2d Cir 1999]). A trade secret is "any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it" (*Ashland Mgt. v Janien*, 82 NY2d 395, 407 [1993], quoting Restatement of Torts § 757, comment b).

In determining whether information constitutes a trade secret, "several factors should be considered: (1) the extent to which the information is known outside of [the] business; (2) the extent to which it is known by employees and others involved in [the] business; (3) the extent of measures taken by [the business] to guard the secrecy of the information; (4) the value of the information to [the business] and [its] competitors; (5) the amount of effort or money expended by [the business] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others" (*id.*).

The complaint, when read in the light most favorable to plaintiffs, states a claim for trade secret misappropriation against Cohen. Plaintiffs allege that while Cohen was an officer

of Rendezvoo and Skoop Media, he was exposed to the companies' confidential and proprietary technology and business plans. Plaintiffs further allege that despite being aware that the information was to be kept confidential, Cohen provided it to Pinterest. According to the complaint, Schroeder devoted nearly four years of his life, and thousands of hours, developing the technology that ultimately led to the Rendezvoo and Skoopwire websites. The complaint alleges that this technology was valuable to plaintiffs, and was not easily acquired or duplicated by others. Further, Schroeder took steps to maintain the secrecy of all of the technology and business information related to the projects.

These allegations are sufficient, for pleading purposes, to satisfy the first element of a misappropriation of trade secrets claim, namely, that plaintiffs possessed a trade secret (*see Ashland Mgt.*, 82 NY2d at 407 [whether information constitutes a trade secret is generally a question of fact]). Plaintiffs have also pleaded facts supporting the second element — that Cohen used the trade secrets in breach of an agreement, confidential relationship or duty, or as a result of discovery by improper means (*see North Atl. Instruments*, 188 F3d at 43-44). As noted earlier, plaintiffs allege that Cohen acquired the confidential information while he was a fiduciary of Rendezvoo and Skoop Media, and that he purposely caused the project to deadlock so

that he could steal that information.

Plaintiffs, however, cannot prevail on their trade secret claim against Pinterest. The complaint does not allege that plaintiffs entered into any agreement with Pinterest or had any confidential relationship with the company or its founders. Indeed, as noted earlier, there is no allegation that Schroeder, or either of the corporate plaintiffs, had any contact whatsoever with Pinterest. Nor do plaintiffs allege that Pinterest obtained the trade secrets by improper means. In fact, the complaint states that Cohen voluntarily gave Pinterest the alleged trade secrets, not that Pinterest employed any improper means to acquire them. Plaintiffs point only to the allegation that Pinterest's founders knew that the idea given to them by Cohen was not Cohen's own. This allegation, however, does not give rise to an inference that Pinterest used improper means to obtain the information.

Although we uphold the misappropriation of trade secrets cause of action against Cohen, the claim should be limited to the confidential information referenced in the complaint, and cannot extend to information in the public domain. "[A] trade secret must first of all be secret" (*Ashland Mgt.*, 82 NY2d at 407), *i.e.*, "somethin[g] known to only one or a few and kept from the general public" (*Leo Silfen, Inc. v Cream*, 29 NY2d 387, 394-395 [1972]). Thus, information that is readily available from public

sources is not entitled to trade secret protection (*JAD Corp. of Am. v Lewis*, 305 AD2d 545, 546 [2d Dept 2003]; *Newton Garment Carriers v Consolidated Carriers Corp.*, 250 AD2d 482, 482 [1st Dept 1998]).

Here, the complaint identifies a number of similar features in both Pinterest.com and the second version of Rendezvoo.com. As noted earlier, this version of the Rendezvoo website was introduced in August 2006, and had over 5,000 users by January 2007. The alleged misappropriation of trade secrets took place in 2009, several years after the Rendezvoo website entered the public domain. Thus, to the extent the features identified by plaintiffs were readily ascertainable from the publicly-available Rendezvoo website, they are not protectable trade secrets (*see Midsummer Fin. Prods., Inc. v Rapid Filing Servs. LLC*, 14 Misc 3d 1209[A] [Sup Ct, NY County 2006] ["online content . . . and . . . website's 'general look and functionality' are not trade secrets because they are publicly exhibited on the website"]; *PlasmaNet, Inc. v Apax Partners, Inc.*, 6 Misc 3d 1011[A] [Sup Ct, NY County 2004] [information about the functionality and appearance of a website that was already in commercial operation was in the public domain, and thus, was not a trade secret]). On the other hand, trade secret protection can extend to plaintiffs' confidential technology, not readily ascertainable from the

public Rendezvoo site, that led to the website's development.[9]

The complaint also states a claim against Cohen for misappropriation of ideas.[10] This cause of action requires proof of two elements: (1) a legal relationship between the parties in the form of a fiduciary relationship, an express contract, implied contract, or quasi contract; and (2) an idea that is novel and concrete (*Turner v Temptu Inc.*, 586 Fed Appx 718, 722 [2d Cir 2014]; *see Downey v General Foods Corp.*, 31 NY2d 56, 61-62 [1972]). Here, the complaint sufficiently alleges both a fiduciary relationship between Cohen and plaintiffs, and that the misappropriated ideas were novel. As with the trade secret claim, the idea misappropriation claim cannot extend to material in the public domain (*see Marraccini v Bertelsmann Music Group Inc.*, 221 AD2d 95, 98 [3d Dept 1996] [affirming dismissal of misappropriation claim where idea was a "creative variation" on an idea preexisting in the public domain], *lv denied* 89 NY2d 809 [1997]; *Oasis Music v 900 U.S.A.*, 161 Misc 2d 627, 631 [Sup Ct, NY County 1994] [idea that is merely "a variation on a basic

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[9] We need not, at this stage of the proceedings, define the precise contours between features that are readily ascertainable from the Rendezvoo website and confidential technology that is not. Nevertheless, we note that some of the similarities between the Pinterest and Rendezvoo websites, such as the color scheme and use of an infinite scroll, appear to fall into the former category.

[10] Although the misappropriation cause of action does not specifically allege idea misappropriation, a fair reading of the complaint's factual allegations sets forth this claim.

theme" available in the public domain is not novel]).

With respect to Pinterest, the idea misappropriation claim was properly dismissed. Although plaintiffs concede that they have no contractual or fiduciary relationship with Pinterest, they nevertheless argue that a quasi-contractual relationship exists as evidenced by their unjust enrichment claim. However, as discussed previously, no unjust enrichment claim lies against Pinterest. In the absence of the requisite legal relationship between plaintiffs and Pinterest, the idea misappropriation claim fails (*see Hudson & Broad, Inc. v J.C. Penney Corp.*, 2013 WL 3203742, *7, 2013 US Dist LEXIS 89207, *20-22 [SD NY Jun 18, 2013 [dismissing idea misappropriation claim because the plaintiff failed to plausibly plead a legal relationship between the parties], *affd* 553 Fed Appx 37 [2d Cir 2014]).

The motion court correctly upheld the misappropriation of skills and expenditures claim against Cohen. To properly assert this claim, which is a subset of New York's unfair competition law, a plaintiff must allege that a defendant misappropriated plaintiff's labor, skills, expenditures or good will, and displayed some element of bad faith in doing so (*see Macy's Inc. v Martha Stewart Living Omnimedia, Inc.*, 127 AD3d 48, 57 [1st Dept 2015]; *Abe's Rooms, Inc. v Space Hunters, Inc.*, 38 AD3d 690, 692 [2d Dept 2007]). In this context, bad faith can be established by a showing of fraud, deception, or an abuse of a

fiduciary or confidential relationship (*Big Vision Private, Ltd. v E.I. DuPont de Nemours & Co.*, 610 Fed Appx 69, 70 [2d Cir 2015]).

Plaintiffs adequately allege that Schroeder invested labor, skill and expenditures, having spent nearly four years of his life, and thousands of working hours, on performing the technical requirements to develop the Rendezvoo and Skoopwire websites. Further, sufficient facts are alleged showing that Cohen misappropriated the fruits of Schroeder's investment by giving the ideas and technology to Pinterest in bad faith. As discussed previously, the complaint asserts that Cohen acquired the confidential information while he was a fiduciary of Rendezvoo and Skoop Media. The complaint also alleges that Cohen knew that the proprietary information he obtained should be kept confidential, and that Cohen agreed to be bound by the restrictive covenants in the Rendezvoo operating agreement, which included not taking Schroeder's ideas or using any of Rendezvoo's work product for his own benefit.[11]

The misappropriation of skills and expenditures claim was properly dismissed against Pinterest. Although plaintiffs argue that Pinterest exhibited bad faith by aiding and abetting Cohen's

[11] Like the other misappropriation causes of action, this claim cannot be premised upon misappropriation of publicly-available information (*see e.g. Demetriades v Kaufmann*, 698 F Supp 521, 526-527 [SD NY 1988]).

breach of fiduciary duty, we have already rejected that claim. Likewise, we have rejected the claim that bad faith is established merely because Pinterest may have known that the ideas given to them by Cohen were not his own. Because the complaint fails to sufficiently allege the existence of a fiduciary or confidential relationship, or that Pinterest otherwise obtained the information in bad faith, the misappropriation of skills and expenditures claim cannot stand.

The misappropriation causes of action are sufficiently stated against NY Angels under the theory of respondeat superior. "An employer may be vicariously liable for its employees' tortious acts on a theory of respondeat superior only if they were committed in furtherance of the employer's business and within the scope of employment" (*Bowman v State of New York*, 10 AD3d 315, 316 [1st Dept 2004]). The complaint alleges that Cohen was acting at all times in furtherance of NY Angels' business and within the scope of his authority as an NY Angels officer. At this preanswer stage of the proceedings, these allegations are sufficient to state a claim against NY Angels under respondeat superior (*see Riviello v Waldron*, 47 NY2d 297, 303 [1979] ["because the determination of whether a particular act was within the scope of the servant's employment is so heavily dependent on factual considerations, the question is ordinarily one for the jury"]).

Finally, the motion court should have dismissed the promissory estoppel cause of action against Cohen. "The elements of a claim for promissory estoppel are: (1) a promise that is sufficiently clear and unambiguous; (2) reasonable reliance on the promise by a party; and (3) injury caused by the reliance" (*MatlinPatterson ATA Holdings LLC v Federal Express Corp.*, 87 AD3d 836, 841-842 [1st Dept 2011], *lv denied* 21 NY3d 853 [2013]). Detrimental reliance is an indispensable element of a promissory estoppel claim (*Thome v Alexander & Louisa Calder Found.*, 70 AD3d 88, 104-105 [1st Dept 2009], *lv denied* 15 NY3d 703 [2010]), and a failure to adequately plead that element requires dismissal (*see Rosenberg v Home Box Off., Inc.*, 33 AD3d 550, 550 [1st Dept 2006], *lv denied* 8 NY3d 804 [2007]).

Plaintiffs' promissory estoppel claim is based on the July 1, 2008 email from Cohen to Schroeder wherein Cohen stated that he had "absolutely NO interest in PROFITING from [Schroeder's] specific design work on Skoopwire." Even assuming that this statement constitutes a clear and unambiguous promise, the promissory estoppel claim fails because it does not sufficiently allege detrimental reliance. The complaint merely states, in conclusory fashion, that plaintiffs "reasonably relied on Cohen's promise," but does not explain how they purportedly relied. Indeed, there are no facts pleaded showing that plaintiffs did something, or refrained from doing something, in reliance on

Cohen's email. Thus, the promissory estoppel claim should have been dismissed (*see Knight Sec., L.P. v Fiduciary Trust Co.*, 5 AD3d 172 [1st Dept 2004] [promissory estoppel claim dismissed where the complaint failed to allege that the plaintiff was injured by reason of its reliance on the promise]; *Tierney v Capricorn Invs., L.P.*, 189 AD2d 629, 632 [1st Dept 1993] [dismissing promissory estoppel claim where there were only conclusory allegations of reliance], *lv denied* 81 NY2d 710 [1993]).

Plaintiffs argue on appeal that they sufficiently alleged detrimental reliance because Schroeder "did not further implement his own ideas" as a result of Cohen's email. No such allegation is contained in the complaint. To the contrary, the complaint alleges that after the email was sent, Schroeder "continually contemplated how he could make use of his ideas and work product," a claim that is inconsistent with plaintiffs' current position that Schroeder held off pursuing his ideas in reliance on Cohen's email. Plaintiffs also contend, in their appellate brief, that they never would have granted Cohen access to their confidential information absent the promise contained in the July 1, 2008 email. Again, this allegation is found nowhere in the complaint. Nor does it make any sense since, according to the complaint, the confidential information was shared with Cohen long before he sent the email.

On appeal, plaintiffs maintain that the promissory estoppel claim is also based on assurances given by Cohen in the Rendezvoo operating agreement. However, the promissory estoppel claim set forth in the complaint is premised solely on the July 1, 2008 email, and makes no reference to the operating agreement. In any event, such a claim would fail because no facts are pleaded showing detrimental reliance on any covenants contained in the agreement. Further, a promissory estoppel claim is not viable where the conduct underlying the claim is governed by contract, and where the plaintiff fails to allege a duty independent of the contract (*see Coleman & Assoc. Enters., Inc. v Verizon Corporate Servs. Group, Inc.*, 125 AD3d 520, 521 [1st Dept 2015]).

We have considered the parties' remaining contentions, including plaintiffs' request on appeal for leave to amend their complaint, and find them unavailing.

Accordingly, the judgment of the Supreme Court, New York County (Melvin L. Schweitzer, J.), entered July 29, 2014, bringing up for review orders, same court and Justice, entered July 11, 2014 and July 25, 2014, which, to the extent appealed from as limited by the briefs, granted defendant Pinterest's motion to dismiss the complaint as against it, and granted the Cohen defendants' motion to dismiss the complaint to the extent of dismissing the causes of action for misappropriation of trade secrets/ideas and breach of fiduciary duty, and denied the motion

as to the causes of action for misappropriation of skills and expenditures, and promissory estoppel, should be modified, on the law, to grant the Cohen defendants' motion as to the promissory estoppel claim, to deny the Cohen defendants' motion as to the misappropriation of trade secrets/ideas and breach of fiduciary duty claims, to reinstate those claims, and otherwise affirmed, without costs. The appeals from the aforesaid orders should be dismissed, without costs, as subsumed in the appeals from the judgment.

All concur

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

ENTERED: OCTOBER 6, 2015

CLERK