SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

DECEMBER 23, 2008

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

4292-
4293 Zelinda Antoinette Dinardo, Index 15325/00
Plaintiff-Respondent,

-against-

The City of New York,
Defendant,

The Board of Education of the
City of New York,
Defendant-Appellant.

Michael A. Cardozo, Corporation Counsel, New York (Marta Ross of counsel), for appellant.

Clark, Gagliardi & Miller, P.C., White Plains (John S. Rand of counsel), for respondent.

Amended judgment, Supreme Court, Bronx County (Norma Ruiz, J.), entered on or about April 8, 2008, after a jury trial, awarding plaintiff damages in the total amount of $512,465, affirmed, without costs. Appeal from original judgment, same court and Justice, entered on or about August 22, 2007, unanimously dismissed, without costs, as superseded by the appeal from the amended judgment.

The trial court properly denied defendant Board of Education's motion at the close of plaintiff's case for judgment

as a matter of law (CPLR 4401). Plaintiff, a special education teacher, was injured when she attempted to protect one of her students from attack by another student with a history of aggressive and disruptive behavior. "A motion for judgment at the close of all the evidence is substantially equivalent to one for a directed verdict made at that point. . . In considering [such] a motion . . . the test to be applied is not founded upon a weighing of the evidence, but rather, in taking the case from the jury, the trial court must find 'that by no rational process could the trier of the facts base a finding in favor of the [plaintiff] upon the evidence . . . presented'" (*Lipsius v White*, 91 AD2d 271, 276-277 [1983], quoting *Blum v Fresh Grown Preserve Corp.*, 292 NY2d 241, 245 [1944]). "[T]he plaintiff's evidence must not only be accepted as true, but accorded the benefit of every favorable inference that may be drawn therefrom [citation omitted]. As long as the record yields a view of the evidence upon which a jury could rationally find for the plaintiff, he is entitled to have the jury pass upon the case, and the complaint may not be dismissed" (*Candelier v City of New York*, 129 AD2d 145, 147 [1987]). Accepting plaintiff's evidence as true and according her the benefit of every favorable inference that may be drawn therefrom (*see e.g. Szczerbiak v Pilat*, 90 NY2d 553, 556 [1997]), a jury could have rationally concluded that a special relationship existed between plaintiff and the Board, where the

latter, in initiating a Type 3 referral to have the student who later attacked plaintiff transferred from her classroom to another program, assumed an affirmative duty to act on plaintiff's behalf; that the Board, through its agents, had knowledge that inaction could lead to harm; that there was direct contact between those agents and plaintiff; and that plaintiff justifiably relied on the Board's affirmative undertaking (*see Cuffy v City of New York*, 69 NY2d 255, 260 [1987]; *Pascucci v Board of Educ. of City of N.Y.*, 305 AD2d 103, 104 [2003]).

Although no express promise was made to plaintiff by any agents of the Board, there is no requirement that the promise to protect be explicit (*see Bloom v City of New York*, 123 AD2d 594, 595 [1986]). In this regard, we note in particular that plaintiff testified that her supervisor told her to "hang in there because something was being done to have [the student] placed or removed." The dissent posits that plaintiff could not have been lulled into a false sense of security by being told something was being done and by the initiation of a Type 3 referral, especially since she knew it could take up to 60 days to process such a referral. The jury, however, had a rational basis for finding that plaintiff justifiably relied on the Board's affirmative undertaking, given the assurances she received from her local administrators. For instance, plaintiff told the principal, the assistant principal and her direct

supervisor that the situation was getting more impossible, that she wanted to quit, that it was getting unsafe, and that she was concerned about safety in the classroom; in response she was told that "things were being worked on, things were happening [suggesting an imminent solution], . . . and to hang in there." In addition, while the Type 3 referral was pending, the principal intervened by writing a letter to the District 10 supervisor of special education, "urgently requesting an alternative site" for the student.

We reject the Board's argument that plaintiff's claim fails because it is premised on the Board's alleged negligence in the placement and transfer of a student. This is a function carried out in accordance with educational policy, the responsibility for which lies within the professional judgment and discretion of those charged with the administration of the public schools (*see e.g. Brady v Board of Educ. of City of N.Y.*, 197 AD2d 655 [1993]). The evidence demonstrates that agents of the Board began the process of transferring the offending student out of plaintiff's class, and contrary to the Board's contention, the gravamen of plaintiff's negligence claim was that her supervisor and other school administrators failed to follow through with the transfer request in a timely fashion. Furthermore, the Board's argument that it cannot be held liable because its agents had no knowledge of prior threats or violence committed by the student

who attacked plaintiff, or that she feared for her safety, is belied by the evidence that the Board's agents were aware of the student's aggressive tendencies and that plaintiff indeed feared for her safety in the classroom.

All concur except McGuire and DeGrasse, JJ. who dissent in a memorandum by DeGrasse, J. as follows:

DeGRASSE, J. (dissenting)

I respectfully dissent because the evidence at trial was legally insufficient to establish that defendant Board of Education assumed a special duty to plaintiff. On March 25, 1999, plaintiff, a teacher, was injured while trying to prevent one of her students from striking another. This problem student, 10 years old at the time of the incident, was first assigned to plaintiff's special education classroom in September 1998. In the ensuing months, his behavior became progressively disruptive, marked by aggression toward his classmates. Out of concern for safety, plaintiff approached her supervisors about having him placed in a learning environment more suitable for his behavior pattern. As plaintiff knew, because this was a special education pupil, such a change could only be effected by way of an administrative process known as a Type 3 referral. Plaintiff, who had worked on two previous Type 3 referrals, also knew that the process began with a written recommendation to the Board's Committee on Special Education. Accordingly, starting in January 1999, on her supervisors' instructions, plaintiff kept anecdotal notes for the purpose of documenting the request. The recommendation, supported by plaintiff's notes, was signed by plaintiff and her supervisor on February 12, 1999. Plaintiff testified that she knew it could take up to 60 days to complete a Type 3 referral. She also testified that it was never promised

the recommendation would be processed on any specific date. Nor did she assume the referral would be done immediately. Plaintiff testified as follows with respect to her superiors' response to her inquiries about the status of the recommendation: "I was asked to hang in there because something was being done, but I didn't know exactly what that - something was being done to have [him] placed or removed, but I did not know exactly what." No other representation was proffered as a basis for the claim of a special duty on part of the Board.

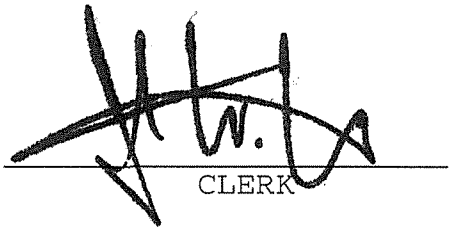
"It is well settled that absent a special duty to an injured teacher, liability may not be imposed upon a governmental entity for its breach of a duty owed generally to persons in the school system and members of the public" (*Feder v Board of Educ. of City of N.Y.*, 147 AD2d 526 [1989], *lv denied* 74 NY2d 610 [1989]). As the Court of Appeals noted in *Cuffy v City of New York* (69 NY2d 255, 261 [1987]), "the injured party's reliance is as critical in establishing the existence of a 'special relationship' as is the municipality's voluntary affirmative undertaking of a duty to act. That element provides the essential causative link between the 'special duty' assumed by the municipality and the alleged injury. Indeed, at the heart of most of these 'special duty' cases is the unfairness that the courts have perceived in precluding recovery when a municipality's voluntary undertaking has lulled the injured party into a false sense of security and

has thereby induced him either to relax his own vigilance or to forego other available avenues of protection."

Measured against this standard, plaintiff's proof was legally insufficient to establish reliance. The vague statement that something was being done could not have lulled plaintiff into a false sense of security, particularly because she was acutely aware of this student's presence in the classroom and his disruptive propensity right up to the time of the subject incident. Further, as noted above, plaintiff knew from experience that it could take up to 60 days to process a Type 3 referral. The incident occurred 41 days after plaintiff initiated the process by signing the recommendation form. Accordingly, I would reverse and grant the Board's motion for judgment dismissing the complaint pursuant to CPLR 4401.

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

ENTERED: DECEMBER 23, 2008



CLERK

Tom, J.P., Saxe, Williams, Catterson, Moskowitz, JJ.

4411 Joel J. Klein, Index 601299/06
Petitioner-Respondent-Appellant,

-against-

CAVI Acquisition, Inc.,
Respondent,

Loeb Holding Corporation,
Respondent-Appellant-Respondent.

Stroock & Stroock & Lavan, LLP, New York (Daniel A. Ross of counsel), for appellant-respondent.

Rick C. Kim & Associates, P.C., Flushing (Rick C. Kim of counsel), for respondent-appellant.

Order, Supreme Court, New York County (Alice Schlesinger, J.), entered March 27, 2008, which denied respondent Loeb Holding Corp.'s and petitioner's respective motions for summary judgment, unanimously affirmed, without costs.

The memoranda of law submitted in connection with the parties' dispositive motions are not included in the record. Although, as Loeb now contends, the issue of whether the corporate veil of defendant CAVI Acquisition, Inc., a Delaware corporation, should be pierced is governed by Delaware law (*see e.g. Sweeney, Cohn, Stahl & Vaccaro v Kane*, 6 AD3d 72, 75 [2004], *lv dismissed* 3 NY3d 751 [2004]), in letter briefs submitted to Supreme Court, both parties maintained that the law to be applied was not material to the outcome. Loeb argued that petitioner's "claim is no more valid under New York law than it is under

Delaware law," and petitioner asserted that, irrespective of whether Delaware law governs, "the result remains the same." Having indicated that the court's choice of applicable law was immaterial, Loeb cannot now assign as error the court's failure to decide the issue solely on the basis of Delaware law (*see Cohn v Goldman*, 76 NY 284, 287 [1879] [questions not raised before the trial court cannot be asserted as error on appeal]; *Recovery Consultants v Shih-Hsieh*, 141 AD2d 272, 276 [1988] [same]). Indeed, Loeb continues to maintain that "[u]nder any view of New York law, Klein's claim of alter ego liability fails."

Petitioner identified an issue of fact as to Loeb's misuse of "the corporate form to operate a sophisticated shell game, shuttling assets between entities in an effort to escape the effect of any potentially adverse judgment" (*Mobil Oil Corp. v Linear Films, Inc.*, 718 F Supp 260, 270 [D Del 1989]; *Matter of Superior Leather Co. v Lipman Split Co.*, 116 AD2d 796, 797 [1986] ["intercorporate shuffling of assets and debts"]). In assessing whether Loeb is the alter ego of CAVI, "the question of domination is generally one of fact" (*Fletcher v Atex, Inc.*, 68 F3d 1451, 1458 [2d Cir 1995] [applying Delaware law]) and is thus "particularly unsuited for resolution on summary judgment" (*Forum Ins. Co. v Texarkoma Transp. Co.*, 229 AD2d 341, 342 [1996]; *see also First Bank of Ams. v Motor Car Funding*, 257 AD2d 287, 294 [1999]). As Supreme Court stated, "Issues of fact abound," and

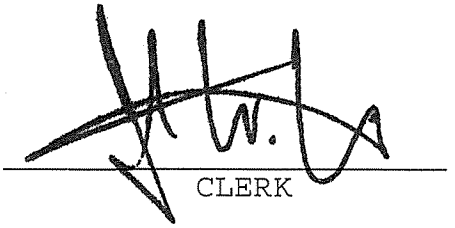
petitioner failed to establish his entitlement to summary disposition (*see First Capital Asset Mgt. v N.A. Partners*, 300 AD2d 112, 117 [2002]; *cf. Midland Interiors, Inc. v Burleigh*, 2006 WL 3783476, 2006 Del Ch LEXIS 220 [Del Ch 2006] [plaintiff prevailed on alter ego claim after trial]).

Petitioner does not contend that he should have been granted summary judgment on his fraudulent conveyance claim, and Loeb's contention that it should have been granted summary judgment dismissing that cause of action is unavailing. On May 25, 2004, petitioner commenced an arbitration proceeding against Loeb and CAVI's predecessor. On May 28, 2004, Loeb and three other CAVI shareholders lent CAVI money. Eleven months later, on April 28, 2005, Loeb filed a UCC statement with respect to its portion of the loan. Loeb cites no authority for the proposition that the May 2004 loan and the April 2005 UCC filing were "essentially contemporaneous," i.e., that the loan was not antecedent. Thus, CAVI gave a security interest to its shareholders - as opposed to outsiders - with respect to an antecedent loan. Such a conveyance cannot be found, as a matter of law, to have been made for fair consideration (*see Farm Stores v School Feeding Corp.*,

102 AD2d 249 [1984], *affd* 64 NY2d 1065 [1985]; *cf. In re Applied Theory Corp.*, 323 BR 838 [Bankr SD NY 2005], *affd* 330 BR 362 [SD NY 2005]).

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

ENTERED: DECEMBER 23, 2008



CLERK

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on December 23, 2008.

Present - Hon. Peter Tom, Justice Presiding
Luis A. Gonzalez
Eugene Nardelli
Karla Moskowitz
Dianne E. Renwick, Justices.

Elie Tahari, etc.,
Plaintiff-Respondent,

Index 603120/06

-against-

4763-
4764

Andrew Rosen, et al.,
Defendants,

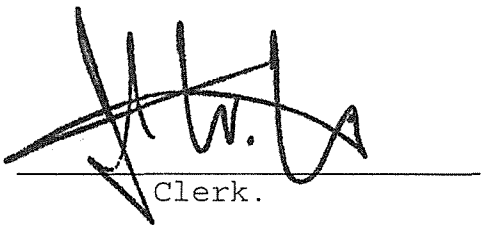
Link Theory Holdings Co., Ltd., et al.,
Defendants-Appellants.

An appeal having been taken to this Court by the above-named appellants from an order of the Supreme Court, Bronx County (Helen E. Freedman, J.), entered February 13, 2008,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated December 8, 2008,

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

ENTER:



Clerk.

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on December 23, 2008.

Present - Hon. Peter Tom, Justice Presiding
Luis A. Gonzalez
Eugene Nardelli
Karla Moskowitz
Dianne E. Renwick, Justices.

Elie Tahari, etc.,
Plaintiff-Appellant-Respondent,

Index 603120/06

-against-

4765-
4766

Andrew Rosen, et al.,
Defendants-Respondents,

Fast Retailing Co., Ltd.,
Defendant-Respondent-Appellant,

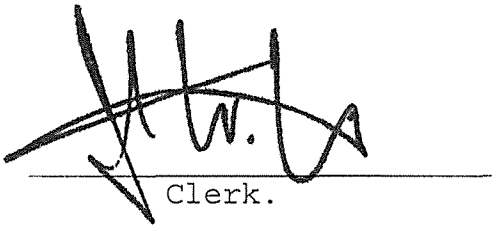
Global Retailing Co., Ltd., et al.,
Defendants.

Cross-appeal having been taken to this Court by the above-named appellants from an order of the Supreme Court, Bronx County (Helen E. Freedman, J.), entered on or about June 22, 2007, and from a judgment, same court and Justice, entered July 19, 2007,

And said appeals having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated December 8, 2008,

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

ENTER:



Clerk.

Friedman, J.P., McGuire, Acosta, DeGrasse, Freedman, JJ.

4810 Racepoint Partners, LLC, et al., Index 600739/06
Plaintiffs-Respondents,

-against-

JPMorgan Chase Bank, N.A.,
Defendant-Appellant.

Simpson Thacher & Bartlett LLP, New York (Thomas C. Rice of counsel), for appellant.

Bartlit Beck Herman Palenchar & Scott LLP, Chicago, IL (James B. Heaton, III, of the Illinois Bar, admitted pro hac vice, of counsel), for respondents.

Order, Supreme Court, New York County (Karla Moskowitz, J.), entered November 9, 2007, which denied defendant's motion to dismiss the complaint, unanimously reversed, on the law, with costs, the motion granted and the complaint dismissed. The Clerk is directed to enter judgment accordingly.

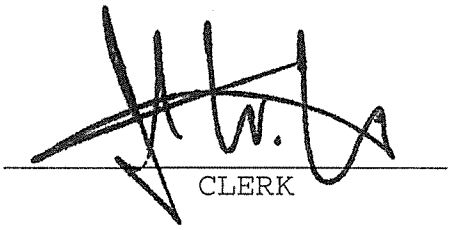
After the December 2, 2001 bankruptcy filing by Enron Corporation, plaintiffs purchased certain notes issued by Enron. In this action, plaintiffs assert breach of contract and fiduciary duty claims against JPMorgan Chase Bank, N.A., which had served as indenture trustee for the notes. Plaintiffs' claims, which allege acts or omissions by JPMorgan occurring before plaintiffs purchased the notes, are predicated on section 4.02 of the indenture agreement. In relevant part, section 4.02 required Enron to "file with the Trustee, within 15 days after it files the same with the SEC, copies of its annual reports and of

the information, documents and other reports . . . which [Enron] is required to file with the SEC pursuant to Section 13 or 15(d) of the [Securities] Exchange Act [of 1934, as amended]."

When read in light of the entire indenture agreement and, in particular, the provision of section 4.02 stating that the "[d]elivery of such reports, information and documents to the Trustee is for information purposes only," section 4.02 merely required Enron to file with the indenture trustee copies of the information, documents and other reports it filed with the SEC. Thus, contrary to plaintiffs' contentions, section 4.02 did not require Enron to file with the indenture trustee financial statements the contents of which comply with federal securities law. Because there was neither a default by Enron nor an event of default under the indenture agreement, the breach of contract cause of action must be dismissed. As plaintiffs concede, the dismissal of the contract cause of action is fatal to the breach of fiduciary duty cause of action.

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

ENTERED: DECEMBER 23, 2008



CLERK

Tom, J.P., Saxe, Catterson, Moskowitz, DeGrasse, JJ.

4865 The People of the State of New York, Ind. 4795/06
Respondent,

-against-

Shawn Riley,
Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered June 12, 2007, convicting defendant, after a jury verdict, of criminal possession of stolen property in the fourth degree, and sentencing him to a term of 2 to 4 years, unanimously affirmed.

The court properly exercised its discretion when it declined to grant a six-day adjournment, in the midst of a relatively short trial, so that defendant could call a police officer to whom the victim had given a statement containing a purported inconsistency (*see Matter of Anthony M.*, 63 NY2d 270, 283-284 [1984]; *People v Foy*, 32 NY2d 473, 476 [1973]). Defense counsel, who made it clear to the jury that he was reading from a District Attorney writeup, extensively cross-examined the victim about the statement, and she denied making it. Furthermore, the uncalled officer's testimony at a pretrial hearing demonstrated that, if

called at trial, he would have testified that the victim never made the purported inconsistent statement. In that event, CPL 60.35(1) would have prevented defendant from using the writeup to impeach his own witness, since the officer neither signed it nor swore to it (*see People v Nuculli*, 51 AD3d 408 [2008], *lv denied* 10 NY3d 938 [2008]). Moreover, a party who is cross-examining a witness cannot call other witnesses to contradict the witness' answers concerning collateral matters solely for the purpose of impeaching the witness' credibility (*People v Pavao*, 59 NY2d 282, 288-289 [1983]). Finally, the inconsistency was relatively insignificant in the context of the case, and there is no reasonable possibility that testimony from the uncalled officer would have changed the outcome. Similarly, since there is no indication that the officer could have provided any material, noncumulative testimony, the court properly denied defendant's request for a missing witness instruction (*see People v Gonzalez*, 68 NY2d 424, 427-428 [1986]).

While defendant complains on appeal about several interchanges between the court and trial counsel, the only issue that defendant has even arguably preserved is a claim that the court interfered with his cross-examination of a witness. However, the court's participation was very brief and inconsequential (*compare People v Raosto*, 50 AD3d 508, 509 [2008]). Defendant's other claims about the court's conduct are

unpreserved and we decline to review them in the interest of justice. As an alternative holding, we find that the court's remarks directed to defense counsel were not prejudicial.

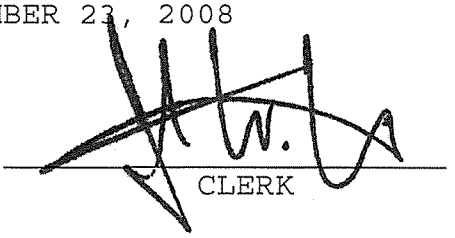
At the close of the People's case, the court provided a suitable opportunity for a conference between defense counsel and defendant about whether defendant would testify on his own behalf, and it properly exercised its discretion in declining to excuse the jury during the conference. Counsel never asked for any particular amount of time to confer, or suggested he was being rushed. Counsel merely asked for an opportunity to confer in private, but he was able to converse with his client out of earshot of the jury, and there is no indication in the record that this procedure was unsatisfactory. Furthermore, counsel had already received ample opportunity during the trial to confer with defendant (*see e.g. People v Overton*, 25 AD3d 432 [2005], *lv denied* 6 NY3d 851 [2006]).

The constitutional aspects of each of the above-discussed claims are unpreserved (*see e.g. People v Lane*, 7 NY3d 888, 889 [2006]; *People v Green*, 27 AD3d 231, 233 [2006], *lv denied* 6 NY3d

894 [2006]), and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits.

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

ENTERED: DECEMBER 23, 2008



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Tom, J.P., Saxe, Catterson, Moskowitz, DeGrasse, JJ.

4866-
4866A Board of Managers of
60 East 88th Street
Condominium Association,
Plaintiff-Appellant,

-against-

Andrew Stein, et al.,
Defendants-Respondents.

- - - - - - - - -

Board of Managers of
60 East 88th Street
Condominium Association,
Plaintiff-Appellant,

-against-

David Kuo Liang Yang,
Defendant-Respondent.

Index 109715/03
109447/07

Nesenoff & Miltenberg, LLP, New York (Philip A. Byler of counsel), for appellant.

Kramer Levin Naftalis & Frankel, LLP, New York (Yehudis Shalva Lewis of counsel), for Andrew Stein, respondent.

Bainton McCarthy LLC, New York (J. Joseph Bainton of counsel), for David Kuo Liang Yang, respondent.

Order, Supreme Court, New York County (Edward H. Lehner, J.), entered June 18, 2007, which granted defendant Stein's motion to enforce an oral stipulation purportedly made by plaintiff's counsel in open court on December 8, 2006 to dismiss plaintiff's claims for damages arising from Stein's harboring of dogs in the apartment he rented from defendant Yang, and denied plaintiff's cross motion to clarify the record to reflect that

counsel made no such stipulation, or to vacate the purported stipulation and reinstate the claims against Yang for damages arising from Stein's harboring of dogs in Yang's apartment, unanimously reversed, on the law and the facts, with costs, plaintiff's motion to vacate the purported stipulation of December 8, 2006 granted and its claims for damages against Yang arising from Stein's harboring of dogs reinstated. Appeal from order, same court and Justice, entered November 27, 2007, which granted Yang's motion to dismiss a separate complaint for money damages arising from Stein's harboring of dogs in Yang's apartment, unanimously dismissed, without costs, as academic.

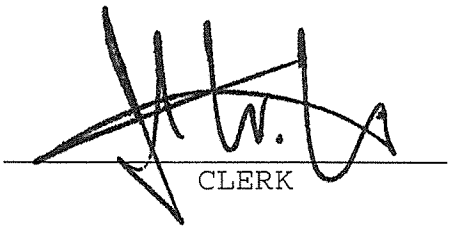
From the minutes of the December 8, 2006 proceeding, it appears that plaintiff's counsel agreed that plaintiff was no longer seeking damages arising from the harboring of the dogs but was seeking only legal fees in connection with the damages claims and thus that she acquiesced in the stipulation (*see Hallock v State of New York*, 64 NY2d 224, 231 [1984]). Since counsel had represented plaintiff at several conferences earlier in the consolidated actions and was knowledgeable about these proceedings, the court reasonably concluded that she had apparent authority to dismiss the damages claims (*see id.; Matter of Silicone Breast Implant Litig.*, 306 AD2d 82, 84-85 [2003]).

However, it also appears from the minutes that plaintiff's counsel agreed that the claims against Yang "relate to the dogs,

the parking by Mr. Stein *and* the legal fees in relation thereto" (emphasis added), and the minutes reflect a general lack of clarity in the proceeding. For instance, when the court asked whether plaintiff consented to the dismissal of certain claims, it was not plaintiff's counsel but Yang's counsel who answered in the affirmative. We therefore find that plaintiff has demonstrated good cause to vacate the stipulation, i.e., that "it appears that [plaintiff] has inadvertently, unadvisably or improvidently entered into an agreement which will take the case out of the due and ordinary course of proceeding in the action, and works to [its] prejudice" (*Matter of Frutiger*, 29 NY2d 143, 150 [1971] [internal quotation marks and citation omitted]).

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

ENTERED: DECEMBER 23, 2008



CLERK

Tom, J.P., Saxe, Catterson, Moskowitz, DeGrasse, JJ.

4867-
4867A-
4867B In re Ibrahim B., etc., and Others,

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

Shahidah A.-M.,
Respondent-Appellant,

Family Support Systems Unlimited, Inc.,
Petitioner-Respondent.

Lisa H. Blitman, New York, for appellant.

John R. Eyerman, New York, for respondent.

Karen Freedman, Lawyers for Children, Inc., New York (Hal Silverman of counsel), Law Guardian.

Orders of fact-finding and disposition, Family Court, New York County (Rhoda Cohen, J.), all entered on or about July 7, 2006, which, after a hearing at which respondent did not personally appear, found that respondent permanently neglected the subject children, terminated her parental rights to the children, and committed the children to petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed with respect to the dispositions, and the appeal with respect to the fact-finding determinations unanimously dismissed, without costs.

No appeal lies from the fact-finding portions of the orders

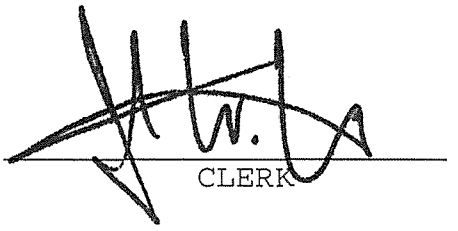
since they were made upon a default at the hearing (*Matter of "Male" M.*, 18 AD3d 215 [2005]). Were we to review the fact-finding determinations, we would find that clear and convincing evidence established that the agency made diligent efforts to strengthen and encourage the parental relationship by referring respondent for mental health counseling, and explaining to respondent and reminding her regularly that attending the counseling was critical to having her children returned to her, and that, despite the agency's efforts, respondent refused to submit to mental health counseling during the relevant period, thus failing to plan for the children's future within the meaning of Social Services Law § 384-b(7) (*see Matter of Elizabeth Amanda T.*, 52 AD3d 376 [2008]; *Matter of Kimberly C.*, 37 AD3d 192 [2007], *lv denied* 8 NY3d 813 [2007]; *Matter of Paul Michael G.*, 36 AD3d 541 [2007]).

The finding that termination of respondent's parental rights is in the children's best interests is supported by a preponderance of the evidence showing, inter alia, that the children have been in foster care for more than five years and are in a safe and nurturing foster home (*see Elizabeth Amanda T.*, 52 AD3d at 376; *Paul Michael G.*, 36 AD3d at 542).

We have considered respondent's other arguments and find them unavailing.

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

ENTERED: DECEMBER 23, 2008



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Tom, J.P., Saxe, Catterson, Moskowitz, DeGrasse, JJ.

4871 The People of the State of New York, Ind. 2386/04
Respondent,

-against-

Stephanie Jones,
Defendant-Appellant.

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

Judgment, Supreme Court, Bronx County (Albert Lorenzo, J. at plea; Seth Marvin J. at sentence), rendered on or about July 28, 2006, unanimously affirmed.

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

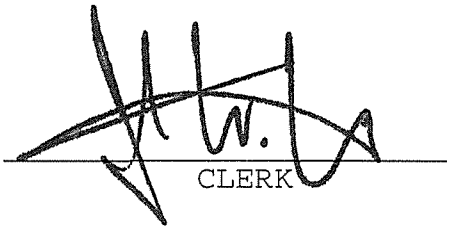
Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department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

Denial of the application for permission to appeal by the

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

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

ENTERED: DECEMBER 23, 2008



Tom, J.P., Saxe, Catterson, Moskowitz, DeGrasse, JJ.

4873 Brandon Milliner, an Infant by his Mother and Natural Guardian, Theresa McMullin, et al., Plaintiffs-Appellants, Index 8368/05

-against-

New York City Housing Authority, et al., Defendants-Respondents.

[And a Third-Party Action]

Kenneth L. Falk, New York, for appellants.

Cullen and Dykman LLP, Brooklyn (Joseph Miller of counsel), for New York City Housing Authority, respondent.

Catalano Gallardo & Petropoulos, LLP, Jericho (Matthew K. Flanagan of counsel), for Gazebo Contracting, Inc., respondent.

Order, Supreme Court, Bronx County (Mark Friedlander, J.), entered September 5, 2007, which granted defendants' motions for summary judgment dismissing the complaint, unanimously affirmed, without costs.

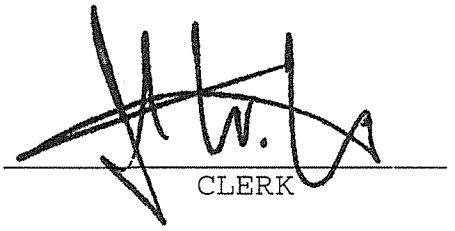
Dismissal of the complaint was appropriate since plaintiff assumed the risks inherent in playing basketball outdoors (*see Sykes v County of Erie*, 94 NY2d 912 [2000]; *LaSalvia v City of New York*, 305 AD2d 267 [2003]; *McKey v City of New York*, 234 AD2d 114 [1996]). The evidence establishes that plaintiff, an experienced basketball player who was familiar with the subject court's playing surface and its depressions, slipped in a puddle of water and fell. Indeed, plaintiff acknowledged that he had

been playing on the court for about an hour and a half prior to his fall and was aware of the puddle.

The court properly found the expert's affidavit submitted by plaintiff to be of no probative value because it was vague and unsubstantiated (*see Ramos v Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544 [2002]; *Parris v Port of N.Y. Auth.*, 47 AD3d 460, 461 [2008]).

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

ENTERED: DECEMBER 23, 2008



CLERK

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on December 23, 2008.

Present - Hon. Peter Tom, Justice Presiding
David B. Saxe
James M. Catterson
Karla Moskowitz
Leland G. DeGrasse, Justices.

The People of the State of New York, SCI 1909/06
Respondent,

-against- 4874

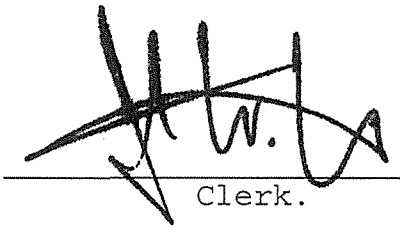
Alfredo Rodriguez,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Troy K. Webber, J.), rendered on or about September 12, 2006,

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

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

ENTER:



Clerk.

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

Tom, J.P., Saxe, Catterson, Moskowitz, DeGrasse, JJ.

4875 Virginia Albizu, Index 302180/04
Plaintiff-Respondent,

-against-

Jose Duval,
Defendant-Appellant.

Phillip Jaffe, New York, for appellant.

Michael L. Paikin, New York, for respondent.

Judgment, Supreme Court, New York County (Saralee Evans, J.), entered May 14, 2008, to the extent appealed from as limited by the briefs, awarding plaintiff a principal sum of $236,346.45, and counsel fees in the amount of $8,155, unanimously affirmed, without costs.

These awards represented, respectively, the accelerated balance of plaintiff wife's equitable distribution based on the value of her husband's dental license, and her counsel fees in connection with enforcement proceedings. Defendant failed to demonstrate grounds to warrant setting aside or modifying the equitable distribution provisions of the parties' separation agreement, which were incorporated by reference but not merged with the divorce decree (*see Merl v Merl*, 67 NY2d 359 [1986]). The parties expressly stipulated that they accepted the valuation

opinion of the court-appointed neutral forensic accountant, acknowledged the findings in the accountant's report as true and binding, and accepted them for equitable distribution purposes. Contrary to defendant's assertion, his student loans were taken into account in the valuation process. The total amount of the loans was deducted from the gross valuation in the accountant's report, resulting in an adjusted enhanced earning capacity value of $672,200. The parties further agreed that 75% of this figure was the appropriate value of the marital asset to be divided, of which $252,075 represented plaintiff's 50% share. The incorporation of the agreement by reference in the final judgment of divorce makes it binding on the parties.

The accountant's valuation was anything but "speculative." The value of a newly earned license may be measured by comparing the average lifetime income of a college graduate with the average lifetime earnings of a person holding such a license, and reducing the difference to its present value (*see McSparron v McSparron*, 87 NY2d 275, 286 [1995]). There was no legal basis for modifying or setting aside the equitable distribution.

Counsel fees were properly awarded under the terms of the

separation agreement.

M-4105 - *Albizu v Duval*

Motion seeking, inter alia, dismissal of appeal, leave to enlarge record and related relief granted only to the extent of enlarging the record and otherwise denied.

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

ENTERED: DECEMBER 23, 2008

CLERK

Tom, J.P., Saxe, Catterson, Moskowitz, DeGrasse, JJ.

4876 The People of the State of New York, Ind. 5955/05
Respondent,

-against-

Mihai Merzianu,
Defendant-Appellant.

Hoffman & Pollok, LLP, New York (John L. Pollok of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Sylvia Wertheimer of counsel), for respondent.

Judgment, Supreme Court, New York County (Robert Stolz, J.), rendered November 19, 2007, convicting defendant, after a jury trial, of assault in the second degree, and sentencing him to a term of 1 day, with 5 years' probation, a $5,000 fine and 250 hours of community service, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's determinations concerning credibility. Defendant was convicted of assault under a theory of recklessness (*see* Penal Law §§ 15.05[3]; 120.05[4]), based on evidence establishing that he deliberately engaged in a course of highly dangerous risk-creating conduct. During rush hour at the busy intersection of York Avenue and East 60th Street, defendant's car was behind several cars which were waiting for the left-turn signal to

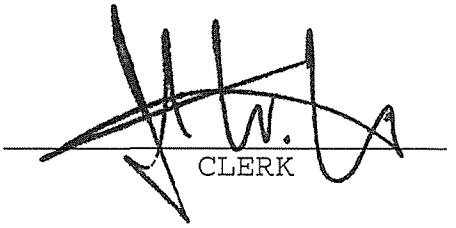
illuminate in one of two left-turning lanes on the southbound side of York Avenue leading to the northbound FDR drive. Defendant's car suddenly made a screeching noise, crossed over the double yellow line and proceeded the wrong way on the northbound side of the Avenue, passing the cars waiting to turn, in an attempt to make the turn onto the ramp which led to the Drive. This resulted in a collision with a vehicle traveling north on the Avenue, which in turn, caused that vehicle to pin a traffic enforcement agent against a divider, causing him to sustain serious physical injuries. This evidence supports the conclusion that defendant was aware of, and consciously disregarded, the substantial and unjustifiable risk posed by his actions (*see e.g. People v Carrington*, 30 AD3d 175 [2006], *lv denied* 7 NY3d 846 [2006]).

The court properly exercised its discretion in permitting a physician to testify about the victim's injuries even though defendant had expressly conceded the element of serious physical injury (*see People v Hills*, 140 AD2d 71, 77-81 [1988], *lv denied* 73 NY2d 855 [1988]; *cf. Old Chief v United States*, 519 US 172 [1997]). The court placed suitable limits on the testimony,

which was not unduly prejudicial, and it gave the jury an appropriate cautionary instruction that it is presumed to have followed (*see People v Davis*, 58 NY2d 1102, 1104 [1983]).

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

ENTERED: DECEMBER 23, 2008



Tom, J.P., Saxe, Catterson, Moskowitz, DeGrasse, JJ.

4878 The People of the State of New York, Docket 12898C/05
Respondent,

-against-

John Brown,
Defendant-Appellant.

Robert E. Carrigan, Montclair, NJ, for appellant.

Robert T. Johnson, District Attorney, Bronx (Jennifer Marinaccio of counsel), for respondent.

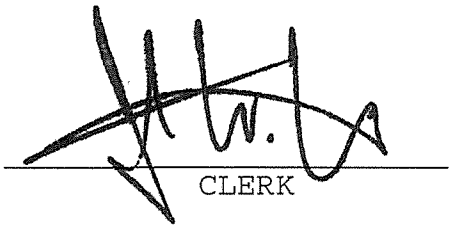
Judgment, Criminal Division of the Supreme Court, Bronx County (Michael Gross, J.), rendered March 10, 2005, convicting defendant, upon his plea of guilty, of criminal possession of a weapon in the fourth degree and violation of the Open Container Law (Administrative Code of City of NY § 10-125[b]), and sentencing him to a conditional discharge and time served, unanimously affirmed.

To the extent that defendant's ineffective assistance of counsel claim is based upon the denial of his CPL 440.10 motion, the claim is not properly before this Court as his motion for leave to appeal was denied. On the existing record, to the extent it permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *People v Ford*, 86 NY2d 397, 404 [1995]; *see also Strickland v Washington*, 466 US 668 [1984]). Given defendant's extensive criminal record,

counsel could have reasonably concluded that the disposition offered at arraignment, providing for a nonincarceratory sentence with immediate release from custody, was so favorable that it would be unwise to forgo it in favor of litigating a suppression claim, regardless of the claim's merits.

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

ENTERED: DECEMBER 23, 2008



CLERK

Tom, J.P., Saxe, Catterson, Moskowitz, DeGrasse, JJ.

4879 Ruth E. Venduro, Index 100530/07
Plaintiff-Respondent,

-against-

The Port Authority of New York and New Jersey, et al.,
Defendants-Respondents,

Adirondack Transit Lines, Inc.,
Defendant-Appellant.

Gallo Vitucci Klar Pinter & Cogan, New York (Yolanda L. Ayala of counsel), for appellant.

Popick, Rutman & Jaw, LLP, New York (Evelyn Jaw of counsel), for Ruth E. Venduro, respondent.

Milton H. Pachter, New York (Kathleen M. Collins of counsel), for The Port Authority of New York and New Jersey, respondent.

Ahmuty, Demers & McManus, Albertson (Brendan T. Fitzpatrick of counsel), for Greyhound Lines, Inc., respondent.

Order, Supreme Court, New York County (Louis B. York, J.), entered May 16, 2008, which denied defendant Adirondack's motion for summary judgment dismissing the complaint as against it, unanimously reversed, on the law, without costs, the motion granted, and the complaint dismissed as against that party. The Clerk is directed to enter judgment accordingly.

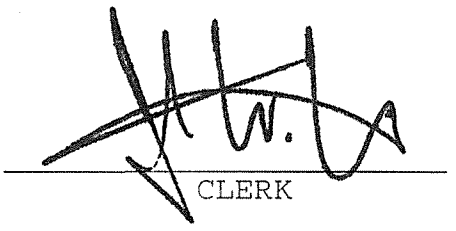
The court found issues of fact as to whether Adirondack was responsible for maintenance of the platform under its agreement with defendant Port Authority, and whether Adirondack met its duty to deposit the passengers in a safe area. Contrary to the

court's characterization, the agreement between these parties was a "licensing agreement," not a "lease." Adirondack's status as a licensee, without more, did not give rise to a duty to maintain the gate areas (*see Gibbs v Port Auth. of N.Y.*, 17 AD3d 252, 255 [2005]). The Port Authority retained primary responsibility for repair and maintenance of those areas (*see Abraham v Port Auth. of N.Y. & N.J.*, 29 AD3d 345, 347 [2006]), except for damage caused by Adirondack, of which there is no evidence here.

As a common carrier, Adirondack had a duty to provide departing passengers with a safe place to exit the bus (*see e.g. Trainer v City of New York*, 41 AD3d 202 [2007]). Plaintiff does not allege that the driver parked the bus outside the bay or otherwise left it in a dangerous place. The evidence indicates that safe egress was available for the passengers by turning left and walking along the platform to the interior of the terminal. Adirondack thus met its obligation to provide a clear, direct and safe path (*see Blye v Manhattan & Bronx Surface Tr. Operating Auth.*, 124 AD2d 106, 112 [1987], *affd* 72 NY2d 888 [1988]) from the bus.

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

ENTERED: DECEMBER 23, 2008



CLERK

Tom, J.P., Saxe, Catterson, Moskowitz, DeGrasse, JJ.

4881-
4882N Margarita Ayala, et al., Index 24636/04
Plaintiffs-Respondents,

-against-

Saada A.R. Bassett,
Defendant-Appellant.

Mead, Hecht, Conklin & Gallagher, LLP, Mamaroneck (Elizabeth M. Hecht of counsel), for appellant.

Ryan S. Goldstein, P.L.L.C., New York (Ryan S. Goldstein of counsel), for respondents.

Judgment, Supreme Court, Bronx County (Barry Salman, J.), entered July 16, 2007, awarding the adult plaintiffs the principal sum of $25,000 each, and the infant plaintiff the principal sum of $10,000, unanimously reversed, on the law, without costs, the awards vacated and the complaint dismissed. The Clerk is directed to enter judgment in favor of defendant dismissing the action. Appeal from order, same court (Wilma Guzman, J.), entered on or about May 5, 2008, which denied defendant's motion to vacate the judgment and dismiss the action for lack of personal jurisdiction, unanimously dismissed, without costs.

As gleaned from the face of the affidavit of service, the process server exercised due diligence in attempting to serve defendant personally with the summons and complaint before resorting to nail-and-mail service at the residential address

defendant had provided to police at the time of the accident (*see* CPLR 308[4]). The affidavit constituted prima facie evidence of proper service, indicating efforts to serve defendant at the residence on three different occasions (early morning, afternoon and evening) across a 22-day span (*see e.g. Brown v Teicher*, 188 AD2d 256 [1992]). When the burden thus shifted to defendant to rebut the presumption of proper service, she failed to offer an affidavit or other documentary evidence challenging the validity of the attempted service.

The default resolved the issue of which party was at fault, but the burden remained with plaintiffs to establish a prima facie case of serious injury at the inquest (*Ortiz v Biswas*, 4 AD3d 151 [2004]). Defendant's repeated objection to the admissibility of plaintiffs' unaffirmed or uncertified medical documents at the inquest preserved this challenge. Most of plaintiffs' medical evidence was not properly authenticated or affirmed, and thus was inadmissible (*see Grasso v Angerami*, 79 NY2d 813 [1991]; *Shinn v Catanzaro*, 1 AD3d 195 [2003]). The only admissible evidence -- medical records of plaintiffs' radiologist and chiropractor -- failed to establish that any of the plaintiffs suffered serious injury. The radiologist's MRI reports that found the two adult plaintiffs had suffered herniations were insufficient as those conditions were not

causally related to the accident (*see generally Pommells v Perez*, 4 NY3d 566 [2005]). The chiropractor's medical reports alluded to specified findings of plaintiffs' range-of-motion limitations, but such findings were made approximately two weeks after the accident, and no further findings were made after the plaintiffs each completed several months of therapy to address their diagnosed soft-tissue injuries. Even assuming, for the sake of argument, that all of the plaintiffs' medical evidence submitted at the inquest was admissible, the unexplained gap in treatment of 4½ years for each plaintiff undermined their respective claims of serious injury based on allegations of permanent injury (*see id.* at 574).

None of the plaintiffs offered evidence sufficient to show their incapacity to perform substantially all of their usual and customary activities for at least 90 of the first 180 days following the accident (Insurance Law § 5102[d]). The two adult plaintiffs noted few activities they were prevented from undertaking, and they each returned to full-time work within a week or two. The infant plaintiff was not shown to have been precluded from engaging in her regular daily activities.

In view of the foregoing, we need not address the appeal from the order denying vacatur of the judgment. We would note only that a party who asserts lack of jurisdiction as grounds for vacating a default judgment has no obligation to prove a

meritorious defense (*see Johnson v Deas*, 32 AD3d 253, 254 [2006]; *Boorman v Deutsch*, 152 AD2d 48, 51 [1989], *lv dismissed* 76 NY2d 889 [1990]).

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

ENTERED: DECEMBER 23, 2008

Tom, J.P., Saxe, Catterson, Moskowitz, DeGrasse, JJ.

4883N Yaguiris Carela, an Infant Over the Age of 14 by Her Mother and Natural Guardian, Maria Rincon, et al., Plaintiffs-Respondents, Index 8090/00

-against-

Pelham Realty, Inc., Defendant-Appellant.

Barrett Lazar LLC, Forest Hills (Marc B. Schuley of counsel), for appellant.

Stephen H. Fields & Associates, White Plains (Lisa M. Comeau of counsel), for respondents.

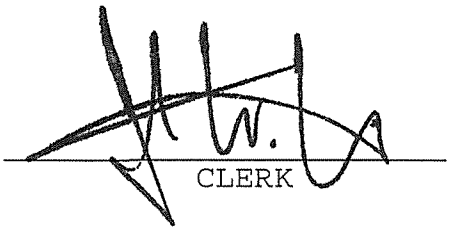
Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered on or about May 22, 2008, which granted plaintiffs' motion to vacate an earlier dismissal and restored the action to the trial calendar, unanimously affirmed, without costs.

This action was dismissed pursuant to 22 NYCRR 202.27 upon plaintiff's failure to attend a pre-trial conference. In seeking to vacate the dismissal, plaintiffs came forward with the requisite satisfactory excuse for their default in appearing and a showing of a meritorious claim (*see Rugieri v Bannister*, 7 NY3d 742 [2006]). Their attorneys did not willfully default when they failed appear for a scheduled court conference and neglected to move to restore the case to the calendar (*see Sanchez v Javind Apt. Corp.*, 246 AD2d 353 [1998]). In the absence of service of the dismissal order with notice of entry, there was no time limit

on the making of the motion to vacate the dismissal, and any alleged prejudice caused by post-dismissal delay short of laches is not a consideration (*see Acevedo v Navarro*, 22 AD3d 391 [2005]).

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

ENTERED: DECEMBER 23, 2008



Tom, J.P., Saxe, Catterson, Moskowitz, DeGrasse, JJ.

4884N Arnold H. Nager, Individually and on Behalf of All Others Similarly Situated, Plaintiffs-Appellants-Respondents, Index 119294/02

-against-

Teachers' Retirement System of the City of New York, et al., Defendants-Respondents-Appellants.

Keller Rohrback L.L.P., New York (David S. Preminger of counsel), for appellants-respondents.

Michael A. Cardozo, Corporation Counsel, New York (Elizabeth S. Natrella of counsel), for respondents-appellants.

Order and judgment (one paper), Supreme Court, New York County (Paul G. Feinman, J.), entered September 17, 2007, in a action by a class of school teachers and administrators for a retroactive application of the decision in *Weingarten v Board of Trustees of N.Y. City Teachers' Retirement Sys.* (98 NY2d 575 [2002]) holding that "per session" pay is pensionable, insofar as appealed from, awarding plaintiffs' attorneys, the firms of Rosen Preminger & Bloom LLP and Sandals & Associates, P.C., fees of $332,681.50 and $113,030, respectively, unanimously modified, on the facts, to reduce the fee to the Rosen firm to $241,010, and the fee to the Sandals firm to $103,430, and otherwise affirmed, without costs.

Supreme Court properly used the lodestar method in determining the reasonable value of plaintiffs' attorneys'

services in instituting and settling this class action, rather than applying a percentage of the value of the settlement, in view of the enormous disparity in result between the two methods (*see Goldberger v Integrated Resources, Inc.*, 209 F3d 43, 50 [2d Cir 2000]; *In re Washington Public Power Supply Sys. Sec. Litig.*, 19 F3d 1291, 1927-1928 [9th Cir 1994]), and also correctly found that a multiplier was not warranted to enhance the lodestar amount (*see Goldberger, id.*; *Sheridan v Police Pension Fund, Art. 2 of City of N.Y.*, 76 AD2d 800 [1980]). We find, however, that the Preminger firm failed to establish the reasonableness of its $610 per hour rate, the reasonableness of billing 76% of its hours at the top partner rate, and the qualifications of its associates (*see Lochren v County of Suffolk*, 2008 US Dist LEXIS 38100, *15 n 4, 2008 WL 2039458, *5 n 4 [ED NY 2008]). Accordingly, we modify to reduce the Preminger fee to $241,010. Similarly, we find that the Sandals firm failed to demonstrate its entitlement to payment at the top partner rate of all hours billed by Sandals for speaking to plan members, and accordingly reduce its fee to $103,400. We have considered the parties'

remaining contentions for affirmative relief and find them unavailing.

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

ENTERED: DECEMBER 23, 2008

CLERK

Friedman, J.P., Sweeny, McGuire, Renwick, Freedman, JJ.

4885 The People of the State of New York, Ind. 6437/99
Respondent,

-against-

William Hogue,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Vincent Rivellese of counsel), for respondent.

Order, Supreme Court, New York County (Charles H. Solomon J.), entered on or about February 27, 2007, which denied defendant's CPL 440.10 motion to vacate a judgment, same court and Justice, rendered on or about April 3, 2001, and denied his CPL 440.20 motion to set aside his sentence, unanimously modified, on the law, to the extent of vacating defendant's sentence and remanding for resentencing, and otherwise affirmed.

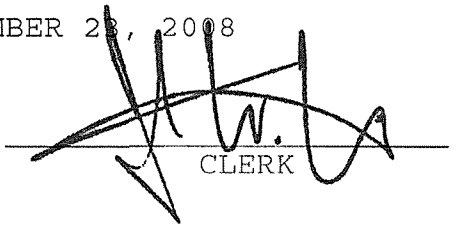
Although defendant's conviction required the imposition of a term of post-release supervision (PRS), the court did not mention PRS during the plea allocution (*see People v Catu*, 4 NY3d 242 [2005]), and failed to impose any term of PRS at sentencing, either orally or otherwise (*see People v Sparber*, 10 NY3d 457 [2008]). However, defendant did not raise any issue relating to PRS on his direct appeal to this Court. Defendant was not entitled to raise, by way of a CPL 440.10 motion, a claim that

the lack of a warning that his sentence would include PRS rendered the plea involuntary under *Catu*, because "the omission at issue is clear from the face of the record" (*People v Louree*, 8 NY3d 541, 546 [2007]; *see also People v Cooks*, 67 NY2d 100 [1986]; CPL 440.10[2][c]). *People v Hill* (9 NY3d 189 [2007], *cert denied* 553 US __, 128 S Ct 2430 [2008]) is not to the contrary, as the issue there was raised on direct appeal. There was no impediment to defendant raising this issue on his direct appeal, and to the extent he contends the attorney who represented him on that appeal rendered ineffective assistance, that claim would require a coram nobis motion addressed to this Court (*see People v Cuadrado*, 37 AD3d 218, 223 [2007], *affd* 9 NY3d 362 [2007]).

Nevertheless, defendant's sentence is presently unlawful because it does not include a period of PRS. Since, as indicated, defendant's *Catu* claim is procedurally barred because he did not raise it on direct appeal, he is not entitled to withdraw his plea at resentencing, regardless of whether PRS is actually imposed or, on consent of the People pursuant to Penal Law § 70.85, omitted from the sentence.

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

ENTERED: DECEMBER 23, 2008



Friedman, J.P., Sweeny, McGuire, Renwick, Freedman, JJ.

4886 Khandaker M. Ali, et al., Index 102041/03
Plaintiffs-Appellants,

-against-

City of New York, et al.,
Defendants,

Trump International Hotel and
Tower Condominium, et al.,
Defendants-Respondents.

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

Lester Schwab Katz & Dwyer, LLP, New York (Steven B. Prystowsky of counsel), for Trump International Hotel and Tower Condominium, respondent.

Richard W. Babinecz, New York (Helman R. Brook of counsel), for Consolidated Edison Company of New York Inc., respondent.

Judgment, Supreme Court, New York County (Nicholas Figueroa, J., and a jury), entered August 27, 2007, dismissing the complaint in an action for personal injuries sustained in a trip and fall over a sidewalk grate owned and maintained by defendant Con Edison and located in front of defendant Trump Hotel's property, unanimously affirmed, without costs.

In view of plaintiff's testimony that he tripped over a gap in the grate frame itself, and the absence of any evidence that plaintiff tripped over any defect extending beyond the grate itself, the trial court correctly charged the jury that New York

City Department of Transportation Highway Rule (34 RCNY) § 2-07(b)(2), which requires grate owners to maintain a 12-inch area extending outward beyond the perimeter of the grate, was irrelevant (*see Green v Downs*, 27 NY2d 205, 208 [1970]; *Forman v McFadden*, 44 AD3d 523, 523-524 [2007]; *cf. Montanez v Manhattan & Bronx Surface Tr. Operating Auth.*, 139 AD2d 411, 411-412 [1988]). The trial court also correctly precluded plaintiff's engineering expert from testifying that the 1¾-inch depression he measured around the grate exceeded an industry safety standard of no more than 3/8 of an inch, where plaintiff's expert acknowledged that the claimed standard is not set forth in any code, ordinance or published industry document, and that his knowledge thereof was based only on experience (*cf. Peters v Trammell Crow Co.*, 47 AD3d 419, 420 [2008]). The trial court also correctly directed a verdict in favor of Trump Hotel. Plaintiff testified that "[t]here was very little light," that "there was not enough light" and that it was "kind of dark" in the area at the time of the accident. Those mere conclusions were insufficient to establish that the lighting in the area was inadequate (*see generally Folks v New York City Hous. Auth.*, 227 AD2d 520 [1996], citing *Rodriguez v New York City Hous. Auth.*, 87 NY2d 887 [1995]), and the court correctly determined that no

reasonable juror could reasonably conclude that Trump negligently failed to provide adequate lighting (*see* CPLR 4401).

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

ENTERED: DECEMBER 23, 2008

CLERK

Friedman, J.P., Sweeny, McGuire, Renwick, Freedman, JJ.

4888 In re Demetrie T. J. C.,

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

Sully Ebtel C.,
Respondent-Appellant,

Cardinal McCloskey Services,
Petitioner-Respondent.

Neal D. Futerfas, White Plains, for appellant.

David H. Berman, Larchmont, for respondent.

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

Order of disposition, Family Court, New York County (Gloria Sosa-Lintner, J.), entered on or about January 23, 2007, which terminated respondent mother's parental rights upon a finding of permanent neglect and committed the child's custody to petitioner and the Commissioner of the Administration for Children's Services for the purpose of adoption, unanimously affirmed, without costs.

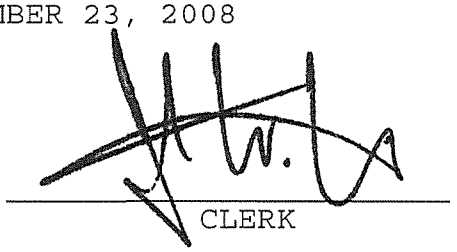
While an agency has a statutory obligation to make diligent efforts to encourage and strengthen the parental relationship (Social Services Law § 384-b[7][a]), a parent must still assume a measure of initiative and responsibility. The agency's statutory duty is fulfilled when it embarks upon a diligent course, even though it faces an uncooperative or indifferent parent (*see*

Matter of Sheila G., 61 NY2d 368, 385 [1984]). Here, the agency referred respondent to drug rehabilitation and parenting skills programs, and attempted to implement a course of visitation. Respondent missed a quarter of her scheduled visits with the child, did not timely attend the drug treatment program, and refused to attend the parenting skills course unless it was scheduled in Brooklyn. Under these circumstances, Family Court properly terminated respondent's parental rights (*see Matter of Jowell Lateefra B.*, 271 AD2d 366 [2000], *lv denied* 95 NY2d 760 [2000]).

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

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

ENTERED: DECEMBER 23, 2008



CLERK

Friedman, J.P., Sweeny, McGuire, Renwick, Freedman, JJ.

4890 Richard E. Snyder, Index 105454/07
Plaintiff-Respondent,

-against-

Edgar M. Bronfman, Jr.,
Defendant-Appellant.

Gibson, Dunn & Crutcher LLP, New York (Orin Snyder of counsel), for appellant.

Wilson Sonsini Goodrich & Rosati, P.C., New York (Robert Gold of counsel), for respondent.

Order, Supreme Court, New York County (Bernard J. Fried, J.), entered April 24, 2008, which, insofar as appealed from, denied defendant's motion to dismiss plaintiff's causes of action for unjust enrichment and quantum meruit, unanimously reversed, on the law, with costs, the motion granted and said causes of action dismissed.

The causes of action for unjust enrichment and quantum meruit are barred by the applicable statute of frauds, General Obligations Law 5-701(a)(10). In relevant part, this enactment renders void any oral agreement "to pay compensation for services rendered in . . . negotiating the purchase . . . of any . . . business opportunity." As is evident, the statute broadly applies to "*any*" business opportunity. The statute expressly defines the term "negotiating" and does so in the following broad terms: "'Negotiating' includes procuring an introduction to a

party to the transaction or assisting in the negotiation or consummation of the transaction." Thus, the statute's sweep is comprehensive as it covers conduct occurring at the outset, during the course of and at the conclusion of the purchase of a business opportunity. Finally, the statute applies not only to an alleged oral agreement but also "to a contract implied in fact or in law to pay reasonable compensation."

The unjust enrichment and quantum meruit causes of action fall squarely within the statute's broad and unambiguous prohibition as they seek compensation for plaintiff's role in the acquisition of Warner Music Group. Contrary to plaintiff's contention, *Freedman v Chemical Constr. Corp.* (43 NY2d 260 [1977]) does not limit the scope of the statute to situations in which the plaintiff merely provides limited and transitory services. Nor does the text of the statute provide any basis for principled distinctions to be drawn distinguishing services that are and are not sufficiently limited and transitory to be barred.

Freedman, in which the plaintiff's role in the transaction is "limited and transitory" (*id.* at 267), is a paradigmatic case for application of General Obligation Law 5-701(a)(10). But the paradigmatic case cannot logically be equated with the essential or exclusive case for the statute's application. Nothing in the broad language of the statute supports such a narrow reading of its scope. Rather, as Chief Judge Breitel stated, "where . . .

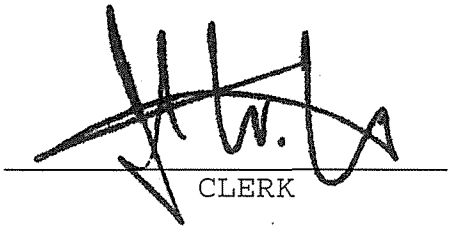
the intermediary's activity is so evidently that of providing 'know-how' or 'know-who', in bringing about between principals an enterprise of some complexity or an acquisition of a significant interest in an enterprise, the statute is entitled to be read both in accordance with its plain meaning, its evident purpose, and to accomplish the prevention of the mischief for which it was designed" (*id.*). The crux of plaintiff's claim is that he provided "know-how" and "know-who" in connection with the acquisition of Warner Music Group. Accordingly, the quasi-contractual causes of action also are barred.

For the same reason, plaintiff cannot avoid the bar of the statute by alleging that he acted as a principal in the contemplated business opportunity. That is, nothing in the text of the statute suggests that it applies to claims for compensation advanced by all persons other than those who claim to be or can be characterized as principals or partners in the prospective business opportunity. Moreover, as defendant correctly observes, limiting the statute to the claims of non-principals or non-partners would permit its purpose to be frustrated if not circumvented by the assertion of a legal conclusion. Finally, the complaint seeks compensation solely for plaintiff's efforts in connection with the acquisition of Warner Music Group. Accordingly, it is of no moment that the complaint alleges that plaintiff performed services in connection with

other transactions that were not consummated or that plaintiff alleges he provided services for defendant following the acquisition of Warner Music Group.

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

ENTERED: DECEMBER 23, 2008



CLERK

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on December 23, 2008.

Present - Hon. David Friedman, Justice Presiding
John W. Sweeny, Jr.
James M. McGuire
Dianne T. Renwick
Helen E. Freedman, Justices.

The People of the State of New York, Ind. 6622/06
Respondent,

-against- 4891

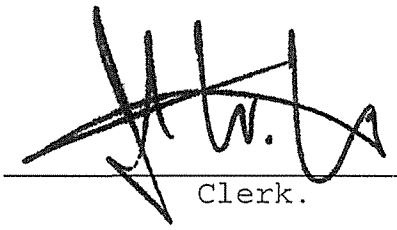
Jose DeLeon,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Laura A. Ward, J.), rendered on or about June 28, 2007,

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

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

ENTER:



Clerk.

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

Friedman, J.P., Sweeny, McGuire, Renwick, Freedman, JJ.

4893 Ana Reyes, Index 21928/06
Plaintiff-Respondent,

-against-

Andres Brito,
Defendant-Appellant.

Baker, McEvoy, Morrissey & Moskovits, P.C., New York (Stacy R. Seldin of counsel), for appellant.

Belovin & Franzblau, LLP, Bronx (David Karlin of counsel), for respondent.

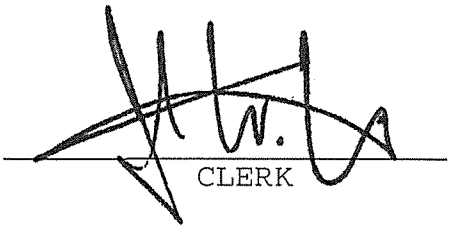
Order, Supreme Court, Bronx County (Lucy Billings, J.), entered on or about July 31, 2008, which denied defendant's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, the motion granted and the complaint dismissed. The Clerk is directed to enter judgment accordingly.

Defendant made a prima facie showing that the motor vehicle accident did not cause plaintiff to suffer a serious injury, as defined by Insurance Law § 5102(d) (*see Lesocovich v 180 Madison Ave. Corp.*, 81 NY2d 982, 985 [1993]). Defendant presented admissible evidence that a neurological examination found no disabling injuries. Any abnormalities in the lumbar and cervical spine, as revealed by MRIs taken shortly after the accident, were the result of a degenerative process. In opposition, plaintiff failed to raise a triable issue of fact on this point. The

affirmation of her treating doctor made no effort to address, much less rebut, the finding by defendant's radiologist that the condition of plaintiff's lumbar and cervical spine was attributable to preexisting degeneration rather than to this accident. Therefore, no causal connection was established between the MRI findings and the accident (*see Pommells v Perez*, 4 NY3d 566, 579-580 [2005]; *Charley v Goss*, 54 AD3d 569, 571-572 [2008]), and no issue of fact exists as to whether the accident might have caused a permanent consequential or significant limitation of the use of a body function or system. Plaintiff also failed to raise an issue of fact as to whether the accident rendered her incapable of performing usual and customary activities during at least 90 of the next 180 days (*see Batts v Medical Express Ambulance Corp.*, 49 AD3d 294, 295 [2008]).

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

ENTERED: DECEMBER 23, 2008



Friedman, J.P., Sweeny, McGuire, Renwick, Freedman, JJ.

4894 The People of the State of New York, Ind. 456/07
Respondent,

-against-

Tomas Santiago,
Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Kerry S. Jamieson of counsel), for appellant.

Judgment, Supreme Court, New York County (Laura A. Ward, J.), rendered on or about March 23, 2007, unanimously affirmed.

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

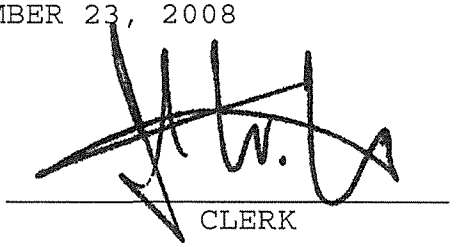
Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department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

Denial of the application for permission to appeal by the

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

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

ENTERED: DECEMBER 23, 2008



CLERK

Friedman, J.P., Sweeny, McGuire, Renwick, Freedman, JJ.

4896 The People of the State of New York, Ind. 3043/06
Respondent,

-against-

Jarell Sears,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Christopher P. Marinelli of counsel), for respondent.

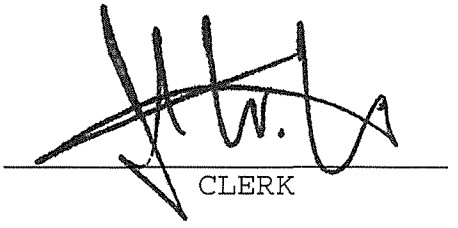
Judgment, Supreme Court, New York County (James A. Yates, J. at suppression hearing; Lewis Bart Stone, J. at plea and sentence), rendered July 11, 2007, convicting defendant of gang assault in the first degree, and sentencing him to a term of 8 years, unanimously affirmed.

The record establishes that defendant made a valid general waiver of his right to appeal that encompassed his suppression claims (*see People v Kemp*, 94 NY2d 831 [1999]). Defendant signed a written waiver in which he agreed to waive appellate review of all possible issues, except for a list of four constitutional issues corresponding to the issues deemed nonwaivable in *People v Seaberg* (74 NY2d 1 [1989]). At the plea proceeding, defense counsel informed the court that he had explained the written waiver to his client, and defendant acknowledged that he understood it. Under these circumstances, we conclude that the

insertion of language in the document highlighting the fact that the waiver would include any excessive sentence claim did not create any ambiguity as to whether the waiver also included suppression claims.

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

ENTERED: DECEMBER 23, 2008



CLERK

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on December 23, 2008.

Present - Hon. David Friedman, Justice Presiding
John W. Sweeny, Jr.
James M. McGuire
Dianne T. Renwick
Helen E. Freedman, Justices.

The People of the State of New York, Ind. 2656/05
Respondent,

-against- 4897

Andrea Williams,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (James A. Yates, J.), rendered on or about January 12, 2006,

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

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

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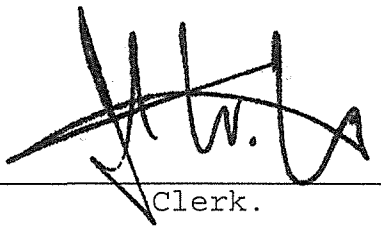

Clerk.

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

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on December 23, 2008.

Present - Hon. David Friedman, Justice Presiding
John W. Sweeny, Jr.
James M. McGuire
Dianne T. Renwick
Helen E. Freedman, Justices.

Gregory Evans,
Plaintiff-Respondent,

Index 27531/03

-against-

4898

Jose G. Alonzo, et al.,
Defendants-Appellants.

An appeal having been taken to this Court by the above-named appellants from a judgment of the Supreme Court, Bronx County (Alan Saks, J.), entered on or about May 29, 2008,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated December 3, 2008,

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

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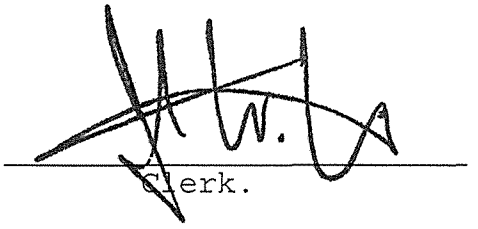


Clerk.

Friedman, J.P., Sweeny, McGuire, Renwick, Freedman, JJ.

4901 A.O. Textile Inc., Index 119256/06
Plaintiff-Appellant,

-against-

SEP Plus Inc., et al.,
Defendants-Respondents.

McGovern Doherty & Kim, PLLC, New York (Kyu O. Kim of counsel), for appellant.

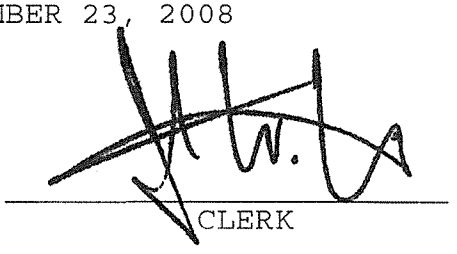
Collier & Basil, P.C., New York (Robert J. Basil of counsel), for respondents.

Order, Supreme Court, New York County (Barbara R. Kapnick, J.), entered on or about April 28, 2008, which, insofar as appealed from, denied plaintiff's motion for summary judgment or partial summary judgment on its cause of action for an account stated, unanimously affirmed, with costs.

Plaintiff failed to establish as a matter of law that defendants either agreed with its statement of the balance of the indebtedness or admitted to owing a lesser amount (*see Herrick, Feinstein v Stamm*, 297 AD2d 477, 478 [2002]).

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

ENTERED: DECEMBER 23, 2008



CLERK

Friedman, J.P., Sweeny, McGuire, Renwick, Freedman, JJ.

4903N-
4903NA In re Roberta Bell-Kligler, et al., Index 500163/06
Petitioners-Respondents,

For the Appointment of a Guardian of the Person and Property of Arline Bell,
An Alleged Incapacitated Person.
- - - - - - - - -
Evan Bell,
Cross Petitioner-Appellant.

Capuder Fazio Giacoia LLP, New York (Douglas Capuder of counsel), for appellant.

Mazur Carp & Rubin, P.C., New York (Robert M. Freedman of counsel), for respondents.

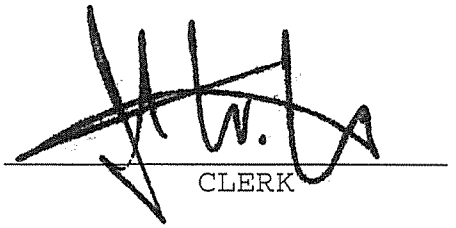
Order and judgment (one paper), Supreme Court, New York County (William P. McCooe, J.), entered August 23, 2007, which, insofar as appealed from as limited by the briefs, in a proceeding pursuant to article 81 of the Mental Hygiene Law, set aside the sale of certain real property by an alleged incapacitated person (AIP) to cross petitioner, unanimously affirmed, with costs. Appeal from decision, same court and Justice, entered August 23, 2007, unanimously dismissed, without costs, as taken from a non-appealable paper.

Cross petitioner failed to demonstrate by clear and convincing evidence that the sale of property by the AIP (his mother) to him at a price significantly less than market value was voluntarily and understandingly made, and fair and free of

undue influence (*see Matter of Gordon v Bialystoker Ctr. & Bikur Cholim*, 45 NY2d 692, 695-696 [1978]). The record shows that the sale of the property was made just one week after the AIP had executed a will providing that cross petitioner was to purchase petitioners' interests in the property after the AIP's death and within 90 days after appraisal of the property. The sale, however, was effected with no notice to petitioners (cross petitioner's sisters), and despite the fact that the AIP had a long-time family attorney, she was represented at the closing by an attorney who was a stranger to her and whom cross petitioner had engaged through the attorney who represented him at the hearing on the subject petition (*see Matter of Connelly*, 193 AD2d 602 [1993], *lv denied* 82 NY2d 656 [1993]).

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

ENTERED: DECEMBER 23, 2008



Friedman, J.P., Sweeny, McGuire, Renwick, Freedman, JJ.

4904N In re The Bridge and Tunnel Officers Benevolent Association, Petitioner-Respondent, Index 110880/06

-against-

The Triborough Bridge and Tunnel Authority, Respondent-Appellant.

Robert M. O'Brien, New York (Goodwin E. Benjamin of counsel), for appellant.

Stuart Salles, New York, for respondent.

Order, Supreme Court, New York County (Charles J. Tejada, J.), entered October 30, 2007, which, to the extent appealed from as limited by the briefs, granted the petition to modify a May 3, 2006 arbitration award, unanimously reversed, on the law, without costs, the petition denied and the proceeding dismissed.

In January 2005, petitioner exercised its prerogative under its policy governing leave pursuant to the Family Medical Leave Act of 1993 (FMLA) (29 USC § 2601 *et seq.*) to require employees to substitute paid annual leave for FMLA leave (*see* 29 USC § 2612[d]). Before then, petitioner had given its employees the option of taking FMLA leave paid or unpaid. Respondent filed a grievance charging that the new requirement violated its members' rights under the parties' collective bargaining agreement (CBA) by "forc[ing] [them] to use annual leave outside of their contractually bidded seniority based vacation periods," and the

grievance went to arbitration.

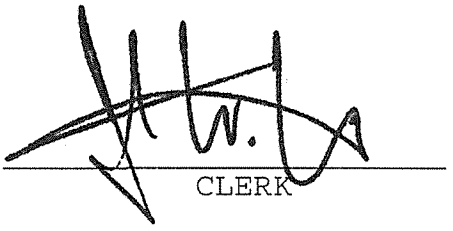
In an opinion and award dated January 6, 2006, the arbitrator sustained the grievance, finding that respondent's "inflexible and across-the-board requirement that employees must always use annual leave for medical leave purposes . . . can lead to a complete abrogation of an employee's vacation rights [under the CBA]." However, the arbitrator also found that since employees could be required to use annual leave for purposes other than vacation, they could not expect to be able to use all their annual leave for vacation purposes. The arbitrator sustained the grievance but left it to the parties to fashion a remedy that would take into account the needs of both, retaining his jurisdiction to do so in the event they failed. On May 3, 2006, the arbitrator issued an opinion and award directing that respondent could require an employee to charge up to 25% of his or her accrued annual vacation leave for FMLA leave purposes before giving him or her the option of taking FMLA leave unpaid.

In modifying the May 3, 2006 award, the court impermissibly substituted its judgment and interpretation of the CBA for that of the arbitrator (*see Matter of New York State Correctional Officers & Police Benevolent Assn. v State of New York*, 94 NY2d 321, 326 [1999]). Based on his findings that nothing in the CBA limited respondent's discretion to require that some percentage of annual leave be charged for purposes of FMLA leave and that

the parties understood that respondent retained a degree of flexibility in deciding whether to impose that requirement, the arbitrator concluded that an appropriate remedy for the grievance would reflect respondent's discretion while guaranteeing petitioner's members that a percentage of their accrued annual leave would be available for vacation purposes. When the parties were unable to agree on a remedy, he decided that respondent could require up to 25% percent of accrued annual leave to be charged to FMLA leave, thus leaving intact employees' "reasonable expectation that they will be able to utilize the bulk of their annual leave for vacation purposes." The result reached by the arbitrator based on his interpretation of the CBA in light of what he found to be the intent of the parties cannot be said to be completely irrational (*see Matter of Local Div. 1179, Amalgamated Tr. Union, AFL-CIO (Green Bus Lines)*, 50 NY2d 1007 [1980]).

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

ENTERED: DECEMBER 23, 2008



CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Richard T. Andrias, J.P.
Eugene Nardelli
Milton L. Williams
James M. McGuire
Rolando T. Acosta, JJ.

2709
Index 603554/05

Ashland Management Incorporated,
Plaintiff-Respondent-Appellant,

-against-

Altair Investments NA, LLC, et al.,
Defendants-Appellants-Respondents.

Cross appeals from order of the Supreme Court, New York County (Shirley Werner Kornreich, J.), entered October 4, 2006, which granted defendants' motion for summary judgment solely to the extent of dismissing the fifth and sixth causes of action and denied plaintiff's cross motion to reinstate a previously issued preliminary injunction.

Gordon & Haffner, LLP, Harrison (David Gordon and Steven R. Haffner of counsel), for appellants-respondents.

Grayson & Associates, P.C., Greenwich, CT (Eric D. Grayson of counsel), for respondent-appellant.

ACOSTA, J.P.

The primary issues in this case involve the denial of defendants' motion for summary judgment dismissing the complaint, which alleges, among other things, defendants' blatant theft of confidential information in violation of confidentiality agreements as well as breach of fiduciary duties. Thus, contrary to the dissent, which focuses primarily on defendants' version of events, this Court is constrained to view the evidence in the light most favorable to the party opposing summary judgment (*Toure v Avis Rent A Car Sys., Inc.*, 98 NY2d 345, 353 [2002]). It is in this context that we highlight plaintiff's claims, which have been established with evidence in admissible form, and which the motion court found sufficient to defeat defendants' motion (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Plaintiff is in the business of providing investment advice and management to high net worth individuals and entities. Defendant Jones, the son of one of plaintiff's co-founders, worked for plaintiff for 17 years until he resigned in August 2003 to form Altair with defendant Obuchowski. At the time of his resignation, Jones was a managing director, portfolio manager and member of plaintiff's Investment Committee. Obuchowski was hired by plaintiff in January 2002 on Jones's recommendation as vice-president for Quantitative Research.

In December 2000, Jones entered into an employee confidentiality agreement with plaintiff, which provided in relevant part that the employee:

> "will not, at any time during or after the termination of his or her employment by the Company for any reason whatsoever, use for any purpose other than the performance of his or her duties with the Company, reveal, divulge or make known to any person (other than the Company) any records, data, trade secrets, know-how, methods of operations, strategies, processes, computer programs, personnel information . . . or any other confidential or proprietary information of the Company or any Client whatever (the "Confidential Information") used by the Company and made known (whether or not with the knowledge or permission of the Company, and whether or not developed, devised or otherwise created in whole or in part by the efforts of the Employee) to the Employee by reason of his or her employment by the company. The Employee further covenants and agrees that he or she shall retain all such knowledge and information which he or she shall acquire or develop respecting such Confidential Information in trust for the sole benefit of the Company and its successors and assigns. Upon termination of his or her employment with the Company, the Employee will deliver to the Company any and all copies of any Confidential Information which is in the possession or under control of the Employee and *shall not, directly or indirectly, copy, take, or remove from the premises of the Company, any of the books or records, client lists or client information or any other documents of the Company including, without limitation, those which incorporate any Confidential Information*" (emphasis added).

Obuchowski entered into a substantially similar confidentiality agreement.

Prior to January 2003, and while still employed by plaintiff, Jones and Obuchowski started planning Altair, and on January 15, 2003, the domain name Altairinvestments.com was

registered to Obuchowski. Then, in the summer of 2003, while still in plaintiff's employ, Jones and Obuchowski prepared and distributed to plaintiff's clients a commentary on investment performance for the second quarter of 2003 and their forecast for the third quarter. This was done on plaintiff's letterhead without its Investment Advisory Committee's approval and in breach of company policies. Obuchowski misstated his title on the commentary as "Director of Research," rather than vice-president of Quantitative Research. According to plaintiff, these actions were in violation of defendants' fiduciary duty and confidentiality agreements, and designed to increase their visibility to plaintiff's clients immediately prior to their resignation so that they would be more likely to attract those clients.

Plaintiff also asserts that in a further effort to cause it damage and take its clients, defendants contacted plaintiff's clients to advise them that defendants would be leaving plaintiff's employ even though it was plaintiff's contractual obligation to notify its clients of changes to its Investment Advisory Committee. Plaintiff was not only blind-sided by angry clients who were upset that plaintiff had failed to notify them of Jones's departure, but defendants' actions also damaged its relationship with at least three clients.

Less than a week after defendants resigned from plaintiff, Altair was officially formed on August 21, 2003. Then, on at least 40 occasions, Altair, without plaintiff's knowledge, used plaintiff's Federal Express account to send packages of information to plaintiff's clients, which plaintiff asserts was for the purpose of soliciting business from plaintiff's clients on behalf of Altair. In addition, Jones called plaintiff clients to solicit their business.

According to plaintiff, defendants contacted plaintiff's clients using improperly obtained confidential information that could not have been readily ascertained from publicly available sources (such as the Internet as defendants had alleged), and that considerable money and effort had been expended in obtaining that information. Over the years, plaintiff had identified and developed relationships with certain individuals who were brokers, custodians, or consultants for specific types of investment accounts that comprised its clients. Indeed, as plaintiff notes, some Internet sites do not have addresses, some individuals are not listed on the sites, and, in some cases, defendants even stole the wrong address right out of plaintiff's files. Defendants also stole plaintiff's performance data, which they used in their solicitation materials sent to a client of plaintiff.

In January 2004, when plaintiff discovered that defendants had apparently hacked into plaintiff's computer and sent promotional materials to plaintiff's clients via Federal Express, it commenced an action against defendants (*Ashland I*) seeking damages and injunctive relief. Finding that plaintiff had demonstrated likelihood of success on the merits with respect to its claims for breach of fiduciary duty and breach of the Confidentiality Agreements, Supreme Court issued a preliminary injunction enjoining and restraining defendants from "(1) using, disseminating or exploiting information derived or copied from any of plaintiff's records, data, trade secrets, know-how, methods of operation, strategies, processes, computer programs, personnel information, client lists or client information and any other confidential or proprietary information" and "(2) soliciting any of the individual brokers, custodians or consultants of plaintiff's institutional clients that Jones and Obuchowski were either introduced to through their employee relationship with plaintiff or learned of from any of the Confidential Information."

The action was thereafter discontinued without prejudice while the parties attempted to resolve the dispute. The settlement discussions were unsuccessful, however, and the action was then recommenced in October 2005. In the current action,

which demands compensatory and punitive damages as well as injunctive relief, plaintiff accuses Jones and Obuchowski of having, among other things, "combined and conspired to form a new investment advisory company . . . and to divert business away from plaintiff and misappropriate such business to Altair by stealing plaintiff's confidential information." The complaint asserts, in that regard, seven claims for, respectively, (1) a preliminary and permanent injunction that would direct defendants to "immediately cease and desist from any use, dissemination or exploitation of information derived or copied from any of plaintiff's records, data, trade secrets, know-how, methods of operation, strategies, processes, computer programs, personal information, client lists or client information and any other confidential or proprietary information," (2) and (3) both breach of fiduciary duty, (4) breach of contract [confidentiality agreements], (5) conversion, (6) tortious interference with contract, and (7) unfair competition as against Altair.

Defendants responded by moving for summary judgment dismissing the complaint, and plaintiff cross-moved for an order reinstating the preliminary injunction that it had been previously granted in *Ashland I*. By order dated September 26, 2006, Supreme Court granted defendants' motion only to the extent of dismissing plaintiff's fifth and sixth causes of action for

conversion and tortious interference with contract, pointing out that plaintiff "did not oppose that part of defendants' motion," and denied the broad injunctive relief sought by plaintiff in its cross motion. The court found that there "are issues of fact such that summary judgment is not appropriate at this time," and, concerning plaintiff's request for a preliminary injunction, stated that the "preliminary injunction from *Ashland I* dissolved automatically on June 9, 2005 when *Ashland I* was voluntarily discontinued by written stipulation. The discontinuance contained an agreement that plaintiff could recommence an action through an identical complaint if the parties did not resolve the matter," and under such stipulation, the preliminary injunction previously issued in *Ashland I* "was replaced with a narrower and more precisely defined agreement, which was limited in scope to certain individuals set forth in an annexed list."

The motion court properly declined to dismiss the complaint in its entirety. Restrictive covenants, such as the confidentiality agreements herein, are subject to specific enforcement to the extent that they are "'reasonable in time and area, necessary to protect the employer's legitimate interests, not harmful to the general public and not unreasonably burdensome

to the employee'" (*BDO Seidman v Hirshberg*, 93 NY2d 382, 388-389 [1999], quoting *Reed, Roberts Assoc. v Strauman*, 40 NY2d 303, 307 [1976]). With respect to covenants aimed at protecting against misappropriation of an employer's trade secrets or confidential customer lists, "courts . . . recognize the legitimate interest an employer has in safeguarding that which has made his business successful and to protect himself against deliberate surreptitious commercial piracy. Thus, restrictive covenants will be enforceable to the extent necessary to prevent the disclosure or use of trade secrets or confidential customer information" (*Reed, Roberts Assoc.*, 40 NY2d at 308). Whether a plaintiff's customer list and/or other proprietary information constitutes a trade secret or is readily ascertainable from public sources is ordinarily a triable issue of fact (*see Suburban Graphics Supply Corp. v Nagle*, 5 AD3d 663, 666 [2004]; *Bender Ins. Agency v Treiber Ins. Agency*, 283 AD2d 448, 450 [2001]; *Spectron Glass & Elecs. v Marianovsky*, 273 AD2d 374 [2000]).

Further, if the parties entered into a confidentiality agreement and the proprietary information at issue constitutes a trade secret, whether defendants' use of that information was a

result of casual memory is irrelevant (*see North Atl. Instruments, Inc. v Haber*, 188 F3d 38, 47 [2d Cir 1997], explaining *Leo Silfen, Inc. v Cream*, 29 NY2d 387 [1972], and quoting 4 Roger F Milgrim on Trade Secrets, APP 15A-3 [1998] ["The majority rule is . . . that appropriation by memory will be restrained under the same circumstances as will appropriation by written list"]).[1]

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[1] The casual memory cases cited by the dissent (*Leo Silfen, Inc. v Cream*, 29 NY2d 387, *supra; Falco v Parry*, 6 AD3d 1138 [2004]; *Arnold K. Davis & Co. v Ludemann*, 160 AD2d 614 [1990]; and *Levine v Bochner*, 132 AD2d 532 [1987]) are inapposite inasmuch as there were no express agreements in those cases. Thus, the courts' holdings in those cases that the lists at issue could have been ascertained by public sources are of no moment to this case where there are confidentiality agreements. As the court in *North Atl.* explains:

> "Numerous cases applying New York law have held that where . . . it would be difficult to duplicate a customer list because it reflected individual customer preferences, trade secret protection should apply . . . *Leo Silfen, Inc. v. Cream* does suggest that one factor in analyzing a trade secret claim against an employee who has solicited a former employer's customers is whether the solicitation was merely 'the product of casual memory.' 29 N.Y.2d at 391 . . . [W]e do not [, however,] read *Leo Silfen* to describe a broad rule dictating that anything an employee remembers casually is not a trade secret. Rather, *Leo Silfen* expressly notes that customer lists. . . in which customers are not readily ascertainable and in which patronage has been secured only through the expenditure of considerable time and money, are protectable trade secrets. See 29 N.Y.2d at 392-93; *accord Webcraft Techs.*, 674 F.Supp. at 1045; *cf.* 4 Roger M. Milgrim, Milgrim on Trade Secrets, App. 15A-3 (1998) . . . Moreover, *Leo Silfen* implies that its holding is limited to cases lacking an express confidentiality agreement protecting customer lists--a clear distinction from the

Here, the record establishes that the individual defendants took plaintiff's proprietary material and made use of it to further their own business interests in their new endeavor. Although defendants argue that their conduct did not violate the confidentiality agreements because the subject material was publicly available, plaintiff has presented evidence in admissible form showing that defendants targeted Altair's promotional materials to specific brokers, consultants and custodians, all of whom were plaintiff's clients, and that defendants only learned the identities of these individuals through their employment with plaintiff. Viewing the evidence in the light most favorable to the party opposing summary judgment (*People v Grasso*, 50 AD3d 535, 544 [2008]), it is for a jury to decide whether the targeted information was confidential or ascertainable through public records. Accordingly, defendants

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> instant case. *See* 29 N.Y.2d at 395" (188 F3d at 46-47 [footnote and some citations omitted]; *but see Columbia Ribbon & Carbon Mfg. Co. v A-1-A Corp*, 42 NY2d 496, 499 [1997] [covenant unrestrained by any limitations keyed to uniqueness, trade secrets, confidentiality or even competitive unfairness, is unenforceable]).

Buhler v Maloney Consulting, 299 AD2d 190, 191 (2002), also cited by the dissent, does not dictate a different result inasmuch as the court held that the list in question was not a trade secret but rather was "prepared by plaintiff based on her knowledge of the financial services industry and on information that was publicly available."

cannot demonstrate that they are entitled to dismissal of the complaint on the ground that they did not, as a matter of law, violate their confidentiality agreements with plaintiff by taking its trade secrets (*compare Fredric M. Reed & Co. v Irvine Realty Group*, 281 AD2d 352 [2001], *lv denied* 96 NY2d 720 [2001]).

Contrary to the dissent, the mere fact that the confidentiality agreements were not limited in duration does not necessarily make them ipso facto unenforceable. We find no legal support for the dissent's core position that the absence of a durational limitation renders a confidentiality agreement void as a matter of law in cases where the employee does not provide "unique or extraordinary" services. A restrictive covenant is unenforceable if its duration is unreasonable (*see e.g. Maxon v Franklin Traffic Serv.*, 261 AD2d 830, 832 [1999]) because of the "'powerful considerations of public policy which militate against sanctioning the loss of a man's livelihood'" (*Reed, Roberts Assoc.*, 40 NY2d at 307, quoting *Purchasing Assoc. v Weitz*, 13 NY2d 267, 272 [1963]), as well as the general public policy favoring robust and uninhibited competition (*American Broadcasting Cos. v Wolf*, 52 NY2d 394, 404 [1981]). Protecting trade secrets and truly confidential information, however, does not have to be time limited in every instance where the covenant does not otherwise prevent a former employee from pursuing his or

her livelihood or interfere with competition (16 Lord, Williston on Contracts § 13:5, at 291-292 [4th ed] ["basic test for determining permissible time . . . limitations is whether the restraint as to time . . . is necessary for the protection of the promisee, but neither oppressive on the promisor, nor injurious to the interests of the general public"] [citing, inter alia, Restatement (Second) of Contracts § 188(1)(a)(b)]); *cf. Karpinski v Ingrasci*, 28 NY2d 45, 50 [1971] [in enforcing *permanent* restraint on competition against oral surgeon in limited rural area, court stated that "a covenant will not be stricken merely because it contains no time limit or is expressly made unlimited as to time" (internal quotation marks omitted)]).

Thus, although covenants restraining competition by a former employee whose services were "unique or extraordinary" are given wider latitude (*BDO Seidman*, 93 NY2d at 389-390), such as in *Karpinski*, the reasonableness of the duration of a covenant of a non-unique employee nonetheless necessarily depends on the circumstances. Otherwise, the rule would not be stated in terms of reasonableness, but rather by a fixed durational requirement.[2]

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[2] *Airline Delivery Servs Corp. v Lee* (72 AD2d 731 [1979]), cited by the dissent, does not dictate a different result. In *that case*, this Court noted that "covenants which perpetually restrict an employee from working for another are invalid and must fail" (*id.* at 731, citing *Kaumagraph Co. v Stampagraph Co.*, 235 NY 1 [1923]). In this case, however, the

In the present case, there is "no reason to suppose that [an unlimited durational] limitation [on the use of confidential information] will prevent defendant[s] from pursuing [their] livelihood or that it will have the effect of precluding [them] from operating a successful [competing business]" (*Chernoff Diamond & Co. v Fitzmaurice, Inc.*, 234 AD2d 200, 202 [1996]). In any event, if a jury were to find that defendants violated an otherwise valid agreement, the court could simply modify the agreements' duration to one more reasonable under the circumstances.

Courts have the "power to sever and grant partial enforcement of an overbroad employee restrictive covenant," as long as the covenant does not otherwise "violate the tripartite

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confidentiality agreements do not perpetually restrict defendants from working for someone else or in a similar business. Indeed, there is no evidence in the record that defendants were unable to operate a successful business once they left plaintiff. Rather, the agreements at issue merely attempt to prevent defendants from unfairly using plaintiff's trade secrets. In this respect, *Kaumagraph* supports plaintiff's position in this case. There, the court noted that the contracts at issue were "unlimited as to time and [were] valid as a basis for equitable relief only as they protect trade secrets acquired during a confidential employment. They merely express[ed] the implied contract of one who enters into such an employment not to carry elsewhere into competition with his employer confidential knowledge obtained from him" (*id.* at 6).

common-law test for reasonableness" (*BDO Seidman*, 93 NY2d at 393-394); that is, the covenant (1) is no greater than is required for the protection of the legitimate interest of the employer, (2) does not impose undue hardship on the employee, and (3) is not injurious to the public" (*id.* at 388-389). Thus, as *BDO Seidman v Hirshberg* explains:,

> "when . . . the unenforceable portion is not an essential part of the agreed exchange, a court should conduct a case specific analysis, focusing on the conduct of the employer in imposing the terms of the agreement. Under this approach, if the employer demonstrates an absence of overreaching, coercive use of dominant bargaining power, *or other anti-competitive misconduct, but has in good faith sought to protect a legitimate business interest, consistent with reasonable standards of fair dealing,* partial enforcement may be justified" [emphasis added] (93 NY2d at 394, citations omitted]).[3]

Whether the performance is an essential part of the agreed

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[3] In rejecting the concern that partial enforcement would require the rewriting of the parties' agreement, the Court noted that the only revision required was to narrow the restriction. It also went on to note:

> "Moreover, to reject partial enforcement based solely on the extent of necessary revision of the contract resembles the now-discredited doctrine that invalidation of an entire restrictive covenant is required unless the invalid portion was so divisible that it could be mechanically severed, as with a 'judicial blue pencil.' The Restatement (Second) of Contracts rejected that rigid requirement of strict divisibility before a covenant could b partially enforced (*see*, Reporter's Note, Restatement [Second] of Contracts § 184, at 32). Thus, we conclude that severance is appropriate, rendering the restrictive covenant partially enforceable" (*id.* [citation omitted]).

exchange depends on its relative importance in the light of the entire agreement between the parties (Restatement [Second] of Contracts § 184, Comment a).

Here, the essential part of the agreements is not their duration but the prohibition against using, copying or removing confidential information. Moreover, at least with respect to Jones, the agreement was not imposed as a condition of his initial employment. Instead, he was asked to sign it after working for plaintiff for approximately 14 years. And, although Obuchowski was asked to sign the agreement when he commenced his employment (*cf.* Restatement [Second] of Contracts § 184, Comment b ["The fact that the term is contained in a standard form supplied by the (former employer) argues against aiding (the former employer) in this request"]), there is no evidence that plaintiff was motivated by some "general plan to forestall competition" or otherwise "imposed the covenant in bad faith, knowing full well that it was overbroad" (*BDO Seidman*, 93 NY2d at 395). Rather, viewing the evidence in the light most favorable to plaintiff as we must, it was legitimately attempting to protect information that it had taken years to develop. The fact that plaintiff's president was unable to state at his deposition the actual amount of time and money plaintiff had spent developing these contacts does not, as the dissent suggests,

defeat its position.

The dissent also posits that a court cannot "sever" a nonexistent durational requirement. We disagree for the reasons stated above. There is a durational requirement in these contracts; the duration is unlimited. A court, however, may find that the unlimited durational requirement is overbroad in this case and reduce it to a more reasonable one, especially if it were to find that the client information was in fact a trade secret, but a secret which professionals in the business would have ultimately determined on their own after working in the industry for a period of years. That plaintiff did not insert a limited or reasonable durational limit in the contracts is of no moment. In the circumstances of this case, a court has the power to enforce the covenants to the extent it deems reasonable.

Furthermore, while "[a]n employee may create a competing business prior to leaving his employer without breaching any fiduciary duty unless he makes improper use of the employer's time, facilities or proprietary secrets in doing so" (*Schneider Leasing Plus v Stallone*, 172 AD2d 739, 741 [1991], *lv dismissed* 78 NY2d 1043 [1991]), defendants have failed to establish that they did not use any confidential or proprietary information for the benefit of Altair in violation of the confidentiality agreements and their fiduciary duties to their former employer.

Indeed, the opposite is true. Evidence in the record establishes that in the summer of 2003, while still working for plaintiff, defendants prepared and distributed to plaintiff's clients a commentary on investment performance for the second quarter of 2003 and their forecast for the third quarter. As previously noted, this was done on plaintiff's letterhead without its Investment Advisory Committee's approval and in breach of company policies. Moreover, although the dissent correctly finds that plaintiff's past performance data was available to the public and therefore was not a protected trade secret, the manner in which defendants used that information as part of the promotional literature they sent to plaintiff's clients might nonetheless be found by the trier of fact to be in violation of their fiduciary duties of good faith and fair dealing to plaintiff (*see Leo Silfen*, 29 NY2d at 391-392 [1972]; *Duane Jones Co. v Burke*, 306 NY 172, 188-189 [1954]).

Plaintiff's cross motion for reinstatement of the previously issued preliminary injunction was properly denied in circumstances where plaintiff agreed to a more limited injunction in the stipulation between the parties that discontinued the prior action without prejudice.

Accordingly, the order of the Supreme Court, New York County (Shirley Werner Kornreich, J.), entered October 4, 2006, which granted defendants' motion for summary judgment solely to the extent of dismissing the fifth and sixth causes of action and denied plaintiff's cross motion to reinstate a previously issued preliminary injunction, should be affirmed, with costs.

All concur except Nardelli and McGuire, JJ. who dissent in part in an Opinion by McGuire, J.

McGUIRE, J. (dissenting in part)

I respectfully dissent in part. While I agree with the majority that defendants are not entitled to summary judgment dismissing certain aspects of plaintiff's cause of action for breach of fiduciary duty, I disagree that defendants are not entitled to summary judgment dismissing the remaining causes of action. Throughout its analysis the majority repeatedly stresses the conduct allegedly committed by defendants that supports the cause of action for breach of fiduciary duty. But that conduct is not relevant to the question of whether defendants should have been granted summary judgment dismissing the remaining causes of action. As discussed below, because we are reviewing an order deciding a motion for summary judgment, our disposition of this appeal must turn on the evidence submitted on the motion, not on plaintiff's allegations.

Plaintiff is an investment management firm that manages equity and fixed income securities investments. Defendant Jones worked for plaintiff for 17 years, rising to the level of managing director. Jones was also a member of plaintiff's investment committee. Defendant Obuchowski worked for plaintiff for one and a half years, serving as a director of research. While in plaintiff's employ Jones signed a confidentiality agreement prepared by plaintiff. The agreement Jones signed

stated that he would not, at any time,

> "use for any purpose other than the performance of [his] ... duties with [plaintiff,] reveal, divulge or make known to any person (other than [plaintiff]) any records, data, trade secrets, ... or any other confidential or proprietary information of [plaintiff] or any Client whatever (the 'Confidential Information') used by [plaintiff] and made known ... to [him] by reason of [his] employment by [plaintiff]. [Jones] further covenants and agrees that [he] shall retain all such knowledge and information which [he] ... acquires or develops respecting such Confidential Information in trust for the sole benefit of [plaintiff]... Upon termination of [his] employment with [plaintiff], [he] will deliver to [plaintiff] any and all copies of any Confidential Information which is in [his] possession or under [his] control ... and shall not, directly or indirectly, copy, take, or remove from [plaintiff's] premises ... any of the books or records, client lists or client information or any other documentation of [plaintiff] including, without limitation, those which incorporate any Confidential Information."

Jones' confidentiality agreement was supplemented to include within the definition of "Confidential Information" "any information concerning a client of [plaintiff] or the account of such client." Obuchowski signed a confidentiality agreement that was substantially similar to Jones' agreement as supplemented.

Both Jones and Obuchowski resigned from plaintiff in August 2003. Less than a week after they resigned from plaintiff, Jones and Obuchowski formed defendant Altair Investments NA, LLC, an investment management firm. During October and December 2003 Altair sent promotional literature by Federal Express to approximately 50 individuals; six of the individuals were contact

persons at plaintiff's institutional clients and 38 others were financial industry professionals who had referred clients to plaintiff.

Plaintiff commenced an action (*Ashland I*) for damages and injunctive relief against Jones, Obuchowski and Altair. The gravamen of the action was that Jones and Obuchowski, while still employed by plaintiff, took steps to form Altair and promote themselves at plaintiff's expense, and that, upon leaving plaintiff's employ, they misappropriated plaintiff's confidential information, namely a client list and performance data, to solicit plaintiff's clients. Plaintiff did not contend that the names of its clients are trade secrets. Rather, plaintiff asserted that the names of representatives of plaintiff's clients and the names of employees at wealth management firms who refer potential clients to plaintiff are trade secrets.[1] Thus, plaintiff asserted against Jones and Obuchowski causes of action for breach of fiduciary duty based on their (1) alleged use of plaintiff's time and resources to form Altair and promote themselves at plaintiff's expense and (2) misappropriation of plaintiff's client list and performance data. Plaintiff also asserted against Jones and Obuchowski causes of action for breach

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[1]For ease of reference, the representatives of plaintiff's clients and the employees at wealth management firms will be referred to collectively as "contact persons."

of their respective confidentiality agreements based on their use of the client list to solicit business for Altair and of plaintiff's performance data while misrepresenting it as defendants' own. Lastly, plaintiff asserted a cause of action against Altair for unfair competition.[2] In an effort to settle the matter, the parties stipulated to discontinue *Ashland I* without prejudice to plaintiff recommencing the action.

Plaintiff subsequently commenced this action -- *Ashland II* -- which seeks the same relief on the same theories as asserted in *Ashland I*. Defendants jointly moved for summary judgment dismissing the complaint. Plaintiff cross-moved to reinstate a preliminary injunction issued by the court in *Ashland I* enjoining defendants from soliciting plaintiff's clients. Supreme Court, among other things, denied those portions of the motion seeking summary judgment dismissing the causes of action for breach of fiduciary duty, breach of the confidentiality agreements and unfair competition, as well as the cross motion.[3] This appeal by

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[2]While plaintiff asserted against defendants causes of action for conversion and tortious interference with contract, Supreme Court granted those portions of defendants' motion seeking summary judgment dismissing those causes of action. In its brief, plaintiff does not address those portions of Supreme Court's order. Thus, plaintiff has abandoned those causes of action.

[3]Pursuant to the stipulation terminating *Ashland I*, defendants are enjoined from soliciting certain people pending the termination of this action or a finding that the names of

defendants and cross appeal by plaintiff ensued.

In its brief, plaintiff admits that the confidentiality agreements signed by Jones and Obuchowski are in fact restrictive covenants that bar them from soliciting the contact persons. Restrictive covenants relating to employment are not favored, are subject to careful scrutiny (*BDO Seidman v Hirshberg*, 93 NY2d 382, 388 [1999]) and are unenforceable unless reasonable in scope, duration and geographic area (*Columbia Ribbon & Carbon Mfg. Co. v A-1-A Corp.*, 42 NY2d 496, 499 [1977]; *Reed, Roberts Assoc. v Strauman*, 40 NY2d 303, 307 [1976]). A distinction must be drawn between a restrictive covenant restraining competition by a former employee whose services were "unique or extraordinary" and a covenant restraining competition by a former employee whose services were not. Restrictive covenants restraining competition by former employees whose services were "unique and extraordinary" are given wider latitude by the courts and are subject to less exacting scrutiny than is applied to covenants restraining competition by former employees whose services were not "unique or extraordinary" (*see BDO Seidman*, 93 NY2d at 389-390). Since plaintiff does not even argue (let alone

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specified people are not trade secrets. The injunction plaintiff sought in its cross motion is broader than the one imposed by the stipulation.

establish) that Jones and Obuchowski provided "unique or extraordinary" services, we should carefully scrutinize their confidentiality agreements (*see id.* at 388).

Here, the agreements are not limited in duration and thus are unreasonable as a matter of law and unenforceable (*Airline Delivery Servs. Corp v Lee*, 72 AD2d 731, 731 [1st Dept 1979]). *Chernoff Diamond & Co. v Fitzmaurice, Inc.* (234 AD2d 200 [1996]), relied upon by the majority, is clearly distinguishable since the restrictive covenant there was limited in duration (*id.* at 201-202 [two-year restrictive covenant enforceable]).

The majority cites to no authority that permits judicial enforcement of restrictive covenants that restrain competition indefinitely by former employees whose services were not "unique or extraordinary." The treatise (16 Lord, Williston on Contracts § 13:5 [4th ed]) relied upon by the majority does not support its position that "the mere fact that the confidentiality agreements were not limited in duration does not necessarily make them ipso facto unenforceable." Rather, the treatise merely articulates a test for determining whether any particular time limitation is permissible. Moreover, the treatise does not undercut the unequivocal, well-established principle that restrictive covenants must be reasonable in duration (*see e.g. American Broadcasting Co. v Wolf*, 52 NY2d 394, 403-404 [1981] ["an

otherwise valid [restrictive] covenant will not be enforced if it is unreasonable in time"]; *Columbia Ribbon & Carbon Mfg. Co.*, 42 NY2d at 499 ["[restrictive] covenants will be enforced only if reasonably limited temporally"]; *Gelder Med. Group v Webber*, 41 NY2d 680, 683 [1977] [restrictive covenants are enforceable "if they are reasonable as to time"]; *Reed, Roberts Assoc.*, 40 NY2d at 307 ["a restrictive covenant will only be subject to specific enforcement to the extent that it is reasonable in time"]).

The majority's reliance on *Karpinski v Ingrasci* (28 NY2d 45 [1971]) is misplaced. The Court in *Karpinski* concluded that a restrictive covenant restraining an oral surgeon from practicing in several upstate counties was enforceable even though it was unlimited in duration because "'contracts [restricting competition between] physicians, surgeons and others of kindred profession . . . will not be denied [enforcement] merely because . . . unlimited as to time, where as to area the restraint is limited and reasonable'" (*id.* at 50, *citing Foster v White*, 248 App Div 451, 456 [1936], *affd* 273 NY 596 [1937] [restrictive covenant, unlimited in duration, prohibiting a physician from practicing in a particular upstate county]; *see BDO Seidman*, 93 NY2d at 389 ["With agreements not to compete between professionals ... we have given greater weight to the interests of the employer in restricting competition within a confined

geographical area. In *Gelder Med. Group v Webber* (41 NY2d 680) and *Karpinski v Ingrasci* (28 NY2d 45), we enforced total restraints on competition, in limited rural locales, permanently in *Karpinski* and for five years in *Gelder*. *The rationale for the differential application of the common-law rule of reasonableness expressed in our decisions was that professionals are deemed to provide 'unique or extraordinary' services"*] [emphasis added]).

An anticompetition covenant between an employer and an employee whose services are "unique or extraordinary" is one type of restrictive covenant that is not subject to exacting scrutiny. Another is an anticompetition covenant given by one who sells a business to another. "[W]here a business is sold, anticompetition covenants will be enforceable, if reasonable in time, scope and extent. These covenants are designed to protect the goodwill integral to the business from usurpation by the former owner while at the same time allowing an owner to profit from the goodwill which he may have spent years creating. However, *where an anticompetition covenant given by an employee to his employer is involved a stricter standard of reasonableness will be applied*" (*Reed, Roberts Assoc.*, 40 NY2d at 307 [internal citations omitted; emphasis added]; *see Diamond Match Co. v Roeber*, 106 NY 473 [1887] [99-year restrictive covenant in sale of match manufacturing business]; *Goos v Pennisi*, 10 AD2d 643

[1960] [restrictive covenant unlimited in duration in sale of barber shop]; *Lappono v Marmone*, 204 App Div 496 [1923] [restrictive covenant unlimited in duration in sale of shoe repair and hat cleaning business]; *see also Mohawk Maintenance Co. v Kessler*, 52 NY2d 276 [1981]). Thus, cases dealing with restrictive covenants given in the context of the sales of businesses afford no support for the majority's position.

My position, supported by our precedent (*Airline Delivery Servs. Corp., supra*) and buttressed by Court of Appeals case law, is that a restrictive covenant that prevents a former employee whose services are not "unique or extraordinary" from soliciting the representatives of the employer's clients and the employees of firms who steered clients to the employer cannot be unlimited in duration. I note, moreover, that the anticompetition covenants in this case are neither limited in duration nor confined to a specified geographical area. Even assuming that these covenants would not effectively prevent Jones and Obuchowski from continuing to earn a living in their respective positions, the covenants would at the very least substantially curtail the work they could do. Tellingly, the majority does not cite a single case enforcing a restrictive covenant that permanently prevents a former employee whose services are not "unique or extraordinary" from soliciting the former employer's

clients.[4]

Hedging against its conclusion that the agreements can be

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[4]The majority's reliance on *Kaumagraph Co. v Stampagraph Co.* (235 NY 1 [1923]) is misplaced. There, the plaintiff manufactured and sold transfer stamps and embroidery patterns. The plaintiff asserted that it had a special method for manufacturing those goods, one that provided plaintiff with an advantage over its competitors; however, this method was known, used and patented in England many years before the plaintiff opened its business in the United States. The plaintiff's knowledge of the English patents underlying its method of production was obtained from several employees who learned of the patents while employed in England. Two of the employees signed contracts of employment with the plaintiff forever forbidding them from engaging in any business similar to plaintiff's in certain areas (without plaintiff's prior written consent) or disclosing the plaintiff's method of production. The defendants, some of whom were former employees of the plaintiff, including the two men who signed the contracts, opened a competing business without the plaintiff's approval. The plaintiff sued the defendants, seeking to enjoin them from operating the business. The Court of Appeals affirmed the Appellate Division's order finding that the plaintiff had learned of the information underlying its method from its employees from England; the employees did not learn a trade secret while in the plaintiff's employ but had shared with the plaintiff the information regarding the patents. Because the defendants had not learned any trade secrets while in the plaintiff's employ, the plaintiff's action was dismissed. Thus, the language the majority quotes from *Kaumagraph* -- contracts "unlimited as to time ... are valid as a basis for equitable relief only as they protect trade secrets acquired during confidential employment. They merely express the implied contract of one who enters into such an employment not to carry elsewhere into competition with his employer confidential knowledge obtained from him" (*id.* at 6) -- is dicta. Furthermore, to the extent that this dicta could be viewed as supporting the majority's position, *Kaumagraph* predates the now well-established line of Court of Appeals case law that requires courts to scrutinize strictly restrictive covenants of former employees whose services were not "unique or extraordinary" (*e.g. BDO Seidman*, 93 NY2d at 389; *Reed, Roberts Assoc.*, 40 NY2d at 307).

unlimited in duration, the majority suggests that a court could "sever" the agreements to make them partially enforceable. But what is not in the agreements cannot be severed from them. What the majority would "sever" are the nonexistent durational components of the agreements. The majority would do so, moreover, despite the absence of a severance clause in the agreement. Thus, the majority would insert new substantive provisions to which the parties did not agree (*see Crippen v United Petroleum Feedstocks*, 245 AD2d 152 [1997]).[5] Notably, plaintiff has not requested that we "sever" the agreements in this or any fashion, and neither plaintiff nor defendants have briefed this issue. Nonetheless, the majority purports to "sever" from the covenants the unrestricted sweep of the covenants.

The only case the majority discusses in this regard, *BDO Seidman*, does not support its position. The Court in *BDO Seidman* determined that it could sever from the subject restrictive covenant, which was limited in duration, portions of it that the Court determined were overbroad, making the covenant partially enforceable. The Court specifically stated that "[n]o additional

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[5]The majority does not indicate how it would "sever" the agreements. That is to say the majority does not state the length of the durational components it -- not the parties -- believes the agreements should contain.

substantive terms [were] required. The time and geographical limitations on the covenant remain[ed] intact. The only change [wa]s to narrow the class of [plaintiff's] clients to which the covenant applie[d]" (*id.* at 395; *citing Karpinski*, 28 NY2d at 51-52 [court severed overbroad portion of covenant -- that which prohibited defendant from practicing general dentistry -- and enforced portion of covenant prohibiting defendant from practicing oral surgery]). Here, the majority is not severing overbroad provisions from the agreements but adding substantive terms to them, i.e., durational components (*see Crippen, supra*). The majority does not cite a single case in which a court "severed" from a restrictive covenant a nonexistent durational component and added a time limitation that the court, not the parties, determined was reasonable.

"Severance" is not appropriate for an additional reason. The Court in *BDO Seidman* stated that

> "when ... the unenforceable portion [of the restrictive covenant] is not an essential part of the agreed exchange, a court should conduct a case specific analysis, focusing on the conduct of the employer in imposing the terms of the agreement. Under this approach, if the employer demonstrates an absence of overreaching, coercive use of dominant bargaining power, or other anti-competitive misconduct, but has in good faith sought to protect a legitimate business interest, consistent with reasonable standards of fair dealing, partial enforcement may be justified" (93 NY2d at 394 [internal citations omitted]).

Thus, "[f]actors weighing against partial enforcement are the imposition of the covenant in connection with hiring or continued employment - as opposed to, for example, imposition in connection with a promotion to a position of responsibility and trust - the existence of coercion or a general plan of the employer to forestall competition, and the employer's knowledge that the covenant was overly broad" (*Scott, Stackrow & Co., C.P.A.'s, P.C. v Skavina*, 9 AD3d 805, 807 [2004], *lv denied* 3 NY3d 612 [2004], citing *BDO Seidman*, 93 NY2d at 395). Applying these principles, the Court in *BDO Seidman* severed an overbroad portion of a restrictive covenant and partially enforced it. The Court determined that severance and partial performance were appropriate because "[t]he covenant was not imposed as a condition of defendant's initial employment, or even his continued employment, but in connection with [a] promotion" (*BDO Seidman*, 93 NY2d at 395).

The majority certainly cannot assume that these factors weigh in favor of partial enforcement. To the contrary, Jones was presented with the agreement in October 2000 after working for plaintiff for 13 years, and, as plaintiff's president testified, had Jones not signed the agreement as presented he would have been fired. Moreover, Jones was not asked to sign the agreement to obtain a promotion but rather as a condition to his

continued employment. Similarly, Obuchowski was presented with the agreement as a condition of his initial employment; had he not signed it as presented, plaintiff's president testified, Obuchowski would not have been hired. Neither Jones nor Obuchowski negotiated the terms of their respective agreements and neither received any benefit beyond initial or continued employment. The agreements therefore were not the product of "agreed exchanges," but rather plaintiff's dominant bargaining power. Accordingly, "severance" and partial enforcement of the agreements are inappropriate in this case (*see Scott, Stackrow & Co., supra* [overbroad restrictive covenant would not be partially enforced where employer required employee to sign covenant as a condition of both her initial and continued employment, and employee received no benefit in exchange for signing the covenant beyond continued employment]).

The majority states that "[a] court . . . may find that the unlimited durational requirement[s are] overbroad in this case and reduce [them] to . . . more reasonable one[s], especially if it were to find that the client information was in fact a trade secret, but a secret which a professional in the business would have ultimately determined on their own after working in the industry for a period of years." This is unpersuasive. Whether an overbroad restrictive covenant should be partially enforced is

determined by examining both whether the unenforceable portion of the agreement is "an essential part of the agreed exchange" and whether "the employer demonstrates an absence of overreaching, coercive use of dominant bargaining power, or other anti-competitive misconduct." Those inquiries are focused on the circumstances surrounding the negotiations, if any, and execution of an agreement and the employer's motivations in requesting the employee to sign it. Whether a purported trade secret is indeed a trade secret is irrelevant in ascertaining whether an overbroad restrictive covenant is partially enforceable.

Additional, independent grounds exist for dismissing the causes of action asserted against Jones and Obuchowski for breach of their respective confidentiality agreements. With respect to the aspects of those causes of action that are based on Jones and Obuchowski's misappropriation of plaintiff's client list, a restrictive covenant is only enforceable to the extent necessary to protect the employer from the former employee's use or disclosure of trade secrets (*see Columbia Ribbon & Carbon Mfg. Co.*, 42 NY2d at 499). A client list is not in and of itself a trade secret. To be afforded trade secret protection, a client list must either be defined as a trade secret in an enforceable agreement between the parties or have attributes of a trade secret (*Leo Silfen, Inc. v Cream*, 29 NY2d 387, 392-393, 395

[1972]). Here, for the reasons discussed above, the agreements are unenforceable.

Nor do the names of plaintiff's contact persons have attributes of trade secrets. A client list may be a trade secret where the clients are discoverable only by extraordinary efforts, such as where the clients' business was "secured by years of effort and advertising effected by the expenditure of substantial time and money" (*id.* at 392-393). In support of their motion, defendants submitted the deposition testimony of plaintiff's president. With respect to the efforts taken by plaintiff to identify the contact persons and cultivate their business, plaintiff's president was unable to provide any testimony indicating the amount of time and money spent identifying those persons and cultivating their business despite being asked numerous direct questions on those subjects. Notably, plaintiff's president was asked how much money plaintiff spent to identify various clients and cultivate their business; as to each such question plaintiff's president answered "I don't know," "I have no idea" or "No idea." Based on this testimony, defendants made a prima facie showing that plaintiff did not spend substantial time and money to identify the contact persons and cultivate their business.

In opposition, plaintiff failed to raise a triable issue of

fact in this regard. Plaintiff's president averred that "[plaintiff's] list of clients cannot be readily ascertained from publically available sources. These clients have specific investment needs and [plaintiff] has identified and cultivated these clients over the years through the expenditure of considerable time and money." Later in his affidavit, plaintiff's president averred that "over the years, [plaintiff] has identified and developed relationships with clients and with specific individuals who are the brokers, custodians, or consultants for specific types of investment accounts. The identity of these individuals is not public knowledge. [Plaintiff]'s list of these individuals cannot be duplicated simply by resort to a phonebook or even to the internet. [Plaintiff]'s list is confidential, proprietary information that is very valuable to [plaintiff]'s competitors." These conclusory averments, bereft of any factual detail regarding the efforts and resources plaintiff expended in identifying the contact persons and cultivating their business, are insufficient to raise a triable issue of fact. As the Court of Appeals has repeatedly noted, "'[a]verments merely stating conclusions, of fact or of law, are insufficient' to 'defeat summary judgment'" (*Banco Popular N. Am. v Victory Taxi Mgt.*, 1 NY3d 381, 383-384 [2004], quoting *Mallad Constr. Corp. v County Fed. Sav. & Loan Assn.*, 32

NY2d 285, 290 [1973]).[6]

Additionally, defendants, through the affidavits of Jones and Obuchowski and Jones' deposition testimony, made a prima facie showing both that neither Jones nor Obuchowski took a client list and that Jones (and to a lesser extent Obuchowski) recalled from casual memory the names of the contact persons (*see Falco v Parry*, 6 AD3d 1138, 1138-1139 [2004], *citing Arnold K. Davis & Co. v Ludemann*, 160 AD2d 614, 615 [1990] and *Levine v Bochner*, 132 AD2d 532, 532-533 [1987]; *see also Leo Silfen, Inc.*, 29 NY2d at 391 n 1).[7] In opposition, plaintiff failed to raise a

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[6]Contrary to the assertion of the majority, I do not think that plaintiff's president's inability "to state at his deposition the actual amount of time and money [plaintiff] had spent developing [its] contacts" defeats plaintiff's claim that the names of the contact persons are trade secrets. But the absence of testimony regarding the amount of time and money plaintiff spent is highly relevant to our inquiry regarding whether a triable issue of fact exists. What is fatal to plaintiff's claim is its failure to submit any evidence regarding whether the identities of the contact persons were "secured by years of effort and advertising effected by the expenditure of substantial time and money" (*Leo Silfen, Inc.* 29 NY2d at 392-393).

[7]In its first footnote, the majority states that my reliance on cases holding that information is not a trade secret if it is recalled from casual memory is "inapposite inasmuch as there were no express agreements in those cases." However, in my view, the restrictive covenants are unenforceable as a matter of law and concomitantly no relevant "express agreements" are present in this matter. Thus, the casual memory cases I cite above support my position that Jones and Obuchowski made a prima facie showing that they did not misappropriate a client list because they recalled from casual memory the names of the contact persons.

triable issue of fact with respect to whether Jones, Obuchowski or both, prior to leaving plaintiff's employ, took, copied or studiously memorized a client list (*see Leo Silfen, Inc.*, 29 NY2d at 391-392, 395; *Falco*, 6 AD3d at 1138; *Arnold K. Davis & Co.*, 160 AD2d at 615; *Levine*, 132 AD2d at 533). Plaintiff's chairman's affidavit provides no factual averments on this score and contains nothing more than speculative statements that Jones and Obuchowski stole plaintiff's client list.[8]

To the extent that the causes of action asserted against Jones and Obuchowski for breach of their respective confidentiality agreements are based on their misappropriation of

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[8]Plaintiff seems to be of the view that the addresses of the contact persons are trade secrets. Thus, plaintiff makes much of the fact that Jones and Obuchowski were unable to demonstrate that they recalled from casual memory the addresses of the contact persons or used public sources to obtain those addresses. In his affidavit, plaintiff's president also makes much of the fact that defendants used plaintiff's Federal Express account to send Altair's promotional materials to numerous individuals. However, during his deposition, plaintiff's president discounted the importance, if any, of defendants' use of the account. Thus, in response to a line of questioning regarding whether he had seen a letter Altair sent to plaintiff notifying plaintiff that Altair had mistakenly used plaintiff's account, plaintiff's president testified that "I don't know whether [Altair's use of the account] has anything to do with the fact that Mr. Jones was using our client list to solicit accounts. I don't think it has any bearing on that at all." In any event, and unsurprisingly, plaintiff has no answer to defendants' point that, since Jones and Obuchowski knew the names of the contact persons and the names of the firms at which they worked, defendants could simply contact the firms and obtain the specific addresses of the contact persons.

plaintiff's performance data, defendants made a prima facie showing that they did not misappropriate the data. In opposition, plaintiff claimed that Jones, Obuchowski or both took plaintiff's past performance information and misrepresented it as defendants' own in Altair's promotional literature. However, plaintiff's chairman testified at his deposition that plaintiff's past performance data, which is disseminated by plaintiff to attract business, is public knowledge. Thus, the data is not a trade secret (*see Eagle Comtronics, Inc. v Pico, Inc.*, 89 AD2d 803, 804 [1982], *lv denied* 58 NY2d 601 [1982]; *see also* Haig, Commercial Litigation in New York State Courts, § 81:6, at 9-10 [4B West's NY Prac Series, 2d ed, 2005] ["Most important of all is the defining element of secrecy, which is routinely identified as an *essential prerequisite* and the *most important* consideration in trade secrets litigation. According to the New York courts, secrecy embraces the related notions of substantial exclusivity of knowledge and the employment of precautionary measures to preserve such exclusive knowledge by limiting legitimate access by others"] [footnotes and internal quotation marks omitted; emphasis added]). Moreover, defendants did not misrepresent plaintiff's performance data in Altair's promotional literature. The literature contained a graph showing plaintiff's performance between 1997 and June 2003, the period of time during which Jones

was a member of plaintiff's investment committee. Text both on the page of the graph and the page after the graph expressly states that the past performance data is that of plaintiff.

The majority asserts that "the manner in which defendants used that information as part of the promotional literature they sent to [plaintiff's] clients might nonetheless be found by the trier of fact to be in violation of their fiduciary duties of good faith and fair dealing to [p]laintiff." Not surprisingly, the majority does not make any attempt to explain how the manner in which defendants cited this public information, while expressly acknowledging that this public information was plaintiff's, breached a fiduciary duty to plaintiff. Inexplicably, the majority goes so far as to state as if it were an undisputed fact that "[d]efendants also *stole* [plaintiff's] performance data" (emphasis added). Obviously, public information cannot be stolen.

That portion of defendants' motion seeking summary judgment dismissing the causes of action for breach of fiduciary duty based on Jones and Obuchowski's misappropriation of plaintiff's client list should also be granted. As discussed above, defendants made prima facie showings that neither Jones nor Obuchowski took a client list and that both Jones and Obuchowski recalled from casual memory the names of the contact persons, and

plaintiff failed to raise a triable issue of fact with respect to whether Jones, Obuchowski or both, prior to leaving plaintiff's employ, took, copied or studiously memorized a client list.[9]

Rather than discuss the *evidence* submitted on the parties' motions regarding whether the names of the contact persons constituted trade secrets and whether defendants misappropriated plaintiff's performance data, the majority focuses on plaintiff's *allegations*. We are, however, reviewing an order deciding a motion for summary judgment (*see* CPLR 3212), not a motion to dismiss for failure to state a cause of action (*see* CPLR 3211). While we must (and I do) view the evidence in the light most favorable to plaintiff, the party opposing summary judgment, no

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[9]The cause of action asserted against Altair for unfair competition, which is premised on the conduct of Jones and Obuchowski following the termination of their employment at plaintiff, should be dismissed. As discussed above, defendants made a prima facie showing that neither Jones nor Obuchowski misappropriated plaintiff's client list or performance data and plaintiff failed to raise a triable issue of fact.

view of the evidence demonstrates the existence of genuine, triable issues of fact regarding whether the names of the contact persons were trade secrets, whether defendants misappropriated the names or whether defendants misappropriated plaintiff's performance data (*see S.J. Capelin Assoc. v Globe Mfg. Corp.*, 34 NY2d 338, 342 [1974] ["Bald conclusory assertions, even if believable, are not enough to defeat summary judgment"] [internal quotation marks and brackets omitted]). General summary judgment principles, such as evidence must be viewed in the light most favorable to the party opposing summary judgment and whether a client list is a trade secret is generally an issue of fact, are not substitutes for evidence and cannot bridge evidentiary gaps in plaintiff's proof.

All that remains are those portions of the causes of action against Jones and Obuchowski for breach of fiduciary duty that are based on Jones and Obuchowski's use of plaintiff's time and resources to form Altair and promote themselves.[10] Specifically,

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[10]"'[An employee] is prohibited from acting in any manner inconsistent with his agency or trust and is at all times bound to exercise the utmost good faith and loyalty in the performance of his duties. Not only must the employee or agent account to his principal for secret profits but he also forfeits his right to compensation for services rendered by him if he proves disloyal'" (*Maritime Fish Prods. v World-Wide Fish Prods.*, 100 AD2d 81, 88 [1984], *appeal dismissed* 63 NY2d 275 [1984], quoting *Lamdin v Broadway Surface Adv. Corp.*, 272 NY 133, 138 [1936]). While an employee may secretly incorporate a competitive business prior to his departure, he may not use his employer's time,

plaintiff claims that, prior to leaving its employ, Jones and Obuchowski did the following: (1) registered a domain name on the Internet for Altair; (2) sent a newsletter, without plaintiff's permission, on its letterhead to certain clients informing them of the performance of plaintiff's investments; (3) visited plaintiff's then largest client on plaintiff's behalf but without its permission and met with the client's pension fund personnel in an effort to convince the client to terminate its account with plaintiff; and (4) contacted certain of plaintiff's clients and informed them that they were starting their own firm. In their main brief, defendants only make the general assertion that "the record contains no evidence either Jones or Obuchowski diverted any of plaintiff's property or business at any time while in plaintiff's employ" (internal quotation marks omitted); that brief does not address the particulars of the breach of fiduciary claims that are based on Jones and Obuchowski's conduct prior to leaving plaintiff's employ. Thus, defendants have essentially abandoned their contention that those claims should be dismissed (*see New York Mut. Underwriters v Baumgartner*, 19 AD3d 1137, 1140-1141 [2005]).

Finally, I agree with the majority that Supreme Court

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facilities or proprietary secrets to build the competing business (*id.*).

properly denied plaintiff's cross motion seeking reinstatement of the preliminary injunction issued in *Ashland I*.

Accordingly, I would modify the order to the extent of granting those portions of defendants' motion seeking summary judgment dismissing the causes of action against Jones and Obuchowski for breach of their respective confidentiality agreements, the causes of action against Jones and Obuchowski for breach of fiduciary duty premised on their misappropriation of plaintiff's client list and performance data, and the cause of action against Altair for unfair competition, and otherwise affirm.

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

ENTERED: DECEMBER 23, 2008