SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

DECEMBER 8, 2009

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Tom, Friedman, McGuire, Acosta, JJ.

4932 The People of the State of New York, Respondent, Ind. 3492/02 177/03

-against-

Norman Schonfeld, Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Jaime Bachrach of counsel), for respondent.

Judgment, Supreme Court, New York County (Richard D. Carruthers, J.), rendered October 29, 2004, convicting defendant, after a jury trial, of criminal possession of stolen property in the second degree (five counts), criminal possession of stolen property in the third degree (two counts), grand larceny in the first degree, grand larceny in the second degree (nine counts), grand larceny in the third degree, scheme to defraud in the first degree, perjury in the first degree (three counts), forgery in the second degree (eleven counts), criminal possession of a forged instrument in the second degree (six counts), and

sentencing him, as a second felony offender, to an aggregate term of 16 to 32 years and ordering him to pay $5,966,389.61 in restitution, modified, as a matter of discretion in the interest of justice, to reduce the sentence on the count of grand larceny in the first degree to an indeterminate term of from 8 1/2 to 17 years and to direct that the sentences for each of the counts of perjury in the first degree run concurrently with the sentences imposed on all other counts, and otherwise affirmed.

The court properly imposed restitution without a hearing. No such hearing is required unless a defendant requests one, or the record lacks sufficient evidence to support a restitution finding (Penal Law § 60.27[2]). Since defendant did not request a hearing until more than a month after the court calculated the amount of restitution and imposed sentence, the request was clearly untimely (*see People v Seader*, 278 AD2d 26 [2000], *lv denied* 96 NY2d 806 [2001]). Furthermore, the amount of restitution ordered was based upon sufficient evidence of loss, adduced during the trial (*see People v Consalvo*, 89 NY2d 140, 144 [1996]).

Under the particular circumstances presented herein, we find the sentence excessive to the extent indicated. Among the circumstances warranting a reduction in the sentence are the nonviolent nature of defendant's criminal conduct, defendant's

age -- he was 63 at the time of trial -- and the need to ensure that the sentence not be disproportionate to the sentence imposed for similar crimes. In this latter regard, we agree with the dissenter that the "fairness of the criminal justice system requires . . . some measure of equality in the sentences meted out to defendants who commit the same or similar crimes" (*People v Pedraza*, 25 AD3d 394, 397 [2006, Tom, J., dissenting], *lv denied* 7 NY3d 760 [2006]).

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

TOM, J. (dissenting)

Defendant's sentence was not unduly harsh and was clearly warranted under the circumstances of this case. The majority's rationale for sentence reduction is devoid of the mention of legitimate mitigating factors that warrant leniency and, by failing to enforce a penalty that serves as a means of deterring others who might be similarly tempted, sends the wrong message to an industry in which trust is essential to the everyday conduct of business.

By Wall Street standards, where losses due to fraudulent schemes are measured in the tens of billions of dollars, this one is not large, involving only some $6 million. But the damages sustained by its victims, among whom is defendant's own son, are extensive and reach beyond mere financial loss to include the erosion of trust that is the foundation which underlies the entire system of commerce in diamonds. In a business where millions of dollars are committed on a handshake and where a dealer's inventory can be carried off in the heel of a shoe, a particularly high premium is placed on personal integrity, and the extent to which defendant profited by his deceit is a poor measure of the damage to the reputation of those dealers whose misplaced trust inadvertently injured and threatened the livelihood of many others. The damage inflicted by defendant is

compounded by the inappropriately lax penalty imposed as a result of the majority's reduction of his sentence.

Defendant gained an extensive knowledge of the diamond business, beginning work in the industry in 1956 and, in 1974, forming his own company, Norman Schonfeld Inc. The corporation dissolved in 1980, leaving its creditors with losses totaling some $4 million. As a result, defendant was, by his own admission, "a controversial figure in the diamond industry" and resorted to the use of a pseudonym. Adopting the name Norman Baker "for the public," defendant became a co-owner of Sidco Jewelry, a jewelry manufacturing company located on Fifth Avenue in Manhattan in February 1999. Defendant's son, Ariel, then 27 years old, joined the firm as a salesman. Although Ariel had no experience in the diamond business, defendant taught his son how to sell jewelry. Defendant told Ariel that he was obliged to employ a pseudonym because he was reputed to have been involved with "some sort of diamond scam" in the past.

Defendant's capacity to commit fraud is not simply a matter of reputation. On March 31, 2000, he was convicted of third degree grand larceny in a scheme involving fictitious mortgages, in which he promised a business associate a return of 24% on an investment of $200,000. Defendant received a sentence of five years' probation and was ordered to make restitution in the

amount of his victim's investment.

Around this time, defendant told Ariel that he was selling his interest in Sidco to his partner, and Ariel was dismissed as a salesman. Defendant then suggested to his son that they develop a business to give Ariel a "future" in the diamond trade. In June 2000, Anaka Design Ltd. was incorporated, with Ariel listed as its president. Defendant ran the company's operations, this time adopting the pseudonym "Norman Miller," and instructed Ariel to refer to him as a "family friend" who was helping Ariel "learn the industry," warning that if his involvement in the business and his family relationship ever became known, "no one would ever do business" with Ariel. Defendant paid Ariel a weekly salary in cash and controlled the business records and bank account statements, which Ariel never reviewed. Defendant obtained what Ariel described as "false references" from persons who purported to have had dealings with Anaka Design that Ariel could provide to diamond brokers to obtain stones on consignment or, in the parlance of the trade, "on memo."

Using a list furnished by defendant designating which diamond suppliers to use (and which to avoid using), Ariel began contacting brokers, providing them with the references defendant had obtained and telling them, as defendant had instructed, that Ariel was seeking diamonds Anaka would fabricate into jewelry for

a "very high end clientele." By making payment for diamonds within the time provided under the terms of the various consignment memos, Anaka developed a reputation as an ideal client, which enabled it to purchase ever more valuable stones and extend the time for payment.

In February 2001, defendant sent Ariel to a diamond and jewelry trade show in Orlando, Florida. There, he was approached by one Moshe Rabinowitz, who explained that he operated a company called Flextrade International, which dealt in precious metals. Rabinowitz stated that he was interested in purchasing diamonds and gave Ariel his business card. After returning to New York, Ariel gave the card to defendant. Some time later, defendant informed Ariel that Rabinowitz had placed an order for more than $5 million in large diamonds and produced a list of credit references provided by Rabinowitz which, defendant stated, he had checked out.

Using several lists of diamonds defendant had written out, Ariel collected the stones from various suppliers and brought them to defendant at Anaka's office. When the order was complete, defendant told Ariel to deliver the diamonds to Rabinowitz in London. On May 6, 2001, Ariel took a parcel of diamonds from the safe at Anaka's office, secreted them in his underwear and flew to London. He did not declare the diamonds

upon arrival. Two days later, Rabinowitz met Ariel at his hotel and took him to an office with the name "Flextrade" on the door. There, Ariel gave him a package of memos, which Rabinowitz compared with the stones. On defendant's instructions, Ariel left the diamonds with Rabinowitz. Two days later, Rabinowitz delivered to Ariel, at his hotel, signed copies of the memos, a letter of guaranty and nine postdated checks totaling nearly $6.8 million. Upon his return to New York, Ariel was instructed by defendant to deliver the checks to Anaka's attorney, Kenneth Aronson, for expedited collection. According to Aronson, the checks were ultimately rejected by the bank as "forged or fraudulent."

That same month, Anaka, defendant and Ariel were sued by a number of Anaka's suppliers for payment or the return of diamonds delivered on memo. At his deposition, defendant falsely testified that he played no role in obtaining from the suppliers the diamonds that had been sold to Rabinowitz of Flextrade International and that he had no reason to suspect that the checks received from Flextrade were "anything but good."

In late August 2001, Ariel was arrested and charged with grand larceny for using his position with Anaka to steal diamonds. Ariel was originally represented by Aronson, whom defendant provided with the names of persons who might provide

bail, including one Maurice Rico, described as a family friend. No bail money was forthcoming, and Ariel remained under detention at Rikers Island.

In the fall of 2001, defendant asked Vincent Sampieri, a childhood friend and fellow diamond dealer, to have certain diamonds graded by the Gemological Institute of America (GIA). Over the next few months, Sampieri obtained a number of GIA certificates, which he returned to defendant, who then paid for them. Sampieri also sold several diamonds obtained from defendant and arranged for approximately a half dozen others to be recut. In March 2002, Sampieri was arrested by a detective investigating Anaka. Police recovered several diamonds that, upon comparison with GIA reports, were determined to be stones that had been provided by Anaka's suppliers and subsequently recut.[1]

In June 2002, a detective followed defendant as he traveled by subway from his apartment in Manhattan to a bank in Woodside Queens. There, defendant deposited $2,000 in cash into Maurice

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[1] On December 6, 2002, Sampieri pleaded guilty to criminal possession of stolen property in the third degree and was sentenced to 6 months' incarceration and 5 years' probation.

Rico's bank account. Defendant was arrested on July 1, 2002.[2]

Meanwhile, the attorney representing Anaka in the civil litigation was promised a partial payment by Rabinowitz for the diamonds received by Flextrade. The attorney was told that Rabinowitz had sold the diamonds to Asian dealers, who had not yet paid for them. In June 2002, the attorney flew to Israel to meet with Rabinowitz, obtaining his confession of judgment and some identifying documents, including a driver's license.

After returning to New York, the attorney gave a copy of the license to Ariel's attorney. When it was shown to Ariel, he recognized that the person depicted in the license photograph was merely Maurice Rico disguised behind a thick goatee, dark hair and glasses. An August 2001 warrant application indicates that a New York City detective contacted the real Moshe Rabinowitz, an Israeli diamond merchant, and was informed that the latter had never been to Orlando, Florida, was not in London in early May 2001 and had never heard of Ariel or Norman Schonfeld, Anaka Design or Flextrade International.

Police obtained a warrant and conducted a search of Rico's Florida apartment, where they recovered checks of the same type

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[2] At the time of his arrest, defendant was still on probation from his prior conviction of third degree grand larceny in connection with the fraudulent scheme involving fictitious mortgages.

as the checks given to Anaka by Flextrade. On Rico's computer they found letters from Rabinowitz to his lawyer and from Rabinowitz to Ariel, as well as software to print checks for Flextrade, among other entities. In addition, airline records divulged that Rico had made several trips to Tel Aviv, including a two-week stay in March 2002. Finally, account records showed that a $2,000 deposit in Rico's name had been made at a bank in Queens on June 4, 2002 by defendant.[3]

Ariel had been in jail for over a year by the time he was shown the license supposedly belonging to Rabinowitz in late 2002. Shortly thereafter, Ariel began a series of meetings with an Assistant District Attorney, ultimately entering into a cooperation agreement. On January 31, 2003, Ariel pleaded guilty to grand larceny in the first degree in satisfaction of the indictments against him. He turned over two letters received during his pretrial incarceration from defendant that discussed "the hypothetical return of diamonds in return for a plea deal." The letters indicated that defendant had refused the Assistant District Attorney's demand to place the diamonds in escrow before any discussion of a negotiated sentence because those

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[3] On March 16, 2004, Rico pleaded guilty to forgery in the second degree (11 counts) and scheme to defraud (2 counts) and was sentenced to 2 to 4 years' incarceration.

"hypothetical diamonds" were his only "hypothetical ace."

Defendant's jury trial lasted nearly eight weeks with over 50 witnesses appearing for the People. Included among the items the People introduced into evidence were voluminous invoices and memos detailing the value of each diamond stolen by defendant. Testifying on his own behalf, defendant continued to adhere to his story that he and Anaka had been swindled by Flextrade. On August 10, 2004, following three days of deliberations, the jury convicted defendant of all 40 submitted counts.

Following his conviction, defendant used the "hypothetical diamonds" and a purportedly serious medical condition to delay and manipulate the sentencing process. The People submitted a restitution order indicating that the amount defendant owed 11 diamond suppliers whom he had defrauded was $5,966,389.61. Defendant in a letter to the court dated October 25, 2004 stated that he wished to return "the considerable amounts of stolen merchandise" in his possession and provide the District Attorney's office with memos documenting the money owed to Anaka for stones that had been sold. Defendant offered his assistance with any recovery efforts and requested that sentencing be adjourned from 10 days to two weeks to permit him to deliver the stolen property.

At the adjourned sentencing on October 29, 2004, counsel

requested a further two-week adjournment both to give defendant time to turn over the diamonds in his possession and to permit his client to undergo surgery scheduled for November 18, 2004. The People opposed any adjournment as a mere delaying tactic, noting that defendant had made a similar offer to return the diamonds prior to trial in exchange for a negotiated plea.

The court adjudicated defendant a second felony offender and, after reminding defendant that he had been warned sentencing would not be further adjourned, denied the motion and proceeded with sentencing. The People noted that defendant had not only stolen nearly $6 million but had violated the trust of his victims, who "lost their reputation" and suffered "financially, emotionally, [and] physically." Moreover, defendant made his son, Ariel, "the fall guy," resulting in Ariel's conviction of a felony.

Observing that the evidence of defendant's scheme to steal millions of dollars was overwhelming and that there was no question based on his October 25 letter that defendant had perjured himself at trial in an attempt to deceive the court and jury, the court imposed a cumulative sentence of incarceration of from 12½ to 25 years on the charges arising out of the theft of the diamonds, to run consecutively with concurrent terms of 3½ to 7 years imposed for first-degree perjury and violation of

probation, for an aggregate sentence of 16 to 32 years. The court further informed the parties that absent a dispute by defendant warranting an immediate hearing as to the amount of restitution, it was prepared to sign the restitution order. However, the court adjourned the execution of sentence so that defendant could have the scheduled surgery.

In December, defendant moved for a further extension of the execution of sentence to late January 2005 because his surgery had been purportedly postponed to an indeterminate date. He further maintained that he had caused to be delivered to the District Attorney's office some $2 million in diamonds in addition to memoranda of accounts receivable in a like amount and, therefore, that the restitution claimed by the District Attorney "must be substantially offset."

The People opposed these requests, noting that restitution had been determined at sentencing. They emphasized that accounts receivable are merely debts, not the goods or cash required to satisfy the restitution order.

On February 8, 2005, defendant moved to reduce his sentence to the minimum of 4½ to 9 years. Defendant argued that the 16-to-32-year aggregate sentence amounted to a "death sentence" because of his "serious medical problems." Defendant also argued that his 16-to-32 year sentence was much more severe than the 2

to 4 years meted out to codefendant Rico. He also pointed to the restitution he had already paid as proof of his rehabilitation.

After hearing argument, the court stated that "[t]he evidence at trial left no question . . . that [defendant] was the prime mover" behind the scheme to defraud the diamond dealers, finding that defendant had received "an appropriate sentence."

On February 22, 2005, prior to executing sentence, the court again heard argument on sentencing. Defendant repeated his request for a reduction in sentence and sought another adjournment of execution of sentence, stating that his surgery was now scheduled for March 17, 2005. Defendant also pointed to his restitution of some $2 million in diamonds as evidence that the victims were "a lot better off" with his help than they would be once he was in prison. The court denied defendant's requests, stating that the restitution order was "based upon the hard evidence in the case," that defendant's sentence was the result of his own actions, and that defendant might receive his surgery faster once in the custody of the State Department of Correctional Services. Accordingly, the court reimposed the sentence it had previously set.

It is axiomatic that this Court is vested with plenary power to modify a sentence "without deference to the sentencing court" (*People v Delgado*, 80 NY2d 780, 783 [1992]). However, that power

should be exercised only where the sentence is "unduly harsh or severe under the circumstances" (*id.*). In determining whether a sentence is appropriate, the factors to be considered are deterrence, rehabilitation, retribution, and isolation (*see People v Notey*, 72 AD2d 279, 282 [1980]). In imposing sentence upon a particular defendant, a court should consider

> "the harm caused or contemplated by the defendant, the excuse or provocation, if any, for the defendant's conduct, the restitution which may compensate for the harm done, the prior criminal history of the defendant, the likelihood of recurrence of the defendant's conduct, and whether imprisonment would result in excessive hardship to the defendant" (*id.* at 283, citing Model Penal Code § 7.01[2]).

The record before us does not support the conclusion that defendant is unlikely to engage in future fraudulent conduct. He has a long history as a con artist preying on members of the general public. His earlier diamond business was dissolved in 1980 resulting in $4 million in losses to creditors. As a result, he used an alias to hatch further scams. In 2000, he was convicted of larceny in a scheme involving sale of fictitious mortgages. While he was serving a sentence of five years' probation, including $200,000 in restitution, defendant concocted the instant convoluted plan to steal millions of dollars of diamonds from dealers. This is his second fraud conviction,

committed while still on probation following his first such conviction, and the second time his operation of a diamond business has left suppliers with losses in the millions of dollars.

Defendant is a fraud and recidivist with no qualms about casting blame on others, including his own son, to save his own neck. The die was cast when Ariel was used as the front man to set up Anaka. If the scam failed, Ariel would be the fall guy, leaving defendant in the clear. At defendant's arraignment, counsel told the court that defendant's son, Ariel, has "a serious learning disability. He is dyslexic." Counsel nevertheless told the court:

> "His son formed Anaka, I think, in June of 2000. My client has no equitable interest in Anaka and out of the 11 merchants that my colleague refers to on the other indictment involving his son Mr. Norman Schonfeld did not engage in any transaction with them to obtain diamonds. There were no negotiations. No meetings. He was not at all involved in any of that. As I say, he does not have a proprietary interest in Anaka."

Defendant did nothing to make restitution or otherwise keep his son out of jail, leaving him incarcerated for over a year. Defendant found the fruits of his illegal activities to be more important than the freedom of his own son. As a result of entering a guilty plea, Ariel has become a convicted felon.

Defendant has destroyed his son's reputation and ruined his livelihood, without reservation or apparent regret.

Defendant prolonged his day of reckoning by perjuring himself at civil depositions in 2001 and at his criminal trial in 2004. He indirectly admitted to his perjury in his October 25th letter to the court offering the return of stolen merchandise in an attempt to have his sentence reduced. Defendant's purported remorse and efforts at restitution came only after he was convicted, as part of his last-ditch effort to reduce his sentence and "open the jail door."

In the weeks following defendant's conviction, the scammed merchants sent 13 letters to the court requesting that defendant be given the maximum sentence allowed by law. The victims complained about the impact of defendant's theft on their lives, family and businesses, and also about the need to deter such conduct in an industry in which trust and handshakes remain vital. Even if defendant did not have a history of fraudulent activity, the extent of the fraud and its impact on those who were victimized justify a lengthy period of imprisonment as a means of deterring similar conduct by others. As a result of defendant's fraud, the reputation of the victims and the goodwill of their businesses have been ruined, causing huge losses that may never be recovered. Many of the businesses built their

goodwill on a lifetime of laborious work, which defendant's mendacity destroyed in a matter of days. A short sentence will not serve to deter fraud and larceny in an industry vulnerable to this type of crime, where diamonds and other precious stones are commonly transferred by merchants based on a tradition of trust and honesty. The unduly short sentence advocated by the majority sends the wrong message to other prospective criminals by permitting defendant to enjoy the fruits of his crime. Significantly, defendant has failed to account for the roughly $4.5 million worth of diamonds that have not been returned. Rather than protect the diamond industry and deter similar criminal activity, a short sentence will encourage prospective criminals to trade a short sentence for a return of millions of dollars.

The majority's reference to defendant's age is inapposite. While a defendant's health is a relevant factor in assessing the propriety of sentence, age, standing alone, is not (*see e.g.* (*People v Cyr*, 119 AD2d 901 [1986], *lv denied* 68 NY2d 756 [1986]; *People v Notey*, 72 AD2d 279 [1980], *supra*). As this Court has stated, "It is patent that unless incarceration would probably cause defendant's death, he should be made to serve his sentence" (*People v Browarnik*, 42 AD2d 953, 953 [1973] [heart condition]).

With respect to unsubstantiated protestations of supposedly

fragile health, "the mere speculation that due to his advanced age or his prior health problems, the defendant might suffer harm if incarcerated, does not suffice to warrant a modification of the sentence imposed" (*People v Chesnard*, 175 AD2d 254, 255 [1991]). Defendant has, according to the record, been in need of imminently scheduled surgery for the last six or seven years. As this Court stated in *People v Baghai-Kermani* (221 AD2d 219, 220 [1995]), "A modification [of sentence] based on a defendant's deteriorating health must be based on medical proof which convincingly establishes that incarceration would have an extremely deleterious impact." Here, defendant's "poor health" argument is based entirely on unsupported statements by counsel; defendant has not submitted a single medical record or affidavit from a physician to support the notion that imprisonment will have an unduly harmful impact on his health. Defendant has been in custody since his arrest, and in the seven years that have ensued, there is no indication that he has ever undergone surgery (*see Browarnik*, 42 AD2d at 953 ["despite defendant's condition at the time of conviction he has survived for some three years"]; *cf. Notey*, 72 AD2d at 281-282). Nor is there proof of any medical condition that would render the period of incarceration imposed tantamount to a "death sentence," as defendant has repeatedly claimed (*see Baghai-Kermani*, 221 AD2d at 221 [1995]

[incarceration not shown to be life-threatening absent evidence of brain tumor's malignancy]). Defendant's only documented pathology is a pathological disregard for the truth, as evinced by his multiple perjury convictions. Moreover, should objective medical testing establish that defendant is afflicted with a potentially deadly condition, he may apply for medical parole under Executive Law § 259-r (*id.*).

Defendant's contention that his offense should be treated leniently because it is a white-collar crime is unsupported by any reference to case law, reflecting its utter lack of merit. In effect, defendant asks this Court to apply a double standard of punishment in favor of those convicted of financial crimes. He also asks this Court to overlook the fact that he was convicted of a previous such crime and was on probation from that conviction at the time of his arrest. Finally, the nonviolent nature of the crime is overshadowed by "the immensity of the fraud" and the devastating impact on defendant's victims, warranting the imposition of a severe sentence as a means of deterring "others who might be tempted, and as a reflection of community condemnation of the conduct of the defendant" (*Notey*, 72 AD2d at 284 [Medicaid fraud]).

While defendant complains that his coconspirator, Rico, received a disproportionately low sentence for his part in the fraudulent enterprise, defendant concedes that "he certainly deserved a greater sentence than Rico." Rico, likewise a second felony offender, was convicted of a less serious offense. He pleaded guilty to the top count in the indictment against him, forgery in the second degree, a class D felony (Penal Law § 170.10), while defendant was convicted of, inter alia, grand larceny in the first degree, a class B felony (Penal Law § 155.42). In addition, Rico's role in the scheme was relatively minor, being limited to the forging of checks and, at defendant's instance, making trips to Israel to impersonate Moshe Rabinowitz.

Defendant, on the other hand, with his extensive experience in the diamond business, was the mastermind and motive force that guided the entire scheme to defraud Anaka's suppliers. Not only is defendant a second felony offender due to his conviction of third degree grand larceny in connection with the sale of fictitious mortgages, he previously operated a diamond brokerage business that caused some $4 million in losses to its creditors, with the result that defendant, by his own admission, "was a controversial figure in the diamond industry." It was defendant who formed Anaka, using his son to obtain diamonds on consignment and to spirit over $5 million in stones to London, where they

simply disappeared. In view of defendant's pivotal role in the crime, it cannot be said that the sentence imposed by Supreme Court is "unduly harsh or severe" (*Delgado*, 80 NY2d at 783; *cf. People v Pedraza*, 25 AD3d 394, 398 [2006, Tom, J., dissenting], *lv denied* 7 NY3d 760 [2006] [reduced sentence of 23 years to life imposed despite "a lack of credible evidence to personally connect defendant to the acts comprising arson and attempted murder and the victim sustained no significant physical harm"]).

Review of the record thus indicates that, under all the circumstances, the sentence imposed by Justice Carruthers was warranted (*see People v Barzge*, 244 AD2d 213, 214 [1997], *lv denied* 91 NY2d 889 [1998]). The present scheme to defraud resulted in some 40 counts being submitted to the jury, on all of which defendant was found guilty, including grand larceny in the first, second and third degrees, forgery, criminal possession of stolen property and perjury. The fraud was committed against separate individuals and entities. Indeed, the sentence imposed was "relatively lenient" (*id.*) inasmuch as Justice Carruthers was not obligated to have the bulk of the prison terms run concurrently, as he did, instead of consecutively (Penal Law § 70.25[1]).

Defendant has shown no remorse for the fraud he committed or the injury to his victims including his own son. When the fraudulent scheme began to unravel in 2001, defendant left his son holding the bag. He then perjured himself at trial in an attempt to avoid conviction. It was only after being convicted that he offered to return a portion of the stolen merchandise in an attempt to barter a shorter sentence but still has not accounted for an additional $4.5 million in stolen diamonds. After sentencing, defendant continued to deceive the court to delay execution of the sentence advancing unsubstantiated medical ailments to bargain for a lesser sentence.

Even with the foregoing background, the majority sees fit to reduce defendant's aggregated prison term of 16 to 32 years to 8½ to 17 years, making defendant soon eligible for parole.

At defendant's arraignment, the Assistant District Attorney told the court that defendant

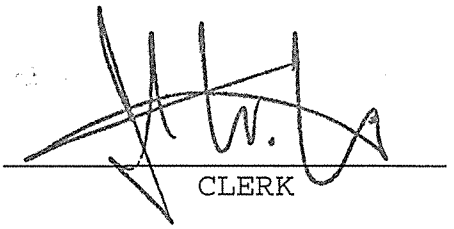
> "is well known in the diamond community as a con artist. In fact, that is, not only in the diamond community, but in the community at large. He is a con artist. That is what he does for a living. And I assume that he will attempt to con the Court."

The record demonstrates that these words were prescient. The proceedings in this matter establish that defendant has engaged in confidence schemes, successfully duping victims both within

and outside the diamond community. The majority's disposition of this appeal demonstrates that defendant has been no less successful in his attempt to deceive this Court.

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

ENTERED: DECEMBER 8, 2009



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

1322N Gerald Phillipps, Index 111645/07
Plaintiff-Respondent,

-against-

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

Steve S. Efron, New York, for appellants.

Law Offices of Alan M. Greenberg, P.C., New York (Jeremy A. Hellman of counsel), for respondent.

Order, Supreme Court, New York County (Donna M. Mills, J.), entered July 23, 2008, which, to the extent appealed from as limited by the briefs, denied defendants' motion to dismiss the complaint for failure to serve an adequate notice of claim, unanimously affirmed, without costs.

Plaintiff stated in the notice of claim that "[o]n or about the 17th day of January 2007," while a passenger on a bus owned and operated by defendants, which "was being operated on Fifth Avenue at or near the bus stop at the[] Southwest corner of 33rd Street in Manhattan, said bus stopped and then went forward and then abruptly came to as final stop[, causing plaintiff] to be propelled in said bus and to violently hit the floor thereby sustaining severe permanent personal injuries." As courts may look to the evidence adduced at a hearing pursuant to General

Municipal Law § 50-h to determine the sufficiency of a Notice of Claim (*see D'Alessandro v New York City Tr. Auth.*, 83 NY2d 891, 893 [1994]), we recount the relevant evidence from the hearing in this case. Plaintiff, who was 84 years old at the time of the accident, testified that he was on his way to visit a friend who lived on 33rd Street between Fifth and Sixth Avenues and had transferred at 49th Street and Fifth Avenue from a crosstown bus. He then "took a Fifth Avenue bus that went downtown" but did not know the number of the bus. The bus, however, "was one of those relatively modern buses that has a[n] . . . elevated backside." As the bus approached the stop at 33rd Street, plaintiff got up from his seat. After the bus stopped and the doors opened, when plaintiff was about a foot from the front door preparing to exit, it "jerked forward violently," and plaintiff fell on his back in the aisle. At the time of the fall, plaintiff had been holding only his cane. Plaintiff was helped up and off the bus by other passengers. Believing he had only a bruise, he walked to his friend's apartment, which was five minutes away. After five or ten minutes, however, the pain was so bad he took a taxi to the hospital. He had broken five ribs and punctured a lung, and was admitted to the hospital.

In relevant part, the statute requires that a notice of claim set forth "the time when, the place where and the manner in

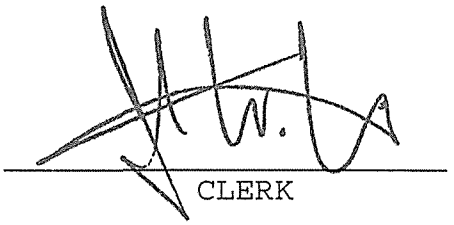
which the claim arose" (General Municipal Law § 50-e[2]). "Reasonably read, the statute does not require those things to be stated with literal nicety or exactness" (*Brown v City of New York*, 95 NY2d 389, 393 [2000] [internal quotation marks omitted]). Rather, "[t]he test of the sufficiency of a Notice of Claim is merely whether it includes information sufficient to enable the city to investigate" (*id.* [internal quotation marks omitted]); "[n]othing more may be required" (*id.* [internal quotation marks omitted]). Finally, as we recently stated, "municipal authorities have an obligation to obtain the missing information if that can be done with a *modicum of effort* rather than rejecting a notice of claim outright" (*Goodwin v New York City Hous. Auth.*, 42 AD3d 63, 69 [2007]).

Under these circumstances, the notice of claim was not insufficient due to plaintiff's inability to state whether the bus was an M1, M2, M3 or M4 or to recall any identifying information regarding the bus driver (*cf. Hudson v New York City Tr. Auth.*, 19 AD3d 648, 649 [2005] [notice of claim not insufficient where plaintiff provided the time and location of accident, the route number of the bus that collided with her vehicle, and the manner in which her claim arose but incorrect information regarding the bus number]). In contending that the notice of claim was insufficient, defendants argued that it would

be overly burdensome for them to "search for bus operators for a 30 minute span on all four bus routes alleged in plaintiff's bill of particulars." Notably, however, this claim of prejudice was not supported by any factual information bearing on either the number of buses that would have stopped at 33rd Street and Fifth Avenue during this time period or the number of those buses that were of the type identified by plaintiff. Of course, "prejudice will not be presumed" (*Goodwin*, 42 AD3d at 68). Given the conclusory character of this claim of prejudice, and that defendants did not make the necessary showing of an attempt to investigate the accident (*id.*), defendants failed to meet their burden of demonstrating prejudice. We note, moreover, that defendants conceded that plaintiff acted in good faith.

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

ENTERED: DECEMBER 8, 2009



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Andrias, J.P., Sweeny, McGuire, Moskowitz, DeGrasse, JJ.

5311-
5311A-
5311B Ferrante Immobiliare, LLC, et al., Index 108089/06
Plaintiffs-Appellants-Respondents,

-against-

Guido A. Pace, et al.,
Defendants.
- - - - - - -
Guido A. Pace, et al.,
Third-Party Plaintiff,

-against-

Vanguard Construction and Development Co., Inc.,
Third-Party Defendant-Respondent-Appellant.

Ellenoff Grossman & Schole, LLP, New York (Gabriel Mendelberg of counsel), for appellants-respondents.

Stein Riso Mantel, LLP, New York (Gerard A. Riso of counsel), for respondent-appellant.

Order, Supreme Court, New York County (Helen E. Freedman, J.), entered July 2, 2008, which granted plaintiffs' motion to reargue their prior motion for leave to amend the complaint to add third-party defendant Vanguard Construction and Development Co., Inc. as a party defendant, and, upon reargument, granted the motion to the extent of permitting plaintiffs to assert a claim against Vanguard for breach of warranty or installation of defective materials, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered December 4, 2007

which granted Vanguard's motion to dismiss the third-party complaint, unanimously dismissed, without costs, as academic. Appeal from order, same court and Justice, entered May 16, 2008, which denied plaintiffs' motion for leave to amend, unanimously dismissed, without costs, as superseded by the appeal from the July 2, 2008 order.

Plaintiffs argue that because Vanguard never substantially completed its work under the contract, the statute of limitations never commenced to run, and that the March 30, 2005 settlement agreement does not necessarily mark the accrual date of their negligence and breach of contract claims since neither a "Certificate of Substantial Performance" nor a final Certificate of Payment has ever been issued by the architect Pace as required by the original contract. These arguments are without merit.

In their original complaint, in which the claims of negligence and breach of contract were only alleged against defendant-architect Pace and defendant-engineer Goldman Copeland Associates, and in which the general contractor, Vanguard, was not a named party, plaintiffs admitted that "[b]y late 2003, Vanguard completed the Project and the Firm moved into the remaining space at the Premises." Subsequently, however, in their proposed amended complaint seeking to add breach of contract and negligence claims against Vanguard, plaintiffs, for

obvious reasons, omit such allegation and allege instead that "[b]y late 2003, the Firm moved into the remaining space at the Premises, while work on the HVAC, plumbing and electrical systems was ongoing," which work "was never substantially completed."

Article 14 of the standard AIA agreement with Vanguard defines substantial completion as "the stage in the progress of the Work when the Work . . . is sufficiently complete in accordance with the Contract Documents so that the Owner can occupy or utilize the Work for its intended use." It further provides that final payment will be made after the architect issues a Certificate of Substantial Completion and a final Certificate for Payment in which it states that it had determined to the best of its knowledge that the work had been completed in accordance with the terms and conditions of the contract. According to § 14.5.1 of the contract, the architect's final Certificate for Payment constitutes a further representation that the conditions precedent to Vanguard's being entitled to final payment of the entire balance found to be due it have been fulfilled.

Although the March 30, 2005 settlement agreement does not state when Vanguard's obligations under the contract are deemed substantially (or entirely) complete, or that Vanguard was otherwise absolved from all of its remaining responsibilities

under the contract, the settlement agreement stresses that Vanguard, which had already completed or abandoned the project, was to receive its final payment under the contract. The settlement agreement also does not indicate that Vanguard has any further obligations under the contract.

Further, it is clear that after the architect Pace advised plaintiffs on January 20, 2005 that Vanguard was unwilling to return to the work site to actually do some unspecified work and that Pace would sign off on the project "when all the issues are resolved," plaintiffs and Vanguard bypassed the architect (whom plaintiffs later sued for breach of contract and negligent design and supervision) and entered into the March 30, 2005 settlement agreement in which they agreed that plaintiffs would pay Vanguard $13,500 "as final payment under the Agreement." In the agreement, plaintiffs stated that, as of that date, they were "unaware of any defects or negligence in connection with the Project," while they retained their rights, if any, with respect to any claims based upon any subsequently discovered defects in workmanship.

Thus, the statute of limitations on plaintiffs' negligence and breach of contract claims, which arguably accrued as early as late 2003, clearly began to run, at the latest, on March 30, 2005, the date of execution of their settlement agreement with

Vanguard, which expressly provided that in consideration for the settlement plaintiffs would pay Vanguard the sum of $13,500 "as final payment under the Agreement" (*see Amedeo Hotels Ltd. Partnership v Zwicker Elec. Co.*, 291 AD2d 322, 323 [2002]). The original agreement with Vanguard provides, in pertinent part, that "[f]inal payment, constituting the entire unpaid balance of the Contract Sum, shall be made by the Owner to the Contractor where [] the Contractor has fully performed the Contract." Therefore, inasmuch as the parties charted their own course and agreed to dispense with the architect's approvals preliminary to final payment under the original contract, there is no need to determine whether Vanguard's work was "substantially complete" within the meaning of that agreement.

Moreover, although the motion court, in its July 2, 2008 order, found that plaintiffs interposed their proposed negligence claim on March 25, 2008 when they filed their motion to amend the complaint, plaintiffs' filing of a supplemental summons and amended complaint on March 25, 2008 did not toll the three-year statute of limitations for negligence claims, since they failed to secure leave of the court or a stipulation signed by counsel for the parties (*see* CPLR 1003). Plaintiffs did not seek leave to amend the complaint until April 7, 2008, when their order to show cause was signed. Although the motion court erroneously

found that its prior order dismissing the third-party complaint, in which it found that the negligence claim was time barred, constituted the law of the case as to plaintiffs, plaintiffs' subsequent failure to timely move to amend their complaint renders that issue academic and, since the order to show cause could not have been submitted prior to April 2, 2008, the date of its supporting affirmation and affidavit, there is no need to determine when it was actually submitted.

Contrary to Vanguard's contention, plaintiffs' breach of contract claim is not precluded by the settlement agreement, which removed 14 enumerated items from the scope of the parties' agreement (the "excluded work") and precluded plaintiffs from suing Vanguard in respect of those items, but expressly preserved plaintiffs' claims for negligence and breach of warranty or defects in connection with the "included work." To the extent the motion court's order may be read to limit the relevant language, the settlement agreement, which preserved all claims for "defects, including, but not limited to, latent defects, and warranties for work remaining in the scope of the work under the Agreement," is controlling and dispositive of the issue. Whether the items alleged to be defective fall within the category of "excluded work" or "included work" is a factual determination that cannot be made on this record.

Finally, in view of the court's determination in its July 2, 2008 order that plaintiffs' proposed negligence claim against Vanguard was untimely, albeit for the wrong reason, i.e. the law of the case, plaintiffs' appeal from the December 4, 2007 order, to the extent it granted Vanguard's motion to dismiss the third-party complaint on the ground that the negligence claim was untimely, is academic. In light of our disposition, it is unnecessary to reach the parties' remaining contentions.

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

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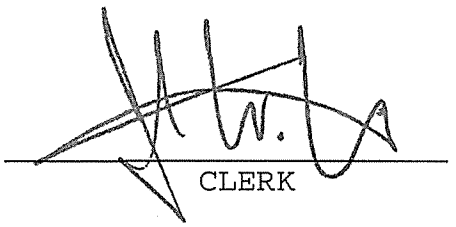


Andrias, J.P., Sweeny, Nardelli, Richter, Abdus-Salaam, JJ.

1197 Digna Diaz, Index 6282/06
Plaintiff-Appellant,

-against-

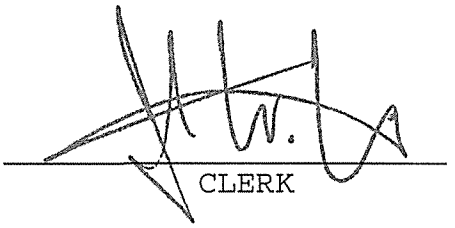
C-Town Supermarket,
Defendant-Respondent.

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, Bronx County (John A. Barone, J.), entered on or about June 19, 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 November 30, 2009,

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

ENTERED: DECEMBER 8, 2009



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Friedman, J.P., McGuire, Renwick, Richter, Manzanet-Daniels, JJ.

1545-
1546 In re Kendra C.R.,

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

Charles R.,
Respondent-Appellant,

Abbott House Family Services, Inc.,
Petitioner-Respondent.

Law Office of Florian Miedel, New York (Florian Miedel of counsel), for appellant.

Law Office of Jeremiah Quinlan, Hastings-on-Hudson (Daniel Gartenstein of counsel), for respondent.

Order of disposition, Family Court, Bronx County (Douglas E. Hoffman, J.), entered on or about February 29, 2008, which revoked a suspended judgment entered on a finding of permanent neglect, terminated respondent father's parental rights to the child and committed the child's custody to the Commissioner of Social Services and the petitioning agency for the purpose of adoption, unanimously affirmed, without costs. Purported appeal from oral ruling, same court and Judge, on November 21, 2007, which terminated parental and visitation rights, unanimously dismissed, without costs, as nonappealable, and, in any event, as subsumed in the appeal from the order of disposition.

On March 4, 2005, respondent admitted having permanently

neglected the child and consented to entry of a suspended judgment. The preponderance of the evidence in the latest proceedings clearly established that respondent materially violated the terms of that suspended judgment. His admitted drug use during the period in question was sufficient to warrant revocation of the suspension (*see Matter of Angel P.*, 44 AD3d 448 [2007]; *Matter of Tiffany R.*, 7 AD3d 297 [2004]). Drug abuse is a major obstacle to unification with a child, and was compounded in this case by respondent's conviction for sale of a controlled substance. His failure to secure housing was also a material violation of the terms of the suspended judgment, and constituted independent grounds for revocation (*see Matter of Fynn S.*, 56 AD3d 959, 961 [2008]; *Matter of Frederick MM.*, 23 AD3d 951, 953 [2005]).

The court may terminate parental rights after a finding of noncompliance with a suspended judgment (*see Matter of Jennifer VV.*, 241 AD2d 622 [1997]). At the time of the dispositional hearing, more than 2½ years after respondent's consent to the suspended judgment, he still was not ready to take care of the child. His proposed solution of having the paternal grandmother take temporary custody ignored her own medical needs and her reluctance to take on that role, as well as the child's preference for adoption by the foster mother. In light of these

circumstances, the court properly found the child's best interests called for transfer of her custody and guardianship to the agency (*see* Family Ct Act § 631; *Matter of Star Leslie*, 63 NY2d 136, 147-148 [1984]; *Matter of Travis Devon B.*, 295 AD2d 205 [2002]).

M-5274 ***In re Kendra C.R.***

Motion seeking leave to supplement record and other related relief denied.

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

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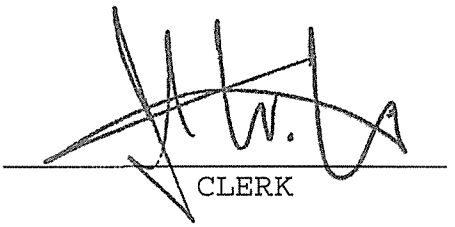

Friedman, J.P., McGuire, Renwick, Richter, Manzanet-Daniels, JJ.

1550 In re Matthew W.,
Petitioner-Appellant,

-against-

Meagan R.,
Respondent-Respondent.

Paul D. Stone, Tarrytown, for appellant.

Steven N. Feinman, White Plains, for respondent.

Karen P. Simmons, The Children's Law Center, Brooklyn (Heather L. Kalachman of counsel), Law Guardian.

Order, Family Court, Bronx County (Sarah P. Cooper, Referee), entered on or about August 4, 2008, which, inter alia, awarded custody of the subject child to respondent mother, unanimously modified, on the facts, to eliminate the provision requiring the father to notify the mother of the address and phone number of any home other than the father's where the child stays during visitation with the father, and otherwise affirmed, without costs.

No basis exists to disturb the court's finding that while the parties are both fit to act as custodial parent on most counts (*see Eschbach v Eschbach*, 56 NY2d 167, 172 [1982]), the ability to nurture a relationship between the child and the noncustodial parent tips the scales in favor of the mother (*see*

Victor L. v Darlene L., 251 AD2d 178, 179 [1998], *lv denied* 92 NY2d 816 [1998]; *Matter of Osbourne S. v Regina S.*, 55 AD3d 465 [2008]). Evidence of the father's hostility toward the mother and intentional undermining of her role in the child's life is ample, including his maligning the mother in the child's presence, his failure to abide by the court's directive that there be telephone contact between the child and mother while the child was staying with the father, and his enrolling the child in a school in Westchester County without consulting the mother and without providing the school with the mother's contact information. The father's claim that the Law Guardian, who recommended that custody be given to the mother, and who was substituted in the proceeding after the father had rested his case and the court-appointed psychologist had testified, did not review the testimony that was taken prior to her substitution is pure speculation; moreover, the claim was not raised at the hearing and therefore is not preserved. The record also supports the court's decision not to follow the custody recommendation of the court-appointed psychologist since, as fully explained by the court, the persuasive force of the expert's testimony was diminished by evidence relating to the mother's rehabilitation and the father's hostility toward the mother, which evidence was generated after the expert's interview of the parties,

preparation of her report, and testimony about that report early on in this protracted hearing (*see Zelnik v Zelnik*, 196 AD2d 700, 702 [1993]; *Matter of Hopkins v Wilkerson*, 255 AD2d 319 [1998]). We have considered the father's other arguments and find them unavailing, except to the extent of the indicated modification.

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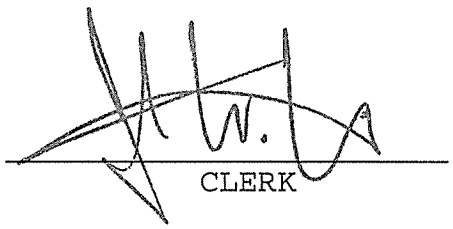

Tom, J.P., Nardelli, Renwick, Freedman, Roman, JJ.

1661 The People of the State of New York, Ind. 6635/05
Respondent,

-against

Richard Fernandez,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Susan Axelrod of counsel), for respondent.

Judgment, Supreme Court, New York County (Charles H. Solomon, J. at hearing; Bonnie G. Wittner, J. at jury trial and sentence), convicting defendant of assault in the first degree, robbery in the first degree (four counts) and robbery in the second degree (two counts), and sentencing him to an aggregate term of 20 years, unanimously affirmed.

Defendant's statements were not the product of an unlawful arrest. There was ample probable cause, and the victim's statement at a hospital showup that defendant was "not the guy" did not, under the totality of circumstances, obligate the police to release defendant without questioning him. In very close temporal and spatial proximity to the stabbing of an elderly man, the police encountered defendant, who was the only person in the area. Defendant's pants were bloody, and he had an obvious stab

wound on his hand. Defendant claimed he had been scratched by his girlfriend, and the girlfriend confirmed by telephone that she had recently inflicted a minor scratch, but the officer reasonably concluded that a scratch could not have caused defendant's condition, and that he was lying. In addition, the police found a bloody knife under a bench in defendant's immediate vicinity, and defendant's clothing matched the description given by the victim. Given all this evidence, the severely wounded victim's statement that this was "not the guy" did not negate probable cause, and the police acted reasonably in not treating it as an exoneration (*see People v Smith*, 63 AD3d 510 [2009], *lv denied* 13 NY3d 749 [2009]; *People v Roberson*, 299 AD2d 300 [2002], *lv denied* 99 NY2d 619 [2003]).

The hearing court, which suppressed defendant's initial statement to police for lack of timely *Miranda* warnings, correctly found attenuation with regard to both of defendant's subsequent statements, given the lengthy passage of time, and the changes in location and interrogators (*see People v Paulman*, 5 NY3d 122, 130-134 [2005]; *see also Missouri v Seibert*, 542 US 600 [2004]). The continued presence of a particular detective was insignificant because he was not involved in the questioning; his role was limited to such matters as transporting defendant and asking him if he needed anything. We have considered and

rejected defendant's remaining arguments concerning the alleged involuntariness of his statements.

Since the issue was never litigated at trial, the court properly denied defendant's request to submit to the jury the issue of the voluntariness of his statements (*see e.g. People v Scurlock*, 33 AD3d 366 [2006], *lv denied* 7 NY3d 928 [2006]). In any event, there is no reasonable possibility that, had it been instructed on the issue of voluntariness, the jury would have found either of the statements involuntary.

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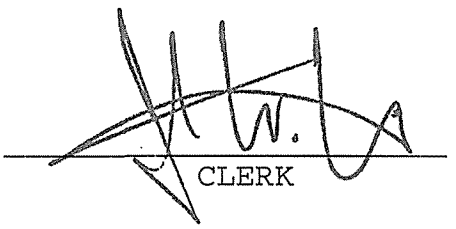

Tom, J.P., Nardelli, Renwick, Freedman, Roman, JJ.

1662 Lisa Marie Caso, Index 100560/05
Plaintiff-Respondent,

-against-

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

Cushman & Wakefield, Inc., et al.,
Defendants-Respondents.

Smith Mazure Director Wilkins Young & Yagerman, P.C., New York (Marcia K. Raicus of counsel), for appellants.

McMahon, Martine & Gallagher, LLP, Brooklyn (Patrick W. Brophy of counsel), for Lisa Marie Caso, respondent.

Cuttita LLP, New York (Scott A. Koltun of counsel), for Cushman & Wakefield respondents.

Order, Supreme Court, New York County (Walter B. Tolub, J.), entered August 20, 2008, which, in an action for personal injuries sustained in a slip and fall on the steps of an escalator located in the vestibule of an interior mall and leading down to a subway station, granted plaintiff's motion to vacate an order that had dismissed the action pursuant to 22 NYCRR 202.27 when plaintiff failed to appear at a compliance conference, unanimously affirmed, without costs.

Plaintiff's attorney, who had appeared at all prior conferences, including the April 20, 2007 compliance conference at which the May 25, 2007 date for a further compliance

conference was set, provided a reasonable excuse for his failure to appear at the May 25 conference, namely, that the May 25 date was not set forth in the April 20 conference order, and that he either did not hear the May 25 date orally announced at the April 20 conference, or, if he heard it, he forgot it because he neglected to write it down (*see Mediavilla v Gurman*, 272 AD2d 146 [2000]). The delay caused by plaintiff's failure to appear on two occasions for court-ordered depositions was neither protracted nor prejudicial, and defendants' claims of longstanding, protracted, deliberate, willful and contumacious disregard of disclosure orders are not otherwise borne out by the record.

Plaintiff's affidavit in support of the motion made a sufficient showing of merit by providing details concerning the date, time, and location of the accident and the manner in which it occurred, and asserting that it had been continuously raining on the day of the accident, that the floor outside of defendants' premises leading up to the escalator was wet from the rain, and that no measures were taken to absorb the rainwater or to prevent it from being tracked into the vestibule and then onto the escalator steps. We reject defendants' argument that plaintiff's affidavit should be discounted as an attempt to create a new theory of liability not found in the pleadings. Throughout her

complaint, amended complaint, and bill of particulars plaintiff consistently alleged that defendants were negligent not only in their maintenance and operation of the escalator itself but also in their maintenance of the entranceways and floor leading up to the escalator steps. We also reject defendants' argument that a prior order by another justice precludes plaintiff's claims. The prior order, which granted a motion for summary judgment dismissing a third-party complaint against the Metropolitan Transportation Authority, determined that the escalator was not the property of the MTA but rather the Transit Authority. While such determination likely precludes plaintiff from proving that defendants were responsible for the operation and maintenance of the escalator, it does not preclude her from proving that defendants were responsible for the maintenance of the floor leading up to the escalator. That issue has not been litigated, and, at least in the present context, it appears that it should be (*see Levy v New York City Hous. Auth.*, 287 AD2d 281 [2001] [showing of merit necessary on motion to vacate a 22 NYCRR 202.27

default something less than what is necessary in opposition to a motion for summary judgment]).

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

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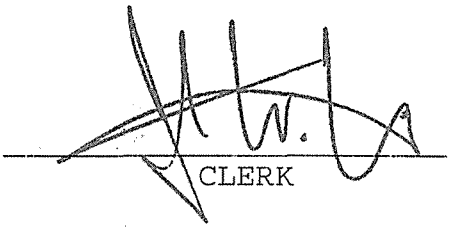

Tom, J.P., Nardelli, Renwick, Freedman, Roman, JJ.

1663-
1664-
1665-
1666

Tonya Anderson,
Petitioner-Respondent,

-against-

Hal H. Harris,
Respondent-Appellant.

Hal H. Harris, appellant pro se.

Tonya Anderson, respondent pro se.

Order, Family Court, Bronx County (Andrea Masley, J.), entered on or about July 11, 2008, which denied respondent's objections to an order of the Support Magistrate, dated April 21, 2008, dismissing with prejudice respondent's supplemental petition for a downward modification of his child support obligation and upwardly modifying his child support obligation to $342 bi-weekly, and which brings up for review an order, same court (Marian R. Shelton, J.), entered on or about January 17, 2006, which, inter alia, (i) denied respondent's objection to a October 11, 2005 ruling of a Support Magistrate denying his motion to vacate his March 3, 2005 default, and (ii) remanded this matter for a hearing to determine child support based on the child's needs or standard of living, whichever was higher, unanimously modified, on the law and the facts, respondent's objections granted to the extent of remanding this matter to

Family Court for a recalculation of his income, to include any reduction due to the amount of court-ordered child support provided to his two sons who are not subjects of the instant action, and to determine whether his income would fall below the poverty level, and otherwise affirmed, without costs. Order, Family Court, Bronx County (Lori Sattler, J.), entered on or about January 15, 2008, which denied respondent's objection to a decision, dated July 12, 2007, denying his motion to recuse Support Magistrate Robert Mulroy, unanimously affirmed, without costs. Order, same court (Andrea Masley, J.), entered on or about March 17, 2009, which denied respondent's objection to the Support Magistrate's October 3, 2008 decision and fact-finding and October 8, 2008 order to the extent that it directed a money judgment in favor of petitioner, and dismissed as premature his objection to the extent that it challenged the finding of a willful violation of and the recommendation of incarceration, unanimously affirmed, without costs.

Family Court properly ordered child support to be based upon the needs or standard of living of the child, whichever was greater (*see* Family Court Act § 413[1][k]). Respondent defaulted by appearing more than two hours late on March 3, 2005. The Support Magistrate reasonably concluded that respondent's default was not excusable (*see* CPLR 5015[a][1]). Respondent's claim that

he did not have to appear until 11:30 a.m. is refuted by petitioner's adjourn slip indicating that the March 3 hearing was for 9:15 a.m., and respondent failed to produce his adjourn slip.

Respondent objected on the ground that the April 21, 2008 support order would reduce his income below the poverty level (*see* Family Court Act § 413[1][d]), but Family Court failed to determine respondent's income. If one accepts respondent's tax return for 2005 (the most recent tax return before the April 2008 support order, as respondent requested extensions for his 2006 and 2007 returns), he would be below the poverty level after paying $342 biweekly ($8,892 per year). Neither the Support Magistrate nor Family Court accepted the income shown in the tax return, which they were entitled to do (*see e.g. Matter of Childress v Samuel*, 27 AD3d 295, 296 [2006]). While exercising its discretion to impute income to respondent (*see e.g.* Family Court Act § 413[1][b][5][v]), the court was "required to provide a clear record of the source from which the income is imputed and the reasons for such imputation" (*Matter of Kristy Helen T. v Richard F.G.*, 17 AD3d 684, 685 [2005]) and "the record is not sufficiently developed to permit appellate review" (*id.*). When calculating respondent's income, the court should deduct the child support that respondent provided to his two sons who are

not the subject of the instant action (*see* Family Court Act § 413[1][b][5][vii][D]).

The Support Magistrate was not "interested" within the meaning of Judiciary Law § 14. "In the absence of statutory grounds, the decision upon a recusal motion is a discretionary one . . . and should not be disturbed unless the moving party can point to an actual ruling which demonstrates bias, which appellant does not do here" (*Yannitelli v D. Yannitelli & Sons Constr. Corp.*, 247 AD2d 271, 271 [1998], *lv dismissed* 92 NY2d 875 [1998] [internal quotation marks, emendations, and citations omitted]).

Respondent's contention that the purge amount set in the October 2008 order ($18,000) is excessive is premature because the purge amount is part of the Support Magistrate's recommendation of incarceration, which is subject to confirmation by Family Court (*see* Family Court Act § 439[a]). Since Family Court will determine whether respondent is below the poverty line, we note that "[w]here the non-custodial parent's income is less than or equal to the poverty income guidelines amount for a single person . . . unpaid child support arrears in excess of five hundred dollars shall not accrue" (Family Court Act § 413[1][g]).

Respondent's argument that the contempt proceeding against

him for violating a support order should have been dismissed because he was never served with the violation petition is unavailing. In open court on May 12, 2005, respondent's attorney said that petitioner could serve her with the petition; respondent, who was in court, did not disagree. On June 13, 2005, respondent's attorney received the petition, as respondent himself admitted in paragraph 5(c) of his affidavit, sworn to on July 11, 2005.

Respondent's contention that due process was violated lacks merit. "Due process is satisfied so long as a party receives reasonable notice of a claim and an opportunity to be heard" (*Matter of Stone v Stone*, 218 AD2d 824, 825-826 [1995], *lv dismissed* 87 NY2d 843 [1995]). Respondent received both.

We also reject respondent's argument that the contempt proceeding should have been dismissed because the Support Magistrate did not decide his motion to dismiss within 60 days. The 60-day deadline in CPLR 2219(a) is "precatory . . . so that a decision rendered after the expiration of the allotted time is still a valid one" (Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C2219:2).

We have considered respondent's remaining arguments, to the extent they are preserved and properly before us on this appeal, and find them devoid of merit.

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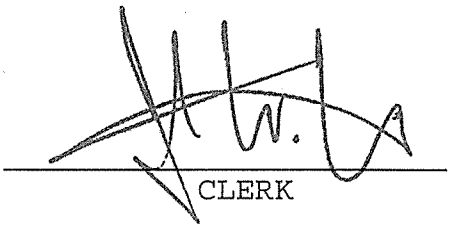
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: DECEMBER 8, 2009



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Tom, J.P., Nardelli, Renwick, Freedman, Roman, JJ.

1667-
1668-
1668A Barrett Japaning, Inc., Index 102165/06
Plaintiff-Respondent,

-against-

Anna Bialobroda,
Defendant-Appellant,

Sebastien Klotz, et al.,
Defendants.

Anna Bialobroda, appellant pro se.

Zane and Rudofsky, New York (Edward S. Rudofsky of counsel), for respondent.

Judgment, Supreme Court, New York County (Marylin G. Diamond, J.), entered June 6, 2008, to the extent appealed from, enjoining defendant Bialobroda from having persons unrelated to her (other than one roommate) occupy the fifth floor apartment and directing all but one of the co-residents to vacate the premises, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered March 27, 2008, to the extent that order granted plaintiff's motion for summary injunctive relief, unanimously dismissed, without costs, as subsumed in appeal from judgment. Appeal from order, same court and Justice, entered October 30, 2006, to the extent it dismissed Bialobroda's seventh and eight counterclaims, unanimously

dismissed, without costs, as untimely taken.

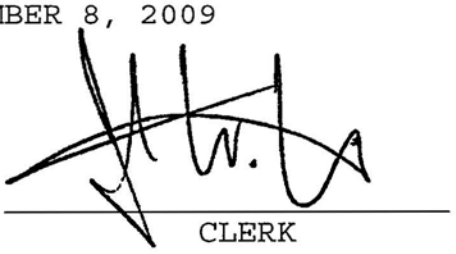
Regardless of whether or not the building is covered by the Multiple Dwelling Law, the so-called roommate law (Real Property Law § 235-f[3]) permits only one occupant in the subject apartment in addition to the lawful tenant and family. While this statute was not intended to provide a remedy for landlords (*see Capital Holding Co. v Stravrolakes*, 242 AD2d 240, 243 [1997], *affd* 92 NY2d 1009 [1998]), the landlord may enforce a lease clause where, as here, it is consistent with the statute (*see Roxborough Apts. Corp. v Becker*, 296 AD2d 358 [2002]). There was no evidence that Bialobroda and her roommates constituted a nontraditional "family" with a long-term relationship, and characterized by emotional and financial commitment and interdependence (*see Braschi v Stahl Assoc. Co.*, 74 NY2d 201, 211 [1989]).

Bialobroda's appeal from the 2008 judgment does not bring up for review the 2006 order, since she seeks to challenge only so much of that order as dismissed her seventh and eighth counterclaims. An appeal from a judgment encompasses any nonfinal determination that necessarily affects the judgment (CPLR 5501[a][1]; *see* Siegel, NY Prac § 530, at 910 [4th ed]; 12 Weinstein-Korn-Miller, NY Civ Prac ¶ 5501.03 [2d ed]). The judgment dealt solely with Bialobroda's roommate claims, and was

not affected by the 2006 ruling dismissing -- with finality (*see Burke v Crosson*, 85 NY2d 10, 16 [1995]) -- her counterclaims for breach of warranty of habitability and discrimination.

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

ENTERED: DECEMBER 8, 2009



CLERK

Tom, J.P., Nardelli, Renwick, Freedman, Roman, JJ.

1669-
1669A Christine Yuen, Index 114841/06
Plaintiff-Respondent,

-against-

Edwin Yuen K. Wong, et al.,
Defendants-Appellants.

Joseph D. Manno, Staten Island, for appellants.

Eugene A. Gaer, New York, for respondent.

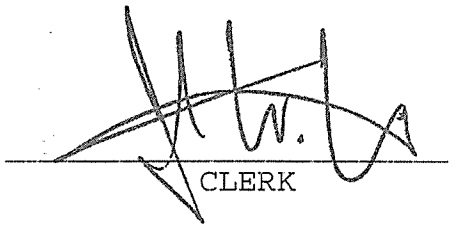
Judgment, Supreme Court, New York County (Milton A. Tingling, J.), entered June 24, 2008, awarding plaintiff the total sum of $225,332.59, pursuant to an order, same court and Justice, entered June 17, 2008, which granted plaintiff's motion for summary judgment, unanimously affirmed, with costs. Appeal from the aforesaid order unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

In opposition to plaintiff's showing that defendants executed the promissory note and defaulted in payment (*see Alard, L.L.C. v Weiss*, 1 AD3d 131 [2003]), defendants' evidence was

insufficient to raise a triable issue of fact concerning any of the payments they claim should be credited against the note.

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

ENTERED: DECEMBER 8, 2009



Tom, J.P., Nardelli, Renwick, Freedman, Roman, JJ.

1672 In re Lovenia V.,

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

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

Michael A. Cardozo, Corporation Counsel, New York (Kristin M. Helmers of counsel), for presentment agency.

Order of disposition, Family Court, Bronx County (Juan M. Merchan, J.), entered on or about September 8, 2008, which adjudicated appellant a juvenile delinquent, upon a fact-finding determination that she committed acts which, if committed by an adult, would constitute the crimes of attempted assault in the second and third degrees and menacing in the second degree, and placed her on probation for a period of 12 months, unanimously modified, on the law, to the extent of vacating the finding as to attempted assault in the third degree and dismissing that count of the petition, and otherwise affirmed, without costs.

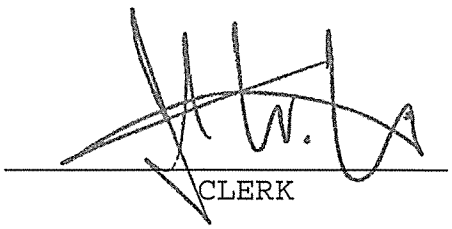
The court's finding was based on legally sufficient evidence and was not against the weight of the evidence. Appellant's conduct in chest-butting her teacher, swinging at him hard enough to cause a scratch, and then continuing to kick and lash out for

several minutes supported an inference that she intended to cause physical injury (*see e.g. Matter of Jose B.*, 47 AD3d 461 [2008]), especially since relatively minor injuries causing moderate, but "more than slight or trivial pain" may constitute physical injury (*People v Chiddick*, 8 NY3d 445, 447 [2007]; *see also People v Guidice*, 83 NY2d 630, 636 [1994]). The evidence also supported the finding as to second-degree menacing, in that appellant placed the victim in reasonable fear of physical injury (*see Matter of Tjay T.*, 34 AD3d 1060, 1061 [2006]) by threatening him with an umbrella, which, under the circumstances, was a dangerous instrument (*see People v Dones*, 279 AD2d 366 [2001], *lv denied* 96 NY2d 799 [2001]).

The charge of attempted third-degree assault should have been dismissed as a lesser included offense of attempted second-degree assault.

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

ENTERED: DECEMBER 8, 2009



Tom, J.P., Nardelli, Renwick, Freedman, Roman, JJ.

1673 The People of the State of New York, Respondent,

SCI 6214/03

-against-

Tyrone Wilson,
Defendant-Appellant.

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

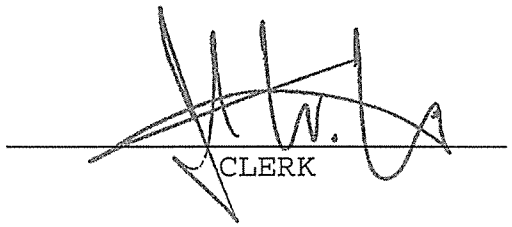
Robert M. Morgenthau, District Attorney, New York (Britta Gilmore of counsel), for respondent.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Patricia Nunez, J.), rendered on or about December 18, 2008,

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.

ENTERED: DECEMBER 8, 2009



CLERK

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

Tom, J.P., Nardelli, Renwick, Freedman, JJ.

1675 JFK Holding Company, LLC, et al., Index 110582/08
Plaintiffs-Respondents,

-against-

City of New York, et al.,
Defendants-Appellants.

Michael A. Cardozo, Corporation Counsel, New York (Dona B. Morris of counsel), for appellants.

Kasowitz Benson Torres & Friedman LLP, New York (Michael J. Bowe of counsel), for respondents.

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered May, 13, 2009, which denied defendants' motion to dismiss the complaint pursuant to CPLR 3211(a)(1) and (7), unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment in favor of defendants dismissing the complaint.

Although, on a motion to dismiss pursuant to CPLR 3211, the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]),

> [i]t is well settled that bare legal conclusions and factual claims, which are either inherently incredible or flatly contradicted by documentary evidence . . .

> are not presumed to be true on a motion to dismiss for legal insufficiency . . . and that when the moving party offers matter extrinsic to the pleadings, the court need not assume the truthfulness of the pleaded allegations, but rather is required to determine whether the opposing party actually has a cause of action or defense, not whether he has properly stated one (*O'Donnell, Fox & Gartner v R-2000 Corp.*, 198 AD2d 154, 154 [1993]).

Here, plaintiffs leased to The Salvation Army certain premises to be used as a homeless shelter. The lease provided that it was entered into solely to fulfill the obligations of The Salvation Army to defendant Department of Homeless Services ("DHS") under a separate services agreement and further permitted termination in the event the City terminated the services agreement upon payment of a termination fee and restoration of the premises to the same condition in which it was let. There is no language incorporating the services agreement into the lease. Article 9 of the services agreement provided only that, if the City terminates the services agreement prior to expiration of the lease and DHS elects not to cause the lease to be assigned, the DHS was obligated either (1) to continue payment of the required lease payments or (2) pay The Salvation Army the applicable termination payment. The $10 million termination payment was paid to The Salvation Army which forwarded the funds to plaintiff in payment of its lease termination fee.

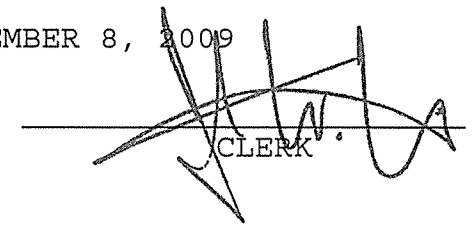
Plaintiff commenced this action alleging that the City

breached an oral contract in which the City agreed to assume and honor all the outstanding obligations under the lease, including but not limited to all rent, payment and restoration obligations, in exchange for which plaintiffs agreed to forgo an immediate legal action against The Salvation Army and DHS.

Defendants' dismissal motion should have been granted. While the City disputes the existence of the claimed oral agreement to forego legal action, even if such agreement had been made it would have been invalid and unenforceable since, pursuant to NY City Charter §§ 394(b) and 328(a), any enforceable agreement with the City must be in writing, approved as to form by the Corporation Counsel, and registered with the Comptroller (*see Granada Bldgs. v City of Kingston*, 58 NY2d 705, 708 [1982]; *Infrastructure Mgt. Sys. v County of Nassau*, 2 AD3d 784, 786 [2003]). Nor was there evidence that the lease was assumed by the City and, contrary to plaintiffs' contention, estoppel does not generally lie against municipalities (*see Matter of Parkview Assocs. v City of New York*, 71 NY2d 274, 282 [1988], *cert denied* 488 US 801 [1988]).

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

ENTERED: DECEMBER 8, 2009



Tom, J.P., Nardelli, Renwick, Freedman, Roman, JJ.

1677-
1678 In re Gregory L.B.,
Petitioner-Respondent,

-against-

Magdelena G.,
Respondent-Appellant.

Howard M. Simms, New York, for appellant.

Rosemary Rivieccio, New York, for respondent.

Steven N. Feinman, White Plains, Law Guardian.

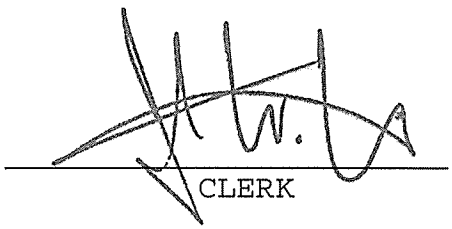
Order, Family Court, New York County (Elizabeth Barnett, Referee), entered on or about March 4, 2008, which, inter alia, granted petitioner father's petition to modify an earlier order awarding joint legal custody of the subject child to the parties, with sole physical custody of the child to respondent mother and visitation to the father, and awarded the father sole legal and physical custody with visitation to the mother, and which denied the mother's petition for sole custody of the child, unanimously affirmed, without costs.

The record establishes that following the issuance of the joint custody order in March 2004, the mother wilfully violated multiple court orders by unilaterally deciding, inter alia, the child's education and medical needs, and also by continuously

interfering with the father's visitation rights. The mother, unlike the father, did not cooperate with the attempts by a court appointed social worker and psychologist to facilitate the parties' co-parenting arrangement, and her conduct and attitude indicated a continued unwillingness to support and encourage a relationship between the father and his son (*see e.g. Matter of Mildred S.G. v. Mark G.*, 62 AD3d 460 [2009]). Accordingly, the court's conclusion that an award of sole custody to the father would be in the best interests of the child was supported by a sound and substantial basis in the record, and is entitled to deference (*see Eschbach v Eschbach*, 56 NY2d 167, 173 [1982]).

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

ENTERED: DECEMBER 8, 2009



CLERK

Tom, J.P., Nardelli, Renwick, Freedman, Roman, JJ.

1680 Sarit Shmueli, Index 104824/03
Plaintiff-Respondent,

-against-

NRT New York, Inc., doing business as
The Corcoran Group,
Defendant-Appellant.

Bragar Wexler Eagel & Squire, PC, New York (Lawrence P. Eagel of counsel), for appellant.

Sarit Shmueli, respondent pro se.

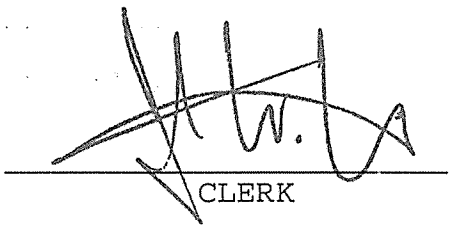
Judgment, Supreme Court, New York County (Michael Stallman, J. and a jury), entered January 5, 2007, awarding plaintiff compensatory damages of $400,000 plus prejudgment interest, and punitive damages of $1,200,000 plus postverdict interest, unanimously modified, on the law, to vacate the award of punitive damages, and otherwise affirmed, without costs.

The award of compensatory damages is supported by the weight of the evidence showing that when defendant, a real estate brokerage firm, terminated its association with plaintiff, a real estate broker, defendant converted plaintiff's customer list and other information that she had stored on the computer that defendant had provided to her, and that plaintiff's resulting loss of commissions amounted to $400,000. We vacate the award of punitive damages because defendant's practice of precluding a

terminated employee from having access to its computer system does not evince a high degree of moral turpitude (*see Ross v Louise Wise Servs., Inc.*, 8 NY3d 478, 489 [2007]).

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

ENTERED: DECEMBER 8, 2009



Tom, J.P., Nardelli, Renwick, Freedman, Roman, JJ.

1681 The People of the State of New York, Ind. 1153/07
Respondent,

-against-

Jonathan Cando,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Sheila L. Bautista of counsel), for respondent.

Judgment, Supreme Court, New York County (A. Kirke Bartley, J. at suppression hearing; Robert Stolz, J. at jury trial and sentence), rendered March 19, 2008, convicting defendant of robbery in the second degree, and sentencing him to a term of 3½ years, unanimously affirmed.

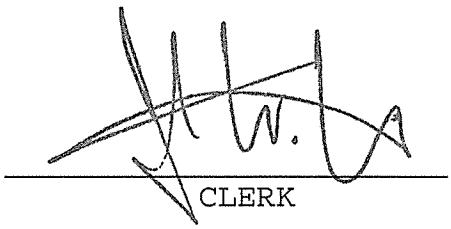
The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's determinations concerning identification. The victim had a sufficient opportunity to observe defendant, gave a detailed and accurate description, and made a reliable lineup identification.

The court properly denied defendant's suppression motion. The hearing evidence, including the lineup photographs,

establishes that the lineup was not unduly suggestive (*see People v Chipp*, 75 NY2d 327, 336 [1990] *cert denied* 498 US 833 [1990]). Defendant was not noticeably younger than the other participants, and the police successfully concealed anything distinctive about defendant's hairstyle by having all the participants wear hats.

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

ENTERED: DECEMBER 8, 2009



CLERK

Tom, J.P., Nardelli, Renwick, Freedman, Roman, JJ.

1682 Wooster 76 LLC, Index 111970/04
Plaintiff-Respondent-Appellant,

-against-

David Ghatanfard, et al.,
Defendants-Appellants-Respondents.

Harold, Salant, Strassfield & Spielberg, White Plains (Leonard I. Spielberg of counsel), for appellants-respondents.

Robinowitz Cohlan Dubow & Doherty, LLP, White Plains (Bruce Minkoff of counsel), for respondent-appellant.

Corrected judgment, Supreme Court, New York County (Marylin G. Diamond, J.), entered February 27, 2009, after a nonjury trial, awarding plaintiff landlord against defendants tenants jointly and severally the sum of $115,334.69 consisting of $129,000 in arrears plus interest, costs and disbursements for a total of $190,334.69, against which a $75,000 credit for the security deposit was applied, and $687,849.73 against defendant GMD Restaurant, Inc. for the $545,000 balance owed on the lease plus interest, and awarding plaintiff reasonable attorneys fees and expenditures and referring the issue of such fees to a Special Referee, unanimously modified, on the law, to the extent of directing that the $75,000 credit for the security deposit be applied before the calculation of the interest on the arrears, and otherwise affirmed, without costs, and the matter remanded

for further proceedings consistent herewith.

In this commercial landlord-tenant action, plaintiff's delivery of the lease was established by, inter alia, defendants' assignment of the lease and their letters attempting to cancel it (*see* 51 AD3d 428 [2008]), as well as plaintiff's deposit of the security deposit, delivery of a key to the premises, provision of the lease to defendants' liquor license counsel, invoicing of defendants and rejection of their attempt to cancel the lease. The foregoing acts and words manifested the intent to convey the interest in the leased premises (*see 219 Broadway Corp. v Alexander's, Inc.*, 46 NY2d 506, 512 [1979]).

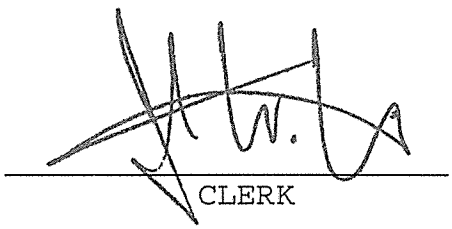
The court's finding that Ghatanfard's obligations under the guaranty ended three months after plaintiff's receipt of the notice of termination was consistent with the court's prior ruling (*see* 51 AD3d at 428), as conceded by defendants at trial. Moreover, the guaranty's clear language provided that any termination would not be effective until three months after plaintiff's receipt of the termination notice. To interpret the guaranty otherwise would render the provision delaying the effective date of termination meaningless, in contravention of rules of contractual construction (*see RM 14 FK Corp. v Bank One Trust Co., N.A.*, 37 AD3d 272, 274 [2007]; *Helmsley-Spear, Inc. v New York Blood Ctr.*, 257 AD2d 64, 69 [1999]). In finding that

plaintiff failed to establish that it did not receive the termination notice on December 3, 2003, the trial court credited the testimony of defendants' counsel as to service and appropriately found that plaintiff's forensic expert's testimony that it was "highly probable" the document was created on a later date was insufficient to meet its burden.

Furthermore, the lease provided plaintiff with the authority to "use, apply or retain the whole or any part of the security [deposit] to the extent required for the payment of any rent and additional rent . . ." Accordingly, nothing prevented plaintiff from applying the security deposit to the arrears, but the interest on the arrears should not have been calculated prior to the application of a credit for the security deposit.

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

ENTERED: DECEMBER 8, 2009



CLERK

Tom, J.P., Nardelli, Renwick, Freedman, Roman, JJ.

1684N-
1684NA-
1684NB United States Fidelity & Guaranty Company, et al.,
Plaintiffs-Respondents,

-against-

Excess Casualty Reinsurance Association, et al.,
Defendants-Appellants,

American Re-Insurance Company, et al.,
Defendants.

Index 604517/02

Quinn Emanuel Urquhart Oliver & Hedges, LLP, New York (Michael B. Carlinsky of counsel), for appellants.

Simpson Thacher & Bartlett LLP, New York (Mary Kay Vyskocil of counsel), for respondents.

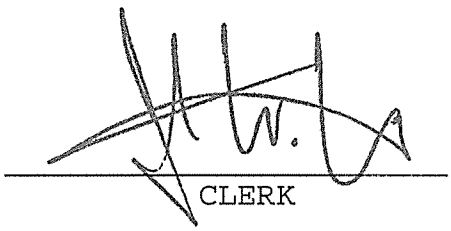
Orders, Supreme Court, New York County (Richard B. Lowe, III, J.), entered October 21, 2008, January 9, 2009 and January 23, 2009, which, inter alia, denied defendants-appellants' (reinsurers) motion to compel plaintiff (cedant) to disclose attorney-client communications, unanimously affirmed, with costs.

Our prior decision in *American Re-Insurance Co. v United States Fid. & Guar. Co.* (40 AD3d 486, 492-493 [2007]) held that cedant's waiver of the attorney-client privilege was limited to communications between its officer, James Kleinberg, and Robert Omrod, the in-house lawyer whose advice Kleinberg disclosed at his EBT, regarding preparation of cedant's re-insurance bill.

Our citation to *Kirschner v Klemons* (2001 US Dist LEXIS 17863, 2001 WL 1346008 [SDNY 2001]) ought to have made it clear that, based on cedant's representation that it did not intend to use "advice of counsel" as a defense, our finding of waiver did not extend to cedant's communications with any other attorneys concerning this subject matter. In view of cedant's concession, however, that it will not raise the "advice of counsel" defense and make any reference to attorney-client communications by cedant at the trial, we agree that the court should not permit cedant to raise this defense to reinsurers' claims, or refer to any such communications.

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

ENTERED: DECEMBER 8, 2009



CLERK

Tom, J.P., Nardelli, Renwick, Freedman, JJ.

1685N Neftali Mendoza, Index 115242/03
Plaintiff-Appellant,

-against-

The City of New York, et al.,
Defendants-Respondents.

Bader Yakaitis & Nonnenmacher, LLC, New York (John J. Nonnenmacher of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Norman Corenthal of counsel), for respondents.

Order, Supreme Court, New York County (Paul G. Feinman, J.), entered December 17, 2007, which granted plaintiff's motion to strike defendants' answer only to the extent of directing defendants to disclose requested discovery materials within 45 days or be precluded from contesting liability, unanimously affirmed, without costs.

The drastic sanction sought by plaintiff was properly denied for failure to show that defendants' delays in meeting its disclosure obligations were willful and contumacious (*see Mangual v New York City Tr. Auth.*, 48 AD3d 212 [2008]).

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

ENTERED: DECEMBER 8, 2009

CLERK

Andrias, J.P., Saxe, Sweeny, Moskowitz, Abdus-Salaam, JJ.

1686 The People of the State of New York, Ind. 2654/06
Respondent,

-against-

Herman Thomas,
Defendant-Appellant.

Stanley Neustadter, New York (Glenn A. Garber of counsel), for appellant.

Herman Thomas, appellant pro se.

Robert M. Morgenthau, District Attorney, New York (Patricia Curran of counsel), for respondent.

Judgment, Supreme Court, New York County (Charles H. Solomon, J. at suppression motion; Edward J. McLaughlin, J. at jury trial and sentence), rendered May 18, 2007, convicting defendant of manslaughter in the second degree, vehicular manslaughter in the second degree, reckless endangerment in the first degree, assault in the second degree, vehicular assault in the second degree, operating a motor vehicle while under the influence of alcohol, operating a motor vehicle while impaired by drugs and two counts of assault in the third degree, and sentencing him to an aggregate term of 6 to 15 years, unanimously affirmed.

The court properly denied defendant's motion to suppress the results of a blood test. The test was not the product of an

unlawful arrest, because the police had probable cause to believe defendant had driven while intoxicated, based on such factors as the odor of alcohol on his breath, his slurred speech, his uncooperative behavior, and the fact that he had evidently caused a very serious traffic accident. Under the circumstances, defendant's Alco-Sensor reading, which was slightly below the legal limit, was far from conclusive, and it did not undermine probable cause. We have considered and rejected defendant's remaining arguments concerning the blood test, including those contained in his pro se supplemental brief.

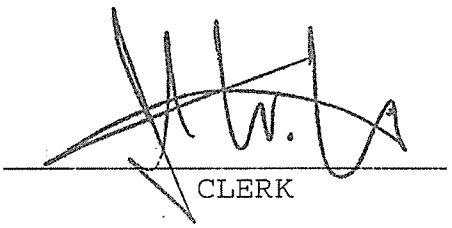
We reject defendant's challenge to the sufficiency of the evidence supporting his conviction of reckless endangerment in the first degree. Defendant's egregious conduct, viewed as a whole, supported the conclusion that he acted with the culpable mental state of depraved indifference to human life (*see People v Feingold*, 7 NY3d 288 [2006]; *People v Mooney*, 62 AD3d 725 [2009], *lv denied* __ NY3d __, 2009 NY LEXIS 3447 [2009]).

The record does not establish that defendant's sentence was

based on any improper criteria, and we perceive no basis for reducing the sentence.

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

ENTERED: DECEMBER 8, 2009



CLERK

Andrias, J.P., Saxe, Sweeny, Moskowitz, Abdus-Salaam, JJ.

1689 Luisa C. Esposito, Index 109446/06
Plaintiff-Respondent,

-against-

Allen H. Isaac, etc.,
Defendant-Appellant,

Harvey Gladstein, etc., et al.,
Defendants.

Gordon & Rees LLP, New York (Diane Krebs of counsel), for appellant.

Luisa Castagna Esposito, respondent pro se.

Order, Supreme Court, New York County (Doris Ling-Cohan, J.), entered October 9, 2008, which denied defendant Allen H. Isaac's motion to reject so much of a referee's report as found that plaintiff established grounds for an extension of time to serve the complaint, and confirmed the report in its entirety, unanimously reversed, on the law and the facts, without costs, and the motion granted. The Clerk is directed to enter judgment in favor of defendant dismissing the complaint as against him.

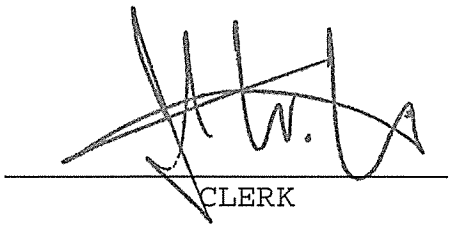
Plaintiff failed to satisfy the criteria for an extension of time to serve either upon good cause shown or in the interest of justice (*see* CPLR 306-b; *Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95, 103-104 [2001]). As to good cause, plaintiff failed to demonstrate diligence in effecting service (*see Leader* at 105).

The referee found that the process server "at best, was sloppy, and at worst, was untruthful." And, having provided an incorrect address for defendant, plaintiff appears to have made insufficient efforts to locate the correct address.

As to the interest of justice standard, while plaintiff moved promptly for an extension of time in response to defendant's motion to dismiss, she failed to show either that her cause of action was meritorious or that there was no prejudice to defendant (*see Leader* at 105-106). There is no evidence that defendant had notice of the action at any time before the end of the 120-day period for making service (*see Yardeni v Manhattan Eye, Ear & Throat Hosp.*, 9 AD3d 296, 297-298 [2004], *lv denied* 4 NY3d 704 [2005]). In light of the foregoing, the fact that the statute of limitations has expired does not warrant an extension (*see Leader* at 107; *Okoh v Bunis*, 48 AD3d 357 [2008]).

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

ENTERED: DECEMBER 8, 2009



CLERK

Andrias, J.P., Saxe, Sweeny, Moskowitz, Abdus-Salaam, JJ.

1691 The People of the State of New York, Ind. 3398/07
Respondent,

-against-

Darnell Jackson,
Defendant-Appellant.

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

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

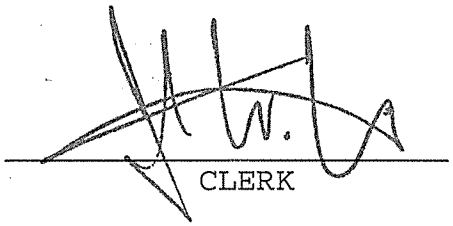
Judgment, Supreme Court, New York County (Marcy L. Kahn, J.), rendered June 19, 2008, convicting defendant, after a jury trial, of two counts of assault in the third degree and sentencing him to concurrent terms of 60 days and 30 days, followed by three years of probation, unanimously affirmed.

The trial court properly denied defendant's for cause challenge to a prospective juror who indicated that she was "affected" by a prior mugging because the panelist, upon the court's and prosecutor's inquiry, indicated that she could remain

impartial and follow the court's instructions (*compare People v Valdivia*, 65 AD3d 950, 950 [2009], *with People v Sarubbi*, 61 AD3d 493, 493 [2009]).

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

ENTERED: DECEMBER 8, 2009



Andrias, P.J., Saxe, Sweeny, Moskowitz, Abdus-Salaam, JJ.

1692 Pedro Arriola, et al., Index 302904/08
Plaintiffs-Respondents,

-against-

A&W Landscaping of Long Island,
Defendant-Appellant.

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

David Resnick & Associates, P.C., New York (David Resnick of counsel), for respondents.

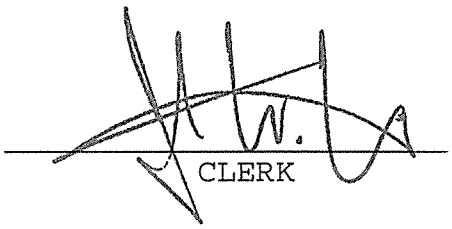
Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered August 21, 2009, which, in an action for personal injuries sustained in a slip and fall on ice in a parking lot, denied defendant's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment in favor of defendant dismissing the complaint.

Dismissal of the complaint is warranted in this action where plaintiff alleges that his fall was due to defendant's failure to properly perform its snow-removal duties. The record shows that defendant met its prima facie burden of showing that it did not launch an instrument of harm by submitting evidence that it plowed the parking lot to the satisfaction of its owner several days before plaintiff's fall. Plaintiff's testimony that on the

day of his accident, he observed approximately six inches of ice in some spots of the parking lot did not create a material issue of fact (*see Fung v Japan Airlines Co., Ltd.*, 9 NY3d 351, 360-361 [2007]; *Espinal v Melville Snow Contrs., Inc.*, 98 NY2d 136, 141 [2002] [defendant "was under no obligation to monitor the weather to see if melting and refreezing would create an icy condition"]; *Cason-Payano v Damiano*, 58 AD3d 472 [2009]).

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

ENTERED: DECEMBER 8, 2009



Andrias, J.P., Saxe, Sweeny, Moskowitz, Abdus-Salaam, JJ.

1696 The People of the State of New York, Ind. 454/04
Respondent,

-against-

Phillip Clark,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Brian J. Reimels of counsel), for respondent.

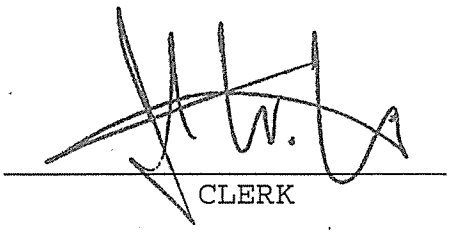
Order, Supreme Court, Bronx County (Megan Tallmer, J.), entered on or about November 3, 2008, which adjudicated defendant a level three sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The record supports the court's discretionary upward departure to a level three sex offender adjudication. Defendant committed a serious sexual assault that was similar to the offense requiring registration, but that was not accounted for in the risk assessment instrument because it was a subsequent offense. This conduct demonstrates that defendant poses an

increased risk to public safety, and warrants the upward departure (*see People v Buss*, 44 AD3d 634, 635 [2007], *affd* 11 NY3d 553 [2008]).

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

ENTERED: DECEMBER 8, 2009



CLERK

Andrias, J.P., Saxe, Sweeny, Moskowitz, Abdus-Salaam, JJ.

1698-
1699 In re Anahys V., and Another,

Children Under the Age
of Eighteen Years, etc.,

John V.,
Respondent-Appellant,

Katherine O.,
Respondent,

New York City Administration for
Children's Services,
Petitioner-Respondent.

Dora M. Lassinger, East Rockaway, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Victoria Scalzo of counsel), for ACS respondent.

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

Order of disposition, Family Court, Bronx County (Gayle P. Roberts, J.), entered on or about December 12, 2008, which, upon a fact-finding determination that respondent father sexually abused the subject children, placed the children in the custody of the Commissioner of Social Services until the completion of the permanency hearing scheduled for January 29, 2009, unanimously affirmed insofar as it brings up for review the fact-finding determination, and the appeal otherwise dismissed, without costs.

The children's out-of-court statements were corroborated by hospital records noting the older child's noticeable change in demeanor when talking about respondent; the testimony of the expert in child psychology who found that the child's disclosures were consistent with prior disclosures to others and that her narrative was spontaneous and lacked the "robotic" quality of coached children; and therapy records revealing the child's repeated declarations that respondent had abused her and her sister, and her continued anger at respondent, fear of him, and nightmares and other symptoms (*see e.g. Matter of Jaclyn P.*, 86 NY2d 875 [1995], *cert denied sub nom. Papa v Nassau County Dept. of Social Servs.*, 516 US 1093 [1996]; *Matter of Shirley C.-M.*, 59 AD3d 360 [2009]; *Matter of Keisha McL.*, 261 AD2d 341 [1999]). Although the younger child's verbal limitations and lack of detail render her statement insufficient alone to support a finding of sexual abuse, the statements of the children were cross-corroborative, given the similarity of their accounts of respondent's conduct and the older child's repeated statements that respondent had touched her sister in the same way as he had touched her (*see e.g. Matter of Nicole V.*, 71 NY2d 112, 124 [1987]).

The court properly admitted the expert's report into evidence without redacting the statements of the children's

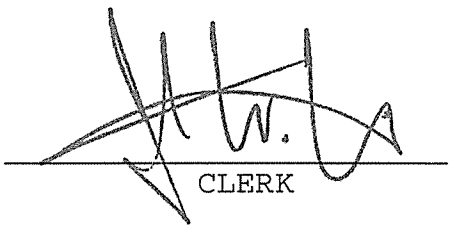
foster mother, since these statements were admitted not for their truth but to show the information on which the expert relied in forming his opinion (*see Rivera v City of New York*, 200 AD2d 379 [1994]).

Respondent's challenge to the court's denial of his request for an adjournment of the dispositional hearing is academic, as the order of disposition has expired by its own terms (*see Matter of Vincent L.*, 46 AD3d 395, 396 [2007]). In any event, respondent admittedly was not in a position to take custody of the children, and the court properly determined that he could contest the issue of visitation at the permanency hearing.

We have reviewed respondent's remaining contention and find it unavailing.

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

ENTERED: DECEMBER 8, 2009



CLERK

Andrias, J.P., Saxe, Sweeny, Moskowitz, Abdus-Salaam, JJ.

1702 The People of the State of New York, Ind. 1909/07
Respondent,

-against-

Manuel Vega,
Defendant-Appellant.

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

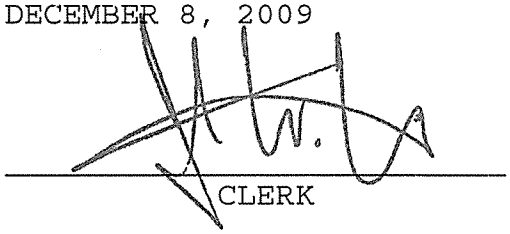
Robert T. Johnson, District Attorney, Bronx (Maureen A. Lee of counsel), for respondent.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Efrain Alvarado, J.), rendered on or about May 13, 2008,

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.

ENTERED: DECEMBER 8, 2009



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

Andrias, J.P., Saxe, Sweeny, Moskowitz, Abdus-Salaam, JJ.

1703-
1703A Kenneth DeRiggi, Index 104300/07
Plaintiff-Respondent,

-against-

Edward Brady, et al.,
Defendants-Appellants,

Mark Saad, et al.,
Defendants.

David E. Frazer, New York, for appellants.

Abraham, Lerner & Arnold, LLP, New York (Frank P. Winston of counsel), for respondent.

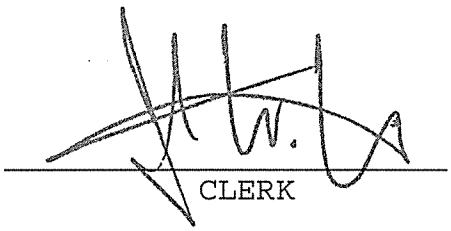
Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered April 1, 2009, which granted plaintiff's motion pursuant to CPLR 3126 to strike defendants' answer and counterclaims, unanimously affirmed, with costs. Order, same court and Justice, entered July 2, 2009, which, to the extent appealable, denied defendants' motion to renew or to vacate the April 1 order, unanimously affirmed, with costs.

Defendants' unexplained failure to comply with several disclosure orders, the last of which explicitly advised that defendants' answer would be struck if compliance were not forthcoming, was willful and contumacious and warranted the

extreme sanction of striking of their answer (*see Zletz v Wetanson*, 67 NY2d 711 [1986]; *Helms v Gangemi*, 265 AD2d 203, 204 [1999]). We have considered defendants' other contentions and find them unavailing.

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

ENTERED: DECEMBER 8, 2009



CLERK

Andrias, J.P., Saxe, Sweeny, Moskowitz, Abdus-Salaam, JJ.

1704 Tanyayette Willoughby, et al., Index 121922/03
Plaintiffs-Respondents,

-against-

The Mount Sinai Hospital, etc.,
Defendant-Appellant.

Wenick & Finger, P.C, New York (Frank J. Wenick of counsel), for appellant.

Armand J. Rosenberg, New York, for respondents.

Order, Supreme Court, New York County (Paul G. Feinman, J.), entered March 24, 2009, which, inter alia, in this action for false imprisonment against a hospital, denied defendant's cross motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the cross motion granted. The Clerk is directed to enter judgment in favor of defendant dismissing the complaint.

Plaintiff Willoughby was a patient at defendant hospital from January 21 to February 3, 2003. She voluntarily presented there with her husband, at which time a physician concluded that plaintiff should be an emergency admission pursuant to Mental Hygiene Law § 9.39, which provides that a person may be held for involuntary care and treatment for up to 15 days of admission. Moreover, four days after her admission, she signed a "Seventy-

Two Hour Retraction Letter" in which she stated her willingness to voluntarily remain at the hospital. In a prior appeal, we affirmed the denial of plaintiffs' motion for summary judgment because an issue of fact was raised as to whether she consented to all or part of the alleged 14-day unlawful confinement (*see* 15 AD3d 264 [2005]).

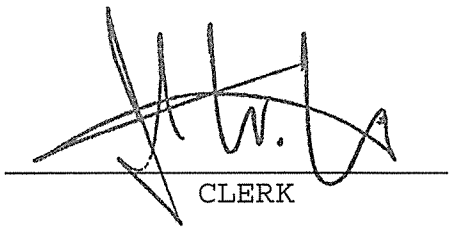
Defendant has established its prima facie entitlement to judgment as a matter of law by showing that the confinement was privileged (*see* Mental Hygiene Law § 9.39; *see also Tewksbury v State of New York*, 273 AD2d 376 [2000], *lv denied* 95 NY2d 766 [2000]). The evidence, which included the testimony of the psychiatrist who treated plaintiff during her stay at the hospital, as well as the affirmation of a psychiatrist who reviewed and evaluated plaintiff's records and performed examinations of plaintiff, demonstrated that plaintiff had a qualifying "mental illness" for emergency admission under Mental Hygiene Law § 9.39, and that defendant did not depart from good and accepted medical standards in admitting and treating plaintiff.

In opposition, plaintiff failed to raise a triable issue of fact and her challenges to the admissibility of defendant's evidence are unavailing. Plaintiff did not produce an expert medical affirmation to rebut the conclusions of the

aforementioned psychiatrists, nor did she show that an issue of fact existed, particularly in light of her affidavit in which she said that she "went to the hospital voluntarily," and the "Seventy-Two Hour Retraction Letter," wherein she stated her willingness to remain at the hospital.

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

ENTERED: DECEMBER 8, 2009



CLERK

Andrias, J.P., Saxe, Sweeny, Moskowitz, Abdus-Salaam, JJ.

1705N Efraim Shurka, Index 304584/08
Plaintiff-Appellant,

-against-

Jane Shurka,
Defendant-Respondent.

Michael C. Marcus, Long Beach, for appellant.

Ira E. Garr, New York, for respondent.

Order, Supreme Court, New York County (Saralee Evans, J.), entered September 10, 2008, which, inter alia, granted defendant's motion for pendente lite relief in the form of spousal maintenance of $12,000 per month, payment of all expenses of the marital residence, $75,000 in interim fees to defendant's counsel, and the cost of an appraisal by a forensic evaluator of the closely held corporation founded by plaintiff, unanimously affirmed, with costs.

The award of temporary maintenance is amply supported by the evidence demonstrating defendant's financial need, the parties' income and assets, and their previous standard of living (*see Ritter v Ritter*, 135 AD2d 421, 422 [1987]). The undisputed evidence that the parties enjoyed a lavish marital lifestyle, as well as the evidence that substantial personal expenses were paid by the family-controlled business, supports the court's

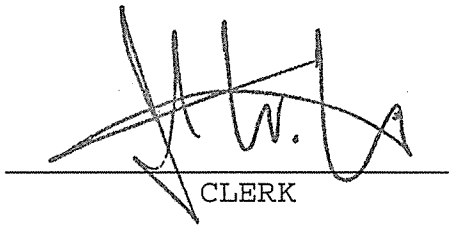
conclusion that plaintiff's actual income and financial resources were substantially greater than he reported in tax returns and financial statements (*see Wildenstein v Wildenstein*, 251 AD2d 189 [1998]; *Jose R.D. v Elisabeth R.D.*, 197 AD2d 457 [1993]). The amount awarded is substantially less than defendant requested, and corresponds with the amount plaintiff paid voluntarily for several months following the separation, before threatening to cut off all support. Plaintiff shows no exigency which would warrant departure from the general rule that an aggrieved party's remedy for perceived inequities in a pendente lite award is a speedy trial (*see Sumner v Sumner*, 289 AD2d 129 [2001]).

Whether or not plaintiff stipulated to the appointment of a financial evaluator to appraise the family-controlled business, of which he is chief executive officer, and regardless of his claims that he has no ownership interest in the company and that the company is not marital property, in light of the evidence of the commingling of plaintiff's personal finances with the company's finances, the court properly appointed an appraiser to conduct an audit to enable it to determine the equitable distribution of marital assets and an award of maintenance (*see Pechman v Pechman*, 303 AD2d 479 [2003]; *Gellman v Gellman*, 160 AD2d 265, 267 [1990]). Given the large discrepancy in the parties' respective incomes and the nature of the issues in

dispute, there is no basis for interfering with the award of interim counsel fees and the appraiser's fee (*see generally Charpie v Charpie*, 271 AD2d 169, 173 [2000]).

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

ENTERED: DECEMBER 8, 2009



Andrias, J.P., Saxe, Sweeny, Moskowitz, Abdus-Salaam, JJ.

1706N In re Lydia Gitis, Index 104327/08
Petitioner-Respondent,

-against-

The City of New York,
Respondent-Appellant.

Michael A. Cardozo, Corporation Counsel, New York (John Hogrogian of counsel), for appellant.

Rimland & Associates, Brooklyn (Anthony M. Grisanti of counsel), for respondent.

Order, Supreme Court, New York County (Edward H. Lehner, J.), entered June 23, 2008, which, in an action for personal injuries allegedly sustained as the result of a trip and fall on a public sidewalk, granted petitioner's application for leave to file a late notice of claim, unanimously reversed, on the law and the facts, and in the exercise of discretion, without costs, the application denied, and the proceeding dismissed.

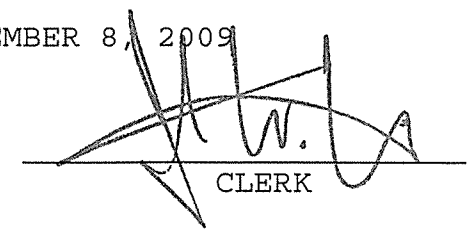
Supreme Court exercised its discretion in an improvident manner in granting plaintiff's application for leave to file a late notice of claim some three months after expiration of the applicable 90-day deadline (General Municipal Law § 50-e[1][a], [5]; *see e.g. Washington v City of New York*, 72 NY2d 881, 883 [1988]). The record shows that petitioner not only failed to demonstrate that respondent City of New York had timely actual

notice of her claim, but she also failed to establish a reasonable excuse for failing to meet the statutory deadline. Petitioner possessed the Big Apple Map reflecting defects at the subject location, and while she asserts that the delay in filing a timely notice of claim was attributable to the fact that she was awaiting documents from the Department of Transportation, those records were not necessary to the composition and timely filing of a notice of her claim (*see Potts v City of N.Y. Health & Hosps. Corp.*, 270 AD2d 129 [2000]).

Petitioner also failed to establish the absence of prejudice to the City, as photographs of the accident location taken by petitioner shortly after the accident depict the sidewalk in its original condition, while photographs taken by her investigator after the expiration of the 90-day period reveal that repairs had been made. Had timely notice been filed, the City may have been able to perform an inspection of the sidewalk in its original condition (*compare Matter of Gerzel v City of New York*, 117 AD2d 549, 551-552 [1986]).

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

ENTERED: DECEMBER 8, 2009



SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Angela M. Mazzarelli, J.P.
David B. Saxe
David Friedman
Rolando Acosta
Leland G. DeGrasse, JJ.

5001
Ind. 600057/06

The RGH Liquidating Trust, etc.,
Plaintiff-Respondent,

-against

Deloitte & Touche LLP, et al.,
Defendants-Appellants.

Defendants appeal from an order of the Supreme Court, New York County (Karla Moskowitz, J.), entered on or about November 13, 2007, which, insofar as appealed from, denied their motion to dismiss the amended complaint with respect to claims asserted on behalf of identified creditors and groups of creditors of Reliance.

Kramer Levin Naftalis & Frankel LLP, New York (Michael J. Dell, Jonathan M. Wagner and Timothy J. Helwick of counsel), for appellants.

Gage Spencer & Fleming LLP, New York (G. Robert Gage, Jr., William B. Fleming and Laura-Michelle Rizzo of counsel), for respondent.

FRIEDMAN, J.

This appeal requires us to determine whether a federal statute, the Securities Litigation Uniform Standards Act of 1998 (Pub L 105-353, 112 US Stat 3227, codified in pertinent part at 15 USC § 78bb[f] [SLUSA or the Act]), mandates the dismissal of fraud claims against an accounting firm asserted by plaintiff RGH Liquidating Trust (the RGH Trust) on behalf of the holders of bonds issued by Reliance Group Holdings, Inc. (RGH), a now-defunct insurance holding company. We hold that SLUSA bars the assertion of the bondholders' claims in this single action because these claims, which did not originally belong to RGH itself, seek recovery under state law on behalf of more than 50 persons for injuries allegedly arising from misrepresentations relating to the purchase or sale of securities traded on a national exchange. On this pleading motion, however, the claims asserted by the RGH Trust on behalf of three other categories of RGH creditors (bank lenders, two former Reliance employees, and the Pension Benefit Guarantee Corporation [PBGC]) were correctly sustained. We therefore modify the order appealed from to the extent of granting the motion to dismiss the RGH Trust's amended complaint solely as to the claims asserted on behalf of the RGH bondholders, and affirm the denial of the motion as to the claims asserted on behalf of other identified RGH creditors.

Relevant Facts Set Forth in the Amended Complaint and Documentary Evidence

RGH, through its subsidiary Reliance Financial Services Corp. (RFS), owned Reliance Insurance Company (RIC), a property and casualty insurer.[1] At all relevant times, defendant Deloitte & Touche LLP (Deloitte) functioned as Reliance's independent actuary and auditor. On or about February 25, 2000, Deloitte issued a statement of actuarial opinion for the year ended December 31, 1999, concerning RIC's insurance business. The statement of actuarial opinion was incorporated into Reliance's consolidated financial statements for the year ended December 31, 1999, which were audited by Deloitte. Based on its audit, Deloitte certified the 1999 consolidated financial statements as a fair presentation of Reliance's financial condition in accordance with generally accepted accounting principles. The 1999 financial statements, along with Deloitte's independent auditor's report, dated February 29, 2000, were publicly filed with the United States Securities and Exchange Commission on March 30, 2000, as an attachment to RGH's Form 10-K for the year ended December 31, 1999 (the 1999 10-K).

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[1]In the remainder of this writing, the name "Reliance" is used to refer to RGH, RFS and RIC individually or in any combination.

The amended complaint alleges that Reliance's 1999 consolidated financial statements, which Deloitte had certified, incorporated various inaccuracies and misleading omissions whose "combined effect . . . was an overstatement of surplus by approximately $500 million and an underreporting of net loss reserves by approximately $500 million resulting in a total overstatement of $1 billion." It should be noted, however, that the picture of Reliance's financial condition available to its creditors at the time of the filing of the 1999 10-K was far from rosy; indeed, it was grim. Among other setbacks, the company was reported to have suffered an operating loss of $318.3 million in 1999. The 1999 10-K also included a message to shareholders stating that "Reliance Group's 1999 results were unacceptable" and describing 1999 as "our annus horribilis." A month before the filing of the 1999 10-K, on February 29, 2000, RGH had announced that it was suspending its quarterly dividends and that the maturity of its bank loans had been extended from March 31 to August 31, 2000.

The amended complaint alleges that the four categories of Reliance creditors on whose behalf this action is being prosecuted -- bondholders; bank lenders; employees; and the PBGC -- relied to their detriment on Deloitte's certification of the allegedly inaccurate 1999 financial statements in the following

general ways:

> "(i) trustees for the bondholders did not exercise their rights under Trust Indenture Agreements including, but not limited to, notifying the bondholders that specific events of default had occurred and declaring the bonds due and payable; (ii) present bondholders did not take action to sell their bonds; (iii) new bond investors purchased bonds at inflated prices; (iv) the bank[] lenders and agents to the Credit Agreement did not know that specific events of default had occurred and did not exercise their rights under that Agreement including, but not limited to, calling the loans; (iv) [*sic*] the PBGC did not take action to prevent the inflation of pension benefits for which it would ultimately become financially responsible; and (v) employees of RGH and RFS did not take action to cash out their pension and employee benefits and instead stayed with the company. These Creditors reasonably relied upon Deloitte's and Lommele's misrepresentations and thus did not act or refrained from acting in a way to prevent or mitigate their losses of hundreds of millions of dollars."

Within a brief period after the filing of the 1999 10-K on March 30, 2000, RGH filed additional reports making plain that it was in dire straits. The Form 10-Q for the first quarter of 2000, which RGH filed on May 15, 2000, reported that Reliance had an operating loss (before gains on sales of investments) of $36.5 million during that period; that it had agreed to sell its surety operations; that Standard & Poor's and Moody's had placed RGH's senior and subordinated bonds on "credit watch with negative implications"; and that A.M. Best & Co. (Best) had placed its rating of RIC "under review with negative implications."

Thereafter, on August 14, 2000, RGH filed its 10-Q for the

second quarter of 2000 (the August 14 10-Q), which reported, among other bad news: (1) that the company had an after-tax net loss of approximately $504 million for the quarter; (2) that actuarial net loss reserves were being increased by $444.2 million; (3) that Best's downgrading of RIC's rating during the quarter (from "A-" [Excellent] to "B++" [Very Good] and then to "B" [Fair]) was believed to "seriously impair [RIC's] ability to write many of its lines of business," as a result of which Reliance had entered into agreements to sell much of its property and casualty businesses and had written off its remaining $195.6 million goodwill balance; and (4) that, as a result of the Best downgrade, RGH "d[id] not expect to be able to obtain regulatory approval for dividends from [RIC] sufficient to fund the repayment at maturity of [RGH's] bank debt and the senior notes." The August 14 10-Q also warned, ominously:

> "The Company is in discussions with its creditors and regulators to develop a comprehensive plan to restructure its outstanding debt. However, there can be no assurance that its efforts will be successful. The Company is exploring a full range of alternatives to restructure its debt, among which would be to seek protection under the Federal Bankruptcy Code, which could be in conjunction with a negotiated settlement in advance of filing."

Reliance ultimately could not recover from its financial difficulties. A Pennsylvania court placed RIC in rehabilitation in May 2001 and in liquidation the following October. On June

12, 2001, RGH and RFS filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code.

In 2005, the bankruptcy court approved a reorganization plan for Reliance (the reorganization plan), pursuant to which plaintiff RGH Trust was created and charged with, among other tasks, the liquidation of the assets of the Reliance estate for the benefit of the creditors. The property assigned to the RGH Trust pursuant to the reorganization plan included, besides the assets of the Reliance estate, certain "Creditor Litigation Claims." The "Creditor Litigation Claims" were defined, in pertinent part, to include any claim of any member of certain impaired classes of creditors (except for claims retained by creditors choosing to opt out and certain other exceptions not relevant here) that arose "from or in connection with [the creditor's] claims against [RFS] or [RGH]." The reorganization plan provided that, upon its taking effect, the RGH Trust obtained "all rights to litigate" the Creditor Litigation Claims, among other causes of action.

In 2006, the RGH Trust commenced this action against Deloitte and defendant Jan A. Lommele, a Deloitte principal. The original complaint asserted causes of action for fraud, inter alia, on behalf of both Reliance and its unsecured creditors. Supreme Court granted Deloitte's motion to dismiss the original

complaint but gave the RGH Trust leave to replead the fraud claims on behalf of the creditors so as to allege reliance with more particularity. On the RGH Trust's appeal, this Court affirmed the dismissal with prejudice of all claims on behalf of Reliance (47 AD3d 516 [2008]). The fraud claims asserted on behalf of Reliance's unsecured creditors were not at issue on the prior appeal.

After the dismissal of the original complaint, the RGH Trust filed the present amended complaint on behalf of Reliance's unsecured creditors. The amended complaint asserts one cause of action for "actuarial fraud" and one cause of action for "accounting and auditing fraud" on behalf of the creditors, but, consistent with this Court's affirmance of the order dismissing the original complaint, omits any claims on behalf of Reliance itself. Deloitte again moved to dismiss. Supreme Court granted the motion solely to the extent of dismissing the claims asserted on behalf of unidentified former employees, and sustained the legal sufficiency of the remainder of the amended complaint. This appeal by Deloitte ensued.

Analysis

We will first discuss the bondholder claims, which we hold to be barred by SLUSA, and then we will turn to the claims of the remaining three categories of creditors (bank lenders, employees,

and the PBGC) on whose behalf the action is being prosecuted.

I. The Bondholders

Deloitte argues that the claims the RGH Trust asserts on behalf of holders of bonds issued by Reliance are barred by SLUSA. We agree. Congress's purpose in enacting SLUSA was to prevent a group of more than 50 claimants, or a litigant seeking to represent a class having more than 50 prospective members, from evading the limits placed on actions under the federal securities laws by casting securities-related fraud claims as state-law claims in a single lawsuit (*see* SLUSA, Pub L 105-353, § 2, 112 US Stat at 3227 [setting forth the findings that prompted the legislation]; *see also Merrill Lynch, Pierce, Fenner & Smith, Inc. v Dabit*, 547 US 71, 82 [2006]). This is precisely what the RGH Trust and the bondholders are doing in this action. In this regard, we note that it is undisputed that the bondholders' claims against Deloitte, if brought under the federal securities laws, would have been time-barred under federal law when this action was commenced in 2006.[2]

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[2]The bondholders' claims accrued no later than March 30, 2000, the date of the public filing of the allegedly fraudulent 1999 10-K. At that time, private causes of action under section 10(b) of the Securities Exchange Act or 1934, and Rule 10b-5 promulgated thereunder, had a statute of limitations of the earlier of one year from discovery of the facts constituting the violation or three years from the violation (*see Lampf, Pleva, Lipkind, Prupis & Petigrow v Gilbertson*, 501 US 350, 364 [1991]).

SLUSA provides, among other things, that

> "[n]o covered class action [as defined by the Act] based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal court by any private party alleging . . . a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security" (15 USC § 78bb[f][1]).

The term "covered class action" is defined, in pertinent part, to mean

> "any single lawsuit in which . . . damages are sought on behalf of more than 50 persons or prospective class members, and questions of law or fact common to those persons or members of the prospective class, without reference to issues of individualized reliance on an alleged misstatement or omission, predominate over any questions affecting only individual persons or members" (15 USC § 78bb[f][5][B][i][I]).

The term "covered security" is defined, in pertinent part, as a security that was listed on a national securities exchange at the time of the misstatement or omission alleged in the lawsuit (15

Under *Lampf*, the bondholders' claims would have become time-barred no later than 2002, the year after RIC went into liquidation and RGH and RFS went into bankruptcy. The subsequent extension of the relevant statute of limitations to the earlier of two years from discovery or five years from the violation by the Sarbanes-Oxley Act of 2002 (*see* 28 USC § 1658[b]), even if applicable, would have resulted in the bondholders' claims under the federal securities laws becoming time-barred in 2003. In any event, to the extent that the bondholders' claims would have become time-barred under *Lampf* before the effective date of the Sarbanes-Oxley Act (July 30, 2002), Sarbanes-Oxley's extension of the statute of limitations would not have applied to such claims (*see In re Enterprise Mortgage Acceptance Co., LLC Sec. Litig.*, 391 F3d 401, 406 [2d Cir 2004]).

USC § 78bb[f][5][E] [referring to section 18(b) of the Securities Act of 1933 (15 USC § 77r[b])]), as were the bonds issued by Reliance.

There is no dispute that the claims the RGH Trust asserts on behalf of the Reliance bondholders have most of the characteristics that trigger SLUSA's applicability. As pleaded by the RGH Trust itself, the claims are based on state law. Moreover, the RGH Trust does not dispute that the bondholders' claims are based on alleged misrepresentations made "in connection with the purchase or sale of a covered security."[3] Neither does the RGH Trust dispute that, apart from questions of individual reliance, the common questions of law and fact arising from the bondholders' claims (i.e., questions regarding the accuracy of the challenged statements and Deloitte's state of mind) predominate over any questions affecting only individual claimants.

Since it is undisputed that all the other elements required

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[3]Certain of the claims asserted by the RGH Trust on behalf of the bondholders are "holder" claims, that is, claims that bondholders suffered losses because they were allegedly induced by Deloitte's statements to continue to hold Reliance bonds. Although "holder" claims are not afforded a private remedy under the federal securities laws (*see Blue Chip Stamps v Manor Drug Stores*, 421 US 723 [1975]), such claims are nonetheless covered by SLUSA (*see Merrill Lynch, Pierce, Fenner & Smith, Inc. v Dabit*, 547 US 71 [2006], *supra*).

to render SLUSA applicable are satisfied, the RGH Trust's ability to pursue the bondholders' claims in this single lawsuit turns on whether those claims seek "damages . . . on behalf of more than 50 persons" (15 USC § 78bb[f][5][B][i][I]). The amended complaint, however, says nothing about the number of Reliance bondholders whose claims are being asserted. The pleading, while identifying only five particular Reliance bondholders (Wexford LLC, Mariner Investment Group, PIMCO, Conseco, and Richard Meltzer), neither quantifies nor estimates the total number of such bondholders. Indeed, it does not even allege that the RGH Trust has information supporting a reasonable belief that there are 50 or fewer of them. The matter of the number of bondholders is simply ignored.[4]

Deloitte argues that, given the substantial and uncontradicted indications in the record that Reliance bonds are held by more than 50 persons, the amended complaint's silence on the number of bondholders justifies drawing an inference adverse

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[4]The amended complaint purports to assert claims on behalf of all Reliance bondholders, although, as noted, only five bondholders are named. For purposes of our discussion of the SLUSA issue, we assume, without deciding, that the claims of unidentified bondholders can be pleaded based on the alleged reliance of the indenture trustees of the bonds, as agents of the bondholders. In this regard, the amended complaint alleges that the indenture trustees relied on Deloitte's alleged misstatements in determining whether to declare the bonds in default.

to the RGH Trust.[5] After all, whether more than 50 bondholders assigned their Reliance-related litigation claims to the RGH Trust is a matter within the RGH Trust's knowledge or, at a minimum, something that it could readily ascertain without judicial assistance.[6] By contrast, there is no reason to believe

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[5]Deloitte points to a number of strong indications in the record that the RGH Trust is suing on behalf of more than 50 bondholders. The amended complaint alleges that "[t]he largest group of creditors whose claims have been assigned to the RGH Liquidating Trust to administer are individuals and entities that purchased RGH bonds." According to the amended complaint, when RGH filed for bankruptcy in June 2001, there were approximately $290 million in principal of senior RGH bonds and $170 million in principal of subordinated RGH bonds outstanding (in each case, excluding bonds held by RGH itself). At the time of the bankruptcy filing, approximately $510 million (including interest) was due to the senior and subordinated bondholders but had not been paid. Further, in a previous federal securities class action brought against RGH executives by certain RGH bondholders and stockholders, it was alleged that RGH stockholders and bondholders numbered in the "hundreds, if not thousands," and were "so numerous that joinder of all members [of the class] [was] impracticable."

[6]The amended complaint acknowledges that certain "institutions and individuals have identified themselves as bondholders by filing proofs of claim with the Bankruptcy Court." Neither in the amended complaint nor in any of its other submissions does the RGH Trust disclose how many bondholders filed such proofs of claim, although the RGH Trust presumably has this information in its immediate possession. While the RGH Trust's records may not identify those bondholders whose bonds were held in "street name" and who did not file individual proofs of claim in the bankruptcy case, the amended complaint implies that these bondholders can be identified through the "Depository Trust Company clearing house system," which, the RGH Trust represents, will be used to distribute to the bondholders any damages ultimately recovered for them in this action.

that Deloitte has access to this information. Surely, Deloitte points out, the RGH Trust should not be permitted to artfully omit from its pleading (and to continue to withhold while litigating the ensuing motion to dismiss) factual information accessible to it that, if disclosed, would easily resolve the SLUSA issue. We agree with Deloitte that this sort of gamesmanship should not be indulged. A litigant should not be rewarded for deliberately omitting from its pleading potentially dispositive information within its purview. This is precisely what the RGH Trust is doing here, as is demonstrated by its brief opposing the motion to dismiss at Supreme Court, which contended that, if Deloitte's argument were valid, "the [RGH] Trust should be permitted to amend its complaint to *reduce* the total number of bondholders to 50" (emphasis added).[7]

In any event, it is, at best, disingenuous for the RGH Trust to take the position that it cannot now be determined whether the amended complaint asserts the claims of more than 50 bondholders. Deloitte brings to our attention, and the RGH Trust does not dispute, that the electronically accessible public records of the Reliance bankruptcy case show that RGH's voluntary petition

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[7]Apparently realizing that offering to reduce the number of bondholders to 50 necessarily implied that the action was brought on behalf of more than 50 bondholders, the RGH Trust has not repeated that offer on appeal.

estimated the number of beneficial holders of its notes "to be in excess of 500 holders." The bankruptcy record also includes the certification of the tabulation of votes on the reorganization plan, which states that 454 senior bondholders and 364 subordinated bondholders voted in favor of the plan. While it would have been preferable for Deloitte to place these bankruptcy court filings in the record on its motion to dismiss (and we hasten to add that we would reach the same result even if we were not aware of this material), it is well established that a court "may take judicial notice of undisputed court records and files" (*Matter of Khatibi v Weill*, 8 AD3d 485 [2004]). This principle extends to the uncontroverted public records of bankruptcy proceedings (*see MJD Constr. v Woodstock Lawn & Home Maintenance*, 293 AD2d 516, 517 [2002], *lv denied* 100 NY2d 502 [2003]; *Marcinak v General Motors Corp.*, 285 AD2d 387 [2001]; *Two Guys From Harrison-NY v S.F.R. Realty Assoc.*, 186 AD2d 189 [1992]); *cf. Property Clerk, N.Y. City Police Dept. v Seroda*, 131 AD2d 289, 294 n 2 [1987] [taking judicial notice of letter in the record of a federal court action]; *Matter of Hartman v Joy*, 47 AD2d 624, 625 [1975] [taking judicial notice of pendency of Civil Court action]; *George v Time, Inc.*, 259 App Div 324, 328 [1940], *affd* 287 NY 742 [1942] [taking judicial notice of decree entered in a

federal court action]).[8]

In view of the foregoing, there is no question that the RGH Trust is asserting the claims of more than 50 bondholders in this action. Indeed, the RGH Trust, rather than seeking to justify or excuse its failure to estimate the number of bondholders it represents, argues instead that the number of bondholders is irrelevant for either of two reasons. The RGH Trust's first argument in this regard is that the bondholder claims should be deemed to have been brought on behalf of the two indenture trustees for the two categories of bonds (senior and subordinated), not the bondholders themselves. Secondly, the RGH Trust argues that, under one of SLUSA's provisions, it is entitled to be counted as one person for purposes of determining this action's compliance with the statute. We reject both of

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[8]We recognize, of course, that judicial notice should not be taken of a controverted matter of fact simply because a document alleging that "fact" has been filed with a court (*see Walker v City of New York*, 46 AD3d 278, 282 [2007]; *Weinberg v Hillbrae Bldrs.*, 58 AD2d 546 [1977]). The RGH Trust does not, however, affirmatively take a position one way or the other on the relevant factual issue, i.e., whether the number of bondholders does or does not exceed fifty. Instead, as previously discussed, this sophisticated litigant disingenuously asserts that the matter cannot be determined from the present record, while not denying that it already knows the answer. Thus, taking notice that the Reliance bankruptcy record shows that there are more than 50 bondholders does not offend the rule against "tak[ing] judicial notice of a 'fact' which [i]s controverted" (*Weinberg v Hillbrae Bldrs., supra*).

these arguments.

The argument that this action is being prosecuted on behalf of the two indenture trustees (which the RGH Trust inappropriately raises for the first time on appeal) is belied by the amended complaint itself. The first paragraph of the amended complaint avers that the action is brought by the "RGH Liquidating Trust, on behalf of the general unsecured creditors of [RGH] and the general unsecured creditors of [RFS]," and the prayer for relief demands "judgment in favor of the general unsecured creditors of RGH and RFS." Similarly, a lengthy section of the pleading, entitled "The Creditors of RGH and RFS," identifies by subheading the four groups of creditors whose claims are asserted in this action; the "Bondholders" (but not the indenture trustees) are one of these groups. The amended complaint further alleges that "[t]he largest group of creditors whose claims have been assigned to the RGH Liquidating Trust to administer are *individuals and entities that purchased RGH bonds*" (emphasis added). While the amended complaint alleges that the indenture trustees relied on Deloitte's statements in determining whether to declare the bonds in default, there is no allegation that the indenture trustees, as such, suffered any injury or that

any recovery is sought for them.[9] To the contrary, the amended complaint alleges that the bondholders were the parties injured by the alleged misconduct and that "[a]ny money recovered by the [RGH] Trust on the bondholders' claims *will be distributed to the bondholders* on a pro rata basis pursuant to the bankruptcy plan of reorganization" (emphasis added).

To recapitulate, SLUSA defines a "covered class action" as a single lawsuit in which "damages are sought on behalf of more than 50 persons or prospective class members" as to whose claims "common" questions of law or fact predominate (15 USC § 78bb[f][5][B][i][I]). Hence, given that the amended complaint neither alleges any injury to the indenture trustees nor seeks any damages on their behalf, the number of indenture trustees does not enter into the SLUSA analysis. What does matter under SLUSA is whether the number of Reliance bondholders -- the allegedly injured parties for whom damages are sought -- exceeds 50, and, as previously discussed, it does.

The RGH Trust's second argument on the SLUSA issue -- that the RGH Trust should be counted as one person, regardless of the

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[9]The amended complaint does not indicate whether either institution that served as an indenture trustee held Reliance bonds for its own account and, if it did, whether its claims as an individual bondholder were among those assigned to the RGH Trust.

number of bondholders for whom it seeks damages -- relies on the following provision of the Act, captioned "Counting of certain class members":

> "For purposes of this paragraph [which includes the definition of the term 'covered class action'], a corporation, investment company, pension plan, partnership, or other entity, shall be treated as one person or prospective class member, but only if the entity is not established for the purpose of participating in the action" (15 USC § 78bb[f][5][D]).

The RGH Trust takes the position that it is entitled to be treated as a single person under the above-quoted provision on the ground that it was not established *solely* or even (as the RGH Trust would have it) *primarily* "for the purpose of participating in th[is] action." In this regard, the RGH Trust contends that the primary purpose for which it was established was the liquidation of the assets of the Reliance bankruptcy estate and the distribution of the proceeds of that liquidation to the creditors of the estate.[10] This argument is also unavailing.

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[10]The bondholders' claims against Deloitte, although assigned to the RGH Trust under the reorganization plan, were not part of the Reliance bankruptcy estate. Again, the claims asserted in the amended complaint, including those of the bondholders, were among the "Creditor Litigation Claims" assigned to the RGH Trust pursuant to the reorganization plan approved in the Reliance bankruptcy case. Under the reorganization plan, the RGH Trust acquired the right to litigate the "Creditor Litigation Claims," which were defined to include any claim of any member of certain impaired classes of creditors (except for claims retained by creditors who opted out and certain other exceptions not relevant here) that arose "from or in connection with [the

The flaw in the RGH Trust's contention that it is entitled to be counted as a single person under SLUSA is that the Act excludes from single-person treatment any entity "established for the purpose of participating in the action," not only entities whose sole or primary purpose is to participate in the action. Specifically, the statute states that an entity "shall be treated as one person . . . only if the entity is not established for the purpose of participating in the action" (15 USC § 78bb[f][5][D]). The word "purpose" is not modified in any way. Hence, if an entity was established for the purpose of participating in the subject action, it is irrelevant that the entity also has other purposes, or that participation in the action is not the entity's primary purpose.

The record in this case makes plain that the RGH Trust was, in fact, "established for the purpose of participating in th[is] action," among others. The amended complaint itself alleges that "the RGH Liquidating Trust has been established to pursue the claims of RFS, RGH *and their respective creditors*" (emphasis added). This allegation is borne out by the reorganization plan. Section 10.6 of the reorganization plan provides that, upon the plan's effective date,

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creditor's] claims against [RFS] or [RGH]."

> "all Causes of Action held by the Debtor, the Estate or either Committee [of unsecured creditors] . . . , *including . . . Creditor Litigation Claims* (other than those held by Opt-Out Claimants), shall be deemed assigned to the Liquidating Trust [i.e., plaintiff] and become Trust Property, to be managed by the Liquidating Trust. *Upon such assignment, the Liquidating Trust shall obtain all rights to litigate such Causes of Action*" (emphasis added).[11]

To like effect, section 6.6 of the reorganization plan provides that, upon the plan's effective date, the RGH Trust

> "shall have the authority, to the extent set forth in the Liquidating Trust Agreement, to . . . examine all rights of action, including, without limitation, . . . Causes of Action that constitute Trust Property [including Creditor Litigation Claims] and *to file, litigate to final judgment, settle or withdraw such rights of action*" (emphasis added).

Moreover, it is of no moment that the reorganization plan does not refer specifically to the claims asserted in this action (i.e., the claims of Reliance's unsecured creditors against Deloitte), since those claims are plainly within the scope of the litigation the RGH Trust was created to conduct (*see Cape Ann Investors LLC v Lepone*, 296 F Supp 2d 4, 10 [D Mass 2003] [in holding that a trust created for the purpose of litigating claims contributed to it was not "one person" within the meaning of SLUSA, the court observed that "(t)he Trustee's argument that the

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[11]Again, the claims against Deloitte asserted in the amended complaint, including those of the bondholders, are included in the reorganization plan's definition of the term "Creditor Litigation Claims."

Trust is a unitary entity because it was created not to pursue any particular action, but all 'such actions as necessary to recover on behalf of beneficiaries,' makes no sense conceptually or legally"]).

The decision on which the RGH Trust primarily relies in arguing that it is entitled to single-person treatment under SLUSA is not to the contrary. While the Ninth Circuit stated in *Smith v Arthur Andersen LLP* (421 F3d 989 [9th Cir 2005]) that it construed the relevant statutory language ("established for the purpose of participating in the action") to mean that an entity's "'primary purpose' is to pursue causes of action" (*id.* at 1007), that statement constituted dicta unnecessary to decide the case. This is because the *Smith* plaintiff was a bankruptcy trustee suing on the claims of the estate of the corporate debtor (Boston Chicken), not on behalf of a group of creditors (*see id.* at 1003 ["the Trustee is not attempting to assert claims that were assigned to him by Boston Chicken's creditors, but rather seeks to rectify injuries to Boston Chicken itself"]). Thus, whether litigation was the primary purpose of the Boston Chicken trustee or only one of a number of purposes, the action would not have implicated SLUSA, since the claims asserted were originally held by only one injured person, namely, Boston Chicken (*see LaSala v Bordier et Cie*, 519 F3d 121, 134 [3d Cir 2008], *cert dismissed*

sub nom Bordier et Cie v LaSala, __ US __, 129 S Ct 593 [2008] [the phrase "on behalf of 50 or more persons" in 15 USC § 78bb(f)(5)(B)(i) "refers to the assignors of a claim, not to the assignee (or, if the assignee is a trust, to its beneficiaries)"]).[12]

In *LaSala*, SLUSA was held not to be implicated in an action brought by the liquidating trust for the estate of a bankrupt corporation (AremisSoft), the beneficiaries of which were the purchasers of AremisSoft stock (the Purchasers). As the *LaSala* court explained, "the Trust is not bringing its claims 'on behalf of' the Purchasers, as SLUSA uses the term, because the Purchasers are not the injured parties; rather, the Trust is

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[12]The Third Circuit concluded in *LaSala* that the statutory phrase "on behalf of 50 or more persons" refers to "assignors of a claim, not to the assignee" (519 F3d at 134) based on the following reasoning:

> "Prong two of § 78bb(f)(5)(B)(i) ['questions of law or fact common to those persons or members of the prospective class . . . predominate over any questions affecting only individual persons or members'] . . . seems to use the terms 'persons' and 'members of the prospective class' to refer to the original owners of the claim -- those injured by the complained-of conduct, as those are the persons who might have common questions of law or fact related to the claim that predominate over individual questions of law or fact. Reading prong one in light of prong two, the phrase 'on behalf of 50 or more persons' seems to refer to someone bringing a claim on behalf of 50 or more *injured* persons" (*id.*).

bringing the claims 'on behalf of' AremisSoft" (519 F3d at 134), the defunct corporation, which had assigned the claims in question to the trust for the benefit of the Purchasers. In this case, by contrast, the claims of Reliance, the bankrupt debtor, have all been dismissed, and the only claims asserted in the amended complaint originally belonged to Reliance's numerous unsecured creditors, including the bondholders. This being the case, insofar as there are more than 50 bondholders, the maintenance of their claims against Deloitte in a single action offends SLUSA, which was

> "designed to prevent securities-claims owners from bringing what are, in effect, class actions by assigning claims to a single entity. Put simply, Congress's goal was to prevent a class of securities plaintiffs from running their claims through a single entity [what the bondholders are doing here], not to prevent a single bankruptcy estate from assigning its claims to an entity capable of acting to protect the common interests of a class of people [what occurred in *Smith* and *LaSala*]" (*id.* at 136; citation omitted).

A scenario similar to the one here was presented in *Cape Ann Investors LLC v Lepone* (*supra*), a decision that the RGH Trust mistakenly views as supporting its position. The *Cape Ann* action was prosecuted by a litigation trust created in the bankruptcy proceedings for NutraMax (296 F Supp 2d at 8). In addition to the claims of NutraMax itself, the trust asserted state-law claims against NutraMax's auditor that had been assigned to the

trust by NutraMax shareholders (the Electing Shareholders). The court held that, since the trust's purpose was the prosecution of the claims contributed to it (*id.* at 10), and all other elements of SLUSA were satisfied, the action was barred to the extent it asserted the claims of the Electing Shareholders (*id.* at 12).[13] In reaching this conclusion, the court noted that the trustee's "role [in suing on the Electing Shareholders' claims] is no different than that of any shareholder class representative" (*id.* at 10). The same is true of the RGH Trust in this case.

Contrary to the RGH Trust's contention, its position is not supported by SLUSA's legislative history. The report of the Senate Committee on Banking, Housing and Urban Affairs states that SLUSA's definition of a "covered class action" was drafted

> "to ensure that the legislation does not cover instances in which a person or entity is duly authorized by law, other than a provision of state or federal law governing class action procedures, to seek damages on behalf of another person or entity. Thus, a trustee in bankruptcy, a guardian, a receiver, and other persons or entities duly authorized by law (other

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[13]The *Cape Ann* decision states, as a matter of fact, that the trust agreement in that case "describe[d] the primary purpose of the Trust as 'prosecuting the Causes of Action contributed to it . . . and distributing to the Class 6 Beneficiaries [the Electing Shareholders] the assets of the Trust remaining after payment of all claims against or assumed by the Trust'" (296 F Supp 2d at 10). Nowhere in the *Cape Ann* decision, however, is there any indication that it was crucial to the result in that case that the trust's litigation functions were its "primary" purpose.

> than by a provision of state or federal law governing class action procedures) to seek damages on behalf of another person or entity would not be covered by this provision" (S Rep 182, 105th Cong, 2d Sess, at 8, available at 1998 WL 226714, at *8).

As the Third Circuit explained in *LaSala*, the above-quoted discussion demonstrates "Congress's clear intent not to reach claims asserted by a bankruptcy trustee *on behalf of a bankruptcy estate*" (519 F3d at 135 [emphasis added]). Again, in this action, the bondholders' claims against Deloitte are not being asserted on behalf of the Reliance bankruptcy estate; the claims originally belonged to the bondholders, not Reliance.

Moreover, the Senate report manifests Congress's intent that SLUSA not affect the power of an agent to bring suit on behalf of another person or entity where the power to bring such a suit is a necessary incident of an agency created by law to deal with the property of the other person or entity. Thus, as elucidated by *LaSala*, Congress did not intend that SLUSA would limit a bankruptcy trustee's power to sue on causes of action belonging to the bankruptcy estate.[14] This principle does not avail the

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[14]Similarly, a guardian's assertion of claims belonging to the person under the protection of the guardianship is a necessary incident of the guardian's power to manage that person's property. By the same token, a receiver's assertion of claims belonging to the entity in receivership is a necessary incident of the power to manage or dispose of that entity's property.

RGH Trust with respect to the bondholders' claims, however, because the power to sue on those claims is not a necessary incident of the liquidation of the assets of the Reliance bankruptcy estate, the primary purpose for which the RGH Trust was created. After all, the bondholders' claims did not originally belong to Reliance, and, under the reorganization plan, each bondholder was free to retain its own claims by opting out of the provision for assignment of Creditor Litigation Claims to the RGH Trust. Thus, the assignment of the claims at issue to the RGH Trust was simply a voluntary assignment of causes of action, rather than a necessary incident of the RGH Trust's core task of liquidating Reliance's assets.[15] A group (like the

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[15]By contrast, in *Lee v Marsh & McLennan Cos., Inc.* (2007 WL 704033, 2007 US Dist LEXIS 16489 [SD NY, Mar. 7, 2007]), a case relied on by the RGH Trust, the plaintiff family trusts were held to be entitled to be counted as single persons under SLUSA, without regard to the number of beneficiaries, because the trusts were established for the purpose of managing family property; prosecuting actions relating to the property under the trusts' management was a necessary incident to the management of that property (2007 WL 704033, *4-5, 2007 US Dist LEXIS 16489, *14-18). Similarly distinguishable is *State of Oregon by Oregon 529 College Savings Bd. v OppenheimerFunds, Inc.* (2009 WL 2517086, 2009 US Dist LEXIS 72739 [D Or, Aug. 14, 2009]), in which the court denied a SLUSA-based motion to dismiss securities-related state-law claims asserted by the board of Oregon's college savings plan trust against its financial adviser. Because the Oregon board's prosecution of litigation relating to the trust's assets was a necessary incident of its duty to manage those assets, the board was appropriately treated as a single person under SLUSA, regardless of the number of plan participants.

Reliance bondholders) of more than 50 holders of securities issued by a bankrupt entity should not be permitted to defeat SLUSA through the expedient of voluntarily assigning their claims for alleged securities fraud to the bankruptcy trustee of the issuer's estate. The role of such a trustee in bringing suit on claims that did not originally belong to the bankrupt issuer "is no different than that of any shareholder class representative" (*Cape Ann Investors LLC v Lepone*, 296 F Supp 2d at 10). To paraphrase a well-worn expression, a class representative by any other name would offend SLUSA as much.

For the foregoing reasons, we hold that SLUSA bars the assertion of the bondholders' claims in this single lawsuit. Accordingly, we need not discuss any of the remaining arguments raised with regard to the bondholders' claims.

II. Other Categories of Creditors

On this motion addressed to the sufficiency of the RGH Trust's pleading, Supreme Court correctly declined to dismiss the claims asserted on behalf of the three categories of creditors other than the bondholders. Given that we are required to assume the truth of the amended complaint's allegations, and to draw all inferences in the pleader's favor, we conclude that the RGH Trust has sufficiently alleged that Reliance's 15 bank lenders, two identified former Reliance employees (David C. Woodward and

Christine Howard), and the PBGC relied to their detriment on Deloitte's statements regarding Reliance's financial condition in the 1999 10-K and suffered losses as a result. To the extent it is alleged that the creditors' reliance on Deloitte's alleged misstatements took the form of forbearance from taking protective action, such alleged forbearance satisfies the reliance element of a fraud cause of action (*see Foothill Capital Corp. v Grant Thornton, L.L.P.*, 276 AD2d 437, 438 [2000]). Whether the creditors' alleged reliance was reasonable in light of all of the information that was available to them, and whether such reliance, if reasonable, resulted in compensable losses, are questions of fact not susceptible to resolution on a motion to dismiss (*id.*).

With regard to the employee claimants, as previously noted, the amended complaint identifies only two such former Reliance employees by name, although reference is made to a larger class of allegedly injured employees. Since Supreme Court granted Deloitte's motion to dismiss with respect to the claims "assert[ed] on behalf of unidentified creditors" (other than unidentified bondholders), and the RGH Trust has not appealed that determination, the only employee claims that remain pending and are being sustained on this appeal are those of the two

employees identified by name in the amended complaint.[16]

Deloitte argues that SLUSA bars the employee claims to the extent the "pension and employee benefits" the employees failed to cash out consisted of securities traded on a national exchange. As Deloitte acknowledges, however, the extent to which these "pensions and employee benefits" consisted of securities cannot be determined from the amended complaint or anything else in the present record. In view of the uncertainty as to whether the employees' claims relate to the purchase or sale of securities, and given that the claims of only two employees remain pending, dismissal of the employee claims based on SLUSA is not warranted at this juncture.[17]

We have considered Deloitte's remaining arguments, including the claims that scienter and loss causation have not been sufficiently alleged and that the amended complaint is barred by

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[16]To the extent the RGH Trust argues that Supreme Court did not dismiss the claims asserted on behalf of unidentified employees, that argument is contradicted by Supreme Court's decision, which plainly states that the only employee claims being sustained were those of the "*two* former employees of RGH and RFS" identified by name in the amended complaint (17 Misc 3d 1128[A], 2007 NY Slip Op 52181[U], *7 [emphasis added]).

[17]Deloitte has not argued that the claims of the bank lenders and of PBGC should be dismissed pursuant to SLUSA at this point in the proceedings.

this Court's decision on the prior appeal, and find them unavailing.

Conclusion

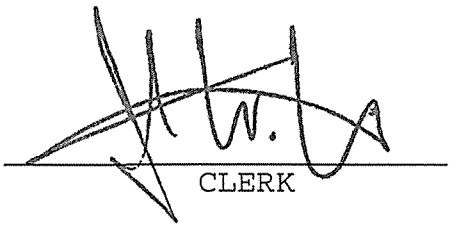
For the foregoing reasons, we modify the order appealed from to grant the motion to dismiss the amended complaint insofar as it asserts claims on behalf of holders of bonds issued by Reliance, and otherwise affirm the denial of the motion.

Accordingly, the order of the Supreme Court, New York County (Karla Moskowitz, J.), entered on or about November 13, 2007, which, insofar as appealed from, denied defendants' motion to dismiss the amended complaint with respect to claims asserted on behalf of identified creditors and groups of creditors of Reliance, should be modified, on the law, to grant the motion to the extent of dismissing the claims asserted on behalf of holders of bonds issued by Reliance, and otherwise affirmed, without costs.

All concur.

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

ENTERED: DECEMBER 8, 2009



CLERK