SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

SEPTEMBER 29, 2016

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Tom, J.P., Renwick, Richter, Kapnick, Webber, JJ.

1012 NexBank, SSB, a Texas State Savings Bank,
Plaintiff-Appellant,

-against-

Jeffrey Soffer, et al.,
Defendants-Respondents.

Index 650866/11

_____

Debevoise & Plimpton LLP, New York (Shannon Rose Selden of counsel), for appellant.

Meister Seelig & Fein LLP, New York (Stephen B. Meister of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Charles E. Ramos, J.), entered September 12, 2014, dismissing the action with prejudice, and bringing up for review an order, same court and Justice, entered on or about June 16, 2014, which, inter alia, confirmed the judicial hearing officer's (JHO) report, dated December 16, 2013, unanimously affirmed, without costs.

The findings contained in the JHO's report are substantially supported by the record, and the JHO "clearly defined the issues

and resolved matters of credibility" (*see Hopper v Premier Coach, Inc.*, 111 AD3d 508 [1st Dept 2013] [internal quotation marks omitted]). The JHO defined the issue as the value on March 4, 2011, the date of the foreclosure sale, of the property that was the collateral for a loan on which defendants executed a payment guaranty, and, after conducting a four day hearing during which the JHO heard testimony from six witnesses, including each side's expert, the court found defendants' expert more credible than plaintiff's expert, and accepted his valuation of $527 million. The JHO found that plaintiff's expert's 2011 valuation of $395 million, made for purposes of potential litigation, was inconsistent with his 2008 valuation of $548.8 million, made for loan underwriting purposes, particularly in light of the 2008 economic climate. Despite plaintiff's argument to the contrary, the record does contain conflicting evidence from both experts as to what impact the 2008 financial crisis had on the value of the property. Therefore, the JHO was free to resolve this conflict and the record discloses no ground upon which the JHO's credibility determinations may be disturbed. Moreover, while contrary to the JHO's assertion, he could have departed from the

appraisal of either expert (*see Gyrodyne Co. of Am., Inc. v State of New York*, 89 AD3d 988 [2d Dept 2011], *lv denied* 19 NY3d 804 [2012]), the record discloses no ground upon which to find that he erred in not doing so (*see e.g. Hoffinger Indus., Inc. v Alabama Ave. Realty, Inc.*, 68 AD3d 818, 820 [2d Dept 2009]).

By failing to argue before the motion court that the JHO's report does not comply with CPLR 4320(b), plaintiff waived the argument (*see Sea Trade Mar. Corp. v Coutsodontis*, 111 AD3d 483, 486 [1st Dept 2013]).

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

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

ENTERED: SEPTEMBER 29, 2016

CLERK

Mazzarelli, J.P., Moskowitz, Manzanet-Daniels, Gesmer, JJ.

1169N VR Capital Group Ltd., Index 653259/15
Plaintiff-Appellant,

-against-

Broadridge Financial Solutions, Inc.,
Defendant-Respondent.

_____

O'Hare Parnagian LLP, New York (Robert A. O'Hare, Jr. of counsel), for appellant.

Drinker Biddle & Reath LLP, New York (Michael O. Adelman and Diego J. Rosado of counsel), for respondent.

_____

Order, Supreme Court, New York County (Eileen Bransten, J.), entered January 29, 2016, which granted defendant's motion to compel arbitration, unanimously affirmed, with costs.

The motion court correctly found that there was a valid agreement to arbitrate and that the issue sought to be submitted to arbitration fell within the scope of the agreement's broad arbitration clause (*see Edgewater Growth Capital Partners, L.P. v Greenstar N. Am. Holdings, Inc.*, 69 AD3d 439, 439 [1st Dept 2010]). It is for the arbitrator, and not a Court, to determine whether the parties' agreement falls within the ambit of section 5-903(2) of the General Obligations Law. Even if the agreement is subject to GOL § 5-903(2), as plaintiff contends, such would not nullify the parties' agreement to arbitrate "all disputes

arising out of or relating to th[e] [a]greement," including this one.

> The Decision and Order of this Court entered herein on May 17, 2016 is hereby recalled and vacated (*see* M-3091 decided simultaneously herewith).

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

ENTERED: SEPTEMBER 29, 2016

CLERK

Friedman, J.P., Sweeny, Webber, Gesmer, JJ.

1455N 21st Century Diamond, LLC, Index 650331/09
Plaintiff,

-against-

Allfield Trading, LLC, et al.,
Defendants.

- - - - -

Allfield Trading, LLC, et al.,
Third-Party Plaintiffs-Respondents,

-against-

Exelco North America, Inc., et al.,
Third-Party Defendants-Appellants,

Doe Corporations 1-100, et al.,
Third-Party Defendants.

- - - - -

Sterling Jewelers, Inc.,
Nonparty Appellant.

_____

The Law Offices of James A. A. Kirk, PLLC, New York (James A. A. Kirk of counsel), for Exelco North America, Inc., Exelco NV, doing business as Exelco North America, Inc., FTK Worldwide Manufacturing, doing business as Exelco North America, Inc., Exelco International Ltd., doing business as Exelco North America, Inc., Jean Paul Tolkowsky, Fazal Chaudhri, Isidor, Inc. and Ori Levy, appellants.

LeClairRyan, New York (Joseph P. Paranac, Jr. of counsel), for Sterling Jewelers, Inc., appellant.

Judd Burstein, P.C., New York (Judd Burstein of counsel), for respondents.

_____

Order, Supreme Court, New York County (Lawrence K. Marks, J.), entered November 2, 2015, which, to the extent appealed from, granted third-party plaintiffs' motion to compel nonparty Sterling Jewelers, Inc. (Sterling) to produce all documents claimed to be protected from disclosure by the common-interest privilege, unanimously reversed, on the law and the facts and in the exercise of discretion, without costs, and the matter remanded for further proceedings to determine whether the common-interest privilege applies to the documents as to which Sterling asserts privilege.

The motion court based its finding that the common-interest privilege had been waived on a poorly worded analogy – the import of which is not entirely clear – made in open court by nonparty appellant Sterling's former counsel, in addition to several other potentially misleading representations (most of which are not contained in the record before us). Although we agree with the motion court that Sterling's previous counsel's representations were potentially misleading, it appears that plaintiffs' counsel agreed to limit the subpoena to internal Sterling communications, all of which were produced and none of which were privileged. Further, although Sterling had signed a common-interest agreement with defendant Exelco, Sterling was not a named defendant, and in

that sense remained a neutral party. Even taken together, these representations do not "clear[ly], unmistakabl[y] and without ambiguity" express an intention to waive the privilege (*Matter of Professional Staff Congress-City Univ. of N.Y. v New York State Pub. Empl. Relations Bd.*, 7 NY3d 458, 465 [2006] [internal quotation marks omitted]; CPLR 4503[a]). Moreover, Sterling could not unilaterally waive the joint privilege on behalf of third-party defendants-appellants, the other parties asserting it (*Arkin Kaplan Rice LLP v Kaplan*, 118 AD3d 492 [1st Dept 2014]).

Since any otherwise applicable common-interest privilege has not been waived, in light of the recent Court of Appeals decision clarifying the scope of the common-interest privilege (*Ambac Assur. Corp. v Countrywide Home Loans, Inc.*, 27 NY3d 616 [2016]) (which was issued after Supreme Court rendered its order), further proceedings are necessary to determine whether the common-interest privilege applies in the first instance to the documents as to which Sterling asserts privilege. In deciding the motion to compel, Supreme Court noted that a question of fact exists as to whether Sterling entered into the common-interest agreement with Exelco to protect its business relationship with

Exelco (in which case the common-interest privilege would not apply under *Ambac*) or out of a reasonable concern that plaintiffs might decide to add Sterling as a defendant (in which case the common-interest privilege would apply under *Ambac*).

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

ENTERED: SEPTEMBER 29, 2016

CLERK

Mazzarelli, J.P., Andrias, Saxe, Gische, Kahn, JJ.

1521-
1522N Kevin Pludeman, et al.,
Plaintiffs-Appellants,

-against-

Northern Leasing Systems, Inc., et al.
Defendants-Respondents.

Index 101059/04

Chittur & Associates, P.C., Ossining (Krishnan S. Chittur of counsel), for appellants.

Cahill Gordon & Reindel LLP, New York (Thomas J. Kavaler of counsel), and Moses & Singer LLP, New York (Robert D. Lillienstein of counsel), for respondents.

Order, Supreme Court, New York County (Martin Shulman, J.), entered August 4, 2014, which, insofar as appealed from as limited by the briefs, denied plaintiffs' motion to sanction defendants for discovery violations without prejudice to renewal at the fact-finding hearing, unanimously affirmed, without costs. Order, same court and Justice, entered January 7, 2015, which granted defendants' motion to decertify the class and/or remove plaintiffs as class representatives, unanimously modified, on the law and the facts, to deny the motion to decertify with respect to the issue of the reasonableness of the Loss and Destruction Waiver (LDW) fee for those lessees whose leases provided for an LDW fee of "price in effect" and who were charged a LDW fee of up

to $4.95, and to remove plaintiff Chris Hanzsek as a class representative, and otherwise affirmed, without costs.

In accordance with orders of this Court in prior appeals, a fact-finding hearing was held to determine (1) whether plaintiffs were provided with only one page of a lease; (2) whether, even if provided with a four-page booklet, a reasonable person would have believed that the first page comprised the entire lease; and (3) if the LDW provision on the third page of the leases was found to be part of the leases, whether the LDW fee charged under leases setting a LDW fee of "price in effect" was reasonable (*see Pludeman v Northern Leasing Sys., Inc.*, 106 AD3d 612 [1st Dept 2013]; *Pludeman v Northern Leasing Sys., Inc.*, 87 AD3d 881 [1st Dept 2011]; *Pludeman v Northern Leasing Sys., Inc.*, 74 AD3d 420 [1st Dept 2010]). As a result of the hearing, class certification is no longer warranted with respect to the first two issues (*see DeFilippo v Mutual Life Ins. Co. of N.Y.*, 13 AD3d 178 [1st Dept 2004], *lv dismissed* 5 NY3d 746 [2005]). Two of four plaintiffs testified that they were not rushed to sign the leases; three testified that they had an opportunity to read the leases, but simply failed to do so; two testified that they either made a copy of the leases or declined to do so; and one testified that he was apprised of additional lease pages and the

LDW charge. This testimony contradicts the allegations made in the complaint and amplified in affidavits previously provided by plaintiffs describing a routine practice by sales people for defendant Northern Leasing Systems, Inc. of obscuring all but the first page of the lease.

However, this action may be maintained as a class action with respect to the third issue (CPLR 906[1]; *see Stellema v Vantage Press*, 109 AD2d 423 [1st Dept 1985]). If the LDW charge was not reasonable, then Northern Leasing's overcharges were a breach of the leases, regardless of whether the individual lessees reasonably believed that the first page alone comprised the entire lease.

Since plaintiff Chris Hanzsek's lease set the LDW fee at $2.95, he does not represent the class as we have limited it.

The motion court providently exercised its discretion in denying plaintiffs' motion for sanctions, without prejudice to renewal as issues arose at the hearing.

Because plaintiffs did not appeal from the order holding in abeyance their cross motion for judgment as a matter of law, that ruling is not properly before us (*Stratakis v Ryjov*, 66 AD3d 411 [1st Dept 2009]).

The Decision and Order of this Court entered herein on June 21, 2016 is hereby recalled and vacated (*see* M-3512 decided simultaneously herewith).

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

ENTERED: SEPTEMBER 29, 2016

CLERK

Mazzarelli, J.P., Acosta, Saxe, Moskowitz, Gesmer, JJ.

1749 The People of the State of New York, Ind. 3946/08
Respondent,

-against-

Eshawn Almodovar,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Eric C. Washer of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Dominic R. Massaro, J.), rendered September 6, 2011, convicting defendant, upon his plea of guilty, of manslaughter in the first degree, and sentencing him to a term of 20 years, unanimously modified, on the law, to the extent of vacating the sentence and remanding for a youthful offender determination, and otherwise affirmed.

Defendant's ineffective assistance of counsel argument involves matters not reflected in, or fully explained by, the record, and thus requires a CPL 440.10 motion. Although defendant raised his present claim in such a motion, the motion was denied and a justice of this Court denied leave to appeal. Accordingly, our review is limited to the trial record (*see People v Evans*, 16 NY3d 571, 575 [2011]), and to the extent that

record permits review, we conclude that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]). Defendant has not established that counsel's decision to rest on the record at the suppression hearing was ineffective, since there is no indication that any suppression argument would have had any chance of success. In particular, the hearing evidence demonstrated that the interrogating officer gave defendant *Miranda* warnings before any questioning, and that the officer did not make any remarks of the type condemned in *People v Dunbar* (24 NY3d 304 [2014], *cert denied* 575 US __, 135 S Ct 2052 [2015]), or that otherwise undermined the effect of the warnings.

Defendant did not preserve his challenge to his plea allocution, which does not come within the narrow exception to the preservation requirement (*see People v Williams*, 27 NY3d 212, 219 [2016]; *People v Lopez*, 71 NY2d 662, 665-666 [1988]), and we decline to review it in the interest of justice. As an alternative holding, we find that the plea was knowing, intelligent and voluntary. Nothing in the plea allocution cast doubt on defendant's guilt or raised a potentially viable defense regarding the justifiable use of deadly force.

However, as the People concede, defendant is entitled to resentencing pursuant to *People v Rudolph* (21 NY3d 497 [2013]) for a youthful offender determination.

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

ENTERED: SEPTEMBER 29, 2016

CLERK

Mazzarelli, J.P., Acosta, Saxe, Moskowitz, Gesmer, JJ.

1752 The People of the State of New York, Ind. 807/11
Respondent,

-against-

Terry King,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Shannon Henderson of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Troy K. Webber, J.), rendered September 5, 2014, convicting defendant, upon his plea of guilty, of two counts of rape in the first degree, and sentencing him to concurrent terms of 19 years, unanimously affirmed.

Although we do not find that defendant made a valid waiver of his right to appeal, we find his arguments unavailing.

The court properly denied defendant's suppression motion. There is no basis for disturbing the court's credibility determinations, in which it rejected defendant's claims that he asserted his right to counsel during questioning and that the police made coercive remarks.

The court properly denied defendant's requests for

reassignment of counsel, made before the suppression hearing and renewed in connection with a plea withdrawal motion. In each application, defendant presented his grievances against his attorney in writing, but failed to make specific factual allegations of serious complaints that would trigger the court's obligation to inquire further (*see People v Porto*, 16 NY3d 93, 99-100 [2010]). With regard to the plea withdrawal application, counsel did not take a position adverse to his client and there was no violation of defendant's right to conflict-free counsel (*see People v Washington*, 25 NY3d 1091, 1095 [2015]). Furthermore, the record supports the court's rejection of defendant's claim that he failed to comprehend the plea proceedings due to his psychiatric medication.

We perceive no basis for reducing the sentence.

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

ENTERED: SEPTEMBER 29, 2016

CLERK

Mazzarelli, J.P., Acosta, Saxe, Moskowitz, Gesmer, JJ.

1755 The People of the State of New York, Ind. 5207/12
Respondent,

-against-

Randall Rutledge,
Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Rena Uviller, J. at plea; Eduardo Padro, J. at sentencing), rendered July 31, 2013, as amended October 18, 2013, unanimously affirmed.

Application by defendant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1st Dept 1976]). We have reviewed this record and agree with defendant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

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

service of a copy of this order.

Denial of the application for permission to appeal by the judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

ENTERED: SEPTEMBER 29, 2016

CLERK

Mazzarelli, J.P., Acosta, Saxe, Moskowitz, Gesmer, JJ.

1756 Joseph McManus, Index 307029/12
Plaintiff-Respondent,

-against-

The City of New York,
Defendant-Appellant.

_____

Fabiani Cohen & Hall, LLP, New York (Kevin B. Pollak of counsel), for appellant.

Hogan & Cassell, LLP, Jericho (Michael Cassell of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Fernando Tapia, J.), entered June 11, 2015, which, to the extent appealed from as limited by the briefs, granted plaintiff's motion for partial summary judgment on the issue of defendant's Labor Law § 240(1) liability, unanimously reversed, on the law, without costs, and plaintiff's motion denied.

Summary judgment on the Labor Law § 240(1) claim was inappropriate, because questions of fact exist concerning whether a scaffold purportedly covering the opening of the flocculation tank through which plaintiff fell was a proper and adequate

safety device (*see Ortega v City of New York*, 95 AD3d 125, 128 [1st Dept 2012]) and whether, if the scaffold was an adequate safety device, plaintiff removed the device by moving it away from the opening (*see Boyd v Schiavone Constr. Co., Inc.*, 106 AD3d 546, 548 [1st Dept 2013]).

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

ENTERED: SEPTEMBER 29, 2016

CLERK

Mazzarelli, J.P., Acosta, Saxe, Moskowitz, Gesmer, JJ.

1757 The People of the State of New York, Ind. 1921/08
Respondent,

-against-

Eldred Leitzsey,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Mitchell J. Briskey of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Sabrina Margret Bierer of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Renee A. White, J.), rendered February 17, 2009, convicting defendant, following a jury trial, of four counts of aggravated harassment of an employee by an inmate, and sentencing him, as a second felony offender, to three consecutive terms and one concurrent term of 2½ to 5 years, unanimously affirmed.

The court properly exercised its discretion in ordering that defendant be kept in physical restraints during the trial. Defendant's constitutional claim to the contrary is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. Although the use of restraints that are visible to the jury requires that a

particularized justification be placed on the record (*People v Clyde*, 18 NY3d 145, 152 [2011]; *People v Cruz*, 17 NY3d 941, 944-945, 945 n [2011]), here the court's initial order required that the restraints be concealed from the jury by means of draping material, and that the prosecutor's table be similarly draped in order to prevent the jury from drawing any inferences. It was only at defendant's insistence that the restraints were revealed to the jury (*see People v Martinez*, 284 AD2d 157 [1st Dept 2001]). In any event, the court set forth an adequate, case-specific justification, based on security concerns that included defendant's criminal history, his conduct while incarcerated and the nature of the crimes charged, which involved attacks on correction officers.

The court properly imposed consecutive sentences on three of defendant's convictions, because the evidence showed that, in

three separate throws, he threw a mixture of feces and urine at correction officers. Although part of a single transaction, the three offenses were separate acts committed in violation of Penal Law § 240.32 (*see People v Rodriguez*, 25 NY3d 238, 244 [2015]).

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

ENTERED: SEPTEMBER 29, 2016

CLERK

Mazzarelli, J.P., Acosta, Saxe, Moskowitz, Gesmer, JJ.

1759 In re Stefani L.,
Petitioner-Appellant,

-against-

Eugene B.,
Respondent-Respondent.

_____

Shmuel Agami, New York, for appellant.

Eugene B., respondent pro se.

_____

Order, Family Court, New York County (Tandra L. Dawson, J.), entered on or about April 16, 2013, which denied petitioner's objection to an order of support of the Support Magistrate, dated January 2, 2013, unanimously affirmed, without costs.

Supreme Court properly determined that the Support Magistrate providently exercised his discretion in declining to impute additional income to respondent (*see Matter of Minerva R. v Jorge L.A.*, 59 AD3d 243, 244 [1st Dept 2009]). The document that petitioner contends establishes that respondent has additional income concerns a period predating the child's birth, the filing of the child support petition and the time of trial. Since the Support Magistrate's findings regarding respondent's income were based on credibility determinations and are supported by the record, Supreme Court properly concluded that such

findings should not be disturbed.

Although the Support Magistrate erred in failing to consider the statutory factors for determining whether or not to award child support based on parental income above the statutory cap (FCA §§ 413[1][c][3]; 413[1][f]), for establishing each party's obligation to pay a portion of the cost of health insurance premiums and unreimbursed medical expenses (FCA § 413[1][c][5]), and for deviating from the non-custodial parent's pro rata share of childcare expenses (FCA §§ 413[1][c][4]; 413[1][f]), our application of those factors to the record before us leads us to the same result.

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

ENTERED: SEPTEMBER 29, 2016

CLERK

Mazzarelli, J.P., Acosta, Saxe, Moskowitz, Gesmer, JJ.

1760 The People of the State of New York, Ind. 4648/13
Respondent,

-against-

Ari Satlin,
Defendant-Appellant.

_____

Law Offices of Thomas A. Farinella, P.C., New York (Thomas A. Farinella of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Laura A. Ward, J.), rendered October 22, 2014, convicting defendant, after a jury trial, of assault in the second degree, criminal possession of a weapon in the fourth degree and criminal mischief in the fourth degree, and sentencing him to an aggregate term of 2½ years, unanimously affirmed.

The court properly denied defendant's motion to set aside the verdict based on a *Rosario* violation, consisting of an undisclosed document, discovered after the verdict but before sentencing. The motion was not cognizable under CPL 330.30(1) because such a motion is limited to grounds appearing in the record (*see People v Wolf*, 98 NY2d 105 [2002]; *see also People v Giles*, 24 NY3d 1066, 1068 [2014]). "To the extent the motion

could be deemed a de facto or premature motion to vacate judgment pursuant to CPL 440.10, the issues raised in the motion are unreviewable since defendant failed to obtain permission from this Court to appeal (*see* CPL 450.15[1]; 460.15; *People v Ai Jiang*, 62 AD3d 515, 516 [1st Dept 2009], *lv denied* 14 NY3d 769 [2010]). As an alternative holding, we also reject defendant's claim on the merits. Defendant has failed to establish a reasonable possibility that the nondisclosure materially contributed to the result of the trial (*see* CPL 240.75). Defendant's claim that the belatedly disclosed *Rosario* material constituted newly discovered evidence was procedurally cognizable under CPL 330.30(3), but the court properly rejected this claim on the merits because the document fell far short of creating a "probability" of a more favorable verdict (*id.*).

Defendant also challenges evidentiary rulings made during trial. We find these rulings to be proper exercises of the court's discretion that, in any event, did not cause defendant any prejudice. Accordingly, we find no violation of defendant's rights to a fair trial and to present a defense.

To the extent that, independently of his claim that the alleged *Rosario* and other errors were harmful, defendant is also

claiming that the verdict was based on legally insufficient evidence and was against the weight of the evidence, those arguments are improperly made for the first time in a reply brief, and are in any event without merit.

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

ENTERED: SEPTEMBER 29, 2016

CLERK

Mazzarelli, J.P., Acosta, Saxe, Moskowitz, Gesmer, JJ.

1761 The People of the State of New York, Ind. 1021/13
Respondent,

-against-

Jonathan Moorer,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered May 29, 2014, convicting defendant, upon his plea of guilty, of robbery in the first degree, and sentencing him to a term of 5 years, unanimously modified, on the law, to the extent of vacating the sentence and remanding for a youthful offender determination, and otherwise affirmed.

As the People concede, defendant is entitled to an express determination of whether, notwithstanding his conviction of an armed felony offense, he is eligible for youthful offender treatment based on the factors set forth in CPL 720.10(3), and if

so, whether such treatment should be granted (*see People v Middlebrooks*, 25 NY3d 516 [2015]; *People v Rudolph*, 21 NY3d 497 [2013]).

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

ENTERED: SEPTEMBER 29, 2016

CLERK

Mazzarelli, J.P., Acosta, Saxe, Moskowitz, Gesmer, JJ.

1762-
1763 Index 653090/13

Certain Underwriters at Lloyd's, London, et al.,
Plaintiffs-Respondents,

-against-

AT&T, Corp., et al.,
Defendants,

American Excess Insurance Association,
Defendant-Appellant.

_____

Litchfield Cavo LLP, New York (Krupa A. Shah of counsel), for appellant.

Mendes & Mount LLP, New York (Eileen Therese McCabe of counsel), for respondents.

_____

Order, Supreme Court, New York County (Eileen Bransten, J.), entered December 1, 2015, which denied defendant American Excess Insurance Association's (AEIA) motion to compel arbitration, and order, same court and Justice, entered December 2, 2015, which denied AEIA's motion to dismiss the complaint as against it, unanimously affirmed, with costs.

AEIA's motion to dismiss was filed well beyond the statutory time period (CPLR 3211[e]; 3012[a]), and the record does not support AEIA's contention that the delay was due to plaintiffs' actions.

The motion to compel arbitration was correctly denied, as it cannot be said that plaintiffs, nonsignatories to the AEIA policy containing the arbitration clause that signatory AEIA seeks to enforce, "knowingly exploit[ed]" the AEIA policy or derived a "direct benefit" from it (*Matter of Belzberg v Verus Invs. Holdings Inc.*, 21 NY3d 626, 631 [2013] [internal quotation marks omitted]; *see also Matter of SSL Intl., PLC v Zook*, 44 AD3d 429, 430 [1st Dept 2007]).

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

ENTERED: SEPTEMBER 29, 2016

CLERK

Mazzarelli, J.P., Acosta, Saxe, Moskowitz, Gesmer, JJ.

1764 In re Freedom R., and Others,

Children Under the Age of Eighteen Years, etc.,

Jamila W.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

Larry S. Bachner, Jamaica, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Benjamin Welikson of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Judith Stern of counsel), attorney for the children.

_____

Appeal from order, Family Court, New York County (Clark V. Richardson, J.), entered on or about July 23, 2015, which granted petitioner Administration for Children's Services' motion for an order directing that the subject children receive all immunizations necessary to allow them to attend New York State Department of Education schools, unanimously dismissed, without costs, as moot.

Because it is undisputed that the children have already been vaccinated, the appeal is moot. The issues presented by this appeal are not sufficiently substantial or novel to warrant

invocation of the exception to the mootness doctrine (*see Coleman v Daines*, 79 AD3d 554, 558 [1st Dept 2010], *affd* 19 NY3d 1087 [2012]). Were we to reach the merits of the appeal, we would affirm since the mother failed to submit an affidavit, relying only on an affirmation of counsel without any supporting evidence, and thus failed to demonstrate that her opposition to immunization stems from beliefs that are religious in nature, and are genuinely and sincerely held (*see Matter of Isaac J. [Joyce J.]*, 75 AD3d 506, 507 [2d Dept 2010]; *Matter of Nassau County Dept. of Social Servs. v R.B.*, 23 Misc 3d 270, 274-275 [Fam Ct, Nassau County 2008]).

We have considered the remaining arguments and find them unavailing.

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

ENTERED: SEPTEMBER 29, 2016

CLERK

Mazzarelli, J.P., Acosta, Saxe, Moskowitz, Gesmer, JJ.

1765 The People of the State of New York, Ind. 5021/11
Respondent,

-against-

Tambassie Dumbuya,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Marcy L. Kahn, J.), rendered January 11, 2013, convicting defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree, and sentencing him to a term of 4 years, unanimously affirmed.

The court properly denied defendant's suppression motion. In a high crime area around midnight, an officer saw defendant carrying a heavy, bulging object in his right waistband area, which defendant adjusted several times as he walked. As the police approached to question him, defendant quickly adjusted the bulge in his waistband and then fled. This combination of circumstances provided reasonable suspicion justifying the police

chase of defendant, during which he abandoned a weapon (*see e.g. People v Byrd*, 304 AD2d 490 [1st Dept 2003], *lv denied* 100 NY2d 579 [2003]). The officer clearly testified, and the hearing court specifically found, that the bulge was in the waistband, and we reject defendant's arguments to the contrary.

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

ENTERED: SEPTEMBER 29, 2016

CLERK

Mazzarelli, J.P., Acosta, Saxe, Moskowitz, Gesmer, JJ.

1766 The People of the State of New York, Ind. 2012/13
Respondent,

-against-

Omar Capellan,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Daniel P. FitzGerald, J.), rendered November 14, 2014, convicting defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree (two counts) and reckless endangerment in the first degree, and sentencing him, as a second felony offender, to an aggregate term of six years, unanimously affirmed.

By pleading guilty while his constitutional speedy trial motion remained undecided, defendant abandoned that claim and forfeited any appellate review (*see People v Alexander*, 19 NY3d 203, 219 [2012]; *People v Rodriguez*, 50 NY2d 553 [1980]; *People v Flemming*, 27 AD3d 257 [1st Dept 2006], *lv denied* 7 NY3d 755 [2006]). Moreover, since defendant's attorney declined to adopt

this pro se motion, the court had no duty to entertain it (*see People v Rodriguez*, 95 NY2d 497, 502-503 [2000]). In any event, to the extent the available record would permit review, we find no violation of defendant's constitutional right to a speedy trial (*see generally People v Taranovich*, 37 NY2d 442, 445 [1975]).

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

ENTERED: SEPTEMBER 29, 2016

CLERK

Mazzarelli, J.P., Acosta, Saxe, Moskowitz, Gesmer, JJ.

1767 Clean Air Options, LLC, et al., Index 654595/12
Plaintiffs-Respondents,

-against-

Humanscale Corporation,
Defendant-Appellant.

_____

Cole Schotz P.C., New York (Arianna Frankl of counsel), for appellant.

Agoglia, Holland & Agoglia, P.C., Jericho (Craig D. Holland of counsel), for respondents.

_____

Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered April 12, 2016, which, to the extent appealed from as limited by the briefs, denied defendant's motion for summary judgment dismissing the breach of contract claim, unanimously modified, on the law, to grant so much of the motion as seeks to dismiss the claim for lost profits arising from defendant's alleged failure to provide plaintiffs with products for resale, interest at the contractual rate, and damages arising from defendant's sale of products to a third-party, and otherwise affirmed, without costs.

The parties' agreements, pursuant to which plaintiffs granted defendant a license to manufacture and sell products incorporating certain air purification technology for use in

consumer products, contain no requirement that defendant supply plaintiffs with products for resale. Neither the 2006 agreement nor the 2009 amendment contains language obligating defendants to supply plaintiffs with any products. Nor did the 2007 agreement obligate defendant to sell products to plaintiffs. It provided defendant with the "right" to sell products to plaintiff Clean Air Options for resale, and supplied a formula for calculating the price for those products, but it further provided that in the event that defendant was unable to supply the requested products at a competitive price and in a timely manner, Clean Air could purchase the product from another manufacturer (rather than declare a breach and seek damages from defendant).

The late fee, which according to the parties' calculations results in an annual interest rate of 78%, is "unreasonable and confiscatory in nature," and thus unenforceable (*see Sandra's Jewel Box v 401 Hotel*, 273 AD2d 1, 3 [1st Dept 2000], citing Penal Law § 190.40). Indeed, in opposition to the motion, plaintiffs admitted that the interest at issue "was in the form of a penalty" (*see Love v State of New York*, 78 NY2d 540, 544 [1991]).

The motion court correctly found that defendant failed to establish that the 2009 amendment's sublicensing requirements

were satisfied by the execution of three separate agreements with a manufacturer and that this possible breach could not have resulted in any damages. Neither plaintiffs nor defendant were parties to the first agreement with the manufacturer, and none of the sublicensing agreements tied their own termination to defendant's agreements with plaintiffs. While "pointing to perceived deficiencies in plaintiff[s'] proof," defendant failed to meet its burden of establishing the absence of damages (*see DeMilia v DeMico Bros.*, 294 AD2d 264 [1st Dept 2002]).

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

ENTERED: SEPTEMBER 29, 2016

CLERK

Mazzarelli, J.P., Acosta, Saxe, Moskowitz, Gesmer, JJ.

1768 The People of the State of New York, Ind. 1832/11
Respondent,

-against-

Teri W.,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Rena K. Uviller, J.), rendered June 6, 2012, convicting defendant, upon her plea of guilty, of sexual abuse in the first degree, adjudicating her a youthful offender and sentencing her to a term of 10 years' probation, unanimously affirmed.

Although the court adjudicated defendant a youthful offender, it lawfully imposed a 10-year term of probation rather than a 5-year term (*see People v Gray*, 2 AD3d 275, 275 [1st Dept 2003] *lv denied* 1 NY3d 628 [2004]). We decline to revisit our holding in *Gray*.

Although we do not find that defendant made a valid waiver of her right to appeal, we perceive no basis for reducing the sentence.

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

ENTERED: SEPTEMBER 29, 2016

CLERK

Mazzarelli, J.P., Acosta, Saxe, Moskowitz, Gesmer, JJ.

1769 Nanette Basden, Index 22051/13E
Plaintiff-Appellant,

-against-

Liberty Lines Transit, Inc., et al.,
Defendants-Respondents.

_____

Michael Gunzburg, P.C., New York (Michael Gunzburg of counsel), for appellant.

Lifflander & Reich, LLP, New York (Kent B. Dolan of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Lizbeth Gonzalez, J.), entered September 15, 2015, which granted defendants' motion to change venue from Bronx County to Westchester County and referred plaintiff's cross motion for partial summary judgment on the issues of serious injury and liability to Westchester County, unanimously reversed, on the law, without costs, the motion denied and the cross motion granted to the extent of finding that plaintiff demonstrated that she suffered a serious injury within the meaning of Insurance Law § 5102(d).

Plaintiff properly commenced this action against Westchester County and Liberty Lines in Bronx County, where she resides (CPLR 503[a]), and defendants moved to change venue to Westchester County on the grounds that it is an action against that County

(CPLR 504[1]). While such motions are ordinarily granted in the absence of compelling countervailing circumstances (*see Garces v City of New York*, 60 AD3d 551 [1st Dept 2009]), in cases brought against defendants Liberty Lines and Westchester County, this Court has held that CPLR 504(1) does not require a change of venue absent any showing that Westchester County is not merely a nominal party in the action (*see Forteau v Westchester County*, 196 AD2d 440 [1st Dept 1993] [*Forteau I*]; *Forteau v County of Westchester*, 213 AD2d 257 [1st Dept 1995] [*Forteau II*]; *see also Jackson v City of New York*, 127 AD3d 552 [1st Dept 2015]). Notwithstanding this precedent, defendants submitted no evidence to make such a showing in support of the motion, and then improperly submitted an affidavit of a Senior County Attorney in reply in an attempt to remedy the deficiency in the moving papers (*see Mulqueen v Live*, 111 AD3d 585 [1st Dept 2013]). However, even considering that affidavit, defendants' showing was insufficient since it was unsupported by any documentary evidence, such as the indemnification contract which could indicate "insurance requirements and indemnification provisions" (*Forteau I*, 196 AD2d at 441).

In support of her cross motion, plaintiff demonstrated prima facie that she suffered a fractured rib, which is a serious

injury within the meaning of Insurance Law § 5102(d). Defendants do not oppose that portion of plaintiff's appeal, which is therefore granted. The remainder of the cross motion, seeking partial summary judgment on the issue of liability, should be decided in the first instance by the Supreme Court.

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

ENTERED: SEPTEMBER 29, 2016

CLERK

Mazzarelli, J.P., Acosta, Saxe, Moskowitz, Gesmer, JJ.

1770 The People of the State of New York Ind. 1151/11
Respondent,

-against-

Leonard Kinsler,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (David Crow of counsel), and Willkie Farr & Gallagher LLP, New York (Jonathan D. Waisnor of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Lawrence Marks, J. at suppression hearing; Gregory Carro, J. at jury trial and sentencing), rendered March 26, 2012, as amended April 23, 2012, convicting defendant of criminal possession of a controlled substance in the second and third degrees, criminal possession of a weapon in the second degree, endangering the welfare of a child (two counts), criminally using drug paraphernalia in the second degree (two counts) and criminal possession of marijuana in the fifth degree, and sentencing him to an aggregate term of 5 years, unanimously affirmed.

The court properly denied defendant's suppression motion. There is no basis for disturbing the court’s credibility

determinations. The hearing evidence established that the police entered defendant's apartment and observed drugs and drug paraphernalia only after obtaining defendant's voluntary consent (*see People v Gonzalez*, 39 NY2d 122, 128-131 [1976]). Given that the officers were investigating a call regarding an assault in progress at the apartment, and their explanation to defendant that they "needed to . . . make sure that everybody was okay at that location," the security sweep of the apartment fell within the scope of consent (*see People v Jassan J.*, 84 AD3d 620 [1st Dept 2011], *lv denied* 18 NY3d 925 [2012]).

Defendant did not preserve his claim that the evidence was legally insufficient to support his drug and weapon convictions involving items found in a lockbox, and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. We also find that the verdicts at issue were not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). We see no reason to disturb the jury's credibility determinations. The evidence of defendant's dominion and control over the entire apartment, including the closet in which the lockbox was found, established constructive possession of the box (*see People v Manini*, 79 NY2d 561, 573 [1992]; *People v Singleton*, 195 AD2d 339 [1st Dept 1993], *lv*

denied 82 NY2d 903 [1993]). Such evidence of constructive possession permits the inference that defendant knew about the narcotics and pistol in the box (*see People v Reisman*, 29 NY2d 278, 285 [1971], *cert denied* 405 US 1041 [1972]). Moreover, the ample evidence, including a recorded phone conversation and the reasonable inferences to be drawn therefrom, of defendant's participation in the drug operation being conducted out of the apartment also establishes knowing possession of the items in the box (*see People v Tirado*, 38 NY2d 955 [1976]; *People v Diaz*, 220 AD2d 260 [1st Dept 1995]).

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

ENTERED: SEPTEMBER 29, 2016

CLERK

Mazzarelli, J.P., Acosta, Saxe, Moskowitz, Gesmer, JJ.

1771 The People of the State of New York, Ind. 573/13
Respondent,

-against-

Gregory Mays,
Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (A. Kirke Bartley, J. at plea; Laura Ward, J. at sentencing), rendered August 12, 2013, unanimously affirmed.

Application by defendant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1st Dept 1976]). We have reviewed this record and agree with defendant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

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

service of a copy of this order.

Denial of the application for permission to appeal by the judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

ENTERED: SEPTEMBER 29, 2016

CLERK

Mazzarelli, J.P., Acosta, Saxe, Moskowitz, Gesmer, JJ.

1772N Vincent Massa, Index 100115/09
Plaintiff-Respondent,

-against-

Lower Manhattan Development Corporation, et al.,
Defendants,

Bovis Lend Lease LMB, Inc., et al.,
Defendants-Appellants.

_____

Shaub, Ahmuty, Citrin & Spratt, LLP, Lake Success (Christopher Simone of counsel), for appellants.

The Altman Law Firm, PLLC, New York (Michael T. Altman of counsel), for respondent.

_____

Order, Supreme Court, New York County (Lynn R. Kotler, J.), entered March 21, 2016, which denied defendants Bovis Lend Lease LMB, Inc. and Bovis Lend Lease, Inc.'s (Bovis) motion to quash a subpoena by plaintiff for a nonparty deposition, unanimously affirmed, without costs.

The motion court determined that the motion to quash was moot because the noticed deposition date had passed. This was erroneous, because the deposition had been adjourned to May 20, 2016. Moreover, both plaintiff and Bovis acknowledge that the deposition has not yet taken place.

Nevertheless, plaintiff demonstrated "unusual or unanticipated circumstances" and "substantial prejudice" warranting post-note-of-issue discovery (*see* 22 NYCRR 202.21[d]; *Arons v Jutkowitz*, 9 NY3d 393, 411 [2007]; *Schroeder v IESI NY Corp.*, 24 AD3d 180 [1st Dept 2005]). Counsel's statement that he only realized the importance of the nonparty witness's testimony after filing the note of issue is sufficient.

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

ENTERED: SEPTEMBER 29, 2016

CLERK

Mazzarelli, J.P., Acosta, Saxe, Moskowitz, Gesmer, JJ.

1773 In re Alex Wooldridge, Ind. 2623/15
[M-2979] Petitioner,

-against-

Hon. Gregory Carro, etc., et al.,
Respondents.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Rachel Black and Allison Lewis of counsel), for petitioner.

Eric T. Schneiderman, Attorney General, New York (Michelle R. Lambert of counsel), for Hon. Gregory Carro, respondent.

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

_____

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

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

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

ENTERED: SEPTEMBER 29, 2016

CLERK

Tom, J.P., Friedman, Richter, Kapnick, Gesmer, JJ.

1549 The People of the State of New York, Ind. 4407/12
Respondent,

-against-

John Robinson,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Gregory Carro, J.), rendered April 3, 2014, reversed, on the law, and the matter remanded for a new trial.

Opinion by Kapnick, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
David Friedman
Rosalyn H. Richter
Barbara R. Kapnick
Ellen Gesmer, JJ.

1549
Ind. 4407/12

_____x

The People of the State of New York,
Respondent,

-against-

John Robinson,
Defendant-Appellant.

_____x

Defendant appeals from the judgment of the Supreme Court, New York County (Gregory Carro, J.), rendered April 3, 2014, convicting him, after a jury trial, of criminal possession of a controlled substance in the third degree, and imposing sentence.

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

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

KAPNICK, J.

On this appeal, defendant contends that the court failed to follow the mandates of CPL 310.30 in responding to notes from the jury, that the verdict was against the weight of the evidence, and that his sentence was excessive. Relevant here are the fourth and fifth jury notes (court exhibits IV and V respectively). The fourth note asked as follows: "Officer Suzanno [sic] testimony - Was Mr. Robinson found with a bag? - If so, where/when was the bag searched? - What denominations of $ was the $32 made of? - What was in the bag?" The fifth note asked the following questions: "What are the requirements for conviction? - Does everything have to be unanimous? - If we are hung on a charge, what happens?"

The trial court responded to these notes as follows:

> "Jurors, we are in receipt of your last two notes which you requested the read back [sic] of Officer Susana's testimony. So the reporter is prepared to read back the entire testimony.
>
> You also asked various questions about a bag. The parties believe that the best way to answer those questions are through read back [sic] of Officer Ward's testimony, which they have isolated and will be read back to you.
>
> As far as what the denomination of the money, of the $32 was made of, the parties agree there was no testimony about the denomination. However, the money was put in evidence, so you can look at it. So that's

> how we will deal with that. So let's deal with this. The reporter will now read back that testimony."

After the reporter completed the readback, the trial court continued:

> "In your second request[,] you asked a number of questions in your second inquiry: What are the requirements of conviction? As I said, I gave you the elements of each crime. Those elements must be proven beyond a reasonable doubt. Yes, every verdict has to be unanimous. All 12 of you have to agree as to what that verdict is.
>
> And your last question about hang. It's too early to tell you about that now, so I'm going to ask you to continue your deliberations."

It is well settled that "CPL 310.30 requires a trial court to provide 'notice to both the people and counsel for the defendant' of a substantive jury inquiry" (*People v Nealon*, 26 NY3d 152, 155-156 [2015], quoting *People v O'Rama*, 78 NY2d 270, 276 [1991]). The trial court has a "core responsibility under the statute . . . both to give meaningful notice to counsel of the specific content of the jurors' request - - in order to ensure counsel's opportunity to frame intelligent suggestions for the fairest and least prejudicial response - - and to provide a meaningful response to the jury" (*People v Kisoon*, 8 NY3d 129, 134 [2007]; *O'Rama*, 78 NY2d at 277). In *O'Rama*, the Court of Appeals held that, in most cases, the meaningful notice

requirement is best served by the procedure set forth in *United States v Ronder* (639 F2d 931 [1981]):

> "Under this procedure, jurors' inquiries must generally be submitted in writing, since . . . written communications are the surest method for affording the court and counsel an adequate opportunity to confer. Further, whenever a substantive written jury communication is received by the Judge, it should be marked as a court exhibit and, before the jury is recalled to the courtroom, read into the record in the presence of counsel. Such a step would ensure a clear and complete record, thereby facilitating adequate and fair appellate review. After the contents of the inquiry are placed on the record, counsel should be afforded a full opportunity to suggest appropriate responses. As the court noted in *Ronder*, the trial court should ordinarily apprise counsel of the substance of the responsive instruction it intends to give so that counsel can seek whatever modifications are deemed appropriate *before* the jury is exposed to the potentially harmful information. Finally, when the jury is returned to the courtroom, the communication should be read in open court so that the individual jurors can correct any inaccuracies in the transcription of the inquiry and, in cases where the communication was sent by an individual juror, the rest of the jury panel can appreciate the purpose of the court's response and the context in which it is being made" (*O'Rama*, 78 NY2d at 277-278 [internal citation omitted]).

In *O'Rama*, the Court determined, and it is now well settled, that a trial court's duty, imposed by CPL 310.30, to provide notice of a substantive jury inquiry can only be properly discharged by providing "meaningful notice," which means "notice

of the actual specific content of the jurors' request" (*O'Rama*, 78 NY2d at 277). Moreover, as recently reiterated by the Court of Appeals, "A trial court's failure to fulfill its first responsibility — meaningful notice to counsel — falls within the narrow class of mode of proceedings errors for which preservation is not required" (*People v Mack*, 27 NY3d 534, 536 [2016]). A trial court cannot "satisfy its responsibility to provide counsel with meaningful notice of a substantive jury inquiry by summarizing the substance of the note" (*Nealon*, 26 NY3d at 156, citing *O'Rama*, 78 NY2d at 275, 278-279). This is because "counsel cannot participate effectively or adequately protect the defendant's rights if this specific information is not given" (*O'Rama*, 78 NY2d at 277). As a result, the requirement to give "meaningful notice" cannot be satisfied "when counsel is not afforded a verbatim account of a juror's communication" (*id.* at 279; *People v Walston*, 23 NY3d 986, 990 [2014] [trial court failed to give meaningful notice of a jury note when it paraphrased the note for counsel and the jury, each time omitting any reference to the note's inclusion of the word "intent," which was a crucial element of the homicide counts]; *People v Kisoon*, 8 NY3d at 135 [holding that the "failure to read the note(,) (which reported the status of the deliberations,) verbatim deprived counsel of the opportunity to accurately analyze the jury's

deliberations and frame intelligent suggestions for the court's response"]).

Defendant argues that the record is clear that the court violated *O'Rama* by failing to read either note into the record in the presence of counsel prior to recalling the jury into the courtroom, to afford counsel an opportunity to suggest responses, to advise counsel of its suggested responses, or, when the jury was returned to the courtroom, to read either note into the record before responding to the notes. Defendant contends that under these circumstances, a mode of proceedings error occurred and reversal is warranted, notwithstanding lack of preservation and without regard to harmless error analysis.

The People concede that the trial Justice "neglected to make a contemporaneous record that he had shared the contents of the notes with the parties and provided each with an opportunity to offer input." However, they contend that the response to the jury expressly states that the parties had agreed on the appropriate response, indicating that the court did indeed discuss the notes with counsel off the record.[1] Based on this, the People argue that preservation is required.

[1] The transcript, however, does not reflect that prior to responding to the fourth and fifth notes, the court reconvened the parties outside of the jury's presence and read the notes.

"Where a trial transcript does not show compliance with *O'Rama's* procedure as required by law, we cannot assume that the omission was remedied at an off-the-record conference that the transcript does not refer to" (*Walston*, 23 NY3d at 990). Here, the court's response to the jury regarding the fourth note does include a limited reference to how the "parties" wished to respond to the jury's request, suggesting that an off-the-record conference may have occurred with respect to the fourth note. Even assuming, without deciding, that this reference would suffice to remedy the *O'Rama* violation with respect to the fourth note, there is no such reference to the parties' agreement in the trial court's response to the jury regarding the fifth note. Therefore, the court's handling of the fifth note constitutes a clear departure from the *O'Rama* procedure and a mode of proceedings error for which preservation is not required (*cf. Mack*, 27 NY3d at 537 [holding that trial court's failure to respond to jury's substantive inquiries, which counsel had meaningful notice of, prior to accepting the jury's verdict, does not fall within the tightly circumscribed class of mode of proceedings errors for which preservation is not required]). In light of this holding, we need not reach defendant's remaining arguments, except that we find that the verdict was not against the weight of the evidence.

Accordingly, the judgment of the Supreme Court, New York County (Gregory Carro, J.), rendered April 3, 2014, convicting defendant, after a jury trial, of criminal possession of a controlled substance in the third degree, and sentencing him, as a second felony drug offender previously convicted of a violent felony, to a term of seven years, should be reversed, on the law, and the matter remanded for a new trial.

All concur.

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

ENTERED: SEPTEMBER 29, 2016

CLERK

CORRECTED OPINION - SEPTEMBER 29, 2016

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Rolando T. Acosta, J.P.
Dianne T. Renwick
David B. Saxe
Rosalyn H. Richter
Judith J. Gische, JJ.

1488
Index 652269/14

_____x

Avi Dorfman,
Plaintiff-Respondent,

RentJolt, Inc.,
Plaintiff,

-against-

Robert Reffkin, et al.,
Defendants-Appellants.

_____x

Defendants appeal from the order of the Supreme Court, New York County (Jeffrey K. Oing, J.), entered September 10, 2015, which, insofar as appealed from as limited by the briefs, denied their motion to dismiss plaintiff Avi Dorfman's claims for unjust enrichment and quantum meruit.

Kirkland & Ellis LLP, New York (Eric F. Leon, Atif Khawaja, John C. Vazquez and Lindsey R. Oken of counsel), for appellants.

Harris, St. Laurent & Chaudhry LLP, New York (Jonathan Harris L. Reid Skibell, David B. **Deitch** and Jared B. Foley of counsel), and Susman Godfrey LLP, New York (Shawn J. Rabin, Arun Subramanian and Zachary Savage of counsel), for respondent.

RENWICK, J.

Plaintiff Avi Dorfman is a young entrepreneur who claims to be a former partner of defendant Robert Reffkin, the founder of the apartment search website Urban Compass. Plaintiff sues Reffkin and the company, accusing Reffkin of, inter alia, stealing proprietary information that helped Urban Compass reach a $360 million evaluation in 2014, only a year after it came to fruition. The dispositive issue on this appeal is whether the statute of frauds, as embodied in General Obligations Law § 5-701(a)(10), bars the causes of action in the amended complaint for quantum meruit and unjust enrichment, through which Dorfman seeks compensation for services he provided in helping to found and initialize operations of Urban Compass.

Factual and Procedural Background

"Inasmuch as this appeal had its genesis in a motion to dismiss pursuant to CPLR 3211(a)(7), we are bound to, inter alia, 'accept the facts as alleged in the [amended] complaint as true'" (*JF Capital Advisors, LLC, v Lightstone Group, LLC,* 25 NY3d 759, 762 [2015] quoting *Leon v Martinez*, 84 NY2d 83, 87 [1994]). In or about 2008, plaintiff Avi Dorfman began developing a web-based program that would allow renters to search and apply for apartment rentals online without the assistance of a broker or

other third party. Based on this premise, in 2010, Dorfman began developing iRent, a company which reached the beta testing phase, but never went "live." Dorfman went on to create a new company, RentJolt, into which iRent was merged, and which functioned as a brokerage firm, connecting current tenants to prospective renters. By January 2012, RentJolt was a functioning business with a live website.

In 2012, Dorfman sought investors for RentJolt. A friend suggested he meet defendant Reffkin, a Goldman Sachs investment banker interested in learning about and getting involved in the New York City real estate market. During the parties' first meeting on July 14, 2012, Dorfman observed that Reffkin was well versed in private equity and investment banking, but had limited knowledge of the New York real estate market. Dorfman discussed his experiences in real estate, as well as his vision for RentJolt. Reffkin expressed an interest in partnering with Dorfman to create a new, web-based start-up for real estate rentals, which would come to be known as "Urban Compass."

Recognizing that Urban Compass would be a direct competitor of RentJolt, Reffkin consulted with his attorney, who advised him to acquire RentJolt. To that end, Urban Compass and RentJolt executed a confidentiality and non disclosure agreement dated

July 23, 2012 (NDA), which Dorfman signed on behalf of RentJolt, and Reffkin signed on behalf of Urban Compass (then identified as Newco). The NDA indicates that it was entered in contemplation of a "possible negotiated transaction between the two companies" and provides, in section 11(b):

> "Each party recognizes and acknowledges the competitive value and confidential nature of the Evaluation Material of the other party and that irreparable damage may result to the other party if information contained therein or derived therefrom is disclosed to any person except as herein provided or is used for any purpose other than the evaluation of a possible negotiated transaction between the parties."

Section 8 of the NDA, entitled "No Representations and Warranties," provides in relevant part:

> "(a) Only those representations or warranties which are made in a definitive agreement between the parties, when, as and if executed, and subject to such limitations and restrictions as may be specified therein, will have any legal effect. For purposes of this Agreement, the term 'definitive agreement' does not include any executed letter of intent or any other preliminary written agreement, nor does it include any written or verbal acceptance of any offer or bid made by one party.
>
> "(b) Each party understands and agrees that no contract or agreement providing for any transaction involving the parties shall be deemed to exist unless and until a definitive

> agreement has been executed and delivered and each party hereby waives in advance any claims, including without limitation claims for breach of contract, in connection with any transaction between the parties unless and until the parties shall have entered into a definitive agreement. Each party also agrees that unless and until a definitive agreement regarding a transaction between the parties has been executed and delivered, neither party will be under any legal obligation of any kind whatsoever with respect to such a transaction by virtue of this Agreement or any other written or oral communication with respect to such transaction, except for the matters specifically agreed to herein."

The NDA also contains a covenant not to sue, with a carve out for "the other party's failure to comply with its promises and provide benefits under this Agreement."

In reliance on the protections under the NDA, RentJolt provided Reffkin and Urban Compass with proprietary and confidential information solely for the purpose of allowing Urban Compass to assess whether to acquire RentJolt. In particular, RentJolt provided Reffkin and Urban Compass with a list of its assets, as well as full access to iRent and RentJolt's confidential and proprietary information, including proprietary software code. Further, Dorfman alleges that he made significant

contributions to Urban Compass's formation, which were separate and apart from RentJolt's preexisting trade secrets. For instance, he developed materials aimed at securing financing and recruiting engineers and helped develop Urban Compass' software. Dorfman also created a budget for Urban Compass, as well as a model showing how the company would differentiate itself from a traditional brokerage firm, and a proposal detailing the vision for Urban Compass's development and goals.

Dorfman alleges that in July 2012, Goldman Sachs made a $6 million initial investment in Urban Compass, due in large part to his efforts. He also successfully convinced Ori Allon, Twitter's New York director of engineering, to leave Twitter and join Urban Compass.

In August, Dorfman negotiated with Reffkin and Allon regarding a position with Urban Compass and compensation. A few offers were made which included a combination of equity and base salary, but Dorfman rejected them, finding them to be "insulting" and believing that they "greatly minimized" the work he had done for Urban Compass.

The parties never executed a "definitive agreement" (other than the NDA), and Urban Compass ultimately did not acquire RentJolt. On September 17, 2012, RentJolt sent Urban Compass a

cease and desist letter reminding Urban Compass that the NDA prohibited the use of RentJolt's trade secrets. Urban Compass's chief operating officer responded by noting that there was no agreement between Urban Compass and Dorfman.

Urban Compass's website went live in May 2013, allegedly premised on iRent and RentJolt's confidential and proprietary information, as well as ideas separately developed by Dorfman. Urban Compass was an immediate success and received considerable acclaim, being named by CNN as one of 10 "Start-Ups to Watch." By July 2014, a little more than one year after its launch, Urban Compass was valued at about $360 million. Dorfman alleges that without his input in the early stages of Urban Compass' formation, the company never would have grown as fast or as big as it did.

According to Dorfman, defendants did not compensate him for his valuable work. Consequently, Dorfman and RentJolt commenced this action by filing a complaint which asserts, inter alia, claims for breach of contract, breach of implied contract, unjust enrichment, and quantum meruit. The breach of contract claim is asserted by RentJolt against Urban Compass and Reffkin and is based upon the alleged violation of the NDA. The breach of implied contract is asserted by Dorfman and RentJolt against

Reffkin and Urban Compass. The unjust enrichment and quantum meruit claims are asserted by Dorfman and RentJolt against Reffkin and Urban Compass

Defendants moved pursuant to CPLR 3211(a)(1) and (a)(7) to dismiss all the claims except for the breach of contract claim. Defendants argued, inter alia, that plaintiffs' claim for breach of implied contract, unjust enrichment and quantum meruit are barred by the statute of frauds.

The court dismissed the cause of action for breach of implied contract as void under the statute of frauds, holding that Dorfman's efforts to form Urban Compass involved a "business opportunity" covered thereunder. The court rejected defendants' argument that the statute of frauds precludes the claims for unjust enrichment and quantum meruit, and declined to dismiss those causes of action as asserted by Dorfman. However, it held that section 8 of the NDA precludes RentJolt from asserting claims for unjust enrichment and quantum meruit in the alternative to its claim for breach of the NDA, and granted defendants' motion to dismiss those two claims as asserted by RentJolt. As indicated, the only issue in dispute on this appeal is whether the claims of quantum meruit and unjust enrichment, through which Dorfman seeks compensation for helping to found and

initialize the operations of Urban Compass, should also have been dismissed as precluded by the statute of frauds.

Discussion

The statute of frauds is codified in General Obligations Law § 5-701. Under the statute of frauds, to be enforceable, certain types of agreements cannot be oral; they must be in writing. Simply stated, the purpose of the statute is to prevent perjury and fraud and to preserve the integrity of contracts (*William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 476 [2013]); Morris Cohon & Co. v Russell, 23 NY2d 569, 574 [1969]).

This appeal concerns a lesser-known provision of the statute of frauds, that is, General Obligations Law 5-701(a)(10), which requires a writing in an agreement pertaining to the negotiation of services for the purchase of real estate or of a business opportunity. Specifically, it provides, in pertinent part:

> "a. Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking:
>
> . . .
>
> "10. Is a contract to pay compensation for services rendered in . . . negotiating the

> purchase . . . of any real estate or interest therein, or of a business opportunity, business, its good will, inventory, fixtures or an interest therein . . . .”

The same paragraph further states that “‘[n]egotiating’ includes procuring an introduction to a party to the transaction or assisting in the negotiation or consummation of the transaction” (*id.*).

The tension around this section concerns the scope of services within the meaning of “negotiating . . . a business opportunity” (*id.*). In this appeal, defendants argue that because the motion court dismissed plaintiff Dorfman’s implied contract claim, as barred by the statute of frauds, the court was required to dismiss plaintiff’s quasi contract (quantum meruit and unjust enrichment) claims as well. Defendants’ argument, however, is based on the false premise that the quasi contract claims and the implied contact claim overlap as all seeking compensation for the work Dorfman performed in creating Urban Compass, which would be barred as “assisting in the negotiation or consummation” of the business opportunity (*id.*).

Plaintiff Dorfman, however, alleges that he provided services clearly extending beyond the negotiation of a business opportunity, including developing materials to secure investor

backing, recruiting engineers and others to join Urban Compass, and developing the details of how Urban Compass's software product, web, and mobile applications would be "architected." When alleged services go beyond the negotiation of a business opportunity, claims for unjust enrichment and quantum meruit should be sustained (*see Ashwood Capital, Inc. v OTG Mgt., Inc.*, 99 AD3d 1, 10-11 [1st Dept 2012]; *Venetis v Stone*, 81 AD3d 503 [1st Dept 2011]).

Nevertheless, defendants argue that any other work Dorfman may have performed is intertwined with his alleged work in "assisting in the negotiation or consummation of the business opportunity. As fully explained below, however, the Court of Appeals has rejected defendants' broad interpretation of the term negotiating a business opportunity within the meaning of General Obligations Law 5-701(a)(10).

To be sure, General Obligations Law § 5-701(a)(10)'s sweep is comprehensive as it covers conduct at the outset, during the course of, and at the conclusion of the services rendered for the purpose of "assisting in the negotiation or consummation" of a business opportunity, as illustrated by the Court of Appeals' pronouncement in *Snyder v Bronfman* (13 NY3d 504 [2009]). In *Snyder*, the Court of Appeals held that General Obligations Law

5-701(a)(10) applied where the plaintiff alleged "that he devoted years of work to finding a business to acquire and causing an acquisition to take place — efforts that ultimately led to defendant's acquisition of his interest in Warner Music" (*Snyder* at 509). Specifically, the plaintiff in *Snyder* alleged that he "developed . . . a series of business relationships with key figures in the corporate and investment banking communities," "met with defendant and defendant's other business associates to discuss possible acquisitions," "worked on several aborted deals," and "was a major contributor" to the defendant's eventual successful acquisition of Warner Music (*id.* at 507 [internal quotation marks omitted]). The plaintiff "identified the opportunity, persuaded the defendant of its merits, helped to get debt financing[,] and obtained financial information from the target company [Warner Music]" (*id.*). The Court of Appeals held that "[i]n seeking reasonable compensation for [these] services, plaintiff obviously seeks to be compensated for finding and negotiating the Warner Music transaction," and that such a "claim is of precisely the kind the statute of frauds describes" (*id.* at 509) In so finding, the Court affirmed this Court's dismissal of the plaintiff's claims.

The Court of Appeals has, however, warned against the

"pitfalls" of interpreting General Obligations Law 5-701(a)(10) too broadly (*Sporn v Suffolk Mktg.*, 56 NY2d 864, 865 [1982]); *see e.g. Freedman v Chemical Constr. Corp.*, 43 NY2d 260 [1977]). The reason for this concern is that "[t]oo broad an interpretation would extend the writing requirement" to situations beyond those intended by the legislature (*Freedman*, 43 NY2d at 266). Thus, the Court of Appeals has cautioned that the interpretation of General Obligations Law 5-701(a) (10) should be decided on a "case-by-case basis" to avoid "sweeping generalizations" about its scope (*Sporn v Suffolk Mktg.*, 56 NY2d at 865; *see also Freedman*, 43 NY2d at 267; *Tower Intl., Inc. v Caledonian Airways, Ltd.*, 133 F3d 908, 909 [2d Cir 1998]).

Indeed, just recently, *in JP Capital Advisors, LLC v Lightstone Group, LLC* (25 NY3d 759 [2015], *supra*), the Court rejected this Court's interpretation of GOL 5-701(a)(10) as barring recovery for all services rendered in connection with business opportunities including those that went beyond assisting in the negotiation or consummation of such opportunity. In that case, the plaintiff commenced an action against the Lightstone Group, LLC, seeking to be paid for investment advisory service in connection with the defendants' acquisition of certain hotels and other investment opportunities (*id.* at 762). In lieu of

answering, the defendant moved to dismiss the amended complaint pursuant to CPLR 3211(a)(7), contending that the claims for compensation of the advisory services based on the theories of unjust enrichment and quantum meruit were barred by the statute of frauds (*id.* at 763-764). As relevant to this appeal, Supreme Court denied the dismissal of the claims pertaining to 5 of the alleged 12 business opportunities for which the plaintiff provided advisory services (*id.*). The Court held that the statute of frauds was not applicable to such claims for compensation because the advisory information the plaintiff provided was not later used to assist in the negotiations or consummation of any business opportunity. Instead, the information that JP Capital provided just informed Lightstone of what those business opportunities would cost and be worth if it pursued those opportunities. This Court, however, held that these claims for compensation should have been dismissed because "investment analyses and financial advice regarding the possible acquisition of investment opportunities clearly fall within the negotiation of a business opportunity" (*JF Capital Advisors, LLC v Lightstone Group, LLC*, 115 AD3d 591, 592 [1st Dept 2014]).

The Court of Appeals reinstated these quasi contract claims, agreeing with Supreme Court's narrower interpretation of the term

"negotiating . . . a business opportunity" (*JF Capital Advisors*, LLC, 25 NY3d at 766). Specifically, the Court held that tasks performed so as to inform the defendants whether to partake in certain business opportunities were not performed within the meaning of assisting in the negotiation or consummation of a business opportunity (*id. at 767*). Rather, in the Court's view, "work performed so as to inform defendants whether to partake in a business opportunity" is intended for the narrower purpose of deciding "*whether to negotiate*" (*id.* at 766). In so doing, the Court of Appeals distinguished *Snyder* as being more akin to the seminal case of *Freedman* (43 NY2d 260).

In *Freedman*, the Court held that an oral agreement under which the plaintiff was to negotiate a construction contract on the defendant's behalf in exchange for a fee was unenforceable under the statute of frauds (*id.* at 267). The Court explained that 5-701(a)(10) "applies to various kinds of intermediaries who perform limited services in the consummation of certain kinds of commercial transactions" (*id.* at 266). In *Freedman*, the Court found that the agreement by which the plaintiff "was to use his 'connections,' his 'ability,' and his 'knowledge' to arrange for [the defendant] to meet 'appropriate persons'" so that the defendant could procure a construction contract fell within the

statute of frauds (*id.* at 267). The Court explained that where the "intermediary's activity is so evidently that of providing 'know-how' or 'know-who,' in bringing about between principals an enterprise of some complexity or an acquisition of a significant interest in the enterprise," the statute of frauds applies (*id.*).

In the present case, the amended complaint contains allegations that, if accepted by the trier of fact, demonstrate that plaintiff's role consisted of more than functioning as an intermediary that assisted in the negotiation or consummation of the business opportunity. Rather, Dorfman allegedly rendered a wide variety of services, which presumably took place after the company came to fruition, making these services related to a purpose other than "assisting in the negotiation or consummation" of a business opportunity, so as to escape the strictures of General Obligations Law 5-701(a)(10).

To be clear, we simply hold that Dorfman's unjust enrichment and quantum meruit claims were properly sustained, but only insofar as they involved services that went beyond the negotiation or consummation of a business opportunity pursuant to General Obligations Law 5-701(a)(10). The motion court, however, sustained those claims based on all the alleged services provided. As defendants correctly indicate, the amended

complaint also avers that Dorfman was negotiating a business opportunity for defendants by providing know—how in bringing a business enterprise to fruition. Those alleged services clearly fall under the statute of frauds and should have been dismissed.

Accordingly, the order of the Supreme Court, New York County (Jeffrey K. Oing, J.), entered September 10, 2015, which, insofar as appealed from as limited by the briefs, denied defendants' motion to dismiss plaintiff Avi Dorfman's claims for unjust enrichment and quantum meruit, should be modified, on the law, to grant the motion only to the extent the services allegedly provided by plaintiff Avi Dorfman fall under General Obligations Law § 5-701(a)(10), and otherwise affirmed, without costs.

All concur.

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

ENTERED: SEPTEMBER 22, 2016

CLERK