SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

APRIL 24, 2008

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Lippman, P.J., Saxe, Gonzalez, Nardelli, JJ.

3431 Marlene Smith, Index 20149/05
Plaintiff-Respondent,

-against-

Costco Wholesale Corporation,
Defendant-Appellant.

Thomas M. Bona, P.C., White Plains (James C. Miller of counsel), for appellant.

Order, Supreme Court, Bronx County (Patricia Anne Williams, J.), entered July 27, 2007, which denied defendant's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, the motion granted, and the complaint dismissed. The Clerk is directed to enter judgment accordingly.

It is a well-established principle of law that a landowner is under a duty to maintain its property in a reasonably safe condition under the existing circumstances, which include the likelihood of injury to a third party, the potential that such an injury would be of a serious nature, and the burden of avoiding the risk (*Basso v Miller*, 40 NY2d 233, 241 [1976]; *Zuk v Great Atl. & Pac. Tea Co., Inc.*, 21 AD3d 275 [2005]). In order to subject a property owner to liability for a hazardous condition

on its premises, a plaintiff must demonstrate that the owner created, or had actual or constructive notice of the dangerous condition which precipitated the injury (*Piacquadio v Recine Realty Corp.*, 84 NY2d 967, 969 [1994]; *Alexander v New York City Tr.*, 34 AD3d 312, 313 [2006]). In the case of actual or constructive notice, plaintiff must also show that the owner had a sufficient opportunity, with the exercise of reasonable care, to remedy the situation (*Aquino v Kuczinski, Vila & Assoc., P.C.*, 39 AD3d 216, 219 [2007]; *Morales v Shelter Express Corp.*, 26 AD3d 420 [2006]).

A defendant who moves for summary judgment in a slip-and-fall action has the initial burden of making a prima facie demonstration that it neither created the hazardous condition, nor had actual or constructive notice of its existence (*Manning v Americold Logistics, LLC*, 33 AD3d 427 [2006]; *Mitchell v City of New York*, 29 AD3d 372, 374 [2006]). Once a defendant establishes prima facie entitlement to such relief as a matter of law, the burden shifts to plaintiff to raise a triable issue of fact as to the creation of the defect or notice thereof (*Kesselman v Lever House Rest.*, 29 AD3d 302, 303-304 [2006]; *Bosman v Reckson FS Ltd. Partnership*, 15 AD3d 517 [2005]).

In the matter before us, the deposition testimony of defendant's senior administrative manager and the documentary evidence submitted by defendant demonstrate that the bathrooms

were cleaned and monitored regularly by defendant's personnel, that no problems were noted during the inspection prior to plaintiff's fall, and that inspections conducted after the incident indicated no foreign substance or liquid on the bathroom floor, no bucket and mop were present in the bathroom, and no plumbing problems existed. As a result, we find that defendant shouldered its burden of making a prima facie showing that it neither created the hazardous condition, nor had notice of it (*see Edwards v Port Auth. of N.Y. and N.J.*, 48 AD3d 405 [2008]; *Resto v 798 Realty, LLC*, 28 AD3d 388 [2006]).

In contrast, plaintiff's deposition testimony provides nothing more than mere speculation as to the cause of the accident and offers nothing to indicate that defendant created or had notice of the hazard. Indeed, plaintiff testified that she "assume[d]" and "think[s]" she fell because the floor was wet, had no idea how long the water was on the floor or how it got there, and did not notice any debris on the floor. Accordingly, plaintiff has failed to establish that an issue of fact exists as to defendant's liability (*see Rudner v New York Presby. Hosp.*, 42 AD3d 357, 358 [2007]; *Kane v Estia Greek Rest.*, 4 AD3d 189, 190-191 [2004]). To the extent that plaintiff's correction sheet to her deposition testimony, and her affidavit in opposition to defendant's motion, now indicate that she did, in fact, see water and debris on the bathroom floor, as well as a mop, bucket and

caution sign in the corner of the bathroom, we can only consider such statements to have been tailored to avoid the consequences of her earlier testimony and are, therefore, insufficient to raise a triable issue of fact (*see Burkoski v Structure Tone, Inc.*, 40 AD3d 378, 383 [2007]; *Perez v Bronx Park S. Assoc.*, 285 AD2d 402, 404 [2001], *lv denied* 97 NY2d 610 [2002]). We further note that plaintiff's correction sheet lacked a statement of reasons for making the corrections to her deposition testimony and the reason proffered in plaintiff's affidavit in opposition, that she was not asked questions which would have elicited the information in the corrected responses, is unpersuasive (*see Rodriguez v Jones*,, 227 AD2d 220 [1996]).

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

ENTERED: APRIL 24, 2008

CLERK

Lippman, P.J., Friedman, Sweeny, Moskowitz, JJ.

3472 The People of the State of New York, Respondent, Ind. 5188/02

-against-

Richard Hingel, Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Lucy Jane Lang of counsel), for respondent.

Order, Supreme Court, New York County (Charles H. Solomon, J.), entered on or about March 10, 2006, which adjudicated defendant a level two sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

We reject defendant's challenges to the choice of risk factors made by the Legislature and the Board of Examiners of Sex Offenders (*see People v Bligen*, 33 AD3d 489 [2006], *lv denied* 8 NY3d 803 [2007]; *People v Joe*, 26 AD3d 300 [2006], *lv denied* 7 NY3d 703 [2006]). In addition, defendant did not establish any

special circumstances warranting a downward departure from his presumptive risk level (*see People v Guaman*, 8 AD3d 545 [2004]).

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

ENTERED: APRIL 24, 2008

CLERK

Lippman, P.J., Friedman, Sweeny, Moskowitz, JJ.

3473 Richard Matos, Index 16844/04
Plaintiff-Appellant,

-against-

Challenger Equipment Corp.,
doing business as Consolidated
Appliance Services,
Defendant-Respondent,

Alpro Service Co., et al.,
Defendants.

Alpert & Kaufman, LLP, New York (Gary Slobin of counsel), for appellant.

Cohen, Kuhn & Associates, New York (Gary P. Asher of counsel), for respondent.

Order, Supreme Court, Bronx County (John A. Barone, J.), entered May 7, 2007, which, in an action for personal injuries, granted the motion of defendant Challenger Equipment Corp. (Challenger) for summary judgment dismissing the complaint and all cross claims as against it, unanimously affirmed, without costs.

Challenger made a prima facie case of entitlement to summary judgment by establishing that it did not make repairs to the griddle top of the oven at plaintiff's employer, the instrument which caused plaintiff's injury. The work order and invoice relating to repairs effected approximately two weeks prior to the subject accident demonstrate that the work performed did not

relate to the griddle top (*compare Royal v Brooklyn Union Gas Co.*, 122 AD2d 132 [1986]). The affidavit from plaintiff's expert submitted in response to Challenger's motion lacked an appropriate evidentiary basis to create a triable issue of fact (*see Butler-Francis v New York City Hous. Auth.*, 38 AD3d 433, 434 [2007]).

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: APRIL 24, 2008

CLERK

Lippman, P.J., Friedman, Sweeny, Moskowitz, JJ.

3474 Helene Provencal-Dayle,
Petitioner-Respondent,

-against-

Dwight Dayle,
Respondent-Appellant.

Howard D. Simmons, New York, for appellant.

Helene Provencal-Dayle, respondent pro se.

Order, Family Court, New York County (Karen I. Lupuloff, J.), entered on or about August 16, 2007, which confirmed a determination of the Support Magistrate, dated July 16, 2007, that respondent willfully failed to obey an order of support, and ordered that respondent be committed to the Department of Correction for six months or until a $60,000 undertaking was paid to the Child Support Collection Unit, unanimously affirmed, without costs.

Respondent's failure to pay support as ordered constituted prima facie evidence of a willful violation of a support order, which respondent failed to rebut with competent evidence (*see Matter of Powers v Powers*, 86 NY2d 63, 68-69 [1995]; *Matter of Maria T. v Kwame A.*, 35 AD3d 239 [2006]). Although respondent claims that he did submit such evidence, he failed to include in the record on appeal most of the minutes from the hearing before the Support Magistrate, and the Support Magistrate's findings of

fact state otherwise. Accordingly, respondent "having submitted the appeal on an incomplete and insufficient record must abide the consequences" (*Di Francesco v Di Francesco*, 23 AD2d 740, 740 [1965]; *see Kahn v City of New York*, 37 AD2d 520, 521 [1971], *affd* 30 NY2d 690 [1972]). Furthermore, in light of respondent's long history of nonpayment and the large sum of arrears, the court did not improvidently exercise its discretion in declining to accept the Support Magistrate's recommendation that respondent be incarcerated for 30 days unless a $25,000 undertaking was paid, and instead imposing a 6-month sentence of incarceration until a $60,000 undertaking was paid (*see* Family Court Act § 454[1], [3]).

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

ENTERED: APRIL 24, 2008

CLERK

Lippman, P.J., Friedman, Sweeny, Moskowitz, JJ.

3475 Roberto Soto, et al., Index 25151/01
Plaintiffs-Respondents,

-against-

Ahmed Koysor, et al.,
Defendants-Appellants.

Richard M. Duignan, New York, for appellants.

James M. Lane, New York, for respondents.

Order, Supreme Court, Bronx County (George D. Salerno, J.), entered March 19, 2007, which denied defendants' 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 defendants' favor dismissing the complaint.

Plaintiffs provided no explanation for terminating their medical treatment several months after the accident in which they claim to have sustained "serious injury" (Insurance Law § 5102[d]; *see Pommells v Perez*, 4 NY3d 566, 574-575 [2005]).

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

ENTERED: APRIL 24, 2008

CLERK

Lippman, P.J., Friedman, Sweeny, Moskowitz, JJ.

3476-
3476A-
3476B Kerusa Co. LLC, Index 601610/03
Plaintiff-Appellant,

-against-

W10Z/515 Real Estate Limited Partnership, et al.,
Defendants-Respondents.

Gibson, Dunn & Crutcher LLP, New York (Robert L. Weigel of counsel), for appellant.

Landman Corsi Ballaine & Ford P.C., New York (William G. Ballaine of counsel), for W10Z/515 Real Estate Limited Partnership and Zeckendorf, respondents.

Cozen O'Connor, New York (Kevin G. Mescall of counsel), for J.A. Jones Construction Group, LLC, respondent.

Wilson, Elser, Moskowitz, Edelman & Dicker LLP, New York (Richard E. Lerner of counsel), for Jaros, Baum & Bolles Consulting Engineers, respondent.

Milber, Makris, Plousadis & Seiden, LLP, White Plains (Christopher A. Albanese of counsel), for Frank Williams & Associates, P.C., respondent.

Gogick, Byrne & O'Neill, LLP, New York (Kevin J. McGrath of counsel), for The Cantor Seinuk Group, P.C., respondent.

Orders, Supreme Court, New York County (Jane S. Solomon, J.), entered January 11, 2007, which, in this action alleging breach of contract and negligence in the construction, marketing and sale of luxury condominium units, granted defendants' motions for summary judgment dismissing the complaint, unanimously affirmed, with costs.

Plaintiff has standing to seek relief for damage and defects to its own units only and not for injury to the common elements of the subject building (*see Caprer v Nussbaum*, 36 AD3d 176, 183-186 [2006]; *Devlin v 645 First Ave. Manhattan Co.*, 229 AD2d 343, 343 [1996]; *Residential Bd. of Mgrs. of Zeckendorf Towers v Union Square-14th St. Assoc.*, 190 AD2d 636, 637 [1993]; *see also* Real Property Law § 339-dd). Notwithstanding its complaints of mold in its penthouse apartment, the only evidence thereof was plaintiff's expert's statement that mold was found there by his company in sample testing performed on a single day in late December 2002. The expert did not adopt the opinion of the company's draft report that these test results indicated a potential health hazard for individuals with compromised immune systems or sensitivity to mold. Moreover, the unrebutted evidence indicated that all environmental inspections and tests performed in the penthouse unit after December 30, 2002 found acceptable levels of mold.

In any event, plaintiff fails, as a matter of law, to demonstrate any injury for which it is entitled to hold defendant sponsors liable. Although the purchase agreement obligated defendant sponsors to provide plaintiff with a building and unit constructed "in a good and workman-like manner," the purchase agreement, through its incorporation of the terms of the offering plan, limited plaintiff's remedy for any breach of this

obligation to the right to require the sponsors to "repair or replace any defective item of construction." The latter provision necessarily excludes from recoverable damages any diminution in the value of the unit that may result from defective construction. Plaintiff does not allege that it has incurred any expense to repair or replace any defects in the construction of its unit, and, having now sold the unit, it has no further interest in the repair or replacement of any such defects.

Nor does the record evidence any viable cause of action by plaintiff against any of the defendants other than the sponsors. Since plaintiff had no contractual or other relationship with the general contractor, architect, mechanical engineer or structural engineer on the project and is, at best, only an incidental, rather than an intended, beneficiary of the contracts that defendants J.A. Jones Construction Group, Frank Williams & Associates, Jaros, Baum & Bolles, and the Cantor Seinuk Group entered into with the sponsors, plaintiff may not recover for negligence or breach of contract from these defendants either (*see Zeckendorf Towers*, 190 AD2d at 637).

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

ENTERED: APRIL 24, 2008

CLERK

Lippman, P.J., Friedman, Sweeny, Moskowitz, JJ.

3477 The People of the State of New York, Respondent, Ind. 1765/06

-against-

Rudy Jouvert, Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (Charles H. Solomon, J. on suppression motion; Marcy L. Kahn, J. at jury trial and sentence), rendered August 15, 2006, convicting defendant of criminal possession of a weapon in the third degree, grand larceny in the fourth degree (two counts) and criminal possession of stolen property in the fourth degree, and sentencing him, as a second felony offender, to an aggregate term of 3½ to 7 years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The evidence established that the knife recovered from defendant was a gravity knife (*see People v Smith*, 309 AD2d 608 [2003], *lv denied* 1 NY3d 580 [2003]). An officer both described and demonstrated for the jury the manner in which the knife operated, which conformed to the statutory

definition of a gravity knife (*see* Penal Law § 265.00[5]). Defendant's main argument to the contrary is based on a misinterpretation of the officer's testimony.

The motion court properly denied defendant's motion to suppress physical evidence without granting a hearing. The allegations in defendant's moving papers, when considered in the context of the detailed information provided by the People as to the basis for his arrest, were insufficiently specific to require a hearing (*compare People v Long*, 36 AD3d 132 [2006], *affd* 8 NY3d 1014 [2007], *with People v Bryant*, 8 NY3d 530, 533-534 [2007]).

The court properly exercised its discretion in denying defendant's challenge for cause to a prospective juror. Although the panelist initially expressed an inclination to credit police testimony, the court instructed him that he could not give any extra credence to an officer's testimony by virtue of the officer's status. During a colloquy on defendant's challenge for cause, defense counsel expressly conceded that the panelist agreed to follow that instruction, and this was the court's recollection as well. Under all the circumstances, transcription error is the only reasonable explanation of a statement appearing

in the minutes that defendant cites as supporting his position (*see e.g. People v Valdes*, 283 AD2d 187 [2001], *lv denied* 97 NY2d 688 [2001]). Accordingly, the panelist's unequivocal declaration rendered him qualified for service.

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

ENTERED: APRIL 24, 2008

CLERK

Lippman, P.J., Friedman, Sweeny, Moskowitz, JJ.

3478 Kenneth Giudice, Index 116941/04
Plaintiff-Respondent,

-against-

Green 292 Madison, LLC, et al.
Defendants-Respondents-Appellants,

USADATA, Inc.,
Defendant-Appellant-Respondent.

Kral, Clerkin, Redmond, Ryan, Perry & Girvan, LLP, New York (Justine L. Grisanti of counsel), for appellant-respondent.

Hoey, King, Toker & Epstein, New York (Angela P. Pensabene of counsel), for respondents-appellants.

Finkelstein & Partners, LLP, Newburgh (Marie M. DuSault of counsel), for respondent.

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered June 19, 2007, which denied defendants' motions for summary judgment as untimely, unanimously affirmed, without costs.

By preliminary conference order dated October 6, 2005, the court directed the filing of a note of issue by April 30, 2006 and any summary judgment motions by June 30, 2006. By compliance conference order dated January 19, 2006, the deadline for summary judgment motions was changed to 45 days after the filing of the note of issue. A subsequent compliance conference order dated August 17, 2006 extended the deadline for filing the note of issue to August 31, 2006, but did not adjust the deadline for

summary judgment motions. Thus, upon the filing of a note of issue on August 25, 2006, summary judgment motions were required by October 9, 2006. Since USADATA's motion was dated October 24, 2006 and Green's November 20, 2006, both motions had to be denied as untimely absent good cause shown for the delays (CPLR 3212[a]; *Brill v City of New York*, 2 NY3d 648, 652 [2004]). USDATA's argument that "the motion was served well within the statutory time frame, albeit later than the deadline set by the [c]ourt," effectively admitted the absence of good cause, and was correctly rejected by the motion court (*Glasser v Abramovitz*, 37 AD3d 194 [2007] [CPLR 3212(a) applies to court-imposed deadlines shorter than the statutory 120-day period]). Nor are we persuaded by USADATA's argument, raised for the first time on appeal, that good cause existed by reason of the "ambiguity" created by the court's preliminary compliance order and compliance conference orders. USDATA's failure to appreciate that its motion was due within 45 days after the filing of the note of issue "is no more satisfactory than a perfunctory claim of law office failure" (*Crawford v Liz Claiborne, Inc.*, 45 AD3d 284, 285 [2007]). Since

USADATA's motion was untimely, Green's motion may not be considered (*cf. James v Jamie Towers Hous. Co.*, 294 AD2d 268, 272 [2002], *affd on other grounds* 99 NY2d 639 [2003]). We have considered defendants' other arguments and find them unavailing.

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

ENTERED: APRIL 24, 2008

CLERK

Lippman, P.J., Friedman, Sweeny, Moskowitz, JJ.

3479 In re Antowa McD., a Minor,
Appellant.
- - - - - -
Deonne Andrea W.,
Petitioner,

-against-

Wayne McD., et al.,
Respondents.
- - - - -
The Door's Legal Services,
Amici Curiae.

McDermott Will & Emery LLP, New York (Andrew B. Kratenstein of counsel), for appellant.

Christa Stewart, New York (Jason A. Cade of counsel), for Amici Curiae.

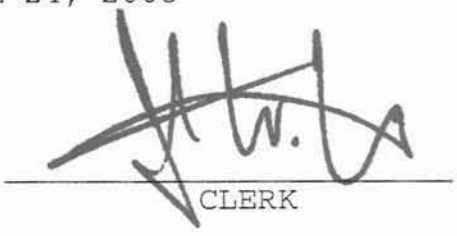
Order, Family Court, Bronx County (Alma Cordova, J.), entered on or about January 26, 2007, which, insofar as appealed from, denied appellant child's motion for findings that would enable her to petition the United States Citizenship and Immigration Services for Special Immigrant Juvenile Status pursuant to 8 USC § 1101(a)(27)(J), unanimously reversed, on the law and the facts, without costs, the motion granted, and the matter remanded to Family Court to issue an order making the requested findings.

Appellant was sent by her mother from her native Jamaica to live with her father in the United States at the age of four in 2003, but was quickly abandoned by her father, who left her with

her aunt. Upon her mother refusing to take her back, she has continued to reside with the aunt. Although Family Court issued letters of guardianship to the aunt, it refused to make the factual findings that would enable appellant to apply for Special Immigrant Juvenile Status, i.e., that she was eligible for long-term foster care due to abuse, neglect or abandonment, and that it would not be in her best interests to be returned to Jamaica. This was error given a record that clearly establishes parental abandonment, contains a statement from the mother that she is unable "to give [appellant] the love and attention she needs," and clearly establishes that it is appellant's best interests to continue living in her aunt's loving and nurturing home. Family Court's appointment of a guardian constitutes the necessary declaration of dependency on a juvenile court (*Matter of Jose A. Menjivar*, 29 Immig Rptr B2-37 [1994], construing, inter alia, 8 CFR 204.11[a]).

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

ENTERED: APRIL 24, 2008



CLERK

Lippman, P.J., Friedman, Sweeny, Moskowitz, JJ.

3480 In re Elite Contractors, Inc., Index 100985/07
Petitioner,

-against-

Office of Regional & Economic Development of The Port Authority of New York and New Jersey,
Respondent.

Goldberg and Connolly, Rockville Centre (Erik A. Ortmann of counsel), for petitioner.

Milton H. Pachter, New York (Racquel H. Reinstein of counsel), for respondent.

Determination of respondent, dated October 2, 2006, denying petitioner certification as a woman-owned business enterprise (WBE), unanimously confirmed, the petition denied and the proceeding brought pursuant to CPLR Article 78 (transferred to this Court by Order of the Supreme Court, New York County [William A. Wetzel, J.], entered May 22, 2007), dismissed, without costs.

Petitioner, Elite Contractors, Inc., an Ohio corporation authorized to do business and with a principal place of business in New York and engaged in the business of bridge painting, is 82% owned by two sisters, with two brothers having minority shares. Despite this majority ownership, respondent's determination that petitioner is not a WBE was not arbitrary and

capricious, and was supported by substantial evidence (*see 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 181-182 [1978]; *Matter of Skyline Specialty v Gargano*, 294 AD2d 742 [2002]).

Respondent's guidelines provided a basis to deny the application as there was "some credible evidence" (*see Matter of Borenstein v New York City Employees' Retirement Sys.*, 88 NY2d 756, 760-761 [1996]) that petitioner relied on another family-owned entity for expertise and referrals.

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

ENTERED: APRIL 24, 2008

CLERK

Lippman, P.J., Friedman, Sweeny, Moskowitz, JJ.

3481-
3481A The People of the State of New York, Ind. 7259/03
Respondent,

-against-

Vincent Raosto,
Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered October 20, 2005, convicting defendant, after a jury trial, of criminal possession of a controlled substance in the third and fifth degrees, and sentencing him, as a second felony offender, to an aggregate term of 7 to 14 years, unanimously reversed, on the law and as a matter of discretion in the interest of justice, and the matter remanded for a new trial. Appeal from order, same court and Justice, entered on or about September 20, 2007, which denied defendant's CPL 440.10 motion to vacate the judgment, unanimously dismissed as academic in light of the foregoing.

"[T]he Trial Justice unduly injected himself into the proceeding to such an extent as to deny defendant a fair and impartial trial." (*People v Ellis*, 62 AD2d 469, 470 [1978]). In particular, the court conducted lengthy and inappropriate

cross-examinations of defendant and defense witnesses, which were neither neutral nor aimed at clarification, but disrupted the flow of testimony and plainly conveyed to the jury the court's disbelief of these witnesses.

In addition, the prosecutor's cross-examination of defendant contained several prejudicial errors. The prosecutor improperly impeached defendant regarding his postarrest failure to report to law enforcement his belief that he was being framed by the arresting officer (*People v DeGeorge*, 73 NY2d 614 [1989]), elicited statements by defendant that should have been disclosed pursuant to CPL 240.20(1)(a) and impeached defendant with averments by former counsel in motion papers even though these statements were not fairly attributable to defendant, either directly or by inference (*see People v Jones*, 190 AD2d 31 [1993]).

Moreover, the trial record, taken together with testimony elicited at a hearing on defendant's CPL 330.30 motion to set aside the verdict and the submissions made on his CPL 440.10 motion, establishes that defendant was also deprived of a fair trial by the ineffective assistance provided by his counsel. This is the unusual case where trial counsel's overall performance can be said to be prejudicially unsatisfactory (*see People v Droz*, 39 NY2d 457 [1976]). Defense counsel displayed general carelessness and inattention throughout the trial. Among

other things, his opening statement contradicted the ultimate testimony of his own witnesses, he appeared to be confused about the time of the arrest and mishandled an important opportunity to impeach the arresting officer, and he elicited inaccurate and highly prejudicial information about his client's prior record. In addition, counsel did not object to any of the above-described improper questioning by the court and prosecutor. The record reveals no possible strategic explanations for any of counsel's errors and omissions. Finally, there is very substantial evidence that defendant's attorney, who was convicted of a drug felony shortly after defendant's trial (*see Matter of Bloomberg*, 45 AD3d 63 [2007]), was under the influence of heroin throughout the proceedings.

None of the errors by the court, the prosecutor or defense counsel was harmless, and we reject the People's arguments to the contrary. The evidence was legally sufficient but far from overwhelming. This case presented a close question of credibility to be resolved by the jury, in which a major issue

was whether the arresting officer (the People's only fact witness) had a bias against defendant arising out of a series of prior encounters.

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

ENTERED: APRIL 24, 2008

CLERK

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on April 24, 2008.

Present - Hon. Jonathan Lippman, Presiding Justice
David Friedman,
John W. Sweeny, Jr.,
Karla Moskowitz, Justices.

The People of the State of New York, Ind. 1777/04
Respondent,

-against- 3482
3483

Digno Mejia,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of resentence of the Supreme Court, New York County (William A. Wetzel, J.), rendered on or about August 28, 2006,

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

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

ENTER:

Clerk.

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

Lippman, P.J., Friedman, Sweeny, Moskowitz, JJ.

3484 Lorenza Ledesma,
Plaintiff,

-against-

Aragona Management Group, et al.,
Defendants.

- - - - -

Aragona Management Group, et al.,
Third-Party Plaintiffs-Appellants,

-against-

Empire State Fuel Oil Corp.,
Third-Party Defendant-Respondent.

- - - - -

[And a Second Third Party Action]

- - - - -

Aragona Management Group, et al.,
Third Third-Party Plaintiffs-Appellants,

-against-

Abetta Boiler & Welding Service, Inc.,
Third Third-Party Defendant-Respondent.

Index 103062/04
590507/04
591033/04
590845/05

Law Offices of Charles J. Siegel, New York (Jack L. Cohen of counsel), for appellants.

Fiedelman & McGaw, Jericho (Ross P. Masler of counsel), for Empire State Fuel Oil Corp., respondent.

Quirk and Bakalor, P.C., New York (Jeanne M. Boyle of counsel), for Abetta Boiler & Welding Service, Inc., respondent.

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered August 15, 2007, which granted the motions of third-party defendant Empire State Fuel Oil Corp. (Empire Fuel) and third third-party defendant Abetta Boiler & Welding Service, Inc. (Abetta Boiler) for summary judgment dismissing the third-party

complaints and all cross claims as against them, unanimously affirmed, without costs.

Summary judgment was properly granted in favor of Empire Fuel and Abetta Boiler in this action where plaintiff was injured when she lost her balance and fell in the shower when there was a sudden increase in the hot water temperature and water pressure. The building owner and property manager, defendants Wadsworth Associates 9 and Aragona Management Group (appellants) did not have a service contract with either Empire Fuel or Abetta Boiler to maintain or service the building's boiler, and "[i]n the absence of a contract for routine or systematic maintenance, an independent repairer/contractor has no duty to install safety devices or to inspect or warn of any purported defects" (*Daniels v Kromo Lenox Assoc.*, 16 AD3d 111, 112 [2005]).

The evidence also fails to establish negligence by either Empire Fuel or Abetta Boiler in the services they performed on the subject boiler (*see Kleinberg v City of New York*, 27 AD3d 317 [2006]). Appellants' contention that Abetta Boiler's replacement of a corroded boiler coil less than a week prior to plaintiff's accident warranted an adjustment of the mixing valve, is unsupported by evidence that such coil was corroded, and, in any event, complaints regarding fluctuations in the water temperature and pressure were lodged well before Abetta Boiler's work on the

boiler. Abetta Boiler was only hired to replace the coil, and there was no evidence that the newly installed coil was defective, or improperly installed.

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

ENTERED: APRIL 24, 2008

CLERK

Lippman, P.J., Friedman, Sweeny, Moskowitz, JJ.

3485 Vidal A. Bello, Infant by Mother and Natural Guardian, etc., et al., Plaintiffs-Respondents, Index 26065/01

-against-

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

Wallace D. Gossett, Brooklyn (Lawrence A. Silver of counsel), for appellants.

Ephrem J. Wertenteil, New York, for respondents.

Judgment, Supreme Court, Bronx County (Alexander W. Hunter, Jr., J.), entered on or about November 15, 2006, which, after a jury trial, to the extent appealed from as limited by the briefs, awarded plaintiff Vidal Bello $750,000 for past pain and suffering, and $750,000 for future pain and suffering, unanimously modified, on the law, to the extent of vacating the award of interest and remanding the matter to recompute interest at the rate of 3% per annum, and otherwise affirmed, without costs. The Clerk is directed to enter an amended judgment accordingly.

Viewing the evidence in the light most favorable to plaintiff (*see Hersh v New York City Tr. Auth.*, 297 AD2d 556 [2002]), it cannot be said that there exists no valid line of reasoning or permissible inferences which could possibly lead a rational juror to conclude that the bus driver was put on notice

of the dangerous possibility that one of the rowdy children on the sidewalk, who were pushing each other, would push another person into the bus (*see generally Cohen v Hallmark Cards*, 45 NY2d 493, 499 [1978]; *Baker v Turner Constr. Co.*, 200 AD2d 525 [1994], *lv denied* 83 NY2d 755 [1994]), and that the driver should have pulled in further from the curb.

Contrary to defendants' contention, the trial court's instruction that "[a] driver is charged with the duty to see that which under the facts and circumstances he should have seen by the proper use of his senses," was appropriate (PJI 2:77.1; *see Conradi v New York City Tr. Auth.*, 249 AD2d 436 [1998]; *see also Domanova v State of New York*, 41 AD3d 633, 634 [2007]).

The awards for past and future pain and suffering do not deviate materially from reasonable compensation. The record shows that at the time of the accident, plaintiff was seven years old, and suffered an open fracture to the right tibia and fibula, a degloving injury to the right leg, and the tibia sustained a spiral fracture. Pins were placed in plaintiff's leg, and he has undergone seven additional procedures, including grafting to cover exposed tissue. His leg has significant scarring and deformity, and x-rays show the fibula to be curved. Plaintiff walks with a limp that will get progressively worse as he grows, and he will subsequently require a revision of the graft, and

work to his ankle (*see Lopez v Gomez*, 305 AD2d 292 [2003]; *Kraus v Caliche Realty Estates*, 302 AD2d 214 [2003], *lv denied* 100 NY2d 503 [2003]; *Silfverschiold v Hut Cab Corp.*, 266 AD2d 147 [1999]).

To the extent the judgment included interest at the rate of 6% instead of 3%, the matter should be remanded as indicated (*see* Public Authorities Law § 1212[6]; § 1203-a[6]; *Klos v New York City Tr. Auth.*, 240 AD2d 635, 638 [1997], *lv dismissed* 91 NY2d 846 [1997]).

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

ENTERED: APRIL 24, 2008

Lippman, P.J., Friedman, Sweeny, Moskowitz, JJ.

3486-
3487-
3488 Sara Kinberg, Index 72304/92
Plaintiff-Appellant, 108061/01

-against-

Yoram Kinberg,
Defendant-Respondent.

Sara Kinberg, appellant pro se.

Jane Bevans, New York, for respondent.

Order, Supreme Court, New York County (Joan Lobis, J.), entered March 25, 2002, which, to the extent appealed from as limited by the brief, dismissed plaintiff's complaint in her 2001 action to set aside the parties' 2000 separation agreement, and directed her to pay defendant $250 in connection with fees for a religious divorce, and order, same court and Justice, entered December 5, 2006, which, insofar as appealable, denied renewal of the March 25, 2002 order, unanimously affirmed, without costs. Appeal from resettled judgment of the same court (Jacqueline W. Silbermann, J.), entered October 26, 2000, which dissolved the marriage and directed maintenance, child support and equitable distribution, unanimously dismissed, without costs.

Plaintiff's allegations in support of her claim that the separation agreement is unconscionable or a product of duress or fraud are inherently incredible or flatly contradicted by

documentary evidence (*see Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 [1999], *affd* 94 NY2d 659 [2000]), including the agreement itself and the minutes of the court's careful and thorough allocution of plaintiff, during which plaintiff showed no sign of being coerced or too ill to understand the agreement into which she was entering. The award of $250 to defendant as plaintiff's share of $5,600 in fees for a religious divorce in Israel is supported by the record. Plaintiff's motion for renewal four years after the original order was entered was not based on any additional facts that were unknown to her at the time of the original motion, and plaintiff failed to offer an excuse for omitting such facts (*see Elson v Defren*, 283 AD2d 109, 119 [2001]; *Tri-Land Props. v 115 W. 28th St. Corp.*, 247 AD2d 233 [1998]). In any event, the additional facts she presented did not warrant a departure from the motion court's original determinations.

As we denied plaintiff leave to consolidate an appeal from the resettled judgment with her appeals from the March 25, 2002 and December 5, 2006 orders (M-5057, M-5275, M-5332), we have not

considered her arguments in connection with the former appeal, and that appeal is dismissed.

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

ENTERED: APRIL 24, 2008

CLERK

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on April 24, 2008.

Present - Hon. Jonathan Lippman, Presiding Justice
David Friedman,
John W. Sweeny, Jr.,
Karla Moskowitz, Justices.

The People of the State of New York, Ind. 5295/99
Respondent,

3489

-against-

Alvin Peterson,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Ronald A. Zweibel, J.), rendered on or about March 9, 2006,

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

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

ENTER:

Clerk.

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

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on April 24, 2008.

Present - Hon. Jonathan Lippman, Presiding Justice
David Friedman,
John W. Sweeny, Jr.,
Karla Moskowitz, Justices.

The People of the State of New York, SCI 41554C/05
Respondent,

-against- 3490

David Santana,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (John P. Collins, J.), rendered on or about March 8, 2007,

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

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

ENTER:

Clerk.

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

Lippman, P.J., Friedman, Sweeny, Moskowitz, JJ.

3492 The People of the State of New York, Respondent, Ind. 6580/05

-against-

Leroy Lewis, Defendant-Appellant.

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

Judgment, Supreme Court, New York County (Ruth Pickholz, J. at suppression hearing; Gerald Harris, J. at sandoval hearing, plea and sentence), rendered on or about July 18, 2006, unanimously affirmed.

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

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

Denial of the application for permission to appeal by the

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

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

ENTERED: APRIL 24, 2008

CLERK

Lippman, P.J., Friedman, Sweeny, Moskowitz, JJ.

3493N William Clemente, Index 5115/93
Plaintiff-Respondent,

-against-

Ana Rosa Clemente,
Defendant-Appellant.

Joel B. Mayer, New York, for appellant.

Charles Zolot, Jackson Heights, for respondent.

Order, Supreme Court, Bronx County (Ira R. Globerman, J.), entered on or about June 19, 2007, which, insofar as appealed from, granted plaintiff husband's motion to dismiss defendant wife's counterclaim for a separation as abandoned nunc pro tunc to March 26, 1995, and directed a hearing to determine the amount of arrears and interest, if any, owed by the husband in child support and spousal maintenance for the period between January 3, 1994 and March 24, 1995, unanimously modified, on the law and the facts, to the extent of dismissing the counterclaim as abandoned as of June 19, 2007, and ordering a hearing to determine the amount of arrears and interest, if any, owed by the husband in child support and maintenance for the period between January 18, 1994 and June 19, 2007, and otherwise affirmed, without costs.

The motion court properly dismissed the wife's counterclaim for a separation pursuant CPLR 3215©, since she failed to enter a default judgment on the counterclaim within one year of the

default, and failed to offer a reasonable excuse for the more than 12-year delay in proceeding in the matter (*see Geraghty v Elmhurst Hosp. Ctr. of N.Y. City Health & Hosps. Corp.*, 305 AD2d 634 [2003]). However, the court improperly deemed the counterclaim dismissed nunc pro tunc to the one-year expiration date of the default. A dismissal for abandonment pursuant to CPLR 3215© requires that some action be taken, either by one of the parties, or by the court on its own initiative, to dismiss the action. Therefore, the counterclaim remained viable until the motion court dismissed it (*compare* CPLR 3404; *Cawthon v Cawthon*, 276 AD2d 661 [2000]).

Although the husband's obligations under the temporary support order terminated with the dismissal of the counterclaim, he was required to obey the temporary order while the counterclaim was pending[1] (*see Fotiadis v Fotiadis*, 18 AD3d 699 [2005]), and the wife is entitled to any arrears that accrued prior to dismissal and could enforce such obligation by seeking a money judgment (*see Matter of Dyandria M. v Gerald M.*, 278 AD2d 37 [2000]). Accordingly, a hearing is ordered to determine the amount of arrears and interest the husband owes, if any, from the

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[1]We note that the husband continued to make payments throughout the period, albeit in a reduced amount.

date of the temporary order of support (January 18, 1994), through June 19, 2007, the date of entry of the order dismissing the wife's counterclaim.

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

ENTERED: APRIL 24, 2008

CLERK

Lippman, P.J., Friedman, Sweeny, Moskowitz, JJ.

3494N Thomas J. Osborne, Index 600016/07
Petitioner-Respondent,

-against-

David Jones,
Respondent-Appellant,

Lextel Communications, Inc.
Respondent.

McDaniel & Chusid, LLP, Saddle Brook, NJ (Jay R. McDaniel of counsel), for appellant.

O'Hare Parnagian LLP, New York (Andrew C. Levitt of counsel), for Thomas J. Osborne, respondent.

Order, Supreme Court, New York County (Bernard J. Fried, J.), entered October 1, 2007, insofar as it denied respondent Jones's motion to vacate an order, same court and Justice dated July 2, 2007, granting on default petitioner's motion for, inter alia, a final order of dissolution of respondent corporation, unanimously reversed, on the law, with costs, and the motion to vacate the July 2, 2007 order granted. Appeal from that portion of the October 1, 2007 order that denied renewal unanimously dismissed as academic. Appeal from that portion of the order that denied reargument unanimously dismissed as taken from a nonappealable paper.

Respondent demonstrated that he had no intention to abandon his defense of the petition and that his counsel honestly believed the motion had been adjourned, due in part to a pending

motion by respondent's incoming counsel (*see ICBC Broadcast Holdings-NY, Inc. v Prime Time Adv., Inc.*, 26 AD3d 239 [2006]; *Cannon v Ireland's Own, Inc.*, 21 AD3d 264 [2005]). Contrary to petitioner's assertion, there is no evidence in the record that respondent's counsel knew about the hearing and willfully chose not to attend. Respondent also raised potentially meritorious defenses to petitioner's claims.

M-1794 Osborne v Jones, et al.

Motion seeking leave to supplement the record granted.

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

ENTERED: APRIL 24, 2008

CLERK

Andrias, J.P., Saxe, Williams, McGuire, JJ.

8256 The People of the State of New York, Ind. 4614/01
Respondent,

-against-

Bienvenido Pina,
Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (Micki A. Scherer, J.), rendered June 19, 2002, convicting defendant, upon his plea of guilty, of criminal possession of a controlled substance in the second degree, and sentencing him to a term of 3 years to life, unanimously affirmed.

We previously held this appeal in abeyance and directed Supreme Court to hold a hearing on defendant's claim, advanced in a motion to vacate his guilty plea, that he had been denied his right to conflict-free counsel (35 AD3d 45 [2006]). In accordance with our directive, Supreme Court held that hearing, at which the People submitted documentary evidence, defendant and his wife testified on defendant's behalf and defendant's former counsel then testified as a rebuttal witness for the People. In a written decision and order dated July 24, 2007, Supreme Court expressly found defendant's testimony "wholly incredible" and

implicitly found credible the testimony of defendant's former counsel in that Supreme Court found the relevant facts to be essentially as testified to by counsel. Concluding that "prior counsel's representation was not conflicted, coercive or inadequate," Supreme Court again denied defendant's motion to vacate his guilty plea.

Supreme Court's credibility and factual determinations are amply supported by the evidence adduced at the hearing (*People v Prochilo*, 41 NY2d 759, 761 [1977]). On the basis of the credible evidence, we find that defendant failed to meet his burden of showing both the existence of a potential conflict of interest and that "the conduct of his defense was in fact affected by the operation of the conflict of interest, or that the conflict operated on the representation" (*People v Ortiz*, 76 NY2d 652, 657 [1990] [internal quotation marks omitted]; *see also People v Harris*, 99 NY2d 202, 210 [2002]).

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

ENTERED: APRIL 24, 2008

CLERK

Mazzarelli, J.P., Saxe, Buckley, Sweeny, McGuire, JJ.

9478 The People of the State of New York, by Eliot Spitzer, the Attorney General of the State of New York, Plaintiff-Respondent, Index 401620/04

-against-

Richard A. Grasso, et al., Defendants,

Kenneth G. Langone, Defendant-Appellant.

[And Other Actions]

Kramer Levin Naftalis & Frankel LLP, New York (Gary P. Naftalis of counsel), for appellant.

Andrew M. Cuomo, Attorney General, New York (Avi Schick of counsel), for respondent.

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered August 4, 2006, which denied defendant Kenneth Langone's motion for summary judgment dismissing the complaint as against him, affirmed, without costs.

The Attorney General brought this action to challenge compensation and benefits awarded to the former CEO of the New York Stock Exchange, Richard Grasso. A detailed discussion of the background of the litigation and the substance of the complaint is set forth in our decision in *People v Grasso* (42 AD3d 126 [2007]).

This appeal is from the denial of defendant Kenneth G. Langone's motion for summary judgment to dismiss the seventh

cause of action. In that claim, the Attorney General alleges that defendant Langone, a NYSE director and Chair of its Compensation Committee from June 1999 until May 2003, breached his fiduciary duties to the NYSE by failing to make complete and accurate disclosures of Grasso's compensation to the NYSE Board of Directors.[1]

In the early 1990s, the NYSE Compensation Committee determined that the Exchange was at a competitive disadvantage because it was unable to offer its senior executives stock-based forms of deferred compensation. To remedy this problem, in 1997, the Board of Directors approved the NYSE's Capital Accumulation Plan (CAP) for four of its most senior executives. Originally CAP provided a 25% match of variable compensation awards for eligible executives in a given year. The variable compensation to which it applied was the NYSE's Incentive Compensation Plan (ICP) and its Long Term Incentive Plan (LTIP). CAP payments were deferred until retirement or termination.

In May 1999, the NYSE Compensation Committee and Board of Directors approved, and Grasso executed, his second employment agreement as Chairman and CEO of the NYSE. The 1999 agreement modified Grasso's 1995 contract and extended his term to May 31, 2005. In fact, Grasso's 1999 employment agreement set forth five

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[1]Members of the NYSE Compensation Committee were all members of the NYSE Board of Directors.

components of his annual compensation, which, for the first time included CAP. These were: (1) a base salary of $1.4 million; (2) a discretionary ICP bonus with a minimum target amount of $1 million annually; (3) a LTIP award; (4) a CAP award equal to 50% of his total variable compensation (ICP and LTIP); and (5) a Senior Executive Retirement Plan (SERP) award.

The annual compensation for all of the NYSE senior executives was set each February for the prior calendar year. Between the 1997 institution of CAP awards and Grasso's 2003 resignation, the process for setting executive compensation was as follows: Frank Ashen, the head of human resources, would collect median target compensation for a group of comparator companies from NYSE's compensation consultant, Hewitt Associates. He would also prepare a summary of each NYSE executive's performance for the year, based upon input from operating managers. Next, Ashen compared his raw data against 65 quantitative measurements to reach a score for each executive. That score comprised 65% of the individual's compensation. The Chairman of the Compensation Committee then had discretion to determine the remaining 35% of compensation figures. Thus, during his tenure as Chair of the Compensation Committee, Langone was directly responsible for determining 35% of the compensation of NYSE executives. Also, he interacted with the NYSE Department of Human Resources by making his yearly proposals to Frank Ashen.

After the Chair made his recommendations, Ashen met individually with each of the members of the Compensation Committee to present and discuss the salary proposals. On the first Thursday of each February, the Compensation Committee would meet for a collective discussion and vote on all of the executives' compensation. Later that same day, the full Board of Directors would meet and vote on the same matters. It was the role of the Compensation Committee Chair to make oral presentations to the Committee and the full Board before they voted.

The first time the Board of Directors had to approve CAP awards was in February 1998. The written materials prepared for the 1998 and 1999 Compensation Committee meetings, under the leadership of then Chair Bernard Marcus, provided the Committee Members with worksheets that gave an exact value of the recommended CAP award for each participant. The "total compensation" column of those worksheets also displayed the recommended sum of each executive's base salary, ICP, LTIP and CAP award for the year. For example, the 1997 salary worksheet for Robert Britz, a NYSE Executive Vice president who received a

25% CAP award, contained the following information (emphasis supplied):

	Base Salary	ICP	LTIP	CAP	Total Compensation
Comparator Median Target	$400,000	$246,781	$640,020	--	$1,113,458
1996 Actual	$400,000	$350,000	No Payout	--	$750,000
1997 Recommended	$435,000	$410,000	No Payout	102,500[2]	$947,500

After Langone became chair of the Compensation Committee in June 1999, the values of recommended CAP awards were removed from the worksheets distributed to Committee members. In addition, the values for "total variable compensation" and "total compensation" no longer included the recommended CAP awards. For example, the worksheet outlining Grasso's recommended 1999 compensation was as follows:

	Base Salary	ICP	LTIP	Total Compensation	Total Variable Compensation
1998	$1,400,000	$4,204,000	$396,000	$6,000,000	$4,600,000
1999	$1,400,000	$5,652,000	$948,000	$8,000,000	$6,600,000

Grasso's February 2000 recommended 1999 compensation worksheet had the following statement underneath the chart: "Grasso will receive 50% of his variable compensation in the Capital Accumulation Plan." However, the document did not give a value for his 1999 CAP award, which was $3,300,000. The worksheet similarly failed to set forth that his actual recommended compensation was $11,300,000.

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[2]Britz's CAP Award was 25% of his variable compensation.

After the Committee voted to approve Grasso's compensation, a worksheet quantifying all of the components of Grasso's compensation, including the CAP award, and their sum total, was sent to the NYSE CFO to effect payment:

	Base Salary	ICP	LTIP	Variable Compensation	Total Cash Compensation	CAP	Total Compensation
1998	$1,400,000	$4,204,000	$396,000	$4,460,000	$6,000,000	--[3]	$6,000,000
1999	$1,400,000	$5,652,000	$948,000	$6,600,000	$8,000,000	$3,300,000	$11,300,000

Dale Bernstein, the deputy head of NYSE's Human Resources Department, testified at her deposition that it was her job to prepare the worksheets of executives' compensation. She related that after Langone became Chairman of the Compensation Committee, Frank Ashen told her to remove the CAP column from the materials distributed to the Compensation Committee. Bernstein stated that she told Ashen that she thought the worksheets were clearer with the CAP awards displayed. However, she testified that she deferred to Ashen, who told her that Grasso did not want the CAP columns displayed. Thus, from February 2000 to February 2003, the materials distributed to the Compensation Committee did not have a CAP column. Bernstein stated that after the compensation packages were approved, she gave the finance division worksheets which displayed the values of CAP and total compensation figures.

[3]Grasso was not eligible for a CAP award until after the execution of the 1999 employment agreement.

In February 2000, the Compensation Committee[4] was given materials indicating that Grasso's total 1999 compensation was $8 million, notwithstanding that his actual total compensation was $11.3 million. The minutes from the February 2000 Compensation Committee meeting do not indicate that Grasso's CAP award was discussed. However, speaking points prepared for Langone's remarks at the February 3, 2000 Board meeting indicate that Langone specifically told the Board that Grasso's 2000 CAP award was $3.3 million.

One member of the Compensation Committee, D. Maughan, testified at his deposition that the worksheet he was given at the February 2000 Committee meeting would have been clearer if it included a CAP column and a "real total compensation" figure. Two other members of the Compensation Committee gave deposition testimony that they thought Grasso had been awarded approximately $8 million in total compensation for 1999, when in fact, the actual total compensation approved for Grasso in 1999 was $11.3 million. Notably, the $3.3 million discrepancy was the exact value of the CAP award (which, again, was not disclosed on the compensation worksheet). However, four Board members (M. Karmazin, L. Wachner, G. Levin, and R. Murphy), testified at

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[4]The 1999 Compensation Committee (as of June 1999) included: K. Langone (Chairman), C. Bocklet, R. Fuld, M. Greenberg, M. Karmazin, D. Komansky, C. Marshall, D. Maughan, A. Trotman, and L. Wachner.

their depositions that it was clear to them, before they voted, that Langone was recommending that Grasso receive a $3.3 million CAP award for 1999.

Similar to the format for the prior year, the February 2001 worksheet for Grasso's compensation indicated a recommended "total 2000 Cash Comp" of $15 million.

	Base Salary	ICP	LTIP	Variable Comp	Total Cash Comp
1999	$1,400,000	$5,652,000	$948,000	$6,600,000	$8,000,000
2000	$1,400,000	$12,519,000	$1,081,000	$13,600,000	$15,000,000

The 2001 and 2002 worksheets added the word "also" to the CAP statement under the chart. They both stated: "Grasso will also receive 50% of his variable compensation in the Capital Accumulation Plan." However, the February 2001 worksheet did not reveal: (1) that Grasso's 2000 recommended CAP award was $6.8 million, (2) that a $5 million special award was recommended for Grasso for 2000; or (3) that Grasso's total recommended compensation for 2000 was $26.8 million. The minutes from the February 2001 Compensation Committee meeting do not indicate that Grasso's CAP award was discussed. C. Bocklet, a member of the Compensation Committee,[5] testified at his deposition that he believed that Grasso's total 2000 compensation was $15 million. This was the value in the "total compensation" column of the

[5]The 2000 Compensation Committee (as of June 2000) included: K. Langone (Chairman), C. Bocklet, R. Fuld, M. Greenberg, M. Karmazin, D. Komansky, A. Trotman, and L. Wachner.

worksheet, not the $26.8 million Grasso was actually awarded.

The same procedures were followed in February 2002. The worksheet given to the Committee was as follows:

	Base Salary	ICP	LTIP	Variable Comp	Total Cash Comp
2000	$1,400,000	$12,519,000	$1,081,000	$13,600,000	$15,000,000
2001	$1,400,000	$10,600,000	N/A	$10,600,000	$12,000,000

The notations under the chart on the February 2002 worksheet indicated that: (1) Grasso would also receive a CAP equal to 50% of his variable compensation; (2) in February 2001, Grasso was granted a special award of $5,000,000; and (3) in February 2002 Mr. Grasso is proposed for a special award of $10,500,000. Thus, the worksheet (including the table and the proposed $10.5 million special award) itemized a recommended compensation for Grasso of $22.5 million in 2001.[6] Again, neither Langone's speaking points nor the Compensation Committee minutes indicate a discussion of Grasso's CAP award. Thus, the actual value of Grasso's proposed compensation for 2001, including the $8.05 million CAP award, was $30.55 million.

Compensation Committee member R. Murphy, and Board members W. Harrison and J. Duryea all testified at their depositions that they believed they had voted to approve 2001 compensation for Grasso in the $20 million range. C. Bocklet and R. Murphy also

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[6]The 2001 Compensation Committee (as of June 2001) included: K. Langone (Chairman), R. Fuld, M. Greenberg, M. Karmazin, D. Komansky, G. Levin, R. Murphy, and A. Trotman.

testified that the members of the NYSE would not be happy if they knew that the Compensation Committee was approving paying Grasso $30 million for his work in 2001.

Grasso's employment contracts also entitled him to a lump-sum Supplemental Employee Retirement Plan (SERP) distribution upon his departure from the NYSE. This SERP award was determined based upon the length of his service at the NYSE and the amount of his variable compensation during that time. In the summer of 2002, Grasso sought to extend his contract and accelerate payment of some of his deferred compensation. The Compensation Committee held a special meeting during which some members first learned that Grasso's SERP would be $152 million as of the date of his projected retirement. The Committee was concerned about the rapid, substantial growth of Grasso's deferred compensation, and they decided that a third party should be retained to review the issue. Langone hired Vedder, Price, Kaufman & Kammholz, a consulting firm, for this purpose. Vedder, Price requested a copy of the materials provided to the Compensation Committee for their February 2002 meeting. However, Ashen provided Vedder, Price with the worksheets that were prepared for the CFO; namely, those which included the actual recommended CAP awards and compensation totals incorporating CAP awards, rather than the worksheet provided to the Committee, which did not display these figures.

Grasso then made a proposal to cap his final pay at $12 million, extend his contract to 2006, and to move $56 million of his accrued SERP benefit into his Supplemental Employee Savings Plan (SESP). The Compensation Committee considered this proposal, because it would lessen the NYSE's accrual expenses, but it made no determination on the matter. Then, in January 2003, Grasso revised his proposal to request the immediate payment of approximately $140 million in deferred compensation, including more than $11 million in CAP benefits.

At its February 2003 meeting, the Compensation Committee was given worksheets which included, for the first time under Langone's leadership, a figure for Grasso's proposed CAP award. The "Total Compensation" figures in this worksheet also included, again, for the first time under Langone's leadership, the CAP awards. Thus, the format of the February worksheet was inconsistent with those distributed to the Compensation Committee in February 2000, February 2001, and February 2002.

	Base Salary	ICP	LTIP	Variable Comp	Total Cash Comp	CAP	Total Compensation
2000	$1,400,000	$12,519,000	$1,081,000	$13,600,000	$15,000,000	$6,800,000	$21,800,000
2001	$1,400,000	$16,100,000	N/A	$16,100,000	$17,500,000	$8,050,000	$25,550,000
2002	$1,400,000	$7,066,000	N/A	$7,066,666	$7,066,666	$3,533,333	$12,000,000

Grasso's recommended total compensation for 2002 was $12 million. The minutes from the February 2003 Compensation Committee meeting also indicate the disclosure and approval of Grasso's CAP award.

However, the Compensation Committee did not vote to approve Langone's recommendation, but referred it for further study of the financial implications for the NYSE.

On August 27, 2003 Grasso executed his third employment agreement with the NYSE. The same day the NYSE issued a press release revealing that $139.5 million would be immediately payable to Grasso. The press release did not reveal that $48 million was also due to be paid Grasso upon his retirement. In September 2003, the Chairman of the Securities and Exchange Commission contacted the NYSE and requested information concerning Grasso's compensation. In response to increasing internal and external pressure, Grasso agreed to forgo future benefit payments. Several weeks later, he resigned.

The Attorney General then brought this action. The complaint alleges that the NYSE paid Grasso an unlawful amount of compensation and seeks the return of such sums to the NYSE. The seventh cause of action alleges that as an officer of the NYSE and chair of its Compensation Committee, Langone violated N-PCL 717(a) by, "among other things," misleading the Board about the CAP awards. Paragraph 207 of the complaint quotes the relevant portion of N-PLC 717(a), a codification of the fiduciary duty owed by all officers and directors of not-for-profit corporations. That section provides in pertinent part:

> "Directors and officers shall discharge the duties of their respective positions in good faith and with that degree of

> diligence, care and skill which ordinarily prudent men would exercise under similar circumstances in like positions."

In paragraph 208 of the complaint, the Attorney General asserts that as Chairman of the Compensation Committee, Langone breached his fiduciary duties under § 717(a) by misleading its Board of Directors, "which had delegated to him the task of explaining the proposed compensation." Langone's digressions, the complaint continues, are actionable under N-PCL 720(b)[7] and 720(a)(1).[8]

After substantial discovery, including 61 depositions and the exchange of approximately one million documents, Langone moved for summary judgment dismissing the seventh cause of action. Langone asserted that he was falsely accused of misleading the NYSE Board as to Grasso's CAP award. He averred that he personally disclosed Grasso's CAP program to the Board

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[7]N-PCL 720(b) authorizes the Attorney General to bring an action against an officer or director of a not-for-profit corporation under N-PCL 720(a)(1).

[8]N-PCL 720(a) provides that "[a]n action may be brought against one or more directors or officers of a corporation...:

> (1) To compel the defendant to account for his official conduct in the following cases:
>
> > (A) The neglect of, or failure to perform, or other violation of his duties in the management and disposition of corporate assets committed to his charge.
> >
> > (B) The acquisition by himself, transfer to others, loss or waste of corporate assets due to any neglect of, or failure to perform, or other violation of his duties.

and was present for similar disclosures by others. He stated that Grasso's $3.3 million 1999 CAP award was disclosed to the Board at their February 2000 meeting. Langone also asserted that his presentations in 2001 and 2002 fairly and accurately represented all of the components of Grasso's compensation. He claimed that the "undisputed facts" demonstrated that "[he] and others repeatedly disclosed Grasso's CAP awards, both orally and in writing." Langone's motion contained 45 exhibits. These included Langone's speaking points for various Board meetings, minutes from February 1997, 1999-2002 Compensation Committee meetings, excerpts from the deposition testimony of various Board members, and salary worksheets for the 2000-2002 Compensation Committee meetings. In support of Langone's contention that the Board was fully informed about Grasso's CAP awards, his counsel also annexed, as required by Rule 19-a of the Rules of the Commercial Division, a 23-page "Statement of Material Undisputed Facts."

In opposition, the Attorney General submitted excerpts from the depositions of 26 individuals, including Board members, NYSE employees, Grasso and Langone. He also presented 58 exhibits, a 14-page response disputing aspects of Langone's "Statement of Material Undisputed Facts," and a 32- page "Counter-Statement of Material Undisputed Facts." The Attorney General's submissions pointed to the necessity of annual disclosure of the CAP awards.

The Attorney General also submitted excerpts from the deposition testimony of a number of the Board members, including Deryck Maughan, Charles J. Bocklett, David Komansky, James Duryea, William Harrison, Robert Murphy, and H. Carl McCall. These witnesses' testimony, much of which is set forth in the factual recitation, indicated misconceptions as to the magnitude of the compensation that they had voted to approve for Grasso in February 2000 - February 2002.

In reply, Langone submitted 29 additional exhibits, including documents and deposition testimony. These were to establish that Langone met his duty to fully inform the Board about Grasso's compensation.

At oral argument and on the record, before deciding the motion, the IAS court inquired as to why, upon Langone's succession to leadership as Chair of the Compensation Committee, compensation worksheets circulated to the Committee members no longer itemized the exact values of CAP awards. Langone's counsel responded that his client had nothing to do with the formatting of the worksheets shown to the Compensation Committee, and that he should not be faulted for those documents' failure to disclose the CAP awards. The Attorney General countered that Langone was the only NYSE director who interacted with the Department of Human Resources, and that he was also responsible for recommending compensation to the remaining members of the

Compensation Committee. The Attorney General added that in his role as Chair of the Compensation Committee, Langone had a duty to ensure that the Committee was provided with a complete and accurate presentation of proposed compensation.

Langone's counsel then asserted that the speaking points from the February 2000 Compensation Committee meeting showed, unequivocally, that Langone disclosed the exact amount of Grasso's recommended CAP award to the Committee. However, the Attorney General produced evidence that Grasso's CAP award was not included in Langone's speaking points for the February 2001 or 2002 meetings. The Attorney General also asserted that there was no evidence that the exact values of Grasso's 2000 or 2001 CAP awards were disclosed to any member of the Compensation Committee or the Board prior to voting to approve his compensation packages.

The IAS court denied Langone's motion. It found issues of fact as to whether Langone breached his duties to the Board. The court held that the worksheets omitting the exact values of Grasso's CAP awards constituted evidence that Langone may have breached his obligation to fully and accurately disclose his salary recommendations to the Board. The court noted that Langone's speaking points for Compensation Committee meetings were inconsistent from year to year. The court also observed that Board members' deposition testimony indicated that some

directors were not aware of the magnitude of the total compensation that they were approving for Grasso.

On appeal, Langone contends that the Attorney General failed to raise an issue of fact as to the claim that he violated his fiduciary duties. He asserts that he had no duty to annually remind the Compensation Committee that it had approved a 50% CAP award for Grasso, and that even if he had such a duty, the undisputed facts reveal that he fulfilled it. Langone also claims that the element of causation has not been met because no Board members could have "reasonably relied" upon the worksheets to conclude that Grasso was not entitled to his contractual CAP award. Finally, Langone contends that any claims which rely upon his purported failure to apprise the Board of Grasso's SERP awards were not pleaded in the complaint, and cannot be a basis for a determination that Langone breached his duties.

In response, the Attorney General asserts that Langone had a duty to disclose Grasso's compensation to the Committee and the Board. He claims that the record is replete with evidence that Langone did not fulfill his obligations, and that his failures led the Board to vote in favor of compensation packages which were substantially higher than what they had understood. The Attorney General asserts that omissions regarding Grasso's CAP and SERP both preclude summary judgment in favor of Langone.

Pursuant to CPLR 3212(b) a court will grant a motion for

summary judgment upon a determination that the movant's papers justify holding, as a matter of law, "that there is no defense to the cause of action or that the cause of action or defense has no merit." Further, all of the evidence must be viewed in the light most favorable to the opponent of the motion (*Marine Midland Bank v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610 [1990]).

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact as to the claim or claims at issue (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Matter of Redemption Church of Christ of Apostolic Faith v Williams*, 84 AD2d 648, 649 [1981]; *Greenberg v Manlon Realty*, 43 AD2d 968, 969 [1974]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

Once the prima facie showing has been made, the party opposing a motion for summary judgment bears the burden of "produc[ing] evidentiary proof in admissible form sufficient to

require a trial of material questions of fact" (*Zuckerman*, 49 NY2d at 562; *see also Romano v St. Vincent's Med. Ctr. of Richmond*, 178 AD2d 467, 470 [1991]; *Tessier v New York City Health & Hosps. Corp.*, 177 AD2d 626 [1991]). The substantive law governing a case dictates what facts are material, and "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." (*Anderson v Liberty Lobby, Inc.*, 477 US 242, 248 [1986]).

Here, Langone's motion sought dismissal of the seventh cause of action, which alleged that he violated N-PCL 717(a), a codification of the fiduciary duty of corporate officers and directors. The elements of the Attorney General's seventh cause of action are (1) the existence of a fiduciary duty; (2) breach of that duty; (3) and a showing that the breach was a substantial factor in causing an identifiable loss. The first element of the cause of action is not controverted. N-PCL 717(a) expressly provides, and Langone concedes, that as a NYSE director and Chairman of the Board's Compensation Committee, he had a fiduciary obligation to discharge his duties, "with that degree of diligence, care and skill which ordinarily prudent men would exercise under similar circumstances in like positions."

The dissent correctly recognizes that the scope of Langone's

duties present a question of law for the court (*532 Madison Ave. Gourmet Foods v Finlandia Ctr.*, 96 NY2d 280, 288 [2001]). In *532 Madison Ave.*, the Court of Appeals aptly summarized our role in making this determination, which is to:

> "fix the duty point by balancing factors, including the reasonable expectations of parties and society generally, the proliferation of claims, the likelihood of unlimited or insurer-like liability, disproportionate risk and reparation allocation, and public policies affecting the expansion or limitation of new channels of liability. At its foundation, the common law of torts is a means of apportioning risks and allocating the burden of loss. In drawing lines defining actionable duty, courts must therefore always be mindful of the consequential, and precedential, effects of their decisions" (*id.* at 288-289 [internal quotation marks and citations omitted]).

As Chair of the Compensation Committee, Langone had discretion to recommend 35% of NYSE executives' variable compensation. With that discretion, Langone had the responsibility, under N-PCL 717(a), to accurately and completely convey his compensation recommendations to the Board. Langone also had a duty to make compensation recommendations which were in the interest of the NYSE, in good faith and with "conscientious fairness, morality and honesty in purpose" (*see Kavanaugh v Kavanaugh Knitting Co.*, 226 NY 185, 193 [1919]; *see also, Pebble Cove Homeowners' Assn. v Shoratlantic Dev. Co.*, 191 AD2d 544, 545 [1993], *lv dismissed* 82 NY2d 802 [1993] ["directors of a corporation have the fiduciary obligation to act on behalf of the corporation in good faith and with reasonable care so as to protect and advance its interests"]).

The issue of whether Langone breached his duties to the Board and to the Exchange is fact based, and it cannot be determined on the record before us:

> "New York courts have long held fiduciaries to a standard 'stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is ... the standard of behavior.' *Meinhard v. Salmon*, 249 N.Y. 458, 464 (1928) (Cardozo, *C.J.*). A corporate officer's fiduciary duty includes discharging corporate responsibilities 'in good faith and with conscientious fairness, morality and honesty in purpose' and displaying 'good and prudent management of the corporation.' *Alpert v. 28 Williams St. Corp.*, 63 NY2d 557, 569 (1984) (internal quotations omitted)" (*Gully v National Credit Union Admin. Bd.*, 341 F3d 155, 165 [2d Cir 2003]).

In support of summary judgment, Langone submitted excerpts from deposition testimony, minutes from Compensation Committee and Directors meetings, and other documentary evidence. These purported to conclusively establish that Langone effectively communicated Grasso's proposed compensation to the Board in conformity with his duties to his co-directors and the Exchange. Langone asserted that because CAP was a component of Grasso's 1999 employment agreement, a reminder of yearly CAP awards was not a material element of his presentations to the Board. He alternatively asserted that the Board members were all aware of CAP, that the participants' yearly CAP award was "an automatic contractual consequence" of the Board's other compensation decisions, and that Langone nonetheless made adequate disclosures of recommended CAP awards at the annual February compensation

meetings. Langone submitted excerpts from the depositions of a number of Board members who related that they were fully informed as to their compensation decisions under Langone's leadership.

However, in opposition, the Attorney General submitted deposition testimony, minutes from Compensation Committee and Board meetings, and documentary evidence, which demonstrated that while he was Chair of the Compensation Committee, Langone may not have effectively communicated Grasso's compensation to the Board. In addition, the record raises questions as to whether Langone's executive compensation recommendations were in the best interest of the NYSE. The Attorney General's submissions included deposition testimony from seven Board members, which indicated that they did not understand the impact of their votes in favor of Grasso's compensation awards.

First, it is uncontested that the Department of Human Resources was directed to remove both the CAP award column and the total compensation column incorporating CAP awards contemporaneous with Langone's succession to the position as Chairman of the Compensation Committee. It is unclear from the extant record who was responsible for the changes to the format of the compensation worksheets. However, it is also unclear whether Langone adequately explained the newly formatted written materials to the Compensation Committee. Further, some of the Board members testified that they believed Grasso's total

compensation for a given year was an amount which, the record reveals, was equal to the value displayed in the total compensation column in the worksheet for that year (a figure which excluded the CAP award referenced in the notations). Whether this was confusion or coincidence is an issue to be explored at trial.

As to damages, the Attorney General asserts that Grasso received exorbitant, unwarranted compensation awards between 2000 and 2002, while Langone was the Chair of the Compensation Committee, at the expense of the NYSE. On this issue, the Attorney General's submissions included the testimony of two Board members who opined that they knew that the NYSE members would not be happy if they had been made aware of the total compensation Grasso was awarded for his work in 2001.

Finally, the relevant inquiry on the present motion is whether, viewing the submissions in the light most favorable to the Attorney General, Langone has established, as a matter of law, that his actions did not constitute a breach of his duties as Compensation Committee Chair (*see* N-PLC 717).

Further, the court's role is limited to identifying whether there are material issues of fact, not to determine them (*Sillman*, 3 NY2d at 404). Thus, whether any of the directors who testified that they did not comprehend the implications of their votes either could, or should, have either done additional

research or asked questions before approving Grasso's compensation is an issue to be explored at trial. The dissent concludes that the notations describing Grasso's CAP award on the 2000-2002 worksheets adequately apprised the Board that Grasso's actual compensation was the "total compensation" figure in the chart plus 50% of the recommended ICP and LTIP awards. However, deposition testimony in the record indicates that the disclosures and the postulated mathematical calculations may not have been as clear to some of the directors voting to approve Grasso's compensation as they are to the author of the dissenting opinion.

This record exemplifies the general rule that "comparison of a party's conduct with the fiduciary standard of care is a question of fact" (*Cramer v Devon Group, Inc.*, 774 F Supp 176, 185 [SDNY 1991]). For example, the record shows that there were changes in the format of the worksheets under Langone's leadership which may have required explanation to the Compensation Committee; there is inconsistent deposition testimony about Langone's oral presentations to the Compensation Committee and the Board between 2000 and 2002; and there is deposition testimony indicating that Committee members were confused. Thus, Langone has not established as a matter of law

that he fulfilled his obligations under N-PCL 717. Accordingly, we affirm the order appealed denying his motion for summary judgment.

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

McGUIRE, J. (dissenting)

Defendant Kenneth G. Langone appeals from the denial of his motion for summary judgment dismissing the complaint as to him. The principal issue on this appeal is a simple one: whether there is a triable issue of fact about whether Langone, who was a member of the Board of Directors (the Board) of the New York Stock Exchange (the Exchange) and the Chair of its Compensation Committee at the time of the Board meetings at issue, failed to inform or remind the Board during three meetings of the Board (in February of 2000, 2001 and 2002) about a contractually-mandated consequence of the decision the Board was to make at each of these meetings on the amount of the bonus it was awarding to its Chair and Chief Executive Officer, Richard A. Grasso. In concluding that there is such an issue of fact, the majority relies on: (1) allegedly misleading worksheets prepared by Exchange staff, and (2) purported contradictory deposition testimony of certain directors of the Exchange. However, the worksheets were never presented to the Board, and thus could not possibly have misled the members of the Board, and the deposition testimony the majority relies upon either expressly supports Langone's position or fails to call it into question. Accordingly, there is no triable issue of fact and Langone is entitled to summary judgment for this reason alone. In addition, as discussed below, the majority fails to come to grips with the

two other, independent grounds for reversal advanced by Langone.

On March 4, 1999, during a meeting of the Board, the Board met in "executive session" -- i.e., outside the presence of Grasso -- to discuss the terms of a new employment agreement with Grasso. Earlier that day, the Compensation Committee of the Board, which was then chaired by Bernard Marcus, had reviewed the agreement and voted to recommend it to the full Board. One of the key provisions of that agreement, Grasso's participation in the Capital Accumulation Plan (CAP or the CAP Program), is central to this appeal. And the central concept of CAP, as one of the Directors, Gerald Levin, stated when he was deposed in this litigation, is "not at all" difficult. That simple concept is that each year Grasso would be entitled under the agreement to an award of deferred compensation (payable upon retirement or termination) in the amount of 50% of his annual "variable compensation," i.e., the annual bonus awarded to him by the Board. Thus, each year the Board would decide the amount of Grasso's bonus and, by operation of law, the employment agreement would dictate an additional benefit set at one half of the bonus in the form of the deferred CAP award.

As the minutes of the Board meeting state, Director Marcus addressed the Board regarding the proposed employment agreement with Grasso, reviewed its terms and informed the Board that the Compensation Committee had reviewed the agreement and recommended

it to the Board. As was testified to by numerous attendees of the Board meeting, both directors and Exchange staff, one of the terms that Director Marcus expressly disclosed to the Board was that Grasso would participate in the CAP Program and receive a deferred 50% match of his annual bonus. Significantly, there is no testimony or any other evidence that Director Marcus did not make this disclosure concerning a central feature of the proposed agreement. The Board unanimously approved the proposed agreement.

In addition to being uncomplicated, the CAP Program was familiar to the Board. In September 1997, some 18 months earlier, the CAP Program was commenced when the Board approved the program, which was then limited to four "Group Executive Vice Presidents" and provided for a deferred 25% match of their variable compensation. As the minutes of the September 1997 Board meeting make clear, and as is undisputed, the CAP Program was explained to the Board by Frank Ashen, the Exchange's Vice President for Human Resources, and he informed the Board, inter alia, that the four participants would receive a deferred 25% match of their annual variable compensation. In addition, the then Chair of the Compensation Committee, Ralph Larsen, who at the time was also the Chair of Johnson & Johnson, told the Board that the Compensation Committee had reviewed the CAP Program and recommended its adoption. By unanimous vote, the Board approved

the program.

In June 1999, shortly after Grasso's new employment agreement was approved by the Board, Langone became Chair of the Compensation Committee. By then, a three-step process was already in place for determining and approving the annual incentive compensation awards for the prior year for senior Exchange executives, including Grasso. First, Ashen would meet individually with members of the Committee. The materials Ashen brought to these meetings included worksheets he prepared with proposed incentive compensation amounts for senior executives other than Grasso. During the one-on-one meetings, however, Ashen also reviewed the components of Grasso's possible compensation (the annual salary fixed by the agreement at $1.4 million and his incentive or variable compensation), and his potential CAP award. As Ashen testified, "I would say that he [Grasso] would get 50 percent of his variable compensation wherever it ended up." Second, in early February, the Compensation Committee met to discuss and approve the variable (i.e., incentive) compensation of senior executives, including Grasso. In most years, Ashen circulated a worksheet to Committee members with the proposed variable compensation for Grasso after Grasso left the room. Third, after the Committee approved recommendations for incentive compensation awards for Grasso and other senior executives, the full Board would meet later that

same day. Assisted by "Speaking Points" prepared by Ashen, the Committee Chair summarized the recommendations and the Board voted on and approved the compensation awards for the senior executives. When Grasso's compensation was under discussion, Grasso would leave the room and the Board would meet in Executive Session.[1]

At meetings of the Board on February 3, 2000, February 1, 2001 and February 7, 2002 (the February meetings) the Board, in accordance with recommendations of the Compensation Committee, approved variable compensation awards for Grasso of $6.6 million (for 1999), $13.6 million (for 2000) and $16.1 million (for 2001). At the latter two meetings, the Board also approved a "special award" to Grasso of $5 million, a payment that would be excluded from both his variable compensation (and thus from the CAP Program) and his pension plans. Accordingly, pursuant to the 1999 employment agreement, the Board's actions at the February meetings resulted in CAP awards to Grasso of $3.3 million, $6.8 million and $8.05 million.

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[1]The majority makes repeated references to Langone having "discretion to recommend 35% of NYSE executives' variable compensation." Nothing in the record, however, would support the notion that Langone's authority to make a recommendation was tantamount to the authority to make a determination. In fact, the record evidence is to the contrary. Thus, for example, Ashen testified that the members of the Committee were "[h]igh powered, sophisticated, very savvy executives, not bashful at all." Moreover, "[e]ach meeting [of the Committee] was something of a challenge, because you would get questions sometimes out of left field."

The crux of the Attorney General's allegations against Langone are set forth as follows in paragraph 208 of the complaint:

> "Langone breached his fiduciary duty to the NYSE by misleading the NYSE Board of Directors -- which had delegated to him the task of explaining the proposed compensation -- about the amount of the annual compensation the Compensation Committee was recommending be approved by the Board, through, among other things, *his failure to disclose that Grasso would be receiving as deferred compensation an additional 50 percent of his bonus or ICP [Incentive Compensation Plan] award"* (emphasis added).

In moving for summary judgment dismissing the complaint as to him, Langone relied in part on testimony and documentary evidence relating both to the meetings on March 4, 1999 of the Compensation Committee and the Board approving Grasso's employment agreement and to the September 1997 meeting of the Board at which the CAP Program was established. In addition, and in particular, Langone relied on testimony from directors and other attendees at the February meetings of the Board and the Compensation Committee, and on documentary evidence relating to these meetings. For present purposes, suffice it to say that numerous directors and others present at the February meetings testified that Langone expressly referred to Grasso's CAP award, and that no director or other person present at the February meetings testified that Langone failed to disclose the CAP award. In short, the evidence relating to the February meetings provided

further support for Langone's position that: (1) the Board was fully aware that its decisions on Grasso's variable compensation entailed an additional benefit under the CAP Program of an award of deferred compensation in the amount of 50% of his bonus, and (2) he specifically informed the Board at each of the February meetings of the additional CAP award.

Another meeting of the Board, on April 5, 2001, is relevant. At the meeting both Ashen and Langone made presentations to the Board regarding a proposal, approved earlier that day by the Compensation Committee, to eliminate one of the bonus programs and expand the CAP program beyond the six senior executives who were then participating in it. As the Speaking Points prepared for Langone by Ashen state:

> "The Committee recommends expanding the participation in the Capital Accumulation Plan . . .
>
> There are presently six participants in the Plan. Dick Grasso, Bob Britz and Cathy Kinney participate at the 50% of variable compensation level . . ."

Ashen and Board members Gerald Levin and Robert Murphy testified that Langone, consistent with the Speaking Points, stated that Grasso was one of the executives participating in the CAP plan at the 50% level. Ashen and Board members Murphy and Mel Karmazan also testified that no Board members stated at the April 2001 meeting that he or she had been unaware two months earlier, when Grasso's 2000 variable compensation was approved, that Grasso

also was getting a CAP award of 50% of his bonus. On Langone's motion for summary judgment, none of this testimony was controverted.

As discussed below, Supreme Court denied Langone's motion, ruling that material issues of fact existed that precluded granting the motion and that the testimony Langone relied on "drips of credibility [issues]." On this appeal, Langone argues that his motion should have been granted for three reasons: (1) he was under no duty to remind the Board each year of what the Board unquestionably knew when it approved Grasso's 1999 employment agreement, viz., that Grasso would receive an additional benefit under the CAP Program of an award of deferred compensation in the amount of 50% of his bonus, (2) the undisputed evidence submitted on the motion demonstrated that he did so remind the Board at the February meetings, and (3) the Attorney General failed to raise an issue of fact concerning causation, because the Board did understand that Grasso was entitled to an additional CAP award and thus any alleged failure so to remind the Board could not have been the cause of any injury to the Exchange. I need not reach the first and third of these arguments as Langone's motion should have been granted on the second of these three grounds.

As Langone correctly maintains, the evidence he presented on his motion for summary judgment demonstrates that he did inform

the Board of the amount of Grasso's CAP award at each of the February meetings. The Attorney General, however, failed to meet his burden (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]) of producing evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact requiring a trial on the question of whether Langone so informed the Board.

The Attorney General and the majority maintain that the worksheets presented to the Compensation Committee members are sufficient to establish a material issue of fact as to whether Langone so informed the Board at the February meetings. To understand why that is incorrect, the worksheets must be discussed in some detail.

The worksheet prepared by Ashen relating to Grasso for the February 3, 2000 meeting of the Compensation Committee contains columns for his 1999 "Base Salary," "ICP" (Incentive Compensation Plan) and "LTIP" (Long Term Incentive Plan), i.e., the two components of his bonus or variable compensation, "Total Compensation" and "Total Variable Compensation." Immediately below these columns a notation states as follows: "In 1999 Mr. Grasso will receive 50% of his variable compensation in the Capital Accumulation Plan." The worksheets prepared by Ashen relating to Grasso for the other two February meetings of the Compensation Committee contain columns for his 2000 and 2001

"Base Salary," "ICP" and "LTIP," "Variable Comp[ensation]" and "Total Cash Comp[ensation]." On both worksheets, immediately below these columns a notation prominently states (in type identical in size to the preceding text) as follows: "Mr. Grasso will also receive a capital accumulation award equal to 50% of the Variable Compensation."[2]

At most, the first worksheet is ambiguous in that someone not knowledgeable about Grasso's participation in the CAP Program pursuant to the 1999 employment agreement might understand the

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[2]The majority pays only lip service to this notation in both worksheets, noting only that the worksheets "added the word 'also' to the CAP statement under the chart." With respect to the February 2001 worksheet, the majority immediately goes on to make the erroneous assertion that the worksheet "did not reveal: (1) that Grasso's 2000 recommended CAP award was $6.8 million[;] (2) that a $5 million special award was recommended for Grasso for 2000; or (3) that Grasso's total recommended compensation for 2000 was $26.8 million." In fact, it was the Committee that first recommended the special $5 million bonus that was to be excluded from the CAP Program and thus it is hardly surprising that the worksheet prepared by staff before the Committee met did not "reveal" that component of Grasso's "compensation." The majority's reference to a "recommended CAP award" is misleading because neither the Committee nor the Board was asked or required to approve a "recommend[ation]" on the CAP award. But the more important point is that the worksheet certainly did "reveal" that Grasso would receive "Total Cash Compensation" of $15 million plus a CAP award of $6.8 million. For anyone who can divide by two, the worksheets for the Compensation Committee meeting in February 2001 and 2002 provided just that figure. After all, both worksheets expressly stated the full value of Grasso's proposed "Variable Compensation" and clearly noted that "Mr. Grasso will also receive a capital accumulation award equal to 50% of the Variable Compensation." Accordingly, the majority also errs when it states that at the February 2003 meeting of the Compensation Committee the members were given worksheets "which included, for the first time under Langone's leadership, a *figure* for Grasso's proposed CAP award" (emphasis added).

notation to mean that the $6.6 million figure in the "Total Variable Compensation" column included a CAP award of $3.3 million. For that to be the case, however, Grasso's award of deferred compensation under the CAP Program would have to have been set at 100% (rather than 50%) of his variable compensation.[3] Moreover, the amount of "Total Variable Compensation" exactly matches the sum of ICP and LTIP (the two components of Grasso's bonus or variable compensation) and the figure set forth as "Total Compensation" equals that amount plus the "Base Salary," thus indicating that CAP must be an additional category.

Putting aside that the notations in the latter two worksheets unequivocally state that the CAP award is an additional 50% of the variable compensation, the first worksheet is irrelevant in any event. In the first place, even if the worksheet could have been ambiguous to a director on the Compensation Committee, it does not affirmatively misstate the CAP award, let alone negate or cast doubt on the testimonial and

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[3]The majority ignores this point. Moreover, the majority is simply wrong in stating that this worksheet "*indicat[ed]* that Grasso's total 1999 compensation was $8 million, notwithstanding that his actual total compensation was $11.3 million" (emphasis added). In fact, it "indicat[ed]" no such thing. Nor is the February 2000 worksheet misleading simply because it does not include the deferred CAP award within the term "compensation." As noted above, the worksheets for the Compensation Committee meetings in February 2001 and 2002 refer to "Total Cash Comp[ensation]" rather than "Total Compensation." As discussed below, any alleged ambiguity in the February 2000 worksheet (to someone not knowledgeable about the CAP Program) is of no moment in any event.

documentary proof both that the Board correctly understood Grasso's participation in the CAP Program and that Langone specifically informed the Board at the February 3, 2000 meeting that Grasso would receive a $3.3 million CAP award in addition to his bonus of $6.6 million. Perhaps most notable in this regard is the testimony of Linda J. Wachner, a member of the Board. Her uncontradicted testimony was that Langone "was careful to articulate each piece, including the CAP award, the 1999 compensation will be $8 million, and that Dick will also receive another $3.3 [million]." In addition, after making his presentation to the Board, Langone asked the members of the Compensation Committee "if there were any things he left out."[4]

The second reason the worksheet is irrelevant is that only Compensation Committee members received the worksheets. The full Board never received either the lone and ostensibly ambiguous worksheet or any of the other worksheets prepared by Ashen. This undisputed fact -- the majority ignores it -- is critical because, as noted above, the operative allegation of the

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[4]Another document prepared by Ashen, Speaking Points for Langone's use in presenting the Committee's recommendations on Grasso's compensation to the Board at the February 2000 meeting, should be noted, especially in light of the Attorney General's reliance on a sentence from other Speaking Points prepared by Ashen for the February 2002 meeting. The February 2000 Speaking Points state that Grasso's "total compensation will be $8,000,000" and that he "will also receive a Capital Accumulation Award of 50% of his variable compensation (or $3,300,000) per his contract to be deferred until his retirement."

complaint is that Langone "misle[d] the *NYSE Board of Directors* . . . through . . . his failure to disclose that Grasso would be receiving as deferred compensation an additional 50 percent of his bonus" (emphasis added).

Unfortunately, despite their irrelevance, further discussion of the worksheets is necessary given that they are so critical to the majority's position. The majority takes pains to note that "[a]fter Langone became chair of the Compensation Committee in June 1999, the values of recommended CAP awards were removed from the worksheets distributed to Committee members" and that "the values for 'total variable compensation' and 'total compensation' columns no longer included the recommended CAP awards." The majority also maintains that "[i]t is unclear from the extant record who was responsible for the changes to the format of the compensation worksheets."

Why the majority makes these statements and places such reliance on the changes in the worksheets is bewildering. Langone had nothing whatsoever to do with these changes in the worksheets. Not a shred of evidence is to the contrary. In fact, Ashen testified that Langone never told him "how to do" or "set . . . up" the worksheets. The only other relevant testimony on this subject is that of Bernstein. As the majority also notes, Bernstein testified that Ashen told her to remove the CAP column from the worksheets. But Bernstein offered only the

hearsay explanation that Ashen told her that *Grasso*, not Langone, did not want "CAP Accumulation" and "Total Compensation" columns to be displayed. It may be unclear whether Grasso played a role in the changes to the format of the worksheets, but the record is not unclear with respect to Langone. Nothing but rank speculation and a blatant fallacy -- *post hoc, ergo propter hoc* -- would support linking to Langone the hearsay-based attribution of these changes to Grasso. Immediately before its claim that the record is unclear with respect to who was responsible for the format changes, the majority stresses that "it is uncontested that the Department of Human Resources was directed to [make the changes] contemporaneous with Langone's succession to the position as Chairman of the Compensation Committee." The majority may not overtly commit this fallacy, but it plainly intends to suggest that the mere fact that the changes occurred after Langone became Chair of the Compensation Committee raises an issue of fact regarding who decided to make the changes.

The majority also states that "Bernstein stated that she told Ashen that she thought the worksheets were clearer with the CAP awards displayed." In the first place, however, merely because a statement can be made more clearly, it hardly follows that the statement actually made is not clear, let alone that it is false or misleadingly incomplete. As noted above, the worksheets for the February 2001 and 2002 meetings unambiguously

support Langone's position and the worksheet for the February 2000 meeting does not create a material issue of fact. Moreover, the majority fails to mention that Bernstein also testified that she did not "feel uncomfortable" with the changes in the worksheets "because the CAP was footnoted, so I felt that the information was there."

On the subject of the worksheets, finally, the majority also is wrong in asserting that I "conclude[] that the notations describing Grasso's CAP award on the 2000-2002 worksheets adequately apprised the Board that Grasso's actual compensation was the 'total compensation' figure in the chart plus 50% of the recommended ICP and LTIP awards." To the contrary, my position is that the worksheets do not create a material issue of fact precluding summary judgment for at least two reasons. First, and most importantly, the worksheets submitted to the *Committee members* do not undercut or create a material issue of fact regarding the evidence submitted by Langone that he specifically informed the *full Board* at each of the February meetings of the additional CAP award. Second, and as I have noted without contradiction by the majority, the worksheets for the February 2001 and 2002 meetings of the Committee unambiguously support Langone's position while the worksheet for the February 2000 meeting is at most ambiguous.

In its oral decision denying Langone's motion for summary

judgment, Supreme Court relied on the absence of any statement in the minutes of the February meetings of either the Board or the Compensation Committee evidencing a discussion of Grasso's CAP award. Indeed, Supreme Court went so far as to opine that "the Attorney General probably makes a prima facie case by just showing the minutes." In attempting to defend its contention that material issues of fact precluded the granting of Langone's motion, the majority does not rely on the minutes. In stating its view of the facts, however, the majority repeatedly notes that the minutes from each of the three February meetings of the Compensation Committee do not indicate that Grasso's CAP award was discussed. On appeal, moreover, the Attorney General continues to rely on the minutes in this regard.

The absence of any reference in the minutes to a discussion of Grasso's CAP award is as unsurprising as it is irrelevant. As Langone correctly observes, it is hornbook law that board minutes are meant to reflect the board's actions, not all of its discussions (*see* 5A Fletcher, Fletcher Cyclopedia of the Law of Private Corporations, § 2190 at 155-156 [2004] [minutes "should definitely and positively show what *action* was taken by the corporation in the matters that they purport to memorialize," but the "secretary is not obligated to include everything that is said in the minutes as long as the secretary actually transcribes what has taken place"] [emphasis added]; *see also* Fletcher,

Fletcher Cyclopedia of the Law of Private Corporations, § 3:27 at 74 [2005 Supp.] ["Ordinarily the secretary makes no record of the discussions that take place in the meeting, the *action* which is taken following the discussion being the important thing" [emphasis added]). The majority offers nothing by way of response to this basic point of corporate law and procedure.

The minutes of the February meetings of the Compensation Committee and the Board do reflect the relevant actions taken, i.e., approval of the incentive compensation awards made to Grasso and other senior executives. By contrast, approval of the CAP award to Grasso or to any other executive was neither an action that the Committee or the Board did take nor an action that either was required to take. Rather, in each year the approval of the incentive compensation award automatically dictated the CAP award (by virtue of the terms of the 1999 employment agreement in Grasso's case and by virtue of the terms of the CAP Program for the other executives). And as Langone notes, when an action was taken with respect to CAP, the minutes so reflect. Thus, when the CAP award was increased for two executives (from a 25% to a 50% match) in February 2000, the Compensation Committee minutes so reflect, and the April 2001 minutes similarly reflect an expansion of the CAP Program to include additional executives.

In short, the absence of any reference in the minutes to a

discussion of Grasso's CAP award is devoid of any significance. It neither undercuts nor creates a material issue of fact regarding the documentary proof and uncontradicted testimony of participants at the February meetings of the Board (and of the Compensation Committee) that Langone did remind the Board anew (and the Committee) about Grasso's CAP award.[5]

Nor is the Attorney General persuasive in urging that a material issue of fact on whether Langone misled the Board is raised by a sentence in the Speaking Points prepared by Ashen for

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[5]The Attorney General contends that Langone's "argu[ment] that CAP awards did not have to be approved by the [Board] . . . is undercut by the minutes of the February 2003 meeting of the Compensation Committee," because those minutes state that the Committee had approved "Incentive Compensation of $7,066,666 and a *Capital Accumulation Plan Award of $3,533,333 for Mr. Grasso*" (emphasis added). But it is indisputable (i.e., not an "argu[ment]"), that as a result of the 1999 employment agreement Grasso's CAP awards did not have to be approved by the Board. In fact, a breach of contract would have occurred if the Board had awarded an amount less than that prescribed by the CAP formula set forth in Grasso's employment agreement. Nor does the italicized sentence fragment from the minutes of a Compensation Committee meeting occurring a year *after* the last of the three February meetings of the Board (the meetings the complaint puts in issue) create a material issue of fact about Langone's prior disclosures to the Board at the February meetings. Moreover, this contention about the minutes of the February 2003 meeting of the Committee ignores that the minutes of each of the February meetings (in 2000, 2001 and 2002) reflect other "discussion[s]" regarding Grasso's compensation that were not further described. Finally, as Langone correctly maintains, both sides can speculate about why this fragment appears in the February 2003 minutes of the Compensation Committee. But there is no evidence explaining it (such as testimony from the person who prepared the minutes) and the Attorney General's speculation is not a proper basis for denying Langone's motion for summary judgment (*see Batista v Rivera*, 5 AD3d 308 [2004]; *Warden v Orlandi*, 4 AD3d 239, 242 [2004]; *Leggio v Gearhart*, 294 AD2d 543, 544-545 [2002]).

Langone's use at the February 2002 meeting of the Board in presenting the Compensation Committee's recommendations for Grasso's 2001 compensation. At most, the last sentence of these Speaking Points is ambiguous. The third "bullet-point" notes that in 2000 Grasso received his contractually fixed salary of $1.4 million and "variable compensation of $13.6 million and a Special Payment of $5 million that will vest fully in February 2006." The Speaking Points then continue as follows:

> " • This year, the Committee recommends that Dick receive, in addition to his salary:
>
> -$16.1 million in variable compensation (up $2.5 million from last year)
>
> -A Special Payment of $5 million that he will receive when he leaves the Exchange that will also be placed in his SESP account - The Exchange's non-qualified Savings Plan
>
> -Like the Special Payment we made last year, the $5 million will not be eligible for the Capital Accumulation Plan,[6] nor will it be a part of Dick's retirement calculation
>
> • As a result, all in, the Committee recommends that Dick's compensation be raised $2.5 million, including a deferred special payment of $5 million"

If one understands the term "compensation" in the last sentence to include the CAP award, the Speaking Points would be

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[6]The majority states that these Speaking Points do not "indicate a discussion of Grasso's CAP award." Of course the Speaking Points would not indicate any "discussion" by the Board but only the subjects about which Langone was to speak. As is evident, the subject of Grasso's participation in CAP is "indicate[d]" in the Speaking Points.

to this extent misleading in that the $2.5 million increase in the variable compensation dictated a $1.25 million increase in the CAP award so that the increase in total "compensation" would be $3.75 million. On the other hand, if one understands the term "compensation" to exclude the CAP award and include only the compensation the Committee was recommending for approval (the funds which, in contrast to the CAP award, were payable immediately) the Speaking Point would not be misleading.[7] Moreover, anyone who understood the basic elements of Grasso's participation in the CAP Plan (which is mentioned in the preceding sentence of the Speaking Points) would understand that a $2.5 increase in "variable compensation" would dictate an increase of $1.25 million in the CAP award.

The extent to which the last sentence of these Speaking Points is ambiguous, however, need not be explored any further. First, there is no evidence that Langone read the Speaking Points as written to the Board. To the contrary, and no evidence contradicts him, Langone testified with respect to these and

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[7]Speaking Points prepared by Ashen two years earlier did so exclude the CAP award from the term "total compensation." Thus, Speaking Points he prepared for Langone's use in February 2000 in presenting the Compensation Committee's recommendations for Grasso's compensation do not include the CAP award as part of the "total 1999 compensation." As noted above, after stating the amount of that "total compensation," the Speaking Points specifically state that "Dick will also receive a Capital Accumulation Award of 50% of his variable compensation (or $3,300,000) per his contract to be deferred until his retirement."

other Speaking Points prepared for him by others, "I don't read [to the Board]." The Attorney General focuses on one snippet of Langone's testimony and asserts that Langone "conceded that he made the 'all in' statement from the speaking points." In fact, the last sentence was read to Langone during his deposition and he was then asked: "Did you tell the Board that?" Langone's response was: "Words to that effect, I did. I wouldn't have read it." Putting aside that the words "in effect" undermine the fatal concession the Attorney General discovers in that one response by Langone, a subsequent question by the Assistant Attorney General focused specifically on whether Langone had said "all in" during his presentation to the Board. His response was: "Well, first of all, I did not say all in." Of course, a witness's testimony must be viewed as a whole and one snippet of testimony cannot be taken out of its context and used to support or oppose a motion for summary judgment (*see Baillargeon v Kings County Waterproofing Corp*, 29 AD3d 838, 838-839 [2006]; *Mitchell v Route 21 Assoc.*, 233 AD2d 485, 486 [1996]). Furthermore, as Langone also repeatedly made clear during the questioning on the last sentence of the Speaking Points, the term "compensation" did not include the CAP award.

During this same line of questioning, Langone gave other relevant testimony. With respect to his presentation to the Board, Langone repeatedly stated that the amount of Grasso's CAP

award was "give[n]" or "broke[n] . . . out" "very clearly." In this regard, Langone also stressed that there was a "full discussion" of the special $5 million payment that, as is reflected in the penultimate sentence of the very Speaking Points on which the Attorney General relies, was not included in the CAP award. Indeed, at other points in the deposition, Langone testified more generally that he always gave to the Board the dollar amount of Grasso's CAP award at all of the February meetings.

Contrary to what the Attorney General argues in his brief, Langone's testimony about his presentation to the Board at the February 2002 meeting was not contradicted by the testimony of Gerald Levine, another director. When Levine was asked at his deposition (more than three years after the meeting) whether Langone had said during the meeting how much the CAP award was, Levine answered: "Either [Langone] did identify the number, or it wasn't necessary because he was identifying the variable compensation against which the 50 percent CAP was taken. And the fact that the $5 million [special award] was excluded for CAP purposes made it very clear that it [i.e., the CAP award] was $8,050,000."

By not excluding the possibility that Langone had not belabored the obvious, Levine did not with this answer, as the Attorney General argues, "thereby confirm[] the existence of at

least a factual question about whether Langone made the necessary disclosures to his fellow directors." To the contrary, it confirms that at least for Levine all that was necessary was for Langone to state the amount of the variable compensation. Even assuming without any evidentiary support that this simple concept (divide variable compensation by two to determine the CAP award) was not obvious to all of the other directors, Levine's answer certainly does not preclude summary judgment.[8] Like the last sentence of the February 2002 Speaking Points, it merely "g[i]ve[s] rise to nothing more than a shadowy semblance of an issue" insufficient to defeat summary judgment (*Hooke v Speedy Auto Ctr.*, 4 AD3d 110, 112 [2004] [internal quotation marks omitted]).

The majority relies in crucial part on numerous assertions it makes about the excerpts from the deposition testimony of members of the Board that were submitted by the Attorney General in opposition to the motion. These assertions are erroneous at best. The broadest of them are the following:

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[8]Of course, the notion that the sophisticated business leaders and other prominent persons who comprised the Board did not grasp this elementary concept is risible. The majority nonetheless maintains that "deposition testimony in the record indicates that the disclosures and the postulated mathematical calculations may not have been as clear to some of the directors voting to approve Grasso's compensation as they are to the author of the dissenting opinion." Suffice it to say that the majority does not and cannot quote or paraphrase the testimony of anyone to support this claim about what is "indicate[d]" by this unspecified deposition testimony.

> "The Attorney General also submitted excerpts from the deposition testimony of a number of the Board members, including Deryck Maughan, Charles J. Bocklet[], David Komansky, James Duryea, William Harrison, Robert Murphy, and H. Carl McCall. These witnesses' testimony, much of which is set forth in the factual recitation, indicated misconceptions as to the magnitude of the compensation that they had voted to approve for Grasso in February 2000 - February 2002."
>
> "The Attorney General's submissions included deposition testimony from seven Board members, which indicated that they did not understand the impact of their votes in favor of Grasso's compensation awards."

These assertions are notable in at least four aspects. First, the majority does not quote or paraphrase even a *single* example of this supposed testimony. Rather, the majority asserts only that "much" of it is "set forth" elsewhere in its writing. As discussed below, however, the majority can eke no support for its position from the excerpts of the deposition testimony that are referred to elsewhere in its writing. Second, the majority again makes claims only about what is "indicated," not what was testified to, by these Board members. Third, the majority makes no claim that when they voted to approve Grasso's bonus any of these seven Board members had misconceptions about or failed to understand the magnitude or effect of their votes on Grasso's CAP award. Rather, the majority speaks in far more general terms about alleged misconceptions and failures to understand relating to Grasso's "compensation." Fourth, the majority implicitly and

illogically assumes that any such misconception or failure to understand by a Board member reflects a disclosure failure by Langone.

The truth is that none of the excerpts contain testimony from any of these directors that at the time of the votes in favor of Grasso's bonus awards, he or she was not aware of or did not understand that Grasso also would receive a CAP award of 50% of the amount of the bonus. The only testimony from any of the excerpts (the Attorney General submitted excerpts from the deposition testimony of 16 members of the Board) that remotely bears on these assertions by the majority was given by David Komansky and Linda Wachner. Mr. Komansky testified that without seeing the relevant documents, he could not remember (not that he did not understand at the time) what the impact of the compensation awards in 2000 and 2001 was on a pension benefit Grasso received, the "Supplemental Executive Retirement Plan" or "SERP" (*not* the CAP award). Ms. Wachner testified only that she did not know how much money was being saved in terms of SERP benefits when the determination was made in February 2001 that the special $5 million bonus would not count for purposes of Grasso's SERP benefits.[9]

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[9]Presumably, the majority does not rely on testimony given by Komansky during a pre-litigation investigation conducted by the Attorney General at which Langone was neither present nor represented by counsel. Although the Attorney General also submitted an excerpt from this testimony in opposition to

The majority's other assertions about supposed deposition testimony or other ostensible evidence supporting its position also are baseless. The majority writes:

> "[I]t is also unclear whether Langone adequately explained the newly formatted written materials to the Compensation Committee. Further, some of the Board members testified that they believed Grasso's total compensation for a given year was an amount which, the record reveals, was equal to the value displayed in the total compensation column in the worksheet for that year (a figure which excluded the CAP award referenced in the notations)."

The first sentence is unsupported and irrelevant. The worksheets were give to Compensation Committee members by Ashen when he met on a one-on-one basis with the members. Whether Ashen or Langone explained the changes in the format of the worksheets either before or at the February 2000 meeting of the Committee is of no moment at all. The complaint alleges a failure by Langone to make adequate disclosure to the Board, not the Committee, of Grasso's CAP award. Even assuming some unknown member or members of the Committee were confused by the format change in the worksheet prepared by Ashen for the February 2000

Langone's motion, it is not admissible evidence against Langone (*see Bigelow v Acands, Inc.*, 196 AD2d 436, 439 [1993]). In any event, to the extent that excerpt suggests that at the time he was deposed during the investigation Komansky erroneously understood from a document shown to him that the $8 million in "compensation" stated to have been received by Grasso in 1999 included the CAP award, that misunderstanding was refuted in the admissible deposition testimony given by Komansky in this litigation that Langone submitted in reply. Again, moreover, any isolated misunderstanding that a director may have had cannot be equated with a disclosure failure by Langone.

meeting of the Committee, any such confusion would be irrelevant to Langone's alleged liability. The relevant and decisive point is that no testimony or documentary evidence creates a material issue of fact that undercuts Langone's evidentiary showing that: (1) the Board understood that Grasso would receive an additional benefit under the CAP Program in the form of deferred compensation in the amount of 50% of his bonus, and (2) he specifically informed the Board at each of the Board meetings of the additional CAP awards.

As for the second sentence, the majority fails to identify the witnesses who purportedly gave such testimony. Presumably, however, the majority is referring to certain testimony (from either Deryck Maughan, Charles Bocklet, Robert Murphy, William Harrison or James Duryea, or all of these Board members) to which it refers, directly or indirectly, elsewhere in its writing. As discussed below, none of that testimony comes close to raising a material issue of fact that precludes summary judgment.

Before discussing that testimony, other particularly inscrutable references by the majority to the deposition testimony should be noted. At the end of its writing, as if by way of summary, the majority relies on both "inconsistent deposition testimony about Langone's oral presentations to the Compensation Committee and the Board between 2000 and 2002" and "deposition testimony indicating that Committee members were

confused." Once again, the majority does not provide any details that would explain what testimony it is relying on or who gave the testimony. Nor does the majority provide any reason to conclude that the "inconsistent deposition testimony" relates to a material issue of fact concerning Langone's statements to the full Board about Grasso's CAP award. The majority is just as uninformative about the "testimony indicating that Committee members were confused." What were they confused about, when in point of time they were confused and why their confusion is relevant all are matters about which the majority is completely silent.

That silence reflects the simple reality that no member of the Board testified that when voting on Grasso's bonus he or she was "confused" or did not understand Grasso's CAP award. The repeated failures by the majority to provide any relevant particulars are telling. None are provided because they do not exist.

Putting aside the majority's unsupported generalizations about the deposition testimony, no material issue of fact is raised by any of the deposition excerpts the majority paraphrases or quotes. True, Deryck Maughan testified that the February 2000 worksheet prepared by Ashen "would have been clearer for everybody if there had been a column called 'CAP' and then a real total displayed." As already noted, however, any purported

ambiguity in the worksheet prepared by Ashen and presented only to Compensation Committee members (who presumably would be even more knowledgeable about the CAP program than other Board members) cannot sensibly be equated with a disclosure failure by Langone, let alone such a failure in the presentation Langone made to the full Board. Moreover, Maughan left the Board in June 2000 and understandably did not have a "good memory of a CAP conversation" in the February 2000 meeting.[10] Nonetheless, despite his "poor memory of the CAP conversation," he knew that it "took [Grasso's compensation] to some higher number." The perhaps more decisive point about Maughan's deposition is that he never testified that Langone failed to mention Grasso's CAP award in his presentation to the Board in February 2000.

In an apparent reference to Maughan and Charles Bocklet, another director, the majority states that "[t]wo other members of the Compensation Committee gave deposition testimony that they thought Grasso had been awarded approximately $8 million in total compensation for 1999." Similarly, after stating that Bocklet "testified at his deposition that he believed that Grasso's total compensation was $15 million," the majority immediately goes on to write that "[t]his was the value in the 'total compensation' column of the worksheet, not the $26.8 million Grasso was

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[10]The record on appeal is unclear as to whether Maughan is referring to the February meeting of the Compensation Committee or the Board.

actually awarded."[11] In substance, during their depositions these directors were asked by the Assistant Attorney General to guess, years after the relevant meetings of the Board, what Grasso's total "compensation" was in the years in question. Their incorrect "belief" or recollection is not admissible proof of anything (other than the understandable fallibility of their memories). As a matter of logic, moreover, from their incorrect "belief" about Grasso's total "compensation" -- even putting aside the potential ambiguity (discussed above) in that term -- it does not follow that any one component of that "compensation" was not disclosed to them. For these reasons, the raw recollections or beliefs of these two directors "g[i]ve[s] rise to nothing more than a shadowy semblance of an issue" (*Hooke v Speedy Auto Ctr.*, 4 AD3d at 112). Furthermore, like all the other directors and staff who were present at the February meetings, neither Maughan nor Bocklet testified that Langone did not disclose Grasso's CAP award.

The majority also writes that "Compensation Committee member R. Murphy, and Board members W. Harrison and J. Duryea all

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[11]To be clear, Bocklet never testified that his belief (more accurately, his guess) that Grasso's total compensation was $15 million was derived from or connected to the "total compensation column of the worksheet." Bocklet gave no such testimony. Rather, years after the February 2001 meeting, he simply testified, without reference to the worksheet or any column in it, that he believed Grasso's total compensation for 2000 "[w]as 15 million."

testified at their depositions that they believed they had voted to approve 2001 compensation for Grasso in the $20 million range." For the reasons just stated, what these directors "believed" years later does not raise a material issue of fact about whether Langone disclosed Grasso's CAP award. Furthermore, even if these directors had such an erroneous belief at the time they voted to approve the compensation -- none of them so testified -- that error cannot rationally be equated with a failure of Langone to make adequate disclosure (not, unless, Langone's duty to make adequate disclosure made him a guarantor that all Board members would understand him correctly).[12]

Another reason the majority's reliance on these snippets of deposition testimony is misplaced is that the belief of these directors was correct. The amount of compensation that the Board "voted to approve" ($21.1 million) *was* in the $20 million range. The other components of Grasso's "compensation" (his salary of $1.4 million and his CAP award of $8.05 million) were not voted on but were, respectively, specified in or dictated by his employment agreement.[13]

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[12]Nor for that matter, could the "confusion" the majority relies upon be equated with such a disclosure failure by Langone.

[13]Moreover, Harrison testified that he was not in a position to deny that Langone made the CAP disclosures contained in the Speaking Points. Because the majority emphasizes what certain directors "believed," it bears note that Duryea answered "I do not" to a question asking him if he "ha[d] any reason to believe that Mr. Langone misled you in any way concerning Mr. Grasso's

That the majority relies on such an irrelevant snippet from Murphy's testimony is particularly unfortunate given other testimony from Murphy that is highly relevant both to an understanding of that snippet and the core allegation of the complaint that Langone failed to make adequate disclosures to the Board about Grasso's CAP award. With specific reference to his testimony that he believed he had voted in 2002 for compensation for Grasso in 2001 in the "low 20s," Murphy testified he had been focusing on the discretionary components of Grasso's compensation that the Compensation Committee actually was approving, that he knew Grasso had other elements of his compensation that were not discretionary and that the CAP award was one of the components that the Committee and the Board did not have to vote on. He also testified that at the February 2002 meeting of the Compensation Committee he understood that by approving an incentive payment to Grasso of $16.1 million, "there would also be a payment into Mr. Grasso's CAP." Indeed, he testified that he understood all the elements of Grasso's compensation for each of the years he was on the Board and voted to approve it.

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compensation." Finally, the majority also relies on opinion testimony from Bocklet and Murphy to the effect, as the majority puts it, that the members of the Exchange "would not be happy" if they knew the Compensation Committee was approving $30 million in compensation for Grasso in 2001. This opinion testimony adds some color to the majority's position but is manifestly irrelevant to the issue of what Langone said to the Board about Grasso's CAP award.

The majority ignores other highly relevant testimony from Murphy. Back in 1999, when Grasso's employment agreement was approved, Murphy understood that the 50% match of the CAP benefit to Grasso was in addition to his bonus. Asked if the 50% match was a difficult concept to understand and to apply, Murphy answered, "[n]o." Murphy never heard or saw anything that suggested to him that there was any confusion among Board members about what the 50% match meant. Asked if Langone ever said anything about CAP at any meeting of the Board or the Compensation Committee that he viewed as misleading, Murphy answered "[n]o." In short, far from creating a material issue of fact supporting denial of Langone's motion for summary judgment, Murphy's testimony supported that motion in every relevant respect.[14]

That leaves only the majority's reliance on the excerpt from the deposition testimony of H. Carl McCall that the Attorney General submitted in opposition to the motion. That excerpt consists of three pages of deposition testimony in which McCall testified only that "as a member of the board, we did not receive full information, detailed information about the various components of the compensation" and that it was his

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[14]Langone asserts in his brief, and the Attorney General does not contend otherwise, that the Assistant Attorney General deposing Maughan and Bocklet never even asked either witness whether Langone had disclosed Grasso's CAP award.

"understanding that we did not always receive details about the components, including deferred income as one of the components." But even putting aside the ambiguous scope of the term "compensation," it hardly follows from the asserted fact that full or detailed information was not received, or that members of the Board did not receive even the basic information about Grasso's CAP award. McCall gave testimony on that very subject which was not included within the excerpt submitted by the Attorney General. Specifically, McCall testified that there "were discussions about a CAP program" but that he could not remember the details. Moreover, in the above-quoted testimony, McCall was referring to a memorandum captioned, "H. Carl McCall, Summary Of Events Regarding NYSE Executive Compensation." In another portion of the memorandum, one that the majority and the Attorney General do not mention, McCall states that "[a]lthough the board knew about and voted on annual salaries *and awards*, it was not informed about accumulated benefits and how particular salary actions would lead to *pension* on [sic] long-term accumulations" (emphasis added). In short, nothing in McCall's testimony undercuts Langone's evidence that he disclosed the CAP award. If anything, the testimony and memorandum actually support Langone's position.

In the course of denying Langone's motion for summary judgment, Supreme Court stated that the issue of the sufficiency

of the disclosure was a case of "he said, she said." To the contrary, however, just the opposite is true. As noted above, and as the majority does not dispute, numerous directors and others present at the February meetings of the Board testified that Langone expressly referred to Grasso's CAP award; no director or other person present at the meetings testified that Langone failed to disclose the CAP award. Nor does any documentary evidence raise a triable issue of fact with respect to whether Langone disclosed Grasso's CAP award. Thus, as Langone correctly observes, this is a case of "everyone said, no one said."

One last aspect of the majority's writing warrants a response. Although the complaint alleges that Langone failed to make adequate disclosures regarding Grasso's CAP award, the majority mints an entirely new theory of liability. Thus, the majority writes, "[i]n addition, the record raises questions as to whether Langone's executive compensation recommendations were in the best interest of the NYSE." This unsupported assertion -- the majority refers to nothing in the record -- is as irrelevant as it is conclusory and inscrutable. The Attorney General has never asserted that Langone is liable on this ground, not in his complaint, not in opposing Langone's motion and not in the brief he submitted to this Court.

One other contention by the Attorney General must be

addressed. In opposing Langone's motion for summary judgment, the Attorney General charged that Langone also had breached his fiduciary duty to the Exchange by: (1) misleading the Compensation Committee regarding the forfeitable character of Grasso's CAP awards, and (2) failing to disclose Grasso's accumulated pension benefit, the "Supplemental Executive Retirement Plan" or "SERP." On this appeal, Langone asserts in his main brief that these two allegations stating new theories of liability were raised by the Attorney General for the first time in the brief he submitted to Supreme Court in opposition to Langone's motion for summary judgment.

The Attorney General, however, argues that Langone had "adequate notice" of these two theories of liability by virtue of, in part, paragraph 208 of the complaint. Although I have quoted it in full already, paragraph 208 bears repeating here given the specific argument the Attorney General makes. It provides:

> "Langone breached his fiduciary duty to the NYSE by misleading the NYSE Board of Directors -- which had delegated to him the task of explaining the proposed compensation -- about the amount of the annual compensation the Compensation Committee was recommending be approved by the Board, through, among other things, his failure to disclose that Grasso would be receiving as deferred compensation an additional 50 percent of his bonus or ICP award."

According to the Attorney General, in light of the phrase "among

other things" and "numerous other allegations regarding SERP in the complaint, . . . Langone was on notice that his failure to disclose SERP was included as a fundamental aspect of his breach of duty." With respect to the theory of liability premised on the charge that Langone misled the Compensation Committee regarding the forfeitable character of the CAP awards, the Attorney General does not similarly point to any other allegations in the complaint regarding their forfeitable character. Rather, the Attorney General relies only on the words "among other things" in paragraph 208 and interrogatory responses which assertedly "disclose" the charge that Langone had "[c]onceal[ed] the unvested status" of the CAP awards.[15]

For numerous reasons, the two theories of liability charging that Langone had misled the Committee regarding the forfeitable nature of the CAP awards and failed to disclose accumulated SERP benefits are untimely and thus cannot support denial of Langone's motion for summary judgment. First, I agree with the reasoning

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[15]In the course of announcing its ruling on the motion for summary judgment, Supreme Court made no mention of either of these two theories of liability; it neither ruled on whether the Attorney General properly had raised them in opposition to the motion nor on whether there was a material issue of fact that precluded granting summary judgment to Langone on either or both of these two theories. At a later proceeding that same day, however, Supreme Court ruled that the Attorney General would be permitted to pursue at trial the allegation relating to the SERP benefits. In doing so, Supreme Court stated that it regarded the Attorney General's interrogatory responses as "the equivalent of an amplification of a pleading."

of the panel of the United States Court of Appeals for the Federal Circuit in *Korody-Colyer Corp. v General Motors Corp.* (828 F2d 1572 [1987]) in rejecting the plaintiff's relation-back argument premised in part on the words "among other things" in the complaint. As the panel stated, these words constitute a "catchall and meaningless phrase" (*id.* at 1575) and accepting the plaintiff's relation-back argument on the basis of that phrase "would undermine the notice pleading approach of the Federal Rules of Civil Procedure" (*id.* at 1575-1576), and similarly the pleading requirements of the CPLR (*see* CPLR 3013, 3014). In short, the phrase gives fair notice of nothing.

Second, the phrase is particularly unhelpful to the Attorney General because it refers to the allegation that Langone misled the Board "about the amount of the annual compensation the Committee was recommending be approved by the Board." Thus, at most this phrase purports to indicate that Langone misled the Board about Grasso's "annual compensation" through means other than the one specifically alleged. The new allegations relate to different subjects, the *forfeitability* of the deferred CAP awards and the accumulated *retirement* benefit.

Third, the "other allegations regarding SERP in the complaint" did not give Langone fair notice that he was being charged with breaching his fiduciary duty by failing to disclose Grasso's accumulated SERP benefit. Some of those "other

allegations regarding SERP" merely state the fact that SERP was one of the benefits Grasso received (paragraph 37), explain background facts relating to SERP-type benefits generally, Grasso's contractual entitlement to "SERP-like benefits," and the total of the SERP benefit for Grasso as of 2002 (paragraphs 46-48), or relate to and are contained within one of the causes of action against Grasso (paragraphs 167-172). Another alleges the non-disclosure -- it does not say anything identifying the person or persons responsible for the non-disclosure -- of certain SERP benefits pursuant to Grasso's 1995 and 1999 employment agreements, both of which were entered into before Langone became Chair of the Compensation Committee (paragraphs 70, 78-82). This allegation, moreover, appears to relate to one or more of the six causes of action against Grasso, as it asserts as well that this allegedly undisclosed benefit "unlawfully enriched Grasso by providing him with an interest-free loan at a corresponding cost to the NYSE" (paragraph 70).

Similarly, another of the allegations merely alleges that "information was withheld from the Board" about the effect the compensation awards would have in increasing Grasso's SERP benefit and the amount of the accumulated benefit (paragraph 20 [ii], [iii]). Again, nothing is alleged about the identity of the person or persons responsible for withholding this

information.[16] To the extent the complaint alleges any entity or person to be responsible for not disclosing SERP benefits, paragraph 85 refers to an analysis prepared in February 2001 of "the multiplier effect" that a bonus award could have on Grasso's SERP benefit and to an accompanying "spreadsheet detailing the amount of Grasso's accumulated SERP." It then goes on to allege only that "*[t]he NYSE did not transmit* the . . . analysis, the information it contained, or the spreadsheet *to the members of the Compensation Committee or Board of Directors*" (emphasis added). Obviously, Langone is not the "NYSE" but was a member of both of the entities to which the information was not transmitted. At no point does the complaint allege that Langone ever received either the analysis, the information it contained, or the spreadsheet.[17] The apparent point of these allegations, moreover, is stated in paragraphs 88 and 89. That is, they support certain of the causes of action against Grasso asserting that the SERP benefit awards are invalid under N-PCL 715(f) and are "void and subject to rescission" (paragraph 89).

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[16]From the immediately preceding paragraph, it would appear that the complaint alleges that Langone was one of the persons from whom the information was withheld. Thus, the complaint asserts that Ashen and one of the Exchange's consultants "have confirmed that the Compensation Committee and Board were misled."

[17]Paragraph 86 makes reference to another report prepared by a different consultant to the Exchange. The complaint alleges neither that Langone withheld it from anyone nor that he ever received it.

Fourth, the Attorney General's reliance on the interrogatory responses to save the two unpleaded theories of liability is meritless. Langone moved for summary judgment by notice of motion dated January 23, 2006. The interrogatory responses are dated May 12, 2006, nearly five months later, a little over a month before the Attorney General's opposing papers were submitted. By the time Langone received the interrogatory responses, the massive discovery efforts of the parties were virtually if not actually completed.[18]

For these reasons, the two unpleaded theories of liability are untimely and cannot support the denial of Langone's motion (*see Abalola v Flower Hosp.*, 44 AD3d 522 [1st Dept 2007] ["Plaintiff's physician expert also improperly raised, for the first time in opposition to the summary judgment motion, a new theory of liability . . . that had not been set forth in the complaint or bills of particulars"]; *Mathew v Mishra*, 41 AD3d 1230, 1231 [4th Dept 2007] ["a plaintiff cannot defeat an otherwise proper motion for summary judgment by asserting a new theory of liability . . . for the first time in opposition to the motion" [internal quotation marks omitted; ellipsis in original];

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[18]At oral argument on Langone's motion, his attorney stated that when the motion was made in January, 36 witnesses had been deposed; that the Attorney General wanted more time to respond; and that ultimately 61 witnesses were deposed -- resulting in 29,000 pages of deposition testimony -- and more than a million pages of documents were produced.

Pinn v Baker's Variety, 32 AD3d 463, 464 [2d Dept 2006] ["[r]aised for the first time in opposition to the motion for summary judgment, this theory [of liability] should not have been considered as a basis for defeating summary judgment"]).[19]

Finally, as noted earlier, given my conclusion that Langone is entitled to summary judgment on the ground that the Attorney General failed to raise a material issue of fact on the question of whether he made disclosure of Grasso's CAP award at the February meetings, I need not reach Langone's arguments that he also is entitled to summary judgment on the grounds that he had no duty to remind the Board about the CAP benefit and the Attorney General failed to raise an issue of fact concerning causation. Because it affirms the denial of Langone's motion, however, the majority must come to terms with Langone's additional arguments.

With respect to the issue of the scope of the duty owed by Langone, none of the cases cited by the majority in its brief discussion of the issue hold that the high standard fiduciaries must observe (which, of course, applies as well to the other Board members) required Langone to remind the members of the Board of what they either actually knew about Grasso's CAP

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[19]Presumably, the majority agrees with this conclusion. After all, the majority has nothing to say about it and does not even mention the Attorney General's effort to oppose Langone's motion on the basis of unpleaded theories of liability.

benefit (as the submissions on the motion demonstrate) or should have known. After all, each of the other Board members had an independent duty in approving Grasso's compensation awards to act on a reasonably informed basis after making a reasonable inquiry into material matters (*see Hanson Trust PLC v ML SCM Acquisition Inc.*, 781 F2d 264, 274-275 [2d Cir 1986]). The majority similarly fails to meet Langone's causality argument. Suffice it to say that it is far from obvious that, even assuming a majority of the Board did not know of Grasso's participation in the CAP program, the Exchange was injured by a breach of a duty that Langone owed rather than a breach by the directors who did not know.

M-5614 People of the State of New York v Grasso, et al.

Motion seeking leave to enlarge record granted.

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

ENTERED: APRIL 24, 2008

CLERK

Andrias, J.P., Gonzalez, Sweeny, McGuire, JJ.

1280 The People of the State of New York, Respondent, Ind. 7417/01

-against-

Richard Lowe, Defendant-Appellant.

The Legal Aid Society, New York (Steven Banks and Amy Donner of counsel), for appellant.

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

Judgment, Supreme Court, New York County (Ronald A. Zweibel, J. at hearing; Arlene R. Silverman, J. at jury trial and sentence), rendered February 2, 2004, convicting defendant of criminal possession of a control substance in the first degree, and sentencing him to a term of fifteen years to life, affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence. The evidence supports the conclusion that, at the time defendant possessed the cocaine, its aggregate weight, including moisture, exceeded four ounces, and that nothing was added to the cocaine between the time it was seized and the time it was tested (*see People v Johnson*, 301 AD2d 462 [2003], *lv denied* 99 NY2d 655 [2003]; *see also People v Julian*, 41 NY2d 340 [1977]).

Following our in camera review of the minutes of the hearing conducted pursuant to *People v Darden* (34 NY2d 177 [1974]), we

find that the court properly denied defendant's suppression motion, and that disclosure of these minutes, even with redactions, would jeopardize the safety of the confidential informant. Defendant's arguments for disclosure are similar to those he made in an unsuccessful motion before this Court, and we see no reason to revisit our prior ruling (*see People v Merejildo*, 305 AD2d 143 [2003], *lv denied* 1 NY3d 540 [2003]).

We disagree with the dissent that the informant's basis of knowledge was not established. Without disclosing the exact substance of the *Darden* hearing testimony, we find that in its totality, the information from the informant provided ample basis to conclude that the informant had a basis for his or her knowledge that defendant was in possession of narcotics (*see People v Mendez*, 44 AD3d 302 [2007], *lv denied* 9 NY3d 1036 [2008]; *People v Herold*, 282 AD2d 1, 6-7 [2001], *lv denied* 97 NY2d 682 [2001]), and that it further sufficed to establish probable cause to arrest.

All concur except McGuire, J. who dissents in a memorandum as follows:

McGUIRE, J. (dissenting)

This is one of the unusual cases in which an evidentiary hearing on a motion to suppress is conducted in the absence of the defendant and his counsel (*see People v Darden*, 34 NY2d 177 [1974]). It is unusual in another respect as it presents less than clear cut issues concerning the legality of the arrest and search of defendant, including whether the basis-of-knowledge prong of the *Aguilar-Spinelli* test was satisfied (*see People v Griminger*, 71 NY2d 635 [1988]). I respectfully dissent as I would not resolve the ultimate issue of the legality of the arrest. Rather, I would hold the appeal in abeyance and require the People to demonstrate anew on an in camera basis that disclosure of the minutes of the *Darden* hearing would jeopardize the informant's safety. If the People fail to do so, I would provide defendant with the minutes and permit additional briefing on any issue or issues defendant might raise. If the People demonstrate a continuing need to protect the informant's safety, I would nonetheless permit additional briefing on a particular issue (discussed below) given that the resolution of that issue might obviate the need to determine whether the informant had an adequate basis of knowledge.

After the *Darden* hearing had concluded, Justice Zweibel stated in the presence of defendant and his attorney that the hearing had concluded that morning with the second of two police

witnesses. The court informed counsel that earlier, on the date the hearing first had commenced, the court had "heard from the confidential informant as well as a detective." The court then announced its findings as follows: "I found all witnesses at this hearing to be credible. I confirmed at the hearing the existence of the confidential informant. I found him based upon his testimony at the *Darden* hearing to be reliable and trustworthy. Furthermore, the confidential informant, his direct first hand knowledge of the fact that the defendant would have narcotic drugs on him, the information was relayed to a backup team[,] and the defendant[,] based upon the information with a specific description[,] was placed under arrest on Broadway between 137th and 138th Street."

Contrary to the court's findings, the informant did *not* have personal knowledge that defendant was in possession of narcotics. As disclosure of the minutes of the hearing might jeopardize the safety of the confidential informant, I am unwilling to explicate the basis for my contrary conclusion. Suffice it to say, however, that the informant certainly did not testify that he had such personal knowledge and the inference that he did cannot reasonably be drawn from his testimony.

During his testimony the detective never asserted that the informant had told him anything about the basis for the informant's belief that the defendant would be in possession of

narcotics. Nor, for that matter, did the informant ever testify that during any of the telephone conversations with the detective that evening he told the detective *anything* about the basis of his belief that defendant would be in possession of a controlled substance. Moreover, the court asked the detective the following question: "Did [the informant] tell you how -- did he tell you whether he saw drugs in [defendant's] possession?" Again, I think it prudent not to quote the answer in full. But in relevant part the detective answered that "[t]he only thing he told me, he got it . . ."

In short, the arrest occurred without any knowledge by the detective or the police officers who effectuated the arrest about the factual basis for the informant's belief. Whether that complete lack of knowledge about the informant's basis of knowledge would render the search unlawful even if the informant had an adequate basis of knowledge is an issue the parties have not briefed. Defendant, of course, could not have known that the police had no knowledge of the informant's basis of knowledge before they arrested and searched him. My own less than exhaustive research has not yielded a case squarely on point. Although it is not obvious that suppression would be required if the informant had an adequate basis of knowledge but the police blundered by not asking the informant anything about how he knew what he had reported to them, I am loathe to resolve the issue

against defendant without giving him an opportunity to brief it. To do otherwise hardly seems consistent with our duty to "recogni[ze] . . . the special need for protection of the interests of the absent defendant" (*Darden*, 34 NY2d at 181; *see also People v Castillo*, 80 NY2d 578, 585-586 [1992] ["when a court resolves [the probable cause] question without the defendant's participation it must be particularly diligent and consider all possible challenges that might be raised on the defendant's behalf"], *cert denied* 507 US 1033 [1993]).

As noted, the informant did not have personal knowledge that defendant was in possession of narcotics. Moreover, the information provided by the informant "about the criminal activity" was not "so detailed as to make clear that it must have been based upon personal observation of that activity" (*People v Elwell*, 50 NY2d 231, 241 [1980]); nor did the detective or the arresting officers "observe conduct suggestive of, or directly involving the criminal activity about which [the] informant . . . [gave] information to the police" (*id.*; *see also id.* at 237 [1980] ["[i]t follows that when the basis of the informant's knowledge is not given, personal police observation corroborative of data received from the informant should be regarded as sufficient only when the police observe facts suggestive of criminal activity. Otherwise privacy and liberty may be invaded by a warrantless search or arrest based solely on the quality of

the informant and not at all on the quality of the information, i.e., its suggestiveness of criminal activity"]).

Although the informant did not have personal knowledge that defendant was in possession of narcotics, the informant's belief to that effect was not "unsubstantiated rumor, unfounded accusation or conclusory characterization" (*People v Ketcham*, 93 NY2d 416, 420 [1999]). For this reason, the majority's conclusion that the informant had an adequate basis of knowledge is not unreasonable. Nonetheless, I would not decide this issue unless it becomes necessary to do so, i.e., unless the issue of the lack of knowledge of the police about the informant's knowledge is resolved against defendant and this Court does not receive additional briefing from the parties due to a new demonstration by the People that disclosure of the minutes would jeopardize the informant's safety.

With respect to the adequacy of the informant's basis of knowledge, two other points should be made. First, even if it ultimately might have been unavailing, ambiguities in the informant's testimony could and should have been the subject of additional questioning by the court. Second, even if the testimony relating to the informant's basis of knowledge might pass muster in a case in which the defendant and his counsel were present for and participated in the suppression hearing, it does not necessarily follow that in this case the informant had an

adequate basis of knowledge. I express no opinion on the matter but heightened scrutiny of the adequacy of this informant's basis of knowledge would be consistent with "the special need for protection of the interests of the absent defendant" (*Darden*, 34 NY2d at 181).

Because I believe the issues in this case are less than clear-cut, I disagree with the majority's conclusion that there is no need to revisit our prior determination to deny defendant's motion to unseal the *Darden* minutes. That determination was made more than two years ago (on February 28, 2006) in part on the basis of an affidavit dated January 9, 2006 from the Assistant District Attorney assigned to the motion asserting that at some earlier time the Assistant District Attorney assigned to the case had "investigated the whereabouts and status of the confidential informant and . . . that the confidential informant is alive and still very much at risk." Suffice it to say that what was true more than two years ago might not be true today.

Defendant, of course, cannot be expected to know whether the relevant circumstances have changed. Given both the passage of time and the question of the adequacy of the informant's basis of knowledge, the People should be required to bear the minimal

burden of demonstrating anew that confidentiality is necessary, i.e., that disclosure of the minutes would jeopardize the informant's safety.

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

ENTERED: APRIL 24, 2008

CLERK

Tom, J.P., Mazzarelli, Williams, Sweeny, JJ.

3451 The People of the State of New York, Ind. 5729/05
Respondent,

-against-

Keith Wilks,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Sam Wasserman of counsel), for respondent.

Judgment, Supreme Court, New York County (Lewis Bart Stone, J. at suppression hearing; Ronald A. Zweibel, J. at plea and sentence), rendered April 6, 2006, convicting defendant of grand larceny in the fourth degree, and sentencing him, as a second felony offender, to a term of 1½ to 3 years, unanimously affirmed.

The court properly denied defendant's suppression motion. The People met their burden at the suppression hearing of justifying the challenged activity by showing that the store detectives who stopped and searched defendant were not state actors (*see People v Jones*, 47 NY2d 528, 533 [1979]). Defendant offered no evidence to contradict the People's proof, thus failing to satisfy his ultimate burden (*see People v Di Stefano*, 38 NY2d 640, 652 [1976]). The testifying store detective gave competent testimony that a nontestifying colleague who also

participated in the arrest was neither a designated special patrolman nor otherwise an agent of the police. In any event, the record also supports the court's alternative holding that defendant's arrest was based on probable cause. We have considered and rejected defendant's remaining arguments.

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

ENTERED: APRIL 24, 2008

CLERK

Tom, J.P., Mazzarelli, Williams, Sweeny, JJ.

3452-
3452A Sebastiana Palacios, Index 7129/96
Plaintiff-Appellant,

-against-

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

Raymond Schwartzberg & Associates, PLLC, New York (Raymond Schwartzberg of counsel), for appellant.

Steve S. Efron, New York, for respondents.

Order, Supreme Court, Bronx County (Barry Salman, J.), entered August 28, 2007, which, in an action for personal injuries, insofar as appealable, denied plaintiff's motion to renew a prior order, same court (Janice L. Bowman, J.), entered January 19, 2007 (1) granting defendants' motion to dismiss the complaint because of plaintiff's failure to appear for an independent medical examination in accordance with a prior conditional order of dismissal, and (2) denying defendant's cross motion to vacate the conditional order, unanimously reversed, on the facts, without costs, renewal granted, and, upon renewal, defendants' motion to dismiss denied, plaintiffs' cross motion to vacate the conditional order granted, and the complaint reinstated. Appeal from the January 19, 2007 order unanimously dismissed, without costs, as superseded by the appeal from the August 28, 2007 order.

Defendants admittedly, although claiming clerical error, continued to schedule IMEs with plaintiff after her failure to attend the June 15, 2006 IME that had been scheduled pursuant to June 1, 2006 conditional order of dismissal, during the pendency of the parties' respective motions pertaining to that order. There is a bona fide dispute whether plaintiff appeared for, but was turned away from, the first such IME, which was scheduled for September 7, 2006, the very day that the parties' respective motions were returnable, but there is no dispute that she attended two IMEs in January 2007, shortly after the action was dismissed by the January 19, 2007 order. Renewal should have been granted, and the conditional order of dismissal vacated, based on this continuing scheduling, plaintiff's ultimate compliance with her disclosure obligations, albeit belated, and the reasonable excuse for the noncompliance with the conditional order provided in plaintiff's cross motion to vacate that order, namely, the hospitalization of her daughter in June 2006, around the time of the IME that had been scheduled pursuant to that

order (*see Rancho Santa Fe Assn. v Dolan-King*, 36 AD3d 460, 461 [2007]; *Irizarry v Ashar Realty Corp.*, 14 AD3d 323, 324 [2005]).

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

ENTERED: APRIL 24, 2008

CLERK

Tom, J.P., Mazzarelli, Williams, Sweeny, JJ.

3453 In re Kaseem W.,

A Person Alleged to be
A Juvenile Delinquent,
Appellant.

- - - - -

Presentment Agency

Howard M. Simms, New York, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Ellen Ravitch of counsel), for presentment agency.

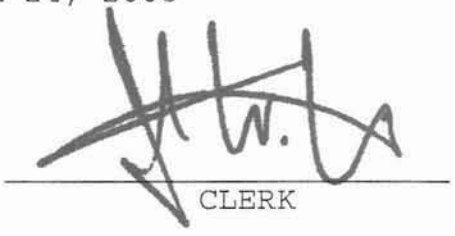
Order, Family Court, Bronx County (Alma Cordova, J.), entered on or about June 19, 2006, which adjudicated appellant a juvenile delinquent, upon a fact-finding determination that he committed acts, which, if committed by an adult, would constitute the crimes of assault in the third degree and menacing in the third degree, and placed him on probation for a period of 12 months, unanimously affirmed, without costs.

The court's finding was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). Appellant's entire course of conduct before, during and after the assault supports the inference of accessorial liability, while contradicting his

claim that he was merely present, and that his menacing statement to the victim was only a warning not to start a fight.

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

ENTERED: APRIL 24, 2008



CLERK

Tom, J.P., Mazzarelli, Williams, Sweeny, JJ.

3454-
3455 Joyce Oestreich, etc., Index 101467/03
Plaintiff-Appellant,

-against-

Daniel L. Present, M.D., et al.,
Defendants-Respondents,

Jack D. Rabinowitz, M.D.,
Defendant.

Kasowitz, Benson, Torres & Friedman LLP, New York (Mitchell R. Schrage of counsel), for appellant.

Wilson, Elser, Moskowitz, Edelman & Dicker LLP, New York (Richard E. Lerner of counsel), for Daniel L. Present, M.D., Adam F. Steinlauf, M.D. and Michael T. Harris, M.D., respondents.

Martin Clearwater & Bell LLP, New York (Claudia J. Charles of counsel), for Blair S. Lewis, M.D., respondent.

Aaronson, Rappaport, Feinstein & Deutsch, LLP, New York (Anthony J. Connors of counsel), for Anna C. Gregoriou, M.D. and The Mount Sinai Medical Center, respondents.

Order, Supreme Court, New York County (Sheila Abdus-Salaam, J.), entered July 10, 2006, which granted defendants-respondents' motions for summary judgment dismissing the complaint, and order, same court and Justice, entered January 12, 2007, which, to the extent appealed from as limited by the briefs, denied plaintiff's motion for leave to renew the prior motion, unanimously affirmed, without costs.

Defendants-respondents made a prima facie showing of entitlement to summary judgment dismissing this medical

malpractice action by submitting affidavits from medical experts establishing that the treatment provided to plaintiff's decedent, including the recommendation for surgery, comported with good and accepted practice. In response, plaintiff failed to raise a triable factual issue, as her expert anesthesiologist's affirmation, based on assumptions that were not supported by the record, set forth general conclusions, misstatements of evidence and was insufficient to demonstrate that said defendants failed to comport with accepted medical practice or that any such failure was the proximate cause of decedent's injuries (*see Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544 [2002]; *Coronel v New York City Health & Hosps. Corp.*, 47 AD3d 456 [2008]). The anesthesiologist based his opinion on the use of an 8 millimeter endotracheal tube to intubate decedent during the surgery she underwent in April 2001, asserting that the size of the tube, which was inappropriate given decedent's size, weight and poor health, combined with the fact that a nasogastric tube was used for the duration of the surgery, which lasted nine hours, led to the development of an esophageal fistula. The record, however, demonstrates that a 6 millimeter tube was used and does not indicate anywhere that a nasogastric tube was utilized. The expert also strenuously asserted that the injury was to decedent's trachea and not her esophagus, while plaintiff's bill of particulars refers to an injury to the esophagus.

Plaintiff's expert gastroenterologist similarly submitted a conclusory affirmation that fails to set forth how or why defendants departed from good and accepted medical practice. The expert suggests that the results of the diagnostic tests were inconsistent with a diagnosis of Crohn's disease of the esophagus, but fails to explain why they were inconsistent with the diagnosis or why the diagnosis was allegedly incorrect. This expert also fails to explain why the recommendation that decedent undergo a high-risk surgical procedure to address the condition was a deviation. The expert asserts that dilatation of the esophagus was possible at the time the recommendation for surgery was made and would have been the better course, but the record demonstrates that such a procedure was not possible at that time because attempts at passing a scope through decedent's esophagus were unsuccessful.

The court also properly denied the motion to renew. Although plaintiff submitted an affirmation of clarification from her expert anesthesiologist, she failed to provide a reasonable explanation as to why she had not offered this information in

opposition to the prior motions (*see* CPLR 2221[e][3]; *Crawford v Sorkin*, 41 AD3d 278 [2007]). In any event, the new material would not have warranted a different result.

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

ENTERED: APRIL 24, 2008

CLERK

Tom, J.P., Mazzarelli, Williams, Sweeny, JJ.

3456 In re Barbara Meehan, Index 106472/05
Petitioner-Appellant,

-against-

Raymond Kelly, as the
Police Commissioner of the
City of New York, etc., et al.,
Respondents-Respondents.

Jeffrey L. Goldberg, P.C., Lake Success (Jeffrey L. Goldberg of counsel), for appellant.

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

Judgment, Supreme Court, New York County (Paul G. Feinman, J.), entered November 6, 2006, which denied the petition and dismissed the proceeding brought pursuant to CPLR article 78 seeking to annul respondents' denial of accident disability retirement (ADR), unanimously affirmed, without costs.

The determinations that petitioner's line-of-duty injuries were not the natural and proximate cause of her disabling Reflex Sympathetic Dystrophy (RSD) in her left hand, were based on "some credible evidence," and were neither arbitrary nor capricious (*Matter of Drayson v Board of Trustees of Police Pension Fund of City of N.Y.*, 37 AD2d 378, 380 [1971], *affd* 32 NY2d 852 [1973]; *see Matter of Borenstein v New York City Employees' Retirement Sys.*, 88 NY2d 756, 761 [1996]). In her first application for ADR, petitioner submitted evidence of several line-of-duty

injuries to her neck and spine. However, the last injury occurred in April 1998, and there were no symptoms of RSD for approximately four years. In her second application, petitioner included evidence of a wrist injury from April 1999, three years prior to the onset of RSD symptoms.

The Medical Board's findings were supported by the credible evidence of the time between petitioner's last line-of-duty injury and the onset of her RSD, in addition to the fact that there was no evidence or medical literature submitted supporting a conclusion that RSD could remain dormant for such a period of time. Furthermore, the Medical Board was not required to employ an expert in a field relating to RSD, nor were they required to accept the opinion of petitioner's examining physician (*see Matter of Barber v Ward*, 194 AD2d 459 [1993]). Accordingly, the Medical Board properly concluded that petitioner failed to carry her burden of showing a causal connection between her line-of-duty injuries and her RSD (*see Matter of Carney v New York City Employees' Retirement Sys.*, 162 AD2d 382 [1990], *lv denied* 76 NY2d 712 [1990]), and the Board of Trustees was entitled to rely

on the Medical Board's recommendations (*see Matter of Drayson*, 37 AD2d at 381).

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

ENTERED: APRIL 24, 2008

CLERK

Tom, J.P., Mazzarelli, Williams, Sweeny, JJ.

3457 The People of the State of New York, Respondent, Ind. 606/05 SCI 4233/05

-against-

Beresford Muffatt, etc., Defendant-Appellant.

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

Judgment, Supreme Court, New York County (William A. Wetzel, J.), rendered on or about October 3, 2005, unanimously affirmed.

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

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

Denial of the application for permission to appeal by the

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

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

ENTERED: APRIL 24, 2008

CLERK

Tom, J.P., Mazzarelli, Williams, Sweeny, JJ.

3458 The People of the State of New York, Ind. 3205/05
Respondent,

-against-

Michael Henderson,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Alice Wiseman of counsel), for respondent.

Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered January 27, 2006, 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, to a term of 4½ to 9 years, unanimously affirmed.

The court properly exercised its discretion when it denied defendant's mistrial motion made after the deliberating jury indicated it was deadlocked (*see Matter of Plummer v Rothwax*, 63 NY2d 243, 250 [1984]). Although deliberations had been spread out over several days, the total amount of time expended in actual deliberations was not particularly lengthy, and there is no reason to believe the jury reached a verdict under coercive circumstances.

All of defendant's challenges to the court's main charge and

its responses to jury notes, including its response to the jury's final deadlock note, are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we also reject each of them on the merits. Although the court made inappropriate departures from standard instructions, including the use of language that we disapproved in *People v Johnson* (11 AD3d 224 [2004]), nothing in the charge was constitutionally deficient. There is no reason to believe the jury could have been misled into believing that the People's burden was anything less than proof beyond a reasonable doubt (*see People v Gortspujuls*, 44 AD3d 368 [2007], *lv denied* 9 NY3d 1006 [2007]). Unlike the situation in *Johnson*, any references to numerical majorities or "probabilities" occurred in completely different contexts from any discussion of the burden of proof, which the court consistently stated to be beyond a reasonable doubt. The instruction delivered in response to the last jury note, which defendant characterizes as an *Allen* charge (*Allen v United States*, 164 US 492 [1896]), was not coercive or prejudicial because it did not urge the jurors to agree upon a verdict or obligate them to convince one another of the correctness of their views, and it did not ask any jurors to surrender their conscientiously held beliefs (*see People v Ford*, 78 NY2d 878 [1991]). Moreover, this instruction never actually urged or requested the jury to reach a unanimous verdict; instead, its

primary focus was to remind the jury of the presumption of innocence, the reasonable doubt standard and the duty to follow the law as charged. Finally, since nothing in any of the main and supplementary jury instructions on this appeal was constitutionally deficient, the absence of any objections by trial counsel did not deprive defendant of effective assistance.

The court's *Sandoval* ruling balanced the appropriate factors and was a proper exercise of discretion (*see People v Hayes*, 97 NY2d 203 [2002]). The court properly permitted inquiry into drug offenses that were relevant to defendant's credibility as a witness.

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

ENTERED: APRIL 24, 2008

CLERK

Tom, J.P., Mazzarelli, Williams, Sweeny, JJ.

3460 William Jacobs, et al., Index 117332/05
Plaintiffs-Appellants,

-against-

Richard L. Kay, et al.,
Defendants-Respondents.

Andrew Lavoott Bluestone, New York, for appellants.

Pryor Cashman LLP, New York (Sanford M. Goldman of counsel), for respondents.

Judgment, Supreme Court, New York County (Leland DeGrasse, J.), entered February 26, 2007, dismissing the complaint, unanimously affirmed, with costs.

After settling with the executrix their objections to the probate of their father's will and trust, plaintiffs commenced this action against the attorneys for alleged fraudulent misrepresentation, fraudulent concealment, legal malpractice, breach of contract and for treble damages, in the preparation of those instruments. Not only does New York not recognize a right of action for tortious interference with prospective inheritance (*see Vogt v Witmeyer*, 87 NY2d 998 [1996]), but having earlier settled their objections, plaintiffs may not now seek, in effect, to challenge indirectly the validity of the will and trust by suing these defendants with whom they had absolutely no privity.

Absent a contractual relationship between the professional and the party claiming injury, the potential for liability "is

carefully circumscribed" (*William Iselin & Co. v Mann Judd Landau*, 71 NY2d 420, 425 [1988]). A viable tort claim against a professional requires that the underlying relationship between the parties be one of contract or the bond between them so close as to be the functional equivalent of contractual privity (*Ossining Union Free School Dist. v Anderson LaRocca Anderson*, 73 NY2d 417 [1989]). However, plaintiffs have not pleaded any facts setting forth the existence of a contractual relationship or the functional equivalent thereof between themselves and defendants. Moreover, they have no viable cause of action for treble damages under Judiciary Law § 487, since defendants' purported deceit did not occur during the course of a pending judicial proceeding (*see Costalas v Amalfitano*, 305 AD2d 202, 203-204 [2003].

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

ENTERED: APRIL 24, 2008

Tom, J.P., Mazzarelli, Williams, Sweeny, JJ.

3461
The People of the State of New York, Ind. 560/05
Respondent,

-against-

Peter Gonzalez,
Defendant-Appellant.

- - - - -

3462 The People of the State of New York,
Respondent,

-against-

Celeste Ortiz,
Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Eunice C. Lee of counsel), for Peter Gonzalez, appellant.

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

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

Judgments, Supreme Court, New York County (Marcy Kahn, J.), rendered March 2, 2006 (defendant Gonzalez) and March 3, 2006 (defendant Ortiz), convicting defendants, after a jury trial, of criminal sale of a controlled substance in the third degree, and sentencing each defendant to a term of 1 to 3 years, unanimously affirmed. The matter is remitted to Supreme Court, New York County, for further proceedings pursuant to CPL 460.50(5) as to each defendant.

The verdicts are based on legally sufficient evidence and

are not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's determinations concerning credibility and identification. The evidence satisfactorily explained the inability of the police to recover buy money from defendant Gonzalez, and there was no merit to defendant Ortiz's agency defense.

The court properly denied Ortiz's suppression motion. The hearing evidence established, circumstantially, that Ortiz was arrested because she matched the undercover officer's radioed description of one of the participants in a drug transaction (*see People v Poole*, 45 AD3d 501 [2007]).

The court properly denied defendants' challenge for cause to a prospective juror who demonstrated difficulty understanding the court's preliminary charge on the People's burden of proof, since, after the court's further explanation of that subject, the panelist gave her unequivocal assurance that she understood the court's instructions and would follow them (*see People v Serrano*, 19 AD3d 303 [2005], *affd* 7 NY3d 730 [2006]).

The court properly exercised its discretion in permitting jurors to submit questions to witnesses, subject to a careful screening process (*see People v Miller*, 8 AD3d 176, 177 [2004], *mod on other grounds* 6 NY3d 295 [2006]). Defendants' assertion that certain questions revealed that the inquiring jurors had

prematurely formed opinions on the merits is speculative.

The trial court properly denied defendants' CPL 330.30(2) motions alleging juror misconduct. The record supports the court's findings, made after a thorough hearing, that there was no prejudicial misconduct that would warrant a new trial (see *People v Rodriguez*, 100 NY2d 30, 35 [2003]).

Defendant Ortiz's ineffective assistance of counsel claims are unreviewable on direct appeal because they involve matters outside the record with regard to counsel's strategic decisions and allegedly unprofessional demeanor (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). On the existing record, to the extent it permits review, we find that Ortiz received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]). Counsel made reasonable strategic decisions regarding the introduction of character evidence, and in handling aspects of Ortiz's prior conviction.

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

ENTERED: APRIL 24, 2008

CLERK

Tom, J.P., Mazzarelli, Williams, Sweeny, JJ,

3463 In re Jashua A.,

A Person Alleged to be
a Juvenile Delinquent,
Appellant.

- - - - -

Presentment Agency

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

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

Order of disposition, Family Court, Bronx County (Alma Cordova, J.), entered on or about October 26, 2006, which adjudicated appellant a juvenile delinquent, upon a fact-finding determination that he committed acts which, if committed by an adult, would constitute the crimes of grand larceny in the fourth degree, petit larceny, criminal mischief in the fourth degree, criminal possession of stolen property in the fourth and fifth degrees, possession of a stolen motor vehicle in violation of Vehicle and Traffic Law § 426 and unauthorized use of a vehicle in the third degree, and placed him on probation for a period of 18 months, unanimously modified, on the law, to the extent of vacating the findings as to grand and petit larceny, criminal mischief and fifth-degree possession of stolen property and dismissing those counts of the petition, and otherwise affirmed, without costs.

Except as indicated hereinafter, the court's finding was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]; *Matter of Michael S.*, 262 AD2d 6 [1999], *lv denied* 94 NY2d 752 [1999]). The evidence established the knowledge element of the possessory crimes by application of the inference drawn from recent, exclusive, unexplained possession (*see People v Galbo*, 218 NY 283, 290 [1916]), and also established the corresponding element of unauthorized use of a vehicle by application of the statutory presumption of knowledge (Penal Law § 165.05[1]), which the court implicitly applied. However, we dismiss the larceny and mischief counts on the ground that the evidence did not establish beyond a reasonable doubt that appellant actually stole or damaged the car. We dismiss the fifth-degree possession count as a lesser included offense of fourth-degree possession.

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

ENTERED: APRIL 24, 2008

CLERK

Tom, J.P., Mazzarelli, Williams, Sweeny, JJ.

3464 Vitra, Inc., Index 118259/03
Plaintiff-Appellant, 590987/04

-against-

Soho House, LLC, et al.,
Defendants-Respondents,

29-35 Equities LLC, et al.,
Defendants.

- - - -

[And a Third Party Action]

Guzov Ofsink LLC, New York (Gregory P. Vidler of counsel), for appellant.

David Samel, New York, for respondents.

Order, Supreme Court, New York County (Doris Ling-Cohan, J.), entered October 2, 2007, which, insofar as appealed from, granted the motion of defendants Soho House, LLC, Soho House US Corp., and Soho House New York, LLC (collectively Soho House), for partial summary judgment dismissing plaintiff's claim for punitive damages, unanimously affirmed, without costs.

Dismissal of plaintiff's claim for punitive damages was proper, where the record demonstrates that over a period of two to three years, leaks emanated from Soho House's facilities causing property damage to plaintiff's showroom and office and interference with its business. The leaks had various causes, and Soho House undertook to remediate the problems and accommodate plaintiff, albeit not to plaintiff's satisfaction.

Such conduct does not rise to the level of egregious culpable conduct, or wrongdoing aimed at the general public as to warrant the imposition of punitive damages (*see Rocanova v Equitable Life Assur. Socy. of U.S.*, 83 NY2d 603, 613 [1994]; *905 5th Assoc., Inc. v 907 Corp.*, 47 AD3d 401 [2008]).

We have considered plaintiff's remaining arguments, including that Soho House's motion was not supported by evidence in admissible form, and find them unavailing.

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

ENTERED: APRIL 24, 2008

CLERK

Tom, J.P., Mazzarelli, Williams, Sweeny, JJ.

3465 Fred L. Cartha, Index 20517/04
Plaintiff-Respondent,

-against-

Omar Quin, et al.,
Defendants-Appellants,

High Class Limousine and
Car Service Corp.,
Defendant.

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

Finkelstein & Partners, LLP, Newburgh (Kristine M. Cahill of counsel), for respondent.

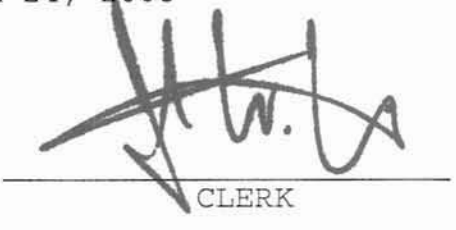
Order, Supreme Court, Bronx County (George D. Salerno, J.), entered November 1, 2007, which denied defendants-appellants' motion for summary judgment dismissing the complaint for lack of a serious injury as required by Insurance Law § 5102(d), unanimously reversed, on the law, without costs, and the motion granted. Upon a search for the record, the Clerk is directed to enter judgment dismissing the complaint in its entirety.

Plaintiff's medical reports, while indicating disc and elbow injuries, do not correlate the range-of-motion measurements therein to a norm, or otherwise show how the alleged injuries to plaintiff's back and arm resulted in significant limitations in their use, and thus fail to rebut defendants' prima facie showing that plaintiff did not suffer any permanent or significant

injuries as a result of the accident (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350-351 [2002]). Although plaintiff's elbow required surgery, which was performed eight months after the accident, and he apparently missed work as a result, the record establishes that the condition was corrected by the surgery (*see Baker v Thorpe*, 43 AD3d 535 [2007]). Nor does plaintiff adduce evidence of any substantial interference with his usual and customary daily activities for 90 of the first 180 days following the accident. He returned to work immediately after the accident, and his surgery, followed by his absence from work, did not fall within 90/180 time frame. Even if they had been substantiated, neither plaintiff's claim of a reduced work schedule following the accident (*see Lopez v Simpson*, 39 AD3d 420 [2007]), nor the minor curtailment of his usual activities during 90/180 time frame (*see Blackmon v Dinstuhl*, 27 AD3d 241 [2006]), would satisfy the statute.

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

ENTERED: APRIL 24, 2008



CLERK

Tom, J.P., Mazzarelli, Williams, Sweeny, JJ.

3466 The People of the State of New York, Respondent, Ind. 67161C/04

-against-

Rasheen Roberts, Defendant-Appellant.

Johnathan Kaye, Whitestone (Andrew J. Schatkin of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Jean Soo Park of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Ralph A. Fabrizio, J.), rendered April 24, 2006, convicting defendant, after a jury trial, of robbery in the second degree and attempted robbery in the second degree, and sentencing him to consecutive terms of 6 years and 4 years, respectively, unanimously affirmed.

The court properly exercised its discretion (*see People v Foy*, 32 NY2d 473, 477-478 [1973]) in denying defendant's request that the commencement of trial be delayed to enable him to interview certain potential witnesses. The court provided a suitable remedy by affording defense counsel or his investigator an opportunity to interview these witnesses during jury selection, and the court specifically assured counsel that there would be no opening statements until these interviews were conducted. Counsel interviewed both witnesses, and advised the court that although he had additional questions for one of them,

he was ready for opening statements. Counsel ultimately chose not to call either witness. Defendant has not demonstrated that he was prejudiced in any manner by this procedure.

To the extent that defendant's challenges to the reliability of certain trial testimony can be viewed as a claim that the verdict was against the weight of the evidence, we reject such claim (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). Defendant's remaining contentions, including those relating to the criteria employed by the court in imposing sentence, are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits.

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

ENTERED: APRIL 24, 2008

CLERK

Tom, J.P., Mazzarelli, Williams, Sweeny, JJ.

3467 The People of the State of New York, Respondent, Ind. 746/06

-against-

Winston Jackson, Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (Maxwell T. Wiley, J.), rendered August 2, 2006, convicting defendant, upon his plea of guilty, of burglary in the third degree, and sentencing him, as a second felony offender, to a term of 2 to 4 years, unanimously affirmed.

Defendant's claim regarding the imposition of a mandatory surcharge and fees is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits (*see People v Lemos*, 34 AD3d 343 [2006], *lv denied* 8 NY3d 924 [2007]).

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

ENTERED: APRIL 24, 2008

CLERK

Tom, J.P., Mazzarelli, Williams, Sweeny, JJ.

3468 Joann Negron, Index 18515/00
Plaintiff, 83641/02

-against-

Daniel Grinberg Topelson, et al.,
Defendants,

- - - - -

Chrysler Financial Company, LLP,
Third-Party Plaintiff-Appellant,

-against-

Richard Radna, M.D.,
Third-Party Defendant-Respondent.

Buckley & Fudge, P.A., New York (Michael B. Buckley of counsel), for appellant.

Shaub, Ahmuty, Citrin & Spratt, LLP, Lake Success (Gerard S. Rath of counsel), for respondent.

Judgment, Supreme Court, Bronx County (John A. Barone, J.), entered March 30, 2007, dismissing the third-party complaint as barred by General Obligations Law § 15-108(c), unanimously affirmed, with costs.

The plain language of General Obligations Law § 15-108(c) bars the contribution claim of the settling defendant/third-party plaintiff against the nonsettling third-party defendant (*see Chase Manhattan Bank v Akin, Gump, Strauss, Hauer & Feld*, 309 AD2d 173, 174 [2003]). As the Court of Appeals has stated,

"[S]urrender of the right to contribution is a small price to ask of a defendant who is intent on avoiding litigation" (*Rock v Reed-Prentice Div. of Package Mach. Co.*, 39 NY2d 34, 41 [1976]).

We have considered the third-party plaintiff's remaining arguments and find them unavailing.

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

ENTERED: APRIL 24, 2008

CLERK

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on April 24, 2008.

Present - Hon. Peter Tom, Justice Presiding
Angela M. Mazzarelli,
Milton L. Williams,
John W. Sweeny, Jr., Justices.

The People of the State of New York, SCI 192N/06
Respondent,

-against- 3469

Edward Mitchell,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Patricia Nunez, J.), rendered on or about January 23, 2007,

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

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

ENTER:

Clerk.

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

Tom, J.P., Mazzarelli, Williams, Moskowitz, JJ.

3470N Peter A. Plimpton, Index 604027/05
Plaintiff-Appellant, 591091/06

-against-

Massachusetts Mutual Life
Insurance Company, et al.,
Defendants-Respondents.

[And a Third Party Action]

Weiss & Hiller, P.C., New York (Michael S. Hiller of counsel), for appellant.

Rivkin Radler LLP, Uniondale (Cheryl F. Korman of counsel), for respondents.

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered August 17, 2007, which, in an action to enforce a disability policy issued by defendants, denied plaintiff insured's motion for a protective order, unanimously affirmed, without costs.

The demanded document is a letter to plaintiff from an expert analyzing plaintiff's rights under the disputed policy provisions and, although dated one week before plaintiff formally retained his attorney and two years before commencement of the action, was clearly intended to assist plaintiff in deciding whether to pursue litigation in response to the denial of his claim almost five months earlier. Plaintiff's attorney states that he is "absolutely certain" that the expert was consulted based on a conversation he had with plaintiff no more than four

months after defendants' denial of benefits, before his formal retainer but after he considered plaintiff a client. The existence of the letter was discovered by defendants as a result of a document demand served on third-party defendant, who at all relevant times has been acting on plaintiff's behalf under a power of attorney. Plaintiff's attorney does not say he knew of the existence of the letter before this disclosure by third-party defendant almost four years after its creation.

The attorney-client privilege does not apply because the letter was not a communication between a lawyer and client made during the course of a professional relationship for the purposes of facilitating the rendition of legal advice or services (*Spectrum Sys. Intl. Corp. v Chemical Bank*, 78 NY2d 371, 377-378 [1991]). The exemption for attorney work product does not apply because the letter was not prepared by counsel acting as such and does not otherwise uniquely reflect a lawyer's learning and professional skills (*Brooklyn Union Gas Co. v American Home Assur. Co.*, 23 AD3d 190, 190-191 [2005]). The exemption for materials prepared in anticipation of litigation does not apply because expert reports prepared for the purpose of assisting a party in making the decision to litigate or not are considered to have a mixed purpose, and therefore must be disclosed (*Landmark Ins. Co. v Beau Rivage Rest.*, 121 AD2d 98, 102 [1986]). In the latter regard, although the letter was prepared after defendants'

rejection of plaintiff's claim (*see id.*), litigation was not commenced for two years. No explanation is provided for this gap between the letter's creation and commencement of litigation, indicative of uncertainty whether to pursue litigation. Absent any indication that plaintiff's attorney even knew of the letter until its disclosure by third-party defendant, we reject plaintiff's argument that the circumstances warrant an in camera review of not only the letter itself but also of the circumstances surrounding its creation.

We have considered plaintiff's other arguments and find them without merit.

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

ENTERED: APRIL 24, 2008

CLERK

Tom, J.P., Mazzarelli, Williams, Sweeny, JJ.

3471N Madison/Fifth Associates LLC, Index 603295/05
Plaintiff-Respondent-Appellant,

-against-

1841-1843 Ocean Parkway, LLC, et al.
Defendants-Appellants-Respondents.

Morrison Cohen LLP, New York (Ethan R. Holtz of counsel), for appellants-respondents.

Stern Tannenbaum & Bell LLP, New York (David S. Tannenbaum of counsel), for respondent-appellant.

Order, Supreme Court, New York County (Karen Smith, J.), entered October 31, 2007, which, inter alia, directed plaintiff to post an undertaking in the amount of $200,000, unanimously affirmed, without costs.

Based on the evidence presented at extensive hearings on the issue, the amount of the undertaking fixed by the court is "rationally related to defendants' potential damages if the preliminary injunction later proves to have been unwarranted" (*Kazdin v Putter*, 177 AD2d 456, 457 [1991]; CPLR 6312[b]).

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

ENTERED: APRIL 24, 2008

CLERK