SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

NOVEMBER 4, 2010

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Tom, J.P., Andrias, Saxe, McGuire, Manzanet-Daniels, JJ.

1808 Cleopatra Rosioreanu, Index 116796/08
Petitioner-Appellant,

-against-

New York City Office of
Collective Bargaining,
Respondent-Respondent.

_____

Cleopatra Rosioreanu, appellant pro se.

Steven C. Decosta, New York (John F. Wirenius of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (O. Peter Sherwood, J.), entered April 7, 2009, dismissing this article 78 proceeding to annul a determination of the New York City Board of Collective Bargaining (BCB) on an objection in point of law, unanimously affirmed, without costs.

The application court correctly found the City, petitioner's public agency employer and petitioner's union to be necessary parties to this proceeding, but incorrectly held they could not be joined because the statute of limitations had run. "When a person who should be joined . . . has not been made a party and

is subject to the jurisdiction of the court, the court shall order him summoned" (CPLR 1001[b]), and after joinder, the necessary parties may assert the defense of statute of limitations, if so advised (*Friedland v Hickox,* 60 AD3d 426 [2009]). This Court, however, may consider the merits of the alternative ground raised in respondent's motion, which was to dismiss the petition for failure to state a cause of action (*see Subolo Contr. Corp. v County of Westchester*, 282 AD2d 737, 738 [2001]).

Upon conclusion of the grievance process that attended the termination of her public employment, petitioner filed an improper practices petition with respondent Office of Collective Bargaining alleging that her union failed to provide adequate representation throughout the grievance process, in violation of New York City Collective Bargaining Law (Administrative Code of City of NY) § 12-306(b)(1) and (3). Respondent denied the petition and petitioner brought the instant article 78 proceeding challenging that determination. Other than petitioner's conclusory assertion that because the grievance process ended with her termination, the union representatives must have acted arbitrarily, capriciously or in bad faith, nothing in the record suggests malfeasance by the union representatives, much less fraud, deceitful action, dishonest conduct or discrimination (see

Mellon v Benker, 186 AD2d 1020, 1021 [4th Dept 1992] ["there must be substantial evidence of fraud, deceitful action, or dishonest conduct, or evidence of discrimination that is intentional, severe, and unrelated to legitimate union objectives"].

Petitioner's claim that respondent violated Administrative Code § 12-312 by finding the arbitration decision to have been "correct, impartial and legal" without first reviewing a certified transcript of the proceedings is improperly raised for the first time on appeal and we decline to review it (*see Matter of Chaplin v New York City Dept of Educ.*, 48 AD3d 226 [2008]). We note, however, that contrary to petitioner's claim, respondent did not find that the arbitrator's determination was "correct, impartial and legal." Also unpreserved, for the same reason, is petitioner's claim that it was error to grant the motion to dismiss because respondent failed to file the administrative record with the court (*see Matter of Leewen Contr. Corp. v Department of Sanitation of City of N.Y.*, 272 AD2d 246, 247 [2000]). In any event, while a certified transcript of the proceedings must be filed with an answer to an article 78 petition (CPLR 7804[e]), respondent filed a dismissal motion in lieu of an answer (*see* CPLR 7804[f]).

Petitioner's claim that the application court erred by limiting its consideration to evidence submitted and arguments

made at the BCB hearing lacks merit because petitioner fails to identify any such evidence or arguments and also because judicial review of administrative determinations is confined to the facts and record adduced before the agency (*see Matter of Torres v New York City Hous. Auth.*, 40 AD3d 328, 330 [2007]).

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

ENTERED: NOVEMBER 4, 2010

CLERK

Andrias, J.P., McGuire, Moskowitz, Freedman, Román, JJ.

1987 Estate of Saul Spitz, et al., Index 109854/08
Plaintiffs-Appellants,

-against-

Gary Pokoik, etc., et al.,
Defendants-Respondents,

Davin Pokoik,
Defendant.

_____

The Law Firm of Gary N. Weintraub, Huntington (Gary N. Weintraub of counsel), for appellants.

Rosenberg & Estis, P.C., New York (Norman Flitt or counsel), for respondents.

_____

Order, Supreme Court, New York County (Marilyn Shafer, J.), entered June 24, 2009, which, insofar as appealed from, granted defendants' cross motion to dismiss plaintiffs' fourth cause of action, unanimously affirmed, with costs.

Affording the complaint a liberal construction, accepting the facts alleged therein as true, according plaintiff estate the benefit of every possible favorable inference, and determining that the facts alleged fit within a cognizable legal theory (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]), dismissal of the fourth cause of action nonetheless was proper. Defendants' written offer stated that plaintiff's decedent Saul Spitz could manage the property "act[ing] alone or retain[ing] your own

management company at your own expense." Even assuming that the phrase "your own management company" can be construed as "a management company," rather than a management company in which decedent had an ownership interest, decedent's purported acceptance designated an individual to manage the property rather than a management company. Thus, there was no valid acceptance of the offer and the breach of contract claim properly was dismissed. As decedent's estate seeks an accounting with respect to decedent's interest in the property elsewhere in the complaint, the dismissal of the fourth cause of action in its entirety causes no prejudice.

We have considered plaintiffs' remaining arguments and find them unavailing.

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

ENTERED: NOVEMBER 4, 2010

CLERK

Tom, J.P., Friedman, Nardelli, Catterson, JJ.

2446 The People of the State of New York, Respondent, Ind. 1760/04

-against-

Lynette Caban, Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Andrew C. Fine of counsel), for appellant.

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

_____

Upon remittitur from the Court of Appeals (14 NY3d 369 [2010]) for consideration of issues now appropriate for this Court's review, judgment, Supreme Court, New York County (Budd G. Goodman, J.), rendered April 28, 2005, convicting defendant, after a jury trial, of criminally negligent homicide, and sentencing her to a term of 1 to 3 years, unanimously reversed, on the law, and the matter remanded for a new trial.

On a prior appeal (51 AD3d 455 [2008]), this Court ordered a new trial based on an evidentiary issue, and the Court of Appeals reversed this Court's order. In the Court of Appeals, defendant raised a new issue under *People v O'Rama* (78 NY2d 270 [1991]), and that court remitted the case for our consideration of that issue, as well as any other issues now appropriate for our review. Upon consideration of the *O'Rama* claim, we again reach

the conclusion that defendant is entitled to a new trial.

During deliberations, the jury sent four notes containing substantive questions on such matters as the order in which it was to consider the counts, the meaning of recklessness, the difference between recklessness and negligence, the limitation on the use of defendant's license suspension as evidence, and whether it was to evaluate the risk of defendant's conduct with regard to other people or only with regard to the victim. The court did not read any of these notes into the record in the presence of counsel before recalling the jury to the courtroom and responding to the notes. Nor does the record indicate that the court informed counsel about the contents of the notes or gave the parties any opportunity for input into the court's proposed responses. The court did not read either of the first two notes into the record, verbatim or otherwise, at any time.

The court did not satisfy its core obligation pursuant to CPL 310.30 to give meaningful notice to counsel following substantive juror inquiries (*see People v Lewis*, __ AD3d __ [2010 NY Slip Op 7669 (2010)]; *People v Tabb*, 13 NY3d 852 [2009]; *People v Kisoon*, 8 NY3d 129, 135 [2007]; *People v O'Rama*, 78 NY2d at 277). While "some departures from the procedures outlined in *O'Rama* may be subject to rules of preservation" (*Kisoon*, 8 NY3d at 135; *see also People v Donoso*, __ AD3d __, 2010 NY Slip Op

07245 [2010]), a failure to fulfill the court's core responsibility is a mode of proceedings error that is exempt from preservation requirements and requires reversal as a matter of law (*compare e.g. People v Ramirez*, __ NY3d __ , 2010 NY Slip Op 06559 [Sept 16, 2010]; *People v Kadarko*, 14 NY3d 426 [2010]).

With the possible exception of the third note in question, there is no evidence in the record to support an inference, or even an intimation, that the court revealed the notes to counsel in unrecorded colloquies (*compare People v Fishon,* 47 AD3d 591 [2008], *lv denied* 10 NY3d 958 [2008] [record demonstrated existence of unrecorded colloquy concerning note]), and the People's argument in this regard is conjectural. Moreover, there is evidence tending to negate such an inference.

In light of this result, we need not reach defendant's remaining contention.

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

ENTERED: NOVEMBER 4, 2010

CLERK

Saxe, J.P., Nardelli, McGuire, Freedman, Abdus-Salaam, JJ.

3301 Millennium Import, LLC, Index 603350/07
Plaintiff-Respondent, 59100/07

-against-

Reed Smith LLP, et al.,
Defendants-Appellants.

_____

Riker, Danzig, Scherer, Hyland & Perretti LLP, Morristown, NJ (Anthony J. Sylvester, of the New Jersey Bar, admitted pro hac vice, of counsel), for appellants.

Barack Ferrazzano Kirschbaum & Nagelberg LLP, Chicago, IL (Robert E. Shapiro, of the Illinois Bar, admitted pro hac vice, of counsel), for respondent.

_____

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered March 5, 2010, which, in an action alleging legal malpractice, denied defendants' motion to dismiss the first amended complaint on the ground of collateral estoppel, unanimously affirmed, without costs.

The motion court properly denied defendants' motion. The issue that was necessarily determined in the Moet arbitration -- that Moet failed to give timely notice to Phillips Beverage Co. under the indemnification provisions of the parties' purchase agreement -- had no preclusive effect with respect to the

malpractice claim. We therefore need not address defendants' remaining arguments.

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

ENTERED: NOVEMBER 4, 2010

CLERK

Mazzarelli, J.P., Friedman, Catterson, DeGrasse, Manzanet-Daniels, JJ.

3519 The People of the State of New York, Ind. 5417/06
Respondent,

-against-

Brunildo Beltran,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (David P. Stromes of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Daniel P. FitzGerald, J.), rendered March 22, 2007, convicting defendant, after a nonjury trial, of sexual abuse in the first degree, and sentencing him to a term of 1 year, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the court's credibility determinations, including its evaluation of

the different versions of the incident presented by the prosecution and defense witnesses.

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

ENTERED: NOVEMBER 4, 2010

CLERK

Mazzarelli, J.P., Friedman, Catterson, DeGrasse, Manzanet-Daniels, JJ.

3520 Bovis Lend Lease LMB, Inc., et al., Index 100133/07
Plaintiffs-Appellants,

-against-

Travelers Property Casualty
Company of America, etc.,
Defendant-Respondent.

_____

Newman Myers Kreines Gross Harris, P.C., New York (Olivia M. Gross and Howard Altman of counsel), for appellants.

Lazare Potter & Giacovas LLP, New York (Jeremy M. Sokop of counsel), for respondent.

_____

Order, Supreme Court, New York County (Paul G. Feinman, J.), entered August 20, 2009, which, to the extent appealed from as limited by the briefs, granted defendant's cross motion for summary judgment declaring no duty to defend or indemnify plaintiff Bovis in an underlying personal injury action, unanimously affirmed, with costs.

As a purported additional insured under a commercial liability policy, Bovis was required to give defendant notice of the underlying claim as soon as practicable. Absent a valid excuse, the failure to satisfy this notice requirement, which is a condition precedent to coverage, vitiates the policy (*Sec. Mut. Ins. Co. of N.Y. v Acker-Fitzsimons Corp.*, 31 NY2d 436, 440 [1972]). Here, defendant properly denied coverage inasmuch as

plaintiff's May 2006 notice was not given to defendant until nine months after the claim accrued.

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

ENTERED: NOVEMBER 4, 2010

CLERK

Mazzarelli, J.P., Friedman, Catterson, DeGrasse, Manzanet-Daniels, JJ.

3521 Gloria Castro-Castillo, Index 115933/08
Plaintiff-Appellant,

-against-

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

Metropolitan Transit Authority,
Defendant.

_____

Susan R. Nudelman, Dix Hills, for appellant.

Wallace D. Gossett, Brooklyn (Lawrence Heisler of counsel), for respondents.

_____

Order, Supreme Court, New York County (Harold B. Beeler, J.), entered July 15, 2009, which granted defendants' motion to dismiss the complaint for failure to serve a notice of claim upon the proper party, unanimously affirmed, without costs.

Plaintiff was allegedly injured in a slip and fall on a slushy subway staircase. Although she served a timely notice of claim on the City and the MTA, she failed to serve such a notice upon the proper party, defendant New York City Transit Authority, which operates the subway system. It is well settled that service of the requisite notice of claim must be made upon the correct party (*Williams v City of New York*, 74 AD3d 548 [2010]), and a plaintiff may not avoid dismissal in that regard by invoking the savings provision of General Municipal Law § 50-

e(3)(c) (*Scantlebury v New York City Health & Hosps. Corp.*, 4 NY3d 606 [2005]; *Diaz v NYCHHC*, 56 AD3d 317, *lv denied* 12 NY3d 712). The notice of claim that was served listed only the City and the MTA. Even though these papers were subsequently transmitted by those defendants to NYCTA for a hearing under General Municipal Law § 50-h, that cannot be considered appropriate service (*see Cottiers v New York City Health & Hosps. Corp.*, 303 AD2d 187 [2003]).

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

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

ENTERED: NOVEMBER 4, 2010

CLERK

Mazzarelli, J.P., Friedman, Catterson, DeGrasse, Manzanet-Daniels, JJ.

3523 The People of the State of New York, Ind. 4783/07
M-4701 Respondent,

-against-

Nerys Montalvo,
Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Robert M. Stolz, J.), rendered on or about February 25, 2009, 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 thejudge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

M-4701 ***People v Montalvo***

Motion to dismiss appeal denied.

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

ENTERED: NOVEMBER 4, 2010

CLERK

Mazzarelli, J.P., Friedman, Catterson, DeGrasse, Manzanet-Daniels, JJ.

3524 ADL Construction, LLC, et al., Index 7091/07
Plaintiffs-Respondents,

-against-

Keith Chandler,
Defendant-Appellant,

Ponce DeLeon Bank,
Defendant-Respondent,

Yehuda Kaploun, et al.,
Defendants.

_____

Danzig Fishman & Decea, White Plains (Peter F. Sisca of counsel), for appellant.

James T. Moriarty, New York, for ADL Construction, LLC and Dominick Cicale, respondents.

Codelia & Socorro, P.C., Bronx (Peter R. Shipman of counsel), for Ponce DeLeon Bank, respondent.

_____

Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered on or about April 7, 2009, which denied defendant Chandler's motion to vacate his default in responding to plaintiffs' motion for summary judgment, unanimously affirmed, with costs.

Defendant failed to demonstrate a reasonable excuse for his default (*see* CPLR 5015[a][1]). After his bankruptcy court petition was dismissed, he was obligated to respond to plaintiffs' pending summary judgment motion, to obtain

plaintiffs' consent to additional time for his response, or to seek additional time from the court. Defendant did nothing.

The record supports the court's conclusion, in light of defendant's other conduct, including his failure to make any attempt to vacate the default until almost a year later, that defendant's failure to respond to the motion was willful and calculated to cause delay (*see e.g. Youni Gems Corp. v Bassco Creations Inc.*, 70 AD3d 454 [2010]; *Brown v Suggs*, 38 AD3d 329 [2007]).

There is no evidence to support defendant's claim that his default should have been vacated on the ground of fraud, misrepresentation or misconduct of an adverse party.

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

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

ENTERED: NOVEMBER 4, 2010

CLERK

Mazzarelli, J.P., Friedman, Catterson, DeGrasse, Manzanet-Daniels, JJ.

3525 Cynthia Dimond, Index 102768/08
Plaintiff-Appellant,

-against-

Sherwood Allen Salvan,
Defendant-Respondent.

_____

Andrew Lavoott Bluestone, New York, for appellant.

Furman Kornfeld & Brennan LLP, New York (A. Michael Furman of counsel), for respondent.

_____

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered October 27, 2009, which granted defendant's motion for summary judgment dismissing plaintiff's legal malpractice action and denied plaintiff's cross motion for summary judgment as moot, unanimously affirmed, with costs.

Supreme Court properly granted the motion for summary judgment dismissing the complaint. Defendant established that he reasonably decided to prosecute plaintiff's malpractice action against her former attorneys on the theory that they failed to call an appropriate expert in plaintiff's underlying personal injury action. Indeed, the sole reason that plaintiff's complaint in the underlying action was dismissed was the trial court's finding that plaintiff's expert was unqualified (*see Dimond v Heinz Pet Prods. Co.*, 298 AD2d 426 [2002]).

While plaintiff raises a host of issues which she argues defendant should have included in the action against her former attorneys, none of these alleged failures by her former attorneys contributed to the dismissal of her case. In any event, even assuming that defendant could have advanced other theories in the malpractice case, it is well settled that "selection of one among several reasonable courses of action does not constitute malpractice" (*Rosner v Paley*, 65 NY2d 736, 738 [1985]). Thus plaintiff's legal argument is conclusory and insufficient to support this action (*Dweck Law Firm v Mann*, 283 AD2d 292 [2001]).

We separately note that the opinion offered by plaintiff's legal malpractice expert is improper since it is the function of the court to determine whether defendant's performance constituted malpractice (*see Russo v Feder, Kaszovitz, Isaacson, Weber, Skala & Bass*, 301 AD2d 63, 68-69 [2002]).

Finally, in light of the foregoing, plaintiff's cross motion was properly denied as moot.

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

ENTERED: NOVEMBER 4, 2010

CLERK

Mazzarelli, J.P., Friedman, Catterson, DeGrasse, Manzanet-Daniels, JJ.

3528 The People of the State of New York, Ind. 403/06
Respondent,

-against-

Rolando Estrada,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Rena K. Uviller, J.), rendered October 11, 2006, convicting defendant, upon his plea of guilty, of criminal possession of a weapon in the third degree, and sentencing him, as a second felony offender, to a term of 3½ years, unanimously affirmed.

The court properly adjudicated defendant a second felony offender. Since defendant's prior conviction was under a New Jersey statute that covered separate and distinct types of drug crimes, some but not all of which would be felonies in New York, the court properly referred to the indictment in order to determine that defendant was convicted of the equivalent of a New York felony (*see People v Searvance*, 236 AD2d 306, 307 [1997], *lv denied* 89 NY2d 1041 [1997]). Furthermore, as we have repeatedly stated, "the unavailability of the agency defense in a foreign

jurisdiction has no bearing on whether a foreign felony qualifies as the equivalent of a New York felony" (*People v Reilly*, 273 AD2d 143 [2000], *lv denied* 95 NY2d 937 [2000]).

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

ENTERED: NOVEMBER 4, 2010

CLERK

Mazzarelli, J.P., Friedman, Catterson, DeGrasse, Manzanet-Daniels, JJ.

3530-
3530A In re Adaliz Marie R., and Another,

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

Natividad G.,
Respondent-Appellant,

The Children's Aid Society,
Petitioner-Respondent.

_____

Robin S. Steinberg, The Bronx Defenders, Bronx (Rachel Schwartz of counsel), for appellant.

Rosin Steinhagen Mendel, New York (Douglas H. Reiniger of counsel), for respondent.

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

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Orders of disposition, Family Court, Bronx County (Sidney Gribetz, J.), entered on or about July 8, 2008, which, to the extent appealed from as limited by the briefs, found that respondent mother permanently neglected the subject children, unanimously affirmed, without costs.

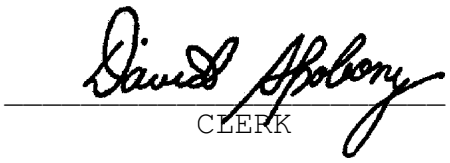
The neglect findings are supported by clear and convincing evidence that petitioner made diligent efforts to assist a meaningful relationship between respondent and her children and that, despite these efforts, respondent failed to plan for the children's future (*see* Social Services Law § 384-b[7][a]; *Matter*

of Star Leslie W., 63 NY2d 136, 142 [1984]). Petitioner's efforts included providing numerous referrals to programs tailored to respondent's changing needs and consistently following up with respondent on such critical goals as completing a mental health evaluation and domestic violence counseling (*see* Social Services Law § 384-b[7][f]; *Star Leslie W.*, 63 NY2d at 142). Petitioner's focus on the issues of health and domestic violence was the most appropriate course of action (*see Matter of Isabella Star G.*, 66 AD3d 536, 537 [2009]). Nevertheless, respondent refused to complete these critical components of the service plan (*see e.g.*, *Matter of Alexander B. [Myra R.]*, 70 AD3d 524 [2010], *lv denied* 14 NY3d 713 [2010]; *Matter of Gloria Melanie S.*, 47 AD3d 438 [2008]; *Matter of Ibrahim B.*, 57 AD3d 382 [2008]). Moreover, the record belies her argument that petitioner failed to assist her with such other service plan goals as obtaining suitable housing and a source of income. Petitioner made referrals in these areas and monitored respondent's changing housing and employment circumstances; it was respondent's own lack of meaningful cooperation with

petitioner that hindered her accomplishment of these goals.

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

ENTERED: NOVEMBER 4, 2010



CLERK

Mazzarelli, J.P., Friedman, Catterson, DeGrasse, Manzanet-Daniels, JJ.

3531 In re Christian Anthony Y.T., and Others,

Dependent Children Under
Eighteen Years of Age, etc.,

Donna Marie T.,
Respondent-Appellant,

The Children's Aid Society,
Petitioner-Respondent.

_____

The Bronx Defenders, Bronx (Mary Ann Barile of counsel), for appellant.

Rosin Steinhagen Mendel, New York (Douglas H. Reiniger of counsel), for respondent.

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

_____

Order, Family Court, Bronx County (Sidney Gribetz, J.), entered on or about June 30, 2009, which found that respondent mother had violated the terms of a suspended judgment entered April 24, 2006, terminated her parental rights to her three children, and placed the children in the custody of the Commissioner of Social Services and the petitioner agency for purposes of adoption, unanimously affirmed, without costs.

A preponderance of the evidence supported the court's finding that the mother violated the terms of the suspended judgment, and that termination of her parental rights was in the children's best interests (*see generally Matter of Darren V.*, 61

AD3d 986 [2009], *lv denied* 12 NY3d 715 [2009]). The record demonstrates that notwithstanding the mother's efforts to comply with the technical terms of the suspended judgment (*id.* at 987), her emotional and cognitive limitations rendered her unable to meaningfully comply with the terms and goals of the suspended judgment, including cooperating with the agency towards a reunification with her children, advocating for her children's special needs, and acquiring the skills necessary to ensure that her three special needs children would be safe in her care (*see e.g. Matter of Giovanni K.*, 62 AD3d 1242 [2009], *lv denied* 12 NY3d 715 [2009]; *Matter of Elijah F.*, 56 AD3d 260, 261 [2008]).

Further, the mother often exhibited unrestrained anger towards agency representatives when disagreement arose over aspects of the reunification plan, and she frequently stormed out of meetings and/or threatened the agency representatives.

Given the above-mentioned circumstances, viewed as a whole, the decision of the agency to seek revocation of the suspended judgment within three months of its entry was proper (*see e.g. Matter of Jonathan P.*, 283 AD2d 675 [2001], *lv denied* 96 NY2d 717 [2001]), and the mother's contention that she was not afforded sufficient time to show progress towards reunification under the suspended judgment is unavailing. The burden rested with the mother at all times to show progress during the period of the

suspended judgment, as well as compliance with the suspended judgment's terms (*see Matter of Darren V.*, 61 AD3d at 987) and, as such, we find no merit to her argument that the agency failed to exercise requisite efforts during the suspended judgment to restore the children to her care. Even lapses by an agency during a suspended judgment do not relieve a parent of his or her duty to comply with the terms of the suspended judgment (*see Matter of Lourdes O.*, 52 AD3d 203 [2008]).

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

ENTERED: NOVEMBER 4, 2010

CLERK

Mazzarelli, J.P., Friedman, Catterson, DeGrasse, Manzanet-Daniels, JJ.

3532 Vesta Capital Management LLC, Index 602580/05
Plaintiff-Appellant,

-against-

The Chatterjee Group, et al.,
Defendants-Respondents.

_____

Belair & Evans LLP, New York (Marshall J. Shepardson of counsel), for appellant.

Posternak Blankstein & Lund, LLP, Boston, MA (Dustin F. Hecker, of the Massachusetts Bar, admitted pro hac vice, of counsel), for respondents.

_____

Order, Supreme Court, New York County (Eileen Bransten, J.), entered September 2, 2009, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, with costs.

"Mere assertion by one that contract language means something to him, where it is otherwise clear, unequivocal and understandable when read in connection with the whole contract, is not in and of itself enough to raise a triable issue of fact" (*Unisys Corp. v Hercules Inc.*, 224 AD2d 365, 367 [1996] [internal quotation marks and citation omitted]). The subject agreement makes clear that the shares of stock had to be sold before plaintiff's profit could be calculated. Thus, there is no support in the record for plaintiff's principal's contention that

plaintiff could demand payment under the agreement at any time. Moreover, the record contains actions and statements by the parties prior to litigation demonstrating that they interpreted the term "profit" to mean "realized gains" calculated at the time of the sale of the stock (*Ocean Transport Line, Inc. v American Philippine Fiber Indus., Inc.*, 743 F2d 85, 91 [2d Cir 1984]). Thus, plaintiff's principal's affidavit stating that she understood that "profit" meant the value of a marketable investment less the cost of the investment is insufficient to raise an issue of fact as to the meaning of that term (*see Lupinsky v Windham Constr. Corp.*, 293 AD2d 317, 318 [2002]).

Contrary to plaintiff's argument, its principal's December 31, 2000 e-mail and June 1, 2005 letter were properly considered by the motion court, since they did not contain offers of compromise and thus were not inadmissible settlement communications pursuant to CPLR 4547.

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

ENTERED: NOVEMBER 4, 2010

CLERK

Mazzarelli, J.P., Friedman, Catterson, DeGrasse, Manzanet-Daniels, JJ.

3533 The People of the State of New York, SCI 4430/08
Respondent,

-against-

Javon Miller,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Rena K. Uviller, J.), rendered on or about December 17, 2008,

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

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

ENTERED: NOVEMBER 4, 2010

CLERK

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

Mazzarelli, J.P., Friedman, Catterson, DeGrasse, Manzanet-Daniels, JJ.

3534 Myron Zuckerman, Index 113633/07
Plaintiff-Respondent,

-against-

Sydell Goldstein, et al.,
Defendants-Appellants.

_____

Lance A. Landers, New York, for appellants.

McElroy, Deutsch, Mulvaney & Carpenter, LLP, New York (I. Michael Bayda of counsel), for respondent.

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Appeal from order, Supreme Court, New York County (Carol R. Edmead, J.), entered September 30, 2009, which granted plaintiff's motion to reargue and renew an order, same court and Justice, entered August 19, 2009, and, inter alia, upon reargument, denied defendants' motion to vacate so much of an order entered July 1, 2009 as awarded plaintiff prejudgment interest and, upon renewal, vacated so much of the August 19th order as referred to a special referee the issue of whether the court should vacate the judgment entered July 6, 2009, unanimously dismissed, without costs, as moot.

The satisfaction of the underlying judgment leaves the parties with no further liability exposure or other rights to be affected on this appeal (*see Wisholek v Douglas*, 97 NY2d 740 [2002]). Hence, this appeal is moot inasmuch as it does not

involve a controversy or issue that is likely to recur, typically evades review and raises a substantial and novel question (*see e.g. Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714 [1980]).

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

ENTERED: NOVEMBER 4, 2010

CLERK

Mazzarelli, J.P., Friedman, Catterson, DeGrasse, Manzanet-Daniels, JJ.

3535N Donald P. Fewer, Index 601099/08
Plaintiff-Respondent,

-against-

GFI Group Inc., et al.,
Defendants-Appellants.

_____

Carter Ledyard & Milburn LLP, New York (Lawrence F. Carnevale of counsel), for appellants.

Troutman Sanders LLP, New York (Stephen F. Harmon of counsel), for respondent.

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Order, Supreme Court, New York County (Richard B. Lowe, III, J.), entered on or about May 26, 2010, which insofar as appealed from, denied defendants' motion to compel production of a joint defense agreement, unanimously reversed, on the law, with costs, and the motion granted.

Plaintiff did not meet his burden of establishing that the joint defense agreement in question was protected from disclosure by the attorney-client privilege. The agreement is not a communication from an attorney to a client "made for the purpose of facilitating the rendition of legal advice or services, in the course of a professional relationship" (*Rossi v Blue Cross & Blue Shield of Greater N.Y.*, 73 NY2d 588, 593 [1989]); *see Muriel Siebert & Co., Inc. v Intuit Inc.*, 32 AD3d 284 [2006], *affd* 8 NY3d 506 [2007]). Rather, it is a statement of the parties'

intention that all information they share with each other remain subject to the attorney-client privilege, despite their disclosure to each other. Its drafter is not identified, and it specifically states that it creates no attorney-client relationship. Furthermore, in the absence of an attorney-client privilege, the common-interest rule does not apply (*US Bank Nat. Ass'n v App Intern, Finance Co.*, 33 AD3d 430, 431; *United States v Schwimmer*, 892 F2d 237, 243-244 [1989]; *see Pem-America, Inc. v Sunham Fashions, LLC,* 2007 WL 3226156, *2, 2007 US Dist LEXIS 80548, *5-6 [SD NY 2007]).

Although the motion court did not reach this issue, we further find that the work-product doctrine would not preclude discovery. There is no indication that the agreement was prepared by counsel acting as such, and it contains only standard language not uniquely reflecting a lawyer's learning and professional skills, including legal research, analysis, conclusions, legal theory or strategy (*see Plimpton v Massachusetts Mut. Life Ins. Co.*, 50 AD3d 532, 533 [2008];

Brooklyn Union Gas Co. v American Home Assur. Co., 23 AD3d 190 [2005]).

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

ENTERED: NOVEMBER 4, 2010

CLERK

Tom, J.P., McGuire, Acosta, Renwick, Freedman, JJ.

3538 In re Annalize P., and Another,

Children Under the Eighteen
Years of Age, etc.,

Angie D.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

John J. Marafino, Mount Vernon, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Mordecai Newman of counsel), for respondent.

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

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Order of disposition, Family Court, New York County (Susan K. Knipps, J.), entered on or about January 9, 2009, which, upon a fact-finding determination of neglect as to the two children and educational neglect as to one of the children, discharged the children to respondent mother on a trial basis, unanimously affirmed, without costs.

A preponderance of the evidence supports the court's finding that respondent neglected the two children by failing to provide them with adequate supervision (*see Matter of Serenity P. [Shameka P.]*, 74 AD3d 1855, 1856 [2010]; *Matter of Victor V.*, 261 AD2d 479 [1999], *lv denied* 93 NY2d 819 [1999]). A showing that

the children were impaired by respondent's failure to exercise a minimum degree of care is not required for an adjudication of neglect; it is sufficient that they were "in imminent danger of becoming impaired" (Family Court Act § 1012[f][i]; *see Nicholson v Scoppetta*, 3 NY3d 357, 368-369 [2004]).

A preponderance of the evidence also supports the court's finding of educational neglect as to one of the children. The record shows that, in addition to five excused absences, respondent permitted the child to have 24 unexcused absences during the 2007-2008 school year (*see Matter of Amanda K.*, 13 AD3d 193 [2004]; *see also Matter of Kyle T.*, 255 AD2d 945 [1998], *lv denied* 93 NY2d 801 [1999]). While the court could reasonably have concluded, based on this record of excessive unexcused absences, that the child was in imminent danger of becoming impaired (*see Matter of Jovann B.*, 153 AD2d 858 [1989]), contrary to respondent's contention, the record supports the court's finding that the child's absences adversely affected her academic performance.

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

ENTERED: NOVEMBER 4, 2010

CLERK

Tom, J.P., McGuire, Acosta, Renwick, Freedman, JJ.

3539 In re Darwin Bruce, Index 103507/09
Petitioner,

-against-

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

_____

Meyer, Suozzi, English & Klein, P.C., New York (Jeffrey Anbinder of counsel), for petitioner.

Sonya M. Kaloyanides, New York (Samuel Veytsman of counsel), for respondents.

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Determination of respondent Housing Authority (NYCHA), dated January 21, 2009, which, after a hearing, terminated petitioner's employment, unanimously confirmed, the petition denied, and this proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, New York County [Joan A. Madden, J.], entered July 13, 2009), dismissed, without costs.

The finding that petitioner resided in NYCHA housing from November 2006 to January 2008 without authorization was supported by substantial evidence, including documents he himself submitted to NYCHA. Contrary to petitioner's contention, NYCHA did not terminate him for acts for which he was not charged, namely, his lying about his residence. Based on documentary evidence and petitioner's testimony at a prior hearing, NYCHA discredited petitioner's testimony at the latest disciplinary hearing that he

had falsely admitted having lived in NYCHA housing during the relevant period. Although the trial officer at the disciplinary hearing implicitly credited petitioner's testimony, the officer's findings are not conclusive and may be overruled by the administrative agency where, as here, the agency's decision is supported by substantial evidence (*see Matter of Simpson v Wolansky*, 38 NY2d 391, 394 [1975]). Petitioner's contention that NYCHA ignored evidence that he was residing in his girlfriend's apartment during the period in question is unavailing. NYCHA considered that evidence and rejected it. There is no basis for disturbing the agency's findings in that regard.

Despite petitioner's length of service and lack of a disciplinary record, the penalty of terminating his employment is not so disproportionate to the offense as to shock one's sense of fairness (*see Matter of Pryce v New York City Hous. Auth.*, 69 AD3d 497 [2010]). We note in particular that petitioner's misconduct prevented the agency from renting to other families on the public housing waiting list during the period of his unauthorized residence.

Petitioner is not entitled to a lesser sanction due to NYCHA's delay in processing his request to take over the apartment lease. Even if petitioner's unauthorized occupancy could be considered less egregious during the pendency of his

request, this would not excuse his unauthorized residency in the months before and after his request was submitted and processed.

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

ENTERED: NOVEMBER 4, 2010

CLERK

Tom, J.P., McGuire, Acosta, Renwick, Freedman, JJ.

3540 Franklin Strauss, et al., Index 106108/08
Plaintiffs-Appellants,

-against-

Hemda Billig,
Defendant-Respondent.
- - - - - -
Hemda Billig,
Third-Party Plaintiff,

-against-

Castle Village Owners Corp.,
Third-Party Defendant-Respondent.

_____

Kagan & Gertel, Brooklyn (Irving Gertel of counsel), for appellants.

Connors & Connors, P.C., Staten Island (Nicole-Celina Urbont of counsel), for Hemda Billig, respondent.

Molod Spitz & DeSantis, P.C., New York (Marcy Sonnenborn of counsel), for Castle Village Owners Corp., respondent.

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Order, Supreme Court, New York County (George J. Silver, J.), entered February 25, 2010, which, in this action for personal injuries, denied plaintiffs' motion for summary judgment on the issue of liability, unanimously reversed, on the law, without costs, and the motion granted.

Plaintiffs established their entitlement to judgment as a matter of law in this action where plaintiff Franklin Strauss was injured when, while walking on a sidewalk, he was struck by a

vehicle driven by defendant as it was turning into a driveway on premises owned by third-party defendant. Contrary to the motion court's findings, triable issues regarding plaintiff's comparative negligence in allegedly failing to keep a proper lookout for traffic in light of his testimony that he was looking straight ahead and that a pile of garbage bags on the sidewalk did not impede his ability to look right as he was walking in front of the driveway, do not warrant the denial of the motion.

Plaintiffs are not required to establish freedom from comparative negligence in order to obtain summary judgment in their favor on the issue of liability. Plaintiff's comparative negligence, if any, merely acts to diminish recovery in proportion to the culpable conduct of defendant *(see* CPLR 1411). It was not plaintiffs' burden to demonstrate that defendant's negligence was the sole proximate cause of his injuries *(see Tselebis v Ryder Truck Rental, Inc.,* 72 AD3d 198, 200 [2010]), and defendant failed to raise a triable issue of fact as to whether plaintiff's conduct was the sole proximate cause of his injuries.

Defendant failed to provide a proper evidentiary basis supporting her request for further discovery on the issue of

liability (*see e.g. Global Mins. & Metals Corp. v Holme*, 35 AD3d 93, 102-103 [2006], *lv denied* 8 NY3d 804 [2007]; CPLR 3212[f]).

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

ENTERED: NOVEMBER 4, 2010

CLERK

Tom, J.P., McGuire, Acosta, Renwick, Freedman, JJ.

3541 Joshua Emery, Index 400831/08
Plaintiff-Respondent,

-against-

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

_____

Steven S. Efron, New York, for appellants.

Michael Gunzburg, New York, for respondent.

_____

Order, Supreme Court, New York County (Harold B. Beeler, J.), entered on or about June 26, 2009, which, to the extent appealed from as limited by the briefs, granted plaintiff's motion for summary judgment on the issue of liability in this personal injury action, unanimously affirmed, without costs.

Plaintiff's testimony and the testimony of an eyewitness established that as plaintiff was bicycling down Fifth Avenue in the far right lane, the bus came up alongside him and, without sounding its horn, moved toward the curb, forcing plaintiff to jump the curb to avoid being struck. This evidence demonstrates plaintiff's prima facie entitlement to summary judgment on the issue of liability (*see Palma v Sherman*, 55 AD3d 891 [2008]). Defendants failed to raise an issue of fact in opposition. Any purported discrepancies in the testimony as to the relative location and the speed of the bus, plaintiff's speed, and whether

there was any contact between plaintiff and the bus are not material to the issue of liability, and there is no evidence to support an inference that plaintiff caused or contributed to his own injuries or that he was negligent in attempting to speed past the bus when he realized that the bus was moving toward the curb.

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

ENTERED: NOVEMBER 4, 2010

CLERK

Tom, J.P., McGuire, Acosta, Renwick, Freedman, JJ.

3542 In re Mamadiou D.,

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

_____

Tamara A. Steckler, The Legal Aid Society, New York (Raymond E. Rogers of counsel), for appellant.

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

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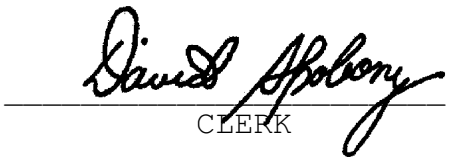
Order of disposition, Family Court, Bronx County (Robert R. Reed, J.), entered on or about September 17, 2009, which adjudicated appellant a juvenile delinquent upon his admission that he committed an act which, if committed by an adult, would constitute the crime of petit larceny, and imposed a conditional discharge for a period of 12 months, unanimously affirmed, without costs.

The court properly exercised its discretion in denying appellant's request for an adjournment in contemplation of dismissal, and instead adjudicating him a juvenile delinquent and imposing a term of conditional discharge (*see e.g. Matter of Jonaivy Q.*, 286 AD2d 645 [2001]). In light of the seriousness of the underlying incident, appellant's history of school disciplinary problems, and the very short duration of any

supervision that an ACD might have provided, the court adopted the least restrictive dispositional alternative consistent with appellant's needs and those of the community (*see Matter of Katherine W.*, 62 NY2d 947 [1984]).

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

ENTERED: NOVEMBER 4, 2010



CLERK

Tom, J.P., McGuire, Acosta, Renwick, Freedman, JJ.

3543 The People of the State of New York, Ind. 305/08
Respondent,

-against-

Julius Simms,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Yuval Simchi-Levi of counsel), for respondent.

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Robert Stolz, J.), rendered on or about December 17, 2008,

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

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

ENTERED: NOVEMBER 4, 2010

CLERK

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

Tom, J.P., McGuire, Acosta, Renwick, Freedman, JJ.

3547 The People of the State of New York, Ind. 5727/08
Respondent,

-against-

Tamika Moses,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Joanne Legano Ross of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (David P. Stromes of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Rena K. Uviller, J.), rendered on or about June 10, 2009,

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

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

ENTERED: NOVEMBER 4, 2010

CLERK

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

Tom, J.P., McGuire, Acosta, Renwick, Freedman, JJ.

3549 Guillermo Ramos, Index 112856/03
Plaintiff,

-against-

The City of New York, et al.,
Defendants.
- - - - - -
The City of New York,
Third-Party Plaintiff-Respondent,

-against-

P&M Electrical Contracting Corp.,
Third-Party Defendant,

Tristar Patrol Service, Inc.,
Third-Party Defendant-Appellant.

_____

Morris Duffy Alonso & Faley, New York (Iryna Krauchanka of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Larry A. Sonnenshein of counsel), for respondent.

_____

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered April 8, 2009, which, to the extent appealed from, denied third-party defendant Tristar Patrol Service, Inc.'s (Tristar) cross motion for summary judgment dismissing the third-party complaint and all claims asserted against it, unanimously reversed, on the law, without costs, the cross motion granted, and the third-party complaint and all claims asserted against Tristar dismissed. The Clerk is directed to enter judgment

accordingly.

Plaintiff, who was employed by Tristar as a security guard, was injured at premises owned by defendant/third-party plaintiff the City of New York. Tristar provided security services at the premises. On the date of the accident, plaintiff's duties consisted of checking the ID's of people who worked at the premises, scanning people who did not work there, checking bags for weapons, and patrolling the exterior of the building. Plaintiff claims that he was directed by an employee of the City, who supervised him at the premises, to turn off the heater/fan which was located in a closet on the main floor of the premises. The closet was dark and there were no signs posted warning that the area was restricted. After returning to the City employee, having his request for a flashlight denied, and being directed to go back and shut the heater/fan off, plaintiff returned to the closet, pressed the switch of the heater/fan and allegedly received a severe electric shock. Plaintiff commenced the instant action against the City, as the owner of the premises and the City commenced a third-party action against Tristar for contractual indemnification. Tristar subsequently cross-moved for summary judgment.

Pursuant to the contract entered into between the City and Tristar, Tristar agreed to provide unarmed and armed uniformed

guard services at the City's premises. The clear and unambiguous words of said contract provide that Tristar is only obligated to indemnify the City for "claims arising out of or in any way related to this Contract . . . resulting or alleged as resulting from the negligence of the Contractor . . . in its performance of this Contract." Thus, Tristar had a duty to indemnify the City only for Tristar's negligence in the performance of its duties and not for the City's own negligence. Since plaintiff's injuries arose when he attempted to turn off the switch for the heater/fan which was an activity clearly outside of the scope of his duties as a security guard, and the contract between the City and Tristar does not allocate any responsibility to Tristar for the installation, maintenance, repair, or operation of the heater/fan and its switch, Tristar is not obligated to indemnify the City as a matter of law; there is no proof that plaintiff's injuries arose from Tristar's breach of a duty of care owed to the City or from the work Tristar performed under its contract with the City (*see Lopez v Consolidated Edison Co. of N.Y.*, 40 NY2d 605 [1976]; *Guinter v I. Park Lake Success, LLC,* 67 AD3d 406 [2009]).

Tristar's cross motion was not premature as the City contends. The City has failed to show that further discovery would lead to evidence which would raise a triable issue of fact

(*see Steinberg v Schnapp*, 73 AD3d 171 [2010]; *Bailey v New York City Tr. Auth.*, 270 AD2d 156 [2000]).

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

ENTERED: NOVEMBER 4, 2010

CLERK

Tom, J.P., McGuire, Acosta, Renwick, Freedman, JJ.

3551N Blanca U. Torres, etc., et al., Index 112522/05
Plaintiffs-Respondents,

-against-

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

_____

Wallace D. Gossett, Brooklyn (Anita Isola of counsel), for appellants.

Melucci, Celauro & Sklar, LLP, New York (Daniel Melucci of counsel), for respondents.

_____

Order, Supreme Court, New York County (Harold B. Beeler, J.), entered August 12, 2009, which granted plaintiff's motion for leave to amend her bill of particulars, unanimously affirmed, without costs.

Although plaintiff waited until after the note of issue was filed to move to amend the bill of particulars, and failed to provide a reasonable excuse for the delay, we decline to hold that the motion court abused its discretion in granting the motion given the lack of prejudice to defendant and the fact that plaintiff's initial bill of particulars provided notice of the theory of decedent's accident that plaintiff seeks to add. Under these circumstances, mere delay is insufficient to defeat the amendment, especially given that the delay was mitigated by the court's vacating of the note of issue and granting defendant

additional discovery in connection therewith (*see Cherebin v Empress Ambulance Serv., Inc.*, 43 AD3d 364 [2007]).

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

ENTERED: NOVEMBER 4, 2010

CLERK

Andrias, J.P., Sweeny, Nardelli, Catterson, DeGrasse, JJ.

1534 Amazon.com, LLC, et al., Index 601247/08
Plaintiffs-Appellants,

-against-

New York State Department of
Taxation and Finance, et al.,
Defendants-Respondents.
- - - - - -
Performance Marketing Alliance,
Tax Foundation and American Legislative
Exchange Council,
Amici Curiae.
- - - - - - -

1535 Overstock.com, Inc., Index 107581/08
Plaintiff-Appellant,

-against-

New York State Department of
Taxation and Finance, et al.,
Defendants-Respondents.

_____

Gibson, Dunn & Crutcher LLP, New York (Randy M. Mastro of counsel), for Amazon.com, LLC and Amazon Services, LLC, appellants.

Bracewell & Giuliani, LLP, New York (Daniel S. Connolly of counsel), for Overstock.com, Inc., appellant.

Andrew M. Cuomo, Attorney General, New York (Peter Karanjia of counsel), for respondents.

Venable LLP, New York (Gregory W. Gilliam of counsel), for Performance Marketing Alliance, amicus curiae.

McDermott Will & Emery LLP, New York (Arthur R. Rosen of counsel), for Tax Foundation, amicus curiae.

Stewart Occhipinti, LLP, New York (Charles A. Stewart, III of counsel), for American Legislative Exchange Council, amicus curiae.

Judgment, Supreme Court, New York County (Eileen Bransten, J.), entered February 17, 2009, modified, on the law and on the facts, to declare that the statute is constitutional on its face and does not violate the Equal Protection Clause either on its face or as applied and, to reinstate the complaint for further proceedings with regard to the claims that, as applied, the statute violates the Commerce and Due Process Clauses, and otherwise affirmed, with costs. Order, same court and Justice, entered January 15, 2009, modified, on the law and on the facts, to declare that the statute is constitutional on its face, and does not violate the Equal Protection Clause either on its face or as applied, and to reinstate the complaint for further proceedings with regard to the claims that, as applied, the statute violates the Commerce and Due Process Clauses, and otherwise affirmed, with costs.

Opinion by Nardelli, J. All concur except Catterson, J. who concurs in a separate Opinion.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Richard T. Andrias, J.P.
John W. Sweeny
Eugene Nardelli
James M. Catterson
Leland G. DeGrasse, JJ.

1534-
1535
Index 601247/08
107581/08

_____x

Amazon.com, LLC, et al.,
Plaintiffs-Appellants,

-against-

New York State Department of
Taxation and Finance, et al.,
Defendants-Respondents.

- - - - - -

Performance Marketing Alliance,
Tax Foundation and American Legislative
Exchange Council,
Amici Curiae.

- - - - - - -

Overstock.com, Inc.,
Plaintiff-Appellant,

-against-

New York State Department of
Taxation and Finance, et al.,
Defendants-Respondents.

_____x

Plaintiffs Amazon.com, LLC and Amazon Services, LLC appeal from a judgment of the Supreme Court, New York County (Eileen Bransten, J.), entered February 17, 2009, dismissing the

complaint in this declaratory judgment action challenging the constitutionality of Tax Law § 1101(b)(8)(vi) on Commerce Clause and federal and state due process and equal protection grounds. Plaintiff Overstock.com, Inc. appeals from an order, same court and Justice, entered January 15, 2009, which, inter alia, directed entry of a judgment dismissing the complaint in the separate declaratory judgment action challenging the constitutionality of subparagraph vi on Commerce Clause and federal and state due process and equal protection grounds.

Gibson, Dunn & Crutcher LLP, New York (Randy M. Mastro, Gabriel Herrmann and Timothy D. Swain [and Julian W. Poon, Taheane E. Kapur, and Kahn A. Scolnick, of the California Bar, admitted pro hac vice], of counsel), for Amazon.com, LLC and Amazon Services, LLC, appellants.

Bracewell & Giuliani, LLP, New York (Daniel S. Connolly, Rachel B. Goldman, David A. Shargel and David J. Ball of counsel), for Overstock.com, Inc., appellant.

Andrew M. Cuomo, Attorney General, New York (Peter Karanjia, Barbara D. Underwood and Andrew D. Bing of counsel), for respondents.

Venable LLP, New York (Gregory W. Gilliam of counsel), for Performance Marketing Alliance, amicus curiae.

McDermott Will & Emery LLP, New York (Arthur R. Rosen of counsel), for Tax Foundation, amicus curiae.

Stewart Occhipinti, LLP, New York (Charles A. Stewart, III of counsel), for American Legislative Exchange Council, amicus curiae.

NARDELLI, J.

In a case with far-reaching ramifications because of the exponential expansion of cyberspace in general, and commerce over the Internet in particular, the issue presented is the constitutionality of a recent amendment to the Tax Law §1101(b)(8)(vi) intended to force on-line retailers to collect a sales tax on purchases made by New York residents. Since we find that there are issues of fact concerning some of the as-applied challenges raised by plaintiffs to the statute, we conclude that the dismissal of the entire complaint was premature, and remand for further proceedings. We do, however, find that the facial challenges fail to state a cause of action, and declare in the State's favor to that extent.

In New York "every vendor of tangible personal property" is required to collect sales and use taxes on sales of tangible personal property (Tax Law § 1131[1]; *see also* §§ 1101[b][8], 1105, 1110, 1132[a]). A "vendor" is defined to include, inter alia, "[a] person who solicits business . . . by employees, independent contractors, agents or other representatives . . . and by reason thereof makes sales to persons within the state of tangible personal property or services" (Tax Law § 1101[b][8][i][C][I]). Vendors are required to register with the Department of Taxation and Finance (DTF), and are granted

certificates of authority permitting them to collect sales taxes (Tax Law § 1134[a]).

On April 23, 2008, the Tax Law was amended to reflect the reality that many sales of goods to New York residents are effected through the Internet, and to place upon certain sellers who use the Internet the same responsibilities that are imposed upon other out-of-state sellers. The statute, as amended, created a presumption that an out-of-state seller was

> "soliciting business [in New York] through an independent contractor or other representative if the seller enters into an agreement with a resident of this state under which the resident, for a commission or other consideration, directly or indirectly refers potential customers, whether by a link on an internet website or otherwise, to the seller, if the cumulative gross receipts from sales by the seller to customers in the state who are referred to the seller by all residents with this type of an agreement with the seller is in excess of ten thousand dollars during the preceding four quarterly periods ending on the last day of February, May, August, and November" (Tax Law § 1101[b][8][vi]).

The effect of this amendment was that the responsibility to collect sales or use taxes was now imposed on an out-of-state seller which used an in-state resident to solicit business from New York residents, through an Internet Web site.

The law further provided, however, that the presumption that the vendor was doing business in New York could be rebutted by

proof that the resident with whom the seller had an agreement "did not engage in any solicitation in the state on behalf of the seller that would satisfy the nexus requirement of the United States Constitution during the four quarterly periods in question" (*id.*).

Shortly after the statute became effective, and Amazon instituted its lawsuit, DTF issued two memoranda, known as Technical Services Bureau Memoranda. In the first memorandum (TSB-M-08(3)S, dated May 8, 2008), DTF advised that the statute applied to sellers, including e-commerce retailers, which "solicit business within the state through employees, independent contractors, agents or other representatives and, by reason thereof, make sales" to New York residents of taxable property or services. This memorandum also offered six examples of how certain transactions would be affected by the statute. Example 4 made clear that the statutory presumption would only be triggered by commission-based referral agreements, as opposed to flat-fee agreements. The memorandum further explained that the presumption that solicitation had occurred could be rebutted if the seller established that "the only activity" of its in-state representatives consisted of the placement of Internet links connecting their Web sites to the out-of-state seller's Web site, i.e., advertisers only, and that "none of the resident

representatives engage in any solicitation activity in the state targeted at potential New York State customers on behalf of the seller." Thus, more than a mere pass-through "click" on the Internet was required to impose tax collection responsibilities on the out-of-state sellers. The in-state contractor actually has to engage affirmatively in customer solicitation before the out-of-state vendor becomes subject to the statute.

The DTF then issued a second memorandum (TSB-M-08(3.1)S, dated June 30, 2008) which set forth a "safe harbor" procedure whereby sellers could rebut the presumption by including in their business-referral agreements a provision prohibiting their in-state representatives from "engaging in any solicitation activities in New York State that refer potential customers to the seller," and requiring each in-state representative to submit a signed certification every year, stating that it has not engaged in any such solicitation during the prior year.

Plaintiff Amazon.com, LLC is a limited liability company incorporated in Delaware, and Amazon Services, LLC is a limited liability company incorporated in Nevada. Neither has offices, employees or property in New York. New York residents order products from Amazon solely through its Web site. Amazon does not have any in-state representatives in New York to assist customers in placing orders, and all technical support telephone

calls or e-mails are handled by Amazon's representatives located outside of New York. Products sold by Amazon are shipped directly to customers from fulfillment centers located outside New York.

Amazon, however, has developed a program using entities known as Associates which it allows hundreds of thousands of independent third parties located around the world, many of which have provided Amazon with New York addresses, to advertise the Web site "Amazon.com" on their own Web sites. Visitors to the Affiliates' Web sites can click on the link and immediately be redirected to Amazon.com. If the visitor ends up making a purchase from Amazon on the Amazon.com Web site – and only in that event – the Associate is paid a commission. Any purchase made by the visitor takes place solely with Amazon, and all customer inquiries are handled only by Amazon, its corporate affiliates, or other sellers without any involvement of the Associate.

In the standard operating agreement which governs the relationship between Amazon and its Associates, Amazon expressly disavows any control over their activities or Web site content, except to state that Associates are prohibited from "misrepresent[ing] or embellish[ing]" the relationship between themselves and Amazon.

Co-plaintiff Overstock.com is a Delaware corporation with its principal and only place of business in Utah. As Amazon does, it offers various products over the Internet at discounted prices. Overstock does not have any retail stores or outlets. All goods purchased through Overstock.com are shipped to customers directly via the mail or by common carrier. None of Overstock's employees or representatives live in New York. Like Amazon, Overstock allows owners of other Web sites located around the world to advertise Overstock.com on their own Web sites. Advertisements on the Web sites of these owners, known as Affiliates, consist of electronic links and banners. When a visitor to the Affiliate's Web site clicks on the link or banner, the visitor's browser navigates to the Overstock.com Web site.

The Master Agreement between Overstock and the Affiliate permits the Affiliate to provide advertising for Overstock in the form of links or banners. Affiliates are paid a commission only when a customer clicks on the link or banner and arrives at Overstock's Web site, and then purchases goods from Overstock. Furthermore, the Master Agreement provides that an Affiliate is only paid a commission if the Affiliate's Web site is the last site visited before Overstock's Web site, and the customer makes a purchase within a specified period of time. After the statute was enacted on April 23, 2008, Overstock suspended its

relationships with all of its Affiliates in New York.

On April 25, 2008, two days after the bill was signed by the Governor, Amazon filed a complaint seeking declaratory and injunctive relief on the ground that the statute was unconstitutional. Amazon asserted claims for violation of the Commerce, Due Process and Equal Protection Clauses of the United States Constitution, as well as the Due Process and Equal Protection Clauses of the New York State Constitution. Other than by passing reference, however, the challenges under the New York State Constitution are not pursued on this appeal.

Overstock's complaint was filed on May 30, 2008. It also sought injunctive and declaratory relief, but only asserted claims for violation of the Commerce and Due Process Clauses of the United States Constitution, and the Due Process Clause of the New York State Constitution. Its claims under the State Constitution are likewise not pursued on this appeal.[1]

The State moved by order to show cause to dismiss the complaints pursuant to CPLR 3211(a)(2) and (7) on July 17, 2008. Subsequently, on August 11, 2008, Amazon cross-moved for summary judgment on its first and second causes of action, which

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[1]Also submitting amicus curiae briefs on this appeal, all contending that the statute is unconstitutional under the Commerce Clause, are the Tax Foundation, American Legislative Exchange Council, and Performance Marketing Alliance.

encompassed its Commerce and Due Process Clauses causes of action.[2] Overstock moved on August 12, 2008 for similar relief.

In response to the cross motions, the State submitted evidence purporting to demonstrate that Amazon's and Overstock's Affiliates in fact engaged in activities that arguably amounted to solicitation of New York business, and argued generally that the claims that the statute was unconstitutional as applied could not be determined as a matter of law without discovery into Amazon's and Overstock's business practices. The materials proffered by the State included documents relating to Amazon's "SchoolRewards" affiliates program and other similar programs, by which local (including New York-based) nonprofit organizations are given a commission when they lead visitors to their Web sites to purchase goods on Amazon.com. The State argued that, due to the local nature of these nonprofit organizations, the visitors to their Web sites were most likely to be based locally as well, and, thus, it was a reasonable assumption that these organizations were actively targeting and soliciting other New York residents in their communities to purchase goods from Amazon so as to benefit the organization.

[2]Although Amazon did not move for relief on its equal protection claims, their viability is addressed on appeal because the State obtained dismissal of the complaint in its entirety.

In an order entered January 13, 2009, the court granted the State's motion to dismiss Amazon's complaint in its entirety and denied Amazon's cross motion for summary judgment as moot. The court found the Commerce Clause challenge unavailing because the statute was targeted at requiring tax calculation from out-of-state sellers which avail themselves of in-state contractors, and was "carefully crafted to ensure that there is a sufficient basis for requiring collection of New York taxes and, if such a basis does not exist, it gives the seller an out" through the ability to rebut the statutory presumption that it qualifies as a vendor. The court also rejected the as-applied Commerce Clause challenge because it found that Amazon did not allege in its complaint that "its New York Associates do not solicit business for it from New York customers."

With regard to Amazon's due process challenges, the court reasoned that "[t]here is a 'reasonably high degree of probability' that New York business people and entities desirous of raising money that are compensated for referring customers who ultimately make purchases will solicit business from those with whom they are familiar and encourage sales," and that "[i]t is also highly probable that New York residents will more likely than not have ties to other New York residents and it is [therefore] not irrational to presume that at least some of them

will actively solicit business for the remote seller from within the State from others within the State." In addition, the court stated, the "statutory presumption is by its terms and effect rebuttable." The court also rejected the vagueness challenge because "the [Statute's] applicability upon entry into an agreement with an in-state resident for a commission 'or other consideration' based on direct referral of New York customers or 'indirect' referrals is not so vague and standardless as to leave the public uncertain about its reach." Finally, the court held that Amazon's "class-of-one" equal protection challenge failed to state a cause of action because Amazon's complaint failed to assert that the State had treated it differently from others similarly situated.

In a separate order entered January 15, 2009, the court similarly granted the State's motion to dismiss Overstock's complaint and denied Overstock's cross motion to dismiss as moot "[f]or the reasons stated" in the Amazon decision.

Amazon and Overstock appealed directly to the Court of Appeals, pursuant to CPLR 5601(b)(2). By separate orders dated May 5, 2009, the Court of Appeals transferred the appeals to this Court, on the ground that "a direct appeal does not lie when questions other than the constitutional validity of a statutory

provision are involved (12 NY3d 827, 827 [2009]; 12 NY3d 830, 831 [2008]).”

On this appeal Amazon raises three challenges to the statute. It does not pursue its facial claims with the Commerce Clause, but argues that, as applied to it, the statute is unconstitutional because it lacks a “substantial nexus” within the State. Amazon also argues that the statute violates the Due Process Clause because, facially and as applied, it enacts an irrational and irrebuttable presumption, and is also vague. It lastly argues that the statute violates the Equal Protection Clause because it targets Amazon, one of the world’s largest Internet retailers, in bad faith.

Overstock argues that the statute violates the Commerce Clause, both on its face, and as applied to Overstock. It likewise argues that the statute is unconstitutional on its face because it runs afoul of the Due Process Clause because of its vagueness.

FACIAL CHALLENGES

We address first the facial challenges. Initially, as was recently reiterated by the Supreme Court in *Washington State Grange v Washington State Republican Party* (552 US 442 [2008]), facial challenges to a statute’s constitutionality are disfavored. “[A] plaintiff can only succeed in a facial

challenge by 'establish[ing] that no set of circumstances exists under which the Act would be valid', *i.e.*, that the law is unconstitutional in all of its applications" (*id.* at 449, quoting *United States v Salerno*, 481 US 739, 745 [1987]; *see also Matter of Moran Towing Corp. v Urbach*, 99 NY2d 443, 448 [2003]; *Cohen v State of New York*, 94 NY2d 1, 8 [1999]).[3] Since "[l]egislative enactments enjoy a strong presumption of constitutionality . . . parties challenging a duly enacted statute face the initial burden of demonstrating the statute's invalidity 'beyond a reasonable doubt'" (*LaValle v Hayden*, 98 NY2d 155, 161 [2002] [internal citations omitted). "Moreover, courts must avoid, if possible, interpreting a presumptively valid statute in a way that will needlessly render it unconstitutional" (*id.*).

COMMERCE CLAUSE FACIAL CHALLENGE

Article I (§ 8[3]) of the US Constitution expressly authorizes Congress to "regulate Commerce with foreign Nations, and among the several States." While the Constitution "says

[3]We note that Overstock, relying on language in a footnote in *City of Chicago v Morales* (527 US 41, 55 [n 22] [1999]) contends that the "no set of circumstances" standard is not the appropriate test, and claims that the test has been rejected by the Supreme Court. Yet, the *Washington Grange* case was issued nine years after *Morales,* and, Justice Stevens, the author of the plurality decision in *Morales*, joined the majority decision in *Washington Grange.* Thus, in the absence of any unequivocal holding to the contrary, we conclude that continued reliance on the "no set of circumstances" standard is warranted.

nothing about the protection of interstate commerce in the absence of any action by Congress . . . the Commerce Clause is more than an affirmative grant of power; it has a negative sweep as well" (*Quill Corp. v North Dakota*, 504 US 298, 309 [1992]). "'[B]y its own force', [it] prohibits certain state actions that interfere with interstate commerce" (*id.* quoting *South Carolina State Highway Dept. v Barnwell Bros., Inc.*, 303 US 177, 185 [1992]).

In *Moran Towing Corp.*, the Court of Appeals outlined the four-prong test for determining whether a state tax violates the Commerce Clause. The court stated that the tax will be upheld "'[1] when the tax is applied to an activity with a substantial nexus with the taxing State, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and [4] is fairly related to the services provided by the State'" (99 NY2d at 449, quoting *Complete Auto Tr., Inc. v Brady*, 430 US 274, 279 [1977]). As was the situation in *Moran,* the challenge to the tax in this case only implicates the first prong, i.e., whether the activity involved has a substantial nexus with the taxing State.

The sine qua non for the finding that a party has a substantial nexus with New York, and is thus required to collect sales or use taxes, is that it have a physical presence within

the state (*id.* at 449, citing *Matter of Orvis Co. v Tax Appeals Trib. of State of N.Y.*, 86 NY2d 165 [1995], *cert denied* 516 US 989 [1995]; *see also National Bellas Hess, Inc. v Department of Revenue of Ill.*, 386 US 753 [1967]). Nevertheless, "[w]hile a physical presence of the vendor is required, it need not be substantial" (*Orvis Co.* at 178). While it must constitute more than a "'slightest presence'" (*id.* quoting *National Geographic v California Equalization Bd.*, 430 US 551, 556 [1977]), "it may be manifested by the presence in the taxing State of the vendor's property or the conduct of economic activities in the taxing State performed by the vendor's personnel or on its behalf" (*Orvis Co.* at 178).

National Bellas Hess, discussed at length in *Orvis*, involved an out-of-state mail-order vendor whose only connection with customers in the state of Illinois was by common carrier or the United States mail. The Supreme Court observed that in order to uphold the imposition of a sales tax by Illinois on the vendor's transactions, it "would have to repudiate totally the sharp distinction ... between mail order sellers with retail outlets, solicitors, or property within a State, and those who do no more than communicate with customers in the State by mail or common carrier as part of a general interstate business" (386 US at 758). The Court went on to state, "[T]his basic distinction

which until now has been generally recognized by the state taxing authorities, is a valid one, and we decline to obliterate it" (*id.*).[4]

On the other hand, where a Pennsylvania company which manufactured aerospace fasteners such as nuts and bolts, and whose only presence in the State of Washington was an engineer who operated from his home, and whose responsibilities were essentially encompassed in communicating with the Boeing Company as to its needs and requirements, but did not include taking orders, the substantial nexus requirement was found to have been met (*see Standard Pressed Steel Co. v Washington Dept. of Revenue*, 419 US 560 [1975]). In upholding the tax, the court framed the threshold inquiry as "'whether the state has given

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[4]The Supreme Court adhered to the "bright line" requirement that in order to impose a duty on the out-of-state seller to collect sales taxes it must have a demonstrable, albeit minimal, presence in the taxing state, in *Quill Corp. v North Dakota* (504 US 298 [1992]). In pertinent part, the Court stated, "[s]uch a rule firmly establishes the boundaries of legitimate state authority to impose a duty to collect sales and use taxes and reduces litigation concerning those taxes" (*id.* at 315). In language that is at once ironic and prescient, it also observed, "[t]his benefit is important, for as we have so frequently noted, our law in this area is something of a 'quagmire' and the 'application of constitutional principles to specific state statutes leaves much room for controversy and confusion and little in the way of precise guides to the States in the exercise of their indispensable power of taxation'" (*id.* at 315-316, quoting *Northwestern States Portland Cement Co. v Minnesota*, 358 US 450, 457-458 [1959]).

anything for which it can ask return'" (*id.* at 562, quoting *Washington v J.C. Penney Co.*, 311 US 435, 444 [1940]), and answered by stating that the company's employee "made possible the realization and continuance of valuable contractual relations between [the company] and Boeing" (*Standard Pressed Steel* at 562).

Our analysis leads us to the conclusion that on its face the statute does not violate the Commerce Clause. It imposes a tax collection obligation on an out-of-state vendor only where the vendor enters into a business-referral agreement with a New York State resident, and only when that resident receives a commission based on a sale in New York. The statute does not target the out-of-state vendor's sales through agents who are not New York residents. Thus, the nexus requirement is satisfied.

Of equal importance to the requirement that the out-of-state vendor have an in-state presence is that there must be solicitation, not passive advertising. While Tax Law §1101(3)(8)(vi) creates the presumption that the in-state agent will solicit, it provides the out-of-state vendor with a ready escape hatch or safe harbor. The vendor merely has to include in its contract with the in-state vendor a provision prohibiting the in-state representative from "engaging in any solicitation activities in New York State that refer potential customers to

the seller"[5], and the in-state representative must provide an annual certification that it has not engaged in any prohibited solicitation activities as outlined in the memorandum. Thus, an in-state resident which merely acts as a conduit for linkage with the out-of-state vendor will be presumed to have not engaged in activity which would require the vendor to collect sales taxes. Presumably, there are vendors which will be able to execute the annual certification without fear of making a misrepresentation.

On the other hand, the State has a legitimate basis to conclude that many other in-state representatives will engage in direct solicitation, rather than mere advertising. For instance, a document prepared by Amazon explaining the benefits of joining the Associates' program, states, in pertinent part, "Our compensation philosophy is simple: reward Associates for their contributions to our business in unit volume and growth. Amazon is a fast growing business and we want our Associates to grow

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[5]Advisory memo TSB-M-08(3)S, dated June 30, 2008 provides, not unreasonably, that solicitation activities can include "distributing flyers, coupons, newsletters and other printed promotional materials, or electronic equivalents; verbal solicitation (e.g., in-person referrals); initiating telephone calls; and sending e-mails." Additionally, in a recognition of the potential use of fundraisers conducted by organizations, the memo provides that in an agreement with a club or non-profit group, "the contract or agreement must provide that the organization will maintain on its Web site information alerting its members to the prohibition against each of the solicitation activities described above."

with us." The overview document goes on to state, "The Performance structure allows you to earn higher fees when you generate a sufficient volume of referrals that result in sales at Amazon.com during a month. *The higher your referrals, the greater your earnings will be."*

Clearly, Amazon's program, reasonably, is not designed for the passive advertiser, but seeks growth by reliance upon representatives who will look to solicit business. The obligations imposed by the state to collect the tax only arise when the paradigm shifts from advertising to solicitation. Thus, until such time as the out-of-state vendor produces a certification from every one of its New York representatives that they have not engaged in solicitation, the facial challenge based upon the Commerce Clause must fail, since there is a set of circumstances under which the statute would be valid, i.e., when a New York representative uses some form of proactive solicitation which results in a sale by Amazon, and a commission to the representative; and the representative has an in-state presence sufficient to satisfy the substantial nexus test.

DUE PROCESS FACIAL CHALLENGES

Amazon and Overstock make two main due process arguments. First, they argue that the statute violates due process because it creates a presumption that is both irrational and

irrebuttable. Second, they argue that the statute is void for vagueness. Both arguments challenge the fairness of requiring them and other out-of-state retailers like them to collect sales tax from New York residents referred to them by their New York-based Affiliates.

In *Quill* (504 US 298 [1992], *supra*), the Supreme Court made clear that the Due Process Clause implicates fundamentally different concerns from the Commerce Clause (*id.* at 306-18). The Court stated:

> "[d]ue process centrally concerns the fundamental fairness of governmental activity. Thus, at the most general level, the due process nexus analysis requires that we ask whether an individual's connections with a State are substantial enough to legitimate the State's exercise of power over him. . . In contrast, the Commerce Clause and its nexus requirement are informed not so much by concerns about fairness for the individual . . . as by structural concerns about the effects of state regulation on the national economy."

(*id.* at 312). Thus, the Commerce Clause operates to "limit the reach of state taxing authority so as to ensure that state taxation does not unduly burden interstate commerce" (*id.* at 313), while the Due Process Clause ensures that there is "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax, and that the income attributed to the State for tax purposes [is] rationally

related to 'values connected with the taxing state" (*id.* at 306 (internal quotation marks and citations omitted)).

CLAIMS OF IRREBUTTABLE PRESUMPTION

The Supreme Court has noted that irrebuttable presumptions are looked upon with disfavor as violative of due process (see e.g. *Vlandis v Kline*, 412 US 441, 446 [1973]). Nevertheless, rational presumptions, even in criminal cases, are commonly upheld (*see e.g. Tot v United States*, 319 US 463 [1943]; *People v Leyva*, 38 NY2d 160 [1975]).

The test for assessing the validity of a presumption is that there be a rational connection between the basic facts proven and the ultimate fact presumed (*County Court of Ulster County v Allen*, 442 US 140, 165 [1979]). Succinctly stated, the validity of the presumption turns on whether it is more likely than not that the fact presumed flows from the fact proven (*id.*). In New York the test is even higher, i.e., "the connection must assure a reasonably high degree of probability' that the presumed fact follows from those proved directly" (P*eople v Leyva*, 38 NY2d at 166, quoting *People v McCaleb*, 25 NY2d 394, 404 [1969]).

The statute at issue makes the presumption that in-state solicitation occurs when an in-state representative is paid a commission on a per sale basis, after a New York purchaser accesses its Web site and "clicks" through to make a purchase at

the out-of-state vendor's Web site. This is not an irrational presumption. Both the out-of-state vendor and the in-state representative seek, quite frankly, to make money. It is not irrational to presume that the in-state representative will engage in various legal methods to enhance earnings. Advertising would be one of those methods, but mere advertising does not implicate the statute. Solicitation, however, in varying forms, is another extremely plausible and likely avenue by which any competent businessperson would seek to improve revenues.

In the event, however, the in-state representative wishes to chance success merely on luck and good fortune, without expending initiative, the statute permits it to offer proof that it did not engage in solicitation. The implementing regulation provides that this proof can come in the form of a certification from the in-state representative that it did not engage in solicitation.

DUE PROCESS VAGUENESS CLAIM

The second prong of the due process challenge is the claim that the statute is unconstitutionally vague. Amazon takes issue with the words "or indirectly" (in discussing referrals), and "other consideration" (in discussing the manner of recompense to the in-state representative). Overstock likewise takes umbrage at the use of the words "or indirectly," but also complains that the failure to define "solicitation" is fatal. It claims that

since the Internet has drastically changed the manner in which commerce is transacted, the medium requires a definition tailored to this new world of communication.

Initially, both Amazon and Overstock are correct in their assertions that, at least under certain circumstances, a statute may be challenged for unconstitutional vagueness both facially and as applied (*see People v Stuart*, 100 NY2d 412, 421 [2003]). Yet, both the decision in *Stuart* (100 NY2d at 422 n8, *but see* 100 NY2d at 429-433, Kaye, Ch. J., concurring) and the Supreme Court in *Chapman v United States* (500 US 453, 467 [1991]) indicate that a facial challenge is only implicated when First Amendment rights are at issue. This is not the case here.

For purposes of resolving plaintiffs' vagueness challenge, however, our inquiry will be directed first to the as-applied challenge, which we conclude is unavailing. The finding that the as-applied vagueness challenge is not substantiated, of necessity, leads to the conclusion that "the facial validity of the statute" is confirmed.

The words "or indirectly," criticized by both Amazon and Overstock, do not present any confusion. The in-state buyer can be referred by the in-state representative "directly" to the out-of-state vendor by a click on its Web site. We take the words "or indirectly" to mean by a manner other than a direct click,

perhaps just by providing an e-mail address of the out-of-state vendor. In either case, the result is the same - a buyer has been routed to a seller by an intermediary.

Amazon's criticism of the words "or other consideration" is likewise perplexing. The statute simply provides that if there is some type of remuneration to the in-state representative other than a direct payment, the transaction will still be encompassed by the statute. Presumably, "other consideration" could include such items as a bonus program, or discounting of the vendor's goods if purchased by the representative, either in lieu of or in addition to the direct payment. The rationale for the language turns not on what form the consideration takes, but on the fact that the in-state representative is being compensated for its efforts.

Finally, with regard to the vagueness challenge, Overstock complains that the word solicitation is so imprecise, in this Internet age, as to be unconstitutionally vague. Yet, while the Internet certainly represents a significant change in communication, the argument that it is a brave new world requiring its own definitions of terms that previously had a clear meaning is not persuasive. An advertisement in a newspaper is clearly not solicitation, as it is geared to the public at large. Likewise, the maintenance of a Web site which the visitor

must reach on his or her own initiative is not, under the statute, or the advisory opinions, a solicitation.

On the other hand, the targeting of a potential customer by the transmission of an e-mail is no different from a direct telephone call or a mailing to a customer. Both constitute active initiatives by a party seeking to generate business by pursuing a sale.

RIPENESS OF ISSUES FOR JUDICIAL RESOLUTION

Preliminary to the arguments that the statute, as applied, is unconstitutional on Commerce, Due Process and Equal Protection Clause grounds, the State's claim that the issues are not ripe for judicial review must be addressed. The State argues that because an enforcement action has yet been commenced and thus the statute has not been applied to either Amazon or Overstock, any factual review is not ripe. The State also argues that plaintiffs are precluded from bringing this action because they have not exhausted their administrative remedies.

In support of its argument that the as-applied challenges are not ripe, the State relies upon the decision in *Church of St. Paul & St. Andrew v Barwick* (67 NY2d 510 [1986], *cert denied* 479 US 985 [1986]). In *Barwick* a church brought a declaratory judgment action contending that the Landmarks Law was unconstitutionally applied to it, and that the restrictions

imposed prevented it from undertaking structural renovations, and, in turn, that failing to undertake these renovations would expose it to criminal sanctions. The Court noted that "a claim based upon an injury which might never occur should be dismissed" (*id.* at 518). In order to determine ripeness, it reasoned, there must be a determination that the issues are appropriate for judicial resolution (i.e., the action being reviewed must be final, and the controversy may be determined as a "purely legal" question), and an assessment that the hardship to the parties involved if judicial action is denied, will be both significant and direct (*id.* at 519-520, citing *Abbott Labs. v Gardner*, 387 US 136 [1967]; *Toilet Goods Assn. v Gardner*, 387 US 158 [1967]; *Gardner v Toilet Goods Assn.*, 387 US 167 [1967]). The Court found that since the effect on the plaintiff of being subject to the Landmarks Law could not yet be gauged because it had not yet sought the appropriate permission to undertake renovations, the issue was not ripe (*Barwick*, 67 NY2d at 522-523).

In *Lorillard Tobacco Co. v Roth* (99 NY2d 316 [2003]), which also presented a challenge to a tax law, the Court of Appeals rejected an argument by DTF, premised on *Barwick*, that the controversy was unripe because DTF had not commenced any enforcement action (*id.* at 321 n3). The Court stated that DTF's reliance on *Barwick* was "misplaced" because, even though an

enforcement action against the plaintiffs, a cigarette manufacturer and retailer, had not yet been initiated, DTF had "allegedly used threats to force retailers to stop participating in [the cigarette marketing promotions at issue], and this constitute[d] sufficiently 'direct and immediate' harm for jurisdictional purposes" (*id.* quoting *Barwick* at 520).

In this case, DTF has made clear its position that the statute applies to the activities of the New York-based representatives taken on their behalf, and its intention to enforce the statute against them. Thus, the threat of harm to them is as equally "direct and immediate" as it was to the plaintiffs in *Lorillard* (*see also MedImmune, Inc. v Genentech, Inc.*, 549 US 118, 128-29 [2007] ["where threatened action by government is concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat – for example, the constitutionality of a law threatened to be enforced. The plaintiff's own action (or inaction) in failing to violate the law eliminates the imminent threat of prosecution, but nonetheless does not eliminate Article III jurisdiction"]).

The State also argues that the as-applied claims should not be decided by the courts at this stage because Amazon and Overstock have not exhausted their administrative remedies with

respect to those claims. It contends that these claims should be addressed in the first instance to the applicable administrative agency, DTF, so that the necessary factual record can be established, either in an enforcement proceeding (if they choose to take their chances and not collect the tax), or a refund action (if they choose to collect it in an abundance of caution).

The New York courts have generally recognized an exception to the exhaustion requirement where a party is challenging the constitutionality or the basic applicability of a statute or regulation (*see e.g. Matter of First Natl. City Bank v City of N.Y. Fin. Admin.*, 36 NY2d 87, 92 [1975] ["When a tax statute ... is alleged to be unconstitutional, by its terms or application, or where the statute is attacked as wholly inapplicable, it may be challenged in judicial proceedings other than those prescribed by the statute as 'exclusive.'"]; *Martinez 2001 v New York City Campaign Fin. Bd.*, 36 AD3d 544, 548 [2007]).

The State argues, however, that this exception only applies where the issues are purely legal, and do not require the resolution of factual issues (*see Dun & Bradstreet, Inc. v City of New York*, 276 NY 198, 206 [1937]); *Matter of Between the Bread II v Urbach*, 234 AD2d 724 [1996]). Generally, however, these cases involve factual issues as to the amount of tax that is owed, for example, not whether the statute is constitutional as

applied to the challenger in the first place (*see Empire State Bldg. Co. v New York State Dept. of Taxation & Fin.*, 185 AD2d 201 [1992], *affd* 81 NY2d 1002 [1993], citing *Tully v Griffin, Inc.*, 429 US 68, 75 [1976]). In this case, the circumstances are exigent enough to warrant review now. Plaintiffs are conducting an on-going business, and require finality and clarity as to the extent of their present obligations.

COMMERCE CLAUSE AS-APPLIED CLAIM

The first of the "as-applied" arguments to be addressed is the claim that the statute violates the Commerce Clause. Plaintiffs argue that since their representatives do nothing more than advertise on New York-based Web sites, the statute cannot be applied in a constitutional manner. Inasmuch as there has been limited, if non-existent, discovery on this issue we are unable to conclude as a matter of law that plaintiffs' in-state representatives are engaged in sufficiently meaningful activity so as to implicate the State's taxing powers, and thus find that they should be given the opportunity to develop a record which establishes, actually, rather than theoretically, whether their in-state representatives are soliciting business or merely advertising on their behalf. Although, as noted above, the advisory memoranda describe a process by which the representatives can certify that they do not solicit, the

possibility remains that many of the in-state representatives could certify that they are not soliciting, and, yet, the DTF could find that the activities in which they are engaged do constitute solicitation. Additionally, it is within the realm of possibility that the DTF could find that purported out-of-state representatives are actually located in-state by virtue of misrepresenting their address. It would also afford plaintiffs the opportunity to establish the bona fides of their other claims, such as whether it is impossible to identify who their in-state representatives are (even though plaintiffs presumably need an address to which to send, inter alia, any commission checks).

We are also unable to determine on this record whether the in-state representatives are engaged in activities which are "significantly associated" with the out-of-state retailer's ability to do business in the state, as addressed in *Tyler Pipe Indus., Inc. v Washington State Dept. of Revenue* (483 US 232, 250 [1987]). In an affidavit from its vice-president, Amazon represents that, in 2007, its sales to New York State residents referred by Associates which provided Amazon with New York addresses upon registration constituted less than 1.5% of its total sales to New York State residents. It argues that this revenue is not "significantly associated" with its ability to do

business in New York.[6] Whether plaintiffs can meet their burden on this issue remains to be seen, but we cannot, on this record, make a determination.

DUE PROCESS AS-APPLIED CLAIM

Amazon and Overstock also raise an "as applied" due process challenge based on their contention that the statute is both irrational and irrebuttable as applied to them specifically. Ultimately, the determining factor in this inquiry is whether it is irrational to conclude that the Amazon and Overstock agreements with New York-based Web sites, by which they compensate the New York-based Web sites in exchange for the New York-based Web sites' referral of customers to Amazon and Overstock through Web links, are by their nature sufficient to establish that the New York-based Web sites will engage in other activity that goes beyond mere advertising and actually amounts to solicitation – to such a level that would satisfy the Commerce

[6]The affidavit did not supply the sales data upon which the calculation was based. An Internet search, however, found, and we take judicial notice, that on April 22, 2010 Amazon reported that its first quarter sales in Canada and the United States were $3,780,000,000 (which would translate on an annual basis into North American sales of over $15,000,000,000). What percentage of those sales were made in New York cannot be quantified from the data available. Nor can the actual percentage made as a result of New York residents accessing New York-based Associates be calculated. Even 1.5% of New York sales by New York Associates, however, would not appear to be an insignificant number.

Clause's substantial nexus requirement – of New York business on Amazon's and Overstock's behalf. The existence of Amazon's SchoolRewards and similar programs is strong evidence that the presumption is valid. Nevertheless, we remand for further discovery so that plaintiffs can make their record that all their in-state representatives do is advertise on New York-based Web sites.

Amazon's and Overstock's claim that they cannot "control and remain informed about whether their New York contractors solicit business from other New York residents" because they have relationships with "hundreds of thousands" of such entities and cannot possibly keep tabs on all of them in a manner sufficient to rebut the presumption is belied by the fact that they have contracts with all of their representatives, presumably including addresses. In any event, they can easily include the terms recommended in the TSBMs in their standard affiliate agreements to protect themselves. Nevertheless, we conclude that it would be premature to find that even as applied the due process challenges are unavailing, whether because they create an illegal and irrebuttable presumption, or because the language of the statute is so vague that plaintiffs cannot ascertain which transactions give rise to their obligations to collect the sales tax.

EQUAL PROTECTION AS-APPLIED CLAIM

Lastly, Amazon contends that the statute, as applied to it, violates the Equal Protection Clause because it is being treated differently from two similarly situated entities: out-of-state retailers who advertise in New York but do not use a mechanism similar to its Associates program, and those out-of-state retailers who do advertise in New York, and who do utilize an Associates-like program, but who compensate their advertisers with a flat fee or on a "pay-per-click" model.

The Supreme Court has recognized that successful equal protection claims may be brought by a class of one, "where the plaintiff alleges that [it] has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment" (*Village of Willowbrook v Olech*, 528 US 562, 564 [2000], citing *Sioux City Bridge Co. v Dakota County*, 260 US 441 [1923]). As the Supreme Court stated, "'The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents'" (*Olech* at 564, citing *Sioux City Bridge Co.*, 260 US at 445, quoting *Sunday Lake Iron Co. v Wakefield Twp.*, 247 US 350, 352 [1918]).

"Legislatures have especially broad latitude in creating classifications and distinctions in tax statutes" (*Regan v Taxation With Representation of Wash.*, 461 US 540, 547 [1983]). Consequently, the "'presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes'" (*id.*, quoting *Madden v Kentucky*, 309 US 83, 88 [1940])).

Our review concludes that Amazon has failed to establish the existence of a viable equal protection claim. In the first instance, Amazon cannot claim that it is being exclusively targeted since it is being treated exactly the same as Overstock. Their programs are similar, in that they both use in-state representatives and reward them on a "sales-made" basis, rather than on a "per-click" basis. Secondly, Amazon also fails in its claims that it is treated differently from those out-of-state retailers which do not have an Affiliates program like its own. Those retailers are not similarly situated. The first example offered by Amazon involves businesses which do not directly solicit, but only advertise in media, and the second involves representatives who are paid for results that are much less beneficial to the out-of-state vendor - referrals rather than actual sales. When a representative can only receive

compensation for an actual sale, it is much more likely that the representative will actually solicit, rather than passively maintain a Web site. Thus, there is no proof of impermissible motive - "proof of action with intent to injure – that is, proof that the applicant was singled out with an 'evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances'" (*Bower Assoc. v Town of Pleasant Val.*, 2 NY3d 617, 631 [2004], quoting *Masi Mgt. v Town of Ogden* [appeal No.3], 273 AD2d 837, 838 [2000], quoting *Matter of 303 W. 42nd St. Corp. v Klein*, 46 NY2d 686, 693 [1979], quoting *Yick Wo v Hopkings*, 118 US 356, 373-374 [1886]).

In summation, although we do not find that the facial challenges have merit, further discovery is necessary before a determination can be rendered as to the as-applied Commerce and Due Process Clauses claims.

Accordingly, the judgment of the Supreme Court, New York County (Eileen Bransten, J.), entered February 17, 2009, dismissing the complaint in this declaratory judgment action challenging the constitutionality of Tax Law § 1101(b)(8)(vi) on Commerce Clause and federal and state due process and equal protection grounds, should be modified, on the law and on the facts, to declare that the statute is constitutional on its face

and does not violate the Equal Protection Clause either on its face or as applied and, to reinstate the complaint for further proceedings with regard to the claims that, as applied, the statute violates the Commerce and Due Process Clauses, and otherwise affirmed, with costs. The order of the same court and Justice, entered January 15, 2009, which, inter alia, directed entry of a judgment dismissing the complaint in the separate declaratory judgment action challenging the constitutionality of subparagraph vi on Commerce Clause and federal and state due process and equal protection grounds, should be modified, on the law and on the facts, to declare that the statute is constitutional on its face, and does not violate the Equal Protection Clause either on its face or as applied, and to reinstate the complaint for further proceedings with regard to the claims that, as applied, the statute violates the Commerce and Due Process Clauses, and otherwise affirmed, with costs.

All concur except Catterson, J. who concurs in a separate Opinion.

CATTERSON, J. (concur)

While I believe that there may be a genuine issue of material fact sufficient to warrant a trial on the question of whether the tax in question violates the Commerce Clause as it is applied to the activities of the plaintiffs, I must nonetheless concur with the majority because on appeal, the plaintiffs have chosen to assert only a facial challenge to the statute's constitutionality under the Commerce Clause.

The majority maintains that, "[c]learly, Amazon's program, reasonably, is not designed for the passive advertiser, but seeks growth by reliance upon representatives who will look to solicit business." The majority concludes that, the statute in question would be valid "when a New York representative uses some form of proactive solicitation which results in a sale by Amazon, and a commission to the representative; and the representative has an in-state presence sufficient to satisfy the substantial nexus test." Unfortunately, the record is insufficient to rebut the premise as a matter of law.

Thus, I agree with the majority that in order to prevail on a facial challenge to the constitutionality of the tax at issue, plaintiffs must overcome the strong "presumption of constitutionality accorded to legislative enactments by proof

'beyond a reasonable doubt.'" Matter of Moran Towing Corp. v. Urbach, 99 N.Y.2d 443, 448, 757 N.Y.S.2d 513, 516, 787 N.E.2d 624, 627 (2003), quoting LaValle v. Hayden, 98 N.Y.2d 155, 161, 746 N.Y.S.2d 125, 129, 773 N.E.2d 490, 494 (2002). Furthermore, that plaintiffs bear the "substantial burden of demonstrating 'that "in any degree and in every conceivable application" the law suffers wholesale constitutional impairment.'" Moran Towing Corp., 99 N.Y.2d at 448, 757 N.Y.S.2d at 516, quoting Cohen v. State of New York, 94 N.Y.2d 1, 8, 698 N.Y.S.2d 574, 576, 720 N.E.2d 850, 852 (1999), quoting McGowan v. Burstein, 71 N.Y.2d 729, 733, 530 N.Y.S.2d 64, 65, 525 N.E.2d 710, 711 (1988). Had the challenge been based on the tax as applied to the plaintiffs' actual activities in New York, supported by a complete record of those activities as well as how the tax was apportioned, the plaintiffs may have had a valid challenge.

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

ENTERED: NOVEMBER 4, 2010

CLERK