Saxe, J.P., Acosta, Freedman, Richter, Abdus-Salaam, JJ.

3509 The People of the State of New York, Ind. 2963/08
Respondent,

-against-

Douglas Welsh,
Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Gregory Carro, J.), rendered June 4, 2009, convicting defendant, after a jury trial, of robbery in the first degree, and sentencing him to a term of 7 years, unanimously affirmed.

We reject defendant's contention that the evidence failed to establish that his conduct manifested the presence of a firearm. The requirement of Penal Law § 160.15(4), that defendant "display[] what appears to be a . . . firearm," was satisfied by the testimony describing the position taken by defendant, combined with words spoken by him.

The complainant was working, alone, behind the counter of a pizzeria when defendant walked up to the counter. The complainant testified that defendant first demanded, "Give me all the fucking money," and that after that, "he said that he had a

gun. He was going to shoot me in the face," causing the complainant to say "all right," open the cash register, and throw the cash on the counter. The complainant testified that while defendant gesticulated with his right hand, he kept his left arm rigidly in one position, with the elbow bent, so that his left hand would be situated near his waist. While both his waist and his hand were hidden from the complainant by the counter and the soda display on it, the People argued, and the jury could reasonably have found, that by his posture and the manner in which he had situated himself, defendant had purposefully created the impression that his left hand was on or near a gun at his waist.

Although Penal Law § 160.15(4) defines the crime as "[*d]isplay[ing]* what appears to be a . . . firearm" (emphasis added), case law makes clear that the victim of the robbery need not actually see the firearm, or even its outline or bulk. The Court of Appeals has explained that "the display requirement has been construed broadly to cover a wide range of actions which might reasonably create the impression in the mind of the victim that the robber is armed with a firearm" (*People v Lopez*, 73 NY2d 214, 220-221 [1989]). There must be a showing that the defendant "consciously displayed something that could reasonably be perceived as a firearm . . . and that the victim actually

perceived the display" (*id.* at 220). Thus, the firearm apparently being displayed may be "held inside a coat *or otherwise obscured*," and "even a hand consciously concealed in clothing may suffice" (*id.* [emphasis added]).

Following *Lopez*, this Court has recognized that to establish the display element it is sufficient that the victim hears the defendant say that he or she has a gun, and sees *some gesture by the defendant indicating* that the gun of which he spoke is at hand, albeit secreted or obscured; those actions by the defendant have been characterized as "manifesting" the firearm's presence. For instance, in *People v Clarke* (265 AD2d 170 [1999], *lv denied* 94 NY2d 821 [1999]), as defendant's companion snatched a necklace from the victim, he yelled to the defendant, "get the gun," and the victim saw the defendant reach into his waistband in response. By this combination of words and actions the defendant was found to have "manifested" that he had an gun in his waistband. In *People v Avilla* (234 AD2d 45 [1996]), the defendant told the victim, "I have a gun and I'm gonna blast you," then reached into his jacket pocket and rummaged around. In neither case did the victim actually see the weapon displayed, or even see its outline or a bulge; rather, the presence of the weapon was "*manifested*" by the defendant's physical gestures.

The showing here that defendant's hand was obscured behind

the counter display, so that the complainant could not see whether defendant was simulating a firearm or was simply placing his left hand at his waist or on the shoulder bag hanging down his left side, does not preclude a finding that defendant manifested the presence of a gun. When a person places his hand inside his coat, an observer cannot tell if the person is placing his hand on some other innocuous item or on a gun; the critical point is whether the words spoken *and the actions taken* "reasonably create[] the impression in the mind of the victim that the robber is armed with a firearm" (*Lopez*, 73 NY2d at 220-221). Defendant's hiding his hand from view behind the counter display is no different from sliding it into the inside of a jacket; it is the implication that the hand is reaching for the already mentioned gun, not the sight of the weapon itself, or the hand, that matters. Nor is the motion of the hand critical; it may be the motion or it may be the placement of the hand that gives the victim the impression that the robber has a firearm. Notably, this Court has affirmed a conviction for robbery in the first degree under Penal Law 160.15(4) where there was even less evidence than in this case that the defendant consciously created an impression of what could reasonably be -- and was -- perceived as a firearm (*see People v McDaniel*, 54 AD3d 577 [2008], *affd* 13 NY3d 751 [2009]). There, the "display" of a weapon was

established only by the testimony that the defendant held one hand at the complainant's neck and the other "'under the arm,' apparently near his waist"; there was not even an indication that the defendant explicitly stated that he had a gun (54 AD3d at 578 [Catterson, J., dissenting]).

Here, the jury necessarily found that the manner in which defendant positioned himself was calculated to make it appear that his left hand was reaching toward a concealed gun, and that this positioning served to indicate to his victim that the gun he had referred to in his verbal threat was within reach of his hidden left hand. This finding was sufficiently supported by the testimony. Nor was the verdict against the weight of the evidence.

Defendant's remaining contention is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits.

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

ENTERED: JANUARY 11, 2011

CLERK

Mazzarelli, J.P., Friedman, McGuire, Renwick, Richter, JJ.

3835 In re Tanya Parker, Index 251729/09
Petitioner,

-against-

Gladys Carrión, as Commissioner of the New York State Office of Children and Family Services, et al.,
Respondents.

_____

Legal Services NYC-Bronx, Bronx (Terry D. Lawson of counsel), for petitioner.

Andrew M. Cuomo, Attorney General, New York (Carol Fischer of counsel), for Gladys Carrión and John Franklin Udochi, respondents.

Michael A. Cardozo, Corporation Counsel, New York (Julie Steiner of counsel), for John B. Mattingly, respondent.

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Decision after hearing on behalf of respondent Commissioner, dated March 10, 2009, finding petitioner to have committed maltreatment of a child, unanimously annulled, on the law, without costs, the petition in this CPLR article 78 proceeding (transferred to this Court by order of Supreme Court, New York County [Cynthia S. Kern, J.], entered November 17, 2009), granted, and the report of maltreatment amended to "unfounded" and sealed.

The New York State Office of Children and Family Service (ACS) alleges that petitioner maltreated her daughter by the use of excessive corporal punishment. At the fair hearing, ACS had

the burden of establishing these allegations by a fair preponderance of the evidence (*see* Social Services Law § 424-a[2][d]; *Matter of Hattie G. v Monroe County Dept. of Social Servs., Children's Servs. Unit*, 48 AD3d 1292, 1293 [2008]), and that such corporal punishment impaired or was in imminent danger of impairing her daughter's physical, mental, or emotional condition (*see* Social Services Law § 412[2][a][i]; Family Ct Act § 1012[f][i]; *Matter of Cheyenne F.*, 238 AD2d 905 [1997]). "This prerequisite to a finding of [maltreatment based upon] neglect ensures that the [agency] . . . will focus on serious harm or potential harm to the child, not just on what might be deemed undesirable parental behavior" (*Nicholson v Scoppetta*, 3 NY3d 357, 369 [2004]). Impairment of a physical condition has been defined as "'a state of substantially diminished physical growth, freedom from disease, and physical functioning in relation to, but not limited to, fine and gross motor development and organic brain development'" *(Matter of Nassau County Dept. of Social Servs. v Denise J.*, 87 NY2d 73, 78 [1995], quoting Besharov, Practice Commentary, McKinney's Cons Laws of NY, Book 29A, Family Ct Act § 1012, at 321 [1999 ed]).

We conclude on the record before us that the administrative determination that petitioner neglected her daughter by the use of excessive corporal punishment was not supported by substantial

evidence. At the administrative hearing the only witness was petitioner, who testified that, on January 2, 2008, in response to her daughter slamming the door of her room, crying, and "throwing things around," when asked to look for crayons and pencils to do her homework, petitioner disciplined her child. Petitioner told her daughter she could not act that way. When the behavior continued, petitioner found a "child's belt," intending to hit her daughter with the belt on her behind. However, the child was accidentally hit in the face with the belt buckle when petitioner grabbed the child as she was running away. Petitioner never intended to hit her daughter on the face with the belt. Petitioner put bacitracin on the scratch and the scratch healed in a day or so.

There was no discernible basis for doubting petitioner's account that her daughter's eye injury was an accident. Indeed, the Administrative Law Judge (ALJ) never explicitly found that petitioner intended to strike her daughter in the face with the belt.

Nor do we agree with the ALJ's determination that, even if petitioner had not intended to hit her daughter with the belt on the face, the accident established neglect because petitioner allegedly struck the child out of anger, resulting in "impairment or threatened impairment of the child." We find that, under the

peculiar circumstances of this case, where there was no evidence presented at the hearing that the daughter required medical treatment for her eye injury or that petitioner had ever used excessive corporal punishment, the proof adduced by the respondent did not constitute substantial evidence of neglect (*see* Social Services Law § 412[2][a][i]; Family Ct Act § 1012[f][i]; *Matter of Veronica C. v Carrion*, 55 AD3d 411 [2008]; *see also Matter of Natiello v Carrion*, 73 AD3d 1070 [2010]).

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

ENTERED: JANUARY 11, 2011

CLERK

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

3893 Ivy Beloff, Index 116998/07
Plaintiff-Respondent,

-against-

Samy Gerges, et al.,
Defendants-Appellants,

Ralph Rodriguez, Jr., et al.,
Defendants-Respondents.

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Cascone & Kluepfel, LLP, Garden City (Michael T. Reagan of counsel), for appellants.

Bennett & Moy, LLP, New York (Alan J. Bennett of counsel), for Ivy Beloff, respondent.

Wallace D. Gossett, Brooklyn (Jane Shufer of counsel), for Ralph Rodriguez, Jr., Manhattan and Bronx Surface Transit Operating Authority and New York City Transit Authority, respondents.

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Order, Supreme Court, New York County (Michael D. Stallman, J.), entered April 20, 2010, which, insofar as appealed from, in this action for personal injuries, denied defendants Samy Gerges and Morgan Limo Trade Corp.'s motion for summary judgment dismissing the complaint as against them, unanimously reversed, on the law, without costs, the motion granted, and the complaint dismissed as to appellants. The Clerk is directed to enter judgment accordingly.

Plaintiff and her daughter were rear seat passengers in a taxi driven by defendant Gerges and owned by Morgan Limo. While

the taxi was stopped on First Avenue at or near the intersection with East 79th Street, it was struck in the rear by an uptown M-15 bus. The driver of the bus offered no explanation, non-negligent or otherwise, for the collision.

Defendants Gerges and Morgan Limo were entitled to summary judgment in their favor. Under New York law, "a rear-end collision with a stopped vehicle establishes a prima facie case of negligence on the part of the operator of the second vehicle," and the injured occupants of the front vehicle are entitled to summary judgment on liability unless the driver of the following vehicle can provide a non-negligent explanation for the accident (*Figueroa v Luna,* 281 AD2d 204, 206 [2001] [internal quotation marks and citation omitted]). We reject plaintiff's contention that the testimony of her daughter established that the taxi was not lawfully stopped, and therefore, furnished a non-negligent explanation for the stop that would deprive the driver of the benefit of the presumption of negligence. The daughter was seated in the rear of the taxi on the right hand, or curb side. She assumed, based on the distance of the taxi from the curb, that the taxi's rear end must have protruded into the next lane of traffic. However, she made no such observations and testified that she had no knowledge concerning the width of the lane of traffic. Under these circumstances, her testimony was mere

speculation. The presence of the taxi in the right lane "merely furnished the condition or occasion for the occurrence of the event," rather than constituting one of its causes (*Sheehan v City of New York*, 40 NY2d 496, 503 [1976]). Defendants, accordingly, were entitled to summary judgment in their favor.

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

ENTERED: JANUARY 11, 2011

CLERK

Saxe, J.P., Friedman, McGuire, Abdus-Salaam, Román, JJ.

4016 &
M-5647 David Abraham, Index 102623/09
Petitioner-Appellant,

-against-

Diamond Dealers Club, Inc.,
Respondent-Respondent,

Jacob Banda,
Respondent.

_____

Arent Fox LLP, New York (Eugene R. Scheiman of counsel), for appellant.

S. Herman Klarsfeld, P.C., New York (Jeffrey R. Berke of counsel), for respondent.

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Order and judgment (one paper), Supreme Court, New York County (Michael D. Stallman, J.), entered March 23, 2010, which, inter alia, denied the petition seeking to set aside the vote of members that approved amendments to the by-laws of respondent Diamond Dealers Club, Inc. (DDC), and dismissed the proceeding, unanimously affirmed, with costs.

The court properly determined that the voting rights of the members of DDC could not be automatically suspended for non-payment of dues. Contrary to petitioner's claim, Not-For-Profit Corporation Law § 507(c) required DDC to give a member "reasonable notice," in addition to the provisions of the by-laws themselves, to enforce the collection of dues against that

member. The court also correctly determined that the notice of a special meeting, sent by DDC's then-president, complied with DDC's by-laws. Furthermore, petitioner failed to show that the discovery he requested was material or necessary (*see e.g. Stapleton Studios v City of New York*, 7 AD3d 273, 275 [2004]), since the record demonstrates that no voting members had been suspended prior to the special meeting.

M-5647 - *David Abraham v Diamond Dealers Club, Inc., et al.*

Motion to strike portions of brief denied.

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

ENTERED: JANUARY 11, 2011

CLERK

Andrias, J.P., Friedman, Catterson, Renwick, DeGrasse, JJ.

4020 The People of the State of New York, Ind. 3878/08
Respondent,

-against-

Alexis Cordoba,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Matthew T. Murphy of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Maxwell Wiley, J.), rendered November 23, 2009, convicting defendant, upon his plea of guilty, of attempted reckless endangerment in the first degree, and sentencing him, as a second felony offender, to a term of 1½ to 3 years, unanimously affirmed.

Defendant, who concedes that a guilty plea to the logically impossible crime of attempted reckless endangerment may be permissible under *People v Foster* (19 NY2d 150 [1967]), claims his plea was involuntary because the court did not advise him that he was pleading guilty to a nonexistent crime. Defendant did not move to withdraw his guilty plea, and since this case does not come within the narrow exception to the preservation requirement (*see People v Lopez*, 71 NY2d 662 [1988]), this claim is unpreserved and we decline to review it in the interest of

justice. As an alternative holding, we also reject it on the merits. The record establishes that defendant's plea was made with a full understanding of the charge to which he was pleading guilty, and there was nothing in the plea allocution that cast doubt on his guilt (*see People v Toxey*, 86 NY2d 725 [1995]). Defendant's allocution clearly established that he was admitting his guilt of first-degree reckless endangerment. Adding the word "attempted," in a plea context, did not change the crime defendant was admitting, but was simply a device to extend leniency by lowering the degree of felony under Penal Law § 110.05(6).

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

ENTERED: JANUARY 11, 2011

CLERK

Andrias, J.P., Friedman, Catterson, Renwick, DeGrasse, JJ.

4021 On Kee Foods, Inc., et al., Index 103279/06
Plaintiffs-Respondents,

-against-

7 Eldridge LLC, etc.,
Defendant-Appellant.

_____

Green & Cohen P.C., New York (Michael R. Cohen of counsel), for appellant.

Jerald D. Kreppel, New York, for respondents.

_____

Order, Supreme Court, New York County (Richard F. Braun, J.), entered October 8, 2009, which, in an action alleging breach of commercial leases, denied defendant's motion to vacate a default judgment entered against it, unanimously affirmed, with costs.

Defendant failed to provide a reasonable excuse for its default in appearing at an inquest and did not proffer a meritorious defense on the issue of damages (*see e.g. Crespo v A.D.A. Mgt.*, 292 AD2d 5, 9 [2002]). The contention that it did not receive any notice of the inquest is belied by the evidence. Plaintiffs' counsel informed defense counsel of the conference date, had faxed over a letter confirming the date, and called and left messages with defense counsel's office on the day of the conference. Regarding its meritorious defense, defendant failed

to submit evidence or raise arguments concerning the issue of damages.

We also note that the motion was properly denied as untimely. The record shows that the judgment with notice of entry was served on December 22, 2007, and the subject motion was not brought until August 2009 (*see* CPLR 5015[a][1]).

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

ENTERED: JANUARY 11, 2011

CLERK

Andrias, J.P., Friedman, Catterson, Renwick, DeGrasse, JJ.

4022 In re Omar Saheem Ali J., etc.,

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

Matthew J.,
Respondent-Appellant,

Little Flower Children and Family
Services of New York,
Petitioner-Respondent.

_____

Neal D. Futerfas, White Plains, for appellant.

Carrieri & Carrieri, P.C., Mineola (Ralph R. Carrieri of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (John A. Newbery of counsel), attorney for the child.

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Order, Family Court, Bronx County (Carol A. Stokinger, J.), entered on or about May 18, 2009, which, upon a fact-finding determination that respondent father had abandoned the subject child, terminated his parental rights and committed custody and guardianship of the child to petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.

The finding of abandonment was established by clear and convincing evidence *(see Matter of Ruben J.R.*, 303 AD2d 238 [2003], *lv denied* 100 NY2d 507 [2003]). The father did not contact the agency or the child, and did not send letters, cards

or gifts for his son during the six months immediately preceding the filing of the petition (*see Matter of Annette B.*, 4 NY3d 509, 513 [2005]). Although a court order prevented the father from visiting the child until a mental health evaluation was completed, that did not absolve him of the obligation to maintain contact and he took no steps to resume contact once the report was completed *(see Matter of Raquel N. [Evelyn O.]*, 71 AD3d 418, 419 [2010]). Furthermore, contrary to the father's assertion, the agency was not required to demonstrate diligent efforts to encourage his relationship with the child (*see Matter of Gabrielle HH.,* 1 NY3d 549, 550 [2003]).

The father's request for a suspended judgment was raised for the first time on appeal, and is unpreserved. In any event, a suspended judgment would not have been appropriate under the circumstances. The child was in a loving, preadoptive foster home for several years, where his special needs were being met (*see Matter of Kairi Jazlyn F.*, 50 AD3d 602 [2008].

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

ENTERED: JANUARY 11, 2011

CLERK

Andrias, J.P., Friedman, Catterson, Renwick, DeGrasse, JJ.

4025 Kolmar Americas, Inc., Index 602644/08
Plaintiff-Appellant,

-against-

Marathon Petroleum Company, LLC,
Defendant-Respondent.

_____

Kelley Drye & Warren LLP, New York (James E. Nealon of counsel), for appellant.

Blank Rome LLP, New York (John D. Kimball of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Ira Gammerman, J.H.O.), entered October 27, 2010, which, after a nonjury trial, dismissed the complaint and counterclaim, unanimously affirmed, with costs.

In this breach of contract action, Kolmar alleged that petroleum it purchased from Marathon failed to conform to previously agreed-upon quality specifications. The court providently exercised its discretion in finding that plaintiff failed to put forth a foundation to introduce into evidence the independent reports indicating the quality of the petroleum tested at Marathon's refinery (*see Montes v New York City Tr. Auth.*, 46 AD3d 121 [2007]). The court also providently exercised its discretion in denying Kolmar's mid trial motion to call a

witness to lay a foundation for the reports (*see e.g. Mayorga v Jocarl & Ron Co.*, 41 AD3d 132, 134 [2007], *appeal dismissed* 9 NY3d 996 [2007]).

In any event, the trial testimony and documentary evidence established that there was no meeting of the minds between the parties as to essential contract terms regarding, inter alia, the quality and quantity of the petroleum being purchased (*see Kleinschmidt Div. of SCM Corp. v Futuronics Corp.*, 41 NY2d 972 [1977]). Therefore, the proffered evidence would not have changed the result of the trial (*see Division Seven, Inc. v HP Bldrs. Corp.*, 58 AD3d 796 [2009]).

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

ENTERED: JANUARY 11, 2011

CLERK

Andrias, J.P., Friedman, Catterson, Renwick, DeGrasse, JJ.

4028 The People of the State of New York, Ind. 1159/08
Respondent,

-against-

Edward Harvey,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Mary C. Farrington of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Ronald A. Zweibel, J.), rendered January 23, 2009, convicting defendant, after a jury trial, of criminal possession of a weapon in the third degree and sentencing him, as a persistent felony offender, to a term of 15 years to life, unanimously modified, as an exercise of discretion in the interest of justice, to the extent of vacating the persistent felony offender adjudication and reducing the sentence to 3½ to 7 years, and otherwise affirmed.

The court improvidently exercised its discretion in adjudicating defendant a persistent felony offender.

We have considered and rejected defendant's remaining claims.

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

ENTERED: JANUARY 11, 2011

CLERK

Andrias, J.P., Friedman, Catterson, Renwick, DeGrasse, JJ.

4029 Mode Contempo, Inc., Index 650198/09
Plaintiff-Respondent-Appellant,

-against-

Raymours Furniture Company, Inc.,
Defendant-Appellant-Respondent.

_____

Hahn & Hessen LLP, New York (John P. Amato of counsel), for appellant-respondent.

Adam J. Feldman, Mineola, for respondent-appellant.

_____

Order, Supreme Court, New York County (Ira Gammerman, J.H.O.), entered March 3, 2010, which, insofar as appealed from, granted defendant's motion to dismiss the complaint to the extent of dismissing the cause of action alleging breach of contract, and found that plaintiff had sufficiently stated a claim for breach of a duty to negotiate in good faith the terms of a prospective lease assignment, unanimously modified, on the law, to grant the motion in its entirety, without costs. The Clerk is directed to enter judgment in favor of defendant dismissing the complaint.

Even accepting the facts alleged in the complaint as true and according plaintiff the benefit of every possible inference therefrom (*see e.g. Leon v Martinez*, 84 NY2d 83, 87-88 [1994]), the breach of contract cause of action was properly dismissed.

The evidence demonstrates that there was no meeting of the meeting of the minds with respect to a material term of the promissory note and accordingly, no contract to be breached (*see Matter of Express Indus. & Term. Corp. v New York State Dept. of Transp.*, 93 NY2d 584, 589-590 [1999]; *Joseph Martin, Jr., Delicatessen v Schumacher*, 52 NY2d 105, 109-110 [1981]).

However, the motion court erred in finding that the complaint sufficiently stated a claim for breach of a duty to negotiate in good faith. The final material term of the promissory note was left open for negotiation between the parties, and simply because those negotiations ultimately failed, it cannot be said that defendant acted in bad faith (*see e.g. Bernstein v Felske*, 143 AD2d 863, 865 [1988]).

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

ENTERED: JANUARY 11, 2011

CLERK

Andrias, J.P., Friedman, Catterson, Renwick, DeGrasse, JJ.

4031 The People of the State of New York, Respondent, Ind. 7741/02

-against-

Michael Shaw, Defendant-Appellant.

_____

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

Michael Shaw, appellant pro se.

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

_____

Judgment, Supreme Court, New York County (Renee A. White, J.), rendered June 10, 2008, convicting defendant, after a jury trial, of rape in the first degree and burglary in the first degree, and sentencing him, as a second violent felony offender, to consecutive terms of 12½ to 25 years and 3½ to 7 years, unanimously affirmed.

The court did not violate defendant's right of confrontation when it received two declarations by the nontestifying victim in which she described being raped, since neither declaration was testimonial. The victim died before defendant was identified, years later, by means of DNA evidence. At trial, the sole issue was consent.

The first declaration was made to a police officer who

responded shortly after the crime. This statement was not testimonial, because it was primarily made "to enable police assistance to meet an ongoing emergency" (*Davis v Washington*, 547 US 813, 822 [2006]; *People v Nieves-Andino*, 9 NY3d 12 [2007]; *People v Smith*, 37 AD3d 333 [2007], *lv denied* 8 NY3d 950 [2007]). Rather than gathering information about past events for the purpose of future prosecution, the officer's primary purpose was to ascertain what had happened and deal with the danger posed to other persons in the area by a knife-wielding suspect who had just committed a violent crime, and who might have still been nearby. A second aspect of the ongoing emergency was the officer's need to learn the facts in order to determine whether the victim required prompt medical assistance.

The second declaration at issue was made to a gynecologist who examined the victim at a hospital. This was not testimonial, because the doctor acted primarily as a treating physician (*see People v Duhs*, 65 AD3d 699 [2009], *lv granted* 14 NY3d 887 [2010]), and her role in gathering evidence for the police by way of a rape kit was secondary. Although the gynecologist prepared a sexual assault form and questionnaire as part of the rape kit, neither was received in evidence.

In any event, any error in admitting either or both declarations was harmless, since these declarations were

cumulative to unchallenged declarations made to other persons and admitted into evidence, and since there was overwhelming evidence establishing the element of force (*see People v Crimmins*, 36 NY2d 230 [1975]).

Defendant's trial counsel did not render ineffective assistance by failing to challenge the constitutionality under *Apprendi v New Jersey* (530 US 466 [2000]) of the procedure by which the court imposed consecutive sentences, since such a challenge would have been unavailing (*see Oregon v Ice*, 555 US 160 [2009]).

We have considered and rejected the claims contained in defendant's pro se supplemental brief.

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

ENTERED: JANUARY 11, 2011

CLERK

Andrias, J.P., Friedman, Catterson, Renwick, DeGrasse, JJ.

4035 The People of the State of New York, Ind. 2634/08
Respondent,

-against-

Larry Benekin,
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 (Brian E. Rodkey 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 January 28, 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: JANUARY 11, 2011

CLERK

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

Tom, J.P., Mazzarelli, Sweeny, Freedman, Abdus-Salaam, JJ.

3123-
3124-
3124A ABN AMRO Bank, N.V., et al., Index 601475/09
Plaintiffs-Respondents,

-against-

MBIA Inc., et al.,
Defendants-Appellants.
- - - - - -
Aurelius Capital Master, Ltd.,
Aurelius Capital Partners, LP,
Fir Tree Value Master Fund, L.P.,
Fir Tree Capital Opportunity
Master Fund L.P. and Fir Tree Mortgage
Opportunity Master Fund, L.P.,
Amici Curiae.

_____

Kasowitz, Benson, Torres & Friedman LLP, New York (Marc E. Kasowitz of counsel), for appellants.

Sullivan & Cromwell LLP, New York (Gandolfo V. DiBlasi of counsel), for respondents.

Simpson Thacher & Bartlett LLP, New York (David W. Ichel of counsel), for amici curiae.

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Orders, Supreme Court, New York County (James A. Yates, J.), entered February 18, 2010, March 2, 2010 and March 5, 2010, reversed, on the law, with costs, and the motion granted. The Clerk is directed to enter judgment in favor of defendants dismissing the complaint.

Opinion by Freedman, J. All concur except Tom, J.P. and Abdus-Salaam, J. who dissent in part in an Opinion by Abdus-Salaam, J.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
Angela M. Mazzarelli
John W. Sweeny, Jr.
Helen E. Freedman
Sheila Abdus-Salaam, JJ.

3123-
3124-
3124A
Index 601475/09

_____x

ABN AMRO Bank, N.V., et al.,
Plaintiffs-Respondents,

-against-

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

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Aurelius Capital Master, Ltd.,
Aurelius Capital Partners, LP,
Fir Tree Value Master Fund, L.P.,
Sir Tree Capital Opportunity
Master Fund L.P. and Fir Tree Mortgage
Opportunity Master Fund, L.P.,
Amici Curiae.

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Defendants appeal from orders of the Supreme Court, New York County (James A. Yates, J.), entered February 18, 2010, March 2, 2010 and March 5, 2010, which denied their motion to dismiss the complaint.

Kasowitz, Benson, Torres & Friedman LLP, New York (Marc E. Kasowitz, Daniel R. Benson, Aaron H. Marks, Albert S. Mishaan and Kenneth R. David of counsel), for appellants.

Sullivan & Cromwell LLP, New York (Gandolfo V. DiBlasi, Michael T. Tomaino, Jr. and Brian T. Frawley of counsel), for respondents.

Simpson Thacher & Bartlett LLP, New York (David W. Ichel, Barry R. Ostrager, Joseph M. McLaughlin, Patrick T. Shilling and Seth M. Kruglak of counsel), for amici curiae.

FREEDMAN, J.

Plaintiffs are institutions that hold insurance policies issued by defendant MBIA Insurance Corporation (MBIA Insurance), that along with the other defendants form a conglomerate. By this plenary action, plaintiffs challenge the restructuring of the conglomerate in 2009, which the Superintendent of the New York State Insurance Department had approved. Plaintiffs claim that the restructuring amounted to a fraudulent conveyance that left MBIA Insurance undercapitalized and potentially unable to pay out on plaintiffs' future claims on their policies. The complaint asserts causes of action for breach of contract, unjust enrichment, and violation of the Debtor and Creditor Law, and also seeks a declaratory judgment piercing the corporate veil.

Defendants contend in a motion to dismiss the complaint that plaintiffs fail to state causes of action, and that the claims constitute an impermissible collateral attack on the Superintendent's approval of the restructuring, which plaintiffs can only challenge in the article 78 proceeding that they have also commenced. The motion court denied defendants' dismissal motion and we reverse.

The following is not in dispute: Before the restructuring, MBIA Insurance was the wholly-owned subsidiary of defendant MBIA

Inc., a publicly traded holding company, and defendant MBIA Insurance Corp. of Illinois (MBIA Illinois),[1] an essentially dormant company, was the wholly-owned subsidiary of MBIA Insurance. MBIA Insurance, the only active insurer of the three, was licensed under Insurance Law article 69 to offer financial guaranty insurance policies in New York covering securities and other financial instruments held by its policyholders. Under each policy, MBIA Insurance promised to pay the policyholder if the obligor on the covered instrument failed to pay amounts owing on it. Historically, MBIA Insurance had been the world's largest guaranty insurer for municipal bonds and other securities issued by public entities, and its business had exclusively consisted of writing those policies, but in recent years the company had branched out into providing coverage for "structured-finance" products, which are obligations payable from or tied to the performance of pools of assets (such as mortgage-backed securities and collateralized debt obligations). As of the end of 2008, roughly 70% of MBIA Insurance's portfolio consisted of municipal bond policies ($553.7 billion in face amount) and 30% consisted of structured-finance product policies ($233 billion in

[1]MBIA Illinois is now known as National Public Finance Guarantee Corporation.

face amount).

Plaintiffs in this action hold MBIA Insurance policies guaranteeing payment on structured finance products in plaintiffs' portfolios. With the onset of turmoil in the financial markets in 2007, the risk of payment defaults for structured-finance products increased, as did MBIA Insurance's potential liability under its structured-finance policies. The company's growing exposure caused the rating agencies to downgrade its creditworthiness. MBIA Insurance stopped writing new structured-finance policies as of early 2008.

On February 25, 2008, MBIA Inc. publicly announced its plan to establish separate business entities to operate its "public, structured, and asset management businesses." On December 5, 2008, MBIA Insurance, on behalf of itself and its affiliates, submitted an application to the Superintendent setting forth its plan to restructure defendants' business through a series of transactions, many of which required the approval or non-objection of the Superintendent pursuant to various sections of the Insurance Law.

In its application, which was supplemented and amended a number of times through February 16, 2009, MBIA Insurance proposed the following transactions: First, MBIA Insurance would

pay a $1.147 billion dividend to MBIA Inc. Second, MBIA Insurance would redeem about a third of its capital stock from MBIA Inc. and retire it, and in exchange would give MBIA Inc. about $938 million more in cash and securities plus all of the outstanding stock of MBIA Illinois. Third, MBIA Inc. would transfer the approximately $2.27 billion of cash and securities it had received from MBIA Insurance for its dividend and stock redemption, along with the stock of MBIA Illinois, to MBIA Inc.'s wholly-owned subsidiary, MuniCo Holdings, Inc. (MuniCo Holdings). The transfer would change MBIA Illinois from a subsidiary of MBIA Insurance to a subsidiary of MuniCo Holdings. Fourth, MuniCo Holdings would capitalize MBIA Illinois by contributing $2.085 million of the cash and securities that it had received from MBIA Inc.

As the final step of the restructuring, MBIA Insurance proposed that MBIA Insurance and MBIA Illinois would enter into a complex reinsurance transaction, in which, among other things, MBIA Illinois would reinsure nearly all of MBIA Insurance's policies for municipal bonds and other public finance securities on a "cut-through" basis, meaning that public finance policyholders could claim directly against MBIA Illinois as well as MBIA Insurance. In exchange, MBIA Insurance would pay MBIA

Illinois about $3.66 billion, which included about $3 billion in premiums that public finance policyholders had prepaid. Under the proposal, MBIA Illinois would also agree to administer and service all of MBIA Insurance's reinsured policies. The end result of the restructuring was to segregate MBIA Insurance's public finance and structured finance portfolios by having the newly-capitalized MBIA Illinois take responsibility for the public finance portfolio, leaving only MBIA Insurance liable for claims under the structured finance portfolio.

The Superintendent responded to MBIA Insurance's application by letter dated February 17, 2009. After describing the proposed transactions in detail, the Superintendent issued the following determinations, among others: First, the Superintendent approved the MBIA Insurance dividend payment to MBIA Inc. under Insurance Law § 4105(a), which required the Superintendent to determine that MBIA Insurance would "retain sufficient surplus to support its obligations and writings." Second, the Superintendent approved the stock redemption as "reasonable and equitable" to MBIA Insurance, as required under Insurance Law § 1411(d).

The Superintendent next addressed aspects of the proposed reinsurance transaction which required his permission or non-disapproval under a number of Insurance Law provisions.

Sections 1505(a) and 1505(d) of the Insurance Law provide, in relevant part, that a "domestic controlled insurer" (here, MBIA Insurance) and "any person in its holding company system" (here, MBIA Illinois) may enter into a reinsurance transaction upon 30 days advance notice to the Superintendent, if, after considering (among other factors) "whether the transaction may adversely affect the interests of policyholders," the Superintendent does not disapprove the transaction. In his letter, the Superintendent specified that, based upon the statutory factors, he did not disapprove. The Superintendent also confirmed that MBIA Insurance would receive full financial credit for the reinsurance arrangement under Insurance Law §§ 1308 and 6906(a), so that it could release all unearned premium, contingency, and other reserves attributable to the reinsured public finance policies.

For each approval, non-disapproval or other determination in the letter, the Superintendent stated that he relied on the truth of MBIA Insurance's representations in its application and other submissions, on the Superintendent's examination of defendants' financial condition before the restructuring, and on his analysis of defendants' financial condition after the restructuring.

On February 17, 2009, the same day that the Superintendent

issued his letter, defendants consummated the restructuring transactions. On February 18, the Superintendent issued a press release entitled "Department Facilitates, Supervises MBIA Split; Should Add Capacity to Municipal Bond Insurance Market." The press release announced that the Superintendent had overseen "a transformation of [MBIA Insurance] that effectively splits that company in two, dividing its assets and liabilities between two highly capitalized insurance companies." The Superintendent added that

> "[b]oth [MBIA Insurance] and [MBIA Illinois] will continue to pay all valid claims in a timely fashion, and both entities will have sufficient resources to meet policyholder claims as they come due. Consistent with New York State Insurance Law, the [Superintendent] only approved the transaction after deciding that both companies would have sufficient statutory capital to meet the letter and spirit of the Insurance Law. The review and study process lasted approximately one year."

In May 2009, plaintiffs commenced this action in which they assert fraudulent conveyance claims against defendants under New York Debtor and Creditor Law (DCL) §§ 273, 274 and 276. They also assert common law claims for breach of the implied covenant of good faith and fair dealing and unjust enrichment, and seek a declaration piercing the corporate veil and holding defendants

jointly and severally liable under MBIA Insurance's policies. The essence of plaintiffs' allegations is that, through the business restructuring, defendants had siphoned assets worth about $5 billion from MBIA Insurance and transferred them to MBIA Illinois to limit their exposure to "an ongoing financial crisis that has made it increasingly likely that MBIA Insurance will have to pay out billions to [p]laintiffs and other holders of financial guarantee insurance policies written by MBIA Insurance." As a result, plaintiffs claim, MBIA Insurance is insolvent. Plaintiffs asked the trial court to invalidate the transfer of assets out of MBIA Insurance, or alternatively to declare that defendants are jointly and severally liable to plaintiffs under their MBIA Insurance policies. Plaintiffs claimed that MBIA Insurance would be unable to meet its future obligations under their policies, but they did not allege that the company has failed to pay them on any outstanding claims, or even that they have suffered any other monetary damages.

On June 9, 2009, in lieu of answering, defendants moved to dismiss the complaint on the ground that plaintiffs' claims in this plenary action are impermissible collateral attacks on the Superintendent's approval of the restructuring, which can only be challenged in an article 78 proceeding, and that the claims fail

to state causes of action. Six days later, plaintiffs filed an article 78 petition naming the Superintendent and defendants as respondents. Plaintiffs claim that the Superintendent acted arbitrarily and capriciously, abused his discretion, and exceeded his authority by issuing the February 17 letter and making the determinations therein because the restructuring "is not 'fair and equitable' to MBIA Insurance or its structured-finance policyholders." For relief, plaintiffs ask that the February 17 letter be annulled and the Superintendent be directed to disapprove the transactions at issue. The article 78 proceeding was assigned to the same Justice that presides over this action.

By decision and order dated February 17, 2010, as corrected on February 24, 2010, the motion court denied defendants' motion to dismiss the complaint in this action. Rejecting the argument that plaintiffs were collaterally attacking the Superintendent's approval, the court held that approval under the Insurance Law did not "immunize" defendants from claims under the Debtor and Creditor Law and the common law. The court also emphasized that the Superintendent had issued the approval letter without giving plaintiffs and other MBIA Insurance holders notice or an opportunity to be heard. In addition, the court found that the scope of the Superintendent's review and approval in the letter

was unclear, and stated that its ruling did not foreclose defendants from asserting their collateral attack argument in a summary judgment motion after discovery had been conducted. Finally, the court rejected defendants' challenges to the legal sufficiency of plaintiffs' allegations.

The three common-law claims should have been dismissed for failure to state causes of action. For their breach of contract claim, plaintiffs allege that MBIA Insurance breached an implied covenant of good faith and fair dealing in its insurance policies. Plaintiffs do not claim that MBIA Insurance has failed to make any payment due under the policies, but instead contend that the company has frustrated an implicit purpose of obtaining the policies, namely "to enhance the value and credit rating" of the covered structured finance products. However, since this alleged purpose is nowhere reflected in the policies, it cannot serve as the basis for a claim of breach of contract or breach of the implied covenant of good faith and fair dealing (*see National Union Fire Ins. Co. of Pittsburgh, Pa. v Xerox Corp.*, 25 AD3d 309, 310 [2006], *lv dismissed* 7 NY3d 886 [2006] [covenant of good faith and fair dealing cannot be construed so broadly as to create independent contractual rights]). The dissent opines that plaintiffs state a claim by alleging that the restructuring

increased the chance of default on the insurance policies, but given that no default has occurred and no monetary damages are claimed, no breach of a specific contractual provision has been made out.

The claim seeking a declaration piercing the corporate veil and holding defendants jointly and severally liable also fails. As noted, plaintiffs do not allege that they have suffered injury because MBIA Insurance has not paid any of its obligations under the insurance policies. Rather, plaintiffs seek a declaratory judgment that, should the obligors under their insured securities default in the future, then plaintiffs may look to MBIA Inc. and MBIA Illinois to satisfy their insurance claims. In effect, plaintiffs seek an advisory opinion premised on future events that are beyond defendants' control and thus are speculative. This is not the proper subject of a declaratory judgment claim (*see Cuomo v Long Is. Light. Co.*, 71 NY2d 349, 354 [1988]; *Uhlfelder v Weinshall*, 47 AD3d 169, 182 [2007]). Moreover, the basis for any declaratory judgment would be a finding that the restructuring was a fraudulent conveyance, in direct conflict with the Superintendent's determinations.

Plaintiffs also fail to allege particularized statements detailing fraud or other corporate misconduct that would warrant

piercing the corporate veil, especially since defendants were formed for legal purposes and engaged in legitimate business (*see Sheridan Broadcasting Corp. v Small*, 19 AD3d 331, 332-333 [2005]). Plaintiffs do not claim, for instance, that any of defendants were the mere alter egos of another or that the corporate formalities were disregarded. Plaintiffs complain of the actions of the defendant corporations, but do not claim that any of them were not legitimate entities organized for legitimate purposes. Thus, plaintiffs' allegations are insufficient to make out a claim that MBIA Inc., through its domination of MBIA Insurance, abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice against plaintiffs "such that a court in equity will intervene" (*id.*; *see also Ward v Cross County Multiplex Cinemas, Inc*, 62 AD3d 466 [2009]).

Plaintiffs also fail to state a cause of action for unjust enrichment, a quasi-contractual claim based on the principle that a person should not be allowed to enrich himself or herself at the expense of another (*see IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 [2009]). Plaintiffs do not allege that they have conferred some benefit upon MBIA Inc. and MBIA Illinois at plaintiffs' expense. Rather, their contention is

that those companies hold assets that, "in equity and good conscience, should be returned to MBIA Insurance," which is insufficient to allege an unjust enrichment claim (*see IDT Corp.*, 12 NY3d at 142).

The remaining causes of action, under the Debtor and Creditor Law, should have dismissed as improper collateral attacks on the determinations that the Superintendent made in the exercise of his regulatory authority. "The Superintendent of Insurance, as the head of the Insurance Department of the State of New York, has been given full authority to supervise and regulate the business of insurance of insurance in this State" (*Blue Cross & Blue Shield of Cent. N.Y. v McCall*, 89 NY2d 160, 163 [1996]; *see also* Insurance Law §§ 201, 301). The Superintendent periodically examines the affairs of every insurer doing business in New York (Insurance Law § 309), and upon determining that an insurer lacks sufficient assets to honor its commitments to policyholders, the Superintendent may initiate insolvency proceedings under article 74 of the Insurance Law (*see Corcoran v Ardra Ins. Co.*, 156 AD2d 70, 73 [1990], *affd* 77 NY2d 225 [1990], *cert denied* 500 US 953 [1991]).

The appropriate vehicle for challenging a determination by the Superintendent is a proceeding brought under CPLR article 78

(*see* CPLR 7801; Insurance Law § 326 [specifying that determinations of the Superintendent are subject to judicial review in an article 78 proceeding]; *Matter of City of New York [Grand Lafayette Props. LLC]*, 6 NY3d 540, 547 [2006]; *Sohn v Calderon*, 78 NY2d 755, 767 [1991]; *Matter of Lewis Tree Serv. v Fire Dept. of City of N.Y.*, 66 NY2d 667 [1985]). A plenary action that seeks the overturn of the Superintendent's determination, or challenges matters that the determination necessarily encompasses, constitutes "an impermissible 'indirect challenge'" to that determination (*Fiala v Metropolitan Life Ins. Co.*, 6 AD3d 320, 321 [2004], quoting *Chatlos v MONY Life Ins. Co.*, 298 AD2d 316, 317 [2002], *lv denied* 99 NY2d 504 [2003]). In *Fiala*, this Court upheld the dismissal of statutory and common-law claims that policyholders had brought against the issuing insurance company and its directors for consummating the company's conversion, or "demutualization," from a mutual life insurance company to a domestic stock life insurance company, after the Superintendent had approved the demutualization plan under Insurance Law § 7312 (6 AD3d at 321-322). This Court found that the dismissed claims constituted impermissible collateral

attacks on the Superintendent's determination.[2]

The attempt to distinguish *Fiala* on the ground that the Superintendent approved the demutualization plan after notice to policyholders and a public hearing is not sound, given that the application and approval process for the restructuring did not violate lawful administrative procedure. In any event, plaintiffs have not been deprived of the opportunity to be heard, since their article 78 proceeding enables them to challenge the Superintendent's approval and the restructuring. The dissent's concern that, without notice, plaintiffs might have missed the deadline for filing the article 78 proceeding, is not relevant here.

By their first, second and third causes of action, plaintiffs allege that the restructuring was a fraudulent conveyance under DCL § 273 because MBIA Insurance did not receive fair consideration for transferring its assets, under DCL § 274 because the transfer left MBIA Insurance with unreasonably small

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[2]The motion court's assertion that, in *Fiala*, this Court only upheld the dismissal of claims alleging that the insurer defendants violated provisions of the Insurance Law was mistaken. This Court also upheld the dismissal of claims for breach of contract, breach of fiduciary duty, and fraud as impermissible collateral attacks on the Superintendent's determination (*Fiala*, 6 AD2d at 322).

capital, and under DCL § 276 because defendants actually intended to hinder, delay, and defraud MBIA Insurance's structured-finance policyholders. These allegations directly conflict with the Superintendent's determination, based on an analysis of defendants' financial condition after the restructuring, that MBIA Insurance would retain "sufficient surplus to support its obligations and writings" and that the transaction was fair to MBIA Insurance's policyholders. Further, plaintiffs seek to reverse the dividend, stock redemption and reinsurance transactions that comprise the restructuring, notwithstanding that the Superintendent specifically approved those transactions. Accordingly, the only appropriate vehicle for plaintiffs' claims is their proceeding pursuant to CPLR article 78.

The dissent contends that, because plaintiffs seek damages or a declaration that defendants are jointly and severally liable, they raise matters that the Superintendent did not consider. But since plaintiffs are not claiming that MBIA Insurance presently owes them any payment under the structured finance policies and have not suffered any damages, they neither seek any monetary relief nor state a viable cause of action for a declaratory judgment. Moreover, all of plaintiffs' allegations in the complaint necessarily conflict with the Superintendent's

broad determination that the restructuring is fair to MBIA Insurance policyholders and that the company remains solvent.[3]

The dissent also claims that the allegation that the restructuring was a fraudulent conveyance would not conflict with the Superintendent's determination because the MBIA Insurance application was submitted and the determination was issued before the restructuring (i.e., the allegedly fraudulent conveyance) took place. But that contention is belied by the near-simultaneity of these events and the substance of the determination. MBIA Insurance last supplemented its application on February 16, 2009, the Superintendent issued its determination that the restructuring transactions would be fair to defendants on February 17, and the transactions occurred later the same day.

Finally, plaintiffs never claim, as the dissent maintains, that defendants deliberately misled the Superintendent about their finances and the effect of the restructuring to obtain the Superintendent's approval. At most, plaintiffs allege that while MBIA Inc. has "claimed publicly that its internal projections

[3]Since the Superintendent's determination about the restructuring is comprehensive, the analysis of the United States District Court in *Aurelius Capital Master, Inc. v MBIA Ins. Corp.* (695 F Supp 2d 68 [2010]) does not provide a basis for maintaining this action.

show that MBIA Insurance is still solvent," it admits in other public filings that such projections are the result of "an inherently uncertain process" and that there was no assurance that its estimates were accurate. If plaintiffs are contending that the Superintendent based his determination on bad information and projections, they should explore the factual bases for the determination in the article 78 proceeding to which the Superintendent is a party.

Accordingly, the orders of the Supreme Court, New York County (James A. Yates, J.), entered February 18, 2010, March 2, 2010 and March 5, 2010, which denied defendants' motion to dismiss the complaint, should be reversed, on the law, with costs, and the motion granted. The Clerk is directed to enter judgment in favor of defendants dismissing the complaint.

All concur except Tom, J.P. and Abdus-Salaam, J. who dissent in part in an Opinion by Abdus-Salaam, J.

ABDUS-SALAAM, J. (dissenting in part)

I would modify, on the law, only to the extent of dismissing the cause of action for unjust enrichment, and would otherwise affirm.

This action alleges fraudulent conveyances under New York Debtor and Creditor Law, breach of contract and unjust enrichment. Plaintiffs hold financial guarantee insurance policies issued by defendant MBIA Insurance Corporation (MBIA Insurance), a wholly owned subsidiary of MBIA Inc., that cover a wide variety of "structured-finance" products, such as mortgage-backed securities. Under the policies, MBIA Insurance unconditionally and irrevocably promised to make payments if the obligors on the insured underlying instruments failed to pay. In December 2008, MBIA Inc. submitted an application to the New York State Insurance Department that sought approval to carry out various transactions as part of a restructuring. In February 2009, the Insurance Department issued a letter approving and/or not disapproving and/or not objecting to certain aspects of the proposal. The application was not made upon notice to plaintiffs or any other policyholders of MBIA Insurance.

The restructuring involved an integrated series of related-party transfers, including MBIA Insurance paying a $1.147 billion

dividend to MBIA, Inc.; MBIA Insurance transferring $938 million of cash and securities, as well as 100% of the common stock of MBIA Illinois (a wholly-owned and controlled subsidiary of MBIA Insurance) to MBIA Inc.; and MBIA Inc. transferring the cash and securities received from MBIA Insurance to MBIA Illinois.[1]

In what plaintiffs describe as one of the largest fraudulent conveyances in history, involving more than $5 billion in assets, plaintiffs allege that "[i]n an unlawful attempt to escape MBIA Insurance's coverage obligations to [p]laintiffs and other policyholders, [d]efendants executed a series of fraudulent conveyances, in breach of MBIA Insurance's contracts, to transfer MBIA Insurance assets in MBIA Illinois - an entity that [d]efendants structured to be free from liabilities or other obligations to [p]laintiffs." Plaintiffs further allege that defendants intentionally "ensured that, regardless of the fate of MBIA Insurance, MBIA Inc. will continue to own (and its senior management will continue to be handsomely paid to operate) a new insurance business financed using assets stripped out of MBIA Insurance and shielded from its creditors" and that MBIA Inc.'s

[1]Plaintiffs allege that in the fraudulent restructuring, MBIA Illinois became a wholly owned and controlled subsidiary of another entity that, in turn, is a wholly owned and controlled subsidiary of MBIA Inc.

CEO publicly acknowledged that one of the restructuring objectives "was to weaken MBIA Insurance so much that structured-finance policyholders like [p]laintiffs would be pressured to 'cut a settlement today' and surrender their policies for a fraction of their former values."

Plaintiffs allege that the restructuring left MBIA Insurance undercapitalized and insolvent; that the improperly transferred assets are no longer available to pay claims of plaintiffs and other structured-finance policyholders, exposing them to potentially billions of dollars of losses; and that the restructuring drove MBIA Insurance's credit rating from investment-grade to six steps below investment grade into junk territory. The complaint seeks to set aside the allegedly fraudulent transfers, or in the alternative, a declaration that MBIA Inc., MBIA Insurance and MBIA Illinois are jointly and severally liable to plaintiffs under plaintiffs' insurance policies, or an award of damages.

The motion court correctly rejected defendants' argument that this action must be dismissed as a collateral attack on the Superintendent's determination to approve and/or decline to disapprove the transactions. While defendants assert, and the majority agrees, that plaintiffs' attempt to have the

restructuring transactions set aside is an impermissible collateral attack on the Superintendent's actions, as noted above, plaintiffs also seek damages or alternatively, a declaration that defendants are jointly and severally liable to plaintiffs under the policies. This alternative demanded relief concerns matters that clearly were not considered by or passed upon by the Superintendent, and may be outside the scope of any review that would be undertaken by the Superintendent and beyond the Superintendent's authority. Indeed, no financial determination by the Superintendent would be dispositive of the causes of action pursuant to the Debtor and Creditor Law because the timing of the relevant financial analysis is distinct. The restructuring application was filed with the Superintendent in December 2008 and the determination issued in February 2009, prior to the alleged fraudulent conveyances, whereas "[u]nder traditional fraudulent conveyance rules, the solvency test is to be conducted at the time of the conveyance" (*In re Best Prods. Co., Inc.*, 168 BR 35, 54 [SD NY 1994], *affd* 68 F3d 26 [2d Cir 1995]).

Additionally, plaintiffs allege that defendants misled the Superintendent regarding defendants' financial condition and the impact that these transactions would have on MBIA Insurance and

its policyholders. While the majority notes that plaintiffs neither specifically make this allegation nor name the Superintendent as a party to this action, it is evident from a reading of the allegations of the complaint and the record in opposition to the motion to dismiss that this is one of the claims. For example, plaintiffs allege that "MBIA Inc.'s projections have been demonstrably unreliable in the past . . . MBIA Insurance's loss estimates on multi-sector collaterized debt obligations increased from $1.7 billion on December 31, 2008 to $1.9 billion as of March 31, 2009." MBIA Inc. filed its restructuring application in December 2008 and the Superintendent issued his determination in February 2009, the time frame identified by plaintiffs as when the debt obligations projected by MBIA Inc. were significantly underestimated.

The Superintendent's determination expressly states, several times, that the approvals were issued in reliance on the truth of the representations and submissions of defendants. The majority's quibble that plaintiffs don't specifically allege that defendants deceived the Superintendent elevates form over substance. In determining a motion to dismiss pursuant to CPLR 3211, the court must "accord plaintiffs the benefit of every possible favorable inference, and determine only whether the

facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]).

The salient point here is that it does not follow, as the majority posits, that because the Superintendent's determination about the restructuring was "comprehensive," this action is an impermissible collateral attack on that determination, when plaintiffs have alleged, for example, that MBIA Inc.'s loss estimates on debt obligations, relied upon by the Superintendent, were unreliable and grossly inaccurate. There is no proof at this stage of the litigation, in the context of a CPLR 3211 motion addressed to the pleading, that the Superintendent was aware of the alleged misrepresentations and violations of the Debtor and Creditor Law that purportedly occurred here (*see Fiala v Metropolitan Life Ins. Co.*, 6 AD3d 320, 321 [2004]). Here, in contrast to *Fiala*, none of the causes of action are properly dismissed pursuant to CPLR 3211. As was noted by the District Court in *Aurelius Capital Master, Inc. v MBIA Ins. Corp.* (695 F Supp 2d 68 [SD NY 2010]), a case similar to this one, brought as a class action by other policyholders against the MBIA defendants concerning the same allegedly fraudulent conveyances, "[e]ven where a claim challenges the sufficiency of a plan approved by the Superintendent, . . . the preclusive effect of

the Superintendent's decision is necessarily limited by the scope of the Superintendent's review" (*id.* at 74). In *Aurelius*, the District Court concluded that "[b]ased solely on the approval letter, and without the benefit of any discovery, the scope of the Superintendent's approval is insufficiently clear for the Court to hold that Plaintiffs' claims must fail as a matter of law. Defendants may instead raise the collateral attack defense at summary judgment, as *Fiala* contemplates" (*id.* at 75).

While defendants assert that the Superintendent contemplated all of plaintiffs' allegations in making his determination, defendants have not demonstrated that the Superintendent took into account the issues raised by plaintiffs, especially considering that plaintiffs had no opportunity to be heard by the Superintendent regarding these transactions. As noted above, the Superintendent has expressly stated that the approvals were issued in reliance on the truth of the representations and submissions of defendants. The policyholders had no notice or opportunity to contest the "truth" of the MBIA defendants' submissions to the Superintendent.

Significantly, in *Fiala* (6 AD3d 320 [2004], *supra* [involving demutualization of an insurance company]), as well as other cases cited by defendants where plenary lawsuits against private

parties were dismissed as collateral attacks on an administrative agency's determination, there was notice and a hearing or other opportunity to participate in the process (*see e.g. Steen v Quaker State Corp.*, 12 AD3d 989 [drilling permit issued by Department of Environmental Conservation]; *Brawer v Johnson,* 231 AD2d 664 [1996] [bank demutualization]; *Matter of East N.Y. Sav. Bank Depositors Litig.*, 145 Misc 2d 620 [1989], *affd* 162 AD2d 251 [1990] [bank demutualization]).

Furthermore, defendants' argument that plaintiffs may only properly raise these claims in the article 78 proceeding which plaintiffs commenced, is unavailing. Whether the *Superintendent* had a rational basis for his determination to approve/not disapprove the transactions, based upon the information provided to him by defendants, without any input by plaintiffs, is a distinctly different matter from plaintiffs' allegation in a plenary action that *defendants* committed fraudulent conduct and violated the Debtor and Creditor Law, especially where plaintiffs claim that the Superintendent was intentionally misled by defendants regarding MBIA Insurance's financial condition and the impact that the transactions would have on MBIA Insurance and its policyholders.

Notably, none of the cases cited by the majority in which an

article 78 was determined to be the sole remedy, involved a situation such as the one here, where the agency held no hearing or afforded affected persons an opportunity to be heard or otherwise provide input regarding the determination. And in *Fiala* (6 AD3d 320 [2004], *supra*), relied upon by the majority, this Court *permitted* the plaintiffs to press the claim that certain defendants had accorded a large policyholder preferential treatment in the course of the demutualization by allocating it excessive shares, "since there [was] no indication that the Superintendent was aware of the alleged excessive allocation at the time he passed upon the Plan" (6 AD3d at 321). While the majority notes that plaintiffs do not claim that the Superintendent violated lawful administrative procedure by failing to provide notice and an opportunity to be heard, this misses the point - - that plaintiffs had no notice, and no opportunity to be heard, is pertinent to what was considered by the Superintendent. That plaintiffs have commenced an article 78 proceeding, where the standard of review is limited to whether there was a rational basis for the determination, does not require dismissal of this plenary action, which does not even

seek relief from the Superintendent.[2]

Regarding defendants' arguments directed to the sufficiency of the pleading, I agree with the majority's conclusion that plaintiffs have not stated a cause of action for unjust enrichment by alleging that MBIA Inc. and MBIA Illinois should return assets to MBIA Insurance, in that plaintiffs did not pay premiums to MBIA Inc. and MBIA Illinois, and thus cannot allege that these entities have been unjustly enriched at plaintiffs' expense (*IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 [2009]). However, the remaining causes of action should be sustained.

In asserting the claim for breach of contract premised upon a breach of the implied covenant of good faith and fair dealing, by alleging, among other things, that MBIA violated the covenant by substantially reducing the likelihood that MBIA Insurance will be able to pay its policyholders, plaintiffs have properly alleged that defendants took steps that "will have the effect of

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[2]In the absence of notice of the proceedings before the Superintendent of Insurance, it was merely fortuitous that these plaintiffs learned of the adverse determination within the four-month statute of limitations period. If the majority's position is accepted, the nonparty who learns of an adverse determination after the expiration of the statute of limitations would be left without a remedy.

destroying or injuring the right of [plaintiffs] to receive the fruits of the contract" (*Dalton v Educational Testing Serv*,, 87 NY2d 384, 389 [1995] (internal quotation marks and citation omitted); *see also MBIA Ins. Corp. v Countrywide Home Loans, Inc.*, 2009 NY Slip Op 31527(U) [2009] *19 [where in a case *brought by MBIA*, the motion court held that MBIA had adequately stated a claim for breach of the implied covenant of good faith by alleging that defendant "exercised its discretion in bad faith to deprive [plaintiff] of the fruits of the agreements and unfairly shifted the risks of default and delinquencies to MBIA"]).

While the majority concludes that the claim for a declaratory judgment and piercing of the corporate veil must be dismissed on the ground that it seeks an advisory opinion on future events that may never occur, the cases cited by the majority involve declaratory judgments regarding the potential implementation of an emergency plan that was subject to future approval by a federal agency (*Cuomo v Long Is. Light Co.*, 71 NY2d 349 [1988]), and the possibility of being granted a newsstand license and then potentially being required to reimburse a franchisee (*Uhlfelder v Weinshall*, 47 AD3d 169 [2007). In contrast, the alleged domination of the corporation and abuse of

the corporate form has already occurred here.

Furthermore, it is not "necessary that an unsatisfied judgment first be obtained to pierce the corporate veil." (*Chase Manhattan Bank (N.A.) v 264 Water St. Assoc.*, 174 AD2d 504, 505 [1991]; *see also Ross v Stuart Intl.*, 275 AD2d 650 [2000]). Plaintiffs have made "sufficient allegations to sustain a cause of action to pierce the corporate veil by alleging that the individual defendant dominated and controlled the corporation and caused the corporation to make fraudulent conveyances" (*Chase Manhattan Bank (N.A.) v 264 Water St. Assoc.*, 174 AD2d at 505).

The majority holds that plaintiffs' claim that MBIA Inc. and MBIA Insurance share senior management personnel is insufficient to show MBIA Inc has abused the privilege of doing business in the corporate form. However, plaintiffs allege much more than domination by MBAI Inc. For example, plaintiffs allege that MBIA Insurance received "no value whatsoever in exchange for its $1.147 billion dividend of cash and securities paid to MBIA Inc."; that "MBIA Insurance also received no value whatsoever in exchange for transferring away the additional $938 million and the 100% of MBIA Illinois' common stock that it had owned [and] although MBIA Inc. gave MBIA Insurance shares of MBIA Insurance's own common stock, those shares were worthless pieces of paper to

MBIA Insurance because, both before and after this transaction, MBIA Insurance was a wholly owned and controlled subsidiary of MBIA Inc."; and that as a result of the fraudulent restructuring, "MBIA Illinois now holds claims-paying assets that support the municipal-bond business, but that cannot be reached by structured-finance policyholders such as [p]laintiffs (absent the relief sought in this action)", all in order to enrich MBIA, Inc., with resulting injury to plaintiffs.

"The party seeking to pierce the corporate veil must establish that the owners, through their domination, abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice against that party such that a court in equity will intervene" (*Matter of Morris v New York State Dept. Of Taxation & Fin.*, 82 NY 135, 141, [1993]). "Veil-piercing is a fact-laden claim that is not well suited for summary judgment

resolution" (*First Bank of Ams v Motor Car Funding*, 257 AD2d 287, 294 [1999]), much less for resolution on a pre-answer, pre-discovery motion.

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

ENTERED: JANUARY 11, 2011

CLERK