SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JANUARY 18, 2011

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Tom, Catterson, Richter, JJ.

3394 Credit Suisse First Boston, Index 601123/04
Plaintiff-Respondent,

-against-

Utrecht-America Finance Co., et al.,
Defendants-Appellants.

Ferber Chan Essner & Coller, LLP, New York (Robert M. Kaplan of counsel), for appellants.

Richards Kibbe & Orbe LLP, New York (Brian S. Fraser of counsel), for respondent.

Order, Supreme Court, New York County (Eileen Bransten, J.), entered February 3, 2010, which, to the extent appealed from, partially granted plaintiff's motion for summary judgment on its first cause of action and declined to search the record to dismiss the second and fourth causes of action, unanimously reversed, on the law, plaintiff's motion denied and the second and fourth causes of action dismissed, with costs.

This action for breach of contract arises out of defendant Utrecht-America's oral agreement (made through its agent, defendant Rabobank) to sell distressed assets to plaintiff (the trade) consisting of defendant's interest in a May 28, 1999 loan to nonparty Choctaw Investors B.V., a Dutch limited liability company, for 62.5 cents on the dollar. As a special financing vehicle for Enron Corporation, Choctaw included among the significant intangible assets securing the loan its rights to a letter of indemnity provided by Enron, then involved in bankruptcy proceedings. On November 5, 2003, plaintiff sent written confirmation of the trade subject to the standard terms and conditions for distressed trade confirmations published by the Loan Syndications and Trading Association, Inc. (LSTA), which include the parties' representations that each has independently ascertained the obligor's business and financial condition and that, irrespective of information that may have come into possession of the other party, has decided to enter into the transaction notwithstanding its lack of such information. The parties specifically agreed that included with the loan documentation defendants were obligated to provide was a "copy of the Credit Agreement (including all schedules, and, if requested by Buyer, exhibits, and any other related documentation reasonably requested by Buyer)."

The confirmation specified that the trade would be subject to credit documentation, and by November 17, 2003, plaintiff's counsel had received the closing documents for the Choctaw loan.

Several days later, plaintiff learned that Choctaw had been dissolved. Negotiations dragged on through December and into January as plaintiff sought to ascertain whether the transfer of the Choctaw collateral to the collateral agent, JP Morgan Chase (Chase), was effective under Dutch law. On the morning of January 14, 2004, defendant's attorney was informed that plaintiff was "ready to move forward on its purchase from Utrecht." However, that very afternoon, defendant sent a letter to plaintiff terminating the agreement due to plaintiff's failure to consummate the purchase, and Rabobank, as defendant's agent, determined to terminate the trade.

On January 21, 2004, it was announced that a settlement had been reached between the various lenders to Choctaw and the Enron bankruptcy estate, a development that had the effect of substantially increasing the value of the Choctaw assets. Within the week, defendant reached an agreement with third parties for the transfer of its interest in the Choctaw loan at a price above par, and in early February, plaintiff bought additional Choctaw debt to effect cover of the terminated trade with Utrecht-America.

Plaintiff commenced this action for breach of contract against Utrecht-America and Rabobank, respectively (causes of action one and two), including breach of the covenant of good faith and fair dealing (causes of action three and four). Following discovery, the parties agreed that Rabobank would "satisfy and guarantee payment of any final unappealable judgment against . . . Utrecht-America" and plaintiff would not pursue a claim based on the alleged status of Rabobank as Utrecht-America's alter ego. Plaintiff thereafter brought this motion for summary judgment, excusing its delay in closing the trade on the need to complete documentation review, in particular, to resolve issues with respect to the collateral and to conform the representations and warranties in connection with the transfer to those contained in the original loan documents.

Defendants opposed the motion and moved to dismiss the complaint for failure to state a cause of action (CPLR 3211[a][7]). Although their expert agreed that nonconforming representations and warranties would be a last resort because of the adverse effect on marketability, he stated that plaintiff's conduct did not comply with the customs and practices of the distressed debt market in numerous material respects. For instance, he noted that if plaintiff had any legitimate concerns regarding the effectiveness of the transfer of assets from Choctaw to Chase, as collateral agent, it had only to contact Chase or its counsel for clarification. Similarly, if plaintiff believed it needed further information about the transfer of collateral, it would have been customary to contact both Chase and the original lenders to Choctaw, with whom plaintiff had pending trades. The expert concluded that in light of plaintiff's receipt of the Choctaw loan documentation in mid-November 2003, plaintiff's redundant request for similar information in January 2004 raised the question of whether plaintiff evinced a good-faith intent to close the trade.

There is a triable issue of fact as to whether plaintiff negotiated with Utrecht-America in good faith. This issue, "which necessitates examination of a state of mind, is not an issue which is readily determinable on a motion for summary judgment" (*Coan v Estate of Chapin*, 156 AD2d 318, 319 [1989]; *see also Brookfield Indus. v Goldman*, 87 AD2d 752, 753 [1982]; *cf. IDT Corp. v Tyco Group, S.A.R.L.*, 13 NY3d 209, 214 [2009] [settlement agreement subject to good-faith negotiation of further agreements]). Defendants' expert, who may be called to testify concerning the practices of an industry (*see AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 5 NY3d 582, 594 [2005), opined that plaintiff's negotiations were inconsistent with those customary to the distressed debt market, and while the availability of a more prudent course of conduct does not preclude a party from demonstrating its good faith (*see Polotti v Fleming*, 277 F2d 864, 868 [2d Cir 1960]), it presents a factual issue for resolution at trial. At such time, the weight to be afforded to the expert opinion is within the province of the trier of fact (*see Rivera v City of New York*, 212 AD2d 403, 404 [1995]).

We note that the obligation to negotiate in good faith "bar[s] a party from . . . insisting on conditions that do not conform to the preliminary agreement" (*Teachers Ins. & Annuity Assn. of Am. v Tribune Co.*, 670 F Supp 491, 498 [SD NY 1987]). The parties having agreed to the terms and conditions promulgated by LSTA governing the confirmation, defendants were under no obligation to supply information sought by plaintiff in regard to Choctaw's bankruptcy, much of which defendants produced nonetheless. While documentation concerning the transfer of Choctaw's collateral or the status of the Enron Indemnity Letter might fall under the category of "any other . . . documentation [related to the Credit Agreement] reasonably requested by Buyer," which defendants were obligated to provide, the issue of whether plaintiff's request for the same was reasonable presents a question of fact not amenable to summary resolution (*see e.g. Wilson Trading Corp. v David Ferguson, Ltd.*, 23 NY2d 398, 406 [1968]).

The duty of good faith and fair dealing is an implicit obligation imposed on the parties to a commercial transaction (*see Dalton v Educational Testing Serv.*, 87 NY2d 384, 389 [1995]). The cause of action for breach of the duty merely duplicates the cause of action for breach of contract and was properly dismissed as redundant (*e.g. Levi v Utica First Ins. Co.*, 12 AD3d 256, 257-258 [2004]) because a court, where appropriate, will enforce the obligation on contracting parties (*see Murphy v American Home Prods. Corp.*, 58 NY2d 293, 304 [1983]).

As to plaintiff's claims based on Rabobank's status as Utrecht-America's alter ego, "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*, 82 NY2d 135, 142 [1993]). "An inference of abuse does not arise . . . where a corporation was formed for legal purposes or is engaged in legitimate business" (*TNS Holdings v MKI Sec. Corp.*, 92 NY2d 335, 339-340 [1998]). It is undisputed that Rabobank was formed for legal purposes and was engaged in a legitimate business. Moreover, in an unappealed portion of the order under review, the court denied plaintiff's motion for summary judgment against Rabobank because plaintiff failed to show that Rabobank used

Utrecht-America "to commit fraud or malfeasance or other inequity." In view of such finding, defendants' request to dismiss the alter-ego claims against Rabobank should have been granted.

Finally, defendants' contention that the motion court correctly found that the parties failed to enter into a fully binding preliminary agreement but, instead, entered into an agreement to negotiate in good faith is not cognizable. Defendants' motion only sought dismissal of plaintiff's third cause of action for breach of the covenant of good faith and fair dealing against Utrecht-America, and their contention is impermissibly raised for the first time on appeal (*see Recovery Consultants v Shih-Hsieh*, 141 AD2d 272, 276 [1988]). In any event, an interpretation that renders a contract illusory and therefore unenforceable is disfavored and enforcement of a bargain is preferred (*see Wood v Duff-Gordon*, 222 NY 88 [1917]; *Curtis Props. Corp. v Greif Cos.*, 212 AD2d 259, 265-266 [1995]), particularly where, as here, the parties have expressed their intent to be contractually bound in a writing (*see Four Seasons Hotels v Vinnik*, 127 AD2d 310, 317 [1987]). To the extent the writing is equivocal, as defendants maintain, the issue is for the trier of fact (*id.*).

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

ENTERED: JANUARY 18, 2011

CLERK

Gonzalez, P.J., Mazzarelli, Moskowitz, Acosta, Román, JJ.

4055 The People of the State of New York, Dkt. 44818C/07
Respondent,

-against-

Santi D.,
Defendant-Appellant.

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Steven Banks, The Legal Aid Society, New York (Denise Fabiano of counsel), and Dewey & LeBoeuf, LLP, New York (Matthew L. DiRisio of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Bari L. Kamlet of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Elizabeth A. Foley, J.), rendered December 1, 2008, convicting defendant, after a nonjury trial, of obstructing governmental administration in the second degree and harassment in the second degree, adjudicating him a youthful offender, and sentencing him to an aggregate term of 30 days, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The evidence warranted the inference that while defendant may have been motivated by anger, he acted with the intent to prevent a public servant from performing an official function (*see Matter of Garrick B.*, 30 AD3d 217 [2006]).

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

ENTERED: JANUARY 18, 2011

CLERK

Gonzalez, P.J., Mazzarelli, Moskowitz, Acosta, Román, JJ.

4056 Maninder Bhugra, Index 110825/07
Plaintiff-Respondent,

-against-

Massachusetts Casualty Insurance Company, et al.,
Defendants,

Disability Management Services,
Defendant-Appellant.

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

Maninder Bhugra, respondent pro se.

Order, Supreme Court, New York County (Debra A. James, J.), entered October 17, 2008, which to the extent appealed from as limited by the brief, denied defendant Disability Management Services's (DMS) motion to dismiss the first cause of action as against it, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment dismissing the complaint as against DMS.

The complaint alleges that DMS is a corporation that administers disability insurance claims on behalf of insurers, including defendant Centre Life Insurance Company (CLIC), which issued a disability policy to plaintiff. The first cause of action alleges that this policy constitutes a contract, that plaintiff sustained a total disability within the meaning of the policy, and that DMS breached the policy by failing to pay the benefits owed to her. However, there is no allegation in the complaint that plaintiff ever entered into a contract with DMS, and there is no showing that DMS, as CLIC's agent, intended to be personally bound by the policy issued to plaintiff by CLIC (*see Hall v Lauderdale*, 46 NY 70, 74 [1871] [agent of a disclosed principal will be personally bound by a contract only upon "clear and explicit evidence" of an intent to be so bound]). Thus, the complaint fails to state a cause of action for breach of contract against DMS.

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

ENTERED: JANUARY 18, 2011

CLERK

Gonzalez, P.J., Mazzarelli, Moskowitz, Acosta, Román, JJ.

4057 In re Ryan R.,

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

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

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

Order of disposition, Family Court, Bronx County (Robert R. Reed, J. at fact-finding determination; Nancy M. Bannon, J. at disposition), entered on or about February 22, 2010, 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 menacing in the third degree, and placed him on probation 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 probation. That disposition was the least restrictive alternative consistent with the needs of appellant and the community in light of appellant's behavioral problems, the violent nature of the underlying incident, and the very short duration of any supervision that an ACD might have provided (*see Matter of Katherine W.*, 62 NY2d 947 [1984]).

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

ENTERED: JANUARY 18, 2011

CLERK

Gonzalez, P.J., Mazzarelli, Moskowitz, Acosta, Román, JJ.

4059 Raymond Smith, et al., Plaintiffs-Respondents, Index 107091/06 590837/06

-against-

Broadway 110 Developers, LLC, et al.,
Defendants-Respondents-Appellants.

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BDS Developers, LLC sued here as Broadway 110 Developers, et al.,
Third-Party Plaintiffs-Respondents-Appellants,

-against-

A&B Caulking Co., Inc.,
Third-Party Defendant-Appellant-Respondent.

Chesney & Murphy, LLP, Baldwin (Michael Jenks of counsel), for appellant-respondent.

Barry, McTiernan & Moore, New York (Laurel A. Wedinger of counsel), for respondents-appellants.

Sacks and Sacks, LLP, New York (Scott N. Singer of counsel), for respondents.

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered April 7, 2009, which, insofar as appealed from as limited by the briefs, granted the part of defendants' motion that sought summary judgment on their defense and indemnification claim against third-party defendant (A&B), denied the part of the motion that sought summary judgment on their cause of action against A&B for failure to procure insurance, and denied the part of the motion that sought summary judgment dismissing the Labor

Law §§ 240 and 241(6) causes of action, unanimously affirmed, without costs.

Plaintiffs seek damages for injuries sustained by plaintiff Raymond Smith when the suspended scaffold that he was straddling swung toward a building and crushed his chest. At the time, plaintiff was working for A&B, which had supplied him with the scaffold and supervised his work.

Defendants demonstrated their entitlement to judgment as a matter of law on their defense and indemnification claim against A&B. The terms of the Trade Contract pursuant to which A&B was retained by defendant Pavarini McGovern, LLC to perform work on the project required A&B to defend and indemnify defendants where, as here, the claims arose from A&B's work and there was no evidence of any negligence on defendants' part. A&B's contention that there is at least a question of fact whether Pavarini was negligent is unsupported. Indeed, the court dismissed the Labor Law § 200 and common-law negligence causes of action, and there is no evidence that any of defendants' acts or omissions contributed to plaintiff's accident. Nor does the indemnification provision violate General Obligations Law § 5.322.1(1), since it limits indemnification "[t]o the fullest extent permitted by law" (*see Jackson v City of New York*, 38 AD3d 324, 324-325 [2007]).

Defendants failed to eliminate all issues of fact as to A&B's alleged failure to procure insurance, which is the subject of a declaratory judgment action. Nor did they eliminate all issues of fact as to the Labor Law § 240(1) cause of action, since the record raises the inference that plaintiff's accident was one "in which the scaffold . . . proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]; *see Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 605 [2009] [where the injury was "the direct consequence of a failure to provide statutorily required protection against a risk plainly arising from a workplace elevation differential"]). Moreover, plaintiff testified that, when the scaffold started to swing, he grabbed onto it to avoid falling (*see Pesca v City of New York*, 298 AD2d 292 [2002]).

Defendants also failed to meet their burden of demonstrating either that no violations of the Industrial Code (12 NYCRR) provisions cited by plaintiff (§§ 23-5.8 and 23-5.9) occurred or that any violation that occurred was not a proximate cause of plaintiff’s injury (*see Potter v NYC Partnership Hous. Dev. Fund Co., Inc.*, 13 AD3d 83, 85 [2004]).

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

ENTERED: JANUARY 18, 2011

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CLERK

Gonzalez, P.J., Mazzarelli, Moskowitz, Acosta, Román, JJ.

4060-
4060A Jayne Bayer, Index 301653/07
Plaintiff-Respondent,

-against-

Steven A. Bayer,
Defendant-Appellant.

The Penichet Firm, P.C., White Plains (Fred L. Shapiro of counsel), for appellant.

Butler, Fitzgerald, Fiveson & McCarthy, P.C., New York (David K. Fiveson of counsel), for respondent.

Judgment, Supreme Court, New York County (Saralee Evans, J.), entered April 22, 2009, dissolving the parties' marriage, and, to the extent appealed from as limited by the briefs, ordering equitable distribution of the marital assets, and awarding plaintiff lifetime maintenance and attorney's fees; and order, same court and Justice, entered November 12, 2009, denying defendant's motion seeking a modification of judgment and the imposition of sanctions, and granting plaintiff's cross motion for attorney's fees, unanimously affirmed, without costs.

When ordering equitable distribution, the Supreme Court did not err by overlooking the tax consequences impacting plaintiff's receipt of fifty percent of monies which defendant had earned in the fiscal quarter preceding commencement of the divorce action, as defendant failed to present evidence from which the court could determine the amount of such taxes (*see D'Amico v D'Amico*, 66 AD3d 951 [2009]; 1 New York Matrimonial Law and Practice § 11:3 [2010]).

The Supreme Court providently exercised its discretion by awarding plaintiff 35% of defendant’s enhanced earnings capacity. The record on appeal clearly demonstrates plaintiff’s economic and non-economic contributions to defendant's acquisition of a medical license and his subsequent lucrative career, as well as the termination of her own career in order to maintain the marital household, and her absence from the job market during marriage (*see Holterman v Holterman*, 3 NY3d 1, 8-9 [2004]).

We perceive no basis for disturbing the Supreme Court's award of lifetime maintenance in the amount of $10,000 per month, which properly took into account, inter alia, the marriage’s duration; the distribution of marital assets; the parties' lavish standard of living before dissolution; their income potentials, property and future earning capacity; and plaintiff's reasonable needs and ability to become self-supporting (*see Hartog v Hartog*, 85 NY2d 36, 51-52 [1995]; *Coburn v Coburn*, 300 AD2d 212, 213 [2002]).

The Supreme Court properly declined defendant’s request for a credit based upon tax payments he claimed to have made with funds earned post-commencement, which he argued had lowered the parties' joint income tax arrears and the amount of tax liens encumbering the marital residence. Defendant failed to adequately establish that the purported payments were made with funds earned after commencement of the divorce action, and had been paid to satisfy joint tax obligations (*see Higgins v Higgins*, 50 AD3d 852, 853-54 [2008]).

The record on appeal fails to support defendant's argument that the Supreme Court's judgment awarded attorney fees to plaintiff which were in addition to an earlier pendente lite fee payment. Plaintiff's motion for fees specifically sought an amount which had been adjusted downward to account for the pendente lite payment.

Having reviewed the record, we are satisfied that the Supreme Court did not err by granting plaintiff's cross-motion for attorney's fees in connection with her opposition to defendant's post-judgment motion for modification (*see DeCabrera v Cabrera-Rosete*, 70 NY2d 879, 881 [1987]), or by denying defendant's request for sanctions due to alleged frivolous conduct (*see Edwards v Edwards*, 165 AD2d 362, 366 [1991]).

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

ENTERED: JANUARY 18, 2011

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CLERK

Gonzalez, P.J., Mazzarelli, Moskowitz, Acosta, Román, JJ.

4061 The People of the State of New York, Ind. 5255N/06
Respondent,

-against-

Vernon Parker,
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 (Richard Nahas 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 (Robert Stolz, J.), rendered on or about July 1, 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 18, 2011

CLERK

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

Gonzalez, P.J., Mazzarelli, Moskowitz, Acosta, Román, JJ.

4062 New York Downtown Hospital, et al., Index 109099/09
Plaintiffs-Appellants,

-against-

Lorenzo Terry, et al.,
Defendants-Respondents.

Proskauer Rose LLP, New York (Charles S. Sims of counsel), for appellants.

Gallet Dreyer & Berkey, LLP, New York (David T. Azrin of counsel), for respondents.

Amended order, Supreme Court, New York County (Milton A. Tingling, J.), entered March 25, 2010, which, to the extent appealed from, conditioned the grant of plaintiffs' application for a voluntary discontinuance of their action on their payment of the sum of $10,000 to defendants, unanimously modified, in the exercise of discretion, to the extent of striking the payment requirement, and otherwise affirmed, without costs.

Contrary to plaintiffs' assertions, it is within a court's discretion to condition an application for a voluntary discontinuance made pursuant to CPLR 3217(b) upon the movant paying the adverse party's legal fees, costs, and disbursements (*see Beigel v Cohen*, 158 AD2d 339 [1990]). However, under the circumstances presented, the court should have allowed plaintiffs to discontinue their libel claims without any condition (*see Townhouse Co., LLC v Peters*, 17 Misc 3d 133(A) [2007]).

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

ENTERED: JANUARY 18, 2011

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CLERK

Gonzalez, P.J., Mazzarelli, Moskowitz, Acosta, Román, JJ.

4063 The People of the State of New York, Ind. 2393/09
Respondent,

-against-

Jacqueline Davis,
Defendant-Appellant.

Schwartz, Lichten & Bright, P.C., New York (Stuart Lichten of counsel), for appellant.

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

Judgment, Supreme Court, New York County (Ronald A. Zweibel, J. at motions; Arlene D. Goldberg, J. at jury trial and sentence), rendered April 29, 2010, convicting defendant of forgery in the second degree (nine counts), grand larceny in the fourth degree and falsifying business records in the first degree, and sentencing her to an aggregate term of 30 days, with 5 years' probation and restitution in the amount of $1025, 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 jury's credibility determinations. The evidence refuted defendant's assertion that she had permission to sign another person's name to the withdrawal slips at issue. The evidence also supported inferences that defendant used these forged slips to obtain money for herself, and that she caused the making of false entries in business records.

The court properly denied defendant's speedy trial motion. The period from July 2 to July 16, 2009 was excludable as a delay resulting from pretrial motions, including "the period during which such matters are under consideration by the court" (CPL 30.30[4][a]). The People's delay in producing grand jury minutes was reasonable (*see People v Harris*, 82 NY2d 409, 413 [1993]); in any event, during the same period the court was also considering a consolidation motion that did not involve grand jury minutes. The period from July 30 to September 17, 2009, was excludable as a reasonable time to prepare after the court's decision on motions (*see People v Green*, 90 AD2d 705 [1982], *lv denied* 58 NY2d 784 [1982]), thus constituting "a reasonable period of delay resulting from . . . pre-trial motions" within the meaning of CPL 30.30(4)(a). In any event, the last three weeks of this period were excludable for the separate reason that they were granted at defense counsel's request (CPL § 30.30[4][b]), where defense counsel actively participated in setting the date and sought a longer adjournment for his own convenience (*see e.g. People v Matthews*, 227 AD2d 313 [1996], *lv denied* 88 NY2d 989 [1996]).

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 18, 2011

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CLERK

Gonzalez, P.J., Mazzarelli, Moskowitz, Acosta, Román, JJ.

4064-
4064A Cara Kodjovi, etc., Index 116889/06
Plaintiff-Appellant,

-against-

Trustees of Columbia University
in the City of New York,
Defendant-Respondent.

Fitzgerald & Fitzgerald, P.C., Yonkers (Mitchell Gittin of counsel), for appellant.

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

Judgment, Supreme Court, New York County (Edward H. Lehner, J.), entered June 5, 2009, dismissing the complaint, and bringing up for review an order, same court and Justice, entered May 7, 2009, unanimously reversed, on the law, without costs, and the complaint reinstated. Appeal from the aforesaid order unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

On its motion for summary judgment, defendant failed to meet its burden of establishing prima facie that plaintiff did not suffer an injury causally related to her exposure to lead paint. The very affidavits by two of plaintiff's experts on which defendant relied in its moving papers were based on numerous well accepted neurological tests and reflected a loss of at least seven IQ points and an impairment of perceptual-motor abilities attributable to lead poisoning (*see Veloz v Refika Realty Co.*, 38 Ad3d 299 [2007], *lv denied* 9 NY3d 817 [2008]).

Even were we to find that defendant made its prima facie showing, we would deny its motion on the ground that plaintiff raised an issue of fact with her expert submissions demonstrating that she experienced a decrease in IQ and an impairment of motor skills causally related to lead poisoning.

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

ENTERED: JANUARY 18, 2011

CLERK

Gonzalez, P.J., Mazzarelli, Moskowitz, Acosta, JJ.

4065 In re Meryl Brodsky, Index 118316/06
Petitioner-Appellant,

Mark Feinsot, et al.,
Petitioners,

-against-

New York City Campaign Finance Board,
Respondent-Respondent.

Meryl Brodsky, appellant pro se.

Michael A. Cardozo, Corporation Counsel, New York (Drake A. Colley of counsel), for respondent.

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered December 16, 2009, which, to the extent appealed from, granted respondent's motion to compel petitioner Meryl Brodsky to completely and accurately respond to an information subpoena and questionnaire (CPLR 5224), and denied said petitioner's cross motion to quash the subpoena and vacate the underlying judgment, same court and Justice, entered August 31, 2009, unanimously affirmed, without costs.

Petitioner waived her objection to Supreme Court's jurisdiction over her by failing to raise it in her opposition to respondent's motion (*see* CPLR 3211[e]; *Matter of United Servs. Auto. Assn. v Kungel*, 72 AD3d 517, 518 [2010]).

Petitioner has not been prejudiced by any technical defects in the judgment in connection with which the information subpoena was served.

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

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

ENTERED: JANUARY 18, 2011

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CLERK

Gonzalez, P.J., Mazzarelli, Moskowitz, Acosta, JJ.

4066 Kerwin Espino, etc., et al., Index 23833/02
Plaintiffs-Respondents,

-against-

The New York City Board of Education,
Defendant-Appellant,

The City of New York
Defendant.

Michael A. Cardozo, Corporation Counsel, New York (Deborah A. Brenner of counsel), for appellant.

Pena & Kahn, PLLC, Bronx (Diane Welch Bando of counsel), for respondents.

Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered on or about May 1, 2009, which, insofar as appealed from as limited by the briefs, denied the motion of defendant Board of Education for summary judgment dismissing the complaint as against it, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment in favor of defendant dismissing the complaint.

Defendant Board established its prima facie entitlement to judgment as a matter of law in this action where infant plaintiff, a 17-year-old student, was injured during a fight in a school hallway. The evidence demonstrates that the supervision provided for students of plaintiff's age was sufficient (*see*

Barretto v City of New York, 229 AD2d 214, 219 [1997], *lv denied* 90 NY2d 805 [1997]), that the attack on plaintiff was sudden and spontaneous and could not have been prevented by more supervision (*see Mirand v City of New York*, 84 NY2d 44, 49 [1994]; *McCollin v Roman Catholic Archdiocese of N. Y.*, 45 AD3d 478, 479 [2007]), and that defendant had no prior notice of the problems between plaintiff and his assailants (*see Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297, 302 [2010]; *Mirand* at 49).

Plaintiffs' opposition failed to raise a triable issue of fact. It cannot be said that there is an issue with respect to whether defendant violated its duty of supervision, since in the absence of any notice of a specific threat to infant plaintiff, it is reasonable to leave high school students unsupervised for several minutes (*see Johnsen v Carmel Cent. School Dist.*, 277 AD2d 354 [2000]), especially where, as here, there were adults in the immediate vicinity. Nor is there a triable issue regarding whether the school's safety plan, which required that a person be stationed in the area where the fight occurred, was violated. That plan required personnel to patrol the halls, with the top priority being to keep the halls clear and move the students along, and a witness testified that she saw this happening.

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

ENTERED: JANUARY 18, 2011

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CLERK

Gonzalez, P.J., Mazzarelli, Moskowitz, Acosta, Román, JJ.

4067-
4067A Nora Teresa Devlin, et al., Index 113986/07
Plaintiffs-Respondents,

-against-

Blaggards III Restaurant Corp., etc., et al.,
Defendants-Respondents,

Fraglow Realty LLC,
Defendant-Appellant.

Richard C. Rubinstein, New York, for appellant.

Carol R. Finocchio, New York, for Nora Teresa Devlin and Ian Mel Devlin, respondents.

Wade Clark Mulcahy, New York (Georgia G. Stagias of counsel), for Blaggards III Restaurant Corp, etc., and Blaggards Restaurant Corp., respondents.

Order, Supreme Court, New York County (Paul Wooten, J.), entered May 26, 2010, which, insofar as appealed from as limited by the briefs, denied the cross motion of defendant Fraglow Realty LLC (Fraglow) for summary judgment dismissing the complaint as against it, unanimously reversed, on the law, without costs, and the cross motion granted. The Clerk is directed to enter judgment accordingly. Appeal from order, same court and Justice, entered November 30, 2010, which, inter alia, granted the motion of defendant Blaggards III Restaurant Corp. (Blaggards) to reargue, and upon reargument, granted Blaggards' motion for summary judgment dismissing Fraglow's cross claim for contractual indemnification, unanimously dismissed, without costs, as academic.

Plaintiff, an employee of Blaggards, sustained injuries when she slipped on a wet bathroom floor allegedly caused by a leaking air conditioning vent. Plaintiff claimed that Blaggards' owner and the building's owner, Fraglow, were aware of the defective condition several weeks before her accident, since the subject vent was inspected by Blaggards' owner and the building's superintendent.

As an out-of-possession owner, Fraglow had no obligation to perform repairs. Although Fraglow reserved a right in the lease to enter the premises to make repairs, it could only be found liable for failing to do so if the nature of the defect that caused the injuries was a significant structural or design defect that was contrary to a specific statutory provision (*see Malloy v Friedland*, 77 AD3d 583 [2010]; *Babich v R.G.T. Rest. Corp.*, 75 AD3d 439, 440 [2010]. Since there is no evidence that the condition which caused plaintiff to slip constituted such a defect, there is no basis to impose liability for plaintiff's accident on Fraglow. That conclusion is not affected by whether or not Fraglow had knowledge of the defective condition prior to the accident or retained a right to re-enter the premises to inspect and repair under the lease.

In view of the foregoing, Fraglow's appeal from the November 30, 2010 order is dismissed as academic.

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

ENTERED: JANUARY 18, 2011

CLERK

Gonzalez, P.J., Mazzarelli, Moskowitz, Acosta, Román, JJ.

4068 In re Administrative Proceeding of Raimund Johann Abraham, Deceased. File 1381/10

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Una Katrina Abraham,
Petitioner-Respondent,

-against-

Joan Waltemath,
Objectant-Appellant.

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Timothy O'Donnell, New York, for appellant.

Tane Waterman & Wurtzel, P.C., New York (Marcie Waterman Murray of counsel), for respondent.

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Order, Surrogate's Court, New York County (Kristin Booth Glen, S.), entered on or about June 7, 2010, which granted the petition for letters of administration, unanimously affirmed, without costs.

Even if objectant could prove that she was the deceased's concubine under the law of Oaxaca, Mexico, her relationship with the deceased would not be recognized as a marriage in New York because concubinage is not considered marriage in Oaxaca (*see Van*

Voorhis v Brintnall, 86 NY 18, 25 [1881]; *Matter of Mott v Duncan Petroleum Trans.*, 51 NY2d 289, 292 [1980]; *see also Godfrey v Spano*, 13 NY3d 358, 378 [2009] [Ciparick, J., concurring]).

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

ENTERED: JANUARY 18, 2011

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CLERK

Gonzalez, P.J., Mazzarelli, Moskowitz, Acosta, Román, JJ.

4069 The People of the State of New York, Ind. 867/09
Respondent,

-against-

Jonathan Salva,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Jaime Bachrach 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 May 26, 2010,

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 18, 2011

CLERK

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

Gonzalez, P.J., Mazzarelli, Moskowitz, Acosta, Román, JJ.

4070-
4071
[M-5937
& 5938] Ind. 1337/02

In re Woodrow Flemming,
Petitioner,

-against-

New York State Division of
Criminal Justice Services, et al.,
Respondents.

Woodrow Flemming, petitioner pro se.

Cyrus R. Vance, Jr., District Attorney, New York (Nicole A. Coviello of counsel), for District Attorney, respondent.

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

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

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

ENTERED: JANUARY 18, 2011

CLERK

Sweeny, J.P., Catterson, Moskowitz, Renwick, Richter, JJ.

3783 The People of the State of New York, Ind. 1654/07
Respondent,

-against-

Victor Quintana,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Beth Fisch Cohen of counsel), for respondent.

Judgment, Supreme Court, New York County (Renee A. White, J.), rendered March 19, 2007, convicting defendant, after a jury trial, of robbery in the first and second degrees and criminal impersonation in the first degree, and sentencing him, as a second felony offender, to an aggregate term of 12 years, unanimously affirmed.

The court did not deprive defendant of his right to be present at all material stages of his trial *(see People v Antommarchi*, 80 NY2d 247, 250 [1992]) when it excluded him from sidebar conferences at which counsel exercised peremptory challenges (*see e.g. People v Green*, 54 AD3d 603 [2008], lv denied 11 NY3d 899 [2008]). All questioning of prospective jurors took place in open court, and there is nothing in the record to suggest that defendant lacked suitable opportunities to consult with his attorney about the panelists before each of these sidebars. On the contrary, in addressing defense counsel before each of these sidebars, the court indicated that it would wait until counsel was ready. The better practice, however, would be to permit a defendant to be present at such sidebar conferences at his or her request.

Defendant asserts that his conviction of robbery in the first degree was against the weight of the evidence. However, we reject that claim (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. The victim's testimony established that defendant displayed what appeared to be a firearm, as required under Penal Law § 160.15(4).

The court's *Sandoval* ruling does not warrant reversal.

We perceive no basis for reducing the sentence.

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

ENTERED: JANUARY 18, 2011

CLERK

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

3834 David McCreary, Index 114348/06
Plaintiff-Respondent,

-against-

St. Luke's-Roosevelt Hospital Center,
sued here as St. Luke's Hospital,
Defendant-Appellant.

Fiedelman & McGaw, Jericho (Andrew Zajac of counsel), for appellant.

Abrams, Fensterman, Fensterman, Eisman, Greenberg, Formato & Einiger, LLP, Lake Success (Harry C. Demiris, Jr. of counsel), for respondent.

Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered October 26, 2009, which denied defendant's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment dismissing the complaint.

Plaintiff, while a voluntary inpatient of defendant hospital's detoxification unit, was injured in a physical altercation allegedly instigated by another patient. On this record, the hospital was entitled to summary judgment dismissing plaintiff's complaint alleging negligent supervision of the other patient, as plaintiff failed to rebut the hospital's prima facie showing that it lacked "[a]ctual or constructive notice . . . of prior similar conduct" by the other patient "that would have put a reasonable person on notice to protect against the injury-causing act" (*Mirand v City of New York*, 84 NY2d 44, 49 [1994]; *see also Pollock v Bones*, 52 AD3d 343, 343 [2008] [defendant was entitled to summary judgment dismissing negligent supervision claim where there was "no evidence of previous physical altercations between the infant plaintiff and her fellow camper" from which the fellow camper's act "could reasonably have been anticipated"]).

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

ENTERED: JANUARY 18, 2011

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

1547-
1547A-
1547B Global Reinsurance Corporation - U.S. Branch, etc., Plaintiff-Appellant,

Index 600815/07

-against-

Equitas Ltd., et al., Defendants-Respondents.

Cahill Gordon & Reindel LLP, New York (Edward P. Krugman of counsel), for appellant.

Simpson Thacher & Bartlett LLP, New York (Kevin J. Arquit of counsel), for respondents.

Judgment, Supreme Court, New York County (Bernard J. Fried, J.), entered March 11, 2009, reversed, on the law, with costs, and the complaint reinstated. Appeal from order, same court and Justice, entered March 4, 2009, dismissed, without costs, as subsumed in the appeal from the judgment. Appeal from order, same court and Justice, entered May 27, 2009, dismissed, without costs, as taken from a nonappealable order.

Opinion by McGuire, J. All concur except Manzanet-Daniels, J. who dissents in an Opinion.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David Friedman, J.P.
James M. McGuire
Dianne T. Renwick
Roslyn H. Richter
Sallie Manzanet-Daniels, JJ.

1547-1547A-1547B
Index 600815/07

____x

Global Reinsurance Corporation
- U.S. Branch, etc.,
Plaintiff-Appellant,

-against-

Equitas Ltd., et al.,
Defendants-Respondents.

____x

Plaintiff appeals from the judgment of the Supreme Court, New York County (Bernard J. Fried, J.), entered March 11, 2009, which dismissed the second amended complaint, from the order, same court and Justice, entered March 4, 2009, which granted defendants' motion to dismiss the second amended complaint, and from the order, same court and Justice, entered May 27, 2009, which denied plaintiff's motion for reargument.

Cahill Gordon & Reindel LLP, New York (Edward P. Krugman of counsel), for appellant.

Simpson Thacher & Bartlett LLP, New York (Kevin J. Arquit of counsel), for respondents.

McGUIRE, J.

The complaint alleges that the Equitas defendants are the hub of a conspiracy that violates New York's antitrust law (General Business Law § 340 *et seq*. [the Donnelly Act]). The product market alleged is the market for non-life (property, casualty and related lines of insurance business) retrocessional reinsurance coverage – the coverage provided by retrocessionaires to retrocedents, i.e., the reinsurers that provide coverage to the insurers, or cedents, that provide the coverage to the underlying policyholders – and the market is alleged to include the purchase, sale and servicing of this retrocessional reinsurance coverage. The geographic scope of the market is alleged to be worldwide, but a submarket also is alleged, the Lloyd's marketplace, i.e., the collection in London of the hundreds of syndicates (composed of individual underwriting members or "Names") that annually compete for the placement of new insurance, reinsurance and retrocessional business. Prior to the formation of the conspiracy, syndicates that provide retrocessional coverage, like syndicates that provide the other forms of non-life insurance coverage, are alleged to have competed with each other in two principal areas: premiums charged and claims handling. With respect to claims handling, plaintiff essentially contends in the complaint, and in affidavits submitted in opposition to the motion to dismiss, that for decades the culture of the Lloyd's marketplace, a culture that helped it win business, has been that claims should be paid on terms that are favorable to claimants (be they policyholders, cedents or retrocedents), i.e., even when the policy's terms would permit the claims to be rejected. In other words, obtaining new business depends not only on having the ability to pay claims submitted on past contracts but on having a reputation for not making "hardheaded" decisions when those claims are submitted.

The alleged conspiracy originated in 1996, when the Names were faced with financial ruin because of potentially crippling losses stemming from unexpectedly large claims on certain pre-1993 non-life lines of business, i.e., long-tail asbestos and environmental coverage (the pre-1993 business). As the syndicates could not retroactively increase the premiums they received on the pre-1993 business, they could meet the threat only by cutting claims payouts. The problem with cutting claims payouts, however, was that if only some syndicates sinned, all others would be saints. That is, individual syndicates of Names that cut claims payments would lose current and future business to syndicates that adhered to the culture that helped Lloyd's achieve its preeminent stature.

The solution was concerted action in 1996 that permitted all syndicates both to cut claims payments on the pre-1993 business and to compete as they historically had on new business. Through the Reconstruction and Renewal Plan (the R & R Plan), the Lloyd's marketplace was restructured. The Equitas entities were established, as the complaint alleges, "to reinsure and perform claims-handling responsibilities for certain pre-1993 liabilities of the Names, including liabilities under retrocessional agreements with retrocedents such as [plaintiff]." Pursuant to a Reinsurance and Run-Off Contract (the RROC) that the Equitas entities entered into with most of the Names, Equitas purportedly was granted "exclusive and irrevocable responsibility" for the liabilities of the Names that arose from the pre-1993 business. Thus, instead of the syndicates making their own independent decisions on the validity of claims and whether, when and how much to pay, under the RROC those decisions were the sole province of Equitas. The reserves held by or on behalf of the Names to meet their individual liabilities under the pre-1993 business were pooled into a separate fund (the Fund) solely managed and controlled by Equitas. By reinsuring the liabilities of the Names under the pre-1993 business, each of the Names effectively capped its liabilities at the amount of the reserves contributed to the Fund (provided, presumably, that Equitas was able to pay all claims). The effect of the restructuring was to place all the syndicates simultaneously into runoff with respect to the pre-1993 business. Equitas's exclusive claims-handling authority permitted it to cut claims payouts on the pre-1993 business (and thus tended to ensure the adequacy of the reserves in the Fund).

In its main brief in this Court, plaintiff is understandably quick to point to the rationale for Equitas articulated by a Lloyd's executive in another litigation:

> "One of the premises behind [Equitas] is that the efficient management of long tail liabilities is hindered, not helped, by the structure of Lloyd's. Internal competition provided by Lloyd's syndicate structure has helped the market win business over the years. But in handling long tail liabilities, the decentralised syndicate system is flawed. Centralisation promises major savings" (*Allen v Lloyd's of London*, 1996 WL 490177, *52, 1996 US Dist LEXIS 12300, *159-160 [1996][internal quotation marks omitted]).

Or, as the principal of the current owner of Equitas reportedly stated in explaining its multi-billion dollar investment in Equitas: "[B]y concentrating all of the liabilities into one place, [Equitas] had the advantage of eliminating much of the costly intramural squabbling that went on among syndicates." Also understandably, plaintiff states in its main brief that "[t]he correct name for such 'squabbling' is 'competition.'"

Although the complaint goes on to allege in considerable detail the ongoing consequences of the concentration in Equitas of claims-handling authority for the pre-1993 business, those consequences need not be detailed here. Suffice it to say, plaintiff alleges that cost savings from the elimination of claims service competition with respect to the pre-1993 business were realized over the ensuing years at its expense and that of retrocedents generally. According to plaintiff, Equitas engaged in claims payment behavior – i.e., denying claims and, when they were not denied, paying less and later – that retrocessionaires subject to competitive constraints could not have engaged in, and that it (plaintiff) has suffered millions of dollars in damages as a result.

In upholding the dismissal of the complaint, the dissent first accepts an argument -- that plaintiff fails to allege an antitrust injury -- rejected by Supreme Court when it denied Equitas's prior motion to dismiss under CPLR 3211(a)(7) and (8) for failure to state a claim and want of personal jurisdiction. Legal analysis of that argument begins with the precept that the provisions of the Donnelly Act "should generally be construed in light of Federal precedent and given a different interpretation only where State policy, differences in the statutory language or the legislative history justify such a result" (*Anheuser-Busch*, *Inc. v Abrams*, 71 NY2d 327, 335 [1988]). Antitrust injury is "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful" (*Brunswick Corp. v Pueblo Bowl-O-Mat, Inc.*, 429 US 477, 489 [1977]). Antitrust laws "are meant to protect competition" and "[t]o demonstrate harm to competition, a plaintiff must show that there has been an adverse effect on prices, output, or quality of goods in the relevant market as a result of the challenged actions" (*Aventis Envtl. Science USA LP v Scotts Co.*, 383 F Supp 2d 488, 503 [SD NY 2005]). The antitrust plaintiff, accordingly, "must assert harm to competition as a whole" (*New York Medscan LLC v New York Univ. School of Medicine*, 430 F Supp 2d 140, 146 [SD NY 2006]). In determining whether a plaintiff has suffered antitrust injury, the conduct causing the injury is assumed to be a violation of the antitrust laws (*see* IIA Phillip E. Areeda et al., *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, ¶ 335 at 74 [1975]; *see also SAS of Puerto Rico, Inc. v Puerto Rico Tel. Co.*, 48 F3d 39, 43 [1st Cir 1995]).

Immediately before stating its conclusion that plaintiff does not allege antitrust injury, the dissent writes that plaintiff "simply states a claim for breach of the relevant retrocessional treaties" when it alleges that its claims were settled on less favorable terms because of the concentration of claims-handling authority in Equitas. The dissent is wrong, however, if it means to suggest that plaintiff contends that it is entitled by contract law to all the favorable practices it and other retrocedents historically had enjoyed. Rather, plaintiff's position is that certain of the practices arose because of competition among the retrocessionaires, not because they are required by contract law, and that antitrust law bars the retrocessionaires from agreeing to stop engaging in any of the practices, not just those that are required by contract law. Moreover, even if plaintiff did contend that all the favorable practices were required by contract law, the dissent's implicit premise -- that no antitrust violation could be stated -- is wrong (*cf. Puerto Rico Tel.*, 48 F3d at 44 ["Not every antitrust claim in a contract case is simply a contract claim masquerading as a candidate for treble damages"]). Indeed, that premise entails the self-refuting proposition that conduct otherwise constituting a violation of federal and state antitrust laws is nonetheless not actionable if it constitutes a breach of contract under state law.

The other linchpin in the dissent's conclusion that plaintiff fails to allege antitrust injury is the undisputed fact that plaintiff itself has been in runoff and has not purchased retrocessional coverage since the alleged unlawful restraint of trade went into effect. Thus, the dissent cites *Puerto Rico Tel.* (*supra*) for the proposition that "the presumptively proper antitrust plaintiff is a customer who obtains services in the threatened market or a competitor who seeks to serve that market" and stresses that plaintiff "does not allege that it participated in any market where retrocessional insurance coverage was sold – either as purchaser or competitor – at any point after 1996 (when Equitas was formed), the period of the alleged conspiracy."[1]

Consistent with the appropriate methodology of assuming an antitrust violation, the dissent (and Equitas in its brief) all but expressly states that plaintiff would be a proper antitrust plaintiff if it had purchased retrocessional coverage after Equitas was formed and began exercising its exclusive claims-handling authority over pre-1993 business. But to hold that only then would plaintiff suffer antitrust injury would make no sense, because plaintiff would suffer no qualitatively different injury on account of that purchase; indeed, it would suffer no additional injury at all. No additional injury could be suffered

[1]Inexplicably, the dissent also states that plaintiff "apparently also asserts that by concentrating claims-handling responsibility in Equitas, competition in the [non-life retrocessional reinsurance] market was affected on a *prospective* basis" (emphasis added). In fact, however, plaintiff asserts that an essential attribute of the alleged scheme is that on a prospective basis the syndicates would compete in that market just as they historically had, freely and without restraint.

precisely because the unlawful conspiracy does not – a condition of its success is that it must not – have any adverse consequences for purchasers of post-1993 non-life retrocessional coverage.

The dissent appears to be of the view that for a customer to be a proper antitrust plaintiff, the customer must be a purchaser after the unlawful agreement goes into effect. The dissent does not expressly adopt that view, however, and the parties do not discuss it. If that is the dissent's view, it cannot easily be reconciled with precedent holding that an antitrust plaintiff need not be a purchaser at all (*see e.g. New York Medscan*, 430 F Supp 2d at 148 ["there is no requirement that a plaintiff be a consumer or competitor to assert an antitrust claim"]). A customer who purchases after sellers enter into an illicit agreement to restrain trade and pays more for the product than it otherwise would is no doubt a paradigmatic antitrust plaintiff. But neither the dissent nor Equitas provides any reason grounded in the law or economics for concluding that only a customer injured by a purchase made after the illegal agreement takes effect suffers antitrust injury and is a proper antitrust plaintiff. Plaintiff alleges that through Equitas the Names "created a horizontal restraint – an agreement among competitors on the way in which they will compete with one another" (*NCAA v*

Board of Regents of Univ. of Okla., 468 US 85, 99 [1984]). A post-purchase horizontal restraint that deprives the purchaser of economic benefits it otherwise would obtain affects the quality of the product or service purchased, thereby causing economic injury just as real as a pre-purchase horizontal restraint that increases the price the customer pays. Just as obviously, sellers can obtain economic benefits from a horizontal restraint that are no less real when the restraint takes effect after rather than before purchases are made.

Plaintiff sustained antitrust injury because the quality of what it purchased, retrocessional coverage with the attendant claims-handling service, was adversely affected by an agreement eliminating competition over claims-handling (*see Atlantic Richfield Co. v USA Petroleum Co.*, 495 US 328, 339 [1990] ["Antitrust injury does not arise . . . until a private party is adversely affected by an anticompetitive aspect of the defendant's conduct"] [emphasis deleted]). We recognize that although such a pre-restraint purchaser will not invariably be injured -- because, for example, a retrocedent like plaintiff will not necessarily have a claim that its retrocessionaire must handle -- all post-restraint purchasers who pay a price inflated by a horizontal restraint necessarily are injured. But that hardly seems an adequate justification for concluding that no pre-restraint purchasers who are injured are proper antitrust plaintiffs, especially given that the horizontal restraint can be, as alleged here, one designed to impose costs directly on the purchasers so as to enable the sellers to avoid those costs.[2]

We turn to the ground on which Supreme Court granted the motion to dismiss the second amended complaint. In determining a prior motion to dismiss the first amended complaint, Supreme Court construed the complaint to allege only a market of limited geographic scope, a Lloyd's of London market. Supreme Court found that plaintiff's allegations were sufficient but also allowed plaintiff to move within a prescribed period for leave to amend the complaint to allege a worldwide market. On consent, plaintiff filed the second amended complaint, which in relevant part only added to the allegations of the first amended complaint by including allegations of a worldwide market for non-life retrocessional reinsurance and identifying the Lloyd's of London

[2]Because plaintiff apparently has been in runoff at all relevant times since Equitas was established, its claims under pre-1993 business arguably would have been subjected to the same unfavorable treatment even if Equitas had not been established. Its retrocessionaires, after all, would not have been motivated by competitive considerations to accord it the favorable treatment it accorded to retrocedents who were or might be purchasing coverage on an ongoing basis. Equitas does not make this causality argument, however, and it could not in any event be resolved on the pleadings.

market as a submarket within that worldwide market. Equitas again moved to dismiss, challenging, inter alia, the sufficiency of the allegations of a worldwide market and a Lloyd's submarket. With respect to the challenge to the submarket allegations, Supreme Court rejected plaintiff's argument that the law of the case doctrine alone required that it be rejected. Supreme Court went on to rule that the second amended complaint failed sufficiently to allege a "true submarket" because it did not "allege that the products sold at Lloyd's are not interchangeable with other reinsurance products sold outside the Lloyd's market." Supreme Court dismissed the second amended complaint for this reason; despite expressly noting that plaintiff had alleged a worldwide market, Supreme Court did not mention or discuss the issue of whether the allegations of a worldwide market were sufficient. Although it was dismissing the antitrust allegations for the first time, and although it did not find that the specific deficiencies of the submarket allegations it relied upon were incurable, Supreme Court dismissed the complaint with prejudice. Moreover, it did so sua sponte.

On appeal, although plaintiff defends the sufficiency of the submarket allegations, its principal argument is that the second amended complaint pleads a worldwide market and that its express allegation that "the Lloyd's syndicates collectively had market power in the worldwide market for retrocessional coverage" was more than adequately supported by the specific allegations of paragraph 36. The second amended complaint unquestionably alleges a worldwide market and we agree with plaintiff that the allegations of market power are sufficient.[3]

In subparagraphs of paragraph 36 of the second amended complaint, plaintiff alleges that at all relevant times: the Lloyd's marketplace "was the single most significant seller of most forms of non-retrocessional coverage to reinsurers worldwide"; the Lloyd's marketplace "provide[d] the benchmark for prices, terms, and conditions for most forms of non-life retrocessional coverage"; any reinsurer or broker seeking to

[3]As plaintiff also argues, market power need not be pleaded where actual adverse effects on competition are alleged (*see FTC v Indiana Fed. of Dentists*, 476 US 447, 460-461 [1986] ["Since the purpose of ... inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, proof of actual detrimental effects ... can obviate the need for an inquiry into market power, which is but a surrogate for detrimental effects" [internal quotation marks omitted]). Accordingly, plaintiff also argues that a "naked agreement among the Names to coordinate claims handling of pre-1993 claims so as to reduce payment on those claims, followed by coordinated unreasonable claims handling[,] [is] subject to 'quick look' condemnation." Given the conclusion that the allegations of market power are sufficient, we need not address plaintiff's argument that it has adequately pleaded an unreasonable restraint of trade independent of the existence of market power. Nor need we address the dispute arising from that argument over whether "quick look" analysis is precluded by *Texaco, Inc. v Dagher* (547 US 1 [2006]).

purchase such coverage "would have to at least consider approaching Lloyd's for quotes and would have to take into account the terms and conditions offered by various Lloyd's syndicates"; and that "[f]or many lines of retrocessional business . . . competition *within* the Lloyd's marketplace is more significant to prospective purchasers of retrocessional coverage than is competition between Lloyd's as a whole and other sellers because Lloyd's is expected to, and does, set the lead in establishing coverage."

Equitas's challenge to the sufficiency of these allegations of market power rests on a divide and conquer approach. That is, it analyzes each one separately and, after concluding, plausibly enough, that each is alone insufficient, it pronounces the whole insufficient. But the allegations must be viewed as a whole, and plaintiff is entitled to all reasonable inferences (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). For these reasons, the allegations are sufficient because they support a reasonable inference that at all relevant times the Lloyd's syndicates had market power, i.e., "the ability to raise price significantly above the competitive level without losing all of [their] business" (*CDC Tech., Inc. v IDEXX Labs., Inc*., 186 F3d 74, 81

[2d Cir 1999][internal quotations and citations omitted]).[4] Moreover, any doubt on this score should be resolved so as to permit the fact-intensive question of market power to be resolved after discovery (*see Todd v Exxon Corp*., 275 F3d 191, 199-200 [2d Cir 2001] [Sotomayor, J.] ["Because market definition is a deeply fact-intensive inquiry, courts hesitate to grant motions to dismiss for failure to plead a relevant product market"]). Although Equitas protests that the allegations of paragraph 36 are conclusory, evidentiary detail is not required (*id*. at 198 ["No heightened pleading requirements apply in antitrust cases"]).

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[4]In the typical case, that is surely the appropriate definition of market power. As the unreasonable restraint alleged in this case has nothing to do with concerted action raising the price for purchasers, it is not obvious that whether an antitrust violation can be established should depend on whether the Names could do what they did not try to do, significantly raise price above the competitive level without losing all their business. The parties appear to agree, however, that to the extent plaintiff relies on market power, it must show market power in this sense. Presumably, such a showing would tend to satisfy the requirement under the rule of reason test of "an actual adverse effect on competition as a whole in the relevant market" (*Capital Imaging Assoc., P.C. v Mohawk Valley Med. Assoc, P.C.*, 996 F2d 537 [2d Cir 1993], *cert denied* 510 US 947 [1993][emphasis deleted]). At one point in its brief, however, Equitas suggests that the appropriate market power showing in this case "would be the ability to drive down payments to reinsurers below the payments that would prevail in a competitive market" (internal quotation marks omitted). Of course, that is precisely what plaintiff alleges that Equitas was able to do with respect to pre-1993 business.

As plaintiff points out, Equitas's position that plaintiff cannot show market power is ironic. After all, Equitas offers, as it states, "a significant procompetitive justification for its formation – the preservation of competition that would have otherwise exited the market if Lloyd's had ceased to exist." But if Equitas is correct that the demise of Lloyd's would cause the worldwide market to suffer in a competitively significant way, it is in an awkward position when it nonetheless argues that an agreement among virtually all the Names to stop competing over claims handling does not cause worldwide competition to suffer in a competitively significant way.

Equitas offers three alternative grounds for affirmance, one the dissent does not discuss and the other two it accepts. We reject the first, that plaintiff's antitrust claims are barred by the Donnelly Act's four-year statute of limitations (General Business Law § 340[5]), for essentially the reasons stated by Supreme Court in an order entered July 7, 2008 denying, inter alia, Equitas's motion to dismiss the first amended complaint.

The second argument is that New York courts lack subject matter jurisdiction over plaintiff's antitrust claims under the Foreign Trade Antitrust Improvements Act (FTAIA) (15 USC § 6a), as interpreted in *F. Hoffman-LaRoche Ltd. v Empagran S.A.* (542 US 155 [2004]). In accepting that argument, the dissent concludes that plaintiff has not alleged that the anticompetitive conduct has had sufficiently direct effects on the domestic market. That conclusion is founded on a misreading of the complaint. According to the dissent, plaintiff "alleges that a conspiracy among the Lloyd's syndicates caused anticompetitive effects in a worldwide market -- including, presumably, New York -- for the underwriting of *new* retrocessional reinsurance business because insurers worldwide follow a 'benchmark' set by Lloyd's" (emphasis added). Contrary to the dissent, plaintiff makes no claim at all that the anticompetitive conduct has had any effect on the pricing or any other aspect of competition over "new" retrocessional business, i.e., coverage provided in and after 1993. Rather, plaintiff complains about the effects on it and other retrocedents of the claims-handling conduct of Equitas relating to pre-1993 business.

Assuming the applicability of the FTAIA, the jurisdictional question is whether the challenged conduct has a "direct, substantial and reasonably foreseeable effect" (*F. Hoffman-LaRoche*, 542 US at 59). Plaintiff's allegations of injury to it in New York are sufficient to support a reasonable inference of such effects. We do not doubt that under the federal statute that governs the determination of corporate citizenship for purposes of federal diversity jurisdiction (28 USC § 1332 [c]), plaintiff is a citizen of Germany. But as plaintiff argues, it is recognized by New York law to have a legal status as a U.S. branch (*see* Insurance Law § 107[a][44] ["'United States branch' means . . . the business unit through which business is transacted within the United States by an alien insurer"]), it is regulated by the New York State Insurance Department (*id.* § 1106[e]), and it maintains separate financial statements (*id.* § 307[a][3]) which governs its capacity to take on risk without reference to the foreign insurer as a whole (*id.* §§ 1115[a], 1313[b][1]). Relatedly, plaintiff alleges that the financial losses caused by Equitas's conduct are reflected on its distinct balance sheet as a branch. For purposes of determining whether the requisite anticompetitive effects occurred in New York, surely the legal status of plaintiff under New York law as a "branch" is at least relevant. Indeed, focusing on just one of the requirements of the Insurance Law applicable to United States branches of foreign insurers, the Third Department has stated that the "requirement places the branch in essentially the same position as if it were formally incorporated in this State" (*see Matter of Zurich Ins. Co. v New York State Tax Commn.*, 144 AD2d 202, 203 [1988], *lv denied* 74 NY2d 602[1989]). We note, too, that the complaint alleges that Equitas engaged, and continues to engage, in anticompetitive claims handling in New York, and plaintiff asserts that it, qua branch, entered the insurance contracts and submitted the subject claims. Furthermore, in the procedural posture of this case, dismissal of the complaint on this ground is particularly inappropriate (*see Todd v Exxon Corp.*, 275 F3d 191, 199-200 [2d Cir 2001], *supra*).

Finally, without citation to any authority, the dissent states that it "do[es] not believe that New York antitrust law should be applied extraterritorially to challenge the creation of a U.K. entity that has met with the approval of the U.K. insurance and antitrust authorities." In the first place, however, plaintiff challenges not the creation of Equitas but its post-creation conduct. That Her Majesty's government blessed the existence of Equitas does not license Equitas to violate New York laws with impunity. Moreover, as plaintiff stresses, comity is not an issue here because the anticompetitive conduct of Equitas was not mandated by British law (*see Hartford Fire Ins. Co. v California*, 509 U.S. 764, 799 [1993] [rejecting comity argument of London reinsurers against application of Sherman Act; "the London reinsurers do not argue that British law *requires* them to act in some fashion prohibited by the law of the United States . . . or claim that their compliance with the laws of both countries is otherwise *impossible*"] [emphasis added]).

Accordingly, the judgment of the Supreme Court, New York County (Bernard J. Fried, J.), entered March 11, 2009, which dismissed the second amended complaint should be reversed, on the law, with costs, and the complaint reinstated. Appeal from the order, same court and Justice, entered March 4, 2009, which granted defendants' motion to dismiss the second amended complaint, should be dismissed, without costs, as subsumed in the appeal from the judgment. Appeal from the order, same court and Justice, entered May 27, 2009, which denied plaintiff's motion for reargument, should be dismissed, without costs, as taken from a nonappealable order.

All concur except Manzanet-Daniels, J.
who dissents in an Opinion:

MANZANET-DANIELS, J. (dissenting)

Because I believe that the New York antitrust statute, the Donnelly Act, may not be applied extraterritorially in the manner advocated by the majority, to govern the alleged anticompetitive practices of the London reinsurance market, a market that operates under the auspices of U.K. regulators, I respectfully dissent. The complaint herein fails to allege, nor does it purport to allege, a direct and substantial effect on the local domestic market, and the case involves fundamentally foreign commerce, as a result of which subject matter jurisdiction under the antitrust laws is lacking.

Plaintiff, Global Reinsurance Corporation, is not a domestic corporation but the United States branch of a German reinsurance company. Like other reinsurance companies, Global further reinsured its obligations, as "retrocedents," to other reinsurers, known as "retrocessionaires," under retrocessional agreements, further spreading the risk assumed by the cedents and reinsurers. One retrocessional reinsurance product, called non-life retrocessional reinsurance (NLRRI), pertaining to property and casualty insurance, is the product at issue in this case.

Global entered into certain retrocessional treaties with groups of underwriters, known as syndicates, in the London insurance market. Pursuant to these treaties, the syndicates agreed to pay a specified percentage of Global's risk under its various insurance obligations. In the late 1980s and 1990s, the individual underwriters, or "Names," as they are known in the London market, faced financial ruin after large losses outpaced the collection of premiums. The London market was restructured, pursuant to a Reconstruction and Renewal Plan, to "fix and cap" the liabilities of the Names on pre-1993 business. The Equitas defendants were established, with the blessing of British insurance regulators, to reinsure and perform claims-handling responsibilities for certain pre-1993 liabilities of the Names, including liabilities under retrocessional agreements the Names had with retrocedents such as plaintiff Global. By agreement dated September 3, 1996, the Equitas defendants entered into a "Reinsurance and Run-off Contract" with certain Names which granted Equitas exclusive and irrevocable responsibility for managing, evaluating and paying out on certain pre-1993 non-life liabilities of the Names.

Global contends, in the instant suit, that centralizing the Names' claims-handling obligations with respect to pre-1993 liabilities in a single entity, i.e., Equitas, provided Equitas with an anticompetitive advantage to renegotiate and/or discount the percentage liabilities owing to Global under the retrocessional treaties, in violation of the Donnelly Act

(General Business Law § 340). Global alleges, by way of example, that Equitas sought to impose "extra-contractual conditions" on Global's right to payment under the treaties by refusing to render payment of certain claims unless plaintiff furnished Equitas and the underwriters with releases of future liabilities, contrary to industry custom. Global alleges that the underwriters have refused to indemnify Global or delayed payment, or both, for certain asbestos-related claims under the treaties absent compliance with certain Reinsurance Documentation Requirements drafted and imposed by Equitas. Plaintiff alleges that Equitas' ability to engage in these practices "stems directly from the combination effected by the R&R Plan, by which the previously independent Syndicates have been – illegally and in violation of the Donnelly Act – replaced by a single, combined entity that has no economic or business incentive to cause the Underwriters to honor their obligations under the Treaties." Global asserts that the concentration of claims-handling responsibility in Equitas has affected competition in the NLRRI market on a prospective basis. However, plaintiff concedes that the current NLRRI product offered on the London market is interchangeable with other NLRRI products in the world-wide marketplace. In any event, plaintiff concedes that it no longer purchases the NLRRI product. Thus, the injury plaintiff Global sustained by virtue of any alleged noncompetitive conduct is confined to the effects of alleged concentrated claims-handling responsibility in Equitas by virtue of the restructuring of the London market pursuant to the 1996 Reinsurance and Run-off Contract.

I do not doubt that plaintiff Global was "injured" in the sense that its claims were not settled on as favorable a basis as they had been previously, owing to consolidation of claims-handling responsibility in Equitas. However, this simply states a claim for breach of the relevant retrocessional treaties. Plaintiff fails to allege an antitrust injury as that term is understood (*see SAS of Puerto Rico, Inc. v P.R. Tel. Co.*, 48 F3d 39 [1st Cir 1995] [the presumptively proper antitrust plaintiff is a customer who obtains services in the threatened market or a competitor who seeks to serve that market]). Plaintiff does not allege that it participated in any market where retrocessional insurance coverage was sold – either as purchaser or competitor – at any point after 1996 (when Equitas was formed), the period of the alleged conspiracy.

More fundamentally, plaintiff Global fails to allege any facts that would permit a New York court to exercise subject matter jurisdiction over the alleged Donnelly Act violation. The Donnelly Act (General Business Law § 340) proscribes monopolization and certain restraints of trade and applies to primarily intrastate conduct. The Donnelly Act is intended to apply to conduct "alleged to have a significant intrastate or local anticompetitive impact in violation of State antitrust law with *minimal interstate consequences*" (*Two Queens, Inc. v Scoza*, 296 AD2d 302, 304 [2002] [emphasis added]; *H-Quotient, Inc. v Knight Trading Group, Inc.*, 2005 WL 323750, *4 [SDNY 2005]; *see also People v Coventry First LLC*, 52 AD3d 345, 345 [2008] [Donnelly Act claim properly dismissed to the extent that defendants' alleged conduct did not take place "in this state"], *affd* 13 NY3d 108 [2009]). Nothing in the history of the Act or its application suggests that it was meant to have the extraterritorial effect urged by the majority.

Plaintiff alleges a "world-wide" conspiracy, not one directed at the U.S. market, let alone the local market. The majority would find the Act applicable to alleged anticompetitive conduct that occurred entirely abroad – i.e., the claims-handling practices of an entity created under the auspices of the British insurance regulators – which happens to have an indirect effect on plaintiff Global, a branch office of a German reinsurance company. The majority cites no authority for the proposition that the Act was intended to have so broad a scope.

Furthermore, the majority's construction of the statute would give the state antitrust statute broader applicability than its federal counterpart, the Sherman Act, a result that cannot be reconciled with the constitution. In order for an antitrust plaintiff to allege jurisdiction under the Sherman Act (upon which the Donnelly Act is based),[1] it must demonstrate that the alleged anticompetitive conduct (1) has a *direct, substantial and reasonably foreseeable* anticompetitive effect on United States commerce and (2) that such conduct gave rise to the antitrust claim. The anticompetitive conduct must be directed at the domestic market and not merely at a domestic plaintiff.

Plaintiff Global is "a branch of a foreign reinsurance company organized under the laws of Germany, with its principal place of business in Cologne, Germany." For purposes of subject matter jurisdiction, U.S. branches of foreign companies are deemed to be foreign entities (*see Colonia Ins., A.G. v D.B.G. Prop. Corp.*, 1992 WL 204376 [SDNY 1992]). Lloyd's of London and

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[1]The Donnelly Act, or "Little Sherman Act," should generally be construed in light of federal precedent and given a different interpretation only where state policy, differences in the statutory language or the legislative history justify such a result (*see Anheuser-Busch, Inc. v Abrams*, 71 NY2d 327 [1988] [citations omitted]).

Equitas are U.K. entities. The complaint alleges conduct involving a German entity and U.K. entities that occurred in the London marketplace and that is regulated by the U.K. government. Thus, this case does not involve domestic commerce.

Whether or not Global is considered to be a U.S. entity, the complaint still fails to allege a sufficiently direct effect upon U.S. commerce giving rise to plaintiff's antitrust claim. Plaintiff Global alleges that a conspiracy among the Lloyd's syndicates caused anticompetitive effects in a worldwide market – including, presumably, New York – for the underwriting of new retrocessional reinsurance business because insurers worldwide follow a "benchmark" set by Lloyd's. However, such a roundabout, "but for" effect on the domestic market is insufficiently direct to confer subject matter jurisdiction under the federal statute. Where alleged anticompetitive effects in the U.S. are based on a theory that the globally interconnected nature of the marketplace enabled foreign conduct to affect the U.S. market, that effect is not considered "direct" within the meaning of the federal statute (*see Boyd v AWB Ltd.*, 544 F Supp2d 236, 246 [SDNY 2008] ["although plaintiffs [U.S. wheat farmers] may have alleged a plausible theory of causation based on the global interrelatedness of the wheat markets in Iraq and the United State, [defendant's] extraterritorial conduct in Iraq was, at most, only a ‘but for’ cause of the alleged drop in wheat prices in the United States”); *In re Intel Corp. Microprocessor Antitrust Litig.*, 452 F Supp2d 555, 561 [D. Del. 2006] [dismissing suit by U.S. computer chip microprocessor against U.S. competitor which manufactured components and assembled them into final products abroad] [“While the Court understands the nature of a global market, the allegations of foreign conduct here result in nothing more than what courts have termed a ‘ripple effect’ on the United States domestic market, and [federal law] prevents the Sherman Act from reaching such ‘ripple effects.’”)][2]

Plaintiff procured retrocessional insurance from the London

[2]The allegations found wanting in these cases are virtually indistinguishable from the allegations in the amended complaint. For example, in *Intel*, the plaintiff alleged that “[i]n maintaining its monopoly by unlawfully denying rivals a competitive opportunity to achieve minimum levels of efficient scale, Intel must necessarily exclude them from the product market worldwide. As the domestic U.S. market is but an integral part of the world market, successful monopolization of the U.S. market is dependent on world market exclusion, lest foreign sales vitalize a rival’s U.S. competitive potential.” The court rejected these allegations, reasoning “[plaintiff] places great weight on its allegations that it is an American company engaged in a world-wide market; however, such allegations do not create jurisdiction without substantial, direct effects on the domestic market.”

market. Plaintiff alleges that the centralization of claims-handling responsibility in Equitas, an entity created under the auspices of British insurance regulators, has resulted in unfavorable and alleged anticompetitive settlement of claims under its treaties of retrocessional insurance. Global alleges that but for Lloyd's conduct in the United Kingdom, other market players, presumably including domestic market players, would offer retrocessional reinsurance at more competitive prices, terms and conditions. The alleged anticompetitive conduct is "in significant part foreign," and rests on a foreign harm, even assuming, arguendo, that it has caused some attenuated domestic injury (*see F. Hoffman La Roche, Ltd. v Empagran S.A.*, 542 US 155 [2004]).

Further, I do not believe that New York antitrust law should be applied extraterritorially to challenge the creation of a U.K. entity that has met with the approval of the U.K. insurance and antitrust authorities. The R&R Plan by which Equitas was formed was cleared through the relevant British insurance regulatory authorities at the Department of Trade and Industry. The R&R Plan was also reported to the relevant antitrust regulators in the United Kingdom and Europe, including the U.K. Office of Fair Trading and the European Commission. Indeed, the R&R plan was even evaluated by the New York Insurance Department. For all of the foregoing reasons, the second amended complaint was properly dismissed.

The Decision and Order of this Court entered herein on January 11, 2011 is hereby recalled and vacated.

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

ENTERED: JANUARY 18, 2011

CLERK