TO BE ARGUED BY:
ROY DEN HOLLANDER

Supreme Court of the State of New York
Appellate Division: First Department

In the Matter of the Application of

ROY DEN HOLLANDER,

Petitioner-Appellant,

-against-

THE CITY OF NEW YORK COMMISSION ON HUMAN RIGHTS,

Respondent-Respondent.

BRIEF FOR PETITIONER-APPELLANT

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Supreme Court, New York County, Index No. 100299/2013

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According to the lower court—Yes. "Amnesia's decision for requiring $350 bottle service [from older males] was based upon a nondiscriminatory, legitimate reason of . . . 'the goal of furthering the image of Amnesia's establishment.'" (*Order and Judgment*, Hunter, J., at 3, A-10).

2. Can government officials, who are bigoted towards evolutionarily correct [1] Euro-Americans, manipulate New York's "election of remedies" law to create a trap for them when discriminated against by leaving them no remedy other than to take to the streets?

According to the lower court—Yes. New York's "election of remedies" law prevents the N.Y.C. Commission on Human Rights from considering a complaint that raises a cause of action when a complaint on a different cause of action, but concerning the same fact situation had been filed with the State Division of Human Rights and the State lacked jurisdiction over the cause of action submitted to the City. (*Order and Judgment*, Hunter, J., at 2-3, A-9-10).

[1] "Evolutionarily Correct" is the opposite of politically correct because "EC" tenets are based on science—not delusional Hollywood depictions that those who can't, can.

3. Can bureaucrats base a probable cause determination of whether an evolutionarily correct Euro-American was discriminated against by a public accommodation nightclub on an investigation that (1) failed to interview two of the three eyewitnesses; (2) relied on Internet blogs by persons identifiable only by their Internet monikers and who, by their own blogs, admitted not even being at the nightclub Amnesia at the time of the incident; (3) ignored an Internet blog by one person who was at the nightclub at the time of the incident because it supported a finding of discrimination; and (4) dismissed as *dicta* the findings of the only government agency, N.Y. State Division of Human Rights, to conduct an on-site investigation—also because it supported a finding of discrimination?

According to the lower court—Yes. "It cannot be said that the [New York City] Commission [on Human Rights] conducted a one-sided or abbreviated investigation . . . ." (*Order and Judgment*, Hunter, J., at 3, A-10).

4. Can a government agency violate its required procedures, in part by failing to provide an impartial decision maker, and still adhere to procedural due process in making a decision concerning the violation of civil rights, just because its decision is appealable to a court?

According to the lower court—Yes. "Petitioner's Fourteenth Amendment procedural due process claim is dismissed, as petitioner was afforded constitutional minimum due process of notice and the opportunity to be heard. Furthermore,

petitioner had an adequate post-deprivation opportunity to be heard in this Article 78 proceeding." (*Order and Judgment*, Hunter, J., at 3, A-10).

5. Can the lower court wrongly apply the standard of review for administrative decisions in order to make it more difficult for evolutionarily-correct Euro-Americans to successfully challenge those decisions that are motivated by bigotry against this latest disfavored group of society?

According to the lower court—yes, even though the lower court relies on an analogy to the doctrine of *res judicata* that holds the administrative decision was arbitrary and capricious. (See, *Order and Judgment*, Hunter, J., at 3, A-10).

Nature of the Case and Facts

This is a special proceeding against the respondent New York City Commission on Human Rights ("City HR") and its Executive Director of Law Enforcement, Carlos Velez ("Velez"), for intentionally discriminating against the petitioner ("Den Hollander") because of his ancestry (Euro-American protestant), his speech (litigates for men's rights), and his marital status (divorced) in dismissing an age discrimination complaint filed by Den Hollander against "Amnesia," a public accommodation nightclub located in Manhattan. Then again, maybe City HR and Velez discriminated against Den Hollander for being an African-American. After all, everyone's ancestors originated in Africa.

Anyway, Velez, in his capacity as City HR's Executive Director for Law Enforcement, intentionally discriminated against Den Hollander in investigating, writing, and issuing a *Determination and Order*, A-41, which was adopted by City HR as its *Final Determination and Order*, A-47.

City HR dismissed Den Hollander's age discrimination complaint against the nightclub Amnesia based on various extra-legal and bigoted reasons that expose a discriminatory intent by it and Velez. Bureaucratic bias, even against Euro-Americans, has no place among civilized men.

> "Discrimination itself, by perpetuating 'archaic and stereotypic notions' or by stigmatizing members of the disfavored group as 'innately inferior' and therefore as less worthy participants in the political community . . . can cause serious noneconomic injuries to those persons who are personally denied equal treatment…."

Heckler v. Mathews, 465 U.S. 728, 739-740 (1984). No group is more "disfavored" today than evolutionarily-correct Euro-Americans who have nothing good to say about their ex-wives.

City HR's *Final Determination and Order* failed to rely on substantial evidence and was "arbitrary and capricious" because it resulted from an abbreviated and one sided investigation that failed to follow City HR's own procedures.

Den Hollander sought in the Supreme Court (1) reversal of City HR's *Final Determination and Order*; (2) that City HR implements anti-discrimination policies

to avoid unlawful discriminatory acts by its employees against Euro-Americans of protestant origin, divorced husbands, and any man who chooses to petition the government for a redress of grievances; (3) that Velez undergo sensitivity training to the city, state and federally protected rights of those who belong to groups that he does not identify with; (4) nominal damages from New York City plus compensatory damages in the amount of the disbursements for bringing this action; and (5) incidental punitive damages from Velez in his personal capacity for the amount of $3,000.

The Supreme Court denied reversal of City HR's *Final Determination and Order*, granted City HR's motion to dismiss, and as of the filing of this appeal, has not made a decision on Den Hollander's motion to supplement the Petition, which raises deprivations of Den Hollander's federally protected rights under the Fourteenth Amendment to the U.S. Constitution.[2]

The underlying facts are as follows:

On Saturday, January 9, 2010, at 11:05 PM, Den Hollander and his friend, both older, middle-aged male lawyers, stood on line in front of the nightclub Amnesia in order to enter the club, which had opened at 11 PM. Two females, immediately in front of them and who appeared to be in their 20s or 30s,

[2] The Motion to Supplement the Petition in the Supreme Court was filed on the very same day that the lower court's *Order and Judgment* was issued. Den Hollander did not learn of the *Order and Judgment* until the following day when he received notice through the e-track system. Neither Den Hollander nor apparently the Court knew of each other's simultaneous filings.

approached the Amnesia doorman who checked their identification and then allowed them to enter the club without any further requirement. When Den Hollander and his friend approached the doorman, he told them they must buy a bottle of alcohol for $350 in order to enter the club. Den Hollander and his friend declined and were asked to step out of the line, which they did. Den Hollander and his friend then witnessed another pair of females, who appeared to be in their 20s or 30s, enter the club without having to agree to buy a bottle of alcohol for $350.

The following week of January 10, 2010, Den Hollander filed a complaint with the New York State Division of Human Rights ("State DHR") for what he believed at the time was sex discrimination.

State DHR issued a decision on September 16, 2010, that concluded the discrimination against Den Hollander and his friend was not based on sex. The State also found that it did not have jurisdiction because Den Hollander and his friend were discriminated against probably because of their age. (State DHR, *Determination and Order After Investigation* at p. 2, A-50). The State was powerless to remedy the situation because age discrimination in public accommodations is outside its jurisdiction:

> "Based on observations made during the field visit, the vast majority of the patrons of the nightclub [Amnesia] appeared to be under the age of 30 years. Respondent [Amnesia] asserts that, when the nightclub is crowded, respondent employs an admissions strategy to limit the number of individuals, male and female, who do not have the appearance respondent desires to maintain the image of the nightclub.

> A photo on complainant's website suggests that he is significantly older than respondent's patrons, and age discrimination is beyond the jurisdiction of the Division with regards to public accommodation."

(*Id.* at p. 2, A-50).

On receiving the State DHR decision, Den Hollander immediately made an October 15, 2010 appointment with City HR, which does have jurisdiction over age discrimination, in order to initiate the process of filing a complaint against Amnesia for age discrimination.

Right from that first meeting at City HR, Velez, who under the law is suppose to act as a neutral fact-finder, demonstrated his prejudice toward Den Hollander on multiple levels—some of it illegal under the City's Administrative Code and some of it not.[3]

Velez notified the City HR staff attorney, with whom Den Hollander was meeting, that he would not allow Den Hollander to file an age discrimination complaint against the nightclub Amnesia. According to the staff attorney, Velez told her that there was no discrimination because had Den Hollander and his friend agreed to buy a $350 bottle, they could have entered the nightclub.

[3] Under New York City's Human Rights Law, Admin. Code Title 8, discrimination based on national origin and marital status are illegal. Discrimination against ancestry is also illegal, since it is included under national origin. N.Y.C. Admin. Code § 8-102(7). The Human Rights law does not specifically mention discrimination based on free speech exercised in litigation, but that is covered by the First Amendment, *N.A.A.C.P. v. Button*, 371 U.S. 415, 429 (1963).

After the meeting, Den Hollander sent a letter to City HR's Commissioner, *Gatling Letter*, October 15, 2010, A-52, arguing that years ago in Montgomery, Alabama, people with relatively darker skin color could enter a public bus, but they would have to sit in the back. By Velez's reasoning, such conduct was not discriminatory because those with a different skin complexion were not barred from entering and riding the buses as long as they sat in the back.

The U.S. Supreme Court disagreed in *Browder v. Gayle*, 352 U.S. 903 (1956), which found that allowing blacks to enter a bus, but requiring them to sit in the back was unconstitutional discrimination. In a different case, the U.S. Supreme Court also ruled that a discriminatory injury can be the existence of a "barrier [read $350 bottle of brandless, water-downed vodka] that makes it more difficult for members of one group [read older guys] to obtain a benefit [read chasing young ladies] than it is for members of another group [read younger guys]." *Northeastern Fla. Chapter, Associated Gen. Contractors of America v. Jacksonville*, 508 U.S. 656, 666 (1993).

So, contrary to the U.S. Supreme Court, but in accordance with Velez's own brand of law, since Den Hollander and his friend could enter the club [get on the bus], but once inside, they would have to buy a bottle [sit in the back], there was no discrimination. There is nothing comical about this type of rationalization used by Velez and the Ku Klux Klan of the Deep South in another century. It makes

clear a mindset driven by bigotry, which in Velez's case is directed toward Den Hollander and people like him.

To the credit of City HR's Commissioner, Velez was required to accept the case, but it only aggravated his prejudice toward Den Hollander. Velez—not unlike a member of the Ku Klux Klan who has to go through the trouble to find his rope—now had to conduct an investigation and write a determination. In order to reach a determination that would support his perverse view of the law and appease his prejudice, he conducted a slipshod investigation and concluded (1) there was no probable cause that Amnesia discriminated against Den Hollander and his friend based on age; [4] and (2) City HR was barred from considering Den Hollander's age discrimination claim because Den Hollander had previously filed a sex discrimination complaint with the State DHR, which had no jurisdiction over age discrimination in nightclubs.

City HR adopted Velez's determination as its *Final Determination and Order*, which dismissed Den Hollander's age discrimination complaint against Amnesia on July 27, 2012. Den Hollander then brought an Article 78 action in the New York County Supreme Court before Justice Alexander W. Hunter, Jr. seeking reversal of the City HR decision. While the action was pending, Den Hollander

[4] "Probable Cause" for City HR means "where a reasonable person, looking at the evidence as a whole, could reach the conclusion that it is more likely than not that the unlawful discriminatory practice was committed." 47 RCNY 1-03.

examined Velez's investigation file and supplemented his petition with some of the results of that examination. Justice Hunter upheld the City HR decision and dismissed the action on July 30, 2013.

Arguments

1. Is age-discrimination against older Euro-American males by a public accommodation nightclub legally justified in New York City in order to further the club's image of youth by populating the space within the club only with people who fit that image?

The lower court held that "Amnesia's decision for requiring $350 bottle service was based upon a nondiscriminatory, legitimate reason of . . . 'the goal of furthering the image of Amnesia's establishment.'" (*Order and Judgment*, Hunter, J., at 3, A-10). State DHR found that image was one of youth. (State DHR, *Determination and Order After Investigation* at 2, A-50).

The Ku Klux Klan should have thought of that argument when it was opposing integration in the 1960s. Those bigots of the Deep South could have argued that public lunch counters admit only those who further the counters' image—white. Clearly, that was not the law then and there, but according to the lower court, that is the law here and now—providing the people trying to integrate a public accommodation are older Euro-American guys.

2. Can government officials, who are bigoted towards evolutionarily-correct Euro-Americans, manipulate New York's "election of remedies" law to create a trap for them when discriminated against by leaving them no remedy other than to take to the streets?

Caveat Euro-Americans in the judicial system or the "election of remedies" doctrine applies just because one belongs to a currently disfavored group.

The lower court's first manipulation of the "election of remedies" doctrine to jurisdictionally bar Den Hollander from bringing an age discrimination complaint wrongly relied on N.Y. Executive Law § 297(9), N.Y.C. Admin. Code § 8-502 and the following cases: *Emil v. Dewey*, 49 N.Y.2d 968 (1980); *Benjamin v. N.Y.C. Dept. of Health*, 57 A.D.3d 403 (1st Dep't 2008); *Higgins v. NYP Holdings, Inc.*, 836 F.Supp.2d 182 (S.D.N.Y. 2011); *Benjamin v. N.Y.C. Dept. of Health*; 17 Misc. 3d 1122(A)(N.Y. Sup. Ct. 2007); *Bhagalia v. State*, 228 A.D.2d 882 (3rd Dep't 1996). (*Order and Judgment*, Hunter, J., at 2-3, A-9-10).

N.Y. Executive Law § 297(9), N.Y.C. Admin. Code § 8-502 and the above cases hold that a person alleging discrimination has a choice: he can either go to court or file a complaint with a human rights agency concerning the same fact situation but not both. The problem with the lower court's reliance is that Den Hollander did not go to court after filing the State DHR complaint. When State DHR's decision pointed out the discrimination was likely based on age, over which it had no jurisdiction, Den Hollander immediately made a complaint of age discrimination with City HR. Had Den Hollander tried to go into court instead,

then he would have been barred by the above cited statutes and cases—but he did not, he filed with City HR.

The lower court's second manipulation of the remedies doctrine in order to erect a barrier to justice for Euro-Americans is its misplaced holding that

> [Den Hollander's] age discrimination claim 'constitutes the same cause of action as the formerly litigated [gender] claim,' as it arose out of the same transaction or occurrence from January 9, 2010. *Troy v. Goord*, 300 A.D.2d 1086, 1087 (4th Dept. 2002); see also *Smith v. Russell Sage Coll.*, 54 N.Y.2d 185,192-194 (1981); *Tsabbar v. Delena*, 300 A.D.2d 196, 197 (1st Dept. 2002).

(*Order and Judgment*, Hunter, J., at 3, A-10).

The lower court relied on *res judicata* cases for this holding. Okay, if the lower court wants to argue its remedies of election decision by analogy with *res judicata*, let's see what the real result is.

Res judicata and collateral estoppel are generally applied to valid and final judgments of courts of limited jurisdiction. *See Hallock v. Dominy*, 69 N.Y. 238, 240-41 (1877); *Firedoor Corp. of Am., Inc. v Merlin Indus., Ltd.*, 86 A.D.2d 577, 446 N.Y.S.2d 325, 327 (1st Dep't 1982). However, if the limited nature of the court's jurisdiction precludes determination of a particular claim, its decision will obviously not be *res judicata* as to that claim. *Leshin v. Ludwig*, 111 N.Y.S.2d 105, 110 (Dom. Rel. Ct. 1952). As Judge Cardozo held in a Court of Appeals case:

> An election of remedies presupposes a right to elect. . . . If in truth there is but one remedy, and not a choice between the two, a fruitless

> recourse to a remedy withheld does not bar recourse thereafter to the remedy allowed.

Schenck v. State Line Tel. Co., 238 N.Y. 308, 311 (1924). Since State DHR does not have jurisdiction over age discrimination in public accommodations, the lower court's analogy to *res judicata* means that the election of remedies doctrine did not apply when the age discrimination complaint was brought to City H.R.

If State DHR had jurisdiction over all the causes of action stemming from the Amnesia fact situation, the original complaint would have been amended to add the other cause of action—age discrimination. If Den Hollander had failed to add that cause of action in a timely fashion then State DHR could have denied leave to amend—just as a court does. But that is not the situation here. Here, the State had jurisdiction over the allege cause of action: sex discrimination, but then the State discovered through its investigation that the real cause of action was age discrimination over which it had no jurisdiction, but City HR did.

The lower court's third manipulation of the remedies doctrine involved interpreting N.Y.C. Admin. Code § 8-109(f)(iii) to create the false impression that it applies to the same fact situation rather than the same cause of action. N.Y.C. Admin. Code § 8-109(f)(iii) states City HR will not have jurisdiction if

> the complainant has previously filed . . . an action or proceeding before any administrative agency under any other law of the state alleging an unlawful discriminatory practice as defined by this chapter . . . with respect to the same grievance which is the subject of the complaint under this chapter [before City HR].

The lower court assumed the term "grievance" was identical with the "occurrence" or "fact situation" which gave rise to the grievance. It is not and here is why:

The City's Human Rights Law states that "[a]ny person aggrieved by an unlawful discriminatory practice" can file a complaint. N.Y.C. Admin. Code § 8-109(a)(emphasis added). An unlawful discriminatory practice means subjecting a person to different treatment that denies him the advantages, privileges, and facilities of a public accommodation because of his "race, creed, color, national origin, age, gender, disability, marital status, partnership status, sexual orientation or alienage, or citizenship status . . . ." N.Y.C. Admin. Code § 8-107(4)(a) (emphasis added).

The disjunctive "or" means that discriminating against a person for say "alienage" is one unlawful discriminatory practice and discriminating against a person for say "color" is another separate unlawful discriminatory practice. The person discriminated against because of his alienage is "aggrieved," he is wronged, which means he has a grievance, referred to legally as a "cause of action" because he was denied something others weren't due to his alienage. A person discriminated against because of his color also has a grievance, a cause of action, because he was denied something due to his skin hue. The two grievances, causes of action, are not the same. One was motivated by ill will toward a person's alienage while the other was motivated by ill will toward a person's color.

What if the same person is discriminated against for both his alienage and color on the same occasion at the same time? Does he have one grievance, one cause of action, or two? Every first year law student knows the answer—the person has two causes of action or two grievances stemming from that one fact situation.

According to Black's Law Dictionary, "grievance" means "an injury, injustice, or wrong that gives ground for a complaint." Without the violation of a right, there is no wrong and no complaint, so the violation of a right, no matter what the factual circumstances, is the requirement. The U.S. Supreme Court ruled "[a] cause of action does not consist of facts, but of the unlawful violation of a right which the facts show." *Baltimore S.S. Co. v. Phillips*, 274 U.S. 316, 321 (1927). When the "violations of two individual rights have occurred," even though "both violations spring from a common fact, a single occurrence" there are two injuries, not one. *Herrmann v. Braniff Airways, Inc.*, 308 F.Supp. 1094, 1099-1100 (S.D.N.Y. 1969).

An analogy of what really occurred in this case is the following: Let's assume City HR's investigator, Velez, steps into a British telephone booth and ends up in Atlanta, Georgia, in front of the Pickrick Restaurant in 1964. Hungry, after his time travel, he tries to enter the restaurant, but is met by Lester Maddox brandishing an axe handle. Maddox, an avowed bigot toward people with darker

skin color and those he thinks are aliens (foreigners), refuses to admit Velez. Does Velez have one cause of action, one grievance, against Maddox or two? There's only one fact situation, but he has two causes of action because Maddox discriminated against him on the basis of color and alienage.

The lower court, however, believes that in the Maddox analogy, Velez has only one cause of action, or one grievance, because there was only one incident of keeping Velez out of the restaurant. The lower court used this mistaken view to rule that because Den Hollander had filed a complaint with the State DHR on a cause of action for what he believed at the time to be sex discrimination, he could not file a complaint with the City HR for a cause of action based on age discrimination even though the State did not have jurisdiction over age discrimination in public accommodations.

The lower court's wrong conclusion that "grievance" does not mean an unlawful discriminatory practice, but the actual incident, the fact situation, which gives rise to the discrimination, is how it justifies relying on N.Y.C. Admin. Code §8-109(f)(iii) to claim City HR did not have jurisdiction of Den Hollander's complaint for age discrimination. (*Order and Judgment*, Hunter, J. at 2, A-9).

Back to Lester Maddox: If Georgia in 1964 had the same laws as New York in 2013, and Velez filed a complaint for color discrimination with Georgia's State division of human rights and it dismissed the complaint but indicated the

discrimination was based on alienage instead, over which it had no jurisdiction, under the lower court's definition of "grievance" as the fact situation itself, Velez could not file a complaint with Atlanta's human rights commission. He'd be out of luck and the bigots would win.

Such, however, is not the law, even in Atlanta, Georgia. When Amnesia refused to let Den Hollander and his friend to enter the club unless they paid $350 for a bottle, that occurrence gave rise to two potential injuries, injustices, or wrongs: unlawful sex and unlawful age discrimination. State DHR made a final determination only on the sex discrimination grievance, finding that age discrimination was probably at work, but the State had no jurisdiction over that grievance or cause of action. City HR, however, did have jurisdiction over the age discrimination because N.Y.C. Admin. Code § 8-109(f)(iii) does not bar Den Hollander's complaint with City HR because that rule only deals with the same cause of action or grievance—not the same fact situation.

The lower court is simply wrong in claiming that once a complaint is filed with State DHR concerning a fact situation, no other complaint alleging different grievances—different causes of action—can ever be filed concerning the same fact situation with City HR, which has jurisdiction where State DHR does not.

If the lower court's ruling is upheld that the election of remedies doctrine prevents different causes of actions stemming from the same fact situation to be

filed with different human rights agencies when one agency lacks jurisdiction over one cause of action, then a person whose complaint is dismissed for another cause of action is left without any recourse on the non-jurisdictional cause of action. The complainant cannot go to City HR, which has jurisdiction, because he already filed a complaint with State DHR, or he cannot go to the State, which has jurisdiction, because he already filed a complaint with City HR, and in both cases, he cannot start a new action in court because of Exec. Law § 297(9) and N.Y.C. Admin. Code § 8-502(a). In addition, any appeal of City HR or the State's dismissal of the non-jurisdictional cause of action would go nowhere because it did not have jurisdiction to begin with.

The person could start a special proceeding and incur the time and cost of such on the cause of action that falls within an agency's jurisdiction. The avoidance of that, however, was one of the reasons for setting up human rights agencies because the legislature knew that when faced with such costs in money and time, individuals are likely to forego fighting discrimination, which means the bigots win again.

Under the lower court's ruling, certain discriminatory actions would go uncheck. A person complains to State DHR about discrimination by a public accommodation because of race, creed, color, national origin, sex, disability, marital status, sexual orientation, or military status, but the State dismisses the

complaint because it finds the discrimination was based on age, partnership status, alienage, or citizenship and the State has no jurisdiction over those. N.Y. Exec. Law § 296(2)(a). Or, a person complains to City HR about discrimination by a public accommodation because of race, creed, color, national origin, age, sex, disability, marital status, partnership status, sexual orientation, alienage, or citizenship, but City HR dismisses the complaint because it finds the discrimination was based on military status and City HR has no jurisdiction over that. N.Y.C. Admin. Code 8-107(4)(a).

It is highly unlikely that either the City Council or the State Legislature intended the consequences that the lower court strongly supports.

3. **Can bureaucrats base a probable cause determination of whether an evolutionarily correct Euro-American was discriminated against by a public accommodation nightclub on an investigation that (1) failed to interview two of the three eyewitnesses; (2) relied on Internet blogs by persons identifiable only by their Internet monikers and who, by their own blogs, admitted not even being at the nightclub Amnesia at the time of the incident; (3) ignored an Internet blog by one person who was at the nightclub at the time of the incident because it supported a finding of discrimination; and (4) dismissed as dicta the findings of the only government agency, N.Y. State Division of Human Rights, to conduct an on-site investigation—also because it supported a finding of discrimination?**

Velez's slipshod or don't leave your desk investigation.

City HR's decision, upheld by the lower court, as to whether probable cause existed for age discrimination by Amnesia had to rely on "substantial evidence";

otherwise, City HR's finding would not be conclusive, and a court could then substitute its judgment for that of City HR. *See* N.Y.C. Admin. Code §8-123(e); *Okoumou v. Community Agency for Senior Citizens, Inc.*, 17 Misc.3d 827, 833, 842 N.Y.S.2d 881, 887, 2007 N.Y. Misc. LEXIS 6756 *13 (2007). For information to be used as substantial evidence requires that the "[e]ssential attributes are relevance and a probative character", *Edison Co. v Labor Bd.*, 305 U.S. 197, 229 (1938); *Matter of Ralph v Board of Estimate of City of N. Y.*, 306 N.Y. 447, 454 (1954). Substantial evidence is "[m]arked by its substance—its solid nature and ability to inspire confidence, substantial evidence does not rise from bare surmise, conjecture, speculation or rumor." *300 Gramatan Ave. Associates v. State Div. of Human Rights*, 45 N.Y.2d 176, 180 (1978)(citations omitted). The evidence must be "more than seeming or imaginary." *Id.* In addition, evidence for establishing facts can only come from a person in a position to know the facts. *Penn Troy Mach. Co., Inc. v. Dept. Gen. Services*, OATH Index No. 478/93 (March 2, 1993).

Further, information in which one person tells another and that second person tells City HR or one person writes something that is not sworn to and City HR only has the written document is called hearsay and is treated skeptically. *Triborough Bridge and Tunnel Auth. v. Simms*, OATH Index No. 1303/97 (May 30, 1997). The reasons are that the person making the original statement or writing the document does not present himself to any official to swear that his

representations are true or for assessment of his demeanor and credibility, and does not submit to cross examination in which the certainty of his perceptions, his motivations, the reliability of his memory, and his credibility may be tested by one with a motive to test vigorously. *Id*.

City HR is charged with eliminating and preventing discrimination; therefore, it has a motive to "test vigorously" information it relies on for a finding. Velez, and not Den Hollander, had the "fact-finding responsibility" to conduct a sufficient investigation that searched for substantial evidence to support a determination. *Matter of T.K. Management Inc. v. Gatling*, 2005 N.Y. Misc. LEXIS 3593 *12. Velez failed to do so because the discrimination was against those persons he considers lacking in human rights.

The only information garnered in Velez's slam, bam, get it off my desk investigation that met the above requirements for evidence showed that Den Hollander and his friend had been discriminated against because of their age. Velez, however, found differently by relying on information from his "desk-chair-desktop" research that was irrelevant, not probative, unauthenticated, and the hearsay of an Internet article and two Internet blogs. An Internet article by an unknown person and two Internet blogs hardly inspire confidence that Amnesia "more likely than not" did <u>not</u> commit a discriminatory practice. Such so-called

evidence is useless and only a biased mind could view it as a rational basis for a probable cause decision.

The lower court in upholding Velez's decision not only manifested an acceptance of such useless information as substantial evidence, but it also ruled that Velez's Inspector Clouseau investigation was not one-sided or abbreviated. The lower court used a laundry list of actions by Velez to create the false impression that Velez's investigation was not a joke driven by a desire to get it over with a.s.a.p. (*Order and Judgment*, Hunter, J., at 3, A-10).

The lower court listed that Velez:

"*[C]onducted an intake interview prior to the filing of his complaint*": If Velez had his way, there would have been no interview, and even with the interview, where Den Hollander told City HR about his eyewitness Robert M. Ginsberg, Velez failed to contact him.

"*[S]erved petitioner's complaint*": The mailman did that. Still, what investigation technique meant to discover the truth is mailing a complaint—none.

"*[D]emanded and obtained a Verified Answer from Amnesia; gave petitioner an opportunity to submit a Rebuttal*": Actually, the demand was a form letter delivered by the mailman with the complaint and Den Hollander did submit a rebuttal.

As for the "Verified Answer," it was useless because the person making it did not have firsthand knowledge of the facts as required by *Kopanski v. Hawk Sales Co.*, 76 Misc. 2d 348, 349; 350 N.Y.S.2d 53, 534 (N.Y. Sup. Ct. Herkimer Cty. 1973). Velez also failed to independently verify the answer's alleged facts—something the courts consider important, *Bachman v. State Division of Human Rights*, 104 A.D.2d 111, 113 (1st Dep't 1984). So among the complaint, answer, and rebuttal, only the complaint and rebuttal were made by someone with first hand knowledge. Yet, Velez and the lower court considered a defective answer as more probative than a complaint and rebuttal that followed the legal requirements.

"[Velez] obtained and reviewed the [State DHR] entire file on [Den Hollander's] previous [sex] discrimination complaint": The only items from State DHR that were in Velez's investigation file were the State DHR's *Determination and Order After Investigation* with a cover letter from State DHR. Not much of a file and Velez's *Determination and Order* at Dos, A-42, discredits the State's investigation anyway. [5]

"[A]ttempted to locate [the doorman]": The only attempt by Velez to locate the Amnesia doorman that was found in Velez's investigation file was a letter addressed to only the first name of the doorman, "David," at Amnesia's business address. The letter was returned as undeliverable. There were no emails, letters,

[5] For some unknown reason, Velez did not number the pages in his *Determination and Order*, so Den Hollander numbered the pages for him in order to make citation feasible.

telephone logs, or evidence of in-person visits to Amnesia's manager, or officers in an attempt to locate "David," or even determine his last name.

"*[A]ttempted to obtain Amnesia's surveillance video*": An obviously wasted effort, since even had Velez acquired it, all it would have shown is the following:

Two young ladies approach the doorman, there's some discussion and he looks at something they give him, which he gives back to them, and they enter the door. Did the doorman require them to buy a bottle and they agreed? Don't know because there's no audio. Den Hollander and his friend approach the doorman, there's some discussion, and the two step out of line. Were they told to step out of line because the doorman required them to buy a bottle and they refused? Don't know because there's no audio. Then two young ladies approach the doorman, there's some discussion, and he looks at something they give him, which he gives back to them, and they enter the door. Did the doorman require them to buy a bottle and they agreed? Don't know because we are in the silent era. Such a video was pretty much useless for determining what actually occurred, but the lower court believes it was a crucial investigative effort in trying to obtain it.

The lower court ruled that Velez's efforts were sufficient because City HR has broad discretion in determining the method to be employed in investigating a claim. (*Order and Judgment*, Hunter, J., at 3, A-10). But how broad is that discretion—is it a blank check? The lower court cites to three Appellate Division

cases: *Wu v. N.Y.C. Commn. on Human Rights*, 84 A.D.3d 823, 824 (2nd Dept. 2011), quoting *Matter of Levin v. N.Y.C. Commn. on Human Rights*, 12 A.D.3d 328, 329 (1st Dept. 2004); see also *Stern v. N.Y.C. Commn. on Human Rights*, 38 A.D.3d 302, 302 (1st Dept. 2007). The problem with these Appellate decisions is that they do not specify the methods used in the respective investigations conducted by City HR to reach a no probable cause finding. Without knowing what steps were taken in those investigations, it is impossible to compare them to Velez's actions. Of course, that might have been the lower court's purpose, since all the cases cited by City HR in the lower court were useless in arguing Velez conducted a sufficient investigation. The investigations in those cases relied upon by City HR all involved full evidentiary hearings in which an administrative law judge assessed witness demeanor and credibility, along with weighing the quantity and quality of the evidence.

To try to circumvent this road-block, Den Hollander, with the aid of an excellent law librarian, found the three Supreme Court decisions that were appealed to their respective Appellate Divisions. Only one of the decisions, *Stern v. N.Y.C. Commn. On Human Rights*, Sup. Ct. N.Y. 110668/03, at 1-2, A-54-55, cited the investigatory methods used by City HR to find no probable cause. In *Stern*, City HR reached its no probable cause decision based on affidavits from two administrative law judges involved in the fact situation of the alleged

discrimination, affidavits from security guards, an affidavit from the N.Y.C. Department of Finance Equal Opportunity Officer, and incident reports from the Department of Finance. No Internet blogs or articles were involved.

Velez's investigation as compared with cases cited by City HR and by the lower court show the investigation was nothing but a whitewash, or more accurately a "bias-wash." Still, the lower court ruled it was a sufficient investigation by allowing Velez free-range in whatever methods he used.

Those methods, however, still had to meet the requirements of producing substantial evidence. *Matter of 119-121 E. 97th St. Corp. v. New York City Commn. on Human Rights*, 220 A.D.2d 79, 81-82 (1996).

So what kind of evidence does the lower court refer to in upholding Velez and the City HR's decision? The lower court refers to (1) the State DHR *Determination and Order After Investigation*, which was based on the eyewitness accounts of trained investigators in discrimination and infers age-discrimination; (2) a verified complaint and rebuttal by Den Hollander, also an eyewitness; and (3) an answer by Amnesia's corporate officer Henry Rosas who was <u>not</u> an eyewitness. (*Order and Judgment*, Hunter, J., at 3, A-10). Since Rosas was not an eyewitness, his answer is useless. So it sounds like the weight of the evidence tips in favor of age-discrimination, yet the lower court upheld Velez's decision of no probable cause that age discrimination occurred. There must be some missing

materials that tipped the balance for the lower court to uphold Velez's decision even though the lower court does not mention them—perhaps out of embarrassment.

The only other materials that the lower court could have considered as supporting no probable cause of discrimination are two Internet blogs and the Internet article critical about Den Hollander chasing young ladies and his audacity to exercise his free speech by bringing anti-feminist cases. From the Internet article, "NYC Attorney Out To Reclaim Ex-Wife From Feminism's Clutches, Get Laid Easier," by some unknown person using the moniker "Jezebel," *Jezebel Article*, A-58, Velez held:

> [Den Hollander] is a self professed advocate for men's rights who identifies himself as an 'anti-feminist lawyer' on his website, www.roydenhollander.com. He has filed a number of lawsuits against bars and clubs that have "Ladies Nights," and admits in several online publications that he is 'bitter' from an ex-wife who used him for his US citizenship and money. [Den Hollander] description of himself is consistent with his pattern of filing several gender discrimination suits.

(*Velez Determination and Order* at Tres, A-43).

Okay, so Velez got something right, Den Hollander is "bitter" toward his ex-wife and her feminist allies, but what does that have to do with an age discrimination complaint against a New York City nightclub? Nothing, unless Velez is biased against a divorced male who has nothing good to say about his ex-wife.

Perhaps Velez was actually ruling that any person or organization that sues in court for rights guaranteed by the U.S. Constitution can be summarily discriminated against because they brought prior suits. By that reasoning, had Velez been on the U.S. Supreme Court in 1954, he would have ruled against the NAACP in *Brown v. Board of Education*, 347 U.S. 483, because the NAACP had a history of fighting in the courts for human rights. Also, would he rule the same way on actions brought by the National Council of LaRaza? Not likely, but consistency rather than arbitrary decision making driven by prejudices would required that LaRaza lose before Judge Velez.

The two Internet blogs relied on by Velez came from the site "Yelp.com." Velez used them, and the lower court in upholding Velez's decision must have considered them as substantial evidence that Amnesia also required younger folk to buy a $350 bottle in order to enter. (*Velez Determination and Order* at Cuatro, A-44).

Of course, Velez and the lower court do not know whether the two bloggers are who they say they are, do not know whether they were sober at the time of their purported observations, have no way of testing their perceptions and memories, and do not know whether they were actually at Amnesia when they claimed. Yet, such flimsy, untrustworthy information are considered by Velez and the lower court as able to inspire confidence in proving the truth.

Velez put special emphasis on a blog from "Tasty 1027" as substantial evidence that Amnesia required both older and younger patrons to buy a bottle for admission. Velez wrote:

> "an alleged patron of [Amnesia], whom based on her posted picture appears to be in her 20's or 30's, expressed her frustration on yelp.com about the difficulty in gaining entry into the club, stating '. . . of course the only way to get in was if we bought bottles.'"

(*Velez Determination and Order* at Cuatro, A-44).

What Velez left out of Tasty's blog was that "[I]n the end my party of 12 made it in . . . ." (*Tasty's Blog*, A-62). This may have indicated that her party entered without buying a bottle, or maybe there were older folks in her party and they had to buy a bottle, or maybe everyone was young and they still had to buy a bottle because of the size of her party. We don't know because Velez never contacted her.

Velez also relies of Tasty's blog from April 25, 2010, as conclusive proof that Amnesia did <u>not</u> engage in the incident of discrimination against Den Hollander and his friend on January 9, 2010, and did not have a policy on that date of discriminating against older persons who did not fit its intentionally created image of youth. Assuming the blog accurate, it occurred months after Amnesia learned that it had fallen under the scrutiny of the State DHR for discriminatory practices, which was clearly an incentive for Amnesia to clean up its act.

The second blogger "Maria W. NY," dated December 11, 2009, does not even mention buying a bottle to gain admission. (*Maria W. N.Y. Blog*, A-63). She just mentions that younger folks were "lining up at the downstairs bar," which is inside the club. Velez, and apparently the lower court, assumed they were lining up to buy bottles, but that assumption is wrong. Bottles can only be purchased at tables within a nightclub. Bottle service is the practice in which tables at clubs are reserved for a group as long as they buy a high-priced bottle of vodka or champagne. State Liquor Authority, Departmental Bill # 16 (SLA 10-07); Associated Press 2007, *New York Eyes Regulating Bottle Service*. The State DHR Order confirms this for Amnesia when it stated that Amnesia had "several tables for individual bottle service . . . ." (State DHR, *Determination and Order After Investigation* at 2, A-50).

Neither of the two blogs purports to represent the events that occurred to Den Hollander and his friend on January 9, 2010. Since a single instance of discrimination is sufficient to violate the law, probative evidence should concern that fact situation. *Silver Dragon Restaurant v. City Commission on Human Rights*, N.Y.L.J., March 31, 2004, p. 24, col. 3 (Sup. Ct. Kings Co.)(on one occasion a black lady was required to pay for food before it was served while others who were white were served first and then paid); *Joseph v. N.Y. Yankees Partnership*, N.Y.L.J., October 24, 2000, p. 35, col. 5 (S.D.N.Y.)(on one occasion

a black lady was refused admission to the Stadium Club unless she changed attire, which she did, but inside she saw that white ladies did not have to wear the same type of attire).

These two blogs are not only hearsay, unreliable, unauthenticated, but irrelevant, and yet, the lower court must have considered them crucial for it to uphold Velez's decision of no probable cause for age discrimination. What's inexcusable in Velez relying on these blogs is that City HR has subpoena power to gather testimony, affidavits, documents, and other evidence. Did Velez subpoena these bloggers or even try to contact them? No.

Ironically, there is one blog in Velez's investigation file about what did occur on January 9, 2010, at around 11 PM, but Velez and the lower court ignored it. "Kelly R. Paris France" wrote that she entered Amnesia around the same time, 11 PM, on the same night that Den Hollander and his friend were required to buy a bottle for entry. Kelly wrote "It wasn't crowded inside!" (*Kelly R. Paris France Blog*, A-64 (emphasis added)). And next to the blog printout is handwritten, "Same date & time cs Mr. Hollander"—presumably, the writing is Velez's.

This blog refutes a ruling by the lower court that a legitimate, nondiscriminatory reason for Amnesia to require Den Hollander and his friend to buy a $350 bottle was "limited space" within the club. (*Order and Judgment*,

Hunter, J., at 3, A-10). According to Kelly, there was plenty of space available in the club when Den Hollander and his friend tried to enter.

There are three people who know exactly what happened on January 9, 2010, when Den Hollander and his buddy tried to gain admission to Amnesia: Den Hollander, his friend, and the doorman. Velez had Den Hollander's sworn statement but he never bothered to contact Den Hollander's friend and, apparently, never tracked down the doorman. Doesn't it seem strange that of the three persons with firsthand knowledge, Velez ignores two of them and disses the third?

The likely reason Velez did not contact Den Hollander's buddy is that Velez would not have been able to discredit him as he tried with Den Hollander by using the Jezebel Internet article. Den Hollander's friend graduated Yale Law School, is a one per-center, and very liberal having been a Democratic State Committeeman on the Upper Westside for years. No, Velez could not use the same PC tactics against him as he did against Den Hollander. As for the doorman, perhaps Velez never contacted him out of sloth, or, given the propensity of government officials these days to lie, such as President O'Bama, Velez may have contacted the doorman, but the doorman confirmed Den Hollander's accusation—who knows?

It is clear, however, that as far as Velez and the lower court are concerned, any bit of untrustworthy information obtained by sitting at one's desk and surfing the Internet is enough to satisfy not only the requirements of a fair and full

Investigation, but are more probative than first hand accounts by eyewitnesses. Of course, if the Internet information supports a Euro-American's allegation of discrimination, then it is ignored. Such standards do not provide a rational basis for agency determinations of probable cause as required by *Wu v. N.Y.C. Commn. Human Rights*, 84 A.D.3d 823, 824 (2d Dep't 2011).

Velez's investigation consisted of him sitting down at his desk and with little work over a short period of time, sending out a letter to the doorman that was returned, contacting Amnesia's attorney—only the number but not any notes of a conversation were in the file, sending an email requesting a complete file from the State that he never received, searching the Internet and cherry picking a couple of untrustworthy, irrelevant blogs, and an article that he stretched into supporting a "no probable cause" determination. All done in order to enforce his view that if you are allowed on the bus, you are not discriminated against even though you have to sit in the back or pay a higher fare. The law, however, says otherwise, when "a barrier . . . makes it more difficult for members of one group to obtain a benefit than it is for members of another group . . . . [It] is the denial of equal treatment resulting from the imposition of the barrier . . . ." *Northeastern Fla. Assoc. Gen. Contractors Am. v. Jacksonville*, 508 U.S. 656, 666 (1993).

Dicta or seeing is not believing.

State DHR investigators who actually visited Amnesia, which Velez's desktop investigation never did, concluded that:

> Based on observations made during the field visit, the vast majority of the patrons of the nightclub [Amnesia] appeared to be under the age of 30 years. Respondent [Amnesia] asserts that, when the nightclub is crowded, respondent employs an admissions strategy to limit the number of individuals, male and female, who do not have the appearance respondent desires to maintain the image of the nightclub. A photo on complainant's website suggests that he is significantly older than respondent's patrons, and age discrimination is beyond the jurisdiction of the Division with regards to public accommodation."

(State DHR, *Determination and Order After Investigation* at 2, A-50).

The lower court calls this part of the State's finding "*dicta*." (*Order and Judgment*, Hunter, J., at 1, A-8). *Dicta*, however, are "statements made by a court in an opinion which are unnecessary to the holding . . . ." *Chiasson v. N.Y.C. Dep't of Consumer Affairs*, 138 Misc. 2d 394, 396 (1988). Among the requirements of the State DHR's Investigative Procedure is that the investigation "[r]esolve issues of questionable jurisdiction." (*Information for Complaints* at 1-2, A-66-67). The State's trained investigators made the necessary fact findings to resolve whether the State had jurisdiction—it did not because the reasonable inference was that Amnesia had engaged in age-discrimination.

Another definition for *dicta* are expressions in a court's opinion that go beyond the facts. The State DHR, however, reached its conclusion based on the

facts its investigators observed—facts of a more probative value than those relied on by Velez who used an Internet article and Internet blogs. The lower court clearly places more value on Internet communications than eyewitness accounts by trained investigators.

4. Can a government agency violate its required procedures, in part, by failing to provide an impartial decision maker and still adhere to procedural due process in making a decision concerning the violation of civil rights just because its decision is appealable to a court?

The lower court held that just because this Article 78 proceeding was brought before the judiciary, it means Velez's investigation satisfied procedural due process. (*Order and Judgment,* Hunter, J, at 3, A-10). That's not the law and it is not the issue. The procedural due process issue is whether Velez's investigation followed City HR procedures. "[N]ot properly conducting an investigation in accordance with the [agency's] procedures would mean [it] did not afford sufficient process . . . ." *Rosu v. The City of New York,* 2012 U.S. Dist. 178875 *14 (S.D.N.Y. 2012).

The lower court wrongly relies on *Velella v. N.Y.C. Local Conditional Release Commn.*, 13 A.D.3d 201, 202 (1st Dep't 2004), that violation of an agency's procedures does not violate procedural due process. *Velella* actually held that procedural due process requires a post-deprivation review of an agency's

actions not that the mere availability of such a review absolves an agency of due process violations.

Velez's investigation failed to follow City HR's procedures and violated its own rule requiring an accurate and thorough fact-finding, 47 RCNY §1-31, because he

- did not interview witnesses;
- did not issue interrogatories;
- did not obtain authenticated documents;
- did not make any telephones logs, which indicates he made no telephone calls, except perhaps to Amnesia's attorney for which there are no logs;
- did not try to contact a potential witness, attorney Robert M. Ginsberg, who was with Den Hollander on the night of the discrimination and whom Velez knew about and how to contact, which alone amounted to denying Den Hollander a "full and fair opportunity" to present his claims, *Stern v. N.Y.C. Commn. Human Rights*, 38 A.D.3d 302, 302 (lst Dep't 2007);
- did no more than send a letter to Amnesia addressed to the doorman 'David," which was returned as undeliverable;
- did not try to contact anyone familiar with Amnesia's admission policy;

- did not try to contact anyone at Amnesia who may have also witnessed the discrimination even though there were two bouncers standing behind the doorman.

So no interviews with other eye-witnesses or Amnesia officials, no interrogatories of anybody, and no requests for documents other than the State DHR's file from which Velez only received its *Determination and Order After Investigation*.

More importantly, Den Hollander's procedural due process was violated by not having an impartial adjudicator. The lower court unilaterally tried to erase from the requirements of City HR procedures and the U.S. Constitution that "a neutral fact-finder" will conduct the investigation and make the decision. *Rosu v. City of New York*, 2012 U.S. Dist, LEXIS 178875 *3. The lower court eliminated this requirement by wrongly asserting that only "notice and opportunity to be heard" are necessary. (*Order and Judgment* at 3, A-10). The lower court's definition of minimum due process as notice and opportunity to be heard are meaningless when the decision maker is not impartial. After all, the very reason for 42 U.S.C. 1983 was to take deprivation of rights cases away from bigoted municipal and state decision makers.

The right to have a dispute resolved by an impartial decision maker is one of the bare rudiments of due process. William J. Rich, *Modern Constitutional Law*, §22.12, Third Edition. In the words of Justice Marshal:

> The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases. This requirement of neutrality in adjudicative proceedings safeguards the two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decisionmaking process. *See Carey v. Piphus*, 435 U.S. 247, 259-262, 266-267 (1978). The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law. *See Mathews v. Eldridge*, 424 U.S. 319, 344 (1976). At the same time, it preserves both the appearance and reality of fairness, "generating the feeling, so important to a popular government, that justice has been done," *Joint Anti-Fascist Committee v. McGrath*, 341 U.S. 123, 172 (1951) (Frankfurter, J., concurring), by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him.

Velez's failure to follow City HR investigation procedures means the lower court wrongly upheld a determination that violated lawful procedure as required by constitutional provisions. *See* CPLR 7803(3); *Hecht v. Monaghan*, 307 N.Y. 461 (1954).

5. Can the lower court wrongly apply the standard of review for administrative decisions in order to make it more difficult for evolutionarily-correct Euro-Americans to successfully challenge those decisions that are motivated by bigotry against this latest disfavored group of society?

The lower court applied the arbitrary and capricious standard of review, *Order and Judgment*, Hunter, J., at 2, A-9, but did so mistakenly because its decision was taken without regard to the facts supported by reliable evidence. *See Pell v. Board of Education of Union Free School District No. 1 of the Towns of Scarsdale and Mamaroneck, Westchester County*, 34 N.Y.2d 222, 231 (1974).

The arbitrary and capricious issue will turn on whether there is adequate proof to sustain City HR's finding of no probable cause that discrimination did not occur. *See Classic Realty LLC v. State Div. Housing and Community Renewal*, 2 N.Y.3d 142, 146 (2004). An agency's decision is arbitrary and capricious when it relies on reports that are "inapplicable or irrelevant" on their face. *125 Bar Corp. v. State Liquor Authority*, 24 N.Y.2d 174, 179 (1969). As shown above in Section 3, the Internet article by Jezebel and the blogs by "Tasty 1027" and "Maria W. NY," which Velez and the lower court relied on to outweigh eyewitness accounts and find no discrimination did not even address the discriminatory incident of January 9, 2010, and Amnesia's answer was useless because Rosas did not witness the incident.

In addition, if an agency officer fails to follow the agency's rules in rendering a determination, that determination will be arbitrary and capricious.

Frick v. Bahou, 56 N.Y.2d 777, 778 (1982). That's exactly what Velez did as argued above in Section 4.

Conclusion

Once upon a time, people in positions of power considered those with darker complexions or whose ancestors didn't come over on the Mayflower as inferior and lacking of rights. That all started to change in the 1960s with S.D.S. radicals such as Den Hollander. Today, many of those previously discriminated against now hold positions of power. But, as often happens when members of formerly disfavored groups achieve power, some of those members abuse that power to vent revenge for discrimination they suffered—both real and imagined. They justify doing harm to others in order to make up for old injustices. The problem with that rational is that two wrongs don't make a right.

Dated: December 24, 2013
New York, N.Y.

/S/
_____
By: Roy Den Hollander, Esq.
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Dated: December 24, 2013
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Addendum: Pre-Argument Statement

SUPREME COURT OF THE STATE OF
NEW YORK COUNTY OF NEW YORK
----------X
In the Matter of the Application of — Index No. 100299/2013

ROY DEN HOLLANDER, — **PRE-ARGUMENT STATEMENT**

Petitioner-Appellant,

-against-

THE CITY OF NEW YORK COMMISSION ON HUMAN RIGHTS,

Respondent-Respondent.
----------X

1. The title of the action is Hollander v. NYC Commission on Human Rights.

2. There has been no change in the title of the action.

3. The petitioner-appellant is Roy Den Hollander, an attorney representing himself, 545 East 14th Street, 10D, New York, N.Y. 10009, (917) 687-0652, rdhhh@yahoo.com.

4. Respondent-respondent is represented by Leonard M. Braman, Senior Counsel, Affirmative Litigation Division, New York City Law Department, 100 Church Street, New York, NY 10007, (212) 356-2294.

5. Court and County from which appeal is taken: Supreme Court, New York County.

6. This appeal is from an order and judgment entered on August 6, 2013.

7. There is no related action or proceeding now pending in any court of this or any other jurisdiction except for (1) a Motion to Supplement the Petition in the Supreme Court that was filed on the very same day that the Order and Judgment was issued. The petitioner did not learn of the Order and Judgment until the following day when he received notice through the e-track system. That Supplement raised deprivations of the petitioner's federally protected rights under the Fourteenth Amendment to the U.S. Constitution and (2) a Motion to Reargue the Petition in the Supreme Court that would include consideration of the alleged deprivations of the petitioner's Fourteenth Amendment rights.
8. This is a special proceeding that alleges the Commission on Human Rights and its Executive Director of Law Enforcement, Carlos Velez, intentionally discriminated against the petitioner because of his ancestry (Euro-American protestant), his speech (litigates for men's rights), his marital status (divorced) when Velez and the Commission dismissed an age discrimination complaint filed by the petitioner against a public accommodation nightclub. The Commission's Final Order and Determination was not based on substantial evidence, relied on misrepresentations, resulted from an abbreviated and one sided investigation, and Velez failed to follow the Commission's procedures in investigating the age-discrimination complaint. The petitioner seeks (1) reversal of the Commission's Final Order; (2) that the Commission implement anti-

discrimination policies to avoid unlawful discriminatory acts by its employees against Euro-Americans of protestant origin, divorced husbands, and any man who chooses to petition the government for a redress of grievances; (3) that Carlos Velez undergo sensitivity training to the federally protected rights of those who belong to groups that he does not identify with; (4) nominal damages from New York City plus compensatory damages in the amount of the disbursements for bringing this action; and (5) incidental punitive damages from Velez in his personal capacity for the amount of $3,000.

9. The Supreme Court denied reversal of the Commission's Final Order, granted the Commission's motion to dismiss, and as of the filing of this Pre-Argument Statement, has not addressed the discrimination claims against the Commission and Carlos Velez.

10. The ground for seeking annulment or modification of the Supreme Court's decision are (1) age-discrimination by a public accommodation nightclub is not legally justified in order to further the club's image by populating the finite space within the club with only people who fit that image; (2) substantial evidence does not include Internet blogs by unknown persons concerning irrelevant events; (3) an investigation is inadequate when it fails to use reasonable efforts to interview two of the three persons who were eyewitnesses, wrongly blames the petitioner for the absence of a video tape that lacked

probative value because it had no audio, and misrepresents findings by the State Human Rights Division's investigation; (4) New York's election of remedies law does not bar the bringing of a different claim in a different agency stemming out of the same fact situation; (5) violation of procedural due process occurs when an agency fails to follow its procedures; and (6) the allegations of discrimination based on ancestry, speech, and marital status need to be decided.

11. There is no additional appeal in this action.

Dated: New York, N.Y.
August 12, 2013

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_____
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Supreme Court, New York County
Index No. 100299/13

To be argued by:
INGRID R. GUSTAFSON
(10 minutes)

NEW YORK SUPREME COURT
APPELLATE DIVISION: FIRST DEPARTMENT

ROY DEN HOLLANDER,

Petitioner-Appellant,

-against-

THE CITY OF NEW YORK COMMISSION ON HUMAN RIGHTS,

Respondent-Respondent.

RESPONDENT'S BRIEF

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February 26, 2014

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NEW YORK SUPREME COURT
APPELLATE DIVISION: FIRST DEPARTMENT

ROY DEN HOLLANDER,

Petitioner-Appellant,

-against-

THE CITY OF NEW YORK COMMISSION ON HUMAN RIGHTS,

Respondent-Respondent.

RESPONDENT'S BRIEF

PRELIMINARY STATEMENT

In this special proceeding, petitioner-appellant Roy Den Hollander ("petitioner") appeals from a decision and order (one paper) of the Supreme Court, New York County (Hunter, J.), filed August 6, 2013, which granted the motion of respondent-respondent the City of New York Commission on Human Rights ("the Commission") to dismiss the petition. The Supreme Court held that, (a) as the Commission had determined, the Commission lacked jurisdiction to entertain petitioner's complaint because petitioner had previously filed a complaint with the New York State Division of Human Rights based on the same incident, (b) the Commission's alternate determination that there was no probable cause to believe that petitioner had been discriminated against was not arbitrary and capricious, and (c) the

Commission's investigation had not violated petitioner's procedural due process rights.

QUESTIONS PRESENTED

1. Did the Supreme Court correctly conclude that petitioner was barred from filing a complaint with the Commission, where petitioner had previously filed a complaint based on the same incident with the New York State Division of Human Rights?

2. Did the Court properly determine that the Commission's finding of no probable cause was not arbitrary and capricious, where the record contained no evidence that petitioner had been discriminated against, the New York State Division of Human Rights had also concluded that the acts petitioner complained of had been taken "for...non-discriminatory reasons," and the Commission afforded petitioner a full and fair opportunity to present his claim?

3. Did the Court properly determine that the Commission's investigation did not violate petitioner's due process rights, where the courts have approved the Commission's procedures, and where petitioner has failed to allege that the Commission did not take any investigatory step that it was required to take?

STATEMENT OF FACTS

1. The New York State Division of Human Rights Proceedings.

On January 10, 2010, petitioner filed a verified complaint with the New York State Division of Human Rights ("the Division" or "NYSDHR"). *See* Notice of Motion to Dismiss and in Opposition to the Petition (Apr. 5, 2013), Affirmation of Leonard M. Braman ("Braman Aff."), Ex. 1.[1] Petitioner alleged that Amnesia J.V. LLC ("Amnesia"), a night club, had unlawfully discriminated against him on the basis of sex. *Id.* Petitioner stated:

> On Saturday, January 9, 2010, at approximately 11:05 PM, a friend and I, both males, tried to enter the nightclub called Amnesia but were refused admittance unless we bought a bottle for $350.
>
> We had been standing in a line with two ladies in front of us. The ladies were allowed to enter without agreeing to purchase a bottle inside for $350. We, however, were told by an individual named David that to enter the club, we would have to buy a bottle inside for $350. We declined, and he told us to step out of line, which we did. We stood on the side of the line as a couple of groups of ladies entered without having to agree to buy a bottle for $350. *Id.*

[1] Unless otherwise indicated, numbers in parentheses refer to the Appendix ("A") supplied by petitioner. Because the Appendix is inadequate, however, in that it omitted the Commission's motion to dismiss and attached exhibits, which are critical to deciding this appeal and which, under this Court's Rule § 600.10(c) and C.P.L.R. § 5528(a)(5), petitioner was required to include, the Commission will also refer to documents in the court file.

On September 16, 2010, by Determination and Order After Investigation, the Division dismissed petitioner's complaint and closed his file for lack of probable cause (A50). The Division indicated that it had conducted an investigation of petitioner's complaint, which had included a field visit to Amnesia by a male investigator, but that its investigation had uncovered no evidence of discrimination (A50). As Amnesia had stated to the Division, "when the nightclub is crowded, [it] employs an admissions strategy to limit the number of individuals, male and female, who do not have the appearance [it] desires to maintain the image of the nightclub" (A50). The Division accordingly determined that Amnesia's alleged actions toward petitioner were taken not because of petitioner's sex, but "for the non-discriminatory reasons of limited space and the goal of furthering the image of respondent's establishment" (A49-50). Thus, there was "NO PROBABLE CAUSE to believe that [Amnesia] has engaged in or is engaging in the unlawful discriminatory practice complained of" (A49).

In *dicta*, the Division noted that, "based on observations made during the [investigator's] field visit" as well as "[a] photo on [petitioner]'s website," petitioner appeared to be "significantly older than [Amnesia]'s patrons,

and age discrimination is beyond the jurisdiction of the Division" (A50).

2. The Commission Proceedings.

a. The Second Complaint.

Following the dismissal of his complaint by NYSDHR for lack of probable cause, petitioner filed a second discrimination complaint based on the same alleged incident with the Commission. *See* Braman Aff., Ex. 3. Petitioner again alleged that, on January 9, 2010, at 11:05 p.m., he and a male friend had been waiting in line to enter Amnesia, when David "L.N.U." ("Last Name Unknown") informed them that they must buy a $350 bottle to enter. Petitioner observed two patrons in front of him and two patrons behind him enter without being asked to do the same. *Id.* The complaint's content differed from that of the prior complaint only in that it stated that petitioner was 63 years old, that the patrons were "individuals...in their 20's and/or 30's" instead of "ladies," and that petitioner had been discriminated against on the basis of age instead of sex. *Id.*

b. The Commission's Investigation.

The Commission's Law Enforcement Bureau conducted an intake interview with petitioner prior to the filing of the

complaint, at which petitioner explained the substance of his complaint to a Commission attorney. Braman Aff. ¶ 5.

The Commission then served the complaint on Amnesia and demanded an answer. *Id.* ¶ 6. Amnesia submitted an answer, in which it argued that the election-of-remedies provision of the City Human Rights Law –- Administrative Code ("Admin. Code") § 8-109(f) -- barred petitioner from filing a complaint with the Commission because petitioner had previously filed a complaint with NYSDHR based on the same act or occurrence. *See* Braman Aff., Ex. 4, ¶ 8. Amnesia also denied that it had discriminated against petitioner. It stated that, because "New York City clubs[] are typically frequented by individuals in their 20s and 30s[,]...a significant majority of Amnesia's clientele fall[s] into those age ranges due to no fault, action or omission on the part of Amnesia." *Id.* ¶ 17. Amnesia attached three exhibits to its answer. *See id.* The Commission gave petitioner the opportunity to submit a rebuttal, which he did, and to which he attached three exhibits. *See* Braman Aff., Ex. 5.

Also pursuant to its investigation, the Commission obtained and reviewed NYSDHR's file regarding petitioner's previous complaint, which included its decision, investigation report, and supporting materials, *see* Braman Aff. ¶ 9; Ex. 6;

attempted to contact David "L.N.U." at Amnesia and to obtain surveillance video of the incident, *see* Braman Aff. ¶ 10; and reviewed relevant online comments posted by patrons of Amnesia in the months surrounding the alleged incident, *see* Braman Aff. ¶ 11; Ex. 7.

c. The Commission's Decision.

On July 27, 2012, by Determination and Order After Investigation, the Commission found (a) that it did not have jurisdiction to review petitioner's complaint because petitioner had previously filed a discrimination complaint regarding the same incident with NYSDHR, which had dismissed the complaint for lack of probable cause, and (b) that, in any event, there was no probable cause to believe that Amnesia and David "L.N.U." had discriminated against petitioner on the basis of age (A41, 44).

The Commission first determined that it was statutorily barred from considering petitioner's complaint by Admin. Code § 8-109(f)(iii), which states that the Commission does not have jurisdiction to entertain a complaint if "the complainant has previously filed a complaint with the state division of human rights alleging an unlawful discriminatory practice...with respect to the same grievance which is the subject of the complaint under this chapter and a final

determination has been made thereon." The Commission emphasized that New York courts, including the Court of Appeals, had repeatedly interpreted New York Executive Law ("Exec. Law") § 297(9), the analogous election of remedies provision of the State Human Rights Law, to preclude a multiple actions "based upon the same incident" (A43 (citation omitted)). Because petitioner's complaint with the Commission was based on the same alleged incident as petitioner's prior NYSDHR complaint, and because NYSDHR had dismissed that complaint for lack of probable cause, the Commission did not have jurisdiction to entertain petitioner's subsequent complaint (A43). It was well established, the Commission reasoned, that a complainant could not circumvent this bar, "by changing the legal theory of relief relied upon, or split claims, if they all arise out of the same course of conduct" (A43 (citations omitted)).

The Commission also determined that, in any event, there was no probable cause to believe it more likely than not that petitioner had been asked to purchase bottle service because of his age (A41). As an initial matter, the Commission gave little weight to the statement of NYSDHR that petitioner appeared to be "significantly older than [Amnesia]'s patrons" -- the apparent impetus for petitioner's age discrimination

complaint. Not only was the statement *dicta*, but it also did not demonstrate that petitioner had been discriminated against: the ages of the patrons inside the club proved little regarding the ages of those waiting in line to enter the club, and proved little regarding the ages of those denied entry (A42).

Additionally, website comments indicated that Amnesia did not discriminate on the basis of age (A44). Indeed, a reviewer who, based on her photo, appeared to be in her 20s or 30s posted a comment within a few months of petitioner's visit to Amnesia and "expressed her frustration...about the difficulty in gaining entry into the club, stating, '...of course the only way to get in was if we bought bottles'" (A44). Another reviewer indicated that she had seen an "interesting and eclectic crowd" in Amnesia, including "people in their 20's, 30's, 40's" (A44 (internal quotation marks omitted)).

The Commission also stated that it had attempted to obtain video of the alleged incident but had been unable to do so, because the club's surveillance video self-erased every 30 days and petitioner had waited nine months to file his complaint with the Commission (A43).

After reviewing the record, the Commission concluded that it could not "establish by a preponderance of the evidence

that [Amnesia and David "L.N.U."] required [petitioner] to purchase bottle service...due to his age" (A44).

d. Petitioner's Appeal to the Commission.

On or about August 17, 2012, petitioner submitted a 22-page Appeal and Complaint to the Commission, in which he accused the Commission's Executive Director of Law Enforcement, Carlos Velez, of illegally discriminating against him for being a "Euro-American," an "anti-feminist," and a "divorced male." Braman Aff., Ex. 9, at 4-8. In making this argument, petitioner primarily relied on the fact that Mr. Velez "[o]n information and belief...is Latin-American and Catholic." *Id.* at 4. Petitioner also raised additional factual and legal objections to the Commission's order, and attached six exhibits. *See id.* The Commission gave petitioner the opportunity to submit additional comments in support of his appeal, which petitioner declined. Braman Aff. ¶ 20.

On January 11, 2013, upon review of petitioner's complaint, Amnesia's answer, all comments submitted by the parties, the notice of administrative closure, and petitioner's request for review, the Commission affirmed its earlier dismissal of petitioner's complaint and administrative closure of petitioner's file (A47).

3. The Special Proceeding.

a. The Petition and Supplemental Petition.

By Verified Petition dated February 5, 2013, petitioner sought an order from the Supreme Court reversing the Commission's January 2013 determination (A25).

Petitioner argued that, in concluding that his complaint was statutorily barred, the Commission had misinterpreted the election-of-remedies provision of the City Human Rights Law (A21-24). Petitioner maintained that, although Admin. Code § 8-109(f)(iii) precluded him from bringing a second complaint on "the same grievance," "grievance" should be interpreted to mean a single legal theory, or a single cause of action. Thus, he should have been allowed to bring a second complaint on the same set of facts, as he was now alleging a new legal theory (A22-23).

Petitioner further argued that the Commission's decision was not supported by substantial evidence. In particular, he asserted that the Commission (a) had effectively required him to show multiple instances of discrimination by Amnesia (A16), (b) had inappropriately relied on irrelevant hearsay evidence (A16-17), (c) had inappropriately assumed that David "L.N.U." was an independent contractor (A18), and (d) had

inappropriately criticized petitioner for filing his complaint nine months after the alleged incident (A18-19). Petitioner lastly accused the Commission of conducting an abbreviated and one-sided investigation (A24-25).

On February 28, 2013, petitioner filed a Supplement to Petition "to add a Fourteenth Amendment procedural due process claim" (A27). Petitioner argued that he had a property interest in his discrimination claim against Amnesia, and that the Commission had denied him due process in that it had insufficiently investigated his complaint (A28-31). Petitioner admitted that the Commission's "investigation procedures are sufficient to satisfy procedural due process -- so long as the procedures are followed" (A28).

b. The Commission's Answer and Motion to Dismiss the Petition.

On April 5, 2013, the Commission served a Verified Answer to the petition. That same day, the Commission also filed a Notice of Motion to Dismiss the Petition, with attached affirmation. The Commission argued that petitioner's claims were barred under Admin. Code § 8-109(f)(iii) and Exec. Law § 297(9) and that petitioner had failed to state a claim on which relief could be granted. See Memorandum of Law in Support

of City of New York Commission on Human Rights' Motion to Dismiss (Apr. 5, 2013).

The Commission first argued that it had no jurisdiction to entertain petitioner's complaint. Petitioner had previously filed a complaint with NYSDHR regarding the same incident, which had been dismissed for lack of probable cause, and "[i]t is well settled that such duplicative discrimination complaints are statutorily barred." *Id.* at 10 (citations omitted). The Commission emphasized that, in arguing that Admin. Code § 8-109(f)(iii) should be interpreted to bar only complaints alleging the same single legal theory, petitioner had not addressed relevant precedents, which had interpreted Exec. Law § 297(9), an analogous provision, to preclude the filing of successive complaints based on the same *incident* or *conduct*, not legal theory. *Id.* at 11-12.

The Commission further argued that the finding of no probable cause was not arbitrary or capricious and was supported by substantial evidence. *Id.* at 14-18. First, the Commission could properly rely on NYSDHR's conclusion that "[Amnesia] required complainant to purchase a bottle for the non-discriminatory reasons of limited space and the goal of furthering the image of respondent's establishment." *Id.* at 16.

Second, at the time of the incident, the club had taken no action and made no statement that had led even petitioner to believe that he had been discriminated against because of age. *Id.* at 16-17. Indeed, petitioner himself had initially believed that he had been discriminated against on the basis of sex, and it was not until he read the *dicta* in NYSDHR's decision that he changed his theory to age discrimination. *Id.* at 17.

Third, the *dicta* in NYSDHR's decision did not support a finding of age discrimination. *Id.* at 17. The comment that "the vast majority of the patrons of the club appeared to be under 30" in no way demonstrated that the club sought to exclude certain individuals on the basis of age -- or that the club had asked petitioner to purchase a bottle for this reason. *Id.* at 18. Indeed, as Amnesia had stated in its answer to petitioner's complaint, "Amnesia, and other New York City clubs, are typically frequented by individuals in their 20s and 30s,...lead[ing] to a significant majority of Amnesia's clientele falling into those age ranges due to no fault...of Amnesia." *Id.* at 17-18. Finally, online comments reviewed by the Commission indicated that Amnesia had asked individuals in their 20's and 30's to purchase bottles as well, supporting its finding of "no probable cause." *Id.* at 18.

The Commission next argued that its investigation was not abbreviated, one-sided, or biased. *Id.* at 19-22. As established by binding precedent, the Commission had broad discretion in deciding how to investigate petitioner's complaint, and had given his complaint the investigation it warranted. *Id.* at 19. Indeed, the Commission had taken numerous steps to investigate petitioner's complaint, and his objections to the Commission's investigation were "nothing more than disagreements with the Commission's factual and legal conclusions." *Id.* at 21. The Commission was under no obligation to subpoena witnesses or serve interrogatories, as petitioner demanded, and hearsay could be relied upon in administrative proceedings. *Id.* at 21 & n.9.

The Commission lastly argued that petitioner had not stated a procedural due process claim. *Id.* at 22-24. First, petitioner could not demonstrate that the Commission had failed to take any investigatory step it was required to take, as it had broad discretion in conducting its investigations. *Id.* at 23. Second, the Commission's procedures, which the Commission here followed, had been found to satisfy due process. *Id.* at 22-23. Third, petitioner had failed to show that the Commission was biased against him. *Id.* at 23.

On April 30, 2013, petitioner submitted a Memorandum of Law in Opposition to the Commission's Motion to Dismiss. And on May 17, 2013, the Commission submitted a Reply Memorandum of Law in Further Support of the Commission's Motion to Dismiss.

DECISION BELOW

The Supreme Court granted the City's motion, denied the petition, and dismissed the proceeding (A8).

The Court held that, pursuant to controlling case law on the doctrine of election of remedies, Admin. Code §§ 8-502(a) and 8-109(f)(iii), and Exec. Law § 297(9), the Commission did not have jurisdiction to consider petitioner's complaint (A10).

Although "[n]o further review is warranted," the Court further found that, were it to review the Commission's January 11, 2013 Final Determination, it would hold that the determination was rational (A10). Not only was the Commission's conclusion supported by NYSDHR's earlier finding that "Amnesia's decision for requiring $350 bottle service was based upon a nondiscriminatory, legitimate reason of 'limited space and the goal of furthering the image of [Amnesia's] establishment,'" but also the record was bereft of "any credible basis...to find age discrimination" (A10).

The Court further determined that the Commission's investigation could not be considered "so one-sided to render it arbitrary and capricious" (A10). The Commission has "broad discretion in determining the method to be employed in investigating a claim" (A10 (citations omitted)), and the Commission took numerous actions in investigating petitioner's complaint (A10).

The Court lastly dismissed petitioner's due process claim on the grounds that petitioner was afforded the constitutional minimum of notice and the opportunity to be heard and had the "adequate post-deprivation opportunity to be heard in this Article 78 proceeding" (A10).[2]

RELEVANT STATUTES

Admin. Code § 8-109: Commission on Human Rights: Complaint.

> (f) The commission shall not have jurisdiction to entertain a complaint if:
>
> (i) the complainant has previously initiated a civil action in a court of competent jurisdiction alleging an unlawful discriminatory practice as defined by this chapter...with respect to the same grievance which is the subject of the complaint under this chapter, unless such civil action has

[2] On the same day that the Supreme Court issued its decision granting the Commission's motion to dismiss the petition, petitioner filed a motion to supplement the petition and a motion to reargue. The Commission opposed the motions. On January 8, 2014, the Supreme Court, New York County (Hunter, J.), issued a decision and order (one paper) denying both motions.

> been dismissed without prejudice or withdrawn without prejudice; or
>
> (ii) the complainant has previously filed and has an action or proceeding before any administrative agency under any other law of the state alleging an unlawful discriminatory practice as defined by this chapter...with respect to the same grievance which is the subject of the complaint under this chapter; or
>
> (iii) the complainant has previously filed a complaint with the state division of human rights alleging an unlawful discriminatory practice as defined by this chapter...with respect to the same grievance which is the subject of the complaint under this chapter and a final determination has been made thereon.

Admin. Code § 8-502(a): Civil Action by Persons Aggrieved by Unlawful Discriminatory Practices.

> ...[A]ny person claiming to be aggrieved by an unlawful discriminatory practice as defined in chapter one of this title... shall have a cause of action in any court of competent jurisdiction for damages, including punitive damages, and for injunctive relief and such other remedies as may be appropriate, unless such person has filed a complaint with the city commission on human rights or with the state division of human rights with respect to such alleged unlawful discriminatory practice or act of discriminatory harassment or violence....

Exec. Law § 297(9): Human Rights Law: Procedure.

> Any person claiming to be aggrieved by an unlawful discriminatory practice shall have a cause of action in any court of appropriate jurisdiction for

> damages...unless such person had filed a complaint hereunder or with any local commission on human rights, or with the superintendent pursuant to the provisions of section two hundred ninety-six-a of this chapter, provided that, where the division has dismissed such complaint on the grounds of administrative convenience, on the grounds of untimeliness, or on the grounds that the election of remedies is annulled, such person shall maintain all rights to bring suit as if no complaint had been filed with the division.... No person who has initiated any action in a court of competent jurisdiction or who has an action pending before any administrative agency under any other law of the state based upon an act which would be an unlawful discriminatory practice under this article, may file a complaint with respect to the same grievance under this section or under section two hundred ninety-six-a of this article.

ARGUMENT

POINT I

THE COURT BELOW CORRECTLY DETERMINED THAT THE COMMISSION LACKED JURISDICTION TO ENTERTAIN THE COMPLAINT. PETITIONER HAD ALREADY FILED A COMPLAINT WITH NYSDHR AND WAS THUS STATUTORILY BARRED FROM FILING A SUBSEQUENT COMPLAINT WITH THE COMMISSION BASED ON THE SAME INCIDENT.

Because petitioner had filed a prior complaint with NYSDHR and NYSDHR had dismissed that complaint for lack of probable cause, the Supreme Court properly determined that the Commission was barred from entertaining petitioner’s complaint

by New York City's and New York State's human rights laws and the doctrine of election of remedies.

New York City's Human Rights Law establishes a comprehensive election-of-remedies scheme. *See* Admin. Code §§ 8-109(f), 8-502(a). On the one hand, Admin. Code § 8-109(f) explicitly deprives *the Commission* of jurisdiction to entertain a complaint where the complainant has previously and "with respect to the same grievance": (i) initiated a court action, (ii) filed and has an action or proceeding before any administrative agency, or (iii) "*filed a complaint with [NYSDHR]...and a final determination has been made thereon*." Admin. Code § 8-109(f)(i)-(iii) (emphasis added). On the other hand, Admin. Code § 8-502(a) deprives *the courts* of jurisdiction where the complainant has previously "filed a complaint with the [Commission] or [NYSDHR] with respect to such alleged unlawful discriminatory practice." Admin. Code § 8-502(a).

New York State's Human Rights Law sets forth an analogous election-of-remedies scheme. *See* Exec. Law §§ 297(9), 300. Exec. Law § 297 establishes that a person "claiming to be aggrieved by an unlawful discriminatory practice shall have a cause of action in any court of appropriate jurisdiction...*unless* such person had filed a complaint

hereunder or with any local commission on human rights." Exec. Law § 297(9) (emphasis added). The provision further provides that no person who has initiated an action in court or "has an action pending" before any administrative agency "based upon any other law of the state" may file a complaint "with respect to the same grievance under this section." *Id.*

Under these election-of-remedies provisions, it is well established that a party may bring a claim of discrimination based on the State and/or City Human Rights Law in an administrative forum, or in court, but not both. *See, e.g.*, *Emil v. Dewey*, 49 N.Y.2d 968, 968 (1980) (interpreting Exec. Law § 297(9)); *Benjamin v. N.Y.C. Dept. of Health*, 57 A.D.3d 403, 403-04 (1st Dept. 2008) (interpreting Exec. Law § 297(9) and Admin. Code § 8-502(a)).

It is also well established that the standard for determining which successive discrimination complaints are barred is whether the complaints are based on the same *incident* or *conduct*. *See, e.g.*, *Emil*, 49 N.Y.2d at 968 (filing of prior complaint with NYSDHR "precludes the plaintiff from commencing an action in court based on the same incident"); *Benjamin*, 57 A.D.3d at 403-04 (filing of prior complaint with Commission barred subsequent judicial action based "on the same continuing

allegedly discriminatory underlying conduct"); *Jones v. Gilman Paper Co.*, 166 A.D.2d 294 (1st Dept. 1990) ("same facts and circumstances"); *Wrenn v. Verizon*, 106 A.D.3d 995, 996 (2d Dept. 2013) ("same allegedly discriminatory conduct"); *Craig-Oriol v. Mount Sinai Hosp.*, 201 A.D.2d 449, 450 (2d Dept. 1994) ("same allegedly invidious behavior"); *Higgins v. NYP Holdings, Inc.*, 836 F. Supp. 2d 182, 188 (S.D.N.Y. 2011) ("same incident").

Under this standard, a "[c]laimant cannot avoid the jurisdictional bar by merely adding additional elements of damage arising out of the same underlying conduct" or "changing his legal theory." *Bhagalia v. New York*, 228 A.D.2d 882, 883 (3d Dept. 1996).

For example, in *Benjamin v. New York City Department of Health*, this Court held that the plaintiff could not bring a judicial action alleging discrimination based on national origin and a shoulder injury because the plaintiff had previously filed a complaint with the Commission alleging "discrimination based on skin color, stress, gastric disorders, or a peptic ulcer." 57 A.D.3d at 403-04. Despite the change in legal theory, the second complaint, this Court emphasized, was "based on the same continuing allegedly discriminatory underlying conduct" and therefore barred. *Id.* at 404; *see also Jones*, 166 A.D.2d

(judicial action alleging Labor Law violation barred by plaintiff's previous filing of sex discrimination complaint with the Commission); *Craig-Oriol*, 201 A.D.2d at 449-50 (judicial action alleging racial discrimination barred by plaintiff's previous filing of age discrimination complaint with NYSDHR).

This standard is consistent with New York's "general prohibition against splitting a single claim into multiple legal actions." *Craig-Oriol*, 201 A.D.2d at 450. Indeed, courts applying the analogous judicial bar on successive claims -- *res judicata* -- dismiss those claims if they arise out of the same *transaction*, not legal theory. *See, e.g.*, *O'Brien v. Syracuse*, 54 N.Y.2d 353, 357-58 (1981) ("[O]nce a claim is brought to a final conclusion, all other claims arising out of the *same transaction or series of transactions* are barred, even if based upon different theories." (emphasis added)).

The Supreme Court properly applied this standard to the instant case. As both the Commission and the Supreme Court noted, Admin. Code § 8-109(f)(iii) explicitly deprives the Commission of jurisdiction where a complainant "has previously filed a complaint with [NYSDHR]...with respect to the same grievance" and "a final determination has been made thereon."

Here, petitioner had previously filed a complaint with NYSDHR. Moreover, that complaint was based on the same alleged incident and underlying course of conduct as petitioner's subsequent complaint filed with the Commission. *Compare* Braman Aff., Ex. 1 (on January 9, 2012, Amnesia allegedly required petitioner to purchase a $350 bottle to enter and did not require other patrons to do the same), *with* Braman Aff., Ex. 3 (on January 9, 2012, Amnesia allegedly required petitioner to purchase a $350 bottle to enter and did not require other patrons to do the same). Furthermore, it is uncontested that NYSDHR's dismissal of petitioner's complaint and closing of his administrative file constituted its "final determination" (A50-51). Thus, the Supreme Court correctly determined that the Commission did not have jurisdiction to entertain petitioner's complaint under Admin. Code §§ 8-109(f) and 8-502(a) and Exec. Law § 297(9) (A10).

Notably, even if the language of Admin. Code § 8-109(f)(iii) were ambiguous -- which it is not -- this Court should nonetheless dismiss the petition and leave the Commission's decision undisturbed, as it is well established that "the practical construction of a statute by the agency charged with implementing it, if not unreasonable, is entitled

to deference by the courts." *Louis Harris & Assocs. v. deLeon*, 84 N.Y.2d 698, 706 (1994) (granting deference to a Commission determination regarding burdens of proof). As this Court has emphasized, "[t]he usual standard of judicial deference to administrative interpretation of a particular term...applies unless a particular construction placed upon a relevant term flaunts clear law, and hence is arbitrary." *Acosta v. Loews Corp.*, 276 A.D.2d 214, 220 (1st Dept. 2000) (upholding the Commission's interpretation of the term "public interest" as it appears in Admin. Code § 8-113(a)(5)).

Both of these requirements are satisfied here. First, the New York City Human Rights Law charges the Commission with its implementation. *See id.*; Admin. Code § 8-101. Second, the Commission's construction is not unreasonable, nor does it "flaunt clear law." To the contrary, not only is the Commission's construction of "with respect to the same grievance" consistent with the plain meaning of Admin. Code § 8-109(f)(iii), but it is also consistent with the standard that the Court of Appeals and this Court have consistently applied in election-of-remedies cases. Thus, the Supreme Court correctly affirmed the Commission's interpretation.

In his brief, petitioner recognizes that, after NYSDHR dismissed his complaint for lack of probable cause, the election-of-remedies provisions of the City and State Human Rights Laws barred him from filing a subsequent complaint in court because that subsequent complaint would have been based on the same "fact situation." *See* Appellant's Brief ("App. Br.") at 11-12 ("[A] person alleging discrimination...can either go to court or file a complaint with a human rights agency concerning the same fact situation, but not both."). Petitioner nonetheless maintains that, because he filed his complaints with NYSDHR and the Commission -- *two agencies* as opposed to *a court and an agency* -- a different standard should apply here and his complaint should not have been barred. *See id.*

To support his interpretation, petitioner argues that, where a complainant alleges that he or she was discriminated against based on more than one discriminatory animus, a single incident of discrimination nonetheless gives rise to multiple "grievances" under the statute in that it gives rise to multiple "causes of action," or multiple "injuries." *Id.* at 13-15.

Petitioner, however, has cited no case law that supports his interpretation of "grievance." Nor has he cited any case in which an individual was able to circumvent an

election-of-remedies provision by simply alleging a new legal theory based on the same incident or conduct. Petitioner also does not explain why, where a court admittedly would not have jurisdiction to entertain his complaint, this Court should nonetheless reverse the Commission's determination and hold that the Commission must accept jurisdiction solely because the case concerns two agencies as opposed to a court and an agency.

To the contrary: the structure and language of the election-of-remedies provisions of New York City's Human Rights Law indicate that this Court should *not* apply a different standard where successive complaints are filed with two *agencies* as opposed to a *court and an agency*. First, its provisions bar successive complaints *regardless of whether* the initial complaint was originally filed with a court, with NYSDHR, or with the Commission. *Compare* Admin. Code § 8-502(a) (subsequent action in court barred where complainant has previously filed with NYSDHR or the Commission), *with* Admin. Code § 8-109(f)(i), (iii) (subsequent action with the Commission barred where complainant has previously filed with a court or NYSDHR). Second, Admin. Code § 8-109(f) specifically deprives the Commission of jurisdiction where the complainant has previously filed a complaint *regardless of whether* that prior complaint was

filed with a court, an agency, or NYSDHR. Indeed, Admin. Code § 8-109(f)(i), which applies to courts; Admin. Code § 8-109(f)(ii), which applies to agencies; and Admin. Code § 8-109(f)(iii), which applies to NYSDHR all use the "with respect to the same grievance" language. Petitioner is thus incorrect that the Supreme Court should have applied a different standard in this case simply because he filed his successive complaints with two agencies.

Furthermore, because the "same grievance" language appears throughout Admin. Code § 8-109(f), construing "same grievance" to mean "same legal theory," as petitioner advocates, would eviscerate the protections of the Human Rights Law's election-of-remedies provision. Under petitioner's interpretation, an individual could file a complaint with the Commission even after a court, an agency, or NYSDHR had dismissed a prior complaint based on the same incident simply by changing the type of alleged discriminatory animus. For example, a plaintiff could file a lawsuit alleging race discrimination in court, lose, and then re-file essentially the same complaint with the Commission on grounds of color discrimination. Such an interpretation would allow litigants a

"second bite at the apple" and defeat the very purpose of election-of-remedies provisions.

Moreover, and in any event, petitioner fails to support his alternative interpretation of "same grievance." First, petitioner is incorrect that a single incident of alleged discrimination gives rise to multiple "causes of action" where a complainant alleges more than one discriminatory animus. Not only do none of the election-of-remedies cases discussed above support this interpretation of "cause of action," but New York courts applying the analogous doctrine of *res judicata* have also ruled directly to the contrary, holding that a claim based on the same essential facts as a prior claim is based on the "same cause of action." *See Reilly v. Reid*, 45 N.Y.2d 24, 30 (1978) ("[W]here the same foundation facts serve as a predicate for each proceeding, differences in legal theory and consequent remedy do not create a separate cause of action."); *Jumax Assoc. v. 350 Cabrini Owners Corp.*, 110 A.D.3d 622, 623 (1st Dept. 2013) (*res judicata* bars subsequent actions "on the same cause of action" in that it bars "all other claims arising out of the same transaction or series of transactions...even if based upon different theories or if seeking a different remedy"); *Troy v. Goord*, 300 A.D.2d 1086, 1087 (4th Dept. 2002) ("[A] new claim

constitutes the same cause of action as the formerly litigated claim if they both arise out of the transaction or occurrence or series of transactions or occurrences, even if the new claim is based upon a different legal theory....").

Second, petitioner's definition of "grievance" as "an injury or wrong" avails him nothing. Petitioner asserts that sex discrimination and age discrimination are two separate "injuries," but petitioner has provided no support for this interpretation of "injury." Rather, petitioner has alleged only one "injury": the nightclub's discriminatory request that he purchase bottle service. Moreover, petitioner's interpretation of the term, although incorrect, *at most* demonstrates that the definition of "grievance" is ambiguous -- in which case this Court should defer to the agency's construction.

Petitioner lastly argues that this Court should not apply the election-of-remedies provision to successive complaints filed with multiple *agencies* because agencies have limited jurisdiction. For example, NYSDHR here indicated that it did not have jurisdiction over age discrimination with regard to public accommodations (A50). Thus, petitioner argues, he should have been allowed to file a complaint alleging age discrimination with the Commission. *See* App. Br. at 18-19.

But petitioner's argument ignores the fact that the Court of Appeals and this Court have applied election-of-remedies provisions to bar actions initiated in court where the complainant has previously filed a complaint with NYSDHR or the Commission, despite the fact that the agencies have limited jurisdiction. *See, e.g.*, *Emil*, 49 N.Y.2d at 968; *Benjamin*, 57 A.D.3d at 403-04. Indeed, this Court's holding in *Jones v. Gilman Paper Co.* is directly to the contrary. In that case, the plaintiff, who had filed a prior complaint with the Commission alleging sex discrimination, filed a second complaint with the Supreme Court under the State Labor Law. *Jones*, 166 A.D.2d at 294. Despite the fact that the Commission does not have jurisdiction to entertain complaints under the Labor Law, this Court nonetheless found that the plaintiff was barred from commencing an action in court because both complaints "ar[ose] out of the same facts and circumstances." *Id.*

If petitioner had wanted to file a complaint alleging sex discrimination *and* age discrimination, he could have done so by initiating an action in the Supreme Court or with the Commission. The fact that he now contends that he mistakenly filed his complaint with NYSDHR based on the wrong discriminatory animus does not earn him a second bite at the

apple: "[a]fterthoughts or after discoveries however understandable and morally forgivable are generally not enough to create a right to litigate anew." *Reilly*, 45 N.Y.2d at 28.

The election-of-remedies doctrine provides grievants with a choice: they may file a complaint with an administrative agency, which is limited in its jurisdiction and affords less process, but which also provides a less expensive and swifter resolution, or they may initiate an action in court, but not both. As this Court stated in *Magini v. Otnorp, Ltd.*, election-of-remedies provisions do not require "that a grievant have...a full appreciation of the finality of an election to proceed in the administrative forum." 180 A.D.2d 476, 477 (1st Dept. 1992). Even if a grievant later regrets his choice, that choice is nonetheless final, and attempts to relitigate his claim will be foreclosed. *Id.* Accordingly, both the Commission and the Supreme Court correctly determined that petitioner's attempts to relitigate his discrimination claim should be foreclosed.

POINT II

THE SUPREME COURT PROPERLY DISMISSED THE PETITION BECAUSE THE COMMISSION'S DECISION WAS NOT ARBITRARY OR CAPRICIOUS.

The Supreme Court properly determined that the Commission's decision was rational, and that its investigation

was not so abbreviated or one-sided as to render it arbitrary and capricious.

A. The Commission's no probable cause determination was not arbitrary or capricious.

Under Admin. Code § 8-113(d), the Commission "shall dismiss" a complaint if it finds that there is no probable cause to believe that the respondent engaged in an unlawful discriminatory practice. In making its determination, the Commission considers whether "a reasonable person, looking at the evidence as a whole, could reach the conclusion that it is more likely than not that the unlawful discriminatory practice was committed." 47 Rules of the City of New York § 1-03.

The Commission's probable cause determinations are afforded substantial deference because they are within its "area of expertness." *See NYSDHR v. Cnty. of Onondaga Sheriff's Dept.*, 71 N.Y.2d 623, 630 (1988).[3] Thus, they will only be disturbed if they are arbitrary and capricious, *see De La Concha v. Gatling*, 13 A.D.3d 74, 75 (1st Dept. 2004); *Mitchell v. Comm'r of Human Rights*, 234 A.D.2d 128 (1st Dept. 1996), or lack

[3] Cases addressing review of the Commission's decisions cite interchangeably to cases reviewing decisions of NYSDHR because those cases involve the same standard of review. *See, e.g., Johnson v. Scholastic, Inc.*, 52 A.D.3d 375, 375 (1st Dept. 2008) (citing *New Venture Gear, Inc. v. NYSDHR*, 41 A.D.3d 1265, 1266 (4th Dept. 2007)).

substantial evidence, *see Johnson v. Scholastic, Inc.*, 52 A.D.3d 375, 375 (1st Dept. 2008).

An agency decision is not "arbitrary and capricious" if there is a rational basis for its decision and that decision is legally permissible. *See Chenango Forks Cent. Sch. Dist. v. Pub. Empl. Relations Bd.*, 21 N.Y.3d 255, 265 (2013); *Beck-Nichols v. Bianco*, 20 N.Y.3d 540, 559 (2013). "Substantial evidence 'means such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact.'" *Mittl v. NYSDHR*, 100 N.Y.2d 326, 331 (2003) (quoting *300 Gramatan Ave. Assoc. v. NYSDHR*, 45 N.Y.2d 176, 180 (1978)). Where substantial evidence supports an agency's determination, "that determination must be sustained, irrespective of whether a similar quantum of evidence is available to support other varying conclusions." *119-121 E. 97th St. Corp. v. N.Y.C. Comm'n on Human Rights*, 220 A.D.2d 79, 82 (1st Dept. 1996); *see also Berenhaus v. Ward*, 70 N.Y.2d 436, 444 (1987).

Here, the Supreme Court correctly determined that the Commission's finding of no probable cause was rational (A10). It was further supported by substantial evidence.

First, the Supreme Court properly determined that NYSDHR's prior determination that Amnesia "required complainant

to purchase a bottle for the non-discriminatory reasons of limited space and the goal of furthering the image of respondent's establishment" supported the Commission's determination (A10). NYSDHR reached this conclusion after an investigation of petitioner's complaint, which included a visit to Amnesia by an investigator (A50). Further, this conclusion was supported by Amnesia's statement to NYSDHR -- reported in NYSDHR's decision and present in NYSDHR's record, which the Commission requested and reviewed prior to its decision, *see* Braman Aff. ¶ 9; Ex. 6 -- that, "when the nightclub is crowded, respondent employs an admissions strategy to limit the number of individuals...who do not have the appearance respondent desires to maintain the image of the nightclub" (A50). Both NYSDHR and the Commission were entitled to credit this statement.

Second, the Supreme Court properly determined that there existed no "credible basis in the record before the Commission to find age discrimination" (A10). Indeed, petitioner has never claimed that Amnesia or its agents took any particular actions or said any particular words that led him to believe at the time of the incident that he was the victim of age discrimination. Rather, petitioner believed that he was asked to purchase bottle service because of his gender, not his

age (A14), and "he did not realize" until he read NYSDHR's decision that Amnesia allegedly asked him to do so because of his age (A20).

Thus, petitioner is quite frank that the primary reason *he* believes that he was discriminated against on the basis of age was the following statement in NYSDHR's decision:

> Based on observations made during the field visit, the vast majority of the patrons of the nightclub appeared to be under the age of 30 years.... A photo on complainant's website suggests that he is significantly older than respondent's patrons, and age discrimination is beyond the jurisdiction of the Division with regards to public accommodation (A50).

Although petitioner ascribes great significance to this statement, characterizing it as a "finding of probable age discrimination" (A21), an examination of the statement itself reveals that it has little, if any, probative value with regard to petitioner's complaint. Nowhere in this statement -– which, in any event, is *dicta* -- is there any indication that (a) Amnesia asked petitioner to purchase bottle service because of his age, (b) "the vast majority of the patrons in the nightclub appeared to be under...30" *because* Amnesia was engaging in age discrimination, (c) a greater number of older patrons were waiting in line for the club than were being allowed into the

club, or (d) that the Division investigator saw any evidence of Amnesia treating older individuals differently than younger individuals in any way. Furthermore, this statement cannot be characterized as a "finding of probable age discrimination" where NYSDHR just two paragraphs prior specifically stated that "[t]he record suggests...that [Amnesia] required complainant to purchase a bottle for...non-discriminatory reasons" (A49).

Rather, the record indicates that young people frequent Amnesia at a greater rate because Amnesia, like most dance clubs in New York City, attracts primarily younger patrons. This inference not only is common sense but also is directly supported by the record. Indeed, in Amnesia's answer to petitioner's Commission complaint, Amnesia stated: "Upon information and belief, Amnesia, and other New York City clubs, are typically frequented by individuals in their 20s and 30s. This leads to a significant majority of Amnesia's clientele falling into those age ranges due to no fault, action or omission on the part of Amnesia." Braman Aff., Ex. 4, ¶ 17. Again, the Commission was entitled to credit this statement.

Finally, the Commission's determination was supported by website comments that indicated that Amnesia did not discriminate on the basis of age (A44). Indeed, a reviewer who,

based on her photo, appeared to be in her 20s or 30s posted a comment within a few months of petitioner's visit to Amnesia and "expressed her frustration...about the difficulty in gaining entry into the club, stating, '...of course the only way to get in was if we bought bottles'" (A44). Another reviewer indicated that she had seen an "interesting and eclectic crowd" in Amnesia, including "people in their 20's, 30's, 40's" (A44 (internal quotation marks omitted)).

Petitioner nonetheless argues that the Commission's decision should be overturned as arbitrary and capricious and lacking in substantial evidence because these comments are hearsay. However, the Commission's partial reliance on hearsay in no way renders its decision arbitrary and capricious or lacking in substantial evidence.

As an initial matter, petitioner's argument relies on a misapplication of the relevant standards of review. An administrative determination is not arbitrary and capricious or lacking in substantial evidence if there is a rational basis for that determination or if there is evidence supporting that determination upon the whole record. Here, even if the website comments are excluded from consideration, the Commission's

decision has a rational basis and is supported by the record as a whole, as set forth above.

Further, agencies may properly rely on hearsay. Indeed, even the case petitioner cites states only that hearsay should be treated skeptically, *see* App. Br. at 20, and this Court and other New York courts have explicitly rejected petitioner's argument, *see Bellamy v. NYSDHR*, 8 A.D.3d 269, 270 (2d Dept. 2004) ("Contrary to the petitioner's contention, the fact that the Division's determination rested in part on alleged hearsay statements does not warrant reversal."); *Hirsch v. Corbisiero*, 155 A.D.2d 325 (1st Dept. 1989) ("The evidence against a respondent in an administrative proceeding may consist entirely of hearsay...."). In any event, the record indicates that the Commission *did* take note of the hearsay nature of the website comments, finding that they nonetheless had probative value (A44 n. 1 ("The Commission realizes that it could not interview any of [the] individuals [who wrote the website comments]....").

Thus, the Commission's determination was not arbitrary and capricious, nor was it lacking in substantial evidence.

B. The Commission's investigation was not so abbreviated or one-sided as to render its determination arbitrary and capricious.

The Supreme Court also correctly found that the Commission's investigation was not so abbreviated or one-sided as to render its determination arbitrary and capricious.

"It is within the discretion of [the Commission] to decide how to conduct its investigations." *Stern v. N.Y.C. Comm'n on Human Rights*, 38 A.D.3d 302, 302 (1st Dept. 2007) (citing *Cornelius v. NYSDHR*, 286 A.D.2d 329, 329-30 (2d Dept. 2001)); *see also Barnes v. Beth Israel Med. Ctr.*, 977 N.Y.S.2d 888 (1st Dept. 2014); *Wu v. N.Y.C. Comm'n on Human Rights*, 84 A.D.3d 823, 824 (2d Dept. 2011), *lv. denied*, 18 N.Y.3d 808 (2012). A determination of lack of probable cause will not be reversed on the ground that the Commission conducted an insufficient investigation unless its investigation was "abbreviated or one-sided." *Block v. Gatling*, 84 A.D.3d 445, 446 (1st Dept. 2011), *lv. denied*, 17 N.Y.3d 709 (2011); *Pascual v. NYSDHR*, 37 A.D.3d 215, 216 (1st Dept. 2007).

As this Court has repeatedly found, under this standard, there is no particular investigatory step that the Commission is required to take. The Commission is not required to: (a) hold a hearing or fact-finding conference, *see Gleason*

v. W.C. Dean Sr. Trucking, 228 A.D.2d 678, 678 (2d Dept. 1996); *Chirgotis v. Mobil Oil Corp.*, 128 A.D.2d 400, 403 (1st Dept. 1987), (b) conduct interviews, *see Barnes*, 977 N.Y.S.2d at 888; *McFarland v. NYSDHR*, 241 A.D.2d 108, 112 (1st Dept. 1998); *Chirgotis*, 128 A.D.2d at 403, or (c) subpoena records, *Pascual*, 37 A.D.3d at 216. Indeed, the Commission may reach a determination solely on the basis of written submissions. *Chirgotis*, 128 A.D.2d at 403.

Rather, in determining whether an investigation is one-sided or abbreviated, the crucial question is whether the agency "provided [the] petitioner with a full and fair opportunity to present his claim." *Stern*, 38 A.D.3d at 302; *Block*, 84 A.D.3d at 445-46 ("[The Commission]'s investigation into petitioner's complaint was sufficient, and its determination rational, since petitioner had a full and fair opportunity to present her case."); *Wooten v. N.Y.C. Dept. of Gen. Servs.*, 207 A.D.2d 754, 754 (1st Dept. 1994); *Chirgotis*, 128 A.D.2d at 403.

Here, the Commission conducted an appropriate, even-handed investigation of petitioner's claim. *See Bush v. NYSDHR*, 78 A.D.3d 505, 506 (1st Dept. 2010) ("The record shows that the Division conducted an appropriate and fair investigation....").

The Commission first conducted an intake interview with petitioner before he filed his complaint. *See* Braman Aff. ¶ 5. At this interview, petitioner explained his claim to a Commission attorney. *Id.* Following petitioner's filing of his complaint, the Commission served it on Amnesia and demanded and obtained an answer. *See* Braman Aff. ¶ 6; Ex. 4. The Commission gave petitioner the opportunity to submit a rebuttal, which he did, with exhibits. *See* Braman Aff. ¶ 8, Ex. 5. Also pursuant to its investigation, the Commission obtained and reviewed NYSDHR's file regarding petitioner's previous complaint, which included its decision, investigation report, and supporting materials, *see* Braman Aff. ¶ 9; Ex. 6; attempted to contact David "L.N.U." at Amnesia and to obtain surveillance video of the incident, *see* Braman Aff. ¶ 10; and reviewed relevant online comments posted by patrons of Amnesia in the months surrounding the alleged incident, *see* Braman Aff. ¶ 11; Ex. 7. Following the dismissal of his complaint, petitioner submitted a 22-page Appeal and Complaint to the Commission. Braman Aff. ¶ 19, Ex. 9. Petitioner attached six exhibits, and was given the chance to submit additional comments in support of his appeal, which he declined, *see* Braman Aff. ¶ 20.

Accordingly, petitioner had a full and fair opportunity to present his case. He was able to fully present his contentions and to submit evidence, and to rebut the contentions and evidence presented by Amnesia. *See Chirgotis*, 128 A.D.2d at 403 ("[W]here a claimant has a full and fair opportunity to present her contentions and evidence, there is no basis to annul the determination as arbitrary or capricious."); *Goston v. Am. Airlines*, 295 A.D.2d 932, 932-33 (4th Dept. 2002) (NYSDHR investigation not arbitrary and capricious where the Division "provided petitioner with a full opportunity to present evidence on his behalf and to rebut the evidence presented by respondent"); *Wooten*, 207 A.D.2d at 754. Further, he had the opportunity to appeal the Commission's decision and respond to its factual and legal conclusions. Under the relevant standard, then, the Commission's investigation was more than sufficient.

Moreover, petitioner cannot demonstrate that the Commission's investigation was one-sided. For example, petitioner cannot detail any advantage or opportunity that Amnesia was afforded and that he was not. Nor can petitioner show that any of the investigatory steps were taken by the Commission to benefit solely Amnesia or petitioner. Rather, the Commission's investigation was neutral, and included attempts to

contact David "L.N.U." and to obtain surveillance video of the incident, as well as the receipt and review of NYSDHR's file. Thus, this Court should affirm the Supreme Court's determination that the Commission's investigation was not so abbreviated or one-sided as to render its decision arbitrary and capricious.

POINT III

THE SUPREME COURT PROPERLY DETERMINED THAT THE COMMISSION'S INVESTIGATION DID NOT VIOLATE DUE PROCESS, AS PETITIONER CANNOT SHOW THAT THE COMMISSION FAILED TO TAKE ANY REQUIRED INVESTIGATORY STEP.

Petitioner's procedural due process claim is largely duplicative of his "insufficient investigation" claim. However, as fully set forth in Point II, *supra*, the Commission has broad discretion to determine how to conduct its investigations. Furthermore, both state and federal courts have held that the Commission's and similar procedures satisfy due process.

New York City's Human Rights Law sets forth the following procedure for the Commission's acceptance and review of complaints. First, the grievant files a complaint with the Commission, and the Commission acknowledges receipt of the complaint. *See* Admin. Code § 8-109(a). The Commission then serves the complaint on the respondent, *id.* § 8-109(d), and the respondent must answer, *id.* § 8-111(a). The Commission must

then "complete a thorough investigation of the allegations of the complaint," *id.* § 8-109(g), which *may* include interviewing witnesses and/or subpoenaing documents, *id.* § 8-114. If, after investigation, the Commission determines "that probable cause does not exist to believe that the respondent has engaged or is engaging in an unlawful discriminatory practice," the Commission must dismiss the complaint, *id.* § 8-113(d), and the complainant may appeal the dismissal to the chairperson, *id.* § 8-113(f). If the Commission determines that probable cause does exist, however, an administrative law judge conducts a hearing and issues a recommendation. *Id.* §§ 8-119, 8-120. The complainant or respondent may seek judicial review of the Commission's final determinations. *See id.* § 8-123.

These procedures satisfy due process under both state and federal law. Indeed, this Court has repeatedly held that, where a special judicial proceeding is available to review an agency determination, due process is satisfied. *See Velella v. N.Y.C. Local Conditional Release Comm'n*, 13 A.D.3d 201, 202 (1st Dept. 2004) ("Even were we to find that any of the petitioners were denied an essential aspect of procedural due process, we would find that...each of the petitioners had an adequate post-deprivation opportunity to be heard in these article 78

proceedings."); *C/S Window Installers, Inc. v. N.Y.C. Dept. of Design & Constr.*, 304 A.D.2d 380, 380 (1st Dept. 2003) (same). Here, the availability of the instant special proceeding therefore satisfies due process.

Further, the federal courts have explicitly held that the Commission's administrative procedures satisfy due process. *See Rosu v. City of New York*, Docket No. 13-243-cv, 2014 U.S. App. LEXIS 2402, at *10-13 (2d Cir. Feb. 7, 2014) (holding that the Commission's procedures satisfy due process); *Givens v. City of New York*, 11 Civ. 2568 (PKC) (JCF), 2012 U.S. Dist. LEXIS 2892, at *17-18 (S.D.N.Y. Jan. 10, 2012) (holding that Commission's procedures constitute "extensive, regular procedures that provided [the plaintiff] ample opportunity to vigorously litigate the issues of accommodation and retaliation," and that are similar to NYSDHR's "panoply of procedures," which were approved by the Supreme Court in *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 483-85 (1982)).

Indeed, in the recent case of *Rosu v. City of New York*, the Second Circuit affirmed a 2012 decision by the District Court of the Southern District rejecting both as-applied and facial procedural due process challenges to the Commission's procedures. *See* 2014 U.S. App. LEXIS 2402, at *1-

2. In *Rosu*, the plaintiff claimed that the Commission had violated his due process rights by insufficiently investigating his complaint. *Id.* at *6. Specifically, the Commission "failed to conduct[] any witness interviews or request documents from [the respondent]," *id.* at *4-5, and failed to conduct a hearing at which petitioner could cross-examine witnesses, *id.* at *6.

The Second Circuit, however, determined that the Commission's procedures do satisfy due process requirements as outlined in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). *Id.* at *7-11. Although the Commission need not hold a hearing prior to a determination of "no probable cause," its procedures nonetheless afford sufficient notice and opportunity to be heard in that they provide a sufficient post-deprivation remedy in the form of judicial review. *Id.* at *12-13. The Second Circuit also rejected the plaintiff's as-applied challenge on the ground that "the [Commission] did not have a duty to perform any activity that [it] allegedly failed to perform." *Id.* at *2. Thus, the Second Circuit affirmed the dismissal of petitioner's complaint on the ground that it failed to set forth a due process claim.

Similarly, in the instant case, the Supreme Court correctly determined that petitioner failed to set forth a due

process claim. First, the Commission fully complied with the procedures set forth in New York City's Human Rights Law, described *supra*. Second, although petitioner presents a laundry list of investigatory steps that *he* believes the Commission should have taken, *see* App. Br. at 36, as the Second Circuit held in *Rosu*, the Commission here "did not have a duty to perform any activity that they allegedly failed to perform."

Petitioner's only remaining contention is that his due process rights were violated because the official who issued the Commission's determination was biased against him "because of his ancestry (Euro-American protestant), his speech (litigates for men's rights), and his marital status (divorced)." App. Br. at 3; *see also id.* at 4 ("No group is more 'disfavored' today that evolutionary-correct Euro-Americans who have nothing good to say about their ex-wives."). In making this argument, petitioner appears to rely on (a) the fact that the ALJ disagreed with his arguments, *see* App. Br. at 9; (b) his assumption that the ALJ's national origin and race differ from his own, *see, e.g.*, App. Br. at 15-16, 28; and (c) the statement in the Commission's Determination and Order After Investigation that petitioner's description of himself as an "anti-feminist

lawyer" "is consistent with his pattern of filing several gender discrimination suits" (A43). *See* App. Br. at 27.

To state claim for bias, however, "[t]here must be a factual demonstration to support the allegation of bias and proof that the outcome flowed from it." *Warder v. Board of Regents*, 53 N.Y.2d 186, 197 (1981); *see also Dunlop Devt. Corp. v. Spitzer*, 26 A.D.3d 180, 181 (1st Dept. 2006). Here, petitioner can make neither showing. As an initial matter, that the ALJ's race may differ from petitioner's and that the ALJ ultimately disagreed with petitioner's legal arguments in no way demonstrate that the ALJ was biased against petitioner. If either fact were indicative of bias, many, if not most, administrative determinations would be open to challenge on this ground. Further, the fact that the ALJ's investigation revealed that petitioner is a repeat-litigant in the area of gender discrimination is merely a statement of truth and not a "factual demonstration" that the ALJ was prejudiced against petitioner. But even if it were, petitioner can allege no facts to demonstrate that the Commission's "outcome flowed from [bias]." Indeed, as demonstrated above, the ALJ took numerous steps to investigate petitioner's complaint, and the ALJ's determination was well supported by the record. *See Warder*, 53 N.Y.2d at 197.

Thus, the Supreme Court properly determined that petitioner had failed to state a due process claim.

CONCLUSION

THE DECISION AND ORDER (ONE PAPER) APPEALED FROM SHOULD BE AFFIRMED IN ALL RESPECTS, WITH COSTS.

Respectfully submitted,
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February 26, 2014

CERTIFICATION OF COMPLIANCE

This brief was prepared with Microsoft Word 2003, using Courier New 12 pt. for the body and Courier New 10 pt. for footnotes. According to the aforementioned processing system, the entire brief, including portions that may be excluded from the word count pursuant to 22 N.Y.C.R.R. § 600.10(d)(1)(i), contains 10,814 words.

To Be Argued By:
Roy Den Hollander

New York County Clerk's No. 100299/2013

New York Supreme Court

APPELLATE DIVISION—FIRST DEPARTMENT

ROY DEN HOLLANDER,

Petitioner-Appellant,

-against-

THE CITY OF NEW YORK COMMISSION ON HUMAN RIGHTS,

Respondent-Respondent.

REPLY BRIEF FOR PETITIONER-APPELLANT

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Preliminary Statement

Three weeks after receiving the Appendix, the attorney for the New York City Commission on Human Rights ("City HR") requested that 172 more pages of documents be added to the 69 page Appendix. Den Hollander, Petitioner-Appellant, responded with an email dated February 1, 2014:

> When added to the appendix, you will, in effect, have the record on appeal. Your request for what is basically the entire record on appeal makes a mockery of the Advisory Committee's aim to make the appendix method the principal method for an appeal when it amended CPLR 5528 in 1963. David D. Siegel, *Practice Commentaries C5528:1*.
>
> You are clearly trying to make appeals against the City too costly for an individual taxpayer to incur; thereby, winning by default. It was the growing concern over the high and continually increasing cost of printing records on appeal and the use of it by "deep-pockets" to deter appellate review that led to the appendix system.
>
> > We [the Court of Appeals] note that the appendix system was adopted in New York after extended study indicated the need to reduce the cost of printing records on appeal. (*Second Preliminary Report of Advisory Comm. on Practice and Procedure* [N. Y. Legis. Doc., 1958, No. 13], pp. 344-347; Eleventh Annual Report of N. Y. Judicial Council, 1945, pp. 414-416.)
> >
> > In accordance with this policy, paragraph 5 of subdivision (a) of CPLR 5528 provides that an appellant's appendix shall contain "only such parts of the record on appeal as are necessary to consider the questions involved, including those parts the appellant reasonably assumes will be relied upon by the respondent."

> The draftsmen assumed that the main practice problem would be the printing of appendices that were too extensive rather than too attenuated. Thus, while the provision for sanctions in subdivision (e) of CPLR 5528 allows the court to "withhold or impose costs" for "any failure to comply with subdivision (a), (b) or (c)" (see 7 Weinstein-Korn-Miller, N. Y. Civ. Prac., par. 5528.03, p. 55-208 [1965]), the draftsmen assumed that the power would be exercised "if unnecessary parts of the record are printed;" (Second Preliminary Report of Advisory Comm. on Practice and Procedure [N. Y. Legis. Doc., 1958, No. 13], p. 354; italics supplied). This, of course, is the situation in which sanctions are most useful.
>
> The most effective guarantee against an inadequate appendix, of course, is an attorney's desire to supply the court with all material necessary to convince it to adopt his client's position. And with the tactical and practical risk of omission so great, the main danger to be guarded against, in the view of the draftsmen, is the too verbose rather than the too cryptic appendix.

E. P. Reynolds, Inc., v. Nager Electric Company, Inc., 17 N.Y.2d 51, 55-56 (1966).

> The dispute in this case centers on several clearly delineated segments of the record that are included in the appendix.

City HR's misuse of the fact section in its brief and correction of its errant "Facts."

City HR inappropriately uses its "Fact" section to repeat its legal arguments made in the lower court. This was one reason it requested an additional 172 pages be added to the Appendix—so it could cite an unnecessarily costly appendix for its lower court arguments and its affidavit. An affidavit that also contains legal

arguments and facts already included in the Appendix. City HR actually uses the word "argued" nine times in its "Fact" section.

Den Hollander requests that City HR be required to include only facts in its "Fact" section and save its lower court arguments for its Argument section. Assuming City HR can pretty much do what it wants as a City agency, Den Hollander will not only briefly counter City HR's misleading "facts" but certain of its patently wrong arguments.

City HR states that the New York State Division of Human Rights ("State DHR") conducted its field investigation at Amnesia with one person, City HR Brf. at 4, when actually there were two, A-50. Two sets of eyes are always better than one and bolster the reliability of the State's fact-findings. One of those fact-findings, which City HR tries to dismiss as irrelevant, was the State determining it did not have jurisdiction because age-discrimination was most likely at work.

State DHR's *Determination and Order After Investigation* concluded there was no reason to believe that sex discrimination had occurred—not as City HR disingenuously represents that no "discrimination" occurred, City HR Brf. at 4, by failing to modify the word with "sex."

City HR falsely states that the State DHR file reviewed by its Executive Director of Law Enforcement, Carlos Velez ("Velez") "included [the State's] decision, investigation report, and supporting materials." (City HR Brf. at 6, 42).

Den Hollander examined the file under a F.O.I.L. request, and it only included the decision called the *Determination and Order After Investigation* and a cover email—nothing else.

City HR falsely recounts Velez's *Determination and Order* section on Election of Remedies. There are three laws addressed in that section that apply to two distinct situations, but City HR mixes the laws to reach its false conclusion that N.Y.C. Admin. Code § 8-109(f)(iii) is the same as N.Y. Exec. Law § 297(9) and N.Y.C. Admin. Code § 8-502 that "preclude[s] [] multiple actions 'based upon the same incident." (City HR Brf. at 8, 13). City HR even faults Den Hollander for ignoring precedents that do not exist that the three statutes apply to the same situations. (City HR Brf. at 13).

The actions precluded by N.Y. Exec. Law § 297(9) and N.Y.C. Admin. Code § 8-502 are when a person files a complaint with a human rights agency and then files a plenary complaint over the same occurrence with a court. He cannot do both, but must choose one or the other. This case does not involve filing a complaint with a human rights agency and then filing the same complaint with a court. The only court involvement here is this Article 78 proceeding.

City HR claims the following statement by State DHR, made after a visit by trained investigators to Amnesia, somehow has zero weight while Internet blogs by

unknown persons are substantial evidence for inferring there was no age-discrimination. (City HR Brf. at 8, 9, 14).

> Based on observations made during the field visit, the vast majority of the patrons of the nightclub [Amnesia] appeared to be under the age of 30 years. Respondent [Amnesia] asserts that, when the nightclub is crowded, respondent employs an admissions strategy to limit the number of individuals, male and female, who do not have the appearance respondent desires to maintain the image of the nightclub. A photo on complainant's website suggests that he is significantly older than respondent's patrons, and age discrimination is beyond the jurisdiction of the Division with regards to public accommodation."

(State DHR, *Determination and Order After Investigation* at 2, A-50).

City HR admits that it "gave little weight to the statement of [State DHR] that petitioner appeared to be 'significantly older than [Amnesia]'s patrons.'" because that statement alone "did not demonstrate that petitioner had been discriminated against." (City HR Brf. at 8, 9). A probable cause determination does not require the same kind of proof, which is a synonym for "demonstrate," that an evidentiary hearing does. Further, when that phrase is viewed in light of the party opponent admission by Amnesia that it "employs an admissions strategy to limit the number of individuals . . . who do not have the appearance [Amnesia] desires to maintain the image of the nightclub," which is one of youth, and in light of the State DHR fact-finding that Amnesia required Den Hollander to purchase a bottle in order to advance its "goal of furthering [that] image," A-49-50, by

keeping him out, it is more likely than not that Den Hollander had been asked to purchase bottle service because of his age.

City HR also bizarrely argues that "the ages of the patrons inside the club proved little regarding the ages of those waiting in line to enter the club, and proved little regarding the ages of those denied entry." (City HR Brf. at 9).

So what Clintonesque tactic is City HR using here?

Here are a couple of analogies that might make it clear. Suppose you're black and try to get into a club in the South, but the bouncers won't let you in. The following weekend, your best buddy, an Aryan white, gets into the club no problem and later tells you the only people inside were those eligible for membership in the Hitler youth. What would you think? Would it be reasonable—yes, especially in light of the facts that you were denied admission. City HR would rule your inference illogical.

Here's another analogy. You and your buddy stumble out of the Copacabana at three in the morning. He's going uptown and you're heading south. This time, he's black, you're white. He tries to hail a cab but can't. The vacant cabs keep zipping by. You step out into the uptown lane, raise your hand and a cab immediately stops. So, why did the other cabs pass your buddy by? According to City HR, it was just coincidence.

City HR even considers as substantial evidence the ramblings of one unknown Internet blogger who wasn't a witness and not even at Amnesia in the same month that the incident in this case occurred. City HR argues the following statement is sufficient for a reasonable person to believe it more likely than not that Amnesia did not discriminate against Den Hollander because of his age: the crowd included "people in their 20's, 30's, 40's." (City HR Brf. at 9). Den Hollander has not seen 40 in over two decades and his friend even longer. So even if this blogger had submitted a sworn affidavit to such—it is irrelevant.

City HR also blames Den Hollander for its failure to acquire a silent video of the incident because he did not file his complaint within 30 days of the incident, which would have prevented the alleged self-erasing of the video "every 30 days." (City HR Brf. at 9). The City's Human Rights law requires that any complaint be filed within three years of when the discrimination occurred. *Alimo v. Off Track Betting Corp.*, 685 N.Y.S.2d 180 (A.D. 1 Dept. 1999). City HR, however, has unilaterally reduced that to 30 days or however long a nightclub's surveillance tape lasts.

Further, one case, *Dept. of Correction v. Whitehead*, OATH Index No. 1152/97 (October 10, 1997), made no adverse inference because complainant was responsible for the loss of interview tapes of witnesses, since the witnesses were still available. All three witnesses to the discrimination in this case were available,

but City HR chose to ignore one, Robert M. Ginsberg, and did not really try to find the doorman.

In response to Velez's *Determination and Order*, Den Hollander filed an appeal within City HR and a complaint against Velez for illegally discriminating against Den Hollander. City HR ignored the complaint and never issued a determination concerning that complaint. So why is City HR now raising the allegations of that complaint in its Brief at 10? To falsely infer that in this case Den Hollander is motivated by bigotry toward Velez because Velez is apparently of Latin American descendant.

The violators of the rights of others always accuse those others as doing what the violators do. City HR intentionally misrepresents that Den Hollander "primarily relied on the fact that Mr. Velez "[o]n information and belief . . . is Latin-American and Catholic." (City HR Brf. at 10). In addition to the facts in Den Hollander Brf. at 7-9, Den Hollander based his allegation of Velez's bigotry on Velez's own words:

> Complainant is a self-professed advocate for men's rights who identifies himself as an "anti-feminist lawyer" on his website, www.roydenhollander.com. He has filed a number of lawsuits against bars and clubs that have "Ladies Nights," and admits in several online publications that he is "bitter" from an ex-wife who used him for his US citizenship and money. Complainant's description of himself is consistent with his pattern of filing several gender discrimination suits.

These words of Velez have nothing to do with an age-discrimination complaint against a nightclub, so what possibly could have motivated Velez to include them in an administrative agency order—bigotry toward Den Hollander for exercising his First Amendment rights, which include the right to file lawsuits to fight for the rights he foolishly thought the U.S. Constitution guaranteed him, *N.A.A.C.P. v. Button*, 371 U.S. 415, 429 (1963), to believe as he chooses, and to communicate those beliefs. This type of discrimination, as evinced in an official government document, is the same tactic so commonly used throughout history by small minded conformists and totalitarians: justify violating human rights because the individual does not believe, speak, and act as "right minded" people do, or in this case "left minded," and therefore he belongs to a disfavored group. City HR in this Court uses the same tactic by alleging Den Hollander is bigoted toward Latin Americans. (City HR Brf. at 10, 48-49).

City HR continues its dissembling by omitting that City HR's final decision was largely based on an Internet article, Internet blogs and its failure to contact Robert M. Ginsberg, an eyewitness to the incident.

City HR, in recounting the Verified Petition's allegations against it, also failed to address that it relied on misrepresentations in finding no probable cause. Those misrepresentations are at A-20-A-24.

City HR argued that "[Amnesia] required complainant to purchase a bottle for the nondiscriminatory reasons of limited space and the goal of furthering the image of respondent's establishment." (City HR Brf. at 13, emphasis added). The problem with this argument is that the club had opened at 11 PM, and at 11:05 PM Den Hollander and his friend were required to purchase a bottle for entry. That early in the evening the club had plenty of vacant space. (*See* Kelly R. Paris France blog, A-64).

City HR falsely claims that "online comments reviewed by the Commission indicated that Amnesia had asked individuals in their 20's and 30's to purchase bottles as well, supporting its finding of 'no probable cause.'" (City HR Brf. at 14). Den Hollander's Brf. at 28-31 shows that this City HR statement is blatantly false.

City HR continues to include its lower court arguments in its "Fact" section by arguing its investigation was not abbreviated or one sided. (City HR Brf. at 15). Den Hollander's counter-arguments on this point are in his Brf. at 19-35.

City HR lastly recounts its last lower court argument in its "Fact" section by arguing that City HR had followed its procedures in investigating Den Hollander's complaint. (City HR Brf. at 15). Den Hollander's Brf. at 35-38 refutes that argument.

Most of this eight page section would not have been necessary if City HR had not tried to gain an unfair advantage by including its lower court arguments in its "Fact" section.

Arguments

There are only two interesting issues in this case:

1. The definition of the word "grievance" in N.Y.C. Admin. Code § 8-109(f)(iii), whether it means a wrong, a cause of action or it means the fact situation, incident, occurrence that causes the wrong and gives rise to a cause of action; and
2. Whether a nightclub can charge an exorbitant amount of money for a bottle of alcohol in order to keep out those who do not fit the image it is trying to promote to the public.

1. The term "grievance" under New York City law—not New York State law—means "cause of action."

The key to the election of remedies issue in this case, which may make it to the Court of Appeals, is whether "grievance" in N.Y.C. Admin. Code § 8-109(f)(iii) means a wrong, a cause of action or it means the fact-situation, incident, occurrence that causes the wrong and gives rise to a cause of action or causes of action.

N.Y.C. Admin. Code § 8-109(f)(iii) prohibits a plaintiff from starting a proceeding with State DHR, which makes a decision, and then starting a

proceeding with City HR "with respect to the same grievance [which] is the subject" of the State DHR proceeding. (Emphasis added).

City HR argues "grievance" means the fact-situation that gives rise to a cause of action or causes of action, but for authority, it relies on New York State law and a City Administrative Code provision, which does not even use the term "grievance." Further, both of these State and City rules apply to a different situation than the one before this Court.

The problem with City HR's reliance on N.Y. Exec. Law § 297(9) and N.Y.C. Admin. § 8-502(a) and the plethora of cases that City HR cites for its position is that they all deal with the rule for the situation where "a person who files a complaint with either the [State] DHR or the New York City Commission on Human Rights . . . thereby waives his or her right to sue in court." *Higgins v. NYP Holdings, Inc.*, 836 F. Supp. 2d 182, 187 (S.D.N.Y. 2011)(emphasis added). Both of these statutes "require dismissal of a suit in court if the complainant lodges a complaint with either the [State] DHR or [City HR]." *Id.*

By going to a State of City human rights agency first, the plaintiff waives his right to start a plenary action in court concerning the same fact-situation. He waives his right to go to court for all the wrongs he may have suffered from that fact-situation. The rule makes sense, since judicial resources are stretched to the

limit and the purpose of human rights agencies are to provide citizens who are discriminated against a low cost alternative to going to court to enforce their rights.

Despite City HR's repeated statement that "it is well established" that these two statutes are "analogous" to N.Y.C. Admin. Code § 8-109(f)(iii)—they are not. N.Y.C. Admin. Code § 8-109(f)(iii) applies to a completely different situation, and, given the common legal meaning for "grievance," does not result in a person waiving all his causes of action stemming from an incident. N.Y.C. Admin. Code § 8-109(f)(iii) prevents a person from filing the same cause of action first with the State DHR and then the City HR. It logically deals with going from a State agency to a City agency on a cause of action that either of the two agencies on their own could resolve.

The same concern for judicial resources are not present in this situation, and despite City HR's somewhat confusing policy arguments, the key concern is that citizens have a low cost means to protect their rights by using government agencies established for that purpose. Legislators were not blind to the difference in the jurisdictional reach of State DHR and City HR. (Den Hollander's Brf. At 17-19). They knew that a citizen might file with an agency that did not have the power to deal with a particular type of discrimination, so rather than preventing him from going to an agency that did have the power, they used the term "grievance" to mean a cause of action—not the fact situation. Of course, they were also mindful

of not wasting an agency's resources on a type of discrimination that was already resolved by another agency. Use of the term "grievance" as a cause of action provides the best of both worlds—protection of rights and conservation of the taxpayers' money.

In this case, Den Hollander started at State DHR, which concluded it did not have jurisdiction over age-discrimination, so Den Hollander proceeded to another agency that did have jurisdiction—City HR. No courts were involved, so N.Y.C. Admin. Code § 8-109(f)(iii) applied—not N.Y. Exec. Law § 297(9) or N.Y.C. Admin. § 8-502(a).

Throughout its Brief, City HR failed to cite any cases in which a person filed a complaint with an agency that decided it did not have jurisdiction over the pertinent cause of action, and that person was then barred from filing with another agency that did have jurisdiction over the cause of action. City HR also failed to show that the N.Y.C. Council adopted City HR's alleged meaning for the term "grievance" as opposed to Black's Law Dictionary.

City HR did try to rely on *res judicata* and "splitting" for support in its mixing of the proverbial apples and oranges. Apples being where a person goes from an agency to a court—both of which would initially have jurisdiction, and oranges where a person goes from one agency lacking in jurisdiction to another agency that has jurisdiction.

The *res judicata* argument was dealt with in Den Hollander's Brf. at 12-13, but City HR still believes it is analogous to the situation here. (City HR Brf. at 29). *Res judicata* forecloses matters that might have been litigated. *Schuylkill Fuel Corp. v. B & C Nieberg Realty Corp.*, 250 N.Y. 304 (1929). As State DHR made clear, Den Hollander could not litigate age-discrimination because the State does not have jurisdiction over age-discrimination. (A-50). So age discrimination was not a matter that might have been litigated before State DHR.

The splitting doctrine deals with instances in which a plaintiff with a single money claim omits part of what is due him when he sues. Siegel, *New York Practice*, p. 774, 5th ed. The omitted part is waived. *Id.* Even the case cited by City HR deals with a single monetary claim. Once again, that is not the situation here.

After arguing that the black letter law of N.Y. Exec. Law § 297(9), N.Y.C. Admin. § 8-502(a), and N.Y.C. Admin. Code § 8-109(f)(iii) are identical, City HR argues that even if they are not, City HR's mixing of apples and oranges should be upheld out of deference to it; that is, the term "grievance" in N.Y.C. Admin. Code § 8-109(f)(iii) really means "incident" or "occurrence." What that argument boils down to is that government is presumed right no matter the harm it causes. Some would disagree: "the forefathers did not trust any government to separate the true

from the false for us." *Thomas v. Collins*, 323 U.S. 516, 545 (1945)(Jackson, J. concurring).

City HR faulted Den Hollander for not producing case law that defines "grievance" as used in N.Y.C. Admin. Code § 8-109(f)(iii), but neither does City HR cite to a case defining "grievance" under City law, whether it concerns § 8-109(f)(i), (ii) or (iii). City HR uses inapposite cases concerning N.Y. Exec. Law § 297(9) and N.Y.C. Admin. § 8-502(a), which does not even include the word "grievance." Den Hollander at least relies on a dictionary of legal terms, Black's, something that the U.S. Supreme Court does at times in defining a basic concept.

It is important to keep in mind what this case is about and not the specious example City HR uses in claiming Den Hollander wants a "second bite at the apple." (City HR Brf. at 28-29). Den Hollander never got one bite at the apple because State DHR's fact-finding showed it did not have jurisdiction and City HR dismissed. City HR's example in its Brief is not on point because color and race are within the jurisdiction of the courts, State DHR and City HR. If a person went to any of these bodies, he could allege discrimination under both, and the body would have jurisdiction. If he failed to initially allege one, he could amend, and if he did not, then he sat on his rights, which has nothing to do with election-of-remedies.

City HR tries to argue that an agency's lack of jurisdiction does not matter. (City HR Brf. at 31). It does to the person who is discriminated against. Besides its lack of concern for human rights, the cases City HR relies on for this argument are those barring a person going from an agency to the courts under N.Y. Exec. Law § 297(9) and N.Y.C. Admin. § 8-502(a). As stated previously, that is not the situation here. For argument's sake, let's assume a person files a complaint with State DHR for partnership status discrimination, and State DHR dismisses because such is outside its jurisdiction. This person goes to the Supreme Court, but it dismisses under N.Y. Exec. Law § 297(9) and N.Y.C. Admin. § 8-502(a). So what's the aggrieved person to do? Under Den Hollander's argument, he goes to City HR. Under City HR's argument, the bigots win.

Sometimes, or perhaps often times, lawyers in their zeal concoct strange rules. City HR alleges that an injury cannot be caused by more than one cause of action. (City HR Brf. at 30). Relying on City HR's own example, City HR Brf. 28-29, if a person has to sit in the back of the bus because of his color and race, he has one injury, sitting in the back, but he has two causes of action: discrimination against his color and discrimination against his race.

2. It is invidiously discriminatory to allow nightclubs to discriminate based on a person's physical appearance in order to further the image a nightclub promotes.

City HR places much weight on State DHR stating "The record suggests, however, that respondent [Amnesia] required complainant to purchase a bottle for the non-discriminatory reasons of limited space and the goal of furthering the image of respondent's establishment." (A-49-50). City HR, however, fails to note that the source of that part of the record came from Amnesia, "Respondent asserts that, when the nightclub is crowded, respondent employs an admissions strategy to limit the number of individuals, male and female, who do not have the appearance respondent desires to maintain the image of the nightclub." (A-50, emphasis added).

Admitting that it uses the $350 bottle requirement to further its image, which State DHR inferred to be one of youth, is a party opponent admission, so it is most likely true. Amnesia, however, added the caveat that it only discriminated in favor of patrons who met its youthful image when the club was crowded. Perhaps, but even if true, which the evidence indicates it is not for this case, that still amounts to discrimination.

Amnesia's image is necessarily based on a person's appearance—as it admits. (A-50). Its doorman has no other information, other than an identification card, to go on for concluding whether a person meets Amnesia's image. Amnesia

couldn't pursue an image of only Christians because there is no way of distinguishing a Christian from the followers of some other religion by just looking at the person and checking their identification, at least in America.

So when Amnesia starts limiting the number of people to enter the club in order not to exceed its occupancy limit, it necessarily starts discriminating—based on appearance—against those who do not fit its image. Since its image is one of youth, it erects a barrier to deter the un-young from entering—$ 350 for a bottle of watered down, brandless alcohol. If its image was not one of youth, then it could be discriminating on the basis of color, sex, or perhaps national origin. Regardless of which basis Amnesia or any nightclub was discriminating on in order to preserve its image of appearance when crowded, it still violates N.Y.C. Admin. Code Title 8. Both the lower court and City HR approved of such discrimination.

While placing great emphasis and approval on State DHR's "conclusion" that Amnesia's actions are to maintain its image, City HR incongruously dismisses the following finding by State DHR:

> Based on observations made during the field visit, the vast majority of the patrons of the nightclub appeared to be under the age of 30 years. Respondent asserts that, when the nightclub is crowded, respondent employs an admissions strategy to limit the number of individuals, male and female, who do not have the appearance respondent desires to maintain the image of the nightclub. A photo on complainant's website suggests that he is significantly older than respondent's patrons, and age discrimination is beyond the jurisdiction of the Division with regards to public accommodation.

In order to call this quote *dictum*, City HR had to delete the following sentence from it:

> "Respondent asserts that, when the nightclub is crowded, respondent employs an admissions strategy to limit the number of individuals, male and female, who do not have the appearance respondent desires to maintain the image of the nightclub.

City HR could not logically rely on the heart of that paragraph, the above sentence, and then argue that the paragraph itself had no probative value without engaging in a little slid-of-hand by deleting that sentence. (City HR Brf. at 36).

Even ignoring City HR's slid-of-hand, the entire paragraph was the result of required State DHR procedures. "In the course of receiving a complaint, the S[tate] DHR Regional Office will serve respondents, make sure the S[tate] DHR has jurisdiction, and if so, begin investigation." *Rosu v. City of New York*, Docket No. 13-243-cv, 2014 U.S. App. LEXIS 2402, at *9 (2d Cir. Feb. 7, 2014). Conducting a fact-finding visit to "make sure the S[tate] DHR has jurisdiction" is not *dicta*.

Another trick City HR uses to disguise Amnesia's admitted discrimination is the quote-out-of-context. The quote is "[t]he record suggests . . . that [Amnesia] required complainant to purchase a bottle for . . . non-discriminatory reasons." (City HR Brf. at 37). What City HR left out was the following sentence that made clear the "non-discriminatory reasons" referred to sex-discrimination. "There is a

lack of evidence that respondent's treatment of complainant was based on his sex." (A-50).

City HR continues to justify Amnesia discriminating against those whose "appearances" do not fit its image by arguing "that young people frequent Amnesia at a greater rate because Amnesia, like most dance clubs in New York City, attracts primarily younger patrons. This inference . . . is common sense . . . ." That's the same type of excuse as claiming the members of a country club are all white because it is mainly white people who play golf and tennis.

In order to permit Amnesia to discriminate in accordance with its image, City HR argues that it can do or not do whatever it wants in its investigations, and what it did in this case was consistent with other cases. The cases cited by City HR, however, do not hold that City HR has unfettered discretion in how it determines probable cause, and make clear by comparison that City HR conducted a slip-shod investigation in this case. (City HR Brf. at 40-41).

Chirgotis v. Mobile Oil Corp., 128 A.D.2d 400, 403 (1st Dep't 1987), found that in light of a 56 page statement by defendant with affidavits and relevant documents that a hearing or conference was not required. Amnesia only submitted a three page answer by a person lacking first hand knowledge. *Pascual v. N.Y.S. Div. Human Rights*, 37 A.D.3d 215, 216 (1st Dep't 2007), found that subpoenaing documents was unnecessary because petitioner had a two hour fact-finding

conference to present and rebut information. Here, City HR did not provide a fact-finding conference. *Block v. Gatling*, 26 Misc. 3d 1228(A), 2010 N.Y. Misc. LEXIS 352 (Sup. Ct. N.Y. Cty., Feb. 18, 2010), *aff'd*,84 A.D.3d 445 (lst Dep't 2011), found that the people not interviewed were not relevant to plaintiff's allegations of age discrimination and disability discrimination, which were actually disproved by plaintiff's own admissions, a collective bargaining agreement, and defendant's position statement. Amnesia never provided a position statement although it was invited to, and while City HR tried to contact a witness for Amnesia, it failed to even try to contact Petitioner's eyewitnesses to the discrimination—attorney Robert M. Ginsberg, which amounted to denying Petitioner a "full and fair opportunity" to present his claims, as required by *Matter of Barnes v Beth Israel Med. Ctr.*, 977 N.Y.S.2d 888 (lst Dep't 2014); *Stern v. N.Y.C. Comm'n Human Rights*, 38 A.D.3d 302, 302 (lst Dep't 2007); *Gleason v. W.C. Dean Sr. Trucking*, 228 A.D.2d 678, 678 (2d Dept. 1996). *McFarland v. NYSDHR*, 241 A.D.2d 108, 111 (1st Dept. 1998), included a fact-finding conference in which witnesses were presented and numerous documents submitted. Such did not occur here.

A case not cited by City HR makes clear that its investigation in this matter was insufficient. In *Givens v. Gatling*, 2011 N.Y. Misc. Lexis 3551 (Sup. Ct. N.Y. Cty. July 11, 2011), City HR "did not interview witnesses, because petitioner

failed to provide the Commission with this information during the investigation." *Givens* at *8. Here, City HR simply ignored a key witness, Robert M. Ginsberg, even though it knew about him and how to contact him.

Allowing Amnesia to discriminate based on its promoted image also required City HR to violate procedural due process by failing to conduct a full investigation. (Den Hollander's Brf. at 35-38). In *Rosu v. City of New York*, Docket No. 13-243-cv, 2014 U.S. App. LEXIS 2402, at *11 (2d Cir. Feb. 7, 2014), the Court of Appeals held that "[b]efore [a] determination of no probable cause may be reached, the Commission's statute requires a full investigation. N.Y.C. Admin. Code § 8-109(g)."

City HR argues a "full investigation" does not matter because the availability of review within City HR and an Article 78 proceeding excuses any violation of City HR in providing a "full investigation." City HR cites for support of this proposition to *C/S Window Installers, Inc. v. N.Y.C. Dept. of Design & Constr.*, 304 A.D.2d 380, 380 (1st Dept. 2003). But *C/S Window Installers* does not involve the investigation procedures of a City agency but rather contractual rights. "It is this contractual right, rather than any agency or statutory promulgation, that permitted [the N.Y.C. Dept. of Design & Constr] to disapprove the petitioner." *C/S Window Installers, Inc. v. N.Y.C. Dept. of Design & Constr.*, N.Y. Sup. Ct., Commercial Part 49, No. 12421/01.

Conclusion

"The validity and moral authority of a conclusion largely depend on the mode by which it was reached." *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 171 (Frankfurter J., concurring)(1951). The mode used by City HR to find no probable cause of age-discrimination in this case was a travesty.

Den Hollander requests the lower court decision be reversed.

Dated: New York, N.Y.
March 3, 2013

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