COURT OF APPEALS
STATE OF NEW YORK

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In the Matter of the Application of

ROY DEN HOLLANDER,

Petitioner-Appellant,

-against-

THE CITY OF NEW YORK COMMISSION ON HUMAN RIGHTS,

Respondent-Respondent.

NOTICE OF MOTION TO DISMISS APPEAL

New York County Sup. Ct.
Index No. 100299/13

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PLEASE TAKE NOTICE that, upon the annexed affirmation of Ingrid R. Gustafson, Esq., and all the papers and proceedings had herein, respondent-respondent, the City of New York Commission on Human Rights, will move this Court, at the Courthouse at 20 Eagle Street, Albany, New York, on October 6, 2014, for an order dismissing the appeal, and granting such other and further relief as the Court deems just and proper.

Dated: New York, New York
September 22, 2014

ZACHARY W. CARTER,
Corporation Counsel,
Attorney for Respondent-Respondent
City of New York Commission on
Human Rights,
100 Church Street,
New York, NY 10007.
(212) 356-0853 or 2505

INGRID R. GUSTAFSON, ESQ.
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(212) 356-0853
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TO: CLERK OF THE COURT
COURT OF APPEALS

ROY DEN HOLLANDER, ESQ., Petitioner-Appellant, *Pro Se*
545 East 14th Street, 10D
New York, NY 10009
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COURT OF APPEALS
STATE OF NEW YORK

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In the Matter of the Application of

ROY DEN HOLLANDER,

Petitioner-Appellant,

-against-

THE CITY OF NEW YORK COMMISSION ON HUMAN RIGHTS,

Respondent-Respondent.

AFFIRMATION IN SUPPORT OF MOTION TO DISMISS APPEAL

New York County Sup. Ct.
Index No. 100299/13

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INGRID R. GUSTAFSON, an attorney admitted to practice before the courts of this state, affirms, in accordance with C.P.L.R. 2106, that the following statements are true, subject to the penalties of perjury:

1. I am an attorney in the office of ZACHARY W. CARTER, Corporation Counsel of the City of New York and attorney for respondent-respondent the City of New York Commission on Human Rights ("the Commission") in the above-referenced special proceeding. Having successfully represented the Commission in the appeal of petitioner-appellant Roy Den Hollander ("petitioner") to the Appellate Division, First Department, I am familiar with the facts of this case.

2. I submit this affirmation in support of the Commission's motion for an order dismissing petitioner's appeal from a decision and order of the Appellate Division, First Department, dated June 3, 2014, reported at 118 A.D.3d

418, and attached hereto as "Exhibit A." The Appellate Division unanimously affirmed a final order and judgment of the New York County Supreme Court (Hunter, J.). In a decision entered on September 16, 2014, and attached hereto as "Exhibit B," this Court granted petitioner leave to appeal the Appellate Division's decision and order. However, for the reasons set forth below, petitioner's appeal to this Court is moot in that it is academic, and should therefore be dismissed.

3. In its order and judgment, the Supreme Court granted the Commission's cross-motion to dismiss the petition on two independent grounds. First, the Court held that the Commission had correctly determined that it lacked jurisdiction to entertain petitioner's age discrimination complaint because petitioner had previously elected to file a sex discrimination complaint with the New York State Division of Human Rights based on the same incident. Second, the Court held that, in any event, the Commission's alternative determination that there was no probable cause to believe that petitioner had been discriminated against on the basis of age was not arbitrary and capricious. Thus, even if the Commission did have jurisdiction to entertain petitioner's complaint, his claim failed on the merits.

4. The Appellate Division affirmed the dismissal of the petition on both grounds. However, in his motion for leave to appeal to this Court, petitioner explicitly limited his appeal to the first issue, stating: "*The only issue to be appealed* is whether N.Y.C. Admin. Code § 8-109(f)(iii) is interpreted to prevent discrimination complaints being filed with [the Commission] when the State Division of Human Rights previously dismissed a discrimination complaint

because it did not have jurisdiction over a different discriminatory practice arising from the same fact situation . . . ." *See* Den Hollander Affidavit in Support of Motion for Leave to Appeal (June 17, 2014) ¶ 5 (emphasis added).

5. Although a grant of leave to appeal ordinarily brings every reviewable issue before this Court, "under rule 500.11 of the Rules of the Court of Appeals, if a party in its application for leave to appeal specifically limits the issues it seeks to have reviewed, it is bound by such limitation and may not raise additional issues on appeal." *Quain v. Buzzetta Constr. Corp.*, 69 N.Y.2d 376, 379 (1987). Indeed, in *Quain v. Buzzetta Construction Corp.*, this Court found that the appellant had specifically limited the issue on appeal by stating in its motion for leave to appeal: "[It] is requested that this Honorable Court review that limited issue on this motion for leave to appeal of whether the Appellate Division was in error...in holding that the applicable [provision] of the General Obligations Law did not make void...the recovery by the City of indemnification from [appellant] . . . ." *Id.* at 380.

6. As did the appellant in *Quain*, petitioner here limited the issue on appeal, indicating that he was "only" appealing the election-of-remedies issue. Thus, under *Quain*, petitioner has disclaimed any challenge to the Appellate Division's alternate ground for affirmance: that, even if the Commission had jurisdiction to entertain petitioner's complaint, the complaint nonetheless lacked merit. In so doing, petitioner rendered his appeal to this Court academic.

7. It is well established that the subject matter jurisdiction of this Court "extends only to live controversies." *Saratoga Cnty. Chamber of Comm. v.*

Pataki, 100 N.Y.2d 801, 810 (2003) (citations omitted), *cert. denied*, 540 U.S. 1017; *see also New York Public Interest Research Group, Inc. v. Carey*, 42 N.Y.2d 527, 529-30 (1977) (indicating that this principle "is not merely a question of judicial prudence," but is also "a constitutional command defining the proper role of the courts under a common-law system"). The Court cannot give advisory opinions or rule on "academic, hypothetical, moot, or otherwise abstract questions." *Pataki*, 100 N.Y.2d at 810-811. Nor can it issue decisions that lack practical effect.[1] *See New York ex rel. Harkavy v. Consilvio*, 8 N.Y.3d 645, 653 (2007) (finding petitioners' challenge to certain administrative decisions academic where a decision by the Court on the issue "would have no practical effect on the rights or liabilities of [the] parties"); *Carey*, 42 N.Y.2d at 530 ("[T]he courts should not perform useless or futile acts and thus should not resolve disputed legal questions unless this would have an immediate practical effect on the conduct of the parties."); *Hearst Corp. v. Clyne*, 50 N.Y.2d 707, 714 (1980) ("[A]n appeal will be considered moot unless the rights of the parties will be directly affected by the determination of the appeal and the interest of the parties is an immediate consequence of the judgment.").

8. Here, even if this Court were to conclude that the Commission did have jurisdiction to entertain petitioner's complaint, that determination would leave undisturbed the Appellate Division's alternate finding that petitioner's claim,

[1] The exception to this rule does not apply in this case, as the issue involved does not evade review. *See Pataki*, 100 N.Y.2d at 811. Indeed, it was petitioner's own limitation of this appeal that rendered it academic. Furthermore, the issue here presented is not so novel or substantial as to warrant deviation from this Court's well-established principles of justiciability. *See id.* at 811.

already investigated by the Commission, nonetheless failed on the merits. Thus, even if petitioner prevailed in this appeal, he would not be entitled to any relief, and any decision by this Court would accordingly lack practical effect. Under this Court's well-established precedent, petitioner's appeal to this Court is therefore moot in that it is academic, and should be dismissed. *See Hearst*, 50 N.Y.2d at 718; *see also Klam v. Klam*, 239 A.D.2d 390, 391 (2d Dept. 1997) (dismissing appeal as academic where appellant challenged only one of two independent grounds for the dismissal of his complaint and thus "appellate review . . . would neither alter the result nor directly affect a substantial right or interest of any party to this appeal").

WHEREFORE, for the above-stated reasons, petitioner's appeal to this Court should be dismissed.

Dated: New York, New York
September 22, 2014

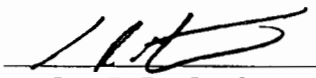
By: 

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Exhibit A

Tom, J.P., Renwick, Andrias, Freedman, Clark, JJ.

12635 In re Roy Den Hollander, Index 100299/13
Petitioner-Appellant,

-against-

The City of New York Commission
on Human Rights,
Respondent-Respondent.

Roy Den Hollander, New York, appellant pro se.

Zachary W. Carter, Corporation Counsel, New York (Ingrid R. Gustafson of counsel), for respondent.

Judgment, Supreme Court, New York County (Alexander W. Hunter, J.), entered August 6, 2013, which denied the petition brought pursuant to CPLR Article 78 seeking to annul a determination of respondent City of New York Commission on Human Rights (CCHR), dated January 11, 2013, dismissing petitioner's complaint of age-based discrimination, unanimously affirmed, with costs.

Petitioner alleges that nonparty Amnesia J.V. LLC discriminated against him by requiring him to purchase a $350 bottle in order to gain admission to its nightclub. The New York State Division of Human Rights previously dismissed a complaint brought by petitioner alleging gender discrimination by Amnesia in hindering his admittance to the nightclub on January 9, 2010. Accordingly, the doctrine of election of remedies now bars

petitioner from filing with CCHR the instant claim of age discrimination with respect to the same alleged incident (*see* NYC Admin Code § 8-109[f]). This is so even though petitioner is now advancing a different theory of invidious discrimination — age discrimination as opposed to gender discrimination (*see Benjamin v New York City Dept. of Health*, 57 AD3d 403, 404 [1st Dept 2008], *lv dismissed*, 14 NY3d 880 [2010]; *Jones v Gilman Paper Co.*, 166 AD2d 294, 294 [1st Dept 1990]).

In any event, CCHR's alternative determination of "no probable cause" has a rational basis and is not arbitrary and capricious (*see David v New York City Commn. on Human Rights*, 57 AD3d 406, 407 [1st Dept 2008]; *de la Concha v Gatling*, 13 AD3d 74, 75 [1st Dept 2004]). Petitioner was afforded a "full and fair opportunity to present [his] case" (*Matter of Block v Gatling*, 84 AD3d 445, 446 [1st Dept 2011], *lv denied*, 17 NY3d 709 [2011]), and received procedural due process (*see Matter of Daxor Corp. v State of N.Y. Dept. of Health*, 90 NY2d 89, 98 [1997], *cert denied*, 523 US 1074 [1997]; *Pinder v City of New York*, 49 AD3d 280, 281 [1st Dept 2008]). There is absolutely no evidence

that CCHR's Executive Director was biased against him, let alone any showing that any such bias "affect[ed] the result" (*People v Moreno*, 70 NY2d 403, 407 [internal punctuation omitted]).

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

ENTERED: JUNE 3, 2014

CLERK

Exhibit B

State of New York
Court of Appeals

Decided and Entered on the sixteenth day of September, 2014

Present, HON. JONATHAN LIPPMAN, *Chief Judge, **presiding**.*

Mo. No. 2014-646
In the Matter of Roy Den Hollander,
Appellant,
v.
The City of New York Commission on Human Rights,
Respondent.

Appellant having moved for leave to appeal to the Court of Appeals in the above cause;

Upon the papers filed and due deliberation, it is

ORDERED, that the motion is granted.

Andrew W. Klein
Clerk of the Court

State of New York
Court of Appeals

Andrew W. Klein
Chief Clerk and
Legal Counsel to the Court

Clerk's Office
20 Eagle Street
Albany, New York 12207-1095

Decided September 16, 2014

Mo. No. 2014-646

In the Matter of Roy Den Hollander,
Appellant,
v.
The City of New York Commission on Human Rights,
Respondent.

Motion for leave to appeal granted.

New York County Supreme Court Index No. 100299/13

COURT OF APPEALS
STATE OF NEW YORK

In the Matter of the Application of

ROY DEN HOLLANDER,

Petitioner-Appellant,

-against-

THE CITY OF NEW YORK COMMISSION ON HUMAN RIGHTS,

Respondent-Respondent.

NOTICE OF MOTION TO DISMISS AND AFFIRMATION IN SUPPORT

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of Counsel

LawManager No. 2013-005235