SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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In the Matter of the Application of

ROY DEN HOLLANDER

Petitioner,

-against-

THE CITY OF NEW YORK COMMISSION ON HUMAN RIGHTS,

Respondent.

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Index No. 13-100299

NOTICE OF PETITION

PLEASE TAKE NOTICE that upon the verified petition of Roy Den Hollander, sworn to on February 5, 2013, and the attached exhibits, petitioner will request this court, at 9:30 AM on the 11th day of March, 2013, at the Courthouse, at 60 Centre Street, New York, N.Y., in the Motion Support Courtroom, Room 130, for a judgment, pursuant to the CPLR, granting the following relief to the petitioner: (1) reversing the final Determination and Order, dated January 11, 2013, of the City of New York Commission on Human Rights, (2) finding that the Petitioner was unlawfully discriminated against because of his age by AMNESIA J.V. LLC, and David "L.N.U.," and (3) for such other and further relief as this Court may deem just and proper.

Dated: February 8, 2013
New York, N.Y.

Respectfully,

/S/

_____

Roy Den Hollander, Esq.
Petitioner and Attorney
545 East 14th Street, 10D
New York, N.Y. 10009
917-687-0652
rdhhh@yahoo.com

To: Respondent
City of New York Commission on Human Rights
40 Rector Street, 10th Floor
New York, N.Y. 10006

SUPREME COURT OF THE STATE OF NEW YORK
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Index No. 13-100299

VERIFIED PETITION

TO THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK:

The verified petition of Roy Den Hollander respectfully shows this Court as follows:

Parties

1. Petitioner Roy Den Hollander resides at 545 East 14th Street, Apartment 10D, New York, N.Y. 10009.

2. The Respondent is the City of New York Commission on Human Rights ("Commission") located at 40 Rector Street, 10th Floor, New York, N.Y. 10006.

Proceedings

3. The Commission issued a final Determination and Order After Review ("Final Order") (Ex. A) on January 11, 2013, (served on January 15, 2013, Ex. B) that upheld its July 27, 2012, Administrative Closure (Ex. C), which dismissed an age-discrimination complaint filed by Den Hollander.

4. The Administrative Closure, titled "Determination and Order After Investigation" found that "[a]fter investigation, the Commission has determined that there is NO PROBABLE CAUSE to believe" that the nightclub Amnesia and its doorman David "L.N.U." unlawfully discriminated against Den Hollander and a friend of his because of their ages.

Facts

5. On Saturday, January 9, 2010, at approximately 11:05 PM, Den Hollander and his friend, both older, middle-aged males, stood on a line in front of the nightclub Amnesia in order to enter the club, which opened at 11 PM. Two individuals immediately in front of them, who appeared to be in their 20s or 30s approached the Amnesia doorman, David "L.N.U.," who checked their identification and then allowed them to enter the club without any further requirement. When Den Hollander and his friend approached David "L.N.U.," he told them they must agree to 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 individuals, who appeared to be in their 20s or 30s, enter the club without having to agree to buy a bottle of alcohol for $350.

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

7. The State Human Rights Division issued a decision on September 16, 2010, in which it concluded that the discrimination against Den Hollander and his friend was not based on sex but probably because of their age. (Ex. F. *State Determination and Order After Investigation* at p. 2). The State, however, 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."

(Ex. F, *State Determination and Order After Investigation* at p. 2, second full paragraph).

8. On receiving the State's decision, Den Hollander immediately made an October 15, 2010, appointment with the New York City Commission on Human Rights, which does have jurisdiction over age discrimination, in order to initiate the process of filing a complaint against Amnesia for age discrimination.

9. On October 22, 2010, the Commission issued a verified complaint against AMNESIA J.V. LLC, and David "L.N.U." (Ex. E), which the Commission subsequently dismissed for lack of probable cause in its Administrative Closure of July 27, 2012.

Arguments

The Commission's finding of "No Probable Cause" was **not** based on substantial evidence.

10. The determination of probable cause by the Commission requires "that an unlawful discriminatory practice has been . . . committed by a respondent 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 §1-51 (emphasis added).

11. The evidence relied on by the Commission must be "substantial evidence"; otherwise, the Commission's findings will not be conclusive, and this Court may then substitute its judgment for that of the Commission. *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).

12. There are four important requirements concerning "substantial evidence."

13. First, substantial evidence does not require a showing of ongoing practices of discrimination—evidence of a onetime act is sufficient. *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).

14. The Commission's Administrative Closure arbitrarily ratchets up the standard for substantial evidence by requiring "discriminatory practices" in the plural, Ex. C at p. uno, or continuing discrimination. (The Administrative Closure document of July 27, 2012 has no page numbers, so the Petitioner inserted numbers for citation purposes).

15. Second, for information to be used as evidence requires that:

> [the] [e]ssential attributes are relevance and probative nature. Such evidence is marked by substance and the ability to inspire confidence. It does not arise from bare surmise, conjecture, speculation or rumor.

Pace University v. Commission on Human Rights, 611 N.Y.S.2d 835 (A.D. 1 dept 1994), *rev'd on other grounds*, 85 N.Y.2d 125 (1995).

16. Third, the evidence for establishing facts can only be provided by 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).

17. Fourth, hearsay is treated skeptically, *Triborough Bridge and Tunnel Auth. v. Simms*, OATH Index No. 1303/97 (May 30, 1997), because the person making the original statement or writing the document does not present himself for assessment of his demeanor and credibility, does not submit to cross examination in which the certainty of his perceptions, his

motivations, his biases, the reliability of his memory, and his character may be tested by one with a motive to test vigorously.

18. The Commission instead relies on two Internet blogs as evidence that Amnesia not only required the Petitioner and his friend to buy a $350 bottle in order to enter but required the younger patrons to buy a bottle as well. (Ex. C, *Admin. Closure* at p. cuatro).

19. The problem with the Commission's reliance is that the blogs are not only hearsay, unreliable, unauthenticated, untrustworthy, but they do not even concern the incident complained of in the verified complaint.

20. The Commission did not know whether the two bloggers were who they claimed to be, were sober enough that their perceptions and memories were accurate, were actually at Amnesia, or whether the first blogger cited was not allowed in without buying a bottle not because of her youth but because she was with gray haired ladies or for some other reason.

21. The second blogger does not even mention bottles, just that younger folk were "lining up at the downstairs bar," which is inside the club. The Commission presents no evidence that these clubbers were lining up to buy bottles and its conjecture that they were is wrong. People in clubs who buy bottles place their orders while sitting at tables because waitresses are the ones who serve the bottles along with cantors of mixer and glasses—customers don't line up at bars for bottles but individual drinks.

22. Another problem with the Commission's reliance on the two blogs is that they do not concern the events that occurred to Den Hollander and his friend on January 9, 2010, and a single instance—that instance—is all that is necessary to find discrimination. *Silver Dragon Restaurant*, N.Y.L.J., March 31, 2004, p. 24, col. 3; *Joseph*, N.Y.L.J., October 24, 2000, p. 35, col. 5.

23. The Commission also inappropriately assumed "upon information and belief" that the doorman who required the purchase of a bottle by Den Hollander and his friend was an independent contractor. (Ex. C, *Admin. Closure* at p. uno).

24. There is no evidence that he was or was not because the Commission never interviewed him or requested or subpoenaed any of Amnesia's records.

25. Even assuming the doorman was an independent contractor, Amnesia is still liable for the discrimination if (1) the doorman was carrying out his duties when he discriminated, which he obviously was, since he decided who entered and who did not, and (2) Amnesia knew about it. N.Y.C. Admin. Code §8-107(13)(c).

26. Amnesia had to know that the doorman was discriminating because it admitted to the State Human Rights Division, which the Commission quotes, that Amnesia "employs an admission strategy to limit the number of individuals . . . who do not have the appearance [Amnesia] desires to maintain the image of the nightclub." (Ex. C, *Admin. Closure* at p. dos). In other words, the back of the bus can hold just so many members of a disfavored group before they are no longer admitted even though there is plenty of room in the front of the bus.

27. The Commission also tries, in this non-Truman era, to pass the buck to Den Hollander for the unavailability of what it considers the key evidence from the night in question—Amnesia's video surveillance of the club on the outside.

28. The Commission blames Den Hollander for the absence of this video because he did not file his complaint within 30 days of the incident, which would have prevented the self-erasing of the video "every 30 days." (Ex. C, *Admin. Closure* at p. cuatro).

29. 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). The Commission, however, unilaterally reduced that to 30 days for nightclubs or however long a nightclub's surveillance tape lasts.

30. In *Dept. of Correction v. Whitehead*, OATH Index No. 1152/97 (October 10, 1997), no adverse inference was drawn because the complainant was responsible for loss of interview tapes of witnesses, since the witnesses were still available.

31. There are three people who know exactly what happened on January 9, 2010: Den Hollander, his friend, and the doorman. The Commission has Den Hollander's sworn statement, Ex. E, *Verified Complaint*, but its investigation never bothered to contact Den Hollander's friend and never tracked down the doorman.

32. All three witnesses to the discrimination in this case were available, but the Commission chose to ignore the evidence from two in favor of a non-existent silent video.

33. Even if the silent video still existed, all it would show is that two young people approach the doorman, there's some discussion and the doorman looks at something they give him, which he gives back to them, and they enter the door. Cannot tell whether the doorman required them to buy a bottle and they agreed because there's no audio. Then Den Hollander and his friend approach the doorman, there's some discussion and the two step out of line. Cannot tell whether they were told to step out of line because the doorman required them to buy a bottle and they refused because there's no audio. Finally, two young people 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. Cannot tell whether the doorman required them to buy a bottle and they agreed because the video is still silent.

34. For these proceedings, the petitioner includes an affirmation from Den Hollander's friend who was with him on the night in question. (Ex. H, affirmation of attorney Robert M. Ginsberg).

The Commission relied on misrepresentations in finding "No Probable Cause."

35. The Commission's Administrative Closure misrepresents that in the complaint filed with the New York State Human Rights Division, Den Hollander "submitted a sworn statement that he was denied access to Respondent Amnesia unless he purchased a bottle of alcohol, and **the reason for the denial was because he was a male**." (Ex. C, *Admin. Closure* at p. dos (emphasis added)).

36. That is intentionally misleading because the complaint actually states "I **believe** I was discriminated against because of my: sex." (Ex. D, *State Human Rights Division Complaint* at p. 4 (emphasis added)).

37. As it turned out, Den Hollander's belief was wrong, which, as he made clear to the Commission on October 15, 2010, he did not realize until the State's decision on September 16, 2010, which concluded that age discrimination was probably involved.

38. If the State Human Rights Division had jurisdiction over age discrimination, Den Hollander would have then amended his complaint rather than approaching the Commission.

39. The Commission, however, unlike any court or other administrative agency, requires that once pleadings are submitted, and regardless of jurisdiction, the pleadings are written in stone and can never be amended no matter what facts are subsequently revealed.

40. Such is contrary to the very purpose of courts and administrative agencies liberally allowing amendments to complaints in order to further justice. The Commission's rule harkens back to the 19th century when "the pretrial functions of notice-giving, issue formulation,

and fact revelation were performed primarily, and inadequately, by the pleadings," *Hickman v. Taylor*, 329 U.S. 495, 500 (1947), and "pleading was a game of skill in which one misstep by counsel may be decisive to the outcome," *Conley v. Gibson*, 355 U.S. 41, 48 (1957).

41. In another misrepresentation used to discredit the State Human Rights Division's finding of probable age discrimination, the Commission falsely says that the State's investigation was limited to "observation[s] on the patrons who were actually inside the club, and not those who were waiting outside [on] the club's line and denied entrance." (Ex. C, *Admin. Closure* at p. dos). The State, however, specifically states that its investigation included observing the people in line as well as inside the club. (Ex. F, *State Determination and Order After Investigation* at p. 2).

42. By ignoring the State Human Rights Division's actual words, the Commission is able to wrongly conclude that "Because [Den Hollander's] allegations specifically refer to those waiting on line, the [State's] observations of the customers inside the club have relatively little weight." (Ex. C, *Admin. Closure* at p. dos).

43. The Commission also misrepresented that N.Y. Executive Law §279(9) prevents the filing of a complaint with the Commission when a prior discrimination complaint was filed with the State Human Rights Division and was dismissed for lack of the State's jurisdiction. (Ex, C, *Admin. Closure* at p. tres).

44. N.Y. Executive Law §279(9) states that a person alleging discrimination has the choice of either going to court or filing a complaint with a human rights agency, but not both.

45. Den Hollander never involved the courts with this discrimination prior to the filing of this Special Proceeding.

46. The Commission finally misrepresents the legal meaning of the word "grievance" by concluding that it means the "fact situation" in which rights are violated rather than the actual violation of a right.

47. The Commission makes this misrepresentation so that it can conclude that because Den Hollander filed a complaint with the State Human Rights Division concerning the fact situation that occurred at Amnesia, he cannot file a complaint concerning the same fact situation with the Commission, even though the complaints allege violations that impact different rights—one for sex discrimination and the other for age discrimination.

48. The Commission's misrepresentation allows it to wrongly rely on N.Y.C. Admin. Code §8-109(f)(iii), which states that after the State Human Rights Division makes a decision on a "grievance," the Commission cannot make a decision on the "same grievance." (Ex, C, *Admin. Closure* at p. tres).

49. The legal question then is what does "grievance" mean?

50. 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), and that 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).

51. 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, which indicates that each unlawful discriminatory practice gives rise to a separate grievance.

52. 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.

53. The U.S. Supreme Court has ruled that "[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).

54. Were the Commission's definition of "grievance" to be upheld, it would create traps in the law leaving a person discriminated against without a City or State remedy:

a. A person complains to the State Human Rights Division 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 practices. N.Y. Exec. Law §296(2)(a); or

b. A person complains to the Commission 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 the Commission dismisses the complaint because it finds the discrimination was based on military status and the Commission has no jurisdiction over that. N.Y.C. Admin. Code 8-107(4).

55. By creating such traps, the Commission's definition of "grievance" actually eliminates in certain circumstances the legislative intent of providing a remedy for discrimination.

56. Under the law, and not the Commission's re-writing of it, when Amnesia refused to let Den Hollander and his friend 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. The State Human Rights Division made a final determination only on the sex discrimination grievance, which left the age discrimination grievance undecided.

<u>The Commission conducted an abbreviated and one sided investigation.</u>

57. While "[t]he Commission has broad discretion in determining the method to be employed in investigating a claim, its determination will be overturned when the record demonstrates that its investigation was abbreviated or one sided." See *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).

58. The Commission conducted an abbreviated and one sided investigation, which violated its own rule requiring an accurate and thorough fact-finding, 47 RCNY §1-31, by:

a. Ignoring that one act of discrimination violates the human rights law;

b. Failing to interview two of the three persons who were in a position to know what actually occurred;

c. Relying on unreliable, irrelevant Internet blogs;

d. Speculating that the Amnesia doorman was not an employee;

e. Blaming Den Hollander for the absence of a video tape that lacked probative value because it had no audio;

f. Misrepresenting what Den Hollander knew and when he knew it;

g. Misrepresenting the State Human Rights Division's findings; and

h. Misrepresenting City, State and the common law.

59. Lastly, Den Hollander, in his August 17, 2012, application for review of the Administrative Closure to the Commission, requested that in accordance with 47 RCNY §1-34, he be allowed to examine the factual documentation in the Commission's investigatory file. The Commission did not respond to that request.

60. So, on January 20, 2013, he repeated the request in a letter to the Commission, Ex. G, to which the Commission responded on January 25, 2013, stating that once it "prepared the file," it would contact him "to arrange a mutually convenient time" for the examination, Ex. I.

61. Given the short time frame in which these Special Proceeding papers have to be filed—30 days—the examination may take place in time for Den Hollander's Reply.

WHEREFORE, the Petitioner requests that this Court reverse the final Determination and Order, dated January 11, 2013, by the Respondent, find that the Petitioner was unlawfully discriminated against because of his age by AMNESIA J.V. LLC, and DAVID "L.N.U.," and for such other and further relief as this Court may deem just and proper.

VERIFICATION

State of New York)
) ss:
County of New York)

Roy Den Hollander, being duly sworn, deposes and says that I am the petitioner in this proceeding, have written the foregoing petition and know the contents of, which are true to my knowledge, and to those matters that I believe to be true.

Sworn to before me on
5th day of February 2013

/S/

/S/

_____
Notary Public

_____
Roy Den Hollander
Petitioner and attorney
545 East 14 St., 10D
New York, NY 10009
(917) 687 0652
rdhhh@yahoo.com

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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In the Matter of the Application of Index No. 13-100299

ROY DEN HOLLANDER

SUPPLEMENT TO PETITION

Petitioner,

-against-

THE CITY OF NEW YORK COMMISSION ON HUMAN RIGHTS,

Respondent.

----------X

STATE OF NEW YORK)
) ss:
COUNTY OF NEW YORK)

I, Roy Den Hollander, being duly sworn, depose and say:

1. This verified supplement is submitted to add a Fourteenth Amendment procedural due process claim in the special proceeding brought against the City of New York's Commission on Human Rights ("City HR"), which proceeding requests the reversal of a decision by the City HR that found no probable cause for the Petitioner Den Hollander being discriminated against because of his age by the nightclub Amnesia.

2. A Fourteenth Amendment procedural due process claim requires a two-part inquiry to "determine whether [plaintiff] was deprived of a protected interest, and, if so, what process was his due." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982).

3. Den Hollander has a property interest in his discrimination claim against Amnesia because it stems from a violation of unlawful discriminatory practices under the New York City Human Rights Law, N.Y.C. Admin. Code § 8-107(4). *Rosu v. The City of New York*, 2012 U.S. Dist. Lexis 178875 * 9, Case No. 11 Civ. 5437.

4. City HR investigation procedures are sufficient to satisfy procedural due process—so long as the procedures are followed.

5. The City HR's procedure for investigating a complaint is that "After a complaint has been filed, a neutral fact-finder, the investigator or attorney, will interview the parties and witnesses, review the respondent's answer and supporting documentation, issue interrogatories and document requests, and conduct field visits and tests where appropriate. At the conclusion of the investigation, the Commission makes a determination of 'probable cause' or 'no probable cause. Where there is insufficient evidence to establish that discrimination occurred, the Commission will issue a 'no probable cause' determination and the case will be dismissed. If the case receives a 'probable cause' determination, it will be prosecuted." City HR website, Processing the Complaint, http://www.nyc.gov/html/cchr/html/processing.html.

6. "[N]ot properly conducting an investigation in accordance with the [City HR's] procedures would mean that Defendants did not afford sufficient process . . . ." *Ruso* at 14.

7. In response to a Freedom of Information Law request, Den Hollander examined Velez's investigation file, which was 98% complete except for attorney work product and privileged documents. (As of the date of this Supplement, the pertinent documents are being copied by the City HR and Den Hollander has not received any of them).

8. Velez did not interview witnesses—there were no notes of witness interviews in his investigation file, he did not issue interrogatories—there were no interrogatories or answers in the file, and he did not obtain authenticated documents relevant to the alleged age-discrimination by Amnesia.

9. There were no telephones logs in Velez's investigation file indicating he failed to even contact potential witnesses, such as Den Hollander's attorney friend who witnessed the discrimination or Amnesia's doorman who refused to allow them admission.

10. The investigation file also shows that Velez failed to interview persons familiar with Amnesia's admission policy.

11. There were letters from Velez to Amnesia and its doorman that included Den Hollander's age-discrimination complaint, but those letters were returned as undeliverable to Velez.

12. There is no indication that Velez then had the letters personally served.

13. There were no letters or emails to Den Hollander's attorney friend who witnessed the discrimination.

14. There were no emails to any officials at Amnesia or the doorman.

15. There is no indication that Velez contacted anyone at Amnesia to determine what happened the night of the discrimination or what Amnesia's policies were in admitting persons.

16. Velez did make a Freedom of Information Law request for a copy of the New York State Division of Human Rights investigation, but the copy, if ever received, was not in the file.

17. So no interviews with eye-witnesses or Amnesia officials, no interrogatories of anybody, and no requests for documents other than the State's Division of Human Rights investigation, which was apparently never received.

18. Velez—a la Inspector Clouseau—ferreted out irrelevant, untrustworthy, and hearsay bits of information on the Internet that comprised the bulk of his investigation into the facts.

19. Displayed in a prominent position in Velez's investigation file was an Internet article titled "NYC Attorney Out To Reclaim Ex-Wife From Feminism's Clutches, Get Laid Easier," written by some unknown person using the pseudonym "Jezebel," whom Velez never interviewed, and who resorts to naming-calling as a substitute for logical argument.

20. Velez also relied for his so-called facts on "Yelp.com" blogs concerning Amnesia of which only one came close to being relevant. That blog from an unknown person using the moniker Kelly R. Paris France stated that she entered Amnesia around the same time, on the same night as Den Hollander and his friend were required to buy a bottle for entry. The blogger says that "It wasn't crowded inside!" Next to the blog printout is handwritten, "Same date & time cs Mr. Hollander." Presumably, the writing is Velez's.

21. Velez ignored the Kelly R. Paris France blog apparently because it refuted a finding he relied on from the State Division of Human Rights *Determination and Order* that infers one reason Amnesia did not discriminate based on age was that the club was crowded and room at a premium, so the requirement for Den Hollander and his friend to purchase a bottle was justified. Velez's *Order* at Dos, quoting the State's *Determination and Order*, states "[Amnesia] asserts that when the nightclub is crowded, [Amnesia] employs an admissions strategy to limit the number of individuals, male and female, who do not have the appearance [Amnesia] desires to maintain the image of the nightclub."

22. Velez, however, did not ignore two other blogs also from "Yelp.com" that he prevaricated and stretched into supporting his *Order*.

23. Velez used a blog from "Tasty 1027," as 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 *Order* at Cuarto, Ex. C of the Verified Petition).

24. What Velez intentionally left out of Tasty's blog was that "[I]n the end my party of 12 made it in . . . ." This may indicate 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 in her age group and they still had to buy a bottle. We don't know because Velez never contacted her. Further, all nightclubs are reluctant to allow such large parties in unless they have reservations. So, if Tasty's party bought a bottle, the reason may just have been because of the size of her party and they had no reservations. Once again, we do not know because Velez never determined whether Amnesia requires large groups to buy a bottle.

25. The second "Yelp.com" blogger, "Maria W. NY," said that "Different groups were dancing and lining up at the downstairs bar, people in their 20's, 30's, 40's." This blogger, however, makes no mention of her or anyone in those age groups having to purchase a bottle to gain admission.

26. Another problem with Velez's reliance on the unknown and un-interviewed persons Tasty and Maria is that neither entered Amnesia on the night that Den Hollander and his friend were discriminated against.

/S/
_____
Roy Den Hollander

Sworn to before me on the
28th day of February 2013

/S/
_____
Notary Public

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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In the Matter of the Application of Index No. 13-100299

ROY DEN HOLLANDER

Petitioner,

-against-

THE CITY OF NEW YORK COMMISSION ON HUMAN RIGHTS,

Respondent.

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ADDENDUM OF EXHIBITS TO THE SUPPLEMENTAL PETITION

A Supplement to the Verified Petition was served on February 28, 2013, and filed on March 1, 2013. The Supplement added news facts that came to light after the filing of the Verified Petition on February 8, 2013 and a new cause of action based on those facts.

The new facts resulted from the Plaintiff's examination of the Defendant Commission on Human Rights' investigation file, which occurred on February 21, 2013.

At that examination, the Plaintiff requested copies of various documents all of which were received by March 13, 2013, which was after the service and filing of the Supplemental Petition in accordance with CPLR 3025(a).

Of those documents, the following are submitted as exhibits that support various allegations in the Supplemental Petition:

Ex. A, Article by Jezebel "NYC Attorney Out To Reclaim Ex-Wife From Feminism's Clutches, Get Laid Easier," ¶ 19;

Ex. B, Yelp blogger Elite 10 (Kelly R. Paris, France), relates to ¶¶ 20, 21;

Ex. C, Yelp blogger Tasty 1027, relates to ¶¶ 23, 24, 26;

Ex. D, Yelp blogger Maria W. NY, relates to ¶¶ 25, 26.

/S/

_____

Roy Den Hollander
Petitioner and Attorney
545 East 14th Street, 10D
New York, N.Y. 10009
917-687-0652
rdhhh@yahoo.com

Sworn to before me on the
14th day of March 2013

/S/

_____

Notary Public

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----------X

In the Matter of the Application of

ROY DEN HOLLANDER

Petitioner,

-against-

THE CITY OF NEW YORK COMMISSION ON HUMAN RIGHTS,

Respondent.

----------X

Index No. 13-100299

ADDENDUM OF EXHIBITS TO THE SUPPLEMENTAL PETITION

A Supplement to the Verified Petition was served on February 28, 2013, and filed on March 1, 2013. The Supplement added news facts that came to light after the filing of the Verified Petition on February 8, 2013 and a new cause of action based on those facts.

The new facts resulted from the Plaintiff's examination of the Defendant Commission on Human Rights' investigation file, which occurred on February 21, 2013.

At that examination, the Plaintiff requested copies of various documents all of which were received by March 13, 2013, which was after the service and filing of the Supplemental Petition in accordance with CPLR 3025(a).

Of those documents, the following are submitted as exhibits that support various allegations in the Supplemental Petition:

Ex. A, Article by Jezebel "NYC Attorney Out To Reclaim Ex-Wife From Feminism's Clutches, Get Laid Easier," ¶ 19;

Ex. B, Yelp blogger Elite 10 (Kelly R. Paris, France), relates to ¶¶ 20, 21;

Ex. C, Yelp blogger Tasty 1027, relates to ¶¶ 23, 24, 26;

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rdhhh@yahoo.com

Sworn to before me on the
14th day of March 2013

Notary Public

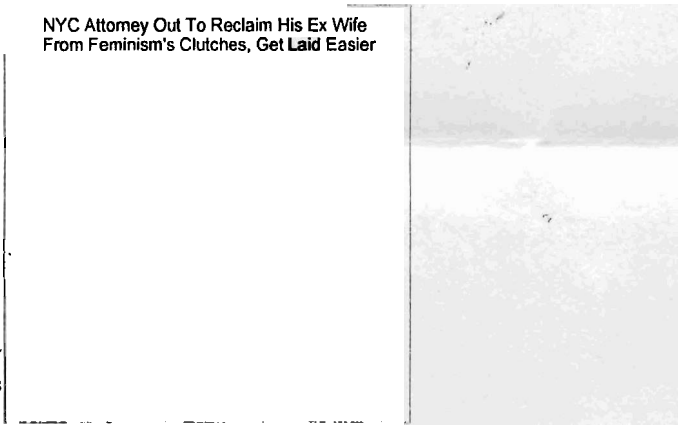
SULTANA A KUTBALI
Notary Public - State of New York
NO. 01KU6272095
Qualified in Bronx County
My Commission Expires 11/13/16

Exhibit A

ROY DEN HOLLANDER

NYC Attorney Out To Reclaim His Ex Wife From Feminism's Clutches, Get Laid Easier

BY MEGAN CARPENTIER AUG 18, 2008 5:00 PM



About eight years ago, Roy Den Hollander was living the high life. He'd just returned to New York from a decade working in Russia with a pretty, young, docile Russian bride in tow and was set to live the high life. Then he found out what all his friends and acquaintances in Russia knew but hadn't told him (and I know, because I called some of them and asked): that she'd married him for her green card and his money and set on about divorcing him. He admits that he's still bitter [*quelle surprise*], which is why he spends all his time these days filing "antifeminist" lawsuits, to try to rid the world of feminism so that in twenty years he can marry a wife untainted by some foolish idea that she is his intellectual equal or better and so that, in the mean time, he can get laid more cheaply. Yeah, he's the same guy that filed lawsuits against bars and clubs that have "Ladies Nights." Oh, brother.At least Hollander admitted to the *New Yorker* that he's got better luck with women when he can talk to them rather then when they get a look at his mug — though he refused to cop to his age, his résumé suggests he turned 50 since his divorce. He says, post-divorce, "I tend to be attracted to black and Latin chicks, and Asian chicks," so all you ladies of color out there, he likes to hang out at the Copa and salsa dance, which I'm sure he's, like, totally good at. But to today's tall tale of woe from the man that feminists forgot — or tried to, anyway. He looks like that creepy guy that used to go to the 19+ clubs in college and stare at all the girls who wouldn't fuck him. But, obviously, that's not *his* fault for being a creepy bastard trying too recapture his lost youth by boning drunk chicks half his age, it's Feminism's fault for convincing drunk chicks half his age that they could do better. Way better. And where does feminism inculcate women to eschew boning creepy old dudes that will divorce you in 10 years for the younger model because there will always be a younger model? Why, Columbia University, where Roy Den did his M.B.A. If you can't get laid at *Columbia* as a 40 year old asshole-y MBA student, really, it's the fault of the goddamned Women's Studies Department. So he's suing them for "using government aid to preach a 'religionist belief system called feminism.'" Feminism, as we all know, teaches us to hate Men, "spreading prejudice and fostering animosity and distrust toward men with the result of the wholesale violation of men's rights due to ignorance, falsehoods and malice." Also, it "demonizes men and exalts women in order to justify discrimination against men based on collective guilt." Thus, since Feminism is a religion dedicated to violating the God-given rights of men, Columbia's program violates the Constitution of the United States and must die a litigious death. Look, I took a women's study class in college, with a woman who considered herself a prominent first-wave feminist. If there was any class that taught me to dislike and take with a grain of salt any first-waver who said she was out there to help me, it was that class with that arrogant, undermining, fake-nice woman who gave me the lowest grade in the class (despite the highest marks throughout) for daring to disagree with her policy prescriptions and political philosophy during class discussion. I got my feminism from my dad, jerk-face, who taught me that I am any man's equal and many men's better and that I don't have to and never should kowtow to a man for anything, including sex, money, love or support. So, look, I would almost feel bad for you that your ex-wife conned you into marrying her so she

could get her green card, but you're such a jerk I kind of don't. But your friends in Russia said that if you're so damned desperate to get back to a society in which women are considered 2nd-class citizens and the "rights" of men are respected by the courts over the rights of women (especially in cases of date rape, which you so lovingly advocate in your *New Yorker* profile as the way things ought to be), you can always go back to Russia. I'm sure we'd even take up a collection to help buy you a plane ticket. Roy Den Hollander's Résumé [Roydenhollander.com] Lawyer Files Antifeminist Suit Against Columbia [NY Times] Hey La-a-a-dies [New Yorker]

Contact Megan Carpentier: EMAIL THE AUTHOR COMMENT

RELATED STORIES
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- Free Drinks And Ladies' Night: Is The Whole Thing Sexist?

DISCUSSION THREADS FEATURED ALL START A NEW THREAD

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RAGTRADE
Linda Evangelista's $46k Child Support Lawsuit Is Going To Court

POLITICS
The Curious Case of Why We Give a CRIME

Exhibit B

actually think you are going inside the Quo/Retox/Mist club space. Even when you enter, you feel like you're inside Quo, but Quo it is not.

Thursday night they had great DJs out playing, so the music was on point. The space is really nice. You walk in and there's tables rite from the start, but don't fret dancers, there's PLENTY of dance space to go around. There are 2 bars but Thursday night it only really needed 1, it wasnt very pakked, which was nice.

There's an upstairs section, VIP i would guess, with extra tables (that are quite comfortable). The decor is like a low lite blue, with these really cool lights up at the ceiling that lite up every so often in different colors of a rainbow. It has a warehouse feel to it, and it's big, but not Mansion sized. Not to mention, there's dancers, but not your usual gogo dancers (like at Quo)...the dancers here dance on silks!!! Swinging bakk and forth 30 feet above the ground...pretty impressive i must say...

I was at a table up in the bakk, so I'm not very sure as to how much everything costs, but my guess would be basic club price...so i would say medium to pricey...A problem I had with the club however, is the location...it is WAYYYYYY west, almost in the water by the time you reach the venue, but if you don't mind to walk, it's a great place to party!!! See you there!

Was this review ...? Useful (3) Funny (1) Cool

Elite '10
45
116

Maria T.
New York, NY

2/10/2010

I feel like this is one of the clubs that is really easy to get in to...

Maybe I'm being bias, but I have only been here once- their grand opening. Interior design was okay- its huuge! Exposed brick wall, and the girls swinging from fabric is a nice touch.

The crowd- again, anyone can get in kind of club..so enough said.

Music was slow when it first started, but it slowly picked up.

Overall I would say go to just say you've tried it out, but not something I would make a regular spot.

Was this review ...? Useful (3) Funny Cool

Elite '10
7
123

Kelly R
Paris
France

1/17/2010 1 photo

I went there on Saturday, January 9th at 10:45. We were on a promoter's list, but they would not let us skip the line. The line was NOT MOVING. Finally, the promoter got there right before 11, and then they let him bring in like 20 people at once, including us. It wasn't even crowded inside! They were just making people stand outside to make it look like a cool club. I don't appreciate bullshit like that. About an hour later, the club was as full as it would get for the night, but it was a comfortable amount of people. I did get jostled every few minutes, but it's not a total nightmare like it can get at other clubs.

The DJ was GREAT. Loved it. Danced all night long. The bathroom sinks are really cool.

I had bottle service at the promoter's table, so I can't speak for the skill of the bartenders. Also, I don't know how much anything cost. Oh, but the guys who were with us had to pay $20 cover.

Same date + Time as Mr. Holla-dee

When we came in, I was like, "What? Why are there sheets hanging from the ceiling? What ugly and awkward decorations." BUT they were for these ladies wearing vintagey-looking lingerie who climbed up and did Cirque de Soleil type stuff! Swinging around and spinning and twisting, all above the main floor of the club, with people dancing below them. It was pretty cool. They did it once around maybe 11:30 and then again maybe at around 1am. Definitely unique! Way better than just having girls in skanky outfits dancing on platforms.

Was this review ...? Useful (6) Funny (3) Cool

0
1

Joe R.
New York, NY

7/13/2010

What a terrible place, extremely expensive for what it is, the crow is sketchy, the bouncers are despicable, there was only one good/friendly bartender....
I will never go there again. Don't waste your time/money, there are so many other places to go instead of this, don't bother.

Was this review ...? Useful Funny Cool

0
2

L W.
New York, NY

7/8/2010

If you're looking for your typical situation in the nightlife at certain clubs where you'll encounter a great deal such as the pull of (NO COVER CHARGE ALL NIGHT or UNTIL 12 if you RSVP) then are asked to pay $20- $40 since "there is no list" after being forced to wait outside of the door for 2 hours...Amnesia is that place!

If it wasn't for running into someone who had a connection, we would have continued walking away trying to "forget" that night.

Once inside, we actually had fun. The place looks nice and all and the dj that night was good, but with the "bait and switch" methods that a lot of these clubs use, it reminded me of why I stopped going to clubs in the first place.

It's unfortunate what people feel they need to do to other people to feel they have power and to take people's money unfairly. DUH, it's called, get everybody in so they can buy drinks! That still means more revenue. Don't piss off the consumer. The consumer is the only reason why you'd exist. Ugh.

Despite this huge TYPICAL flaw in the nightlife scene, I had a much needed fun night out with the ladies.

Was this review ...? Useful Funny (1) Cool

0
1

Amy U.
[illegible] NY

12/12/2009 1 photo

This club caters to everyone...singles, couple, groups....all types of music. The club is huge you won't be shoulder to shoulder like othe places.. You never know what performers they have...
World renowned Dj
Check it out you won't be disappointed..,,

Was this review ...? Useful Funny Cool

5/22/2010

Exhibit C

Amnesia Nightclub New York

< Back to Amnesia Nightclub New York

REVIEWS FOR AMNESIA NIGHTCLUB NEW YORK

Submit a Review

Clubplanet members: [illegible]
Guests: Please create [illegible] or enter your review below
(only registered users can edit their reviews)

Name:*

Title:*

Review:*

Viewing reviews 11 to 13 out of 13 reviews for Amnesia Nightclub New York

[illegible] says: (04.30.2010)

choose scene

This is the worst false advertisement I have ever seen. DJ Clue never came and they should called it Latin thursdays at amnesia. WTF

If you are non Latin looking they wil not let you in.

[illegible] says: (04.25.2010)

Beware of RSVP's !!

I made & confirmed reservations for my bday this past wknd & they basically had no clue about what was going on. first they said u couldn't get in unless u were on a list which i was except to them it wasn't valid even w showing them my confirmation which i got off their website. they were complete pricks about the whole thing & of course only way to get

in was if we bought bottles, go figure !!
in the end my party of 12 made it in but after the hassle they gave me & my friends at the door quite frankly i wouldn't bother to go back. there are plenty of places to party in nyc u don't need to go somewhere & be treated like a jerk for no reason.

[redacted] says: (04.25.2010)

DO NOT GO TO THIS CLUB!!!!

I rsvp to attend this club & when me & my friend get there the bouncer asked if i was on the guestlist i said "yes" & the name of it... this prick say "NO I CANT LET YOU IN" not your not on the guestlist or you have to pay to come in... I was completely offended & outraged because the only reason i think he didnt let us in was because of our skin color racist bastard! Because i'm not white & have blonde hair & 120lbs therfore i would NOT recommend this anyone & I hope the police shut the club down!

First Previous 1 2

+ADD VENUE
+ADD EVENT

USA
CANADA

[Change City]

PLACES TO GO
Clubs Lounges Bar & Restaurants All Venues Advanced Search

EVENTS
Event Calendar Guestlists Tickets New Years Eve Search By Type Search By Location

COMMUNITY
Friends Promoters Message Boards Links

ARTICLES
Nightlife Music Style

PHOTOS
Nightlife Hotties Most Popular Latest Galleries My Photos Upload Photos

VIDEOS
Clubland Miami My Videos Submit A Video

company info | services | privacy policy | legal stuff | opportunities | advertising

Exhibit D

upset with them. We ended up breezing through right after she came out, because I'm pretty sure they didn't want to upset her (Holly's currently one of the models on Project Runway this season, so her "it" factor is pretty high right now).

Holly's party made up a majority of the people there -- so it was basically models. The rest of the crowd was pretty weird, but I don't know how it is on a normal night.

The venue is a really cool space. Very open and clubby, lots of mood lighting, and there are silks hanging from the ceiling, where acrobats perform a couple of times later in the night. There are three tiers -- the open main floor with some lounge couches and a couple of small tables in the middle, and a long bar area on the left; the second tier has more tables and a semi-circular dance floor; the top tier is VIP and has exclusive tables. This place has potential to become a real hotspot, especially since it's in the meatpacking district, steps from cielo and kiss & fly. However, if the rest of the crowd was what I saw, I wouldn't return.

Was this review ...? Useful (3) Funny (2) Cool (1)

Elite '10
384
335
Maria W.
NY

12/11/2009

Put your party pants on and get ready! Last night was the opening for the Thursday party at Manhattan's newest big danceclub, Amnesia.

No relation to Amnesia Ibiza, this venue resides in the space formally held by Sol. A tri-level club, there is a bar on the main floor and another on the third floor, (wo)manned by beautiful staff. Upstairs is the roped off VIP section, with comfy stuffed chairs and couches with a few tables interspersed. It's a crows nest view that takes up one side of the club and makes for a good people watching perch if you don't find the company you're with interesting enough.

Most people were standing rather than sitting in the VIP section, mixing together and making new friends, well lubricated by the flowing cocktails. The main floor was busy, more seating found there with benches that face each other and short knee high tables in between. Different groups were dancing and lining up at the downstairs bar, people in their 20's, 30's, 40's. Interesting and eclectic crowd, let's see if it stays that way without the bs model and bottle service parties that used to be the tired old Sol formula.

DJ Vice on the decks, spinning in a booth above, looking down onto second level center stage opposite the upstairs VIP area. The crowd was filling up the dance areas with their drinks in hand compliments of Belvedere Vodka. The music was pounding and there were a lot of happy friendly people celebrating the season and the new space.

This looks to be the beginnings of a hot Thursday night party. In these days when more places are closing than opening, it's very good to have a new venue to club in the city.

Was this review ...? Useful (5) Funny Cool (2)

Elite '10
Clint H.
NY

2/10/2010

(Written on 1/27/10, then posted in the wrong section!)

So I went here last Thursday and it was a great night out...

ight from the outset, I thought i was at Quo tho! It's weird because at the entrance of it, you

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

---------- x

In the Matter of the Application of

ROY DEN HOLLANDER,

Petitioner,

-against-

THE CITY OF NEW YORK COMMISSION ON HUMAN RIGHTS,

Respondent.

---------- x

VERIFIED ANSWER

Index No.: 100299 / 2013

(Part 33; Hunter, J.)

Respondent City of New York Commission on Human Rights (the "Commission") by its attorney, Michael A. Cardozo, Corporation Counsel of the City of New York, respectfully answers the verified petition (the "Petition") and supplement to the petition (the "Supplemental Petition") of petitioner Roy Den Hollander ("Petitioner") as follows:

ANSWER TO PETITION

1. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 1 of the Petition.

2. Admits that the Commission is named as a respondent in this special proceeding and is located at 40 Rector Street, 10th Floor, New York, New York 10006.

3. Admits that the Commission issued a Determination and Order After Review (the "Order After Review") on January 11, 2013, which was served on January 15, 2013, upholding the Commission's July 27, 2012 Determination and Order After Investigation (the "Order After Investigation"), which dismissed Petitioner's complaint alleging age discrimination. Denies the remaining allegations in paragraph 3 of the Petition.

4. States that the Commission's Order After Investigation speaks for itself, and denies the remaining allegations in paragraph 4 of the Petition.

5. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 5 of the Petition, and states that the relevant facts are set forth in the record before the Commission on which the Commission based its determination.

6. Admits that on or about January 13, 2010, Petitioner filed a discrimination complaint with the New York State Division of Human Rights (the "State DHR"). Denies knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 6 of the Petition, and states that the relevant facts are set forth in the record before the Commission on which the Commission based its determination.

7. Admits that on or about September 16, 2010, the State DHR issued a decision dismissing Petitioner's discrimination complaint. Denies knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 7 of the Petition, states that the State DHR's decision speaks for itself, and further states that the relevant facts are set forth in the record before the Commission on which the Commission based its determination.

8. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 8 of the Petition, and states that the relevant facts are set forth in the record before the Commission on which the Commission based its determination.

9. Admits that Petitioner filed a verified complaint with the Commission on October 22, 2010 against Amnesia J.V. LLC and David "L.N.U.," and that the Commission issued a decision dismissing the complaint on July 27, 2012. Denies the remaining allegations in paragraph 9 of the Petition, states that the complaint and the Commission's decision speak for

themselves, and further states that the relevant facts are set forth in the record before the Commission on which the Commission based its determination.

10. Paragraphs 10 through 17 of the Petition contain legal conclusions, legal arguments, and characterizations to which no response is required. To the extent a response is required, denies the allegations in paragraphs 10 through 17 of the Petition.

11. Paragraphs 18 through 25 of the Petition contain legal conclusions, legal arguments, and characterizations to which no response is required. To the extent a response is required, denies the allegations in paragraphs 18 through 25 of the Petition, states that the Commission's Order After Investigation speaks for itself, and further states that the relevant facts are set forth in the record before the Commission on which the Commission based its determination.

12. Paragraph 26 of the Petition contains legal conclusions, legal arguments, and characterizations to which no response is required. To the extent a response is required, denies the allegations in paragraph 26 of the Petition, states that State DHR's decision and the Commission's Order After Investigation speak for themselves, and further states that the relevant facts are set forth in the record before the Commission on which the Commission based its determination.

13. Paragraphs 27 through 30 of the Petition contain legal conclusions, legal arguments, and characterizations to which no response is required. To the extent a response is required, denies the allegations in paragraphs 27 through 30 of the Petition, states that the Commission's Order After Investigation speaks for itself, and further states that the relevant facts are set forth in the record before the Commission on which the Commission based its determination.

14. Paragraphs 31 through 33 of the Petition contain legal conclusions and characterizations to which no response is required. To the extent a response is required, denies the allegations in paragraphs 31 through 33 of the Petition, and states that the relevant facts are set forth in the record before the Commission on which the Commission based its determination.

15. Admits that the Petition attaches as an exhibit an affirmation of Robert M. Ginsberg. Denies knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 34 of the Petition, and states that the relevant facts are set forth in the record before the Commission on which the Commission based its determination.

16. Paragraphs 35 through 40 of the Petition contain legal conclusions, legal arguments, and characterizations to which no response is required. To the extent a response is required, denies the allegations in paragraphs 35 through 40 of the Petition, states that the complaint before the State DHR and the Commission's Order After Investigation speak for themselves, and further states that the relevant facts are set forth in the record before the Commission on which the Commission based its determination.

17. Paragraphs 41 through 42 of the Petition contain legal conclusions, legal arguments, and characterizations to which no response is required. To the extent a response is required, denies the allegations in paragraphs 41 through 42 of the Petition, states that the State DHR decision and the Commission's Order After Investigation speak for themselves, and further states that the relevant facts are set forth in the record before the Commission on which the Commission based its determination.

18. Paragraphs 43 through 58 of the Petition contain legal conclusions, legal arguments, and characterizations to which no response is required. To the extent a response is required, denies the allegations in paragraphs 43 through 58 of the Petition.

19. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 59 of the Petition, and states that Petitioner's application for review of the Commission's Order After Investigation speaks for itself.

20. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 60 of the Petition, and states that Petitioner's correspondence with the Commission speaks for itself.

21. Paragraph 61 of the Petition contains legal conclusions, characterizations, and statements to which no response is required. To the extent a response is required, denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 61 of the Petition.

22. Denies that Petitioner is entitled to any of the relief requested in the "Wherefore" clause or elsewhere in the Petition.

23. Denies any allegation or inference not specifically admitted herein.

ANSWER TO SUPPLEMENTAL PETITION

24. Paragraphs 1 through 4 of the Supplemental Petition contain legal conclusions, legal arguments, characterizations, and statements to which no response is required. To the extent a response is required, denies the allegations in paragraphs 1 through 4 of the Supplemental Petition.

25. Paragraph 5 of the Supplemental Petition contains legal conclusions, characterizations, and statements to which no response is required. To the extent a response is required, denies the allegations in paragraph 5 of the Supplemental Petition, and states that the Commission's website speaks for itself.

26. Paragraph 6 of the Supplemental Petition contains legal conclusions, legal arguments, and characterizations to which no response is required. To the extent a response is required, denies the allegations in paragraph 6 of the Supplemental Petition.

27. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 7 of the Supplemental Petition.

28. Paragraphs 8 through 26 of the Supplemental Petition contain legal conclusions, legal arguments, and characterizations to which no response is required. To the extent a response is required, denies the allegations in paragraphs 8 through 26 of the Supplemental Petition, and states that the relevant facts are set forth in the record before the Commission on which the Commission based its determination.

29. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in the Addendum of Exhibits to the Supplemental Petition.

FIRST AFFIRMATIVE DEFENSE

The Petition and Supplemental Petition fail to state a cause of action.

SECOND AFFIRMATIVE DEFENSE

The Order After Investigation, which dismissed Petitioner's complaint before the Commission and which was affirmed in the Order After Review, was not arbitrary and capricious, and was supported by substantial evidence in the record considered as a whole.

THIRD AFFIRMATIVE DEFENSE

The Commission's investigation of the Petitioner's complaint before the Commission was not abbreviated, biased, or one-sided.

FOURTH AFFIRMATIVE DEFENSE

The Commission's Order After Investigation and Order After Review are in accordance with applicable law.

FIFTH AFFIRMATIVE DEFENSE

The Commission's Order After Investigation and Order After Review were lawful exercises of agency discretion.

SIXTH AFFIRMATIVE DEFENSE

The claims in the Petition are barred under N.Y.C. Admin. Code § 8-109(f)(iii), N.Y. Exec. Law § 297(9), and/or the doctrine of election of remedies.

SEVENTH AFFIRMATIVE DEFENSE

The claims in the Petition are barred by res judicata and/or collateral estoppel.

EIGHTH AFFIRMATIVE DEFENSE

The Commission has not violated any of Petitioner's rights, privileges or immunities under the Constitution or laws of the United States, the State of New York, or any political subdivision thereof.

NINTH AFFIRMATIVE DEFENSE

The Commission and its employees and officials acted reasonably and in the proper and lawful exercise of their discretion. As such, the Commission is entitled to governmental immunity.

TENTH AFFIRMATIVE DEFENSE

30. Petitioner has failed to comply with the Notice of Claim provisions of New York General Municipal Law §§ 50(e), (h), and (i), and N.Y.C. Admin. Code § 7-201.

WHEREFORE, the City of New York Commission on Human Rights respectfully requests that the Court issue an order dismissing the Petition and affirming the Commission's dismissal of Petitioner's complaint, and ordering such other and further relief as the Court deems just and proper.

Dated: April 4, 2013
New York, New York

MICHAEL A. CARDOZO
Corporation Counsel of the City of New York
Attorney for Respondent City of New York
Commission on Human Rights
100 Church Street, Room 20-101
New York, New York 10007
(212) 356-2294

By: _____
Leonard M. Braman
Assistant Corporation Counsel

VERIFICATION

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

Leonard M. Braman, being duly sworn, states that he is an Assistant Corporation Counsel in the office of Michael A. Cardozo, Corporation Counsel of the City of New York; that the City of New York Commission on Human Rights is a respondent in the within action; that the matters stated in the Answer as to the respondent are true to his knowledge; that the alleged matters alleged therein upon information and belief, he believes to be true; and that the basis of his knowledge is the records of the City of New York Commission on Human Rights. This verification is not made by the respondent because the respondent is a commission created by a municipal corporation.

LEONARD M. BRAMAN

Sworn to before me this
4th day of April, 2013.

NOTARY PUBLIC

RHODA BASLEY
NOTARY PUBLIC-STATE OF NEW YORK
No. 01BA6112414
Qualified in Kings County
My Commission Expires July 06, 2016

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

---------- x

In the Matter of the Application of

ROY DEN HOLLANDER,

Petitioner,

-against-

THE CITY OF NEW YORK COMMISSION ON HUMAN RIGHTS,

Respondent.

---------- x

NOTICE OF MOTION TO DISMISS AND IN OPPOSITION TO THE PETITION

Index No.: 100299 / 2013

(Part 33; Hunter, J.)

PLEASE TAKE NOTICE that upon the annexed Affirmation of Leonard M. Braman, dated April 4, 2013, the exhibits thereto, the accompanying memorandum of law, and upon all the pleadings and proceedings herein, the undersigned will move in the Supreme Court of the State of New York, located at 60 Centre Street, New York, New York, in the Submissions Part, Room 130, on **May 20, 2013**, at 9:30 a.m., pursuant to CPLR 404(a), for an order granting this motion to dismiss and motion in opposition to the petition for judicial review. The above-entitled special proceeding is a proceeding seeking judicial review of a determination of the City of New York Commission on Human Rights.

Dated: New York, New York
April 5, 2013

MICHAEL A. CARDOZO
Corporation Counsel of the City of New York
Attorney for Respondent The City of New York Commission on Human Rights
100 Church Street, Room 20-101
New York, New York 10007
(212) 356-2294

By: 

Leonard M. Braman
Assistant Corporation Counsel

To: Roy Den Hollander, Esq.
545 East 14th Street, 10D
New York, New York 10009

Affirmation of Leonard M. Braman

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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In the Matter of the Application of

ROY DEN HOLLANDER,

Petitioner,

-against-

THE CITY OF NEW YORK COMMISSION ON HUMAN RIGHTS,

Respondent.

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AFFIRMATION OF LEONARD M. BRAMAN

Index No.: 100299 / 2013

(Part 33; Hunter, J.)

LEONARD M. BRAMAN, an attorney duly admitted to practice before the courts of the State of New York, affirms under penalty of perjury the following:

1. I am an Assistant Corporation Counsel in the office of Michael A. Cardozo, Corporation Counsel of the City of New York, and am admitted to practice in the courts of the State of New York. This office represents respondent The City of New York Commission on Human Rights (the "Commission"). I submit this affirmation in support of the Commission's Motion to Dismiss and Motion in Opposition to the Petition for Judicial Review. I am familiar with the facts and circumstances of this proceeding based on personal knowledge and review of relevant documents.

Petitioner's Complaint Before the State Division of Human Rights

2. On or about January 13, 2010, Petitioner filed a complaint of discrimination with the New York State Division of Human Rights (the "State DHR") against Amnesia JV LLC ("Amnesia"). A true and correct copy of this complaint is attached hereto as **Exhibit 1**. In his complaint, Petitioner alleged that "[o]n Saturday, January 9, 2010, at

approximately 11:05 p.m., a friend and I, both males, tried to enter the nightclub called Amnesia but were refused admittance unless we bought a bottle for $350." (Ex. 1 at 5).[1] Petitioner alleged that "[w]e 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 the 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.*). Petitioner alleged that he was discriminated against on the basis of his sex. (*Id.* at 4).

3. On September 16, 2010, the State DHR issued a Determination and Order After Investigation (the "State DHR Order"), dismissing Petitioner's discrimination complaint for lack of probable cause. A true and correct copy of this decision is attached hereto as **Exhibit 2**. The State DHR had investigated the complaint, including by sending a male investigator along with another male to Amnesia on a field visit, and the investigation uncovered no evidence of discrimination. (Ex. 2 at 1-2). Amnesia asserted to the State DHR that "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." (*Id.* at 2). The State DHR found 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 1-2). The DHR accordingly concluded that there was "NO PROBABLE CAUSE to believe that the respondent has engaged in or is engaging in the unlawful discriminatory practice complained of." (*Id.* at 1). The State DHR noted that "the vast

[1] "Ex." refers to the exhibits attached hereto.

majority of the patrons of the nightclub appeared to be under the age of 30 years" and "[a] photo on complainant's website suggests that he is significantly older than the respondent's patrons, and age discrimination is beyond the jurisdiction of the Division with regards to public accommodation." (*Id.* at 2).

Petitioner's Complaint Before the Commission

4. On October 22, 2010, Petitioner filed a discrimination complaint against Amnesia and "David L.N.U." with the Commission. A true and correct copy of this complaint is attached hereto as **Exhibit 3**. Like Petitioner's complaint before the State DHR, this complaint alleged that on January 9, 2010 at 11:05 p.m., Petitioner and his friend were standing on a line to gain admission to Amnesia and were asked to buy a $350 bottle of alcohol in order to enter. (Ex. 3 ¶ 4). Like the State DHR complaint, the Commission complaint alleged that two individuals on line in front of Petitioner and his friend were allowed to enter without buying a bottle, as well as another pair of individuals who entered after them. The only substantive differences between the complaints were that (1) the Commission complaint alleged that Petitioner and his friend were in their 60's and that the individuals they saw gain entry to the club were in their 20's or 30's (*id.* ¶¶ 1, 4); and (2) the Commission complaint alleged that Amnesia discriminated against Petitioner based on age, as opposed to gender (*id.* ¶ 5).

5. The Commission's Law Enforcement Bureau ("LEB") conducted an intake interview with Petitioner prior to the filing of his complaint, in which he explained his discrimination claim to a Commission attorney.

6. The Commission served Petitioner's complaint and demanded an answer.

7. Amnesia submitted a Verified Answer, a true and correct copy of which is attached hereto as **Exhibit 4**. In its Answer, Amnesia denied discriminating against Petitioner

and asserted that, having failed to allege his age discrimination claim in his prior complaint before the State DHR that was dismissed, Petitioner was barred from raising it now. (Ex. 4 ¶¶ 9-14). Amnesia also asserted that: "Any disparity in the ratio of younger customers to older customers of Amnesia on any given night is not due to any act or omission of Amnesia or its agents or employees. 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." (*Id.* ¶ 17).

8. The Commission gave Petitioner an opportunity to submit a Rebuttal, which he did. A true and correct copy of Petitioner's rebuttal is attached hereto as **Exhibit 5**.

9. The Commission obtained and reviewed the State DHR's file on Petitioner's prior discrimination complaint, including its decision, investigation report, and supporting materials.[2] A true and correct copy of the cover letter from the State DHR enclosing its file is attached hereto as **Exhibit 6**.

10. The Commission attempted to locate and interview the individual "David" named in Petitioner's complaint, and to obtain Amnesia's surveillance video from the night in question, but was unable to do so. Amnesia stated to the Commission that its surveillance video self-erases every 30 days, and the complaint was not filed with the Commission until more than 9 months after the alleged incident.

11. The Commission reviewed public comments made on the Internet by patrons of Amnesia that were posted within a few months of Petitioner's visit to the club and

[2] In his Supplement to the Petition, Petitioner claims that the Commission did not obtain a copy of the State DHR file (Supp. Pet. ¶¶ 16-17), but that is not correct.

were relevant to Petitioner's complaint. True and correct copies of such comments are attached hereto as **Exhibit 7**.

The Commission's Determination and Order After Investigation

12. On July 27, 2012, the Commission issued a Determination and Order After Investigation (the "Order After Investigation") concluding that (1) the Commission was statutorily barred from considering Petitioner's discrimination claim because he had previously filed a discrimination complaint based on the same incident with the State DHR; and (2) in any event, there was no probable cause to conclude that Amnesia had engaged in age discrimination. A true and correct copy of this decision is attached hereto as **Exhibit 8**.

13. First, the Commission held that "Complainant is jurisdictionally barred from bringing the Complaint because of his prior filing with the NYSDHR on the same facts and circumstances as the instant matter." (Ex. 8 at 3). The Commission observed that N.Y.C. Admin. Code § 8-109(f)(iii), the "election of remedies" provision of the City Human Rights Law, deprives the Commission of jurisdiction over claims where "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." (*Id.*). "A Complainant cannot avoid the election of remedies bar by changing the legal theory of relief relied upon, or split claims, if they all arise out of the same course of conduct." (*Id.* (citing *Bhagalia v. State*, 228 A.D.2d 882, 883 (3d Dep't 1996); *Benjamin v. N.Y.C. Dep't of Health*, 57 A.D.2d 403, 403 (1st Dep't 2008); and *Rosario v. N.Y.C. Dep't of Educ.*, 2011 U.S. Dist. LEXIS 41177, at *4 (S.D.N.Y. Apr. 15, 2011))).

14. The Commission observed that the State Human Rights Law, N.Y. Executive Law § 297(9), is to the same effect, providing that "[a]ny 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" with the State DHR or a local human rights commission, and that the Court of Appeals has held this provision to bar a subsequent claim "based upon the same incident" as a prior State DHR complaint. (*Id.* (quoting *Emil v. Dewey*, 49 N.Y.2d 968, 968 (1980)). The only exceptions are where "the [State DHR] 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," N.Y. Exec. L. § 297(9), none of which were the case here.

15. Because "Complainant previously filed a complaint with the NYSDHR alleging gender discrimination because a nightclub refused him entry unless he purchased bottle service, and the NYSDHR issued a 'no probable cause' final determination in the matter," the Commission concluded that, under Admin. Code § 8-109(f)(iii) and Exec. L. § 297(9), the Commission lacked jurisdiction over "an age discrimination complaint on the exact same facts" because "Complainant already elected his remedy with the NYSDHR." (Ex. 8 at 3).

16. Second, the Commission concluded that there was not probable cause to believe that it was more likely than not that Petitioner had been asked to purchase bottle service on the basis of his age. The Commission pointed out that the State DHR Order did not suggest that there were older patrons who were being turned away outside the club or being required to purchase bottles for entry. (*Id.* at 2). Accordingly, the Commission gave "relatively little weight" to the State DHR's observation that the club's clientele tended to be younger. (*Id.*). Moreover, the Commission noted that "[a]lthough the NYSDHR expressed these observations, the

statements had no effect on its decision, because New York State's Executive Law does not cover age discrimination in public accommodations." (*Id.*).

17. Among comments made by patrons of Amnesia on websites, the Commission located one posted a few months after Petitioner's visit to Amnesia, from a patron who based on her photo appeared to be in her 20's or 30's, who "expressed her frustration . . . about the difficulty in gaining entry in to the club, stating '. . . of course the only way to get in was if we bought bottles.'" (*Id.* at 4 (emphasis added)). Another reviewer, also appearing from her photo to be in her 20's or 30's, described seeing an "[i]nteresting and eclectic crowd" of people inside the club, including "people in their 20's, 30's, 40's." (*Id.*).

18. After considering the entire record, the Commission concluded that it "cannot establish by a preponderance of the evidence that Respondents required Complainant to purchase bottle service to gain access to the club due to his age." (*Id.*).

19. Petitioner had the opportunity to appeal the Order After Investigation to the Commission's Chairperson. On August 17, 2012, Petitioner submitted to the Chairperson a document entitled "Appeal and Complaint," a true and correct copy of which is attached hereto as **Exhibit 9**.

20. In his Appeal and Complaint, Petitioner raised various legal and factual objections to the Order After Investigation, as well as accusing the LEB's Executive Director, Carlos Velez, of intentional discrimination against Petitioner "motivated by Velez's prejudice . . . against Euro-Americans." (Ex. 9 at 1).[3] Petitioner was given the chance to submit additional comments in support of his appeal, which he declined.

[3] Petitioner provided no basis for this accusation of prejudice against "Euro-American[s]" other than that "[o]n information and belief, Velez is Latin-American and Catholic." (Ex. 9 at 4).

21. On January 11, 2013, after reviewing the record, the Chairperson issued a Determination and Order After Review (the "Order After Review") that affirmed the Order After Investigation. A true and correct copy of this decision is attached hereto as **Exhibit 10**.

The Instant Proceeding

22. On February 8, 2013, Petitioner filed the instant special proceeding, in which he asks that this Court "reverse" the Commission's decision and "find that Petitioner was unlawfully discrimination against because of his age." (Pet. at 13). Subsequently, Petitioner filed a "Supplement to Petition" in which he purported to "add a Fourteenth Amendment procedural due process claim" to this special proceeding. (Supp. Pet. ¶ 1). As the basis of his Fourteenth Amendment claim, Petitioner concedes that the Commission's "investigation procedures are sufficient to satisfy procedural due process—so long as the procedures are followed" (Supp. Pet. ¶ 4), but claims that his case was insufficiently investigated.

WHEREFORE, for the foregoing reasons, the City of New York Commission on Human Rights respectfully requests that the Court issue an order dismissing the Petition and affirming the Commission's dismissal of Petitioner's complaint, and ordering such other and further relief as the Court deems just and proper.

Dated: April 4, 2013
New York, New York

LEONARD M. BRAMAN

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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In the Matter of the Application of

ROY DEN HOLLANDER,

Petitioner,

-against-

THE CITY OF NEW YORK COMMISSION ON HUMAN RIGHTS,

Respondent.

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MEMORANDUM OF LAW

Index No.: 100299 / 2013

(Part 33; Hunter, J.)

MEMORANDUM OF LAW IN SUPPORT OF CITY OF NEW YORK COMMISSION ON HUMAN RIGHTS' MOTION TO DISMISS AND MOTION IN OPPOSITION TO THE PETITION FOR JUDICIAL REVIEW

The New York City Commission on Human Rights (the "Commission") submits this memorandum of law in support of the Commission's motion to dismiss and motion in opposition to the petition for judicial review filed by Petitioner Roy Den Hollander ("Petitioner") as well as the supplement and exhibits thereto (collectively, the "Petition"), because Petitioner's claims are barred under N.Y.C. Admin. Code § 8-109(f)(iii) and Executive Law § 297(9), and because the Petition fails to state a claim on which relief may be granted.

PRELIMINARY STATEMENT

Petitioner is "a self-professed advocate for men's rights who identifies himself as an 'anti-feminist lawyer' on his website, www.roydenhollander.com." (Commission Order After Investigation, Ex. 8 at 3).[1] He has filed various gender discrimination lawsuits, including a

[1] "Aff." refers to the accompanying affirmation of Leonard M. Braman, and "Ex." to the exhibits thereto.

number of suits against bars and clubs that have "Ladies Nights." (*Id.*). In January 2010, Petitioner filed a complaint with the New York State Division of Human Rights (the "State DHR") against a nightclub known as Amnesia, alleging that he and a male friend were refused entry to the club unless they agreed to purchase bottle service for $350, while two women on line in front of them were allowed in without buying bottle service. The State DHR investigated and issued a decision concluding that there was "no probable cause to believe that the respondent has engaged in or is engaging in the unlawful discriminatory practice complained of," but rather 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." (State DHR Order, Ex. 2 at 1-2). The State DHR noted in *dicta* that Petitioner is older than the majority of the club's patrons, but that in any event age discrimination in public accommodations is beyond the State DHR's jurisdiction. (*Id.* at 2).

Subsequently, Petitioner filed a complaint with the Commission based on the same incident at Amnesia and alleging essentially identical facts, but now asserting discrimination based on age rather than gender. After investigating, the Commission's Law Enforcement Bureau ("LEB"), like the State DHR, found no probable cause to believe that Amnesia had discriminated against Petitioner. Moreover, the LEB held that Petitioner's claims were barred under section 8-109(f)(iii) of the City Human Rights Law and section 297(9) of the State Human Rights Law, which prohibit bringing successive discrimination complaints "based upon the same incident." *Emil v. Dewey*, 49 N.Y.2d 968, 968 (1980); *Benjamin v. N.Y.C. Dep't of Health*, 57 A.D.2d 403, 403 (1st Dep't 2008). Petitioner appealed the dismissal of his complaint to the Commission's Chairperson, who affirmed the decision.

The Commission's dismissal of the Petitioner's complaint was correct and should be upheld, and the Petition dismissed. Having brought a discrimination complaint before the State DHR that was dismissed for lack of probable cause, Petitioner was barred from bringing a subsequent discrimination claim before the Commission based on the same incident. The Commission also properly dismissed Petitioner's age discrimination claim on the merits, because its investigation did not reveal credible evidence of discrimination. Finally, Petitioner's meritless claim that he was denied due process of law in violation of the Fourteenth Amendment must be dismissed. It is well settled that where judicial review is available to raise any alleged procedural error in an agency's determination – such as through the instant special proceeding – due process is satisfied, and there can be no procedural due process violation. *Velella v. N.Y.C. Local Conditional Release Comm'n*, 13 A.D.3d 201 (1st Dep't 2004); *C/S Window Installers, Inc. v. N.Y.C. Dep't of Design & Constr.*, 304 A.D.2d 380 (1st Dep't 2003).

STATEMENT OF FACTS

A. Petitioner's Complaint Before the State Division of Human Rights

On or about January 13, 2010, Petitioner filed a complaint of discrimination with the State DHR against Amnesia JV LLC ("Amnesia"). (Ex. 1). In his complaint, Petitioner alleged that "[o]n Saturday, January 9, 2010, at approximately 11:05 p.m., a friend and I, both males, tried to enter the nightclub called Amnesia but were refused admittance unless we bought a bottle for $350." (*Id.* at 5). Petitioner alleged that "[w]e 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 the 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.*). Petitioner alleged that he was discriminated against on the basis of his sex. (*Id.* at 4).

On September 16, 2010, the State DHR issued a Determination and Order After Investigation (the "State DHR Order"), dismissing Petitioner's discrimination complaint for lack of probable cause. (Ex. 2). The State DHR had investigated the complaint, including by sending a male investigator along with another male to Amnesia on a field visit, and the investigation uncovered no evidence of discrimination. (*Id.* at 1-2). Amnesia asserted to the State DHR that "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." (*Id.* at 2). The State DHR found 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 1-2). The DHR accordingly concluded that there was "NO PROBABLE CAUSE to believe that the respondent has engaged in or is engaging in the unlawful discriminatory practice complained of." (*Id.* at 1). In *dicta* that did not affect its decision, the State DHR noted that "the vast majority of the patrons of the nightclub appeared to be under the age of 30 years" and "[a] photo on complainant's website suggests that he is significantly older than the respondent's patrons, and age discrimination is beyond the jurisdiction of the Division with regards to public accommodation." (*Id.* at 2).

B. Petitioner's Complaint Before the Commission

On October 22, 2010, Petitioner filed a discrimination complaint against Amnesia and "David L.N.U." with the Commission. (Ex. 3). Like his complaint before the State DHR, this complaint alleged that on January 9, 2010 at 11:05 p.m., Petitioner and his friend were standing on a line to gain admission to Amnesia and were asked to buy a $350 bottle of alcohol in order to

enter. (*Id.* ¶ 4). Like the State DHR complaint, the Commission complaint alleged that two individuals on line in front of Petitioner and his friend were allowed to enter without buying a bottle, as well as another pair of individuals who entered after them. The only substantive differences between the complaints were that (1) the Commission complaint alleged that Petitioner and his friend were in their 60's and that the individuals they saw gain entry to the club were in their 20's or 30's (*id.* ¶¶ 1, 4); and (2) the Commission complaint alleged that Amnesia discriminated against Petitioner based on age, as opposed to gender (*id.* ¶ 5).

The Commission's Law Enforcement Bureau ("LEB") conducted an intake interview with Petitioner prior to the filing of his complaint, in which he explained his discrimination claim to a Commission attorney. (Aff. ¶ 5). The Commission served the complaint and demanded an answer. (Aff. ¶ 6). Amnesia submitted a Verified Answer in which it denied discriminating against Petitioner and asserted that, having failed to allege his age discrimination claim in his prior complaint before the State DHR that was dismissed, Petitioner was barred from raising it now. (Ex. 4 ¶¶ 9-14). Amnesia also asserted that: "Any disparity in the ratio of younger customers to older customers of Amnesia on any given night is not due to any act or omission of Amnesia or its agents or employees. 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." (*Id.* ¶ 17). The Commission gave Petitioner an opportunity to submit a Rebuttal, which he did. (Ex. 5). The Commission obtained and reviewed the State DHR's file on Petitioner's prior discrimination complaint, including its decision,

investigation report, and supporting materials.[2] (Aff. ¶ 9; Ex. 6). The Commission attempted to locate and interview the individual "David" named in Petitioner's complaint, and to obtain Amnesia's surveillance video from the night in question, but was unable to do so. Amnesia stated to the Commission that its surveillance video self-erases every 30 days, and the complaint was not filed with the Commission until more than 9 months after the alleged incident. (Aff. ¶ 10). The Commission reviewed public comments made on the Internet by patrons of Amnesia that were posted within a few months of Petitioner's visit to the club and were relevant to Petitioner's complaint. (Ex. 7).

C. The Commission's Determination and Order After Investigation

On July 27, 2012, the Commission issued a Determination and Order After Investigation (the "Order After Investigation") concluding that (1) the Commission was statutorily barred from considering Petitioner's discrimination claim because he had previously filed a discrimination complaint based on the same incident with the State DHR; and (2) in any event, there was no probable cause to conclude that Amnesia had engaged in age discrimination. (Ex. 8).

First, the Commission held that "Complainant is jurisdictionally barred from bringing the Complaint because of his prior filing with the NYSDHR on the same facts and circumstances as the instant matter." (*Id.* at 3). The Commission observed that N.Y.C. Admin. Code § 8-109(f)(iii), the "election of remedies" provision of the City Human Rights Law, deprives the Commission of jurisdiction over claims where "the complainant has previously filed a complaint with the state division of human rights alleging an unlawful discriminatory practice

[2] In his Supplement to the Petition, Petitioner claims that the Commission did not obtain a copy of the State DHR file (Supp. Pet. ¶¶ 16-17), but that is not correct.

. . . with respect to the ***same grievance which is the subject of the complaint*** under this chapter and a final determination has been made thereon." *Id.* "A Complainant cannot avoid the election of remedies bar by changing the legal theory of relief relied upon, or split claims, if they all arise out of the same course of conduct." (*Id.* (citing *Bhagalia v. State*, 228 A.D.2d 882, 883 (3d Dep't 1996); *Benjamin v. N.Y.C. Dep't of Health*, 57 A.D.2d 403, 403 (1st Dep't 2008); and *Rosario v. N.Y.C. Dep't of Educ.*, 2011 U.S. Dist. LEXIS 41177, at *4 (S.D.N.Y. Apr. 15, 2011))). The Commission observed that the State Human Rights Law, N.Y. Executive Law § 297(9), is to the same effect, providing that "[a]ny 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" with the State DHR or a local human rights commission, and that the Court of Appeals has held this provision to bar a subsequent claim "based upon the same incident" as a prior State DHR complaint. (*Id.* (quoting *Emil v. Dewey*, 49 N.Y.2d 968, 968 (1980)). The only exceptions are where "the [State DHR] 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," N.Y. Exec. L. § 297(9), none of which were the case here.

Because "Complainant previously filed a complaint with the NYSDHR alleging gender discrimination because a nightclub refused him entry unless he purchased bottle service, and the NYSDHR issued a 'no probable cause' final determination in the matter," the Commission concluded that, under Admin. Code § 8-109(f)(iii) and Exec. L. § 297(9), the Commission lacked jurisdiction over "an age discrimination complaint on the exact same facts" because "Complainant already elected his remedy with the NYSDHR." (Ex. 8 at 3).

Second, the Commission concluded that there was not probable cause to believe that it was more likely than not that Petitioner had been asked to purchase bottle service on the

basis of his age. The apparent impetus for Petitioner's complaint of age discrimination was the comment in the State DHR Order that most of the patrons observed at Amnesia appeared to be under age 30. The Commission pointed out that the State DHR Order did not suggest that there were older patrons who were being turned away outside the club or being required to purchase bottles for entry. (*Id.* at 2). Accordingly, the Commission gave "relatively little weight" to the State DHR's observation that the club's clientele tended to be under 30. (*Id.*). Moreover, the Commission noted that "[a]lthough the NYSDHR expressed these observations, the statements had no effect on its decision, because New York State's Executive Law does not cover age discrimination in public accommodations." (*Id.*).

Among comments made by patrons of Amnesia on websites, the Commission located one posted a few months after Petitioner's visit to Amnesia, from a patron who based on her photo appeared to be in her 20's or 30's, who "expressed her frustration . . . about the difficulty in gaining entry in to the club, stating '. . . of course the only way to get in was if we bought bottles.'" (Id. at 4 (emphasis added)). Another reviewer, also appearing from her photo to be in her 20's or 30's, described seeing an "[i]nteresting and eclectic crowd" of people inside the club, including "people in their 20's, 30's, 40's." (*Id.*).

After considering the entire record, the Commission concluded that it "cannot establish by a preponderance of the evidence that Respondents required Complainant to purchase bottle service to gain access to the club due to his age." (*Id.*). Petitioner had the opportunity to appeal the Order After Investigation to the Commission's Chairperson. On August 17, 2012, Petitioner submitted to the Chairperson a document entitled "Appeal and Complaint," in which he raised various legal and factual objections to the Order After Investigation, as well as accusing the LEB's Executive Director, Carlos Velez, of intentional discrimination against

Petitioner "motivated by Velez's prejudice . . . against Euro-Americans." (Ex. 9 at 1).[3] Petitioner declined the opportunity to submit additional comments in support of his appeal. (Aff. ¶ 20). On January 11, 2013, after reviewing the record, the Chairperson issued a Determination and Order After Review (the "Order After Review") that affirmed the Order After Investigation. (Ex. 10).

D. The Instant Proceeding

On February 8, 2013, Petitioner filed this special proceeding, in which he asks that the Court "reverse" the Commission's decision and "find that Petitioner was unlawfully discriminated against because of his age." (Pet. at 13). Subsequently, Petitioner filed a "Supplement to Petition" in which he purported to "add a Fourteenth Amendment procedural due process claim" to this special proceeding. (Supp. Pet. ¶ 1). This Fourteenth Amendment claim is not brought under a statutory cause of action such as 42 U.S.C. § 1983, and it seeks no relief in addition to the relief already sought in the Petition. As the basis of his Fourteenth Amendment claim, Petitioner concedes that the Commission's "investigation procedures are sufficient to satisfy procedural due process—so long as the procedures are followed" (Supp. Pet. ¶ 4), but claims that his case was insufficiently investigated.

ARGUMENT

The Petition should be dismissed on two grounds. *First*, the Petition must be dismissed because Petitioner's claims before the Commission are barred under the election of remedies provisions in Admin. Code § 8-109(f)(iii) and Executive Law 297(9). Petitioner filed a discrimination complaint with the State DHR, which was dismissed for lack of probable cause, and then filed a complaint with the Commission regarding the same incident and alleging the

[3] Petitioner provided no basis for this accusation of prejudice against "Euro-American[s]" other than that "[o]n information and belief, Velez is Latin-American and Catholic." (Ex. 9 at 4).

same facts, only substituting an allegation of age discrimination in place of his prior allegation of gender discrimination. It is well settled that such duplicative discrimination complaints are statutorily barred. *See, e.g.*, *Emil*, 49 N.Y.2d at 968; *Benjamin*, 57 A.D.2d at 403.

Second, the Petition must be dismissed because it fails to state a claim on which relief may be granted. The Petition provides no basis to reverse the Commission's determination, because the Commission's decision was based on substantial evidence and the law, and its investigation was not abbreviated, one-sided, or biased. Moreover, Petitioner's claim of a procedural due process violation is nothing more than a rehashing of his objections to the Commission's decision cast in constitutional terms. A procedural due process claim cannot survive where, as here, due process has been satisfied by the availability of a specific judicial remedy – this special proceeding – for any alleged procedural error in an administrative determination. *Velella*, 13 A.D.3d at 202; *C/S Window Installers*, 304 A.D.2d at 380.

I. The Petition Should Be Dismissed as Barred by the Election of Remedies Provisions in Admin. Code § 8-109(f)(iii) and Executive Law § 297(9)

Having elected to bring his discrimination complaint to the State DHR, and having had that complaint dismissed for lack of probable cause, Petitioner was barred from subsequently bringing a complaint with the Commission based on the same incident. Section 8-109(f)(iii) of the City Human Rights Law, the "election of remedies" provision, provides in part:

> ***The commission shall not have jurisdiction to entertain a complaint if*** *. . .* ***[t]he 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.***

N.Y.C. Admin. Code § 8-109(f)(iii) (emphasis added). The plain language of this section deprives the Commission of jurisdiction over discrimination complaints where the complainant

has previously filed a complaint with the State DHR involving the same grievance and it has been subject to a final determination. Similarly, the State Human Rights Law provides that "[a]ny 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" with the State DHR or a local human rights commission. N.Y. Exec. L. § 297(9).

It is undisputed that Petitioner "previously filed a complaint" with the State DHR "alleging an unlawful discriminatory practice" and that "a final determination has been made thereon." Admin. Code § 8-109(f)(iii). Petitioner, however, incorrectly contends that the statutory bar of 8-109(f)(iii) does not apply, claiming that his State DHR complaint and Commission complaint dealt with two different "grievances." Thus, Petitioner argues that a person who suffers a single incident of discrimination allegedly based on, for example, race, color, and national origin, has a separate "grievance" under § 8-109(f)(iii) from that single incident for each different alleged basis of discrimination (Pet. ¶¶ 51, 56), and could successively bring three separate complaints before the Commission and/or the State DHR – the first based on race, the second on color, and the third on national origin. This contention is wholly without support in the statutory language or case law.

Petitioner fails to address any of the controlling cases, including several decisions specifically cited by the Commission, all of which hold directly to the contrary – that the election of remedies provisions preclude subsequent complaints based on the same alleged ***incident*** or course of conduct, regardless of whether a new type of discriminatory intent is alleged. *See, e.g.*, *Emil*, 49 N.Y.2d at 968 (dismissal of prior discrimination complaint by State DHR "precludes the plaintiff from commencing an action in court ***based on the same incident***"); *Benjamin*, 57 A.D.2d at 403 (Commission's dismissal of plaintiff's prior discrimination complaint based on

race and disability barred subsequent claim of discrimination on basis of national origin and different disability "***based on the same continuing allegedly discriminatory underlying conduct*** asserted in the Commission proceedings"); *Craig-Oriol v. Mount Sinai Hosp.*, 201 A.D.2d 449, 450 (2d Dep't 1994) (State DHR's dismissal of age discrimination claim barred subsequent race discrimination claim "***encompassing the same allegedly invidious behavior***"); *Higgins v. NYP Holdings, Inc.*, 836 F. Supp. 2d 182, 189 (S.D.N.Y. 2011) (election of remedies bar "preclude[s] not only Higgins's race-based claims, but also his claims based on his Muslim faith . . . [and disability] because Higgins ***presented these same operative events to the SDHR***, which did not find probable cause"); *Rosario v. N.Y.C. Dep't of Educ.*, 2011 U.S. Dist. LEXIS 41177, at *5 (S.D.N.Y. Apr. 15, 2011) (barring subsequent national origin discrimination claim where "[a]lthough the NYSDHR complaint alleged discrimination based on arrest record, marital status, and sex as opposed to discrimination based on national origin, ***the conduct underlying both claims is the same***"); *Borum v. Village of Hempstead*, 590 F. Supp. 2d 376, 383 (E.D.N.Y. 2008) ("While Plaintiff may have couched her [State DHR] claim as discrimination based only upon 'creed,' ***it is clear that her present claims arise out of the same incident forming the basis for the claim before the [State DHR], and are therefore barred.***") (all emphases added).[4]

Particularly where, as here, a human rights agency has already determined that an alleged discriminatory incident was not the result of discrimination, a second complaint cannot

[4] Neither of the inapposite cases cited by Petitioner (Pet. ¶ 53) even involves the State or City Human Rights Law election of remedies provisions, much less authorizes the filing of duplicative discrimination claims. In fact, *Baltimore S.S. Co. v. Phillips*, 274 U.S. 316 (1927) supports the Commission's position, not Petitioner's. There, the U.S. Supreme Court held that an injured plaintiff who did not recover in an admiralty action could not thereafter bring a negligence action based on the same incident. *Id.* at 321-22. The other case on which Petitioner relies, *Herrmann v. Braniff Airways, Inc.*, 308 F. Supp. 1094 (S.D.N.Y. 1969), held that *two different plaintiffs* who each sued on behalf of a different decedent killed in a single airplane crash had two separate claims within the meaning of the federal removal statute, and the decision is thus not remotely on point.

be brought based on the same incident merely by alleging a different type of discriminatory animus. For instance, in *Benjamin*, the First Department held that the plaintiff's discrimination claims based on national origin and a disability were barred by the Commission's dismissal of prior discrimination claims based on skin color and a different disability, observing that "[t]he Commission . . . determined . . . that the disciplinary action taken against plaintiff was based on substandard job performance." 57 A.D.3d at 404. Similarly, the Second Department held in *Craig-Oriol* that plaintiff's race discrimination claims were barred where the State DHR had found that her age discrimination claim "was unfounded." 201 A.D.2d at 449. Here, similarly, the State DHR concluded that Petitioner was not asked to purchase bottle service to enter the club for a discriminatory reason, but rather, "***respondent 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.***" (Ex. 2 at 1-2 (emphasis added)). Petitioner was not entitled to relitigate before the Commission the same allegedly discriminatory action that the State DHR already found was taken for "non-discriminatory reasons."[5]

There are only three limited exceptions to the election of remedies bar for prior State DHR decisions under the State Human Rights Law, none of which are applicable here:

> [W]here 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.

[5] Nor can Petitioner escape the election of remedies bars simply by virtue of having included "David L.N.U." as an additional defendant in his Commission complaint but not his State DHR complaint. *See, e.g., Lyman v. City of New York*, 1997 U.S. Dist. LEXIS, at *14 (S.D.N.Y. Aug. 20, 1997) ("The fact that Mazer was not named in the NYCCHR complaint . . . do[es] not change this result, because the present claims are based on the same facts as the claims raised in the NYCCHR complaint."); *Brown v. Wright*, 226 A.D.2d 570, 571 (2d Dep't 1996) (election of remedies barred claim "arising out of the same facts, against an additional defendant who was not named in the administrative complaint").

Exec. L. § 297(9). First, a dismissal by the State DHR that provides that it is for "administrative convenience" will not bar a subsequent complaint, but such a statement must be explicit in the dismissal order. *York v. Ass'n of the Bar of the City of N.Y.*, 286 F.3d 122, 126 n.2 (2d Cir. 2002) ("[A] dismissal for administrative convenience is a specific statutory instrument, and the NYSDHR did not use that instrument to dismiss the [] discrimination claims."). Here, to the contrary, the State DHR's dismissal was for lack of probable cause. Second, the election of remedies bar does not apply where a State DHR complaint is dismissed as untimely, which is also clearly not the case here. Finally, the State DHR has the power to dismiss a complaint "on the grounds that the election of remedies is annulled," which also did not occur here. Nor did Petitioner at any time before or after the State DHR issued its Order ever request that the DHR dismiss his complaint on the grounds of administrative convenience or annulment of the election of remedies, either of which could have preserved his claims for subsequent filing with the Commission.

Because the State DHR dismissed Petitioner's discrimination claim for lack of probable cause, Petitioner was barred under State and City Human Rights Law election of remedies provisions from bringing a subsequent complaint before the Commission based on the same incident. On that ground alone, the Commission's dismissal should be affirmed, and the Petition dismissed.

II. The Petition Should Be Dismissed Because It Does Not State a Claim on Which Relief May Be Granted

The Petition must also be dismissed on additional grounds: The Commission's decision that there was no probable cause to conclude that Petitioner was subject to age discrimination was not arbitrary and capricious, or lacking in a rational basis, and the

Commission's investigation was not abbreviated, one-sided, or biased. Accordingly, the Commission's decision must be upheld.

A. The Commission's No Probable Cause Determination Was Supported by Substantial Evidence and Was Not Arbitrary or Capricious

The Petition must be dismissed, and the Commission's determination affirmed, because the Commission's Orders After Investigation and After Review were based on substantial evidence and were neither arbitrary nor capricious. Under section 8-113(d) of the New York City Administrative Code, 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 probable cause 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 (emphasis added). The Commission's probable cause determination is afforded substantial deference and will not be overturned unless it is arbitrary or capricious, or lacks a rational basis. *Mitchell v. Comm'r Human Rights*, 234 A.D.2d 128, 128 (1st Dep't 1996); *see Wu v. N.Y.C. Comm'n Human Rights*, 84 A.D.3d 823, 824 (2d Dep't 2011); *Doin v. Continental Ins. Co.*, 114 A.D.2d 724, 725-26 (3d Dep't 1985).

Pursuant to section 8-123(e) of the Administrative Code, "[t]he findings of the commission as to the facts shall be conclusive if supported by substantial evidence on the record considered as a whole." Admin. Code § 8-123(e); *see Orlic v. Gaitling*, 44 A.D.3d 955, 956 (2d Dep't 2007) ("Findings of fact made by the [Commission] must be regarded as conclusive if supported by substantial evidence on the record considered as a whole."). "Substantial evidence 'means such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact.'" *Rainer S. Mittl, Ophthalmologist, P.C. v. N.Y.S. Div. Human Rights*, 100

N.Y.2d 326, 331 (2003) (quoting *300 Gramatan Ave. Assoc. v. N.Y.S. Div. Human Rights*, 45 N.Y.2d 176, 180 (1978)).[6] The question of whether there is substantial evidence to support a human rights agency determination "is solely a question of law." *Id.* Where substantial evidence supports the Commission'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 Human Rights*, 220 A.D.2d 79, 82 (1st Dep't 1996). The standard of review of the Commission's determination of no probable cause is thus whether its determination was arbitrary or capricious, or lacked a rational basis. Only in such a case can the Commission's determination be overturned. *Mittl*, 100 N.Y.2d at 331; *Wu*, 84 A.D.3d at 824; *see also Maltsev v. N.Y.S. Div. Human Rights*, 31 A.D.3d 641, 641 (2d Dep't 2006).

Here, the Commission's dismissal of Petitioner's discrimination claim was based on substantial evidence in the record as a whole and was neither arbitrary nor capricious. The Commission correctly determined that there was not a credible basis to conclude by a preponderance of the evidence that Petitioner was asked to purchase bottle service on account of age discrimination. As an initial matter, the Commission properly considered the finding of the State DHR, which investigated Petitioner's original complaint, that "respondent 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." (Ex. 2 at 1-2).

Furthermore, Petitioner concedes that there were no particular words or actions by Amnesia or its agents that led him to believe at the time of the incident that he was the victim of

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[6] Cases addressing review of Commission decisions cite interchangeably to cases reviewing decisions of the State DHR, which involve the same standard of review. *See, e.g., 119-121 E. 97th St. Corp. v. N.Y.C. Comm'n Human Rights*, 220 A.D.2d 79, 81-82 (1st Dep't 1996); *Stern v. N.Y.C. Comm'n Human Rights*,

Continued...

age discrimination. Rather, Petitioner believed that he was asked to purchase bottle service because of his gender, not his age (Pet. ¶ 6), and "he did not realize until the State's decision on September 16, 2010" that it was allegedly due to his age (*id.* ¶ 37). After the State DHR Order commented on the youthful appearance of the club's clientele, Petitioner filed a new, substantially identical complaint with the Commission in which he now stated that he believed the incident was due to his age.[7] Given Petitioner's previous sworn complaint before the State DHR that he "believe[d] [he] was discriminated against because of [his] sex" (Ex. 1 at 4), the Commission was entitled to view Petitioner's subsequent account of the event skeptically. *Cf. Sosna v. Am. Home Prods.*, 298 A.D.2d 158, 158 (1st Dep't 2002) (disregarding subsequent affidavit at odds with prior testimony).

While Petitioner ascribes great significance to the comment in the State DHR Order that "the vast majority of the patrons of the club appeared to be under 30" (Ex. 2 at 2), this statement has little if any probative value as to whether Amnesia did anything to turn away older patrons, rather than simply tending to attract mostly younger patrons, as many dance clubs undoubtedly do. (*See* Ex. 4 (Amnesia Ans.) ¶ 17 ("Upon information and belief, Amnesia, and

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38 A.D.3d 302, 302 (1st Dep't 2007) (citing *Cornelius v. N.Y.S. Div. Human Rights*, 286 A.D.2d 329 (2d Dep't 2001)).

[7] Petitioner incorrectly suggests that the State DHR Order contained new "facts . . . subsequently revealed" (Pet. ¶ 39) that Petitioner did not possess when he filed his State DHR complaint and that necessitated bringing a new complaint with the Commission. That is not the case. When he filed his State DHR complaint, Petitioner was in possession of all of the relevant facts that he later asserted in his age discrimination complaint with the Commission: his recollection that allegedly individuals in their 20's or 30's were admitted to the club without purchasing bottle service. Moreover, in addition to having knowledge of these facts when he filed his original complaint, Petitioner was undisputedly on notice at that time that the State DHR did not have jurisdiction over age discrimination in public accommodations. (Ex. 1 at 4 (State DHR complaint form completed by Petitioner, stating that age discrimination "does not apply to Public Accommodations")). Thus, as the Commission observed, "[i]f in fact Complainant believed he was also being discriminated against because of his age, Complainant could have come to the Commission instead of the NYSDHR immediately after the initial denial of entry." (Ex. 8 at 2).

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.")). The State DHR investigator who visited Amnesia did not report that any individuals over age 30 were being turned away or required to purchase bottle service for entry. Accordingly, there was no basis for the Commission to conclude from the State DHR decision that Petitioner was asked to purchase bottle service due to age discrimination – which, indeed, would be contrary to the State DHR's own 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."

The Commission's determination was also supported by its review of public comments posted on the Internet by patrons of Amnesia. Among these comments was one posted a few months after Petitioner's visit to Amnesia and prior to the filing of his age discrimination complaint, from a patron who appeared to be in her 20's or 30's and who "expressed her frustration . . . about the difficulty in gaining entry in to the club, stating '. . . of course the only way to get in was if we bought bottles.'" (Ex. 8 at 4). Such comments, posted roughly contemporaneously to Petitioner's visit to Amnesia, indicated that Amnesia had also asked individuals in their 20's or 30's to purchase bottle service to gain entry to the club.

On this record, it was not arbitrary and capricious for the Commission to conclude that there was not probable cause to find by a preponderance of the evidence that Petitioner was the victim of age discrimination. Accordingly, the Commission's no probable cause determination must be affirmed.

B. The Commission's Investigation Was Not Abbreviated, One-Sided, or Biased

The Commission has broad discretion "to decide how to conduct its investigations." *Stern v. N.Y.C. Comm'n Human Rights*, 38 A.D.3d 302, 302 (1st Dep't 2007) (citing *Cornelius v. N.Y.S. Div. Human Rights*, 286 A.D.2d 329 (2d Dep't 2001)); *Wu*, 84 A.D.3d at 824 (quoting *Levin v. N.Y.C. Comm'n Human Rights*, 12 A.D.3d 328, 328 (1st Dep't 2004)) (Commission "has broad discretion in determining the method to be employed in investigating a claim"). "It is within the discretion of the [human rights agency] to decide the method or methods to be employed in investigating a claim." *Chirgotis v. N.Y.S. Div. Human Rights*, 128 A.D.2d 400, 403 (1st Dep't 1987) ("where 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" even if no witnesses were interviewed and no hearing was conducted).

The Commission's determination of no probable cause will not be reversed for insufficient investigation unless the Commission's investigation was "abbreviated or one sided" or "biased." *David v. N.Y.C. Comm'n Human Rights*, 57 A.D.3d 406, 407 (1st Dep't 2008); *Chirgotis*, 128 A.D.2d at 403 (holding that State DHR determination of no probable cause "should be overturned as capricious only where the record demonstrates that its investigation was abbreviated or one-sided").

Here, the Commission gave Petitioner's complaint the investigation that it merited. The Commission conducted an intake interview with Petitioner prior to the filing of his complaint, in which he explained his discrimination claim to a Commission attorney. (Aff. ¶ 5). The Commission served Petitioner's complaint on his behalf, demanded and obtained a Verified Answer from Amnesia (Ex. 4), and gave Petitioner an opportunity to submit a Rebuttal, which he did (Ex. 5). The Commission obtained and reviewed the State DHR's entire file on Petitioner's

prior discrimination complaint, including its decision, investigation report, and supporting materials. (Aff. ¶ 9; Ex. 6). The Commission attempted diligently but unsuccessfully to locate and interview the individual "David" named in Petitioner's complaint, and to obtain Amnesia's surveillance video from the night in question. (Aff. ¶ 10). The Commission reviewed public comments posted on the Internet by patrons of Amnesia that were relevant to Petitioner's complaint. (Ex. 7).

Upon reviewing the entire record, the Commission's LEB properly dismissed the complaint, finding no probable cause for a conclusion of age discrimination, as well as no jurisdiction over the complaint due to Petitioner's prior filing of a complaint with the State DHR based on the same incident. Petitioner had the opportunity to appeal this decision to the Commission's Chairperson, which he did, submitting a 22-page brief in which he objected at length to the legal and factual grounds for the LEB's decision and accused the LEB's Executive Director, without any basis, of personal discriminatory animus and bias against "Euro-Americans." (Ex. 9 at 1). Petitioner was given the chance to submit additional comments in support of his appeal, which he declined. (Aff. ¶ 20). The Chairperson, after reviewing the record, affirmed the dismissal. (Ex. 10). The Commission's determination was correct and should be upheld, and the Petition dismissed.[8]

Petitioner contends that the Commission's investigation was deficient because the Commission allegedly (1) "[i]gnore[d] that one act of discrimination violates the human rights

[8] In any case, the relief sought by Petitioner is improper in that he asks this Court to "reverse" the Commission's determination and "find that Petitioner was unlawfully discriminated against because of his age by Amnesia J.V. LLC and David 'L.N.U.'" (Pet. at 13). Judicial review of administrative agency decisions is "confined to the 'facts and record adduced before the agency,'" *Featherstone v. Franco*, 95 N.Y.2d 550, 554 (2000) (quoting *Yarbough v. Franco*, 95 N.Y.2d 342, 347 (2000)), and scope of this special proceeding is limited to reviewing the Commission's decision based on the administrative record, not finding new facts outside of that record.

law"; (2) relied on the Internet comments of Amnesia's patrons, which contained hearsay;[9] (3) "[s]peculat[ed]" that the Amnesia doorman was an independent contractor; (4) "blamed" Petitioner for the inability to obtain surveillance video; and (5) "[m]isrepresent[ed] . . . what Den Hollander knew and when he knew it[,] the State Human Rights Division's findings[,] and City, State and the common law." (Pet. ¶ 58). But these are nothing more than disagreements with the Commission's factual and legal conclusions, and do not show that the Commission's investigation was abbreviated, one-sided, or biased.

Petitioner also complains that the Commission did not locate and/or interview "David" or Petitioner's friend, serve interrogatories, or obtain certain documents. (Supp. Pet. ¶ 8). The Commission, however, has no obligation to interview particular witnesses, obtain particular documents, or propound interrogatories, and may make its determination solely on the basis of the parties' written submissions. *See, e.g.*, *Chirgotis*, 128 A.D.2d at 403 (affirming no probable cause determination in which no interviews were conducted where parties' written submissions "were thoroughly considered"); *Pascual v. N.Y.S. Div. Human Rights*, 37 A.D.3d 215, 216 (1st Dep't 2007) (State DHR had no obligation to subpoena documents where "[t]he information supplied by the parties was sufficient for the Human Rights Division to make its determination"); *Block v. Gatling*, 26 Misc. 3d 1228(A), 2010 N.Y. Misc. LEXIS 352, at *12-13 (Sup. Ct. N.Y. Cty. Feb. 18, 2010), *aff'd*, 84 A.D.3d 445 (1st Dep't 2011) ("Petitioner complains that certain people were not interviewed or solicited for information, but it is clear that both parties submitted pleadings which contained various factual assertions and statements, and both

[9] The Commission may properly consider hearsay in making its determinations. *Bellamy v. N.Y.S. Div. Human Rights*, 8 A.D.3d 269, 270 (2d Dep't 2004) ("the fact that the Division's determination rested in part on alleged hearsay statements does not warrant reversal").

were invited to submit evidence, all of which was considered."); *Givens v. Gatling*, 2011 N.Y. Misc. LEXIS 3551, at *13 (Sup. Ct. N.Y. Cty. July 11, 2011) ("Courts have upheld no probable cause determinations which were based solely on written submissions . . . . As such, the fact that the Commission may not have interviewed witnesses is without import."); *Stillman v. N.Y.S. Div. Human Rights*, 2008 N.Y. Misc. LEXIS 8096, at *2, 5 (Sup. Ct. N.Y. Cty. Nov. 19, 2008) (affirming no probable cause determination where State DHR "conducted an investigation by submission," because "Petitioner was afforded a full opportunity to present his written arguments to DHR"). Accordingly, Petitioner cannot demonstrate that the Commission's investigation was "so one-sided as to render the determination based upon it arbitrary or capricious," *Lee v. N.Y.S. Div. Human Rights App. Bd.*, 111 A.D.2d 748, 748 (2d Dep't 1985), and the Commission's decision must be upheld.

III. Petitioner Fails to State a Claim for a Procedural Due Process Violation

In a Supplement to his Petition, Petitioner purports to bring a "Fourteenth Amendment procedural due process claim" in this special proceeding. (Supp. Pet. ¶ 1). Petitioner does not invoke any cause of action such as 42 U.S.C. § 1983 under which to bring this claim, apparently asserting an implied right of action under the Fourteenth Amendment itself. Nor does Petitioner demand any specific relief on his constitutional claim in addition to the relief he seeks in this special proceeding.

In any event, Petitioner's purported Fourteenth Amendment claim must be dismissed, because Petitioner has failed to identify any violation of his right to procedural due process. Petitioner concedes, as he must, that the Commission's "investigation procedures are sufficient to satisfy procedural due process." (Pet. ¶ 4). *See Givens v. City of New York*, 2012 U.S. Dist. LEXIS 2892, at *17-18 (S.D.N.Y. Jan. 10, 2012) (Commission's "panoply of

procedures" satisfy due process) (citing *Kremer v. Chem. Const. Corp.*, 456 U.S. 461, 483-85 (1982) (holding that State DHR's procedures, which the Commission follows, comport with due process)); *Rosu v. City of New York*, 2012 U.S. Dist. LEXIS 178875, at *11-13 (S.D.N.Y. Dec. 13, 2012) (same). Rather, the gravamen of Petitioner's due process claim is that the Commission did "[n]ot properly conduc[t] an investigation" of his particular case by failing to contact certain witnesses, obtain certain documents, or serve interrogatories. (Supp. Pet. ¶¶ 6, 8). Yet, as discussed above, given the Commission's broad discretion in how to conduct its investigations, *see supra* at 19-22, Petitioner is unable to allege that the Commission failed to take any step in its investigation of his complaint that the Commission was required to take. *Rosu*, 2012 U.S. Dist. LEXIS 178875 at *14 ("none of these alleged failures were duties that [the Commission] had"); *see Chirgotis*, 128 A.D.2d at 403 (no requirement to conduct interviews); *Block*, 2010 N.Y. Misc. LEXIS 352 at *12-13 (same); *Givens*, 2011 N.Y. Misc. LEXIS 3551 at *13 (same); *Pascual*, 37 A.D.3d at 216 (no requirement to subpoena documents). Since he cannot prevail on his claim that the Commission's investigation was abbreviated, one-sided, or biased, Petitioner certainly cannot make the much more difficult showing that the Commission failed to provide him with the constitutional minimum of due process, which requires only "notice and the opportunity to be heard." *Velella*, 13 A.D.3d at 202 ("There is no constitutional guarantee of any particular form of procedure.").

Moreover, Petitioner does not and cannot allege any procedural error by the Commission that he does not have the opportunity to raise in this Court through the instant special proceeding, which is the exclusive remedy provided by the City Human Rights Law for procedural errors by the Commission. *See* N.Y.C. Admin. Code § 8-123. It is well established that there can be no deprivation of procedural due process from an administrative agency's

decision where, as here, "an adequate postdeprivation opportunity to be heard has been provided by this [special] proceeding." *C/S Window Installers, Inc. v. N.Y.C. Dep't of Design & Constr.*, 304 A.D.2d 380, 380 (1st Dep't 2003) (rejecting procedural due process claim against City agency where availability of review in CPLR article 78 proceeding provided all the process that was due).[10] As the First Department stated in *Velella v. N.Y.C. Local Conditional Release Comm'n*, 13 A.D.3d 201 (1st Dep't 2004):

> Even were we to find that any of the petitioners were denied an essential aspect of procedural due process, we would find that, under the circumstances of these cases, each of the petitioners had an adequate post-deprivation opportunity to be heard in these article 78 proceedings.

Id. at 202 (internal citations omitted); *Mordukhaev v. Daus*, 457 F. App'x 16, 21 (2d Cir. 2012) ("[W]e have held that the availability of an Article 78 proceeding to challenge any alleged deficiencies in an administrative adjudication is sufficient to satisfy due process."); *Hellenic Am. Neighborhood Action Comm. v. City of New York*, 101 F.3d 877, 880 (2d Cir. 1996) ("[T]he Due Process Clause of the Fourteenth Amendment is not violated when a [government] employee intentionally deprives an individual of property or liberty, so long as the [government] provides a meaningful post-deprivation remedy.").

CONCLUSION

For the foregoing reasons, the Petition should be dismissed and the Commission's determination should be upheld and affirmed.

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[10] Petitioner appears to rely solely on *Rosu v. City of New York*, 2012 U.S. Dist. LEXIS 178875 (S.D.N.Y. Dec. 13, 2012), for his procedural due process claim, but *Rosu* in fact dismissed such a claim because the plaintiff, like Petitioner here, failed to articulate any grounds on which the Commission's investigation violated due process. *Id.* at *14. To the extent *Rosu* suggests that a procedural due process claim might still be available against the Commission for insufficient investigation, despite the availability of an adequate judicial remedy through a special proceeding, it is not binding on this Court, whereas *C/S Window* and *Velella*, which hold to the contrary, are controlling.

Dated: April 5, 2013
New York, New York

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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In the Matter of the Application of — Index No. 13-100299

ROY DEN HOLLANDER — (Part 33; Hunter, J.)

Petitioner,

-against-

THE CITY OF NEW YORK COMMISSION ON HUMAN RIGHTS,

Respondent.

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VERIFIED REPLY to CITY'S ANSWER with CORRECTIONS of the AFFIRMATION of LEONARD M. BRAMAN pursuant to CPLR 405

STATE OF NEW YORK)
) ss:
COUNTY OF NEW YORK)

I, Roy Den Hollander, the petitioner, being duly sworn, depose and say:

1. As a result of the time constraints for filing papers, the Petitioner's examination of the investigation file of Carlos Velez ("Velez"), the Law Enforcement Director for the City of New York Commission on Human Rights ("City HR"), occurred after the filing of the Verified Petition, and the receipt of documents from the file occurred after the filing of the Supplement Petition.

2. Petitioner's initial pleadings consist of the Verified Petition, February 8, 2013, the Supplement Petition, February 28, 2013, and Exhibits to the Supplement Petition, March 14, 2013. Some references by the Petitions need to be clarified:

   a. Verified Petition ¶ 20 refers to Supplement Petition ¶¶ 23, 24, 26, which are supported by Exhibits to the Supplement Petition, Ex. C, "Tasty 1027."

b. Verified Petition ¶ 21 refers to Supplement Petition ¶¶ 25, 26, which are supported by Exhibits to the Supplement Petition, Ex. D, "Maria W. NY".

c. Supplement Petition ¶ 19 is supported by Exhibits to the Supplement Petition, Ex. A.

3. Two corrections to the Supplement Petition are that "Elite 10" in Supplement Petition ¶ 20 and ¶ 21 should be replaced with "Kelly R. Paris France" and both paragraphs are supported by Exhibits to the Supplement Petition, Ex. B.

Reply to new material in City HR Answer, specifically the Affirmative Defenses

The Petitioner asserts that all the Affirmative Defenses cited by the City HR attorney Leonard M. Braman ("Braman") do not apply. (Braman Answer at 6-7). One defense, by Braman is that the Petitioner has not complied with the Notice of Claim provisions of New York General Municipal Law §§ 50(e), (h), and (i), and N.Y.C. Admin. Code § 7-201. That is false, as shown at Petitioner Reply, Ex. C, Notice of Claim.

Correction of material in Braman Affirmation and providing of omissions under CPLR 405

4. Correction to Braman Affrm. ¶ 2, the Petitioner specifically told the New York State Division of Human Rights, "I **believe** I was discriminated against because of my: sex." (Verified Petition, Ex. D, *State Human Rights Division Complaint* at p. 4 (emphasis added)).

5. Correction to Braman Affirm. ¶ 3, the State Division of Human Rights concluded "[t]he record is not supportive of complainant's allegations of sex discrimination. . . . There is a lack of evidence that respondent's treatment of complainant was based on his sex." (Verified Petition, Ex. F, State Division of Human Rights *Determination and Order After Investigation* ("*State DHR Order*") at 1, 2).

6. Correction to Braman Affirm. ¶ 7 concerning Amnesia's Verified Answer submitted to City HR:

a. Amnesia's corporate officer, Henry Rosas, who verified Amnesia's Answer did not have personal 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). (Braman Affirm., Ex. 5, Petitioner Rebuttal ¶¶ 1, 2).

b. Mr. Rosas denied that Amnesia required the Petitioner and his friend to buy a $350 bottle of alcohol to enter the club (Braman Affirm., Ex. 4, Amnesia Verified Answer ¶ 4), but his attorney, Joseph Anci, admitted to the State's Division of Human Rights that the incident of alleged discrimination in the Verified Complaint at ¶ 4 (Braman Affirm., Ex. 3) was accurate in that it concerned the purchase of a bottle of alcohol for $350 in order for the complainant and his attorney friend to enter the nightclub. (Petitioner Reply, Ex. A, Anci Response to N.Y. State Division of Human Rights, February 2, 2010, at 3 last paragraph and at 4 last two full paragraphs.)

c. Mr. Rojas in Amnesia's Verified Answer at ¶ 7 (Braman Affirm., Ex. 4) swore the nightclub does not have a policy or practice of age discrimination, yet attorney Anci admitted that "it is important for Amnesia to ensure that the individuals who are admitted to Amnesia are representative of the establishment's attitude and image. To further that end, Amnesia admits all individuals regardless of gender, class, religion, race and sexual orientation, so long as those individuals best represent the image of the establishment." (Petitioner Reply, Ex. A, Anci Response to N.Y. State Division of Human Rights, February 2, 2010, at 3-4,

bottom two sentences starting at 3).[1] As the State Division of Human Rights found, that image appears to be one of youth: "[b]ased 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." (Braman Affirm., Ex. 2, *State DHR Order* at 2).

Public lunch counters in the Deep South during the 1960s also limited the individuals they served in order to maintain their image—white. But in doing so, they violated the rights of others. If Amnesia wants the right to admit only persons that fit its alleged image, then it should acquire a membership club liquor license rather than one for a public accommodation.

d. Amnesia's Verified Answer at ¶ 17 asserts Amnesia does not enforce an image of youth and asserts it is the victim of the age demographics for those who generally attend nightclubs. Such does not negate that Amnesia's policy of enforcing a youthful image resulted in discrimination against Petitioner and his friend based on age. Otherwise, an all-white country club could say everybody here is white because it's white people who typically play golf and tennis.

7. Addition to Braman Affirm. ¶ 9, Braman affirmed under penalty of perjury that Velez obtained the State Division of Human Rights' file, which included its decision, investigation report, and supporting materials. However, when Petitioner examined Velez's investigation file on February 21, 2013, the only State Division of Human Rights document was the *State DHR Order*—there was no investigation report, no supporting materials.

[1] It is revealing and an admission of sorts that Amnesia did not include age in the categories it claims not to discriminate against.

8. Correction to Braman Affirm. ¶ 10, the only indication of an attempt to locate the Amnesia doorman "David" (who required the Petitioner and his friend to buy a bottle for admission) that was found in Velez's investigation file was a letter addressed to "David" at Amnesia's business address that was returned to City HR as undeliverable. There was no indication that Velez tried any other means to contact "David." There were also no emails, letters, telephone logs, or evidence of in-person visits to Amnesia's manager or officers in an attempt to locate "David."

9. Correction of the inference from Braman Affirm. ¶¶ 13, 14 that Petitioner was jurisdictionally barred from bringing an age discrimination complaint because of N.Y. Executive Law § 279(9) and the following cases: *Emil v. Dewey*, 49 N.Y.2d 968 (1980); *Bhagalia v. State*, 644 N.Y.S.2d 398 (A.D. 3 Dept. 1996); *Benjamin v. N.Y.C. Dept. of Health*, 2007 WL 3226958 at *5 (A.D. 2 Dept. 1994); *Rosario v. N.Y.C. Dept. of Education*, 2011 U.S. Dist LEXIS 41177 at *4 (S.D.N.Y. 2011). (Ex. A, Order at p. Tres). N.Y. Executive Law § 279(9) and these cases state that a person alleging discrimination has a choice: he can either go to court or file a complaint with a human rights agency, but not both. The Petitioner initially filed a complaint with the State Division of Human Rights, but when its decision pointed out the discrimination was likely based on age, a different cause of action over which it had no jurisdiction, Petitioner immediately made a complaint for age discrimination to City HR. At that point in time, there had been no court involvement in this matter, so the statute and cases relied on by Velez in his *Determination and Order After Investigation* ("*Admin. Closure*") did not apply.

10. Correction of the language in Braman Affirm. ¶ 14 that uses the word "claim" while Velez used the word "action." Braman Affirm. ¶ 14 states the Velez cited to *Emil v. Dewey*, 49 N.Y.2d 968, 968 (1980) for the proposition that "the Court of Appeals has held this provision

[N.Y. Executive Law § 279(9)] to bar a subsequent **claim** 'based upon the same incident' as a prior State DHR complaint" (emphasis added), but Velez used the word "action"—not claim: "[t]he New York Court of Appeals interpreted New York Executive Law $ 297(9) as precluding a subsequent **action** that is 'based upon the same incident' as the Agency complaint.'" (Braman Affirm., Ex. 9(A), *Admin. Closure* at Tres)(emphasis added). "Action" infers a cause of action; claim is linguistically more nebulous and might be interpreted as the fact situation that gives rise to one or more causes of action.

11. Correction of the inference from Braman Affirm. ¶ 15 that N.Y.C. Admin. Code §8-109(f)(iii) prevented City HR from having jurisdiction over Petitioner's age discrimination complaint. Velez was able to reach this conclusion only by an overly strained reading of the word "grievance" as meaning the fact situation and not the cause of action. (Verified Petition ¶¶ 46-55).

12. Correction of conclusions from Braman Affirm. ¶¶ 16, 17. Velez in reaching his conclusion that "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" not committed (N.Y.C. Admin. Code §1-03) gave greater probative weight to unauthenticated, unreliable, and hearsay Internet blogs than the findings of the trained investigators of the State Division of Human Rights who actually visited Amnesia. These investigators were required to determine whether the State had jurisdiction (Petitioner Reply, Ex. D, Information For Complainants) and in doing so, they concluded that it did not because age discrimination in public accommodations is beyond the authority of the State Division of Human Rights.

13. Correction of the inference from Braman Affirm. ¶ 18 that Velez considered the "entire record" when he actually relied on an Internet article critical about Petitioner, two Internet blogs (Exhibits to Supplement Petition, Exs. A, C, D), and a nonexistent video tape.

14. Clarification of Braman Affirm. ¶ 22. The City HR violated the Petitioner's procedural due process rights by failing to follow its procedure for investigating a discrimination complaint.

WHEREFORE, for the foregoing reasons, the Petitioner respectfully requests the Court annul the City of New York Commission on Human Rights decision that Amnesia did not discriminate against the Petitioner because of his age, and order such other and further relief as the Court deems just and proper.

Roy Den Hollander

Sworn to before me on the
28 day of April 2013

Notary Public

JOHN POPESCU
Notary Public - State of New York
NO. 01P06142750
Qualified in Bronx County
My Commission Expires 03-20-14

Exhibit A

LASASSO GRIESMEYER LAW GROUP PLLC
80 MAIDEN LANE - SUITE 2205 - NEW YORK, NEW YORK 10038 - TEL (212) 421-6000 - FAX (212) 421-6006

ROGER GRIESMEYER
MARIEL LASASSO

February 2, 2010

New York State Division of Human Rights
20 Exchange Place, 2nd Floor
New York, New York 10005

FEB 03 2010

Re: Case No. 10138862
Roy Den Hollander, Esq. v. Amnesia J.V. LLC
Response to the Complaint

Respondent, Amnesia J.V. LLC, denies the sole allegation of Complainant, Roy Den Hollander, that, on January 9, 2010, he was discriminated against when he was denied access to a private business, Amnesia, because he would not pay $350 to purchase a bottle of alcohol. Mr. Hollander suggests that he was only asked to pay the $350 because he was a male, and he allegedly witnessed that a "couple of groups of ladies entered without having to agree to buy a bottle for $350."

These bare-bone, self-serving statements by Mr. Hollander fail to establish a prima facie case of discrimination. It is unclear, but it appears that Mr. Hollander is claiming that he was denied access to Amnesia solely because he is a male. However, Mr. Hollander submits one isolated, unsubstantiated instance in an attempt to demonstrate a pattern, plan or policy of discrimination against males by Amnesia and its owners/managers/employees.

Mr. Hollander's Complaint Fails to State A Claim

In a discrimination claim before the Human Rights Division, a complainant has the burden of proving that he was/is a member of a protected class and that the respondent engages in discrimination against members of that class.

Unlike the case of *Braun v. Swiston*, 72 Misc.2d 661 (Sup. Ct. Erie Cty. November 27, 1972), Mr. Hollander fails to identify the specific discrimination against the male gender as a whole. In *Braun*, the New York State Supreme Court for Erie County found that the Plaintiffs, long-haired males, had been denied access to a restaurant, and therefore discriminated against, because long-haired females were permitted to access the restaurant

Here, Mr. Hollander has not shown, and cannot show, the same level of discrimination that is required to satisfy his burden under the Executive Law/Human Rights Law. First, Mr. Hollander's recitation of the facts, if true, only demonstrates that **he** was denied access to **Amnesia.** This allegation, alone, does not establish that either Amnesia has a policy of discrimination against males as a group, or engages in a pattern or practice of discrimination against males as a group. Further, Mr. Hollander fails to establish that he was prohibited from entering because he is a male. Second, Mr. Hollander never alleges, or submits any proof, that all men who entered, or who attempted to enter, Amnesia on the night in question were required to pay the $350 bottle charge. Third, Mr. Hollander never alleges, or submits any proof, that all women who entered, or who attempted to enter, Amnesia on the night in question were exempt from paying the $350 bottle charge.

Respondent's Rebuttal Statement of Facts/Affirmative Defenses

All bars and nightclubs are subject to occupancy restrictions pursuant to fire and building codes. As a result, Amnesia only has a limited amount of floor space on any given night. When maximum occupancy is approached, individuals either have to wait in line until patrons leave, or, they are presented with the opportunity to sit at a reserved table with the purchase of a bottle of alcohol. This option is presented to all individuals when there is a limit on space inside Amnesia. Additionally, if a group or party has already purchased a bottle and is sitting at a reserved table, the other members of their party can enter the club without having to purchase another bottle or take up an additional reserved table.

Mr. Hollander attempted to enter Amnesia at after 11:00 P.M. on a Saturday night. This is a very busy day, and time, for Amnesia. Typically, the club is very crowded at this time and, as mentioned above, the occupancy restrictions limit the admittance of new patrons. Accordingly, Mr. Hollander was offered the opportunity to enter the club immediately if he wanted to sit in a reserved space and purchase a bottle of alcohol. Mr. Hollander chose not to do so and removed himself from the line.

The $350 offer made to Mr. Hollander was purely a business decision and was not motivated in any way by any discriminatory intent or purpose. Amnesia is a business engaged in nightlife entertainment. As with any business, the number one priority is to become, operate, and remain a profitable venture. To that end, it is important for Amnesia to ensure that the individuals who are admitted to Amnesia are representative of the establishment's attitude and image. To further that end, Amnesia admits all individuals regardless of gender, class, religion,

race and sexual orientation, so long as those individuals best represent the image of the establishment.

It is to be expected that the reputation of Amnesia, in part furthered by diverse clientele, will attract individuals who would otherwise not seek to frequent the establishment. In those instances, and depending on the capacity at any given time, individuals, men and women alike, may be requested to purchase a bottle of alcohol in order to gain admittance. This practice is solely to protect the premium that is placed on occupancy during any given night. Therefore, in order to ensure that Amnesia does not lose business by admitting too many non-contributing individuals, the club requests that the individuals tender a good faith purchase in order to secure admission.

In certain circumstances the $350 bottle price is a starting point for negotiations. However, in this case, at no point did Mr. Hollander tender a counter-offer or ask if he could be admitted at a lower price or for a purchase of a less expensive spirit. Additionally, Mr. Hollander was not joining any other individual who was already inside the club and sitting at a reserved table.

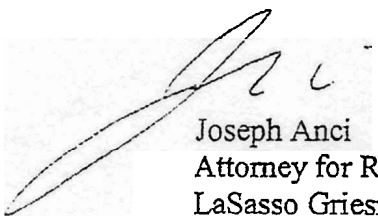
Clearly, there was, and is, no discriminatory animus behind the request that Mr. Hollander purchase a bottle of alcohol in order to gain admission to Amnesia. This request was merely a business decision, made without regard to his, or any individuals' gender, race, religion, sexual orientation or class. This request was a decision solely to protect the profitability of the establishment.

Furthermore, Mr. Hollander is a known Men's Rights Advocate and has filed a number of complaints and lawsuits against public establishments for alleged discrimination against the male

gender (see www.roydenhollander.com). This fact, coupled with the threadbare allegations proffered by Mr. Hollander in the instant complaint, demonstrate that this plea to the New York State Division of Human Rights is nothing more than his next publicity stunt. Mr. Hollander is attempting to manipulate the system in order to gain attention for his crusade to "battle the infringement of Men's Rights by the feminists and their allies."

Therefore, Mr. Hollander cannot establish probable cause for his claim, and the Division should find that there was no unlawful discrimination by Amnesia or any of its owners, managers and/or employees.

Respectfully,

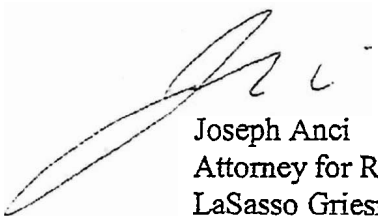


Joseph Anci
Attorney for Respondent Amnesia J.V. LLC
LaSasso Griesmeyer Law Group PLLC
80 Maiden Lane, Suite 2205
New York, New York 10038
(212) 421-6000
(212) 421-6006 fax
janci@lglawgroup.com

gender (see www.roydenhollander.com). This fact, coupled with the threadbare allegations proffered by Mr. Hollander in the instant complaint, demonstrate that this plea to the New York State Division of Human Rights is nothing more than his next publicity stunt. Mr. Hollander is attempting to manipulate the system in order to gain attention for his crusade to "battle the infringement of Men's Rights by the feminists and their allies."

Therefore, Mr. Hollander cannot establish probable cause for his claim, and the Division should find that there was no unlawful discrimination by Amnesia or any of its owners, managers and/or employees.

Respectfully,



Joseph Anci
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Exhibit B

ROY DEN HOLLANDER
Attorney at Law

545 East 14th Street, 10D
New York, N.Y. 10009

Tel: (917) 687-0652
rdhhh@yahoo.com

October 15, 2010

Patricia L. Gatling, Commissioner
New York City Commission on Human Rights
40 Rector Street, 10th Floor
New York, NY 10006

Dear Ms. Gatling:

One of you supervisors, Carlos Velez, refused to accept an age discrimination complaint concerning an incident that occurred on Saturday, January 9, 2010, at the nightclub Amnesia J.V. LLC, located in Manhattan.

At around 11:00 pm, Amnesia required that a friend of mine and I, both male and middle aged, pay $350 for a bottle in order to enter the nightclub. Amnesia did not require other people who were in their twenties to buy a bottle for $350 in order to enter the club.

I filed a complaint with the New York State Division of Human Rights, which found there was no sex discrimination but probably age discrimination. "A photo on complainant's website suggests the he is significantly older than [Amnesia's] patrons...." *Determination and Order After Investigation*, No. 10138862, N.Y.S. Human Rights Division, p. 2, Leon C, Dimaya, Regional Director (copy is attached). Since the N.Y.S. Human Rights Division does not have jurisdiction over age discrimination in a public accommodation, it dismissed the complaint.

The New York City Commission on Human Rights, however, does have jurisdiction over public accommodations that discriminate based age. Although I was trying to file an age discrimination complaint with your Commission, supervisor Velez concluded based on the State's *Determination and Order After Investigation* that the incident really involved sex discrimination, and not age discrimination as indicated by the State. Since I had already filed a complaint with the State about sex discrimination, I could not file another one with the City. Supervisor Velez simply changed my allegations so your Commission would not have to deal with the complaint. So the State says "age discrimination don't bother us" and your Commission says "sex discrimination so the State has to deal with it."

Supervisor Velez also communicated through one of your employees that there was no discrimination at all because Amnesia was only charging older males $350 for admission and was therefore not barring us from entering. 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

supervisor Velez's reasoning, such conduct is not discriminatory because those with a different skin complexion were not barred from riding the buses.

Supervisor Velez, also through an employee, communicated that I should appeal the State's *Determination and Order After Investigation*. That requires bringing an Article 78 action in the New York State Supreme Court, which will cost almost as much as paying $350 for a bottle to enter Amnesia.

So what ever happen to President Harry Truman's philosophy concerning passing the buck?

Thank you for your time.

Sincerely,

/S/

Roy Den Hollander

Exhibit C

----------X

In the Matter of the claim of
ROY DEN HOLLANDER,

Claimant,

NOTICE OF CLAIM

-against-

The CITY OF NEW YORK,

Respondent.

----------X

To: Comptroller of the City of New York

PLEASE TAKE NOTICE that the claimant makes claim and demand against the City of New York as follows:

That Claimant was unlawfully discriminated against because of his national origin, religion, marital status, and exercise of his First Amendment rights.

1. The Claimant's name is Roy Den Hollander and his address is 545 East 14 Street, Apt. 10D, New York, N.Y. 10009. The Claimant is represented by himself, who is an attorney.

2. The nature of the claim: The Executive Director for Law Enforcement, Carlos Velez, of the N.Y.C. Commission on Human Rights ("Commission") unlawfully discriminated against the Claimant in dismissing a Complaint filed by the Claimant with the Commission as a result of Velez's prejudice toward the Claimant because the Claimant is of Euro-American protestant ancestry, divorced, and exercised his First Amendment rights by filing a number of anti-feminist lawsuits.

3. The time when, the place where, and the manner in which the claim arose: Claimant subsequently filed a complaint with the Commission against the New York City nightclub Amnesia for age discrimination on October 22, 2010, at the Commission's Office, 40 Rector Street, 10th Floor, New York, N.Y. 10006. Beginning with the Commission's initial

interview on October 15, 2010, at the Commission's office and continuing through Velez's alleged investigation to his Determination and Order dated July 27, 2012, Velez unlawfully discriminated against Claimant because of Claimant's ancestry, religion, marital status, and exercise of his First Amendment rights by basing the reasons for dismissing Claimant's complaint against Amnesia on Velez's personal prejudices.

4. The items of injuries claimed are: Unlawful discrimination against ancestry, religion, marital status, and exercise of the First Amendment right to bring lawsuits.

5. The remedies requested are: the Commission implement in its operations anti-discrimination policies that prevent unlawful discriminatory acts by its employees against Euro-Americans of protestant ancestry, divorced husbands, and any man who chooses to exercise his free speech and fight for his rights by suing and petitioning the government for a redress of grievances. In addition, the Executive Director for Law Enforcement of HR be required to undergo sensitivity training to mitigate or at least enable him to control his prejudice toward Euro-Americans of protestant ancestry, divorced husbands, and men who choose not to meekly submit to feminist and political correctionalist ideology.

The Claim and demand is hereby presented.

Please Take Further Notice that by reason of the foregoing, the Claimant will file a complainant with the Commission against Velez for his unlawful discrimination.

Roy Den Hollander
545 East 14 St., 10D
New York, NY 10009
(917) 687-0652

Sworn to before me on the
18th day of August 2012

Notary Public

BARBARA N PEREZ
Notary Public - State of New York
NO. 01PE6232290
Qualified in New York County
My Commission Expires 12/06/2014

THE CITY OF NEW YORK
OFFICE OF THE COMPTROLLER
CLAIMS AND ADJUDICATIONS
1 CENTRE STREET ROOM 1200
NEW YORK, N.Y. 10007-2341

WWW.COMPTROLLER.NYC.GOV

Michael Aaronson
Chief, Bureau of Law and Adjustment

015 - 151

John C. Liu
COMPTROLLER

Date: 08/23/2012
Claim No: 2012PI021784
RE: Acknowledgment of Claim

ROY DEN HOLLANDER
545 E 14 ST APT 10D
NEW YORK, NY 10009

Dear Claimant:

We acknowledge receipt of your claim, which has been assigned the claim number shown above. Please refer to this claim number in any correspondence or inquiry you may have with our office.

We will do our best to investigate and, if possible, settle your claim. However, if we are unable to resolve your claim, **any lawsuit against the City must be started within one year and ninety days from the date of the occurrence.**

If you have any questions regarding your claim, you may contact us at either 212-669-8750 for property damage claims or 212-669-4445 for claims involving personal injury.

Sincerely,
Michael Aaronson

Exhibit D

NEW YORK STATE
DIVISION OF HUMAN RIGHTS
20 EXCHANGE PLACE, 2ND FLOOR
NEW YORK, NEW YORK 10005

(212) 480-2522
Fax: (212) 480-0143
www.dhr.state.ny.us

DAVID A. PATERSON
GOVERNOR

GALEN D. KIRKLAND
COMMISSIONER

INFORMATION FOR COMPLAINANTS

CONCERNING COMPLAINT PROCEDURES OF NEW YORK STATE DIVISION OF HUMAN RIGHTS

The New York State Division of Human Rights is a State agency mandated to receive, investigate and resolve complaints of discrimination under N.Y. Executive Law, Article 15 ("Human Rights Law"). The Division's role is to fairly and thoroughly investigate the allegations in light of all evidence gathered.

YOUR RIGHTS AND RESPONSIBILITIES AS A COMPLAINANT

- You have a right to obtain a private attorney at any time, but you are not required to do so.
- If you experience any further conduct by the Respondent that you believe is discriminatory, or is in retaliation for filing your complaint, you should immediately report it to the Division of Human Rights.

  You must notify the Division of any change in your address or telephone number. If the Division cannot contact you, we may not be able to proceed with your case. Inability to locate you will result in the eventual administrative dismissal of your case.
- Your complaint may voluntarily be withdrawn in writing by you at any time. The withdrawal form must be signed by you or your attorney (original or fax will be accepted). A withdrawal form may be obtained from the Division.
- Conciliation or settlement is possible at all points in the proceeding, and the Division may provide assistance with conciliation or settlement at the request of any party.
- You, or your attorney, may review the Division's file in this matter, and may copy by hand any material in the file, or obtain photocopies at a nominal charge. The Respondent in this matter has the same right to review the file.

WHAT IS THE INVESTIGATIVE PROCEDURE?

The Division represents neither the Complainant nor the Respondent. The Division pursues the State's interest in the proper resolution of the matter in accordance with the Human Rights Law. Upon receipt of a complaint, the regional office will:

Notify the Respondent(s). (A Respondent is a person or entity about whose action the Complainant complains.)

- Resolve issues of questionable jurisdiction.

- Forward a copy of the complaint to the U.S. Equal Employment Opportunity Commission (EEOC) or the U.S. Department of Housing and Urban Development (HUD), where applicable. Such federal filing creates a complaint separate and apart from the complaint filed with the Division, and protects your rights under federal law, although in most cases only one investigation is conducted pursuant to work-sharing agreements with these federal agencies.
- Investigate the complaint through appropriate methods (written inquiry, field investigation, witness interviews, requests for documents, investigatory conference, etc.), in the discretion of the Regional Director. The investigation of the complaint is to be objective.
- Allow the parties to settle the matter by reaching agreement on terms acceptable to the Complainant, Respondent and the Division. The Division will allow settlement from the time of filing until the matter reaches a final resolution.
- Determine whether or not there is probable cause to believe that an act of discrimination has occurred, if the matter cannot be settled prior to that Determination. The Division will notify the Complainant and Respondent in writing of the Determination.

WHAT IS THE DIVISION'S POLICY ON ADJOURNMENTS AND EXTENSIONS?

It is the Division's policy to investigate all cases promptly and expeditiously. Therefore, you are expected to cooperate with the investigation fully and promptly. No deadlines will be extended at any time during the investigation, unless good cause is shown in a written application submitted at least five (5) calendar days prior to the original deadline.

WHAT IS THE PROCEDURE FOLLOWING THE INVESTIGATION?

If there is a Determination of no probable cause, lack of jurisdiction, or any other type of dismissal of the case, the Complainant may appeal to the State Supreme Court within 60 days.

If the Determination is one of probable cause, there is no appeal to court. The case then proceeds to public hearing before an Administrative Law Judge. Under Rule 465.20 (9 N.Y.C.R.R. § 465.20), the Respondent may ask the Commissioner of Human Rights within 60 days of the finding of probable cause to review the finding of probable cause.

WHAT IS A PUBLIC HEARING?

A public hearing, pursuant to the Human Rights Law, is a trial-like proceeding at which relevant evidence is placed in the hearing record. It is a hearing de novo, which means that the Commissioner's final decision on the case is based solely on the content of the hearing record. The public hearing is presided over by an Administrative Law Judge, and a verbatim transcript is made of the proceedings.

The hearing may last one or more days, not always consecutive. Parties are notified of all hearing sessions in advance, and the case may be adjourned to a later date only for good cause.

The Complainant can retain private counsel for the hearing, but is not required to do so. If Complainant is not represented by private counsel, the Division's counsel prosecutes the case in support of the complaint. Respondent can retain private counsel for the hearing, and, if Respondent is a corporation, is required to be represented by legal counsel. Attorneys for the parties or for the Division may issue subpoenas for documents and to compel the presence of witnesses.

At the conclusion of the hearing sessions, a proposed Order is prepared by the Administrative Law Judge and is sent to the parties for comment.

A final Order is issued by the Commissioner. The Commissioner either dismisses the complaint or finds discrimination. If discrimination is found, Respondent will be ordered to cease and desist and take appropriate action, such as reinstatement, training of staff, or provision of reasonable accommodation of disability. The Division may award money damages to Complainant, including back pay and compensatory damages for mental pain and suffering, and in the case of housing discrimination, punitive damages, attorney's fees and civil fines and penalties. A Commissioner's Order may be appealed by either party to the State Supreme Court within 60 days. Orders after hearing are transferred by the lower court to the Appellate Division for review.

WHAT IS A COMPLIANCE INVESTIGATION?

The compliance investigation unit verifies whether the Respondent has complied with the provisions of the Commissioner's Order. If the Respondent has not complied, enforcement proceedings in court may be brought by the Division.

NOTICE PURSUANT TO PERSONAL PRIVACY PROTECTION LAW

Pursuant to the Human Rights Law, the Division collects certain personal information from individuals filing complaints and from those against whom a complaint has been filed. The information is necessary to conduct a proper investigation; failure to provide such information could impair the Division's ability to properly investigate the matter. This information is maintained in a computerized Case Management System maintained by the Division's Director of Information Technology, who is located at One Fordham Plaza, Bronx, New York, (718) 741-8365.

GENERAL INFORMATION

For a more detailed explanation of the process, see the Division's Rules of Practice (9 N.Y.C.R.R. § 465) available on our website www.dhr.state.ny.us. If you have any additional questions about the process, the investigator assigned to the case will be available to answer most questions.

SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK

Index No. 13-100299

----------X

In the Matter of the Application of

ROY DEN HOLLANDER,
Petitioner,

against

THE CITY OF N.Y. COMMISSION ON HUMAN RIGHTS,
Respondent.

----------X

REPLY TO RESPONDENT'S ANSWER AND AFFIRMATION

Roy Den Hollander
Attorney-Petitioner
545 East 14th St., 10D
New York, NY 10009
(917) 687-0652
rdhhh@yahoo.com

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----------X

In the Matter of the Application of — Index No. 13-100299

ROY DEN HOLLANDER — (Part 33; Hunter, J.)

Petitioner,

-against-

THE CITY OF NEW YORK COMMISSION ON HUMAN RIGHTS,

Respondent.

----------X

MEMORANDUM OF LAW IN OPPOSITION TO CITY OF NEW YORK COMMISSION ON HUMAN RIGHTS' MOTION TO DISMISS AND MOTION IN OPPOSITION TO THE PETITION FOR JUDICIAL REVIEW

Roy Den Hollander ("Petitioner") submits this memorandum of law in opposition to the motion to dismiss and motion in opposition to judicial review submitted by the New York City Commission on Human Rights ("City HR").

PRELIMINARY STATEMENT

The attorney for City HR, Leonard M. Braman ("Braman"), begins his Memorandum of Law with the typically sophomoric effort of painting Petitioner in a negative light so as to litigate this proceeding on the character traits of Petitioner in the obvious hope that the Court will consider Petitioner an unpopular dissident member of a minority—men, and therefore undeserving of judicial protection of his rights. (Braman Law Memo. at 1-2). As Justice Powell said in his concurring opinion in *United States v. Richardson*, 418 U.S. 166, 192 (1974):

> "The irreplaceable value of the power articulated by Mr. Chief Justice Marshall [Marbury v. Madison, 5 U.S. 137] lies in the protection it has afforded the constitutional rights and liberties of individual citizens and minority groups against oppressive or discriminatory government action. It is this role, not some amorphous general supervision of the operations of government, that has maintained public esteem for the . . . courts and has permitted the peaceful coexistence of the countermajoritarian implications of judicial review and the

> democratic principles upon which our Federal Government in the final analysis rests."

Petitioner believes and advocates countermajoritarian views in this age of political correctness and its sister ideology Feminism. He proudly admits to bringing a number of anti-feminist or men's rights cases in accordance with his belief in equal protection under the U.S. Constitution—but what does that have to do with an age discrimination complaint against a nightclub? Nothing, unless it is used to say, as Braman intentionally imputes, that Petitioner is a misogynist, a colonizer of females, a modern-day leper; therefore, this Court should rule against him.

Braman, a lawyer and not a psychologist, claims those alleged character traits led Petitioner to first file a sex-discrimination complaint with the State Division of Human Rights when the nightclub Amnesia refused him and a male attorney friend admission unless they bought a $350 bottle of alcohol. Okay, let's assume Petitioner has those character traits and they played a part in filing the complaint with the State Division of Human Rights. So what? The issue was whether Amnesia discriminated against the two men based on sex, which involves the intent of the people who operate Amnesia—not the intent of the Petitioner. The State Division of Human Rights conducted an investigation at the nightclub, something City HR never did, and the State found that (1) Petitioner had not been discriminated against because of his sex but (2) he apparently had been discriminated against because of his age:

> "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."

(Verified Petition, Ex. F, State Division of Human Rights, *Determination and Order After Investigation* ("*State DHR Order*" at 2). So, Petitioner was wrong about sex discrimination, but not about being discriminated against and that discrimination was based on age.

Braman calls this part of the State's finding "*dicta.*" (Braman Law Memo. at 2). *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 Division of Human Right's Investigative Procedure is that the investigation "[r]esolve issues of questionable jurisdiction." (Petitioner Reply, Ex. D, Information for Complaints at 1-2). The State's trained investigators made the necessary fact findings to resolve whether the State had jurisdiction—it did not because Amnesia apparently engaged in age discrimination.

Another definition for *dicta* are expressions in a court's opinion that go beyond the facts. The State, however, reached its conclusion based on the facts its investigators observed—facts of a more probative value than those relied on by City HR Law Enforcement Director Carlos Velez ("Velez") who used an Internet article and Internet blogs.

When Petitioner read the State's findings, he realized he had made a mistake—something humans tend to do—by asserting the wrong cause of action. If the State had jurisdiction over age discrimination in public accommodations, Petitioner would have requested leave to amend his complaint with the State to substitute an age-discrimination cause of action. But the State does not have such jurisdiction, so Petitioner immediately corrected his error by contacting City HR to file a cause of action for age discrimination.

At the intake with City HR attorney Laura Flyer, Petitioner explained his error and desire to correct it. Braman, however, considers this effort to change the cause of action as some type

of scam that "entitled" City HR to view the new cause of action "skeptically." (Braman Law Memo. at 17). Under "Braman Law," any change in a complainant's cause of action means the plaintiff is lying and should be treated in the same manner as when a deponent's testimony contradicts the deponent's affidavit, *Sosna v. Am. Home Prods.*, 298 A.D.2d 158, 158 (lst Dep't 2002), which is the case that Braman relies on.

City HR's investigation by Velez did not yield credible evidence of age discrimination because it was abbreviated and cursory. Velez, and not Petitioner, 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. The "desk-chair" or "desktop" information on which Braman rests his case are irrelevant, unprobative, unauthenticated, and hearsay[1] information that are primarily based on an Internet article and Internet blogs. For example, from his computer and desk, Velez held:

> "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."

(Verified Petition, Ex. C, City HR *Determination and Order After Investigation* ("*Admin. Closure*") at Tres).

Continuing to follow in Velez's tracks of personally criticizing Petitioner, Braman says "Petitioner declined the opportunity to submit additional comments in support of his appeal." (Braman Law Memo. at 9, 20). So what insinuation is Braman selling? That Petitioner was

[1] Braman bizarrely asserts that hearsay is substantial evidence for which he relies on *Bellamy v. N.Y.S. Div. Human Rights*, 8 A.D.3d 269, 210 (2d Dep't 2004). (Braman Law Memo. at 21 n.9). *Bellamy* stated that some reliance on hearsay will not alone result in reversal. It did not hold or infer that hearsay was substantial evidence. Further, hearsay is treated skeptically by City HR. *Triborough Bridge and Tunnel Auth. v. Simms*, OATH Index No. 1303/97 (May 30, 1997).

remiss in some fashion or not diligent in exhausting his administrative remedies? Whatever Braman's specific innuendo, his objective is clear—win at any cost.

Why is it that these newer generations of attorneys are incapable of sticking to the merits—they just have to get personal. Perhaps they believe themselves superior to other generations as manifested by Braman telling this Court that it "must" dismissed this action. (Braman Law Memo. at 3, 9, 10, 14, 15, 18, 22). Although in Braman's case, it may simply be attributable to "Harvard hubris."

Braman also adopts another tactic of Velez—rewrite the law. Both argue that because Petitioner had filed one cause of action with the State Division of Human Rights, he could not file a different cause of action with City HR. Velez cited to N.Y. Executive Law § 279(9) and the following cases: *Emil v. Dewey*, 49 N.Y.2d 968, 968 (1980); *Bhagalia v. State*, 228 A.D.2d 882, 883 (3d Dep't 1996); *Benjamin v. N.Y.C. Dept. of Health*, 2007 WL 3226958 at *5 (A.D. 2 Dept. 1994); *Rosario v. N.Y.C. Dept. of Education*, 2011 U.S. Dist LEXIS 41177 *4 (S.D.N.Y. 2011). The statute and the cases state that a person has a choice between going to court or to a human rights agency but not both. They do <u>not</u> say that by going to one human rights agency for one cause of action, a person cannot go to another agency for a different cause of action when the first agency lacks jurisdiction over the different cause of action.

On the procedural due process claim, Braman is correct that due process requires judicial review of an agency's action, which is why Petitioner is now before this Court. Braman, however, is attempting a deception by arguing that just because this proceeding was brought before the judiciary that means Velez's investigation satisfied procedural due process. 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).

ARGUMENTS

I. Velez violated Petitioner's procedural due process rights by failing to follow City HR's required procedures in conducting his investigation.

Reminiscent of the hyper-technical pleading standards of the Field Code, Braman superciliously faults Petitioner for not including the words "according to 42 U.S.C. 1983" in the Supplement Petition that adds a Fourteenth Amendment procedural due process action. (Braman Law Memo. at 22). Braman has apparently forgotten that a pleading "shall be liberally construed" and "defects ignored if a substantial right of a party is not prejudiced." CPLR 3026. "[T]he burden is expressly placed upon one who attacks a pleading for deficiencies in its allegations to show that he is prejudiced." *Foley v. D'Agostino*, 21 A.D.2d 60, 65 (1st Dep't 1964). Braman has not met his burden.

Continuing to betray a remarkable instinct for the capillaries, Braman also faults Petitioner for not adding any specific relief in the Supplement Petition for Velez's due process violations. "[T]he court may grant any type of relief within its jurisdiction appropriate to the proof whether or not demanded . . . ." CPLR 3017. Petitioner is fully confident that this Court will provide such other and further relief it deems just and proper as was previously requested in the Petition that the Supplement Petition supplements. (Verified Petition at 13).

On the procedural due process issue, Braman even makes the ludicrous argument that just because judicial review of an agency action is allowed, there is no procedural due process violation. Braman wrote:

> "It is well settled that where judicial review is available to raise any alleged procedural error in an agency's determination - such as through the instant special

> proceeding - due process is satisfied, and there can be no procedural due process violation."

(Braman Law Memo. at 3). Just because a party has an opportunity for judicial review does not mean an agency's action complied with procedural due process.

Braman is falsely imputing that Petitioner is challenging City HR's required procedures as violating the U.S. Constitution when his Memorandum states, "Petitioner concedes, as he must, that the Commission's 'investigation procedures are sufficient to satisfy procedural due process.'" (Braman Memo. Law at 22). Petitioner is not grudgingly acknowledging that point to the Harvard trained Braman because it was the Petitioner who said such in his Supplement Petition at ¶ 4. Even when Petitioner is right, Braman's litigation strategy of belittling his opponent drives him to insinuate that his opponent is wrong.

In addition to Braman's Ivy League condescension, he simply deletes Petitioner's words so they do not get in the way of Braman's fatuous arguments. For example, Braman says, "Petitioner has failed to identify any violation of his right to procedural due process" because Petitioner did not allege that Velez "failed to take any step in [his] investigation" that he should have taken. (Braman Law Memo. at 22, 23).

The Supplement Complaint at ¶ 5 states in black and white:

> "The City HR's procedure for investigating a complaint is that 'After a complaint has been filed, a neutral fact-finder, the investigator or attorney, will interview the parties and witnesses, review the respondent's answer and supporting documentation, issue interrogatories and document requests, and conduct field visits and tests where appropriate.'"

The internal quote not only comes from City HR's website but *Rosu v. City of New York*, 2012 U.S. Dist, LEXIS 178875 *3 (S.D.N.Y. Dec. 13, 2012). Velez failed to comply with the above in his desk-chair investigation.

Was it "appropriate" for procedural due process purposes that Velez:

- 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,
- did not try to contact a potential witness, attorney Robert M. Ginsberg, who was with Petitioner on the night of the discrimination, which amounted to denying Petitioner a "full and fair opportunity" to present his claims, *Stern v. N.Y.C. Comm'n 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 witnessed the discrimination even though there were two bouncers standing next to the doorman.

So no interviews with eye-witnesses or Amnesia officials, no interrogatories of anybody, and no requests for documents other than the State Division of Human Rights' *Determination and Order After Investigation* ("*State DHR Order*"), which Velez subsequently dismissed as of no value because it supported Petitioner's age-discrimination cause of action.

What then did Velez rely on for his decision and was his reliance "appropriate"?

One Internet source of information reviewed and used by Velez and relied on by Braman in this proceeding, but strangely never cited by either, was the article titled "NYC Attorney Out To Reclaim Ex-Wife From Feminism's Clutches, Get Laid Easier," written by some unknown person using the pseudonym "Jezebel." That article was the source of Velez's finding, which Braman relies on, that

> "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."

(Verified Petition, Ex. C, *Admin. Closure* at Tres; Braman Law Memo. at 1-2).

The article states the following of which Velez and Braman must have thought important; otherwise, they would not have relied on it for their findings in their papers:

> "[Petitioner] admits that he's still bitter [over divorce], which is why he spends all his time these days filing "antifeminist" lawsuits, to try to rid the world of feminism . . . [so] he can get laid more cheaply. Yeah, he's the same guy that filed lawsuits against bars and clubs that have 'Ladies Nights.' . . . He looks like that creepy guy that used to go to the 19+ clubs in college and stare at all the girls who wouldn't fuck him. But, obviously, that's not his fault for being a creepy bastard trying too (sic) recapture his lost youth by boning drunk chicks half his age, it's Feminism's fault for convincing drunk chicks half his age that they could do better. Way better. . . . So, look, I would almost feel bad for you [Petitioner] that your ex-wife conned you into marrying her so she could get her green card, but you're such a jerk I kind of don't. . . . [I]f you're so damned desperate to get back to a society in which women are considered 2nd-class citizens and the "rights" of men are respected by the courts over the rights of women (especially in cases of date rape, which you so lovingly advocate in your New Yorker profile as the way things ought to be), you can always go back to Russia." (Exhibits to Supplement Petitioner, Ex. A).

Velez's decision of "no probable cause" also relied on, as does Braman in his Memorandum, two Internet blogs concerning Amnesia from the site "Yelp.com" as evidence that Amnesia also required younger folk to buy a $350 bottle in order to enter. (Verified Petition, Ex. C, *Admin Closure* at Cuatro). The blogs are not only hearsay, unreliable, unauthenticated but irrelevant.

Braman and Velez do not know whether these two people 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.

Still, Braman and Velez put special emphasis on a blog from "Tasty 1027" as 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.'" (Verified Petition, Ex. C, *Admin. Closure* at Cuarto).

What Velez left out of Tasty's blog was that "[I]n the end my party of 12 made it in . . . ." (Exhibits to Supplement Petition, Ex. C). This may indicate 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.

Braman and Velez also absurdly use this blog from April 25, 2010, as conclusive proof that Amnesia did not engage in the incident of discrimination against the Petitioner and his friend on January 9, 2010, and it did not have a policy at that time 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 Division of Human Rights for discriminatory practices, which was clearly an incentive for Amnesia to clean up its act.

The second blogger "Maria W. NY" does not even mention buying a bottle to gain admission. She just mentions that younger folk were "lining up at the downstairs bar," which is inside the club. Velez and Braman assume 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 coveted tables at swanky 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 . . . ." (Verified Petition, Ex. F at 2).

Neither of the two blogs purports to represent the events that occurred to Petitioner 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).

There is one blog in Velez's investigation file, however, about what did occur on January 9, 2010, at around 11 pm, but Velez and Braman ignored it. "Kelly R. Paris France" wrote that she entered Amnesia around the same time, on the same night that Petitioner and his friend were required to buy a bottle for entry. Kelly wrote "It wasn't crowded inside!" And next to the blog printout is handwritten, "Same date & time cs Mr. Hollander"—presumably, the writing is Velez's. (Exhibits to Supplement Petition, Ex. B).

This blog refutes a statement by Amnesia that is relied on by Velez and Braman, which comes from the *State DHR Order*. Velez's *Admin. Closure* quotes from the *State DHR Order*:

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

(Verified Petition, Ex. C, *Admin. Closure* at Dos; Braman Affirm. ¶ 3; Braman Law Memo. at 4). According to "Kelly R. Paris France," the club wasn't crowded on January 9, 2010, at 11 pm; therefore, Amnesia's rationale does not explain why Amnesia required the Petitioner and his friend to buy a bottle, but it does infer that Amnesia's statements are disingenuous and that it discriminated against the Petitioner and his friend.

Braman not only dissembles the facts but cites to various inapposite cases for holding certain procedures are not required in a City HR investigation. (Braman Law Memo. at 23): *Rosu v. The City of New York*, 2012 U.S. Dist. 178875, deals with lack of procedures involving depositions, a hearing, cross-examination of witnesses, and access to the City HR file during the investigation—the absence of those are not challenged in this case. *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—the absence of such is not challenged here. *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 201l), found that the people not interviewed were not relevant to plaintiff's allegations of age discrimination and disability discrimination, which were disproved by plaintiff's admissions, a collective bargaining agreement, and defendant's position statement. Amnesia never provided a position statement although it was invited to, and while Velez tried to contact a witness for Amnesia, he 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, *Stern v. N.Y.C. Comm'n Human Rights*, 38 A.D.3d 302, 302 (lst Dep't 2007). 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, Velez simply ignored the key witness Robert M. Ginsberg even though he knew about him and how to contact him. *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, Velez did not provide a fact-finding conference.

Braman, failing to find authority that Velez can do whatever he pleases or not do whatever he pleases and still comply with procedural due process, unilaterally tries to erase from the requirements of City HR procedures that "a neutral fact-finder" will conduct the investigation. *Rosu v. City of New York*, 2012 U.S. Dist, LEXIS 178875 *3. Braman completely ignores this requirement by wrongly asserting that only "notice and opportunity to be heard" are necessary. (Braman Law Memo. at 23).

In addition, Braman tries to hoodwink this Court into focusing on the wrong the issue, that because City HR procedures provide "notice and opportunity to be heard" and judicial review, there can be no violation of procedural due process rights. (Braman Law Memo. at 23). Once again, Petitioner's argument is not whether the procedures of City HR coupled with judicial review under special proceedings satisfy procedural due process, but whether Velez followed City HR procedures, which, as illustrated above and below, he clearly did not. By not following City HR procedures, Velez violated the Petitioner's procedural due process rights. *Rosu v. The City of New York*, 2012 U.S. Dist. Lexis 178875 *14.[2]

[2] Braman tries two more of his patented chicaneries in his Law Memo. at 24 n.10 by falsely claiming *Rosu* carries no weight while he himself uses it as authority at 23, and falsely claiming two cases hold that a violation of an agency's procedures cannot violate procedural due process. *C/S Window Installers, Inc. v. N.Y.C. Dep't of Design & Constr*., 304 A.D.2d 380, 380 (1st Dep't 2003) and *Velella v. N.Y.C. Local Conditional Release Comm'n*, 73 A.D.3d 20l, 202 (lst Dep't 2004), actually hold 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.

II. Velez's conclusion of "no probable cause" was based on insubstantial evidence, misrepresentations, and so abbreviated and one-sided that it does not even deserve the moniker "investigation."

"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. There are two important points to note about this definition.

First, it does not require ongoing practices of discrimination in that Amnesia regularly requires gray-haired men to pay $350 for admission while allowing younger folk in for $20 or $30. All that is needed is a onetime act of discrimination—Petitioner and his friend showed up at Amnesia on January 9, 2010, at around 11 pm and are barred from entering unless they agree to buy a bottle for $350 while younger folk are not. The legal authorities that a single instance of discrimination is good enough to show probable cause are the cases *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 and then paid) and *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 saw that white ladies did not have to wear the same type of attire). Velez arbitrarily ratcheted up the standard by requiring multiple "discriminatory practices" or continuing discrimination. (Verified Petition, Ex. A, *Admin. Closure* at Uno).

The second important point is that a decision as to whether probable cause exits has to rely on "evidence." For information to be used as evidence means 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). It 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.* Evidence for establishing facts can only be alleged by 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 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 reason is that the person making the original statement or writing the document does not present himself to City HR for assessment of his demeanor and credibility, does not submit to cross examination by City HR 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*.

Since City HR is charged with eliminating and preventing discrimination, it has a motive to "test vigorously" information it relies on for a finding. Velez did not do that, instead he relied on irrelevant, untrustworthy, unauthenticated, and hearsay information: an Internet article, two Internet blogs (*supra* at 8-11), a speculation about Amnesia's doorman, painting Petitioner in a negative light, an erased video, and Amnesia's Verified Answer by a person without firsthand knowledge whose assertions Velez failed to independently verify—something the courts consider important, *Bachman v. State Division of Human Rights*, 104 A.D.2d 111, 113 (1st Dep't 1984).

Velez claimed "upon information and belief," which means speculation because Velez lacked any rational basis for his assumption, that Amnesia's doorman was an independent contractor. (Verified Petition, Ex. A, *Admin. Closure* at Uno). Let's assume he was. Amnesia can still be liable for discrimination by the doorman if in carrying out his duties, the doorman discriminated. N.Y.C. Admin. Code § 8-107(13)(c). No problem there, the guy hired by Amnesia as gatekeeper refused to admit Petitioner and his friend without agreeing to buy a $350 bottle while younger folk were treated differently. But there's more, Amnesia also had to know that the doorman was discriminating if he was an independent contractor. Velez provides no information or evidence one way or the other because he again failed to use City HR power to gather evidence, which again betrays a pattern of shortcuts and nonfeasance.

Braman, as did Velez, categorizes Petitioner as a member of a currently disfavored group in order to sway the Court in Braman's favor. In that tactic lies the probable reason that Velez never contacted an eyewitness to the discrimination. It seems strange that Velez would ignore Petitioner's friend who accompanied him that night, Robert M. Ginsberg. The likely reason is that Velez would not have been able to discredit him as he tried with Petitioner. Mr. Ginsberg graduated Yale Law School, is listed as a "super lawyer," and very progressive, having been a Democratic State Committeeman for the Upper Westside for decades. Velez could not have used the same tactics against him as he did Petitioner.

Velez, as does Braman, also tried to blame Petitioner for the unavailability of what Velez considered the key evidence of what occurred on the night in question—Amnesia's alleged video surveillance of the club on the outside. (Verified Petition, Ex. C, *Admin. Closure* at Tres-Cuatro). Velez ruled that had Petitioner filed his City HR complaint within 30 days of the incident, it would have prevented the self-erasing of the video "every 30 days." (*Id.*). 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). Velez, however, unilaterally reduced that to 30 days for Petitioner.

Even so, *Dept. of Correction v. Whitehead*, OATH Index No. 1152/97 (October 10, 1997), found no adverse inference was to be drawn because complainant was responsible for the loss of interview tapes of witnesses, since the witnesses were still available. All the witnesses to the discrimination in this case were available, but Velez chose to ignore finding the doorman, other than via a letter to Amnesia, and ignored contacting Ginsberg in favor of a non-existent silent video.

Let's assume, however, that this alleged surveillance tape still exists—what would the video show that night, outside of Amnesia's front door? Two young people 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. Petitioner 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 people 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 this is the silent era. Such a video would not have been much good for determining what actually occurred, but Velez still used it to shift the blame to Petitioner for Velez's slipshod investigation.

Velez's decision does not refer to Amnesia's Verified Answer, so it is unclear whether he relied on any of its allegations, but Braman does. There are plenty of problems with Amnesia's Answer that make it untrustworthy:

a. Amnesia's corporate officer, Henry Rosas, who verified Amnesia's Answer did not have personal knowledge of the facts of the discriminatory event 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), although he could attest to Amnesia's admission policy, which he did below at c and d. (Braman Affirm., Ex. 4, Amnesia Verified Answer).

b. Mr. Rojas denied that Amnesia required the Petitioner and his friend to buy a $350 bottle of alcohol to enter the club (Braman Affirm., Ex. 4, Amnesia Verified Answer ¶ 4), but his attorney, Joseph Anci, earlier admitted to the State Division of Human Rights that the incident of alleged discrimination in Petitioner's Verified City HR Complaint at ¶ 4 (Braman Affirm. Ex. 3) was accurate to the extent that it concerned the purchase of a bottle of alcohol for $350 for the Petitioner and his attorney friend to enter the nightclub. (Petitioner Reply, Ex. A, Anci Response to N.Y. State Division of Human Rights, February 2, 2010, p. 3 last paragraph and p. 4 last two full paragraphs.)

c. Mr. Rojas in Amnesia's Verified Answer at ¶ 7 (Braman Affirm., Ex. 4) swore the nightclub does not have a policy or practice of age discrimination, yet attorney Anci admitted that "[I]t is important for Amnesia to ensure that the individuals who are admitted to Amnesia are representative of the establishment's attitude and image. To further that end, Amnesia admits all individuals regardless of gender, class, religion, race and sexual orientation, so long as those individuals best represent the image of the establishment." (Petitioner Reply, Ex. A, Anci Response to N.Y. State Division of

Human Rights, February 2, 2010, pp. 3-4, bottom two sentences starting on p. 3).[3] As the State Division of Human Rights found, that image is one of youth: "[b]ased 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." (Braman Affirm., Ex. 2, *State DHR Order*, p. 2).

Public lunch counters in the Deep South during the 1960s also admitted only those who furthered their image—white. But in doing so, they violated the rights of others. If Amnesia wanted the right to admit only persons that fit its image, then it should have acquired a membership club liquor license rather than one for a public accommodation.

d. Amnesia's Verified Answer at ¶ 17 (Braman Ex. 4) asserts Amnesia does not enforce an image of youth and asserts it is the victim of the age demographics for those who generally attend nightclubs. Braman also makes this argument in his Law Memorandum at 16-18. Such does not negate that Amnesia's policy of enforcing a youthful image results in discrimination against older folk. Otherwise, an all-white country club could state everybody here is white because it's white people who typically play golf and tennis.

Velez tried to discredit the *State DHR Order* while Braman, Janus-like, tries to have it both ways—using the *Order* when it supports his arguments and discrediting it when it does not.

Braman Law Memorandum at page 8 dismisses the *State DHR Order* as having relatively little weight that Amnesia's clientele tended to be under 30 but then gave the *Order* probative value when it stated that Amnesia required Petitioner and his friend to buy a bottle to further the

[3] It is revealing and an admission of sorts that Amnesia did not include age in the categories it claims not to discriminate against.

club's "image" when there was limited space inside the club (Braman Law Memo. at 16). The "limited space" rationale, however, is contradicted by one of the Internet blogs reviewed by Velez, but not used by him and ignored by Braman. "Kelly R. Paris France" entered Amnesia minutes before Petitioner and his friend were barred. Inside, she found the place not crowded, which means Braman's argument that Petitioner and his friend were required to buy a bottle because the club was crowded is fatuous. (Braman Law Memo. at 18). Apparently for City HR, Internet blogs are substantial evidence when they support Velez and Braman's arguments but not when they don't.

In another having his cake and eating it too, Braman dismisses the observations of the State investigators concerning age discrimination as having "little probative value." (Braman Law Memo. at 8, 17). But then, he relies on their observation of no individuals over age 30 being required to purchase a bottle as evidence that Amnesia did not discriminate against Petitioner and his friend. (Braman Law Memo. at 18).

One clear fallacy in Braman denigrating the *State DHR Order* concerning age discrimination is that one of the requirements of the State Division of Human Right's Investigative Procedure is that "[t]he investigation of the complaint is to be objective" and "[r]esolve issues of questionable jurisdiction." (Petitioner Reply, Ex. D, Information for Complainants at 1-2). Despite this requirement, Braman's Memorandum at 8 argues, as did Velez, that since the State Division of Human Rights has no jurisdiction over age-discrimination in nightclubs, the State's witnesses (presumably trained investigators of age discrimination in other areas within the State's jurisdiction) are of little probative value and can be ignored. According to Braman and Velez's logic, if a New York City policeman witnesses a federal crime, his testimony would be useless to the U.S. Attorney. I don't think so.

Regardless of what Braman and Velez argued, the State made an objective investigation that concluded the State could not do anything because age discrimination in public accommodations was 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." (Verified Petition, Ex. F, *State DHR Order* at 2).

In addition, Velez ignored contacting the State investigators so he could re-write the *State DHR Order* to support his position. For example, Velez unilaterally ruled that the State Division of Human Rights limited its investigation to "observation[s] on the patrons who were actually inside the club, and not those who were waiting outside [in] the club's line and denied entrance." (Verified Petition, Ex. C, *Admin. Closure* at Dos). That is false. The State specifically states that its investigation included observing the people in line as well as inside the club. (Verified Petition, Ex. F, *State DHR Order* at 2).

Relying on this misrepresentation, Velez found that "[b]ecause [Petitioner's] allegations specifically refer to those waiting on line, the [State's] observations of the customers inside the club have relatively little weight." (Verified Petition, Ex. C, *Admin. Closure* at Dos).

So what Clintonesque tactic was Velez using here? A couple of analogies 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, a white guy, gets into the club no problem and later tells you the only people inside were white. What would you think? Would that be

reasonable—yes, especially in light of the facts that you were denied admission and the South has a reputation for discrimination—just as Amnesia has a reputation for a youthful image. Velez 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 Velez, it was just coincidence.

Velez's actions in looking into the discrimination can hardly be called an "investigation," as Braman concedes when he telling omits the word "investigation" in citing to N.Y.C. Admin. Code § 8-113(d), which states, "If after investigation the commission determines that probable cause does not exist to believe that the respondent has engaged . . . in an unlawful discriminatory practice . . ." then dismissal is warranted. (Emphasis added). Braman used the word "finds" instead of "investigation" because he knows that an investigation involves more than sitting at one's desk and surfing the Internet. (Braman Law Memo. at 15).

In addition to Braman's linguistic machinations, he misrepresents what some of his cited cases hold. He falsely claims that City HR's "probable cause determination is afforded substantial deference." (Braman Law Memo. at 15). The key case he cites with no signal, *Mitchell v. Comm'n Human Rights*, 234 A.D.2d 128,128 (1st Dep't 1996), does not state that, does not hold that. That Article 78 proceeding was decided against the petitioner because he failed to file his City HR complaint within one year of the alleged discrimination as required by N.Y.C. Admin. Code § 8-109(e). Anything else from that case is *dicta*. In *Wu v. N.Y.C. Comm'n Human Rights*, 84 A.D.3d 823, 824 (2d Dep't 2011), the Second Department stated a

City HR determination requires a rational basis—something lacking in Velez's *Admin. Closure*, but *Wu* does not hold or state that City HR determinations are accorded "substantial deference." In the third department case, *Doin v. Continental Ins. Co.*, 114 A.D.2d 724,725-26 (3d Dep't 1985), the issue was not the "fairness or completeness" of a State Division of Human Rights investigation but whether the State had rationally denied a formal hearing.

In another questionable effort, Braman attempts to heighten this Court's standard of review for Velez's "probable cause" determination by applying the deferential standard of review for City HR decisions based on a full hearing of the facts and determination by an administrative law judge. (Braman Law Memo. at 15-16). "Judicial review of [a State Division of Human Rights] determination made after a hearing is limited to consideration of whether substantial evidence supports the agency determination." *Rainer S. Mittl, Ophthalmologist, P.C. v. N.Y.S. Div. Human Rights*, 100 N.Y. 2d 326, 331 (2003). All the cases[4] relied on by Braman are City HR and State Division of Human Rights decisions made after a full evidentiary hearing in which an administrative law judge assessed witness demeanor and credibility, along with weighing the quantity and quality of the evidence. Here, there was no hearing, no administrative law judge, and the only assessment Velez made was that unreliable statements from the Internet—by who knows whom—were sufficient.

Even if this Court decides to use the standard of review applied to full hearings on the facts, Velez's decision still must be supported by substantial evidence.

> "Substantial evidence 'means such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact. . . . Essential attributes are relevance and a probative character. . . . Marked by its substance—its solid nature and ability to inspire confidence, substantial evidence does not rise

[4] *Rainer S. Mittl, Ophthalmologist, P.C. v. N.Y.S. Div, Human Rights*, 100 N.Y. 2d 326, 331 (2003); *300 Gramatan Ave. Assoc. v. N.Y.S. Div. Human Rights*, 45 N.Y.2d 176, 180 (1978); *119-121 E. 97th St. Corp, v. N.Y.C. Comm'n Human Rights*, 220 A.D.2d 79, 82 (lst Dep't 1996).

> from bare surmise, conjecture, speculation or rumor. . . . More than seeming or imaginary. . . .'"

Matter of 119-121 E. 97th St. Corp. v New York City Comm'n. on Human Rights, 220 A.D.2d 79, 81-82 (1996). An Internet article by an unknown person and two Internet blogs hardly inspire confidence that Amnesia "more likely than not" did not commit a discriminatory practice. Such so-called evidence is useless.

After trying to mislead by asserting that this Court should apply the deferential standard of review for a full evidentiary hearing to a "probable cause" determination, Braman says the real standard of review is whether Velez's decision lacked a rational basis for which he cites a Court of Appeals case (*Rainer S. Mittl, Ophthalmologist, P.C.*) that does not hold that. Once again, assuming rationality is the standard, reliance on an Internet article and two blogs is far from rational.

Braman even uses a blatant falsehood in his drive to win when he says:

> "Petitioner incorrectly suggests that the State DHR Order contained new "facts . . . subsequently revealed" (Pet. ¶ 39) that Petitioner did not possess when he filed his State DHR complaint and that necessitated bringing a new complaint with the Commission."

That is not even close to what the Verified Petition stated at ¶ 39:

> "The Commission [City HR], however, unlike any court or other administrative agency, requires that once pleadings are submitted, and regardless of jurisdiction, the pleadings are written in stone and can never be amended no matter what facts are subsequently revealed."

There is no "new" in that paragraph of the Verified Petition. Braman simply created it to again increase his chances of winning.

Having failed in his efforts to ratchet-up this Court's standard of review for a City HR probable cause determination, Braman next argues that City HR has the discretion to use any method it wants for gathering information. (Braman Law Memo. at 19). If so, the information

gathered must still meet the requirements of substantial evidence. *Matter of 119-121 E. 97th St. Corp. v. New York City Comm'n on Human Rights*, 220 A.D.2d 79, 81-82 (1996). The cases cited by Braman for City HR discretion were all decided based on substantial evidence or the lack thereof. (Braman Law Memo. at 19). Further, the methods used must comport with procedural due process requirements, *Rosu v. The City of New York,* 2012 U.S. Dist. Lexis 178875 *14. As argued *supra,* Velez failed both requirements.

As for what constitutes a "sufficient investigation" as opposed to an "abbreviated and one-sided" one, the cases cited by Braman show beyond a doubt that Velez conducted a one-sided and abbreviated investigation. In *David v. N.Y.C. Comm'n Human Rights*, 57 A.D.3d 406, 407 (1st Dep't 2008), City HR's investigation included conducting over 20 interviews. Here Velez conducted none. In *Chirgotis v. N.Y.S. Div. Human Rights*, 128 A.D. 2d 400, 403 (1st Dep't 1987), the State Division of Human Rights investigation included a 56 page "statement of position" and numerous affidavits from the respondent. Here, Amnesia provided none, only a verified answer by an individual who had no personal knowledge of the discriminatory event. In *Pascual v. N.Y.S. Div. Human Rights*, 37 A.D.3d 215, 216 (1st Dep't 2007), petitioner had a two hour fact-finding conference to present and rebut information, so subpoenaing documents was not necessary. Here, there was no conference. In *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), the Court found that the people not interviewed were not relevant to plaintiff's allegations of age and disability discrimination, which were also disproved by plaintiff's admissions, a collective bargaining agreement, and defendant's position statement. Amnesia never provided a position statement although it was invited to, and Velez actually failed to interview an eyewitness to the discrimination—Robert M. Ginsberg. Braman wrongly claims that *Givens v.*

Gatling, 2011 N.Y. Misc. Lexis 3551 (Sup. Ct. N.Y. Cty. July 11, 2011), holds that City HR's failure to interview a known witness is "without import." City HR in *Givens* "did not interview witnesses, because petitioner failed to provide the Commission with this information during the investigation."[5] *Givens* at *8. Here, Velez had all the contact information necessary to contact Robert M. Ginsberg during the investigation but did not. The *Givens* Court found a sufficient investigation because it "reviewed the medical notes, [an agency's] internal investigations into the petitioner's disability, and memos from both parties, among other items. The Commission based its finding of no probable cause on both the evidence in the record and on the administrative law judge's findings." *Givens* at *11. In *Stillman v. N.Y.S. Div. Human Rights*, 2008 N.Y. Misc. LEXIS 8096 (Sup. Ct. N.Y. Cty. Nov. 19, 2008), the petitioner claimed discrimination because a bookstore would not accept his personal check as payment. The State Division of Human Rights took evidence from the bookstore on its check payment policy to which the petitioner admitted he failed to comply. The petitioner also requested a hearing that was denied. The Court held that under the circumstances in *Stillman*, City HR's determination was rationally based. *Stillman* at 4. Here, Petitioner did not request a hearing and did not admit that Amnesia acted in a non-discriminatory manner. In *Lee v. N.Y.S. Div. Human Rights App. Bd.*, 111 A.D.2d 748, 748 (2d Dep't 1985), respondent submitted a lengthy response and petitioner's admissions called into question his credibility. Neither of those situations occurred here.

Still, Braman argues Velez conducted a "sufficient investigation" by (1) acquiring the "investigation report, and supporting materials" for the State Division of Human Rights

[5] The witness not interviewed in *Givens* was a person similarly situated as the petitioner, but the petitioner never alleged in her City HR complaint and amended complaint that she was treated differently than that person.

investigation of which none were in Velez's investigation file[6]; (2) "attempt[ing] diligently" to contact the doorman "David" even though all Velez did was send a letter to Amnesia addressed to "David," which was returned undeliverable; (3) trying to obtain a silent and useless video; and (4) finding on the Internet an article by "Jezebel," three blogs, one of which Velez marked as "same date & time . . ." as the discrimination, but did not use because it belied Amnesia's justification for requiring the purchase of a bottle, and two from months later on which Velez relied.

That is it! That's the entire record on which Velez based his no probable cause determination. Braman tries to gloss over this Inspector Clouseau investigation by characterizing Petitioner's criticism "as nothing more than disagreements" between Petitioner and Velez. (Braman Law Memo. at 21). Who does Braman think he is kidding—these aren't mere "disagreements," these are the facts, or more accurately the lack of facts, revealed by Velez's investigation file.

Braman also argues that the "abbreviated and one-sided" standard can be trumped by limiting the Court's focus to just the information Velez gathered—no matter how insubstantial it is. (Braman Law Memo. at 20). Such a rule would mean that City HR could base a probable cause determination on a modicum of the flimsiest information and a court would never be able to find its investigation abbreviated and one-sided. Braman wrongly relies on two cases for his newly-minted rule. In *Featherstone v. Franco*, 95 N.Y.2d 550, 554 (2000), the Court of Appeals stated that "[i]n this case, the administrative record contains substantial evidence" on which the City Housing Authority based its decision. (Emphasis added). In *Yarbough v. Franco*, 95

[6] Braman affirmed under penalty of perjury that Velez obtained the State Division of Human Rights' file, which included its decision, investigation report, and supporting materials. However, when Petitioner examined the City HR investigation file on February 21, 2013, the only State Division of Human Rights document was the *State DHR Order*—there were no investigation report and supporting materials.

N.Y.2d 342, 347 (2000), the Court of Appeals required that the Petitioner had to first vacate a Housing Authority order against her and because she had not, there was no record for the courts to review. Neither the *Featherstone* nor *Yarbough* situations exist here.

Velez sat down at his desk and with little work over a short period of time, sent out a letter that was returned, contacted Amnesia's attorney, sent an email requesting a complete file from the State that he never received, searched the Internet and cherry picked a couple of untrustworthy, irrelevant blogs and an article that he stretched into supporting a "no probable cause" determination. All 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, is that 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).

III. There is no bar to filing a complaint with one human rights agency when a complaint with another human rights agency could not be amended to add a new cause of action because the original agency lacked subject matter jurisdiction over the new action.

A. Under the law, a grievance is not the fact situation that gives rise to a cause of action but the cause of action itself.

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 "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).

Braman tries to deceptively alter the facts here and re-write Petitioner's argument in order to marshal support for his inapplicable position. Braman claims Petitioner argues that when a person has been discriminated against in one fact situation, he can file "successively," one after another, as many complaints as causes of actions. (Braman Law Memo. at 11). That is not this case and not what Petitioner argues.

If either City HR or the State Division of Human Rights have jurisdiction over all the causes of action stemming from a fact situation, the original complaint would be amended to add the other causes of action. If the complainant failed to add the causes of action in a timely fashion then a human rights agency could deny 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.

A proper 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. Hungary 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.

Braman and Velez, however, believe that in the Maddox analogy, Velez has only one cause of action, or one grievance, because only one incident of keeping Velez out of the restaurant occurred. Velez used this mistaken view to rule that because Petitioner had filed a

complaint with the State Division of Human Rights on a cause of action for what was believed 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.

Braman and Velez's wrong assertion that "grievance" does not mean an unlawful discriminatory practice but the actual incident, the fact situation, which gives rise to the discrimination allows them to rely on N.Y.C. Admin. Code §8-109(f)(iii). The section states that after the State Division of Human Rights makes a decision on a "grievance," the City HR cannot make a decision on the "same grievance."

Back to Lester Maddox. If Georgia in 1964 had the same laws as New York State in 2010, and Velez filed a complaint for color discrimination with Georgia's division of human rights and it dismissed the complaint but indicated the discrimination was based on alienage instead, over which it had no jurisdiction just like the N.Y. State Division of Human Rights, under Braman and Velez's definition of "grievance" as the fact situation itself, Velez could not file a complaint with Atlanta's human rights commission. He's out of luck and the bigots win.

Such, however, is not the law. When Amnesia refused to let Petitioner and his friend 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. The State Division of Human Rights 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.

City HR, however, did have jurisdiction over the age discrimination cause of action because N.Y.C. Administrative Code § 8-109(f)(iii) does not bar the City HR Complaint because that rule only deals with the same cause of action—not the same fact situation.

Having failed to re-write § 8-109(f)(iii), Braman also tries to confuse New York's election of remedies doctrine, which prohibits starting a lawsuit over the same fact situation in both an agency and a court, with § 8-109(f)(iii) so as to create the false impression that § 8-109(f)(iii) applies to the same fact situations rather than the same cause of action.[7]

Braman and Velez are simply wrong in claiming that once a complaint is filed with an agency concerning a fact situation, no other complaint alleging different grievances—different causes of action, can ever be filed concerning the same fact situation with another government agency that has jurisdiction where the original agency did not.

B. The election of remedies doctrine does not bar the filing of a complaint with one agency after another agency determines it lacks subject matter jurisdiction over one of the causes of action stemming from a fact situation.

N.Y. Executive Law § 279(9) and the cases relied on by Velez and Braman state that a person alleging discrimination has a choice: he can initially either go to court or file a complaint with a human rights agency, but not both.[8] This election of remedies doctrine prevents the pursuit in court of any claims arising from the same set of facts upon which a plaintiff previously sought relief in an administrative forum, such as City HR or the State Division of Human Rights. *York v. Ass'n Bar City of N.Y.*, 286 F.3d 122, 126-128 (2002); *James v. City of N.Y.*, 2003 U.S. Dist. LEXIS 14526, No. 01 Civ. 30, 2003 WL 21991591 *5 (S.D.N.Y. Aug. 20, 2003). Here, Petitioner did not go from the State Division of Human Rights to a court but to another administrative forum, City HR, because the State did not have jurisdiction to entertain an

[7] Braman asserts Petitioner relies on *Baltimore S.S. Co. v. Phillips*, 274 U.S. 316, 321 (1927), and *Herrmann v. Braniff Airways, Inc.*, 308 F.Supp. 1094 (S.D.N.Y.1969), to argue against the application of the election of remedies doctrine. That is false. Petitioner relies on *Baltimore* and *Herrmann* to show that grievance under N.Y.C. Administrative Code §§ 8-109(f)(iii) means an injury that gives rise to a cause of action. (Verified Petition ¶ 53).

[8] Of course, a plaintiff who begins with a human rights agency can always subsequently appeal that agency's decision to the courts.

amendment of the complaint for age discrimination; therefore, the election of remedies doctrine does not apply.

All the cases relied on by Braman and Velez deal with going from an agency to the courts. Velez's cases (Verified Petition, Ex. C, *Admin. Closure* at Tres) are *Emil v. Dewey*, 49 N.Y.2d 968, 969 (1980)(prior to commencing this court action, the plaintiff had filed a complaint with the State Division of Human Rights, which was later withdrawn); *Bhagalia v. State*, 228 A.D.2d 882, 882-883 (3d Dep't 1996)(plaintiff previously filed claim with the State Division of Human Rights and then with the Court of Claims); *Benjamin v. N.Y.C. Dept. of Health*, 57 A.D.3d 403, 403-404 (1st Dep't 2008)(The present court action was precluded by plaintiff's prior filing with City HR and the discontinuance with prejudice by stipulation of an earlier state court action); *Rosario v. N.Y.C. Dept. of Education*, 2011 U.S. Dist LEXIS 41177 *3 (S.D.N.Y. 2011)("the plaintiff filed an administrative complaint with the [State Division of Human Rights, which] preclude[s] Rosario from bringing his state law claims in this Court.").

Braman relies on the same cases and adds some more that also do not apply to the situation here for the same reason (Braman Law Memo. at 12-13): *Craig-Oriol v. Mount Sinai Hosp.*, 201 A.D.2d 449, 449-450 (2d Dep't 1994)(plaintiff first filed complaint with the State Division of Human Rights, then in state court). The Appellate Division in *Craig-Oriol* barred the court action and also referred to the general prohibition against splitting a single claim into multiple legal actions. Such, however, does not apply when one forum lacks subject matter jurisdiction over one of the causes of action. In *Higgins v. NYP Holdings, Inc.*, 836 F. Supp.2d 182, 187-189 (S.D.N.Y. 2011)(the court barred the action because plaintiff first filed a complaint with the State Division of Human Rights, then filed a complaint in federal court); *Borum v. Village of Hempstead*, 590 F. Supp. 2d 376, 383 (E.D.N.Y. 2003)(the court barred the action

because plaintiff first filed complaint with the State Division of Human Rights, withdrew the complaint, and then filed in the federal court); *Lyman v. City of New York*, 1997 U.S., Dist. LEXIS 12340 *12-13 (S.D.N.Y Aug. 20, 1997)("an aggrieved individual has the choice of instituting either judicial or administrative proceedings. [She] may not, however, resort to both forums; having invoked one procedure, [she] has elected [her] remedies. . . . Because plaintiff filed an administrative complaint with [City HR]before filing the instant [court] action, her claims under" the State and City Human Rights laws were barred); *Brown v. Wright*, 226 A.D.2d 570, 571 (2d Dep't 1996)("the Supreme Court was deprived of its subject matter jurisdiction to consider the plaintiff's [complaint] when the plaintiff commenced the administrative action . . . .").

Unlike the cases cited by Braman and Velez, Petitioner proceeded from the State Division of Human Rights Division to City HR because the City had jurisdiction over age discrimination by a public accommodation while the State did not. Petitioner did <u>not</u> proceed from the State Division of Human Rights to a plenary action in a court of law, so the statute and cases relied on by Braman and Velez do not apply.

If Braman and Velez's contention is upheld that the election of remedies doctrine prevents different causes of actions stemming from the same fact situation to be filed with different 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 the State Division of Human Rights, 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 § 279(9). In addition, any

appeal of City HR or the State's dismissal of the non-jurisdictional cause of action would go nowhere because it does not have jurisdiction.

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 Braman-Velez Law, certain discriminatory actions would go uncheck. A person complains to the State Division of Human Rights 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).

It is highly unlikely that the State Legislature intended the consequences that Braman and Velez strongly support.

CONCLUSION

Given Braman's efforts to misrepresent the law, the facts, and Petitioner's words, this Court is entitled to view Braman's arguments skeptically. City HR's Motions should be denied and City HR's *Determination and Order After Review* (Verified Petition, Ex. A) annulled.

Dated: New York, New York
April 30, 2013

/S/

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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In the Matter of the Application of

ROY DEN HOLLANDER,

Petitioner,

-against-

THE CITY OF NEW YORK COMMISSION ON HUMAN RIGHTS,

Respondent.

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REPLY MEMORANDUM OF LAW

Index No.: 100299 / 2013

(Part 33; Hunter, J.)

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF CITY OF NEW YORK COMMISSION ON HUMAN RIGHTS' MOTION TO DISMISS AND MOTION IN OPPOSITION TO THE PETITION FOR JUDICIAL REVIEW

The New York City Commission on Human Rights (the "Commission") submits this reply memorandum of law in further support of the Commission's motion to dismiss and motion in opposition to the petition for judicial review filed by Petitioner Roy Den Hollander ("Petitioner") as well as the supplement and exhibits thereto (collectively, the "Petition").

PRELIMINARY STATEMENT

Petitioner's opposition to the Commission's motion to dismiss fails to rebut the central reasons that the Petition is subject to dismissal:

First, under the City and State Human Rights Law, the Commission lacked jurisdiction over Petitioner's discrimination complaint that was based on the same "grievance" he previously litigated to a final decision, and lost, before the State DHR. Admin. Code § 8-109(f)(iii). Petitioner provides no support for his contention that a single alleged incident of discrimination gives rise to multiple different "grievances," one for each alleged type of

discrimination (gender, age, race, national origin, etc.), such that he could relitigate the same incident simply by alleging different kinds of discriminatory animus. Nor can Petitioner support his equally untenable position that the City and State Human Rights Laws only prohibit filing duplicative discrimination claims in ***court***, but allow a person to file before one human rights agency, lose, and then relitigate the same incident before a different agency.

Second, the Commission's alternative holding, that there was no probable cause to find that Petitioner had been the victim of age discrimination, was not arbitrary and capricious. The State DHR's decision on Petitioner's prior discrimination complaint explicitly held that the nightclub Amnesia asked Petitioner to purchase bottle service not on account of discrimination, but rather, for "non-discriminatory reasons." (Ex. 2 at 1-2).[1] This finding, and the lack of any credible basis in the record before the Commission to find age discrimination, provided a rational basis for the Commission's no probable cause determination.

Third, the Commission gave Petitioner's complaint the investigation that it merited. Petitioner ***fails to cite a single case*** holding that the extent of the Commission's investigation here – or indeed, of any comparable investigation by a human rights agency – was insufficient. To the contrary, it is well settled that an agency's determination of no probable cause may properly be based even on the parties' written submissions alone, and here the Commission's investigation went beyond the parties' submissions. While Petitioner lists numerous investigative measures that he would have liked the Commission to employ, Petitioner does not and cannot cite any authority requiring the Commission to employ any such techniques, given the Commission's "broad discretion in determining the method to be employed in

[1] "Aff." refers to the affirmation of Leonard M. Braman submitted in support of the Commission's motion to dismiss, and "Ex." to the exhibits thereto.

investigating a claim." *Wu v. N.Y.C. Comm'n Human Rights*, 84 A.D.3d 823, 824 (2d Dep't 2011) (quoting *Levin v. N.Y.C. Comm'n Human Rights*, 12 A.D.3d 328, 328 (1st Dep't 2004)).

Fourth, Petitioner cannot state a claim for a constitutional due process violation. As a matter of law, there cannot have been any violation of due process because Petitioner still has a readily available avenue to obtain review of any alleged procedural error in the Commission's decision – the instant special proceeding. In any event, Petitioner has not alleged any violation of his procedural due process rights, because he has not alleged that the Commission failed to take any step in investigating his claim that the Commission was required to take.

For all of these reasons, the Petition should be dismissed and the Commission's decision upheld.

ARGUMENT

I. The Commission Lacked Jurisdiction Over Petitioner's Complaint

Having brought his discrimination complaint to the State DHR and having lost on the merits, Petitioner was statutorily barred from bringing a subsequent discrimination complaint before the Commission based on the same incident.

Petitioner concedes, as he must, that the "election of remedies doctrine prevents the pursuit in court of ***any claims arising from the same set of facts*** upon which a plaintiff previously sought relief in an administrative forum, such as [the Commission] or the State [DHR]." (Opp. 32 (emphasis added)). Thus, Petitioner concedes that under the State and City Human Rights Laws, he could not have brought his age discrimination complaint in a court after his sex discrimination complaint based on the "same set of facts" was dismissed by the State DHR. Nor does Petitioner dispute that the election of remedies bar works both ways, such that if he had argued his sex discrimination theory first in court and lost, he would similarly have been

barred from bringing his age discrimination theory before the Commission. (Opp. 32 ("a person alleging discrimination has a choice: he can initially go to court or file a complaint with a human rights agency, but not both")). Rather, Petitioner's sole argument to escape the statutory bar is that he "did not go from the State [DHR] to a court but to another administrative forum . . . ." (*Id.*). Petitioner thus relies entirely on the absurd contention that a person who litigates and loses a discrimination claim before one human rights agency is free to bring a claim based on the same incident – or indeed, an identical claim – before another human rights agency to relitigate *de novo*. A simple review of relevant statutes and case law proves this argument false.

Section 8-109(f) of the City Human Rights Law prohibits bringing a subsequent complaint with the Commission after a previous dismissal by either a court ***or*** the State DHR:

> ***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 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 with is the subject of the complaint under this chapter and a final determination has been made thereon.***

Id. (emphasis added). These provisions are complemented by Section 8-502 of the City Human Rights Law, which, conversely, prohibits a bringing a discrimination complaint in court after

having lost before the Commission or the State DHR.[2] Read as a whole, along with analogous provisions of the State Human Rights Law, these interlocking provisions prohibit every possible permutation in which a litigant might attempt a second bite at the apple by bringing successive discrimination claims before different tribunals, whether courts or administrative agencies.

While acknowledging that § 8-109(f)(iii) is applicable here on its face, Petitioner seeks to escape this jurisdictional bar by arguing that his complaints before the State DHR and the Commission, admittedly based on the exact same incident of discrimination, nonetheless involved separate "grievances." (Opp. 28-32). Petitioner is wrong. First, Petitioner offers no reason to interpret the term "same grievance" one way in section 8-109(f)(i) of the City Human Rights Law, when the two "grievances" were filed with a court and an agency, but a different way in section 8-109(f)(iii), when they were filed with two agencies. In the former scenario, Petitioner concedes that filing a complaint with the Commission or State DHR precludes a subsequent court action based on the "same incident," and vice versa, even where a new type of discriminatory intent is alleged. *See Emil v. Dewey*, 49 N.Y.2d 968, 968 (1980) (dismissal of prior discrimination complaint by State DHR "precludes the plaintiff from commencing an action in court based on the same incident"); *Benjamin v. N.Y.C. Dep't of Health*, 57 A.D.2d 403, 403 (1st Dep't 2008) (Commission's dismissal of prior discrimination complaint barred subsequent claim of discrimination "based on the same continuing allegedly discriminatory underlying conduct" even where new kind of discriminatory intent alleged); *Craig-Oriol v.*

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[2] Section 8-502(a) provides, in part: "[A]ny person claiming to be aggrieved by an unlawful discriminatory practice as defined in chapter one of this title or by an act of discriminatory harassment or violence as set forth in chapter six of this title shall have a cause of action in any court of competent jurisdiction for damages . . . 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." The only exceptions are where the prior

Continued...

Mount Sinai Hosp., 201 A.D.2d 449, 450 (2d Dep't 1994) (State DHR's dismissal of age discrimination claim barred subsequent race discrimination claim "encompassing the same allegedly invidious behavior"); *see also Higgins v. NYP Holdings, Inc.*, 836 F. Supp. 2d 182, 189 (S.D.N.Y. 2011); *Rosario v. N.Y.C. Dep't of Educ.*, 2011 U.S. Dist. LEXIS 41177, at *5 (S.D.N.Y. Apr. 15, 2011); *Borum v. Village of Hempstead*, 590 F. Supp. 2d 376, 383 (E.D.N.Y. 2008). Petitioner does not and cannot contend that section 8-109(f)(i) permits bringing a complaint before the Commission based on the "same incident" as a complaint that was already dismissed by a court, as that would entirely defeat the purpose of the election of remedies provisions. Yet Petitioner offers no possible basis in statutory interpretation or case law that an individual should nonetheless be allowed to bring a complaint based on the "same incident" successively before two different agencies under 8-109(f)(iii). Petitioner notes the uncontroversial fact that the above-cited cases, being court decisions, necessarily involved attempts to bring a discrimination claim in court after previously having a claim dismissed by an agency, whereas here Petitioner took a claim that had been dismissed by one agency and brought it before a different agency. But because Petitioner provides no reason to interpret the statute differently in these circumstances, all he has done is identify a distinction without a difference.

Moreover, there is no merit to Petitioner's contention that 8-109(f)(iii) only bars a complaint before the Commission based on "the same cause of action" as a prior complaint dismissed by the State DHR, but not a complaint based on "the same fact situation." (Opp. 32). Not only is such a distinction nowhere to be found in the text of the City or State Human Rights Laws, but it would not avail Petitioner in any event, because under black letter law, a claim

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complaint has been dismissed for administrative convenience or on the grounds that the election of an administrative remedy is annulled. *Id.* § 8-502(b); *see* N.Y. Exec. L. § 297(9).

based on the "same fact situation" as a prior claim ***is*** based on "same cause of action." Under New York law, for preclusion purposes, "***a new claim constitutes the same cause of action*** as the formerly litigated claim ***if they both arise out of the same transaction or occurrence or series of transactions or occurrences***, even if the new claim is based upon a different legal theory or seeks a different remedy." *Troy v. Goord*, 300 A.D.2d 1086, 1087 (4th Dep't 2002); *see Smith v. Russell Sage Coll.*, 54 N.Y.2d 185, 192-94 (1981) (dismissing subsequent claim as based on "same cause of action" as prior dismissed claim where it involved the "***same factual grouping***"); *Reilly v. Reid*, 45 N.Y.S. 24, 30 (1978) (dismissing subsequent claim as based on "same cause of action" as prior one where "[e]ach proceeding brought by petitioner arose out of the ***same act of respondents alleged to be wrongful***, namely, the abolition of his position" and "the ***same foundation facts*** serve as a predicate for each proceeding"); *Tsabbar v. Delena*, 300 A.D.2d 196, 197 (1st Dep't 2002) (dismissing claim under res judicata where "both this and the previously asserted claim arise from the ***same underlying transactions***") (all emphases added).

Thus, where a person brings a new discrimination claim based on the same alleged discriminatory conduct as a previously litigated claim, and merely alleges "an additional discriminatory motive . . . or [] an additional legal theory," it is nonetheless the "same cause of action" as the prior claim and cannot be relitigated. *Troy*, 300 A.D.2d at 1087. Here, while Petitioner's complaint with the Commission alleged "an additional discriminatory motive" on the part of Amnesia, the complaint unquestionably arose out of the "same transaction or occurrence," the "same factual grouping," the "same act of [Amnesia] alleged to be wrongful," the "same foundation facts," and the "same underlying transactions" as Petitioner's prior complaint before the State DHR that was dismissed for lack of probable cause. In short, under any plausible reading of Admin. Code § 8-109(f)(iii), Petitioner's complaint before the

Commission arose out of the "same grievance" as his prior State DHR complaint and the Commission accordingly lacked jurisdiction to hear it.

In support of the contrary position – that a single fact situation gives rise to a separate "grievance" for each possible type of alleged discriminatory intent (Opp. 29) – Petitioner cites nothing beyond the same two inapposite cases he cited in his Petition, neither of which involve discrimination at all, and one of which in fact supports the Commission's position. In *Baltimore S.S. Co. v. Phillips*, 274 U.S. 316 (1927), cited by Petitioner, the Supreme Court held that a plaintiff who litigated and lost an admiralty action arising from an accident could not subsequently bring a negligence claim based on that same accident, because he could not be allowed to rely upon different theories "by piecemeal in successive actions to recover for the same wrong and injury." *Id.* at 322. That is precisely what Petitioner attempted to do here: having lost on his gender discrimination theory in the State DHR, he sought to relitigate before the Commission the exact same discriminatory incident based on an age discrimination theory. If Petitioner's reasoning were correct, however, there would be nothing to stop him, even now, from going back to the Commission or the State DHR and relitigating this identical incident based on yet another alleged discriminatory basis – such as race, national origin, or religion. (*See Opp.* 29 (arguing that person discriminated against on the basis of alienage and color "has two causes of action or two grievances stemming from that one fact situation")). Contrary to Petitioner's contention, the Human Rights Law does not permit such an absurd result.[3]

[3] Petitioner erroneously tries to analogize himself to a litigant with an ongoing case before a single tribunal who simply seeks to amend his complaint to add a new theory of relief. (Opp. 3, 30). Nothing could be more inapposite. Petitioner litigated his complaint to a final decision in the State DHR, lost, and then sought to relitigate the same fact situation before the Commission on a new theory. While Petitioner complains that "he made a mistake . . . by asserting the wrong cause of action" before the State DHR (Opp. 3), it is well established that "[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.S.2d at 28.

Because the Human Rights Laws plainly forbid a litigant who has lost a discrimination claim before the State DHR from subsequently bringing a claim based on the identical incident before the Commission, the Commission lacked jurisdiction over Petitioner's complaint and it was properly dismissed on that ground alone.

II. The Commission's Alternative Holding of No Probable Cause Was Not Arbitrary and Capricious

There is a separate and independent ground on which the Commission's decision should be upheld. As discussed in the Commission's opening brief (at 15-18), the Commission's determination that there was no probable cause for a finding of age discrimination was not arbitrary and capricious or irrational, and is entitled to deference. "[I]t is settled that in a proceeding seeking judicial review of administrative action, the court may not substitute its judgment for that of the agency responsible for making the determination, but must ascertain only whether there is a rational basis for the decision or whether it is arbitrary and capricious." *Flacke v. Onondaga Landfill Systems, Inc.*, 69 N.Y.2d 355, 363 (1987). "Moreover, where, as here, the judgment of the agency involves factual evaluations in the area of the agency's expertise and is supported by the record, such judgment must be accorded great weight and judicial deference." *Id.*; *Rosario v. N.Y.S. Div. Human Rights,* 2008 N.Y. Misc. LEXIS 5827, at *9 (Sup. Ct. N.Y. Cty. Sept. 15, 2008) (same); *Phillips v. Rosa*, 222 A.D.2d 592, 592 (2d Dep't 1995) ("It is peculiarly within the domain of the Commissioner, who is presumed to have special expertise in the matter, to assess whether the facts and the law support a finding of unlawful discrimination."). A court must "resolve [any] reasonable doubts in favor of the administrative findings and decisions" of the responsible agency. *Rosario*, 2008 N.Y. Misc. LEXIS 5827 at *9 (quoting *Town of Henrietta v. Dep't Envtl. Conservation*, 76 A.D.2d 215, 224 (4th Dep't 1980)). Thus, only where the Commission's determination of no probable cause is arbitrary and

capricious, or lacks a rational basis, may it be overturned. *See Wu v. N.Y.C. Comm'n Human Rights*, 84 A.D.3d 823, 824 (2d Dep't 2011); *Mitchell v. Comm'r Human Rights*, 234 A.D.2d 128, 128 (1st Dep't 1996); *see also Friedman v. N.Y.S. Div. Human Rights*, 2012 N.Y. Misc. LEXIS 3343, at *3 (Sup. Ct. N.Y. Cty. July 13, 2012) ("[C]ourts are limited to an assessment of whether a rational basis exists for the administrative determination and their review ends when a rational basis has been found.").

Here, there was a rational basis for the Commission's no probable cause determination. First, the State DHR, whose decision and investigatory file the Commission considered, made an explicit factual finding that Amnesia did not discriminate against Petitioner, but to the contrary, "required [Petitioner] to purchase a bottle for the ***non-discriminatory reasons*** of limited space and the goal of furthering the image of respondent's establishment." (Ex. 2 at 1-2 (emphasis added)). Petitioner transparently attempts to misrepresent the State DHR Order by characterizing it as holding that Petitioner was "apparently [] discriminated against because of his age" (Opp. 2) and that because "age discrimination was probably at work" the State DHR therefore lacked jurisdiction (*id.* 31). The Order does not say this. Nowhere is there any conclusion of age discrimination in the State DHR Order – its only conclusion is that there was "NO PROBABLE CAUSE to believe that the respondent has engaged in or is engaging in the unlawful discriminatory practice complained of," principally because the record showed that Petitioner was asked to buy a bottle for "non-discriminatory reasons." (Ex. 2 at 1-2). Considered as part of the whole record that was before the Commission, the State DHR Order and the findings on which it was based support the Commission's no probable cause determination.

Moreover, as discussed in the Commission's opening brief (at 16-18), the Commission's decision was supported by (1) Petitioner's own lack of any contemporaneous

basis to believe he had suffered age discrimination, until after he read the State DHR's unremarkable observation that the nightclub tended to attract patrons under 30; and (2) public comments on the Internet by other patrons of Amnesia in their 20's or 30's, one of whom described being asked to purchase bottle service as Petitioner was, and another who described seeing an "[i]nteresting and eclectic crowd" of "people in their 20's, 30's, 40's" inside. (Ex. 8 at 4). Petitioner places great weight on the State DHR's comment about the youthful appearance of the dance club's clientele, claiming that it demonstrates discrimination, but it does no such thing. Rather, as Amnesia stated in its answer and Petitioner does not dispute (Opp. 19), "Amnesia, and other New York City clubs, are typically frequented by individuals in their 20s and 30s." (Ex. 4 ¶ 17). This fact logically "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." (*Id.* ¶ 17).

The record supports the Commission's decision that there was no probable cause to find by a preponderance of the evidence that Petitioner was the victim of age discrimination. Accordingly, the Commission's no probable cause determination was not arbitrary and capricious or irrational, and must be affirmed.

III. The Commission's Investigation Was Not Abbreviated, One-Sided, or Biased

Failing to find any support for his argument that the Commission's decision on the record before it was irrational, Petitioner attempts to attack the process by which the decision was reached. Petitioner lists various investigative measures that he believes the Commission should have taken and that he speculates would have uncovered evidence of discrimination by Amnesia (Opp. 7-8). But Petitioner ***fails to cite a single case*** anywhere in his entire 35-page

brief or Petition that requires the Commission to have done any of the things Petitioner demands, or in which the steps the Commission did take here were held to be insufficient.[4]

Petitioner's inability to cite any authority to support his position is telling, and it is dispositive. As set forth in the Commission's opening brief (at 19-22), all of the authority is to the contrary, and affords the Commission broad discretion "to decide how to conduct its investigations." *Stern v. N.Y.C. Comm'n Human Rights*, 38 A.D.3d 302, 302 (1st Dep't 2007) (citing *Cornelius v. N.Y.S. Div. Human Rights*, 286 A.D.2d 329 (2d Dep't 2001)); *Wu*, 84 A.D.3d at 824 (quoting *Levin v. N.Y.C. Comm'n Human Rights*, 12 A.D.3d 328, 328 (1st Dep't 2004)) (Commission "has broad discretion in determining the method to be employed in investigating a claim"); *Chirgotis v. N.Y.S. Div. Human Rights*, 128 A.D.2d 400, 403 (1st Dep't 1987) ("It is within the discretion of the [human rights agency] to decide the method or methods to be employed in investigating a claim."); *see also Rosario*, 2008 N.Y. Misc. LEXIS 5827 at *10 (citing *Kushnir v. N.Y.S. Div. Human Rights*, 114 A.D.2d 898 (2d Dep't 1985)) (same).

In particular, the Commission has no obligation to interview witnesses, subpoena documents, or serve interrogatories, and may properly make a determination on the basis of the parties' written submissions alone. *See Chirgotis*, 128 A.D.2d at 403 (affirming no probable cause determination based on parties' written submissions where no interviews were conducted); *Pascual v. N.Y.S. Div. Human Rights*, 37 A.D.3d 215, 216 (1st Dep't 2007) (State DHR was not required to subpoena documents); *Block v. Gatling*, 2010 N.Y. Misc. LEXIS 352, at *12-13 (Sup. Ct. N.Y. Cty. Feb. 18, 2010), *aff'd*, 84 A.D.3d 445 (1st Dep't 2011) (affirming no probable

[4] Indeed, the case Petitioner cites twice for his argument that the Commission's decision not to interview a particular witness "den[ied] Petitioner a 'full and fair opportunity' to present his claims" (Opp. 8, 12), *Stern v. N.Y.C. Comm'n Human Rights*, 38 A.D.3d 302 (1st Dep't 2007), does not remotely stand for that proposition, and in fact supports the Commission's position, not Petitioner's.

cause determination on basis of written submissions; Commission had no obligation to interview witnesses); *Givens v. Gatling*, 2011 N.Y. Misc. LEXIS 3551, at *13 (Sup. Ct. N.Y. Cty. July 11, 2011) ("Courts have upheld no probable cause determinations which were based solely on written submissions . . . . As such, the fact that the Commission may not have interviewed witnesses is without import."); *Stillman v. N.Y.S. Div. Human Rights*, 2008 N.Y. Misc. LEXIS 8096, at *2, 5 (Sup. Ct. N.Y. Cty. Nov. 19, 2008) (affirming no probable cause determination where State DHR "conducted an investigation by submission," because "Petitioner was afforded a full opportunity to present his written arguments to DHR"); *Rosario*, 2008 N.Y. Misc. LEXIS 5827 at *10 (affirming no probable cause determination where "petitioner was given an opportunity to present her lengthy and detailed written submissions, and . . . her submissions were thoroughly considered").

Here, the Commission gave Petitioner's claim the degree of investigation that was appropriate. The Commission: (1) interviewed Petitioner and gave him an opportunity to explain his discrimination claim; (2) reviewed Petitioner's complaint; (3) served Petitioner's complaint on his behalf and obtained a Verified Answer with attached exhibits from Amnesia, which the Commission reviewed; (4) reviewed Petitioner's Rebuttal and attached exhibits; (5) obtained and reviewed the State DHR's investigative file on Petitioner's prior discrimination complaint, including its decision, investigation report, and supporting materials; (6) made efforts to locate and interview the individual "David" named in Petitioner's complaint and to obtain Amnesia's surveillance video from the night in question; and (7) performed independent research that included review of public comments posted on the Internet by patrons of Amnesia. After the Commission determined that it lacked jurisdiction and that there was no probable cause, it gave Petitioner the opportunity to appeal the decision to the Commission's Chairperson, which he did.

The Commission considered Petitioner's 22-page "Appeal and Complaint" that challenged the legal and factual grounds for the Commission's decision and also baselessly accused the LEB's Executive Director of discrimination against "Euro-Americans." (Ex. 9 at 1).

Because the Commission's investigation of Petitioner's complaint was appropriate, Petitioner cannot demonstrate that the investigation was "so one-sided as to render the determination based upon it arbitrary or capricious," *Lee v. N.Y.S. Div. Human Rights App. Bd.*, 111 A.D.2d 748, 748 (2d Dep't 1985), and the Commission's decision must be upheld.

IV. Petitioner's Procedural Due Process Claim Is Meritless

Petitioner fails to state any claim for a violation of his constitutional due process rights. As explained in the Commission's opening brief (at 22-24), it is well established that where, as here, an agency determination is subject to a judicial review process designed to correct any potential procedural errors in its determination, this post-deprivation opportunity for review satisfies all of the requirements of due process. In other words, as a matter of law, there can be no procedural due process violation from an alleged error in an administrative agency's adjudication where any such error may readily be addressed through judicial review.

In *C/S Window Installers, Inc. v. N.Y.C. Dep't of Design & Constr.*, 304 A.D.2d 380 (1st Dep't 2003) and *Velella v. N.Y.C. Local Conditional Release Comm'n*, 13 A.D.3d 201 (1st Dep't 2004), both cited in the Commission's opening brief, the First Department held that even assuming *arguendo* that there had been a procedural error in an agency's determination, "***no due process violation occurred since an adequate postdeprivation opportunity to be heard has been provided by this CPLR article 78 proceeding***." *C/S Window*, 304 A.D.2d at 380 (emphasis added); *Velella*, 13 A.D.3d at 201 (same; no actionable due process violation from agency decision where "the petitioners had an adequate opportunity to be heard" in subsequent

judicial review of decision). Likewise, the Second Circuit has explained that "there *is no* constitutional violation (and no available § 1983 action) when there is an adequate state postdeprivation procedure to remedy a random, arbitrary deprivation of property or liberty," and "an Article 78 proceeding is a perfectly adequate postdeprivation remedy . . . ." *Hellenic Am. Neighborhood Action Comm. v. City of New York*, 101 F.3d 877, 881-82 (2d Cir. 1996) (emphasis in original); *see Mordukhaev v. Daus*, 457 F. App'x 16, 21 (2d Cir. 2012) ("the existence of [an Article 78] proceeding" to challenge any alleged deficiencies in an administrative adjudication "confirms that the state afforded [a person] adequate process to defeat his constitutional claim"); *cf. Chase Group Alliance LLC v. City of New York Dep't of Fin.*, 620 F.3d 146, 152-53 (2d Cir. 2010) ("[E]ven if the Housing Court erred, such an error does not itself become a due process violation to be remedied in a Section 1983 action . . . . So long as state appellate remedies are available, a Section 1983 action is not an available vehicle for relief."). Thus, the very existence of the instant special proceeding, in which Petitioner can have his claimed procedural errors addressed, in itself "defeat[s] his constitutional claim." *Mordukhaev*, 457 F. App'x at 21; *Chase Group*, 620 F.3d at 153 ("whether state remedies exist" for an alleged procedural due process violation "goes to whether a constitutional violation has occurred at all").

Petitioner's argument to the contrary is based entirely on misplaced reliance on *dicta* in *Rosu v. City of New York*, 2012 U.S. Dist. LEXIS 178875 (S.D.N.Y. Dec. 13, 2012), the only case Petitioner cites for his constitutional argument in either his Petition or his opposition brief. But *Rosu* dismissed a procedural due process claim against the Commission because the plaintiff, like the Petitioner here, did not allege that the Commission failed to take any step in its investigation that it was required to take. *Rosu*, 2012 U.S. Dist. LEXIS 178875 at *14 ("none of

these alleged failures were duties that [the Commission] had"). To the extent Petitioner reads *Rosu* to suggest that a plaintiff may collaterally attack a Commission decision as violating procedural due process, notwithstanding the available remedy of a special proceeding to correct any alleged procedural errors in a Commission determination, that argument is foreclosed by the controlling First Department and Second Circuit authority cited above.

Petitioner's due process claim also fails for the same reason as the plaintiff's in *Rosu*: Petitioner has failed to identify any investigative measures the Commission was ***required*** to take but failed to. Petitioner cites the Commission's website as describing some of the procedures the Commission may generally employ in its investigations, including interviews and document requests. (Opp. 7). Yet as discussed in detail above, it is well established that the Commission may properly dismiss a complaint for lack of probable cause based solely on a review of the evidence submitted by the parties, without interviewing any witnesses or subpoenaing any documents. *See supra* at 12-13. Petitioner does not cite a single authority to the contrary. His meritless procedural due process claim should be dismissed.

CONCLUSION

For the foregoing reasons as well as those set forth in the Commission's opening brief, the Petition should be dismissed and the Commission's determination should be upheld and affirmed.

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