To be Argued by:
ELISE M. BLOOM
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Court of Appeals

of the

State of New York

An Individual Described Herein by the Pseudonym
"MARGARET DOE,"

Plaintiff-Appellant,

– against –

BLOOMBERG L.P.,

Defendant,

– and –

MICHAEL BLOOMBERG,

Defendant-Respondent,

– and –

NICHOLAS FERRIS,

Defendant.

BRIEF FOR DEFENDANT-RESPONDENT

ELISE M. BLOOM
RACHEL S. PHILION
ANDREW A. SMITH
PROSKAUER ROSE LLP
Attorneys for Defendant-Respondent
Eleven Times Square
New York, New York 10036
Tel.: (212) 969-3000
Fax: (212) 969-2900

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Defendant-Respondent Michael R. Bloomberg ("Mr. Bloomberg") respectfully submits this brief in response to the principal brief of Plaintiff-Appellant Margaret Doe ("Plaintiff"), who appeals from the Appellate Division's dismissal of her Complaint against Mr. Bloomberg.

PRELIMINARY STATEMENT

Plaintiff, a former employee of defendant Bloomberg L.P. (the "Company"), sued the Company, her former direct supervisor defendant Nicholas Ferris, and Mr. Bloomberg, alleging that Mr. Ferris harassed her and discriminated against her during her employment. As Plaintiff has conceded, Mr. Bloomberg—who was Mayor of the City of New York when the Company hired Plaintiff and when almost all most of the conduct described in her Complaint allegedly took place—did not participate in Mr. Ferris's alleged conduct, did not know about the conduct, and has no connection to Plaintiff whatsoever. For precisely that reason, the Appellate Division correctly held that Mr. Bloomberg's ownership interest in the Company and alleged position as "CEO" for a portion of Plaintiff's employment standing alone were insufficient to establish individual liability against him as her "employer" under the New York City Human Rights Law (the "City Human Rights Law") and dismissed her Complaint as against him. The Appellate Division also rejected as "unavailing" and unsupported by any legal authority Plaintiff's amorphous and speculative allegations attributing the Company's supposed

corporate "culture" to Mr. Bloomberg, which were based on media articles and old lawsuits of which Plaintiff does not even purport to have personal knowledge or experience (nor could she, as they all predated her employment by years, and in many instances, decades).

In an effort to salvage her claims against Mr. Bloomberg (even though both the Company and Mr. Ferris are separately charged defendants), Plaintiff urges this Court to adopt a reading of Section 8-107 (13) (b) of the City Human Rights Law that would make every individual owner or high-level job holder in an organization strictly liable as an "employer" for the conduct of others in the organization—conduct to which they had absolutely no connection, allegedly committed by employees they never met or knew of. Plaintiff's argument is deeply flawed and the Appellate Division properly rejected it.

Plaintiff's interpretation of "employer" cannot be reconciled with the text of the City Human Rights Law. The statute expressly delineates the circumstances in which an individual may be held personally liable. All of those provisions require personal involvement in a statutory violation. While lower courts have expressed the personal involvement requirement differently, they have come to the same conclusion as the Appellate Division here—that an individual owner or executive is not an "employer" under the City Human Rights Law who is personally liable for the conduct of others, absent some actual, personal involvement,

encouragement, condonation, or approval of the challenged conduct. As the Appellate Division recognized, without such a requirement, the untenable result would be personal (and strict) liability under the statute for every individual owner or high-ranking executive of any business in New York City.

Plaintiff does not address the utter lack of statutory support or precedent for her argument. Rather, she cherry picks an out-of-context quote from Patrowich v Chemical Bank (63 NY2d 541 [1984]), a case that did not analyze the City Human Rights Law at all. Instead, Patrowich answered a question that is not before this Court, namely whether the plaintiff's direct supervisor held an ownership interest or sufficiently high-level position in the organization to be held personally liable for discrimination under the New York State Human Rights Law (the "State Human Rights Law"). Alternatively, Plaintiff asks the Court to import an "economic reality" test specifically developed under the Fair Labor Standards Act, a federal wage and hour statute. That test is inapplicable to Plaintiff's City Human Rights Law claims and, in any event, requires a specific nexus between the individual defendant and the relevant aspects of a plaintiff's employment which is wholly absent here.

Under any conceivable meaning of the term "employer" in Section 8-107 (13) (b) of the City Human Rights Law, Mr. Bloomberg cannot be held directly and strictly liable for conduct he is not alleged to have participated in, encouraged,

condoned, or approved. This Court should affirm the Appellate Division's order dismissing the Complaint against Mr. Bloomberg.

COUNTERSTATEMENT OF THE QUESTION PRESENTED

Whether an individual owner or executive of a plaintiff's employer who had no personal involvement in and did not encourage, condone or approve the conduct giving rise to the plaintiff's claim is considered an "employer" under Section 8-107 (13) (b) of the New York City Human Rights Law and therefore vicariously liable for the challenged conduct of another employee?

Answer: No.

COUNTERSTATEMENT OF THE CASE

I. Plaintiff Files a Complaint Based on Her Employment With the Company.

On December 7, 2016, Plaintiff filed a Complaint against the Company, Mr. Bloomberg and Nicholas Ferris, who she alleged was her supervisor while she was employed by the Company (R-18 – R-75).[1] The Complaint alleged that in September 2012, the Company hired Plaintiff, a recent college graduate, to sell newsletter subscriptions as a temporary employee in its marketing department (R-

[1] The Complaint was unequivocal that Plaintiff was employed by the Company (R-21 ¶ 2 [describing Complaint as seeking redress for "hostile work environment created by her employer, Bloomberg L.P."]).

22 ¶ 7; R-37 ¶ 85). In pertinent part, the Complaint asserted causes of action for sex discrimination and hostile work environment under the City Human Rights Law against Mr. Bloomberg on the premise that he—in addition to the Company—was also her "employer" (R-65 ¶¶ 226-230; R-67 ¶¶ 235-238; R-68 ¶¶ 239-240).[2]

A. Plaintiff Alleges That Individual Defendant Nicholas Ferris Supervised Her and Violated the City Human Rights Law.

Mr. Ferris, according to the Complaint, was responsible for almost every aspect of Plaintiff's employment with the Company. He allegedly interviewed Plaintiff, served as her direct supervisor throughout her employment with the Company, and had the authority to hire Plaintiff into a "permanent" position, which she eventually attained (R-24 ¶¶ 21-22; R-33 ¶ 65; R-34 ¶ 68; R-37 ¶ 86; R-54 ¶¶ 176-178; R-40 ¶ 100). Plaintiff further alleged that Mr. Ferris subjected her to inappropriate comments, unwanted advances, and sexual assault, all in violation of the City Human Rights Law (see e.g. R-22 ¶ 9; R-39 ¶¶ 95-97; R-42 ¶ 113; R-43 ¶ 114; R-44 ¶¶ 120-124; R-45 ¶ 127). Plaintiff did not report Mr. Ferris's alleged

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[2] Those causes of action were denominated as the First through Third Causes of Action in the Complaint, which were also based on the State Human Rights Law. The Complaint contained additional causes of action against Mr. Bloomberg for aiding and abetting a violation of the City Human Rights Law and for negligent infliction of emotional distress (R-69 ¶¶ 241-243; R-71 ¶¶ 253-255). Only the First through Third Causes of Action are at issue on this appeal, and only to the extent that they are based on the City Human Rights Law (see n 5, infra).

conduct to the Company's Human Resources Department (R-42 ¶¶ 110-112; R-48 ¶¶ 140-141; R-49 ¶ 151). Plaintiff did not allege that the Human Resources Department or any of the Company's management (other than Mr. Ferris) were aware of Mr. Ferris's alleged actions.[3]

B. Plaintiff Concedes that Mr. Bloomberg Had No Knowledge Of, Nor Did He Participate In, The Challenged Conduct.

The Complaint alleged that Mr. Bloomberg was the "Co-Founder, Chief Executive Officer and President" of the Company (R-23 ¶ 15). It did not allege that Mr. Bloomberg was ever aware that Plaintiff worked for the Company or that he had any involvement in her employment whatsoever. Nor did the Complaint allege that Mr. Bloomberg was ever aware of Mr. Ferris, had any knowledge of Mr. Ferris's alleged conduct, or was involved in Mr. Ferris's conduct in any way. Indeed, Mr. Bloomberg was the Mayor of New York City when Plaintiff first began working for the Company in September 2012 and during the period when Plaintiff claims that most of that alleged conduct, including the alleged assaults,

[3] Plaintiff alleged that her messages with Mr. Ferris and her co-workers on the Company's internal messaging system contained references to Mr. Ferris's inappropriate conduct, but she did not allege that the Company, much less Mr. Bloomberg, ever reviewed those messages—only making the conclusory allegation that the Company had some sort of unspecified "selective practice" generally of reviewing instant messages (R-59 ¶¶ 200-202).

occurred (R-22 ¶ 7; R-33 ¶¶ 65-67; R-34 ¶¶ 68-69).[4] Plaintiff concedes in her principal brief that Mr. Bloomberg had no knowledge of or "personal involvement in the alleged harassment" claimed by Plaintiff and no "direct connection to Plaintiff" (Pl. Br. at 21).

The only allegations in the Complaint relating to Mr. Bloomberg had no connection to Plaintiff at all. The Complaint cites a handful of magazine articles, blog posts, and litigation concerning allegations from decades ago (see e.g. R-29 ¶ 44 ["an article . . . documented that 'in 1996 and 1997, four women filed sexual harassment suits against Bloomberg, LP'"]). Plaintiff vaguely asserted, based on these second- and third-hand materials, that the Company's "culture" followed Mr. Bloomberg's alleged "example and leadership" (R-32 ¶ 57), despite the fact that none of the materials cited by Plaintiff involved her or her employment with the Company, and in fact predated such employment.

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[4] Among the other events alleged in the Complaint that Plaintiff claims took place while Mr. Bloomberg was serving as the Mayor of New York City and not at the Company include: the year Plaintiff spent as a "temporary" employee at the Company (R-37 ¶ 85); an incident in which Mr. Ferris allegedly "assaulted [Plaintiff] by rubbing her thigh" (R-40 ¶ 99); the two occasions on which Plaintiff alleges she had non-consensual intercourse with Mr. Ferris at his apartment (R-45 ¶ 127; R-50 ¶ 156); Plaintiff's alleged use of illegal drugs with Mr. Ferris throughout 2013 (R-48 ¶¶ 143-144; R-49 ¶¶ 145-151; R-50 ¶¶ 152-155); and Plaintiff's securing a permanent position at the Company on Mr. Ferris's recommendation (R-54 ¶¶ 176-178).

II. The Supreme Court Correctly Grants Mr. Bloomberg's Motion to Dismiss Before Erroneously Granting Plaintiff's Motion to Reargue.

Mr. Bloomberg moved to dismiss the Complaint in its entirety against him pursuant to CPLR 3211 (a) (7), including because he was not Plaintiff's "employer" within the meaning of the City Human Rights Law (R-90 – R-93). The Supreme Court granted that motion because Plaintiff had not alleged that Mr. Bloomberg "was even remotely aware" of the conduct alleged in the Complaint, and simply holding an alleged position as "CEO of Bloomberg L.P." did not make him individually liable for the alleged conduct of others (R-15 – R-16).

Plaintiff moved for reargument as to those aspects of her City Human Rights Law claims that were premised on the theory that Mr. Bloomberg was her "employer."[5] Plaintiff's motion relied solely on Section 8-107 (13) (b), a provision in the City Human Rights Law that she had not mentioned in her opposition to Mr. Bloomberg's motion to dismiss (R-287 – R-288).[6] As Mr. Bloomberg's opposition

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[5] The trial court also dismissed Plaintiff's causes of action against Mr. Bloomberg under the State Human Rights Law and her cause of action for aiding and abetting a violation of the City Human Rights Law (R-16 – R-17). Plaintiff did not seek reargument of those causes of action and did not appeal their dismissal. She also voluntarily discontinued her cause of action for negligent infliction of emotional distress against Mr. Bloomberg (R-157 – R-158).

[6] Plaintiff's attorney affirmation also improperly contained additional extraneous allegations about Mr. Bloomberg, including that five years *before* Plaintiff was hired by the Company, Mr. Bloomberg, while serving as mayor, had communicated with one of the CEOs of the Company about "female executives" and the "management" of the Human Resources Department (R-160 ¶ 6). Though the Complaint had contained no allegations about Mr. Bloomberg's ownership

explained, however, Section 8-107 (13) does no more than specify circumstances in which an “employer” is liable for statutory violations of its employees or agents (R-300). In other words, that section of the City Human Rights Law is applicable only to defendants who are deemed to be “employers” in the first instance; it could not possibly support the predicate conclusion that a defendant was an “employer” (id.).

Despite the complete divergence between Plaintiff’s motion and the only dispositive issue, the Supreme Court granted reargument (R-4 – R-11). Conflating the issue of vicarious liability under Section 8-107 (13) (b) with the issue of whether a defendant is an “employer” to whom that section applies, the court held that Mr. Bloomberg’s “mere ‘managerial or supervisory responsibility’” was a “sufficient basis to succeed on her claim” (R-8). The court quoted Section 8-107 (13) (b) (1), which specifies that an “employer” is liable for certain unlawful discriminatory practices committed by an “employee or agent” who exercised “managerial or supervisory responsibility”—not that an individual who exercised such responsibility is an “employer” who may be held liable.

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interest in the Company, Plaintiff’s attorney affirmation described Mr. Bloomberg as the “majority owner” (id.).

III. The Appellate Division Correctly Dismisses the Complaint as to Mr. Bloomberg.

On Mr. Bloomberg's appeal, the Appellate Division, First Department, reversed the trial court's decision and held that Plaintiff had failed to allege Mr. Bloomberg was her "employer" under the City Human Rights Law (R-416 – R-427). Analyzing the statutory text and the cases that have addressed the issue, the Appellate Division concluded:

> [I]n order to hold an individual owner or officer of a corporate employer, in addition to the separately charged corporate employer, strictly liable under [the City Human Rights Law], a plaintiff must allege that the individual has an ownership interest [in the company] or has the power to do more than carry out personnel decisions made by others *and* must allege that the individual encouraged, condoned or approved the specific conduct which gave rise to the claim.

(R-419 (emphasis in original)). The Appellate Division went on to state that the City Human Rights Law was not so broad as to impose strict liability on any individual who holds an ownership stake or leadership position in a company, because doing so "would have the effect of imposing strict liability on every individual owner or high-ranking executive of any business in New York City" and would be contrary to the principles underlying New York corporate law (R-420).

Because Plaintiff failed to allege that Mr. Bloomberg participated in or encouraged, condoned, or approved the specific discriminatory conduct she allegedly experienced with her manager, the Appellate Division held that the

Complaint failed to state a claim against Mr. Bloomberg under the City Human Rights Law (R-421). In so holding, the Court specifically rejected Plaintiff's contention that Mr. Bloomberg could be held liable as her "employer" on the basis that he allegedly "created a culture of discrimination" at the Company (id.). The Court found that argument to be "unavailing" and unsupported by any legal authority, and thus insufficient to state a claim under the City Human Rights Law (id.).

By contrast, the Appellate Division dissent would have instead required no connection between the individual defendant and the alleged statutory violation (R-423). In the dissent's view, when a plaintiff is employed by a corporate employer, the term "employer" in the City Human Rights Law includes not only the corporate employer but also any individual "shown to have an ownership interest in the relevant organization or the power to do more than carry out personnel decisions made by others," even if the corporate employer is already a defendant and the individual had no connection to or involvement in the alleged underlying conduct (R-425). Because two justices dissented in the Appellate Division, Plaintiff appeals to this Court under CPLR 5601 (a). The case is proceeding against the two other defendants, the Company and Mr. Ferris.

ARGUMENT

Plaintiff has no cause of action against Mr. Bloomberg as her "employer" under Section 8-107 (13) (b) of the City Human Rights Law. As lower courts have recognized, the term "employer" in Section 8-107 (13) may not be read to include owners or executives of a corporate employer who did not participate in, encourage, condone or approve the specific conduct giving rise to a plaintiff's claim under the City Human Rights Law. The language and structure of the statute as a whole expressly limit liability to individuals with such involvement, and any broader interpretation would be entirely unworkable in practice because it would extend individual strict liability to every owner or executive of a business in New York City.

Plaintiff's allegations about the conduct she claims to have experienced at the Company did not involve Mr. Bloomberg at all. Rather, the complaint specifically alleges that Plaintiff's direct manager, defendant Nicholas Ferris, harassed and sexually assaulted her (see generally R-39 – R-48). It also alleges that Mr. Ferris supervised Plaintiff at all relevant times (R-24 ¶ 21), was authorized to and did make decisions that affected the terms and conditions of her employment (R-24 ¶ 22) and controlled her employment (R-37 ¶ 86; R-40 ¶ 100). The complaint made no allegations that Mr. Bloomberg even knew of Plaintiff or Mr. Ferris, much less was aware of Mr. Ferris's conduct or had any involvement in

it. On these alleged facts, Mr. Bloomberg's ownership interest in the Company and alleged job title do not make him an "employer" vicariously liable for the conduct of an employee of the Company under Section 8-107 (13) (b), in addition to the Company (Plaintiff's corporate employer) and Mr. Ferris (Plaintiff's supervisor and alleged perpetrator of the conduct) who are already defendants in this case.

Because Plaintiff appeals from a dismissal under CPLR 3211 (a) (7), this Court's review is "limit[ed] to the legal sufficiency of plaintiff's claims" (JF Capital Advisors, LLC v Lightstone Group, LLC, 25 NY3d 759, 764 [2015]), and although allegations in a Complaint are presumed true for this purpose, "bare legal conclusions" are to be disregarded (Godfrey v Spano, 13 NY3d 358, 373 [2009]). Applying that standard, for the reasons that follow, Plaintiff's Complaint was properly dismissed because she has no cause of action against Mr. Bloomberg as her "employer" under the City Human Rights Law.

I. The Term "Employer" in Section 8-107 (13) Does Not Include an Owner or Executive of a Corporate Employer Who Does Not Participate In or Have a Connection to the Specific Conduct Giving Rise to a Plaintiff's Claim.

Plaintiff asks the Court to read the City Human Rights Law to impose personal, strict liability on an individual for the acts of others in which that individual had no involvement or knowledge, simply by virtue of his ownership

interest or position within the organization that employs a plaintiff. This reading of the City Human Rights Law is unsupported by the plain language of the statute.

The City Human Rights Law creates a cause of action for an employee who is subjected to an "unlawful discriminatory practice" (Admin. Code § 8-502). Section 8-107 (13) specifies the circumstances in which an "employer" may be held liable for an "unlawful discriminatory practice" committed by an "employee or agent" of the "employer" (Admin. Code § 8-107 [13] [a], [b]).

Section 8-107 (13) establishes an absolute rule: "An employer shall be liable for an unlawful discriminatory practice based upon the conduct of an employee or agent which is in violation of any provision of this section other than subdivisions one and two of this section" (Admin. Code § 8-107 [13] [a]). As relevant to the instant lawsuit, for violations of subdivisions 1 and 2, "an employer shall be liable . . . based upon the conduct of an employee or agent" only when: (1) the employee or agent "exercised managerial or supervisory responsibility"; (2) the employer knew of the employee's or agent's conduct and acquiesced in it or failed to act; or (3) the employer should have known of the employee's or agent's conduct but "failed to exercise reasonable diligence" to prevent it (Admin. Code § 8-107 [13] [a] [b] [1], [2], [3]).

Section 8-107 (13) does not define the term "employer." The only definition provided in the City Human Rights Law does not apply to Section 8-107 (13) and

simply exempts "employers" with "fewer than four [employees]" from the coverage of certain subdivisions of the law (see Admin. Code § 8-102).[7] For several reasons, the term "employer" cannot be read as Plaintiff suggests.

A. The Plain Language of the Statute Does Not Support Holding Individuals Personally Liable for the Conduct of Others Based Solely on Ownership Status or Level of Role Within an Organization That Employs a Plaintiff

The City Human Rights Law may be construed "broadly" only to the extent that such an interpretation is "reasonably possible" (Albunio v City of New York, 16 NY3d 472, 477–478 [2011]). This Court has repeatedly rejected broad interpretations of the City Human Rights Law that cannot be reconciled with the statutory text (see e.g. Makinen v City of New York, 30 NY3d 81, 89 [2017] ["we would be rewriting the NYCHRL, not merely giving it a broad reading to effectuate its remedial anti-discrimination purpose"]; Chauca v Abraham, 30 NY3d 325, 331, 334 [2017] [rejecting argument that under the City Human Rights Law "punitive damages should be available in any situation where compensatory damages are available" and instead adopting "the most liberal construction of the

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[7] Section 8-102's definition lacks a substantive component and is entirely circular insofar as it defines "employer" by using the term itself. While the definition contemplates that an individual may be an "employer" when an employee is directly employed by an individual and not a corporate entity—for example, where an individual operates a business as a sole proprietorship— no such facts are alleged here (see generally Rose v Mount Ebo Assoc., Inc., 170 AD2d 766, 768-69 [3d Dept 1991] ["Because plaintiff operated the business as a sole proprietorship with no distinct existence apart from him, there is no separate company."]).

statute that is ‘reasonably possible’”]); <u>Hoffman v Parade Publs.</u>, 15 NY3d 285, 289-290 [2010] [holding that “the statute’s language” mandated an interpretation “concomitantly narrowing the class of nonresident plaintiffs who may invoke its protection”]).

The employment provisions of the City Human Rights Law expressly create individual liability applicable to an owner or executive of an organization in only three circumstances, all of which require the individual’s actual participation in the alleged unlawful conduct and none of which is applicable here.

First, under Section 8-107 (1), an “employee or agent” (terms that encompass an owner and executive) is liable when he or she *personally commits* an “unlawful discriminatory practice” (Admin. Code §§ 8-107 [1] [a], 8-502 [a]; <u>see also</u> <u>Murphy v ERA United Realty</u>, 251 AD2d 469, 471 [2d Dept 1998] [relying on allegations that “plaintiff’s supervisor and two male co-workers created a hostile working environment” to hold that “plaintiff has a cause of action under [Admin. Code § 8-107 [1]] against the employer as well as her coemployees”]; <u>Malena v Victoria’s Secret Direct, LLC</u>, 886 F Supp 2d 349, 366 [SD NY 2012] [explaining that because Section 8-107 [1] “provides for individual liability of an employee regardless of ownership or decisionmaking power,” evidence of “discriminatory or retaliatory intent attributable to [plaintiff’s supervisor]” was sufficient to avoid summary judgment on claim against supervisor in individual capacity] [quotation

omitted]). The legislative history of this section confirms that the creation of individual liability for an "employee" or "agent" of an "employer" who personally commits an "unlawful discriminatory practice" was a deliberate choice (see Report of the Committee on General Welfare on Local Law 39 of 1991 [1991 Report], Section-by-Section Analysis at 9-10 ["Currently, these subdivisions [subd. 1 and 2] prohibit employers, employment agencies and labor organizations from engaging in discriminatory employment practices but are silent as to the individual liability of their employees and agents for such practices. The amendment would make explicit such individual liability."]).

Second, the City Human Rights Law declares that it is an "unlawful discriminatory practice" for any "person" to "aid, abet, incite, compel or coerce" a statutory violation (Admin. Code §§ 8-107 [6]; 8-502). "Person" is defined to include "natural persons" (Admin Code § 8-102), thus an owner, executive, or others at a corporate employer may be held individually liable under this provision, but only where he or she "*actually participated in* the alleged discriminatory acts" (Forrest v Jewish Guild for the Blind, 3 NY3d 295, 328 [2004] [quotations omitted] [emphasis added]).

Third, any "person" commits an "unlawful discriminatory practice" by violating the retaliation provision of the statute (Admin. Code § 8-107 [7]; see also Albunio, 16 NY3d at 477-78). As with the aiding-and-abetting provision,

however, individual liability requires actual participation in the retaliation (see Malena, 886 F Supp 2d at 366 ["as is clear from the text . . . individual liability . . . is limited to cases where an individual defendant . . . *actually participates in* the conduct giving rise to the plaintiff's retaliation claim"] [quotations omitted] [emphasis added]).

Plaintiff is asking this Court to interpret "employer" in Section 8-107 (13) (b) to include owners and executives of an "employer" which would create a fourth, unexpressed, and substantially broader provision that would dispense with any requirement of participation in the challenged conduct. The Court should reject Plaintiff's proposed reading of the statute for that reason alone (see McKinney's Cons Laws of NY, Book 1, Statutes § 240 ["an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded"]; Thoreson v Penthouse Intl., Ltd., 80 NY2d 490, 498 [1992]). Indeed, the statute expressly differentiates an "employer" from its "employee or agent" in Section 8-107 (13) and refers elsewhere to an "owner" or "manager" (see e.g. Admin Code. §§ 8-107(4); 8-502).

Moreover, the Court should reject Plaintiff's proposed reading of Section 8-107 (13) because, unlike the three express provisions in the statute, it would come with no requirement that an owner or executive committed or participated in a statutory violation. The deliberate adoption of these three express provisions

requiring actual participation (see 1991 Report, Section-by-Section Analysis at 9-10) indicates that the legislature did not intend the expansive meaning of "employer" ascribed by Plaintiff (McKinney's Cons Laws of NY, Book 1, Statutes § 97 ["all parts of an act are to be read and construed together to determine the legislative intent"]).

Further, under Plaintiff's view, an owner or executive would be individually liable merely because he or she was an owner or executive. A court would not need to determine whether he or she had committed an unlawful discriminatory practice in violation of Section 8-107 (1), had aided or abetted a violation of the statute in violation of Section 8-107 (6), or had retaliated in violation of Section 8-107 (7). Plaintiff's reading of the statute therefore must also be rejected because it would swallow each of those provisions (McKinney's Cons Laws of NY, Book 1, Statutes § 98 ["Each section of a legislative act must be considered and applied in connection with every other section of the act, so that all with have their due, and conjoint effect"]; see also Matter of Notre Dame Leasing, LLC v Rosario, 2 NY3d 459, 464 [2004] ["such an interpretation undermines the statutory scheme"]).

B. Courts in New York Have Consistently Required Involvement in the Specific Conduct Giving Rise to a Plaintiff's Claim Before an Individual Defendant May Be Held Liable as an "Employer" Under the City Human Rights Law.

Consistent with the language of the statute, courts applying Section 8-107 (13) have declined to find that an individual owner or executive of a corporate

employer is an "employer" and therefore personally liable for the conduct of others solely based on his ownership interest or executive status. Those courts have recognized that reading "employer" to create such individual liability would be inconsistent with the express language of the City Human Rights Law, which requires the commission of or participation in a statutory violation before such an individual may be held liable (Admin. Code §§ 8-107 [1], [6], [7]).

Some courts, including the Appellate Division here, have required that the owner or executive "encouraged, condoned or approved" the specific conduct constituting a statutory violation (R-416; see e.g. Boyce v Gumley-Haft, Inc., 82 AD3d 491, 492 [1st Dept 2011]; McRedmond v Sutton Place Rest. & Bar, Inc., 95 AD3d 671 [1st Dept 2012]).

Other courts have articulated the requirement of personal involvement in the alleged conduct in various other ways but have reached the same conclusion (see e.g. Gallegos v Elite Model Mgt. Corp., 28 AD3d 50, 61–62 [1st Dept 2005] [approving jury instruction on City Human Rights Law claim that the individual owner and cofounder of the company "must have been 'responsible for, assisted or failed to rectify' the discriminatory conduct in order to be held liable" because it required the jury to consider the issue of the owner and co-founder's "individual complicity" in the specific challenged conduct]; Burhans v Lopez, 24 F Supp 3d 375, 385 [SD NY 2014] [relying on allegation that individual defendant "was

personally involved in the conduct in question"]; Zach v E. Coast Restoration & Constr. Consulting Corp., 2015 WL 5916687, *1, 2015 US Dist LEXIS 138334, *2 [SD NY Oct. 7, 2015, No. 15 Civ. 0007 (NRB)] [explaining that "the caselaw requires some allegation of participation by the individual" supervisor or owner]).

Contrary to Plaintiff's suggestion, Zakrzewska v New School, 14 NY3d 469 [2010], does not hold otherwise. There, this Court reached the straightforward conclusion that Section 8-107 (13) (b) (1) makes an "employer" strictly liable for certain actions of a "managerial or supervisory" employee. The only "employer" at issue was the school (i.e. the corporate employer) that employed both the plaintiff and her supervisor, who had allegedly violated the City Human Rights Law. The Court did not have to, and did not, consider whether and under what circumstances the term "employer" might include individual owners and executives of a corporate employer.

Requiring participation in or connection to unlawful conduct before an individual owner or manager may be deemed an "employer" is also consistent with existing law concerning individual liability for owners and agents of a business entity (see GK Alan Assoc. v Lazzari, 44 AD3d 95, 101 [2d Dept 2007] ["A corporation and its shareholder are separate legal persons . . . the agent of a corporate principal is not, merely by virtue of the agency relationship with the corporation, an agent of a shareholder of the corporate principal."]). To disregard

the entity structure and hold individual owners of the entity liable "requires a showing that: (1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury" (Matter of Morris v New York State Dept. of Taxation & Fin., 82 NY2d 135, 141 [1993]).[8] Those circumstances are not present here.

As the Appellate Division recognized, collapsing that structure entirely and treating a corporate employer and its owners and executives as coextensive for purposes of the City Human Rights Law "would be inconsistent with the principles underlying this State's corporate law" (R-420; see also Marchuk v Faruqi & Faruqi, LLP, 100 F Supp 3d 302, 309 [SD NY 2015] ["such a reading would be inconsistent with state corporate law"]). Indeed, an entity can act only through its employees or agents (see Worthy v New York City Housing Auth., 21 AD3d 284 [1st Dept 2005]). Sweeping those individuals into the term "employer" by virtue of the control they exercise on behalf of the entity would disregard the legal status of the entity and the statute's express differentiation between an "employer" and its agents.

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[8] The same principles apply to other types of entities, including a limited partnership (Andejo Corp. v S. St. Seaport LP, 40 AD3d 407, 407 [1st Dept 2007] and a limited liability company (Retropolis, Inc. v 14th St. Dev. LLC, 17 AD3d 209, 210 [1st Dept 2005]).

Finally, without a requirement of participation in or connection to the specific alleged conduct, as Plaintiff suggests, the scope of liability under the City Human Rights Law would be staggering. Every owner, executive, manager, shareholder, and countless other individuals would be subject to personal liability for conduct that they did not know about and could not have known about or prevented, much less participated in or encouraged, condoned, or approved (see e.g. Marchuk, 100 F Supp 3d at 309 ["it cannot be the case . . . that liability attaches to a company's shareholder in his individual capacity without any inquiry into his personal culpability"]; Zach, 2015 WL 5916687, *1, US Dist LEXIS 138334, *2 ["[A] plaintiff could add any supervisor or owner of the alleged liable corporation, regardless of what that prospective defendant knew or did. Such a broad and counter-intuitive result is unreasonable."]. Indeed, the logical extension of Plaintiff's argument would yield the absurd result of turning every individual with any ownership interest into an "employer" under the City Human Rights Law, including, for that matter, any plaintiff compensated with equity or shares of stock in his or her employer (see generally Guiry v Goldman, Sachs & Co., 31 AD3d 70, 71 [1st Dept 2006] [describing practice of compensating employees with "awards of stock and stock options"]). The Appellate Division's holding was partly premised on the recognition that such a result is untenable (R-420 ["holding an individual owner or officer of a corporate employer liable under the City HRL as

an employer, without even an allegation that the individual participated, in some way, in the specific conduct that gave rise to the claim, would have the effect of imposing strict liability on every individual owner or high-ranking executive of any business in New York City"]).

For each of these reasons, lower courts, including the Appellate Division here, have rejected the interpretation of "employer" advanced by Plaintiff. Instead, they have required some involvement in the specific conduct giving rise to the plaintiff's claim before the term may be applied to an individual owner or executive of a corporate employer.

C. Plaintiff's Misinterpretation of "Employer" in Section 8-107 (13) (b) is Based on a Misapplication of Authority Interpreting Other Statutes.

Ignoring the text of the City Human Rights Law and the courts that have applied it, Plaintiff contends that the term "employer" in Section 8-107 (13) (b) includes not only the organization that employs a plaintiff but also any individual with an ownership interest in that entity or the power to do more than carry out personnel decisions made by others on behalf of that entity. Not only is that definition of "employer" inconsistent with the entirety of the City Human Rights Law, but it also relies on a misreading of this Court's decision in Patrowich v Chemical Bank (63 NY2d 541 [1984]), which interpreted the State Human Rights Law and did not address the City Human Rights Law at all.

1. Patrowich Examined Only Whether the Plaintiff's Supervisor Could Be Held Individually Liable Under the State Human Rights Law.

Patrowich's discussion of the State Human Rights Law has sown substantial confusion among lower courts. On the one hand, some courts have quoted the decision's opening sentence out of context, writing that the term "employer" in Section 296 ([1] of the State Human Rights Law includes any individual with an ownership interest in a corporate employer, or, any individual who, on behalf of the entity, has the authority to do more than carry out personnel decisions made by others (see Pepler v Coyne, 33 AD3d 434, 435 [1st Dept 2006]). On the other hand, some courts have questioned whether such a reading of the opening sentence is consistent with the remainder of the decision (see e.g. Kaiser v Raoul's Rest. Corp., 72 AD3d 539, 540 [1st Dept 2010] ["The broad reading of Patrowich is not easily reconciled with the second paragraph of the opinion."]; Giuntoli v Garvin Guybutler Corp., 726 F Supp 494, 507 [SD NY 1989] ["Discussing the HRL, it appears to state that 'individual employees' cannot be sued under that statute."]).

In any event, the facts at issue in Patrowich make clear that its holding does not support Plaintiff's position because the case addressed a different issue under different laws. Patrowich examined only whether the plaintiff's supervisor—not an owner or executive of the plaintiff's corporate employer with no alleged connection to plaintiff—could be held personally liable under the State Human

Rights Law, the federal Age Discrimination in Employment Act ("ADEA") and the federal Equal Pay Act ("EPA") (Patrowich v Chem. Bank, 98 AD2d 318, 325 [1st Dept 1984] affd 63 NY2d 541 [1984]). The question before the Court of Appeals was whether that supervisor, who allegedly participated in the actions complained of by the plaintiff, *also* held an ownership interest or a high-level position with the plaintiff's corporate employer such that he could be held directly liable under those statutes (63 NY2d at 542).

The court concluded that the plaintiff's supervisor could not be held liable because he was not *also* the owner of the business or a high-ranking business executive (id. at 543-44). In examining the statutory definition of "employer" under the State Human Rights Law, the court noted that the statute "provides no clue to whether individual employees of a corporate employer may be sued under [the State Human Rights Law's] provisions" and that its language suggested that the legislature did not intend such an application (id. at 543).[9] Patrowich held only

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[9] Contrary to Plaintiff's description, it is not at all clear that the Patrowich court concluded that the term employer in Section 296 (1) of the State Human Rights Law ever includes an individual owner or executive. In construing that statutory provision, the Court asked simply "whether individual employees of a corporate employer may be sued" and concluded "the contrary" was suggested by a separate provision of the statute, indicating that the legislature "differentiated" individual employees and agents where it intended to cover them (63 NY2d at 542-43). The court quickly dispatched the same issue under the New York Labor Law by relying on the same principle. It was only under the two federal statutes (the ADEA and the EPA) that the Court explained that the question of an individual defendant's liability was a "closer one" because

that the individual defendant was not an "employer" under the State Human Rights Law, *and*, because it did not analyze any claims under the City Human Rights Law, is silent on the only relevant issue here—whether an individual owner or executive with no personal involvement in the specific challenged conduct falls within the meaning of "employer" under Section 8-107 (13) (b).[10]

Even courts that have recited a broad description of Patrowich's holding have applied it to individual defendants personally involved in an alleged statutory violation (see e.g. Pepler, 33 AD3d at 434 [complaint stated claim against individual defendants where plaintiff alleged they "hired plaintiff on behalf of the company, [and] fired her" based on her alleged disability]; Dorvil v Hilton Hotels Corp., 25 AD3d 442 [1st Dept 2006] [affirming dismissal of complaint against individual defendant who conducted investigation resulting in termination of plaintiff but was neither an owner nor had authority to make personnel decisions]; reply brief for plaintiff-appellant in Dorvil, 25 AD3d 442, available at 2005 WL 5924444, *10-11; Gallegos v Elite Model Mgt. Corp., 28 AD3d 50 [1st Dept 2005]

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those statutes expressly defined "employer" to include individual agents of the employer (63 NY2d at 543).

[10] Patrowich is also silent as to an individual who merely holds an ownership interest in a corporate employer—at most it speaks only to a "corporate employee . . . shown to have [an] ownership interest" (63 NY2d at 542). An individual may of course hold an ownership interest in a corporate employer without also being an employee of that entity.

[approving jury instruction on City Human Rights Law claim against individual owner and cofounder of the company who had with "significant managerial responsibilities," hired plaintiff and ignored plaintiff's "repeated requests" for accommodation of disability despite knowledge of it; jury instruction provided that individual defendant "must have been 'responsible for, assisted or failed to rectify' the discriminatory conduct in order to be held liable"]).

The single decision Plaintiff cites, Makinen v City of New York, 167 F Supp 3d 472 [SD NY 2016] revd in part on other grounds 722 Fed Appx 50 [2d Cir 2018], is not to the contrary. There, the court relied on the Charter of the City of New York in holding that the Commissioner of the New York City Police Department was an "employer" because the Charter vested him with authority over the personnel decisions challenged by the plaintiffs (id. at 488 n 6).[11] Perhaps for this reason, the parties never even raised the issue of Commissioner Kelly's individual liability until after a trial (id. at 488 ["At the charge conference, regarding the instruction to the jury that Commissioner Kelly had sufficient control

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[11] Section 434 of the City Charter vests the Commissioner with "cognizance and control of the government, administration, disposition and discipline of the department, and of the police force of the department" and specifically makes him "chargeable with and responsible for the execution of all laws and the rules and regulations of the department" (NY City Charter § 434). Courts have long recognized that the Charter specifically grants the Commissioner with responsibility for officer personnel actions, including officer assignments, restricted assignments, discipline, and terminations within the Police Department (Makinen, 167 F Supp at 488 n 6).

to be held liable as a matter of law, the Court noted, 'I know counsel are both in agreement with this and have indicated that this should be told to the jury as a matter of law,' and confirmed that the source of law was in fact the City Charter."]). There is no similar vesting here of legal authority as an employer.

2. The FLSA "Economic Reality" Test Cannot Be Applied To City Human Rights Law Claims.

Alternatively, Plaintiff suggests that the Court adopt the "economic reality" test applied by federal courts to claims under the Fair Labor Standards Act (FLSA). The threshold problem with that proposal is that the statutes have different definitions of employer. The City Human Rights Law expressly differentiates an "employer" from its "employee or agent," in Section 8-107 (13) and separately refers to an "owner," "manager" and "person" in other provisions (see Admin. Code §§ 8-107 [4]; 8-502, 8-102). In contrast, the FLSA's definition of "employer" specifically includes "any person acting directly or indirectly in the interest of an employer in relation to an employee" (29 USC § 203 [d]; see also Irizarry v Catsimatidis, 722 F3d 99, 103 [2d Cir 2013]).[12] In other words, while the City Human Rights Law expressly differentiates between an "employer" and persons acting on its behalf, the FLSA expressly includes those individuals within

[12] The same statutory definition applies to the federal EPA, which Patrowich distinguished from the bare use of the term "employer" in the State Human Rights Law (see n 9, supra).

the definition of "employer," thus necessitating a test to determine which individuals are encompassed by that definition. In any event, as the Appellate Division recognized, the "economic reality" test applicable to the FLSA is specifically tailored to that statute's purpose, including ensuring the payment of minimum wages (R-422).[13]

Plaintiff's passing reference to an "economic reality" test having been used in Patrowich is misleading. The Patrowich court's discussion about "economic reality," to which Plaintiff refers was in the context of assessing whether an individual "such as [the] defendant" in that case—i.e. plaintiff's direct supervisor who was alleged to have been involved in the underlying discriminatory conduct—fell within the definition of "employer" under the federal statutes at issue in that case (id. at 543-44). The Patrowich court did not adopt the FLSA[14] test or any

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[13] Even if the Court applied the economic reality factors used for FLSA cases, Mr. Bloomberg is not an "employer" who can be held strictly liable for the conduct of others under the City Human Rights Law. As the Irizarry court explained, more than a high-level role or control over the company generally is required for an individual to be found liable as an "employer" under the FLSA test (722 F3d at 109 ["Evidence that an individual is an owner or officer of a company, or otherwise makes corporate decisions that have nothing to do with an employee's function, is insufficient to demonstrate 'employer' status . . . ."]).

[14] Not surprisingly, and as the Appellate Division recognized here, the factors that have developed under the FLSA test for determining an employee-employer relationship are specifically relevant in assessing wage claims, including whether the alleged employer controlled the employee's work schedule; set the employee's rate of pay; determined the employee's method of payment; and maintained the employee's employment records (see Carter v Dutchess Community Coll., 735 F2d 8, 12 [2d Cir 1984]).

other federal test with respect to any of the plaintiff's claims under the State Human Rights Law, much less under the City Human Rights Law.

For all of these reasons, the Court should reject Plaintiff's proposed interpretation of "employer" as inconsistent with the statutory text and unsupported by the authority on which it is based. When a plaintiff is employed by a corporate employer, the term "employer" in Section 8-107 (13) does not encompass an individual owner and executive of that organization who did not participate in, encourage, condone or approve the specific conduct giving rise to the plaintiff's claim.

II. Plaintiff Failed to Allege That Mr. Bloomberg Was Her "Employer" Under Any "Reasonably Possible" Interpretation of the Term.

Any interpretation of the term "employer" in Section 8-107 (13) (b) must be one that is "reasonably possible" in light of the statutory text and overall legislative intent (Albunio, 16 NY3d at 478). For the reasons discussed above, no reasonable interpretation of Section 8-107 (13) (b) of the City Human Rights Law allows for the definition of "employer" that Plaintiff urges the Court to adopt, which would make an individual owner or executive of an organization with absolutely no involvement in the specific conduct underlying the plaintiff's claims strictly liable for another employee's conduct. As the Appellate Division recognized, such an interpretation would yield the absurd result of "imposing strict liability on every

individual owner or high-ranking executive of any business in New York City" (R-420).

Accordingly, Plaintiff has no cause of action against Mr. Bloomberg under Section 8-107 (13) (b). Her allegations about the conduct that forms the basis of her claims are specific to Mr. Ferris. She alleges that Mr. Ferris subjected her to inappropriate comments, unwanted advances, and sexual assault in violation of the City Human Rights Law during her employment with the Company (see e.g. R-39 ¶¶ 95-97; R-42 ¶ 113; R-43 ¶ 114; R-44 ¶¶ 120-124). The Complaint makes clear that she never reported those incidents to *anyone* at the Company (see R-20 – R-72). She also alleges that it was Mr. Ferris who controlled her employment—he interviewed her, hired her, supervised her day-to-day work, and determined the trajectory of her career at the Company (R-24 ¶ 21; R-33 ¶ 65; R-34 ¶ 68; R-40 ¶ 100; R-54 ¶¶ 176-178).

In stark contrast, Plaintiff's Complaint does not contain a single allegation connecting Mr. Bloomberg to her employment in general or to the conduct to which she alleges Mr. Ferris subjected her. This is hardly surprising, given that Mr. Bloomberg was the Mayor of New York City when Plaintiff was hired by the Company and when almost all of Mr. Ferris's conduct is alleged to have occurred. Indeed, Plaintiff did not even allege that Mr. Bloomberg was aware that she or Mr. Ferris worked for the Company and admits that her Complaint reflects Mr.

Bloomberg's "lack of personal involvement in the alleged harassment" and no "direct connection to Plaintiff" (Pl. Br. at 21). Consequently, Plaintiff has not stated and cannot state a claim against Mr. Bloomberg as her "employer" personally and strictly liable for the actions of Mr. Ferris. To the extent Plaintiff has a cause of action, it is against her former employer the Company (a defendant in this case) and her former alleged supervisor Mr. Ferris (also a defendant in this case).

Plaintiff's vague allegations about Company "culture" in no way cure her deficient allegations (R-32 ¶ 57). Plaintiff's speculation is culled from magazine articles, internet postings, and unrelated lawsuits filed 10 to 20 years ago—materials that have nothing to do with Plaintiff, her employment, or the one supervisor (Mr. Ferris) she specifically alleges mistreated her. Indeed, the dated lawsuits Plaintiff references could not possibly relate to Plaintiff in any way because she did not begin working for the Company until 2012—*years* after any of these alleged events and a time when Mr. Bloomberg had not been working at the Company for over a decade (R-33 ¶ 65 – R-34 ¶ 68).

As the Appellate Division recognized in concluding that Plaintiff's argument on this point was "unavailing," there is no legal authority to support imputing liability to individuals based on this sort of unsupported speculation for which Plaintiff does not even purport to have actual knowledge or experience. This does

not meet basic pleading requirements, much less suffice to establish that Mr. Bloomberg should be subject to a strict liability standard along with the Company for Mr. Ferris's alleged conduct, both of whom she has sued in this action (see e.g. Barsella v City of New York, 82 AD2d 747, 747 [1st Dept 1981] [dismissing an action and ordering plaintiff to omit "prejudicial and unnecessary allegations, including references to irrelevant other litigations, . . . to alleged reports in the press, facts claimed to have been 'widely reported', rumors . . . ."]; Acosta v 202 S. 2nd St. LLC, 62 Misc 3d 1209(A), 2019 NY Slip Op 50040(U), *3 [Civ Ct, Kings County 2019] [dismissing complaint when petitioners did not allege, based on personal knowledge, conduct they experienced]).

CONCLUSION

For the foregoing reasons, Plaintiff's Complaint against Mr. Bloomberg was properly dismissed, and this Court should therefore affirm the order of the Appellate Division.

Respectfully submitted,

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PROSKAUER ROSE LLP

By: Elise Bloom
Elise M. Bloom
Rachel S. Philion
Andrew A. Smith

Eleven Times Square
New York, NY 10036
Tel: (212) 969-3000
ebloom@proskauer.com
rphilion@proskauer.com
asmith@proskauer.com

Attorneys for Defendant-Respondent

NEW YORK STATE COURT OF APPEALS
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I hereby certify pursuant to 22 NYCRR PART 500.1(j) that the foregoing brief was prepared on a computer using Microsoft Word.

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Elise M. Bloom
Proskauer Rose LLP
Eleven Times Square
New York, New York 10036
Tel.: (212) 969-3000
Attorneys for Defendant-Respondent