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

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Rafaela Espinal f/k/a Rafaela Espinal-Pacheo,

Plaintiffs,

- against -

Index No.: 151246/2021

New York City Department of Education and Richard Carranza, Chancellor of the New York City Department of Education Individually, Cheryl Watson-Harris, Former First Deputy Chancellor of the New York City Department of Education Individually, David Hay, Ursulina Ramirez, New York City Department of Education Chief Operating Officer Individually and "John Does" and "Jane Does" 1-25 whose names are currently unknown,

Defendants.

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PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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PRELIMINARY STATEMENT

Plaintiff Rafael-Espinal Pacheo ("Plaintiff" or "Espinal") submits this Memorandum of Law in Opposition to Defendants New York City Department of Education ("DOE"), Richard Carranza, Cheryl Watson-Harris, David Hay, and Ursulina Ramirez (collectively "Defendants") motion to dismiss Plaintiff's complaint (the "Motion").

Defendants are unabashedly attempting to dispose of this action at the earliest possible juncture on mainly procedural or technical grounds rather than address the substance of Plaintiff's complaint (the "Complaint"). As set forth below, Defendants' arguments are unavailing.

First, Plaintiff's claims are well within the applicable Statute of Limitations as Plaintiff has alleged a course of conduct beginning mainly in 2018 and continuing to the present day. Defendants' continuing acts of discrimination have tolled the limitations period and all prior acts are considered timely as part of the continuing discrimination.

Second, Plaintiff timely filed an EEOC Complaint against the DOE that is the functional equivalent of a Notice of Claim. The purpose of a Notice of Claim is to provide the School District with knowledge of the essential facts constituting the claim. The case law is clear that other documents, and specifically EEOC Complaints may provide the district with sufficient knowledge of the facts constituting the claim pursuant to Education Law § 3813. Espinal's EEOC Complaint that the DOE discriminated against her on the basis of national origin, race, sex, and age commencing when she was demoted from her position as Superintendent of Schools for District 12 and continuing to the present time, providing the DOE with ample knowledge of Plaintiff's claims.

Finally, as described in detail below and in the accompanying affidavit of Rafaela Espinal ("Espinal Aff."), Plaintiff has adequately pleaded causes of action for discrimination on the basis

of race/national origin, gender, age, retaliation and hostile work environment under the New York State and New York City Human Rights Laws, especially under the relaxed notice pleading standard applicable to those statutes.

Defendants simply attack Plaintiff's Complaint without ever offering any excuse for Plaintiff's termination/demotion or subsequent mistreatment and retaliation. The context of Plaintiff's termination/demotion, Plaintiff's subsequent treatment and the comments directed at Plaintiff sufficiently give rise to inferences of discrimination particularly here on a motion to dismiss where Plaintiff's allegations are presumed true and Plaintiff is afforded the benefit of every possible inference.

The New York State and New York City Human Rights Law are notable for their uniquely broad remedial purposes. It would be a grave miscarriage of justice and against the significant weight of precedent for this action, under the facts pled to be dismissed at this earliest stage prior to offering Plaintiff the benefit of any discovery. Therefore, Defendants' motion to dismiss should be denied in its entirety.

FACTUAL ALLEGATIONS

Espinal began her employment with NYC DOE as a bilingual classroom teacher in 1993 at P.S. 169 in Sunset Park, Brooklyn. Complaint ¶21. Espinal was awarded an Ed. M. and Ed D. from Columbia University. Complaint ¶20. Espinal was consistently commended and promoted throughout her tenure with the DOE. Complaint ¶21-28, 34-39. Espinal was appointed to the position of Community Superintendent for District 12 in 2014 where she served with distinction until her demotion in 2018. Complaint ¶26. During her service as Community Superintendent Espinal had only received positive evaluations, and accolades from all seven Deputy Chancellors, the senior supervising superintendent, the Deputy Chancellor, and the Chancellor. Complaint ¶33.

Espinal was awarded the NYCDOE NYCLA Distinguished Alumni Leadership Award in 2017 as a Superintendent. Complaint ¶37. Espinal received the NYCDOE Emolior Academy Leadership Award in 2018 just before Defendants' orchestration of her capricious termination which the DOE retracted and replaced with a demotion. Complaint ¶39. Defendants used their authority at the NYC DOE to create a work environment that incubated hostility and bigotry and discrimination against protected classes of which Plaintiff is a member. Complaint ¶44.

The improper actions and conduct commenced in the fall of 2017 and gained momentum in March of 2018, soon after Defendant Carranza took the helm of the NYC DOE. Complaint ¶45. Soon after Carranza took office all deputy chancellors (all women, except one) over forty were demoted or terminated. See Espinal's Affidavit ¶8 ("Espinal Aff."). Annexed to Espinal's Affidavit as **Exhibit A** is a list of 19 women over the age of 40 in senior leadership roles who were either demoted, terminated or forced into retirement between June 27, 2018 and June 13, 2019. That pattern of termination and demotion was initiated and instituted under the tenure of Defendant Richard Carranza following his appointment as Chancellor of the DOE on April 2, 2018.

Beginning in October 2017, several black superintendents began to meet separately after the formal monthly superintendents' meetings. Those meetings were exclusionary and took place, on work time, without Espinal or other Dominican or Caucasian Superintendents. Complaint ¶46.

Notably, at the end of many Superintendents meetings, Espinal was asked to cross her hands in the sign of a black power /"Wakanda"/ Black Panther Salute (the "Salute") by Meisha Ross Porter. Complaint ¶49. Espinal refused to participate in the Salute. Complaint ¶50. The refusal was followed up with Plaintiff being ostracized and being told by Defendant Porter in 2018 in the months leading up to Plaintiff's termination, despite Plaintiff being Afro-Latina, that she

was not "black enough" because she did not "get down" with them "like that". Complaint ¶54; Espinal Aff.¶10-12.

Espinal saw Porter weekly at the Superintendents meeting where Porter persistently reprimanded her for *inter alia*, not doing the Salute and not being "down" with them despite being black.[1] Espinal Aff. ¶14.

In June 2018 Jose Ruiz, a male advisor to First Deputy Chancellor Cheryl Watson-Harris drove Espinal to a Bronx principals' meeting. During that car ride, Mr. Ruiz told Espinal:

> **You are so pretty but then you enter the room open your mouth and intimidate men and people. You need to just learn to be quiet and look pretty.**

Complaint ¶55. Mr. Ruiz further advised Plaintiff that she needed to learn how to smile, be pretty, keep her mouth shut, and keep the men happy. Espinal Aff. ¶16. Espinal responded by telling Mr. Ruiz that she thought that type of rhetoric was inappropriate particularly in light of the #MeToo movement. Espinal Aff. ¶17. Mr. Ruiz responded by telling Plaintiff that she needed to learn to play the game. Espinal Aff. ¶18.

On August 31, 2018 Watson fired Espinal by reading her a termination letter (with the wrong district on it) without providing any reason other than that Espinal did not fit with the DOE's new agenda. Complaint ¶61-63.

Further, the benefits options normally afforded DOE employees were not offered to Plaintiff Espinal. Espinal Aff. ¶20. Espinal was not given an option for the continuation of her

[1] Porter, who was part of Defendant Carranza's inner circle, was appointed as one of nine Executive Superintendents only several days prior to Espinal's unwarranted termination turned demotion. On March 15, 2021 Porter became the Chancellor of the DOE following Richard Carranza's resignation.

healthcare coverage (COBRA), annual leave balance, sick leave balance, or sufficient time to schedule a retirement consultation. Complaint ¶65.[2]

After being summarily terminated, Espinal was initially refused an appeal of the termination by Carranza. Complaint ¶72. After numerous requests for a meeting to appeal the decision, and informing him that she had one year left to complete her 25th year with the DOE and being terminated would result in loss of lifetime benefits. Carranza granted Plaintiff a meeting in September 2018. Complaint ¶73.

At the meeting Plaintiff pleaded with Carranza to provide her with any explanation or reason for the termination. Espinal Aff. ¶ 25. Carranza refused to give Espinal any justification for the termination other than that there were layers of supervision between them and that he had to support his staff in their decision to remove Plaintiff as Superintendent without cause. Id. Plaintiff understood Carranza to mean that the decision was made by Watson-Harris and/or Porter. Espinal Aff. ¶26.

Carranza gave Plaintiff one weekend to decide to accept a demotion in lieu of a termination. Espinal Aff. ¶27. Carranza told Plaintiff that if she did not sign the stipulation accepting the demotion she would be terminated and dropped off the DOE payroll. Id. Carranza knew, at the time he made the offer, that termination of Espinal's employ at DOE would leave Espinal, a single mother, and her two children without health care and leaving me without her retirement benefits. At the meeting Defendant Carranza warned Espinal "The clock is ticking. You are a divorced single mother of two children. The ball is in your court." Complaint ¶76. Ultimately, Plaintiff,

[2] The Court is also asked to note that Espinal's replacement was less credentialed and less qualified than Espinal to hold the position. Complaint ¶64.

pushed into the corner, felt she had no choice, but to sign a stipulation accepting a demotion instead of the termination. Espinal Aff. ¶29.

Espinal was told that if she wanted to stay on as a DOE employee the only position available to her was that of a School Based Investigator ("Investigator") a non-pedagogical position that only required a high-school degree, which Espinal is incredibly overqualified for. Complaint ¶78-83. In this new position, Espinal has continuously been subjected to a hostile work. Complaint ¶87. Espinal does not have her own permanent desk or work station, office phone number, computer, DOE mobile phone, NYC DOT Parking Permit. Complaint ¶88. Espinal has been assigned to work sites that require her to travel more than 90 minutes in each direction. Complaint ¶89. These assignments added more time to Espinal's work day and required her to pay the expense of gas and tolls. Complaint ¶89. Defendants have put in place an agenda that isolated and ostracized Espinal from her colleagues and from engaging in the kind of work she was trained and certified for. Espinal Aff. ¶36.

On or about April 16, 2020 Espinal filed an EEOC Complaint against the DOE alleging discrimination on the basis of race, sex, national origin, age, and retaliation. Espinal Aff. ¶37. A copy of the EEOC Complaint is annexed to Espinal's Affidavit as *Exhibit B.* Espinal stated in the EEOC Complaint that the DOE discriminated against her on the basis of national origin, race, sex, and age commencing when she was demoted from her position as Superintendent of Schools for District 12 and continuing to the present time. Espinal complained that the demotion and subsequent discriminatory behavior by the DOE was as a result of her race, national origin, sex and age, including when she was assigned to work as a School Based Investigator at a location without a desk, supplies or any direction from her supervisor.

On or about June 4, 2020, the DOE filed a seven page letter (excluding of Exhibits) responding to the substance of Espinal's claims. A copy of the letter is annexed to the Espinal Aff as *Exhibit C.* The EEOC ultimately sent Espinal a notice of my right to file a lawsuit to enforce her claims in the U.S. District or State Court of competent jurisdiction. Espinal Aff. ¶46-47.

Since Carranza's ultimatum, Espinal has also been assigned menial work assignments, has been stripped of her supervisory responsibilities and is in a non-pedagogical role. Complaint ¶ 90. Espinal has been excluded from DOE communication (P Digest, formally P-Weekly, Central communication, central emails, etc.) excluded from DOE professional development, excluded from professional organizations (who fear retaliation by association), and isolated from her colleagues. Complaint ¶91. Espinal applied to over 20 different jobs within the DOE since her demotion and not surprisingly, stigmatized by Defendants' retaliatory actions, was turned down for each of the jobs. Complaint ¶92-93. In one instance Espinal had an interview with District 3 Superintendent Ilene Altschul and was offered a position as an elementary school principal at 03M075 since Espinal was a successful and experienced principal. Espinal conducted a walkthrough with the outgoing principal and was scheduled for a final meeting with the parents. Fifteen minutes prior to her 7:30 AM meeting, Espinal was told that the Chancellor's office asked the superintendent not to proceed, and that Espinal was not eligible for hiring. Complaint ¶94. No substantive reason for the denial was proffered to Espinal. Espinal was blacklisted. Espinal Aff. ¶41.

At the beginning of the Covid-19 pandemic Espinal was denied the chance to work from home despite her expressed risk factors, until all DOE staff were ordered to work from home. Complaint ¶97. The discriminatory and retaliatory conduct against Plaintiff is continuing unabated. Complaint ¶99.

Throughout the pandemic Espinal used her own equipment (phone and computer etc.) because everything was web based on outlook 365. The assignments were not investigations and therefore not highly sensitive and not of a confidential nature. Espinal Aff. ¶52.

Despite Espinal's requests the DOE failed to provide her with equipment that she could use to conduct investigations remotely. Espinal Aff. ¶53-55. In July 2021 Espinal was advised that since she did not have the tools to work remotely she would need to report in person daily to a school. This despite the fact that: (a) the other investigators in her group would be reporting in person only one day a week to a central location at 65 Court Street, Brooklyn, NY 11201; and (b) school was not in session. Espinal Aff. ¶56.

Espinal continues to receive mixed messages about who her supervisor is and about the work she is supposed to be doing. Espinal continues to be treated worse than her counterparts in retaliation for her filing of the EEOC Complaint and the within Action. Espinal Aff. ¶57-59.

ARGUMENT

I. Plaintiff's Claims Are Timely

Plaintiff's claims are within the Statute of Limitations. Plaintiff's Complaint set forth a discriminatory, retaliatory and created a hostile work environment that began in 2018 and has continued up to the present.

It is well settled that continuing acts of discrimination will toll the running of the Statute of Limitations until the discrimination ends. This is especially true under the liberal and broad construction of the New York City Human Rights Law ("NYCHRL"), and the New York State Human Rights Law ("NYSHRL"). As recently explained by the First Department:

> Under the NYCHRL, however, it has long been recognized that continuing acts of discrimination within the statutory period will toll the running of the statute of limitations until such time as the discrimination ends.
>
> ***
>
> A broad interpretation is consistent with a "rule that neither penalizes workers who hesitate to bring an action at the first sign of what they suspect could be discriminatory trouble, nor rewards covered entities that discriminate by insulating them[selves] from challenges to their unlawful conduct that continues into the limitation period.
> Ctr. for Indep. of Disabled v Metro. Transportation Auth., 184 AD3d 197, 200-01 (1st Dept 2020).

See Harvey v Metro. Life Ins. Co., 34 AD3d 364 (1st Dept 2006) (For purposes of the Statute of Limitations a continuing wrong is "deemed to have accrued on the date of the last wrongful act".)

Consistent with the uniquely broad and remedial purposes of the NYCHRL and NYSHRL, courts have repeatedly and consistently upheld the continuing violation doctrine which provides that so long as there is one act that occurred during the applicable time period, other prior acts may be considered timely as part of a "continuing violation". See Morgan v NYS Atty. Gen.'s Off., 96 Empl Prac Dec P 44760 (SDNY Feb. 8, 2013). In Ferraro v. NYC Dept. of Education, 115 A.D.3d

497, 982 N.Y.S.2d 746 (1st Dept. 2014), the First Department denied the employer's "pre-answer, pre-discovery motion" to dismiss stating "[I]t cannot be said, as a matter of law, that these acts, if proven, were not part of a single continuing pattern of unlawful conduct extending into the [applicable time period] immediately preceding the filing of the complaint..." Id. at 497-98. *See also* Petit v Dept. of Educ. of City of New York, 177 AD3d 402, 403-04 (1st Dept. 2019]

As Courts have explained, "discrete acts" which might otherwise be considered time-barred, in fact "can be considered timely where specific and related instances of discrimination are permitted by the employer to continue unremedied for so long as to amount to a discriminatory policy or practice." Morgan, 2013 WL 491525, at *12 (quotation and citation omitted).

As alleged in the Complaint the discriminatory treatment continued well past Plaintiff's termination turned demotion in August-September 2018. Since then Espinal has been forced to work as a School Based Investigator, a non-pedagogical position that only requires a high school degree. Complaint ¶78-82. The demotion also came with a continued significant decrease in pay. When Espinal is not scheduled to be at a school she is often placed in the Absence Teacher Reserve ("ATR") Complaint ¶84. Espinal has continuously been subjected to an altered and hostile work environment since her assignment to the Investigator position. Complaint ¶87. Not only are Espinal's work conditions a degradation of what Espinal had, Plaintiff does not have her own permanent desk or work station, office phone number, computer, DOE mobile phone, or NYC DOT Parking Permit. Espinal Aff. ¶33-34. Espinal has been assigned menial work with no supervisory or teaching responsibilities. Further, Espinal has been excluded from DOE communications and professional development. Espinal Aff. ¶35-36. Moreover, professional organizations who fear retaliation from the DOE shun Plaintiff's participation and Espinal is

isolated from her colleagues. Id. Defendants' retaliatory conduct black listing has resulted in Espinal's rejection from the numerous DOE positions she has applied for. Espinal Aff. ¶41.

In one instance Espinal had an interview with District 3 Superintendent Ilene Altschul and was offered a position as an elementary school principal at 03M075, a position in keeping with Espinal's education, certifications and work experience prior to the Caranza termination/demotion. In connection with that job opportunity in the DOE system, Espinal conducted a walkthrough with the outgoing principal and was scheduled for a final meeting with the parents. Fifteen minutes prior to her 7:30 AM scheduled meeting, Espinal was told that the Chancellor's office contacted the District superintendent and asked her not to proceed, and that Espinal was not eligible for hiring. Complaint ¶87-94.

The inappropriate conduct did not abate with the advent of the COVID Pandemic. Although Plaintiff requested, at the start of the Pandemic that she be allowed to work from home due to her expressed risk factors, the request was denied. It was only when all DOE staff was ordered to work from home that Plaintiff able to work remotely. Complaint ¶87. The Complaint alleges the discriminatory conduct against Plaintiff is continuing and unabated. Complaint ¶99.

In July 2021 Espinal was advised that since she did not have the tools to work remotely[3] she would need to report in person daily to a school. This despite the fact that: (a) the other investigators in her group would be reporting in person only one day a week to a central location at 65 Court Street, Brooklyn, NY 11201; and (b) school was not in session. Espinal Aff. ¶56.

Espinal has alleged continuing violations based on numerous allegations of specific and related discriminatory acts by Defendants for years. Espinal has alleged a pervasive, hostile work environment. Plaintiff's accompanying affidavit articulates the discriminatory and retaliatory

[3] The DOE refused to provide Espinal with adequate equipment.

behavior continues to the present unabated. It is black letter law that Plaintiff's affidavit in opposition may "remedy defects in the complaint" and "preserve inartfully pleaded, but potentially meritorious claims" Cron v Hargro Fabrics, Inc., 91 NY2d 362, 366 (1998) quoting Rovello v Orofino Realty Co., Inc., 40 NY2d 633, 635 (1976).

At this stage upon a pre-answer, pre-discovery motion to dismiss it cannot be said as a matter of law that the conduct complained of was not a continuing pattern of discrimination that extended into the one-year period immediately preceding the filing of the complaint.

Moreover, the Statute of Limitations was tolled during the pendency of Espinal's EEOC Complaint. *See* Livingston v. Roosevelt Union Free Sch. Dist., No. 17-CV-4189 (JMA)(SIL), 2020 WL 1172642, at *5 (E.D.N.Y. Jan. 15, 2020), *adopted by*, 2020 WL 1166450 (E.D.N.Y. Mar. 11, 2020) (concluding that the one-year statute of limitations for NYSHRL claims against school district tolled while EEOC charge is pending), *and* Riccardo v. N.Y.C. Dep't of Educ., No. 16 Civ. 4891 (LAK) (JCF), 2016 WL 7106048, at *6-7 (S.D.N.Y. Dec. 2, 2016), *adopted sub nom.,* United States v. N.Y.C. Dep't of Educ., 2017 WL 57854 (S.D.N.Y. Jan. 4, 2017) (same);Langella v Mahopac Cent. School Dist., 18-CV-10023 (NSR), 2020 WL 2836760, at *15 [SDNY May 31, 2020]; Espinosa v Weill Cornell Med. Coll., 105 Empl Prac Dec P 46733 [SDNY Mar. 19, 2021].

Particularly when, as here on a pre-answer motion to dismiss all inferences in the Complaint are drawn in Espinal's favor, there is no proper basis on which to dismiss this case as time-barred at this early stage.

II. Plaintiff's EEOC Complaint Satisfied all Notice Requirements Under Education Law §3813 and Therefore No Formal Notice of Claim Was Required

The purpose of a Notice of Claims pursuant to New York Education Law § 3813 is to give the school district knowledge of the essential facts comprising the claim. Here, Espinal timely filed an EEOC Complaint that is the functional equivalent of a Notice of Claim, excusing Plaintiff

from the need to file *a pro forma* Notice with the DOE. *See* Kushner v. Valenti, 285 F.Supp.2d 314, 316 (E.D.N.Y.2003) (holding that an EEOC Notice was sufficient to notify the district of a claim); Donlon v Bd. of Educ. of Greece Cent. School Dist., 06-CV-6027T, 2007 WL 108470, at *3 [WDNY Jan. 12, 2007](same). A copy of Plaintiff's EEOC Complaint is annexed to Espinal's Affidavit as *Exhibit B.*

It is undisputed that as a result of Plaintiff's EEOC Complaint Defendants had full knowledge of Plaintiff's claims and the factual predicate for the claims articulated in this action. A paper which is not denominated a notice of claim may satisfy that requirement if it provides the necessary information as to the nature of the claim, the time when, the place where, and the manner in which the claim arose. Matter of Mennella v Uniondale Union Free School Dist., 287 AD2d 636, 636-37 (2nd Dept. 2001) *citing* Parochial Bus Sys., Inc. v Bd. of Educ. of City of New York, 60 NY2d 539, 547 (1983). *See also* Donlon 2007 WL 108470, at *2. In Menella the Appellate Division concluded that a petition to the Commissioner of Education was the functional equivalent of a Notice of Claim.

The Court of Appeals stated in Parochial Bus.: "We have previously held that, where the school district has been sufficiently informed of the claim all that is required is substantial compliance with the statute regarding the degree of descriptive detail in a notice of claim." 60 NY2d at 547. "While no one factor is dispositive, knowledge of the facts constituting the claim is the factor that 'should be accorded great weight' Riordan v E. Rochester Schools, 291 AD2d 922, 923 (4th Dept. 2002)(internal citations omitted).

A paper that is not a formal notice of claim may provide the district with sufficient knowledge if it provides the essential facts of the nature of the claim, the time when, the place where, and the manner in which the claim arose. Kushner, 285 F.Supp.2d 314, 316 (holding that

an EEOC Notice was sufficient to notify the district of a claim); Donlon., 2007 WL 108470, at *3 (same); Mennella., 287 A.D.2d 636, 636–37,(concluding that a petition to the Commissioner of Education constituted the functional equivalent of a notice of claim).

The majority of the case law on the topic is from federal courts applying New York law. As described by the SDNY:

> [C]ourts in this Circuit have begun to coalesce around the rule that an EEOC complaint can satisfy the notice of claim requirement "in limited circumstances where 'the charge puts the school district on notice of the precise claims alleged, is served on the governing board of the district (and not a different arm of the district), and is served within the statutory time period.

Riccardo,16CIV4891LAKJCF, 2016 WL 7106048, at *8 *see, e.g.*, Bacchus v. New York City Department of Education, 137 F. Supp. 3d 214, 234 (E.D.N.Y. 2015); Grenzig v. Sachem School District, 13 CV 7278, 2014 WL 11191093, at *3 (E.D.N.Y. Feb. 11, 2014).

Prior to filing this Action Ms. Espinal filed an EEOC Complaint against the DOE on or about April 16, 2020 alleging discrimination on the basis of race, sex, national origin, age, and retaliation. Espinal Aff. ¶37. A copy of the EEOC Complaint is annexed to Espinal's affidavit as *Exhibit B* Espinal stated in the EEOC Complaint that the DOE discriminated against her on the basis of national origin, race, sex, and age commencing when she was demoted from her position as Superintendent of Schools for District 12 and continuing to the present time. Plaintiff complained that the demotion and subsequent discriminatory behavior by the DOE was as a result of Espinal's race, national origin, sex and age, including when Espinal was assigned to work as a School Based Investigator at a location without a desk, supplies or any direction from her supervisor. Espinal also complained of being denied the ability to work from home at that time during the height of the pandemic, similar to others. Espinal further complained of being rejected from multiple job applications she was (over)qualified for since her demotion in September 2018

to the present. The EEOC Complaint noted that it was a continuing action. Accordingly, the DOE had ample and detailed notice of the substance and particulars of Plaintiff's claims in this Action. On or about June 4, 2020, the DOE filed a seven page letter (excluding Exhibits) responding to the substance of Plaintiff's claims. A copy of the response is annexed to the Espinal Affidavit as *Exhibit C.* The EEOC sent Ms. Espinal a notice of her right to file a lawsuit to enforce her claims in the U.S. District or State Court of competent jurisdiction[4]. Espinal Aff. 47. Thus, the DOE may not claim that it did not have notice of Plaintiff's claims prior to the filing of the within Action. Notably, Defendants make no mention of Plaintiff's EEOC Complaint in their motion to dismiss. Furthermore, Defendants do not allege any prejudice due to the absence of a formal Notice of Claim.

Moreover, where Courts cannot determine whether the subject EEOC Complaint met the conditions necessary to substitute for a notice of claim under 3813 Courts decline to dismiss the actions. *See* Riccardo 16CIV4891LAKJCF, 2016 WL 7106048 (the Court declined to dismiss the NYSHRL and NYCHRL claims against the DOE despite the fact that no notice of claim was filed. "Without the information necessary to determine whether the EEOC complaint meets any of the preconditions to serve as a substitute for a notice of claim, dismissal for failure to file a notice of claim would be inappropriate.") *See* Kumar v. New York City Construction Authority, No. 10 Civ. 3559, 2011 WL 5929005, at *9 (S.D.N.Y. Nov. 29, 2011) (denying summary judgment where "neither party has provided sufficient information from which this Court could conclusively determine whether [the plaintiff's] filings satisfy the section 3813 requirement").

[4] The right to sue letter was sent to Plaintiff during the effective time of the Governor's Executive Order 202.67 tolling deadlines. Espinal's complaint was timely filed after the expiration of the tolling period.

III. Plaintiff's Complaint States Causes Of Action For Discrimination

A. Standard Of Review

Defendants disingenuously argue that a higher standard of review applies to employment discrimination actions, when in fact the exact opposite is true. Fair notice is all that is required to survive at the pleading stage for discrimination actions. *See* Petit, 177 AD3d 402, 403 (1st Dept 2019); Vig v. NY Hairspray Co., L.P., 67 A.D.3d 140, 145, 885 N.Y.S.2d 74 (1st Dept. 2009).

On any CPLR 3211 motion to dismiss, the court will "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" Nonnon v City of New York, 9 NY3d 825, 827 (2007); Leon v. Martinez, 84 N.Y.2d 83, 87–88, 614 N.Y.S.2d 972, 638 N.E.2d 511 (1994). The applicable standard is thus whether reasonable inferences from the complaint sustain a claim, especially upon a pre answer motion to dismiss as here. Pepler v. Coyne, 33 A.D.3d 434, 435, 822 N.Y.S.2d 516 (1st Dep't 2006).

A plaintiff's initial burden of establishing a prima facie case of discrimination "is not a significant hurdle" Hardy v General Elec. Co., 270 AD2d 700, 701 (3rd Dept. 2000) [internal quotation marks and citation omitted], and has often been described as minimal.; Melman v Montefiore Med. Ctr., 946 NYS2d 27, 32 (1st Dept 2012).

Employment discrimination actions brought pursuant to NYSHRL and NYCHRL "are assessed under a particularly relaxed 'notice pleading' standard." Artis v Random House, Inc., 34 Misc 3d 858, 863-64 (Sup Ct 2011) *quoting* Vig 67 AD.3d at 144-145 (1st Dep't 2009). Krause v Lancer & Loader Group, LLC, 40 Misc 3d 385, 394 (Sup Ct 2013). Under notice pleading, plaintiff need not plead specific facts, but need only give defendant "fair notice" of the nature and grounds

of her claims. *Id. See* Swierkiewicz v Sorema N. A., 534 US 506, 512, 122 S Ct 992, 998, 152 L Ed 2d 1(2002) Plaintiff has met this minimal burden.

B. Plaintiff States a Claim for Discrimination under the New York SHRL

Defendants' argument that the McDonnell Douglas framework applies at this juncture on a pre-answer pre-discovery motion to dismiss is inapposite. All of the cases cited by Defendants employed McDonnell Douglas to review motions for summary judgment[5] not CPLR 3211 motions to dismiss. As discussed above, all that Plaintiff is required to do at the pleading stage is give Defendants fair notice of the nature and basis for her claims.

"The prima facie case under *McDonnell Douglas*, however, is an evidentiary standard, not a pleading requirement." Swierkiewicz., 534 U.S. 506, 510. "[A]t this stage of the proceedings a plaintiff need not make out a prima facie case. She need only plead facts sufficient to show her entitlement to relief, and to give a defendant fair notice of what the claim is and the grounds upon which it rests." Leibowitz v. Cornell University, 445 F.3d 586, 593 (2d Cir. 2006). A plaintiff "need only give plausible support to a minimal inference of discriminatory motivation." Vega v Hempstead Union Free School Dist., 801 F3d 72, 84 (2nd Cir 2015)(internal citations omitted).

"A plaintiff states a claim of invidious discrimination under the State and City HRLs by

[5] Even upon reviewing a motion for summary judgment the Courts use a much looser standard than the one suggested by Defendants. As stated by the First Department:

> "defense motion for summary judgment in an action brought under the NYCHRL must be analyzed under both the familiar framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817 (1973) and *73 under the newer "mixed motive" framework, which imposes a lesser burden on a plaintiff opposing such a motion. Summary judgment dismissing a claim under the NYCHRL should be granted only if "no jury could find defendant liable under any of the evidentiary routes—*McDonnell Douglas,* mixed motive, 'direct' evidence, or some combination thereof" (*Bennett,* 92 A.D.3d at 45, 936 N.Y.S.2d 112).

alleging (1) that he/she is a member of a protected class, (2) that he/she was qualified for the position, (3) that he/she was subjected to an adverse employment action (under State HRL) or he/she was treated differently or worse than other employees (under City HRL), and (4) that the adverse or different treatment occurred under circumstances giving rise to an inference of discrimination." Harrington v. City of New York, 157 A.D.3d 582, 584 (1st Dep't 2018).

Defendants do not dispute that Plaintiff was a member of a protected class, was qualified for her position(s), or that she suffered adverse employment actions. Plaintiff alleges that she is a female Latina of Dominican Republic origins over age 40. Plaintiff's allegations of her education, certifications, experience and promotions and commendations within the DOE demonstrate that she was qualified for position as Superintendent and all of the other positions she has applied for within the DOE since her wrongful demotion.

The Court of Appeals in Forrest v Jewish Guild for the Blind, 3 NY3d 295, 322 (2004) cited by Defendants, acknowledged:

> It is not often that an employer will use overt methods to discriminate. "Far more likely is it that he will pursue his discriminatory practices in ways that are devious, by methods subtle and elusive—for we deal with an area in which 'subtleties of conduct ... play no small part' "], Further, employers who discriminate are not likely to do so in an "open, plainly-appearing fashion" Instead, there is likely to be covert resort to subtle tactics and the pretext of intermingled motives and reasons to obscure the substantial cause" (internal citations omitted)

Similarly the Second Circuit has held: "Employers are unlikely to leave a "smoking gun" admitting a discriminatory motive. *See, e.g.*, Chambers v. TRM Copy Ctrs. Corp., 43 F.3d 29, 37 (2d Cir.1994). And such evidence is not required to make a prima facie case of discrimination. Luciano v. Olsten Corp., 110 F.3d 210, 215 (2d Cir.1997).

The Second Circuit specifically held that a **"plaintiff cannot reasonably be required to**

allege more facts in the complaint than the plaintiff would need to defeat a motion for summary judgment made prior to the defendant's furnishing of a nondiscriminatory justification." Littlejohn v City of New York, 795 F3d 297, 311 (2nd Cir. 2015)(emphasis added).

Therefore Plaintiffs' allegations of Defendants' actions and statements in the Complaint set out a prima facie case of discrimination.

> An inference of discrimination can arise from circumstances including, but not limited to, 'the employer's criticism of the plaintiff's performance in ethnically degrading terms; or its invidious comments about others in the employee's protected group; or the more favorable treatment of employees not in the protected group; or the sequence of events leading to the plaintiff's discharge.' Littlejohn, 795 F.3d at 312 (internal citations omitted).

There is "no bright-line rule for when remarks become 'too attenuated' to be significant to a determination of discriminatory intent." Tolbert v Smith, 790 F3d 427, 437 (2nd Cir 2015). In determining whether comments constitute direct evidence of discrimination, courts regularly consider "who made the remark, when the remark was made in relation to the employment decision, the remark's content, and the context in which the remark was made." Bacchus, 137 F Supp 3d 214, 238 .

The comments made to Plaintiff concerning her race/national origin and the treatment of other similarly situated DOE employees who were not black Afro/Latinas of Dominican origin states a prima facie case of discrimination. It is undisputed that the consistent comments made to Plaintiff by Porter that Plaintiff was not "black enough" because she did not "get down" with them "like that" because inter alia, despite being black Plaintiff refused to perform the Salute in DOE photos, Complaint ¶54 are the types of comments that a reasonable juror could view as discriminatory.

Courts focus on whether a plaintiff's allegations support a "plausible inference of discrimination." *See* Vega, 801 F.3d at 87. Whether facts give rise to a plausible inference of discrimination "is a 'flexible [standard] that can be satisfied differently in differing factual scenarios.' " Howard v. MTA Metro-N. Commuter R.R., 866 F. Supp. 2d 196, 204 (S.D.N.Y. 2011) (quoting Chertkova v. Conn. Gen. Life Ins. Co., 92 F.3d 81, 91 (2d Cir. 1996)). Here, the comments about not being black enough expressed disapproval that Plaintiff did not act a certain way based on her race and national origin and at minimum supports a plausible inference of discrimination. It is also completely inappropriate to ask DOE employees to perform a black power salute or any hand gestures based on race. It is even more discriminatory for Plaintiff to be chastised, demoted, and subjected to adverse treatment, told to "learn how to smile, be pretty, keep her mouth shut, and keep the men happy", ostracized and isolated and blacklisted. See Tolbert, 790 F3d 427, 437(finding an inference of discrimination where inter alia the principal asked the employee: "Do you only know how to cook black, or can you cook American too?")

Defendants incorrectly argue that the only remark to Plaintiff that "appears to invoke race" was made by an unknown employee in 2017. As described in Espinal's affidavit and the Complaint, that is simply not true. Meisha Ross Porter, who is now the Chancellor of the DOE, regularly asked Plaintiff to perform the Salute after weekly Superintendents Meetings and admonished Plaintiff for not partaking in the Salute. Shortly before Espinal was terminated in 2018 Porter admonished Plaintiff for not being "black enough" because she did not "get down" with them "like that". Those comments was part of a pattern of Espinal being marginalized and diminished for not conforming to certain expectations based on Plaintiff's race.

Porter, who made these discriminatory comments to Plaintiff was promoted to Executive Superintendent for the Bronx and as a result Plaintiff's supervisor just before Plaintiff was

terminated/demoted. Carranza, the Chancellor at the time of Plaintiff's termination/demotion, advised her that the supervisors between them (Porter and Watson-Harris) made the decision to terminate Plaintiff. Accordingly, the comments by Porter occurred under circumstances giving rise to an inference of discrimination.

The subject comments were made within a few months of Plaintiff's termination/demotion and therefore probative of discriminatory motivation. See Tolbert, 790 F3d at 437(discriminatory remarks all occurred during a single school year). Moreover, the remarks were made by the *de facto* decision maker. Id.

Campbell v All. Nat. Inc., 107 F Supp 2d 234 (SDNY 2000), cited by Defendants, analyzed a motion for summary judgment not a pre-answer motion to dismiss. The "stray remark" in Campbell did not relate to the Plaintiff, but was made by a former supervisor advising Plaintiff not to hire anyone who was not light skinned etc. Campbell is also distinguishable in that the Campbell Plaintiff was consistently cited for performance problems including tardiness, lack of training, and losing money. Here, by contrast it is undisputed that Plaintiff has an exemplary performance record and the highest credentials. Defendants never once claimed that the decision to terminate/demote Plaintiff was linked to any performance problems.

Furthermore, Espinal's replacement is not black and was much less qualified and credentialed than Plaintiff was to hold the position[6]. The Second Circuit in Littlejohn, cited by Defendants held: "an inference of discrimination also arises when an employer replaces a terminated or demoted employee with an individual outside the employee's protected class." 795 F.3d 297 at 312. *See* Zimmermann v. Assoc. First Capital Corp., 251 F.3d 376, 381 (2d Cir.

[6] In fact, the last school where Espinal's replacement was a principal became a Renewal School (part of a list of the lowest performing schools in NY State) under her leadership. Don't understand the sentence.

2001) ("mere fact that a plaintiff was replaced by someone outside the protected class will suffice for the required inference of discrimination"). See also Pustilnik v Battery Park City Auth., 71 Misc 3d 1058, 1071 [Sup Ct 2021](Plaintiff supported age discrimination claim when Plaintiff's replacement and other new hires were in their 30s and 40s while Plaintiff was in her 50s).

Defendants' mistreatment of Espinal described in the Complaint and her affidavit sufficiently sets forth a prima facie case of discrimination necessary at the pleading stage. In Petit, 177 AD3d 402, 403 the First Department found that the Complaint stated a cause of action for discrimination, retaliation and hostile work environment in violation of the New York State and New York City Human Rights laws where the Plaintiff was assigned to work in an unsanitary basement office and demoted. The Court found that the Plaintiff in Petit had sufficiently given Defendants "fair notice" of his claims which is all that is required on a pre-answer motion to dismiss.

Similarly here, Plaintiff complained of being placed as School Based Investigator and subjected to a hostile work environment since assuming the Investigator position, being assigned menial work assignments, with no supervisory responsibilities and in a non-pedagogical role. Complaint ¶87- 90. Espinal was not given her own desk/work station and when working remotely was not given proper equipment. Espinal was treated worse than her colleagues by inter alia, being assigned to remote job sites, and being asked to report in person when others were permitted to work remotely.

In Vega the Second Circuit held that the Plaintiff "pleaded a plausible discrimination claim under Title VII and § 1983" by alleging "that his assignment to classes with increased numbers of Spanish-speaking students was an "adverse employment action" taken "because of" his Hispanic ethnicity" 801 F3d 72, 88. The Vega Court held that the School District's competing explanation

that the assignment of more Spanish speaking students was based on Vega's language ability and not his ethnicity is "better evaluated at the summary judgment stage or beyond, and not on a motion for judgment on the pleadings." Id., at 89. Notably here, Defendants fail to offer any justification whatsoever (non-discriminatory or otherwise), for the multitude of adverse employment actions Plaintiff has suffered and therefore Espinal sufficiently pleaded a plausible discrimination claim.

Similarly, Plaintiff has sufficiently alleged gender discrimination in her Complaint. A few months prior to her termination, Jose Ruiz direct adviser to Watson-Harris,[7] one of the "decisionmakers" to terminate Ms. Espinal, told Espinal: "You are so pretty but then you enter the room open your mouth and intimidate men and people. You need to just learn to be quiet and look pretty." Complaint ¶55. Mr. Ruiz further advised that she needed to learn how to smile, be pretty, keep her mouth shut, and keep the men happy. When Ms. Espinal told Mr. Ruiz that his comments were inappropriate he responded by telling her that she needed to learn to play the game. Espinal Aff. ¶16-18. These are clearly the kinds of comments that a reasonable juror would find discriminatory.

In addition, Carranza at his first post-termination meeting with Espinal gave her only two days to decide whether to accept a demotion or be terminated, dropped off the payroll and lose her health care and retirement benefits reminded Plaintiff: The clock is ticking. You are a divorced single mother of two children. The ball is in your court." Complaint ¶76. These statements were made immediately after Plaintiff's termination and were clearly probative regarding the DOE's adverse treatment of Plaintiff and cannot be considered "remote" or "oblique".

[7] Defendants incorrectly claim that the remarks were made a year before Plaintiff's termination and that they were made by a "non-decisionmaker" See MOL p. 14.

The sexist comments to Plaintiff must also be considered along with the pattern that under Carranza 19 women over the age of 40 in senior leadership roles who were either demoted, terminated or forced into retirement between June 27, 2018 and June 13, 2019 and that all deputy chancellors (all women, except one) over forty were demoted. See Exhibit A to the Espinal Aff. *See* Matter of McIntosh v. Dept. of Educ. of the City of NY, 115 A.D.3d 464, 981 (1st Dept. 2014). Carranza was sued for similar conduct in San Francisco CGC 15-545842 and a letter of reprimand was included in his file as part of the Settlement. Complaint ¶57-60.

Defendants fault Plaintiff for not establishing that the comments directly related to her termination. However, as described above the case law is clear that there is no requirement to present evidence that shows direct discrimination. The evidence can be indirect and circumstantial. Suri v Grey Glob. Group, Inc., 164 AD3d 108, 128 (1st Dept 2018); Bennett v Health Mgt. Sys., Inc., 92 AD3d 29, 40-41 (1st Dept 2011). Employers are unlikely to leave a "smoking gun" admitting a discriminatory motive. And such evidence is not required to make a prima facie case of discrimination. Forrest, 3 N.Y.3d 295, 305, *citing* Luciano, 110 F.3d at 215.

Godbolt v Verizon New York Inc., 115 AD3d 493, 494 (1st Dept. 2014), cited by Defendants, is easily distinguished from the case at bar. Godbolt dealt with a motion for summary judgment and not a pre-answer motion to dismiss. In Godbolt "Defendant explained that it terminated plaintiff because he failed to disclose his prior criminal convictions on his employment applications, which plaintiff admitted, and demonstrated that every one of its employees who were found to have falsified an employment application was terminated." Id. Here by contrast, Defendants have not proffered a single non-discriminatory justification for terminating/demoting Plaintiff or any of the subsequent adverse treatment Plaintiff suffered. Plaintiff was an exemplary DOE employee and Superintendent.

Furthermore, the Godbolt Plaintiff offered no evidence that Defendant's reason for terminating him was pretextual. The only evidence the Godbolt Plaintiff offered was a single email weeks after the termination where one of defendant's employees "declined to reconsider the penalty because of the nature of plaintiff's convictions and his concern about the liability that defendant would assume if plaintiff committed a similar crime while on company time." Id. Unlike here, the comment in Godbolt was not even overtly racist or sexist. The Godbolt Court held that the remark alone was insufficient particularly in light of the Defendant's stated policy of terminating any employee who lied on their employment application. Here, Plaintiff did not violate any DOE policy, but instead was an exemplary employee. The remarks identified by Plaintiff occurred both before and after her termination and were part of a larger pattern of discrimination described in the Complaint. Therefore, Plaintiff has sufficiently met the minimal burden of stating a cause of action for discrimination in the Complaint.

C. Plaintiff Meets the Minimal Standards Necessary to State a Claim of Discrimination under NYCHRL

"It is undisputed that the NYCHRL's pleading standards are materially looser than the trans-substantive plausibility standard of the Federal Rules of Civil Procedure—or, for that matter, the CPLR's notice-pleading standard for claims under the NYSHRL." Vig., 67 A.D.3d at145, (1st Dept. 2009)(internal citations omitted

As stated by the First Department in Williams v New York City Hous. Auth., 61 AD3d 62, 66 (1st Dept. 2009) the core of the Restoration Act was its revision of the construction provision of the NYCHRL:

> "The provisions of this [chapter] *title* shall be construed liberally for the accomplishment of the *uniquely broad and remedial* purposes thereof, *regardless of whether federal or New York State civil and human rights laws, including those laws with provisions*

> *comparably-worded to provisions of this title, have been so construed*." (Local Law 85 § 7 [deleted language in brackets, new language emphasized].)
>
> As a result of this revision, the City HRL now explicitly requires an independent liberal construction analysis in all circumstances, even where state and federal civil rights laws have comparable language. The independent analysis must be targeted to understanding and fulfilling what the statute characterizes as the City HRL's "uniquely broad and remedial" purposes, which go beyond those of counterpart state or federal civil rights laws.

As described above, Plaintiff's initial burden of establishing discrimination is de minimis, particularly on a pre-answer motion to dismiss where every inference must be interpreted in Plaintiff's favor. Melman, 946 NYS2d at 32 (1st Dept. 2012). *See also* Vig supra.

It is particularly troubling that Defendants cite to Forrest 3 NY3d 295 in their argument section regarding NYCHRL when that is one of the cases explicitly cited by the City Council as misinterpreting the NYCHRL.

> "Insisting that our local law be interpreted broadly and independently will safeguard New Yorkers at a time when federal and state civil rights protections are in jeopardy. There are many illustrations of cases, like *Levin* on marital status, *Priore*[,] *McGrath* and ***Forrest*** that have either failed to interpret the City Human Rights Law to fulfill its uniquely broad purposes, ignore [*sic*] the text of specific provisions of the law, or both. With [the Restoration Act], these cases and others like them, will no longer hinder the vindication of our civil rights. Williams, 61 AD3d at 67 (1st Dept 2009)

A discrimination claim under the NYCHRL has four elements: that (1) plaintiff is a member of a protected class; (2) plaintiff was qualified for the position; (3) plaintiff suffered an adverse employment action; and (4) the adverse employment action occurred under circumstances giving rise to an inference of discrimination. Askin v. Dep't of Educ. of City of New York, 110 A.D.3d 621, 622, (1st Dept. 2013) A plaintiff "need not plead [specific facts establishing] a prima facie case of discrimination but only needs to give 'fair notice' of the nature of the claim and its grounds." Harrington v. City of New York, 157 A.D.3d 582, 584 (1st Dep't 2018) citing Vig, 67 A.D.3d at 145.

Defendants implicitly acknowledge that Plaintiff has met the first three elements. Defendants' sole argument is that Plaintiff did not alleges sufficient facts to give rise to an inference of race and/or gender discrimination. As described above, Defendants are plainly incorrect. Despite Defendants' claims to the contrary, Plaintiff alleged that the comments that Plaintiff was not "black enough" made by Executive Superintendent Meisha Ross Porter (turned Chancellor of the DOE) several months prior to Plaintiff's termination, was part of a broader pattern of discrimination, which included *inter alia*, being admonished for not doing the Black Power Salute and being replaced by someone who is not black and not Dominican. Espinal Aff. ¶12-14, 21, 30. Accordingly, Plaintiff has certainly met the minimal standard necessary to give rise to an inference of race discrimination under the NYCHRL on a pre-answer motion to dismiss. *See* Littlejohn 795 F.3d 297 at 312 (inference of discrimination can arise from, inter alia: "the employer's criticism of the plaintiff's performance in ethnically degrading terms" or fact that Plaintiff's replacement was outside the protected class). *See also* Zimmermann., 251 F.3d 376, 381 (2d Cir. 2001) (same); Tolbert *supra*, Petit *supra*.

Plaintiff's allegations supporting her claim of gender discrimination are perhaps even more clearly discriminatory than her race discrimination claim. As described above, Plaintiff alleged two (not one as the Defendants misrepresented) separate events proximate in time to her termination that plausibly give rise to an inference of gender discrimination. Mr. Ruiz, adviser to Watson-Harris the Deputy Chancellor and one of the "decisionmakers" of Plaintiff's admonished Plaintiff to be "pretty and "quiet" and not intimidate men several months prior to her termination. Further, in Plaintiff's first meeting with Carranza following her termination, Carranza used Plaintiff's status as a divorced single mother of two to pressure her to sign as stipulation accepting a demotion.

These comments plainly rise to a level of discrimination that the NYCHRL was crafted and amended to protect against. *See* Back v Hastings On Hudson Union Free School Dist., 365 F3d 107, 119 (2nd Cir 2004)(Sexist remarks based on stereotyping were sufficient to rebut a nondiscriminatory reason for denying a teacher tenure and deny summary judgment.) See also Edwards v Nicolai, 153 AD3d 440, 442 (1st Dept. 2017)(comment that Plaintiff was "too cute" months before firing coupled with professed jealousy from employer's spouse demonstrated firing was based on sex); Price Waterhouse v Hopkins, 490 US 228, 251, [1989](gender stereotyping is evidence of discrimination "[W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group ....").

Moreover the pattern of either terminating, demoting or forcing into retirement women like Plaintiff who are over 40 under Carranza's administration in and of itself is sufficient to state a claim for gender and age discrimination, particularly under the relaxed pleading standards of NYCHRL. *See* Matter of McIntosh v. Dept. of Educ. of the City of NY, 115 A.D.3d 464, 981 N.Y.S.2d 531 (1st Dept. 2014) [reversing dismissal of NYCHRL age- and race-discrimination claims). *See also* Pustilnik v Battery Park City Auth., 71 Misc 3d 1058, 1071 [Sup Ct 2021].

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court deny Defendants' Motion to dismiss Plaintiff's in all respects, and grant such other and further relief as the Court deems just and proper.

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