No. _____

IN THE

Supreme Court of the United States

PEDIO VAIGASI,

Petitioner,

—v.—

SOLOW MANAGEMENT CORPORATION, GREGORY TUMMINIA, in his individual and official capacity, ANTHONY CALLICCHIO, in his individual and official capacity, GIOVANI BERNARDINO, in his individual and official capacity, RONAN KEARNEY, in his

(*Caption continued on inside cover*)

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Respondents.

QUESTIONS PRESENTED

The Second Circuit Court of Appeals affirmed the District Court's grant of Defendants' Motions to Dismiss and for Summary Judgment, and the granting of sanctions against the pro se Plaintiff for discovery practices.

The following questions are presented:

1. Whether review is warranted because the Court of Appeals affirmed a sanction of $61,605.25 in attorney's fees against a pro se Plaintiff for an alleged failure to follow discovery rules under Fed. R. Civ. P. 26(g), Fed. R. Civ. P. 37(b)(2) and the Court's inherent power?
2. Whether review is warranted to clarify the appropriate motion to dismiss standard as the Court of Appeals held that an employment discrimination plaintiff must do more in his complaint than put his employer on notice than he was the victim of unlawful conduct, i.e. must he also satisfy some heightened fact pleading requirement in order to withstand his employer's motion to dismiss.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the Summary Order of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The summary order of the United States Court of Appeals for the Second Circuit is unreported. *Vaigasi v. Solow Management Corporation, et al.* 17-784-cv. The Court of Appeals affirmed the District Court's March 24, 2014, February 16, 2016 and February 16, 2017 orders for substantially the same reasons. The Court of Appeal held that Petitioner does not plausibly allege that his gender was a basis for any of Respondents' purported adverse employment actions, nor does he set forth factual circumstances from which discrimination could be inferred. Further, the Court of Appeals held that Vaigasi did not plausibly state a claim for religious discrimination as a threat to be "written up" was insufficient to state a claim.

The Court of Appeals, under a summary judgment standard, held that Vaigasi did not raise a triable issue of age discrimination based on a failure to rebut the employer's basis for transfer was for a legitimate personnel need. For the same reasons and based on the holding that the employer did not treat Vaigasi differently than younger employees after his reinstatement, the ADEA, NYSHRL and NYCHRL claims were dismissed on summary judgment. The Court of Appeals continued in holding that the employer was not on notice of Vaigasi's various disabilities, and thus the disability discrimination claims under the ADA, NYSHRL and NYCHRL were dismissed.

Lastly, the Court of Appeals held that the District Court did not abuse its discretion in sanctioning Vaigasi under the Federal Rules of Civil Procedure 26(g), 37(b)(2) and the court's inherent authority. The Court of Appeals held that the sanctions were responsive and proportional to Vaigasi's actions in discovery.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). The Summary Order and Judgment of the Court of Appeals was entered on September 14, 2018 with the Mandate entered on October 9, 2018. The District Court had subject matter over this action pursuant to 28 U.S.C. § 1331 and 1367. On February 17, 2017 the district court docketed a civil judgment dismissing Mr. Vaigasi's complaint pursuant to a Motion for Summary Judgment. On March 17, 2017 a timely appeal of all judgments (including all prior Decisions and Orders) was filed by Mr. Vaigasi to the Court of Appeals for the Second Circuit. On September 5, 2017 Magistrate Judge Pitman awarded Defendants $61,605.25 in attorney's fees. On September 8, 2017, Vaigasi timely filed an Amended Notice of Appeal to include all of the aforementioned judgments. The judgments of the District Court being final, Second Circuit Court of Appeals had appellate jurisdiction pursuant to 28 U.S.C. § 1291.

STATUTORY PROVISIONS

Title VII of the Civil Rights Act of 1964, 42 U.S.C §§ 2000e

The Age Discrimination in Employment Act (ADEA) of 1967, 29 U.S.C. § 621 et seq.

The Americans with Disabilities Act, 42 U.S.C §§ 12101 et seq.

The Civil Rights Act of 1871, 42 U.S.C § 1981

The Civil Rights Act of 1871, 42 U.S.C. § 1983

New York State Human Rights Law, New York Executive Law § 290 et seq.

New York City Human Rights Law, New York Administrative Code § 8-101 et seq.

Family and Medical Leave Act 29 U.S.C. § 2601 et seq.

Federal Rules of Civil Procedure 26(g)

Federal Rules of Civil Procedure 37(b)(2)

STATEMENT OF THE CASE

A. Nature of the Case

Petitioner Pedio Vaigasi ("Vaigasi" or "Petitioner") commenced this action alleging discrimination against his employer Solow Management Corp. ("Solow Mgmt."), Solow Realty & Development Company LLC ("Solow Realty"), and related entities (collectively, "Corporate Respondents"), and 11 named employees and officers of the Corporate Defendants ("Individual Respondents," and together with the Corporate Respondents, "Respondents"). Petitioner alleges that during the course of his employment he was discriminated against, "because of his age, sex, religion and disability" and "subjected [him] to a hostile work environment" in violation of Title VII of the Civil Rights Act, 42 U.S.C. §§ 2000e et seq. ("Title VII"); the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 et seq. ("ADEA"); the Americans with Disabilities Act, 42 U.S.C. §§ 12101 et seq. ("ADA"); the Civil Rights Act, 42 U.S.C. §§ 1981 and 1983 ("Section 1981" and "Section 1983"); the New York

State Human Rights Law, N.Y. Exec L. §§ 290 et seq. ("NYSHRL"); and the New York City Human Rights Law, N.Y.C. Admin. Code §§ 8-101 et seq. ("NYCHRL"). Petitioner also alleges that Defendants "interfere[d] with [his] rights to take . . . leave" under the Family and Medical Leave Act, 29 U.S.C. §§ 2601, et seq, ("FMLA") and to "return to his position or an equivalent position following FMLA leave," and retaliated against him "because he exercised his rights under FMLA, ADA and ADEA." (Id.)

B. Appellant's Employment Background with Appellees

Petitioner worked for the Corporate Respondents beginning in May 2005. On September 11, 2009 Respondents refused to accept Petitioner's return to work with restrictions placed by Petitioner's physician. On November 2, 2009, Vaigasi was permitted to return to work only after his physician permitted full duty work.

In 2010 while at work, Petitioner suffered several work-related injuries. Having previously refused to accept Vaigasi's return to work with restrictions, Respondents were clear that Petitioner must be fully fit to return to work.

C. Discrimination Claims

Specifically, Vaigasi alleged that he was discriminated against because of his religion and sex, including but not limited to, (1) being demoted from ARM to handyman, resulting in "a less distinguished title", (2) being involuntarily transferred against Local 32B/J's ("Union") Collective Bargaining Agreement ("CBA"), (3) being denied access to building areas and his email account to which he previously had access

to as ARM, (4) being denied sick time pay, (5) Vaigasi's schedule was changed from Monday through Friday to any day of the week or any schedule the RM decided, and (6) Vaigasi could no longer use the gym, no longer could stay in the RMs apartment, was no longer permitted in the building during non-working hours.

D. Procedural History Related to Appellee's Cross-Motion for Sanctions

On February 10, 2012, discovery was stayed pending resolution of defendants' motion to dismiss. On July 21, 2014, the court lifted that stay.

On July 28, 2014, Vaigasi filed his first request for production. On August 20, 2014 Tumminia responds to Vaigasi's request for production. On September 4, 2014, the remaining Respondents respond to Vaigasi's request for production.

On October 6, 2014, the Magistrate holds his first discovery conference, directing defendants complete their production by October 10, 2014, directing Vaigasi to identify any unresolved document issues by October 24, 2014 and directed all parties to a follow-up conference on October 29, 2014.

On October 29, 2014, the court directed defendants to, inter alia, describe the burden of searching for relevant Electronically Stored Information ("ESI"). Vaigasi was directed to make a formal motion to compel the production of additional documents by December 1, 2014.

On December 1, 2014, Vaigasi filed his motion to compel production of documents and ESI. On December 5, 2014, the Court questioned Gerard Martinez and

ordered a sample search of Defendant Tumminia's mailbox for a limited number of search terms.

The court further denied Vaigasi's motion to compel yet ordered Vaigasi to revise his responses to defendants' motion to compel production by January 15, 2015 addressing each request individually. These orders were orally made and Vaigasi did not have access to the transcripts.

On January 22, 2015, the court directed a revised response to defendants' document requests by February 20, 2015, additional discovery requests served by March 10, 2015 and revised motion to compel production by March 20, 2015.

On February 11, 2015, the lower court denied Vaigasi's proposed order to show cause. On February 16, 2015, Vaigasi filed a request for review to the district court. The court denied the request.

On February 25, 2015 Vaigasi filed his second request for production. On February 26, 2015, the lower court denied Vaigasi two subpoenas. In addition, the court denied Vaigasi's application to extend discovery and ordered Vaigasi to complete production by March 6, 2015. The court sought that Vaigasi answer defendants' letter submitted the day before during the conference. Vaigasi simply could not do so during the conference. Acting only on letter motion, the court ordered that defendants are entitled to conduct a physical examination of Vaigasi.

On March 2, 2015, Judge Pitman

1. denies Vaigasi's request for extension of time to complete discovery;
2. sets Vaigasi's deposition for March 13, 2015.

3. Vaigasi to complete production by March 6, 2015 or provide note from physician.

On March 6, 2015, Vaigasi filed a notice of appeal seeking review of non-relevant medical records release.

On March 10, 2015 Vaigasi filed and served his notice of deposition.

On March 20, 2015 Vaigasi filed motion to compel production. On March 20, 2015 Vaigasi and Appellees file their respective responses to discovery requests.

On March 30, 2015, the Magistrate denied Vaigasi's motion for reconsideration of his order directing Vaigasi submit to a physical examination. The Magistrate also denied Vaigasi's request for extension of time to complete discovery.

On April 15, 2015, Vaigasi filed an interlocutory appeal seeking review of the order directing Vaigasi submit to a physical exam. Respondents cross-moved the Magistrate Judge to impose sanctions under Fed. R. Civ. P. 26(g), Fed. R. Civ. P. 37(b)(2) and the court's inherent power against Mr. Vaigasi for purportedly failing to comply with discovery rules, acting in bad faith, vexaciously, or for oppressive reasons.

On December 31, 2015 Vaigasi filed his reply to appellees' cross-motion for sanctions.

REASONS FOR ALLOWANCE OF THE WRIT

POINT I

A. Sanctions Review Standard

The magistrate imposed sanctions against Mr. Vaigasi, appearing *pro se*, pursuant to Fed. R. Civ. P.

26(g), Fed. R. Civ. P. 37(b)(2) and the Court's inherent power.

Review of the sanctions order by the Court of Appeals is for an abuse of discretion. *See e.g.,* Kiobel v. Millson, *PLC,* 592 F.3d 78, 81 (2d Cir. 2010), *citing* Storey v. Cello Holdings, L.L.C., 347 F.3d 370, 387 (2d Cir. 2003). An "abuse of discretion" occurs when a district court "base[s] its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence, or render[s] a decision that cannot be located within the range of permissible decisions." Id., *quoting* Sims v. Blot, 534 F.3d 117, 132 (2d Cir. 2008) (citations and internal quotation marks omitted). Because the "trial court [imposing sanctions] may act as accuser, fact finder, and sentencing judge" all in one, Mackler Prods., Inc. v. Cohen, 146 F.3d 126, 128 (2d Cir. 1998), the court of appeals' review of such an order is "more exacting than under the ordinary abuse-of-discretion standard." Wolters Kluwer Fin. Servs., Inc. v. Scivantage, 564 F.3d 110, at 113-14 (2d Cir. 2009)

What occurred at the District Court level, in the severe sanctions imposed on Petitioner for engaging in discovery and motion practice, and the confirmation of those sanctions by Court of Appeals, warrants allowance of the writ, as these sanctions against a *pro se* litigant, if permitted to stand, will have a chilling effect on *pro se* litigants bringing legitimate claims to court. One of the main tenets of our legal system in this country is the "American Rule" in which a party pays only their own attorney's fees, regardless of whether they win or lose, with some carefully enumerated exceptions. This allows individuals to bring legitimate cases to court without the risk of incurring excessive costs if they lose the case, a principle that, in part, is designed to permit

individuals with lesser means to seek justice for their claims against wealthier individuals and corporations.

In this instance, the exorbitant sanctions of $61,605.25 imposed upon Petitioner, if permitted to remain, will have the same effect on potential litigants that the "American Rule" is designed to eliminate. Individuals, and particularly in this case, victims of employment discrimination, should not be silenced and fear going to Court due to the risk of incurring costs which they are simply incapable of paying.

The Magistrate Court's basis for the issuance of sanctions under Fed. R. Civ. P. 26(g), Fed. R. Civ. P. 37(b)(2) and the Court's inherent powers are as follows: Courts "have interpreted Rule 26(g)(3) as incorporating a requirement that there be harm resulting from the alleged violation of the Rule." Kara Holding Corp. v. Getty Petroleum Mktg., 99 Civ. 0275 (RWS), 2004 U.S. Dist. LEXIS 15864, at *67 (S.D.N.Y. Aug. 13, 2004) ("[S]anctions under Rule 26(g) are not appropriate when a party has not been harmed by the failure of his adversary.") (internal quotations omitted)). The Court of Appeals should have reviewed the lower court's factual finding that a certification was made in violation of Rule 26(g) for clear error and the court's decision of the appropriate sanction for an abuse of discretion. The Court of Appeals should have reviewed the district court's findings of fact for clear error and the district court's conclusions of law *de novo*. Bessemer Trust Co., N.A. v. Branin, 675 F.3d 130, 135 (2d Cir. 2012), citing White v. White Rose Food, 237 F.3d 174, 178 (2d Cir. 2001). Accord United States v. Coppola, 85 F.3d 1015, 1019 (2d Cir. 1996) ("[This Court reviews] all conclusions of law, including those derived from the application of a court's findings of fact, *de novo*.") This standard of

review is identical to the Court of Appeals' standard of review for motions to suppress where the question raised is the existence of probable cause. *See* United States v. Elmore, 482 F.3d 172, 178 (2d Cir. 2007).

The court's finding that Vaigasi filed his discovery requests to harass Appellees is not supported by the record or the evidence. First, Mr. Vaigasi's alleged misconduct was due to the court's failure to exercise its discretion in managing the case. Second, "the imposition of such severe sanctions 'is appropriate only as a last resort.'" Chudasama v. Mazda Motor Corp., 123 F. 3d 1353, (11th Cir. 1997). Had the lower court taken the time to rule on Vaigasi's requests relating to discovery and motions before the court, Vaigasi would have been able to comply with the court's orders.

Finally, and most importantly, in exercising its discretion under Rule 26(g)(3) for determining appropriate sanction, the district court should have analyzed the needs of the case. See Fed. R. Civ. P. 26(g)(2)(c). As the analysis herein demonstrates, the lower court failed to do this. It never ruled on Vaigasi's continued requests or offered any indication that it had given the requests serious consideration. Even assuming, arguendo, that sanctions may have been appropriate, "the severe sanctions imposed were clearly excessive, and the court's determination of the 'appropriate sanction' under Rule 26(g)(2)(C) was therefore an abuse of discretion." Chudasama at 1372. Because the sanctions order cannot stand under either Rule 37(b), Rule 26(g), or the Court's inherent powers it must be vacated.

B. Severity of the Sanctions

The Magistrate failed to consider and rule on several of Vaigasi's requests. "Failure to consider and rule on significant pretrial motions before issuing dispositive orders can be an abuse of discretion." Chudasama at 1367. Citing, In re School Asbestos Litig., 977 F.2d 764, 792-93 (3d Cir. 1992) (granting writ of mandamus as remedy for district court's "arbitrar[y] refus[al] to rule on a summary judgment motion"); Ellison v. Ford Motor Co., 847 F.2d 297, 300-01 (6th Cir. 1988) (finding district court's failure to rule on motion to amend complaint before granting summary judgment abuse of discretion).

"By and large, the Federal Rules of Civil Procedure are designed to minimize the need for judicial intervention into discovery matters. They do not eliminate that need, however." Chudasama 1370.

Magistrate Judge Pitman abused his discretion in his sanctions order, therefore, the subsequent sanctions were not within the Magistrate Judge's discretion. The answer should be fairly clear: the Magistrate Judge would have been hard pressed to fashion sanctions more severe than those included in its order. Vaigasi lost everything he had at stake in the litigation and more. In addition to subsequently granting excessive attorneys' fees to the appellees, Magistrate Judge Pitman (1) denied Vaigasi's request for production, (2) permitted Vaigasi only two depositions of two witnesses limited to four hours each, (3) granted severe sanctions against Vaigasi (a) precluding Appellee from any further discovery (b) precluding Vaigasi "from offering or using at trial or in connection with any motion any document other than the documents that have previously been produced by Vaigasi and defendants []", and (c)

ordered Vaigasi submit to a physical exam without formal motion practice.

The severity of these sanctions required the court to find that Vaigasi's "noncompliance" with the order was intentional or in bad faith. "Violation of a discovery order caused by simple negligence, misunderstanding, or inability to comply will not justify" Rule 37 sanctions. Chudasana at 1371. Moreover, a district court abuses its discretion under Rule 37(b)(2) if it renders judgment when "less draconian but equally effective sanctions were available." Id.

In its sanctions order, Judge Pitman found that Petitioner acted in bad faith when he failed to comply with his prior rulings. However, this finding has little support in the record and is erroneous. (A244). The Court's order required Vaigasi complete production by March 6, 2015, giving Vaigasi less than a month to comply. Many of these requests were extremely broad, vague, or both. Literal compliance with several of the requests was simply not possible. Thus, that Vaigasi was unable to comply should be understandable.

Vaigasi brought these complications to the court's attention before the sanctions order was entered. Prior to entry of the order, Vaigasi's objections, and especially the letters to the court, listing the main disputes that required resolution, put the court on notice of the need for clarification. The Magistrate Judge disregarded Vaigasi's emphatic requests for rulings or clarification and issued its order containing no guidance as to how it was to be satisfied. Therefore, the severe sanctions order entered should be considered a clear abuse of discretion and should not stand under Rule 37(b)(2), Rule 26(g) or the court's inherent power.

C. Basis for the Sanctions

1. The Sheer Number of Submissions the Court Required and the Short Time to Comply Made It Impossible for Vaigasi, Appearing Pro Se to Comply

Tellingly, the Court acknowledges that "a review of all of plaintiff's document requests would take more than 96 hours" resulting "in an unreasonable burden on the Court." Yet, the court required that Vaigasi (1) revise Plaintiff's motion to compel Defendants to produce documents and electronically stored information (2) respond to Defendants' motion for a protective order relieving Defendants of the obligation of responding to Plaintiff's second request for the production of documents and notice of depositions and (3) and respond to Defendants' motion for sanctions against Vaigasi, in less than 30 days. Judge Pitman's December 2, 2015 order does not address Vaigasi's April 16, 2015 letter to the Court or Vaigasi's May 4, 2015 letter to the Court, nor does he give Vaigasi additional time to respond.

Thus, Magistrate Judge Pitman failed to give Vaigasi "a reasonable opportunity to elicit information within the control of his adversaries." Quinn v. Syracuse Model Neighborhood Corp., 613 F.2d 438, 445 (2d Cir. 1980) (summary judgment should not be granted against non-dilatory party who has been "denied reasonable access to potentially favorable information").

The court alleges that "Plaintiff also failed to comply with Fed. R. Civ. P. 37(a)(1) which requires a good faith attempt to confer with the adverse party in an effort to resolve the discovery dispute without judicial intervention." The court dismisses Vaigasi's efforts as "a vague reference to a good-faith meet and confer" concluding that "the representation is not

credible." However, Vaigasi did meet and confer and the court acknowledges the parties' email correspondence concerning discovery. The fact that there is record evidence to the contrary means the court reached an improper conclusion. Additionally, given the short time for discovery and defendants incessant refusal to cooperate, Vaigasi did as much as he could do under the circumstances.

2. The courts' alleged substantive defects.

The District Court claims with little or no support that "the underlying document requests are defective for three reasons: (1) they are irrelevant; (2) even if the requests have some relevance, they are disproportionate to the claims remaining in the case; (3) they are overbroad and (4) they are unduly burdensome." Although the court should know that the aforementioned are themselves overbroad, it does not explain how each should be complied with.

The scope of discovery permitted under the Federal Rules of Civil Procedure is set forth in Rule 26(b)(1):

> Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

Information is relevant if: "(a) it has any tendency to make a fact more or less probable than it would be

without the evidence; and (b) the fact is of consequence in determining the action." Fed. R. Evid. 401. The court states that "I am not going to sift through the more than 1000 requests plaintiff has served and attempt to separate the wheat (if any) from the chaff." The court overlooks the fact that the injuries sustained by Vaigasi occurred while Vaigasi was working for Defendants. Therefore, documents referencing Vaigasi's worker's compensation claims relate directly to Vaigasi's ADA claims against defendants.

The Court further misconstrues Vaigasi's requests 526-532, claiming that they relate only to Vaigasi's termination. Although the requests may mention Vaigasi's termination each directly or indirectly relates to either the ADA, ADEA or other claims that remain. The Court overlooks that Vaigasi was constructively discharged. "Constructive discharge of an employee occurs when an employer, rather than directly discharging an individual, intentionally creates an intolerable work atmosphere that forces an employee to quit involuntarily. Working conditions are intolerable if they are so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign." Theilig v. United Tech Corporation, 10-1417 (2d Cir. 2011). Citing Chertkova v. Conn. Gen. Life Ins. Co., 92 F.3d 81, 89 (2d Cir. 1996) (internal citation and quotation marks omitted).

POINT II

THE DISTRICT COURT ERRED IN GRANTING DEFENDANTS' MOTION TO DISMISS PURSUANT TO 12(B)(6)

The second basis for allowance of the writ, is the heightened pleading standard that is applied to Plaintiffs by the courts when deciding a motion to dismiss pursuant to FRCP 12(b)(6).

A. Motion to Dismiss Standard

The Second Circuit reviewed the grant of a motion to dismiss for failure to state a claim *de novo*. Louisiana Stadium & Exposition Dist. v. Fin. Guar. Ins. Co., 701 F.3d 39, 42 (2d Cir. 2012) (citation omitted). The court reviews the legal sufficiency of the complaint, taking its factual allegations to be true and must draw all reasonable inferences in the Plaintiff's favor. *Id.* In determining the sufficiency of the complaint at the motion to dismiss stage, the Court applies a plausibility standard. *Id*. at 42-43. "[A] court must accept as true all of the allegations contained in a complaint." *Id*. at 43. "[D]etermining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id*. "When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009).

The Court of Appeals erroneously found that "Plaintiff fails to allege a gender discrimination claim under Title VII, NYSHRL, and NYCHRL because he 'does not allege facts that suggest that [his] gender

was a basis for Defendant[s' adverse actions], nor does [he] set forth any factual circumstances from which [such discrimination] might be inferred.'" (D. 135 P. 17-18).

It suffices instead to show that the motive to discriminate was one of the employer's motives, even if the employer also had other, lawful motives that were causative in the employer's decision." Univ. of Texas Southwestern Med. v. Nassar, 133 S. Ct. 2517, 2523 (2013).

The question here is what must Vaigasi plead to meet the minimal burden on a motion to dismiss. Title VII thus requires a plaintiff asserting a discrimination claim to allege two elements: (1) the employer discriminated against him (2) because of his race, color, religion, sex, or national origin. Vega v. Hempstead Union Free Sch. Dist., 801 F.3d 72, 85 (2d Cir. 2015). The aforementioned two elements, with regard to Vaigasi's claims, are discussed in detail below.

B. Element One: Alleged Discrimination of Appellant

As to the first element, an employer discriminates against a plaintiff by taking an adverse employment action against him. "A plaintiff sustains an adverse employment action if he or she endures a materially adverse change in the terms and conditions of employment." Vega at 85. "Examples of materially adverse changes include termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices unique to a particular situation." Id. The Second Circuit Court of Appeals has held that

the assignment of "a disproportionately heavy workload" can constitute an adverse employment action. Id.

Vaigasi pleaded he suffered "termination of employment" by being forced out of his job in January 2011. Vaigasi suffered "a demotion" in May 2009 "evidenced by a decrease in wage or salary". This demotion was evident since Vaigasi's work hours increased after he was illegally transferred to the 72nd Street building while his compensation remained the same. Additionally, Vaigasi's working hours were changed to various shifts instead of Vaigasi's previously assigned shift. Mr. Vaigasi's demotion from ARM to handyman means he was assigned "a less distinguished title". Vaigasi suffered a material loss of benefits since Vaigasi could no longer use the gym, could no longer stay in the RM's apartment, Vaigasi was no longer permitted in the building during non-working hours and Vaigasi was now taking orders from individuals who previously worked under him, i.e. Sergio Mota, Bernardino and Genao. As handyman Vaigasi had "significantly diminished material responsibilities" since Vaigasi was demoted from the ARM sedentary tasks to physical handyman duties. The total sum of work orders Vaigasi completed, when compared to other handymen, will prove that Vaigasi was assigned "significantly diminished material responsibilities.

The above clearly meet the definition of an adverse employment.

C. Element Two: Discrimination Because of Religion and Sex

As to the second element, an action is "because of" a plaintiff's religion, or sex, where it was a "substantial" or "motivating" factor contributing to

the employer's decision to take the action. Vega at 85. "[A] plaintiff need only present sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that 'religion, or sex, was a motivating factor for any employment practice.'" (emphasis added)) (quoting 42 U.S.C. § 2000e-2(m)), Vega 85-86. This Circuit ruled that Title VII "does authorize a 'mixed motive' discrimination claim. Vega at 86.

"In making the plausibility determination, the court must be mindful of the 'elusive' nature of intentional discrimination." Vega at 86 citing Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 255 n.8 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). Because discrimination claims implicate an employer's usually unstated intent and state of mind, See Meiri v. Dacon, 759 F.2d 989, 998 (2d Cir. 1985), rarely is there "direct, smoking gun, evidence of discrimination". Vega at 86.

Vaigasi has consistently alleged in his complaint that he was discriminated against because of his religion and sex. Vaigasi was discriminated against "because of" his sex because Ferreras called Vaigasi "sweetheart" and said "I go both ways" even after Vaigasi made it clear he was not interested in him romantically. In fact, Ferreras' persistence was so obvious that Genao said that "Ferreras and Plaintiff were married." Ferreras retaliated by telling Vaigasi to move out of the Resident Managers' apartment in May 2008. Ferreras further punished Vaigasi by telling him to answer calls after working hours and on weekends even though Vaigasi no longer resided locally. Specifically, on Sunday, June 8, 2008, Ferreras told Vaigasi to go to the building to remedy air conditioning situation, even though Vaigasi no longer resided locally. There is a clear inference drawn, due to the above discriminatory comments

that the aforementioned actions were taken against Vaigasi due to his sex.

Vaigasi pled that he was discriminated against "because of" his Christian religion by being forced to work on Sundays even though there were other employees who could have worked on Sundays. Elmenayer v. ABF Freight Sys., Inc., 318 F.3d 130, 134-35 (2d Cir. 2003) (holding that denial of an employee's proposed accommodation for religious practices is a "single completed action when taken" and, as such, is a "discrete act" that starts the statutory clock).

In fact, Ferreras was the first to attempt to permanently give Vaigasi a permanent Saturday and Sunday schedule. Even though the permanent Sunday schedule was later rescinded, Ferreras required Vaigasi to work on Sundays numerous times. After Vaigasi was illegally transferred in May 2009, Dedivanovic gave Vaigasi a work schedule that included working on Sundays. Vaigasi pled that the aforementioned were due to his religion. As the RM, Bernardino denied Vaigasi any overtime after Vaigasi's 2010 reinstatement to 66th Street.

After years of discrimination, "Vaigasi retained counsel who sent Sheldon Solow a letter outlining his grievances and requesting to resolve his disputes with defendants." Nevertheless, the discriminatory treatment continued culminating with Vaigasi being forced to take sick days January 2011. Additionally, Vaigasi pled that "Vaigasi is assigned work orders while other similarly situated employees are permitted to watch soccer games, arrive late and leave early".

Since Vaigasi's Title VII and FMLA claims were dismissed prior to discovery, Vaigasi's claims of Tittle VII and FMLA claims are adequately pled with

enough facts to state a claim for relief that is plausible on its face and gives Defendants fair notice of what the claims are and the grounds upon which they rest. Kaufman v. Time Warner, 836 F. 3d 137, 152 (2d Cir. 2016).

The conflicting standards applied on a motion to dismiss when examining employment discrimination cases warrants approval of the writ.

CONCLUSION

For the foregoing reasons, it is respectfully requested that this Court grant the petition and reverse the judgment of the court of appeals

Dated: New York, New York
December 12, 2018

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Attorneys for Petitioner Pedio Vaigasi

APPENDIX

Appendix A

[STAMP]

MANDATE

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 14th day of September, two thousand eighteen.

PRESENT: BARRINGTON D. PARKER,
PETER W. HALL,
RAYMOND J. LOHIER, JR.,
Circuit Judges.

MANDATE ISSUED ON 10/09/2018

No. 17-784-cv

PEDIO VAIGASI,

Plaintiff-Appellant,

—v.—

SOLOW MANAGEMENT CORPORATION, GREGORY TUMMINIA, in his individual and official capacity, ANTHONY CALLICCHIO, in his individual and official capacity, GIOVANI BERNARDINO, in his individual and official capacity, RONAN KEARNEY, in his individual and official capacity, SOLOW EAST RIVER DEVELOPMENT CO. LLC, STEFAN SOLOW, in his individual and official capacity, SHELDON SOLOW, in his individual and official capacity, NELSON GENAO, in his individual and official capacity, ALEXANDER FERRERAS, in his individual and official capacity, TOWNHOUSE CO. LLC, GEORGE DEDIVANOVICK, in his individual and official capacity, PHILLIP WISCHERTH, in his individual and official capacity, SOLOW REALTY & DEVELOPMENT CO., LISA GARRAPUTA, in her individual and official capacity,

Defendants-Appellees,

SOLOW REALTY CO. LLC,
TOWNHOUSE CO SOLOW BUILDING CORPORATION,

Defendants.

For Appellant:
Stewart Lee Karlin, Stewart Lee Karlin Law Group, PC, New York, New York.

For Appellee Gregory Tumminia:
Mark H. Stofsky, Brooklyn, New York.

For all Appellees:
Melissa D. Hill, Morgan, Lewis & Bockius LLP, New York, New York.

Appeal from a judgment of the United States District Court for the Southern District of New York (Berman, *J.*, Pitman, *M.J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED.**

This is an employment discrimination lawsuit brought by Plaintiff Pedio Vaigasi ("Vaigasi") against his former employer Solow Management Corporation, Solow Realty & Development Co. LLC, and related entities ("Corporate Defendants") and eleven of the Corporate Defendants' employees and officers (collectively, "Defendants"). Vaigasi was employed as a handyman and Assistant Resident Manager ("ARM") at two Manhattan apartment buildings, 265 East 66th Street (the "66th Street Building") and 525 East 72nd Street (the "72nd Street Building").

Vaigasi alleges that the Defendants discriminated against him because of his age, sex, religion, and disability and subjected him to a hostile work environment in violation of Title VII of the Civil Rights Act ("Title VII"); the Age Discrimination in Employment Act ("ADEA"); the Americans with Disabilities Act ("ADA"); 42 U.S.C. §§ 1981 and

1983; the New York State Human Rights Law ("NYSHRL"); and the New York City Human Rights Law ("NYCHRL"). Vaigasi also alleges that Defendants interfered with his rights under the Family and Medical Leave Act ("FMLA") and retaliated against him because he exercised his rights under the FMLA, the ADA, and the ADEA. Vaigasi's claims arise out of four incidents: (1) Vaigasi's transfer from the 66th Street Building to the 72nd Street Building in 2009 ("2009 Transfer"); (2) Vaigasi's reinstatement as the ARM at the 66th Street Building in 2010 ("2010 Reinstatement"); (3) the removal of a door "kickstand" at the 72nd Street Building; and (4) the termination of Vaigasi's employment in January 2012.

We review *de novo* a district court's grant of a motion to dismiss for failure to state a claim. *Trs. of the Upstate N.Y. Eng'rs Pension Fund v. Ivy Asset Mgmt.*, 843 F.3d 561, 566 (2d Cir. 2016). We review *de novo* a district court's decision granting summary judgment. *Fratello v. Archdiocese of N.Y.*, 863 F.3d 190, 198 (2d Cir. 2017). We assume the parties' familiarity with the underlying facts, procedural history, and issues on appeal.

For substantially the same reasons stated in the district court's March 24, 2014, February 16, 2016, and February 16, 2017 orders, we affirm the judgment of the district court. *Vaigasi v. Solow Mgmt. Corp.*, No. 11-CIV-5088(RMB)(HBP), 2014 WL 1259616 (S.D.N.Y. Mar. 24, 2014); *Vaigasi v. Solow Mgmt. Corp.*, No. 11-CIV-5088(RMB)(HBP), 2016 WL 616386 (S.D.N.Y. Feb. 16, 2016); *Vaigasi v. Solow Mgmt. Corp.*, No. 11-CIV-5088(RMB)(HBP), 2017 WL 945932 (S.D.N.Y. Feb. 16, 2017).

Vaigasi does not plausibly allege that his gender was a basis for any of Defendants' purported adverse employment actions, nor does he set forth factual circumstances from which discrimination could be inferred. *See Vega v. Hempstead Union Free Sch. Dist.*, 801 F.3d 72, 83 (2d Cir. 2015). Even if it is true that Defendant Alexander Ferreras ("Ferreras") called him "sweetheart" and said he "go[es] both ways," Vaigasi does not allege that Ferreras was involved in the decision to transfer him to the 72nd Street Building. *Id.* (holding that a plaintiff must "allege facts that provide at least minimal support for the proposition that the employer was motivated by discriminatory intent" (internal quotation marks omitted)).

Vaigasi does not plausibly state a claim for religious discrimination. Defendants' purported threat that Vaigasi would be "written up" if he refused to work on Sunday, without more, is insufficient to state a religious discrimination claim. *Bowles v. N.Y.C. Transit Auth.*, 285 F. App'x 812, 814 (2d Cir. 2008) (summary order) (noting that a mere "threat" of discipline that never "ripen[s] into any further action" is insufficient to demonstrate a materially adverse employment action); *see also Tepperwien v. Entergy Nuclear Operations, Inc.*, 663 F.3d 556, 571 (2d Cir. 2011).[1]

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[1] Vaigasi argues that the district court erred in denying his request to amend his FMLA claims because, unlike his Title VII, ADA, ADEA, NYSHRL, and NYCHRL claims, Vaigasi was not given prior opportunities to cure his defective pleading. "We review a district court's denial of leave to amend for abuse of discretion, unless the denial was based on an

Vaigasi fails to raise a triable issue of age discrimination. Assuming Vaigasi can make a *prima facie* case of age discrimination by providing evidence that he was replaced by a younger employee or that a younger employee was given a promotion over him, Vaigasi's NYSHRL claim fails because he offered no evidence to rebut Defendants' testimony that he was transferred to the 72nd Street Building to meet legitimate personnel needs. *See Summa v. Hofstra Univ.*, 708 F.3d 115, 125 (2d Cir. 2013). Vaigasi's ADEA and NYSHRL claims premised on the 2010 Reinstatement also fail because Vaigasi does not cite evidence in the record demonstrating that he was treated differently than younger employees after he was reinstated as the ARM at the 66th Street Building. *Id.*; *Carlton v. Mystic Transp., Inc.*, 202 F.3d 129, 134 (2d Cir. 2000). For the same reasons, Vaigasi's NYCHRL age discrimination claim was properly dismissed on summary judgment. *Mihalik v. Credit Agricole Cheuvreux N. Am., Inc.*, 715 F.3d 102, 110 (2d Cir. 2013) (holding that although a plaintiff "need only demonstrate by a preponderance of the evidence that [he] has been treated less well than other employees" because of his age, "[t]he

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interpretation of law, such as futility, in which case we review the legal conclusion *de novo*." *Panther Partners Inc. v. Ikanos Commc'ns, Inc.*, 681 F.3d 114, 119 (2d Cir. 2012). Vaigasi fails to demonstrate how he would amend the Third Amended Complaint to avoid dismissal. *Hayden v. Cty. of Nassau*, 180 F.3d 42, 53 (2d Cir. 1999) (noting that leave toamend must be denied "where the plaintiff is unable to demonstrate that he would be able to amend his complaint in a manner which would survive dismissal"). Therefore, the district court did not err in denying him leave to amend yet again.

plaintiff still bears the burden of showing that the conduct is caused by a discriminatory motive" (internal quotation marks omitted)).

Vaigasi also fails to raise a triable issue of disability discrimination. Assuming Vaigasi's vague back, knee, shoulder, hand, and eye injuries rendered him disabled under the ADA, the NYSHRL, and the NYCHRL, Vaigasi's proffered evidence would not permit a rational factfinder to infer that Defendants had notice of his disability, as is required to make out a *prima facie* case. *See Noll v. Int'l Bus. Mach. Corp.*, 787 F.3d 89, 94 (2d Cir. 2015).

Finally, the district court acted within the bounds of its discretion in sanctioning Vaigasi under Federal Rules of Civil Procedure 26(g), 37(b)(2), and the court's inherent authority. "'[A]ll litigants, including *pro ses*, have an obligation to comply with court orders,' and failure to comply may result in sanctions, including dismissal with prejudice." *Agiwal v. Mid Island Mortg. Corp.*, 555 F.3d 298, 302 (2d Cir. 2009) (quoting *Minotti v. Lensink*, 895 F.2d 100, 103 (2d Cir. 1990)). Despite the district court's herculean efforts to guide Vaigasi through the discovery process, Vaigasi showed no interest in complying with the discovery rules or the district court's orders. The district court repeatedly warned Vaigasi that discovery was not a tool to harass Defendants and cautioned him to limit his discovery requests to the facts of the case. Despite these admonitions and the limited scope of Vaigasi's claims, Vaigasi served voluminous discovery requests on Defendants, filed multiple frivolous interlocutory appeals, and blatantly defied the district court's orders. Moreover, each of

the district court's sanctions is directly responsive and proportional to Vaigasi's failure to comply with the court's orders and the discovery rules. The district court, therefore, did not abuse its discretion.

We have considered Vaigasi's remaining arguments on appeal and find them to be without merit. We **AFFIRM** the judgment of the district court.

FOR THE COURT:

/s/_____
Catherine O'Hagan Wolfe, Clerk of Court

[SEAL]

A True Copy
/s/_____
Catherine O'Hagan Wolfe, Clerk
United States Court of Appeals, Second Circuit

[SEAL]

Appendix B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[STAMP]

USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #: _____
DATE FILED: 9/5/17

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11 Civ. 5088 (RMB) (HBP)

PEDIO VAIGASI,

Plaintiff,

—v.—

SOLOW MANAGEMENT CORP., et al.,

Defendants.

OPINION AND ORDER

PITMAN, United States Magistrate Judge:

I. Introduction

By Opinion and Order dated February 16, 2016 (D.I. 302 ("Opinion and Order")), I imposed sanctions on plaintiff as a result of his misconduct during discovery and his failure to comply with at least two discovery orders. I ordered, in part, that plaintiff was required to pay the reasonable attorneys' fees defendants incurred in addressing the motions resolved in the Opinion and Order; those motions were plaintiff's motion to compel and defendants' motions for a protective order and for sanctions. I ordered defendants to submit an affidavit or affirmation, accompanied by contemporaneous time records, establishing the legal fees they incurred in addressing the motions resolved by the Opinion and Order and in opposing plaintiff's motion to compel. Defendants have made the required submissions. For the reasons set forth below, defendants are entitled to recover attorneys' fees in the amount of $61,605.25.

II. Facts

The facts that give rise to this action and the discovery dispute that led to the instant application are set forth in detail in the Opinion and Order. I recite the facts here only to the extent necessary for an understanding of the dispute before me.

In 2015, the parties filed three pertinent discovery motions. First, plaintiff moved to compel defendants to produce documents and electronically stored information in response to his second request for the production of documents ("Second Request for Documents"). Second, defendants moved for a protective order relieving defendants of the obligation of responding to plaintiff's

Second Request for Documents and notice of depositions. Third, defendants moved for sanctions.

In my Opinion and Order, I denied plaintiff's motion to compel. The motion suffered from numerous procedural defects, including a failure to meet and confer with defendants in good faith (Opinion and Order, at 25-30). Additionally, the underlying document requests were irrelevant, disproportionate to the claims remaining in the case, overbroad and unduly burdensome (Opinion and Order, at 30-44). Moreover, plaintiff offered nothing to support his contention that defendants' document production was incomplete other than his personal opinion that there had to be additional non-privileged documents (Opinion and Order, at 44-45). Relatedly, I granted defendants' motion for a protective order relieving them of the obligation of responding to plaintiffs' Second Request for Documents (Opinion and Order, at 45).

I also granted in part defendants' motion for a protective order with respect to a notice of depositions that plaintiff served, seeking the depositions of ten individuals on the same day. Balancing plaintiff's conduct, on the one hand, and defendants' factual showing and the policy in this Circuit of resolving litigation on the merits, on the other hand, I ordered that within 30 days of the date of the Opinion and Order, plaintiff could conduct the depositions of two witnesses of his choice (other than Sheldon or Stefan Solow), each deposition to be limited to a maximum of four hours (Opinion and Order, at 45-50) I also conditionally granted a protective order precluding the depositions of Sheldon and Stefan Solow, provided that defendants submitted affidavits or declarations from the

Solows confirming their positions in Solow Management Corp., Solow Realty & Development Company LLC and their related entities and confirming that they had no knowledge concerning the events underlying plaintiff's claims apart from what they may have learned from counsel (Opinion and Order, at 49-50).

Finally, I granted defendants' motion for sanctions. First, I found that plaintiff's Second Request for Documents was unquestionably prepared and served in bad faith and in a conscious effort to impose an unreasonable burden on defendants (Opinion and Order, at 56-59). Second, I found that plaintiff violated at least two of my discovery orders (Opinion and Order, at 60-61). Third, I found that plaintiff engaged in other obstructive behavior throughout the course of the litigation and that the behavior was "so far beyond the bounds of reason, that the inference of plaintiff's bad faith [was] overwhelming" (Opinion and Order, at 61-63). Accordingly, balancing the relevant factors in determining an appropriate sanction, I concluded, inter alia, that plaintiff was required to pay the reasonable attorneys' fees defendants incurred in addressing the motions resolved in the Opinion and Order (Opinion and Order, at 72).

Defendants timely submitted a declaration and contemporaneous time records establishing the legal fees they incurred in preparing the motions resolved by the Opinion and Order and in opposing plaintiff's motion to compel; they seek attorneys' fees in the total amount of $114,025.00 (Declaration of Melissa D. Hill, Esq., dated Mar. 1, 2016 ("Hill Decl.") ¶ 6).

Plaintiff was required to submit any response or opposition to the amount of fees sought by defendants within 14 days of defendants' submission (Opinion and Order, at 72). Plaintiff requested an extension of time to comply with the Opinion and Order, and I granted him until April 18, 2016 to submit his response or opposition (Endorsement, dated Mar. 7, 2016 (D.I. 308)). Approximately two weeks later, plaintiff requested another extension of time, which I denied for lack of good cause shown (Order, dated Mar. 21, 2016 (D.I. 312)). It was not until May 25, 2016, more than a month late, that plaintiff filed his response to the amount of fees defendants sought. Plaintiff also submitted a declaration from Steven A. Morelli, an attorney whom plaintiff had newly retained.[1]

III. Analysis

A. Applicable Principles

Whether an attorneys' fee award is reasonable is within the discretion of the court. Melgadejo v. S & D Fruits & Vegetables Inc., 12 Civ. 6852 (RA)(HBP), 2015 WL 10353140 at *23 (S.D.N.Y. Oct. 23, 2015) (Pitman, M.J.) (Report & Recommendation), adopted by, 2016 WL 554843 (S.D.N.Y. Feb. 9, 2016) (Abrams, D.J.). The party seeking fees bears the burden of establishing that the hourly rates and the number of hours for which

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[1] Because plaintiff submitted his response more than a month late without justification, together with his history of non-compliance with my discovery orders, I shall not consider his response in deciding the amount of fees to award defendants. Although my analysis happens to coincide with points raised by Mr. Morelli, that is a result of my independent analysis of defendants' time records.

compensation is sought are reasonable. Hensley v. Eckerhart, 461 U.S. 424, 437 (1983); accord Cruz v. Local Union No. 3 of Int'l Bhd. of Elec. Workers, 34 F.3d 1148, 1160 (2d Cir. 1994).

In determining the amount of reasonable attorneys' fees, "[b]oth [the Second Circuit] and the Supreme Court have held that the lodestar — the product of a reasonable hourly rate and the reasonable number of hours required by the case — creates a 'presumptively reasonable fee.'" Millea v. Metro-North R.R. Co., 658 F.3d 154, 166 (2d Cir. 2011), quoting Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany, 522 F.3d 182, 183 (2d Cir. 2008). The hourly rates used in determining a fee award should be "what a reasonable, paying client would be willing to pay." Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany, supra, 522 F.3d at 184. This rate should be "in line with those [rates] prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation." Blum v. Stenson, 465 U.S. 886, 895 n.11 (1984). "[C]ourts should generally use 'the hourly rates employed in the district in which the reviewing court sits' in calculating the presumptively reasonable fee." Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany, supra, 522 F.3d at 192, quoting In re "Agent Orange" Prods. Liab. Litig., 818 F.2d 226, 232 (2d Cir. 1987). In so doing, the court is free to rely on its own familiarity with the prevailing rates in the district. See Miele v. New York State Teamsters Conference Pension & Ret. Fund, 831 F.2d 407, 409 (2d Cir. 1987).

The Honorable Loretta A. Preska, United States District Judge, has summarized the factors to be considered in assessing the reasonableness of the hours claimed in a fee application:

> To assess the reasonableness of the time expended by an attorney, the court must look first to the time and work as they are documented by the attorney's records. See Forschner Group, Inc. v. Arrow Trading Co., Inc., No. 92 Civ. 6953 (LAP), 1998 WL 879710, at *2 (S.D.N.Y. Dec. 15, 1998). Next the court looks to "its own familiarity with the case and its experience generally. . . . Because attorneys' fees are dependent on the unique facts of each case, the resolution of the issue is committed to the discretion of the district court." AFP Imaging Corp. v. Phillips Medizin Sys., No. 92 Civ. 6211 (LMM), 1994 WL 698322, at *1 (S.D.N.Y. Dec. 13, 1994) (quoting Clarke v. Frank, 960 F.2d 1146, 1153 (2d Cir. 1992) (quoting DiFilippo v. Morizio, 759 F.2d 231, 236 (2d Cir. 1985))).
>
> * * *
>
> Finally, billing judgment must be factored into the equation. Hensley, 461 U.S. at 434; DiFilippo, 759 F.2d at 235-36. If a court finds that the fee applicant's claim is excessive, or that time spent was wasteful or duplicative, it may decrease or disallow certain hours or, where the application for fees is voluminous, order an across-the-board percentage reduction

> in compensable hours. In re "Agent Orange" Products Liab. Litig., 818 F.2d 226, 237 (2d Cir. 1987) (stating that "in cases in which substantial numbers of voluminous fee petitions are filed, the district court has the authority to make across-the-board percentage cuts in hours 'as a practical means of trimming fat from a fee application'" (quoting Carey, 711 F.2d at 1146)); see also United States Football League v. National Football League, 887 F.2d 408, 415 (2d Cir. 1989) (approving a percentage reduction of total fee award to account for vagueness in documentation of certain time entries).

Santa Fe Natural Tobacco Co. v. Spitzer, 00 Civ. 7274 (LAP), 00 Civ. 7750 (LAP), 2002 WL 498631 at *3 (S.D.N.Y. Mar. 29, 2002); accord Hensley v. Eckerhart, supra, 461 U.S. at 434.

B. Application of the Foregoing Principles

Defendants' counsel, Morgan, Lewis & Bockius LLP ("Morgan, Lewis"), staffed the discovery dispute in this matter with four attorneys, three paralegals and one "filing clerk."[2] Their positions and hourly rates[3] are as follows:

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[2] Counsel has not explained the nature of a filing clerk's duties. From a review of counsel's time records, the filing clerk was responsible for keeping track of filing deadlines (Hill Decl., Ex. A, Entry for 1/5/16).

[3] The work for which defendants seek fees bridged both 2015 and 2016. Defendants' counsel increased the hourly rates of some of its professionals and support staff in 2016. Accordingly, two rates are quoted for some of the attorneys and support staff who worked on the matter.

Name	Position	2015 Rate	2016 Rate
David A. McManus	Partner, 24 years experience	$795.00	$815.00
Melissa D. Hill	Partner, 12 years experience	$625.00	$645.00
Suzanne Farer	Associate, 4 years experience	$400.00	N/A
Chelsea L. Conanan	Associate, 3 years experience	$400.00	$450.00
Denise Dellaratta	Paralegal	$305.00	N/A
Caroline Ball	Paralegal	$245.00	N/A
J.K. Mickles	Paralegal	$205.00	N/A
Charles M. Calvaruso	Filing Clerk	$265.00	$270.00

(Hill Decl. 7).[4] Defendants are seeking compensation for a total of 234.6 hours of attorney time and 3.9 hours of paralegal and filing clerk time (Hill Decl., Exs. A & B). The sum sought for the attorney time totals $113,029.00; the sum sought for the paralegal and filing clerk time totals $996.00 (Hill Decl., Ex. A).

1. Reasonable Hourly Rate

As the chart above indicates, defendants seek fees based on hourly rates ranging from $400.00 to $815.00 per hour for attorneys and $205.00 to $305.00 for the support staff who worked on this discovery dispute.

The range of appropriate fees for experienced civil rights and employment law litigators is between $250 and $600. Blake v. New York City Health & Hosps. Corp., 14 Civ. 3340 (JGK)(AJP), 2016 WL 6520067 at *5 (S.D.N.Y. Nov. 3, 2016) (Peck, M.J.) (collecting cases); Abdell v. City of New York, 05 Civ. 8453 (RJS), 2015 WL 898974 at *3 (S.D.N.Y. Mar. 2, 2015) (Sullivan, D.J.). "'[R]ates for associates have ranged from $200 to $350, with average awards increasing over time.'"

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[4] Defendants did not provide the qualifications of the attorneys for whom fees are sought. This would normally warrant a reduction in their fees. See, e.g., Yea Kim v. 167 Nail Plaza, Inc., 05 Civ. 8560 (GBD)(GWG), 2009 WL 77876 at *9 (S.D.N.Y. Jan. 12, 2009) (Daniels, D.J.) (reducing attorney rates where no information was provided to the court regarding their backgrounds). Nonetheless, considering the circumstances of this case and the fact that the qualifications of each attorney can be found on the Internet, this omission plays a minimal role in my analysis.

Each attorney's years of experience is measured as of 2016, when counsel submitted their time records.

Makinen v. City of New York, 11 Civ. 7535 (ALC) (AJP), 2016 WL 1451543 at *3 (S.D.N.Y. Apr. 12, 2016) (A. Carter, D.J.), quoting Abdell v. City of New York, supra, 2015 WL 898974 at *3.

Considering defendants' counsel's experience (and counsel's failure to provide it), along with the nature of the matter and my familiarity with the prevailing rates for litigators at a large New York law firm,[5] see Chambless v. Masters, Mates & Pilots Pension Plan, 885 F.2d 1053, 1058-59 (2d Cir. 1989) (size of firm is relevant to determining prevailing market rate and "smaller firms may be subject to their own prevailing market rate"); Kahlil v. Original Old Homestead Rest., Inc., 657 F. Supp. 2d 470, 476 (S.D.N.Y. 2009) (Holwell, D.J.) (size of law firm is factor in determining reasonable hourly rate because of overhead costs), I find that reasonable hourly rates for the attorneys are as follows: $600 for Mr. McManus, $500 for Ms. Hill, $300 for Ms. Conanan and $300 for Ms. Farer. See Powell v. Metro One Loss Prevention Servs. Grp. (Guard Div. NY), Inc., 12 Civ. 4221 (LAP)(DF), 2015 WL 9287121 at *2-*4 (S.D.N.Y. Feb. 5, 2015) (Freeman, M.J.) (Report & Recommendation) (awarding $650 hourly rate to partner with more than 35 years of experience in employment law and $350 hourly rate to associate with 8 years of experience), adopted by, 2015 WL 9255338 (S.D.N.Y. Dec. 17, 2015) (Preska, D.J.); Clark v. Gotham Lasik, PLLC, 11 Civ. 1307 (LGS),

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[5] Morgan, Lewis has over 2,000 professionals and numerous offices across Asia, Europe and North America. Morgan Lewis, About Us, https://www.morganlewis.com/our-firm/about-us (last visited Sept. 5, 2017).

2013 WL 4437220 at *7 (S.D.N.Y. Aug. 20, 2013) (Schofield, D.J.) (awarding $500 hourly rate to partner with more than 15 years of experience in employment law and $275 hourly rate with associate with 4.5 years of experience).

With respect to the rates of the paralegals and filing clerk who worked on the matter, "this district typically awards rates not to exceed $200 per hour." Dimopoulou v. First Unum Life Ins. Co., 13 Civ. 7159 (ALC), 2017 WL 464430 at *3 (S.D.N.Y. Feb. 3, 2017) (A. Carter, D.J.); see TufAmerica Inc. v. Diamond, 12 Civ. 3529 (AJN), 2016 WL 1029553 at *6 (S.D.N.Y. Mar. 9, 2016) (Nathan, D.J.) ("Recent cases in this district suggest that the prevailing rate for paralegals is between $100 and $200 per hour."), reconsidered in part, 2016 WL 3866578 (S.D.N.Y. July 12, 2016) (Nathan, D.J.); Capitol Records, Inc. v. MP3tunes, LLC, 07 Civ. 9931 (WHP), 2015 WL 7271565 at *4 (S.D.N.Y. Nov. 12, 2015) (Pauley, D.J.) (describing $200 hourly rate for non-attorney personnel as "the high end of rates typically approved in this District.").

Counsel has not provided the qualifications of the paralegals and filing clerk who worked on this matter. Accordingly, a reduction in their hourly rates is warranted.[6] See, e.g., Yea Kim v. 167 Nail Plaza, Inc., supra, 2009 WL 77876 at *9 (reducing paralegal rates where no information was provided to the court regarding their backgrounds); Tlacoapa v. Carregal, 386 F. Supp. 2d 362, 370

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[6] The qualifications of the support staff are not as accessible on the Internet as the attorneys' qualifications.

(S.D.N.Y. 2005) (Robinson, D.J.) (reducing paralegal rate where limited information was provided regarding paralegals' qualifications and the nature of their work). A reduction in the hourly rates is also warranted because the rates are too high. Thus, I find that a reasonable hourly rate for the paralegals and filing clerk is $125.00. See Regulatory Fundamentals Grp. LLC v. Governance Risk Mgmt. Compliance, LLC, 13 Civ. 2493 (KBF), 2014 WL 4792082 at *3 (S.D.N.Y. Sept. 24, 2014) (Forrest, D.J.) (reducing paralegals' hourly rate from between $195 and $255 to $125 because no information was provided regarding their expertise or experience; collecting cases awarding paralegals hourly rates close to $125).

Applying the reduced hourly rates set forth above, defendants' fees incurred in preparing the motions resolved by the Opinion and Order and in opposing plaintiff's motion to compel equal $88,007.50. However, as explained below, a further reduction is justified for excessive hours.

2. Reasonable Number of Hours

Defendants have submitted contemporaneous time records for all attorneys and support staff who worked on the discovery dispute that set forth the date on which services were performed, the hours spent and the nature of the work performed.

I have reviewed each of the entries in the time records, and I find that counsel spent an unreasonable number of hours preparing the motions for a protective order and for sanctions. Counsel spent approximately 100 hours drafting and revising the

motion for a protective order and more than 65 hours drafting and revising the motion for sanctions. Even considering the scope of the underlying dispute and plaintiff's lengthy history of misconduct during discovery, these hours are unjustifiably high. See Local Onion No. 40 of Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers v. Car-Win Constr. Inc., 88 F. Supp. 3d 250, 281-82 (S.D.N.Y. 2015) (Swain, D.J.) (35.4 hours researching and drafting motion for sanctions reasonable); Doe v. Delta Airlines, Inc., 13 Civ. 6287 (PAE), 2015 WL 1840264 at *6 (S.D.N.Y. Apr. 21, 2015) (Engelmayer, D.J.) (23.5 hours in drafting and revising 15-page motion for sanctions reasonable); Eldesouky v. Aziz, 11 Civ. 6986 (JLC), 2015 WL 1573319 at *8 (S.D.N.Y. Apr. 8, 2015) (Cott, M.J.) (24 hours spent on motion for sanctions reasonable).

Accordingly, a further reduction of 30% in the fees defendants seek is warranted. See, e.g., Congregation Rabbinical Coll. of Tartikov, Inc. v. Village of Pomona, 188 F. Supp. 3d 333, 344-45 (S.D.N.Y. 2016) (Karas, D.J.) (reducing fees by 30% because of excessive hours, among other things); see also Beastie Boys v. Monster Energy Co., 112 F. Supp. 3d 31, 57 (S.D.N.Y. 2015) (Engelmayer, D.J.) ("Fee reductions around 30% are . . . common in this District to reflect considerations of whether work performed was necessary, leanly staffed, or properly billed.")[7] These adjustments yield the following remainder:

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[7] I also note that Ms. Hill block-billed some of her time entries (Hill Decl., Ex. A, Entries for 3/23/15, 3/27/15, 3/31/15, 4/8/15, 4/23/15, 4/28/15). Although "block-billing,"

Total Fees Sought	$114,025.00
Fees After Reduction in Hourly Rates	$ 88,007.50
30% Adjustment	($ 26,402.25)
Remainder	$ 61,605.25

"the practice of aggregating multiple tasks into one billing entry, is not prohibited, . . . [the practice] can make it exceedingly difficult for courts to assess the reasonableness of the hours billed." LV v. New York City Dep't of Educ., 700 F. Supp. 2d 510, 525 (S.D.N.Y. 2010) (Holwell, D.J.) (internal quotation marks omitted). "At the same time, block billing is most problematic where large amounts of time (e.g., five hours or more) are block billed" because it "meaningfully clouds a reviewer's ability to determine the projects on which significant legal hours were spent." Beastie Boys v. Monster Energy Co., supra, 112 F. Supp. 3d at 53; accord Congregation Rabbinical Coll. of Tartikov, Inc. v. Village of Pomona, supra, 188 F. Supp. 3d at 343; Melgadejo v. S & D Fruits & Vegetables, Inc., supra, 2015 WL 10353140 at *28.

Here, all but one of Ms. Hill's block-billed entries were for less than five hours. Additionally, it is possible to evaluate the reasonableness of Ms. Hill's time in these entries, "even if it is impossible to reconstruct the precise amounts of time allocable to each specific task listed in the block entry." Congregation Rabbinical Coll. of Tartikov, Inc. v. Village of Pomona, supra, 188 F. Supp. 3d at 343; see also United States ex rel. Fox Rx, Inc. v. Omnicare, Inc., 12 Civ. 275 (DLC), 2015 WL 1726474 at *3 (S.D.N.Y. Apr. 15, 2015) (Cote, D.J.) ("The use of block billing here is perfectly reasonable; the specific tasks in each block are described with sufficient detail and clarity to confirm the reasonableness of the work performed." (internal quotation marks omitted)). Therefore, a reduction on the basis of Ms. Hill's block-billing is unnecessary.

IV. Conclusion

For the foregoing reasons, defendants are awarded $61,605.25 in attorneys' fees.

Dated: New York, New York
September 5, 2017

SO ORDERED

/s/
HENRY PITMAN
United States Magistrate Judge

Copies transmitted to:
All Counsel of Record

Appendix C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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11 **CIVIL** 5088 (RMB)(HBP)

PEDIO VAIGASI,

Plaintiff,

—v.—

SOLOW MANAGEMENT CORP., et al.,

Defendants.

JUDGMENT

Defendants Solow Management Corp., Solow Realty & Development Company LLC and related entities (collectively, "Corporate Defendants"),

Geovanni Bernardino ("Bernardino"), George Dedivanovic ("Dedivanovic"), and four other individual employees and officers of the Corporate Defendants ("Individual Defendants," and together with the Corporate Defendants, "Defendants") having moved for summary judgment, and the matter having come before the Honorable Richard M. Berman, United States District Judge, and the Court, on February 16, 2017, having rendered its Decision & Order granting Defendants' motion for to dismiss in its entirety, and directing the Clerk of the Court to close this case, it is,

ORDERED, ADJUDGED AND DECREED: That for the reasons stated in the Court's Decision & Order dated February 16, 2017, Defendants' motion to dismiss is granted in its entirety; accordingly, the case is closed.

Dated: New York, New York
February 17, 2017

RUBY J. KRAJICK
Clerk of Court

BY:

T. Mango
Deputy Clerk

Appendix D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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11 Civ. 5088 (RMB) (HBP)

PEDIO VAIGASI,

Plaintiff,

—v.—

SOLOW MANAGEMENT CORP., et al.,

Defendants.

DECISION AND ORDER

I. Background

This Decision & Order resolves the summary judgment motion, dated August 22, 2016, of

Defendants Solow Management Corp., Solow Realty & Development Company LLC, and related entities (collectively, "Corporate Defendants"), Geovanni Bernardino ("Bernardino"), George Dedivanovic ("Dedivanovic"), and four other individual employees and officers of the Corporate Defendants ("Individual Defendants," and together with the Corporate Defendants, "Defendants"). The summary judgment motion was lodged against Pedio Vaigasi ("Vaigasi " or "Plaintiff") who had brought claims on July 25, 2011 against Defendants under the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 et seq. ("ADEA"); the Americans with Disabilities Act, 42 U.S.C. §§ 12101 et seq. ("ADA"); the New York State Human Rights Law, N.Y. Exec. L. §§ 290 et seq. ("NYSHRL"); and the New York City Human Rights Law, N.Y.C. Admin. Code §§ 8-101 et seq. ("NYCHRL").[1]

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[1] On May 1, 2013, Defendants filed a motion to dismiss all of Vaigasi's claims pursuant to Federal Rule of Civil Procedure 12(b)(6). In a Decision & Order, dated March 24, 2014, the Court granted in part and denied in part Defendants' motion to dismiss, rejecting Plaintiff's claims of gender discrimination, religious discrimination, deprivation of constitutional rights under 42 U.S.C. §§ 1981 and 1983, interference and retaliation under the Family and Medical Leave Act, 29 U.S.C. §§ 2601, et seq., and claims against individual defendants under the ADA, ADEA, and Title VII because "individual defendants are not subject to liability" under those statutes, and allowing Plaintiff to take discovery as to his claims of age discrimination, disability discrimination, and hostile work environment. (See Decision & Order, dated March 24, 2014, at 9, 25-26.) In the Decision and Order, the Court also dismissed from the case five other defendants for failure to state a claim. (Id.)

During the course of these proceedings, Defendants complained that Plaintiff "fail[ed] to produce any documents responsive to Defendants' discovery requests." (Defs.' Resp. in Opp. to Pl.'s Mot. to Compel, filed Apr. 30, 2015, at 29 (emphasis removed).) On February 16, 2016, Magistrate Judge Henry B. Pitman agreed with Defendants and found that Plaintiff had (i) violated discovery orders which sought to compel document production by Plaintiff, and (ii) made a "conscious effort to impose an unreasonable burden on defendants" through, among other things, service of more than 1,100 document requests "that lack even the remotest connection to plaintiff's claims." (Opinion & Order, dated Feb. 16, 2016, at 56, 60.) Judge Pitman precluded Plaintiff from "using . . . in connection with any motion any document other than the documents that have previously been produced" and from relying upon any "facts that were asked about at [Plaintiff's] deposition but which he failed or refused to disclose." (Id. at 68-69; see also UBS Int'l Inc. v. Itete Brasil Instalacoes Telefonicas Ltd., 2011 WL 1453797, at* 1 n.2 (S.D.N.Y. Apr. 11, 2011) ("A magistrate judge . . . has the authority to issue . . . sanctions, including preclusion orders, in the course of overseeing discovery.").)

Plaintiff's Work History

From 2005 to 2009, Plaintiff worked as an Assistant Resident Manager ("ARM") at an apartment building owned and operated by the Corporate Defendants, and located at 265 East 66th Street. (Pl.'s Rule 56.1 Counterstatement of Undisputed Material Facts, dated Oct. 16, 2016 ("Pl. 56.1"), ¶¶ 1, 46.) On May 4, 2009, when

Plaintiff was 41 years old, he was transferred to another apartment building owned and operated by the Corporate Defendants, and located at 525 East 72nd Street ("2009 Transfer" or "Transfer"). Plaintiff's 2009 Transfer was, according to Defendants, based upon "an assessment of the needs of the various Solow properties." (Id. ¶ 8.) Following his Transfer, Plaintiff retained the title of ARM (id. ¶ 9); he reported to Dedivanovic (age 52), the Resident Manager of the 72nd Street building, and to Tommy McDonnell (age 65), the ARM of the 72nd Street building. (Id.) "Plaintiff was primarily responsible for ensuring that the building was safe and operated smoothly." (Id. ¶ 6.) Also, following Plaintiff's Transfer, "at the 66th Street location, Mr. Bernardino replaced . . . [the previous] Resident Manager while Mr. Genao became the ARM." (Id. ¶ 10.)

On May 6, 2009, Plaintiff filed a grievance against Defendants claiming that he was forced to transfer to the 72nd Street building in violation of the terms of his union's collective bargaining agreement. (Id. ¶ 12.) Plaintiff's grievance arbitration did not involve allegations of age or disability discrimination. (Hill Decl., dated Feb. 13, 2014, Ex. A at 2.)[2]

While Plaintiff's grievance was pending, Plaintiff underwent left-shoulder surgery and he took a leave of absence beginning on June 8, 2009. (Pl.'s 56.1 ¶ 16.) He returned to work on November 2, 2009. (Id. ¶ 18.) Between February and October

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[2] As explained infra p. 4, Plaintiff settled his grievance on October 5, 2010, and he was reinstated as ARM at the 66th Street building.

2010, Plaintiff submitted "incident reports" for alleged workplace injuries he claims to have suffered, including "injuries to [his] back, left knee, left shoulder, left hand and left eye." (Id. ¶¶ 19-20.) Plaintiff concedes that "he never raised any such limitations [injuries] with his treating physicians" (id. ¶ 23), and that he does not "recall telling anybody at 72nd Street that [he was] disabled as of July 2010" (Vaigasi Dep. at 121:14-19).

Plaintiff stated at his deposition that, at the 72nd Street building, he "was treated less well than individuals that were younger than [he was]." (Id. 221:22-24, 268:23-24.) Plaintiff does "not explain how he was treated differently than these other employees." (Pl.'s 56.1 ¶ 40.)

As noted, on October 5, 2010, the parties settled Plaintiff's grievance and "mutually agreed to reinstate Plaintiff to the 66th Street building as the ARM for that building under the same employment terms and conditions" ("2010 Reinstatement"). (Id. ¶ 35.)

Plaintiff was 43 years old when he was reinstated at the 66th Street building. (Id. ¶ 36.) He stated as his deposition that, after his 2010 Reinstatement, "the individuals that were assigned better . . . work were younger." (Vaigasi Dep. 315:7-9.) But, Plaintiff concedes in his Counterstatement of Undisputed Material Facts, dated October 16, 2016, that "he did not know the ages of the other employees and did not explain how he was treated differently than these other employees." (Pl.'s 56.1 ¶¶ 40.) Plaintiff acknowledges that he "was never subjected to a single age- or disability-based comment, joke, slur, or any other

type of abusive behavior in the seven years he was employed by Solow." (Id. ¶ 41.)

Plaintiff also stated at his deposition that a kickstand attached to a supply-room door at the 72nd Street building—which he claims "would have helped . . . [him] to go through that door [while] constantly . . . being in pain in the left shoulder"—was removed in or around July 22, 2010 ("Kickstand Incident"). (Vaigasi Dep. 148:5-24.) Plaintiff also stated that he told Dedivanovic that he "would have liked for [the kickstand] to be put back" (id. 156:21-25), and that Dedivanovic, who was not familiar with the area (id. 157:17), "went down to look at the door" (id. 157:14), but Vaigasi's "request was turned down, without reason" (Pl.'s Mem. of Law in Opp'n to Defs.' Mot. for Summ. J., filed Oct. 17, 2016 ("Pl.'s Opp'n"), at 19). Plaintiff also claims that, without the kickstand, it was "inconvenient and painful" for him to open the door. (Id. 162:2-13.) Plaintiff concedes that he "does not know who allegedly removed the kickstand, when it was removed, [or] why it was removed." (See Pl.' s 56.1 ¶ 26.) And, Dedivanovic testified at his deposition that he was not "aware that Mr. Vaigasi had requested that the [kickstand] be replaced" (Tr. of Dep. of George Dedivanovic, dated July 27, 2016, at 70:7-9) and "I couldn't tell you if . . . my life depended on it whether there was one on the door or not" (id. 70:25-71:3).

Summary Judgment Motion

Defendants argue that they are entitled to summary judgment on all of Plaintiff's remaining

claims. They contend, among other reasons, that: **(i)** Plaintiff's age discrimination claims must fail because Plaintiff proffers "nothing more than conclusory and speculative testimony, lacking record support, and, therefore, no inference of age discrimination can be drawn"; **(ii)** Plaintiff's disability discrimination claim based upon lack of reasonable accommodation must fail because Plaintiff "has produced no evidence that [Defendants] . . . were aware of his alleged disability in the first place"; and **(iii)** Plaintiff's hostile work environment claim fails because Plaintiff has "presented no . . . evidence of behavior that would transcend the realm of non-actionable 'petty slights and trivial inconveniences.'" (Defs.' Mem. of Law in Supp. of Mot. for Summ. J., filed Aug. 22, 2016 ("Defs. Mem."), at 1, 5, 12, 20.)

On October 17, 2016, Plaintiff filed an opposition to Defendants' motion for summary judgment arguing, among other things, that **(i)** Plaintiff was "treated differently [as] to all of the younger employees" ; and **(ii)** Defendants knew of Plaintiff's alleged disability "given . . . the surgery on his shoulder, and . . . through his filing of incident reports." (Pl.'s Opp'n 12-13, 18-19.)[3]

On October 27, 2016, Defendants filed their Reply, which argues that Plaintiff"does not bother to address his hostile work environment claim in his opposition papers and, accordingly, has abandoned that claim." (Defs. Reply in Supp. of

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[3] Plaintiff's brief makes no mention, much less refutation, of Defendants' arguments against his claim of a hostile work environment.

Their Motion for Summ. J., filed Oct. 27, 2016 ("Defs. Reply"), at 1.)

For the reasons stated below, Defendants' motion for summary judgment [#322] is granted in its entirety.

II. Legal Standard

"Title VII . . . and NYSHRL discrimination claims are governed at the summary judgment stage by the burden-shifting analysis first established in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-04 (1973)." Tolbert v. Smith, 790 F.3d 427, 434 (2d Cir. 2015). "Under McDonnell Douglas, the plaintiff bears the initial burden of establishing a prima facie case of discrimination." Gorzynski v. JetBlue Airways Corp., 596 F.3d 93, 106 (2d Cir. 2010). "The Court must grant [the employer] summary judgment [where the plaintiff] has failed to even raise a prima facie case of discrimination." Erhunmwunse v. Edison Parking Corp., 301 F. Supp. 2d 278,282 (S.D.N.Y. 2004). "If the plaintiff [establishes a prima facie case], the burden shifts to the defendant to articulate some legitimate, nondiscriminatory reason for its action." Id. "If the defendant proffers such a reason," he is "entitled to summary judgment unless the plaintiff can point to evidence that reasonably supports a finding of prohibited discrimination." Spiegel v. Schulmann, 604 F.3d 72, 80 (2d Cir. 2010) (internal quotation marks and alterations omitted).

"[E]ven if [an employer's] challenged conduct is not actionable under federal and state law, federal courts must consider . . . whether it is actionable

under the broader New York City standards." Mihalik v. Credit Agricole Cheuvreux N. Am., Inc., 715 F.3d 102, 109 (2d Cir. 2013). Summary judgment for the employer is appropriate under NYCHRL where "the record is devoid of evidence suggesting that [an employer's conduct] was at all motivated by . . . discrimination." McDonnell v. Schindler Elevator Corp., 618 F. App'x 697, 700 (2d Cir. 2015).

A plaintiff claiming age discrimination who relies on his "general impression that [his employer] treated h[im] differently than [a younger employee] fails to establish a prima facie case for age . . . discrimination." Dreves v. Hudson Grp. (HG) Retail, LLC, 2013 WL 2634429, at *10 (D. Vt. June 12, 2013).

"[C]ourts in the Second Circuit have repeatedly held that a plaintiff's personal testimony which describes the alleged limits that affect a major life activity, without supporting medical testimony, simply is not sufficient to establish his prima facie case" of disability discrimination. Sussle v. Sirina Prot. Sys. Corp., 269 F. Supp. 2d 285, 301 (S.D.N.Y. 2003). "An employer's awareness that a plaintiff suffered some injury does not establish that an employer had notice that the plaintiff was disabled." McCoy v. Morningside at Home, 2014 WL 737364, at *4 (S.D.N.Y. Feb. 25, 2014).

"A court may, and generally will, deem a claim abandoned when a plaintiff fails to respond to a defendant's arguments that the claim should be dismissed." Williams v. Mirabal, 2013 WL 174187, at *2 (S.D.N.Y. 2013).

III. Analysis

Age Discrimination Claim

In order to establish a prima facie case of age discrimination under the ADEA and NYSHRL, a plaintiff "must show (1) that [he] was within the protected age group, (2) that [he] was qualified for the position, (3) that [he] experienced adverse employment action, and (4) that such action occurred under circumstances giving rise to an inference of discrimination." Gorzynski, 596 F.3d at 107. Under the NYCHRL, a plaintiff need not show that he suffered an "adverse employment action," but must show that he was "treated less well than other employees because of [his age]." Mihalik, 715 F.3d at 110 (internal quotation marks omitted.)

Defendants argue that Plaintiff has not shown he was qualified for the position of ARM at either the 66th Street or the 72nd Street buildings because "the only evidence he has that he was performing his job satisfactorily is his own say-so." (Defs. Mem. at 14 n.13.) They also deny that the 2009 Transfer and the 2010 Reinstatement were "adverse employment actions" because "Plaintiff had the same title (ARM), salary, and job responsibilities when he was transferred to 72nd Street and when he was eventually reinstated back to 66th Street." (Id.) Defendants further argue that Plaintiff "offers nothing more than conclusory and speculative testimony, lacking record support, and, therefore, no inference of age discrimination can be drawn." (Id. at 12.)[4]

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[4] Defendants do not dispute that Plaintiff was within the protected age group, i.e. at least 40 years of age. See Defs. Mem. 12 (Plaintiff's "age [was] 41 years old . . . at the time of

Plaintiff responds that he was qualified for the position of ARM because Defendants "promoted [him] to that position" in 2005 and "put [him] back into the ARM position" in 2010. (Pl. Opp'n 11-12.) Plaintiff contends that the 2009 Transfer constituted an adverse employment action because, "[a]t the new location, he was relegated to handyman duties taking orders from the ARM. At his prior location, in the position of ARM, his responsibilities were supervisory in character." (Id. at 12.) He also contends that the 2010 Reinstatement was an adverse employment action because he was "required to do handyman and porter work, with Genao remaining as ARM, with supervisory authority." (Id.) Plaintiff alleges that "an inference of discrimination exists" regarding the 2009 Transfer because of "the age difference of both [Bernardino and Genao]," who were promoted at 66th Street when Plaintiff was transferred to 72nd Street. (Id. at 11, 14). Plaintiff asserts that "an inference of discriminatory intent exists" regarding the 2010 Reinstatement because he was "treated differently [as] to all of the young employees" and "relegated to reporting to Bernardino . . . and Genao," who were, respectively, eight and seven years younger than he was. (Id. at 12-14.)

Plaintiff has not established a prima facie case because he has not raised an inference of discrimination on the basis of age under Federal law,

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the [2009] [T]ransfer"); id. at 15 (Plaintiff's "age [was] 43 years old at the time" of the 2010 Reinstatement); see also 29 U.S.C. § 631(a) ("The prohibitions in this chapter shall be limited to individuals who are at least 40 years of age.").

NYSHRL, or NYCHRL. See Sampson v. City of New York, 2009 WL 3364218, at *4-5 (S.D.N.Y. Oct. 19, 2009); Dreves, 2013 WL 2634429, at *10; Saenger v. Montefiore Med. Ctr., 706 F. Supp. 2d 494,514 (S.D.N.Y. 2010). Plaintiff proffers two bases for such an inference, namely (1) that Bernardino and Genao were younger than he was (Vaigasi Dep. at 286:20-24 ("Q: So other than the fact that [Bernardino and Genao] were younger than you, is there anything that leads you to believe that you were treated differently because of your age? A: Well, that would be the reason")), and (2) that he "was treated less well than individuals that were younger than [he was]" (id. 221:22-24, 268:23-24).

The age difference between Plaintiff and Bernardino (eight years), and Plaintiff and Genao (seven years) are alone insufficient to raise an inference of age discrimination. See Fagan v. N.Y. State Elec. & Gas Corp., 186 F.3d 127, 134 (2d Cir. 1999); Sampson, 2009 WL 3364218, at *4-5; Flaherty v. Metromail Corp., 293 F. Supp. 2d 355, 362 (S.D.N.Y. 2003). Where a "[p]laintiff's primary evidence of age discrimination . . . rest[s] on comparisons of workload and treatment with that of . . . a [younger] coworker," his claim cannot "survive summary judgment." Sampson, 2009 WL 3364218, at *4-5 (where plaintiff argued that her termination was discriminatory because her coworker, who was not terminated, "was . . . [a] younger female and [plaintiff] was a[n] . . . older female"); see also Roa v. Mineta, 51 F. App'x 896, 900 (2d Cir. 2002) ("The mere fact that . . . a younger woman . . . in [plaintiff's] department, was promoted to a higher grade is insufficient,

without more, to defeat summary judgment."); Fagan, 186 F.3d at 134 ("The replacement of an older worker with a younger worker or workers does not itself prove unlawful discrimination."); Flaherty, 293 F. Supp. 2d at 362 (where "[plaintiff] base[d] [her discrimination] claim, largely, on the fact that he[r] [supervisor] assigned [a particular client] account to . . . a younger woman, rather than to plaintiff'; "standing on its own, this fact [wa]s insufficient to support a reasonable inference that his decision was discriminatory"). The same reasoning applies to Plaintiff's NYCHRL claim. See Sampson, 2009 WL 3364218, at *4-5; Flaherty v, 293 F. Supp. 2d at 362.

Plaintiff's vague assertion here that he "was treated less well than individuals that were younger than [he was]" is also legally insufficient. See Dreves, 2013 WL 2634429, at *10 (where plaintiff relied on her "general impression that [her employer] treated her differently than [a coworker]" who was seventeen years younger); Saenger, 706 F. Supp. 2d at 514 (where plaintiff argued that his younger replacement "was given more free rein in running the department than [plaintiff] ever was," "vague claims of differential treatment alone d[id] not suggest discrimination"). A plaintiff claiming age discrimination who relies, as Plaintiff does, on his "general impression that [his employer] treated h[im] differently than [a younger employee] .... fails to establish [even] a prima facie case for age . . . discrimination." Dreves, 2013 WL 2634429, at *10. Tellingly, Plaintiff concedes in his Counterstatement of Undisputed Material Facts that he "d[oes] not

explain how he was treated differently than these other employees." (Pl. 56.1,1 139-41.)

Assuming, arguendo, that Plaintiff had established a prima facie case of age discrimination, the Court would likely dismiss his claims nonetheless because Defendants proffer a legitimate, nondiscriminatory reason for their conduct. Defendants argue that "an assessment of the needs of the various Solow properties" convinced "Solow management . . . to reorganize certain personnel," including transferring Plaintiff to the 72nd Street building. (Defs. Mem. 6.) "The restructuring of operations has repeatedly been recognized by the courts as a legitimate, non-discriminatory reason for termination" or other adverse actions, including for NYCHRL claims. Olle v. Columbia Univ., 332 F.Supp.2d 599, 616-17 (S.D.N.Y. 2004), aff'd, 136 F. App'x 383 (2d Cir. 2005). Plaintiff submits no evidence that Defendants' explanation is pretextual.[5]

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[5] Defendants also point out that Plaintiff's job description supported his being "required to do handyman and porter work" after the 2010 Reinstatement. (Pl. Opp'n 12.) Plaintiff's job description stated, "Both Assistant Managers are to assist handyman . . . and porter staff as needed," and that " [Plaint iff] will be regularl y assigned to perform work orders." (Medic Decl., Ex. 8.) "No reasonable employee would think being asked to perform tasks that are part of h[is] job description constituted a materially adverse employment action." Martin v. MTA Bridges & Tunnels, 610 F. Supp. 2d 238, 254 (S.D.N.Y. 2009). Plaintiff's NYCHRL claim fails for the same reason. See Hernandez v. Kellwood Co., 2003 WL 22309326, at* 18 (S.D.N.Y. Oct. 8, 2003) ("Defendants have met their burden of offering a non-discriminatory rationale for their action by proffering evidence that Plaintiff's job description included [the] duties [she complains of].").

Because Plaintiff fails to raise an inference of discrimination, the Court need not reach Defendants' (other) arguments that Plaintiff was unqualified for the position of ARM and that neither the 2009 Transfer nor the 2010 Reinstatement were adverse employment actions. (See Defs. Mem. at 14 n.13.)

Disability Discrimination Claim

A plaintiff makes out a prima facie claim for failure to accommodate under the ADA, NYSHRL, and NYCHRL by demonstrating that "(l) [P]laintiff is a person with a disability under the meaning of the [statute]; (2) an employer covered by the statute had notice of his disability; (3) with reasonable accommodation, plaintiff could perform the essential functions of the job at issue; and (4) the employer has refused to make such accommodations." McBride v. BIC Consumer Prod. Mfg. Co., 583 F.3d 92, 97 (2d Cir. 2009).

Defendants argue that Plaintiff has failed to demonstrate a prima facie failure to accommodate under ADA, NYSHRL, and NYCHRL. (Defs. Mem. 17-23.) Specifically, Defendants argue that Plaintiff "has no evidence that he is or was disabled within the meaning of the law." (Id. at 17-18). Defendants also assert that Plaintiff lacks "evidence that Mr. Dedivanovic or any of his supervisors at Solow actually knew of his purported disability." (Id. at 20 (emphasis removed).) Defendants also contend that, even if they did have notice of an actual disability, Plaintiff has no evidence that "a kickstand was ever removed." (Id.) Defendants argue, "despite submitting an incident report or complaint for

myriad issues that occurred in the workplace, Plaintiff did not produce a single document reporting that the kickstand had been removed or requesting that it be reinstalled." (Id. at 22 n.23.) Defendants also argue that Plaintiff has adduced "no evidence that the kickstand would have been a reasonable accommodation." (Id. at 22.)

Plaintiff counters that he was disabled because he "was limited in what he could do physically, given his shoulder disability, the surgery on his shoulder, and other work related injuries." (Pl.'s Opp'n. 18.) Plaintiff argues that the Corporate Defendants were aware of his condition because he had filed "incident reports" and had taken a five-month leave for shoulder surgery from May to November of 2009. (Id.) Plaintiff also argues that the kickstand was a "reasonable accommodation" because it allowed him to avoid "pain in the left shoulder." (Id. at 19.)

Plaintiff has not established a prima facie claim because he has not shown that he was legally disabled. "[C]ourts in the Second Circuit have repeatedly held that a plaintiff's personal testimony which describes the alleged limits that affect a major life activity, without supporting medical testimony, simply is not sufficient to establish his prima facie case . . . ." Sussle, 269 F. Supp. 2d at 301 (collecting cases); see also Zuppardo v. Suffolk Cty. Vanderbilt Museum, 19 F. Supp. 2d 52, 58 (E.D.N.Y. 1998) (where "there [wa]s not a shred of evidence in support of a medical disability, aside from his own baldly stated contentions—not a single doctor's report, hospital or doctor's record, or expert witness deposition testimony"), aff'd, 173 F.3d 848 (2d Cir. 1999). The standard for NYCHRL

claims is the same. See Hart v. N.Y. Univ. Hosps. Ctr., 2011 WL 4755368, at *5 (S.D.N.Y. Oct. 7, 2011) (where the plaintiff "provided a doctor's note . . . and a social security application," "[t]h[o]se documents d[id] not satisfy [plaintiff's] burden of demonstrating that he was disabled at the time of his termination"), aff'd, 510 F. App'x 22 (2d Cir. 2013); Simmons v. Woodycrest Ctr. for Human Dev., Inc., 2011 WL 855942, at *4 (S.D.N.Y. Mar. 9, 2011) ("There is no authority, nor support in the record here, for the claim that [plaintiff's] condition . . . constitutes a disability under the NYSHRL or NYCHRL."); Burke v. City of N.Y., 2011 WL 31869, at *3 (E.D.N.Y. Jan. 5, 2011) (where "[the plaintiff] cite[d] only his self-serving deposition testimony" and offered "scant medical evidence" of an impairment). Here, Plaintiff relies exclusively upon his personal testimony; he has submitted no medical evidence that he was legally disabled. (See Pl. Mem. 17-18 (citing Pl. 56.1 ¶¶ 19, 22, 25-26).)

Even if Plaintiff had adequately shown he was disabled, he has not shown that Defendants had notice of disability. For this reason as well, Plaintiff has not established a prima facie claim under Federal law, NYSHRL, and NYCHRL. See McCoy, 2014 WL 737364, at *4; Young v. Ltd. Brands, 2013 WL 5434149, at *8 (S.D.N.Y. Sept. 25, 2013); Cozzi v. Great Neck Union Free Sch. Dist., 2009 WL 2602462, at *14 (E.D.N.Y. Aug. 21, 2009). Plaintiff concedes that he does not "recall telling anybody . . . that [he was] disabled." (Vaigasi Dep. at 121:14-19.) As discussed supra pp. 13-14, Plaintiff has not submitted any medical records of disability. Rather, he relies upon his allegation that Defendants "were aware of his condition"

because he had filed incident reports and had taken a five-month leave for shoulder surgery. (Pl. Opp'n at 18.) This is insufficient because "[a]n employer's awareness that a plaintiff suffered some injury does not establish that an employer had notice that the plaintiff was disabled." McCoy, 2014 WL 737364, at *4 (where plaintiff's "evidence . . . indicate[d] [only] that [d]efendants may have been notified by [p]laintiff that she suffered a back injury"); Cozzi, 2009 WL 2602462, at *14 ("[A]n employer's knowledge of a plaintiff's symptoms does not establish, as a matter of law, that it knew the plaintiff was disabled."). And, "even knowledge that Plaintiff took medical leaves or experienced pain does not suffice to show awareness of a disability," including for NYCHRL claims. See Young, 2013 WL 5434149, at *8 (where plaintiff "state[d] that she was 'absolutely frail' and 'radically ill'"). Summary judgment is appropriate because Plaintiff "does not recall whether [he] provided defendants any other information regarding [his] condition." See Cozzi, 2009 WL 2602462, at* 14 (where plaintiff "told her supervisors [that] she wanted a single classroom because teaching in multiple classrooms forced her to walk distances that caused her pain").[6]

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[6] Even if Plaintiff had shown that he was disabled, and that Defendants had notice of his disability, the Court would likely find that Plaintiff has not shown that a kickstand was a reasonable accommodation or when (and if) Defendants removed the kickstand. See Hurd v. N.Y. Health & Hosps. Corp., 2007 WL 678403, at *5 (S.D.N.Y. Mar. 5, 2007), aff'd, 2008 WL 5120624 (2d Cir. Dec. 8, 2008); Allaire v. HSBC Bank USA, 2003 WL 23350119, at *5 (W.D.N.Y. Oct. 27, 2003), aff'd, 109 F. App'x 477 (2d Cir. 2004). Dedivanovic testified at his deposition, "I couldn't tell you if . . . my life depended on it whether there was one on the door or not."

Hostile Work Environment Claim

Plaintiff's hostile work environment claim is deemed abandoned because he "does not . . . address [this claim] in his opposition papers" (Defs. Reply at 9). See Williams, 2013 WL 174187, at *2 ("[C]ourts generally will[] deem a claim abandoned when a plaintiff fails to respond to a defendant's arguments that the claim should be dismissed.").

Assuming, arguendo, that Plaintiff had not abandoned his claim, summary judgment would likely be justified because Plaintiff fails to establish a prima facie case that he was subjected to a hostile work environment. See Ben-Levy v. Bloomberg, L.P., 518 F. App'x 17, 20 (2d Cir. 2013); Konipol v. Rest. Assocs., 2002 WL 31618825, at *8 (S.D.N.Y. Nov. 20, 2002); Aina v. City of N.Y., 2007 WL 401391, at *6-7 (S.D.N.Y. Feb. 6, 2007). "[T]o make a claim for a hostile work environment, a plaintiff must show that the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." Ben-Levy, 518 F. App'x at 20. Where a plaintiff admits that no one made any

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(Dedivanovic Dep. at 70:25-71:3.) He also said that he was not "aware that Mr. Vaigasi had requested that the [kickstand] be replaced." (Id. 70:7-9.) " Plaintiff cannot create a genuine issue of fact solely by citing to his own deposition testimony. Such bare, unsubstantiated allegations, which are not admissible at trial, do not establish a prima facie case" Hurd, 2007 WL 678403, at *5 (where the plaintiff "present[ed] no evidence other than his own. . .deposition testimony"); see also Allaire, 2003 WL 23350119, at *5.

comments, jokes, or insults about his age or medical condition, "no reasonable juror could find that [the plaintiff] was subjected to harassment on the basis of his age[] [or] medical condition." Id.

Here, Plaintiff admits that he "was never subjected to a single age- or disability-based comment[.]" (Pl.'s 56.1 ¶ 41.) His deposition testimony that he "was treated less well than individuals that were younger than [him]" (Vaigasi Dep. 221:22-24, 268:23-24) does not establish "how he was treated differently than . . . other employees" (Pl.'s 56.1 ¶ 40). Where a plaintiff "fails to recount the details of any specific comments or instances in which [Defendants] allegedly acted with hostility toward [the plaintiff]," then "even viewing the facts in the light most favorable to plaintiff, [the plaintiff's] claim must be dismissed." Aina, 2007 WL 401391, at *6-7; see also Konipol, 2002 WL 31618825, at *8.

IV. Conclusion & Order

For the reasons stated herein, Defendants' motion to dismiss [#322] is granted in its entirety.

The Clerk of the Court is respectfully requested to close this case.

Dated: New York, New York
February 16, 2017

/s/
RICHARD M. BERMAN, U.S.D.J.

Appendix E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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11 Civ. 5088 (RMB) (HBP)

PEDIO VAIGASI,

Plaintiff,

—v.—

SOLOW MANAGEMENT CORP., et al.,

Defendants.

OPINION AND ORDER

PITMAN, United States Magistrate Judge:

I. Introduction

The following discovery motions are currently pending in this action: (1) plaintiff's motion to compel defendants to produce documents and electronically stored information (Docket Item ("D.I.") 258), (2) defendants' motion for a protective order relieving defendants of the obligation of responding to plaintiff's second request for the production of documents and notice of depositions (D.I. 274) and (3) defendants' motion for sanctions (D.I. 285). For the reasons set forth below,

plaintiff's motion to compel is denied, defendants' motion for a protective order is granted in substantial and defendants' motion for sanctions is granted.

II. Facts

A. Plaintiff's Allegations[1]

Plaintiff formerly worked for the Corporate Defendants[2] as a handyman and assistant resident manager at two apartment buildings in Manhattan, namely 265 East 66th Street (the "66th Street Building") and 525 East 72nd Street (the "72nd Street Building"). Plaintiff's claims arise out of four discreet incidents: (1) plaintiff's transfer in May 2009 from the 66th Street Building to the 72nd Street Building; (2) plaintiff's reinstatement in 2010 to the position of assistant resident manager at the 66th Street Building; (3) the removal of a door "kickstand" at the 72nd Street Building and (4) the termination of plaintiff's employment in January 2012. Plaintiff alleges that the foregoing incidents violated Title VII of the Civil Rights Act, 42 U.S.C. §§ 2000e et seq.

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[1] Plaintiff's factual allegations are discussed at length in the Decision and Order of the Honorable Richard M. Berman, United States District Judge, granting in part and denying in part defendants' motion to dismiss the complaint. Vaigasi v. Solow Mgmt. Corp., 11 Civ. 5088 (RMB)(HBP), 2014 WL 1259616 (S.D.N.Y. Mar. 24, 2014). Familiarity with Judge Berman's decision is assumed. The description of plaintiff's factual allegations set forth herein is largely derived from Judge Berman's decision.

[2] The term "Corporate Defendants" is used to refer to the Solow Management Corp., Solow Realty & Development Company LLC and their related entities.

("Title VII"), the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 et seq. ("ADEA"); the Americans with Disabilities Act, 42 U.S.C. §§ 12101 et seq. ("ADA"); the Civil Rights Act, 42 U.S.C. §§ 1981 and 1983, the New York State Human Rights Law, N.Y. Exec. L. §§ 290 et seq. ("NYSHRL") and the New York City Human Rights Law, N.Y.C. Admin. Code §§ 8-101 et seq. ("NYCHRL").

1. The 2009 Transfer

Plaintiff alleges that the 2009 transfer constituted an adverse employment action because he was effectively demoted from the position of assistant resident manager to handyman and that the transfer resulted in more arduous work assignments and a loss of seniority. Plaintiff claims that after the transfer, Nelson Genao, a male in his early thirties replaced plaintiff as assistant resident manger at the 66th Street Building and Giovanni Bernardino, another male in his thirties, was promoted to manager. Both Genao and Bernardino are alleged to have had less training and experience than plaintiff and both are alleged to have been plaintiff's subordinates before the transfer.

2. The 2010 Reinstatement

Pursuant to his union contract, plaintiff commenced an arbitration challenging his transfer to the 72nd Street Building; plaintiff did not allege in the arbitration that the transfer was discriminatory.

By a Consent Award dated October 6, 2010, the parties agreed to "'reinstate [plaintiff] to his

former position and shift as Assistant Superintendent'" at the 66th Street Building. Vaigasi v. Solow Mgmt. Corp., supra, 2014 WL 1259616 at *2. Plaintiff alleges that his reinstatement to the 66th Street Building actually "negated" the Consent Award. Specifically, plaintiff alleges that Genao, who allegedly had less training and experience than plaintiff, was appointed as plaintiff's supervisor and that plaintiff was assigned physically demanding work while Genao was assigned paperwork. Plaintiff also alleges that he was the victim of a discriminatory salary structure under which he was denied overtime and favorable assignments while Genao received that work.

3. The Kickstand Incident

Plaintiff claims that he suffered work-related injuries in 2009 and 2010 including injuries to his back, knee, shoulder eyes and hand and that defendants failed to make reasonable accommodation for these injuries. Specifically, plaintiff claims that in 2010 defendants removed a kickstand from a particular door at the 72nd Street Building, making it more difficult for plaintiff to get supplies and access his shop. Plaintiff's request that the door be propped open by other means when he was using the door was rejected.

4. January 2012 Termination

Plaintiff claims that in January 2011, plaintiff's doctor determined that plaintiff needed to take time off as a result of defendants' alleged disability, and plaintiff took a medical leave of absence. In support of his leave, plaintiff submitted a

report to his employer from one of his physicians in December 2011 that stated, in substance, that plaintiff was totally disabled and should not perform any work until January 15, 2012.

In January 2012, the Corporate Defendants informed plaintiff that, due his extended absence, his position had been filled, no similar positions were open and available and that, in light of plaintiff's failure to state an intent to return to work and his failure to provide a specific return date, the Corporate Defendants were terminating plaintiff's employment.

B. Proceedings to Date

1. Defendants' Motion to Dismiss

Defendants moved to dismiss the complaint on numerous grounds. For reasons that are not relevant to the resolution of the present motions, Judge Berman granted the motion in part and denied it in part on March 24, 2014. Specifically, Judge Berman dismissed all of plaintiff's claims except (1) plaintiff's ADEA discrimination claim with respect to the 2010 Reinstatement against the Corporate Defendants; (2) plaintiff's NYSHRL and NYCHRL claims of age discrimination with respect to the 2009 Transfer and the 2010 Reinstatement against the Corporate Defendants and the individual defendants Tumminia, Dedivanovic, Caliccho, Wischerth, Kearney and Bernardino; (3) plaintiff's ADA failure-to-accommodate claim with respect to the kickstand incident against the Corporate Defendants; (4) plaintiff's NYSHRL and NYCHRL failure-to-accommodate claims with respect to the kickstand

incident against the Corporate Defendants and Dedivanovic and (5) plaintiff's NYCHRL hostile environment claim with respect to the 2009 transfer and 2010 reinstatement against the Corporate Defendants and Tumminia, Dedivanovic, Calicchio, Wischerth, Kearney and Bernardino.

More than two months after Judge Berman's decision resolving on the motion to dismiss, plaintiff moved for reconsideration of the decision (Notice of Plaintiff's Motion for Reconsideration, dated May 29, 2014 (D.I. 150)). Judge Berman denied that motion on November 6, 2014 (Decision and Order, dated Nov. 6, 2014 (D.I. 177)). Plaintiff filed a notice of appeal from the decision denying his motion for reconsideration (Notice of Appeal, dated Dec. 5, 2014 (D.I. 192)). The Court of Appeals dismissed that appeal for lack of a final order on March 25, 2015 (Mandate, dated Mar. 25, 2015 (D.I. 261)).

2. Discovery and Related Pretrial Proceedings

Although the matter had been referred to me for general pretrial supervision in 2011, discovery had been stayed pending resolution of defendants' motion to dismiss (Endorsed Order, dated Feb. 10, 2012 (D.I. 66)). I lifted that stay after the dismissal motion was resolved on July 21, 2014 (Scheduling Order, dated July 21, 2014 (D.I. 161)). Unfortunately, discovery grew increasingly contentious as the case progressed, and the discovery period was marked by numerous groundless applications by plaintiff. Because the history of plaintiff's pretrial practice bears on the current disputes, I describe it in some detail.

a. The October 6, 2014 Conference

I held my first discovery conference in this matter on October 6, 2014. Although plaintiff took the position that he was entitled to all non-privileged material relevant to the subject matter of the action, I advised him that the Rule 26 standard governing the scope of discovery had been materially amended in 2000 and that the current standard limited discovery to non-privileged material relevant to a claim or defense and that discovery in this case was, therefore, limited to the five surviving claims. I then addressed plaintiff's first request for the production of documents which contained approximately 125[3] separate requests (Plaintiff's First Request to Defendants, dated July 28, 2014 (D.I. 164) ("Plaintiff's First Document Request")). Plaintiff raised a few specific requests at the conference including number 23 which sought "[a]ll documents (including, without limitation, any notes, recordings, memoranda, e-mail and other electronic information or reports) given to Plaintiff, shown to Plaintiff, read aloud to Plaintiff orally, or made available for review by Plaintiff which relate to or refer to any terms or conditions of Plaintiff's employment with Defendants" (Plaintiff's First Document Request ¶ 23). I advised plaintiff that the request was extremely broad and that his requests needed to be more focused. Because defendants' document production was not then

[3] Plaintiff's First Document Request contains 141 numbered paragraph. However, 16 of the 141 paragraphs set forth instructions and definitions. 125 paragraphs set forth actual document requests.

complete, I directed defendants to complete their production by October 10, 2014 and directed the parties to meet and confer with respect to any issues plaintiff may have had with the production. I further directed plaintiff to send me a letter by October 24, 2014 identifying any unresolved document issues and directed the parties to return for a follow-up conference on October 29, 2014 (Order, dated Oct. 7, 2014 (D.I. 171)).

b. The October 29, 2014 Conference

On October 29, 2014, I held a two-hour conference with the parties to discuss plaintiff's issues with defendants' document production. Most of plaintiff's issues lacked merit. For example, although plaintiff had misgivings concerning the completeness of defendants' production with respect to certain categories of documents, he had no specific basis for believing the production was incomplete. In addition, when pressed to explain the relevance of a category of requested documents, plaintiff would respond by addressing a different category of documents (Transcript of Proceedings, dated Oct. 29, 2014 (D.I. 228) ("10-29-14 Tr.") at 18-20). Although defendants had produced a handful of emails that existed in paper form, defendants objected to plaintiff's request for production of electronically stored information ("ESI"), claiming that the it was unduly burdensome and that there was little likelihood that the ESI would yield document relevant to the remaining claims.

Defendants prevailed on the majority of the issues plaintiff raised at the October 29 conference. With respect to plaintiff's request for production of ESI, I directed defendants to submit an affidavit

explaining how the Corporate Defendants maintained their emails and describing the burden of searching for relevant ESI. I also gave plaintiff the option of making a formal motion to compel the production of additional documents, directed that he make any such motion by December 1, 2014 and ordered that any such motion specifically explain why he believed defendants' production was incomplete and how each category of documents identified in his document request was relevant to the claims remaining in the case (Order, dated Nov. 7, 2014 (D.I. 178)).

c. The December 5, 2014 Conference

I held another two-hour discovery conference with the parties on December 5, 2014. I initially addressed defendants' claim of burden with respect to the production of ESI. Prior to the conference, the Corporate Defendants had submitted, as ordered, an affidavit addressing the steps that would need to be taken to search and produce emails (Declaration of Gerard Martinez, dated Nov. 19, 2014 (D.I. 182)). After questioning the affiant at the conference, I directed that a sample search be performed of one custodian's mail box for a limited number of search terms. The custodian chosen — Tumminia — was believed to be the most likely source of relevant ESI.

I also addressed plaintiff's motion to compel the production of documents, filed on December 1, 2014 (Plaintiff's Notice of Motion to Compel, dated Dec. 1, 2014 (D.I. 186)). After noting that plaintiff's arguments in his motion to compel were inconsistent with the positions plaintiff had taken in his own

responses to defendants' document requests,[4] I asked plaintiff why his motion did not explain the relevance of each specific item in his document

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[4] Specifically, I noted at the conference:

> [Q]uite honestly, there's a profound tension, to say the least, between the position that Mr. Vaigasi took in responding to defendant[s'] document request and [his] view of the law as set forth in his motion to compel.
>
> You know, Mr. Vaigasi lists 11 general objections in his response, and then his responses and objections to the 81 requests read as follows: "Plaintiff states that plaintiff is unable to respond or is not obligated to respond to Solow defendant requests 1 through 81 since one or more of the above objections applies. Plaintiff reserves the right to supplement, supplant, or otherwise amend these responses at any time up to and including the trial of this action."
>
> Yet Mr. Vaigasi writes in his memorandum of law at page 2, "courts in this Circuit have commonly held that general and conclusory objections as to relevance, overbreadth, or burden are insufficient to exclude [sic] discovery of requested information. Here defendants have only asserted rote conclusory objections that plaintiff's request for production is overly broad, unduly burdensome, and oppressive. These objections are baseless."
>
> At page 5 [of his memorandum of law in support of his motion to compel] Mr. Vaigasi wrote, "In objecting to discovery this Court has noted that the objecting party must offer evidence showing specifically how despite the broad and liberal construction afforded the Federal discovery rules a request for production is not relevant, or how each question is overly broad, burdensome or oppressive." It's an interesting tension between the two positions.

(Transcript of Proceedings, dated Dec. 5, 2014 (D.I. 230) ("12-5-14 Tr.") at 42-43).

request, as he had been instructed to do in my Order dated November 7, 2014. Plaintiff claimed that he was physically unable to sit at his computer for extended periods of time and did not have enough time to address the relevance of each category of documents he was requesting (12-5-14 Tr. at 60-61). Defense counsel also raised the fact that plaintiff had not produced a single document beyond the documents attached to his second amended complaint. When I asked plaintiff if he had additional, responsive documents, he could not respond to the question (12-5-14 Tr. at 64).

Because plaintiff's motion to compel did not explain the relevance of each category of documents, and in deference to plaintiff's pro se status, I denied his motion to compel without prejudice to a renewed, properly drafted motion (see 12-5-14 Tr. at 68-69, 71, 74). I also directed that by January 15, 2015, plaintiff submit a revised response to defendants' document request that addressed each request individually (12-5-14 Tr. at 66, 72-73) Finally, in response to a request from defendants, I directed plaintiff to identify the health care providers who had treated him for the conditions that he claimed rendered him disabled and directed plaintiff to provide a release for each (12-5-14 Tr. at 81-82).

d. The January 22, 2015 Conference

After receiving a number of letters raising new discovery disputes, I next met with the parties on January 22, 2015. Despite my Order at the December 5, 2014 conference, plaintiff had refused to execute releases for medical records concerning

the conditions that gave rise to his ADA claim,[5] claiming that the physicians who treated him for those conditions may have had records concerning other, irrelevant conditions. However, when I asked plaintiff whether any of those doctors had treated him for other conditions, he stated that they had not. Plaintiff was, therefore, again ordered to execute the releases. In addition, contrary to the oral order issued at the December 5, 2014 conference, plaintiff still had not submitted an amended response to defendants' document requests; he was ordered to so by February 20, 2015. Plaintiff attributed the delay to unidentified physical limitations. I invited plaintiff to submit medical evidence corroborating the existence of any physical condition that prevented him from complying with my deadlines. To this day he has not done so. Defendants also reported on the results of their sampling of ESI which disclosed 178 non-privileged emails. I ordered that these be produced to plaintiff and myself for an assessment of their relevance to plaintiff's claim.

Prior to the conference, plaintiff had submitted a letter application to compel the Corporate Defendants to elaborate on their answer. I explained to plaintiff that no such motion existed under the Federal Rules of Civil Procedure. Nevertheless, plaintiff went on to state that he needed more detail concerning which corporate entity employed him because he had "no idea" who

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[5] Plaintiff's ADA and related NYSHRL and NYCHRL claims were based on alleged injuries to his back, left knee, left shoulder, left hand and left eye.

his employer was. Given plaintiff's express allegation that he was employed by Solow Management Corp., Solow Realty & Development Co., Town House Company, LLC and Solow East River Development Co., LLC (Third Amended Complaint (D.I. 111) ¶ 12) and his admission at the January 22 conference that he received annual W-2 statements identifying his employer, it is difficult to understand how plaintiff could honestly represent that he had "no idea" of the identity of his employer. I admonished plaintiff not to use discovery proceedings to play games with the Court.

At the conclusion of the conference, I granted plaintiff's application to submit a revised response to defendants' document requests by February 20, 2015, directed that any additional discovery requests be served by March 10, 2015 and directed plaintiff to file his revised motion to compel the production of documents by March 20, 2015 (Order, dated Jan. 26 2015 (D.I. 208)).

e. The February 11, 2015 Conference

Approximately three weeks later, I was compelled to hold another discovery conference on February 11, 2015 to address a proposed order to show cause plaintiff had submitted on February 9, 2015 (Proposed Order to Show Cause for Preliminary Injunction and Temporary Restraining Order, dated Dec. 9, 2015 (unsigned) (D.I. 212)). Plaintiff's proposed order to show cause sought to reargue the precise issues concerning the releases of plaintiff's medical records that were addressed at length at the January 22 conference, namely

plaintiff's concern that the physicians might have records concerning irrelevant physical or mental conditions. I denied all the relief sought by plaintiff at the February 11 conference with the following admonition to plaintiff:

> Mr. Vaigasi, you are getting close to the edge. I appreciate that you are pro se and you are not familiar with the rules of procedure, but you are getting close to the point where sanctions may be appropriate. I would really caution you to be judicious in your future discovery efforts. . . . If you are dissatisfied with one of my rulings, you are free to file objections and take an appeal to Judge Berman, but you can't just raise the issue a second time and try to swing at the ball again.

(Transcript of Proceedings, dated Feb. 11, 2015 (D.I. 237) at 17; see also Order, dated Feb. 13, 2015 (D.I. 217)). Notwithstanding plaintiff's baseless attempt to revisit an issue that was previously decided, I denied defendants' application for sanctions (Order, dated Feb. 13, 2015 (D.I. 217)).

Plaintiff filed an appeal from my rejection of his order to show cause on February 16, 2015 (Letter from Pedio Vaigasi to the Honorable Richard M. Berman, dated Feb. 16, 2015 (D.I. 219)). Deeming the appeal to be an application for a preliminary injunction, Judge Berman denied the application on February 18, 2015 (Memo Endorsement, dated Feb. 18, 2015 (D.I. 221)) and affirmed my February 13, 2015 Order on February 25, 2015 (Decision and Order, dated Feb. 25, 2015 (D.I. 234)).

f. The February 26, 2015 Conference

Following another flurry of correspondence concerning discovery disputes, the parties appeared before me again on February 26, 2015, primarily to address four subpoenas plaintiff had served. Two of the subpoenas were addressed to Otis Elevator Company and City Wide Window Cleaning. The former sought documents concerning work Otis had done at the 66th Street Building between 2005 and 2011. The latter sought, among other things, documents concerning window cleaning services at the 66th Street Building and a fatal scaffold accident that occurred in 2007. Although these subpoenas sought material that was far afield from plaintiff's five remaining claims, defendants had no privilege or privacy interest in the materials sought, and I denied their application to quash these subpoenas for lack of standing.

The two remaining subpoenas sought documents from law firms that had represented parties adverse to defendants in two different actions brought against the corporate entities — a wrongful death action arising out of the collapse of a window washing scaffold in 2007 and a discrimination claim brought by an executive employee of the Corporate Defendants. Because the Corporate Defendants had provided confidential documents pursuant to a protective order in both cases, I concluded that the Corporate Defendants had standing and granted their applications to quash these two subpoenas on relevance grounds.

At the February 26 conference, I also ordered plaintiff to appear for his deposition on March 13,

2015 or such other date on which the parties agreed, denied plaintiff's application to further extend discovery and ordered plaintiff to complete his production of documents concerning his medical records, wage and earning information, efforts to mitigate his damages and damages calculations and to confirm to defendants that his production of the foregoing documents was complete by March 6, 2015. Because plaintiff claimed that he had an unidentified physical condition that might prevent him from retrieving his documents, my Order further provided that, in lieu of completing his document production by March 6, I would accept a note from a physician explaining why plaintiff was unable to comply with that deadline.

Notwithstanding plaintiff's recurring uncorroborated claims of unidentified physical limitations, the day before the February 26 conference, plaintiff served a second set of document requests on defendants that was 168 pages long and consisted of 1,027 individual requests (Plaintiff's Second Request to Defendants Solow Management Corp., etc., dated Feb. 25, 2015 (D.I. 235) ("Plaintiff's Second Document Request")).[6] Plaintiff's Second Document Request followed the 125-item request for production of documents plaintiff had served in July 2014 (Plaintiff's First Document Request). In light of this submission, the written Order that I

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[6] Although the last request in Plaintiff's Second Document Request is numbered 1,016, several different requests were assigned the same paragraph number, causing the number of the final paragraph to be inaccurately low. The actual number of requests in Plaintiff's Second Document Request is 1,027.

issued summarizing the outcome of the February 26 conference expressly put plaintiff on notice that discovery was not to be used as a tool for oppression:

> The parties are reminded that "[a] lawsuit is not a game but a search for the truth. The ends of justice are served, not by giving one side a vested right to exhaust the other, but by affording both an equal opportunity to a full and fair adjudication on the merits." Polaroid Corp. v. Casselman, 213 F. Supp. 379, 381 (S.D.N.Y. 1962) (MacMahon, D.J.). The pendency of a lawsuit enables a party to use the tools of discovery to find relevant facts; the tools are powerful and can result in the imposition of great expense and burden. Discovery may not, however, be used to impose unnecessary burden on an adversary or to seek information that has no or minimal relevance to the claims or defenses; if discovery is abused in this manner, monetary sanctions can be imposed. See generally Fed.R.Civ.P. 26(g)(3). I expect all parties to heed these admonitions, to use the time remaining for discovery to address the core issues of liability and damages and to refrain from "'roam[ing] in shadow zones of relevancy . . . to explore matter which does not presently appear germane on the theory that it might conceivably become so.'" In re Surety Ass'n of America, 388 F.2d 412, 415 (2d Cir. 1967), quoting Broadway & Ninety-Sixth St. Realty Co. v. Loew's Inc., 21 F.R.D. 347, 352 (S.D.N.Y. 1958) (Bryan, D.J.). The time remaining to

> complete discovery is short; the parties should not waste it.

(Order, dated Feb. 27, 2015 (D.I. 239)).[7]

g. Discovery Orders Issued in March, 2015

A number of discovery disputes also arose in March 2015 which I resolved in the basis of the parties' written submissions alone.

By letter dated February 25, 2015, defendants sought to conduct a physical and psychological examination of plaintiff based on his disability claims and his claim that he suffered mental distress as a result of defendants' actions (Letter from Melissa D. Hill to the Undersigned, dated Feb. 25, 2015 (D.I. 233)). After receiving plaintiff's submission, I granted defendants' application in part and denied it in part. Because plaintiff was alleging an actual disability, I concluded that he had put his physical condition in issue and that defendants were, therefore, entitled to conduct a physical examination limited to the conditions that were the bases for plaintiff's ADA and related NYSHRL and NYCHRL claims. To the extent defendants sought to conduct a psychological examination, I denied their application without prejudice, finding that plaintiff was seeking only "garden variety" mental distress damages and that such damages did not warrant a psychological examination (Order, dated Mar. 4, 2014 (D.I. 245)).

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[7] I gave similar oral warnings to plaintiff during the course of the February 26 conference (see Transcript of Proceedings, dated Feb. 26, 2015 (D.I. 262) ("2-26-15 Tr.") at 59-61).

On March 30, 2015, I issued an Order addressing additional discovery disputes. I denied a motion by plaintiff seeking reconsideration of my Order directing that he submit to a limited physical examination, explaining again that the examination was warranted because plaintiff's ADA claims put plaintiff's physical condition in issue. My March 30, 2015 Order also denied plaintiff's application for an extension of time to complete discovery. Plaintiff was again asserting that unspecified physical limitations had prevented him from completing discovery by the deadline of March 10, 2015. I rejected this claim, finding that it was belied by the "flurry of appeals, correspondence and discovery requests that plaintiff ha[d] generated" (Order, dated Mar. 30, 2015 (D.I. 268)).

h. Plaintiff's Interlocutory Appeals

In addition to his numerous discovery disputes, plaintiff has filed multiple interlocutory appeals, each of which was dismissed for lack of a final order.

On April 17, 2014, plaintiff filed a notice of appeal to the United States Court of Appeals from Judge Berman's March 2014 decision which granted in part and denied in part defendants' motion to dismiss the third amended complaint (Notice of Appeal, dated Apr. 17, 2014 (D.I. 149)). The Court of Appeals dismissed that appeal sua sponte on July 14, 2014 for lack of jurisdiction because the decision was not a final order (Mandate, dated July 14, 2014 (D.I. 159)).

On December 5, 2014, plaintiff filed a second notice of appeal to the United States Court of Appeals, this time seeking review of Judge

Berman's decision denying plaintiff's motion for reconsideration and an Order that I issued which plaintiff described as denying him permission to make an offer of proof (Notice of Appeal, dated Dec. 5, 2014 (D.I. 192)). The Court of Appeals dismissed this appeal sua sponte on March 25, 2015, again, for lack of a final order (Mandate, dated Mar. 25, 2014 (D.I. 261)).

On March 6, 2015, plaintiff filed a third notice of appeal to the Court of Appeals, this time seeking review of both my February 13 Order directing that plaintiff sign releases for his relevant medical records and Judge Berman's affirmance of my Order (Notice of Appeal, dated Mar. 6, 2015 (D.I. 248)). On April 15, 2015, plaintiff filed a fourth notice of appeal to the Court of Appeals, seeking review of both my Order directing that he submit to a limited physical examination and Judge Berman's Order affirming my Order (Notice of Interlocutory Appeal, dated Apr. 15, 2015 (D.I. 281)). The Court of Appeals dismissed both appeals on August 21, 2015 for lack of a final order (Mandate, dated Aug. 21, 2016 (D.I. 296)).[8]

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[8] The notices of appeal plaintiff filed in March and April 2015 are particularly troubling. At the January 22, 2015 conference, I explained the "final order" rule to plaintiff and advised him that, except in very rare situations, the Court of Appeals would entertain only appeals from final orders, i.e., orders that resolved all claims as to all parties. In addition, the Court of Appeals had dismissed two previous appeals by plaintiff for want of a final order in July 2014 and March 2015. In light of both my advice to petitioner and his own experience with the Court of Appeals, it is difficult to understand why he continued to file interlocutory appeals.

Plaintiff subsequently petitioned the United States Supreme Court for a writ of certiorari to review the Court of Appeal's August 2015 dismissal of his two appeals concerning his medical records and his physical examination (see Letter from Plaintiff to the Undersigned, dated Dec. 7, 2015 (D.I. 298)). The Supreme Court denied the petitions on January 11, 2016 (Defendants' Reply in Support of their Motion for a Protective Order and Cross-Motion for Sanctions and in Further Opposition to Plaintiff's Motion to Compel, dated Jan. 11, 2016 (D.I. 301) ("Def'ts' Reply"), Exs. 2 & 3).

III. Analysis

A. Plaintiff's Motion to Compel Production of Documents and Defendants' Motion for a Protective Order with Respect to Document Production

1. Plaintiff's Document Requests

Plaintiff's motion to compel production of additional documents is denied and defendants' motion for a protective order is granted. Plaintiff's motion fails for both procedural and substantive reasons.

a. Procedural Defects

Procedurally, the motion fails to comply with Local Civil Rule 37.1, and Federal Rule of Civil Procedure 37(a)(1).

Local Civil Rule 37.1 provides:

> Upon any motion or application involving discovery or disclosure requests or responses under Fed. R. Civ. P. 37, the moving party

> shall specify and quote or set forth verbatim in the motion papers each discovery request and response to which the motion or application is addressed. The motion or application shall also set forth the grounds upon which the moving party is entitled to prevail as to each request or response. . . .

This same requirement was set forth in my Order dated November 7, 2014 (D.I. 178) and in my instructions to plaintiff at the December 5, 2014 Conference (12-5-14 Tr. at 68-69, 71, 74). Despite the fact that plaintiff has served more than 1,100 separate document requests, his briefs do not quote any of them and do not explain why plaintiff is entitled to prevail on each request. By my count, Vaigasi's main and reply briefs combined reference only approximately 530 of the 1,152 requests set forth in his two sets of document requests and even with respect to those 530 requests, Vaigasi does not provide specific reasons why each of those requests should be granted. Rather, plaintiff offers only conclusory statements that certain requests are relevant to his remaining claims without bothering to explain the connection. The following excerpts from plaintiff's memorandum of law in support of his motion demonstrate his flawed method of attempting to establish relevance:

> Solow Bates Number 765-766 confirm SAC ¶ 162 that "Dedivanovic takes away the company cellular telephone from Vaigasi" as ordered by Tumminia making SRPD ¶ 340 necessary to evidence SRPD ¶¶289, 291, 320, 517, 564-566. Dedivanovic is further implicated in Plaintiff's termination in Solow Bates

Number 794 by stating "Did I ever tell you that I never lost an arbitration? Lol." Clearly, Defendants are withholding, inter alia, the fact that "Vaigasi is praised by Tumminia for his handling of assigned tasks in Ferreras' absence." (TAC ¶ 81; SRPD ¶ 182).

Solow Bates Numbers 974-975 provide a "bonus schedule-2008", making bonus schedules for 2005-2012 quite probative since the schedule also contains an employee rating scale and title; evincing who are the "similarly situated employees." (SRPD ¶¶ 203, 217-219, 224, 244, 300, 348, 363-365, 382-385, 410, 412, 426, 481, 484, 517, 977-981.)

* * *

Solow Bates Number 665 is an unsigned incident report by Bernardino claiming Plaintiff was "assigned to watch over the painting job of hallway doors in all floors from top to bottom" making SRPD ¶¶ 467, 468, 482 and 484 necessary. The report claims the first instance "occurred on September 17, 10) and that Plaintiff "was notified of OTIS findings on [] Sept 18, 2010" while the report is dated January 5, 2011. Defendants should be ordered to provide elevator service calls from 2005 through 2011 for 265 East 66th Street and 525 East 72nd Street to facilitate Plaintiff's defense against any allegations.

* * *

Since Plaintiff was assigned "Resident Manager" ("RM"), Assistant Resident Manager ("ARM") handyman and porter work it entitled Plaintiff to the salary, vacation, sick time, over-

> time pay, and other types of compensation of all employees of 265 East 66th Street and One River Place. (SRPD ¶¶ 148, 158-60, 167, 205, 287, 302, 996).

(Plaintiff's Memorandum of Law in Support of Plaintiff's Motion to Compel the Production of Documents and Electronically Stored Information, dated Mar. 20, 2015 (D.I. 259) ("Pl.'s Opening Mem.") at 12, 13, 28). The foregoing arguments do not describe the document requests in issue and make no attempt to explain how each request relates to the five claims remaining in the case. The fact that a document request may relate to documents previously produced does not shed any light on whether the request is relevant to a claim or defense.

Although reliance on Local Civil Rule 37.1 to reject a motion to compel may, at times, elevate form over substance, see e.g., Shazad v. County of Nassau, No. 13-CV-2268 (SJF)(SIL), 2014 WL 4805022 at *4 (E.D.N.Y. Sep. 26, 2014), that is not the case here. Despite the limited nature of the remaining claims, plaintiff has served a crushing number of document requests. If it took a judge five minutes to read, decide and memorialize the ruling as to each request, a review of all of plaintiff's document requests would take more than 96 hours. If the judge conducting the review had to refer back and forth between plaintiff's briefs, the requests and defendants' responses, the task would expand exponentially and result in an unreasonable burden on the Court.

Although, I do not rely exclusively on plaintiff's failure to comply with Rule 37.1 to deny plaintiff's

motion to compel and to grant defendants' motion for a protective order, it is one of multiple factors that weigh against plaintiff and in favor of defendants. See Dorchester Fin. Holdings Corp. v. Banco BRJ, S.A., 11 Civ. 1529 (KMW)(KNF), 2014 WL 3747160 at *5 (S.D.N.Y. July 3, 2014) (Fox, M.J.).

Plaintiff has also failed to comply with Fed.R. Civ.P. 37(a)(1) which requires a good faith attempt to confer with the adverse party in an effort to resolve the discovery dispute without judicial intervention. Although plaintiff makes a vague reference to a good-faith meet and confer (Pl.'s Opening Mem. at 17), the representation is not credible. I advised plaintiff at the February 26, 2015 conference and in a subsequent written order that he should reconsider his second set of document requests (2-26-15 Tr. at 59-61; Order, dated Feb. 27, 2015 (D.I. 239)). He refused. The emails between defendants' counsel and plaintiff concerning plaintiff's document requests confirm that plaintiff refused to withdraw any of his document requests even when the irrelevance of numerous requests was expressly pointed out to him (Memorandum of Law in Support of Defendants' Joint Motion for Protective Order Enjoining Plaintiff's Second Request for Production of Documents and Plaintiff's Notice of Depositions, dated Apr. 8, 2015 (D.I. 275) ("Def'ts' Mem.") Ex. C). In light of this email record, plaintiff's representation that he met with defendants' counsel in good faith is not credible.

Plaintiff's failure to meet and confer with defense counsel in good faith is sufficient reason by itself to deny plaintiff's motion to compel.

Prescient Partners, L.P. v. Fieldcrest Cannon, Inc., 96 Civ. 7590 (DAB)(JCF), 1998 WL 67672 at *3 (S.D.N.Y. Feb. 18, 1998) (Francis, M.J.) ("Under ordinary circumstances however, the failure to meet and confer mandates denial of a motion to compel."); Veleron Holding, B.V. v. BNP Paribas SA, 12 Civ. 5966 (CM)(RLE), 2014 WL 4184806 at *2 (S.D.N.Y. Aug. 22, 2014) (Ellis, M.J.); Auto. Club of New York, Inc. v. Port Auth. of New York & New Jersey, 11 Civ. 6746 (RKE) (HBP), 2012 WL 4791804 at *6 (S.D.N.Y. Oct. 9, 2012) (Pitman, M.J.); Pro Bono Inv., Inc. v. Gerry, 03 Civ. 4347 (JGK), 2005 WL 2429767 at *1 (S.D.N.Y. Sept. 30, 2005) (Koeltl, D.J.); 2 Michael A. Silberberg, Edward M. Spiro & Judith L. Mogul, Civil Practice in the Southern District of New York § 24:4 (2015-2016 ed.), citing, inter alia, Window Headquarters, Inc. v. Mat Basic Four, Inc., 91 Civ. 1816 (MBM), 93 Civ. 4135 (MBM), 92 Civ. 5283 (MBM), 1996 WL 63046 at *1 (S.D.N.Y. Feb. 9, 1996) (Mukasey, D.J.) (denying motion to compel and imposing $200 sanction for failure to submit certificate that counsel had met and conferred in good faith); see also Brown v. Lian, No. 10CV396A, 2011 WL 4551474 at *3 (W.D.N.Y. Sept. 29, 2011) (pro se plaintiff's representation that he "tried unsuccessfully through '[numerous] writings'" to obtain discovery insufficient to comply with Fed.R.Civ.P. 37(a)(1)'s meet and confer requirement).

b. Substantive Defects

In addition to the procedural defects in plaintiff's motion, the underlying document requests are defective for three reasons: (1) they are irrelevant; (2) even if the requests have some relevance, they

are disproportionate to the claims remaining in the case; (3) they are overbroad and (4) they are unduly burdensome. Finally, to the extent plaintiff challenges the completeness of defendants' production, he has not plausibly shown that the production is incomplete.

The scope of discovery permitted under the Federal Rules of Civil Procedure is set forth in Rule 26(b)(1):

> Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

Information is relevant if: "(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." Fed. R. Evid. 401. Relevance is a matter of degree, and the standard is applied more liberally in discovery than it is at trial. "'[I]t is well established that relevance for the purpose of discovery is broader in scope than relevance for the purpose of the trial itself.'" Refco Grp. Ltd., LLC v. Cantor Fitzgerald, L.P., 13 Civ. 1654 (RA)(HBP), 2014 WL 5420225 at *7 (S.D.N.Y. Oct. 24, 2014) (Pitman, M.J.)

(brackets in original), quoting Arch Assocs., Inc. v. HuAmerica Int'l, Inc., 93 Civ. 2168 (PKL), 1994 WL 30487 at *1 (S.D.N.Y. Jan. 28, 1994) (Leisure, D.J.); see Degulis v. LXR Biotechnology, Inc., 176 F.R.D. 123, 125 (S.D.N.Y.1997) (Sweet, D.J.); Quaker Chair Corp. v. Litton Bus. Sys., Inc., 71 F.R.D. 527, 530–31 (S.D.N.Y.1976) (Motley, D.J.).

As noted above, plaintiff's case has been limited to five specific claims arising out of three incidents: (1) plaintiff's ADEA discrimination claim with respect to the 2010 Reinstatement; (2) plaintiff's NYSHRL and NYCHRL claims of age discrimination with respect to the 2009 Transfer and the 2010 Reinstatement; (3) plaintiff's ADA failure-to-accommodate claim with respect to the kickstand incident; (4) plaintiff's NYSHRL and NYCHRL failure-to-accommodate claims with respect to the kickstand incident and (5) plaintiff's NYCHRL hostile environment claim with respect to the 2009 transfer and 2010 reinstatement. There are no claims in the case based on anything other than age and disability discrimination. There are no claims currently in the case alleging that plaintiff was wrongfully terminated, treated differently than younger, non-disabled employees in terms of hours, pay, vacation days or discipline or that defendants engaged in a pattern and practice of discrimination against older employees or employees who are protected by the ADA.

Despite the narrowness of the remaining claims, Plaintiff's Second Document Request seeks numerous documents that have nothing to do with the claims or defenses. Because plaintiff himself hasn't bothered to address each specific request and hasn't made the effort to explain how any

requests are relevant to the claims (see pages 25-28, above) and given the large number of items sought in Plaintiff's Second Document Request, I am not going to sift through the more than 1000 requests plaintiff has served and attempt to separate the wheat (if any) from the chaff. This is a task plaintiff should have undertaken either during the meet-and-confer process or in his motion to compel. Rather, I limit my discussion to some examples that illustrate the extraordinary size of the net that plaintiff has cast.

Despite the fact that there is no issue in the case concerning plaintiff's Workers' Compensation claims or benefits, plaintiff seeks:

> 15. All documents which support, contradict, or in any way relate to or otherwise evidences [sic] any matter regarding Plaintiff's Workers' Compensation Claim(s) from January 1, 2009 to the present.
>
> 16. All documents which support, contradict, or in any way relate to or otherwise evidences [sic] any employee of Corporate Defendants attending, and/or testifying at any of Plaintiff's Workers' Compensation hearings from 2009 through 2011.
>
> 17. All documents which support, contradict, or in any way relate to or otherwise evidences [sic] Calicchio attending, and/or testifying at any of Plaintiff's Workers' Compensation hearings from 2009 through 2011.
>
> 18. All documents which support, contradict, or in any way relate to or otherwise evidences [sic] Dedivanovic attending, and/or

> testifying at any of Plaintiff's Workers' Compensation hearings from 2009 through 2011.
>
> 19. All documents which support, contradict, or in any way relate to or otherwise evidences [sic] Garraputa attending, and/or testifying at any of Plaintiff's Workers' Compensation hearings from 2009 through 2011.
>
> 20. Any and all documents provided by or to the New York State Workers' Compensation Board or any entity or employee thereof by any Defendant or their attorney(s), regarding or referencing any of Plaintiff's Workers Compensation Claim(s).
>
> 21. Any and all documents provided by or to the State Insurance Fund or any entity or employee thereof by any Defendant or their attorney(s), regarding or referencing any of Plaintiff's Workers Compensation Claim(s).
>
> 22. Any and all documents evidencing the entity and any insurance payments made or that should have been made to provide Plaintiff's Workers Compensation Insurance.

(Plaintiff's Second Document Request at 12-13). These requests have no relationship to plaintiff's transfer, reinstatement or the kickstand incident.

Despite the fact that plaintiff's wrongful termination claims have been dismissed, he seeks:

> 526. Any and all documents which support, contradict, or in any way relate to Paragraph 264 of the Complaint "that Defendants terminated Mr. Vaigasi []."

527. Any and all documents which support, contradict, or in any way relate to Paragraph 264 of the Complaint that "Defendants terminated Mr. Vaigasi because of his age [] in violation of [] the ADEA []."

528. Any and all documents which support, contradict, or in any way relate to Paragraph 264 of the Complaint that "Defendants terminated Mr. Vaigasi because of his age in violation of the NYSHRL[]."

529. Any and all documents which support, contradict, or in any way relate to Paragraph 264 of the Complaint that "Defendants terminated Mr. Vaigasi because of his age [] in violation of [] the NYCHRL."

530. Any and all documents which support, contradict, or in any way relate to Paragraph 264 of the Complaint that "Defendants terminated "Mr. Vaigasi because of his [] disability in violation of the ADA[]."

531. Any and all documents which support, contradict, or in any way relate to Paragraph 264 of the Complaint that "Defendants terminated Mr. Vaigasi because of his [] disability in violation of [] the NYSHRL[]."

532. Any and all documents which support, contradict, or in any way relate to Paragraph 264 of the Complaint that "Defendants terminated Mr. Vaigasi because of his [] disability in violation of [] the NYCHRL."[9]

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[9] Items 546-63, 725-50, 761-63, 766-68, 774-76, 782-84 and 946-65 of Plaintiff's Second Document Request also seek documents concerning plaintiff's termination.

(Plaintiff's Second Document Request at 88-89). These requests have no relationship to plaintiff's transfer, reinstatement or the kickstand incident.

Other requests that have nothing to do with the issues in the case include:

- Items 9-11 which seek the medical records of plaintiff's former co-workers;
- Items 21-24 which seek Genao's income statements and tax returns;
- Items 25-27 which seek documents relating to the rental value of the apartments in the East 66th Street Building and the costs related to parking spaces and health club dues;
- Items 186-91 which relate to a 2007 accident involving a window washing scaffold and window washing fees;
- Items 490-92 which relate to where plaintiff's name was placed on a holiday card and
- Items 976-96 which seek all apartment work-order forms, work-order log books, chemical reports, packing slips, purchase orders, invoices, "key fob" access entries, payroll approval forms and personal and sick day requests for the period from 2005 through 2011.

The foregoing list is not exclusive, but it demonstrates that plaintiff made no attempt to limit his requests to facts relevant to the issues in the case.

Because plaintiff has served so many grossly irrelevant requests and makes no substantial

attempt to justify them or to segregate the arguably relevant from the plainly irrelevant, his motion to compel is denied on the ground that the document requests do not seek relevant information.

Even if each item in Plaintiff's Second Document Request sought relevant documents, plaintiff's motion would still have to be denied because plaintiff's requests are disproportionate to the needs of the case.

Given the recent amendments to the Federal Rules of Civil Procedure that became effective December 1, 2015, proportionality "has become 'the new black,'" Aguilar v. Immigration & Customs Enf't Div. of U.S. Dep't of Homeland Sec., 255 F.R.D. 350, 359 (S.D.N.Y. 2008) (Maas, M.J.), in discovery litigation, with parties invoking the objection with increasing frequency. The 2015 amendments, however, did not establish a new limit on discovery; rather they merely relocated the limitation from Rule 26(b)(2)(C)(iii) to Rule 26(b)(1). Robertson v. People Magazine, 14 Civ. 6759 (PAC), 2015 WL 9077111 at *2 (S.D.N.Y. Dec. 16, 2015) (Crotty, D.J.) (noting that proportionality has been a limit on discovery since the 1983 amendments to Rule 26); Advisory Committee Notes to the 2015 Amendments to Rule 26 ("Restoring the proportionality calculation to Rule 26(b)(1) does not change the existing responsibilities of the court and the parties to consider proportionality . . . ."); see also Sibley v. Choice Hotels Int'l, CV-14-634 (JS)(AYS), 2015 WL 9413101 at *2 (E.D.N.Y. Dec. 22, 2015). The change was intended to "reinforce[] the Rule 26(g) obligation of the parties to consider [the proportionality factors] in making discovery requests, responses, or objections."

Advisory Committee Notes to the 2015 Amendments to Rule 26.[10] Thus, the 2015 Amendments constitute a reemphasis on the importance of proportionality in discovery but not a substantive change in the law. Robertson v. People Magazine, supra, 2015 WL 9077111 at *2 ("[T]he 2015 amendment [to Rule 26] does not create a new standard; rather it serves to exhort judges to exercise their preexisting control over discovery more exactingly.").

Proportionality focuses on the marginal utility of the discovery sought. Zubulake v. UBS Warburg, LLC, 217 F.R.D. 309, 322-23 (S.D.N.Y. 2003) (Scheindlin, D.J.); Jill C. Rice & Steven M. Puiszis, Returning to Proportionality, 58 No. 1 DRI for Def. 14 (Jan. 2016); see also Hagemeyer N. Am., Inc. v. Gateway Data Scis. Corp., 222 F.R.D. 594, 602 (E.D. Wis. 2004). Proportionality and relevance are "conjoined" concepts; the greater the relevance of the information in issue, the less likely its discovery will be found to be

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[10] In his 2015 Year-End Report on the Federal Judiciary, available at http://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf, Chief Justice John Roberts addressed the December 2015 amendments to the Federal Rules of Civil Procedure and noted:

> Rule 26(b)(1) crystalizes the concept of reasonable limits on discovery through increased reliance on the common-sense concept of proportionality The amended rule states, as a fundamental principle, that lawyers must size and shape their discovery requests to the requisites of a case. Specifically, the pretrial process must provide parties with efficient access to what is needed to prove a claim or defense, but eliminate unnecessary or wasteful discovery. The key here is careful and realistic assessment of actual need.

disproportionate. See Hon. Elizabeth D. Laporte & Jonathan M. Redgrave, A Practical Guide to Achieving Proportionality under New Federal Rule of Procedure 26, 9 Fed. Cts. L. Rev. 20, 53 (Fall 2015) ("[T]he application of the concept of proportionality often turns on how 'central' (or relevant) the proposed discovery may be to overcome any number of objections that are associated with the discovery at issue.").

As set forth in the text of Rule 26(b)(1), multiple factors are relevant in assessing proportionality, and some cases may require a detailed balancing of these factors and the making of fine distinctions. This, however, is not such a case. Plaintiff's remaining claims arise out of three discrete events — the 2009 transfer, the 2010 reinstatement and the kickstand incident. Even if I assume that the items in Plaintiff's Second Document Request had some relevance, it is simply inconceivable that the 1,027 items set forth in Plaintiff's Second Document Request are proportional to the needs of the case. Plaintiff's First Document Request sought approximately 125 categories of documents, and defendants, in response, have produced approximately 1,000 pages of documents, including plaintiff's entire personnel file, the files concerning plaintiff that were maintained at the locations at which he worked, certain employee handbooks and other materials and selected emails (Def'ts' Mem. at 8). Based on my experience in presiding over discovery disputes in employment discrimination cases, and given plaintiff's position and the nature of the surviving claims, the volume of defendants' production is within the range of what is normally seen in similar cases. I appreciate that there is a

strong federal policy against employment discrimination, but that policy cannot justify the service of a total of more than 1,100 document requests in a single plaintiff discrimination case, arising out of three transactions and involving a job that would not ordinarily be expected to generate a substantial volume of relevant documentation. Moreover, even if I assume some measure of relevance, the examples of plaintiff's requests discussed above demonstrate that the materials requested are at the outer fringes of relevance with little probative value to the claims.

Similar discovery requests were served in Robertson v. People Magazine, supra, 2015 WL 9077111. The plaintiff in that case, an African-American female, was a former senior editor at the defendant magazine and alleged that she was discriminated against with respect to the conditions of her employment and wrongfully terminated on the basis of race. She alleged that meetings at which she was scheduled to pitch article ideas were cancelled, that she was excluded from important emails and that stories in her area of the magazine were assigned to white editors. She also alleged that her supervisor made racially offensive comments, often concerning stories about African-Americans suggested by plaintiff. Plaintiff served 135 document requests concerning editorial discussions and the selection of articles for publication.

The Honorable Paul A. Crotty, United States District Judge, denied a motion to compel production of the documents sought, concluding, among other things, that plaintiff's requests were disproportionate.

> The Court has no trouble concluding that Plaintiff's discovery requests are burdensome and disproportionate. Unlike most discrimination cases where discovery is addressed to allegedly discriminatory conduct and/or comments, Plaintiff here seeks nearly unlimited access to People's editorial files, including all documents covering the mental process of People staff concerning what would or would not be published in the magazine. To provide a few examples, Plaintiff requests all documents "concerning any of People Magazine's regular meetings," all documents "concerning any meeting at which discussions concerning which content would appear in People Magazine occurred," all documents "concerning the decision-making process with regard to choosing who would be put on the cover of People Magazine," and copies of all of People's covers and published stories dating back to 2005. Those requests (and others) extend far beyond the scope of Plaintiff's claims and would significantly burden Defendants.

Robertson v. People Magazine, supra, 2015 WL 9077111 at *2.

Like the plaintiff in Robertson, the plaintiff here is seeking access to a wide array of documents concerning the management and operation of defendants' buildings that have very, very little, if anything, to do with plaintiff's claims. Plaintiff's Second Document Request is far out of proportion to his claims.

Even if Plaintiff's Second Document Request was relevant and proportional to the needs of the

case, they are overbroad. Virtually all of the requests set forth in Plaintiff's Second Document Request seek "[a]ny and all documents which support, contradict, or in any way relate to" a particular subject, some of which are broadly defined. "Blanket requests of this kind are plainly overbroad and impermissible." Henry v. Morgan's Hotel Group, Inc., 15 Civ. 1789 (ER)(JLC), 2016 WL 303114 at *2 (S.D.N.Y. Jan. 25, 2016) (Cott, M.J.), citing, inter alia, Gropper v. David Ellis Real Estate, L.P., 13 Civ. 2068 (ALC)(JCF), 2014 WL 518234 at *4 (S.D.N.Y. Feb. 10, 2014); Badr v. Liberty Mutual Group, Inc., No. 3:06CV1208, 2007 WL 2904210 at *3 (D. Conn. Sept. 28, 2007) (finding request for "any and all" documents "overly broad"); see also Pollard v. E.I. DuPont de Nemours & Co., No. 95–3010, 2004 WL 784489, at *5 (W.D. Tenn. Feb. 24, 2004) (holding "any and all" request ambiguous and overbroad).

To the extent plaintiff seeks to compel the production of additional ESI, plaintiff's requests are unduly burdensome. Because plaintiff had raised a colorable issue with respect to ESI at the December 5, 2014, I determined that it was appropriate to conduct a sample search of defendants' ESI to assess the likelihood that the ESI would contain probative documents. See S.E.C. v. Collins & Aikman Corp., 256 F.R.D. 403, 418 (S.D.N.Y. 2009) (Scheindlin, D.J.) ("The concept of sampling to test both the cost and the yield is now part of the mainstream approach to electronic discovery."); see also Pippins v. KPMG LLP, 11 Civ. 377 (CM) (JLC), 2011 WL 4701849 at *9 (S.D.N.Y. Oct. 7, 2011) (Cott, M.J.) (encouraging sampling to defray unnecessary costs). I directed defendants to search

the mail box of defendant Tumminia for all documents containing the terms "Vaigasi" or "Genao" (12-5-14 Tr. at 29). I selected this custodian after conferring with plaintiff and counsel for defendants to ascertain the most likely repository of relevant ESI. In response to that Order, defendant produced approximately 178 non-privileged emails, many of which are duplicates. I have personally reviewed these emails, and they contain nothing of incremental value. To the extent they bear on facts relevant to this action, they bear only on facts that are not in dispute such as plaintiff's transfer to the 72nd Street Building and the ensuing grievance proceeding. The ESI only confirms that these events occurred — a fact which no party challenges. Beyond that the emails relate building maintenance and other similar matters; they do not illuminate any issue relevant to plaintiff's age or disability discrimination claims. Given this result and the cost to defendants of producing additional ESI (see Declaration of Gerard Martinez, dated Nov. 19, 2014 (D.I. 182)), requiring the production of additional ESI would be unduly burdensome.

Finally although plaintiff objects to the completeness of defendants' document production, he offers nothing to support this contention other than his personal opinion that there must be additional non-privileged documents (see, e.g. Pl.'s Opening Mem. at 9-10). This unsubstantiated opinion, in the face of defendants' repeated representations that all requested documents have either been produced or are the subject of an objection (see 10-29-14 Tr. at 5-8), is an insufficient basis on which to enter an order to

produce additional documents. Margel v. E.G.L. Gem Lab Ltd., 04 Civ. 1514 (PAC)(HBP), 2008 WL 2224288, at *3 (S.D.N.Y. May 29, 2008) (Pitman, M.J.) (collecting cases).

c. Summary

As the foregoing demonstrates, plaintiff's motion to compel documents in response to his Second Document Request is procedurally deficient and the underlying requests are substantively deficient. Accordingly, plaintiff's motion to compel production of documents and ESI is denied, and defendants' motion for a protective order relieving them of the obligation of responding to the Plaintiff's Second Document Request is granted.

B. Defendant's Motion for a Protective Order Order with Respect to Plaintiff's Deposition Notice

In addition to seeking a protective order with respect to Plaintiff's Second Document Request, defendants also seek a protective order with respect to a notice of deposition that plaintiff served on March 10, 2015 (Notice of Deposition, dated March 10, 2015 (D.I. 251)). The notice sought the depositions of ten individuals, including Sheldon or Stefan Solow, all to be conducted on April 10, 2015. To date, plaintiff has not conducted any depositions in this matter.

Defendants seek a protective order primarily because plaintiff's deposition testimony indicates that the witnesses noticed by plaintiff have no knowledge of the relevant facts. Plaintiff, however, cannot know what someone else knows, and his

deposition testimony on the issue of what certain individuals know is of little value. In addition, defendants have not submitted any affidavits from the individuals in issue establishing their lack of knowledge.

On the other hand, based on plaintiff's document requests and the additional conduct discussed below in Section III(C)(2), there is serious doubt whether plaintiff will conduct these depositions in good faith.

Accordingly, balancing plaintiff's conduct in conjunction with the weight of defendants' factual showing and the policy in this Circuit of resolving litigation on the merits, defendants' application is granted to the following extent: within thirty (30) days of the date of this Order, plaintiff may conduct the depositions of two witness of his choice (other than the Solows), each deposition to be limited to a maximum of four hours.

Defendants' motion for a protective order precluding any deposition of Sheldon or Stefan Solow involves different issues.

> The Federal Rules set very liberal limits on the scope of discovery. A party may inquire about "any matter, not privileged, that is relevant to [a] claim or defense[,]" and "[f]or good cause, the court may order discovery of any matter relevant to the subject matter involved in the action." Fed.R.Civ.P. 26(b)(1). "[H]ighly-placed executives are not immune from discovery. 'The fact that [an executive] has a busy schedule' is [] not a basis for foreclosing otherwise proper discovery.'" Consolidated Rail Corp. v. Primary Industries

Corp., No. 92 Civ. 4927, 1993 WL 364471, at *1 (S.D.N.Y. Sept. 10, 1993) (quoting CBS, Inc. v. Ahern, 102 F.R.D. 820, 822 (S.D.N.Y. 1984)). Even where, as in this case, a high-ranking corporate officer denies personal knowledge of the issues at hand, this "claim . . . is subject to testing by the examining party." Consolidated Rail Corp., 1993 WL 364471, at *1 (citing Amherst Leasing Corp. v. Emhart Corp., 65 F.R.D. 121, 122 (D. Conn. 1974)).

Nevertheless, discovery is not boundless, and a court may place limits on discovery demands that are "unreasonably cumulative or duplicative," or in cases where

> the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.

Fed.R.Civ.P. 26(b)(2)(C). Likelihood of harassment and business disruption are factors to be considered in deciding whether to allow discovery of corporate executives. See Consolidated Rail Corp., 1993 WL 364471, at *1; Arkwright Mutual Insurance Co. v. National Union Fire Insurance Co., No. 90 Civ. 7811, 1993 WL 34678, at *2 (S.D.N.Y. Feb. 4, 1993). Unless it can be demonstrated that a corporate official has "some unique knowledge" of the issues in the case, "it may be appropriate to preclude a

> [ ] deposition of a highly-placed executive" while allowing other witnesses with the same knowledge to be questioned. Consolidated Rail Corp., 1993 WL 364471, at *1 (citations omitted).

Burns v. Bank of America, 03 Civ. 1685 (RMB) (JCF), 2007 WL 1589437 at *3 (S.D.N.Y. June 4, 2007) (Francis, M.J.); see also RxUSA Wholsale, Inc. v. McKesson Corp., CV-06-4343 (DRH)(AKT), 2007 WL 1827335 at *4 (E.D.N.Y. June 25, 2007).

As the parties seeking to preclude the deposition of the Solows, defendants bear the burden of proof. See Penn Group, LLC v. Slater, 07 Civ. 729 (MHD), 2007 WL 2020099 at *13 (S.D.N.Y. June 13, 2007) (Dolinger, M.J.) ("[T]he proponent of a protective order, plaintiff bears the burden to demonstrate good cause for its proposed limitations . . . ."); Infosint S.A. v. H. Lundbecj A.S., 06 Civ., 2869 (LAK)(RLE), 2007 WL 1467784 at *2 (S.D.N.Y. May 16, 2007) (Ellis, M.J.) ("The party seeking a protective order has the burden of demonstrating that good cause exists for issuance of the order." (internal quotation marks omitted)). Defendants have not submitted any factual material addressing what knowledge, if any, the Solows possess concerning plaintiff's claims; defendants' papers do not even specify the precise positions held by the Solows. It would, however, be unrealistic to doubt that they are highly-placed officers in entities that own and manage millions of dollars worth of Manhattan real estate. It would also be unrealistic to believe that they have unique knowledge of the facts underlying plaintiff's remaining claims. See generally United States v. Blackburn, 461 F.3d 259, 264 (2d Cir. 2006)

("What we know as men and women we must not forget as judges." (quotations marks and citations omitted)).

Plaintiff's basis for asserting that the Solows have knowledge of his claims is, at best, gossamer thin. Plaintiff cites only allegations in his third amended complaint concerning the Solows as "evidence" of their knowledge (Plaintiff's Memorandum of Law in Reply to Defendants' Cross Motion for Sanctions, etc., dated December 31, 2015 (D.I. 300) at 5). Plaintiff's unsworn allegations do not, however, constitute a factual showing of anything.

Thus, defendants have failed to make the factual showing necessary to justify precluding the depositions of the Solows, although the unsupported facts they proffer are probably true. Plaintiff, on the other hand, has a demonstrated predilection for extremely abusive discovery and litigation practices and offers next to nothing to demonstrate that the Solows have relevant knowledge. Given this record, the appropriate resolution is to grant a protective order precluding the depositions of Sheldon and Stefan Solow on the condition that within twenty-one (21) days of the date of this Order, defendants supply affidavits or declarations from the Solows confirming their positions within the Corporate Defendants and confirming that they have no knowledge concerning the events underlying plaintiff's claims apart from what they may have learned from counsel. If the affidavits or declarations suggest that the Solows have relevant knowledge independent of what they may have learned from counsel, plaintiff may move for reconsideration of this

Order notwithstanding the time limit set forth in Local Civil Rul 6.3.

C. Defendants' Motion for Sanctions

In addition to seeking a protective order with respect to Plaintiff's Second Document Request and his notice of deposition, defendants also seek sanctions pursuant to Rules 26 and 37 and the Court's inherent power.

1. Applicable Legal Standards

Defendants assert three different legal bases in support of their motion for sanctions, each of which has its own legal standard.

Defendants first seek sanctions pursuant to Fed.R.Civ.P. 26(g) which provides, in pertinent part:

> **(g) Signing Disclosures and Discovery Requests, Responses, and Objections.**
>
> **(1) Signature Required; Effect of Signature.** Every disclosure under Rule 26(a)(1) or (a)(3) and every discovery request, response, or objection must be signed by . . . the party personally, if unrepresented . . . . By signing, [a] party certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry:
>
> * * *
>
> **(B)** with respect to a discovery request, response, or objection, it is:
>
> **(i)** consistent with these rules and warranted by existing law or by a nonfrivolous argument for extending, modifying, or

> reversing existing law, or for establishing new law;
>
> **(ii)** not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; and
>
> **(iii)** neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.
>
> * * *
>
> **(3) Sanction for Improper Certification.** If a certification violates this rule without substantial justification, the court, on motion or on its own, must impose an appropriate sanction on the signer, the party on whose behalf the signer was acting, or both. The sanction may include an order to pay the reasonable expenses, including attorney's fees, caused by the violation.

Fed. R. Civ. P. 26 (emphasis added).

"Rule 26(g) is designed to curb discovery abuse by explicitly encouraging the imposition of sanctions. The subdivision provides a deterrent to . . . excessive discovery . . . by imposing a certification requirement that obliges each attorney [or unrepresented party] to stop and think about the legitimacy of a discovery request . . . ." 1983 Advisory Committee Note to Rule 26; accord Metro. Opera Ass'n v. Local 100, Hotel Emps. & Rest. Emps. Int'l Union, 212 F.R.D. 178, 219

(S.D.N.Y. 2003) (Preska, D.J.), adhered to on reconsideration, 2004 WL 1943099 (S.D.N.Y. Aug. 27, 2004). Rule 26(g) was enacted in recognition of the fact that abusive discovery tactics had become a prime cause of delay and expense in civil litigation. 1983 Advisory Committee Note to Rule 26, citing, inter alia, ACF Indus., Inc. v. EEOC, 439 U.S. 1081, 1081 (1979) (denying certiorari) (Powell, J. dissenting).

"Imposition of sanctions for a violation of Rule 26(g) is mandatory." Clark v. Westchester County, 96 Civ. 8381 (DLC), 1998 WL 709834 at *9 (S.D.N.Y. Oct. 9, 1998) (Cote, D.J.), citing, inter alia, Chambers v. NASCO, Inc., 501 U.S. 32, 51 (1991). Rule 26(g) "empowers a district court to impose a variety of sanctions for improper" conduct. Chase Manhattan Bank, N.A. v. Turner & Newall, PLC, 964 F.2d 159, 165 (2d Cir. 1992); accord Zalaski v. City of Hartford, 723 F.3d 382, 395 (2d Cir. 2013)

Defendants also seek sanctions pursuant to Rule 37(b)(2). Rule 37(b)(2) states that a court may grant sanctions against a party that "fails to obey an order to provide or permit discovery." Sanctions may be granted against a party under Rule 37(b)(2) if there is noncompliance with an order, "notwithstanding a lack of wilfulness or bad faith, although such factors 'are relevant . . . to the sanction to be imposed for the failure.'" Auscape Int'l v. Nat'l Geographic Soc'y, 02 Civ. 6441 (LAK), 2003 WL 134989 at *4 (S.D.N.Y. Jan. 17, 2003) (Kaplan, D.J.), quoting 8A Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, Federal Practice & Procedure § 2283, at 608 (2d ed. 1994); see Melendez v. Ill. Bell Tel. Co., 79 F.3d 661, 671

(7th Cir. 1996) ("Bad faith . . . is not required for a district court to sanction a party for discovery abuses. Sanctions are proper upon a finding of wilfulness, bad faith, or fault on the part of the noncomplying litigant." (citation omitted)); Alexander v. Fed. Bureau of Investigation, 186 F.R.D. 78, 88 (D.D.C. 1998) ("In making the determination of whether to impose sanctions, Rule 37(b)(2) does not require a showing of willfulness or bad faith as a prerequisite to the imposition of sanctions upon a party." (citations omitted)). Although bad faith is not required to impose sanctions pursuant to Rule 37(b)(2), "intentional behavior, actions taken in bad faith, or grossly negligent behavior justify severe disciplinary sanctions." Metro. Opera Ass'n v. Local 100, Hotel Emps. & Rest. Emps. Int'l Union, supra, 212 F.R.D. at 219; see also Shcherbakovskiy v. Da Capo Al Fine, Ltd., 490 F.3d 130, 140 (2d Cir. 2007) ("[T]he severity of [the] sanction must be commensurate with the non-compliance."). The decision to impose sanctions "is committed to the sound discretion of the district court and may not be reversed absent an abuse of that discretion." Luft v. Crown Publishers, Inc., 906 F.2d 862, 865 (2d Cir. 1990), citing, inter alia, Nat'l Hockey League v. Metro. Hockey Club, Inc., 427 U.S. 639, 642 (1976) (per curiam); see Friends of Animals, Inc. v. U.S. Surgical Corp., 131 F.3d 332, 334 (2d Cir. 1997) ("A district court has broad power to impose Rule 37(b) sanctions in response to abusive litigation practices." (citation omitted)). "Pro se litigants, though generally entitled to 'special solicitude' before district courts, Triestman v. Federal Bureau of Prisons, 470 F.3d 471, 475 (2d Cir. 2006) (internal quotation marks omitted), are

not immune to dismissal as a sanction for noncompliance with discovery orders." Agiwal v. Mid Island Mort. Corp., 555 F.3d 298, 302 (2d Cir. 2009); accord Davis v. Citibank, N.A., 607 F. App'x 93, 94 (2d Cir. 2015)(summary order).

Finally, the defendants seek the imposition of sanctions pursuant to the Court's inherent power. "[A]ny federal court . . . may exercise its inherent power to sanction a party or an attorney who has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons.'" Ransmeier v. Mariani, 718 F.3d 64, 68 (2d Cir. 2013), quoting Chambers v. NASCO, Inc., supra, 501 U.S. at 45-46.

> [I]n Residential Funding [Corp. v. DeGeorge Fin. Grp., 306 F.3d 99 (2d Cir. 2002)], the Court of Appeals reiterated that "[e]ven in the absence of a discovery order, a court may impose sanctions on a party for misconduct in discovery under its inherent power to manage its own affairs." 306 F.3d at 106-07 (citing DLC Mgmt. Corp. v. Town of Hyde Park, 163 F.3d 124, 135-36 (2d Cir. 1998)); see generally Chambers v. NASCO, Inc., 501 U.S. 32, 43, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991) ("it has long been understood that '[c]ertain implied powers must necessarily result to our Courts of justice from the nature of their institution,' powers 'which cannot be dispensed with in a Court because they are necessary to the exercise of all others'") (quoting United States v. Hudson, 7 Cranch 32, 34, 3 L.Ed. 259 (1812)). Like sanctions under § 1927, sanctions under the Court's inherent power require a finding of bad faith.

Metro. Opera Ass'n v. Local 100, Hotel Emps. & Rest. Emps. Int'l Union, supra, 212 F.R.D. at 220. A court may impose sanctions pursuant to its inherent authority "only upon 'a particularized showing of bad faith', which requires '[] clear evidence that the challenged actions are entirely without color and are taken for reasons of harassment or delay or for other improper purposes'." Charles v. City of New York, 11 Civ. 2783 (AT) (RLE), 2015 WL 756886 at *3 (S.D.N.Y. Feb. 20, 2015) (Torres, D.J.), quoting United States v. Int'l Bhd. of Teamsters, 948 F.2d 1338, 1345 (2d Cir. 1991).

2. Application of the Foregoing Principles

Plaintiff's conduct warrants sanctions under Rules 26(g), 37(b)(2) and the Court's inherent power.

Plaintiff's Second Document Request was unquestionably prepared and served in bad faith and in a conscious effort to impose an unreasonable burden on defendants. As noted above, the remaining claims arise out of three transactions — plaintiff's 2009 transfer, his 2010 reinstatement and the kickstand incident. The service of more than 1,100 document requests in a case of this limited magnitude shocks the conscience, especially given the large number of requests that lack even the remotest connection to plaintiff's claims.

The extraordinary breadth of plaintiff's requests cannot be justified by any recalcitrance on the part of defendants with respect to document production. Defendants have produced approximately

1,000 pages of documents, including plaintiff's personnel file, his disciplinary record, employee handbooks, documents relating to plaintiff's workman's compensation claims, incident reports relating to plaintiff's claimed injury, plaintiff's payroll and attendance records and other documents. In response to plaintiff's contention that there was relevant ESI that had not been produced, defendants, pursuant to my Order, searched the mailbox of the custodian most likely to have relevant documents. That search yielded nothing of incremental value. In short, defendants have not taken unreasonable positions in discovery, and certainly have not taken any positions that warrant Plaintiff's Second Document Request.

Plaintiff also cannot justify his Second Document Request as the product of a pro se litigant's lack of sophistication. At the February 26 conference, I repeatedly advised plaintiff that his requests went far beyond what was usually seen in an employment discrimination action and suggested that he consider revising them.[11] The Order that

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[11] At the February 26, 2015 conference, I made the following comments to plaintiff:

> You may want to take a look at Rule 26(g). . . . After we finish, just wait for a few minutes. I'll have my clerk make a copy of Rule 26 and give it to you. Rule 26(g) provides as follows: By signing a discovery request, an attorney or a party certifies that, to the best of the person's knowledge, information and belief, or after reasonable inquiry with respect to a discovery request, response or objection, that it is consistent with these rules and warranted by existing rule or by a nonfrivolous argument for extending, modifying or reversing existing law, or for establishing new law, is

(continued . . .)

(continued . . .)

not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation, and that the request is neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy and the importance of the issues at stake.

Rule 26(g) goes on to provide that: If a certification violates the rule without substantial justification, the court, on motion or on its own motion, may impose an appropriate sanction on the signer, the party on whose behalf the signer was acting or both. The sanction may include an order to pay the reasonable expenses, including attorney's fees, caused by the violation.

Mr. Vaigasi, if you have, in fact, served discovery requests that relate only to dismissed claims, I'm telling you know that you may be running afoul of Rule 26(g). You may want to revisit the requests you've served and maybe think about withdrawing some of them.

* * *

I'm not deciding that today, but when you sign a discovery request, there are certain obligations that come with it, and if a discovery request is served to play games, you're going to have to get your checkbook out.

* * *

The rule is clear, and I'm not ruling on it today, but a thousand discovery requests, with the representation from [defense counsel] that they relate — that some of them relate to claims that have been dismissed — I'm not deciding today whether she's right or she's wrong, but if she's correct, you may wind up facing sanctions.

* * *

I'm suggesting to you that maybe you might want to consider withdrawing some of your requests to eliminate

(continued . . .)

resulted from the conference, which is quoted at page 20 above contained similar admonitions. Nevertheless, despite these repeated warnings, plaintiff refused to withdraw a single item from his Second Document Request.

The sheer number of plaintiff's document requests, his refusal to reconsider any of his requests and his own inability to justify each of the items in his Second Document Request, in conjunction with the other conduct discussed below, all point to the ineluctable conclusion that Plaintiff's Second Document Request was the product of a conscious effort to draft the most burdensome document requests possible.

Plaintiff is also subject to sanctions pursuant to Rule 37(b)(2)(A) for violating at least two of my discovery orders. On February 27, 2015, I issued an Order memorializing the rulings I made at the February 26 conference and directing that plaintiff complete his document production concerning his medical records, wage and earning information, mitigation efforts and his damages calculations by March 6, 2015 or provide a note from a physician confirming that plaintiff was physically unable to complete his document production (Order, dated Feb. 27 2015 (D.I. 239)). Defendant has done neither. The closest he has come to complying with this Order was a note

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(continued . . .)

> any Rule 26(g) motion that may exist here. I'm not saying a basis for a motion exists or not, but a thousand discovery requests are rarely seen in an employment discrimination case.

(2-26-15 Tr. at 59-61).

from a physician dated March 4, 2015, submitted on March 31, 2015, stating that plaintiff was "disabled and unable to work" (Letter from Plaintiff to the Undersigned, dated Mar. 31, 2015 (D.I. 269), Ex. A). Plaintiff's failure to complete production of his documents is particularly troubling given plaintiff's admission at his deposition that he has more than five boxes of files in storage that may contain documents relevant to this action and that he has not reviewed these files to determine whether they contain documents responsive to defendants' requests (Def'ts' Reply, Ex. A at 54-60).

I issued another Order on March 4, 2015, directing that plaintiff submit to a physical examination limited to those conditions that he claimed brought him within the coverage of the ADA (Order, dated Mar. 4, 2015 (D.I. 245)). To this day, plaintiff has not complied with that Order. Although plaintiff filed appeals from that Order, in the absence of a stay, plaintiff's appeal of that Order to Judge Berman, the Court of Appeals and the Supreme Court did not relieve him of the obligation of complying with that Order. Herskowitz v. Charney, 93 Civ. 5248 (MGC), 1995 WL 104007 at *3 (S.D.N.Y. Mar. 8, 1995) (Cedarbaum, D.J.) ("In the absence of a stay, the fact that a litigant has appealed to the District Court from a Magistrate Judge's discovery order does not excuse failure to comply with that order."); Litton Indus., Inc. v. Lehman Bros. Kuhn Loeb, Inc., 124 F.R.D. 75, 78–79 (S.D.N.Y. 1989) (Canella, D.J.) (filing objections to an order by a magistrate judge does not operate to automatically stay the magistrate judge's order); accord

Am. Rock Salt Co. v. Norfolk S. Corp., 371 F. Supp. 2d 358, 360 (W.D.N.Y. 2005).

Finally, plaintiff's conduct in this litigation suggests that he views the litigation itself as a vehicle to secure retribution for what he perceives as defendants' unfair treatment of him. In addition to his gargantuan discovery requests and his disobedience of at least two of my Orders, the record discloses the following obstructive behavior by plaintiff:

- Plaintiff has asserted objections to defendants' discovery requests that he claimed were legally deficient when these same objections were asserted by defendants (see footnote 4, above).
- Plaintiff has taken four interlocutory appeals from non-final Orders (D.I. 149, 192, 248 and 281). The filing of the last two appeals is particularly troubling because they were filed after the January 22, 2015 conference at which I explained the "final order" rule to plaintiff, advising him that, except for very rare situations, a federal appellate court would entertain an appeal only after a district court had issued a final order that disposed of all claims as to all parties.
- Plaintiff sought a conference, seeking "clarification" of the Court's subject matter jurisdiction, despite the facts that plaintiff brought this action under a federal statute, expressly alleged that jurisdiction existed and defendants never challenged this Court's subject matter jurisdiction (see endorsed Order, dated Jan. 30, 2015 (D.I. 211)).

- Plaintiff's refusal to withdraw any of his document requests, even after my admonitions to him to confer with defendants in good faith and my warnings to him concerning the consequences of improper discovery requests suggest that he has not conferred with defendants in good faith.
- Plaintiff's testimony at his deposition suggests that he may have no evidence whatsoever for his claims. For example, he was unable to answer what he believed were the reasons for the 2009 transfer, what decisions Calicchio made concerning plaintiff's employment, how often he interacted with certain other employees, and whether there was evidence of age discrimination other than the fact that the comparators plaintiff identified were younger than plaintiff (Def'ts' Reply, Ex. A at 213, 236, 238, 315-16).
- Plaintiff has cited unspecified physical limitations as excuses for his inability to comply with his discovery obligations while simultaneously prosecuting multiple meritless appeals and drafting his Second Document Request.

I have not failed to consider that plaintiff is proceeding pro se and is not familiar with judicial proceedings, nor have I overlooked the fact that discrimination is often subtle, frequently proved by circumstantial evidence, see Schiano v. Quality Payroll Sys., Inc., 445 F.3d 597, 603 (2d Cir. 2006), and sometimes warrants broad discovery. Golia v. Leslie Fay Co., 01 Civ. 1111 (GEL), 2003 WL 21878788 at *11 (S.D.N.Y. Aug. 7, 2003)

(Lynch, D.J.). Nevertheless, the foregoing behavior is so far beyond the bounds of reason, that the inference of plaintiff's bad faith is overwhelming.

3. The Appropriate Sanction

The factors relevant to the determination of the appropriate sanction for misconduct in discovery include: "(1) the willfulness of the non-compliant party or the reason for noncompliance; (2) the efficacy of lesser sanctions; (3) the duration of the period of noncompliance, and (4) whether the non-compliant party had been warned of the consequences of . . . noncompliance." Agiwal v. Mid Island Mortgage Corp., supra, 555 F.3d at 302-03 (quotation marks and citations omitted); accord Bambu Sales, Inc. v. Ozak Trading Inc., 58 F.3d 849, 852–54 (2d Cir. 1995). An application seeking the sanction of dismissal has to be considered with particular care. "[B]ecause dismissal is a drastic remedy, it should be imposed only in extreme circumstances, usually after consideration of alternative, less drastic sanctions." West v. Goodyear Tire & Rubber Co., 167 F.3d 776, 779 (2d Cir. 1999) (inner quotation marks and citations omitted); accord Metro Found. Contractors v. Arch Ins. Co., 551 F. App'x 607, 609-10 (2d Cir. 2014) (summary order); Reed v. Friedman Mgmt. Corp., 11 Civ. 7547 (JPO)(GWG), 2015 WL 5008629 at *5 (S.D.N.Y. Aug. 24, 2015) (Gorenstein, M.J.).

Application of the foregoing factors yields the following results.

a. The Willfulness of the Non-Compliant Party

For the reasons discussed above, I conclude that plaintiff's actions were willful and that plaintiff

acted in bad faith. This factor weighs in favor of a harsher sanction.

b. The Efficacy of Lesser Sanctions

Although defendants seek the ultimate sanction of dismissal, there are lesser sanctions that will further the purposes of sanctions.

Discovery sanctions serve a "threefold purpose": (1) to ensure that the wrongdoer does not benefit from his misconduct; (2) to secure compliance with discovery orders and (3) to deter the wrongdoer and others from engaging in similar conduct. Cine Forty-Second St. Theatre Corp. v. Allied Artists Pictures Corp., 602 F.2d 1062, 1066 (2d Cir. 1979); accord Granados v. Traffic Bar & Rest., Inc., 13 Civ. 500 (TPG)(JCF), 2015 WL 9582430 at *3 (S.D.N.Y. Dec. 30, 2015) (Francis, M.J.). Thus, the pertinent question is whether sanctions short of dismissal further these purposes.

With respect to plaintiff's overbroad document request, I have already stayed defendants' obligation to respond (Endorsed Order, dated Mar. 30, 2015 (D.I. 265)). Thus, defendants have not incurred the cost of responding to those requests. A protective order permanently relieving defendants of the obligation of responding to those requests and precluding plaintiff from serving any further document requests will ensure that plaintiff will not succeed in using discovery to wage a war of attrition. To the extent plaintiff has failed to complete production of his own documents or failed to answer questions at his deposition, an appropriate sanction is an order precluding plaintiff from offering or using any document that he has not already produced or that has not been produced by

defendants and precluding plaintiff from relying on facts that were asked about at his deposition but which he failed or refused to disclose.

With respect to the physical exam, an appropriate sanction is an order directing plaintiff to submit to the exam within thirty days of this Order with the proviso that if he fails to do so, his remaining claims will be dismissed with prejudice. The foregoing sanctions will ensure that plaintiff complies with my discovery order.

Finally, specific and general deterrence will be achieved through the imposition of an Order as required by Rules 26(g)(3) and 37(b)(2)(C) holding plaintiff liable for the reasonable attorney's fees defendants incurred in addressing the motions resolved herein and providing that, if plaintiff is unable to pay those fees, they will be a taxable cost against plaintiff at the conclusion of this action regardless of the outcome of this matter. I expect that the fees for which plaintiff is liable exceed $50,000 which is a potent deterrent both for plaintiff and the vast majority of litigants.

The availability and efficacy of these lesser sanctions weighs against the dismissal of a more severe sanction.

c. The Duration of the Period of Misconduct

Plaintiff's misconduct here occurred primarily between January and March 2015. It did not infect the entire proceeding. The relatively short duration of plaintiff's misconduct weighs against the imposition of a severe sanction.

d. Whether the Recalcitrant Party Had Been Warned of the Consequences of his Conduct

Plaintiff was warned about his conduct on multiple occasions. At the January 22 conference, I warned plaintiff that his interlocutory appeals were improper because they were not appeals from final Orders. At the February 11 conference, I warned plaintiff that his submission of an order to show cause that effectively sought to raise the same issues and arguments that I had previously rejected was "getting close to the edge" and that his actions were "getting close to the point where sanctions may be appropriate" (Transcript of Proceedings, dated Feb. 11, 2015 (D.I. 237) at 17). Finally, at the February 26 conference and in the resulting Order, I strongly suggested that plaintiff reconsider his Second Document Request and that he might face sanctions if they were improper.

Thus, the multiple warnings given to plaintiff weigh in favor of a more severe sanction.

e. Summary

On balance, I conclude that sanctions short of dismissal are the most appropriate resolution. Although plaintiff has engaged in serious, willful misconduct, his conduct is mitigated to some extent by his pro se status, and the relatively short duration of his misconduct.

I conclude that the following sanctions are appropriate:

1. Defendants are granted a protective order permanently relieving them of the

obligation of responding to Plaintiff's Second Request and plaintiff is precluded from serving any further document requests.

2. Plaintiff is precluded from offering or using at trial or in connection with any motion any document other than the documents that have previously been produced by plaintiff and defendants, and plaintiff is precluded from relying on facts that were asked about at his deposition but which he failed or refused to disclose.

3. Plaintiff is to submit to the limited physical examination that I previously ordered within thirty (30) days of the date of this Order. If plaintiff fails to submit to the physical examination, I shall issue a report and recommendation recommending that the action be dismissed with prejudice.

4. Within 14 days of the date of this Order, defendants are to submit an affidavit or affirmation (accompanied by contemporaneous time records) establishing the legal fees they incurred in preparing the motions resolved herein. With fourteen days of defendants' submission, plaintiff is to submit any response or opposition to the amount of fees sought by defendants. I shall then determine the amount of an appropriate fee award.

IV. Conclusion

Accordingly, for all the foregoing reasons, it is hereby ORDERED that:

1. Plaintiff's motion to compel defendants to produce documents and electronically stored information (D.I. 258) is denied in all respects.

2. Defendants' motion for a protective order relieving defendants of the obligation of responding to plaintiff's second request for the production of documents and notice of depositions (D.I. 274) is granted in part and denied in part. To the extent that defendants seek a protective order relieving them of the obligation of responding to Plaintiff's Second Request for the Production of Documents, the motion is granted. To the extent defendants seek relief from plaintiff's notice of depositions, the motion is granted except that plaintiff will be permitted to conduct two depositions of two witnesses (other than Stefan or Sheldon Solow), each deposition to be limited to a maximum of four hours of questioning by Plaintiff. A protective order precluding the depositions of Stefan and Sheldon Solow is conditionally granted provided that defendants submit within twenty-one (21) days of the date of this Order, affidavits or declarations from the Solows confirming their positions within the Corporate Defendants and confirming that they have no knowledge concerning the events underlying plaintiff's claims apart from what they may have learned from counsel.

3. Defendants' motion for sanctions (D.I. 285) is granted to the following extent:

a. Defendants are granted a protective order permanently relieving defendants of the obligation of responding to Plaintiff's

Second Document Request, and plaintiff is precluded from serving any further discovery requests.

b. Plaintiff is precluded from offering or using at trial or in connection with any motion any document other than the documents that have previously been produced by plaintiff and defendants and plaintiff is precluded from relying on facts that were asked about at his deposition but which he failed or refused to disclose.

c. Plaintiff is to submit to the limited physical examination that I previously ordered within thirty (30) days of the date of this Order. If plaintiff fails to submit to the physical examination, I shall issue a report and recommendation recommending that the action be dismissed with prejudice.

d. Plaintiff is required to pay the reasonable attorney's fees defendants incurred in addressing the motions resolved herein. If plaintiff is unable to pay these fees, they will be a taxable cost against plaintiff at the conclusion of this action regardless of the outcome of this action. Within fourteen (14) days of the date of this Order, defendants are to submit an affidavit or affirmation (accompanied by contemporaneous time records) establishing the legal fees they incurred in preparing the motions resolved herein and in opposing plaintiff's motion to compel. Within fourteen (14) days of defendants' submission, plaintiff is to submit any response or opposition to the amount of fees sought by defendants. I shall

then determine the amount of an appropriate fee award.

The Clerk of the Court is directed to mark Docket Items 258, 274 and 285 as "closed."

Dated: New York, New York
February 16, 2016

SO ORDERED

/s/
HENRY PITMAN
United States Magistrate Judge

Copies transmitted to:

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Appendix F

RELEVANT STATUTORY REFERENCES

42 U.S. Code § 1981 – Equal rights under the law

(a) Statement of equal rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined

For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

42 U.S. Code § 1983 – Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the

jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Fed. Rule Civ. Procedure 26. Duty to Disclose; General Provisions Governing Discovery

(g) Signing Disclosures and Discovery Requests, Responses, and Objections.

(1) Signature Required; Effect of Signature. Every disclosure under Rule 26(a)(1) or (a)(3) and every discovery request, response, or objection must be signed by at least one attorney of record in the attorney's own name—or by the party personally, if unrepresented—and must state the signer's address, e-mail address, and telephone number. By signing, an attorney or party certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry:

(A) with respect to a disclosure, it is complete and correct as of the time it is made; and

(B) with respect to a discovery request, response, or objection, it is:

(i) consistent with these rules and warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law;

(ii) not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; and

(iii) neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.

(2) Failure to Sign. Other parties have no duty to act on an unsigned disclosure, request, response, or objection until it is signed, and the court must strike it unless a signature is promptly supplied after the omission is called to the attorney's or party's attention.

(3) Sanction for Improper Certification. If a certification violates this rule without substantial justification, the court, on motion or on its own, must impose an appropriate sanction on the signer, the party on whose behalf the signer was acting, or both. The sanction may include an order to pay the reasonable expenses, including attorney's fees, caused by the violation.

Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

(b) Failure to Comply with a Court Order.

(2) Sanctions Sought in the District Where the Action Is Pending.

(A) For Not Obeying a Discovery Order. If a party or a party's officer, director, or managing agent—or a witness designated under Rule 30(b)(6) or 31(a)(4)—fails to obey an order to provide or permit discovery, including an order under Rule 26(f), 35, or 37(a), the court where the action is pending may issue further just orders. They may include the following:

(i) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims;

(ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;

(iii) striking pleadings in whole or in part;

(iv) staying further proceedings until the order is obeyed;

(v) dismissing the action or proceeding in whole or in part;

(vi) rendering a default judgment against the disobedient party; or

(vii) treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination.

(B) For Not Producing a Person for Examination. If a party fails to comply with an order under Rule 35(a) requiring it to produce another person for examination, the court may issue any of the orders listed in Rule 37(b)(2)(A)(i)–(vi), unless the disobedient party shows that it cannot produce the other person.

(C) Payment of Expenses. Instead of or in addition to the orders above, the court must order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.

NYS Executive Law §296. Unlawful discriminatory practices.

1. It shall be an unlawful discriminatory practice:

(a) For an employer or licensing agency, because of an individual's age, race, creed, color, national origin, sexual orientation, military status, sex, disability, predisposing genetic characteristics, familial status, marital status, or domestic violence victim status, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment.

6. It shall be an unlawful discriminatory practice for any person to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this article, or to attempt to do so.

7. It shall be an unlawful discriminatory practice for any person engaged in any activity to which this section applies to retaliate or discriminate against any person because he or she has opposed any practices forbidden under this article or because he or she has filed a complaint, testified or assisted in any proceeding under this article.

NYC Administrative Code § 8-107 Unlawful discriminatory practices.

1. Employment. It shall be an unlawful discriminatory practice:

(a) For an employer or an employee or agent thereof, because of the actual or perceived age, race, creed, color, national origin, gender, disability, marital status, partnership status, sexual orientation or alienage or citizenship status of any person, to refuse to hire or employ or to bar or to discharge from employment such person or to discriminate against such person in compensation or in terms, conditions or privileges of employment.

6. Aiding and abetting. It shall be an unlawful discriminatory practice for any person to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this chapter, or to attempt to do so.

7. Retaliation. It shall be an unlawful discriminatory practice for any person engaged in any activity to which this chapter applies to retaliate or discriminate in any manner against any person because such person has (i) opposed any practice forbidden under this chapter, (ii) filed a complaint, testified or assisted in any proceeding

under this chapter, (iii) commenced a civil action alleging the commission of an act which would be an unlawful discriminatory practice under this chapter, (iv) assisted the commission or the corporation counsel in an investigation commenced pursuant to this title, or (v) provided any information to the commission pursuant to the terms of a conciliation agreement made pursuant to section 8-115 of this chapter. The retaliation or discrimination complained of under this subdivision need not result in an ultimate action with respect to employment, housing or a public accommodation or in a materially adverse change in the terms and conditions of employment, housing, or a public accommodation, provided, however, that the retaliatory or discriminatory act or acts complained of must be reasonably likely to deter a person from engaging in protected activity.