

No. \_\_\_\_\_

---

IN THE

# Supreme Court of the United States

---

◆◆◆

FAYE BOATRIGHT,

*Petitioner,*

—v.—

U.S. BANCORP, U.S. BANK NATIONAL ASSOCIATION,  
and U.S. BANCORP INVESTMENTS, INC.,

*Respondents.*

---

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

---

## PETITION FOR WRIT OF CERTIORARI

---

NEIL MULLIN, ESQ.

*Counsel of Record*

NANCY ERIKA SMITH, ESQ.

SMITH MULLIN, P.C.

240 Claremont Avenue

Montclair, New Jersey 07042

(973) 783-7607

[nmullin@smithmullin.com](mailto:nmullin@smithmullin.com)

*Attorneys for Petitioner*

---

---

## **QUESTIONS PRESENTED FOR REVIEW**

In this Title VII case, the second circuit abandoned the constitutionally-compelled *de novo* standard of review of a summary judgment grant required under *United States v. Diebold*, 369 U.S.654 (1962), and progeny. The circuit inverted that standard, disregarding all of Petitioner-employee's evidence and adopting only the Respondent-employers' contentions. In abandoning *Diebold*, the circuit relied upon a widespread local rule that allows a court to "deem admitted" a movant's evidence as a sanction for a purported deficiency in a non-movant's factual submissions. While Fed. R. Civ. Proc. 56 allows discrete facts to be deemed undisputed where a non-movant has failed to adequately dispute those specific facts, this Court and the Seventh Amendment forbid sanctioning a non-movant by ignoring all of her evidence.

The questions presented are:

1. Whether *Diebold* and the Seventh Amendment prohibit a circuit court reviewing a grant of summary judgment from sanctioning a non-movant under a local "deemed admitted" rule by completely abandoning *de novo* review and crediting only the movant's facts.
2. Whether the second circuit erroneously affirmed summary judgment in favor of movants-employers where the non-movant employee proved *prima facie* elements of discrimination and retaliation and provided unrefuted evidence of the employers' mendacity about the central issue in the case in their submissions to the EEOC and in federal court answers to Petitioner's complaint.

**PARTIES TO THE PROCEEDING**

The following is a list of all parties to the proceedings in the court below as required by Rule 24.1(b) and Rule 29.1 of the Rules of the Supreme Court of the United States:

1. Faye Boatright, Plaintiff/Appellant
2. U.S. Bancorp, Defendant/Appellee
3. U.S. Bank National Association, Defendant/Appellee
4. U.S. Bancorp, Investments, Inc., Defendant/Appellee
5. Neil Marc Mullin, Attorney for Plaintiff/Appellee; and
6. Jonathan Stoler, Attorney for Defendants/Appellees
7. Eric David Raphan, Attorney for Defendants/Appellees; and
8. Lindsay C. Stone, Attorney for Defendants/Appellees.

**RELATED PROCEEDINGS**

*Boatright v. U.S. Bancorp*, No. 18 CV7293, 2020 WL 7388661 (S.D.N.Y. Dec. 16, 2020).

*Boatright v. U.S. Bancorp*, 2022 WL 351059 2<sup>nd</sup> Cir. (N.Y.) Feb. 07, 2022

## **TABLE OF CONTENTS**

	PAGE
QUESTIONS PRESENTED FOR REVIEW.....	i
PARTIES TO THE PROCEEDINGS .....	ii
RELATED PROCEEDINGS.....	ii
TABLE OF AUTHORITIES .....	v
OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS AND ORDERS.....	1
JURISDICTION.....	1
CONSTITUTIONAL PROVISION INVOLVED.....	1
STATEMENT OF THE CASE .....	1
REASONS FOR GRANTING THE PETITION .....	14
1. This Court should grant <i>certiorari</i> because this case presents an unsettled issue of national importance, to wit, whether under a common, local, “deemed admitted” rule a circuit court may abrogate the <i>de novo</i> standard of appellate review for grants of summary judgment long-established by this Court as a bulwark against violation of the Seventh Amendment right to a civil jury trial .....	14

2. This Court Should Grant <i>Certiorari</i> to Resolve Conflicts and Confusion Among the Circuit Courts About How to Treat a Non- Movant’s “Additional Material Facts” Once the Court has “Deemed Admitted” the Movant’s Facts Because of a Purported Deficiency in the Non-Movant’s Enumerated Responses to a Movant’s Enumerated Statement of Allegedly Undisputed Facts .....	19
CONCLUSION .....	24
<b>APPENDIX:</b>	
Mandate of the U.S. Court of Appeals for the Second Circuit, dated February 28, 2022 .....	1a
Summary Order of the U.S. Court of Appeals for the Second Circuit, dated February 7, 2022 .....	9a
Opinion and Order of the U.S. District Court of the Southern District of New York, dated December 16, 2020 .....	20a
Selected pages of Plaintiff’s Rule 56.1 Statement of Additional Material Facts, dated April 13, 2020 .....	78a

## TABLE OF AUTHORITIES

	PAGE(S)
<b>Cases</b>	
<i>Anderson v. Liberty Lobby Inc.</i> , 477 U.S. 242 (1986) .....	15
<i>Beard v. Banks</i> , 548 U.S. 521 (2006) .....	14, 15
<i>Boatright v. U.S. Bancorp</i> , 2022 WL 351059 2nd Cir. (N.Y.) (Feb. 07, 2022) .....	1
<i>Boatright v. U.S. Bancorp</i> , No. 18 CV 7293, 2020 WL 7388661 (S.D.N.Y. Dec. 16, 2020).....	1
<i>CMI Capital Mkt. Invest., LLC v. González-Toro</i> , No. 06-2623, 2008 WL 713577 (1st Cir. March 18, 2008) .....	21
<i>Eastman Kodak Co. v. Image Tech. Servs., Inc.</i> , 504 U.S. 451 (1992) .....	14
<i>Euromodas, Inc. v. Zanella, Ltd.</i> , 368 F.3d 11 (1st Cir. 2004).....	20
<i>Fid. &amp; Deposit Co. of Maryland v. United States</i> , 187 U.S. 315 (1902) .....	16
<i>Hernandez v. Philip Morris USA, Inc.</i> , 486 F.3d 1 (1st Cir. 2007).....	21
<i>Hill v. Thalacker</i> , No. 06-1265, 2006 WL 3147274 (7th Cir. Nov. 1, 2006) .....	21, 22

<i>Lombardo v. City of St. Louis, Missouri,</i> 141 S. Ct. 2239, 210 L. Ed. 2d 609 (2021) .....	7
<i>Northwest Bank &amp; Trust Co. v. First Ill. Nat'l Bank,</i> 354 F.3d 721 (8th Cir. 2003) .....	20, 21
<i>Reeves v. Sanderson Plumbing Prod., Inc.,</i> 530 U.S. 133 (2000) .....	6
<i>Riordan v. Kempiners,</i> 831 F.2d 690 (7th Cir. 1987) .....	18
<i>Smith v. Lamz,</i> 321 F.3d 680 (7th Cir. 2003) .....	22
<i>St. Mary's Honor Ctr. v. Hicks,</i> 509 U.S. 502, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993) .....	6, 15
<i>Strauss v. Hensey,</i> 7 App. D.C. 289 (D.C. Cir. 1895).....	16, 17
<i>Tatalovich v. City of Superior,</i> 904 F.2d 1135 (7th Cir. 1990) .....	22
<i>Texas Dept. of Community Affairs v. Burdine,</i> 450 U.S. 248 (1981) .....	15
<i>Tolan v. Cotton,</i> 572 U.S. 650 (2014) .....	7
<i>United States v. Diebold,</i> 369 U.S. 654 (1962) .....	6, 14
<i>U.S. Equal Employment Opportunity Commission v. Big Lots Store, Inc.,</i> 2:17-CV-73 (JRB) 2018 WL 465413 (N.D. East Virginia September 27, 2018).....	9

<i>United States Constitution Fid. &amp; Deposit Co. of Maryland v. United States, 187 U.S. 315 (1902) .....</i>	16
--	----

## Rules

8 A.L.R. Fed. 2d 611, <i>Application of Local District Court Summary Judgment Rules to Non- moving Party in Federal Court.</i> (2022) .....	17
Fed. R. Civ. P. 11 .....	9
Fed. R. Civ. P. 56 .....	19
Fed. R. Civ. P. 56(e) .....	15
Rule 56.1 .....	<i>passim</i>
Rule 56.1(b) .....	2
Rule 56.1(c) .....	3
Rule 311.12 .....	20

## Statutes

18 U.S.C. § 1001.....	9
28 U.S.C. § 1254(1) .....	1
42 U.S.C. §§ 2000e–1, <i>et seq.</i> , Title VII of the Civil Rights Act .....	1
42 U.S.C. §1981a(c).....	14

## **OFFICIAL AND UNOFFICIAL REPORTS OF OPINION AND ORDERS**

In *Boatright v. U.S. Bancorp*, 2022 WL 351059 2<sup>nd</sup> Cir. (N.Y.) (Feb. 07, 2022), the second circuit affirmed a district court grant of summary judgment in favor of all defendants. In *Boatright v. U.S. Bancorp*, No. 18 CV 7293, 2020 WL 7388661 (S.D.N.Y. Dec. 16, 2020), the district court granted defendants' motion for summary judgment.

### **JURISDICTION**

The judgment of the circuit court was entered February 7, 2022 and jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### **CONSTITUTIONAL PROVISION INVOLVED**

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, other than according to the rules of the common law.

U.S. Const. amend. VII.

### **STATEMENT OF THE CASE**

1. Petitioner Faye Boatright, a Black female banker, sued Respondents, her former employers, for gender and race-based salary discrimination and retaliatory termination in violation of Title VII of the Civil Rights Act of 1964 (“Title VII”), 42 U.S.C. §§ 2000e–1, *et seq.* (hereinafter “Title VII”) as well as state and local anti-discrimination laws. Respondents moved for summary judgment and in accordance with

U.S. Dist. Ct. Rules S. & E.D.N.Y. Civ. Rule 56.1 (hereinafter “local rule 56.1” or “rule 56.1”), submitted a statement of allegedly “undisputed facts” with 236 paragraphs. (R.155 *et seq.*)

2. Petitioner responded to each of Respondents’ numbered paragraphs, admitting or denying them in whole or part and meticulously citing record evidence or making objections allowed by Fed. R. Civ. Proc. 56. (R.2185 *et seq.*)

3. As permitted by local rule 56.1(b), Petitioner submitted also a “Statement of Additional Material Facts” (R. 2311 *et seq.*, hereinafter the “SAMF”) setting forth 525 enumerated paragraphs cited to the evidentiary record in support of Petitioner’s claims of discriminatory and retaliatory animus including evidence of Respondents’ outright mendacity before the EEOC about the central issue in the case, Petitioner’s compensation level as compared to a White male comparator, as well as evidence showing Respondents’ disparate treatment of Petitioner in the workplace such as shunning of her in the workplace by her White superior who, by contrast, worked closely with Petitioner’s White male co-workers; Respondents’ failure to provide staff for Petitioner while staffing her White comparator with numerous junior bankers; and Respondents’ creation of the acronym “NIG” for her department. Also, Petitioner’s SAMF detailed Respondents’ retaliation against her which began immediately after she complained internally of discrimination to Respondents’ executives. The SAMF detailed Respondents’ creation of a “paper trail” of exaggerated and false criticism and their decision to fire her on a pretext shortly after Respondents learned she had filed an EEOC charge. (See, selected pages of the SAMF submitted with this Petition at pp.78a to 135a.)

4. On reply, the Respondents did not file any refutation of the evidence-supported contentions in Ms. Boatright's SAMF. However, in violation of 28 U.S.C. §1746 which requires declarations to be sworn "under penalty of perjury," Respondents filed an unsworn "Reply Declaration" (R 2485 to 2660) that falsely alleged that in 48 (out of 762) paragraphs of her opposition submissions Petitioner "had failed provide any record citations." (R2486) In truth, Petitioner had provided record citations in 42 of the cited paragraphs and had provided appropriate objections under Fed. R. Civ. Proc 56 in the remaining 6 paragraphs. (R. 2185 *et seq.*)

5. In granting and affirming summary judgment, both the district and circuit courts chose to disregard the material evidence of discriminatory and retaliatory intent set forth in Petitioner's SAMF and her direct response to Respondents' "facts." Both courts instead adopted the Respondents' version of facts as a sanction against Petitioner under a local rule which provided, *inter alia*, "that each numbered paragraph...set forth in the statement required to be served by the moving party will be **deemed** to be **admitted** for purposes of the motion unless specifically controverted...by the opposing party." Local Rule 56.1(c). Though the district court did not cite to Respondents' false, unsworn declaration, that court repeated its baseless allegation that Petitioner had deficiently answered Respondents' factual submissions. The district court, ruled that the "facts" in its opinion were "drawn from Defendants' [Respondents'] 56.1 statement...and are either assented to or responded to by Plaintiff [Petitioner] with objections that do not contain citations to admissible evidence. Except where otherwise noted,

the facts are undisputed for purposes of this motion.” (21a)

6. In fact, Petitioner’s hundreds of enumerated paragraphs answering Respondents’ submissions “contain[ed] citations to admissible evidence.” (R.2185 to 2423) There was no basis at all for the district court’s assertion to the contrary, nor was there any basis at all in statutory or decisional law for a district court to disregard a non-movant’s evidence, much less to disregard evidence in Petitioner’s SAMF that Respondents had not refuted.

7. Fed. R. Civ. Proc. 56(e)(2) does not give a court authority to completely adopt the entirety of a moving party’s facts where there is an alleged deficiency in a specific factual response by a non-moving party. The rule allows a court to deem “undisputed” only the specific facts that a non-moving party has failed to dispute. Yet the circuit and district courts, without identifying in its opinion Petitioner’s supposed specific deficient disputation, undertook a blanket adoption of Respondents’ facts as a sanction under Local Rule 56.1.

8. Despite its sweeping adoption of Respondents’ facts, the district court found Petitioner had established basic elements of *prima facie* cases of salary discrimination and retaliation based on temporal proximity between when Respondents learned of Petitioner’s EEOC charge and when they fired her. (53a to 59a; 68a to 70a) Yet, ignoring or diminishing extensive evidence of invidious intent documented in Petitioner’s SAMF, the district court concluded there was no evidence of such intent and there was no evidence of a “nexus” between Petitioner’s protected activity and her termination,

and granted summary judgment. (53a to 68a; 68a to 76a)

9. The second circuit affirmed, beginning its opinion with a finding that “Boatright’s responses to the Defendant’s Rule 56.1 Statement did not properly controvert the statement of material facts relevant to this appeal as required by Local Rule 56.1.” (3a to 4a) The only “evidence” in support of that observation was Respondents’ false, unsworn “declaration,” though the circuit did not cite it. As noted, it was actually Respondents who completely failed to offer an enumerated refutation of Petitioner’s SAMF.

10. Although the district court, despite its 56.1 ruling, had found Petitioner to have proven all elements of a *prima facie* case but intent, the circuit court, completely ignored that ruling and the evidence in Petitioner’s SAMF, ruled that “The only fact that Boatright appears to specifically controvert is the Defendants’ claim that she was regarded as a ‘coverage banker’ at the time of hire.” (4a, fn.1)

11. As a sanction for Petitioner’s alleged violation of Local Rule 56.1, the circuit went on 1) to completely adopt Respondents’ facts, 2) to ignore Petitioner’s submissions and particularly to ignore unrefuted evidence of mendacity and retaliatory animus set forth in Petitioner’s unrefuted SAMF (78a to 135a; R.2311 *et seq.*), and 3) to ignore the finding of *prima facie* elements by the district court.

12. In sum, having ignored Petitioner’s evidence of invidious and retaliatory intent, pursuant to the “deemed admitted” rule, the circuit court concluded that there was no evidence of invidious or retaliatory intent, *i.e.* that “there was a total absence of race- or gender-based motivation or animus.” (6a; 8a)

13. As to Petitioner's evidence of Respondents' mendacity concerning the central issue in the case, salary discrimination, the circuit court concluded that "Even if the Defendants' proffered reasons were false, that alone would not carry Boatright's burden at this stage, given the absence of evidence that 'reasonably supports a finding of discrimination.'"(6a) Yet there was no such "absence of evidence" because the district court had found *prima facie* evidence of discrimination and retaliation and, as this Court has held, "A plaintiff's *prima facie* case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." *Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133, 147 (2000). "The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the *prima facie* case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination." *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511, 113 S. Ct. 2742, 2749, 125 L. Ed. 2d 407 (1993).

14. The circuit court decision, premised on Local Rule 56.1, amounts to a complete and unjustified abandonment of the standard of review for summary judgment in disregard of the norms established by this Court in *United States v. Diebold, Inc.*, 369 U.S. 654 (1962) and its extensive progeny. "On summary judgment, the inferences to be drawn from the underlying facts contained in [submitted] materials must be viewed in the light most favorable to the party opposing the motion." *Id.* at. 655. Over the decades, this Court has repeated and itself modeled

the *Diebold* appellate standard of review of a grant of summary judgment on this principle. Thus, very recently reviewing a grant of summary judgment, this Court opined that, “Because this case was decided by summary judgment, the evidence here recounted is viewed ‘in the light most favorable’ to the nonmoving party... *Tolan v. Cotton*, 572 U.S. 650, 655 (2014) (per curiam).” *Lombardo v. City of St. Louis, Missouri*, 141 S. Ct. 2239, 2240, 210 L. Ed. 2d 609 (2021).

15. The circuit court’s abandonment of *de novo* review is particularly troubling given the facts, ignored by the court, that bear upon the very integrity of our judiciary, *i.e.*, indisputable evidence that Respondents lied to the EEOC and pled falsely in federal court about the central issue in this case, the salary differential between Petitioner and a White male comparator. (79a to 83a; 93a to 94a) In that regard, Respondents hired Petitioner Faye Boatright on January 30, 2012 as Managing Director, Grade 18, in the New York City office of a newly-started unit within their bank dedicated to funding governmental infrastructure projects, the Public Finance Group (“PFG”). She reported to Steven A. Wallace. (R. 95,98.1395. 2333-2334). About 6 months before Ms. Boatright’s hire, Respondents hired Paul Scott Nagelson, a White male, for the same position as Petitioner’s in the Respondents’ San Francisco office for the PFG start-up, also reporting to Wallace. (R. 532-533, 2333-2334) Although Respondents falsely contended on summary judgment that the jobs were different, and the circuit court accepted that contention as true without addressing Petitioner’s evidence (5a), Wallace admitted in an email that Ms. Boatright and Nagelson were hired for equivalent positions as “Lead Infrastructure Bankers” for

Respondents' "eastern and western regions." (R.1525, 2342) In the fall of 2015, Petitioner Faye Boatright filed an EEOC charge against her then-employers, the Respondents, alleging gender- and race-based discrimination as to compensation and other terms and conditions of employment. A few days after learning of the charge, on December 2, 2015, Respondents decided to fire Ms. Boatright. (R. 1110, 1102-08; R. 1853) As detailed in Petitioner's SAMF but ignored by the circuit court, the EEOC, in a highly specific interrogatory question, demanded that Respondents submit details of Petitioner's, Nagelson's and various White male comparators' total annual earnings including base pay, bonuses and all other forms of compensation. (80a) In their response to the EEOC interrogatory, Respondents submitted a chart that, under the heading "Compensation History," mis-portrayed Petitioner and Nagelson as having a *de minimus* difference in compensation levels. For 2012 through 2015, the chart portrayed Petitioner's "compensation" as ranging from 200 to 205K while Nagelson's ranged from 220K through 225K. (80a to 82a) Later, in Respondents' federal court Answer and Amended Answer in this litigation, Respondents specifically denied that there was any difference at all between Ms. Boatright's and Mr. Nagelson's starting compensation). The circuit court completely disregarded the fact that in response to Petitioner's complaint allegation that "At the time Plaintiff was hired, the Defendant bank [Respondents] paid her a lower starting salary/compensation than Mr. Nagelson," Respondents falsely answered, in two pleadings, that they "deny each and every allegation set forth in Paragraph 34 of the complaint." (Complaint, ¶34; R14 to 34; Answer, ¶34, R.35 to 39; Amended Answer, ¶34, R-53 *et seq.*) In other words,

Respondents pled that Plaintiff's starting salary was not less than Nagelson's starting salary.

16. The truth, disregarded by the circuit court under its "deemed admitted" rule, was that the difference between Petitioner's and Nagelson's starting salary, when annualized, was over \$1 million, with Nagelson's 2011 compensation (including a guaranteed 2011 bonus) at \$1.24 million and Petitioner's starting 2012 salary at \$200,000.00 per year without any guaranteed bonus. During the following years, Respondents paid Nagelson on average about \$185,000 per year more than Boatright. Thus, as to that annual compensation, Respondents lied to the EEOC by a factor in excess of 1400%. (81a, 93a to 94a). At the time of Nagelson's hire, Respondents' own Vice President of Human Resources wrote that the salary being offered him was unjustified by his salary history, (95a), a party admission the second circuit elected to ignore.

17. Respondents' blatant falsehoods to the EEOC violated Federal criminal law prohibiting intentionally false statements to a federal agency. Intentionally providing false information to the EEOC is a crime under 18 U.S.C. § 1001. *U.S. Equal Employment Opportunity Commission v. Big Lots Store, Inc.*, 2:17-CV-73 (JRB) 2018 WL 465413 at \*9 (N.D. East Virginia September 27, 2018). Respondents' two false pleadings, ignored by the circuit court, violated Fed. Rule Civ. Proc. 11.

18. The circuit court also ignored the fact that the EEOC determined that Respondents had for nine months withheld critical compensation information from the agency. On that basis, the EEOC found "reasonable cause" to believe Respondent has subjected the Charging Party [Ms. Boatright] to

compensation discrimination in connection to her race and sex." (82a to 83a)

19. In the face of this evidence, the circuit court, true to its Local Rule 56.1 commitment to Respondents' version of the facts, concluded there was no mendacity at all in this case, opining, contrary to Petitioner's unrefuted evidence, that Respondents had in fact "acknowledged a pay gap between Boatright and Nagelson." (5a) The circuit concluded that Respondents were not guilty of offering "shifting explanations" for the gap between Boatright's and Nagelson's compensation although Respondents' first line of defense, in their Answers and before the EEOC, was that there was virtually no difference between the salaries and therefore there was no discrimination, while its second line of defense, after discovery revealed a vast gap between the salary levels, was that there were legitimate business reasons for the differential, the very "reasons" uncritically accepted by the circuit court. The circuit uncritically adopted Respondents' second defense and found no "shifting explanations" in Respondents' defense. (5a)

20. Consistent with its Rule 56.1 decision to credit only Respondents' evidence, the circuit court concluded that Respondents had legitimate business justifications for paying Nagelson more than Boatright. The Circuit ignored evidence that Nagelson did not meet even the "essential qualifications" of the job as defined by Respondents' job description (R.1395; 90a to 92a) because he had no MBA (83a) and had supervised only one person in 19 years (84a to 89a) while Petitioner had a Stanford BA and a Wharton MBA (R.2180) and had managed large teams of financial professionals. (R.2318 to R.2321; R. 2181, R.1482, R.1502) The circuit court ignored evidence

that Nagelson's salary history on the eve of his hire was one of declining annual income. (R. 554-56) The circuit ignored documentary evidence that Respondents' own Vice President of Human Resources complained in an email that Nagelson's high starting salary was unjustified by his salary history. (R. 554) The circuit adopted Respondents' claims that Nagelson was more qualified for the job than Ms. Boatright because he had a Series 53 license, ignoring the fact that Respondents' own job description had no such requirement and that Respondents only sponsored White males to take the qualifying examination for that license. (R. 2180, 2325-26) The circuit court cited Nagelson's revenue generation as compared to Boatright's as justification for Nagelson's salary, ignoring Petitioner's unrefuted evidence that Respondents gave Nagelson a large support team while denying such staff to Petitioner. (103a to 110a) The circuit court ignored evidence that despite such disparate treatment, in 2014 Boatright, without any support team, surpassed Nagelson on revenue generation. (111a to 112a)

21. Unmentioned by the circuit court is the fact that at a meeting recognizing Nagelson's promotion, he, addressing staff and executive management, said from the podium that he planned to rename the group, which was then called the Government Infrastructure Group, *i.e.* GIG, as the Public Infrastructure Group but, he said, he realized it would then have the acronym PIG. Having drawn the audience's attention to the group's acronym, he said that he thereafter decided to call the group the National Infrastructure Group, creating the acronym NIG, at which some in the virtually all-White audience chuckled. Nagelson later admitted under

oath, that the comment was not appropriate. (129a to 130a; R.1850, 1473, 1850, 1954-5, 2084)

22. Crediting only Respondents' evidence, the circuit court completely minimized evidence that when Ms. Boatright's superior, Wallace, came to visit her office in New York City and at conventions, he shunned her and instead went out to business lunches and dinners with White male staff, to which he did not invite her though she was a Managing Director. (R. 1477-48, 2384, 1923, 1926). The circuit court reduced this to a claim that Wallace "took others" to lunch, neglecting to mention the racial and gender component of Wallace's behavior. (114a to 115a)

23. The circuit court ignored virtually all the material evidence proffered by Petitioner concerning retaliation. For her first 3 years of employment by Respondents, January 2012 through the end of 2014, she received no written criticism of her job performance—in the entirety of the record below, Respondents produced no such evidence. In December 2014, Ms. Boatright complained to Respondents' Vice-Chairman and Respondents' Human Resources Manager about racial and gender-based discrimination including having virtually no assigned support staff while her White male comparator, Nagelson, had 5 to 7 such reports, being paid less than Nagelson, and being shunned by her superior, Wallace, when he visited the New York City office he took White male subordinates out for business meals but never even visited her in her office, though she headed the department. (117a to 121a) Respondents immediately retaliated. Respondents' HR department told Wallace of Boatright's complaints and asked him for anything he had "documented" on the Petitioner. (121a) He

immediately and secretly listed 21 persons with whom he falsely claimed Petitioner had “conflicts.” (R.902-03, R. 1936-37) He then promoted Nagelson over Petitioner, although he had in 2014 generated less revenue than Petitioner (R.2396, R.2397 to 2400). Thereafter, Nagelson, in close coordination with Respondents’ Human Resources department, began creating a “paper trail” with false or exaggerated claims about Petitioner’s job performance, which paper trail became Respondents’ defense evidence in this case.(124a to 126a; 130a) Evidencing Respondents’ disbelief in their own contentions, during the entirety of 2015, Respondents did not terminate, demote, or suspend Petitioner, who continued to work diligently and who, just before her termination, won a deal for Respondents to underwrite bonds for the Metropolitan Washington Airport Authority. (132a)

24. However, immediately after Respondents learned in December 2015 that Petitioner had filed an EEOC charge against them, Respondents made a decision to terminate Petitioner’s employment, and executed that decision on January 12, 2016. (132a to 134a). The decision was made by Nagelson, the manager who had named the department NIG, Wallace, the executive who shunned Ms. Boatright while conducting business lunches and dinners with White employees and who assigned Petitioner a salary far below that of the unqualified Nagelson, and Kolman, Wallace’s superior. (134a)

In sum, the circuit court completely abandoned its obligation as an appellate court to view all the evidence in a light favoring Ms. Boatright and to draw all reasonable inferences in her favor. The court did the very opposite of what was required by *Diebold* and its progeny. The circuit rigidly credited only

Respondents’ “facts” pursuant to the “deemed admitted” local rule and having ignored Petitioner’s evidence of racial and gender-based animus, found there was no evidence of such animus. On that basis the circuit deprived Petitioner of a jury trial she was entitled to under Title VII, local civil rights laws, and the Seventh Amendment of the United States Constitution.

#### **REASONS FOR GRANTING THE PETITION**

- 1. This Court should grant *certiorari* because this case presents an unsettled issue of national importance, to wit whether under a common, local “deemed admitted” rule a circuit court may abrogate the *de novo* standard of appellate review for grants of summary judgment long-established by this Court as a bulwark against violation of the Seventh Amendment right to a civil jury trial.**

This Court has not decided the issue presented here involving the intersection of the “deemed admitted” rule and the decades old *de novo* standard of appellate review for summary judgment grants articulated in *United States v. Diebold*, 369 U.S.654 (1962), *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 466 (1992), and progeny. The court touched upon the matter in *Beard v. Banks*, 548 U.S, 521 (2006), where on review of a circuit court’s rulings about summary judgment motions in a prisoners’ rights case, the plurality was faced with a record where the non-moving party had not complied with the rules governing summary judgment submissions at all but instead of filing any factual

response to the movant's facts, filed a cross-motion for summary judgment. Despite that total non-compliance, this Court nevertheless "recognized that "at this stage we must draw 'all justifiable inferences,' in [the non-moving party's] favor." *Id.* at 529 to 530, citing *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 255 (1986).

If in the face of total non-compliance, this Court in *Beard* nevertheless applied the traditional *de novo* standard, generous to the non-moving party, then *a fortiori*, in cases such as this where there is compliance with the rules governing factual submissions, the courts should identify specific facts "deemed admitted" but then go on to view the totality of evidence generously in favor of the non-moving party. Here, the circuit court should have, but did not, specifically identify those of Respondents' enumerated paragraphs it found Petitioner to have inadequately disputed, deemed only those Respondents' facts to be true pursuant to Fed. R. Civ. Proc. 56(e), and then, viewing the totality of the evidence, especially evidence of mendacity and animus in Petitioner's unrefuted Statement of Additional Material Facts, in a light favoring the Petitioner and drawing all inferences in her favor, the court should have determined whether Petitioner survived summary judgment under employment law precedents such as *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981) and *St. Mary's Honor Center v. Hicks*, 509 U.S. 502. Here, given the district court's conclusion that Plaintiff made out elements of a *prima facie* case for purposes of summary judgment and given the unrefuted evidence of Respondents' mendacity about the central issue in this case and Petitioner's evidence of disparate treatment, the circuit court should have reversed the district court's

grant of summary judgment and remanded the matter for trial.

Instead, the circuit court construed local rule 56.1 to effectively override this Court’s summary judgment precedent requiring a reviewing court to view the evidence in a non-movant’s favor and to draw all reasonable inferences in favor of a non-movant. Indeed, the circuit court here, like the district court, completely disregarded evidence in Petitioner’s undisputed “Statement of Additional Material Facts,” a submission explicitly allowed by local rule 56.1(b), which evidence supported Petitioner’s proofs of the most important fact in this case, Respondents’ discriminatory and retaliatory intent. In that regard, the circuit court, limiting itself solely to Respondents’ version of the facts, ignored Petitioners’ documentary evidence concerning Respondents’ mendacity about a central issue in the case—compensation discrimination—and her evidence about Respondents’ disparate treatment of her, a Black woman, as compared to white male co-workers.

No local rule may be construed to violate the holdings of this Court concerning the appellate standard of review for grants of summary judgment. This holds with special force, because the *Diebold* standard is rooted in this Court’s early precedents upholding summary judgment against claims that the procedure violates the Seventh Amendment of the United States Constitution. In *Fid. & Deposit Co. of Maryland v. United States*, 187 U.S. 315, 318 (1902), this Court, rejecting a Seventh Amendment attack on a Washington D.C. summary judgment procedure for contract disputes, required that “the facts stated in the affidavit of defense [i.e. the non-movant’s opposition certification] will be accepted as true.” *Id.* at 320, citing, *Strauss v. Hensey*, 7 App. D. C. 289, 36

L. R. A. 92 (D.C. Cir. 1895). In the cited *Hensey*, this Court ruled that viewing the non-movant's opposition affidavit generously was a bulwark against summary judgment violating the right to civil trial by jury:

"The court cannot question or traverse the truth of the facts stated in the defendant's [non-movant's] affidavit. [To] [t]hose facts the court is bound, for the purposes of securing to the defendant the right of trial, to assume as true, and that, too, without reference to what the plaintiff [movant] may have stated in his affidavit. If the facts stated by the defendant, by any reasonable or fair construction, will constitute a defense to the action or claim of the plaintiff, within the scope of the pleas pleaded, it is the absolute constitutional right of the defendant to have that defense regularly tried and determined, in due course of judicial investigation. No rule, however beneficial it may be thought to be, as means of preventing the use of sham or feigned defenses, or desirable for the expedition of business, can deprive the defendant of this right.

*Strauss v. Hensey*, 7 App. D.C. 289, 294 (D.C. Cir. 1895).

In construing Local Rule 56.1 to completely invert the constitutionally-compelled standard of *Diebold*, its predecessors and progeny, by viewing the Respondents-movants' submissions as true, drawing all inferences in favor of them, and ignoring the non-movant's evidence, the second circuit has violated well over a century of this Court's settled precedent. Local 'deemed admitted' rules abound across the federal courts and are routinely used to as a basis for granting or affirming grants of summary judgment. 8

A.L.R. Fed. 2d 611, *Application of Local District Court Summary Judgment Rules to Non-moving Party in Federal Court*. (2022). For that reason, it is of critical importance that this Court to grant certiorari in this matter to assure that local “deemed admitted” rules are not used to abrogate or invert the constitutionally-compelled, non-movant-friendly, *de novo* standard of review.

Such a ruling, requiring that evidence be viewed in its totality and generously to the non-movant, is especially important in matters such as this discrimination case, given the inherent difficulty in proving discriminatory and retaliatory intent, because employers generally do not admit or record such animus—“defendants of even minimal sophistication will neither admit discriminatory animus nor leave a paper trail demonstrating it ....” *Riordan v. Kempiners*, 831 F.2d 690, 697 (7th Cir. 1987). Given the fact-sensitivity of that issue, the requirement of a generous, *de novo* review standard must be protected if there is to be any hope of meritorious cases like this one surviving summary judgment and advancing to a jury trial. Despite the administrative benefits of rigorous summary judgment rules and the efficiency with which such rules root out meritless cases, the overly aggressive application of local summary judgment rules, especially in a civil rights case or any other matter involving animus, intent or scienter, undermines the public perception of our judiciary as a fair and equitable forum.

Here, Ms. Boatright was entitled to a jury trial under Title VII, 42 U.S.C. § 1981a(c), and under the Seventh Amendment because she submitted evidence showing the existence of genuine issues of material fact concerning all of her claims. The circuit court

below deprived her of that right by abrogating the long-settled rule of this Court that when reviewing a grant of summary judgment, courts should “deem admitted” only what is actually admitted, and thereafter view the record generously to the non-movant. This Court should grant *certiorari* to reverse the unconstitutional application and construction of the “deemed admitted” rule endorsed by the second circuit.

2. **This Court should grant *Certiorari* to resolve conflicts and confusion among the circuit courts about how to treat a non-movant’s “additional material facts” once the court has “deemed admitted” the movant’s facts because of a purported deficiency in the non-movant’s enumerated responses to a movant’s enumerated statement of allegedly undisputed facts.**

*Certiorari* is especially appropriate in this matter, because local “deemed admitted” rules abound across the federal circuits with conflicts and variations. Although this Court specifically declined in 2010 to modify Fed. R. Civ. Proc. 56 to require enumerated point-counterpoint factual summary judgment factual submissions, United States District Judge Lee H. Rosenthal, *The Summary Judgment Changes that Weren’t*, 44 Loy. U. Chi. L. J. 471, before and after that decision, local district courts across the country adopted such rules and have, under “deemed admitted” rules, harshly penalized non-movants whose factual paragraphs—sometimes, as here, a few among hundreds—are deemed somehow insufficiently responsive.

Some courts, like the second circuit here, completely disregard a non-movant’s “additional

material facts” once they have “deemed admitted” the movant’s facts because of an alleged defect in the non-movant’s initial enumerated response to a movant’s enumerated facts. At least one circuit rejects that approach, and consistent with *Diebold* and progeny, takes the additional material facts into consideration even if some movant’s facts are deemed admitted. For example, in *Euromodas, Inc. v. Zanella, Ltd.*, 368 F.3d 11, 14–15 (1st Cir. 2004), the first circuit considered whether the district court had erred in analyzing the defendant’s summary judgment motion by restricting consideration of the plaintiff’s evidence, on the basis of the plaintiff’s failure to comply with the local rules. See, *Euromodas*, 368 F.3d at 15. The first circuit concluded that “[b]ecause those additional facts [submitted by the nonmovant] were supported by the record, the lower court should have considered them (while at the same time accepting the facts set forth in the movant’s Local Rule 311.12 statement).” *Id.* at 15–16.

The eight circuit, on the other hand, took the approach of the second circuit here. In *Northwest Bank & Trust Co. v. First Ill. Nat’l Bank*, 354 F.3d 721, 724 (8th Cir. 2003), after the defendant filed a summary judgment motion, the plaintiff filed an opposition that included both a “Response to Defendants’ Statement of Material Facts,” and a “Statement of Additional Material Facts Precluding Summary Judgment,” the district court issued a “deeming order” and then disregarded the non-movant’s additional material facts except for those facts that were specifically referenced by [plaintiff] Northwest in its brief in opposition to summary judgment to the extent that they did not contradict those of [defendant] FINB.” *Northwest Bank & Trust*,

354 F.3d at 724–25 (citing *Northwest Bank & Trust Co. v. First Ill. Nat'l Bank*, 221 F. Supp. 2d 1000, 1003–06 (S.D. Iowa 2002)). The eighth circuit found that the district court's holding was not an abuse of discretion, and that the court had actually been lenient in considering the specific facts referenced in the plaintiff's brief. *Id.* at 725.

In *CMI Capital Mkt. Invest., LLC v. González-Toro*, No. 06-2623, 2008 WL 713577 (1st Cir. March 18, 2008), the first circuit ruled that “failure to set forth a paragraph-by-paragraph admission or denial of the movant's material facts justifies a deeming order even where the opposition does propound other facts.” 2008 WL 713577, at \*3 n.3 (citing *Hernandez v. Philip Morris USA, Inc.*, 486 F.3d 1, 7 (1st Cir. 2007)).

The seventh circuit considered whether failure to properly cite supporting evidence in an opposition to a summary judgment motion warrants both deeming the movant's facts admitted and ignoring the facts proposed by the non-movant in *Hill v. Thalacker*, No. 06-1265, 2006 WL 3147274, at \*2 (7th Cir. Nov. 1, 2006) (unpublished). In *Hill*, the district court's summary judgment rules required that each controverted or additional fact that a party proposed had to be accompanied by specific, supporting evidence. *Id.* at \*1. In the plaintiff's response to the summary judgment motion, he attached supporting affidavits, but failed to refer to them specifically, instead “allud[ing] vaguely to unspecified ‘attached’ material.” *Id.* The district court deemed the defendant's facts admitted because of the plaintiff's failure to comply with the summary judgment procedure, and granted summary judgment for the defendant. *Id.* at \*2. The seventh circuit concluded that “the district court acted within its discretion when it ignored Hill's proposed findings of fact and

deemed Thalacker’s facts admitted, given Hill’s failure to follow the court’s summary judgment procedures.” *Id.* (citing *Smith v. Lamz*, 321 F.3d 680, 683 (7th Cir. 2003); *Tatalovich v. City of Superior*, 904 F.2d 1135, 1140 (7th Cir. 1990)) (emphasis added). Thus, in the context of an opposition submitting additional facts without following the procedure, the court concluded that those facts could be ignored by the district court.

Thus, confusion and conflict exist on how to treat “additional material facts” submitted by the non-movant when the court finds deficiencies in his or her initial response to the movant’s statement of undisputed material facts. The second circuit completely ignored the Petitioner’s SAMF. Yet, in a discrimination or retaliation case, such as this, where the local rules require point-counterpoint factual submissions, it is very likely that a sophisticated employer being sued for discrimination will structure its “undisputed material facts” in a way that does not provide the responding, non-movant employee with a broad enough platform to put forward facts bearing upon affirmative evidence such as proof of mendacity, disparate treatment and direct evidence, such as discriminatory statements. Therefore, the submission by the employee-non-movant of additional material facts becomes essential. If courts rigidly exercise their local “deemed admitted” rule as in this case and the above decisions of the seventh and eighth circuits, limiting their factual analysis solely to the employers’ facts and simultaneously disregarding the employees’ additional material facts, then summary judgment against employees will be routinely but unjustly granted. Since, as here, circuit courts review district court applications of local rules under an “abuse of discretion” standard, only in the rarest of cases will a

circuit court reverse a “deemed admitted” ruling that unfairly costs a plaintiff-employee his day before a jury.

Given the likelihood of injustice under the current “deemed admitted” regime and given the proliferation and variegation of local “deemed admitted” rules as well as divergent rulings in the circuits on the issue of how a non-movant’s “additional material facts” should be treated, this Court should grant *certiorari* in order to make clear that whatever the local “deemed admitted” rule states, *Diebold* and progeny hold and under no circumstances should a non-movant’s facts, if cited to the record, be ignored because of some defect in other factual responses.

Finally, in considering a grant of *certiorari* in this matter, this Court should not be deterred by the fact that the circuit court opted to characterize its decision as a “summary order.” It is inevitable that when a circuit court wrongfully “deems” a non-moving party to have “admitted” all or virtually all of a moving party’s evidence, the decision affirming summary judgment will likely be brief and unpublished. Petitioner is well aware that this Court rarely grants reviews of such decisions. However, to borrow a phrase from this Court’s “mootness” doctrine, if this Court does not grant review of a decision such as the one here, the problem of courts abrogating *Diebold* and progeny via local rules will be “capable of repetition yet evading review.”

**CONCLUSION**

For all of the foregoing reasons, Petitioner respectfully requests that this Court grant certiorari, reverse and vacate the grant and affirmance of summary judgment below, and remand this matter for a jury trial.

Dated: May 6, 2022

Respectfully submitted,

NEIL MULLIN, ESQ.

*Counsel of Record*

NANCY ERIKA SMITH, ESQ.

SMITH MULLIN, P.C.

240 Claremont Avenue

Montclair, New Jersey 07042

(973) 783-7607

[nmullin@smithmullin.com](mailto:nmullin@smithmullin.com)

*Attorneys for Petitioner,*

*Faye Boatright*

## **APPENDIX**

Appendix A  
**MANDATE**

N.Y.S.D. Case # 18-cv-7293(LJL)

**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 TO A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

[STAMP]  
USDC SDNY  
DOCUMENT  
ELECTRONICALLY FILED  
DOC #: \_\_\_\_\_  
DATE FILED: Feb 28 2022

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 7th day of February, two thousand twenty-two.

PRESENT: PIERRE N. LEVAL,  
RAYMOND J. LOHIER, JR.,  
MYRNA PÉREZ,  
*Circuit Judges.*

---

No. 20-4236-cv

---

FAYE BOATRIGHT,  
*Plaintiff-Appellant,*  
v.  
U.S. BANCORP, U.S. BANK NATIONAL  
ASSOCIATION, U.S. BANCORP  
INVESTMENTS, INC., jointly, severally and in  
the alternative,  
*Defendants-Appellees.*

---

[STAMP]  
**MANDATE ISSUED ON 02/28/2022**

FOR PLAINTIFF-APPELLANT:  
NEIL MULLIN, Smith Mullin, P.C., Montclair, NJ

## FOR DEFENDANTS-APPELLEES:

JONATHAN STOLER (Eric D. Raphan, Lindsay C. Stone, Sheppard Mullin, *on the brief*), New York, NY

Appeal from a judgment of the United States District Court for the Southern District of New York (Lewis J. Liman, *Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the District Court is AFFIRMED.

Plaintiff Faye Boatright appeals from the December 16, 2020 judgment of the United States District Court for the Southern District of New York (Liman, *J.*) granting summary judgment in favor of U.S. Bancorp, U.S. Bank National Association, and U.S. Bancorp Investments, Inc. (“Defendants”). Boatright alleged race- and gender-based discrimination and retaliation under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, the New York State Human Rights Law (“NYSHRL”), N.Y. Exec. Law § 290 *et seq.*, and the New York City Human Rights Law (“NYCHRL”), N.Y. City Admin. Code § 8–107. We assume the parties’ familiarity with the underlying facts and record of prior proceedings, to which we refer only as necessary to explain our decision to affirm.

### I. Local Rule 56.1

As an initial matter, Boatright argues that the District Court was wrong to credit as undisputed the statement of facts set forth in the Defendants’ Rule 56.1 Statement. Under Local Civil Rule 56.1 of the Southern and Eastern Districts of New York, a statement of fact “will be deemed to be admitted . . . unless specifically controverted” with a “citation to evidence which would be admissible.” Rule 56.1(c)–(d)

(emphasis added). Boatright’s responses to the Defendants’ Rule 56.1 Statement did not properly controvert the statement of facts relevant to this appeal, as required by Local Rule 56.1.<sup>1</sup> See, e.g., Russell v. Aid to Developmentally Disabled, Inc., 753 F. App’x 9, 12–13 (2d Cir. 2018) (summary order). Given the District Court’s “broad discretion to determine whether to overlook a party’s failure to comply with local court rules,” Holtz v. Rockefeller & Co., 258 F.3d 62, 73 (2d Cir. 2001), we conclude that it did not abuse its discretion in crediting as undisputed those facts that Boatright did not properly controvert in her opposition and on which the court relied in granting summary judgment. See id.

## II. Discrimination Claims

Boatright’s main claim of discrimination under Title VII, the NYSHRL, and the NYCHRL is that the Defendants compensated her less than Paul Scott Nagelson, a white male colleague, for the same work.

We analyze Boatright’s claims under Title VII and the NYSHRL using the familiar McDonnell Douglas burden-shifting framework. See Walsh v. N.Y.C. Hous. Auth., 828 F.3d 70, 74–75 (2d Cir. 2016). Under that framework, the District Court determined that, to the extent Boatright’s discrimination claims rely on comparing herself to Nagelson, she failed to show that the Defendants’ legitimate non-discriminatory reasons for the pay gap were a pretext for discrimination. We agree for several reasons.

---

<sup>1</sup> The only fact that Boatright appears to specifically controvert is the Defendants’ claim that she was regarded as a “coverage banker” at the time of hire. But the District Court did not rely on that fact in its analysis.

First, the circumstances of Nagelson's recruitment were different from Boatright's and resulted in a perceived need to recruit him aggressively with an unusually high pay offer, in addition to which he was hired to work within the Defendants' prime geographic region, whereas Boatright was not. Second, Nagelson had substantially more prior experience in banking than Boatright. Third, he was responsible for serving as the supervisory principal of the Defendants' San Francisco office (and had a license that qualified him to do so), whereas Boatright lacked such a license and worked in an office that already had a supervisory principal. Thus, while Boatright and Nagelson had the same job title, their jobs were quite different in practice. Fourth, the Defendants' system for awarding bonuses accounted for interpersonal skills and the quantity and quality of revenue generation — metrics on which Nagelson indisputably outperformed Boatright. In short, Boatright failed to show that the Defendants' explanations were a pretext for discrimination, much less that the pay gap was "more likely than not based in whole or in part on discrimination." Kirkland v. Cablevision Sys., 760 F.3d 223, 225 (2d Cir. 2014) (quotation marks omitted).

Boatright also points to the Defendants' responses to the Equal Employment Opportunity Commission (EEOC) and their answer to Boatright's complaint to argue that the Defendants' "shifting explanations" for the pay gap and for her termination demonstrate that their asserted justifications on summary judgment were pretextual. Pl.'s Br. at 41. But the record shows that the Defendants acknowledged a pay gap between Boatright and Nagelson and consistently asserted to the EEOC that the difference in experience levels, job responsibilities, and geographic locations contributed

to the gap. App'x 1357, 2551. Even if the Defendants' proffered reasons were false, that alone would not carry Boatright's burden at this stage, given the absence of evidence that "reasonably supports a finding of prohibited discrimination." James v. New York Racing Ass'n, 233 F.3d 149, 154 (2d Cir. 2000); see also Reeves v. Sanderson Plumbing Prod., Inc., 530 U.S. 133, 147 (2000) ("[I]t is not enough to disbelieve the employer; the factfinder must believe the plaintiff's explanation of intentional discrimination." (cleaned up)).

In sum, Boatright's efforts to show discrimination rest on her pay differential as compared to Nagelson, her unsuccessful efforts to disprove the defendants' explanations for Nagelson's higher pay, and, among other ways in which she was treated in the office, the fact that her supervisor Wallace had taken others, but not her, to lunch. As for the pay difference, it showed nothing because her situation was not comparable to Nagelson's; as for the alleged falsity of the employer's explanations for the pay difference, the explanations were not false; and as for her treatment in the office, considering the record as a whole and in view of the total absence of evidence of race- or gender-based motivation or animus, that treatment was insufficient to support her burden of producing evidence from which a jury could reasonably find that discrimination contributed to the adverse employment action of which she complains.

Finally, although the District Court did not separately analyze Boatright's discrimination claim under the NYCHRL, we conclude that the claim fails because a reasonable jury could not find, based on the summary judgment record, that race or gender motivated the pay difference under either the McDonnell Douglas framework or a mixed-motive

theory of discrimination. See Ya-Chen Chen v. City Univ. of N.Y., 805 F.3d 59, 76 & n.13 (2d Cir. 2015); Melman v. Montefiore Med. Ctr., 946 N.Y.S.2d 27, 30 (1st Dep’t 2012) (applying both the McDonnell Douglas framework and a mixed-motive theory to a NYCHRL action).

### **III. Retaliation Claims**

Next, Boatright alleges that she was terminated in retaliation for filing a charge with the EEOC, in violation of Title VII, the NYSHRL, and the NYCHRL.

Because the parties did not dispute that Boatright satisfied the first three elements of a prima facie retaliation claim under Title VII and the NYSHRL, the District Court focused on whether Boatright’s filing of the EEOC charge, which is protected activity, was the but-for cause of her termination. While her protected activity was close in time to her termination, see, e.g., El Sayed v. Hilton Hotels Corp., 627 F.3d 931, 932 (2d Cir. 2010), temporal proximity alone does not create an inference of causation where “gradual adverse job actions began well before the plaintiff had ever engaged in any protected activity,” Slattery v. Swiss Reinsurance Am. Corp., 248 F.3d 87, 95 (2d Cir. 2001). Before the Defendants learned of the EEOC charge, Boatright had already been given lower bonuses due to performance deficiencies, put on a performance improvement plan, and received a performance review and multiple emails that expressed concerns about her interpersonal skills. And Boatright’s supervisors had cautioned her for violating the company’s Code of Ethics and Business Conduct and discussed her failure to comply with financial regulations, a company policy restricting personal

investments, and the internal corporate credit card policy. Yet other significant performance-related issues and concerns predated Boatright's December 2014 internal complaints, including discipline for violating the personal investment policy and the involvement of Human Resources in addressing Boatright's fractious relationships with colleagues. The Defendants maintain that Boatright was fired because of her continued past poor performance, including after she was counseled, and because of an allegedly false statement she inserted in an important document in November 2015. We agree with the District Court that Boatright has not demonstrated that the Defendants' proffered non-retaliatory justifications for her termination are a pretext for retaliation, or that her termination would not have occurred but for a retaliatory motive. See Natofsky v. City of New York, 921 F.3d 337, 348 (2d Cir. 2019).

Finally, even under the NYCHRL's more liberal standard, Boatright cannot prove retaliation because she has not "show[n] that retaliation played any part in the employer's decision." Mihalik v. Credit Agricole Cheuvreux N. Am., Inc., 715 F.3d 102, 116 (2d Cir. 2013).

We have considered Boatright's remaining arguments and conclude that they are without merit. For the foregoing reasons, the judgment of the District Court is AFFIRMED.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk of Court

[SEAL]

/s/ Catherine O'Hagan Wolfe

Appendix B

**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 TO 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 7th day of February, two thousand twenty-two.

PRESENT: PIERRE N. LEVAL,  
RAYMOND J. LOHIER, JR.,  
MYRNA PÉREZ,  
*Circuit Judges.*

---

No. 20-4236-cv

---

FAYE BOATRIGHT,  
*Plaintiff-Appellant,*

v.

U.S. BANCORP, U.S. BANK NATIONAL  
ASSOCIATION, U.S. BANCORP  
INVESTMENTS, INC., jointly, severally  
and in the alternative,

*Defendants-Appellees.*

---

FOR PLAINTIFF-APPELLANT:

NEIL MULLIN, Smith Mullin, P.C., Montclair, NJ

FOR DEFENDANTS-APPELLEES:

JONATHAN STOLER (Eric D. Raphan, Lindsay C. Stone, Sheppard Mullin, *on the brief*), New York, NY

Appeal from a judgment of the United States District Court for the Southern District of New York (Lewis J. Liman, *Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the District Court is AFFIRMED.

Plaintiff Faye Boatright appeals from the December 16, 2020 judgment of the United States District Court for the Southern District of New York (Liman, J.) granting summary judgment in favor of U.S. Bancorp, U.S. Bank National Association, and U.S. Bancorp Investments, Inc. (“Defendants”). Boatright alleged race- and gender-based discrimination and retaliation under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, the New York State Human Rights Law (“NYSHRL”), N.Y. Exec. Law § 290 *et seq.*, and the New York City Human Rights Law (“NYCHRL”), N.Y. City Admin. Code § 8–107. We assume the parties’ familiarity with the underlying facts and record of prior proceedings, to which we refer only as necessary to explain our decision to affirm.

### **I. Local Rule 56.1**

As an initial matter, Boatright argues that the District Court was wrong to credit as undisputed the statement of facts set forth in the Defendants’ Rule 56.1 Statement. Under Local Civil Rule 56.1 of the Southern and Eastern Districts of New York, a statement of fact “will be deemed to be admitted . . . unless specifically controverted” with a “citation to evidence which would be admissible.” Rule 56.1(c)–(d) (emphasis added). Boatright’s responses to the Defendants’ Rule 56.1 Statement did not properly controvert the statement of facts relevant to this appeal, as required by Local Rule 56.1.<sup>1</sup> See, e.g., Russell v. Aid to Developmentally Disabled, Inc., 753 F. App’x 9, 12–13 (2d Cir. 2018) (summary order).

---

<sup>1</sup> The only fact that Boatright appears to specifically controvert is the Defendants’ claim that she was regarded as a “coverage banker” at the time of hire. But the District Court did not rely on that fact in its analysis.

Given the District Court’s “broad discretion to determine whether to overlook a party’s failure to comply with local court rules,” Holtz v. Rockefeller & Co., 258 F.3d 62, 73 (2d Cir. 2001), we conclude that it did not abuse its discretion in crediting as undisputed those facts that Boatright did not properly controvert in her opposition and on which the court relied in granting summary judgment. See id.

## II. Discrimination Claims

Boatright’s main claim of discrimination under Title VII, the NYSHRL, and the NYCHRL is that the Defendants compensated her less than Paul Scott Nagelson, a white male colleague, for the same work.

We analyze Boatright’s claims under Title VII and the NYSHRL using the familiar McDonnell Douglas burden-shifting framework. See Walsh v. N.Y.C. Hous. Auth., 828 F.3d 70, 74–75 (2d Cir. 2016). Under that framework, the District Court determined that, to the extent Boatright’s discrimination claims rely on comparing herself to Nagelson, she failed to show that the Defendants’ legitimate non-discriminatory reasons for the pay gap were a pretext for discrimination. We agree for several reasons. First, the circumstances of Nagelson’s recruitment were different from Boatright’s and resulted in a perceived need to recruit him aggressively with an unusually high pay offer, in addition to which he was hired to work within the Defendants’ prime geographic region, whereas Boatright was not. Second, Nagelson had substantially more prior experience in banking than Boatright. Third, he was responsible for serving as the supervisory principal of the Defendants’ San Francisco office (and had a license that qualified him to do so), whereas

Boatright lacked such a license and worked in an office that already had a supervisory principal. Thus, while Boatright and Nagelson had the same job title, their jobs were quite different in practice. Fourth, the Defendants' system for awarding bonuses accounted for interpersonal skills and the quantity and quality of revenue generation — metrics on which Nagelson indisputably outperformed Boatright. In short, Boatright failed to show that the Defendants' explanations were a pretext for discrimination, much less that the pay gap was "more likely than not based in whole or in part on discrimination." Kirkland v. Cablevision Sys., 760 F.3d 223, 225 (2d Cir. 2014) (quotation marks omitted).

Boatright also points to the Defendants' responses to the Equal Employment Opportunity Commission (EEOC) and their answer to Boatright's complaint to argue that the Defendants' "shifting explanations" for the pay gap and for her termination demonstrate that their asserted justifications on summary judgment were pretextual. Pl.'s Br. at 41. But the record shows that the Defendants acknowledged a pay gap between Boatright and Nagelson and consistently asserted to the EEOC that the difference in experience levels, job responsibilities, and geographic locations contributed to the gap. App'x 1357, 2551. Even if the Defendants' proffered reasons were false, that alone would not carry Boatright's burden at this stage, given the absence of evidence that "reasonably supports a finding of prohibited discrimination." James v. New York Racing Ass'n, 233 F.3d 149, 154 (2d Cir. 2000); see also Reeves v. Sanderson Plumbing Prod., Inc., 530 U.S. 133, 147 (2000) ("[I]t is not enough to disbelieve the employer; the factfinder must believe the plaintiff's explanation of intentional discrimination." (cleaned up)).

In sum, Boatright's efforts to show discrimination rest on her pay differential as compared to Nagelson, her unsuccessful efforts to disprove the defendants' explanations for Nagelson's higher pay, and, among other ways in which she was treated in the office, the fact that her supervisor Wallace had taken others, but not her, to lunch. As for the pay difference, it showed nothing because her situation was not comparable to Nagelson's; as for the alleged falsity of the employer's explanations for the pay difference, the explanations were not false; and as for her treatment in the office, considering the record as a whole and in view of the total absence of evidence of race- or gender-based motivation or animus, that treatment was insufficient to support her burden of producing evidence from which a jury could reasonably find that discrimination contributed to the adverse employment action of which she complains.

Finally, although the District Court did not separately analyze Boatright's discrimination claim under the NYCHRL, we conclude that the claim fails because a reasonable jury could not find, based on the summary judgment record, that race or gender motivated the pay difference under either the McDonnell Douglas framework or a mixed-motive theory of discrimination. See Ya-Chen Chen v. City Univ. of N.Y., 805 F.3d 59, 76 & n.13 (2d Cir. 2015); Melman v. Montefiore Med. Ctr., 946 N.Y.S.2d 27, 30 (1st Dep't 2012) (applying both the McDonnell Douglas framework and a mixed-motive theory to a NYCHRL action).

### **III. Retaliation Claims**

Next, Boatright alleges that she was terminated in retaliation for filing a charge with the EEOC, in

violation of Title VII, the NYSHRL, and the NYCHRL.

Because the parties did not dispute that Boatright satisfied the first three elements of a prima facie retaliation claim under Title VII and the NYSHRL, the District Court focused on whether Boatright's filing of the EEOC charge, which is protected activity, was the but-for cause of her termination. While her protected activity was close in time to her termination, see, e.g., El Sayed v. Hilton Hotels Corp., 627 F.3d 931, 932 (2d Cir. 2010), temporal proximity alone does not create an inference of causation where "gradual adverse job actions began well before the plaintiff had ever engaged in any protected activity," Slattery v. Swiss Reinsurance Am. Corp., 248 F.3d 87, 95 (2d Cir. 2001). Before the Defendants learned of the EEOC charge, Boatright had already been given lower bonuses due to performance deficiencies, put on a performance improvement plan, and received a performance review and multiple emails that expressed concerns about her interpersonal skills. And Boatright's supervisors had cautioned her for violating the company's Code of Ethics and Business Conduct and discussed her failure to comply with financial regulations, a company policy restricting personal investments, and the internal corporate credit card policy. Yet other significant performance-related issues and concerns predated Boatright's December 2014 internal complaints, including discipline for violating the personal investment policy and the involvement of Human Resources in addressing Boatright's fractious relationships with colleagues. The Defendants maintain that Boatright was fired because of her continued past poor performance, including after she was counseled, and because of an

allegedly false statement she inserted in an important document in November 2015. We agree with the District Court that Boatright has not demonstrated that the Defendants' proffered non-retaliatory justifications for her termination are a pretext for retaliation, or that her termination would not have occurred but for a retaliatory motive. See Natofsky v. City of New York, 921 F.3d 337, 348 (2d Cir. 2019).

Finally, even under the NYCHRL's more liberal standard, Boatright cannot prove retaliation because she has not "show[n] that retaliation played any part in the employer's decision." Mihalik v. Credit Agricole Cheuvreux N. Am., Inc., 715 F.3d 102, 116 (2d Cir. 2013).

We have considered Boatright's remaining arguments and conclude that they are without merit. For the foregoing reasons, the judgment of the District Court is AFFIRMED.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk of Court

[SEAL]

/s/ Catherine O'Hagan Wolfe \_\_\_\_\_

**United States Court of Appeals  
for the Second Circuit  
Thurgood Marshall U.S. Courthouse  
40 Foley Square  
New York, NY 10007**

DEBRA ANN LIVINGSTON

CHIEF JUDGE

CATHERINE O'HAGAN WOLFE

CLERK OF COURT

Date: February 07, 2022

Docket #: 20-4236cv

Short Title: Boatright v. U.S. Bancorp

DC Docket #: 18-cv-7293

DC Court: SDNY (NEW YORK CITY)

DC Judge: Liman

**BILL OF COSTS INSTRUCTIONS**

The requirements for filing a bill of costs are set forth in FRAP 39. A form for filing a bill of costs is on the Court's website.

The bill of costs must:

- \* be filed within 14 days after the entry of judgment;
- \* be verified;
- \* be served on all adversaries;
- \* not include charges for postage, delivery, service, overtime and the filers edits;
- \* identify the number of copies which comprise the printer's unit;
- \* include the printer's bills, which must state the minimum charge per printer's unit for a page, a

cover, foot lines by the line, and an index and table of cases by the page;

- \* state only the number of necessary copies inserted in enclosed form;
- \* state actual costs at rates not higher than those generally charged for printing services in New York, New York; excessive charges are subject to reduction;
- \* be filed via CM/ECF or if counsel is exempted with the original and two copies.

**United States Court of Appeals  
for the Second Circuit  
Thurgood Marshall U.S. Courthouse  
40 Foley Square  
New York, NY 10007**

DEBRA ANN LIVINGSTON  
CHIEF JUDGE

CATHERINE O'HAGAN WOLFE  
CLERK OF COURT

Date: February 07, 2022  
Docket #: 20-4236cv  
Short Title: Boatright v. U.S. Bancorp  
DC Docket #: 18-cv-7293  
DC Court: SDNY (NEW YORK CITY)  
DC Judge: Liman

**VERIFIED ITEMIZED BILL OF COSTS**

Counsel for \_\_\_\_\_  
respectfully submits, pursuant to FRAP 39 (c) the  
within bill of costs and requests the Clerk to prepare  
an itemized statement of costs taxed against the

\_\_\_\_\_  
and in favor of \_\_\_\_\_  
for insertion in the mandate.

Docketing Fee \_\_\_\_\_

Costs of printing appendix (necessary copies \_\_\_\_\_)

\_\_\_\_\_  
Costs of printing brief (necessary copies \_\_\_\_\_)

\_\_\_\_\_  
Costs of printing reply brief (necessary copies \_\_\_\_\_)

**(VERIFICATION HERE)**

\_\_\_\_\_  
Signature

Appendix C

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

[STAMP]  
USDC SDNY  
DOCUMENT  
ELECTRONICALLY FILED  
DOC #: \_\_\_\_\_  
DATE FILED: 12/16/2020

---

18-cv-7293 (LJL)

OPINION AND ORDER

---

FAYE BOATRIGHT,

Plaintiff,

—v.—

U.S. BANCORP, U.S. BANK NATIONAL  
ASSOCIATION, and U.S. BANCORP  
INVESTMENTS, INC.

Defendants.

---

LEWIS J. LIMAN, United States District Judge:

Plaintiff Faye Boatright (“Plaintiff” or “Boatright”) brings this action under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000, *et seq.* (“Title VII”), and the Equal Pay Act, 29 U.S.C. § 206(d) (the “EPA”). Plaintiff additionally brings state law claims under the New York State Human Rights Law, N.Y. Exec. L. § 292(21)(c) (the “NYSHRL”), and

the New York City Human Rights Law, N.Y.C. Admin. Code § 8-107, *et seq.* (the “NYCHRL”). Plaintiff alleges that her employers, U.S. Bancorp, U.S. Bank National Association, and U.S. Bancorp Investments, Inc. (“Defendants” or “U.S. Bank”), discriminated against her on the basis of her race and gender by paying her less than similarly situated colleagues and unlawfully retaliated against her for filing a charge of discrimination with the Equal Employment Opportunity Commission (the “EEOC”). Defendants moves for summary judgment on all claims. For the reasons that follow, Defendants’ motion is granted and all claims are dismissed.

## BACKGROUND

The following facts are drawn from Defendant’s 56.1 statement and are supported by specific citations to record evidence and are either assented to or responded to by Plaintiff with objections that do not contain citations to admissible evidence. Except where otherwise noted, the facts are undisputed for purposes of this motion. *See Stewart v. Fashion Inst. of Tech.*, 2020 WL 6712267, at \*1 (S.D.N.Y. Nov. 16, 2020) (citing *Cruz v. Wyckoff Heights Med. Ctr.*, 2016 WL 4533568, at \*1 (S.D.N.Y. July 19, 2016)).

### A. U.S. Bank’s Infrastructure Group

Defendants are affiliated diversified financial services companies with headquarters in Minneapolis, Minnesota. Dkt. No. 86 ¶¶ 5, 7. U.S. Bank’s traditional “footprint” is in the Midwest and West Coast of the United States. *Id.* ¶ 8. U.S. Bank maintains no retail branches on the East Coast. *Id.* ¶ 10.

In 2010, U.S. Bank decided to establish the Municipal Securities Group (“MSG”), based in Charlotte and New York. *Id.* ¶ 11; Dkt. No. 77-6 at 11-12. It hired Rick Kolman (“Kolman”) to be head of the MSG. Though Kolman was based in U.S. Bank’s office in New York City, his task was to develop the group nationwide. *Id.* ¶ 13. *Id.*

In the same year, U.S. Bank also decided to create the Public Finance Group (“PFG”) as a subgroup of the MSG. *Id.* ¶ 12. PFG’s business was considered a “start-up” business within U.S. Bank. *Id.* ¶ 15. Its business was to generate revenue through various financial instruments including the underwriting and selling of bonds on behalf of municipalities that were seeking to raise money for infrastructure projects, as well as providing other means of liquidity for such projects. *Id.* ¶ 12. Steven “Alex” Wallace (“Wallace”), based in Charlotte, North Carolina, was assigned to serve as head of the PFG and to report to Kolman. *Id.* ¶ 14.

#### B. Hiring of Nagelson

In 2010, Kolman and Wallace decided to build out the PFG on the West Coast. The West Coast was a traditionally important region for U.S. Bank. *Id.* ¶ 16; Dkt. No. 77-6 at 13. Kolman and Wallace began plans to open an office in San Francisco. Dkt. No. 77-6 at 15. As one of their first steps in building the business, they decided to hire a senior banker to develop the PFG’s West Coast business and to build and lead the PFG’s new office in San Francisco. Kolman and Wallace agreed that the candidate would need to serve as a supervisory principal for the San Francisco office. Dkt. No. 86 ¶ 21. A supervisory principal must hold a Series 53 license from the Financial Industry Regulatory Authority (“FINRA”), which qualifies an

individual to oversee a bank's municipal securities activities and supervise and train principals and representatives. *Id.* Kolman and Wallace identified Scott Nagelson ("Nagelson") as the most desirable candidate for the position. *Id.* ¶¶ 17, 22.

In the fall of 2010, Wallace approached Nagelson at a conference to ask him whether he might be interested in building and leading the San Francisco office. *Id.* ¶ 23. His responsibilities would include opening the office, hiring bankers and support staff, and performing senior public finance banking work. *Id.* ¶ 18. At the time, Nagelson had twenty-two years of experience in public finance, thirty years of total banking experience, and eight years of experience working in a commercial bank. *Id.* ¶ 24. He had previously established a San Francisco Public Finance Office for Merrill Lynch and Co. *Id.* ¶ 28. At the time he was identified as a potential candidate, Nagelson was employed at Jefferies & Co. ("Jefferies") as a Managing Director in charge of its public finance group in San Francisco. *Id.* ¶ 26. Nagelson's job at Jefferies was "... [to] call on clients . . . throughout California, and develop underwriting opportunities with that [sic] those relationships." *Id.* ¶ 27.

Kolman and Wallace actively recruited Nagelson over a period of more than six months. *Id.* ¶ 29. As part of the hiring process, Nagelson negotiated with U.S. Bank for a compensation package. *Id.* ¶ 30. Nagelson advised U.S. Bank that he stood to leave a significant amount of money behind by leaving Jefferies, including a \$66,666 forgivable loan, a \$10,000 bonus advance, unvested restricted stock grants and a 401(k) match. *Id.* ¶ 31. To induce Nagelson to leave Jefferies, U.S. Bank offered him a

signing bonus and guaranteed incentive compensation for his first year of employment. *Id.* ¶ 32.

U.S. Bank made Nagelson a formal employment offer on June 6, 2011. *Id.* ¶ 34. The offer letter indicated that Nagelson would be employed with the title “Public Finance, Managing Director” with an internal job grade of 18. *Id.* ¶ 35. The offer included: (1) a base salary of \$225,000; (2) a \$100,000 signing bonus; and (3) a \$435,000 guaranteed incentive compensation payment comprised of cash and stock grants for his first year of employment. *Id.* ¶ 36. After the first year, his incentive compensation would be subject to the terms of U.S. Bank’s Capital Markets/Municipal Securities Group Incentive Plan (the “Incentive Plan”), which provided incentives based on employees’ performance in three areas: (1) revenue performance; (2) business development, including cross-selling of the MSG’s products and services; and (3) subjective components including “fostering collaboration among peers,” “sharing credit for team successes,” and “contribut[ing] to the training of junior professionals.” *Id.* ¶¶ 37, 82. The Incentive Plan was offered to all bankers employed in the PFG and was administered by Kolman and Wallace. *Id.* ¶¶ 79, 81.

Nagelson accepted the offer and began work on July 1, 2011. *Id.* ¶ 39.

Under the terms of his offer, Nagelson would serve as the supervisory principal for the San Francisco office. *Id.* ¶ 90. Over 2011 and 2012, Nagelson expanded the office. He hired two coverage bankers, *id.* ¶ 92, as well as one junior banker. *Id.* ¶ 94.

C. Hiring of Plaintiff

The operations of the MSG and the PFG expanded from 2010 to 2012. By 2012, the PFG operated out of four offices, each with its own supervisory principal: San Francisco, headed by Nagelson; New York headed by Kolman; Charlotte, headed by Wallace; and Chicago, headed by Brian McGough. *Id.*

At the time of its creation in 2010, the MSG had several employees in New York. Dkt. No. 77-6 at 14. The New York office made new hires in 2011 and 2012. *Id.* at 14-15.

In the fall of 2011, Boatright approached Kolman to discuss the possibility of obtaining a position at U.S. Bank. Dkt. No. 86 ¶ 53. Boatright is an African American female. *Id.* ¶ 2. She did not have a Series 53 license, which would have qualified her to serve in a position as supervisory principal. *Id.* ¶ 59. But she had previously been employed at several investment banks or financial institutions. From 1992 to 1998, she had worked for Kolman as a banker in the Municipal Bond Department at Goldman Sachs. *Id.* ¶¶ 40, 41. In 1998, Boatright left the Municipal Bond Department and joined the Debt Capital Markets Division. *Id.* ¶ 42. In 2004, she resigned from Goldman Sachs, *id.* ¶ 43, and from 2005 to 2010, she held several positions at different investment banks. *Id.* ¶ 44.

In April 2010, six years after she left Goldman Sachs, Boatright joined The BondFactor Company, LLC (“BondFactor”), a start-up business focused on selling insurance to the municipal bond market. *Id.* ¶¶ 45, 46. Boatright was initially employed not as a banker, but as Chief Marketing Officer and later as its Chief Operating Officer. *Id.* ¶ 45. Her base salary was nominally \$600,000, but she was only eligible to

receive that amount if BondFactor obtained a \$10 million initial capital infusion from outside investors. *Id.* ¶¶ 47-48. BondFactor never obtained the capital infusion. *Id.* ¶ 49. Thus, Boatright was paid the equivalent of minimum wage while she worked at BondFactor. *Id.* Plaintiff performed no bond underwriting or investment banking work while employed at BondFactor. *Id.* ¶ 52.

Over the months following her approach in the fall of 2011, Boatright had several meetings with Kolman and Wallace to discuss potential employment with U.S. Bank. *Id.* ¶ 55. At that time, Kolman and Wallace were considering other candidates for a position in the New York office, which would focus on government and infrastructure clients based in the Northeast. *Id.* ¶ 57. The responsibilities for the position would include managing client relationships in the Northeast, generating new business for the PFG and executing transactions. *Id.* ¶ 61. The bank was not seeking a supervisory principal for the New York office and the role would not include supervisory responsibilities. *Id.* ¶¶ 60-61.

Kolman and Wallace had some reservations about hiring Boatright. *Id.* ¶ 62. Kolman was concerned about her interpersonal skills, having heard from individuals at Morgan Stanley that she was “incredibly difficult to work with.” Dkt. No. 77-7 at 98. Kolman told Wallace that Boatright could be “tough on support.” Dkt. No. 77-6 at 28. Additionally, they were concerned that she might have some difficulty adjusting from the larger scale of “big bulge bracket investment banking firms” to “the reality of a startup municipal securities business at a conservative commercial bank.” Dkt. No. 77-6 at 32. On the other hand, Kolman had “always had a lot of respect for” Boatright, having found her to be

“intelligent” and a hard worker when they worked together at Goldman Sachs. Dkt. No. 77-7 at 98. Wallace also supported hiring Boatright, considering her to be “a smart, aggressive banker.” Dkt. No. 77-6 at 35-36.

During the interview process, Kolman and Wallace advised Boatright that the Northeast was not in U.S. Bank’s traditional footprint, that U.S. Bank did not have a strong public finance presence there, and that part of Boatright’s job would be to build that presence. Dkt. No. 86 ¶ 64. The two also advised her that the PFG was a start-up group and did not have a platform that was as large or well-established as its competitors. *Id.* Further, she would not have the same level of resources from junior bankers as she might have had when she worked at Goldman Sachs and other large investment banks. *Id.* Plaintiff confirmed that she wanted the position in spite of these challenges. *Id.* ¶ 65.

In early 2012, U.S. Bank hired Boatright as a Managing Director in the New York office. *Id.* ¶ 1. Like Nagelson, Boatright was eligible for incentive compensation payments under the Incentive Plan. *Id.* ¶ 75. Unlike Nagelson, Boatright did not receive a sign-on or guaranteed bonus. *Id.* ¶ 72. She began employment with U.S. Bank on February 13, 2012. *Id.* ¶ 78.

#### D. Early Experience of Plaintiff

Boatright had difficulties managing junior employees from the beginning of her employment with U.S. Bank. When she began, Boatright was assisted by Elizabeth Conte (“Conte”), a junior banker based in New York. *Id.* ¶ 91. Though she regularly assisted Boatright, Conte did not directly report to her and also worked with other bankers. *Id.*

By 2013, U.S. Bank had transferred Conte to a different department because, according to Kolman, Conte complained she was mistreated by Boatright. *Id.* ¶ 113; Dkt. No. 28; Dkt. No. 77-7 at 48, 172.<sup>1</sup>

At Plaintiff's request, the PFG also hired Jose Yandun ("Yandun") as a junior banker in the New York office. Dkt. No. 86 ¶ 95. Yandun supported Boatright almost exclusively, but he resigned in August 2014. *Id.* ¶ 97. Until he resigned, Boatright had a difficult relationship with Yandun. On at least one occasion, Boatright copied Yandun's co-workers on emails criticizing his work product. *Id.* ¶ 111. On a number of occasions, Yandun told Kolman that Boatright had verbally attacked him and treated him unfairly. *Id.* ¶ 112. In his exit interview, Yandun stated that Boatright was difficult to work with, that she was "very critical, confrontational," and that she "can be demanding, put you down." Dkt. No. 77-59 at 4. Yandun also stated that his relationship with Boatright was one of the reasons he chose to resign. Dkt. No. 86 ¶ 121. The other reasons he offered were

---

<sup>1</sup> In her response to Defendants' 56.1 Statement, Boatright challenges this and numerous other factual assertions as inadmissible hearsay, because Defendants rely on deposition testimony of Wallace and Kolman reporting what other U.S. Bank employees contemporaneously said to them. But Defendants are relying on this testimony not for the truth of the matter asserted (i.e., whether in fact Boatright mistreated Conte and other employees) but for the fact that other junior employees complained to Boatright's superiors that Boatright had mistreated them. The complaints—not whether they were well-founded or not—have independent evidentiary significance. *See United States v. Dupree*, 706 F.3d 131, 136 (2d Cir. 2013) ("If the significance of an offered statement lies solely in the fact that it was made, no issue is raised as to the truth of anything asserted, and the statement is not hearsay.") (quoting Fed. R. Evid. 8010(c) advisory committee's note).

frustration with his compensation and the fact that, in his view, U.S. Bank's strategy was not winning business. Dkt. No. 77-59 at 2. After Yandun resigned, Kolman told Boatright that he had resigned because of her mistreatment of him. Dkt. No. 86 ¶ 114.

In September 2014, following Yandun's resignation, Plaintiff interviewed Jon Mesadieu ("Mesadieu") for a position in the New York office. *Id.* ¶ 122. At the time, Boatright, Kolman, and Wallace all recognized that Mesadieu was inexperienced. Dkt. No. 86 ¶ 123. When it was decided that Mesadieu would be hired, Boatright requested that he report directly to her. Dkt. No. 77-60 at 2. The request was denied, and Mesadieu reported to Wallace, but worked primarily for Boatright, though he also supported other bankers. Dkt. No. 86 ¶¶ 123, 124. Boatright quickly grew dissatisfied with Mesadieu's performance. *Id.* ¶ 125. As she had with Yandun, Boatright began to copy Mesadieu's co-workers and supervisors on emails she sent to him criticizing his performance. *Id.* ¶¶ 125-26.

During this time, Boatright also received occasional support from other junior bankers. *Id.* ¶¶ 127-28. She refused to work with at least one junior analyst, whom she believed was not suited for his position. *Id.* ¶ 130. She frequently complained that she was not receiving adequate support in the form of assistance from junior bankers. Dkt. No. 77-39.

Boatright's interpersonal challenges were not limited to her interactions with junior bankers. In 2014, Boatright also had conflicts with bankers in U.S. Bank's Government Banking Group ("GBG"), on whom PFG bankers relied upon for business referrals. Dkt. No. 86 ¶ 131. In 2014, three members of the GBG complained to U.S. Bank's HR

Department about Plaintiff's rudeness, her refusal to include them in correspondence and meetings with clients, and her failure to collaborate on business prospects. *Id.* ¶ 132. At least one such conflict triggered an inquiry by U.S. Bank's Human Resources Department. *Id.* ¶ 134. This inquiry did not result in any formal discipline, but Boatright was advised that she should try to work more productively with her colleagues in the GBG. *Id.*; Dkt. No. 77-3 at 16.

#### E. PFG Restructuring and Boatright's Continuing Performance Issues

In March 2014, Wallace and Kolman began to plan a restructuring of the PFG. Dkt. No. 86 ¶ 165. The restructuring was intended to consolidate the PFG's sector-specific business groups and create a dedicated pool of resources for PFG bankers. *Id.* ¶ 166. Wallace and Kolman selected Nagelson to lead the new consolidated group. Dkt. No. 77-48. The restructuring was completed by April 2015. Dkt. No. 86 ¶ 167. Boatright became part of a newly configured public finance team dedicated to government and infrastructure clients and reporting to Nagelson. *Id.* ¶ 167. Boatright's job title, job grade, job duties, base salary and eligibility for incentive compensation were unchanged by the restructuring. *Id.* ¶ 169.

Beginning in 2014, U.S. Bank started to provide formal performance reviews to bankers in the PFG. *Id.* ¶ 160. In November 2014, Wallace began drafting Boatright's performance review. *Id.* ¶¶ 159-60. Wallace asked Maureen McGovern ("McGovern"), an HR Representative, to help draft the performance review to address Boatright's interpersonal performance issues. *Id.* ¶ 161; Dkt. No. 77-92; Dkt. No. 77-93.

The performance review Wallace prepared awarded Boatright an overall performance rating of 3, indicating “Solid Performance.” Dkt. No. 77-94. The review rated employees on a scale of 1-5, with 1 representing the top of the scale or “Exceptional,” and a 5 representing the bottom or “Not Effective.” Dkt. No. 84-59. In the “Build Relationships” and “Collaborate” categories, Boatright received a rating of 4 out of 5, towards the bottom of the scale, indicating “Needs Improvement.” *Id.* The review indicated that Boatright “has had some challenges developing consistent, positive relationships with some of her colleagues in MSG and in Government Banking.” *Id.* at 5. It also stated that: “Among some of the things we have discussed are better planning, time management and higher quality communication (less email and more dialogue with colleagues and partners).” *Id.* at 6.

The performance review also raised issues about Boatright’s revenue production. The review stated that her 2014 revenue production “on a Gross Basis was ranked 8th out of our 14 coverage bankers and on a Net Basis (Gross minus Direct Purchase income) 11th out of 14.” Dkt. No. 77-94 at 3. The review also observed that “Faye has successfully won assignments on finance teams for larger, high profile issuers, but at times these clients don’t match-up well with our current distribution system (especially retail).” *Id.* It went on to note that “[m]ore balance and diversification is needed in the business strategy to generate greater revenue potential from the Northeast market.” *Id.* at 3-4. Further, “Faye’s partnership and relationship behavior during 2014 was inconsistent within MSG and with Government Banking. More consistency here should also result in stronger revenue growth.” *Id.* at 4.

Wallace provided Boatright with the 2014 Review on February 27, 2015. Dkt. No. 86 ¶ 162.

By April 2015, the restructuring of the PFG was completed and Nagelson took over leadership of the new national team. *Id.* ¶ 168. On April 29, 2015, Nagelson announced at a company meeting that the new team would be named the “National Infrastructure Group.” *Id.* ¶ 170. In an email sent the same day, Boatright requested that Nagelson consider choosing a different name, because of the way the name abbreviated (“NIG”). *Id.* ¶ 172; Dkt. No. 77-100. Within twenty-four hours, Nagelson changed the name to the “Government Infrastructure Group” (the “GIG”). Dkt. No. 86 ¶ 173.

Shortly after taking leadership of the GIG, Nagelson began to express concerns about Boatright’s performance. In an email dated May 15, 2015, Nagelson stated Boatright’s behavior and performance needed to be addressed citing: “(1) Her pattern of developing “adversarial relationships with junior staff. . . . (2) Her history of conflict with business partners, such as GBD Relationship Managers, . . . (3) The practice of documenting other individuals’ short-comings in emails that are distributed to many people. (4) Multiple instances of violating the company’s requirements around pre-clearance of securities trades. (5) Unacceptably low revenue generation.” Dkt. No. 77-102 at 2.

In consultation with Kolman, Wallace, and McGovern, Nagelson drafted a document outlining goals and expectations for Plaintiff (the “G&E Outline”). *Id.* ¶ 185. The purpose of the G&E Outline was to help Boatright with her performance and for Wallace and Nagelson to “track [her performance] and see progress over time.” Dkt. No. 77-4 at 124;

Dkt. No. 86 ¶ 185. The G&E Outline stated that Plaintiff needed to:

- Adapt client coverage practices and business efforts around [U.S. Bank's] platform strengths to drive positive revenue events and measurable results.
- Mentor junior colleagues in a positive and constructive way by exhibiting patience and support to enrich the colleague's knowledge and experience.
- Provide constructive and solutions-oriented feedback instead of making negative comments about Relationship Manager experience, municipal sales performance, quantitative and execution support, and credit approvals.
- Build and re-build collaborative, mutually beneficial relationships with colleagues in MSG and Government Banking.
- Avoid using email to highlight junior colleagues' mistakes to senior management; instead, directly share feedback with colleagues in a positive and/or constructive way.
- Be professional and courteous at all times[.]
- Compl[y] with all company policies[.]

Dkt. No. 86 ¶ 186. The G&E Outline included revenue generation goals for Plaintiff of \$1 million in capital markets fees and \$500,000 in direct purchase fees. *Id.* ¶ 187. The same targets were given to all senior GIG bankers. *Id.* The G&E Outline also stated that, should Plaintiff fail to meet the expectations outlined, she could face lower performance ratings, reduced incentive compensation, and disciplinary action. *Id.* ¶ 188.

On July 17, 2015, Nagelson provided Plaintiff with an updated G&E Outline as part of her mid-year review. *Id.* ¶ 189. The updated G&E Outline criticized Plaintiff for: (1) continuing to “use email to point out short-comings in [] Mesadieu’s knowledge or performance”; (2) openly discussing the shortcomings of junior staff with members of the GBG; (3) being disrespectful to her GBG peers and refusing to communicate with some of them directly; (4) failing to comply with multiple U.S. Bank policies.” *Id.* ¶ 190. The updated G&E also observed that “[a]necdotally, several colleagues have commented on Faye’s lack of response to emails and conference call/meeting invitations.” Dkt. No. 77-107 at 4. It also indicated that Boatright had sent “multiple emails referencing lack of resources as a reason that a variety of things have not happened” and had continued to “provide[] unnecessary details about short-comings of junior staff.” *Id.* at 4. The updated G&E Outline also included some positive feedback, crediting her for being “positive and patient” and for sending emails “that were constructive in tone and expressed appreciation for efforts.” Dkt. No. 86 ¶ 190.

During 2015, Boatright repeatedly declined opportunities for work, citing a lack of resources and Mesadieu’s incompetence. *Id.* ¶¶ 196-98. She declined or failed to pursue several revenue generating opportunities with small or mid-cap issuers, claiming that she lacked the resources to pursue the opportunities. *Id.* ¶ 195. On October 27, 2015, a GBG banker referred prospective business to Boatright, but she declined to work on the project, again citing lack of resources. Dkt. No. 77-112 at 4. Nagelson asked her to investigate the opportunity and indicated that he would provide resources to support quality opportunities, but she again refused, claiming

that Nagelson had a “record of not assigning additional resources to support coverage of Northeast accounts.” *Id.* at 3.

Boatright also continued to complain about having to work with Mesadieu, whom she characterized as a “junior underperforming resource.” Dkt. No. 86 ¶ 196. She did not refrain from castigating Mesadieu for minor mistakes in emails copied to his peers and superiors, despite the continued admonitions of her superiors not to do so. *Id.* ¶¶ 203-05. In one incident, Boatright sent an emailed complaint to Kolman and Wallace after Mesadieu had made a mistake. *Id.* ¶ 205. Kolman responded: “Faye I am sorry that you have little to no patience with mistakes for what we ALL agree is an inexperienced professional trying hard to move up the learning curve. . . . [B]leating people into submission does not help and is also not your responsibility to behave that way. Your constant e-mails torturing people or complaining about people is also not acceptable behavior.” *Id.*

Furthermore, Boatright continued to have interpersonal conflicts with members of the GBG, who complained about her to Wallace on several occasions. *Id.* ¶¶ 201-02. In one incident, a GBG banker complained that Boatright lied to her by telling her that she was unable to schedule a meeting with a business prospect. Shortly thereafter, the banker reported that she had noticed Boatright and the business prospect having lunch together. *Id.* ¶ 202. Boatright also refused to work on deals with the Long Island Power Authority and the Metropolitan Transportation Authority because of her conflicts with GBG bankers. *Id.* ¶ 198.

Plaintiff also violated several U.S. Bank policies. Pursuant to U.S. Bank’s Personal Investment Policy

(“PIP”), MSG members were required to pre-clear personal securities trades by requesting advance approval from U.S. Bank. *Id.* ¶ 115. This policy was intended to avoid insider trading concerns. *Id.* Boatright had been counseled by U.S. Bank’s Compliance Department about the PIP following a violation of the policy in 2013. *Id.* ¶ 116. In 2015, she failed to pre-clear personal securities trades in violation of the PIP three times. *Id.* ¶ 214.

She violated U.S. Bank’s corporate credit card policy by using the company card to make personal purchases. *Id.* ¶ 215.

She also violated U.S. Bank’s Independent Registered Municipal Advisor Policy. *Id.* ¶¶ 216-17. Under this policy, only independent registered municipal advisors (“IRMAs”) are permitted to provide certain kinds of information or advice to bond issuers. *Id.* ¶ 216. Because U.S. Bank was not an IRMA, bankers were prohibited from providing such advice until the banker confirmed to U.S. Bank’s Compliance Department that the client already had an IRMA. *Id.*

In October 2015, Nagelson provided Plaintiff with another revised G&E Outline, which indicated that she had failed to demonstrate improvement in the areas identified in the previous G&E Outline. *Id.* ¶ 192. The October G&E Outline indicated that Boatright had generated only \$113,326 in capital markets fees by September 30, despite a target of \$1,000,000. Dkt. No. 77- 109 at 2. Her capital markets fee generation was the lowest of any banker in the GIG. Dkt. No. 86 ¶ 192. Boatright’s revenue generation in 2015 was the lowest of her career at U.S. Bank. *Id.* ¶ 199. The Outline also noted that Boatright maintained that she could not set up more

than one meeting with possible clients at a time due to lack of support. Dkt. No. 77-109 at 3. Additionally, Boatright had failed to respond to emails and to perform work requested by her superiors. *Id.* at 3-4. According to the October G&E Outline, Boatright had “made no visible effort to investigate or identify prospects and clients that are suitable for the USB platform” and she had “conducted only 19 client visits/idea memos since early May, which is the lower [sic] than any other GIG senior banker.” *Id.* at 4. The Outline also faulted her for continuing to complain about Mesadieu through emails copying his superiors and co-workers, and for failing to educate and mentor Mesadieu. *Id.* at 5, 7.

#### F. Boatright’s Discrimination Claims

In December 2014, Boatright approached Richard Payne, a Vice Chairman at U.S. Bank, at a holiday party, and told him that she believed she was being discriminated against based on her gender and her race. Dkt. No. 86 ¶ 138. She complained that she had far fewer resources than Nagelson and that she was being paid less than Nagelson. Dkt. No. 77-2 at 313. Payne relayed her complaint to the HR Department, where McGovern commenced an investigation. Dkt. No. 86 ¶ 139.

On December 19, 2014, McGovern contacted Boatright to discuss her claims. *Id.* ¶ 140. A few days later, on December 23, 2014, McGovern conducted two telephone interviews with Boatright. Boatright claimed that she was: (1) denied sufficient resources; (2) excluded from client communications and new business prospects by members of the GBG; (3) not invited to casual lunches when Wallace came to the New York office; and (4) not sufficiently supported by Wallace in her business efforts. *Id.* ¶ 141. Boatright

claimed that these issues were related to her race and gender. *Id.* She did not complain about unequal pay. *Id.* ¶ 142.

On January 5, 2015, Boatright informed McGovern that she was preparing a written summary of the complaints she had raised. *Id.* ¶ 153. McGovern attempted to schedule follow up interviews with Boatright, but was unable to do so because Boatright was traveling for business or otherwise busy. *Id.* By January 21, 2015, Boatright still had not provided McGovern with her written summary and McGovern advised Boatright that she could not proceed in the investigation without further information and that she was, at that time, unable to substantiate the claims of discrimination. *Id.* ¶ 154. On February 5, 2015, Boatright sent her written summary to McGovern. *Id.* ¶ 155. Her summary principally complained that Wallace failed to provide her with adequate resources. Dkt. No. 77-79. This lack of support, Boatright stated, “has been manifested through a lack of resources to cover my clients relative to both external competition and internal comparable groups, lack of support in providing credit facilities to Northeast Region issuers and a failure to respond to performance issues brought to [Wallace’s] attention.” *Id.* at 4. Boatright additionally claimed that Wallace was “unsupportive of my development and success at US Bancorp,” and that he had “supported exclusionary and unprofessional actions of others as well as promulgated exclusionary behavior.” *Id.* McGovern and Boatright discussed the document by phone shortly thereafter. Dkt. No. 86 ¶ 155.

McGovern subsequently interviewed Kolman, Wallace, and Joe Murphy, U.S. Bank’s Head of Public and Nonprofit Finance, about the Boatright’s letter.

*Id.* ¶ 143; Dkt. No. 77-84. Wallace reported that he regularly spoke with Boatright to talk about her deals and had been encouraging her to “focus on more middle market credits vs large clients, ones that fit our model better. In the NE there are a lot of large, sophisticated issuers, that we can’t make a lot of money on.” Dkt. No. 77-84 at 2. He noted that he had “encouraged Faye to move away from those types of clients, [and had] tried to help her development on our platform.” *Id.* Kolman and Wallace both reported that they had encouraged Boatright to reach out and talk to people rather than sending emails and that Boatright generally did not come out of her office and kept her door closed. *Id.* at 7. Wallace stated that his casual lunch invitations were extended to everyone in the New York office, but that Boatright probably did not hear his invitations because she kept the door to her office closed. *Id.* Wallace committed to working with Boatright and to spending more time with her when he was in New York. *Id.* at 2.

McGovern concluded that Plaintiff’s discrimination claims were unsubstantiated and advised her that the investigation was closed. Dkt. No. 86 ¶ 159.

On August 26, 2015, U.S. Bank received a demand letter from Plaintiff’s counsel. *Id.* ¶ 191. The letter included complaints about her compensation based on her gender and race. *Id.*

Around the same time, Plaintiff filed a Charge of Discrimination with the Equal Employment Opportunity Commission (“EEOC”), premised on the same allegations she made in the demand letter. *Id.* ¶ 193. U.S. Bank received the charge in late November or early December. *Id.*

#### G. Boatright's Termination

On November 12, 2015, Boatright was working on a response to a Request for Proposal (“RFP”) for the Metropolitan Washington Airports Authority (the “MWAA”). *Id.* ¶ 220. An RFP is a document issued to multiple banks by clients seeking financial services. *Id.* ¶ 219. A bank that responds to an RFP is generally trying to put its best foot forward so it will be selected for a project. *Id.* The RFP language drafted by Boatright incorrectly suggested that Boatright had been demoted and her job title and compensation reduced. Dkt. Nos. 77-142, 77-143. It also contained gratuitous language about the number of employees that reported to Boatright and Nagelson respectively, and suggested that Boatright might be leaving the Bank. It stated:

Within MSG, Ms. Boatright was formerly Head of Northeast Banking, although she had no direct reports serving this region. In April 2015, the Northeast Group was folded into the Public Infrastructure Group, Headed [sic] by Scott Nagelson, Managing Director located in San Francisco, CA, formerly Head of West Coast who has had six direct reports since 2012. To the extent Ms. Boatright is further demoted or no longer with US Bancorp, Michael Placencia will assume leadership of US Bancorp’s banking team for the Authority.

*Id.* ¶ 220. Another U.S. Bank employee noticed the language and alerted Nagelson, who observed that it was “inappropriate” and instructed that it be removed. *Id.* ¶ 221; Dkt. No. 77-141.

Shortly thereafter, Nagelson, Kolman, Wallace and McGovern began to discuss terminating Boatright’s

employment. Dkt. No. 86 ¶ 225. The decision was made over a series of calls among the four. Dkt. No. 77-4 at 282. All four supported termination. Dkt. No. 77-3 at 219; Dkt. No. 77-4 at 282; Dkt. No. 77-6 at 131; Dkt. No. 77-7 at 271. Nagelson viewed Boatright's insertion of the language about herself into the RFP as an indication that "she was more interested in sabotaging our efforts than supporting them." Dkt. No. 77-4 at 282. McGovern thought the decision was "appropriate" given "all of the performance issues, and behavioral issues, and policy violations, and work-related issues that they had been addressing with her that hadn't improved." Dkt. No. 77-3 at 220. Wallace thought the primary issue was "performance as measured by revenue production," along with "the weight of the other issues such as the failure to adapt to our business model, the failure to generate strong, positive working relationships with her partners, the treatment of some of her colleagues [and] policy violations." Dkt. No. 77-6 at 131. Nagelson made the final decision to terminate Boatright. Dkt. No. 77-3 at 219. The decision was finalized in mid-December. Dkt. No. 86 ¶ 226. Out of deference to her, the four agreed to wait to inform Boatright of her termination until after the holiday season. *Id.* On January 12, 2016, Nagelson, Wallace, and Kolman met with Plaintiff and informed her that her employment with U.S. Bank was terminated, effective immediately. *Id.* ¶ 227.

U.S. Bank issued a Form U-5, as required when a financial institution terminates an associated person's employment, upon Plaintiff's termination. *Id.* ¶ 228. The Form U-5 stated that the reason for Plaintiff's termination was "Terminated by bank affiliate for unsatisfactory job performance. Not investment related." *Id.*

On May 18, 2018, the EEOC issued a finding of probable cause. Dkt. No. 84-5. Boatright filed this lawsuit shortly thereafter. Dkt. No. 1.

H. Boatright and Nagelson's Revenue Histories

Throughout her employment with U.S. Bank, Boatright received less compensation than Nagelson. In 2012, she received an incentive compensation award of \$179,000. Dkt. No. 86 ¶ 104. For that same year, Nagelson received his contractually guaranteed incentive compensation award of \$450,000. *Id.* ¶ 105. In 2013, Boatright received an incentive compensation award of \$170,000. *Id.* ¶ 117. For that same year, Nagelson received an incentive compensation award of \$325,000. *Id.* For 2014, Boatright received an incentive compensation award of \$135,000. *Id.* ¶ 137. For that same year, Nagelson's incentive compensation award was \$295,000. *Id.* ¶ 137. In every year of her employment with U.S. Bank, Boatright's base salary was equal to or higher than every other male and/or white Director or Managing Director in the PFG with the exceptions of Nagelson and Brian McGough, the supervisory principal for the Chicago office. *Id.* ¶ 71.

The two also generated dramatically different amounts of revenue for U.S. Bank. In 2012, Boatright generated \$747,123 in total revenue, which placed her in the lower range for Managing Directors in the PFG. *Id.* ¶ 101, 102. In 2013, Boatright generated \$826,571.40 in revenue, including \$316,098.66 of higher quality capital markets fees. *Id.* ¶ 106. In 2014, Boatright generated \$1,236,925 in total revenue, but only \$442,499.75 in capital markets fees. *Id.* ¶ 118. In 2012, Nagelson generated \$2,518,341 in revenue. *Id.* ¶ 102. In 2013, Nagelson generated \$1,850,721.68 in total revenue, including \$843,445.64 in capital markets fees. *Id.* ¶ 108. In

2014, Nagelson generated \$778,668 in total revenue, almost all of which consisted of capital markets fees. *Id.* ¶ 119.

## LEGAL STANDARD

Under Federal Rule of Civil Procedure 56, a court “shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). “An issue of fact is ‘material’ for these purposes if it ‘might affect the outcome of the suit under the governing law,’ while “[a]n issue of fact is ‘genuine’ if ‘the evidence is such that a reasonable jury could return a verdict for the nonmoving party.’” *Konikoff v. Prudential Ins. Co. of Am.*, 234 F.3d 92, 97 (2d Cir. 2000) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). In determining whether there are any genuine issues of material fact, the Court must view all facts “in the light most favorable to the non-moving party,” *Holcomb v. Iona Coll.*, 521 F.3d 130, 132 (2d Cir. 2008), and the movant bears the burden of demonstrating that “no genuine issue of material fact exists.” *Marvel Characters, Inc. v. Simon*, 310 F.3d 280, 286 (2d Cir. 2002) (citations omitted).

If the movant meets its burden, “the nonmoving party must come forward with admissible evidence sufficient to raise a genuine issue of fact for trial in order to avoid summary judgment.” *Jaramillo v. Weyerhaeuser Co.*, 536 F.3d 140, 145 (2d Cir. 2008). “[A] party may not rely on mere speculation or conjecture as to the true nature of the facts to overcome a motion for summary judgment.” *Hicks v. Baines*, 593 F.3d 159, 166 (2d Cir. 2010) (citation omitted). Nor may the non-moving party “rely on

conclusory allegations or unsubstantiated speculation.” *F.D.I.C. v. Great Am. Ins. Co.*, 607 F.3d 288, 292 (2d Cir. 2010). Rather, to survive a summary judgment motion, the opposing party must establish a genuine issue of fact by “citing to particular parts of materials in the record.” Fed. R. Civ. P. 56(c)(1)(A); *see also Wright v. Goord*, 554 F.3d 255, 266 (2d Cir. 2009). To defeat a motion for summary judgment, the non-moving party must demonstrate more than “some metaphysical doubt as to the material facts.” *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). The non-moving party “cannot defeat the motion by relying on the allegations in [its] pleading, or on conclusory statements, or on mere assertions that affidavits supporting the motion are not credible.” *Gottlieb v. Cnty. Of Orange*, 84 F.3d 511, 518 (2d Cir. 1996) (internal citation omitted).

In cases involving claims of discrimination or retaliation, “an extra measure of caution is merited in [granting] summary judgment . . . because direct evidence of discriminatory intent is rare and such intent must often be inferred from circumstantial evidence found in affidavits and depositions.” *Chiano v. Quality Payroll Sys., Inc.*, 445 F.3d 597, 603 (2d Cir. 2006) (quoting *Holtz v. Rockefeller & Co., Inc.*, 258 F.3d 62, 69 (2d. Cir. 2001)) (internal citation omitted). However, “the salutary purposes of summary judgment—avoiding protracted, expensive and harassing trials—apply no less to discrimination cases than to . . . other areas of litigation.” *Abdu-Brisson v. Delta Air Lines, Inc.*, 239 F.3d 456, 466 (2d Cir. 2001) (quoting *Meiri v. Dacon*, 759 F.2d 989, 998 (2d Cir. 1985)). “[T]rial courts should not ‘treat discrimination differently from other ultimate questions of fact,’” *id.* (quoting *Reeves v. Sanderson*

*Plumbing Prods., Inc.*, 530 U.S. 133, 148 (2000)), and even in the discrimination context, “a plaintiff must provide more than conclusory allegations to resist a motion for summary judgment.” *Holcomb*, 521 F.3d at 137.

The Southern District’s Local Civil Rule 56.1 sets forth specific requirements about how the facts relied upon by the moving party and disputed by the opposing party are to be presented. Any party moving for summary judgment must “annex[ ] to the notice of motion a separate, short and concise statement, in numbered paragraphs, of the material facts as to which the moving party contends there is no genuine issue to be tried.” L.R. 56.1(a). Local Rule 56.1(b), in turn, requires the party opposing the motion to “include a correspondingly numbered paragraph responding to each numbered paragraph in the statement of the moving party, and if necessary, additional paragraphs containing a separate, short and concise statement of additional material facts as to which it is contended that there exists a genuine issue to be tried.” L.R. 56.1(b). All statements in a Local Rule 56.1 submission “must be followed by citation to evidence which would be admissible.” L.R. 56.1(d). “Each numbered paragraph in the statement of material facts set forth in the statement required to be served by the moving party will be deemed to be admitted for purposes of the motion unless specifically controverted by a correspondingly numbered paragraph in the statement required to be served by the opposing party.” L.R. 56.1(c).

## DISCUSSION

### A. Equal Pay Act

The EPA “prohibits employers from discriminating among employees on the basis of sex by paying higher wages to employees of the opposite sex for equal work.” *Belfi v. Prendergast*, 191 F.3d 129, 135 (2d Cir. 1999). The Act states, in relevant part:

No employer having employees subject to any provisions of this section shall discriminate . . . between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.

29 U.S.C. § 206(d)(1).

Claims under the EPA are evaluated under a burden shifting framework. In order to make out a *prima facie* case under the EPA, a plaintiff must show that: (1) the employer pays different wages to employees of the opposite sex; (2) the employees perform equal work on jobs requiring equal skill, effort, and responsibility; and (3) the jobs are performed under similar working conditions. *See Lavin-McEleney v. Marist Coll.*, 239 F.3d 476, 480 (2d Cir. 2001) (quoting *Belfi*, 191 F.3d at 135). “[P]roof of the employer’s discriminatory intent is not necessary for the plaintiff to prevail on her claim.” *Belfi*, 191 F.3d at 136 (citing *Pollis v. New Sch. for Soc. Rsch.*, 132 F.3d 115, 118 (2d Cir. 1997)); *see also Littlejohn v. City of N.Y.*, 795 F.3d 297, 309 n.7 (2d Cir. 2015)

(noting that under the EPA, “liability turns on whether lesser pay is given for equivalent work—discriminatory motivation is not an element of the claim”).

If a plaintiff can make the *prima facie* showing required under the EPA, the burden of persuasion shifts to the employer to demonstrate that the wage disparity is justified by one of four affirmative defenses provided under the EPA: (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any factor other than sex. 29 U.S.C. § 206(d)(1); *see also, Belfi*, 191 F.3d at 136; *Borrero v. Am. Exp. Bank Ltd.*, 533 F. Supp. 2d 429, 439 (S.D.N.Y. 2008). “Once the employer proves that the wage disparity is justified by one of the EPA’s four affirmative defenses, ‘the plaintiff may counter the employer’s affirmative defense by producing evidence that the reasons the defendant seeks to advance are actually a pretext for sex discrimination.’” *Ryduchowski v. Port Auth. of N.Y. & N.J.*, 203 F.3d 135, 142 (2d Cir. 2000) (quoting *Belfi*, 191 F.3d at 136). “The appropriate inquiry to determine if the factor put forward is a pretext, is whether the employer has used the factor reasonably in light of the employer’s stated purpose as well as its other practices.” *Aldrich v. Randolph Cent. Sch. Dist.*, 963 F.2d 520, 526-27 & n.1 (2d Cir. 1992).

Claims under the EPA are subject to a two-year statute of limitations, except in the case of a willful violation, which is subject to a three-year limitations period. 29 U.S.C. § 255(a). The filing of an EEOC charge does not toll the limitations period. *See Suzuki v. State Univ. of N.Y. Coll. at Old Westbury*, 2013 WL 2898135, at \*5 (E.D.N.Y. June 13, 2013). Because Plaintiff did not file her Complaint until August 13,

2018, even if willful violations of the EPA were to be found, any claims that arose prior to August 13, 2015 are time-barred. Plaintiff was terminated on January 12, 2016, and so her EPA claim can only cover the period from August 13, 2015 to January 12, 2016 (the “EPA Relevant Period”).

Plaintiff has failed to make out the *prima facie* case required under the EPA. The comparator she identifies for her position is Nagelson.<sup>2</sup> But at all times during the EPA Relevant Period, the

---

<sup>2</sup> In her brief in opposition to summary judgment, Boatright argues, for the first time in this litigation, that other U.S. Bank employees should be considered her comparators for EPA and Title VII purposes. Boatright points to Brian McGough, supervisory principal of the Chicago office, who was paid more than her both in base salary and in incentive compensation, and to Mahajan, Allison, Verch, Stowe, and Afsharipour—all non-African American men—who received larger bonuses in 2015 than Boatright, though their base salaries were lower. Boatright named Nagelson only as a comparator when asked at her deposition and did not once suggest that there were other comparators prior to her response to the summary judgment motion. Having previously disavowed that there was another relevant comparator and having failed to raise this argument in her complaint, in her deposition, or at any other time prior to her response to summary judgment, it is too late for Boatright to raise this argument now. *See Minnifield v. City of Birmingham*, 2015 WL 5675738, at \*7 (N.D. Ala. Sept. 28, 2015) (holding that a plaintiff in a pay discrimination case cannot “switch horses mid race and use [a different employee] as [a] comparator . . . [because a] plaintiff may not change or create new claims in his response to a summary judgment motion.”) (quoting *Davis v. Coca-Cola Bottling Co. Consol.*, 516 F.3d 955, 974 (11th Cir. 2008)); *see also Greenidge v. Allstate Ins. Co.*, 446 F.3d 356, 361 (2d Cir. 2006) (declining to reach the merits of an argument raised for the first time in opposition to summary judgment). In any event, the argument is meritless. For reasons stated in the reply brief, the difference in pay with the other alleged comparators is justified by factors other than sex.

undisputed evidence establishes that Plaintiff did not perform “equal work on jobs requiring equal skill, effort, and responsibility,” as Nagelson’s job and hers was not “performed under similar working conditions.” Nagelson was Boatright’s superior. As part of the PFG Restructuring, which was completed by April 2015, prior to the beginning of the EPA Relevant Period, Nagelson became the chief of the GIG, the group in which Boatright was employed. *See Garcia v. Barclay’s Cap., Inc.*, 281 F. Supp. 3d 365, 387 (S.D.N.Y. 2017) (“It is self-evident that a manager does not hold substantially the same position as the individuals she manages. Moreover, it is undisputed that being the head of a regional team is a more senior position and commands a higher level of responsibility than being a member of a regional team.”); *Casseus v. N.Y. Coll. of Health Pros.*, 2016 WL 7029157, at \*18 (E.D.N.Y. Nov. 10, 2016) (holding that an adjunct professor was not similarly situated to her supervisors).

Furthermore, Nagelson had many responsibilities dissimilar to those of Boatright and requiring greater skill, effort and responsibility. He served as the leader and supervisory principal of the San Francisco office and supervised all employees of the GIG. He was in charge of monitoring the performance of all employees and evaluating them. Additionally, he was charged with developing and implementing the GIG’s revenue generation strategies. *See Chiaramonte v. Animal Med. Ctr.*, 2016 WL 299026, at \*10 (S.D.N.Y. Jan. 22, 2016) (holding that, in order to make a prima facie case under the EPA, a plaintiff must “establish that the jobs compared entail common duties or content”).

Boatright, by contrast, did not have any of these responsibilities during the EPA Relevant Period. Her

primary job duty at all times during which she was employed was to generate revenue. Dkt. No. 86 ¶ 61. At no time did Boatright have a supervisory role or a role in developing strategy. *See* 29 C.F.R. § 1620.17 (“The equal pay standard applies to jobs the performance of which requires equal responsibility. . . . Responsibility is concerned with the degree of accountability required in the performance of the job, with emphasis on the importance of the job obligation.”). Because Boatright has not shown that her position was substantially similar to Nagelson’s during the EPA Relevant Period, she has failed to make out a *prima facie* case for liability under the EPA. *See Drury v. Waterfront Media, Inc.*, 2007 WL 737486, at \*3 (S.D.N.Y. Mar. 8, 2007) (“Courts have repeatedly made clear that the ‘substantially equal’ requirement is designed to ensure that employers do not incur liability for legitimate wage disparities owing to differences.”).

Boatright suggests that, to the extent that Nagelson’s position was different from and superior to hers, the difference in treatment between the two was itself a function of discrimination. U.S. Bank did not sponsor her to take the Series 53 exam, as it did for some other employees. Had it done so, she suggests, she would have passed and could have supervised others. That argument, however, does not help Boatright’s EPA claim. For purposes of the EPA, the court and the factfinder analyze whether the plaintiff was treated differently from (and worse than) a similarly situated employee. If Plaintiff cannot identify at least one similarly-situated employee who was paid differently (and better), she does not have an EPA claim. It does not matter for EPA how it came to be that there were no similarly situated employees. *See Kassman v. KPMG LLP*, 925

F. Supp. 2d. 453, 471 (S.D.N.Y. 2013) (“[T]he EPA does not afford a remedy for denial of promotions or ‘titles’.”).

Finally, even if Nagelson were an appropriate comparator for Boatright, there is no genuine issue of fact that the wage disparity was justified by non-pretextual factors other than sex. An EPA claim must be dismissed where an employer can justify a wage differential on factors such as salary negotiated at hire, “inducement to hire the best person for the job,” an employee’s earnings at a prior employer, and the holding of relevant licenses. *Moccio v. Cornell Univ.*, 889 F. Supp. 2d 539, 570-71 (S.D.N.Y. 2012); *Virgona v. Tufenkian Import-Export Ventures, Inc.*, 2008 WL 4356219, at \*10 (S.D.N.Y. Sept. 23, 2008); *Drury*, 2007 WL 737486, at \*4; *Milligan v. Citibank N.A.*, 2001 WL 1135943, at \*9 (S.D.N.Y. Sept. 26, 2001). U.S. Bank has offered an undisputed explanation for Nagelson’s salary and why it was greater than Plaintiff’s. Nagelson had to be recruited away from another high-paying position, whereas Plaintiff was coming from a job where she was paid a minimum wage. Nagelson was hired to build an office from the ground up and to serve as the supervisory principal of the San Francisco office, and held the Series 53 license required to do so. Plaintiff was not hired as a supervisory principal and was not qualified to serve in that capacity. Nagelson had previous experience building public finance businesses at major banks. Plaintiff did not. During the EPA Relevant Period, he held a more senior position than Boatright. These factors all demonstrate that the salary differential between Nagelson and Boatright was based on permissible factors under the EPA.

Boatright has not put forth any evidence suggesting pretext. She has offered nothing more

than speculation that Nagelson was paid a higher salary because of his gender. *See Virgona*, 2008 WL 4356219, at \*11 (“A wage discrimination plaintiff, like any other, may not rest on conclusory allegations of discrimination to defeat an employer’s legitimate explanation for its conduct. Rather, the plaintiff must offer specific facts to create an issue of fact as to whether the employer’s proffered justifications are true or false.”) (quoting *Engelmann v. Nat’l Broad. Co., Inc.*, 1996 WL 76107, at \*11 (S.D.N.Y. Feb. 22, 1996)). Indeed, the undisputed record shows that Boatright was paid more in base compensation than any Managing Director in the PFG who did not serve as a supervisory principal. Dkt. No. 86 ¶ 71. Although she received less in incentive compensation, the record reflects that such incentive payments were based upon revenue generation and overall job performance and did not reflect a pay disparity based on gender.

Summary judgment in favor of the defendants on an EPA claim “is appropriate where ‘two positions are so different . . . that no reasonable juror could conclude that they are ‘substantially equal.’” *Garcia*, 281 F. Supp. 3d at 386 (quoting *Drury*, 2007 WL 737486, at \*3). Plaintiff has not put forth evidence from which a reasonable juror could conclude that Nagelson’s and her positions were substantially equal during the EPA Relevant Period or that Defendants’ substantial reasons for the pay differential were pretextual. Thus, Boatright has failed to make out a *prima facie* case of discrimination under the EPA and even if she had, Defendants have rebutted it. Defendants are entitled to summary judgment on Plaintiff’s EPA claim.

### B. Title VII Pay Discrimination Claim

Pay discrimination claims under Title VII are governed by the burden-shifting framework set forth by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Under this framework, a plaintiff bears the initial burden of making out a prima facie case. To make out a prima facie case, a plaintiff is required to show that: (1) she was a member of a protected class; (2) she was qualified for the job in question; (3) she was paid less than those who were not members of her protected class for the same work; and (4) the employer's adverse employment decision occurred under circumstances that raise an inference of discrimination. *See Belfi*, 191 F.3d at 140. In discrimination cases, the burden of establishing a prima facie case is "minimal." *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506 (1993); *see also, Scaria v. Rubin*, 117 F.3d 652, 654 (2d Cir. 1997) ("The burden of establishing a prima facie case is not onerous, and has been frequently described as minimal."). However, a plaintiff cannot establish a prima facie case based on "purely conclusory allegations of discrimination, absent any concrete particulars." *Meiri v. Dacon*, 859 F.2d 989, 998 (2d Cir. 1985).

If a plaintiff can meet the initial burden of showing a prima facie case, "the burden then shifts to the defendant to offer a legitimate nondiscriminatory reason for the [adverse employment action]. If the defendant does so, the burden returns to the plaintiff to show that the real reason for [the adverse employment action] was" her membership in a protected class. *Ruiz v. Cnty. of Rockland*, 609 F.3d 486, 491-92 (2d Cir. 2010).

The parties do not dispute that Plaintiff has satisfied the first element of the prima facie case; it is undisputed that, as an African American woman, she is a member of two protected classes.

The parties do, however, contest whether Boatright has made out the other three elements of the prima facie case. As for the second element, there is no dispute that Boatright had the qualifications necessary to be hired for her position. She had years of experience in banking and in public finance and Kolman stated at his deposition that: “[h]er intelligence, her smarts was [sic] never questioned on my part.” Dkt. No. 77-7 at 70. However, the Second Circuit has held that this element may be analyzed in terms of whether the plaintiff has shown “satisfactory job performance.” *Thornley v. Penton Pub., Inc.*, 104 F.3d 26, 29 (2d Cir. 1997). In such cases, “[w]hether job performance was satisfactory depends on the employer’s criteria for the performance of the job—not the standards that may seem reasonable to the jury or judge.” *Id.* The record shows that Plaintiff did suffer from performance deficiencies, including: (1) low revenue generation, particularly with respect to higher-value capital markets fees; (2) refusal to adjust her business strategy; (3) mistreatment of junior employees; (4) inability to work cooperatively with members of the GBG; (5) violation of the PIP, IRMA, and credit card policies; and (6) the inclusion of embarrassing and inappropriate language in the response to the WMAA’s RFP. Defendant contends that, in light of the evidence of these performance deficiencies, Plaintiff cannot make out a prima facie case of discrimination.

Defendant’s argument raises the question what Plaintiff is required to show in order to demonstrate satisfactory job performance in her prima facie case,

and the extent to which Defendant is permitted to rebut that showing before the burden has shifted its way. The Second Circuit addressed this issue in *Slattery v. Swiss Reinsurance Am. Corp.*, 248 F.3d 87, 92 (2d Cir. 2001). There, the court stated that, in using the language of satisfactory job performance in the context of the second element of the *prima facie* case, it had not “raised the standard set by the Supreme Court for what suffices to show qualification.” *Id.* at 91. Instead, “[t]he qualification prong must not . . . be interpreted in such a way as to shift onto the plaintiff an obligation to anticipate and disprove, in his *prima facie* case, the employer’s proffer of a legitimate non-discriminatory basis for its decision.” *Id.* at 92. The inquiry must wait until the burden has shifted to the defendant. The qualification and job performance showing required is “minimal; plaintiff must show only that [s]he ‘possesses the basic skill necessary for performance of [the] job.’” *Id.* (quoting *Owens v. N.Y.C. Hous. Auth.*, 934 F.2d 405, 409 (2d Cir. 1991)).

As in *Slattery*, Defendants here seek to have the Court impose a “heightened requirement” upon Plaintiff. 248 F.3d at 92. Plaintiff is not obligated at the outset to rebut Defendants’ complaints about her job performance; instead, she must merely show that she was qualified for her job. Plaintiff has met that burden here.

The third element of the *prima facie* case of Title VII pay discrimination requires the plaintiff to show that she was underpaid discriminatorily. She may make this showing, as in the EPA context, by pointing to an alleged comparator who earned more money for the same work. *Lenzi*, 944 F.3d at 109; *see also Mandell v. Cnty. of Suffolk*, 316 F.3d 368, 379 (2d Cir. 2003) (“A showing of disparate treatment—

that is, a showing that an employer treated plaintiff less favorably than a similarly situated employee outside his protected group—is a recognized method of raising an inference of discrimination for the purposes of making out a *prima facie* case.”). She is not confined to that method of proof, however. In *Lenzi v. Systemax, Inc.*, the Second Circuit clarified that a plaintiff in a Title VII pay discrimination case need not show, as she must in the EPA context, that “she performed equal work for unequal pay,” so long as she can show by some alternative means that she was “discriminatorily underpaid.” 944 F.3d 97, 110 (2d Cir. 2019) (quoting *Washington Cnty. v. Gunther*, 452 U.S. 161, 178 (1981)). Thus, unlike in the EPA context, a plaintiff need not identify a comparator employee who was paid more than her in order to make out the *prima facie* case. She may satisfy the third element by providing evidence “that the challenged wage rate is not based on seniority, merit, quantity or quality of production, or any other factor other than sex.” *Id.* at 111 (quoting *Gunther*, 452 U.S. at 168). If she can provide such evidence, she is not required to show the existence of an exact comparator who was paid at a higher rate. *Id.* at 110 (“[A] Title VII plaintiff alleging a discriminatory compensation practice need not establish that she performed equal work for unequal pay.”). In *Lenzi*, for instance, the Second Circuit permitted a plaintiff to proceed when she showed that she was paid at a rate below the prevailing market salary for her position, while men in different positions at her employer were paid at an above-market rate. *Id.* at 111.

While relying on *Lenzi* for the proposition that the third prong of the *prima facie* case presents a low hurdle, Plaintiff bases her argument that she has satisfied the third prong principally on the traditional

method of proving pay discrimination. She points to Nagelson as an “exact comparator who, from the moment he was hired, was paid far more than her.” Dkt. No. 91 at 18.

As discussed above, Nagelson is clearly not an appropriate comparator for Boatright during the EPA Relevant Period, which follows the PFG Restructuring; Nagelson was Plaintiff’s superior during that time period and had far greater responsibilities. However, Title VII has a lengthier limitations period than the EPA, and so the Court must consider whether earlier in their employment with U.S. Bank Nagelson and Boatright were sufficiently appropriate comparators to make out the showing necessary for a *prima facie* case under Title VII. A plaintiff seeking to pursue claims pursuant to Title VII “must file administrative charges with the EEOC within 300 days of the alleged discriminatory acts.” *Flaherty v. Metromail Corp.*, 235 F.3d 133, 136 n.1 (2d Cir. 2000). The statute of limitations begins to run when each discriminatory act occurs. *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 113 (2002). Boatright filed her charge with the EEOC on October 19, 2015. Thus, her Title VII claims extend to the period beginning December 23, 2014.

Keeping in mind Plaintiff’s minimal burden in making out the *prima facie* case, and recognizing that the issue is close, the Court concludes that, viewed in the light most favorable to Plaintiff, the evidence could support a finding that Nagelson was a sufficient comparator for Boatright during the period before he took leadership of the GIG. Several pieces of evidence support this conclusion: (1) Boatright and Nagelson both held the title “Managing Director”; (2) Boatright and Nagelson both held the internal grade of 18 within U.S. Bank’s internal hierarchy; (3) on

October 27, 2011, while considering offering Boatright the position for which she was ultimately hired, Wallace sent an email to Kolman and other U.S. Bank executives, stating: “We have scheduled time on your calendar . . . for you to meet Faye Boatright. We are talking to Faye as our lead infrastructure banker in the Eastern Region (much like Scott Nagelson in the Western Region),” Dkt. No. 86 ¶ 148; (4) on U.S. Bank’s internal organizational chart labelled “Municipal Bond 2013: Public Finance”, Boatright and Nagelson occupied the same position in their respective offices, Dkt. No. 28; (5) Boatright and Nagelson had the same job description when they were hired. A reasonable juror could conclude, in consideration of this evidence, that Nagelson and Boatright held the same position prior to Nagelson’s promotion.

There is, no doubt, substantial contrary evidence to suggest that Nagelson and Plaintiff were not comparators. This evidence includes that fact that Nagelson had many job responsibilities that Boatright did not, even prior to taking leadership of the GIG, including: (1) opening and leading the San Francisco office; (2) serving as the supervisory principal of the San Francisco office; and (3) making personnel decisions for the San Francisco office. There is additionally record evidence showing that Nagelson’s higher salary was a function of an arms-length bargaining process to recruit him away from a lucrative position at another bank and that his higher bonuses were the result of a record of revenue generation and performance that was superior to Boatright’s. At the *prima facie* stage, however, Defendant cannot rebut Plaintiff’s case. Plaintiff has put forth enough evidence at this early stage to meet her minimal burden of showing that a reasonable

juror might conclude that she and Nagelson held comparable positions prior to the time when Nagelson assumed leadership of the GIG. Because the facts could support a finding that Nagelson was Boatright's comparator during the period prior to the completion of the PFG Restructuring, and because he was paid substantially more than Boatright at all relevant times, Plaintiff has satisfied the third element of the prima facie case.

Finally, in order to make out the prima facie case, Boatright must show that the facts give rise to an inference of discriminatory animus. An inference of discrimination can be proven with direct or indirect evidence. *See Rosen v. Thornburgh*, 928 F.2d 528, 533 (2d Cir. 1991). Such evidence may take a “variety” of forms, including “the employer’s criticism of the plaintiff’s performance in ethnically degrading terms; or its invidious comments about others in the employee’s protected group or the more favorable treatment of employees not in the protected group; or the sequence of events leading to the plaintiff’s discharge.” *Espinosa v. N.Y.C. Dep’t of Transp.*, 304 F. Supp. 3d 374, 389 (S.D.N.Y. 2018) (quoting *Littlejohn*, 795 F.3d at 312 (2d Cir. 2015)). “[T]he fact that an employer favored someone outside of the relevant protected class will ordinarily suffice to sustain an inference of discrimination.” *Vill. Of Freeport v. Barrella*, 814 F.3d 594, 601 n.9 (2d Cir. 2016).

Plaintiff has not offered evidence from which a reasonable juror could find an inference of discrimination. In order to establish an inference of discrimination, Plaintiff relies principally upon the disparity in payment and resources between herself and Nagelson. Plaintiff alleges, and Defendant disputes, that U.S. Bank deliberately deprived her of

the resources that would be necessary for her to succeed and did so because of her race and gender, assigning her underperforming junior bankers, while giving Nagelson a “team” on the West Coast. Dkt. No. 86 ¶ 88. Plaintiff also puts forward three alleged statements by Kolman to suggest an inference of discrimination. She claims that he: (1) once referred to Washington, D.C. as having “bad . . . neighborhoods” and being “unseemly”; (2) once said that the former Chairman of Goldman Sachs “grew up in a really bad neighborhood” and; (3) once said that “the Obamas are disgusting.” Plaintiff points to Nagelson’s original name choice for the public finance team—the “National Infrastructure Group”—as evidence of discrimination. Finally, Plaintiff points out that other employees committed the same policy violations that were part of the reason U.S. Bank stated it terminated her, and were not fired.

Plaintiff’s allegations do not clear the threshold for satisfying the fourth element of the *prima facie* case. First, Kolman’s alleged remarks and Nagelson’s initial naming of the National Infrastructure Group are not themselves sufficient to give rise to an inference of discrimination. Kolman’s alleged remarks are race and gender neutral. An employer or supervisor can comment that an urban area has bad neighborhoods or compliment a bank Chairman for having achieved success despite having come from a less privileged background without—by such comments—taking on the burden to justify (even through a burden of production) an adverse employment action for an employee. So too an employer or supervisor may make derogatory, but race and gender neutral, comments about a political figure including a President of the United States without giving rise to an inference of discrimination.

That is so when the comments are directed at a President who happens to be black or African-American no less than if the comments were directed at a White male or a woman. *See, e.g., Milord-Francois v. N.Y. State Off. of Medicaid Inspector Gen.*, 2020 WL 5659438, at \*14 (S.D.N.Y. Sept. 23, 2020) (holding that no inference of discrimination arose where plaintiff's superior made facially race-neutral comments about Harlem and plaintiff's "angry face" outside the context of the adverse employment action suffered by plaintiff).

The same holds for Nagelson's original titling of the National Infrastructure Group, which the undisputed evidence shows was the name of several other groups in the industry, Dkt. Nos. 77-97, 77-98, 77-99, and which he promptly changed after Boatright complained. Dkt. No. 86 ¶ 173.

Even if Kolman and Nagelson's remarks were interpreted as discriminatory, the Second Circuit has held that "stray remarks," on their own, are not sufficient to raise an inference of discrimination. *See Danzer v. Norden Sys., Inc.*, 151 F.3d 50, 56 (2d Cir. 1998) ("[S]tray remarks, even if made by a decision-maker, do not constitute sufficient evidence to make out a case of employment discrimination."); *see also Liburd v. Bronx Lebanon Hosp. Ctr.*, 2009 WL 900739, at \*4 (S.D.N.Y. Apr. 3, 2009) ("The remark must be considered in context—the more remote and oblique the remarks are in relation to the employer's adverse action, the less they prove that the action was motivated by discrimination, while the more a remark evinces a discriminatory state of mind, and the closer the remark's relation to the allegedly discriminatory behavior, the more probative that remark will be."). In determining whether a remark is stray, a court considers four factors:

(1) who made the remark (i.e., a decision-maker, a supervisor, or a low-level co-worker); (2) when the remark was made in relation to the employment decision at issue; (3) the content of the remark (i.e., whether a reasonable juror could view the remark as discriminatory); and (4) the context in which the remark was made (i.e., whether it was related to the decision-making process).

*Henry v. Wyeth Pharm., Inc.*, 616 F.3d 134, 149 (2d Cir. 2010). The factors are to be considered in their totality. *See Sergilus v. Covenant House Under 21*, 1999 WL 717274, at \*6 (S.D.N.Y. Sept. 15, 1999) (“Stray remarks are not evidence of discrimination if they are not temporally linked to an adverse employment action or if they are made by individuals without decision-making authority.”) (citation omitted).

Nagelson’s initial naming of the GIG is impossible to link to Plaintiff’s pay discrimination allegations. Although Nagelson was her direct superior at the time he selected the offending name, Plaintiff’s allegation is that she was underpaid during the full duration of her employment at U.S. Bank. It is undisputed that Nagelson had no involvement with decisions about Plaintiff’s pay prior to the point when he assumed leadership of the GIG. It is further undisputed that Nagelson never cut Plaintiff’s pay during the period when he led the GIG. Thus, an inference of discrimination cannot arise from Nagelson’s remark.

Kolman, on the other hand, did have a role in setting Plaintiff’s salary, thus satisfying the first element of the stray remarks test. However, his remarks, too, are insufficient to raise an inference of

discrimination on their own. Boatright raises no allegation that these remarks were made in relation to Boatright's employment or decisions about her pay specifically; nor do these facially race-neutral remarks contain any content of a discriminatory nature or that reflects gender or race-based animus. As such, these remarks are also properly classified as "stray" and cannot, on their own, give rise to an inference of discrimination.

The analysis then comes down to whether Plaintiff can make out a *prima facie* case by adding to the foregoing comments the fact that she received less compensation than Nagelson and he received superior resources. *See Khanna v. MUFG Union Bank, N.A.*, 785 Fed. App'x 15, 16 (2d Cir. 2019) (holding that a complaint could survive a motion to dismiss on allegations that the plaintiff "was provided fewer resources, given fewer responsibilities, and held to a higher standard than her white male coworkers."). On the undisputed facts here, Plaintiff cannot establish a *prima facie* case. Nagelson had employees reporting to him because he had a Series 53 license and was capable of supervising employees. Boatright did not have junior bankers reporting to her because she was not a supervisor and was not qualified to be a supervisor. She was not hired to be a supervisor. In that respect, she was treated no differently than bankers in any of the other satellite offices outside of U.S. Bank's traditional footprint of the West Coast, each of whom was able to draw upon—as Boatright was able to draw upon—the unassigned cadre of junior bankers. No one of these senior bankers had junior bankers reporting to them. Boatright was paid more in base salary than all Managing Directors in the PFG who—like Plaintiff—did not serve as supervisory principals and she was

entitled to participate like them in the incentive plan that was applied uniformly to all Managing Directors. *See Fincher v. Depository Tr. and Clearing Corp.*, 2008 WL 4308126, at \*4 (S.D.N.Y. Sept. 17, 2008) (finding no inference of discrimination where plaintiff could not rebut the evidence that her employer applied its performance policy uniformly); *Lee v. Healthfirst, Inc.*, 2007 WL 634445, at \*12-14 (S.D.N.Y. Mar. 1, 2007) (granting summary judgment where defendant granted and denied salary increases and bonuses consistent with policy guidelines). In the face of that evidence, Defendants were not required to give Plaintiff, uniquely among non-supervisory Managing Directors, junior bankers to report to her alone lest—if Defendants did not do so—they create an inference of discrimination and take on for themselves the burden of production under the *McDonnell Douglas* framework.

Finally, even if Boatright could make out the prima facie case, the undisputed record shows that there were legitimate nondiscriminatory reasons that U.S. Bank might pay Nagelson substantially more than it paid Boatright. Under *McDonnell Douglas*, Defendant's burden of putting forth legitimate, nondiscriminatory justification for the adverse employment action is one of “production, not persuasion.” *Reeves*, 530 U.S. at 142 (2000). “[T]he court is not to pass judgment on the soundness or credibility of the reasons offered by defendants, so long as the reasons given are ‘clear and specific’ and, therefore, sufficient to raise a genuine issue of material fact as to whether defendants discriminated against the plaintiff.” *Joseph v. Marco Polo Network, Inc.*, 2010 WL 4513298, at \*13 (S.D.N.Y. Nov. 10, 2010) (quoting *Mandell*, 316 F.3d at 381 (2d Cir. 2003)).

Defendants' legitimate nondiscriminatory reasons include the facts that: (1) Nagelson had prior experience building and leading public finance groups; (2) Nagelson had prior experience working in commercial banks which Plaintiff did not; (3) Nagelson had more total years of work experience in the financial services industry than Boatright; (4) Nagelson held a Series 53 license and was hired to serve a supervisory principal; (5) Nagelson was hired with managerial responsibilities that Boatright never had; (6) Nagelson was earning a comparable salary at Jeffries and had to be aggressively recruited in order to attract him away from his position there; (7) Nagelson generated more revenue than Plaintiff in every year except for 2014, and generated more high-quality capital markets fees in every year; (8) Nagelson did not have any of the interpersonal issues that Plaintiff did; and (9) Nagelson was charged with supervising an office in U.S. Bank's traditional footprint, while Boatright worked in an office where U.S. Bank was attempting to gain a foothold for the first time. Each of these is a legitimate, nondiscriminatory reason for a pay differential. *See Byrnie v. Town of Cromwell*, 243 F.3d 93, 103-05 (2d Cir. 2001) (holding that superior job qualifications are a legitimate, nondiscriminatory reason); *Wagh v. Wilkie*, 2020 WL 5732035, at \*16 (S.D.N.Y. Sept. 24, 2020) (holding that a difference in credentials constitutes a legitimate, nondiscriminatory reason); *Moll v. Telesector Res. Grp., Inc.*, 2020 WL 5593845, at \*25 (W.D.N.Y. Sept. 18, 2020) ("[I]nducements to recruit" an alleged comparator constituted a legitimate, nondiscriminatory business reason."); *Pompey-Howard v. N.Y. State Educ. Dep't*, 275 F. Supp. 3d 356, 364 (N.D.N.Y. 2017) (holding that more extensive experience is a legitimate, nondiscriminatory reason).

Boatright has not produced evidence from which a reasonable juror could conclude that these reasons U.S. Bank gave for paying her less were pretextual. In making a determination on pretext “the trier of fact may still consider the evidence establishing the plaintiff’s *prima facie* case ‘and inferences properly drawn therefrom.’” *Reeves*, 530 U.S. at 143 (2000) (quoting *Tex. Dep’t of Cnty. Affs. v. Burdine*, 450 U.S. 248, 255 n.10 (1981)). If the plaintiff “has presented evidence sufficient to support an inference . . . that the reasons given by the defendant for its employment decision were not its real reasons, triable issues of fact are presented.” *Stern v. Trs. of Columbia Univ. in N.Y.*, 131 F.3d 305, 313 (2d Cir. 1997). “At the summary judgment stage, an employee may meet his or her burden of demonstrating pretext ‘by providing evidence that would allow a fact finder reasonably to (1) disbelieve the employer’s articulated legitimate reasons; or (2) believe that an invidious discriminatory reason was more likely than not the motivating or determinative cause of the employer’s action.’” *Walfish v. Nw. Mut. Life Ins. Co.*, 2019 WL 1248342, at \*9 (S.D.N.Y. Mar. 29, 2019) (quoting *Rich v. Verizon N.J. Inc.*, 2017 WL 6314110, at \*18 (D.N.J. Dec. 11, 2017)).

Boatright’s two principal pieces of evidence for finding the discrepancy between her pay and Nagelson’s to be based on discrimination are: (1) Nagelson’s prior experience did not justify his pay; and (2) she attended Stanford University for her undergraduate studies and held an MBA from Wharton Business School, while Nagelson did not hold an MBA and received his BA from Miami University. Neither of these arguments are sufficient to show pretext.

Boatright's quibbles with Nagelson's prior experience do not render U.S. Bank's reasons pretextual. The record contains ample evidence from which U.S. Bank could conclude that Nagelson's prior experience justified higher pay. Those reasons include that U.S. Bank's management considered it necessary to recruit him away from his high-paying position at Jeffries, that Nagelson had the legal capacity to act as a supervisor which Plaintiff did not, that he was hired into a supervisory role, and that he had prior experience opening offices for prior employers, which Plaintiff did not. *See DeJesus v. Starr Tech. Risks Agency, Inc.*, 2004 WL 2181403, at \*10 (S.D.N.Y. Sept. 27, 2004) (holding that plaintiff's "personal belief that he is as qualified as the other employees who were paid more is not enough to create an issue of fact when the other employees admittedly had more relevant work . . . experience that plaintiff lacked."); *Gross v. Nat'l Broad. Co., Inc.*, 232 F. Supp. 2d 58, 72 (S.D.N.Y. 2002) (holding that plaintiff's "conclusory statement and subjective feelings . . . in support of [plaintiff's] claims that she was treated differently because of her gender . . . cannot withstand a properly supported motion for summary judgment.").

As for her and Nagelson's education, the differences again do not render U.S. Bank's reasons for the pay difference to be pretextual. There were numerous differences in the job experience and work responsibilities of Nagelson and Plaintiff. The fact that years earlier she may have gone to Stanford while he went to Miami, assuming there is a meaningful difference in reputation between the schools as applied to municipal banking, does not necessarily mean that the decision to pay the more experienced Miami graduate more than the less-

experienced Stanford graduate is discriminatory. There is no reason to infer from the fact that U.S. Bank paid Boatright, a Stanford graduate, less than Nagelson, a graduate of Miami University, that Defendants were engaging in discrimination.

Because Boatright has presented no evidence of pretext to overcome the legitimate, nondiscriminatory reasons for her pay relative to Nagelson's that U.S. Bank has put forth, summary judgment is granted to U.S. Bank on Boatright's Title VII pay discrimination claim.

### C. Title VII, NYSHRL & NYCHRL Retaliation

Retaliation claims under Title VII are also analyzed under the *McDonnell Douglas* burden shifting framework. *Smith v. New York City*, 385 F. Supp. 3d 323, 345 (S.D.N.Y. 2019). In order to establish a prima facie case of Title VII retaliation, a plaintiff must show: "(1) participation in a protected activity; (2) that the defendant knew of the protected activity; (3) an adverse employment action; and (4) a causal connection between the protected activity and the adverse employment action." *Hicks*, 593 F.3d at 164 (2d Cir. 2010) (citing *Jute v. Hamilton Sundstrand Corp.*, 420 F.3d 166, 173 (2d Cir. 2005)). As in the discrimination context, "[t]he plaintiff's burden of proof as to this first step 'has been characterized as 'minimal' and '*de minimis*.'" *Kwan v. Andalex Grp. LLC*, 737 F.3d 834, 844 (2d Cir. 2013) (quoting *Jute*, 420 F.3d at 173). "In determining whether this initial burden is satisfied in a Title VII retaliation claim, the court's role in evaluating a summary judgment request is to determine only whether proffered admissible evidence would be sufficient to permit a rational finder of fact to infer a retaliatory motive." *Jute*, 420 F.3d at 173. The

elements of a prima facie case of retaliation under Title VII, the NYSHRL, and the NYCHRL are “identical,” except that the NYCHRL employs a broader standard of an “adverse employment action” than its federal and state counterparts.” *Smith*, 385 F. Supp. at 345-46 (citing *Nieblas-Love v. N.Y.C. Hous. Auth.*, 165 F. Supp. 3d 51, 70 (S.D.N.Y. 2016)).

It is undisputed that Boatright engaged in protected activity when she filed her discrimination complaint with the EEOC on October 19, 2015. Nor is it disputed that U.S. Bank became aware of this activity by early December 2015. Finally, the parties agree that Kolman, Wallace, Nagelson, and McGovern agreed to terminate Boatright shortly after U.S. Bank received the EEOC charge.<sup>3</sup> Thus, only the fourth prong of the prima facie case is in dispute.

Title VII retaliation claims require that a plaintiff “establish that his or her protected activity was a but-for cause of the alleged adverse action by the employer,” and not merely a “substantial” or “motivating” factor, which is sufficient for a discrimination claim. *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 362, 348 (2013). At the prima

---

<sup>3</sup> Boatright does not allege that any adverse employment action arose out of her December 2014 complaint at the holiday party. Nor could she. The only employment event subsequent to her complaint was her placement on the performance improvement plan reflected in the G&E Outline, but it is well established that being placed on a performance improvement plan does not constitute an adverse employment action. *Brown v. Am. Golf Corp.*, 99 Fed. App’x 341, 343 (2d Cir. 2004) (finding an employee’s placement on an employment improvement plan insufficient to constitute an adverse employment action); *Gorman v. Covidien, LLC*, 146 F. Supp. 3d 509, 524 (S.D.N.Y. 2015) (same). Thus, Boatright cannot allege retaliation based on her 2014 complaint.

facie stage, a plaintiff may show causation either indirectly, “by showing that the protected activity was closely followed in time by the adverse [employment] action,” *Kwan v. Andelex Grp., LLC*, 737 F.3d at 845 (quoting *Gorman-Bakos v. Cornell Coop. Extension of Schenectady Cnty.*, 252 F.3d 545, 554 (2d Cir. 2001)), or directly, “through evidence of retaliatory animus directed against the plaintiff by the defendant.” *Hicks*, 593 F.3d at 170 (quoting *Gordon v. N.Y.C. Bd. of Educ.*, 232 F.3d 111, 117 (2d Cir. 2000)).

The decision to terminate Boatright occurred in mid-December, within weeks of U.S. Bank’s receipt of the EEOC charge. This span of time is sufficiently narrow to support an inference of a retaliatory motive. *See El Sayed v. Hilton Hotels Corp.*, 627 F.3d 931, 933 (2d Cir. 2010) (holding that a three-week span between a complaint and discharge was close enough in proximity to raise an inference of retaliation). However, it is not sufficient alone to raise an inference of such a motive to satisfy the plaintiff’s prima facie burden. Where “the only basis for showing causation at the prima facie stage is a temporal nexus, ‘and gradual adverse job actions began well before the plaintiff had ever engaged in any protected activity, an inference of retaliation does not arise.’” *Giudice v. Red Robin Intern., Inc.*, 555 Fed. App’x 67, 69 (2d Cir. 2014) (quoting *Slattery*, 248 F.3d at 95); *see also Spadola v. N.Y.C. Transit Auth.*, 242 F. Supp. 2d 284, 294-95 (S.D.N.Y. 2003) (holding that an employer is “not obligated to automatically cease or abandon an ongoing internal disciplinary procedure merely because an employee files a charge alleging discrimination”). Were this not the case, “[a]n employee who has been repeatedly reprimanded and who sees the writing on the wall ‘[could] shield

herself from legitimate managerial prerogatives by threatening a discrimination complaint and then alleging unlawful retaliation.” *Vitale v. Equinox Holdings, Inc.*, 2019 WL 2024504, at \*13 (S.D.N.Y. May 7, 2019) (quoting *Lee v. Healthfirst, Inc.*, 2007 WL 634445, at \*24 (S.D.N.Y. Mar. 1, 2007)).

That proposition is squarely applicable here. The undisputed record reflects that by the time U.S. Bank received Boatright’s EEOC charge, Boatright was suffering from numerous performance issues which had been noted by her employer, including generating the least revenue of any senior banker in the GIG for 2015, repeated interpersonal conflicts with her colleagues and subordinates, and multiple policy violations. There is no evidence that these complaints themselves were discriminatory. They came from numerous different employees at the Bank. Moreover, prior to the EEOC charge, U.S. Bank had repeatedly warned Boatright and attempted to help her with her performance issues by: (1) counseling her on her policy violations and interpersonal issues with coworkers; (2) providing her with lower incentive compensation payments in 2013 and 2014 because of her performance deficiencies; (3) critiquing her performance on her 2014 Review; and (4) providing her with G&E Outlines in May, July, and October 2015. Those efforts did not succeed. Even after the counseling, Plaintiff continued to have performance issues culminating in the disciplinary violations and the incorrect and derogatory comments in the RFP. The termination of her employment, following her failure to respond to the criticisms that predated the EEOC charge, does not suggest retaliation.

Plaintiff attempts to counter by asserting that Defendants “only discussed terminating [her] after U.S. Bank’s receipt of her EEOC charge.” Dkt. No. 86

¶¶ 225-26. The evidence contradicts this claim. Nagelson testified that the decision to terminate Boatright was made in November 2015, in response to her insertion of the language suggesting she had been demoted into the RFP, before U.S. Bank received the EEOC charge. Dkt. No. 77-4 at 282. U.S. Bank was under no obligation to stop considering terminating Boatright after receiving the charge. *See Clark Cnty. Sch. Dist. v. Breeden*, 532 U.S. 268, 272 (2001) (“[Employers] proceeding along lines previously contemplated, though not definitively determined, is no evidence whatever of causality” in Title VII retaliation claims); *White v. Pacifica Found.*, 973 F. Supp. 2d 363, 385-86 (S.D.N.Y. 2013) (dismissing NYSHRL and NYCHRL claims where employer had already begun contemplating plaintiff’s termination before receiving notice of the complaint). Indeed, there is no any evidence that Kolman, Nagelson, Wallace, or McGovern, the decisionmakers in Boatright’s termination, even knew about the EEOC charge when they decided to terminate Boatright. Because Plaintiff has presented no evidence other than the timing of U.S. Bank’s receipt of her EEOC charge to prove that she was fired in retaliation for it, Plaintiff cannot make out a *prima facie* case of retaliation.

Even if Plaintiff could make out the *prima facie* case here, she has failed to show any evidence that Defendants’ proffered reasons for terminating her were pretextual. In order to establish pretext “a plaintiff must produce evidence sufficient to cast doubt that the defendants’ proffered reasons are not the real reasons for the adverse employment action.” *Blanco v. Brogan*, 620 F. Supp. 2d 546, 554 (S.D.N.Y. 2009) (citing *Jute*, 420 F.3d at 173). The plaintiff may satisfy her burden at this stage “by proving that an

impermissible factor was a motivating factor, without proving that the employer's proffered explanation was not some part of the employer's motivation." *Fields v. N.Y. State Off. of Mental Retardation and Developmental Disabilities*, 115 F.3d 116, 120-21 (2d Cir. 1997); *see also Cronin v. Aetna Life Ins. Co.*, 46 F.3d 196, 203 (2d Cir. 1995) ("[P]laintiff is not required to show that the employer's proffered reasons were false or played no role in the employment decision, but only that they were not the only reasons and that the prohibited factor was at least one of the motivating factors.").

Boatright's principal theory is that, beginning in December 2014, after her complaint of discrimination at the holiday party, U.S. Bank began creating a paper trail of trumped-up performance issues in order to create a basis for terminating her. These issues included her interpersonal difficulties, her low revenue generation, her violations of U.S. Bank's PIP, IRMA, and credit card policies, and, finally, her insubordinate insertion of the language suggesting she had been demoted into the RFP for the WMAA. This argument suffers from two critical flaws. First, Boatright's performance issues, particularly with respect to her interpersonal relationships, pre-dated her complaint at the December 2014 holiday party. By December 2014, Conte and Yandun had already requested transfers in order not to work with Boatright anymore. Wallace began drafting Boatright's 2014 review in November, before she made her initial complaint of discrimination. The review cited her consistent interpersonal problems as an area that needed improvement, stating that "Faye has had some challenges developing consistent, positive relationships with some of her colleagues in MSG and Government Banking" and that "[w]e have discussed

having more patience with partners, particularly in difficult and challenging situations.” Dkt. No. 77-94. The review also cited Boatright’s use of email as a problem: “Among some of the things we have discussed are better planning, time management and higher quality communication (less email and more dialogue with colleagues and partners).” *Id.* The inference thus is plain that the post-December performance counseling was the result of Boatright’s pre-December performance issues.

Second, the undisputed evidence is that the performance issues—both before and after December 2014—were real. Boatright concedes that she had a difficult relationship with Mesadieu and—though she argues she was justified by Mesadieu’s poor performance—admits that she sent numerous emails to superiors complaining about his performance despite their repeated admonitions to stop. She concedes that she was the GIG’s lowest revenue generator in 2015, though she argues this was only because she was starved of resources. She does not contest that she violated the IRMA, PIP, and credit card policies, suggesting only that other employees did the same thing and faced lesser discipline. She admits that she inserted the offending language into the RFP, but claims she did so merely in an effort to be “truthful.” Boatright thus concedes that none of the reasons given for her termination were false; she merely provides excuses for them, which cannot support a finding of pretext. *See Kalra v. HSBC Bank USA, N.A.*, 567 F. Supp. 3d 385, 395 (E.D.N.Y. 2008) (holding that pretext could not be established where plaintiff, “rather than disput[ing] that most of these complaint or incidents occurred, . . . merely provide[d] explanation for his failure to perform his job satisfactorily . . . or trie[d] to minimize the significance

of the incident.”). *Ricks v. Conde Nast Publ’n, Inc.*, 92 F. Supp. 2d 338, 347 (S.D.N.Y. 2000) (“[T]he mere fact that an employee disagrees with her employer’s assessment [of her performance] cannot stand [] on its own [] to show that her employer’s reason for termination was pretextual.”).

Boatright additionally attempts to establish pretext by arguing that other U.S. Bank employees were not terminated for similar conduct. She argues that for each of the rules she violated, there was another employee who also violated that rule without being terminated. It is not sufficient that Plaintiff show that there is at least one person who violated each rule she violated without being terminated. In order to show that different employees were disciplined differently, a plaintiff must show that “the conduct for which the employer imposed discipline was of comparable seriousness.” *Graham v. Long Island R.R.*, 230 F.3d 34, 40 (2d Cir. 2000).

Boatright has failed to do so. Boatright violated multiple policies despite repeated warnings over a period spanning years. She violated the PIP policy three times in 2015 alone, along with violating the IRMA and credit card policies. Although Boatright notes that Wallace violated the PIP policy on at least one occasion, and that Nagelson, Kolman, and Jon Welch, a junior banker in the GIG, all violated the credit card policy and were not terminated, though Welch did receive a written reprimand, Dkt. No. 84-53, none of those employees had the record of repeated violation of numerous rules that Boatright had. A bank—which has responsibility to its clients and to the public—has the discretion to take action against a non-compliant employee. Plaintiff has not

shown that U.S. Bank's determination that such time had come in her case was pretextual.<sup>4</sup>

For these reasons, Boatright cannot make out a *prima facie* case of retaliation under Title VII, the NYSHRL, or the NYCHRL. Even if she could, she has presented no evidence that her termination was pretextual. Thus, U.S. Bank is entitled to summary judgment on Boatright's retaliation claim.

---

<sup>4</sup> Boatright also points out that Kolman's performance evaluations indicated that he needed to improve his personal relationships. Kolman's 2014 evaluation reflected a rating of "Solid Performance" for "Build Relationships" and stated: "Strong relationships with customer and community but could be more effective with internal relationships across business lines." Dkt. No. 84-60. His 2015 performance evaluation reflected a rating of "Needs Improvement" in the "Build Relationships" category stating that Kolman could "improve the tone of his interactions internally" and that he "continue[d] to question internal policies that are often core elements of USB culture, which creates issues that chew up time and resources to fix." Dkt. No. 84-61 at 6. However, Kolman's alleged interpersonal issues never reached anywhere near the severity of Boatright's. During her brief time at U.S. Bank, multiple employees asked not to work with Boatright anyone longer and in some instances left the Bank at least in part because of her abrasive style. The record also shows that she was repeatedly asked not to use email to embarrass her subordinates to their co-workers and superiors, but continued to do so in spite of these requests. Finally, her supposed comparators did not suffer from the same performance deficiencies as Boatright, nor did they engage in direct insubordination, as she did with the RFP.

## CONCLUSION

For the foregoing reasons, summary judgment is GRANTED to Defendants on all counts. The Clerk of Court is respectfully directed to enter judgment for Defendants and close the case.

SO ORDERED

Dated: December 16, 2020  
New York, New York

/s/ Lewis J. Liman  
LEWIS J. LIMAN  
United States District Judge

Appendix D

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

---

Civil Action No. 18 Civ. 7293(LJL)

---

FAYE BOATRIGHT,

Plaintiff

v.

U.S. BANCORP., U.S. BANK NATIONAL  
ASSOCIATION and U.S. BANCORP.  
INVESTMENTS, INC., jointly, severally  
and in the alternative,

---

**PLAINTIFF FAYE BOATRIGHT'S RULE  
56.1(b) STATEMENT OF ADDITIONAL  
MATERIAL FACTS**

Pursuant to Rule 56.1(b) of the Local Rules for the Southern District of New York, Plaintiff Faye Boatright (“Plaintiff” or “Boatright”) respectfully submits this Rule 56.1(b) Statement of Additional Material Facts in opposition to the Motion for Summary Judgment filed by the Defendants U.S. Bancorp, U.S. Bank National Association (“U.S. Bank N.A.”) and U.S. Bancorp Investments, Inc. (“USBI,” and collectively, “Defendants”).

## I. THE PARTIES

### A. Plaintiff

1. Plaintiff Faye Boatright (“Plaintiff” or “Ms. Boatright”) was employed by U.S. Bank National Association (“U.S. Bank N.A.”) and U.S. Bancorp Investments, Inc. (“USBI,” and together with U.S. Bank N.A., “U.S. Bank”) as a Managing Director (“MD”) in U.S. Bank’s New York, New York office (the “New York Office”) from February 13, 2012 until her employment was terminated on January 12, 2016. (JSF ¶ 1).

\* \* \*

23. The entire MSG, including the West Coast Group, used the Northeast Group’s transaction experience to market US Bank municipal services to their respective client bases. (Boatright Decl. at ¶ 9; Burden Decl. **Ex. 1**)

## III. THE PLAINTIFF’S EEOC COMPLAINT AND THE EEOC’S FINDING OF PROBABLE CAUSE

24. As discussed *infra*, on October 19, 2015, after experiencing years of discrimination and disparate pay, Plaintiff filed a Charge of Discrimination with the EEOC, in which she alleged violations of Title VII and the EPA based on her race and/or gender. (Stoler Decl. Ex. 110).

25. On December 2, 2015, U.S. Bank’s counsel, Constangy, Brooks, Smith & Prophete, LLP, wrote to the EEOC. In their letter, U.S. Bank’s counsel stated:

Our law firm has just been retained by U.S. Bancorp to represent the company in response to Ms. Boatright’s charge of discrimination in the above referenced matter. The company has

informed us that although the charge is dated October 2015, a copy of the charge was only just received. We are writing to determine any current deadlines in this matter. Should you need any additional information, please let me know.

[Stoler Decl. Ex. 111.]

26. As part of its investigation into Plaintiff's claims, the EEOC requested that US Bank produce the following documents:

Request No. 1: For the following employees, offer letters, resumes at hire, and year by year compensation figures (from hire until present), separately reporting base salary, total bonus, cash award, signing bonus, RSUs, and dollar value of RSUs: Paul Nagelson, Scott Allison, Amit Mahajan, Kevin Stowe, Esther Berg, Michael Placencia, Paul Chatalas, Jonathan Welch, Brian McGough, Ila Afsharipour, and Charging Party Boatright.

[Burden Decl., **Ex. 2**]

27. On September 8, 2017, counsel for U.S. Bank responded in writing as follows:

Response: Attached as Exhibit 18, please find the resumes, and year by year compensation figures for P. Scott Nagelson, Brian McGough, Scott Allison, Michael Placencia, Esther Berg, Paul Chatalas, Ila Afsharipour, Amit Mahajan and Kevin Stowe. We are still collecting the resume and compensation figures for Jonathan Welch and will produce them in an additional production.

The resumes and compensation data attached demonstrate that at the time of hire, Ms. Boatright's salary was higher than all but two individuals – P. Scott Nagelson and Brian McGough.

[Burden Decl., **Ex. 2**]

28. Attached as Exhibit 18 to U.S. Bank's counsel's letter was a chart which in truth reflected only the **base salary** of all the aforesaid individuals, not the total compensation requested by the EEOC, of all of the aforementioned individuals. The U.S. Banks' salary chart presented these base salary numbers under column heading "Compensation History," thereby giving the EEOC the false impression that the figures presented were for total compensation. (Burden Decl., **Ex. 2**).

29. In this chart, U.S. Bank represented that Plaintiff's "Compensation History" was \$200,000 on 2/15/12 and \$205,000 on 3/1/15. (Burden Decl., **Ex. 2**).

30. In this chart, U.S. Bank represented that Nagelson's "Compensation History" was \$225,000 on 7/1/11. (Burden Decl., **Ex. 2**).

31. These were knowingly false statements designed to mislead the EEOC in its investigation. Had U.S. Bank supplied the EEOC with Boatright and Nagelson's W-2s, the compensation data would have been as follows:

Year	Boatright	Nagelson	Difference
2012	\$165,775.89	\$636,586.96	\$470,811.07
2013	\$357,264.38	\$650,832.12	\$293,567.74
2014	\$367,020.90	\$549,239.65	\$182,218.75
2015	\$342,193.15	\$523,816.46	\$181,623.31
2016	\$ 91,489.19 <sup>5</sup>	\$473,437.30	\$381,948.11

[Burden Decl., **Exs. 3 and 4**]

---

<sup>5</sup> This amount is the total of Boatright's 2016 compensation from U.S. Bank and Blaylock Beal Van, LLC. (Burden Decl., **Ex. 3**).

32. The total difference in compensation between Boatright and Nagelson from 2013 through 2016 was \$1,510,168.98. (Burden Decl., **Exs. 3 and 4**).

33. Even with U.S. Bank's false and misleading statements regarding Boatright and Nagelson's compensation, after an extensive investigation, on May 18, 2018, the EEOC issued a determination in Ms. Boatright's favor finding that there was probable cause that US Bank discriminated against her with respect to her compensation because of her race and sex:

Charging Party alleges that Respondent subjected her to compensation discrimination in connection with her gender (female) and race (black). Charging Party further alleges that she was terminated in retaliation to her opposition and complaints of discrimination.

Respondent contends that Charging Party was terminated due to poor performance, policy violations, and unacceptable conduct. Respondent claims that Charging Party's allegations regarding compensation are unfounded and conclusory due to her not being privy to the compensation of other employees. Respondent claims that the comparators Charging Party compared herself to are considered her true comparators.

The Commission's investigation reveals that Respondent was placed on notice to provide additional information in connection to their defense. Specifically, Respondent was offered nine months to provide information that included, but was not limited to compensation information, actions and decisions, as well as, a job description for managing director. Respondent chose against

producing the information requested. **Investigation supports that higher compensation were afforded to similarly situated males in comparison to Charging Party, supporting that this was more likely than not motivated by sex.**

**Based on the above, Respondent's asserted defense does not withstand scrutiny and the Commission has determined that there is reasonable cause to believe that Respondent has subjected Charging Party to compensation discrimination in connection to her race and sex.**

This determination is final.

[Burden Decl., **Ex. 5**](Emphasis Supplied).

\* \* \*

66. Unlike Plaintiff, Nagelson does not have an MBA and has never taken classes in pursuit of an MBA:

Q. You do not have an MBA?

A. No.

Q. Have you ever taken classes in pursuit of an MBA?

A. No.

[Nagelson 11:23-12:27.]

---

<sup>7</sup> All references to "Nagelson" are to the deposition transcript of Paul Scott Nagelson.

## **IX. NAGESLON'S PROFESSIONAL LICENSING**

67. Nagelson holds a Series 7, 53 and 63 licenses.<sup>8</sup> (Nagelson 12:11-14).

## **X. NAGELSON'S WORK HISTORY**

68. Despite having obtained his BS in 1980, seven (7) years before Plaintiff obtained her BA from Stanford University, Plaintiff's work experience prior to U.S. Bank was comparable, if not superior to, Nagelson's work experience. (Boatright 25:25-26:10; Stoler Decl. Exs. 12 and 14).

69. From 1980 to 1988, Nagelson had no employment and/or job duties that involved securities:

Q. Prior to 1988 had any of your job duties involved securities?

A. No.

[Nagelson 16:13-15.]

70. From January 1980 through December 1983, Nagelson held the position of Credit Analyst for Westinghouse Credit Corporation (Westinghouse"). (Nagelson 12:19-25).

\* \* \*

[Nagelson 16:21-17:3.]

84. Nagelson's clients at National West Minster Bank were located "west of the Rockies." (Nagelson 18:2-6).

---

<sup>8</sup> As discussed *infra*, a Series 53 and/or 63 license was not required for the position of Managing Director, Public Finance at U.S. Bank. (Burden Decl., **Ex. 6**).

85. From January 1992 through December 1998, Nagelson was employed by Artemis Capital Group, Inc., a boutique investment firm that focused on municipal finance. (Nagelson 17:8-12; 17:14-16; Stoler Decl. Ex. 12). This position was also located in San Francisco. (Id.)

86. While at Artemis, the bulk of Mr. Nagelson's clients were located on the West Coast:

Q. When you worked at Artemis where were the clients located?

A. All over. Artemis was a relatively small firm with just a couple of offices. So I would fill in as necessary wherever we had to go. But I spent the bulk of my time on the West Coast.

[Nagelson 18:7-12.]

87. Mr. Nagelson did not supervise anyone when he worked at Artemis:

Q. . . . did you supervise anyone when you worked at Artemis?

A. No.

[Nagelson 19:9-11.]

88. At the end of 1998, Dain Rauscher, Incorporated acquired Artemis and Mr. Nagelson was offered a position as a Managing Director with Dain Rauscher. (Nagelson 18:23-25).

89. As a Managing Director at Dain Rauscher, Nagelson was "involved in generating business, underwriting business from municipal governments." (Nagelson 19:5-8).

90. Nagelson did not supervise anyone while he was employed at Dain Rauscher:

Q. When you were at Dain Rauscher did you supervise anyone?

A. No.

[Nagelson 19:12-14.]

91. From May 1999 through April 2001, Nagelson was employed by Merrill Lynch & Co. in San Francisco. (Nagelson 19:15-19).

92. Nagelson described his employment with Merrill Lynch as follows:

Q. The next employer you have is from May of 1999 to April of 2001 at Merrill Lynch & Co. Can you tell me about that employment?

A. Yeah, similar type of job at Merrill. They recruited me to staff a public finance office in San Francisco and I was primarily responsible for developing relationships in Northern California on the government public finance site.

[Nagelson 19:16-23.]

93. Nagleson was not responsible for hiring anyone while he was employed at Merrill Lynch & Co.:

Q. Were you responsible for hiring any employees during the period of time that you worked at Merrill from May of '99 through April of 2001?

A. No.

[Nagelson 19:24-20:2.]

94. Nagelson did not supervise anyone while he worked at Merrill Lynch & Co.:

Q. Did you supervise anyone while you worked as a Director at Merrill from May of 1999 to April 2001?

A. No.

[Nagelson 20:3-8.]

95. While employed at Merrill Lynch & Co., Mr. Nagelson's business transactions were based almost exclusively in California. (Nagelson 21:23-22:4; Stoler Decl. Ex. 12).

96. Nagelson's resume identifies the following clients while employed at Merrill Lynch:

\$1.1 billion in senior managed appointments including San Francisco Bay Area Rapid Transit District, City of Sacramento, Sacramento Redevelopment Agency, Lewis & Clark College, San Jose International Airport, San Francisco Bay Area Transportation Finance Authority, Rhode Island Economic Development Corporation (T.F. Green State Airport), Bay Area Toll Authority, San Diego Unified Port District.

[Stoler Decl. Ex. 12.]

\* \* \*

[Nagelson 22:14-18]

100. From May 2001 through March 2009, Nagelson was employed as a Principal by Bank of America in San Francisco. (Nagelson 23:4-11). Nagelson described this position as being ". . . a similar job to what I had at Merrill Lynch with a geographic focus on governments in Northern California, not completely but mostly." (Nagelson 23:8-11).

101. All of the clients Nagelson did business with while he was employed at Bank of America were

located in the State of California. (Nagelson 23:17-21; Stoler Decl. Ex. 12).

102. Nagelson did not supervise anyone while he worked at Bank of America:

Q. When you worked at Bank of America did you supervise any employees?

A. No.

[Nagelson 23:22-24:1.]

103. From April 2009 through 2011, Nagelson was employed by Jefferies & Co. in San Francisco. Nagelson described his job duties at Jefferies & Co. as follows:

I was recruited by Jeffries to staff a San Francisco public finance office and be the second senior banker located for Jeffries in California. And my job was again, as I had with prior firms, call on clients, this time throughout California, and develop underwriting opportunities with . . . those relationships.

[Nagelson 24:25-25:6.]

104. Just as with his employment with Bank of America, while he was employed at Jefferies & Co. his clients were located almost exclusively in California:

Q. When you worked at Jefferies did you service any clients that were outside of California?

A. Yes.

Q. Do you remember where they were located?

A. Definitely Denver. And that's all I can remember.

[Nagelson 25:7-13]

105. Nagelson hired only one person, an analyst named Paul Tuan, while he worked at Jefferies. (Nagelson 25:14-16).

106. Mr. Tuan was the only person Nagelson supervised while he was employed at Jefferies:

Q. Did you supervise any employees when you worked at Jefferies?

A. Yes.

Q. Who did you supervise?

A. An analyst.

Q. Do you remember what the analyst's name was?

A. Yes. Paul Tuan.

Q. And is that the same person that you hired?

A. It is.

[Nagelson 25:21-26:8.]

107. The majority of Nagelson's investment banking experience was narrowly focused on Northern California. (See, *infra* ¶¶ 69-104).

108. Nagelson had very little investment banking experience in Southern California, and very little to no investment banking experience outside of California covering any of the other cities or states in the remainder of the West Coast region. (See, *infra* ¶¶ 69-104).

109. Thus, Plaintiff's professional experience prior to working at U.S. Bank was comparable, if not greater than Nagelson's professional experience which was limited almost exclusively to California. (See, *infra* at ¶¶ 38-59; 69-104).

## **XI. THE MANAGING DIRECTOR POSITION AT U.S. BANK**

110. Both Plaintiff and Nagelson held the same U.S. Bank Job Title, Job Code and Grade:

Title: Sales Marketing Managing Director;  
Job Code- RNIM1;  
Grade 18.

[Stoler Decl. Exs. 13, 22.]

111. The written job description for the position that Plaintiff and Mr. Nagelson were hired into at U.S. Bank, Sales Marketing Manager Director (“Managing Director”), describes the position’s function as follows:

Develops and executes calling efforts, services and relationship strategies to identify opportunities in the public sector debt capital market. Increases revenue and improves profitability by conducting business development activities to secure new clients.

Develops, manages and retains the most complex and important client relationships with potential for highest level of financial return. Business segments includes all governments/not-for-profit entities in the United States with a focus on the largest government entities, Higher Education, Not-for-Profit, and Healthcare. Incumbent works closely with the Division’s Relationship Management Teams to create a strategic, integrated approach. Incumbent has well-developed public sector debt capital market skills.

[Burden Decl., **Ex. 6**]

112. U.S. Bank’s written job description for Plaintiff and Nagelson’s Managing Director position identifies

the “Essential Responsibilities” of the position as follows:

1. Sustain profitability and growth of unit(s).
2. Provide strategic direction and leadership to pursue objectives of unit(s).
3. Create and maintain cost effective programs for unit(s).
4. Actively ensure compliance with all US Bancorp policies and procedures such as Code of Ethics and all Anti-Money Laundering, Bank Secrecy Act, information security and suspicious activity reporting requirements, etc.

[Burden Decl., **Ex. 6**]

113. U.S. Bank’s written job description for Plaintiff and Nagelson’s Managing Director position identifies the “Essential Qualifications” of the position of as follows:

1. 15+ years of banking experience
2. 5+ years of management experience
3. BA/MBA in finance, accounting, or other related field
4. Well-developed leadership abilities and strategic management skills
5. Knowledge of unit(s) and relation to industry
6. Well-developed verbal and written communication skills
7. Well-developed analytical, decision-making and problem-solving skills

8. Considerable tact, diplomacy and people skills.

[Burden Decl., **Ex. 6**]

114. A supervisory principal must hold a Series 53 license from the Financial Industry Regulatory Authority (“FINRA”) and, by virtue of that license, is qualified to oversee a bank’s municipal securities activities and supervise and train principals and representatives. (Stoler Decl. Ex. 11).

115. A Series 53 license is not a stated requirement in U.S. Bank’s written job description for the Managing Director position. (Burden Decl., **Ex. 6**).

116. Nagelson admitted that he had the job responsibilities listed on the written job description:

Q. Going back to the actual functions that are listed on what we’ve marked as P-2 is it your testimony that you had these job functions plus a supervisory responsibility?

A. That’s correct.

[Nagelson 35:20-24.]

117. U.S. Bank hired Nagelson as the Managing Director of the West Region and hired Plaintiff as the Managing Director for the Northeast Region. (Stoler Decl. Exs. 13, 22; Boatright 72:20-21). Nagelson accepted the position on July 1, 2011. (JSF ¶16). Boatright accepted the position on February 7, 2012. (JSF ¶ 27; Stoler Decl. Ex. 22). As detailed immediately below, both were to report to the same Manager, Alex Wallace.<sup>9</sup>

---

<sup>9</sup> See, Stoler Decl. Exs. 13, 22.

## **XII. U.S. BANK HIRES NAGELSON**

118. On June 6, 2011, less than one (1) year before U.S. Bank hired Plaintiff, U.S. Bank provided Nagelson with an offer letter summarizing the terms and conditions of his employment. (JSF ¶ 15; Stoler Decl. Ex. 13).

119. Nagelson's offer letter contains the following terms which are identical to those in Plaintiff's offer letter:

Grade: 18

Job Title: Public Finance Managing Director

Manager: Alex Wallace

[Stoler Decl. Exs. 13, 22.]

120. However, despite the fact that Plaintiff, an African American female, had greater, if not comparable qualifications than Nagelson, a white male, U.S. Bank offered him a far more lucrative compensation package than Plaintiff.<sup>10</sup> Nagelson's offer letter stated, in part:

Salary: \$225,000.00 Annually

For 2011 performance, payable during the first quarter of 2012, and provided you remain employed by the company at the time of payout, you will receive a guaranteed cash and equity award valued at \$435,000; a minimum of \$385,000 will be paid out in cash from our Capital Markets/Municipal Securities Incentive Plan and the remainder will be a long-term equity award that will consist of a combination of

---

<sup>10</sup> Plaintiff's offer letter is discussed in detail *infra* at ¶¶ 156-158; Stoler Decl. Ex. 22.

stock options and restricted stock. The award will be governed by the terms and conditions outlined in the applicable stock incentive plan and award agreement.

In addition to your salary, you will receive a taxable signing bonus of \$100,000.00 within 45 days of your date of hire subject to the terms of the enclosed repayment agreement.

[Stoler Decl. Ex. 13; Nagelson 36:15-23.]

121. Nagelson's offer letter makes no reference to any supervisory role or function. (Stoler Decl. Ex. 13).

122. Nagelson accepted U.S. Bank's employment offer and commenced employment at U.S. Bank on July 1, 2011. (JSF ¶ 16).

123. Nagelson described his role as a Managing Director in generating business as follows:

Q. As a Managing Director, what was your role in generating business? What would you do?

A. In generating new business my role was to meet with clients, to understand what their needs were, anticipate transactions that they may be contemplating, and position US Bank to successfully compete for that business.

[Nagelson 51:20-52:2.]

124. Nagelson admitted that U.S. Bank's public finance operations on the West Coast were a "start-up" when he joined the bank:

Q. Would you characterize the operation that you were brought in to start in California as a startup operation?

A. Yes.

[Nagelson 81:21-82:1.]

125. U.S. Bank did not take into account Nagelson's compensation history when it determined his compensation package. On June 1, 2011 at 9:01 AM CDT, Arno Ellis, VP of Human Resources, sent an email regarding Nagelson's hiring and compensation to Wallace, in which he wrote:

A spreadsheet is not the same as confirmation documents. That aside, we're back to a level that is pretty high given his self-described earnings history. He hasn't seen \$375,000 as a bonus since 2005. Please let me know how you would like to proceed but he's giving us a bit more of a challenge. Other than last year which included the forgivable loan, we're discussing a package of \$660,000 which far exceeds his best year of \$525,000 total which was also six years ago.

[Stoler Decl. Ex. 13 at USBI0001104.]

126. Thus, as per Mr. Ellis, U.S. Bank did not consider Nagelson's prior compensation when determining his compensation package. (Stoler Decl. Ex. 13 at USBI0001104).

127. Other written documentation reveals that U.S. Bank treated its male hires more favorably than Boatright or other female hires. For example, on June 3, 2011 at 12:56 PM, Bruce Wilson wrote an email to Arno Ellis regarding hiring Mr. Nagelson in which he stated:

Okay approved. I don't like the guarantee, **but seems to be what we have to do for these guys.**

[Burden Decl., **Ex. 8**](Emphasis Supplied).

128. U.S. Bank claims that it paid Nagelson more than Boatright because he held a Series 53 license. (D56.1 ¶ 21).

129. This is not true because, as noted above, a Series 53 license was not a stated job requirement for the position of Managing Director. (Burden Decl., **Ex. 6**).

130. In addition, the issue of the Series 53 license is another example of discriminatory disparate treatment by U.S Bank. Between 2012 and 2016, U.S. Bank sponsored male bankers to take the Series 53 exam, such as Ila Afsharipour (San Francisco Office), Kevin Stowe (New York Office) and Scott Allison (Charlotte Office). (Wallace 124:20-125:9<sup>11</sup>).

131. Each of these men held positions below Managing Director when Ms. Boatright was hired in 2012. (Stoler Decl. Ex. 27).

132. U.S. Bank could have sponsored Ms. Boatright to take the Series 53 Principal License exam. (Wallace 124:12-19).

133. U.S. Bank never sponsored Boatright, an African-American female, to take the Series 53 exam. (Boatright Decl. ¶ 19). Thus, U.S. Bank treated Boatright less favorably than her male peers.

### **XIII. U.S. BANK HIRES PLAINTIFF**

134. In the Fall of 2011, Boatright reached out to Kolman to discuss the possibility of a position at U.S. Bank. (Boatright 28:17-29:7).

135. Boatright testified:

---

<sup>11</sup> All references to “Wallace” are to the deposition transcript of Steven Alex Wallace; Burden Decl. Ex. 40.

. . . the first thing that I did for them (Kolman and Wallace) is give them a reference for a quantitative expert. That was the initial outreach that I made to Rick Kolman was to refer him to a quantitative expert. So I was doing them a favor, essentially.

[Boatright 29:20-25.]

136. The quantitative expert was Rodolfo Riverol, whom Boatright had worked with at Rice Financial. U.S. Bank offered Mr. Riverol a position but he did not accept it. (Boatright 30:2- 13).

137. Boatright was interested in joining U.S. Bank because BondFactor was experiencing difficulties:

Q. . . . by the time you were talking with U.S. Bank, BondFactor was something of a sinking ship, wasn't it?

A. It had not achieved its objectives of getting ratings from Standard & Poor's.

Q. And they [BondFactor] also did not get their equity investments by the time you left; right?

A. By the time I left, they did not.

[Boatright 38:15-22.]

\* \* \*

149. Boatright discussed her compensation demands with Kolman and Wallace. Boatright described this conversation as follows:

Q. During the hiring process you negotiated your own compensation terms with U.S. Bank; correct?

A. Yes.

Q. And you ultimately asked for and received a base salary of \$200,000; correct?

A. Yes.

[Boatright 63:22-64:4.]

150. Boatright also requested a guaranteed bonus as part of her compensation package. Unlike Nagleson, who received a guaranteed bonus of \$435,000, U.S. Bank refused to pay Boatright a guaranteed bonus:

Q. What else did you ask for other than base comp?

A. A guaranteed bonus.

Q. And what was the response that U.S. Bank gave to you?

A. They (Wallace and Kolman) said that it was in my benefit not to have a guaranteed bonus because I was asking for a total compensation of \$500,000 and Managing Directors at U.S. Bank made \$800,000. So it was actually to my benefit not to have a guarantee.

[Boatright 65:21-66:6.]

151. Kolman testified:

Q. Did you recommend any guaranteed bonus for Ms. Boatright her first year?

A. No. There was no reason to.

[Kolman 103:12-14.]

152. Despite the fact that U.S. Bank denied Plaintiff's request for a guaranteed bonus, U.S. Bank's Executive Hire Offer document reflects a total compensation package for Plaintiff in the amount of \$553,000. (Stoler Decl. Ex. 20 at USBI0401956).

153. Plaintiff never earned that amount during her tenure with U.S. Bank. (Stoler Decl. Ex. 21; Burden Decl., **Exs. 3 and 4**).

154. Boatright trusted Kolman and Wallace when they told her that she would earn \$800,000 as a Managing Director at U.S. Bank, and did not look for opportunities at other firms:

... I would say in this case I trusted Mr. Wallace and Mr. Kolman when I asked for a guarantee of \$500,000 and they told me that MDs ("Managing Directors") made \$800,000 and I trusted them. So I would say, looking back in this deal, obviously they paid me half of that. So in this particular situation I was not a good negotiator.

[Boatright 62:12-18.]

... I would say that because I trusted Wallace and Kolman I didn't look at other firms. And after I made the decision, there were several other people that said they would have been interested in hiring me. So I trusted Kolman and Wallace and, you know, thought that I would be treated fairly.

[Boatright 63:13-19.]

155. On January 30, 2012, U.S. Bank sent Boatright an offer letter. (JSF ¶ 26; Stoler Decl. Ex. 22).

156. Despite her superior credentials and work experience, Boatright's offer letter was far less lucrative than Nagleson's offer letter. Boatright's offer letter stated, in part:

Salary: \$200,000.00 Annually

Grade: 18

Job Title: Public Finance, Managing Director

Manager: Steven A. Wallace [AKA Alex Wallace]  
[Stoler Decl. Ex. 22.]

157. U.S. Bank did not give Boatright a guaranteed cash and equity award. (Stoler Decl. Ex. 22).

\* \* \*

**XIV. U.S. BANK TREATS PLAINTIFF LESS FAVORABLY THAN OTHER WHITE MALES WITH RESPECT TO COMPENSATION**

164. With respect to compensation, U.S. Bank treated Plaintiff less favorably than two other white males, Scott Verch and Brian McGough. (Burden Decl. **Exs. 11 and 12**).

165. On September 24, 2010, U.S. Bank sent Scott Verch, a white male, an offer letter, which stated, in part:

Salary: \$200,000.00 Annually

Grade: 17

Job Title: Managing Director, Municipal Derivatives Banker

As part of your offer, we will recommend to the Board of Directors that you be elected a Vice President.

For 2010, provided you remain employed by the company at the time of payout, you will receive a minimum guaranteed cash award of \$225,000 from our Capital Markets/Municipal Bond Group Incentive Plan. This cash award is to be received within the first quarter of 2011. All functional plans requirements will apply.

[Burden Decl., **Ex. 11**; Nagelson 43:12-13.]

166. U.S. Bank denied Plaintiff's request for a guaranteed bonus/cash award. (Stoler Decl. Ex. 22).

167. On January 4, 2011, U.S. Bank sent Brian McGough, a white male, an offer letter, which stated, in part:

Salary: \$250,000.00 Annually

Grade: 18

For 2012, provided you remain employed by the company at the time of payout, you will receive a minimum guarantee cash award of \$325,000 from our Capital Markets/Municipal Securities Group Incentive Plan. This cash award is to be received within the first quarter of 2012. All functional plan requirements will apply.

\* \* \*

Q. . . . when US Bank was acting as co-manager on a bond transaction it could sell a large number of bonds but potentially get paid a relatively small amount of fees on a particular deal, because of the sales force, for example?

A. If the sales force did not submit quality orders, then we would not make a lot of money, because we didn't put in orders for the bonds.

Q. And were those situations where you had worked on bond deals or led bond deals where the fees that resulted from those bond deals weren't as high as you might have liked because of the sales force's efforts or lack of effort?

A. Yes. I think it was pretty well known throughout the department and acknowledged by Wallace and Kolman that the sales force did not perform and did not increase their fee generation over the period while I was there. And I would also add that on the deal that I senior managed for St. Louis they were not able to sell those bonds. So we did not make high fees even though we were the senior manager.

[Boatright 103:6-104:7.]

199. Boatright testified that the problem with U.S. Bank's sales force's performance especially affected her in the Northeast:

It particularly affected me because of the Northeast region where you have complicated issuers that issue a lot of bonds. So then therefore when my volume was high and the fees were low, that affected me more than other areas.

[Boatright 104:18:22.]

200. Boatright further testified:

Q. But the fact of the matter is your revenue wasn't as high as it related to the bonds that you were selling; it was simply that the sales force wasn't doing their job; correct?

A. My job is to generate fee opportunities for the sales force. That is my job. So I'm bringing the horse to water. I can't make the horse drink. But I'm doing my job.

And if you look at one of Kolman's emails, he specifically says Boatright generated high volume, which the sale force needed and the

whole department needed in order to be seen as a viable bank in the municipal industry. If you're not seen as viable, then you're not going to get future assignments. So it's a circular argument.

[Boatright 105:21-106:14.]

#### **XVI. U.S. BANK GIVES NAGELSON A “TEAM” ON THE WEST COAST**

201. U.S. Bank gave Nagelson, a white male, supervisory responsibilities, which he described as follows:

Q. . . . can you describe for me what was included in the supervisory responsibility?

A. Well, as I stated before a large part of my – reason for being hired was to establish and build a public finance office consisting of multiple people in San Francisco . . . And that I would be responsible for supervising those individuals as well.

[Nagleson 35:25-36:8]

202. U.S. Bank also provided Nagelson, a white male, with a team to support his operations on the West Coast. This began in the first half of 2012, when two people were hired for the San Francisco office, Esther Berg (“Berg”) and Michael Placencia (“Placencia”):

Q. Can you recall when it was that the next person was hired for the San Francisco office?

A. It was in the first half of 2012. [Nagelson 37:18-21.]

Q. Who was the next person hired at that time?

A. I hired two people at that time. Ester Berg and Michael Placencia.

[Nagelson 37:23-38:1.]

203. By November 1, 2012, U.S. Bank's organization chart shows that Nagelson's team consisted of the following:

Berg – Director position  
Placencia – Director position  
Welch – Vice President position  
Tuan – Associate.

[Stoler Decl. Ex. 27.]

204. Plaintiff is the only African-American who appears on U.S. Bank's November 1, 2012 organization chart. (Nagelson 45:3-6). Plaintiff was the only African-American Managing Director during her tenure with U.S. Bank. There was no African-American Director within MSG during Plaintiff's tenure with U.S. Bank and there was no African-Americans in senior management within MSG during Plaintiff's tenure with U.S. Bank (Boatright Decl. ¶ 20).

205. Nagelson described the duties of a Director as follows:

. . . the Director connotation is really more of a seniority and experiential title compared to Managing Director. So we did primarily the same things with regard to client and revenue generation but they [Directors] did not have any supervisory responsibilities.

[Nagelson 46:23-47:3.]

206. Nagelson described the duties of a Vice President as follows:

. . . a VP [Vice President] level individual was someone who had a significant experience in the business and was moving towards being a client facing business origination individual but was still mostly a support role.

[Nagelson 47:11-16.]

207. Nagelson identified Mr. Welch as follows:

Q. Who is Mr. Welch?

A. Jon is another person that I hired. He was a colleague at Jefferies. And Jon was part of the San Francisco office, although he worked remotely in Sacramento.

[Nagelson 40:7-11]

208. Thus, Berg, Placencia and Welch were highly experienced assets for Nagelson. (Stoler Decl. Ex. 27; Nagelson 46:27-47:3; 47:11-16).

209. Nagelson admitted that he supervised Berg, Placencia and Welch:

Q. . . did you supervise Ms. Berg, Mr. Placencia and Mr. Welch?

A. I did.

\* \* \*

215. In the 2014 Performance Review, Nagelson himself even noted that he had his own "team" on the West Coast:

I had a down year with regard to revenue and will look to improve that in 2015. I am proud of what **my team** has accomplished under a constrained resource environment and one where

senior management is less willing to allow us to leverage this platform (i.e. credit).

[Burden Decl., **Ex. 13** at p. 6.](Emphasis Supplied).

216. Unlike Boatright, whom U.S. Bank gave no “team,” Nagleson used his “team” to respond to RFPs:

Q. . . . how would you describe US Bank’s preparation of an RFP? What’s entailed in that?

A. If it’s an RFP that we’re going to respond to there would typically be one person who was primarily responsible for that response, for crafting the outline, for determining what our focus is going to be and then **that person would gather a team**, it might include another senior level banker if that banker was also involved in covering that client, and then it would typically involve one or more support level individuals who would help with the actual compilation of the information.

[Nagelson 52:18-53:5.](Emphasis Supplied).

## **XVII. PLAINTIFF IS THE ONLY PERSON COVERING THE NORTHEAST**

217. From February 2012 to October 2012, Plaintiff covered half of the United States, the Northeast and the Midwest. (Boatright 85:12-14).

218. After October 2012, Plaintiff continued to cover the Northeast, the City of St. Louis and the St. Louis schools. (Boatright 85:15-25).

219. Unlike Nagelson, Plaintiff did not have a “team” of highly skilled bankers to help her cover the Northeast:

... I asked if there would be junior support to do RFPs and presentations. They [Wallace and Kolman] said yes. So I did not know that the resource they were allocating to me was working with four other people. I did not know that, and I did not know that the West Coast was – had five people and was growing to seven with the East Coast having nobody.

[Boatright 155:12-21.]

220. U.S. Bank gave Plaintiff no direct reports during her tenure with U.S. Bank. (Boatright 165:21-23; Kolman 230:1-4).

221. It was well known in the investment banking marketplace that Plaintiff was the only person covering the Northeast for U.S. Bank. On December 29, 2014 at 10:37 AM, Kolman sent an email to Wallace in which he wrote:

... Reassessing coverage should be an annual event for banking and sales I hear you about mid mkt clients but that is also not an overnight accomplishment as these issuers as well as our RMs are very loyal to their regional dealers as we have seen on many occasions The end game to running more deals is having bankers who own some clients which is where we fall short. The RMs were supposed to help us but that has been a flawed strategy. The other challenge which doesn't help us is how we appear to the mkt after having doors opened 4 years. I am sure you get the same questions I get. I attended the retirement party for Bill Cobbs of Prag last week and I was asked basic questions – do you plan on staying in business, you guys have stopped hiring, **who do you have besides Faye [Boatright] covering the East**, how many

salesmen do you have etc. it was a difficult night  
...

[Burden Decl., **Ex. 14** at USBI0110264.]  
(Emphasis Supplied).

222. One day earlier, December 28, 2014 at 7:47 AM, Kolman authored an email in which he stressed how important Plaintiff was to U.S. Bank's operations, stating:

Your remarketing fees are off

As an example, Faye [Boatright] earned 250 from MTA last year and a similar amount for NYC. How did Amit get 1MM+ of Remarketing?

Regarding production it is also about who is getting usb (US Bank) into bond deals which gives us visibility in the mkt with investors . . . **Regarding Faye I know her revenues are not up to snuff with Ila/Kevin but she along with Alison gets USB into bond deals which is important to the franchise especially the desk.** Regarding Ila and the importance of bond business he was co-head of the HE conference and I cannot tell you how many folks externally told me they never heard of him which is because he is not executing any bond deals To be practical for the good of the business we need to go beyond the top 6 or 7. Verch is commercial, **Faye [Boatright] is key to the NO East it would be difficult to find a solid replacement as I know who runs No. East groups at the competitors, . . .**

[Burden Decl., **Ex. 15** at USBI0110554]  
(Emphasis Supplied).

223. At the time Kolman wrote this email, Boatright was the only person “covering the North East.” (Kolman 76:11-14).

224. That same day, December 28, 2014 at 8:54 AM CST, Kolman authored another email in which he praised Boatright as a “key person:”

I don't have big disagreements with your comments but if we had a large denominator of professionals we would be in a much different position as to how to pay producers vs non producers. Unfortunately we are not in that position so we also need to think about keeping critical bankers in key locations because replacing them would be very difficult especially given our reputation as a serious Muni group had taken a big hit over the past 2 years. The critical Mass I am talking about are Brian Scott Esther **Faye [Boatright]** Ila Verch Amit Paul Placencia. I plan on emphasizing on Mon that we can ill afford to lose any of these folks because given our comp structure it will be difficult if not impossible to replace **Key folks** if they left.

[Burden Decl., **Ex. 16** at USBI0110549]

## **XVIII. U.S. BANK PROVIDES PLAINTIFF WITH INSUFFICIENT RESOURCES**

### **A. Plaintiff Did Not Have A “Team”**

225. Unlike Nagelson who had his own “team” on the West Coast, U.S. Bank did not hire anyone to work specifically for Boatright:

Q. Who did you hire, specifically, to work for Faye?

A. No one specifically worked for Faye.

[Wallace 52:1-3.]

226. During Plaintiff's tenure with U.S. Bank, she received sporadic assistance with her work. Specifically, Boatright testified:

Q. At the time of your hire, you did have a few people that were helping you that were assisting you with your projects; correct?

\* \* \*

firedrill prior to completions. Examples of this include the Metropolitan Washington Airports Authority (MWAA) RFP processes in March 2015 and October 2015 in which I alerted Rick Kolman, Alex Wallace and Scott Nagelson that the interim deadlines had not been made and requested assistance in avoiding a firedrill completion. In both cases, nothing was done to assist the team. I have also attempted to schedule debriefing sections after projects in order to prevent the same issues from occurring in the future. After a New York City meeting presentation in June, 2015 that took two weeks to complete and still came down to a firedrill, I scheduled a debrief session with Jon Mesadieu and Scott Nagelson so that Jon could provide feedback on the areas that he needed help in understanding. However, Scott Nagelson cut the session short and instead of focusing on identifying areas of learning and training for Jon, criticized me for scheduling the session.

[Burden Decl., **Ex. 25** at USBI0002082-2083]

276. Nagelson did not have any member of his team on the West Coast who repeatedly made the same mistakes, such as Yandun and/or Mesadieu:

Q. What if somebody kept making the same mistakes over and over again? Were you critical of them?

A. I can't think of a situation where that happened.

Q. So you didn't have somebody like Mr. Mesadieu who made the same mistakes over and over again working in the California office?

A. I did not have anyone in the California office that made the same mistakes over and over again.

[Nagelson 141:20-142:5.]

## **IXX. PLAINTIFF PERFORMS DESPITE U.S. BANK'S DISPARATE STAFFING**

277. Despite being severely understaffed, Plaintiff successfully performed her job duties. Plaintiff described her strategy for generating business as follows:

My approach was that whatever was an opportunity that I would pursue. So did I pursue some smaller entities, for example, the City of Jacksonville where we were allocated a deal after the first time I met them. I went to Buffalo with Jeff Hackman, and there were about three different issuers we met there. I went to Harrisburg. So I went wherever there was an opportunity.

\* \* \*

289. In comparison, in 2013 Boatright and Yandun completed 20 transactions, more than the West Coast team, generating \$229,983.17 in revenue for a total

revenue per person of \$114,991.59. (Burden Decl., **Ex. 26**).

290. For 2014, the chart reflects that Nagelson and his West Coast team of Berg, Placencia, Welch, So, Carlin and Larkin were covering a market opportunity of \$81,735.60 billion dollars of bonds issued on the West Coast. (Burden Decl., **Ex. 26**).

291. In comparison, in 2014 Boatright and Yandun were covering a market opportunity of \$120,639.80 billion of market opportunity on the East Coast. (Burden Decl., **Ex. 26**).

292. The chart reflects that in 2014, Nagelson and his West Coast team completed 23 transactions, generating \$271,132.70 in revenue for a total revenue per person of \$38,733.24. (Burden Decl., **Ex. 26**).

293. In comparison, in 2014 Boatright and Yandun outperformed the entire West Coast team, completing 38 transactions, generating \$375,009.53 in revenue for a total revenue per person of \$187,504.77. (Burden Decl., **Ex. 26**).

294. According to U.S. Bank's Public Finance Scorecard, in 2013 Nagelson generated \$1,850,721.68 in revenue. (Wallace 172:1-5; Stoler Decl. Ex. 31).

295. According to U.S. Bank's Public Finance Scorecard, in 2013 Boatright generated \$826,571.40 in revenue. (Wallace 172:1-5; Stoler Decl. Ex. 31).

296. According to U.S. Bank's Public Finance Scorecard, in 2014 Nagelson generated \$778,668 in revenue. (Wallace 172:6-11; Stoler Decl. Ex. 46).

297. According to U.S. Bank's Public Finance Scorecard, in 2014 Boatright outperformed Nagelson and his West Coast team and generated \$1,236,925 in revenue. (Wallace 172:6-11; Stoler Decl. Ex. 46).

298. Boatright achieved these results without a “team” and in a market which Nagelson admitted was harder to generate business in then in his West Coast region:

Q. Would it be harder for Ms. Boatright to get business than it would be for your group?

A. I think it would be harder with certain clients to get the type of business that's going to generate significant revenue in some respects, yes.

[Nagelson 117:2-7.]

299. Nagelson also admitted that Boatright was competing with a very large group of banks for business in New York City:

Q. Was Faye competing with the bigger banks here in New York for most of those deals?

A. She would have been competing with . . . a very large group of banks for those deals, large and small.

[Nagelson 210:20-24.]

300. Another example of Boatright's excellent performance was the 2012 New York City interest rate swap.<sup>13</sup> Boatright described this as follows:

. . . first of all, the call [from New York City] came in to me from my client who's very high at New York City, and I also work on the Municipal Forum of New York, an industry board that I serve on with him. So I developed a relationship with him. He came to me directly and said, Faye, we're interested in novating some swaps from

---

<sup>13</sup> As discussed *infra*, U.S. Bank would later attempt to give credit for this swap to Scott Verch, a white male.

Morgan Stanley because their credit has gone down. Is this something you would be interested in? I said, Yes, we would be interested. He said, Okay, I will send you the file of our swaps.

The second part is that he sent the file of the swaps. There were probably at least 20 different files. I went through every single file, and I found one swap that I thought was small enough that met U.S. Bank's parameters.

The third step is that we had a meeting with Scott Verch, the swap person, and myself and Alex and Rick, and they said, Okay, what did you guys find? Scott Verch said there's no swaps that meet our parameters. They're either all too big or too complicated.

\* \* \*

actually, at dinnertime, and I saw all of the guys go out. And they just walked by me, and Wallace just waved.

So that started from day one. What reason would there be not to invite me.

Again, as he's the Head of Public Finance and as a new senior person, there's no reason that I wouldn't be invited either to lunch or to dinner. And shortly thereafter I went to a conference in Florida with Mahajan and Wallace, and Wallace asked me to let him know when I arrived the night before. I did that. I didn't hear from him. Then in the morning when I went to the conference, the first people I saw were Mahajan and Wallace coming back from breakfast.

So I wasn't even invited to that breakfast, even though it was a conference and he asked me to invite him – or to let him know when I arrived.

[Boatright 319:7-320:15]

Q. Why do you believe he wasn't inviting you because of your race and gender, though?

A. I'm the only black female, and I'm a Managing Director. And you invited other Managing Directors – I believe Scott Verch was a Managing Director – and you invited other males. And then when even other males come in from out of town – Ila [Afsharipour] was in town from San Francisco – he even invited males that came in from out of town.

. . . He [Wallace] never invited me, and he never told me he was coming to town. And they went to lunch. And in this case I said the next day they were discussing the restaurant and the food.

[Boatright 321:23-322:25]

331. With respect to this issue, Wallace recalls getting lunch with the following bankers in New York when he visited the New York City office: Kevin Stowe, Scott Verch, Ahmit Mahajan, Sean Gomez and Liz Conte. (Wallace 106:4-20).

332. Wallace could not dispute Boatright's claims that she was excluded from meals because Wallace could not recall whether Boatright ever attended any meal with him. (Wallace 107:13- 15; 118:7-10; 118:19-21).

333. Another example of an exclusionary event occurred in or about October 2014, when U.S. Bank

refused to permit Boatright to attend the Women in Public Finance event. Instead, U.S. Bank sent Conte, a junior banker, and Chatalas, a male, to the event. (Burden Decl., **Ex. 34**).

334. Boatright explained why this was a discriminatory act:

Q. Do you think that Ms. Conte had no reason to attend that conference? . . . Do you think it could have helped her career opportunity for someone who was junior to attend a conference like that?

A. Not at the expense of your most senior woman MD where you have a conference of women where you have a lot of senior women at the conference. If it was four tickets or if she took Esther Berg's ticket who was coming all the way from the West Coast and there were no West Coast clients or very few, fine, but she shouldn't have been replacing my ticket.

Q. Because another woman, Ms. Conte, replaced your ticket, you felt as though that was discriminatory against you in some way?

A. It was absolutely discriminatory. A black woman and you send a junior white woman who has no clients to the event?

[Boatright 435:20-436:14.]

335. On September 18, 2015, Boatright emailed Kolman regarding her exclusion from the Women in Public Finance event, stating:

For the record, I would like to state that this decision further impedes my ability to generate business for the Northeast region and diminishes my stature in the industry. As you are aware, I

have insufficient resources to cover clients through regular meetings and unsolicited proposals. Attending conferences is one means of seeing clients and developing/furthering business opportunities. Thus, your decision further impedes my ability to satisfy the business generation goals that you have established as well as diminishes my stature in the public finance community as this is the only national conference for Women in Public Finance and most senior women in the business will be in attendance. Restriction of my attendance will be noted by clients as well as other industry professionals.

[Burden Decl., **Ex. 35**]

336. When Chatalas, the male, returned from the conference, he emailed Kolman and Wallace, noting, “Very well attended – nearly 550 registrants, about 35 of which were men.” (Burden Decl., **Ex. 34**).

## **XXII. PLAINTIFF’S DECEMBER 2014 COM- PLAINT OF DISCRIMINATION**

337. In December, 2014, Boatright complained to Richard “Dick” Payne, the Vice President of U.S. Bank, that she was being discriminated on the basis of her race and gender. Boatright described this complaint as follows:

Q. Now, in December of 2014 you reported your belief you were being discriminated against on the basis of your race and gender. That’s set forth in your complaint at paragraph 40. Is that correct?

A. Yes. Well, I complained to Dick Payne in December. I complained originally in 2013

when I said my compensation is below the 800,000 you said MDs made, can you give me that rationale. That is the first time I said that it was discriminatory. They never gave me a reason why I was below.

[Boatright 308:2-13.]

338. Prior to making this complaint about discrimination, Boatright had complained that two of her white male peers, Ken Gardner and Tim Somers, treated her inappropriately because of her race. (Boatright 311:24-312:10).

339. Boatright testified that she told Mr. Payne the following at the Holiday Party:

I talked about my efforts in moving the business forward. I talked to him about City of Jacksonville, because I knew that he had spent time in Jacksonville.

And then I said, You are aware of the work I've done over the years, and I would like to let you know that I believe that I'm being discriminated against. I've talked to my managers, I've talked to Joe Murphy.

I have, one, a level of severely less resources than Nagelson, which has been since day one; and I also believe I am being compensated at a much lower level than Nagelson. . . . And I asked to be referred to the Head of Diversity, which they had just recently announced.

[Boatright 313:11-314:6.]

340. Joe Murphy, U.S. Bank's Head of Public and Nonprofit Finance, told McGovern, the HR Business Partner, about Boatright's discrimination complaint. (Burden Decl, **Ex. 36**).

341. On December 19, 2014, McGovern, the HR Business Partner, authored notes confirming her conversation with Murphy about Boatright's discrimination complaint:

new issue w/Faye – holiday party  
she was talking to Dick [Payne]  
said she thinks she is being discriminated against by boss  
mentioned RM  
should she talk to D&I  
Dick said Katie Lawler is D&I, maybe she should talk to Brian Bebel  
Dick didn't share any specific  
Joe [Murphy] told Dick he would call me first  
LMTC call – Faye  
[Burden Decl. **Ex. 36.**]

### **XXIII. HR'S "INVESTIGATION" INTO PLAINTIFF'S DISCRIMINATION COMPLAINT**

342. Rather than assign Boatright's discrimination complaint to U.S. Bank's Diversity and Inclusion Department, McGovern conducted the investigation herself. (JSF ¶ 35).

343. McGovern was wholly unsuited to investigate a claim of discrimination made by a high- level employee. McGovern could not recall any specific training that she received from U.S. Bank about how

to investigate such a claim of discrimination. (McGovern 13:9-13<sup>14</sup>).

344. McGovern could not recall any other discrimination claim that she had investigated at U.S. Bank prior to Boatright's claim of discrimination. (McGovern 13:2-8).

345. McGovern could not recall having ever investigated a claim of retaliation prior to Boatright's claim of retaliation. (McGovern 13:24-14:3).

346. McGovern, who was based in Portland, Oregon, never even met Boatright in person during Boatright's employment at U.S. Bank. (JSF ¶ 36; McGovern 14:4-8).

347. McGovern's investigated Boatright's complaint by conducting two telephone interviews of Boatright on December 23, 2014. (JSF ¶ 37; Stoler Decl. Exs. 77-78).

348. McGovern's December 23, 2014 notes of her conversation with Boatright reflect, in part, the following:

[Boatright] doesn't have faith in [her] manager [Wallace]

Jose [Yandun] – issues, wasn't in perf. reviews, input wasn't given

hasn't been a positive experience

nobody that I compete against has just one person & a junior person

set up to fail competing against so many more resources

---

<sup>14</sup> All references to "McGovern" are to the deposition transcript of Maureen McGovern.

my volume that I generate 50% of dept. volume  
brought [complaints] to Alex [Wallace], Rick [Kolman], . . . don't feel I'm treated properly or fairly

resources and how those resources are managed  
Almost everybody else has someone reporting to them

[Boatright] doesn't feel support by Alex [Wallace]  
[Wallace] goes out w/them after work, [Boatright] wants to be invited & she's not invited

I would like an audience with D&I (Diversity & Inclusion) manager

I don't see anybody who looks like me

I have the potential to do a lot more  
exclusionary behavior [by Wallace]

Resources – availability, # of ppl, experience level, rptng relationship

level of support from Alex [Wallace]

why do six other people have direct reports & I don't

[Stoler Decl. Ex. 77.]

349. The next day, December 24, 2014, McGovern prepared questions for her interview with Wallace. (McGovern 39:24-40:8; Burden Decl., **Ex. 37**).

350. McGovern's December 24, 2014 notes reveal that she is focused on investigating Boatright and not her claims of discrimination as her first question for Wallace was: "Alex Reviews – What do you have documented?" (McGovern 39:24-40:8; Burden Decl., **Ex. 37**).

351. In addition, McGovern interviewed Wallace and Kolman, the individuals whom Boatright was claiming were discriminating against her. (JSF ¶ 38).

352. McGovern also interviewed Joe Murphy, U.S. Bank's Head of Public and Nonprofit Finance. (JSF ¶ 38).

353. On January 21, 2015, McGovern advised Boatright that she had been unable to substantiate Boatright's claims of discrimination, and could not proceed without further information from Boatright. (JSF ¶ 39.)

354. McGovern considered only the following information when she concluded that she could not substantiate Boatright's discrimination claim:

Q. What information did you consider when you reached the conclusion that you couldn't substantiate Ms. Boatright's discrimination claim?

A. What I recall from looking into the December 2014 allegations is that I looked to my conversations with Mr. Wallace and Mr. Kolman. I did not recall if I spoke to anyone else within the business line. Those are the two that I'm remembering right now.

And I recall I looked at the organizational charts to see the distribution of support personnel. That's all I can think of right now.

[McGovern 62:17-63:12.]

355. McGovern never prepared any document summarizing her investigation into Boatright's discrimination complaint and her conclusion. (McGovern 64:12-14).

356. McGovern did not find discrimination even though she knew that Nagelson had a team of people reporting to him while Boatright had no one reporting to her. (McGovern 51:2-9).

357. McGovern did not find discrimination despite the fact that Kolman confirmed that Wallace could be more supportive of Boatright and that Wallace did exclude Boatright when he visited the New York City office. McGovern's notes of her January 5, 2015 interview with Kolman state:

She [Ms. Boatright] does bring up a fair point about Alex when he comes to NY. You've gotta be forceful with her. He [Mr. Wallace] does go to lunch with Amit [Mahajan].

Could he [Wallace] be more supportive of her? He could be – the deals – high profile names.

He [Wallace] needs to spend a little more time w/her – go out to coffee, etc.

[McGovern 56:25-66:10; Stoler Decl. Ex. 83.]

358. On February 5, 2015, Plaintiff emailed McGovern a written summary of her complaint containing additional information (the "February 5 Summary"). (JSF ¶ 40; Stoler Decl. Ex. 79).

359. Boatright noted in her summary that she had been excluded from various meals and events:

When my manager [Mr. Wallace] comes to town, he has lunch and before/after work outings with Amit Mahajan, Scott Verch and other male members, including Ila Afsharipour, when he was in town from the San Francisco office. The next day, they often discuss the restaurant and the food. I was never invited to lunch during the day or after work events. In first year, I invited

myself to lunch and then after a little while, stopped doing so.

[Stoler Decl. Ex. 79.]

360. Boatright also noted in her summary a lack of resources and insufficient resources:

Jose Yandun came in as a Vice President in July 2012 with over 10 years of industry experience. As a pre-requisite for the job, a vice-president should be able to execute transactions and client presentations with minimal supervision. However, upon review of Jose's work, it became apparent that he had severe deficiencies in his spelling and grammar as well as product knowledge.

\* \* \*

#### **XXIV. PLAINTIFF'S 2014 PERFORMANCE REVIEW**

363. Only months after Boatright complained made her formal discrimination complaint, on February 27, 2015 she received her first written performance review. (Stoler Decl. Ex. 94).

364. The 2014 Performance Review as completed by Wallace, her supervisor. (Stoler Decl. Ex. 94).

365. Under the Section entitled "Compliance," Wallace noted that Boatright was, "In compliance." (Stoler Decl. Ex. 94).

366. Under the Section entitled "Attendance and Punctuality," Boatright wrote, in part:

I spend an inordinate amount of personal time at night and on weekends reading and writing client Request for Proposals (RFPs); researching,

developing and reviewing presentations and reading documents for deal execution.

In addition to the offset of personal time spent beyond business hours, it is important to note that many times I am the last senior person to leave the office; most of the other senior professionals in the New York office do not work on RFPs or client presentations and therefore are not required to spend personal time on these materials . . .

[Stoler Decl. Ex. 94.]

367. Under the Section entitled “performance-Goals-Summary,” Boatright noted, in part, the following highlights of her performance:

generating \$19 billion in new issue business, which represented nearly 50% of the department’s new issue volume.

obtaining approval and leading the final critical execution of a \$29 million loan to the Government of the District of Columbia . . .

winning co-senior appointments – during 2014 US Bancorp served as co-senior on a \$26 million City of St. Louis transaction and a \$350 million Commonwealth of Massachusetts deal.

New business mandates with New Jersey Turnpike, City of St. Louis, City of Jacksonville and District of Columbia Water and Sewer Authority.

[Stoler Decl. Ex. 94.]

\* \* \*

the West where a white male had five to six to seven employees. So I continued to complain about that.

I went to Wallace, Kolman, then I went to Joe Murphy, appealed to them; and then when that didn't work, I went all the way to Dick Payne in December 2014.

And then after that my performance review in February was actually rehashed many times to even have a lower rating in various categories that are ridiculous like diversity . . .

Q. You believe that you did not get this promotion that Mr. Nagelson was chosen over you for this opportunity because of the complaints that you're reciting now?

A. I complained to Dick Payne in December of 2014. Almost immediately after that I was subject to retaliation, including this demotion.

Also, if you look at one of the reasons is that Wallace states because Nagelson managed his resources. He was given those resources on day one to manage a pool. I was given nobody that was reporting to me. So he was essentially set up from day one to be promoted to that group.

Q. Why do you think that the reason for him [Nagelson] being given more resources has anything to do with your race or gender?

A. We had similar regions. East Coast I showed you 36 percent of the volume was done in the East Coast.

It's [the East Coast] more complicated. It's known in the markets to be more complicated,

more issuers, more staff. If you look at any public finance department, they have more people covering the East than the West.

U.S. Bank had the actual opposite. Even if, to take your argument, they had footprint, that means they [the West Coast] should have less people because they have more referrals versus the East Coast. I have nobody that is giving me referrals and I have to work harder.

So I'm working harder with no resources. And the only difference between Nagelson and myself is that I'm a black female and he's a white male.

... I said racist from the top: Dick Payne, Joe Murphy, Rick Kolman, Alex Wallace and Scott Nagelson. Racist from the top down from day one. I was treated like a slave. You cover this whole complex region as one person. I did it and did it successfully, but the moment I complained, they retaliated.

[Boatright 289:11-292:18.]

399. Boatright further testified:

Q. The fact that Mr. Nagelson was given more resources than you, why does that in and of itself in your mind support your claims of race and gender discrimination?

A. I think it's pretty clear that in a sales organization if you don't have resources you can't generate sales. So then I'm set up on day one to either work around the clock, which I did to perform what I did, or to fail, versus somebody who is covering a less complicated region with five to seven resources. I think

anybody in a sales organization could see that the scale is tipped way in the white man's favor.

[Boatright 295:7-20.]

400. Boatright further testified:

Q. . . . why do you think he [Nagelson] was selected over you because of your race?

A. Because . . . from the beginning he had a team of five to seven people. I had nothing. I performed with that team. When I asked for more resources, I was denied. I was paid less than Nagelson. And then when I complained, they retaliated.

And if they're going to give a reason that he [Nagelson] has more resources, then why did he have more resources on day one? It didn't matter what I did. I performed. I did groundbreaking transactions. I got into deals within months of joining U.S. Bank that nobody else did.

So I performed tremendously, and I still didn't get any resources reporting to me, I didn't get a team. Then you promote a white male who's had a team and therefore an easier time to cover his region than I have the whole time and then you use that as a reason to promote him. I think that's – anybody looking at it would say that's discriminatory.

[Boatright 298:7-299:4]

. . . And he [Nagelson] was basically paid 50 percent more than I was from day one for no performance, versus I had to perform and then get half, essentially, of what he got.

[Boatright 299:25-300:4]

**XXVII. NAGELSON SELECTS AN INAPPROPRIATE NAME FOR THE NEWLY FORMED GROUP**

401. Nagelson decided to rename the subset of the PFG devoted to government and infrastructure clients as part of the Restructuring. (JSF ¶ 54).

402. Nagelson initially selected the name “National Infrastructure Group.” (JSF ¶ 55).

403. Nagelson announced this new name for the group at a departmental off-site conference which was attended by MSG employees and management as well as management of other groups. (Nagelson 270:3-24; 271:3-5).

404. Nagelson stated that National Infrastructure Group was a preferable name to Public Infrastructure Group, which abbreviated to “PIG.” (Boatright 303:12-16; Kolman 224:21- 225:1).

405. Mr. Nagelson used a Power Point presentation to announce the new name for the group. (Nagelson 271:6-7; Burden Decl., **Ex. 41**).

406. On April 29, 2015, Plaintiff emailed Nagelson to ask him to choose another name instead of “National Infrastructure Group” because of the way the name abbreviated, similar to Nagelson’s public discussion of why he did not select Public Infrastructure Group. Boatright wrote, in part:

. . . Also, I respectfully request that another name be considered for the group. Just like “Public Infrastructure Group,” “National Infrastructure Group” doesn’t abbreviate well.

[Burden Decl., **Ex. 42**]

407. McGovern agreed that Nagelson's selected acronym "NIG" was inappropriate:

Q. Do you think there was anything inappropriate about having an acronym with the initials N-I-G?

A. I would agree that having that acronym would be inappropriate.

[McGovern 207:14-20.]

408. Only after Boatright's complaint was the name changed to "Government Infrastructure Group." (JSF ¶ 57).

#### **XXVIII. BOATRIGHT IS PUT ON A PERFORMANCE IMPROVEMENT PLAN**

409. Only three months after she received her 2014 Performance Review which rated her as "3- Solid Performance," on May 20, 2015, Nagelson presented Boatright with a performance improvement plan document called "Goals and Expectations" ("G&E Outline"). (Stoler Decl. Ex. 106).

410. Nagelson, Wallace, Kolman and McGovern, the HR Business Partner who tried to lower Boatright's rating on her 2014 Performance Review, created the G&E Outline. (Nagelson 122:19-123:10; 193:11-20).

411. Boatright was the only employee that Nagelson supervised who received a G&E Outline:

Q. Did you do that for the other people that you supervised?

A. I did not.

Q. So it was only Ms. Boatright that got the Goals and Expectations?

A. That's correct.

[Nagelson 123:11-16.]

412. The issuance of the G&E Outline was clearly retaliatory and designed to orchestrate Boatright's termination because despite having been rated "3–Solid Performer" only months earlier, Wallace could not identify a single incident which occurred between February 27, 2015 and May 20, 2015, which caused him to issue the performance improvement plan (G&E Outline):

Q. Did anything happen between February 27 of 2015 and May 20 of 2015 which caused you to put Ms. Boatright on a Goals and Expectations performance plan?

A. I don't recall that specific time period.

[Wallace 156:7-14.]

\* \* \*

Q. I understand what the question asked. I'm asking whether you thought it was appropriate to phrase – to include that language in response to this question.

A. I thought it was an answer to the question.

Q. Did you think it was appropriate?

A. I thought it was – yes, I thought it was appropriate. This (MWAA) was a client that I brought into the bank, and I had relationships with the staff and with the board and with the financial advisor. So - given what was going on at that point with U.S. Bank in terms of the performance improvement plan and the continual barrage of compliance and false reviews, in my – I felt that it was important to

be honest with them in terms of what was going on at U.S. Bank.

[Boatright 365:8-25; 366:7-15]

Q. Do you think it was appropriate to tell them that you were being demoted?

A. Yes. They had a certain status that they expected of me, and they needed to know that this group now reported to Scott Nagelson.

[Boatright 367:21-25.]

431. In 2015, U.S. Bank was re-selected to the Metropolitan Washington Airport Authority underwriting pool. (Boatright Decl. ¶ 29).

432. Ms. Boatright won two mandates for transactions expected to be executed in early 2016. (Boatright Decl. ¶ 30).

433. U.S. Bank did not terminate Boatright in November, 2015, but only made the decision to terminate her weeks after it was served with her EEOC Charge of Discrimination. (JSF ¶¶ 59- 60).

### **XXX. PLAINTIFF'S TERMINATION**

434. As discussed above, on October 19, 2015, Plaintiff filed a Charge of Discrimination against U.S. Bank with the U.S. Equal Employment Opportunity Commission. (Stoler Decl. Ex. 110).

435. On December 2, 2015, U.S. Bank's counsel, Constangy, Brooks, Smith & Prophete, LLP, wrote to the EEOC indicating that the bank had "only just received" the EEOC Charge. (Stoler Decl. 111).

436. In mid-December 2015, Nagelson, Wallace and Kolman made the decision to terminate Plaintiff's

employment, but decided to communicate such decision to Plaintiff after the holidays. (JSF ¶ 59).

437. Thus, the decision to terminate Boatright was made only weeks **after** U.S. Bank was served with Boatright's EEOC Charge of Discrimination. (Stoler Decl. Exs. 110-111; JSF ¶ 59).

438. McGovern testified that she first discussed Ms. Boatright's termination in December, 2015:

Q. Ms. McGovern, can you tell me when you discussed with Ms. Boatright's management her termination?

A. What I recall is we had discussions about it in December of 2015.

[McGovern 219:10-16.]

439. McGovern testified that Boatright was not terminated as part of a Reduction in Force:

Q. Was Ms. Boatright's termination part of any reduction in force?

A. Ms. Boatright's termination was due to her performance.

[McGovern 222:5-8.]

440. McGovern testified:

Ms. Boatright's termination was due to a number of reasons which include numerous policy violations which, in my recollection, included the inappropriate use of her corporate card.

[McGovern 116:24-117:2]

Q. What were the other policy violations that Ms. Boatright allegedly committed?

A. I recall that there were repeated violations of the personal investment policy and repeated violations of the IRMA requirements to have presentations reviewed. Those are the ones I can recall right now. There may have been others.

[McGovern 117:3-10.]

441. Nagelson also testified that the decision to terminate Boatright was made in late December, 2015:

Q. Do you remember when the decision was made to terminate Ms. Boatright's employment?

A. As best I can recall it was in late December of 2015.

[Nagelson 282:4-8.]

442. Thus, the decision to terminate Boatright was made within weeks of U.S. Bank's receipt of Boatright's EEOC Charge of Discrimination. (Stoler Decl. Exs. 110-111; JSF ¶ 59).

443. On January 12, 2016, Nagelson, Wallace and Kolman met with Plaintiff and informed her that her employment would be terminated effective immediately. (JSF ¶ 60).

444. Nagelson, Wallace and Kolman were the decision-makers with respect to Plaintiff's termination. (JSF ¶ 61).

445. Boatright described the termination meeting as follows:

Q. And who was in attendance at that meeting?

A. Nagelson, Wallace and Kolman.

Q. What did any of those gentlemen say to you when the meeting started?

A. Nagleson and – Wallace and Kolman were silent and looking down, and Nagelson said that my position was being eliminated effective immediately. And he slid across the table some documents for me to look at and asked me for my cell phone and my ID.

[Boatright 439:25-440:11.]