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

----------x Index # 01/112428

HISPANIC AIDS FORUM,

Plaintiff,

– against –

ESTATE OF JOSEPH BRUNO; THE TRUST UNDER ARTICLE SEVENTH OF THE LAST WILL AND TESTAMENT OF JOSEPH BRUNO; LOUISE HILDRETH, in her official capacity as Trustee; JOSEPHINE JOY GAPE, in her official capacity as Trustee; JOY L. HILDRETH, in her official capacity as Trustee; LOUISE E. GAPE, in her official capacity as Trustee; and DOE DEFENDANTS 1-10.

Defendants.

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MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS THE COMPLAINT

FRANKFURT KURNIT
KLEIN & SELZ, P.C.
Edward Hernstadt
Kesari Ruza
488 Madison Avenue
New York, New York 10022
(212) 980-0120
(212) 593-9175 (fax)

-and-

James D. Esseks
Romana Mancini
Lesbian & Gay Rights and AIDS Projects
American Civil Liberties Union Foundation
125 Broad St., 18th Floor
New York, NY 10004
(212) 549-2627
(212) 549-2650 (fax)
Attorneys for Hispanic AIDS Forum

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PRELIMINARY STATEMENT

Plaintiff Hispanic AIDS Forum ("HAF") filed an Amended Complaint (the "Complaint") in this action almost two years ago. The very detailed Complaint set forth the specific factual allegations underlying four separate claims: that the conduct of the defendants (collectively, "Estate of Bruno") in refusing to renew HAF's lease in and evicting Plaintiff from the space it had rented in defendants' Bruson Building constituted sex and disability discrimination under the New York Human Rights Law ("State HRL"), and gender and disability discrimination under the New York City Administrative Code ("City HRL") (collectively, "Human Rights Laws").

Defendants essentially ignore the explicit allegations of the Complaint and base their motion instead on re-writing the Complaint and re-framing of the nature of plaintiff's cause of action to fit arguments they would prefer to make on this motion. Obviously, plaintiff remains the master of its own Complaint, the allegations of which control the issues, are presumed to be true, and are, indeed, the only relevant "facts" at this stage of the litigation. Defendants' improper attempt to divert the Court's attention to other issues is founded upon the Affirmation of Emanuel R. Gold (the "Gold Affirmation"), a collection of unsubstantiated opinions that misstate the causes of action and allegations contained in the Complaint. Even assuming that the Court considers the Gold Affirmation, which under black letter Court of Appeals law, it cannot, and even assuming that there is a factual predicate for the allegations contained therein, which there is not, nothing in the Gold Affirmation would support dismissing Plaintiff's well-pleaded Complaint.

Accordingly, based upon the foregoing, as set forth in detail below, defendants' motion to dismiss should be denied.

FACTS

The Complaint

HAF is New York City's only Latino-run HIV/AIDS organization offering treatment education and innovative prevention services to the City's Latino population. Compl., ¶ 4. HAF operates a number of community-based offices in New York City neighborhoods with large Latino populations, including, since 1991, in defendants' Bruson Building in Jackson Heights, the Queens neighborhood with the highest incidence of AIDS among Latinos. *Id.*, ¶¶ 6-10. By 1999, HAF responded to the increasing

number of transgender Latinas in the Jackson Heights area by increasing the services it provided to such clients. *Id.*, ¶¶ 14-15. Shortly thereafter, HAF, which was by then a long-term Bruson Building tenant in good standing, agreed to a new lease for one of the two spaces it was then renting in defendants' building. In April-May, 2000, defendants accepted the signed renewal lease it had drafted and sent to Plaintiff, together with HAF's supplemental security deposit and insurance documents. *Id.*, ¶¶ 18-20.

After defendants agreed to a renewal in the Bruson Building and transmitted the new lease to HAF, which signed and returned it, defendants informed HAF in May-June, 2000 that they had received complaints from other Bruson Building tenants about "men who think they're women using the women's bathrooms" and "women who think they're men using the men's bathrooms." *Id.*, ¶¶ 20-21. Defendants complained about "'the type of clientele' coming in and out of the building and using the bathrooms," that HAF clients who were "men dressed as women [were] coming into the building and using the bathrooms," and informed HAF that the building wanted to get rid of "all these Queens." *Id.*, ¶¶23-24.

The landlord's agent ultimately informed HAF that defendants "would not renew HAF's lease unless HAF agreed that transgender clients would not be permitted to use [either] the bathrooms," *id.*, ¶ 24, or even "common areas in the building, including the main entrance," *id.* ¶ 2. That is, defendants decided to respond to concerns raised prior to their agreement to renew HAF's lease, which were apparently generated by transgender individuals' use of gender-identity-appropriate restrooms, by summarily demanding that all of HAF's transgender clients be banned from any use of all common areas of the building and all restrooms. *Id.* ¶¶ 2, 23-4.

HAF repeatedly attempted to find a way to address the defendants' complaints and to respond to their Draconian demand that HAF agree not to allow its transgender clients in the building anymore. *Id.*, ¶¶ 24-25. However, before such negotiations were resolved, defendants simply evicted Plaintiff. HAF then filed suit alleging sex and disability discrimination arising out of defendants' refusal to lease space to HAF because of the (i) gender/sex or perceived gender/sex and/or the (ii) disability or perceived disability of its transgender clients. *Id.*, ¶¶ 32-45.

In sum, the Complaint alleges that HAF was a long-time tenant in the Bruson Building, that the number of transgender individuals HAF served increased starting in 1999, that other tenants in the building complained about the presence of the transgender individuals in the building and restrooms, and that defendants' response was to insist that HAF exclude its transgender clients not just from gender-identity-appropriate restrooms, but from all restrooms and all common areas in the entire building. When HAF refused to comply with defendants' demands and sought to work out a legal and practical solution to the situation, defendants evicted HAF from the building, refusing to renew the lease because of the (i) gender/sex or perceived gender/sex and/or the (ii) disability or perceived disability of HAF's transgender clients. Of course, all of these allegations are deemed true for the purposes of defendants' motion.

Defendants' Motion to Dismiss

In support of their motion to dismiss this well-pleaded Complaint, defendants do not actually address the allegations in the Complaint itself. Rather, they misstate them: "the gravaman [sic] of this Complaint deals with alleged clients of the Plaintiff who consider themselves 'transgender,'" Gold Affirmation, ¶ 4; and

> a reading of the . . . Complaint makes it eminently clear that the entire issue in this case is whether or not a landlord has a right to insist that individuals who are men use men's rooms and who are women use women's rooms, and, whether or not those members of our society who consider themselves 'transgender' have the right to use any public bathroom they so desire at any particular time.

Gold Affirmation, ¶ 16. In fact, the gravamen of the Complaint is Plaintiff's allegations that defendants have illegally discriminated against HAF by refusing to renew the lease in its Queens property when HAF refused to exclude its transgender clients from all common areas of the building, including all restrooms. While, as explained below, the rights of HAF's clients are relevant, and while Plaintiff submits that the law does prohibit a landlord from flatly banning transgender people from using gender-identity-appropriate restrooms, this case does not squarely present that issue. Even if it did, defendants' re-writing of the allegations in the Complaint cannot provide a basis for a motion to dismiss. The only relevant facts are those actually contained in the Complaint and whether, as pleaded, the allegations set forth therein state a cognizable claim.

In any event, the Gold Affirmation is facially inadequate and fails to allege anything in support of defendants' motion. Indeed, the bulk of the affirmation is entitled "Argument," s*ee* Gold Affirmation, ¶¶ 18-49, and consists primarily of misstatements of the allegations in the Complaint, as discussed above; generalized comments about the affirmant's personal opinions of how society should be ordered; and a lengthy review of the affirmant's internet research into the meaning of the term "transgender" and his conclusion that no one can say what transgender is.[1] *See id.*

In their brief, defendants transform the Gold Affirmation's re-statement of the Complaint, and the affirmant's opinions, into three arguments: (1) that defendants had

[1] This last assertion is, as the Court is well aware, nonsensical. *See infra*, pp. 6-8.

the right, as every landlord would, to insist that HAF's transgender clients use "appropriate restrooms"; (2) that the "offensive comments" alleged by Plaintiff do not rise to the level of a constitutional due process violation; and (3) that the legislature, not courts, should pass laws to protect transgender people. As an initial matter, it is telling (and, indeed, conclusive) that none of the causes of action implicit in the foregoing arguments are actually set forth in the Complaint. Even disregarding that fatal problem, defendants' arguments are all meritless.

First, as explained in greater detail below, HAF does not merely allege that defendants attempted to persuade its transgender clients to use "appropriate restrooms," but that defendants insisted that HAF exclude its transgender clients from the entire Bruson Building, including all restrooms. Moreover, reference to the "appropriateness" of a restroom merely begs the question of what an "appropriate" restroom is for a transgender person. Second, since HAF as never complained that defendants' comments, as offensive as they clearly are, violate anyone's constitutional rights, the part of defendants' motion regarding HAF's supposed due process claim is irrelevant. Finally, the courts have already interpreted existing statutes as prohibiting discrimination against transgender persons. *See also, infra*, p. 8.

What It Means to Be Trangender

As numerous courts have recognized, transgender individuals are those who have a strong and persistent cross-gender identification and experience persistent discomfort about their assigned sex. In *Maffei v. Kolaeton Indus., Inc.*, 164 Misc. 2d 547, 626 N.Y.S.2d 391 (Sup. Ct., N.Y. County 1995), the Court explained that transsexualism is

> a condition where physiologically normal individuals experience discontent being of the sex to which they were born and have a compelling

> desire to live as persons of the opposite sex. The discomfort is usually accompanied by a desire to utilize hormonal, surgical, and civil procedures to live the sex role opposite to which they were born. They are thus persons whose anatomic sex at birth differs from their psychological sexual identity.

Id. at 551, 626 N.Y.S.2d at 393. The Court in *Richards v. U.S. Tennis Ass'n*, 93 Misc. 2d 713, 719, 400 N.Y.S.2d 267, 271 (Sup. Ct. N.Y. County 1977), further noted that "[m]edical science has not found any organic cause or cure (other than sex reassignment surgery and hormone therapy) for transsexualism, nor has psychotherapy been successful in altering the transsexual's identification with the other sex or his desire for surgical change." *See also Rentos v. Oce-Office Sys.*, 72 Fair Empl. Prac. Dec. (BNA), No. 95 Civ. 7908, 1996 WL 737215 at * 6-7 (S.D.N.Y. Dec. 24, 1996) (discussing transsexualism). The medically approved treatment for transgender individuals is for them to live according to their gender identity, including dressing and presenting as their psychological sex in all aspects of their lives. *See Doe v. Bell*, 754 N.Y.S.2d 846, 848-49 (Sup. Ct. N.Y. County 2003).

This very Court has also had no trouble grasping what it means to be transgender, stating in its discovery decision last year,

> Transgendered people are those who have a strong and persistent cross-gender identification and experience persistent discomfort about their assigned sex. . . . Transgendered individuals include people who present as the other sex but take no hormones and have no surgery, people who take hormones to change their secondary sex characteristics but have no surgery, and people who have a range of surgical procedures to alter their anatomical sex. Only a small percentage of transgendered people have surgery, and a still smaller percentage have all of the surgery required to change all aspects of their physical sex.

Hispanic Aids Forum v. Estate of Bruno, et al., ___ N.Y.S.2d ___, No. 112428/01, 2003 N.Y. Misc. LEXIS 172 at *2 (Sup. Ct. N.Y. County Jan. 10, 2003, Shafer, J.) (defining

transgender based upon the *Diagnostic and Statistical Manual of Mental Disorders* (4th ed.) ("DSM – IV")) (citations omitted); *see also Matter of Robert Wright Heilig*, 816 A.2d 68, 71-79 (Md. 2003) (discussing transsexualism). The fact that so many courts have had no difficulty determining what it means to be transgender shows the absurdity of defendants' suggestion that the term is meaningless.

In this regard, although defendants refer in their brief to bills introduced in "various legislative bodies" concerning protection for transgender individuals, *see* Def. Br. at 13, those bills are irrelevant to the issues presented here. While the City HRL was amended in 2002 to include "gender identity" within its list of non-discrimination protections, *see* N.Y. City Local Law No. 3 Int. 24 (2002) (redefining the term "gender" to "include actual or perceived sex and shall also include a person's gender identity, self-image, appearance, behavior or expression, whether or not that gender identity, self-image, appearance, behavior or expression is different from that traditionally associated with the legal sex assigned to that person at birth"), that amendment recited that it was simply "clarif[ying]" the scope of the statute's coverage, *see id.*, which under existing case law, already included gender identity. *See infra*, Point 1.A.[2]

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[2] The fact that protections based on gender identity already existed before the city amended the statute is further confirmed by an Executive Memorandum from Martha Mann Alfaro, Deputy Chief, Division of Legal Counsel of the City of New York, dated March 1, 2001 (attached as Exhibit A) (hereafter, "Alfaro Memo"). The Alfaro Memo explains that transgender persons were already "protected under provisions of our local law which address discrimination based on actual or perceived gender and disability." *Id.* at 1 (discussing case law). That memorandum was considered by the City Council during its deliberations on the gender identity bill in the legislative session previous to the one in which the bill was passed. *See* Tr. of Mins. of Comm. on Gen. Welfare of the City Council of the City of New York, dated May 4, 2001, at 17-18 (hereafter, "2001 City Council Tr.").

The legislative history of the amendment to the City HRL establishes that passing legislation to clarify the existing law served a number of important social and legislative

ARGUMENT

On a motion to dismiss pursuant to CPLR 3211(a)(7), as defendants have acknowledged, "the pleading is to be afforded a liberal construction. (*See* CPLR 3026). We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Leon v. Martinez,* 84 N.Y.2d 83, 87-88, 614 N.Y.S.2d 972, 974 (1994). *See also Residence in Madison Condo v. W.T. Gallagher & Assocs., Inc.*, 271 A.D.2d 209, 706 N.Y.S.2d 325 (1st Dep't 2000) (all allegations in a

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functions, including: (1) reaffirming for employers, landlords, and providers of public accommodations, in the clearest possible language, that discrimination against transgender people is illegal, *see* Tr. of Mins. of Comm. on Gen. Welfare of the City Council of the City of N.Y., dated April 23, 2002, at 15 (hereafter "2002 City Council Tr."), 2001 City Council Tr. at 15-16 ("[P]rofessionals [in private companies] often times depend on the words of the City statute for their guidance, as do the lawyers that advise them."), *id.* at 16 ("Most employers really want to do the right thing and not discriminate, and the problem was and is that they do not know what is covered by the law."); (2) giving clear notice to ordinary citizens and transgender people themselves that they are entitled to full protection of the law, *see* 2002 City Council Tr. at 15, *id.* at 33 ("In the absence of such explicit protections, there exists no real compulsion for people for one of the City's most marginalized communities to believe that they should engage the system, that they will receive confident, respectful and appropriate responses to complaints."), 2001 City Council Tr. at 16-17 ("Because the law does not clearly state that it covers all persons with diverse gender identities, many persons do not realize that they have rights against employment, housing and public accommodations discrimination."); (3) making it easier for lawyers who practice discrimination law but are not familiar with this area to realize that transgender individuals are covered, *see id.* at 17 ("Keep in mind that some of the attorneys practicing discrimination law have little experience in how the statute might be interpreted by those in the know at the Human Rights Commission or the City Law Department. The fact that the law may cover persons of diverse gender identities should not be a secret shared strictly among regular practitioners before the Commission."); (4) constituting a directive to the Human Rights Commission and other City agencies including the police department, that they must affirmatively seek to protect the rights of transgender individuals, *see* 2002 City Council Tr. at 15; and (5) representing an official legislative statement by the City Government "that the lives, rights and experiences of [transgender people] have the same value as those belonging to any other group in New York City," *id.* at 32; *see also id.* at 44 ("by passing the legislation, the City Council will be expressing a public judgment of what is right").

complaint must be deemed true and all inferences flowing from such allegations must be resolved in favor of plaintiff on motion to dismiss); *Foley v. D'Agostino*, 21 A.D.2d 60, 248 N.Y.S.2d 121 (1st Dep't 1964).

A court presented with a motion to dismiss should, and need, consider only whether the allegations in the complaint fit into any cognizable legal theory. *See Sokoloff v. Harriman Estates Dev. Corp.*, 96 N.Y.2d 409, 414, 729 N.Y.S.2d 425, 428 (2001). "'The sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail.'" *Weiner v. Lenox Hill Hosp.*, 193 A.D.2d 380, 597 N.Y.S.2d 58 (1st Dep't 1993) (quoting *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275, 401 N.Y.S.2d 182, 186 (1977); *see also Polonetsky v. Better Homes Depot, Inc*., 97 N.Y.2d 46, 54, 735 N.Y.S.2d 479, 483 (2001) (same).

Thus, a defendant's burden to prevail on a motion to dismiss a complaint is severe: "When evidentiary material is considered, . . . unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it . . . dismissal should not eventuate." *Guggenheimer*, 43 N.Y.2d at 275. In this regard, affirmations or affidavits submitted by a defendant will almost never defeat a complaint that contains a cognizable cause of action, s*ee Johnson v. Spence*, 286 A.D.2d 481, 730 N.Y.S.2d 334 (2d Dep't 2001), as courts "must accept the allegations of the complaint as true and ignore the affidavits submitted by defendants." *Henbest & Morrisey, Inc. v. W.H. Ins. Agency Inc.*, 259 A.D.2d 829, 830, 686 N.Y.S.2d 207, 208 (3d Dep't 1999)(emphasis supplied).

In undertaking this analysis, moreover, it is black-letter law that "affidavits received [from the moving party in support of] an unconverted motion to dismiss for failure to state a cause of action are not to be examined for the purpose of determining whether there is evidentiary support for the pleading." *Rovello v. Orofino Realty Corp.*, 40 N.Y.2d 633, 635, 389 N.Y.S.2d 314, 316 (1976). As such, the Court need not (and, indeed, cannot) consider the allegations set forth in the Gold Affirmation. As discussed above, it is no more than a re-writing of the allegations actually set forth in the Complaint, and irrelevant musings about the affirmant's understanding of a landlord's legal obligations. Such an affirmation does not meet the very heavy burden of providing "documentary evidence [that] conclusively establishes a defense to the asserted claims as a matter of law." *Leon*, 84 N.Y.2d at 88, 614 N.Y.S.2d at 974.

Accordingly, disregarding the Gold Affirmation and considering the motion to dismiss based only on the "four corners" of the Complaint, defendants have failed to present any fact or law in support of their motion to dismiss, and it should be denied.

POINT I

DISCRIMATION AGAINST HAF ON ACCOUNT OF ITS PROVISION OF SERVICES TO TRANSGENDER INDIVIDUALS IS UNLAWFUL UNDER STATE AND CITY LAW

The Complaint alleges four claims against defendants: (1) that they discriminated against HAF in commercial real estate based on the actual or perceived sex of HAF's clients in violation of the State HRL, N.Y. Exec, Law §§ 296(5)(b)(1) and (2) and 297(9); (2) that they discriminated against HAF in commercial real estate and in a place of public accommodations based on the actual or perceived gender of HAF's clients in violation of the City HRL, N.Y. City Admin. Code §§ 8-107(4)(a), 8-107(5)(b) and 8-502; (3) that

they discriminated against HAF in commercial real estate based on the actual or perceived disability of HAF's clients in violation of the State HRL; and (4) that they discriminated against HAF in commercial real estate and in a place of public accommodations based on the actual or perceived disability of HAF's clients in violation of the City HRL. As discussed below, the Complaint states a cause of action under each theory.

A. The Complaint Adequately Alleges a Sex and/or Gender Discrimination Claim

The Complaint alleges that defendants evicted HAF because HAF refused to bar the doors of the Bruson Building, and all restroom facilities within that building, to its transgender clients. Compl., ¶¶ 2, 23-4. These allegations state a claim of sex discrimination under the Human Rights Laws.

New York State law prohibits discrimination in commercial leasing on the basis of sex:

> It shall be an unlawful discriminatory practice . . . to refuse to sell, rent, lease or otherwise deny to or withhold from any person or group of persons land or commercial space because of race, creed, color, national origin, sex, age, disability . . . . of such person or persons . . . .

N.Y. Exec. Law § 296(5)(b)(1). The City statute essentially parallels the State law, except that it uses the term gender instead of sex:

> It shall be an unlawful discriminatory practice . . . to refuse to sell, rent, lease, approve the sale, rental or lease or otherwise deny to or withhold from any person or group of persons such a housing accommodation or an interest therein because of the actual or perceived race, creed, color, national origin, gender, age, disability, . . . of such person or persons . . . .

N.Y. City Admin. Code § 8-107(5)(b)(1). The City law also prohibits discrimination in a place of public accommodations based on actual or perceived gender. N.Y. City Admin. Code § 8-107(4)(a).

1. Discrimination Against Transgender People Constitutes Sex/Gender Discrimination under the Human Rights Laws

New York case law already establishes that discrimination against transgender individuals constitutes sex and/or gender discrimination covered by State and City law. In *Maffei v. Kolaeton Industry, Inc.*, 164 Misc. 2d 547, 626 N.Y.S.2d 391 (Sup. Ct. N.Y. Cty. 1995), for example, a transgender employee brought a sexual harassment action against his former employer under the Human Rights Laws alleging that he was subjected to a hostile work environment because he was transgender. *Id.*, 164 Misc. 2d at 548, 626 N.Y.S.2d at 392. The crucial issue as framed by the *Maffei* Court was "whether harassment against a transsexual is included within the purview of the aforequoted statutes." *Id.*, 164 Misc. 2d at 550, 626 N.Y.S.2d at 393. The Court considered that as a matter of public policy, the anti-discrimination statutes are remedial provisions "intended to bar all forms of discrimination . . . and to be broadly applied." With these principles in mind, the Court concluded that discrimination related to the fact that an individual transitioned from one sex to another violates the City's prohibition against discrimination based on sex. *Id.* at 556, 626 N.Y.S.2d at 396. The Court recognized that, while "a person may have both male and female characteristics, society only recognizes two sexes," and consequently "transsexual male[s] . . . may be considered part of a subgroup of men" for purposes of the sex discrimination laws. *Id.*

Similarly, in *Richards v. U.S. Tennis Ass'n*, 93 Misc. 2d 713, 400 N.Y.S.2d 267 (Sup. Ct. N.Y. County 1977), the Court held that the State HRL's ban on sex

discrimination covered discrimination against a transgender individual. In *Richards*, the U.S. Tennis Association insisted that Ms. Richards, a male-to-female transsexual, take a chromosome test to determine her "true" sex before she would be allowed to compete in the women's competition at the U.S. Open. Granting Ms. Richards' preliminary injunction motion, the Court ordered that she be allowed to compete as a woman and held that to do otherwise would be sex discrimination prohibited by the State HRL. 93 Misc. 2d at 721-22, 400 N.Y.S. at 272-73. The *Richards* court held that where an individual transitions from one sex to another, the "unfounded fears and misconceptions of defendants must give way" to the State HRL's prohibition on sex discrimination. 93 Misc. 2d at 722, 400 N.Y.S.2d at 272.

Finally, in *Rentos v. Oce-Office Sys.*, 72 Fair Empl. Prac. Cas. (BNA) 1717, No. 95 Civ. 7908, 1996 WL 737215 (S.D.N.Y. 1996), the court denied a motion to dismiss a complaint that alleged sex discrimination and sexual harassment of a "transgendered female" by her employer. Relying on *Richards* and *Maffei*, the federal court concluded that the plaintiff has stated viable claims of sex discrimination under the Human Rights Laws. *Id.* at *1, **8-9. These cases clearly establish that defendants' refusal to renew HAF's lease because of its association with "men who think they're women using the women's bathrooms" and "women who think they're men using the men's bathrooms," Compl., ¶¶ 20-21, constitutes discrimination on the basis of perceived gender, which is unlawful under the City HRL. *See* § 8-107(5)(a)(1).

Judicial recognition that discrimination against someone who has transitioned from one sex to another is sex discrimination comports both with common sense and with the way the law treats other kinds of discrimination. It is beyond dispute that

discrimination against both Catholics and Muslims is religious discrimination, and no one would question that discriminating against someone because she changed her religion from Catholic to Muslim is still religious discrimination. In the same way, discriminating against someone because he or she transitioned from one gender to another is still sex discrimination.

2. Discrimination against HAF Because of its Association with Transgender People is Equally Prohibited by the Human Rights Laws

HAF's association with transgender individuals, and the allegations in the Complaint that HAF was evicted from its offices because of that association, bring HAF squarely within the protection of the Human Rights Laws. New York courts in both *Bernstein v. 1995 Associates*, 185 A.D.2d 160, 586 N.Y.S.2d 115 (1st Dep't 1992), and *Matter of Barton v. New York City Comm'n On Human Rights*, 140 Misc. 2d 554, 531 N.Y.S.2d 979 (Sup. Ct. N.Y. County 1988), have recognized that a commercial tenant has a claim under the Human Rights Laws where the landlord refuses to lease space to the tenant because of the identity of the tenant's clientele. In *Bernstein*, the plaintiff alleged that a commercial landlord discriminated against women, ethnic minorities and the disabled by refusing to grant the plaintiff a lease because of the nature of his medical practice, which provided abortion services and treatment for AIDS patients. The First Department held that, regardless of whether the landlord intended to target women, minorities, or the disabled, the alleged conduct constituted unlawful discrimination against the plaintiff. 185 A.D.2d at 160, 586 N.Y.S.2d at 117.

In *Matter of Barton*, the Court rejected defendants' argument that a dentist who treated AIDS patients did not have standing to bring a claim of disability discrimination under the City HRL because he was not himself handicapped: "a person who sought to

make his services available to a needy and discriminated against class and who was thwarted in those efforts has standing to complain." 140 Misc. 2d at 561, 531 N.Y.S.2d at 983. The Court relied on the United States Supreme Court holding in *Trafficante v. Metropolitan Life Ins.*, 409 U.S. 205 (1972), that whites can bring an action claiming that non-whites were discriminated against in obtaining housing rentals on the theory that the whites were injured by not enjoying the benefit of integrated housing.

Numerous other cases have allowed claims by plaintiffs who were personally injured by virtue of their association with a protected class. *See, e.g, Axelrod v. 400 Owners Corp.*, 189 Misc. 2d 461, 465, 733 N.Y.S.2d 587, 591 (Sup. Ct. N.Y. County 2001) (New York discrimination case law has "allowed claims by persons who were not themselves members of the protected class but who were personally affected, albeit indirectly, by virtue of the alleged discrimination."); *Dunn v. Fishbein*, 123 A.D.2d 659, 507 N.Y.S.2d 29 (2d Dep't 1986)(Caucasian person may maintain a discrimination claim where he alleged that he was denied an apartment because his roommate was African-American); *Woods-Drake v. Lundy*, 667 F.2d 1198 (5th Cir. 1982) (whites who experience discriminatory treatment because of their association with blacks have standing to sue).

Here, HAF's association with transgender individuals, and the allegation that defendants evicted HAF because of that association, is all that is needed to state a claim of sex discrimination under the State and City HRLs.

B. <u>The Complaint Adequately Alleges a Disability Discrimination Claim</u>

The Complaint alleges that defendants evicted HAF because HAF refused to exclude its transgender clients both from the entire Bruson building and from all restroom

facilities within that building. Compl., ¶¶ 2, 23-4. These allegations state a claim of disability discrimination under the Human Rights Laws because transgender individuals, or those perceived to be transgender, are people with a diagnosable condition and therefore are people with a disability for purposes of both the Human Rights Laws.

The Human Rights Laws ban discrimination in commercial leasing based upon a person's disability or perceived disability. N.Y. Exec. Law §§ 296(5)(b)(1) and 292(21); N.Y. City Admin. Code § 8-107(5)(b)(1). The City HRL also bans discrimination in public accommodations against individuals with a disability or those who are perceived that way. N.Y. City Admin. Code § 8-107(4)(a). The Human Rights Laws also have broad definitions of what constitutes a "disability." Under the Executive Law, the term "disability" is defined to include "(a) a physical, mental or medical impairment resulting from anatomical, physiological, genetic, or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques . . . or (c) a condition regarded by others as such an impairment." N.Y. Exec. Law § 292(21). The City HRL's definition of disability, set forth in section 8-107(1)(a), is even broader than the definition of disability under State law. A disability under the City law includes a physical, medical, mental or psychological impairment "of any system of the body" and on its face does not require an impairment to bodily function or even a medical diagnosis. N.Y. City Admin. Code § 8-102(16)(b)(1).

Consistent with the terms of the statute, these laws have been interpreted broadly to protect any medically diagnosable condition. *See, e.g., State Div. of Human Rights v. Xerox Corp.*, 65 N.Y.2d 213, 491 N.Y.S.2d 106 (1985) ("Fairly read, the [State HRL]

covers a range of conditions varying in degree from those involving a loss of a bodily function to those which are merely diagnosable medical anomalies . . . .). *See also Reeves v. Johnson Controls World Servs., Inc.*, 140 F.3d 144, 155-56 (2d Cir. 1998) ("an individual can be disabled under the [State HRL] if his or her impairment is demonstrable by medically accepted techniques; it is not required that the impairment substantially limit the individual's normal activities") (citations omitted).

Transgender people have a diagnosable condition known clinically as Gender Identity Disorder ("GID") or gender dysphoria. GID is recognized as a mental disorder in the DSM-IV, the generally accepted medical catalog of mental disorders authored by the American Psychiatric Association.[3] As people with a medically diagnosable condition, transgender individuals are people with a disability for purposes of both the Human Rights Laws.

Numerous courts have recognized the medical nature of transgenderism or transsexualism. Most recently, Justice Gans of the New York Supreme Court explicitly recognized that transgender people have a disability under the State HRL. *See Doe v. Bell*, 754 N.Y.S.2d 846 (Sup. Ct. N.Y. County 2003). In *Bell*, the Court found that the plaintiff's disorder had been clinically diagnosed as GID "using the medically accepted standards set forth in the DSM-IV" and that "[n]o more is required for [plaintiff] to be

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[3] According to the DSM-IV, there are three components of GID: (i) "a strong and persistent cross-gender identification, which is the desire to be, or the insistence that one is, of the other sex"; (ii) "evidence of persistent discomfort about one's assigned sex or a sense of inappropriateness in the gender role of that sex"; and (iii) "clinically significant distress or impairment in social, occupational, or other important areas of functioning." Recent scientific research suggests that GID is a physiological condition, which originates during fetal development. *See, e.g., Matter of Robert Wright Heilig*, 816 A.2d 68, 71-79 (Md. 2003) (evaluating current medical literature on GID in the context of petitioner's request to the Court for legal recognition of a gender change).

protected under the State Human Rights Law." *Id.* at 851. In this Court's earlier discovery decision in this case, it acknowledged the definition of GID in the DSM-IV. *Hispanic AIDS Forum v. Estate of Bruno et al*, ___ N.Y.S.2d ___, No. 112428/01, 2003 N.Y. Misc. LEXIS 172 at *2 (Sup. Ct. N.Y. County Jan. 10, 2003).

Similarly, in *Arroyo v. N.Y. City Health and Hosp. Corp.*, Compl. No. EM01120-04-89-DE, Recommended Decision and Order (A.L.J., N.Y. City Comm'n on Human Rights Mar. 11, 1994), *aff'd*, Decision and Order (N.Y. City Comm'n on Human Rights May 25, 1994) (*cited in* Alfaro Memo at 1 and in Martha Mann Alfaro, *Regulation of Local Government Services Under Title II of The Americans With Disabilities Act of 1990*, 199 PLI/Crim 569, 696 n.17 (2002)), the City Human Rights Commission held that a male-to-female transsexual who wore feminine attire but had not had any surgery could bring a claim under the City HRL disability provisions. "The plaintiff's gender dysphoria, which the Commission described as 'an incongruence between a person's assigned sex and their [sic] sense of themself [sic] as male or female' was held to meet the law's definition of 'handicap.'" Alfaro Memo at 1 (citing *Arroyo* at 9). Finally, the courts in *Richards*, *Maffei*, and *Rentos* have all recognized that being transgender or transsexual is a medically diagnosable and treatable condition. *Rentos*, 72 Fair Empl. Prac. Cas. (BNA) 1717, No. 95 Civ. 7908, 1996 WL 737215 at **6-7; *Maffei*, 164 Misc. 2d at 551-552, 626 N.Y.S.2d at 393-94; *Richards*, 93 Misc. 2d at 718-19, 400 N.Y.S.2d at 270-71.

Courts in other states with similarly expansive disability statutes (i.e., statutes that do not require that a disability restrict any major life activities) have interpreted their statutes to find that GID or gender dysphoria qualifies as a "disability." *See, e.g.*,

Enriquez v. West Jersey Health Sys., 342 N.J. Super. 501 (2001)("gender dysphoria is a recognized mental or psychological disability that can be demonstrated psychologically by accepted clinical diagnostic techniques and qualifies as a handicap under" New Jersey's Law Against Discrimination).

It is not necessary for HAF to allege facts showing that some or all of its transgender clients have been diagnosed with GID -- defendants' actions, as alleged in the Complaint, constitute disability discrimination whether HAF's transgender clients actually have GID or were *perceived* or *regarded* as being transgender by defendants. The City HRL makes clear that in the context of discrimination in commercial leasing, as in other discrimination cases, it is the landlord's *perception* that is relevant to the issue of discrimination, and not the actual status of the victim:

> It shall be an unlawful discriminatory practice for any person, being the owner, lessor. . . . to refuse to sell, rent, lease . . . commercial space . . . because of the *actual or perceived* . . . sex . . . [or] disability . . . of such person or persons.

N.Y. City Admin. Code § 8-107 (emphasis added). The State HRL also bans discrimination based on a perceived disability. *See* N.Y. Exec. Law § 292(2).

Similarly, in *Romei v. Shell Oil Co.* the court held that the plaintiff could maintain a claim for discrimination on the basis of disability where his former employer regarded him to be suffering from AIDS, despite the fact that plaintiff failed to allege that he was in fact suffering from this disability:

> it is . . . not necessary that [plaintiff] allege that he actually has a "disability" within the meaning of Executive Law 292.21(c) in order to state a cause of action [for

> discrimination] . . . . It is sufficient that he allege that he was regarded by the defendants as having a disability.

1991 WL 692884 (N.Y. Sup. Ct., N.Y. Cty, Feb. 14, 1991).

Nothing in the case law or statutory framework of the Human Rights Laws requires HAF to introduce medical evidence to prove that HAF's clients actually suffer from the disability of GID. *See Grullon v. South Bronx Overall Econ. Dev.Corp.*, 185 Misc. 2d 645, 712 N.Y.S.2d 911 (Civ. Ct. N.Y. County 2000) (holding that it was sufficient that the plaintiff submitted evidence "from which the jury could infer and conclude that defendant 'regarded' or 'perceived' plaintiff as suffering from alcoholism"); *Doe v. Roe*, 160 A.D.2d 255, 256 (1st Dep't 1990)("We note that the definition of disability in the Human Rights Law . . . is broad enough to embrace persons who . . . contend they are not disabled but whom the potential employer perceived (wrongfully) to be disabled.").

As enunciated by the First Department in *Doe v. Roe* and the other cases cited herein, HAF need never show that its clients actually suffer from GID -- it is sufficient to maintain its disability claim that HAF alleged in the Complaint that defendants discriminated against HAF because of HAF's clients' actual or perceived disability: their transgender status. (*See* Compl. ¶¶ 16, 20, 40, 44, stating that defendants refused to "rent commercial space to HAF because of the actual or perceived disability of its transgendered clients.")

Finally, for the same reasons that HAF is protected under the sex and gender discrimination laws based on its association with its transgender clients, it is protected under the disability discrimination laws as well. *See supra* Point I.A.2.

POINT II

EVEN IF DEFENDANTS' CHARACTERIZATION OF THE COMPLAINT WERE CORRECT, HAF WOULD STILL HAVE STATED A CLAIM FOR DISABILITY DISCRIMINATION UNDER BOTH THE CITY AND STATE HUMAN RIGHTS LAWS BECAUSE OF DEFENDANTS' FAILURE EVEN TO ATTEMPT REASONABLE ACCOMMODATION

The Complaint in this case is based on the defendants' insistence on HAF's completely barring its transgender clients from the use of the entire building, or any restroom in it, and defendants' ultimate eviction of HAF because of its transgender clientele. The issue that defendants address in their brief—what restroom may or may not be "appropriate" or "reasonable" for a transgender person to use, and under what circumstances—is simply not before this Court, and need not be decided on this motion. Even if the allegations in the Complaint were different, however, and defendants had done no more than insist that HAF prohibit its clients from using gender-identity-appropriate restrooms, allegations of that conduct alone would state a cognizable cause of action under the Human Rights Laws as a clear failure reasonably to accommodate HAF's transgender clients' disabilities.[4]

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4 An employer or landlord must engage in a dialogue with its employees or tenants in order to determine whether an accommodation is necessary and what accommodation would be reasonable. The federal disability discrimination statute, which serves as a guide to the interpretation of the Human Rights Laws, *see Maffei*, 626 N.Y.S.2d at 395, explicitly recognizes such a requirement. *See, e.g., Humphrey v. Memorial Hosp. Ass'n,* 239 F.3d 1128-1137-39 (9th Cir. 2001) (employers are required to engage in a "dialogue" with their employees to determine what an appropriate accommodation may be given the particular circumstances); *Dvorak v. Mostardi Platt Associates, Inc.*, 289 F.3d 479, 485 (7th Cir. 2002) (the accommodation process is "interactive," under which both parties must put forth "serious efforts"); *Cleveland v. Prairie State Coll.*, 208 F. Supp. 2d 967, 978 (N.D. Ill. 2002) ("The function of the ADA is to force an employer to have an ongoing dialogue with a disabled employee that enables the employer to both 'accommodate' the employer's policies and job requirements and yet meet the needs of a 'qualified individual.'").

The Human Rights Laws require a landlord reasonably to accommodate the disabilities of its tenants, as part of the statutes' general prohibition against disability discrimination. For example, the City HRL provides that "any person prohibited by the provisions of this section from discriminating on the basis of disability," such as landlords leasing commercial real estate, *see* N.Y. City Admin. Code § 8-107(5)(b), "shall make reasonable accommodation to enable a person with a disability to . . . enjoy the right or rights in question provided that the disability is known or should have been known by the covered entity." N.Y. City Admin. Code § 8-107(15)(a). The State HRL similarly prohibits disability discrimination by commercial landlords, *see* N.Y. Exec. Law § 296(5)(b), and reasonable accommodation is part of the State HRL's general ban on disability discrimination.[5]

The duty of the employer or landlord to engage in a dialogue about the possibility of an accommodation also obtains under the Human Rights Laws, which are explicitly more expansive than federal law and have been interpreted to be more protective of civil rights than the federal non-discrimination laws. *See, e.g.*, *Burger v. Litton Indus., Inc.*, No. 91 Civ. 0918, 1996 WL 421449, at *19 (S.D.N.Y. Apr. 25, 1996) ("the 'legislative history' of the NYCHRL makes clear that it is to be even more liberally construed than the federal and state anti-discrimination laws"); *Maffei*, 164 Misc. 2d at 555, 626 N.Y.S.2d at 396 ("Our New York City law is intended to bar all forms of discrimination in the workplace and to be broadly applied."); *Brooklyn Union Gas Co. v. N.Y. State Human Rights Appeal Bd.*, 41 N.Y.2d 84, 86 n.1, 390 N.Y.S.2d 884, 359 N.E.2d 393 (1976) (noting that, in interpreting the state disability law, the court is not bound by more restrictive U.S. Supreme Court decisions interpreting the ADA); *id.* at 88 ("[T]he very purpose of the [state] HRL was by blanket description to eliminate all forms of discrimination, those then existing as well as any later devised."); *Nicolo v. Citibank*, 147 Misc. 2d 111, 114, 554 N.Y.S.2d 795 (Sup. Ct. Monroe County 1990) ("[T]here is nothing precluding a court of this state from making a more expansive interpretation" of state law than that" given to related federal provisions). Based on the allegations in the Complaint, the landlord refused to enter into any such dialogue, and therefore failed to fulfill the reasonable accommodation requirement of the disability non-discrimination laws.

[5] It is clear that reasonable accommodation is a foundational and integral part of the State HRL's ban on disability discrimination. In *Wilmarth v. Broome County Dep't of Transportation*, the State Division of Human Rights ruled that the definition of

As one court explained, ,

> [t]he State Human Rights Law, of course, is not simply a prohibition on discriminatory actions taken because of a person's disability. Quite the contrary, the State Human Rights Law, like federal disability discrimination statutes, requires covered entities to provide to persons with disabilities reasonable accommodations not offered to other persons in order to ensure that persons with disabilities enjoy equality of opportunity.

Doe v. Bell, 754 N.Y.S.2d 846, 851 (Sup. Ct. N.Y. County 2003); *cf. US Airways, Inc. v. Barnett*, 535 U.S. 391, 397 (2002) ("The [Americans with Disabilities] Act requires preferences in the form of 'reasonable accommodations' that are needed for those with disabilities to obtain the same workplace opportunities that those without disabilities automatically enjoy.") (emphasis in original).

The State HRL only defines the term "reasonable accommodation" in the employment context, but that definition is logically exportable to the context of commercial real estate and public accommodations. As defined in the statute,

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"disability" in the Human Rights Law "necessarily implies" an affirmative duty to reasonably accommodate a disabled individual in the employment context, even though the statute was not amended to clarify that this protection was within the statute until four years later. *See* 1997 N.Y. Laws ch. 269 (S. 5052); Legislative Bill and Veto Jackets for S. 5052 (1997), at 8 (N.Y. State Sen. Introducer's Memorandum of Support); *id.* at 16 (letter dated July 18, 1997, from Lawrence Kunin, General Counsel to the State of New York, Executive Dep't, to the Hon. Michael C. Finnegan, Counsel to the Governor) ("Although it has been the Division's position that requiring an employer's reasonable accommodation to persons with disabilities is a sound interpretation of the Human Rights Law, this legislation will enable the Division to avoid time consuming and costly litigation on the matter. The legislation will also have the beneficial effect of clarifying to employees with disabilities and their employers what their rights and responsibilities are, which should consequently result in fewer cases filed with the Division."); N.Y. Legis. Exec. Memo 269 (1997) (Governor's memorandum approving S. 5052) ("Section 296 of the Executive Law currently prohibits discrimination on the basis of disability in a broad range of areas and activities, but does not explicitly incorporate many of the protections afforded persons with disabilities under the federal Americans with Disabilities Act. This legislation corrects that circumstance by making explicit for persons with disabilities and their employers those rights and responsibilities already present in state law.").

"reasonable accommodation" means "actions taken which permit an employee, prospective employee, or member with a disability to perform in a reasonable manner the activities involved in the job or occupation sought or held . . .; provided, however, that such actions do not impose an undue hardship on the business, program or enterprise of the entity from which the action is requested." N.Y. Exec. Law § 292(21-e).[6] The New York City Administrative Code provides that "[t]he term 'reasonable accommodation' means such accommodation that can be made that shall not cause undue hardship in the conduct of the covered entity's business." N.Y. City Admin. Code § 8-102(18).

Obviously, whether an accommodation is "reasonable" or an "undue hardship" varies depending on the circumstances of the individual case. New York courts have held, for example, that under the state disability law, a landlord is required to make an exception to a "no-pet" clause in a lease for a disabled tenant who needed to keep a pet because of his disability. *See Ocean Gate Assocs. Starrett Sys., Inc. v. Dopico*, 109 Misc. 2d 774, 441 N.Y.S.2d 34 (Civil Ct. Kings County 1981). The *Dopico* court held that under the disability law, the no-pet clause (a generally applicable regulation) had "to bow upon proof of a specific, particularized need . . . which . . . arises out of the handicap." *Dopico*, 109 Misc. 2d at 775, 441 N.Y.S.2d at 34. Thus, *Dopico* makes clear that even when a defendant adopts a "neutral" or generally applicable rule, the fact of general applicability alone does not insulate the defendant from a disability discrimination claim. Rather, where feasible, the generally-applicable rule must bow to the particularized needs of the disabled individuals.

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[6] Thus, it is clear that under the state disability law, "a covered entity need not offer all accommodations sought by an individual with a disability. If the proposed accommodation would pose an undue hardship on the entity or is otherwise unreasonable, no liability arises from the failure to provide it." Doe, 754 N.Y.S.2d at 853.

According to the allegations in the Complaint, defendants not only failed to accommodate HAF's clients' disabilities, but failed even to give HAF the opportunity to propose reasonable alternatives that would have accommodated the needs of their clients with disabilities. Had HAF been given such an opportunity, HAF could have suggested a number of different solutions to the conflict, any of which, HAF submits, would have been reasonable. For example, HAF might have proposed any or all of the following: (1) the designation of a single-person restroom facility in the building for use by those who object to sharing a bathroom with transgender people; (2) the designation of a single-person restroom facility in the building for use by transgender people; (3) notifying the other tenants in the building of the hours and/or days of the week when HAF's transgender clientele would be in the building and would likely use the restrooms; (4) that the tenants in the building be educated about the nature of transgenderism and the fact that the transgender women using the bathroom are truly self-identified women and not voyeuristic men (this could include a dialogue allowing the other tenants to express their concerns about having transgender women in the bathroom which could then be directly addressed); (5) the reconstruction of the existing restroom facilities on HAF's floor in the building into a series of single-person facilities; (6) a system whereby whenever the bathroom is in use, an "occupied" sign is placed upon the door so that others may choose to wait until the bathroom is vacant. In determining what accommodation would be reasonable, the reasonableness of defendants' position that transgender individuals should not use gender-identity-appropriate restrooms, or indeed should use no restrooms at all, would also have to be considered.[7]

[7] It is worth pointing out here, however, that the defendants' assumption that it

Had Defendants explored these and/or other possible solutions with HAF, the parties likely could have found a mutually acceptable resolution that would have brought Defendants into compliance with the Human Rights Laws without unduly burdening Defendants. One thing is certain: Defendants' failure to engage in any such exploration or to attempt negotiation at all and their decision to summarily evict HAF instead cannot possibly constitute a reasonable accommodation under either the City or State disability laws. Yet, even if had defendants merely attempted to condition HAF's continued tenancy on its prohibiting transgender clients from using gender-identity-appropriate restrooms, rather than insisting on barring all transgender persons from the entire building, their total failure to explore alternative solutions to the conflict would still constitute illegal disability discrimination. And because it is uncontroverted on this motion that defendants refused to entertain proposals for any accommodations whatsoever, the Court would never be required to reach the issue of what accommodation would have been reasonable.

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would necessarily be "appropriate" or "reasonable" for transgender women to use the men's bathroom and transgender men to use the women's bathroom is highly suspect, especially in a world where transgender men and women are often visually indistinguishable (even to doctors, *see* Harry Benjamin, M.D., *The Transsexual Phenomenon*, ch. 7 (1997), *available at* http://www.symposion.com/ijt/benjamin /chap_07.htm) from biological men and women. Obviously, many people are still uncomfortable being around transgender people, but that cannot mean that they are forbidden to use public bathrooms. Nor can it mean that simply because transgender people use restrooms, it is permissible to challenge the gender and examine the genitalia of men and women when they wish to use a bathroom, on the ground that they do not look sufficiently masculine or feminine.

CONCLUSION

For the reasons stated above, the Court should deny defendants' motion to dismiss the Amended Complaint.

Dated: New York, New York
April 7, 2003

FRANKFURT KURNIT
KLEIN & SELZ, P.C.

By: _____

Edward Hernstadt
Kesari Ruza
488 Madison Avenue
New York, New York 10022
(212) 980-0120
(212) 593-9175 (fax)

-and-

James D. Esseks
Romana Mancini
Lesbian & Gay Rights and AIDS Projects
American Civil Liberties Union Foundation
125 Broad St., 18th Floor
New York, NY 10004
(212) 549-2627
(212) 549-2650 (fax)

Attorneys for Hispanic AIDS Forum

TO: Emanuel R. Gold
Law Offices of Emanuel R. Gold
108-18 Queens Blvd.
Forest Hills, NY 11375
(718) 897-7300

-and-

Peter Lagonikos, Esq.
Risi & Associates
23-19 31st Street
Long Island City, New York 11105
(718) 278-2600
(718) 956-4897 (fax)

Attorneys for Defendants

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