NEW YORK SUPREME COURT - COUNTY OF BRONX

PART 05

Case Disposed	❑
Settle Order	❑
Schedule Appearance	❑

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

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SANTANA,MARLENA Index №. **0305261/2008**

-against- Hon..**ALISON Y. TUITT** ,

G.E.B.MEDICAL MANAGEMENT Justice.

----------X

The following papers numbered 1 to 3 Read on this motion, **ANNUL, SET ASIDE & VAC**
Noticed on **October 27 2015** and duly submitted as No. ____ on the Motion Calendar of 1/11/16

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	1, 2	
Answering Affidavit and Exhibits	3	
Replying Affidavit and Exhibits		
_____ Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law		

Upon the foregoing papers this motion and cross-motion are decided in accordance with the annexed memorandum decision

Motion is Respectfully Referred to:
Justice: _____
Dated: _____

Dated: 10/2/2017

Hon. A. Y. Tuitt
ALISON Y. TUITT, J.S.C.

NEW YORK SUPREME COURT----------COUNTY OF BRONX

PART IA - 5

MARLENA SANTANA, YASMINDA DAVIS and MELISSA RODRIGUEZ,

Plaintiffs,

-against-

G.E.B. MEDICAL MANAGEMENT, INC., BRUCE PASWALL and PETER AYENDE,

Defendants.

INDEX NUMBER: 305261/2008

Present:
HON. **ALISON Y. TUITT**
Justice

The following papers numbered 1 to 3,

Read on this Defendants' Motion to Set Aside the Jury Verdict and Plaintiffs' Cross-Motion for Attorney's Fees, Pre-Judgment Interest and Other Post-Trial Relief

On Calendar of **1/11/16**

Notices of Motion/Cross-Motion - Exhibits, Affirmations 1, 2

Affirmation in Opposition/Support 3

Upon the foregoing papers, defendants' motion to set aside the jury verdict in this matter, or in the alternative, for a new trial on the grounds that the evidence was insufficient as a matter of law to support a jury's verdict and plaintiffs' cross-motion for an Order awarding attorneys' fees, prejudgment interest and other post-trial relief are consolidated for purposes of this decision.

The within action involves plaintiffs' claims that they were subject to discrimination by their employer based on disability/pregnancy. The jury awarded plaintiffs $4.5 million in compensatory damages for physical injury/emotional distress and $1.5 million award of punitive damages. Defendants move to set aside the verdict arguing that the evidence established that plaintiffs never complained of discrimination to any member of defendants' staff, plaintiffs were told they were underperforming and defendants offered them

flexibility in their schedules to keep them employed. Defendants argue that the compensatory damage award lacks not only evidentiary support, but also materially deviates from permissible awards in employment discrimination cases and the punitive damage award is so outrageous that it shocks the judicial conscience. Defendants contend that the lack of any evidence of malice, reckless indifference to the anti-discrimination laws, any intent by defendants to violate the law, or of egregious or outrageous conduct bars an award of any punitive damages.

Pursuant to CPLR §4404(a), a court may set aside a jury verdict and direct judgment entered in favor of a party entitled to judgment as a matter of law. However, a court may grant judgment notwithstanding the verdict only where there is simply no valid line of reasoning and permissible inferences which could possibly lead rational men to the conclusion reached by the jury." Cohen v. Hallmark Cards, 45 N.Y.2d 493 (1978). A verdict may be set aside as against the weight of the evidence only where "the jury could not have reached its verdict on any fair interpretation of the evidence." McDermott v. Coffee Beanery, Ltd.,777 N.Y.S.2d 103 (1st Dept. 2004).

The branch of defendants' motion to set aside the verdict as against the weight of the evidence is denied. Contrary to defendants' contention, the evidence was sufficient to support the jury's findings. The jury's determination is supported by evidence presented at trial by plaintiffs that they were harassed once they were known or suspected of being pregnant and then fired. Plaintiff Marlena Santana (hereinafter "Santana") testified that defendant Bruce Paswall (hereinafter "Paswall") told her "not to have children"; told plaintiff Yasminda Davis (hereinafter "Davis") "you better not get pregnant", and asked an earlier pregnant employee "are you going to keep it?". The evidence presented also showed that defendants subjected plaintiffs to pregnancy-related harassment and stereotypes, including asking impermissible interview questions, stripping Santana of her job duties and imposing intolerable working conditions on her, subjecting plaintiff Melissa Rodriguez (hereinafter "Rodriguez") to forced medical testing, threatening, mocking and/or shunning plaintiffs before firing them and orchestrating false scenarios to justify firing them. At to their alleged non-discriminatory reasons for firing plaintiffs, defendants admitted in sworn interrogatory answers that there were no assignments Santana or Rodriguez did in an improper or untimely manner. Defendant Peter Ayende (hereinafter "Ayende"), plaintiffs' manager, admitted that Davis completed all of her work. Ayende admitted that he never recommended that plaintiffs be fired, never formed the belief that any of the plaintiffs should be fired, and was shocked upon learning that Paswall was firing plaintiffs. Moreover, non-party Monica Eadie testified that she

overheard defendants' own witness, Davis' supervisor, Talitha Crespo, state that Davis and Santana were fired for being pregnant.

With respect to the branch of defendants' motion that argues that the compensatory damages award is not supported by the evidence, is grossly excessive and should be vacated and a new trial ordered or, in the alternative, remittitur is warranted, it is granted. The jury awarded each plaintiff $1.5 million in compensatory damages. All three of the plaintiffs here were found to suffer post-traumatic stress disorder (hereinafter "PTSD") by plaintiffs' expert Dr. Charles Robins, a clinical psychologist, whose work the past 30 years has focused on traumatized patients. Each plaintiff was diagnosed with clinically elevated levels of depression and anxiety and long-term PTSD, i.e., five years after the fact. However, that award as compared to cases with similar facts is excessive and the award should be reduced to $400,000 per plaintiff.

"The existence of compensable mental injury may be proved, for example, by medical testimony where that is available, but psychiatric or other medical treatment is not a precondition to recovery. Mental injury may be proved by the complainant's own testimony, corroborated by reference to the circumstances of the alleged misconduct." New York City Transit Authority v. State Division of Human Rights, 78 N.Y.2d 207 (1991). See also 119-121 East 97th Street Corp. v. New York City Commission on Human Rights, 642 N.Y.S.2d 638 (1st Dept. 1996). Three factors to be considered in reviewing mental anguish compensatory damages awarded by the State Commissioner of Human Rights are "whether the relief was reasonable related to the wrongdoing, whether the award was supported by evidence before the Commission, and how it compared with other awards for similar injuries." Id. "Due to the strong anti-discrimination policy spelled out by the Legislature of this State, an aggrieved individual need not produce the quantum and quality of evidence to prove compensatory damages he would have had to produce under an analogous provision, and this is particularly so where, as here, the discriminatory act is intentionally committed". Cullen v. Nassau County Civil Service Commission, 53 N.Y.2d 492 (1981).

The exercise of the discretion of a trial court over damage awards should be exercised sparingly. Shurgan v. Tedesco, 578 N.Y.S.2d 658 (2d Dept. 1992) citing James v. Shanley, 423 N.Y.S.2d 312 (3rd Dept. 1979). "In the absence of indications that substantial justice had not been done, a successful litigant is entitled to the benefit of a favorable jury verdict", and a court may not employ its discretion merely because it disagrees with a verdict (McDermott v. Coffee Beanery,777 N.Y.S.2d 103(1st Dept. 2004) as such practice would "unnecessarily interfere with the fact finding function of a jury to a degree that amounts to an usurpation of the

jury's duty". Pena v. New York City Transit Authority, 587 N.Y.S.2d 331(1st Dept. 1992). A jury may accept or reject testimony in whole or in part. Mejia v. JMM Autobahn, 767 N.Y.S.2d 427 (1st Dept. 2003).

Dr. Robins testimony was unrebutted. Defendants had retained an expert but never called them to testify. A party cannot argue that undisputed expert testimony, which is not impeached, is contrary to realities or in any way illogical. Sanchez v. City of New York, 949 N.Y.S.2d 368 (1st Dept. 2012). However, based on this record, the jury's award for compensatory damages, $1.5 million per plaintiff, is not supportable in light of awards in other discrimination cases. See, Brady v. Wal-Mart Stores, Inc., 455 F.Supp.2d 157 (E.D.N.Y. 2006) (Compensatory damages of $600,000, rather than $2.5 million awarded by jury, was appropriate following determination that very large employer operating retail store violated New York Human Rights Law in its treatment of employee suffering from cerebral palsy. Award was in line with others of $400,000 to $600,000 decided during previous decade, in cases involving similar incidents of work-induced mental anguish, when those awards were adjusted for inflation); Katt v. City of New York, 151 F.Supp.2d 313 (S.D.N.Y. 2001)(Since the jury reasonably found that the plaintiff's acute psychological disabilities were caused by her experiences working in that environment, the jury's award of $400,000 in compensatory damages falls soundly within the "reasonable range" of comparable cases, and cannot be said to shock the judicial conscience); McIntyre v. Manhattan Ford, Lincoln-Mercury, Inc., 682 N.Y.S.2d 167 (1st Dept. 1998)(Unanimous verdict for plaintiff on claims of sexual harassment, retaliation and intentional infliction of emotional distress of $6.6 million in damages, $5 million of which were punitive damages, set aside to $650,000 for emotional pain and suffering and $3 million in punitive damages. First Department modified to the extent of directing a new trial as to damages only unless plaintiff stipulated to accept compensatory damages in the amount of $653,000, inclusive of the award for back wages and punitive damages in the amount of $1,500,000); Ettinger v. State University of New York State College of Optometry, 1998 WL 91089 (S.D.N.Y. 1999) (Jury award of $100,000 in compensatory damages where plaintiff's pregnancy was a motivating or substantial factor in the defendant's decision to fire her); Town of Hempstead v. State Division of Human Rights,649 N.Y.S.2d 942 (2d Dept. 1996) (Upholding $500,000 award where frequent sexual harassment left plaintiff nervous, upset and afraid to go out alone and plaintiff had been sexually abused as a child, although plaintiff did not see a psychiatrist and there was little, if any, proof of the severity or likely duration of the mental suffering caused by the harassment); Allender v. Mercado, 649 N.Y.S.2d 144 (1st Dept. 1996) ($100,000 award for age discrimination, where plaintiff testified that she was devastated, depressed, suffered headaches, was afraid she would not be able to support her

husband and expert witness corroborated plaintiff's testimony); Boutique Industries, Inc. v. New York State Division of Human Rights, 643 N.Y.S.2d 986 (1st Dept. 1996) (Reducing award from $150,000 to $100,000 in age discrimination and retaliation case where plaintiff worried about his family and felt sick and threatened); Tiffany & Co. v. Smith, 638 N.Y.S.2d 454 (1st Dept. 1996)(Upholding $300,000 mental anguish and compensatory damage award by State Division of Human Rights for employment discrimination); Rhoades v. Niagara Mohawk Power Corp., 608 N.Y.S.2d 733 (3d Dept. 1994) (Reducing jury award of $575,000 compensatory damages to $350,000 ($124,000 of which was for mental anguish) where the psychiatric condition plaintiff suffered from as the result of defendants' discriminatory conduct resolved itself within two years); New York City Transit Authority v. State Division of Human Rights, 581 N.Y.S.2d 426 (2d Dept. 1992) (Appellate Division's remittitur from $450,000 to $75,000 reversed by Court of Appeals, and $450,000 award affirmed on remand; plaintiff suffered a miscarriage, although there was no proof it was caused by the discrimination, and was forced to take unpaid maternity leave during second pregnancy).

Keeping in mind the wide range in awards, the jury's award of $1.5 million in compensatory damages for each plaintiff is excessive. While the jury found the defendants' conduct willful, making the award arguably related to the defendants' wrongdoing, such a large award is without support in the record. Accordingly, defendants' motion to set aside the verdict is granted to the extent of setting aside the verdict for compensatory damages as excessive and directing a new trial on the issue of compensatory damages, unless plaintiffs, within twenty (30) days after service upon its attorney of a copy hereof, with notice of entry thereon, consent to the entry of a judgment decreasing the amount awarded to each of the plaintiffs from $1.5 million to $500,000, in which event the Clerk is directed to enter judgment with the verdict as is amended and decreased.

With respect to the punitive damages award of $1.5 million, $500,000 for each plaintiff, the award is not excessive. Punitive damages are to "serve as a warning to others. They are intended as punishment for gross misbehavior for the good of the public and have been referred to as 'a sort of hybrid between a display of ethical indignation and the imposition of a criminal fine'. Punitive damages are allowed on the ground of public policy and not because the plaintiff had suffered any monetary damages for which he is entitled to reimbursement; the award goes to him simply because it is assessed in his particular suit. The damages may be considered expressive of the community attitude towards one who wilfully and wantonly causes hurt or injury to another". Reynolds v. Pegler, 123 F.Supp. 36(S.D.N.Y.1954), aff'd 223 F.2d 429 (2d Cir.1955), cert. denied

350 U.S. 846. See also, Home Insurance Co. v. American Home Products Corp., 75 N.Y.2d 196 (1990).

Punitive damages must be "reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition". Pacific Mutual Life Insurance Co. v. Haslip, 499 U.S. 1, (1991). An award of punitive damages should be reversed only if it is "so high as to shock the judicial conscience and constitute a denial of justice." Hughes v. Patrolmen's Benevolent Association, 850 F.2d 876 (2d Cir.) cert. denied 488 U.S. 967 (1988); Lee v. Edwards, 101 F.3d 805 (2d Cir.1996). Three "guideposts" for determining whether a punitive damage award is excessive: (1) The degree of reprehensibility; (2) the disparity between the harm or potential harm and the punitive damages award namely, the proportion or ratio of punitive damages to compensatory damages; and (3) the difference between the remedy and the civil penalties authorized or imposed in comparable cases. BMW of North America v. Gore, 517 U.S. 559 (1996). In Gore, the Court noted that "reprehensibility" is "perhaps the most important" factor, and identified certain aggravating factors that are associated with "particularly reprehensible conduct". 517 U.S. at 575. "(1) whether a defendant's conduct was violent or presented a threat of violence, (2) whether a defendant acted with deceit or malice as opposed to acting with mere negligence, and (3) whether a defendant has engaged in repeated instances of misconduct." Lee, 101 F.3d at 809 citing Gore, 517 U.S. at 575–76. As to the ratio of punitive to compensatory damages, there must be a reasonable relationship between them, but the Supreme Court has held that there is no "simple mathematical formula," Gore, 517 U.S. at 582, and has suggested that the outer limit of an acceptable ratio of punitive to compensatory damages may be as high as ten to one. See, TXO Production Corp. v. Alliance Resources Corp., 509 U.S. 443 (1993). The purpose of the third guidepost is to insure that defendants have " 'fair notice' that the wrongful conduct could entail a substantial punitive award." Lee, 101 F.3d at 811.

Here, the jury awarded plaintiffs $1.5 million, $500,000 for each plaintiff, in punitive damages. Said award is not grossly excessive. See, Salemi v. Gloria's Tribeca, Inc., 982 N.Y.S.2d 458 (1st Dept. 2014)(Award of $400,000 in compensatory damages for emotional distress, and $1.2 million in punitive damages not excessive in case of religious and sexual discrimination); Zakre v. Norddeutsche Landesbank Girozentrale, 541 F.Supp.2d 555 (S.D.N.Y. 2008)(In view of the Gore factors considered, the remedial purpose of the City Law, punitive damage awards in comparable cases, and the roughly $1.5 million dollar award for compensatory damages, a punitive damage award in the amount of $600,000 is appropriate and a remittitur to that amount is directed); Bell v. Helmsley, 2003 WL 1453108 (2003), employing a Gore analysis, punitive damages award of $10 million reduced to $500,000); Greenbaum v. Handelsbanken, 67 F.Supp.2d 228

(S.D.N.Y. 1999)(Punitive damage award of $1.25 million in employment discrimination case upheld); McIntyre v. Manhattan Ford, Lincoln-Mercury, Inc., 682 N.Y.S.2d 167 (1st Dept. 1998)(Punitive damages award reduced from $3 million to $1.5 million).

With respect to plaintiffs' cross-motion for attorneys' fees, plaintiffs' attorneys seek a total of $871.364. Attorneys Scott A. Lucas (20 years experience) and Steven M. Sack (35 years experience) seek an hourly rate of $500.00. During the eight years this case was pending, Mr. Lucas claims to have expended 1,481.2 hours and Mr. Sack 237.6 hours investigating and litigating the case. A junior attorney Alex Huot, Esq. spent a total of 131.5 hours in 2012 and 2013 preparing for trial and was paid $6,164.06. Senior litigator Tom Moore, Esq. was paid $5,800 preparing and participating in jury selection and assisting in preparing for trial.

A prevailing plaintiff may be awarded reasonable attorneys' fee and costs under the NYCHRL. N.Y.C. Admin. Code §8-502(g). A trial court providently exercises its discretion in determining the amount of attorneys' fees and costs to be awarded plaintiffs where they are the prevailing parties in an employment discrimination case. Hernandez v. Kaisman, 30 N.Y.S.3d 99 (1st Dept. 2016). What constitutes a reasonable award depends primarily upon the degree of plaintiff's success, not only in terms of liability, but also in terms of the level of damages awarded relative to the amount that was sought. Farrar v. Hobby, 506 U.S. 103 (1992). Thus, the degree of plaintiff's overall success goes to the reasonableness of the legal fees award and thus the most critical factor is the degree of success obtained. Hensley v. Eckerhart, 461 U.S. 424 (1983). Courts use the "lodestar" method to determine the reasonableness of attorney's fees. See, Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 478 U.S. 546 (1986). Under that method, a court makes an initial calculation of a lodestar amount by multiplying the number of hours reasonably spent on the litigation by a reasonable hourly rate. Hensley, 461 U.S. 424; LeBlanc–Sternberg v. Fletcher, 143 F.3d 748 (2d Cir.1998); Luciano v. Olsten Corp., 109 F.3d 111 (2d Cir.1997). If the court finds that certain claimed hours are excessive, redundant, or otherwise unnecessary, it should exclude those hours from its calculation. Luciano, 109 F.3d at 116. After the initial lodestar calculation is made, the court should then consider whether a downward adjustment is warranted by a factor as to the extent of success in the litigation. Hensley, 461 U.S. at 434. The hourly rate used in the calculation must be the rate "prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation." Luciano, 109 F.3d at 116. In determining the lodestar calculation, the "community" to which the court should look is the district in which the court sits. Cruz v. Local Union Number 3 of the Int'l Bhd. Of Elec. Workers, 34 F.3d 1148 (2d Cir.1994). Cioffi v. New York

Community Bank, 465 F.Supp.2d 202 (E.D.N.Y. 2006).

In light of other attorneys' fees award, this Court finds that plaintiffs' attorneys' request of $500 per hour is excessive. More in line with other cases, the hourly rate should be $450. Some of the cases cited herein are from many years before this case was decided. It does not necessarily follow that the prevailing rates in those cases from years ago have remained the same and are still the prevailing rates in this 2015. This Court believes that $450.00 per hour is a reasonable rate for the work of an attorney with Mr. Sack and Mr. Lucas' skill, experience and expertise, particularly in light of the success achieved in the instant case. See, Pilitz v. Inc. Village of Freeport, 2011 WL 5825138 (E.D.N.Y. Nov. 17, 2011)(Recent opinions from the Eastern District of New York have determined that reasonable hourly rates in this district "are approximately $300–$450 per hour for partners, $200–$300 per hour for senior associates, and $100–$200 per hour for junior associates); Builders Bank v. Rockaway Equities, LLC, 2011 WL 4458851 (E.D.N.Y. Sept. 23, 2011) (The range in this district is between $300 and $450 for partners, between $200 and $300 for senior associates and between $100 and $200 for junior associates); Olsen v. County of Nassau, 2010 WL 376642 (E.D.N.Y. Jan. 26, 2010) (Determining reasonable hourly rates to be $375–$400 for partners, $200–$250 for senior associates and $100–$175 for junior associates); Gutman v. Klein, 2009 WL 3296072 (E.D.N.Y. Oct. 9, 2009) (Approving rates of $300–$400 for partners, $200–$300 for senior associates and $100–$200 for junior associates); Duke v. County of Nassau, 2003 WL 23315463 (E.D.N.Y. 2003)($300 per hour a reasonable rate); Kuper v. Empire Blue Cross and Blue Shield, 2003 WL 23350111 (S.D.N.Y. Dec. 18, 2003) (Awarding $425 instead of the $450 per hour requested to pre-eminent labor lawyer who had authored two books on job-discrimination litigation and had over 35 years of experience primarily in the field of employment discrimination); New York State National Organization for Women v. Pataki, 2003 WL 2006608 (S.D.N.Y. Apr. 30, 2003)(Awarding $430 and $400 per hour, respectively, to attorneys with more than 30 years of experience in civil rights and employment law); Skold v. Am. Int'l Group, Inc., 1999 WL 405539 (S.D.N.Y. June 18, 1999) ($400 per hour rate awarded to preeminent employment lawyer with more than 30 years of experience).

In the instant matter, the hourly rate of $450 is within the range of rates awarded to other lawyers of similar experience practicing in New York, and the number of hours worked is likewise not unreasonable, particularly in the context of a litigation that lasted eight years. See, Hernandez, 30 N.Y.S.3d at 101. See also Albunio v. City of New York, 889 N.Y.S.2d 4 (1st Dept. 2009)(Award of $366,323.75 in attorney's fees to attorneys who represented former police officer who was awarded $491,706 in compensatory damages in suit

against city for sexual orientation discrimination was not excessive.

With respect to the branch of plaintiffs' cross-motion which seeks reimbursement of expert witness fees, disbursements, prejudgment interest on the unchallenged lost wages verdict and an award to each plaintiff to offset the increased tax burden resulting from the lump-sum back-pay award is granted with no opposition.

This constitutes the decision and Order of this Court.

Dated: 10/20/17

A. Y. Tuitt

Hon. Alison Y. Tuitt

UNITED LAWYERS

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

---------- X Index No: 305261-2008

MARLENA SANATAN, YASMISNDA DAVIS,
And MELISSA RODRIGUEZ,

Plaintiffs, **NOTICE OF MOTION**

-against-

G.E.B. MEDICAL MANAGEMENT, INC.,
BRUCE PASWALL and PETER AYENDE,

Defendants.

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PLEASE TAKE NOTICE that upon the Memorandum of Law by John C. Luke, Jr., Esq. and the exhibits annexed hereto, the accompanying Affirmation and upon all the papers and pleadings previously served and all proceedings had herein, Plaintiff will move this Court at the courthouse located at an IAS Part, at 851 Concourse, Bronx, New York 10451 on the **27th day of October, 2015 at 9:30 in the forenoon**, for a Memorandum of Law in Support of Defendant's Motion pursuant to N.Y. C.P.L.R. 4404(a).

Dated: New York, New York
September 29, 2015

Yours, etc.,

John C. Luke, Jr., Esq.
Attorneys for Defendants

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SUPREME COURT OE THE STATE OF NEW YORK
COUNTY OF BRONX

----------X

MARLENA SANTANA, YASMISNDA DAVIS
and MELISSA RODRIGUEZ

Index No. 305261-08

Plaintiffs,

- against -

G.E.B. MEDICAL MANAGEMENT, INC.,
BRUCE PASWALL and PETER AYENDE,

Defendants.

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MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION PURSUANT TO N.Y. C.P.L.R.4404(a)

DEREK SMITH LAW GROUP, PLLC
Attorneys for Defendants G.E.B. Medical and Bruce Paswall
30 Broad Street, 35th Floor
New York, New York 10004
(212) 587-0760 (office)

Defendants G.E.B. Medical Management, Inc. and Bruce Paswall ("G.E.B.") submit this memorandum of law in support of its motion pursuant to N.Y. C.P.L.R. 4404(a) for judgment as a matter of law, or in the alternative, for a new trial, on the ground that the evidence was insufficient as a matter of law to support the jury's verdict. [1]

Preliminary Statement

There is no evidence, valid line of reasoning, or permissible inferences that could lead rational jurors to find in favor of plaintiffs on their claims of disability/pregnancy/perceived disability discrimination, nor is there any basis for the jury's grossly excessive $4.5 million award for compensatory damages "physical injury/emotional distress" and $1.5 million award of punitive damages.

As to liability: The evidence established, based on Plaintiffs' testimony that they never complained of discrimination to any members of the Defendants' staff, that they were all told that they were underperforming, and that Defendants offered them flexibility in their schedules to keep them employed.

As to damages: The jury awarded Plaintiffs an outrageous $6 million for the Defendants' purported conduct. The compensatory damage award (of $4.5 million) lacks not only evidentiary support, but also materially deviates from permissible awards in employment discrimination cases involving the most extreme, egregious conduct resulting in lifelong physical and emotional injury. Both are absent here. Similarly, the punitive damage award (of $1.5 million) is so outrageous as to shock the judicial conscience. The lack of any evidence of malice, reckless indifference to the anti-discrimination laws, any intent by the Defendants to violate the law, or of egregious or outrageous conduct bars an award of any punitive damages,

much less the exorbitant $1.5 million award that far exceeds the outer bounds of Constitutionally- permissible punishment for the Defendants' alleged conduct.

The Standard of Review

CPLR 4404(a) provides:

> After a trial of a cause of action or issue triable of right by a jury, upon the motion of any party or on its own initiative, the court may set aside a verdict or any judgment entered thereon and direct that judgment be entered in favor of a party entitled to judgment as a matter of law or it may order a new trial of a cause of action or separable issue where the verdict is contrary to the weight of the evidence ....

The New York Court of Appeals has made clear that judgment as a matter of law under CPLR 4404(a) should be granted where "there is no valid line of reasoning and permissible inferences that could have lead rational jurors to the conclusion they reached." *Stephenson v. Hotel Emps. and Rest. Emps. Union Local 100,* 6 N.Y.3d 265, 271 (2006) (citations omitted). *See also, Cohen v. Hallmark Cards, Inc.,* 45 N.Y.2d 493 (1978).

In the employment discrimination context, New York state courts have consistently overturned plaintiffs' verdicts where the evidence presented did not support the jury's decision. *See, e.g., Stephenson,* 6 N.Y.3d at 271-72 (appellate division properly set aside jury verdict in age discrimination case due to lack of proof of pretext); *Taylor v. New York Univ. Med Ctr,* 21 Misc. 3d 23, 28 (N.Y. App. Term 2008) (affirming trial court's vacatur of jury verdict in sexual orientation discrimination case because of "evidentiary gap in plaintiffs case which can only impermissibly be filled by conjecture."); *Budzanoski v. Pfizer, Inc.,* 245 A.D.2d 72, 72 (1st Dep't 1997) (affirming trial's court vacatur of jury verdict

and grant of judgment as a matter of law in retaliation case). Whether to grant judgment as a matter of law "largely turns on the common sense derived from 'an application of that professional judgment gleaned from the Judge's background and experience as a student, practitioner and judge.'" *Budzanoski v. Pfizer, Inc.*, No. 111847/93, 1996 WL 808066, at *16 (Sup. N.Y. Cty. Dec. 17, 1996), *aff'd,* 245 A.D.2d 72 (citations omitted).

In contrast, the criteria for setting aside a jury verdict as against the weight of the evidence are less stringent and require a discretionary balancing of many factors. *Cohen,* 45 N.Y.2d at 499. It is a settled rule that a jury verdict should be set aside as against the weight of the evidence only if the jury could not have reached its verdict on any fair interpretation of the evidence. *McDermott v. Coffee Beanery, Ltd.*, 9 A.D.3d 195 (1st Dep't 2004); *Nicastro v. Park,* 113 A.D.2d 129 (2d Dep't 1985). A court must cautiously balance "the great deference to be accorded to the jury's conclusion ... against the court's own obligation to assure that the verdict is fair." *McDermott,* 9 A.D.3d at 206 (internal quotation marks and citations omitted).

A court may also set aside a jury's verdict as excessive. Under New York law, an award "is excessive or inadequate if it deviates materially from what would be reasonable compensation." N.Y.C.P.L.R. 5501(c). Measuring material deviation from reasonable compensation requires analyzing awards based on analogous evidence and determining whether the current award departs substantially from those benchmarks. *See,* for example, *Ginsburg v. Valhalla Anesthesia Assocs. P.C.*, 96 Civ. 6462, 1997 U.S. Dist. LEXIS 16681 (S.D.N.Y. Oct. 27, 1997); *Matter of Bronx Cross Cty. Med. Group v. Lassen,* 233 A.D.2d 234 (1st Dep't 1996); *Boutique Indus. v. New York State Div. of Human Rights,* 228 A.D.2d 171 (1st Dep't 1996). While "judges are in a no better position than jurors to place a monetary value on a person's pain and suffering, by reviewing case law they can provide

some uniformity and predictability in damage awards." *Welch v. UPS,* 871 F. Supp. 2d 164, 192 (E.D.N.Y. 2012) (citation omitted.) Remittitur is the process by which a court compels a plaintiff to choose between reduction of an excessive verdict and a new trial. *Kinneary v. City of New York,* 536 F. Supp. 2d 326, 331 (S.D.NY. 2008). "If the court determines that the verdict is excessive, it should remit the jury's award to the maximum amount that would not be excessive." *Id.*

ARGUMENT

I.

THE DEFENDANTS ARE ENTITLED TO JUDGMENT AS A MATTER OF LAW, OR IN THE ALTERNATIVE A NEW TRIAL, BECAUSE THERE IS NO EVIDENCE THAT THE DEFENDANTS DISCRIMINATED AGAINST PLAINTIFFS BECAUSE OF THEIR PROTECTED STATUS

A. The Standard for Pregnancy/perceived pregnancy Discrimination under the NYCHRL

A typical pregnancy discrimination case requires a plaintiff to prove: (1) she is a member of a protected class; (2) she satisfactorily performed the duties required by the position; (3) she was discharged; and (4) her position remained open and was ultimately filled by a non-pregnant employee. A plaintiff may also establish the fourth element by demonstrating that the discharge occurred in circumstances giving rise to an inference of unlawful discrimination.

B. Judgment *As* a Matter of Law is Warranted

Judgment as a matter of law is warranted because none of the three Plaintiffs performed their jobs satisfactorily, none of the three were told that pregnant women were not wanted in the workplace, none of the three complained to anyone about discrimination until after they

were terminated, and all three were terminated for performance related issues. In fact, it is questionable whether one of the three even knew that she was pregnant herself. The following uncontroverted evidence puts the situation in context, and establishes as a matter of law that the Defendants did not discriminate due to the protected statuses of the Plaintiffs.

1. The Evidence Regarding the Job Performance of the Three Plaintiffs

A. Marlena Santana

Ms. Santana commenced employment with Defendants on or around March/April 2006. (Ex. A, Trial Tr. Aug. 6, 2015 – P. 135). Defendants terminated Ms. Santana around October of 2006. (*Id.* at P. 27). During the trial Defendants testified that Ms. Santana blatantly refused to file documents. Filing documents was a crucial aspect of Ms. Santana's employment. (*Id.* at P. 74). Evidence of Ms. Santana's insubordination was also solicited. (Ex. A, Pgs. 15-17,77) Ms. Santana was also caught on a few occasions sleeping at the office. (Ex. A , P. 21). Defendants verbally warned her to not continue sleeping on the job. (*Id.* at P. 24). Ms. Santana had an issue with arriving to work on time. (*Id.* at P. 77, 81). Ms. Santana never complained. (*Id.* at P. 143).

B. Melissa Rodriguez

Defendants hired Ms. Rodriguez on or around October 2006. (Ex. B Trial Tr. August 21, 2015, P. 943). She was terminated on or around March 2007. (*Id.*). She worked at Defendants for five months. (Id. at 943). Defendant discussed with Ms. Rodriguez her job

deficiencies. (Ex. A at P. 31-33). [1] Defendant Paswall testified to personally observing Ms. Rodriguez' job deficiencies. (Ex. A. P. 87). Defendant Paswall testified to engaging in several discussions with Dr. Tehrany regarding Ms. Rodriguez' underperforming. (*Id.* at P. 90). In fact, Dr. Paswall was happy to hear that Ms. Rodriguez was pregnant and told Defendant Peter Ayende to offer her an accommodation. *Id.* at P. 124). Ms. Rodriguez never requested an accommodation. Ms. Rodriguez never complained about discrimination to anyone. (Ex. B, Pg. 951). **Lastly, at the company Christmas party in December 2006, Defendant Paswall handed Ms. Rodriguez a bonus and stated, "This is for the baby."**

C. Yasminda Davis

Ms. Davis commenced employment with Defendants around May 2006. She was hired as a biller/collector. Defendants terminated Ms. Davis due to not filing paperwork properly. Paperwork that had a value of approximately thirty-thousand dollars ($30,000.00). (Ex. A, P. 40). Defendants warned Ms. Davis regarding the paperwork but she still did not complete the task. (*Id.* at P. 43-46). Defendants terminated Ms. Davis after she did not complete her work after being warned. (*Id.* at P. 45, 97-99). Defendants never knew or suspected that Ms. Davis was pregnant. (*Id.* at P. 99), (Ex. C. Trial Tr. Aug. 26, 2015 P. 1216). Ms. Davis did not inform Defendants that her doctor's visits were because she suspected she may be pregnant. (Ex. E Yasminda Davis Deposition Dec. 9, 2009, P. 76-77). In fact, Ms. Davis testified that Defendants treated her coldly before she even knew that she was pregnant. *Id.* at P. 77, 130-131).

Race was never a factor in Defendants Treatment of Defendants

[1] Ex. H Trial Ex. 3 – Dr. Tehrany emails.

Plaintiffs commenced this lawsuit as a party of three. They have a combined fifteen months of employment with Defendants. During the time with Defendants they can account to three to four comments related to race or ethnicity. Ms. Davis states that Defendant Paswall made a comment regarding a Black friend of his during her interview. (Cite). Ms. Santana does not testify to hearing a single raced based comment. Ms. Rodriguez states Defendant Ayende made two comments, both of which she categorizes as jokes. Ex. B Pgs. 976-981). Race was clearly not a factor that led to their alleged pregnancy discrimination.

In this case, Defendant Paswall runs a small business. He needs all hands on deck. If someone is pulling his/her weight than they can be fired. (Ex. A P. 78). He just used his business judgment and a jury is not allowed to substitute what they would do for his subjective business decision.

In this case, however, it appears the jury did exactly what it is precluded from doing: substituted its judgment for that of the Defendants about how the Defendants could have more effectively handled the terminations. The law is well-settled that the jury is prohibited from second-guessing an employer's business judgment or strategies. The issue is not whether the Defendants acted in the same manner the jury would have acted, but whether its business decision would not have been made *but for a discriminatory motive. See Citibank, NA. v. New York State Div. of Human Rights,* 227 A.D.2d 322, 325 (1st Dep't 1996) (while a court or jury may disagree with the actions taken and the manner in which they were taken, it is not the function of the trier of fact to "substitute [its] business judgment for that of the employer") (citation omitted) *Budzanoski,* 1996 WL 808066, at *15 (even though employer's treatment of the plaintiff was "less than genteel and kindly, it was not an act of retaliation prohibited by law which does not prohibit actions by employers that are unfeeling or lacking in grace") (citations omitted).

II

THE COMPENSATORY DAMAGES AWARD IS NOT SUPPORTED BY THE EVIDENCE, IS GROSSLY EXCESSIVE AND SHOULD BE VACATED AND A NEW TRIAL ORDERED, OR ALTERNATIVELY, REMITTITUR IS WARRANTED

There is no valid line of reasoning that can support the jury's compensatory damage award of $4.5 million for physical injury/emotional distress purportedly resulting from Defendants having worked for an average of five months for Defendants. Even if this Court were to uphold the liability verdict, this large award lacks evidentiary support, is grossly excessive and deviates materially in comparison to other cases of comparable and much more substantial injury.

A. The Evidence that Plaintiffs Sustained Injury Caused by the Defendants' Conduct is Against the Weight of the Evidence

The gap in evidence of physical injury arising from the terminations to the alleged injuries is astounding. Marlena Santana was fired in 2006 after five (5) rather uneventful months on the job. Through expert testimony solicited by Plaintiffs' counsel she is now claiming to have suffered Post Traumatic Disorder Syndrome2 akin to that of a Vietnam veteran. (Ex. D. August 19, 2015, P. 603). Further testimony goes on to state that she is depressed but not debilitated from life itself. Ms. Santana life did not end after termination from Defendants employ. She is a few credits shy of a business degree and by all accounts appears completely functioning. She did not testify to any traumatic events after her

[2] All three were diagnosed with PTSD by Plaintiffs' expert Dr. Robbins.

termination.

Ms. Davis was fired in 2006. She states that in 2008 she filed a domestic violence charge against her husband. (Ex. E. P. 169). Due to the domestic violence she took her children and went into a domestic violence shelter.3 (Id. at P. 170). During her time in the shelter Ms. Davis decided to terminate a pregnancy. (Id. at P. 182).

Ms. Rodriguez was terminated in 2007. Testimony shows that her husband, a military veteran, suffers from Post Combat Stress Disorder. Later in 2009 she testifies that her husband struck her. (Ex. B P. 940). In October 2008, Ms. Rodriguez terminated a pregnancy. (Ex. F Melissa Rodriguez Deposition Dec. 9, 2009, Pgs. 157-159). She blames that on Defendants.

B.The Physical Injury/Emotional Distress Award is Grossly excessive

The lack of proof notwithstanding and assuming the jury believed all of Plaintiffs' testimony, the compensatory damage award is nonetheless grossly excessive in comparison to other cases involving similar and far more substantial physical injury/emotional distress. For claims asserted under the State and City Human Rights Laws, the spectrum for physical injury/emotional distress damages in the employment context falls along a continuum:

> At the low-end of the continuum are what have become known as "garden-variety" distress claims in which district courts have awarded damages for emotional distress ranging from $5,000 to $35,000. "Garden variety" remitted awards have typically been rendered in cases where the evidence of harm was presented primarily through testimony of the plaintiff, who describes his or her distress in vague or conclusory terms and fails to describe the severity or consequences of the injury ...
>
> The middle of the spectrum consists of "significant" ($50,000 up to $100,000) and "substantial" emotional distress claims ($100,000). These claims differ from the garden-variety in

[3] Ex. F Trial Tr. Aug. 12, 2015, Pgs. 421-426.

> that they are based on more substantial harm or more offensive conduct, are sometimes supported by medical testimony or evidence, evidence of treatment by a healthcare professional and/or medication, and testimony from other corroborating witnesses.
>
> Finally, on the high end of the spectrum are "egregious" emotional distress claims, where courts have upheld or remitted awards for distress to a sum in excess of $100,000. These awards have only been awarded where the *discriminatory conduct was so outrageous and shocking* or where the physical health of the plaintiff was significantly affected. *Welch v. UPS,* 871 F. Supp 2d at 192.

Cases at the high-end of the spectrum generally contain evidence of debilitating and permanent alterations in lifestyle, *see Rainone v. Potter,* 388 F. Sup. 2d 120, 124 (E.D.N.Y. 2005), tend to "involve particularly egreglous conduct on the part of defendants, such as deliberate, highly offensive, wanton, or violent actions and threats, or situations where the plaintiffs emotional distress is so severe that she exhibits multiple objective physical manifestations ordinarily substantiated by expert testimony," *Kinnearny v. City of New York,* 536 F. Supp. 2d 326, 331 (S.D.N.Y. 2008), and are not based on a discrete episode but multiple acts of discrimination over a period of time. *Phillips v. Bowen,* 278 F. 3d 103 (2d Cir. 2002).

The Plaintiffs' emotional/physical injury/emotional distress does not come close to warranting an award at the high end of the spectrum. None of the Plaintiffs suffered a debilitating or permanent alteration in lifestyle; the Defendants' conduct was not deliberate, highly offensive, wanton or violent. In fact all three Plaintiffs have moved on and are doing quite well. Two are close to completing degrees in higher education and a third is a exquisite chef of various delicacies.

The decision to award Plaintiffs $4.5 million for compensatory damages was

obviously motivated by sympathy for by Plaintiffs a year to two years after employment with Defendants but also a message to a rather condescending defense during a lengthy trial. Obviously painful events sustained this verdict rather than a dispassionate analysis of the evidence.

Comparison of the jury's award to analogous cases and cases involving egregious, lifelong injury demonstrate just how grossly excessive was the jury's verdict. For example, in *Norville v. Staten Island Univ. Hasp.*, CV 96-5222, 2003 U.S. Dist. LEXIS 28399 (E.D.N.Y. Oct. 2, 2003), *aff'd,* 112 Fed. App'x 992 (2d Cir. 2004), the plaintiff nurse sued her hospital employer alleging that it discharged her because of her race, age and disability. The evidence showed at trial that as a result of her termination, the plaintiff had difficulty sleeping, experienced panic attacks, and spent most of her days crying or watching television, and was diagnosed as suffering from clinical depression and post-traumatic stress disorder. The remittitur order, affirmed by the appellate court, reduced the jury's compensatory damage award from $575,000 to $30,000. *See also Gleason v. Callahan Indus.,* 203 A.D.2d 750, 752 (3d Dep't 1994) (award of $54,000 where plaintiff testified that she suffered from irritable bowel syndrome, pains in her sides, insomnia, migraines and depression for which she sought medical treatment).

Even in cases where an attempted suicide the occurred does not place Plaintiffs' emotional distress at the highest end of the spectrum. In *Marjia v. TC. Ziraat Bankasi,* 903 F. Supp. 463 (S.D.N.Y.1995), for example, the court found a $100,000 award appropriate in a national origin discrimination case where the plaintiff attempted suicide one-week after being fired and was hospitalized for approximately two-weeks on suicide watch. Similarly, in *Bick v. City of New York,* No. 95 Civ. 8781, 1998 U.S. Dist. LEXIS 5543 (S.D.N.Y. 1998), the Court remitted an award for pain and suffering of $750,000 to

$100,000 despite evidence that the plaintiff suffered severe mental anguish including a sense of despair, depression and suicidal ideation, required a year of extensive psychotherapy, was prescribed anti-depressant and anti-anxiety medication, and experienced disrupted sleep patterns and weight gain. *See also McGrory v. City of New York,* 2004 U.S. Dist. LEXIS 20425 (remitting emotional distress award from $533,390 to $100,000 where treating psychiatrist testified that plaintiff developed major depressive disorder, post-traumatic-stress disorder, required a series of anti-depressant, sleep-inducing and anti- psychotic medications, was suicidal, and was unlikely to ever again be able to function in a work environment).

In terms of both magnitude of the discrimination and severity of Plaintiffs' injuries, the $4.5 million award is simply shocking and out-of-line, by hundreds of thousands or even millions, from awards in cases with far worse facts.[4] *See,* for example, *Town of Hempstead v. State Div. of Human Rights,* 233 A.D.2d 451 (2d Dep't 1996) ($500,000 award upheld where plaintiff, a victim of childhood sexual abuse, was subjected to "pervasive and relentless" sexual harassment over the course of nine months, which caused her severe, continuing emotional distress); *New York City Transit Auth v. State Div. of Human Rights,* 181 A.D.2d 891 (2d Dep't 1992) ($450,000 award upheld in case involving intentional, pro-longed sex discrimination where evidence supported a finding that plaintiffs mental anguish would persist for the rest of her life). *See also Welch v. UPS, supra* (award of $200,000 in failure to accommodate case where plaintiff suffered severe emotional distress including suicidal ideation, symptoms of depression, and exacerbation of his life-threatening heart condition); *Shea v. Icelander,* 925 F. Supp. 1014, 1021-24 (S.D.N.Y. 1996) (remittitur of $250,000 award to $175,000 where mental anguish

[4] *See Turley v. ISG Lackawanna, Inc.,* 774 F.3d 140 (2d Cir. 2014) (After three years of non -stop discrimination and complaining Plaintiff awarded $1.32 million in emotional distress.).

exacerbated plaintiffs Parkinson's disease, caused an angina attack and fostered a heart condition).

Importantly, the discrimination that allegedly caused Plaintiffs' mental distress arose from a wrongful termination. Defendants gave them; not a repetitive pattern of "deliberate, highly offensive, wanton, or violent" discriminatory acts. That this case involves a discrete act further demonstrates that absurdity of the jury's award. See, for example, Tiffany & Co. v. Smith, 224 A.D. 2d 332 (1st Dep't 1996) (upholding $300,000 compensatory damage where discrimination was constant, egregious and blatant); *Phillips v. Bowen,* 278 F.3d 103, 111-12 (upholding award of $400,000 where the plaintiff suffered severe sexual harassment *over five years).*

III

THE PUNITIVE DAMAGES AWARD MUST BE VACATED AS A MATTER OF LAW BECAUSE THERE IS NO EVIDENCE THAT THE DEFENDANTS' CONDUCT WAS MORALLY REPREHENSIBLE OR THAT IT ACTED WITH RECKLESS INDIFFERENCE TO PLAINTIFF'S RIGHTS AND BECAUSE IT IS GROSSLY EXCESSIVE

A. Plaintiffs Did Not Present Any Evidence of Malice, Reckless Indifference or Outrageous Conduct

There is no valid line of reasoning that can support the jury's award of *any* punitive damages, much less an award of $1.5 million. The standard for the imposition of punitive damages under the New York City Administrative Code, N.Y.C. Admin. Code§ 8-502, is the same as that under the federal law. *Bell v. Helmsley,* No. 111085/01, 2003 N.Y. Misc. LEXIS 192 (Sup. Ct. N.Y. Cty Mar. 4, 2003). *See also Oba Hassan Wat Bey v. City of New York,* Nos. 99 Civ. 03873, 01 Civ. 09406,2013 U.S.

Dist. LEXIS 189025, at *85 (S.D.N.Y. Sept. 4, 2013) (" '[t]he imposition of punitive damages under both federal and local law is governed by the federal standard"), *aff'd in part, rev'd in part sub nom.* by *Rivera v. City of NY.,* 2014 U.S. App. LEXIS 20864 (2d Cir. Oct. 29, 2014) (citation omitted); *Farias v. Instructional Sys., Inc.,* 259 F. 3d 91 (2d Cir. 2001) (claims for punitive damages brought under the City Human Rights Law are analyzed under the federal standard).

The law is well settled that punitive damages are awarded rarely in employment discrimination actions, and are appropriate only where the employer has engaged in intentional discrimination and has done so with malice or reckless indifference to the rights of an aggrieved individual. *Kolstad v. American Dental Ass'n.,* 527 U.S. 526 (1999). *See also Farias,* 259 F.3d 91. A finding of intentional discrimination, without morally reprehensible conduct is *not* a sufficient basis for an award of punitive damages: "Congress plainly sought to establish two standards of liability - - one for establishing a right to compensatory damages and another, higher standard that a plaintiff must satisfy to qualify for a punitive [damage] award." *D 'Ascoli v. Roura & Melamed,* No. 02 Civ. 2684, 2005 U.S. Dist. LEXIS 14274 (S.D.N.Y. July 13, 2005) (citing *Kolstad,* 527 U.S. at 534).

To prove malice or reckless indifference, "an employer must at least discriminate in the face of a perceived risk that its actions will violate federal law;" absent such a showing, punitive damages are not recoverable. *Kolstad,* 527 U.S. at 536. Indeed, the imposition of punitive damages always requires a "positive element of conscious wrongdoing. . ." *Id.* at 538 (citation omitted). As this Court has held, punitive damages serve two distinct purposes: First, the damages serve to punish the defendant and discourage the defendant from acting in a similar fashion in the future. Second, the assessment of punitive damages is intended to

deter others similarly situated from acting in a similar way. *Bell v. Helrnsley,* 2003 N.Y.Misc. LEXIS 192.

As *Bell* has cautioned:

> Punitive damages are not a game of Lotto and more particularly [the Hospital] is not a 4 Billion Dollar pinata for every John, Patrick or Charlie to poke a stick in the hopes of hitting the jackpot.
> Punitive damages are limited by standards of reasonableness and, more recently, by constitutional considerations. . . . Although compensatory and punitive damages are typically awarded at the same time by the same decision maker, they serve distinct purposes. The former are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct. The latter, which have been described as "quasi-criminal," operate as "private fines" intended to punish the defendant and to deter future wrongdoing. A jury's assessment of the extent of a plaintiff's injury is essentially a factual determination, whereas its imposition of punitive damages is an expression of its moral condemnation. [Punitive damages] are not compensation for injury. Instead they are fines to punish reprehensible conduct and to deter its future occurrence. [Id. at 8-10.] [citations omitted.]

As an alternative to proving that the Defendants knew they were acting in violation of the law, "egregious or outrageous acts may serve as evidence supporting an inference of the requisite [intent]." *!d.* at 209 (citation omitted). It was Plaintiffs' burden to prove by a preponderance of the evidence that defendants acted with malice or reckless indifference, or engaged in egregious and outrageous conduct and not the Defendants' burden to disprove it. With respect to the issue of punitive damages, a court is justified in directing a verdict where there is an actual defect of proof and, as a matter of law, the party is not entitled to recover. *See D'Ascoli,* 2005 U.S. Dist. LEXIS 14247, at* 7. Punitive damages are not warranted where there is only negligence or poor judgment on the part of the defendant. *See Jane Doe v. Merck & Co.,* 1 Misc. 3d 911(A), 2002 N.Y. Misc. LEXIS 1987 (Sup. Ct. Suffolk

Cty 2002).

Simply put, Plaintiffs failed to meet their burden of proving intentional discrimination, much less that that Defendants, Dr. Bruce Paswall, or Peter Ayende, the Office manager, or anyone else at the office for that matter, acted with malice or reckless disregard of Plaintiffs' rights in the face of any perceived risk, or engaged in any egregious or outrageous conduct. The Court will scour the record in vain to find even the slightest evidence that could even arguably support the award. In point of fact, the evidence is to the contrary.

First, there was no evidence even remotely close to reckless, malicious or outrageous conduct. Dr. Paswall at best was completely unaware of the day to day workings of his office unless informed by Mr. Ayende. There is absolutely no testimony of complaints that were disregarded, and the three Plaintiffs testified as a team that at the worst the Defendants treated them coldly. As liberally construed as the NYCHRL is, it is still not a civility code. EEOC v. Bloomberg L.P., 967 F. Supp. 2d 816, 836 (S.D.N.Y. 2013).

Second, nothing Defendants did was malicious, reckless or outrageous. Plaintiffs merely testify that Defendants gave them more work, even though they really didn't specify what that work entailed, placed them in a cramped room where everyone in the office seemed to work out of and made one of them walk a few city blocks to another office without compensation.

Courts routinely deny punitive damages in discrimination actions involving discriminatory conduct far worse than the benign facts here even taking the Defendants' conduct in the worst conceivable light. *See, e.g, Taylor,* 21 Misc. 3d at 28 (granting judgment notwithstanding the verdict in sexual orientation case where plaintiff was subjected

to anti-gay comments and insulting gestures, noting that "were we not dismissing, we would find that the evidence did not warrant an award of punitive damages") (citation omitted); *Weissman v. Dawn Joy Fashions, Inc.,* 214 F.3d 224 (2d Cir. 2000) (affirming the trial court's vacatur of a jury's verdict awarding $150,000 in punitive damages where the jury found that employer fired the plaintiff in violation of the federal, state and city anti-discrimination laws after he suffered a heart attack because the company was busy). In *Weissman,* the court explained that the conduct the plaintiff pointed to as egregious, such as "firing [him] less than two weeks after he suffered a heart attack, its failure to contact [his] doctor to determine when [he] could return to work, and its cancellation of his health insurance, do not support an inference of the requisite 'evil motive.'" *Id.* at 236 (citation omitted).

Other courts have similarly refused to allow punitive damages where the defendant's conduct could not be properly characterized as reckless or egregious. *See D'Ascoli,* 2005 U.S. Dist. LEXIS 14274 (vacating $145,000 punitive damage verdict despite court's finding of intentional race discrimination based on firing of black lawyer and replacing him with a white lawyer); *Farias,* 259 F.3d 91 (affirming trial court's ruling that the evidence did not justifY submission of punitive damages to the jury despite jury's verdict the defendant had intentionally retaliated against the plaintiff by refusing to provide her with severance and other benefits because she had filed an EEOC complaint alleging race and national origin discrimination); *Robinson,* 80 F. Supp. 2d at 209-10 (finding that retaliatory denial of post-termination severance and benefits did not constitute egregious or outrageous conduct sufficient to impose punitive damages against the defendant).

B. The Punitive Damage Award Must Be Vacated Because It is Grossly Excessive

Even if there were any evidence supporting any punitive damage award, which there is not, it is grossly excessive and should be vacated. Punitive damages are intended to "'punish the defendant and deter him and others from similar conduct in the future.'" *Lamberson v. Six West Retail Acquisition, Inc.*, No. 98 Civ. 8053, 2002 U.S. Dist. LEXIS 478 (S.D.N.Y. Jan. 15, 2002) (citation omitted). However, punitive damages must be" 'reasonable in their amount and rational in light of their purpose,'" and not be so excessive "as to shock the judicial conscience." *Id.* (citations omitted).

Under the common law of New York, it has long been settled that in awarding punitive damages, there are limits which a jury cannot exceed and" 'it is the duty of the courts to keep a verdict for punitive damages within reasonable bounds, considering the purpose to be achieved as well as the *mala fides* of the defendant in the particular case.'" *Bell,* 2002 N.Y. Misc. LEXIS 192, at *8 (citation omitted.) *Bell* continues: "More recently, in a series of cases, the United States Supreme Court has held that the Due Process Clause of the Fourteenth Amendment imposes both procedural and substantive constraints on awards of punitive damages." *Id.* at *8-9 (citations omitted.) When juries make punitive damage awards, the role of the trial judge is

> to determine whether the jury's verdict is within the confines set by state law, and to determine, by reference to federal standards developed under Rule 59, whether a new trial or remittitur should be ordered." . . . Despite the broad discretion that States possess with respect to the imposition of criminal penalties and punitive damages, the Due Process Clause of the Fourteenth Amendment to the Federal Constitution imposes substantive limits on that discretion. The Due Process Clause of its own force also prohibits the states from imposing "grossly excessive" punishments on tortfeasors.

Id. at *10-11 (citations omitted.) Because a jury's award of punitive damages does not constitute a fact tried by the jury, a review of the award and its reduction on due process grounds does not compel a retrial and stands as a de novo finding. *Id.* at *20.

The standard for establishing the excessiveness of a punitive damage award is set forth in the Supreme Court decision *BMW of N Am., Inc. v. Gore,* 517 U.S. 559 (1996) and applies to a state court's review of such an award. *See Tse v. UBS Fin. Svs., Inc.,* 568 F. Supp. 2d 274 (S.D.N.Y. 2008); *Bell v. Helmsley,* 2003 N.Y.Misc. LEXIS 192, *supra.* As explained in *Gore,* whether a punitive damage award is so large as to shock the conscience of the court is judged according to three factors: (1) degree of reprehensibility of defendant's conduct; (2) the proportion of punitive damages to compensatory damages; and (3) the difference between the punitive damage remedy and civil penalties authorized or imposed in comparable cases. *Id.* At 574-75. *See also Fernandez v. North Shore Orthopedic Surgery & Sports Med., P.C.,* 79 F. Supp. 2d 197 (E.D.N.Y. 2000). Of these three factors, the Supreme Court has identified the degree of reprehensibility as "the most important indicium of the reasonableness of a punitive damages award." *Gore,* 517 U.S. at 575. Because they are based on Constitutional principles, courts in New York must apply the *Gore* factors in determining the appropriateness of a punitive damage award in discrimination actions. *Bell,* 2003 N.Y. Misc. LEXIS 192.

1. The Defendants' Conduct Was Not Reprehensible[5]

To determine if conduct rises to the level of reprehensibility required for the imposition of punitive damages, consideration must be given to (1) whether the defendant's conduct was violent or presented a threat of violence; (2) whether the defendant acted with deceit or malice as opposed to acting with mere negligence; and (3) whether the defendant has engaged in repeated instances of misconduct. *Fernandez,* 79 F. Supp. 2d at 207. *See also Bell,* 2003 N.Y. Misc. LEXIS 192, at *19. Consideration of these factors establish that Defendants' conduct - - asking Ms. Santana to work in the file room -- and Dr. Paswalls' conduct—moving Ms. Rodriguez to work with Dr. Tehrany once a week. There was no evidence that either Defendants' conduct was violent or presented a threat of violence; that they acted with deceit or malice; or that they engaged in repeated instances of misconduct against Plaintiffs or any other employee. - Given that the Defendants' conduct was not reprehensible, the jury's $1.5 million punitive damage award is grossly excessive. *See, e.g., Lamberson* 2002 U.S. Dist. LEXIS 478 (finding evidence of malice slight and far from reprehensible where employer stripped the plaintiff of his ability to hire, excluded him from monthly lunch meetings, reduced his managerial duties, and terminated his employment, in part, in retaliation for alleging race discrimination); *Iannone v. Frederic R. Harris, Inc.,* 941 F. Supp. 403, 414 (S.D.N.Y. 1996) (granting new trial on damages unless the plaintiff accept as a remittitur of the punitive damage award of $250,000 to $50,000, noting that a large punitive

[5] Although the trial displayed Mr. Ayende as the true alleged antagonist, punitive damages were not levied against him.

damage award may only be imposed upon an employer who has committed multiple violations of Title VII or whose acts are part of an overall pattern of discrimination); *Mahoney v. Canada Dry Bottling Co.,* No. 94-CV-2924, 1998 U.S. Dist. LEXIS 6576 (E.D.N.Y. May 7, 1998) (remitting $650,000 punitive damage award to $100,000, noting that with regard to the reprehensibility factor, there was no evidence of repeated misconduct); *Tse v. UBS Fin. Svs. Inc.,* 568 F. Supp. at 309 (remitting punitive damages award against global financial institution from $3 million to $300,000, noting "most significantly, Plaintiff has provided no evidence that defendant has engaged in repeated instances of misconduct.")

New York State Courts have consistently held that even the most reprehensible conduct rarely supports an award as excessive as $1.5 million. In *Mcintyre v. Manhattan Ford Lincoln-Mercury,* 175 Misc. 29 795 (Sup. Ct. N.Y. Cty. 1997), *aff'd in part, modified in part by* 256 A.D.2d 269 (1st Dep't 1998), for example, the court capped punitive damages at $1.5 million for the most abhorrent conduct: Mcintyre, a woman in her mid-thirties, employed by Manhattan Ford car dealership, was subjected to a pattern of intimidation, abuse, humiliation and ridicule perpetrated by her director, department supervisor and floor shop manager for over a two year-period on a nearly daily basis that included (but was not limited to): use of sexually explicit jokes and names and the constant use of vulgar and derogatory language; physical assault on two occasions; ridicule about her pregnancy and miscarriage; comments about the size of her breasts to other co-workers; failure by her employer to investigate vandalism of her desk (involving coarse obscenities carved into her desk); failure to protect her from attacks from other co- workers; failure to stop harassing phone calls made to her by a former co-worker; reference to her as a "bitch on a

broom;" banging on the bathroom door when she entered the bathroom; and spitting on her, causing severe mental anguish and requiring her to see her psychiatrist 21 times in a nine month period. The jury awarded the plaintiff $5 million in punitive damages; however, the trial judge reduced this amount to $3 million and the Appellate Division reduced it further to $1.5 million as the outer constitutionally permissible limit. *See also Bell, surpa,* (remanding $10 million punitive damage award to $500,000 as the outer permissible limit in a sexual orientation discrimination case); *Jordan v. Bates Adver. Holdings, Inc.,* 11 Misc. 3d 764 (Sup. Ct. N.Y. Cty. 2006) ($500,000 punitive damage award appropriate in disability discrimination case where defendant's President and others harassed plaintiff about her use of a cane, reduced her responsibilities, turned her office into a storage room, called her a cripple and terminated her on account of her perceived disability.)

2. The Award Is Grossly Excessive

As set forth above, the evidence does not support any compensatory damage award. However, should this Court uphold the jury's verdict regarding the Defendants' liability, at the most outer-bound end of the spectrum, Plaintiffs are not entitled to an award exceeding $100,000 if even that high. Using this generous figure for purposes of this analysis only, the $1.5 million punitive damage award is more than 21 times that amount, a clearly excessive award in accordance with the standards promulgated by the Supreme Court and the cases cited above. *See, e.g., Ortiz-Dei Valle,* 42 F. Supp. 2d at 345-46 (for purposes of determining whether punitive damage award is excessive based on ratio between punitive and compensatory damages, the appropriate measure of compensatory damages is the remitted amount, not the amount improperly awarded by the jury).

3. Courts Have Consistently Held In Similar Cases That Punitive Damages Awarded Were Excessive

The $1.5 million punitive damages award is also grossly excessive when compared to punitive damage awards imposed in other employment discrimination cases. Not only do juries rarely make such exorbitant awards in employment discrimination cases involving far more egregious and outrageous conduct than in Plaintiffs' case, but even when such large sums are awarded, they are remitted. *See,* for example, *Luciano v. Olsten Corp.,* 110 F.3d 210 (2d Cir. 1997) (remittitur of $5,000,002 punitive damages award to $300,000 even though there was "ample evidence to support a finding that [defendant] acted with malice or reckless indifference to [plaintiff's] rights with respect to gender discrimination," including evidence that the employer's CEO called plaintiff a "bitch" at an official business function); *Ettinger v. State Univ, of NY,* No. 95 Civ. 9893, 1998 U.S. Dist. LEXIS 2289, at *33 (S.D.N.Y. Feb. 28, 1998) (remitting a $450,000 punitive damage award to $6,000, noting that a large punitive damage award is not warranted where the defendant's "degree of retaliation was not extreme."); *Ortiz- Del Valle,* 42 F. Supp. 2d 334 (conditioning denial of new trial on plaintiff accepting reduction of $7 million punitive damage award to $250,000 in gender discrimination action despite jury's finding that NBA's conduct in maintaining a policy that prohibited hiring of females as referees was reckless); *Fernandez,* 79 F. Supp. 2d 197 (finding that jury's verdict, awarding plaintiff $100,000 in punitive damages for retaliatory termination, was excessive when considering such awards rendered in similar cases, and reducing it to $50,000); *Mahoney,* 1998 U.S. Dist. LEXIS 6567 (finding $650,000 punitive damage award excessive and remitting it to $100,000 despite jury's finding that defendant specifically instructed its district manager to treat plaintiff differently

because she had filed an EEOC charge and that the defendant failed to follow up on EEOC charge); *Iannone,* 941 F. Supp. at 414-5 (remitting $250,000 punitive damage award to $50,000 where jury found retaliatory discharge based on employee's refusal to work on project involving sexually suggestive photograph); *Kim,* 1997 U.S. Dist. LEXIS 66 (finding $750,000 punitive damage award excessive and remitting it to $25,000 in race discrimination action because degree of reprehensibility was low); *Jowers v. DME Interactive Holdings, Inc.,* No. Civ. 4753, 2006 U.S. Dist. LEXIS 32536 (S.D.N.Y. May 22, 2006) (reducing punitive damage award for intentional race discrimination from $10,000 to $5,000). As the wealth of case law above makes clear, the $1.5 million punitive damage award imposed against the Defendants far surpasses any reasonable award

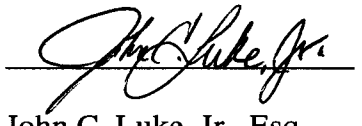
Conclusion

Even if there were any legally and factually sufficient basis for the jury's verdict, the award of $4.5 million in compensatory damages and $1.5 million in punitive damages cannot stand. There is no evidence to support the compensatory damage award, and as a matter of law, plaintiffs failed to prove that the Defendants' conduct rose of the level of reckless indifference to Plaintiffs' legal rights with the intent to violate the law; the required showing for an award of any punitive damages. Finally, the combined $6 million award in this case is grossly excessive, warranting a new trial or, alternatively, remittitur.

For the foregoing reasons, the Defendants respectfully requests that the Court grant its motion for judgment notwithstanding the verdict.

Dated: New York, New York
September 29, 2015

Respectfully submitted



John C. Luke, Jr., Esq.

AFFIDAVIT OF SERVICE

STATE OF NEW YORK }
} ss.
COUNTY OF NEW YORK }

I, Dawn DeMaio, being duly sworn, deposes and says;

I am not a party to the action, am over eighteen (18) years of age and reside in Staten Island, New York.

On September 29, 2015 I served via United States Postal Mail the following, by depositing a true copy thereof enclosed in a post-paid wrapper, in an official depository under the exclusive care and custody of the United States Postal service within New York State, addressed to the following: **Notice of Motion and Memorandum of Law in Support of Defendants' Motion Pursuant to N.Y. CPLR 4404(a)**

To: Scott A. Lucas, Esq.
250 Park Avenue
20th Floor
New York, New York 10177

Steven Mitchell Sack
110 East 59th Street
19th Floor
New York, New York 10022

Dawn DeMaio

Sworn to before me on this 29th day of September, 2015

Notary Public/State of New York

DANIEL I. NEVELOFF
NOTARY PUBLIC, State of New York
No. 02NE5029857
Qualified in New York County
Term Expires July 5, 2016

AFFIDAVIT OF SERVICE

STATE OF NEW YORK }
} ss.
COUNTY OF NEW YORK }

I, Dawn DeMaio, being duly sworn, deposes and says;

I am not a party to the action, am over eighteen (18) years of age and reside in Staten Island, New York.

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To: Scott A. Lucas, Esq.
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

----------X

MARLENA SANTANA, YASMINDA DAVIS and MELISSA RODRIGUEZ,

Plaintiff,

Index No. 305261-08

(Tuitt, J.)

-against-

NOTICE OF CROSS-MOTION

G.E.B. MEDICAL MANAGEMENT, INC., BRUCE PASWALL and PETER AYENDE,

Defendants.

----------X

CROSS-MOTION BY: Plaintiffs

DATE, TIME & PLACE: December 7, 2015 at the Bronx County Supreme Court, Part IA-5 (Justice Tuitt), at 9:30 a.m. (the return date of Defendants' CPLR 4404(a) motion), or at such other time and place as the Court shall direct.

SUPPORTING PAPERS: Affirmation of Scott A. Lucas and Memorandum of Law.

REIEF SOUGHT: An order awarding attorney's fees, prejudgment interest, and other post-trial relief, as set forth in the accompanying Memorandum of Law.

ANSWERING PAPERS: Pursuant to CPLR 2215, answering papers are due at least 3 days before the return date if December 7, 2015 remains scheduled as the return date, and at least 7 days before the return date if a later return date is set.

November 24, 2015

Law Offices of Scott A. Lucas
250 Park Avenue, 20th Floor
New York, New York 10177
(212) 983-6000
scott@lucasemploymentlaw.com
Attorneys for Plaintiffs

By _____
Scott A. Lucas

(2)

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

----------X

MARLENA SANTANA, YASMINDA DAVIS
and MELISSA RODRIGUEZ, Index No. 305261-08

Plaintiff, (Tuitt, J.)

-against-

G.E.B. MEDICAL MANAGEMENT, INC.,
BRUCE PASWALL and PETER AYENDE,

Defendants.

----------X

SCOTT A. LUCAS, an attorney duly licensed to practice law in the State of New York, hereby affirms the truth of the following under penalty of perjury:

1. I submit this Affirmation in opposition to Defendants' motion to set aside or reduce the verdict, and in support of Plaintiffs' cross-motion for attorneys' fees, prejudgment interest, and an award to offset the negative tax consequences of Plaintiffs' back-pay being awarded in a lump sum.

2. Annexed hereto are true copies of the following documents:

Ex. 1: The jury's unanimous verdict.

Ex. 2: The trial transcript pages referenced in the accompanying Memorandum of Law. Due to its size, this exhibit is a separate (standalone) bulk exhibit.

Ex. 3: Appellate Brief of Plaintiffs-Respondents in *Honzawa v. Honzawa*

Ex. 4: Affidavit of George D. Wolff, Executive Director of the Legal Referral Service sponsored by the Association of the Bar of the City of New York and the New York County Lawyer's Association

Ex. 5: Affidavit of Michael G. Berger

Ex. 6: Affirmation of Eric R. Stern

Ex. 7: Affirmation of Jeffrey Pollack

Ex. 8: Affirmation of Jonathan Bernstein

Ex. 9: Time-keeping records maintained by Scott A. Lucas for period from 12/06/07 through 12/02/13.

Ex. 10: Time-keeping records maintained by Scott A. Lucas for period from 3/14/14 through 11/22/15.

Ex. 11: Time-keeping records maintained by Steven M. Sack for some of his additional hours from June 2008 to November 2013 that are not reflected in my timekeeping records.

Ex. 12: Time-keeping records maintained by Steven M. Sack and me for Steven M. Sack's time spent on this matter from March 24, 2014 to November 22, 2015.

Ex. 13: Affidavit of economist Stephen B. Levinson, Ph.D dated November 11, 2015

Ex. 14: Affirmation of Steven M. Sack dated November 24, 2015.

3. I am familiar with and have reviewed the time entries attached as Exhibits 9 and 10, and can attest to the accuracy of those time-keeping entries, as they were and are derived from records contemporaneously kept by me with one exception: my time-keeping entries for the period shortly before and during the trial were not maintained contemporaneously because it was a high-intensity period where we were focused exclusively on the trial itself. However, the entries for that period have been reasonably and very conservatively reconstructed and estimated based on our memories, calendar references, emails, transcripts, etc.

4. While most of my clients are low income workers, and cannot afford to pay an hourly fee, I do charge $500-$600 per hour for those clients who can afford to pay it.

5. I also attest to the accuracy of the statements in the accompanying Memorandum of Law regarding my qualifications and level of experience, and the difficulties and challenges encountered in litigating this eight-year-long multi-party action.

6. I also affirm that the payments made for the experts (Dr. Robins and Dr. Levinson) and other out-of-pocket costs referenced in the accompanying Memorandum of Law were actually and reasonably incurred and paid by me.

7. Wherefore, I respectfully request that Defendants' motion be denied and that Plaintiffs' cross-motion for an award of attorney's fees and other appropriate relief be granted.

Dated: November 24, 2015

Scott A. Lucas

AFFIRMATION OF SERVICE

Scott A. Lucas, an attorney duly licensed to practice in the State of New York, hereby affirms the truth of the following under penalty of perjury:

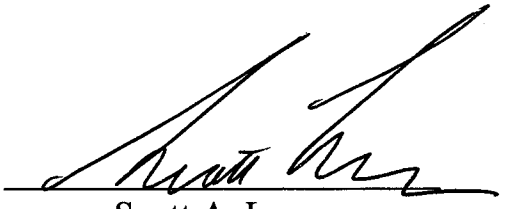
On 11/24/15 I served a true copy of the annexed Notice of Cross-Motion, Bulk Exhibit 2, and Plaintiffs' Memorandum of Law in Opposition to Defendants' C.P.L.R. 4404(a) Motion, and in Support of Plaintiffs' Cross-Motion for Attorney's Fees, Prejudgment Interest, and Other Appropriate Post-Trial Relief on the persons below via overnight delivery by delivering same to Federal Express on 11/24/15 for overnight delivery:

John Luke Esq. & Laurie Morrison Esq.
Derek Smith Law Group PLLC
30 Broad Street, 35th Floor
New York, New York 10004
Attorneys for Defendants G.E.B. Medical Management, Inc. and Bruce Paswall

-and-

Peter Ayende
4720 42nd Street #5A
Sunnyside, NY 11104
Defendant Pro Se

Dated: New York, NY
November 24, 2015



Scott A. Lucas

AFFIRMATION OF SERVICE

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Attorneys for Defendants G.E.B. Medical Management, Inc. and Bruce Paswall

-and-

Peter Ayende
4720 42nd Street #5A
Sunnyside, NY 11104
Defendant Pro Se

Dated: New York, NY
November 24, 2015

Scott A. Lucas

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

----------X

MARLENA SANTANA, YASMINDA DAVIS
and MELISSA RODRIGUEZ,

Index No. 305261-08

Plaintiff,

(Tuitt, J.)

-against-

G.E.B. MEDICAL MANAGEMENT, INC.,
BRUCE PASWALL and PETER AYENDE,

Defendants.

----------X

Plaintiffs' Memorandum of Law in Opposition to Defendants' C.P.L.R. 4404(a) Motion, and in Support of Plaintiffs' Cross-Motion for Attorneys' Fees, Prejudgment Interest, and Other Appropriate Post-Trial Relief

Respectfully submitted,

Law Offices of Scott A. Lucas
250 Park Avenue
20th Floor
New York, New York 10177
(212) 983-6000
scott@lucasemploymentlaw.com
Scott A. Lucas and Steven M. Sack, Of Counsel

(3)

TABLE OF CONTENTS

Table of Cases

Plaintiffs, through their undersigned counsel, respectfully submit this Memorandum of Law in opposition to Defendants' motion to set aside or reduce the jury's verdict, and in support of Plaintiffs' cross-motion: (A) for attorney's fees and costs; (B) to add prejudgment interest to the lost wages component of the verdict; and (C) to adjust the lost wages component to offset the increased tax burden as a result of said wages being awarded in a lump sum. The unanimous verdict is attached as Ex. 1 to the accompanying Affirmation of Scott A. Lucas ("Lucas Aff."). As detailed below, Defendants' motion should be denied and Plaintiffs' cross motion should be granted.

INTRODUCTION & SUMMARY OF ARGUMENT

The evidence of intentional discrimination was so overwhelming that no rational jury could not find Defendants liable.

All three Plaintiffs were harassed once they were known or suspected of being pregnant, and then fired. Defendant Paswall told Marlena Santana "***not to have children,***" told Yasminda Davis "***you better not get pregnant,***" and asked an earlier pregnant employee "***Are you going to keep it?***"

Defendants subjected Plaintiffs to pregnancy-related harassment and stereotypes, including asking illegal interview questions, stripping Santana of her job duties and imposing cruel working conditions on her, subjecting Rodriguez to forced medical testing, threatening, mocking and/or shunning Plaintiffs before firing them, and orchestrating false factual scenarios to justify firing Plaintiffs.

As to their alleged non-discriminatory reasons for firing Plaintiffs, Defendants admitted in sworn interrogatory answers that there were no assignments Santana or Rodriguez did in an

improper or untimely manner. Ex. 2 (Lucas Aff.) 2:12-13:10. And Defendant Ayende admitted that Davis completed all of her work, undercutting Paswall's claims that she didn't. Ex. 2 (Lucas Aff.) 1106:22-1107:5.

Most important, Defendant Ayende, the manager of Santana and Rodriguez who also had supervisory authority over Davis, admitted under oath that he: (A) never recommended that any of the Plaintiffs be fired; (B) never formed the belief that any of the Plaintiffs should be fired; and (C) was shocked upon learning that Paswall was firing each of the Plaintiffs. Ex. 2 (Lucas Aff.) 1068:8-18; 1094:19-22; 1105:23-1106:4; 1114:16-19.

Moreover, a neutral non-party, Monica Eadie, testified that she overheard Defendants' own witness -- Davis's Supervisor, Talitha Crespo -- state that Davis and Santana were fired for being pregnant.

Despite the overwhelming evidence of intentional discrimination, Paswall and G.E.B. argued, in essence, that G.E.B. was somehow plagued with three pregnant employees who simply didn't want to do their jobs. The jury rightly rejected such nonsense.

The idea that Defendants would not discriminate against pregnant employees was also belied by Defendants' conduct at trial. Even though the law strictly bars pre-employment inquiries about a job applicant's pregnancy status, lead defense counsel (Ms. Morrison) repeatedly castigated Plaintiff Rodriguez having "hid her pregnancy" when interviewing – even after the Court confirmed that a job applicant has no obligation to say whether she's pregnant at the time of a job interview. Ex. 2 (Lucas Aff.) 962:6-12; 886:17-888:9.

As to damages, "[a] victim of discrimination suffers a dehumanizing injury as real as, and often of far more severe and lasting harm than, a blow to the jaw." *Mardell v. Harleysville Life Ins. Co.*, 65 F.3d 1072, 1074 (3d Cir. 1995) (Per Curium). This case proves the point.

Defendants' serial harassment and discrimination caused devastating consequences for each of these women, including long-term depression, anxiety, PTSD, all of which was proved by comprehensive diagnostic testing and unrebutted expert testimony. The diagnostically-proven harm to Plaintiffs was also corroborated by the painful life-altering events that followed, *e.g.*, terminated pregnancies, severe and irreversible marital conflict followed by separation, hair loss, gastrointestinal problems, permanent weight gain, hypertension, *etc.*

Defendants focus exclusively on the duration of Plaintiffs' employment (5-6 months apiece), but that focus is misplaced because: **(A)** it wrongly assumes that offensive words or conduct spread out over a longer period of time are necessarily more destructive than words or conduct concentrated in a shorter period of time. *Dortz v. City of New York*, 904 F.Supp. 127, 151 (S.D.N.Y. 1995) ("Indeed, it could be concluded that the cumulative effect of these statements was severe and that the comments represented more than offhand remarks precisely because they were concentrated within the span of one month"); **(B)** in conflates situations where an employee is mistreated with situations where an employee is mistreated and then fired; and **(C)** it fails to recognize the uniquely vulnerable position a lower-income pregnant employee occupies, and the impact of threatening to take away that employee's ability to protect and provide for her child.

To illustrate the point, consider which experience would be more traumatic:

> A situation where a female executive works 20 years at a company where certain male co-workers routinely used sexist language in her presence?
>
> Or
>
> A situation where the Company's owner tells a lower income employee "*not to have children*" and then, upon finding out she's pregnant and sick, treats her like a slave who is not worth of being acknowledged as a person, gratuitously denies her a necessary accommodation that involves no cost

> or inconvenience whatsoever, and banishes her to a hot, unventilated, bug-infested 24-inch-wide storage closet where she's often bitten by bugs and required, despite her medical condition, to stand on unstable elevated surfaces to reach the top shelf of the storage area and effectively pressured to lift and carry heavy boxes and heavy stacks of files because she's facing *de facto* termination threats, and is then fired for being pregnant and left with no means to support her family?
>
> Or
>
> Or a situation where the lower-income employee is accused of hiding her belly, told she's too big to fit in the filing room, accused of lying about how far along she is in her pregnancy, forced to undergo compulsory medical testing to prove she's not lying, and then deliberately set up and fired and left with no income and without the emotional bandwidth needed to tend to her soldier-husband's post-combat stress?

Clearly, the first scenario would be the least traumatic – by far.

An expectant mother's primary biological impulse is to protect and nurture the fetus growing inside her. While even harassment and discrimination unrelated to pregnancy can cause PTSD, a lower-income pregnant woman harassed and fired for being pregnant is in a uniquely vulnerable position which threatens the well-being of her and her baby because it can cut off her financial resources and place great strain on the marriage, *i.e.*, the family structure that evolved to raise and protect children. Ex. 2 (Lucas Aff.) 704:13-709:12.

Accordingly, there is no comparison between the harm that a non-pregnant discrimination victim from an upper-middle class background who is not fired might suffer, and the harm that a pregnant lower-income discrimination victim who is fired might suffer.

Given the objective proofs presented, and the extensive harm these women have endured, the verdicts rendered are not excessive. The cases relied on by Defendants are inapposite because they did not involve comprehensive diagnostic testing proving that the plaintiff suffered from PTSD.

While there are cases involving much higher court-approved compensatory damages verdicts, discussed in Point II below, the reasonableness of the compensatory damages awards in this case is also shown by an analysis of the leading New York case on the issue of compensatory damages awards, *New York City Transit Authority v. State Div. of Human Rights*, 78 N.Y.2d 207 (1991). Unlike the Plaintiffs in this case, the plaintiff in *Transit Authority*: (A) was not fired; and (B) did not present any expert or medical testimony that she suffered from clinically significant depression, anxiety or PTSD. Further, while the plaintiff in *Transit Authority* had a miscarriage, the defendant's conduct was not shown to have caused it (*Id.*, 78 N.Y.2d at 214) because the plaintiff in that case had a history of prior miscarriages. *Id.*, 78 N.Y.2d at 211.

Despite the absence of any expert or medical testimony in *Transit Authority* that the plaintiff suffered from clinically significant depression, anxiety or PTSD, and despite the fact that the plaintiff did not lose her job, the Court of Appeals reversed the Appellate Division's reduction of a 1988 emotional distress damages award equal to $915,645 when adjusted for inflation to 2015.[1] (The award, rendered in 1988, was for $450,000, equal to $915,645 in 2015 or about $927,000 in 2016.)

The Court of Appeals' decision in *Transit Authority* underscores the main issue here:

> **Issue:** If an inflation-adjusted emotional distress award equal to $915,645 is proper for a plaintiff who was not fired, and who had no expert or medical proof that she suffered clinically significant depression, anxiety or PTSD, then how can a $1.5 million award be excessive for plaintiffs who were fired, suffered terribly after being fired, and proved through comprehensive diagnostic testing and unrebutted expert testimony long-term suffering from clinically significant depression, anxiety and PTSD?

To ask the question is to answer it.

---

[1] *See* the inflation calculator at http://www.dollartimes.com/inflation/inflation.php?amount=450000&year=1932

Moreover, because the Defendants in this case cross-examined Plaintiffs with reports prepared by their own expert (Ex. 2 (Lucas Aff.) 160:3-5; 190:7-16; 338:18-345:6; 456:9-24; 517:23-519:17), and then failed to call their own expert to testify, it cannot be said that the amount of damages was not supported by the record. Justice Acosta made this very point in *Jordan v. Bates Advertising Holdings, Inc.*, 11 Misc.3d 764 (N.Y. Sup. Ct. 2006):

> Although defendant cross-examined Crawford with a report prepared by its own expert, it never called the expert to testify on the issue of damages. Thus, based on the testimony before the jury, it cannot be said that the amount of damages was not supported by the record.

11 Misc.3d at 770-71 (Emphasis added).

The same point was made in *Ricci v. Key Bancshares of Maine, Inc.*, 662 F.Supp. 1132, 1140-41 (D.Me. 1987), a case alleging discriminatory termination of credit. In *Ricci*, the court upheld an emotional distress award equal to $12.9 million when adjusted for inflation to 2015. The award, rendered in 1986, was for $6 million, equal to $12,889,954 in 2015 (*see* note 1, *supra*), *i.e.*, 860% higher than each Plaintiff's compensatory damages award in this case -- and much more than that if one adjusts for regional differences between the cost of living in Maine and New York, as is warranted.[2] In upholding the emotional distress award, the *Ricci* Court emphasized the absence of any contradictory expert testimony by the Defendants:

> Particularly in the absence of any contradictory expert testimony on behalf of defendants, the evidence regarding ... the emotional distress suffered by plaintiff Ricci in connection with Count X provide a reasonable basis for the jury's verdict.

662 F.Supp. at 1140-41 (emphasis added).

---

[2] *See Gallegos v. Elite Model Mgmt. Corp.*, 2004 WL 51604, at *4 (N.Y.Sup. 2004), *rev'd on other grounds*, 28 A.D.3d 50 (1st Dep't 2005) ("one would expect that New York would award higher amounts of money for personal injuries than Delaware.").

As detailed at Point II herein, the awards in this case are much lower than many court-approved compensatory damages awards, even in cases where the plaintiff produced no expert or medical testimony to substantiate the harms alleged. *See, e.g., Cantu v. Flanigan*, 705 F.Supp.2d 220, 231 (E.D.N.Y. 2010) (applying New York law: upholding award of non-economic damages totaling $150 million – 100 times higher than each Plaintiff's compensatory damages verdict in this case -- even though there was no apparent expert or medical testimony that the plaintiff suffered from clinically significant depression, anxiety or PTSD);[3] *Osorio v. Source Enterprises, Inc.*, 2007 WL 683985, at *5 and n.3 (S.D.N.Y. 2007) (New York City Human Rights Law case upholding compensatory damages verdict rendered in 2006 of $4 million -- $4,772,602 adjusted for inflation to 2015 (*see* note 1, *supra*), *i.e.*, 320% higher than each Plaintiff's compensatory damages verdict in this case, even though there was no apparent expert or medical testimony that the plaintiff suffered from clinically significant depression, anxiety or PTSD); *Prozeralik v Capital Cities Communications*, 222 A.D.2d 1020, 1021 (4th Dep't 1995) (Appellate Division, in affirming a $9.5 million verdict, affirmed an award rendered in or about 1991 for non-economic "emotional and physical injury" in the amount of $3,500,000 million -- $6,142,317 adjusted for inflation to 2015 (*see* note 1, *supra*), *i.e.*, 430% higher than each Plaintiff's compensatory damages verdict in this case -- even though there was no apparent expert or medical testimony that the plaintiff suffered from clinically significant depression, anxiety or PTSD); *See also* the many other cases cited in Point II below.

Finally, the punitive damages verdict in this case of serial misconduct -- $500,000 per plaintiff or $1.5 million collectively -- is clearly not excessive. Punitive damages are usually a

[3] Although the plaintiff in *Cantu* suffered a far greater economic injury than the Plaintiffs in this case (*i.e.*, the loss of hundreds of millions of dollars in contracts), the $150 million award was for non-economic injury. There is nothing to indicate that the very wealthy plaintiff in *Cantu* suffered non-economic harm as great as the traumatized Plaintiffs in this case.

multiple of compensatory damages. Here they are but a fraction. As detailed in Point III below, even in single-plaintiff cases, vastly higher punitive damages awards have been upheld.

POINT I

DEFENDANTS' LIABILITY WAS CLEARLY ESTABLISHED

A. The Relationship Between Paswall and Ayende

Paswall is G.E.B.'s owner. Ex. 2 (Lucas Aff.) 16:14-17. Ayende was G.E.B.'s Office Manager and reported directly to Paswall. Ex. 2 (Lucas Aff.) 1067:22-1068:1. Ayende was the direct supervisor of Santana and Rodriguez (Ex. 2 (Lucas Aff.) 56:19-57:24; 1132:9-11), and also exercised some supervisory authority over Davis. Ex. 2 (Lucas Aff.) 380:17-381:4.

Paswall was a father figure to Ayende, and told Ayende that he would inherit the business one day. Ex. 2 (Lucas Aff.) 381:6-15; 1072:13-18. Through his words and conduct, Paswall taught his office manager and protégé, Ayende, how to discriminate against pregnant women. For example:

- Paswall told Ayende not to have children, and when Ayende's wife Brenda (a G.E.B. employee) became pregnant, Paswall was shocked (Ex. 2 (Lucas Aff.) 1070:21-22), and his very first words to her were "***Are you going to keep it?***" (Ex. 2 (Lucas Aff.) 1068:19-1069:8)[4] Defendant Ayende followed Paswall's example. When he learned that Plaintiff Rodriguez was pregnant, Ayende asked her the exact same offensive and discriminatory question: "***Are you going to keep it?***" Ex. 2 (Lucas Aff.) 554:20.

- With Ayende by his side, Paswall asked job applicants such as Santana and Davis illegal and discriminatory questions[5] designed to screen out women who were or were

[4] Brenda Ayende returned after maternity leave, and thereafter "walked out on Dr. Paswall without any notice and left everything the way it was" (Ex. 2 (Lucas Aff.) 375:9-11), *i.e.*, "in shambles". Ex. 2 (Lucas Aff.) 374:15-375:13. Paswall was shocked by her departure. Ex. 2 (Lucas Aff.) 1070:13-24.

[5] *See Pre-Employment Inquiries and Marital Status or Number of Children*, Equal Employment Opportunity Commission, http://www.eeoc.gov/laws/practices/ inquiries_marital_status.cfm (last visited April 21, 2015); *See also EEOC Guidelines on Discrimination Because of Sex*, 29 C.F.R. § 1604.7 ("Any pre-employment inquiry in connection with prospective employment which expresses directly or indirectly any limitation, specification, or discrimination as to sex shall be unlawful unless based upon a bona fide occupational qualification."); *Barbano v.*

likely to become pregnant. Ex. 2 (Lucas Aff.) 135:21-136:24; 372:7-25. So when it was *his turn* to interview people for a front office administrator position, Ayende asked Rodriguez a question, in code, designed to reveal if she was pregnant (*i.e.*, whether she could "lift heavy things" [Ex. 2 (Lucas Aff.) 543:25-544:1] – which is not a job requirement for an administrative assistant).

- With Ayende by his side, Paswall "***advised [Santana] not to have children***". Ex. 2 (Lucas Aff.) 136:20-24.

- After Santana became pregnant, Paswall, while speaking to Ayende, turned to Davis and said "***I know YOU better not get pregnant like that.***" Ex. 2 (Lucas Aff.) 382:1-4.

B. The Established Protocol at G.E.B.

There was an established protocol at G.E.B. that before firing an employee, the employee needs to be made aware that there's a problem and given a chance to rectify the problem. Ex. 2 (Lucas Aff.) 13:11-16. Accordingly, G.E.B. did not have a high employee turnover rate. Ex. 2 (Lucas Aff.) 55:4-7.

C. Defendants Harassed All Three Plaintiffs Upon Learning or Suspecting They Were Pregnant

Defendants harassed all three women upon learning or suspecting they were pregnant.

Madison County, 922 F.2d 139, 143 (2d Cir. 1990) ("[Interviewer's] questioning [plaintiff] about whether she would get pregnant and quit was also discriminatory, since it was unrelated to a bona fide occupational qualification. [citation omitted] Similarly, [interviewer's] questions about whether [plaintiff's] husband would mind if she had to 'run around the country with men,' and that he would not want his wife to do it, were discriminatory, since once again the questions were unrelated to bona fide occupational qualifications.") (*citing Price Waterhouse v. Hopkins*, 490 U.S. 228, 241 (1989) and 29 C.F.R. § 1604.7)); *King v. Trans World Airlines*, 738 F.2d 255, 258 n.2 (8th Cir. 1984) (questions about pregnancy and childbearing are unlawful per se); *See also Bennett v. Health Management Systems, Inc.*, 92 A.D.3d 29, 34 (1st Dep't 2011) (NYCHRL "explicitly requires an independent liberal construction analysis in all circumstances") (emphasis in original).

Santana: After learning Santana was pregnant, Ayende told her he was "not happy about it" and was "going to let Dr. Paswall know," which made Santana scared. Ex. 2 (Lucas Aff.) 140:4-8. Santana was suffering from bad morning sickness, complicated by anemia. Ex. 2 (Lucas Aff.) 139:9-22; 185:8-12.

Upon learning Santana was pregnant, Defendants went from treating Santana as a valued member of the team to treating her as a pariah. Ex. 2 (Lucas Aff.) 137:3-138:13; 259:14-23. They moved her from the front office, which was clean and well-lit, to a hot, unventilated (Ex. 2 (Lucas Aff.) 143:3-6), bug-infested elongated 24-inch-wide (Ex. 2 (Lucas Aff.) 1111:20-21) storage closet (referred to as the "back filing room") where she was often bitten by bugs. Ex. 2 (Lucas Aff.) 143:4-5; 261:1-4.[6] There, despite her medical condition, she had to stand on unstable elevated surfaces (Ex. 2 (Lucas Aff.) 142:24-25; 246:6-7; 250:17-24) and felt pressured to lift and carry heavy boxes and heavy stacks of files. Ex. 2 (Lucas Aff.) 166:19-167:8; 246:1-7; 254:20-22. Despite the risk of miscarriage this posed, Santana did as she was told since she was in fear of losing her job and not having the means to support her family (Ex. 2 (Lucas Aff.) 264:22-25) because she was often gratuitously told she was "on shaky ground" and "you got to watch what you do now". Ex. 2 (Lucas Aff.) 263:15-17; 142:12-19; 345:15-23; 361:7-9.

After Santana became pregnant Paswall refused to say another word to her. Ex. 2 (Lucas Aff.) 165:7-25; 180:20-21; 229:3-230:2; 307:22. Paswall's treatment of Santana as a pariah was so dehumanizing that when he wanted his water bottle filled, he would either toss it at Santana or

[6] Ayende only went in the back filing "room" to grab a file, not to work. Ex. 2 (Lucas Aff.) 253:12-14. Defendants pointed out that Talitha Crespo's daughter Brittany Arnold worked an unspecified amount of time in the same back filing room, but that argument is inapposite because Ms. Arnold only worked at G.E.B. two or three days when she was on vacation. Ex. 2 (Lucas Aff.) 302:25-303:3; The fact that other employees were bitten by bugs in that room after only being in there very occasionally (Ex. 2 (Lucas Aff.) 261:6-22) supports Santana's claim that the work environment was bad because Santana, and Santana alone, was forced to spend most of her time in there after Defendants learned she was pregnant. Ex. 2 (Lucas Aff.) 254:3 ("[Santana] was the only person who was there for hours.").

extend his arm with the empty water bottle to Santana, without saying a word. Ex. 2 (Lucas Aff.) 314:25-316:2; 167:9-19; 317:11-13. Taking his cue from Paswall, Ayende would loudly tell co-workers that Santana was lying about her pregnancy-related medical condition. Ex. 2 (Lucas Aff.) 379:167-380:16. When Ayende said these things, Davis (whose pregnancy was not yet apparent) would speak up and tell Ayende that he couldn't do that to Santana. Ex. 2 (Lucas Aff.) 379:17-380:16.

Paswall, who was well aware of his obligation to accommodate Santana, made sure Santana, who was suffering from exhaustion and anemia, was gratuitously denied an accommodation that would involve no cost or inconvenience whatsoever to G.E.B., *i.e.*, the ability to use her own lunch break to take a power nap behind closed doors in unused space. Ex. 2 (Lucas Aff.) 176:11-177:8; 230:3-5; 230:10-14.[7]

Jennifer Van Norden, an employee known to gossip with Paswall and Ayende about who was pregnant, screamed at Santana calling her a "ghetto bitch" in the presence of Paswall and Ayende, and they did nothing to countermand Van Norden. Ex. 2 (Lucas Aff.) 347:3-348:19.

As the date for Santana's medical-benefits eligibility approached (Ex. 2 (Lucas Aff.) 349:23-350:7), Defendants did a "bait and switch" by offering Santana a fake accommodation that was, in reality, nothing more than an opportunity to "break in" her replacement – Ayende's very attractive friend Natalie. Ex. 2 (Lucas Aff.) 168:3-171:20; 1076:20-21; 224:11-12; 224:25-

[7] After using her lunch break one time to take a power nap behind closed doors, Defendants prohibited Santana from ever doing so again (Ex. 2 (Lucas Aff.) 176:11-177:8; 230:3-5; 230:10-14), even though Paswall admitted (consistent with the law and with G.E.B.'s alleged policy of accommodating employees with medical needs) that he "needed to accommodate" pregnant women in Santana's condition. Ex. 2 (Lucas Aff.) 16:23-25; 25:22-24; 26:20-22. Paswall never told Ayende to provide Santana with any type of accommodation (Ex. 2 (Lucas Aff.) 1077:223-25), and Santana was never provided with any actual accommodation. Ex. 2 (Lucas Aff.) 345:24-346:3; 227:16-230:2. A difficult pregnancy can constitute a disability under the NYCHRL, *LaSalle v. City of New York*, 2015 WL 1442376, at *4 (S.D.N.Y. 2015); Complaint ¶¶ 244-248, 60-62, 82(A); *See also Romanello v. Intesa Sanpaolo, S.p.A.*, 22 N.Y.3d 881, 885 (2013) (outlining an employer's duty to accommodate an employee with any type of disability).

225:2; 234:25-235:8. Specifically, Santana was asked if she would want to switch to part-time near the end of her 7th or 8th month, and she said ok. But instead of waiting 2-3 months, until the end of Santana's 7th or 8th month, Defendants promptly and unilaterally switched Santana to part-time and simultaneously brought in Natalie on September 18, 2006 to "help out" doing the same job as the position Santana held (Ex. 2 (Lucas Aff.) 168:3-171:20; 1076:22-23; 224:11-12; 224:25-225:2; 234:25-235:8), except that Natalie did not work in the 24-inch-wide storage closet known as the back filing room. Ex. 2 (Lucas Aff.) 170:25-171:5; 171:15-17; 1077:4-6. Natalie had very poor attendance (Ex. 2 (Lucas Aff.) 171:9-14; 557:19-22; 562:2-7; 927:6-12; 1060:5-7) and, as far as anyone can tell, her pay was never even docked. Ex. 2 (Lucas Aff.) 171:18-20. Santana was fired on October 6, 2006, 2½ weeks after Natalie was brought in to replace her (Ex. 2 (Lucas Aff.) 169:15-18). Santana was fired on the date her medical benefits were supposed to begin. Ex. 2 (Lucas Aff.) 349:23-350:7.

Davis: Davis's supervisor was Talitha Crespo. Ex. 2 (Lucas Aff.) 373:7-9; 374:5-7. Crespo was "very happy with [Davis's] job performance [and Davis and Crespo's work relationship]." Ex. 2 (Lucas Aff.) 377:19-378:3.

Referring to Santana, Paswall told Davis "***I know you better not get pregnant like that.***" Ex. 2 (Lucas Aff.) 382:1-4.

Davis became sick with undiagnosed morning sickness which prevented her from going to work on September 5th or 12th of 2006. Ex. 2 (Lucas Aff.) 382:21-383:18; 392:7-19. That sickness persisted for the remainder of Davis's employment. Ex. 2 (Lucas Aff.) 382:21-383:13; 392:10-14.

On or about September 13, 2006 Davis told her supervisor, Crespo, "*oh, my God, I might be pregnant*" (Ex. 2 (Lucas Aff.) 384:10, 384:21-385:3), and Crespo replied "*my God, if you're*

pregnant imagine how bad they would treat you, they're already treating Marlena badly[.]" Ex. 2 (Lucas Aff.) 384:15-17.

Davis started receiving a lot of unjustified criticism beginning on or about September 13, 2006, the date she told Crespo she might be pregnant. Ex. 2 (Lucas Aff.) 383:19-21; 385:4-389:23; 529:12-530:13; 392:23-393:6.

On September 15, 2006, Davis's supervisor, Crespo, told Davis to take the work papers that were on her desk and put them in the cabinet above her desk so her work area wouldn't look cluttered. Ex. 2 (Lucas Aff.) 385:21-25. The cabinet was empty and Davis did not have to climb on a step stool or any other elevated surface to get to it. 389:15-17. Davis did as she was told. Ex. 2 (Lucas Aff.) 386:1-3. Davis did nothing wrong by storing her work in the cabinet above her desk. Ex. 2 (Lucas Aff.) 1099:19-1100:6.

Shortly after she left the office that day, Ayende began "going through [Davis's] things" and "complaining about [Davis] terribly." Ex. 2 (Lucas Aff.) 389:20-390:2. Davis received a negative-sounding email from Ayende stating that Paswall and Ayende would be meeting with her the next business day (Monday morning). 386:5-16. When Davis arrived to work the following workday (September 18, 2006), she was called into a meeting with Paswall and Ayende and falsely accused of not doing her work. Ex. 2 (Lucas Aff.) 43:3-44:15; 40:7-21; 1098:8-11; 387:1-389:11. Ayende followed Paswall's false criticisms. Ex. 2 (Lucas Aff.) 393:7-394:2; 395:18-19.

Davis informed Paswall that Crespo had told her to put her papers in the cabinet so her desk would look neater (Ex. 2 (Lucas Aff.) 389:6-11), but was not otherwise given a chance to explain her side of the story. Ex. 2 (Lucas Aff.) 1100:25-1101:2. Even though she was not

behind in her work (Ex. 2 (Lucas Aff.) 42:14-18), Paswall told her to finish all of her pending assignments in two weeks. Ex. 2 (Lucas Aff.) 44:9-12.

Davis never fell behind in her work (Ex. 2 (Lucas Aff.) 529:4-11; 42:14-18), and Defendants never pointed to a single assignment that Davis did not complete in a timely fashion. Ex. 2 (Lucas Aff.) 530:25-531:12; 390:15-19. As she had been doing since the inception of her employment, Davis emailed Paswall on a daily basis notifying him of what she was working on. Ex. 2 (Lucas Aff.) 478:8-14. There was not a single email from Paswall (Ex. 2 (Lucas Aff.) 58:10-23), Ayende (Ex. 2 (Lucas Aff.) 58:10-23), or Davis's Supervisor Talitha Crespo (Ex. 2 (Lucas Aff.) 57:25-58:9) to suggest that Davis was not doing her job. Ex. 2 (Lucas Aff.) 403:4-25.

On September 28, 2006 Davis made a doctor's appointment for the following day to verify she was pregnant, and notified Paswall and Ayende that she had a doctor's appointment the following day (Ex. 2 (Lucas Aff.)), and told Ayende what she told Supervisor Crespo 15 days earlier, *i.e.*, that she might be pregnant. Ex. 2 (Lucas Aff.) 394:13-395:8 (confirming that she told Ayende it might be "*number two*," meaning her second child). Ayende said "*Oh Boy!*" and stormed off in the direction of Paswall's office. Ex. 2 (Lucas Aff.) 528:1-6.

When Davis was at the doctor's office the following to verify her pregnancy Paswall cleared her desk. Ex. 2 (Lucas Aff.) 396:1-8.

The next work day (Monday October 2nd) Davis came into work, saw that her desked was cleared, and asked Ayende what was going on. Ex. 2 (Lucas Aff.) 396:4-8. Paswall then suggested to Davis that she should give her two weeks' notice, and then asked Davis if the job was too much for her. Ex. 2 (Lucas Aff.) 396:22-397:7. Davis told him the job was not too

much for her, and that she could handle her work, and that she was doing her work. Ex. 2 (Lucas Aff.) 396:22-397:9; 399:18-21.

Paswall then said "We're going to watch what you do with this pile of work and see how it goes." Ex. 2 (Lucas Aff.) 397:12-13.

The following day Davis received official confirmation that she was in fact pregnant, and told her supervisor (Crespo). Ex. 2 (Lucas Aff.) 399:25-401:3.

Two days later -- on October 5th, just 24 hours before firing another pregnant employee, Santana -- Paswall fired Davis, telling her it "wasn't working out" and that she needed to find something more her pace. Ex. 2 (Lucas Aff.) 404:4-20.

When Davis was fired, her supervisor, Crespo, told her "I can't believe that they're letting you go, I don't want to work with anyone else" (Ex. 2 (Lucas Aff.) 413:8), and Dr. Jamie Bassel, a doctor for whom Davis performed billing services, expressed how shocked he was and gave Davis his business card so that she could use him as a reference because she was a good worker. Ex. 2 (Lucas Aff.) 412:3-6; 412:25-413:3.

Davis was replaced by a man named Leon. Ex. 2 (Lucas Aff.) 1107:10-12.

At trial Paswall claimed that Davis caused G.E.B. to lose $20,000-$40,000 in receivables, but Davis was never told that her actions caused G.E.B. to lose any amount of money, much less $20,000-$40,000 (Ex. 2 (Lucas Aff.) 410:2-7), and Defendants never produced a single email or document to substantiate the claim. Ex. 2 (Lucas Aff.) 42:19-43:2.

Ayende admitted at trial that Davis completed all of her pending work assignments on time, as directed. Ex. 2 (Lucas Aff.) 1106:22-1107:5.

At trial, in an effort to justify the firing, Paswall fabricated a story about a second stack of work that was supposedly hidden. Ex. 2 (Lucas Aff.) 434:10-24. However, Paswall was

impeached with his own deposition testimony where he admitted not knowing if Davis was behind in her work at the time she was fired. Ex. 2 (Lucas Aff.) 42:12-18.

A neutral non-party named Monica Eadie testified that she clearly heard Defendants' own witness – Davis's Supervisor Talitha Crespo, who was intimately familiar with the reason Davis was fired – state that Davis and Santana "were terminated because they were pregnant." Ex. 2 (Lucas Aff.) 1174:5-1175:1; 562:17-563:15; 1058:13-1059:13.

Rodriguez: Rodriguez was hired 10 days after the firings of Davis and Santana and put a picture of her daughter on her desk. When Paswall and Ayende saw it they appeared stunned, and they peppered her with intrusive, negative-sounding questions, *i.e.*, "*whose child is that[?]*," "*you have a child[?]*," "*you married[?]*," etc. Ex. 2 (Lucas Aff.) 549:8-19. Rodriguez was offended but glossed over the questions because her goal was to keep her job. Ex. 2 (Lucas Aff.) 549:8-19.[8]

Before she started showing, Rodriguez was praised for her work. Ex. 2 (Lucas Aff.) 550:14-551:9; 550:18-14. After Rodriguez's appearance began to change in December 2006 (Ex. 2 (Lucas Aff.) 551:15-16), Paswall, Ayende and others openly gossiped about whether she was pregnant (Ex. 2 (Lucas Aff.) 551:17-552:21), and Ayende confronted her about whether she was pregnant and whether her husband was the father. Ayende, who was shaped and molded by his father figure, Paswall, also asked Rodriguez the very same outrageous question that his boss

[8] Paswall tried to actively mislead the jury into believing that his companies embraced other pregnant women in the workforce before these three Plaintiffs were fired. Ex. 2 (Lucas Aff.) 103:9-15; 82:11-24. But the only pregnant women who worked for Paswall's companies before these three Plaintiffs came along were Ayende's wife (who Paswall asked "**Are you going to keep it?**") and Paswall's own wife at the time. Ex. 2 (Lucas Aff.) 1070:25-1072:12. As for the employees who became pregnant **after** Plaintiffs filed a discrimination complaint, it is clear that an employer who is sued by three pregnant woman for pregnancy discrimination cannot safely go after other pregnant women while the pregnancy discrimination case is still pending. *Chuang v. University of California Davis, Bd. of Trustees*, 225 F.3d 1115, 1129-30 (9th Cir. 2000) ("Given the obvious incentive in such circumstances for an employer to take corrective action in an attempt to shield itself from liability, it is clear that nondiscriminatory employer actions occurring subsequent to the filing of a discrimination complaint will rarely even be relevant as circumstantial evidence in favor of the employer.").

and mentor Paswall had asked Ayende's wife when *she* became pregnant: **"[A]re you going to keep it?"** Ex. 2 (Lucas Aff.) 554:17-20; 890:10-12; 1068:19-1069:12.

Rodriguez replied that she was pregnant, that her husband was the father, and that she was going to come back to work at G.E.B. after giving birth because this was a career. Ex. 2 (Lucas Aff.) 553:16-554:15. Ayende replied "*well, I don't know. I got to speak to Dr. Paswall.*" Ex. 2 (Lucas Aff.) 554:15-16. Rodriguez then retreated to another room because she could not stop crying, and the medical assistant, Jennifer, told her Santana was fired for having a "*complicated pregnancy*" but that Rodriguez did not have to worry because her pregnancy was not complicated. Jennifer then called out, "*Right, Peter, Marlena was fired because she had a difficult pregnancy[?] and Peter said yes.*" Ex. 2 (Lucas Aff.) 556:1-17.

After learning Rodriguez was pregnant, Paswall stopped smiling at her, stopped speaking with her, and barely had any further interaction with her. Ex. 2 (Lucas Aff.) 553:2-5; 939:18-25.

Shortly thereafter Ayende said, in the presence of co-workers and patients, "*whoa, what you been doing, hiding your stomach[?] What you've been doing, wearing a girdle[?]*"; he also said Rodriguez must be having twins, to which Paswall agreed. Ex. 2 (Lucas Aff.) 558:7-559:4; 967:25-968:1; 1111:14-1112:4. Ayende also ridiculed Rodriguez's maternity clothes and told her she was not going to fit into the filing area any longer because she was too big (Ex. 2 (Lucas Aff.) 559:8-22; 1111:18-1112:4) and tried to justify his comments by insisting that he'd have said the same thing to a 400 pound man. Ex. 2 (Lucas Aff.) 1111:18-1112:4.

Rodriguez was also repeatedly accused of lying about how far along she was in her pregnancy, and was subjected to compulsory medical testing. Despite having had two prior ultrasounds, Rodriguez was ordered to undergo a third ultrasound performed by an imaging center chosen by Defendants, with the results sent directly from the medical testing center to

G.E.B., to see if Rodriguez was lying about how far along she was in her pregnancy. Ex. 2 (Lucas Aff.) 559:23-561:14; 937:16-939:2.

Rodriguez pleaded with Ayende to reconsider because she was scared to take another ultrasound because she worried that too many ultrasounds might be harmful to the baby, but he refused to reconsider. Ex. 2 (Lucas Aff.) 937:16-939:2. Scared of losing her job, Rodriguez did as she was told and underwent another ultrasound, the results of which were sent directly from the medical testing center to G.E.B. Ex. 2 (Lucas Aff.) 560:14-22.

The results proved Rodriguez was telling the truth about how far along she was in her pregnancy (Ex. 2 (Lucas Aff.) 559:23-561:14), but the harassment continued.

Defendants dramatically increased the pregnant Rodriguez's workload and demanded that she get it done in fewer hours than before. Ex. 2 (Lucas Aff.) 561:23-25; 948:12-14; 957:23-958:3; 1059:14-1060:7. They also hand-picked her to work for Dr. Tehrany, a doctor with a history of complaining about G.E.B. employees. The very pregnant Rodriguez was ordered to periodically walk several blocks in the middle of winter to Tehrany's west side office carrying pre-signed prescriptions that she was told might cause her to be assaulted by junkies. Ex. 2 (Lucas Aff.) 564:21-565:17.

D. Defendants also Fired All Three Plaintiffs For Being Pregnant or Suspected of Being Pregnant

Defendant Ayende never recommended that any of the Plaintiffs be fired, never formed the belief that any of the Plaintiffs should be fired, and was shocked when he learned each of the Plaintiffs was being fired. Ex. 2 (Lucas Aff.) 1068:8-18; 1094:19-22; 1105:23-1106:4; 1114:16-19.

With respect to Santana, Defendants, in sworn interrogatory answers, confirmed there were no assignments she did in an untimely or improper manner. Ex. 2 (Lucas Aff.) 2:12-13:10.

When Paswall was deposed, he testified Santana was fired for allegedly refusing to stop sleeping at work. Ex. 2 (Lucas Aff.) 230:20-23. However, there was only one instance when she slept on G.E.B.'s premises, and that was when she used her own lunch break to take a power nap. She was then told not to do so again, and never did (Ex. 2 (Lucas Aff.) 176:11-177:8; 230:3-5; 230:10-14), consistent with Ayende's testimony on the issue. Ex. 2 (Lucas Aff.) 1078:6-1079:3.

At trial, Paswall changed his story and testified that Santana was fired for failing to file; but he was impeached with his deposition testimony that he couldn't think of any reason for firing Santana apart from her (non-existent) refusal to stop sleeping in the office. Ex. 2 (Lucas Aff.) 27:16-28:4. Moreover, Santana denied ever having refused to file (Ex. 2 (Lucas Aff.) 345:15-17; 232:12-14), and, according to Ayende, Santana's not filing only happened one time and never happened again. Ex. 2 (Lucas Aff.) 1074:5-8; 1077:15-19.

Paswall also testified that "Mr. Ayende spoke to me about her consistent lateness causing patients to wait outside the door, doctors being delayed on their schedules" (Ex. 2 (Lucas Aff.) 15:7-13), but Ayende testified that that only happened one time (Ex. 2 (Lucas Aff.) 1075:16-23) and Santana denied it ever happened (Ex. 2 (Lucas Aff.) 179:4-9; 352:5-10), and that alleged problem was never even mentioned by Paswall when he was asked in his deposition to articulate the reasons Santana was fired. Ex. 2 (Lucas Aff.) 27:16-28:2.

With respect to Santana's absences relating to her difficult pregnancy, Ayende testified that Santana usually brought in doctor's notes even though she wasn't required to, and that he conveyed to Santana the impression that "her absences from work would result in her pay being docked, but would not jeopardize her job." Ex. 2 (Lucas Aff.) 1075:9-17; 1076:4-8; 211:15-21.

According to Ayende, there was only a single instance when Santana was absent from work for a reason that she shouldn't have been absent. Ex. 2 (Lucas Aff.) 1075:2-10.

Santana was never written up (Ex. 2 (Lucas Aff.) 345:18-20) and was never warned apart from the unexplained statements that she was on "shaky ground." Ex. 2 (Lucas Aff.) 345:21-23.

With respect to Davis, Ayende admitted she completed all of her pending work, undercutting Paswall's claims that she did not. Ex. 2 (Lucas Aff.) 1106:22-1107:5.

Moreover, a neutral non-party, Monica Eadie, testified that she overheard Davis's Supervisor (Crespo) tell Rodriguez that Davis and Santana were fired for being pregnant. Ex. 2 (Lucas Aff.) 1174:5-1175:1; 562:17-563:15; 1058:13-1059:13. That testimony fatally undercut Paswall's claim that Davis was fired because Supervisor Crespo said she wasn't doing her work and recommended she be fired.

As for Rodriguez, Defendants, in sworn interrogatory answers, confirmed that there were no assignments she did in an untimely or improper manner. Ex. 2 (Lucas Aff.) 2:12-13:10.

Moreover, the evidence at trial showed that Paswall used Tehrany to help create a bogus "paper trial" that Paswall could use to justify firing Rodriguez (consisting solely of two inexplicable, bizarre-sounding emails sent by Tehrany to Paswall a few hours apart on a single day).[9] Ex. 2 (Lucas Aff.) 916:20-922:5.

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[9] One day, out of the blue, the complaint-prone Tehrany wrote two inexplicable, bizarre-sounding emails to Paswall accusing Rodriguez of being "incompetent, defensive and irreverent," and threatening to move his entire medical practice if Paswall did not deal firmly with Rodriguez.

These two emails were so bizarre that Tehrany couldn't even explain, much less substantiate, what was written in them. Tehrany (A) couldn't identify a single fact to substantiate his accusation that Rodriguez was incompetent, defensive or irreverent; (B) admitted that he might have been confusing the plaintiffs in this case with two other G.E.B. employees he complained about, Jennifer Dacey and Rachel Vega (Ex. 2 (Lucas Aff.) 39:12; 1061:1-16); and (C) admitted he had no idea what Rodriguez even looks like – even though Rodriguez was sitting just 5 feet away from Tehrany when he was asked that question. Ex. 2 (Lucas Aff.) 918:1-919:20. Moreover, Defendants never told Rodriguez there was ever any problem with her performance as it related to Dr. Tehrany. Ex. 2 (Lucas Aff.) 566:21-24; 937:12-15.

Given these facts, how could one not concluded the firings were discriminatory, especially in light of the direct evidence of Paswall's animus against pregnant employees (*e.g.*, telling Davis "***you better not get pregnant***," telling Santana "***not to have children***", asking illegal and discriminatory interview questions of Santana and Davis, asking Ayende's wife "***Are you going to keep it?***" as soon as he heard Ayende's wife was pregnant, *etc.*)?

E. Plaintiffs were Severely Traumatized by the Discriminatory Harassment and Firing

As noted, an expectant mother's primary biological impulse is to protect and nurture the fetus growing inside her. While even harassment and discrimination unrelated to pregnancy can cause PTSD,[10] a lower-income pregnant woman harassed and fired for being pregnant is in a uniquely vulnerable position which threatens the well-being of her and her baby because it can cut off her financial resources and place great strain on the marriage, *i.e.*, the family structure that evolved to raise and protect children. Ex. 2 (Lucas Aff.) 704:13-709:12.

Paswall also testified that Tehrany complained about Rodriguez's ability to collect patient data and demographic sheets (Ex. 2 (Lucas Aff.) 69:3-17), but Tehrany denied there was any such problem. Ex. 2 (Lucas Aff.) 69:18-70:13. Aware that Tehrany testified otherwise, Paswall was also forced to recant his earlier deposition testimony that Rodriguez failed to collect co-pays from Tehrany's patients. Ex. 2 (Lucas Aff.) 67:12-16; 60:8-19.

Defendants argued that Dr. Tehrany, who is not a G.E.B. employee, was a neutral witness. But the evidence proved that Paswall and Tehrany referred business to each other. Tehrany depo. Ex. 2 (Lucas Aff.) 11:23-12:6; 55:10-15.

[10] 717:10-13; *See Taylor v. Metzger*, 706 A.2d 685, 697, 152 N.J. 490, 515 (N.J. 1998) (State high court decision that jury is free to credit PTSD diagnosis based on single comment that plaintiff was a "jungle bunny": "Dr. Fox's diagnosis that plaintiff suffered post-traumatic stress disorder permits a rational factfinder to conclude that she suffered severe emotional distress."); *Dortz v. City of New York*, 904 F.Supp. 127, 151 (S.D.N.Y. 1995).

Accordingly, there is no comparison between the harm that a non-pregnant discrimination victim from an upper-middle class background who is not fired might suffer, and the harm that a pregnant lower-income discrimination victim who is fired might suffer.[11]

In this regard, the jury heard from Dr. Charles Edward Robins, an expert in clinical psychology with a Ph.D from Columbia University, where he also taught clinical psychology, and the author of a number of peer-reviewed articles on the subject. Ex. 2 (Lucas Aff.) 597:2-9;

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[11] A wrongdoer takes his victim as he finds her. *Tobin v. Steisel*, 64 N.Y.2d 254, 259 (1985) (wrongdoer is responsible for aggravation of preexisting psychological injuries); *Brady v. Wal-Mart Stores, Inc.*, 455 F.Supp.2d 157, 197 (E.D.N.Y. 2006) (same); *Jenson v. Eveleth Taconite Co.*, 130 F.3d 1287, 1294-95 (8th Cir. 1997) (same).

Although Defendants' moving papers focus solely on the alleged excessiveness of the verdicts, they do not allege that Plaintiffs failed to adduce sufficient proof of causation for any of the harms alleged. And for good reason: To the extent there is any arguable uncertainty regarding a particular aspect of Plaintiffs' damages, the Defendant bears the risk of that uncertainty. *Spitz v. Lesser*, 302 N.Y. 490, 494 (1951) ("The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created."); *Bartolone v Jeckovich*, 103 A.D.2d 632, 635 (4th Dep't 1984) ("Nor may defendants avail themselves of the argument that plaintiff should be denied recovery because his condition might have occurred even without the accident."); *McKinnon v. Kwong Wah Restaurant,* 83 F.3d 498, 506-07 (1st Cir. 1996) ("The burden is on the [Title VII] defendant to establish a causal relationship between the prior emotional injury and the emotional distress damages claimed by the plaintiffs. If the court finds it impossible to apportion the damages, then the defendants are liable for the entire amount."); *Northington v. Marin*, 102 F.3d 1564, 1568 (10th Cir. 1996) (civil rights case applying same rule); *Malandris v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 703 F.2d 1152, 1170 (10th Cir. 1981) ("The defense has pointed out that there were other factors contributing to plaintiff's emotional condition. Yet, it failed to produce any evidence which would separate the effects of its wrongful conduct from the effects of other influences."); *Lancaster v. Norfolk and Western Ry. Co.*, 773 F.2d 807, 822 (7th Cir. 1985) (Posner, J.) (trial judge correctly "refus[ed] to instruct the jury to reduce Lancaster's damages by the probability that he would have become schizophrenic even if the railroad's supervisors had not misbehaved."); *See also Bennett v. Health Management Systems, Inc.*, 92 A.D.3d 29, 34 (1st Dep't 2011) (NYCHRL "explicitly requires an independent liberal construction analysis *in all circumstances*") (emphasis in original).

This rule applies with particular force where, as here, the defendant cross-examines the plaintiff using its own expert's report and then fails to call its expert. *See, e.g., Jordan v. Bates Advertising Holdings, Inc., supra,* 11 Misc.3d 764, 771 (N.Y. Sup. Ct. 2006) (Acosta, J.) ("*Although defendant cross-examined Crawford with a report prepared by its own expert, it never called the expert to testify on the issue of damages. Thus, based on the testimony before the jury, it cannot be said that the amount of damages was not supported by the record.*"); *Ricci v. Key Bancshares of Maine, Inc., supra,* 662 F.Supp. 1132, 1140-41 (D.Me. 1987) (upholding inflation-adjusted emotional distress verdict equal to $12,889,954 in 2015 "*[p]articularly in the absence of any contradictory expert testimony on behalf of defendants*[.]").

Further, a plaintiff will not be denied recovery where her actionable mistreatment "combine[s] with pre-existing problems and subsequent tragedies to create" an even worse situation. *Katt v. City of New York*, 151 F. Supp. 2d 313, 351, n.31 (S.D.N.Y. 2001) (Lynch, J.), *aff'd in relevant part sub nom. Krohn v. New York City Police Dep't*, 60 F. App'x 357 (2d Cir. 2003); *See also* 453:18-454:9 (testimony of Davis, consistent with Judge Lynch's conclusion in *Katt, supra,* that she didn't blame Defendants for all of the problems she encountered after she was fired, but that Defendants' discriminatory conduct was connected to those problems and played a part in causing them to happen); 1044:21-24 (testimony of Rodriguez, consistent with Judge Lynch's conclusion in *Katt, supra,* identifying G.E.B.'s discriminatory firing of her as "one of the reasons" she terminated her next pregnancy).

614:20-615:6; 637:6-8. The main part of Dr. Robins' work over the past 30 years has been focusing on traumatized patients. Ex. 2 (Lucas Aff.) 597:22-23.

To evaluate the condition of each of the Plaintiffs, Dr. Robins administered the exact same battery of diagnostic tests used at the Austen Riggs Center, arguably the most renowned psychiatric hospital in the world, namely, the Rorschach, the MMPI-2, the Beck Depression Inventory, the Thematic Apperception Test, and the Human Figure Drawing Test. Ex. 2 (Lucas Aff.) 672:17-22; 605:1-608:24; 608:25-610:2; 613:22-615:6.

These tests can prove whether someone is "faking bad," *i.e.*, pretending to be more emotionally injured than they are. Ex. 2 (Lucas Aff.) 610:3-613:21. Dr. Robins also testified that if Plaintiffs' were lying during their clinical examinations with Dr. Robins about the cause of their condition, it would have been detected in the clinical diagnostic scales designed to detect malingering ("faking bad"). Ex. 2 (Lucas Aff.) 684:8-685:3. *See also Johnson v. BAE Systems Land & Armaments, L.P.*, 2014 WL 1714487, at *34 (N.D.Tex. 2014) ("courts routinely admit expert testimony about whether a certain individual is malingering when the testimony is based on sound academic research, clinical experience, and results of similar tests."). "Faking bad" was ruled out for each of the Plaintiffs. Ex. 2 (Lucas Aff.) 640:11-12; 657:19-24; 662:16-663:4; 673:14-23; 674:1-675:4; 675:18-676:2; 682:25-683:8.

Among other things, the Rorschach test is also helpful in detecting PTSD and cannot be faked. Ex. 2 (Lucas Aff.) 630:20-633:17; 654:21-655:5.

Each Plaintiff was diagnosed with clinically elevated levels of depression and anxiety (Ex. 2 (Lucas Aff.) 662:9-12) and long-term PTSD, *i.e.*, five years after the fact. Ex. 2 (Lucas Aff.) 683:13-684:10; 837:16-19; 667:25-668:21; 640:17-641:2; 658:22-659:2; 882:22-883:8; 1031:12-1032:6.

Dr. Robins explained why a pregnant woman would (or reasonably might) perceive discriminatory harassment and firing as a threat to her physical integrity, and that of her baby, and why she would (or reasonably might) respond to that threat with fear, helplessness and horror:

> [T]he mother's main focus is on the growing life within her, and how to protect that, how to safeguard that. ...there's no more sacred bond that we've had in our lives [than] in our start with our own mothers ... that bond Freud called it the soul. He said the soul can be shattered ... that bond can be broken. *** If you are a pregnant woman, and if your first obligation is to protect this new soul growing within you, and all of the sudden your livelihood is totaled threaten[ed], how can you provide for, how can you give, promote that life growing within you?

Ex. 2 (Lucas Aff.) 705:3-706:1; 838:15-19; 704:13-709:12.

The severity of the post-firing harms that befell these three women show why these lower-income pregnant women harassed and fired for being pregnant correctly perceived it as a threat to their physical integrity and that of the fetuses they were carrying, and would be justified experiencing a corresponding sense of fear, helplessness and horror.

Davis: When they suspected Yasminda Davis was pregnant, Defendants began harassing her, trying to induce her to quit, and setting up contrived scenarios to justify firing her a few weeks before her medical benefits were scheduled to start. Davis, who was expressly warned by Paswall not to get pregnant, was extremely frightened by such conduct because her husband's work van had just been stolen (Ex. 2 (Lucas Aff.) 390:2-12) and her family would be facing financial calamity if they fired her.

Dr. Robins diagnosed Davis as suffering from PTSD and testified that for Davis, "being fired because she was pregnant was an extreme psychosocial stressor, it was traumatic, and ... she had serious ongoing physical and psychological sequelae ... that come from that." Ex. 2

(Lucas Aff.) 684:1-10. Dr. Robins also explained how the Rorschach test and the other diagnostic tests administered to Davis corroborated certain aspects of Davis' MMPI-2 results and served as checks and balances to other aspects of Davis' MMPI-2 results. Ex. 2 (Lucas Aff.) 903:4-907:23.

Davis's family was left with no income (Ex. 2 (Lucas Aff.) 390:2-12) and Davis, whose medical insurance at G.E.B. was almost due to begin, did not have medical insurance, was denied Medicaid, and could not get prenatal care or proper medical care for her children. Ex. 2 (Lucas Aff.) 417:4-11; 418:5-9; 418:18-25. Davis was "terrified" of telling her husband that her job was gone. Ex. 2 (Lucas Aff.) 407:1-11.

Davis's family had no money to pay the rent and was evicted and blacklisted in the New York rental market (Ex. 2 (Lucas Aff.) 415:12-15; 454:5-9), and then moved to Georgia where the rent was cheaper and a job was supposed to be waiting for her husband, but the job never materialized. Ex. 2 (Lucas Aff.) 528:12-529:3; 415:21-416:8.

As often happens when critical resources are gone, the bonds of Davis's 15-year marriage (Ex. 2 (Lucas Aff.) 427:21-22) were severely strained,[12] resulting in extreme fighting, a lengthy separation, and Davis moving herself and her children into a domestic violence shelter in March 2008 (17 months after being fired from G.E.B.) after Davis's husband, for the first time in a 15-year marriage, ended up hitting her. Ex. 2 (Lucas Aff.) 526:19-527:6; 417:18-427:14.

While in the shelter Davis learned she was pregnant. Ex. 2 (Lucas Aff.) 425:9-427:2. Davis, who was raised Christian, made the "extremely difficult" decision to "terminate[] the

[12] *See, e.g., Cuevas v. Wentworth Group*, 2014 WL 4494166, at *7 (N.J.Super.A.D. 2014) ("The 'stress and the frustration' about paying bills after he was terminated also caused arguments. She filed for divorce a few months after he was fired.").

baby" (Ex. 2 (Lucas Aff.) 426:16-427:2)[13] because she was looking for jobs so she could pull her family out of the shelter and "didn't want to suffer again what happened at G.E.B" (*i.e.*, being deprived of a job needed to support her family merely because she was pregnant). Ex. 2 (Lucas Aff.) 672:1-10. Davis never told her husband about her pregnancy or that it was terminated. Ex. 2 (Lucas Aff.) 427:3-427:9.[14]

Davis could not afford a treating therapist and had no opportunity to see one. Ex. 2 (Lucas Aff.) 437:8-18. *See Transit Authority*, *supra*, 78 N.Y.2d at 215-19 (discussing how not seeing a treating therapist does not preclude finding of substantial compensatory damages). However, the severity of her injuries was objectively verified through a comprehensive battery of diagnostic tests administered by Dr. Robins. Her severe long-term depression, anxiety and PTSD have continued for many years and were evident when she cried uncontrollably during her testimony at trial (9 years after the events in question) and show no signs of ending.

Santana: As a result of being harassed and fired for being pregnant, Santana was transformed from a happy petite social butterfly into a depressed, anxious, rageful and obese social recluse. Ex. 2 (Lucas Aff.) 662:9-668:24; 183:23-187:7. Her continuing obesity nine years later was evident to all at trial.

After she was harassed and fired, but while she was still pregnant, Santana also developed hypertension and became very worried about the health of her unborn child (Ex. 2 (Lucas Aff.) 854:11-855:1; 343:17-20) and was diagnosed to a reasonably degree of psychological certainty with "Posttraumatic stress disorder with consequen[t] hypertension, high

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[13] The terminated pregnancies of Davis and Rodriguez were verified by medical records admitted at trial.

[14] *See also Lockley v. Turner*, 779 A.2d 1092, 1099, 344 N.J.Super. 1, 14 (N.J.Super.A.D. 2001) ("We decline to attribute any significance, for purposes of assessing the jury's award, to Lockley not seeking professional help to cope with his emotional distress and suffering."); *Holland v. America West Airlines*, 416 F.Supp.2d 1028, 1035 (W.D.Wash. 2006) (to same effect).

blood pressure, psycho motor retardation, slow moving and gastrointestinal symptom. [and] *** code five, extreme psycho social stressors [from] a traumatic incident with serious ongoing physical and psychological sequelae, meaning she's having physical and psychological problems because of it, and it was extremely serious the stressor." Ex. 2 (Lucas Aff.) 837:16-19; 667:25-668:21; 640:17-641:2; 658:22-659:2. With respect to the "fits of rage" characteristic of PTSD (Ex. 2 (Lucas Aff.) 663:5-6), Santana was so traumatized that many years after the fact she fantasized about seeing Defendants "tortured and sodomized" for what they did to her. Ex. 2 (Lucas Aff.) 664:13-22.

Santana has received frequent counselling from her sister, a psychologist (Ex. 2 (Lucas Aff.) 186:19-25; 320:8-10; 345:2-4), but her severe long-term depression, anxiety and PTSD have continued for many years, were evident when she cried uncontrollably on multiple occasions during her testimony at trial (9 years after the events in question), and show no signs of ending. Ex. 2 (Lucas Aff.) 656:16-657:5.

Rodriguez: Before Rodriguez was harassed and fired for being pregnant, Rodriguez and her husband, an Iraq war veteran suffering from post-combat stress (Ex. 2 (Lucas Aff.) 1036:14-24), had a very good relationship because Rodriguez had the emotional bandwidth to tend to her soldier-husband's emotional needs. Ex. 2 (Lucas Aff.) 875:5-10; 932:17-23; 930:6-16. After she was harassed and fired from G.E.B. for being pregnant, Rodriguez felt like a dagger went into her heart. Ex. 2 (Lucas Aff.) 932:4-934:9. She isolated herself and no longer had the emotional bandwidth to tend to her husband's emotional needs (Ex. 2 (Lucas Aff.) 932:4-934:9), causing her solid relationship with her husband began "breaking off in pieces". Ex. 2 (Lucas Aff.) 932:4-934:9 ("...I was just isolated. Our relationship started deteriorating little by little, little by little, piece by piece. Just breaking, my broken mirror just kept on falling, chipping

away."). Rodriguez and her husband began fighting intensely, a cycle from which they were unable to recover. Ex. 2 (Lucas Aff.) 940:1-941:15; 1044:21-24; 1051:4-1052:13; 870:11-15; 1040:5-1041:11 and 1057:21-1058:12.

In 2008, the year after she was fired from G.E.B., Rodriguez and her husband briefly reconciled, and Rodriguez became pregnant again; but what happed to her at G.E.B. caused her to be so terrified of being fired again and not being able to support her family and being pushed "over the edge" that she terminated the pregnancy. Ex. 2 (Lucas Aff.) 893:8-21.[15]

Rodriguez's marital relationship with her husband, which had become an on-again off-again relationship in the months that followed Rodriguez's termination from G.E.B., ended for good shortly after the termination of Rodriguez's pregnancy in 2008. Ex. 2 (Lucas Aff.) 1043:14-20.

After being fired Rodriguez attended therapy for one year, but had to discontinue therapy when she could not afford it. Ex. 2 (Lucas Aff.) 931:23-24; 698:13-701:10.[16] Five years after her employment with G.E.B. ended Rodriguez was diagnosed with PTSD and "severe anxiety" symptoms, including alopecia (hair loss) and gastrointestinal symptoms. Ex. 2 (Lucas Aff.) 882:22-883:8; 1031:12-1032:6. Her severe long-term depression, anxiety and PTSD have continued for many years and were evident when she cried uncontrollably during her testimony at trial (9 years after the events in question) and show no signs of ending.

POINT II

[15] Rodriguez rebutted Defendants' baseless insinuation that her husband may have been unfaithful, and that perhaps she didn't mind having an abortion. Ex. 2 (Lucas Aff.) 913:14-915:20.

[16] *See, e.g., McIntyre v. Manhattan Ford, Lincoln-Mercury, Inc.*, 175 Misc.2d 795, 800 (N.Y.Sup. 1997) ("She testified that she had to discontinue treatment when she could no longer afford the fees after she was terminated."), *aff'd in relevant part*, 256 A.D.2d 269 (1st Dep't 1998).

THE COMPENSATORY DAMAGES AWARDS ARE WARRANTED AND SHOULD NOT BE REDUCED

A. Standard of Review

"[A] trial court should ... be wary of substituting its judgment for that of a panel of fact finders whose peculiar function is the fixation of damages." *So v. Wing Tat Realty, Inc.*, 259 A.D.2d 373, 374 (1st Dep't 1999). "A reviewing court's discretionary power to interfere with damage awards should be exercised sparingly." *Douglass v. St. Joseph's Hosp.*, 246 A.D.2d 695, 697 (3d Dep't 1998).

It is unclear which standard governs this Court's review of a verdict in a NYCHRL case or how such standard should be applied. However, the verdicts in this case are fair and reasonable under any standard.

The standard for reviewing compensatory damages verdicts under the *State* (as opposed to City) Human Rights Law was set forth in *New York City Transit Authority v. State Div. of Human Rights*, 78 N.Y.2d 207 (1991). In *Transit Authority*, the Court of Appeals identified three factors to be considered in reviewing mental anguish compensatory damages awarded by the State Commissioner of Human Rights in a discrimination case: "whether the relief was reasonably related to the wrongdoing, whether the award was supported by evidence before the Commissioner, and how it compared with other awards for similar injuries." *N.Y. City Trans. Auth.*, 78 N.Y.2d at 219, 573 N.Y.S.2d 49, 577 N.E.2d 40. This standard is different than, and more favorable to plaintiffs, than the "deviates materially" standard of CPLR § 5501(c). As the Second Circuit stated in *Brady v. Wal-Mart Stores, Inc.*, 531 F.3d 127 (2d Cir. 2008):

> We believe that *Transit Authority* states the applicable law of New York. We note, moreover, that the *Transit Authority* standard is more favorable to plaintiffs than the statutory standard.

531 F.3d at 137-38.

Under federal law, by contrast, emotional distress verdicts are reviewed under an even more deferential "shocks the conscience" standard. *See, e.g., Ricci v. Key Bancshares of Maine, Inc.*, 662 F.Supp. 1132, 1141 (D.Me. 1987).

Since the "[t]he NYCHRL explicitly requires an independent liberal construction analysis in all circumstances," *Bennett v. Health Management Systems, Inc.*, 92 A.D.3d 29, 34 (1st Dep't 2011) (emphasis added), and since the NYCHRL's "uniquely broad and remedial purposes ... go beyond those of counterpart state or federal civil rights laws," *id.*, the Court should review the verdict under the more deferential "shocks the conscience" standard. However, counsel for Plaintiffs notes that this particular issue does not appear to have been addressed in any cases, and that many appellate cases appear to default to the CPLR § 5501(c) standard without discussing the issue of which standard is appropriate for reviewing a verdict issued under the NYCHRL.

If the Court declines to apply either the "shocks the conscience" standard or the *Transit Authority* standard, and applies CPLR § 5501(c)'s "deviates materially" standard instead, then, at the very least, it should assure itself "that the verdict lies beyond the pale of non-material deviation before it is rejected." *See Geressy v. Digital Equipment Corp.*, 980 F.Supp. 640, 660-62 (E.D.N.Y. 1997) (noting that it is unclear whether the "deviates materially" language of § 5501(c) should be interpreted as requiring either one or two standard deviations from the mean, and selecting "two standard deviations from the mean" as the measure for determining whether a verdict "deviates materially" under CPLR § 5501(c)). (Emphasis added).

B. Burden of Proof

The party challenging the size of a jury verdict bears the burden of proving it should be rejected. *Geressy v. Digital Equipment Corp.*, 980 F.Supp. 640, 660-62 (E.D.N.Y. 1997)

(applying New York and federal law); *Smallwood v. United Airlines, Inc.*, 728 F.2d 614, 615 n.5 (4th Cir. 1984) (the burden of limiting the remedy rests with the defendant).

C. The Nature of Plaintiffs' Injuries

As noted, "[a] victim of discrimination suffers a dehumanizing injury as real as, and often of far more severe and lasting harm than, a blow to the jaw." *Mardell v. Harleysville Life Ins. Co.*, 65 F.3d 1072, 1074 (3d Cir. 1995) (Per Curium).

The nature and severity of Plaintiffs' clinically significant depression, anxiety and PTSD was proved through expert testimony and comprehensive diagnostic testing. Critically, that proof was unrebutted, as Defendants' expert – who failed to perform any diagnostic testing – was never called to testify.

The highly detailed battery of generally accepted diagnostic tests administered by Dr. Charles Edward Robins, a recognized expert in the field of clinical psychology (Ex. 2 (Lucas Aff.) 596:7-617:20), proved that Defendants' harassment and discrimination caused each Plaintiff to suffer long-term post-traumatic stress disorder (PTSD). Ex. 2 (Lucas Aff.) 605:1-719:13; 903:4-908:20. That comprehensive diagnostic evidence eliminated the possibility that Plaintiffs were faking their condition for financial gain, and was corroborated by objective indicators as to just how traumatized Plaintiffs were after being harassed and then fired at a time in their lives when they were at their most vulnerable (*e.g.*, ruptured marriages, terminated pregnancies, hair loss, gastrointestinal problems, significant weight gain and hypertension, terrifying rage, *etc.*). Ex. 2 (Lucas Aff.) 605:1-719:13; 903:4-908:20.

As detailed below, the compensatory damages verdicts rendered in this case – $1.5 million per Plaintiff – fall well within the accepted boundaries for awards of emotional distress /

noneconomic damages awards in cases where, as here, the prevailing plaintiffs proved that they were suffering from clinically significant depression, anxiety and PTSD. Indeed, as detailed below, much higher compensatory damages verdicts have been upheld even where there was no medical or expert evidence presented, much less expert psychological evidence, that the plaintiff suffered from clinically significant depression, anxiety or PTSD.

D. The Court of Appeals' Decision in *Transit Authority*, the Objective Diagnostic Proofs of Severe Emotional Harms, and Defendants' Failure to Call Their Expert

The Court of Appeals' decision in *New York City Transit Authority v. State Div. of Human Rights*, *supra*, 78 N.Y.2d 207 (1991) makes clear that if an inflation-adjusted emotional distress award equal to $915,645 is appropriate for a plaintiff who was not fired, and who presented no expert or medical proof that she suffered from clinically significant depression, anxiety or PTSD, then an emotional distress award of $1.5 million cannot be excessive for plaintiffs who were fired, who suffered terribly after being fired, and who presented unrebutted expert testimony proving long-term suffering from clinically significant depression, anxiety and PTSD.

Defendants' failure to call the own expert severely undercuts their ability to argue otherwise. *Jordan v. Bates Advertising Holdings, Inc.*, *supra*, 11 Misc.3d 764, 771 (N.Y. Sup. Ct. 2006) (Acosta, J.) ("*Although defendant cross-examined Crawford with a report prepared by its own expert, it never called the expert to testify on the issue of damages. Thus, based on the testimony before the jury, it cannot be said that the amount of damages was not supported by the record.*"); *Ricci v. Key Bancshares of Maine, Inc.*, *supra*, 662 F.Supp. 1132, 1140-41 (D.Me. 1987) (upholding inflation-adjusted emotional distress verdict equal to $12,889,954 [originally $6 million in 1986, *see* note 1, *supra*], and much more than that if one adjusts for regional

differences between the cost of living in Maine and New York, as is warranted (*see* note 2, *supra*): "*Particularly in the absence of any contradictory expert testimony on behalf of defendants, the evidence regarding ... the emotional distress suffered by plaintiff Ricci in connection with Count X provide a reasonable basis for the jury's verdict.*") (Emphasis added).

E. Assuming, *Arguendo*, That Defendants Did Not Anticipate That Plaintiffs Would Suffer As Much As They Did, It Would Not Justify Reducing The Verdicts

Having apparently given little if any thought to the impact their harassment and discrimination would have on Plaintiffs, Defendants seem to suggest Plaintiffs' damages should be reduced because: (A) Defendants could not have been expected to have suffered as much as the comprehensive diagnostic tests prove that they did; and (B) there are cases where comparable misconduct produced a smaller quantum of harm.

Even if Defendants had requested a jury instruction to that effect (which they did not), such an instruction would have been both erroneous and unfair. As Judge Posner cogently explained in *Lancaster v. Norfolk and Western Ry. Co.*, 773 F.2d 807, 822 (7th Cir. 1985):

> The last issue relates to the judge's refusal to instruct the jury to reduce Lancaster's damages by the probability that he would have become schizophrenic even if the railroad's supervisors had not misbehaved. Lancaster points out that since the tortfeasor takes his victim as he finds him, if the victim is highly vulnerable that is the tortfeasor's bad luck; there is no discount to average damages. This is a thoroughly sensible principle, by the way. If a tortfeasor never had to pay more than the average victim's damages, victims as a class would be systematically undercompensated and tortfeasors as a class therefore systematically underdeterred, because victims with above-average injuries would get their damages cut down while victims with below-average injuries would not get an offsetting increase.

773 F.2d at 822 (emphasis added).

F. The Compensatory Damages Verdicts In This Case – $1.5 Million Per Plaintiff – Fall Within Accepted Boundaries For Awards Where The Plaintiff Proved She Was Suffering From Clinically Significant Depression, Anxiety And PTSD

Compensatory damages verdicts well above $1.5 million have been upheld even where there was no medical or expert evidence presented -- much less expert psychological evidence based on comprehensive diagnostic testing -- that the plaintiff suffered from clinically significant depression, anxiety or PTSD. *See* case cited below.

As noted at the beginning of this brief, the leading New York case, *New York City Transit Authority v. State Div. of Human Rights*, 78 N.Y.2d 207 (1991), involved a plaintiff was not even fired, and the award in that case was based solely on the plaintiff's own testimony, with no expert or medical testimony that the plaintiff suffered from clinically significant depression, anxiety or PTSD. There, the Court of Appeals reversed the Appellate Division's reduction of a 1988 emotional distress damages award equal to $915,645 when adjusted for inflation to 2015. (The award, rendered in 1988, was for $450,000, equal to $915,645 in 2015 or about $927,000 in 2016. *See* the inflation calculator at note 1, *supra*.)

If an emotional distress award equal to $915,645 is appropriate for a plaintiff who was not fired, and who presented no expert or medical proof that she suffered from clinically significant depression, anxiety or PTSD, then an award of $1.5 million cannot be considered excessive for plaintiffs who were fired, suffered terribly after being fired, and who presented unrebutted expert testimony proving that they were suffering from clinically significant depression, anxiety and PTSD.

Many other cases illustrate the point, including, but by no means limited to, the following sampling:

In *Ricci v. Key Bancshares of Maine, Inc.*, 662 F.Supp. 1132, 1140-41 (D.Me. 1987), a case alleging discriminatory termination of credit, the court upheld a 1986 emotional distress verdict of $6 million -- $12,889,954 adjusted for inflation to 2015 (*see* note 1, *supra*), *i.e.*, 860% higher than each Plaintiff's compensatory damages award in this case -- and much more than that if one adjusts for regional differences between the cost of living in Maine and New York, as is warranted. *See* note 2, *supra.*

In *Cantu v. Flanigan*, 705 F.Supp.2d 220, 231 (E.D.N.Y. 2010), the court, applying New York law, upheld an award of non-economic damages totaling $150 million – 150 times higher than each Plaintiff's compensatory damages verdict in this case -- even though there was no apparent expert or medical testimony that the plaintiff suffered from clinically significant depression, anxiety or PTSD. Although the plaintiff in *Cantu* suffered a far greater economic injury than the Plaintiffs in this case (*i.e.*, the loss of hundreds of millions of dollars in contracts), the $150 million award was for non-economic injury, and there is nothing to indicate that the very wealthy plaintiff in *Cantu* suffered non-economic harm as great as – much less greater than – the traumatized Plaintiffs in this case.

In *Osorio v. Source Enterprises, Inc.*, 2007 WL 683985, at *5 and n.3 (S.D.N.Y. 2007), a New York City Human Rights Law case, the court upheld a compensatory damages verdict rendered in 2006 of $4 million -- $4,772,602 adjusted for inflation to 2015 (*see* note 1, *supra*), *i.e.*, 320% higher than each Plaintiff's compensatory damages verdict in this case, even though there was no apparent expert or medical testimony that the plaintiff suffered from clinically significant depression, anxiety or PTSD.

In *Prozeralik v. Capital Cities Communications*, 222 A.D.2d 1020, 1021 (4th Dep't 1995), the Appellate Division, in affirming a $9.5 million verdict, affirmed an award rendered in

or about 1991 for non-economic "emotional and physical injury" in the amount of $3,500,000 million -- $6,142,317 adjusted for inflation to 2015 (*see* note 1, *supra*), *i.e.*, 430% higher than each Plaintiff's compensatory damages verdict in this case -- even though there was no apparent expert or medical testimony that the plaintiff suffered from clinically significant depression, anxiety or PTSD. *See also Cantu v. Flanigan*, 705 F.Supp.2d 220, 227 (E.D.N.Y. 2010) (observing that in *Prozeralik* the Appellate Division "uph[eld] an award of $6,000,000 for injury to plaintiff's reputation and $3,500,000 for mental suffering—in addition to a separate award of $1,500,000 for direct financial loss[.]").

In *Honzawa v. Honzawa*, 309 A.D.2d 629 (1st Dep't 2003), the plaintiff, whose assets had been wrongfully attached, testified that the litigation caused him to "*become very irritable because (he had) been very stressed about this.*" Ex. 3 (Lucas Aff.), Plaintiffs'-Respondents' Brief on Appeal in *Honzawa* at pg. 11. Justice Gammerman vacated the emotional distress award because, in response to further questioning, the plaintiff could not state that the distress was caused by the wrongful attachment as opposed to the financial difficulties caused by the litigation. *Id.* However, the First Department reinstated the verdict, rendered in 2002, for emotional distress and loss of consortium of $2,031,250 ($1,131,250 for emotional distress, and $900,000 for loss of consortium, *see* Ex. 3 (Lucas Aff.), Plaintiffs'-Respondents' Brief on Appeal in *Honzawa*, at pg. 1 -- $2,699,275 adjusted for inflation to 2015 (*see* note 1, *supra*), *i.e.*, 80% higher than each Plaintiff's compensatory damages verdict in this case -- even though there was no apparent expert or medical testimony that the plaintiff suffered from clinically significant depression, anxiety or PTSD.

In *Gallegos v. Elite Model Mgmt. Corp.*, 2004 WL 51604, at *4 (N.Y.Sup. 2004), *rev'd on other grounds*, 28 A.D.3d 50 (1st Dep't 2005), a case involving claims of failure to

accommodate, hostile work environment and retaliation, the court upheld a total "pain and suffering" verdict in 2003 of $1.1 million -- $1,427,823 adjusted for inflation to 2015 (*see* note 1, *supra*) -- where the plaintiff was ridiculed and later terminated after complaining about smoking in the workplace.

In *Vitale v. Hagen*, 132 A.D.2d 468 (1st Dep't 1987), *mod. on other grounds*, 71 NY2d 955 (1988), the First Department affirmed a $735,000 emotional distress verdict for a plaintiff who "was minimally inconvenienced" (132 AD2d 468, 472 [dissenting op.]), but was nonetheless humiliated by a malicious prosecution -- $1,639,001 adjusted for inflation to 2015 (*see* note 1, *supra*) -- even though there was no apparent expert or medical testimony that he suffered from clinically significant depression, anxiety or PTSD.

In *McIntyre v Manhattan Ford, Lincoln-Mercury*, 256 A.D.2d 269, 271 (1st Dep't 1998), the First Department affirmed a 1997 emotional distress damages verdict to the extent of $600,000 -- $888,318 adjusted for inflation to 2015 (*see* note 1, *supra*) -- even though the plaintiff in that case was "less distraught" after being fired (175 Misc.2d 795, 800 (N.Y.Sup. 1997)).

In *Gantt v. Sentry Insurance*, 1 Cal.4th 1083 (Cal. 1992), the state's highest court affirmed a compensatory damages verdict rendered in or about 1988 of $1.34 million -- $2,726,586 adjusted for inflation to 2015 (*see* note 1, *supra*), *i.e.*, 82% higher than each Plaintiff's compensatory damages verdict in this case -- even though there was no apparent expert or medical testimony that the plaintiff suffered from clinically significant depression, anxiety or PTSD.

In *Mogull v. CB Commercial Real Estate Group, Inc.*, 744 A.2d 1186, 1188, 162 N.J. 449, 452 (N.J. 2000), the state's highest court reinstated a 1996 compensatory damages verdict

for $1.5 million -- $2,294,580 adjusted for inflation to 2015 (*see* note 1, *supra*), *i.e.*, 53% higher than each Plaintiff's compensatory damages award in this case -- even though there was no apparent expert or medical testimony that the plaintiff suffered from clinically significant depression, anxiety or PTSD.

In *McNeil v. Seaton Home Health Care Services Inc.*, 1994 WL 503439, at *2 (N.D.Ala. 1994), the Alabama court upheld an award of compensatory damages of $975,000 -- $1,570,245 adjusted for inflation to 2015 (*see* note 1, *supra*), and much higher than that if one adjusts for regional differences between the cost of living in Alabama and New York, as is warranted (*Gallegos*, *supra* note 2) -- even though there was no apparent expert or medical testimony that the plaintiff suffered from clinically significant depression, anxiety or PTSD.

In *Passantino v. Johnson & Johnson Consumer Prods., Inc.*, 212 F.3d 493, 503, 513-14 (9th Cir. 2000), the appeals court affirmed an emotional distress verdict rendered in 1997 for $1 million -- $1,480,530 adjusted for inflation to 2015 (*see* note 1, *supra*) -- even though there was no apparent expert or medical testimony that the plaintiff suffered from clinically significant depression, anxiety or PTSD.

In *Snyder v. Phelps*, 533 F.Supp.2d 567, 588 (D.Md. 2008), *rev'd on other grounds*, 580 F.3d 206 (4th Cir. 2009), the court upheld a compensatory damages verdict rendered in 2008 for $2.9 million -- $3,242,086 adjusted for inflation to 2015 (*see* note 1, *supra*), *i.e.*, 220% higher than each Plaintiff's compensatory damages verdict in this case -- even though there was no apparent expert or medical testimony that the plaintiff suffered from clinically significant depression, anxiety or PTSD.

In *Gardenhire v. Housing Authority*, 101 Cal.Rptr.2d 893, 896, 85 Cal.App.4th 236, 240 (Cal.App. 2 Dist. 2000), the appeals court affirmed a 1999 award for emotional distress damages

of $1.3 million -- $1,862,450 adjusted for inflation to 2015 (*see* note 1, *supra*), *i.e.*, 36% higher than each Plaintiff's compensatory damages verdict in this case -- even though there was no apparent expert or medical testimony that the plaintiff suffered from clinically significant depression, anxiety or PTSD.

In *Steele v. Superior Home Health Care of Chattanooga, Inc.*, 1998 WL 783348, at *11 (Tenn.App. 1998), the appeals court affirmed a compensatory damages verdict rendered in or about 1997 in Tennessee for $850,000 -- $1,258,450 adjusted for inflation to 2015 (*see* note 1, *supra*) -- and much more than that if one adjusts for regional differences between the cost of living in Tennessee and New York, as is appropriate (*Gallegos*, *supra* note 2).

In *Lucas v. J.C. Penney Co., Inc.*, 1997 WL 730328, at *1 (9th Cir. 1997) (unreported), the appeals court affirmed a 1996 emotional distress verdict of $1.5 million -- $2,294,580 adjusted for inflation to 2015 (*see* note 1, *supra*), *i.e.*, 53% higher than each Plaintiff's compensatory damages award in this case -- even though there was no apparent expert or medical testimony that the plaintiff suffered from clinically significant depression, anxiety or PTSD.

In *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 426 (2003), an insurance bad faith action, the Supreme Court confirmed that "the Campbells were awarded $1 million [in 1984] for a year and a half of emotional distress" -- $2,317,986 adjusted for inflation to 2015 (*see* note 1, *supra*), and much more than that if one adjusts for regional differences between the cost of living in Utah and New York, as is warranted (*Gallegos, supra* note 2) -- even though there was no apparent expert or medical testimony that the plaintiff suffered from clinically significant depression, anxiety or PTSD.

In *Sommer v. Gabor*, 40 Cal.App.4th 1455, 1470-1471 (1995), a defamation case, the appeals court affirmed an award rendered in or about 1994 for noneconomic damages of $2 million -- $3,221,015 adjusted for inflation to 2015 (*see* note 1, *supra*), *i.e.*, 210% higher than each Plaintiff's compensatory damages verdict in this case -- even though there was no apparent expert or medical testimony that the plaintiff suffered from clinically significant depression, anxiety or PTSD.

In *Gagliardo v. Connaught Laboratories, Inc.*, 311 F.3d 565, 574 (3d Cir. 2002), the appeals court affirmed an emotional distress verdict rendered in 2000 of $1.55 million -- $2,162,559 adjusted for inflation to 2015 (*see* note 1, *supra*), *i.e.*, 44% higher than each Plaintiff's compensatory damages award in this case -- even though there was no apparent expert or medical testimony that the plaintiff suffered from clinically significant depression, anxiety or PTSD.

In *Pollard v. E.I. DuPont De Nemours, Inc.*, 338 F.Supp.2d 865, 884 (W.D. Tenn. 2003), *aff'd*, 412 F.3d 657, 666 (6th Cir. 2005), the courts upheld a compensatory damages verdict in 2003 of $1,250,000 -- $1,622,526 adjusted for inflation to 2015 (*see* note 1, *supra*), and much more than that if one adjusts for regional differences between the cost of living in Tennessee and New York, as is warranted (*Gallegos, supra* note 2).

In *Watson v. Department of Rehabilitation*, 212 Cal.App.3d 1271, 1294 (Cal.App. 2 Dist. 1989), the appeals court affirmed a compensatory damages verdict rendered in or about 1987 of $1,102,000 -- $2,341,745 adjusted for inflation to 2015 (*see* note 1, *supra*), *i.e.*, 56% higher than each Plaintiff's compensatory damages award in this case.

In *Capps v. Nexion Health at Southwoods, Inc.*, 349 S.W.3d 849, 870 (Texas App. 2011), the appeals court affirmed a compensatory damages verdict rendered in or about 2009 of

$1,335,000 -- $1,491,115 adjusted for inflation to 2015 (*see* note 1, *supra*), and much more than that if one adjusts for regional differences between the cost of living in Texas and New York, as is warranted (*Gallegos, supra* note 2) -- even though there was no apparent expert or medical testimony that the plaintiff suffered from clinically significant depression, anxiety or PTSD.

In *Anderson v. American Airlines, Inc.*, 2008 WL 4816620, at **5-6 (N.D.Cal. 2008), *aff'd* 352 Fed.Appx. 182, 183, 2009 WL 3698566 (9th Cir. 2009), the courts upheld an emotional distress verdict of $1 million -- $1,117,961 adjusted for inflation to 2015 (*see* note 1, *supra*) -- even though there was no apparent expert or medical testimony that the plaintiff suffered from clinically significant depression, anxiety or PTSD.

In *Harper v. Metropolitan Dist. Com'n*, 134 F.Supp.2d 470, 472, 490 (D.Conn. 2001), the court entered judgment on jury's compensatory damages verdict rendered in 2000 of $1.6 million -- $2,232,318 adjusted for inflation to 2015 (*see* note 1, *supra*), *i.e.*, 49% higher than each Plaintiff's compensatory damages verdict in this case.

In *Roby v. McKesson Corp.*, 219 P.3d 749, 769, 101 Cal.Rptr.3d 773, 797, 47 Cal.4th 686, 718 (Cal. 2009), the state's highest court affirmed an emotional distress damages verdict rendered in 2004 of $800,000 -- $1,019,260 adjusted for inflation to 2015 (*see* note 1, *supra*).

In *Dillon v. Bailey*, 45 F.Supp.2d 167, 169 (D.Conn. 1999), a First Amendment political speech case, the court upheld a compensatory damages award rendered in 1998 totaling $1.2 million -- $1,746,896 adjusted for inflation to 2015 (*see* note 1, *supra*) -- even though there was no apparent expert or medical testimony that the plaintiff suffered from clinically significant depression, anxiety or PTSD.

In *Hope v. California Youth Authority,* 134 Cal.App.4th 577, 595 (2005), a sexual orientation harassment case, the appeals court affirmed a 2003 verdict of noneconomic damages of $1 million -- $1,298,021 adjusted for inflation to 2015 (*see* note 1, *supra*).

In *Clark v. Claremont University Center*, 6 Cal.App.4th 639, 643 (Cal.App. 2 Dist. 1992), the appeals court affirmed a 1990 verdict for compensatory damages of $1 million -- $1,862,109 adjusted for inflation to 2015 (*see* note 1, *supra*), *i.e.*, 24% higher than each Plaintiff's compensatory damages award in this case -- even though there was no apparent expert or medical testimony that the plaintiff suffered from clinically significant depression, anxiety or PTSD.

In *Lockley v. Turner*, 779 A.2d 1092, 1099, 344 N.J.Super. 1, 14 (N.J.Super.A.D. 2001), the appeals court affirmed an compensatory damages verdict rendered in or about 1998 of $750,000 -- $1,091,810 adjusted for inflation to 2015 (*see* note 1, *supra*) -- even though there was no apparent expert or medical testimony that the plaintiff suffered from clinically significant depression, anxiety or PTSD.

In *Forbes v. ABM Industries, Inc.*, 2005 WL 914836, at *10 (Wash.App. Div. 3 2005), the appeals court affirmed an emotional distress verdict rendered in or about 2003 of $1,625,975 -- $2,110,550 adjusted for inflation to 2015 (*see* note 1, *supra*), *i.e.*, 41% higher than each Plaintiff's compensatory damages award in this case -- even though there was no apparent expert or medical testimony that the plaintiff suffered from clinically significant depression, anxiety or PTSD.

In *Rosario-Mendez v. Hewlett Packard Caribe BV*, 638 F.Supp.2d 205, 228 (D.Puerto Rico 2009), the court upheld a compensatory damages award of $1.5 million -- $1,675,410 adjusted for inflation to 2015 (*see* note 1, *supra*), and much more than that if one adjusts for

regional differences between the cost of living in Puerto Rico and New York, as is warranted (*Gallegos*, *supra* note 2) -- even though there was no apparent expert or medical testimony that the plaintiff suffered from clinically significant depression, anxiety or PTSD.

In *Jenkins v. American Red Cross,* 141 Mich.App. 785, 798–99, 369 N.W.2d 223, 230 (1985), the appeals court affirmed a verdict rendered in or about 1983 that included $500,000 for non-economic damages for "humiliation, embarrassment, outrage, disappointment and other forms of mental anguish which flow from the discrimination" -- $1,202,930 adjusted for inflation to 2015 (*see* note 1, *supra*) -- even though there was no apparent expert or medical testimony that the plaintiff suffered from clinically significant depression, anxiety or PTSD.

In *Lockley v. State of New Jersey Dept. of Corrections*, 828 A.2d 869, 873, 177 N.J. 413, 419 (2003), the state's highest court affirmed an emotional distress verdict rendered in 1999 of $750,000 -- $1,074,491 adjusted for inflation to 2015 (*see* note 1, *supra*) -- "[d]espite a lack of expert testimony regarding Lockley's alleged emotional distress[.]"

In *Mehlman v. Mobil Oil Corp.,* 153 N.J. 163, 178, 707 A.2d 1000 (1998), the Court sustained an award of $875,000 -- $1,338,505 adjusted for inflation to 2015 (*see* note 1, *supra*) -- even though there was no apparent expert or medical testimony that the plaintiff suffered from clinically significant depression, anxiety or PTSD.

In *Munoz v. Sociedad Espanola De Auxilio Mutuo y Beneficiencia De Puerto Rico*, 671 F.3d 49, 61 (1st Cir. 2012), the appeals court affirmed an emotional distress verdict rendered in or about 2010 of $1,000,000 -- $1,087,349 adjusted for inflation to 2015 (*see* note 1, *supra*), and much more than that if one adjusts for regional differences between the cost of living in Puerto Rico and New York, as is warranted (*Gallegos*, *supra* note 2) -- even though there was no

apparent expert or medical testimony that the plaintiff suffered from clinically significant depression, anxiety or PTSD.

In *Bihun v. AT&T Information Systems, Inc.*, 16 Cal.Rptr.2d 787, 797-98, 13 Cal.App.4th 976, 996-97, n.8 (Cal.App. 2 Dist. 1993), the appeals court affirmed an emotional distress damages verdict rendered in 1990 of $662,000 -- $1,232,716 adjusted for inflation to 2015 (*see* note 1, *supra*).

POINT III

THE PUNITIVE DAMAGES AWARDED ARE REASONABLE AND SHOULD NOT BE DISTURBED

The jury in this multi-plaintiff case awarded punitive damages equal to $500,000 per Plaintiff, or $1.5 million collectively. The punitive damages awarded were not a multiple of the total damages award, as is typical, but merely a fraction (less than 1/3) of the total damages awarded. As detailed below, the punitive damages award is proper, and, all things considered, modest, in light of the serial nature or the discrimination at issue, Defendants' utter lack of remorse, and the compelling need to deter similar misconduct against victims of modest backgrounds.

A. Standard Of Review

As then-Judge Sotomayor observed, the correct state law standard for reviewing punitive damage awards is not set forth in CPLR § 5501(c). *Greenbaum v. Handelsbanken*, 67 F.Supp.2d 228, 267 (S.D.N.Y. 1999) (Sotomayor, J.). Rather, under New York law, "the amount of exemplary damages awarded by a jury should not be reduced by a court unless it is so grossly excessive 'as to show by its very exorbitancy that it was actuated by passion.' " *Id.* (citations

omitted); *Salemi v. Gloria's Tribeca Inc.*, 115 A.D.3d 569 (1st Dep't 2014) (applying "grossly excessive" standard).

B. Factors to Consider

"Perhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 575 (1996). Defendants intentionally harassed, discriminated against, and set up each of these women to be fired at a time in their lives when they were at their most vulnerable. The punitive damages award is perfectly reasonable, if not somewhat modest in light of the serial nature of the harassment and discrimination at issue.

Moreover, if each Plaintiff had brought a proceeding before the New York City Human Rights Commission, then Defendants might have been fined $750,000 or more in connection with each Plaintiff's administrative complaint, or $2,250,000 or more collectively, *i.e.*, $250,000 in connection with each Plaintiff's administrative complaint for illegal and discriminatory questions and comments during the job interview process (N.Y.C. Admin. Code § 8–126(a)), $250,000 in connection with each Plaintiff's administrative complaint for discriminatory mistreatment during the employment relationship (N.Y.C. Admin. Code § 8–126(a)), and $250,000 in connection with each Plaintiff's administrative complaint for illegally and discriminatorily terminating them. N.Y.C. Admin. Code § 8–126(a).

Further, Defendants do not argue that the award should be reduced based on their net worth. Nor could they, because "it is the defendant's burden to show that his financial circumstances warrant a limitation of the award." *Tyco Int'l Ltd. v. Walsh*, 02-CV-4633 (DLC), 2010 WL 3000179 (S.D.N.Y. July 30, 2010) (citing cases), and Defendants never introduced any

evidence of their net worth, and never argued that financial circumstances warranted a lower punitive damages award, so there is no basis for speculating about whether or not a lower award might have been rendered or upheld if Defendants had introduced such evidence.

C. Other Much Higher Awards

In *McIntyre v Manhattan Ford, Lincoln-Mercury*, 256 A.D.2d 269, 271 (1st Dep't 1998), the First Department affirmed a 1997 punitive damages verdict to the extent of $1.5 million -- $2,220,794 adjusted for inflation to 2015 (*see* note 1, *supra*), *i.e.*, 450% higher than the $500,000 per plaintiff award in this case.

In *Salemi v. Gloria's Tribeca Inc.*, 115 A.D.3d 569 (1st Dep't 2014), the First Department affirmed a 2012 punitive damages verdict of $1.2 million -- $1,248,602 adjusted for inflation to 2015 (*see* note 1, *supra*), *i.e.*, 250% higher than the $500,000 per plaintiff award in this case.

In *Greenbaum v. Handelsbanken*, 67 F.Supp.2d 228, 272 (S.D.N.Y. 1999) (Sotomayor, C.J.), then-Judge Sotomayor upheld a 1997 punitive damages verdict of $1.25 million -- $1,850,662 adjusted for inflation to 2015 (*see* note 1, *supra*), *i.e.*, 370% higher than the $500,000 per plaintiff award in this case.

In *Gallegos v. Elite Model Mgmt. Corp.*, 2004 WL 51604, at *4 (N.Y.Sup. 2004), *rev'd on other grounds*, 28 A.D.3d 50 (1st Dep't 2005), the court upheld a 2003 punitive damages verdict of $2.6 million -- $3,374,855 adjusted for inflation to 2015 (*see* note 1, *supra*), *i.e.*, 675% higher than the $500,000 per plaintiff award in this case.

In *Chopra v. General Elec. Co.*, 527 F.Supp.2d 230, 246 (D.Conn. 2007), the court remitted a 2006 punitive damages verdict to $5 million -- $5,965,762 adjusted for inflation to

2015 (*see* note 1, *supra*), *i.e.*, nearly 12 times higher than the $500,000 per plaintiff in punitive damages awarded in this case.

In *Bogle v. McClure*, 332 F.3d 1347 (11th Cir. 2003), the appeals court affirmed a punitive damages award on behalf of seven plaintiffs in a reverse discrimination case tried in or about 2001 of $13.3 million -- $17,948,274 adjusted for inflation to 2015 (*see* note 1, *supra*), *i.e.*, a per-plaintiff award over 500% higher than the $500,000 per plaintiff in punitive damages awarded in this case -- and much more than that if one adjusts for regional differences between the cost of living in Georgia and New York, as is warranted (*Gallegos, supra* note 2).

In *McNeil v. Seaton Home Health Care Services Inc.*, 1994 WL 503439, at *2 (N.D.Ala. 1994), the court rendered a punitive damages award of $2,925,000 -- $4,710,735 adjusted for inflation to 2015 (*see* note 1, *supra*) -- *i.e.*, 940% higher than the $500,000 per plaintiff in punitive damages awarded in this case -- and much more than that if one adjusts for regional differences in cost of living between Alabama and New York, as is warranted (*Gallegos, supra* note 2).

In *Weeks v. Baker & McKenzie*, 74 Cal.Rptr.2d 510, 534, 63 Cal.App.4th 1128, 1166 (Cal.App. 1 Dist. 1998), the appeals court affirmed a punitive damages verdict rendered in or about 1996 for $3.5 million -- $5,354,020 adjusted for inflation to 2015 (*see* note 1, *supra*), *i.e.*, 10.7 times higher than the $500,000 per plaintiff in punitive damages awarded in this case.

In *Zhang v. Am. Gem Seafoods, Inc.*, 339 F.3d 1020, 1043-44 (9th Cir. 2003), the appeals court affirmed a punitive damages verdict rendered in or about 2001 for $2.6 million -- $3,508,685 adjusted for inflation to 2015 (*see* note 1, *supra*), *i.e.*, 700% higher than the $500,000 per plaintiff in punitive damages awarded in this case.

In *Holland v. Schwan's Home Service, Inc.*, 992 N.E.2d 43, 94, 372 Ill.Dec. 504, 555, 2013 IL App (5th) 110560, ¶ 257 (Ill.App. 5 Dist. 2013), the appeals court affirmed a punitive damages verdict rendered in or about 2011 for $3.6 million -- $3,856,771 adjusted for inflation to 2015 (*see* note 1, *supra*), *i.e.*, 770% times higher than the $500,000 per plaintiff in punitive damages awarded in this case.

In *Lynn v. TNT Logistics North America Inc.*, 275 S.W.3d 304, 312 (Mo.App. W.D. 2008), the appeals court vacated the trial court's reduction of punitive damages verdict rendered in or about 2007, and awarded plaintiff's punitive damages at $3.75 million, *i.e.*, $4,363,454 adjusted for inflation to 2015 (*see* note 1, *supra*) -- *i.e.*, 875% higher than the $500,000 per plaintiff in punitive damages awarded in this case -- and much more than that if one adjusts for regional differences between the cost of living in Missouri and New York, as is warranted (*Gallegos, supra* note 2).

In *Lambert v. Ackerly*, 180 F.3d 997, 1101 and n. 15 (9th Cir. 1999), the appeals court, in a six-plaintiff case where the jury verdict was rendered in about 1996, affirmed a remitted punitive damages award of $4,182,000 million -- $6,397,288 adjusted for inflation to 2015 (*see* note 1, *supra*), *i.e.*, a per-plaintiff award 12.4 times higher than the $500,000 per plaintiff in punitive damages awarded in this case.

In *Blount v. Stroud*, 915 N.E.2d 925, 938-43, 333 Ill.Dec. 854, 867-72, 395 Ill.App.3d 8, 20-27 (Ill.App. 1 Dist. 2009), even though the compensatory damages award was just $25,000, the appeals court affirmed a punitive damages verdict rendered in or about 2006 of $2.8 million -- $3,340,821 adjusted for inflation to 2015 (see note 1, supra) -- *i.e.*, 670% higher than the $500,000 per plaintiff in punitive damages awarded in this case.

In *Swinton v. Potomac Corp.*, 270 F.3d 794, 817 (9th Cir. 2001), the appeals court affirmed a punitive damages verdict rendered in or about 1999 of $1 million -- $1,432,654 adjusted for inflation to 2015 (*see* note 1, *supra*) -- *i.e.*, almost 3 times higher than the $500,000 per plaintiff in punitive damages awarded in this case.

In *Yedidag v. Roswell Clinic Corp.*, 314 P.3d 243, 253 (N.M.App. 2013), *aff'd* 346 P.3d 1136, 1154 (N.M. 2015), the state high court affirmed a punitive damages award on a verdict rendered in or about 2011 of $3 million -- $3,213,976 adjusted for inflation to 2015 (*see* note 1, *supra*) -- *i.e.*, 640% higher than the $500,000 per plaintiff in punitive damages awarded in this case -- and much more than that if one adjusts for regional differences between the cost of living in New Mexico and New York, as is warranted (*Gallegos, supra* note 2).

In *Steffens v. Regus Group, PLC*, 2013 WL 4499112, at *1 (S.D.Cal. 2013), the court upheld a punitive damages award of $3.5 million -- *i.e.*, 700% higher than the $500,000 per plaintiff in punitive damages awarded in this case.

In *Vandevender v. Sheetz, Inc.*, 490 S.E.2d 678, 694, 200 W.Va. 591, 607 (W.Va. 1997), the state high court affirmed a punitive damages verdict rendered in 1995 in the subsequently remitted amount of $2,232,740 -- $3,502,165 adjusted for inflation to 2015 (*see* note 1, *supra*), *i.e.*, 700% higher than the $500,000 per plaintiff in punitive damages awarded in this case -- and much more than that if one adjusts for regional differences between the cost of living in West Virginia and New York, as is warranted (*Gallegos, supra* note 2). The conduct in that single-plaintiff case was nowhere near as reprehensible as the intentional and calculated misconduct at issue in this case. In justifying reduction of punitive damages award from $2.7 million to $2,232,740, the state high court in that case stated:

> Because the record in this case lacks evidence that Sheetz' conduct towards Appellee with regard to the unlawful termination/failure to rehire

> claims was prompted by malice or an intent to cause her specific harm and because the evidence on these claims similarly fails to demonstrate fraud, trickery, or deceit on Sheetz' part, we cannot uphold the punitive to compensatory ratio of seven to one under our ruling in syllabus point fifteen of *TXO*. Sheetz' conduct on these claims falls into a category of reckless disregard of Appellee's rights, rather than malice committed towards her.

Id., 490 S.E.2d at 693-94, 200 W.Va. at 606-07 (citations omitted).

In *Pollard v. E.I. DuPont De Nemours, Inc.*, 412 F.3d 657, 668 (6th Cir. 2005), the appeals court affirmed a punitive damages verdict rendered in 2003 of $2.5 million -- $3,245,053 adjusted for inflation to 2015 (*see* note 1, *supra*), *i.e.*, 650% higher than the $500,000 per plaintiff in punitive damages awarded in this case -- and much more than that if one adjusts for regional differences between the cost of living in Tennessee and New York, as is warranted (*Gallegos, supra* note 2).

In *Littell v. Allstate Ins. Co.*, 177 P.3d 1080, 1095, 143 N.M. 506, 521 (N.M.App. 2007), the appeals court affirmed a punitive damages verdict rendered in or about 2005 of $1 million -- $1,233,904 adjusted for inflation to 2015 (*see* note 1, *supra*), *i.e.*, almost 250% higher than the $500,000 per plaintiff in punitive damages awarded in this case -- and much higher than that if one adjusts for regional differences between the cost of living in New Mexico and New York, as is warranted (*Gallegos, supra* note 2).

In *Dixon v. International Broth. of Police Officers*, 504 F.3d 73 (1st Cir. 2007), the appeals court affirmed a punitive damages verdict rendered in 2005 of $1,027,501 (*see* 434 F.Supp.2d 73, 76 (D.Mass. 2006)) -- $1,267,838 adjusted for inflation to 2015 (*see* note 1, *supra*), *i.e.*, 250% higher than the $500,000 per plaintiff in punitive damages awarded in this case.

In *Baker v. National State Bank*, 353 N.J.Super. 145 (N.J.Super.A.D. 2002), the appeals court, in a two-plaintiff case where the jury verdict was rendered in or about 1997, affirmed a remitted punitive damages verdict of $1.8 million -- $2,664,953 adjusted for inflation to 2015 (*see* note 1, *supra*), *i.e.*, a per-plaintiff award 280% higher than the $500,000 per plaintiff in punitive damages awarded in this case.

In *Coates v. Wal-Mart Stores, Inc.*, 127 N.M. 47 (N.M. 1999), the state high court affirmed, in a two-plaintiff case, a combined punitive damages award on verdict rendered in or about 1997 of $1.755 million -- $2,598,330 adjusted for inflation to 2015 (*see* note 1, *supra*), *i.e.*, a per plaintiff award 270% higher than the $500,000 per plaintiff in punitive damages awarded in this case -- and much more than that if one adjusts for regional differences between the cost of living in New Mexico and New York, as is warranted (*Gallegos, supra* note 2).

In *Ellison v. O'Reilly Automotive Stores, Inc.*, 463 S.W.3d 426, 440 (Mo.App. W.D. 2015), the appeals court affirmed a punitive damages award of $2 million -- *i.e.*, 400% higher than the $500,000 per plaintiff in punitive damages awarded in this case -- and much more than that if one adjusts for regional differences between the cost of living in Missouri and New York, as is warranted (*Gallegos, supra* note 2).

In *Dillon v. Bailey*, 45 F.Supp.2d 167, 169 (D.Conn. 1999), a First Amendment case, the court upheld a 1998 punitive damages award of $1.5 million -- $2,183,621 adjusted for inflation to 2015 (*see* note 1, *supra*), *i.e.*, 430% higher than the $500,000 per plaintiff in punitive damages awarded in this case

In *Walls v. MiraCorp, Inc.*, 2011 WL 1636930, at *7 (D.Kan. 2011), the court upheld a punitive damages award of $2,014,000 -- $2,157,649 adjusted for inflation to 2015 (*see* note 1, *supra*), *i.e.*, 430% higher than the $500,000 per plaintiff in punitive damages awarded in this

case -- and much more than that if one adjusts for regional differences between the cost of living in Kansas and New York, as is warranted (*Gallegos, supra* note 2).

In *Hardeman v. City of Albuquerque*, 377 F.3d 1106, 1123 (10th Cir. 2004), the appeals court affirmed a post-remittitur punitive damages award on a verdict rendered in or about 2003 on three claims totaling $1,875,000 collectively -- $2,433,789 adjusted for inflation to 2015 (*see* note 1, *supra*), *i.e.*, 480% higher than the $500,000 per plaintiff in punitive damages awarded in this case -- and much more than that if one adjusts for regional differences between the cost of living in New Mexico and New York, as is warranted (*Gallegos, supra* note 2).

In *Hall v. Consolidated Freightways of Delaware*, 337 F.3d 669 (6th Cir. 2003), the appeals court reinstated a punitive damages verdict rendered in 2000 for $750,000 -- $1,046,399 adjusted for inflation to 2015 (*see* note 1, *supra*), *i.e.*, over 200% higher than the $500,000 per plaintiff in punitive damages awarded in this case -- and more than that if one adjusts for regional differences in cost of living between Ohio and New York, as is warranted (*Gallegos, supra* note 2).

In *Howard v. City of Kansas City*, 332 S.W.3d 772, 778 (Mo. 2011) (*En Banc*), the state's highest court reinstated March 2008 punitive damages verdict of $1.5 million -- $1,676,941 adjusted for inflation to 2015 (*see* note 1, *supra*), *i.e.*, 330% higher than the $500,000 per plaintiff in punitive damages awarded in this case -- and much more than that if one adjusts for regional differences in cost of living between Missouri and New York, as is warranted (*Gallegos, supra* note 2).

In *Snyder v. Phelps*, 533 F.Supp.2d 567, 591 (D.Md. 2008), *rev'd on other grounds*, 580 F.3d 206 (4th Cir. 2009), the court remitted a punitive damages award to $2.1 million --

$2,347,718 adjusted for inflation to 2015 (*see* note 1, *supra*), *i.e.*, 470% higher than the $500,000 per plaintiff in punitive damages awarded in this case.

In *Laughinghouse v. Risser*, 786 F.Supp. 920 (D.Kan. 1992), the court upheld a 1991 punitive damages verdict of $600,000 -- $1,021,662 adjusted for inflation to 2015 (*see* note 1, *supra*), *i.e.*, 200% higher than the $500,000 per plaintiff in punitive damages awarded in this case -- and much more than that if one adjusts for regional differences between the cost of living in Kansas and New York, as is warranted (*Gallegos, supra* note 2).

In *Southwest Forest Industries, Inc. v. Sutton*, 868 F.2d 352 (10th Cir. 1989), the appeals court affirmed a 1985 punitive damages award of $1 million - $2,229,934 adjusted for inflation to 2015 (*see* note 1, *supra*), *i.e.*, 440% higher than the $500,000 per plaintiff in punitive damages awarded in this case -- and much more than that if one adjusts for regional differences between the cost of living in Kansas and New York, as is warranted (*Gallegos, supra* note 2).

In *Green v. Laibco, LLC*, 121 Cal.Rptr.3d 415, 419, 192 Cal.App.4th 441, 446 (Cal.App. 2 Dist. 2011), the appeals court affirmed a punitive damages verdict rendered in 2008 of $1,237,086 million -- $1,383,014 adjusted for inflation to 2015 (*see* note 1, *supra*), *i.e.*, 280% higher than the $500,000 per plaintiff in punitive damages awarded in this case.

In *E.E.O.C. v. Federal Express Corp.*, 537 F.Supp.2d 700, 718 (M.D.Pa. 2005), the court upheld a punitive damages verdict rendered in 2004 of $1.25 million -- $1,592,594 adjusted for inflation to 2015 (*see* note 1, *supra*), *i.e.*, 320% higher than the $500,000 per plaintiff in punitive damages awarded in this case.

In *Weaver v. African Methodist Episcopal Church, Inc.*, 54 S.W.3d 575, 589 (Mo.Ct.App.2001), the appeals court upheld a punitive damages award rendered in or about 2000 of $4 million -- $5,580,796 adjusted for inflation to 2015 (*see* note 1, *supra*), *i.e.*, 920% higher

than the $500,000 per plaintiff in punitive damages awarded in this case -- where defendant's grabbing of the victim's breasts "was merely the culmination of a long history of far worse verbal and physical sexual harassment ...."

In *Haddad v. Wal-Mart Stores, Inc.*, 914 N.E.2d 59, 74, 455 Mass. 91, 109 (Mass. 2009), the state's highest court reinstated a punitive damages verdict rendered in 2007 of $1 million -- $1,163,588, *i.e.*, 230% higher than the $500,000 per plaintiff in punitive damages awarded in this case.

In *Shank v. CRST Van Expedited, Inc.*, 2015 WL 176628, at **1, 18 (Cal.App. 4 Dist. 2015), the appeals court reinstated a $1.17 million punitive damages verdict, *i.e.*, 230% higher than the $500,000 per plaintiff in punitive damages awarded in this case.

In *Hampton v. Dillard Dept. Stores, Inc.*, 247 F.3d 1091, 1117 (10th Cir. 2001), the appeals court affirmed a punitive damages verdict rendered in or about 1999 for $1.1 million -- $1,575,919 adjusted for inflation to 2015 (*see* note 1, *supra*), *i.e.*, 310% higher than the $500,000 per plaintiff in punitive damages awarded in this case -- and much more than that if one adjusts for regional differences between the cost of living in Kansas and New York, as is warranted (*Gallegos, supra* note 2). The *Hampton* Court confirmed that "where the injury is primarily personal, a greater ratio [than 10:1 punitive damages to compensatory damages] may be appropriate." *Id.*

POINT IV

THE COURT SHOULD AWARD ATTORNEY'S FEES TO PLAINTIFFS

A prevailing plaintiff may be awarded reasonable attorneys' fees and costs under the NYCHRL. N.Y.C. Admin. Code § 8–502(g). This fee-shifting provision is vital to the NYCHRL's mission to eradicate discrimination because it is often hard for lower-income discrimination victims to find qualified counsel to aggressively and tirelessly represent them.

This difficulty exists because, *inter alia*: **(A)** lower wage scales translate into lower recoveries of back pay and front pay, making the case less attractive to counsel; **(B)** due to crushing life circumstances, lower-income discrimination victims often do not have the luxury of seeing a therapist, which means that an attorney seeking to prove the damages of a plaintiff who has been significantly harmed may feel constrained to underwrite the cost of comprehensive diagnostic testing and analysis by a highly-trained clinical psychologist; and **(C)** lower-income discrimination victims are often employed by smaller entities that may arrange to make themselves insolvent if, as and when a judgment is entered.

Not surprisingly, the Plaintiffs in this case were unsuccessful in their efforts to find competent counsel willing to take their case. Accordingly, they went to the Legal Referral Service sponsored by The Association of the Bar of the City of New York and the New York County Lawyers' Association (LRS). LRS referred them to Sack and Lucas.

Lucas and Sack have spent eight years thus far seeking justice for Yasminda Davis, Marlena Santana and Melissa Rodriguez, culminating in a month-long trial, the outcome of which was highly successful.

A. Experience and Competence of Counsel

Scott A. Lucas and Steven M. Sack are highly experienced employment lawyers with over 20 and 35 years of practice, respectively.

"Due to their expertise as trial attorneys, and their exemplary practice management skills and high level of communication and customer service to clients," Lucas and Sack have been tapped by LRS's Executive Director to help develop and implement training modules -- a set of proposed "best practices" for LRS panel members to follow to ensure that clients are well-informed throughout the process of resolving their matters, and that LRS panel members strive to follow a high level of case management protocols. *See* Lucas Aff., Ex. 4 (Affidavit of LRS Executive Director George D. Wolff).

Lucas and Sack successfully litigated the landmark case of *Samiento, et al. v. World Yacht, Inc., et al.*, 10 N.Y.3d 70 (2008). Prior to *Samiento*, restaurants and banquet operators in ever-increasing numbers throughout the State were keeping the percentage-based "service charge" added to the bill in place of the tip, instead of distributing those monies to the wait staff. Unfortunately, the banquet operators were armed with case law and administrative opinions that were said to justify such unscrupulous behavior.

Lucas and Sack took the case recognizing that they would need to make it to the Court of Appeals in order to win. The Court of Appeals' decision in *Samiento* made it much harder for unscrupulous employers to steal gratuities from wait staff employees. The case generated widespread media attention and ushered in substantial changes throughout the State's restaurant and banquet industry.

The holding of *Samiento* was later codified in a set of State-wide regulations (contained within Part 146 of Title 12 of New York's Codes Rules and Regulations), providing protection to tens of thousands of direct service employees throughout the State. In his retirement interview with the New York Law Journal, Allen Charne, the former executive director of the New York City Bar Legal Referral Service (LRS), talked about how LRS received over 2.25 million calls during his tenure. When asked, "*Any high-profile or significant cases that started with a call to the service?*," Mr. Charne replied:

> An LRS referral ended the widespread practice in New York of restaurant employers pocketing 'service charges' that should be paid to the wait staff. The LRS panel members took the case even though the practice seemed to be legal under existing appellate law. After a loss at the trial court and 5-0 dismissal by the Appellate Division, the Court of Appeals in *Samiento v. World Yacht,* 10 N.Y.3d 70 (2008), unanimously reinstated the wait staff's Labor Law claims. The holding effectively abolished the practice of retaining such charges instead of distributing them to wait staff.

New York Law Journal, December 12, 2013.

Lucas also litigated and tried the case of *Brown v. Suggs*, Index No. 605492-00 (New York Country Supreme Court, Nov. 2007), the verdict of which was discussed in the New York Times, the American Association of Justice's Law Reporter, and New York Magazine. The *Brown v. Suggs* trial followed an extraordinarily difficult 7-year litigation, including four separate trips to the Appellate Division, culminating in a $2.6+ million jury verdict (in a single-plaintiff case) and a separate finding of punitive damages liability.

Lucas, with Sack assisting him, has also been certified as class counsel in three employment law cases, each of which resulted in class-wide recoveries. In one of those cases, *Xia v. BYO, Co. (USA) Ltd.*, 08-cv-4415 (S.D.N.Y. 2008), Lucas and Sack counseled the class of restaurant workers *not* to accept the Labor Department's conclusion as to what the Company's

employees were owed; the case ultimately settled for approximately 10 times as much as the Labor Department thought was owed.

Another of those cases, *Breland v. Zakarian*, 08-cv-6120 (S.D.N.Y. 2008), resulted in a class-wide settlement on behalf of 165 restaurant workers with several of the defendants, followed by continued litigation against the main defendant. When the main defendant filed for bankruptcy in the Connecticut Bankruptcy Court, Lucas moved to be admitted to the Connecticut Bankruptcy Court *pro have* vice and then moved to have the automatic stay lifted. In an apparent ruling of first impression, the Bankruptcy Court granted the motion to lift the automatic stay on the ground that the liquidated damages remedies under NYLL §§ 663(1) and 198(1-a) require a showing of willfulness sufficient to render Defendants' conduct "willful" and "malicious" under Section 523(a)(6) of the Bankruptcy Code, and lifted the automatic stay. After the automatic stay was lifted, the main Defendant agreed to settle, thus resulting in a second class-wide settlement.

As for Mr. Sack, he not only is an experienced employment law practitioner, but has been repeatedly recognized as an expert, and has testified in court numerous times over the past 20+ years as an expert on the subject of employment disputes and industry practices. Mr. Sack is also the author of 20 legal books, including *The Employee Rights Handbook*, *Getting Fired* and *The Working Woman's Legal Survival Guide*. The latest edition of *The Employee Rights Handbook* is 620 pages, and has already been named the winner of the USA Book News National Best Books 2010 award in the category of Business Reference.

B. The Hourly Rate Requested

Reasonable hourly rates are determined by reference to, *inter alia*, fees in the community in which the action is pending and to prevailing market rates for attorneys of similar expertise providing comparable services. *Gierlinger v. Gleason,* 160 F.3d 858, 882 (2d Cir.1998).

Coupled with Plaintiffs' Counsel's level of experience, the accompanying affidavits of attorneys who have knowledge of the current range of hourly rates that highly experienced New York City employment lawyers commonly charge to paying clients (Lucas Aff. Ex. 4 [Affidavit of George D. Wolff, Executive Director of the Legal Referral Service sponsored by The Association of the Bar of the City of New York and the New York County Lawyers' Association], Ex. 5 [Affidavit of Michael G. Berger], Ex. 6 [Affirmation of Eric R. Stern], and Ex. 7 [Affirmation of Jeffrey Pollack], and Ex. 8 [Affirmation of Jonathan A. Bernstein]) demonstrate that the hourly rate of compensation for Lucas and Sack of $500 is reasonable, especially in light of the results obtained.

Lucas is requesting compensation at the rate of $500 per hour for himself and Sack. While most of his clients are low income workers, and cannot afford to pay an hourly fee, he does charge $500-$600 per hour for those clients who can afford to pay it.

C. Time Expended / Attorney's Fees

With respect to the issue of whether this labor-intensive eight-year-long enterprise could have been avoided, Plaintiffs' counsel made repeated efforts to settle this case for a comparatively modest sum, but was met with rudeness and arrogance, even before Ms. Morrison was substituted in as Defendants' counsel.

In addition, the matter was scheduled for trial several times, which required Plaintiffs' counsel to "ramp up" for trial each time. In some cases the matter couldn't proceed to trial because there were older cases on the Court's calendar; but in four instances the trial of this matter was delayed at the request of Defendants for a variety of reasons.

As for the amount of time expended in connection with the very lengthy trial, everyone present at the trial recognized that the trial was drawn out and complicated by the persistently obstreperous and disruptive behavior of Defendants' lead trial counsel, Laurie Morrison.

To illustrate the intensity of the combativeness faced by Plaintiffs' counsel, just four days before the jury's unanimous verdict was reached, defense counsel Morrison emailed Plaintiffs' counsel stating, *inter alia*, "*you've spent years and hundreds of thousands of dollars on a loser lawsuit.*"

Scott A. Lucas has spent not less than 1,481.2 hours to date investigating and litigating this case. *See* Lucas Aff. Exhs. 9 and 10 (time-keeping entries before and after March 2014).

Steven M. Sack has spent not less than 237.6 hours to date on this matter. *See* Lucas Aff. Ex. 9 (last page, right column total), Ex. 11, and Ex. 12. Exhs. 9 and 10 (Lucas Aff.), time-keeping entries before and after March 2014.

A junior attorney seeking litigation experience, Alex Huot, Esq., spent a total of 131.5 hours in 2012 and 2013 preparing for one of the previous instances when the case was supposed to be tried, for which he charged, and was paid, at a greatly reduced rate totaling only $6,164.06 ($2,164.06 was paid to Huot on 5/23/09 [chk # 3939]; $2,000 was paid to Huot on 2/28/13 [chk # 3898]; and $2,000 was paid to Huot on 1/10/13 [chk # 3883]). Plaintiffs' counsel seeks reimbursement of that $6,164.06 on a dollar-for-dollar basis, with no mark up.

Senior litigator Tom Moore, Esq. (with approximately 30 years of mostly big-firm trial experience) spent the rough equivalent of five days in late July and the first week of August 2015 preparing for and participating in jury selection, and assisting Lucas and Sack in preparing the organizational chart marked as Plaintiffs' trial exhibit 1, and in editing the opening statement. In light of the public interest in prosecuting cases of this nature, attorney Moore only asked for payment totaling $5,800 instead of the $10,800 he could have insisted on receiving. That $5,800 was paid via check # 5202. Plaintiffs' counsel seeks reimbursement of that $5,800 on a dollar-for-dollar basis, with no mark up.

Summary of Attorney's Fees Requested	
Scott A. Lucas	$740,600
Steven M. Sack	$118,800
Alex Huot	$6,164
Tom Moore	$5,800
Total to Date	**$871,364**

These fee-based computations do not include any of the hundreds of hours spent on this matter by Lucas's paralegal, Laura DeJesus, or the time spent by legal interns on this matter.

D. Reimbursement of Expert Witness Fees & Certain Other Expenses

Plaintiffs also seek reimbursement of the expert fees incurred in this matter pursuant to N.Y.C. Admin. Code § 8–502(a), which expressly authorizes the Court to include in any award "such other remedies as may be appropriate[.]" Reimbursement of such fees is clearly appropriate because: **(A)** expert fees are recoverable in federal discrimination cases, *see, e.g.*, *Bazile v. City of Houston*, 2013 WL 5775596, at *4 (S.D.Tex. 2013); **(B)** the NYCHRL's

"uniquely broad and remedial purposes ... go beyond those of counterpart state or federal civil rights laws," *Bennett v. Health Management Systems, Inc.*, 92 A.D.3d 29, 34 (1st Dep't 2011); and **(C)** "[t]he NYCHRL explicitly requires an independent liberal construction analysis in all circumstances[.]" *Id.* (emphasis in original).

Plaintiffs' counsel retained highly respected forensic clinical psychologist Dr. Charles Edward Robins to perform comprehensive diagnostic testing, to meet with Plaintiffs, and to testify at trial. Dr. Robins was questioned at length at trial concerning the basis for the fees charged and the manner in which they were computed. *See, e.g.*, Ex. 2 (Lucas Aff.) 896:19-902:24 (confirming that Dr. Robins charged an effective hourly rate in this matter of $334). The total amount charged by Dr. Robins since 2011, $34,500, was paid via check nos. 3704 ($6,000, on 9/22/11), 5177 ($12,000, on 8/10/15), 5180 ($11,500 on 8/17/15), and 5182 ($5,000, on 9/01/15).

Plaintiffs' counsel also retained a respected economics firm, Sobel Tinari Economic Group, to analyze the increased taxes each Plaintiff will have to pay on a lump sum payment of the lost wages awarded to her, as opposed to the lower taxes each Plaintiff would have paid if those wages had been paid to her incrementally over time (as would have happened absent the discriminatory firings). As detailed in Point VI below, this analysis was undertaken so that the Court can implement the NYCHRL's goal of ensuring that discrimination victims receive "make whole" relief by adjusting the lost wages awards to offset the increased tax burden, consistent with federal court case law on the issue (which, as noted, is less protective of discrimination victims than the NYCHRL). The economic analysis prepared by Stephen Levinson, Ph.D of Sobel Tinari Economic Group is attached as Lucas Aff. Ex. 13, together with the paid invoice for $3,000 (check # 5199) regarding that engagement.

Expert Fees to be Reimbursed	Total Amount
Dr. Charles Edward Robins	$34,500
Sobel Tinari Economics Group	$3,000
Total	**$37,500**

Pursuant to, *inter* alia, N.Y.C. Admin. Code § 8–502(a), Plaintiffs also seek reimbursement of certain process server fees incurred, deposition costs, and filings fees, as detailed below:

Date	Vendor	Notes	Amount
	Process Server Fees		
09/29/08	Elite Process Servers	Ayende Service	$139.60
08/01/10	Essential Services Group	subpoena service	$50.00
08/01/10	Essential Services Group	ref. # 3517	$90.00
08/11/10	Essential Services Group	ref. # 3531	$140.00
03/11/13	Essential Services Group	multiple subpoenas - ref. # 3907	$570.25
08/11/13	Essential Services Group	subpoena service	$140.00
06/08/10	Essential Services Group	Inv. 10623	$140.00
		Total	**$1,269.85**

	Stenographer Fees		
09/22/09	Bee Reporting	Paswall depo	$839.10
10/29/10	Bee Reporting	Ayende, P. Depo	$913.05
03/23/10	Bee Reporting	Crespo Depo	$707.75
07/20/10	Bee Reporting	Eadie; Tehrany; Ortiz depos (ref. # 10-4277)	$881.50
07/21/10	Bee Reporting	Ayende, B. depo (ref. # 10-4331)	$355.40
		Total	**$3,696.80**

Filing Fees		

8/15/2008	County Clerk	initial filing fee / index number purchased	$175.00
08/27/10	County Clerk	filing fee - RJI (county clerk - chk # 3533)	$95.00
06/28/11	Bronx County	filing fee (NOI & jury demand) (check # 3680)	$95.00
11/25/15	County Clerk	filing fee for cross-motion (check # 5203)	$45.00
		Total	**$410.00**

POINT V

THE COURT SHOULD AWARD PREJUDGMENT INTEREST ON THE UNCHALLENGED LOST WAGES VERDICTS

Plaintiffs were collectively awarded $181,000 in lost wages. *See* Lucas Aff., Ex. 1 (verdict sheet). That aspect of the verdict is not challenged by Defendants. Where, as here, the Plaintiffs in a discrimination action receive an award of lost wages, "it is ordinarily an abuse of discretion *not* to include pre-judgment interest[.]" *Aurecchione v. New York State Div. of Human Rights*, 771 N.E.2d 231, 233 (2002) (citation omitted; emphasis in original). June 1, 2008 is an appropriate midpoint from which to compute prejudgment interest. Accordingly, Plaintiffs respectfully request that prejudgment interest at the statutory rate (9%) commencing April 1, 2008 be added to the amounts awarded for lost wages.

POINT VI

AN AMOUNT SHOULD BE AWARDED TO EACH PLAINTIFF TO OFFSET THE INCREASED TAX BURDEN SHE WILL CARRY AS A RESULT OF HER LUMP-SUM BACK-PAY AWARD

Consistent with the "make whole" relief goals articulated in *Aurecchione v. New York State Div. of Human Rights*, 771 N.E.2d 231 (2002), this Court should award each Plaintiff an amount needed to offset the increased tax burden she will carry as a result of her lump-sum back-

pay award. The Seventh Circuit Court of Appeals addressed this issue earlier this year in *E.E.O.C. v. Northern Star Hospitality, Inc.*, 777 F.3d 898, 903-04 (7th Cir. 2015):

> Today, we join the Third and Tenth Circuits in affirming a tax-component award in the Title VII context. Upon Miller's receipt of the $43,300.50 in back pay, taxable as wages in the year received, *see* IRS Pub. No. 957 (Rev. Jan. 2013), *available at* www.irs.gov/pub/irs-pdf/p957.pdf, Miller will be bumped into a higher tax bracket. The resulting tax increase, which would not have occurred had he received the pay on a regular, scheduled basis, will then decrease the sum total he should have received had he not been unlawfully terminated by Hospitality. Put simply, without the tax-component award, he will not be made whole, a result that offends Title VII's remedial scheme.

Such an adjustment is particularly appropriate here because the NYCHRL's "uniquely broad and remedial purposes ... go beyond those of counterpart state or federal civil rights laws[.]" *Bennett v. Health Management Systems, Inc.*, 92 A.D.3d 29, 34 (1st Dep't 2011).

Economist Stephen Levinson, Ph.D of Sobel Tinari Economic Group prepared an analysis of the increased tax burdens each Plaintiff will carry as a result of her lump-sum award of back-pay, and has identified the following amounts as the mark-ups for excess tax necessary to make each Plaintiff whole in terms of her loss of earnings:

Santana	$24,719
Davis	$92,486
Rodriguez	$24,000

See Lucas Aff. Ex. 13 (Affidavit of Stephen B. Levinson, Ph.D).

Accordingly, in keeping with the remedial "make whole" relief envisioned by the anti-discrimination laws, and the NYCHRL in particular, Plaintiffs respectfully request that they be awarded these additional amounts to offset the anticipated negative tax consequences of the lump sum back-pay awards.

CONCLUSION

Wherefore, Plaintiffs respectfully request that Defendants' motion be denied, and Plaintiffs' cross motion be granted.

Dated: November 24, 2015

Respectfully submitted,

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