CITY OF NEW YORK
COMMISSION ON HUMAN RIGHTS

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In the Matter of

Complaint No.: M-P-R-14-1029899

COMMISSION ON HUMAN RIGHTS ex rel.
RONNIE LONGMIRE,

Petitioner,

OATH Index No. 1060/15

-against-

S&A STORES, INC., "JOHN DOE" and
"JOHN ROE,"

Respondents.

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MEMORANDUM & ORDER

On March 12, 2014, Ronnie Longmire ("Complainant" or "Mr. Longmire") filed a Verified Complaint ("Complaint") with the Law Enforcement Bureau of the New York City Commission on Human Rights ("Bureau") asserting claims of race-based discrimination against S&A Stores, Inc. ("S&A Stores") and unnamed store managers "John Doe" and "John Roe" (collectively, "Respondents"). (ALJ Ex. 1, Compl.) The Complaint alleges that while shopping at S&A Stores in the Bronx on January 20, 2014, Mr. Longmire was closely watched, followed, and physically confronted by Respondents "Doe" and "Roe," who then called the police, resulting in Mr. Longmire's arrest. (*Id.* ¶¶ 7, 8.) The Complaint asserts that Mr. Longmire was the only black customer in the store that day and that he was targeted by Mr. "Doe" and Mr. "Roe" because of his race. (*See id.* ¶¶ 7, 10.) The Bureau asserts that Respondents denied Mr. Longmire equal access to accommodations, advantages, services, facilities, or privileges of a public accommodation because of his race, in violation of § 8-107(4)(a) of the New York City

Human Rights Law ("NYCHRL"), codified as Title 8 of the Administrative Code of the City of New York. (*See id.* ¶ 11.)

Respondents did not submit an answer to the Complaint or otherwise appear until July 6, 2015, when they sent a request to OATH seeking permission to file an untimely answer and requesting a new hearing for adjudication of the case on the merits. (Letter of Alexander J. Drago, Esq. to Judge Gloade, dated July 6, 2015.) The next day, on July 7, 2015, the Honorable Judge Astrid B. Gloade of the Office of Administrative Trials and Hearings ("OATH") issued her Report and Recommendation. *In re Comm'n on Human Rights ex rel. Longmire v. S&A Stores, Inc.*, OATH Index No. 1060/15, R&R, 2015 WL 4776128 (July 6, 2015).

The Report and Recommendation noted that Respondents had failed to appear at a settlement conference on March 3, 2015, and at a hearing held on May 6, 2015. Judge Gloade also found that the Bureau had properly served Respondents with the notice of the probable cause determination, notice that the case had been referred to OATH, notices of conferences, and notice of trial. *Id.* at *1. Judge Gloade therefore deemed Respondents to be in default. *Id.* The Report and Recommendation did not acknowledge or address Respondents' appearance on July 6, 2015. Based on the evidence that the Bureau presented at the hearing, including testimony from Mr. Longmire, Judge Gloade recommended that the Commission hold Respondents liable for racial discrimination in a public accommodation, award emotional distress damages to Mr. Longmire, impose civil penalties on Respondents, and require them to undergo anti-discrimination training. *Id.* at *1, *9-12.

The Office of the Chair of the New York City Commission on Human Rights ("Commission") commenced consideration of the Report and Recommendation on July 7, 2015. (Letter of Sol Rivera to the parties, dated July 7, 2015.) On July 22, 2015, the Commission

granted Respondents' request for an extension to August 14, 2015, to submit comments and objections to the Report and Recommendation. (Letter of Dana Sussman, Esq. to the parties, dated July 22, 2015; *see also* Letter of Alexander J. Drago, Esq. to Dana Sussman, Esq., dated July 21, 2015.)

On August 12, 2015, Respondents filed a motion to vacate the default, accompanied by an answer to the Complaint. (Resp'ts' Objection to R&R and Mot. to Vacate.) In reply comments, the Bureau encouraged the Commission to deny the motion to vacate or, in the alternative, remand the matter for further investigation. (Letter from Katherine Carroll, Esq. to Commissioner Malalis, dated Sept. 3, 2015.)

Based on a review of the Report and Recommendation, hearing record, Respondents' motion to vacate, and the Bureau's objection to the motion, and for the reasons discussed below, the Commission grants Respondents' motion. Given the seriousness of the allegations in this case, opening the default will serve the dual function of allowing Respondents to respond to the claims against them on the merits and supplementing the record to better facilitate an assessment of liability and whatever remedies and penalties may be warranted if liability is found.

As set forth below, the Commission orders that the default be vacated, directs the Bureau to accept Respondents' untimely answer, and remands the case to the Bureau for further action consistent with this Order. To the extent that the Bureau intends to pursue claims against the currently unnamed respondents, the Commission further directs that the Complaint be amended to name the proper individuals.

I. RESPONDENTS' MOTION

In support of the motion to vacate, Respondents submit the affirmation of their attorney, Alexander J. Drago, Esq., accompanied by six documentary exhibits. The motion includes the

affidavits of S&A Stores property manager Lisa Fritz (Resp'ts' Vacate Mot., Ex. A ("Fritz Aff.")), store manager Lahcen Benbaih (*id.* at Ex. B ("Benbaih Aff.")), and assistant store manager Mohamed Boutoughrite (*id.* at Ex. C ("Boutoughrite Aff.")). Respondents also submit a map of the S&A Stores location in Bronx Community District 4 (*id.* at Ex. D), a demographic report from the U.S. Census Bureau for that district (*id.* at Ex. E), and a Verified Answer (*id.* at Ex. F).

Respondents move to vacate the default judgment on two grounds. First, Respondents argue that their default is attributable to excusable error because their prior counsel misrepresented to them that he was handling their case when he was not. Second, Respondents dispute Complainant's factual allegations, asserting that Complainant was not the only black customer in the store and that their conduct was not motivated by Complainant's race, but rather by the fact that Complainant was known to have shop-lifted from the store on at least two prior occasions and that he physically accosted a store employee.

A. Legal Standard

Pursuant to § 8-121 of the NYCHRL, the Commission may "reopen any proceeding, or vacate or modify any order or determination of the commission, whenever justice so requires." N.Y.C. Admin. Code § 8-121. In an administrative proceeding, a motion to vacate a default is assessed based on "the reasons for the nonappearance and any meritorious defenses that would justify re-opening the default." *Yarbough v. Franco*, 95 N.Y.2d 342, 347 (2000). To succeed on a motion to vacate a default and to re-open Commission proceedings after a hearing was held at OATH and a Report and Recommendation was issued, the movant must "demonstrate a reasonable excuse for the default and a potentially meritorious defense to the action." *In re Comm'n on Human Rights ex rel. Blue v. Jovic*, OATH Index No. 1624/16, Dec. & Order, 2017

WL 2491797, at *7 (May 26, 2017) (quoting *State Farm Mut. Auto. Ins. Co. v. Knish Hacking Corp.*, 52 Misc. 3d 132(A) (2d Dep't 2016)). The determination of a reasonable excuse lies within the tribunal's discretion. *See Campbell-Jarvis v. Alves*, 68 A.D.3d 701, 702 (2d Dep't 2009).

B. Respondents Have Established a Reasonable Excuse for Their Default

The S&A Stores property manager, Ms. Fritz, indicates in her affidavit that the store only received the Complaint, determination of probable cause, and notice of referral to OATH on or about November 17, 2014. (Fritz Aff. ¶ 4.) Ms. Fritz's sworn statement and corroborative documentary evidence attached thereto indicate that Ms. Fritz immediately faxed these documents to the store's insurance broker to determine coverage for the claim and about two and a half weeks later, on December 3, 2014, emailed the documents to attorney Claude Castro seeking legal representation in the case. (*Id.* ¶¶ 5, 8 & attachments.) Ms. Fritz attests that Respondents "were advised by Mr. Castro's firm that he would be handling the matter on [their] behalf." (*Id.* ¶ 8.) Ms. Fritz emailed additional materials relating to the case to Mr. Castro on March 5, 2015, and asked for an update about the status of the case. (*Id.* ¶ 10 & attachment.) When Ms. Fritz did not hear from Mr. Castro, she "began calling his office, speaking to his secretary to request the status of this matter." (Fritz Aff. ¶ 11.) She "was told every time [she] called the matter was being handled." (*Id.* ¶ 12.) However, in May 2015, Mr. Castro's secretary "advised [Ms. Fritz] . . . that it would be better if [Respondents] retained another attorney." (*Id.* ¶ 12.) Ms. Fritz immediately contacted the firm of Marin Goodman for legal representation in an effort to promptly re-engage in the case. (*See id.* ¶ 12.)

In short, Respondents argue that their default should be excused because their former counsel affirmatively misled them into believing they were being represented in this case when

they were not. Law office failure may be excused when the defaulting party had a "reasonable belief that [its] legal interests were being adequately protected by counsel" at the time of default. *Evolution Impressions, Inc. v. Lewandowski*, 59 A.D.3d 1039, 1040 (4th Dep't 2009); *see also Gerdes v. Canales*, 74 A.D.3d 1017, 1018 (2d Dep't 2010) (collecting cases). Generally, when evaluating whether a default should be excused because of law office failure, the tribunal must weigh the "extent of counsel's negligence" against the "merits of the claim" and potential "prejudice to the other side." *Sanchez v. Javind Apt. Corp.*, 246 A.D.2d 353, 355 (1st Dep't 1998).

Based on the evidence, the Commission concludes that it was reasonable for Respondents to have relied on the affirmative representations from Mr. Castro's office that their case was being properly handled. *See Solondz v. Barash*, 225 A.D.2d 996, 998 (2d Dep't 1996). Ms. Fritz's affidavit also suggests that Respondents attentively sought to monitor their attorney's engagement in the case and that, as soon as Mr. Castro's firm advised them that it would no longer represent them, they acted promptly to secure new legal representation and to re-engage in the case by filing a notice of appearance with OATH prior to the issuance of the Report and Recommendation.[1] (Letter of Alexander J. Drago, Esq. to Judge Gloade, dated July 6, 2015.) Thereafter, Respondents filed a timely request to extend the deadline for comments (*see* Letter of

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[1] Respondents' motion is substantiated by the sworn statement of a witness with personal knowledge of the events underlying Respondents' default and demonstrates with specificity the reasons for the default, as well as Respondents' proactive efforts to participate in good faith in this proceeding. As such, Respondents' application stands in marked contrast to other cases where default has been found inexcusable despite claims of law office failure. *See, e.g., Cantor v. Flores*, 94 A.D.3d 936, 937 (2d Dep't 2012); *Marisol Realty Corp. v. N.Y. State Div. of Hous. & Cmty. Renewal*, No. 100906/14, 2017 WL 4507271, at *1 (1st Dep't Oct. 10, 2017); *Blue*, 2017 WL 2491797, at *7.

Alexander J. Drago to Dana Sussman, Esq., dated July 21, 2015) and a timely motion to vacate the default (*see* Resp'ts' Vacate Mot.).

Overall, Respondents appear to have acted in good faith and with appropriate diligence. *See Ahmad v. Aniolowiski*, 28 A.D.3d 692, 693 (2d Dep't 2006) (in assessing default, court "should have considered the absence of any evidence that the defendant's default was intentional, made in bad faith, or with an intent to abandon the action"). The Commission therefore concludes that the errors of Mr. Castro's firm should not be attributed to Respondents. *See Sarcona v. J & J Air Container Station, Inc.*, 111 A.D.3d 914, 915 (2d Dep't 2013) (excusing default where the defendants had no notice that their attorney would not appear or that the attorney was no longer representing them and the defendants moved to vacate the default shortly after it was entered); *see also E. Res. Serv., Inc. v. Mountbatten Sur. Co.*, 289 A.D.2d 283, 284 (2d Dep't 2001) (holding that a one-month period between the entry of judgment and defendant's motion to vacate reflected a prompt response by defendant and "undercut[] any claim of willfulness or prejudice to the plaintiff.").

C. Respondents Raise a Potentially Meritorious Defense to Discrimination

During the hearing, Mr. Longmire testified that he entered S&A Stores in the Bronx on January 20, 2014, to purchase toothbrushes. (Tr. at 12:6-10.) As he walked through the aisle, Mr. Longmire reportedly noticed that a store employee was "staring directly into [his] eyes" and "would not break eye contact with [him]." (*Id.* at 12:15-16.) Mr. Longmire testified that he felt prompted to introduce himself to let the store employee know that "I shop here regularly and I don't come to steal." (*Id.* at 12:17-23.) However, Mr. Longmire stated that when he offered his hand for an introduction, the employee "shoved [his] hand away" and that the employee then "grabbed [him] and he began to try to bring [him] down." (*Id.* at 12:24-13:3.) A second store

employee reportedly came up from behind and physically restrained Mr. Longmire. (*Id.* at 13:5-6.) Mr. Longmire testified that he became "angry" and told the employees that he planned to call the police and press charges for assault. (*Id.* at 13:7, 13:20-21.) The store employees then called the police. (*See id.* at 14:4-9.)

Respondents offer the sworn statements of S&A Bronx store manager Lahcen Benbaih and assistant manager Mohamed Boutoughrite in support of their argument that the default should be reopened because Respondents have a meritorious defense to the discrimination claims against them. Mr. Benbaih and Mr. Boutoughrite both attest that Mr. Longmire initiated a confrontation in the store when he noticed that they were watching him. (*See* Benbaih Aff. ¶¶ 7-9; Boutoughrite Aff. ¶ 6.) Mr. Benbaih admits that he "did keep a watchful eye on [Mr. Longmire]" from the upper level of the store, but asserts that it was not because of Mr. Longmire's race, but because he was aware that Mr. Longmire "had a history of stealing in the store" and had previously stolen batteries. (*Id.* ¶ 6.) Mr. Boutoughrite similarly states that he recognized Mr. Longmire from "other times when he has tried to steal things" and noted a specific instance where "he attempted to steal deodorant but I took it away from him and told him to leave the store." (*See* Boutoughrite Aff. ¶ 4, 5.)[2]

According to Mr. Benbaih, when Mr. Longmire noticed his gaze, Mr. Longmire "became nasty and curs[ed] at [him]," and then pushed him. (Benbaih Aff. ¶ 9.) Mr. Boutoughrite attests that he came to Mr. Benbaih's assistance to "get away from this person who was very nasty and aggressive." (Boutoughrite Aff. ¶ 9.) Mr. Benbaih and Mr. Boutoughrite state that they then told Mr. Longmire that they would call the police. (*See* Benbaih Aff. ¶ 10; Boutoughrite Aff. ¶ 11.)

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2 In his testimony, Mr. Longmire stated that, in December of 2013, he was confronted by a store employee at S&A Stores while he was attempting to purchase deodorant. (Tr. at 20:18-21:1.)

Mr. Benbaih and Mr. Boutoughrite dispute Mr. Longmire's claim that he was the only black person in the store on the day in question, offering corroborative documentary evidence. (*See* Benbaih Aff. ¶¶ 3, 4; Boutoughrite Aff. ¶ 3; Resp'ts' Vacate Mot., Ex. E). They note that it was a "very busy shopping day" for the store (*see* Benbaih Aff. ¶¶ 3, 4; Boutoughrite Aff. ¶¶ 3, 4) and Mr. Benbaih asserts that, on that day, the store was "full of customers, many of which were black." (*Id.*)

If credited, Respondents' evidence may undermine Mr. Longmire's testimony and draw into question whether Respondents acted with racial animus. That is particularly true since the Bureau relies on an inference of racial discrimination premised solely on Mr. Longmire's testimony that he was the only black customer in the store at the time. (*See* Tr. at 26:21-25.) While Mr. Longmire's testimony alone undoubtedly could suffice to support a claim of unlawful discrimination, Respondents have offered more than mere self-serving statements in support of their defense. (*See* Resp'ts' Mot. to Vacate, Ex. F); *see also Bistre v. Rongrant Assocs.*, 109 A.D.3d 778, 779 (2d Dep't 2013) (noting that a showing of a potentially meritorious defense to open a default should be based on more than "only self-serving and conclusory allegations without any evidentiary support.").

There is a strong public policy favoring disposition of a case on the merits. Where, as here, the parties' accounts are completely different, the Commission credits neither party's statement of facts over the other's and finds that both parties' statements should be subjected to the rigors of cross-examination. If Mr. Longmire's account of racial discrimination prevails with a finding of liability, the horrors he alleges should be met with equal force in damages and penalties ordered after a thorough record on such remedies is developed. Conversely, if Respondents' version of events is credited, they raise a potentially meritorious defense to

discrimination where neither liability nor damages are warranted. These considerations weigh in favor of opening the default and remanding the case for a determination on the merits.

It does not appear that granting Respondents' motion will result in significant prejudice. Although opening the default will cause some delay, it appears that eye witnesses to the event remain available to testify. In addition, opening the default will allow for the record on potential damages and penalties to be more fully developed, which may ultimately accrue to the benefit of the opposing side.

Racism has no place in New York City and enforcing claims of racial discrimination remains fundamentally important to the work of the Commission and to the well-being of the public. It is vital that victims of race discrimination feel encouraged to come forward with their claims and, if successful, that they be fully compensated for the profound harm that racism causes. The Commission is therefore confident that, upon remand, the Law Enforcement Bureau will ensure that Respondents' statements and evidence are subjected to robust investigation. The parties should anticipate that if Respondents are ultimately deemed liable, the Commission will give deep consideration to the question of financial penalties based in part on grave nature of the claims at issue.

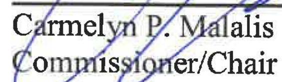
II. CONCLUSION

For the reasons discussed above, the Commission hereby ORDERS that: (1) Respondents' motion to vacate the default is granted; (2) the Bureau must accept the Verified Answer for filing; and (3) the case is remanded to the Bureau for further action consistent with

this Order. In addition, to the extent that the Bureau intends to pursue claims against the individual respondents, it is directed to amend the Complaint to add them by name.

Dated: New York, New York
April 12, 2018

SO ORDERED:
New York City Commission on Human Rights



Carmelyn P. Malalis
Commissioner/Chair