Keeping Clerks Happy:

Examples of effective (and less effective) techniques in appellate briefs

Hon. Richard C. Wesley, Second Circuit Court of Appeals
David Carpman, Law Clerk to Judge Wesley, 2012-13

PRELIMINARY STATEMENT/INTRODUCTION

1. *Including an introduction or preliminary statement before the brief begins can be an effective way to frame what's going on. This introduction frames the issue completely in the first paragraph and tells the story of the facts, the argument, and the district court's decision in the following three paragraphs.*

PRELIMINARY STATEMENT

Plaintiffs-Appellants are sophisticated investors who committed to invest in private commercial real estate partnerships on November 30, 2007, just as the global economy was entering a major economic crisis. After the recession affected the value of their limited partnership interests, Plaintiffs sought to use the federal securities laws to hold Defendants responsible for their unforeseen loss. The core of Plaintiffs' allegations is that Defendants knowingly omitted from various documents provided to prospective investors the purported fact that certain properties intended for transfer to the partnerships had declined in value, and that upon the properties' transfer, the partnerships would sustain an immediate loss.

As the District Court correctly held in dismissing the complaint, a critical flaw in Plaintiffs' theory (among others) is that they are unable to allege, with the particularity required under Federal Rule of Civil Procedure 9(b) and the Private Securities Litigation Reform Act ("PSLRA"), that the subject properties had in fact lost value by the time they invested in the partnerships, let alone that Defendants knowingly concealed that information. On appeal, Plaintiffs rest their case on a Lehman Brothers Form 8-K, dated June 9, 2008, which purportedly shows that Defendants had begun marking down the value of the subject investments by November 1, 2007, before Plaintiffs invested in the partnerships.

But the Form 8-K shows no such thing. The Form 8-K does attach a press release which shows a net markdown in Lehman Brothers' aggregate "real estate held for sale," but this is a broad financial reporting category encompassing holdings across the entire company. Significantly, this line item anticipates financial results for Lehman Brothers' real estate holdings on a *net* basis: while some properties may have increased in value, others may have decreased, resulting in an expected overall loss. There is no basis to infer from the 8-K, as Plaintiffs promote, that each and every parcel of Lehman Brothers real estate, including the subject properties, lost value "across the board." Rather, it could just as easily be inferred (indeed it is established by contemporaneous internal documents) that the partnership properties were among those that had gained value during this time period. Plaintiffs' only support for their preferred inference is their repeated, conclusory allegation that it is so. This style of conclusory allegation is the exact pleading method Rule 9(b) was designed to prevent.

In the end, with the benefit of hindsight, Plaintiffs are seeking to use the securities laws to insulate themselves from the market's global downturn. The fact of the matter is

that Plaintiffs had all the information necessary about the partnerships to make an informed investment decision before they decided to invest. They cannot now use the securities laws as insurance when their investment decisions were not as successful as they had hoped.

2. *Effective framed introductions from two opposing briefs:*

John Catsimatidis is the long-time owner of Gristedes Foods, Inc. ("Gristede's"), a professionally managed company which, through a subsidiary, operates the Gristede's supermarkets throughout the New York area. Catsimatidis also holds the honorary role of Chairman, President, and CEO. Although Catsimatidis remains somewhat involved in the company's high-level financial management and strategic planning, he has not been involved in the day-to-day operations of the Gristede's supermarkets for over a decade. He plays no role in hiring or firing store employees; he does not participate in setting store employees' work schedules or assignments; he does not decide when store employees get paid or how much.

Despite the overwhelming record evidence that Catsimatidis does not supervise Gristede's store employees or control the conditions of their employment, the district court concluded that the "undisputed" facts establish that Catsimatidis is their "employer" and thus personally liable for any violations of the Fair Labor Standards Act ("FLSA") and the New York Labor Law ("NYLL") that Gristede's supermarkets may have committed.

That decision is incorrect. It is settled that individual officers or majority shareholders in a corporation are not automatically liable for all of the acts of the corporation. And while traditional, common-law veil-piercing is not required to establish personal liability for FLSA violations, Congress did not intend for officers or owners to be personally liable for such violations merely by virtue of their high-level control over general corporate affairs. Otherwise, virtually *every* senior officer or owner would be liable for the company's FLSA's violations— even those who bore no personal responsibility for the company's violations. To prevent that result, the FLSA provides that a corporate officer is personally liable for a company's FLSA violations only if the plaintiff proves that the officer exercised personal responsibility for the company acts that violated the statute, including by controlling the affected employees' hiring and firing, the conditions of their employment, and the rate and methods of their pay. And, of course, a plaintiff cannot obtain summary judgment on the officer's personal liability unless the evidence on the foregoing factors is all so overwhelmingly one-sided that no reasonable factfinder could possibly reject personal liability. Plaintiffs here came nowhere close to satisfying that standard. If anything, the record compels the opposite conclusion: Catsimatidis did *not* exercise the direct control over these plaintiffs' conditions of employment that would be required to establish his personal liability for any FLSA violations committed by Gristede's.

The district court concluded otherwise only because it asked the wrong legal

question. Rather than examine the "economic reality" of the relationship between Catsimatidis and store employees, as required by this Court's precedent, the court below simply looked to whether Catsimatidis had general control over the company. That high-level inquiry is contrary to this Court's well-established precedent, and would lead to personal liability for corporate employers' FLSA violations in many—if not most—cases involving companies with controlling shareholders who oversee the company's general operations, but who do not make day-to-day decisions about employment issues. The FLSA does not contemplate such disdain for the corporate form. Rather, the FLSA permits personal liability only when the corporate officer is *personally responsible* for the acts that violated the statute. Under the correct standard, it is Catsimatidis who is entitled to summary judgment, not plaintiffs. At a bare minimum, there are genuine disputes of material fact that preclude granting summary judgment in plaintiffs' favor.

The district court also erred in granting plaintiffs' motion for partial summary judgment under the NYLL because, as the New York courts have squarely held, the NYLL does not provide for personal civil liability of individual officers. The court below failed to address that issue at all.

The judgment below should be reversed.

vs.

The Fair Labor Standards Act (FLSA) includes the "broadest definition" of the employment relationship "that has ever been included in any one act." *United States v. Rosenwasser,* 323 U.S. 360, 363 n.3 (1945). It defines "employer" to include "any person acting directly or indirectly in the interest of an employer in relation to an employee," and "employ" as "to suffer or permit to work." 29 U.S.C. § 203(d), (g). Based on this language, "[t]he overwhelming weight of authority" holds that "a corporate officer with *operational control* of a corporation's covered enterprise is an employer along with the corporation, jointly and severally liable under the FLSA for unpaid wages." *Donovan v. Agnew*, 712 F.2d 1509, 1511 (1st Cir. 1983) (emphasis added).

If anyone can be said to have "operational control" over a company, it is the defendant in this case, John Catsimatidis. Catsimatidis is the sole owner, President, CEO, and Chairman of the Board of Gristede's Foods, and with that authority maintains, as the district court put it, "absolute control of Gristede's, and all of its operations." SA-50. He considers himself the "boss" of the company, his employees recognize that he is the "head honcho," and he stated in open court that he is "their employer." Catsimatidis's position gives him authority to manage the company's finances, open and close stores, hire and fire employees, borrow money, buy and sell property, and even declare bankruptcy—all on his own initiative. As the district court concluded, "it is pellucidly clear that [Catsimatidis] is the one person who is in charge of the corporate defendant." SA-53.

Although Catsimatidis disputes some peripheral aspects of his authority, he does not deny that, as Gristede's sole owner, he possesses broad power over the company's operations. To the contrary, he admitted in the district court that he personally controls

the company's finances and property, and told the district judge that he could shut down the business if he desired. Catsimatidis instead tries to downplay his involvement in the company's day-to-day operations, arguing that he is less involved than he once was and that he was not "personally responsible" for the FLSA violations committed by his subordinates.

Catsimatidis's argument misconstrues both the record below and this Court's decisions interpreting the FLSA. First, Catsimatidis's characterization of himself as a figurehead divorced from the company's day-to-day operations flies in the face of the undisputed record evidence. That evidence establishes that Catsimatidis shares an office with the company's executive vice president and other top management, from which he "generally presides over the day to day operations of the company." SA-52. And Catsimatidis uses his authority to make decisions at all levels of company policy—from whether to open a new store or hire a high-level executive, to how best to display potato chips or what varieties of fish to sell at a particular store. Based on this record, the district court concluded that "there is no aspect of Gristede's operations from top to bottom and side to side which is beyond Mr. Catsimatidis' reach." SA-53.

Second, Catsimatidis's argument that he is not liable for the decisions he delegates to others is foreclosed by this Court's decision in *Herman v. RSR Security Services*, 172 F.3d 132 (2d Cir. 1999). *RSR* held that the relevant question under the FLSA is not whether a corporate officer exercised "direct control" over the plaintiff employees, as Catsimatidis contends, but whether the officer "possessed the *power* to control" them. *Id.* at 139, 140 (emphasis added). Whether Catsimatidis chose to exercise his power directly or by delegation is beside the point, because the fact that authority is "exercised only occasionally … do[es] not diminish the significance of its existence.'' *Id.* at 139 (internal quotation marks omitted). Indeed, the FLSA's coverage was designed to prevent employers from evading responsibility for FLSA violations by delegation to third parties—precisely the evasion that Catsimatidis seeks to achieve here.

3. *In a case that may be procedurally complicated, it can also be helpful to include a preliminary statement that simply sets for the procedural posture:*

PRELIMINARY STATEMENT

Plaintiff-Appellant Johnathan Johnson, by his pro bono counsel, respectfully submits this brief in support of his three appeals from: (1) an order of the United States District Court for the Northern District of New York (Hon. Thomas J. McAvoy, U.S.D.J.) denying Mr. Johnson's motion for a preliminary injunction (Second Circuit Docket No. 11-2563 (Lead)); (2) the final judgment of the United States District Court for the Northern District of New York (Hon. William H. Stafford Jr., U.S.D.J., E.D. Fla.), dismissing the complaint sua sponte pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii) and 42 U.S.C. § 1997e(c)(1) (Second Circuit Docket No. 11-3282 (Con.)); and (3) an order of the United States District Court for the Northern District of New York (Hon. William H. Stafford Jr., U.S.D.J., E.D. Fla.), denying Mr. Johnson's post-judgment request for reconsideration (Second Circuit Docket No. 11-2946 (Con.)).

QUESTIONS PRESENTED/STATEMENT OF ISSUES

1. *The first list of questions divides the case into way too many issues – not every alleged error in fact or reasoning needs to be framed as its own question. The responding list is much more comprehensible. (Also, don't capitalize every word – ever.)*

1. Did The District Court Err In Denying Qualified Immunity On Plaintiff's Substantive Due Process Claim Because The Defendants' Actions Did Not Violate Clearly Established Law Of Which A Reasonable Person Would Have Known?

2. Did The District Court Err In Relying On A Subjective Intent Standard When Considering Defendants' Qualified Immunity Defense To Plaintiff's Substantive Due Process Claim?

3. Did The District Court Err In Creating A Fact Not Supported In The Record And Inconsistent With The Undisputed Facts In The Record, i.e. That Defendants Intended To See Plaintiff's Medical Records?

4. Did The District Court Then Err In Creating A Disputed Material Issue Of Fact Of Whether Defendants Intended To Harm Plaintiff Based On The Unsubstantiated Finding That Defendants Intended To See Her Medical Records?

5. Did The District Court Err In Recognizing A Substantive Due Process Cause Of Action Against Linda Rinker When She Had Already Been Dismissed From The Case?

6. Did The District Court Err In Denying Qualified Immunity To Defendants In Regard To Plaintiff's 2007 First Amendment Claim Because The Court Misapplied The Clear Law Under *Mt. Healthy*, In That *Mt. Healthy* Applies To Bar Claims Regardless Of Retaliatory Motive?

7. Did The District Court Err In Denying Qualified Immunity To Defendants Where The Facts Establishing The Legitimacy Of Plaintiff's Progressive Discipline Are Undisputed, Thereby Satisfying The *Mt. Healthy* Standard?

vs.

I. Did the defendants establish that undisputed facts entitle them to qualified immunity on the plaintiff's First Amendment retaliation claim?

II. Did the defendants establish that undisputed facts entitle them to qualified immunity on the plaintiff's substantive due process claim?

III. Does this Court lack appellate jurisdiction over defendant Rinker's claim that the district court had no jurisdiction of her person as to the substantive due process claim?

2. *The first question tries to include way too many facts and way too much argument, rendering it completely ineffective as a way to frame the case. The second example corrects these errors.*

> Whether plaintiffs, investors in real estate limited partnerships, allege securities fraud with sufficient particularity, and raise sufficiently strong inferences of defendants' scienter, with their collective allegations of: (a) 39 separate offering memorandum (PPM) statements of Defendants' skill and procedures to locate and acquire future real property investments for sale to investors' partnerships, called LBREP III, ***while omitting to mention that*** (i) most property investments Lehman intended to sell to LBREP III partnerships had already been acquired in early 2007, prior to the market decline in late 2007, (ii) that Lehman's SEC-filed Form 8-K showed that it began marking down the "Fair Value" of its entire portfolio of "Real estate held for sale" on November 1, 2007, i.e., a month before the first investors committed to buy their interests on November 30th, that (iii) Lehman's Form 8- K showed that the write-downs had continued for six months to May 31, 2008, during all but 3 days of which, when Lehman sold to LBREP III on May 28th, the properties sold to LBREP III were part of the "Real estate held for sale" that Lehman marked down in value, and that (iv) due to the limited partnership agreement (LPA) provision that Lehman would sell to LBREP III at Lehman's original acquisition cost, investors would inherit Lehman's losses (from markdowns) on the properties and sustain a certain loss their investment value;
>
> [*just one of three issues framed this way*]

vs.

> **QUESTIONS PRESENTED**
>
> 1. Whether the District Court correctly held that Plaintiffs failed to plead that Defendants acted with the requisite scienter for securities fraud because they failed to allege any facts demonstrating that Defendants knew or were reckless in not knowing that the LBREP III properties had lost value by the time Plaintiffs committed to the partnerships and in fact the only contemporaneous documents Plaintiffs rely on show that Defendants believed the LBREP III properties had actually *increased* in value during the relevant timeframe.
>
> 2. Alternatively, whether the District Court correctly held that Plaintiffs failed to allege any actionable misstatements or omissions because the allegedly concealed information was disclosed in several documents provided to Plaintiffs before they committed to the partnerships.
>
> 3. Whether the District Court correctly dismissed the Section 20(a) claim against the Individual Defendants because, finding no primary violation, there could be no control-person liability.

3. *The first example tries to include every relevant fact in the question presented – this is not the place for that!*

QUESTION PRESENTED

1. When an out of state party solicits an individual residing in New York State, contacts that individual in New York State, sends a false statement to that individual in New York State upon which the individual relies in New York State, initiates meetings where the individual in New York State engages in the meeting in New York via video and/or audio conferencing with the out-of-state party, where the out of state party sends numerous emails, faxes and telephone calls directed to the individual in New York State, where the out-of-state individual thereby creates a continuous business relationship with the individual in New York State, do some or all of these actions by the out-of-state individual, either individually or viewed as a whole, establish jurisdiction over the out-of-state party under the New York State long-arm statute.

vs.

QUESTION PRESENTED

1. Whether the district court properly granted defendants Banca Caripe S.P.A.'s ("Banca") and Dario Mancini's ("Mancini") motion to dismiss the action for lack of personal jurisdiction where plaintiff Max Pincione ("Pincione") asserted jurisdiction over these foreign defendants with no ties to New York.

STATEMENT OF THE CASE

1. *The statement of the case should briefly tell both the substantive/factual and the procedural story of the case. These two examples do so simply and effectively.*

> This is not a typical prisoner § 1983 appeal. The District Court dismissed *sua sponte* Mr. Johnson's complaint four years after the complaint had been filed, after Defendant-Appellant's motion for summary judgment had been denied, and less than two weeks prior to the scheduled trial. The dismissal was not based on any intervening change in the law, nor was it based on any new facts or evidence. Rather, the case was reassigned to Senior Judge William H. Stafford, who was determined from the outset to avoid a trial in this prisoner § 1983 case.
>
> Mr. Johnson's complaint alleges he was transferred to Upstate Correctional Facility from Elmira Correctional Facility in retaliation for his having engaged in First Amendment protected activity. Specifically, Mr. Johnson was transferred after he sent a letter to Defendant-Appellee John Burge, the Superintendent of the Elmira Facility, indicating that he was the victim of an assault, giving notice of a future lawsuit, and requesting that Superintendent Burge preserve all evidence of the assault, including any video tapes. After receipt of the letter, Superintendent Burge confronted Mr. Johnson and told him that he was getting rid of him. Mr. Johnson was then transferred to Upstate Correctional Facility, where certain gang members had repeatedly threatened Mr. Johnson's safety and well-being. In moving to dismiss Mr. Johnson's claim, defendants did not dispute that Mr. Johnson's conduct in sending a letter to Superintendent Burge was constitutionally protected activity. Mr. Johnson's retaliation claim survived a motion for summary judgment, the case was reassigned to Judge Stafford, and trial was set for August 17, 2011.
>
> Three weeks before the scheduled trial, Judge Stafford required expedited briefing on the issue of whether Mr. Johnson's threat to file a lawsuit was sufficient to form the basis of a retaliatory transfer claim, because, under *Lewis v. Casey*, there is no constitutionally protected right to file frivolous lawsuits. (A- 132-33.) The day following expedited briefing on this issue, Judge Stafford dismissed the complaint because Mr. Johnson did not allege that he filed a "grievance" and because he failed to allege "what type of lawsuit he planned to file against whom." (A-137.) Mr. Johnson filed a motion for reconsideration, which Judge Stafford summarily denied. (A-144.) This appeal followed.

2.

Ms. Kelly commenced this action on October 17, 2011, by filing a Complaint in the United States District Court for the Eastern District of New York alleging harassment, discrimination and retaliation in violation of Title VII and the NYSHRL.

Specifically, the Complaint details multiple instances of a hostile work environment created as a result of widespread sexual favoritism stemming from Defendant-Appellee Lawrence Shapiro's illicit affair with a subordinate, Kelly Joyce, as well as the detrimental effect that such widespread sexual favoritism had on the terms and conditions of Ms. Kelly's employment. The Complaint also details Defendants-Appellees' acts of retaliation – e.g., stripping Ms. Kelly of her titles, duties, responsibilities and authority, berating her in front of other employees, summarily terminating the employment of Ms. Kelly's husband and son, and permitting Ms. Joyce to physically threaten Ms. Kelly and usurp her authority – in response to Ms. Kelly's multiple complaints regarding Defendants-Appellees' discriminatory misconduct and the hostile work environment that they created. Indeed, Defendants-Appellees reduced Ms. Kelly's duties to a level where they were virtually non-existent after more than 28 years as a senior executive.

On December 8, 2011, Defendant-Appellee Lawrence Shapiro filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), and Defendants-Appellees Jay Shapiro and HIS jointly filed a separate motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). On August 3, 2012, Judge Arthur Spatt issued a consolidated Order granting Defendants-Appellees' motions to dismiss the Complaint in its entirety. On August 7, 2012, the district court entered the Order dismissing the Complaint. On August 29, 2012, Ms. Kelly timely filed a Notice of Appeal.

By this brief, Ms. Kelly does not appeal that part of the Order that dismissed her claims for discrimination and harassment under Title VII and the NYSHRL. As a result, the only aspects of the lower court's Order at issue in this appeal are the dismissal of the claims for retaliation under Title VII and the NYSHRL, as well as the claim for aiding and abetting retaliation violations under the NYSHRL.

FACTS SECTION

1. *Effective briefs spin the facts to their advantage without blurring the factual and argumentative portions of the brief. In this first example, all of the facts are framed in the writers' favor, but there is no legal argument, quibbling with the district court or defendants, etc.*

Because this appeal arises from an order granting summary judgment to plaintiffs on Catsimatidis's personal liability, the record must be viewed in the light most favorable to Catsimatidis, drawing all inferences in his favor, resolving all ambiguities against plaintiffs, and disregarding all evidence favorable to plaintiffs that is subject to genuine dispute. *See infra* at 11-12. That said, the following facts are wholly uncontradicted.

Gristede's supermarkets in and around the New York City area are operated by Namdor, Inc., which is in turn a subsidiary of Gristede's Foods, Inc. JA-2482 ¶ 2 (Catsimatidis Decl.). Gristede's Foods, Inc. is a professionally managed company whose stock is indirectly owned by John Catsimatidis, who serves in the honorary role of Chairman, President, and CEO of the company. *Id.* ¶ 3. Catsimatidis's involvement in the company is limited to high-level management issues; he focuses on "the big picture of trying to establish what Gristede's image is and what it means to the consumer." *Id.* ¶ 24. The business is operated on a day-to-day basis by Charles Criscuolo, Executive Vice President. *Id.* ¶ 3. For at least the last ten years, Catsimatidis has not been involved in the day-to-day operations of Gristede's supermarkets. In fact, even the higher-level management responsibilities he previously assumed have been largely delegated to his Deputy. *Id.* ¶¶ 3, 6. During this period, Catsimatidis has not been involved in the hiring, firing, or disciplining of a single Gristede's store employee. *Id.* ¶ 4. In fact, the only individual Catsimatidis has hired in the last decade is Robert Zorn, the Executive Vice President and Deputy to the Chairman of Red Apple Group, a holding company that owns United Acquisitions, which in turn owns Gristede's Foods, Inc.

Catsimatidis has also not been involved in assigning duties to store employees or instructing them about how to operate the Gristede's supermarkets. *Id.* ¶ 4. Nor has he been involved in supervising or controlling the work schedules or conditions of employment of any Gristede's store employee. Although Catsimatidis has occasionally visited stores, those visits were focused on merchandising and product placement or served a public relations function. During these visits, Catsimatidis did not discuss payroll, wages, timekeeping, work schedules, or any similar matters with store employees. *Id.* ¶ 9.

Catsimatidis's involvement with Gristede's supermarkets' affiliated unions has also been quite limited. He signed one collective bargaining agreement, sat on one union pension fund board, and is theoretically accessible to union presidents who know him. *See* JA-1802-03 (Catsimatidis Dep. 44:18-45:12); JA-2044-2123 (collective bargaining agreements). But to the extent Gristede's has participated in collective bargaining negotiations, Gristede's officers other than Catsimatidis have represented Gristede's in those negotiations. JA-2483-84 ¶ 11 (Catsimatidis Decl.). And Catsimatidis has not been involved in any day-to-day issues regarding Gristede's union employees, including issues

regarding hours and wages. Again, other Gristede's officers are responsible for and perform these functions. *Id.* ¶ 12. Likewise, Catsimatidis has not controlled—or even been involved with— payroll and human resources issues. There are specific departments tasked with those responsibilities, and they perform all payroll and human resource related tasks. Catsimatidis does not supervise the individuals in those departments. *Id.* ¶ 15; *see also id.* ¶ 18. For at least the last ten years, Catsimatidis has not made any decision related to, or established any rule regarding, payroll or payment issues relating to store employees. *Id.* ¶ 16. Nor has he been involved in determining the amount, rate, or method of payment of store employees during that time period. *Id.* ¶ 19. Although payroll checks bear his electronic signature, he does not personally sign the checks or review them and has not done so for at least the last ten years. *Id.* ¶ 20.

Finally, Catsimatidis is not involved in maintaining Gristede's employment records. *Id.* ¶ 22. Although his office is in the same building as the payroll and human resources departments, he rarely interacts with individuals in those departments and plays no role in the maintenance of those employee records. *Id.*

2. *Making the facts section read like the discussion section – makes the brief seem messy, disorganized, and angry.*

Maida testified that he determined and informed Ben-Levy within weeks of his return that Ben-Levy was going to be removed as Head of Systems. (A: 136-7;525). Maida further testified that he knew of no performance issues that precipitated this move; his only basis for the move was his understanding from HR (or Ben-Levy, which never occurred) that Ben-Levy was physically unable to complete the tasks associated with the Head of Systems role; and before learning of the alleged physical impediment (Maida could not recall with whom he spoke or when the conversation took place, i.e. before or after Ben-Levy completed his cardiac rehabilitation) he had no opinion as to whether Ben-Levy should be removed as Head of Systems. (A: 1 36-7;525;576;580-1 ; 584;675-82). This testimony is not even referenced in the Order below, nor is the fact that Glenn Jacoby, a member of upper-level management with supervisory authority over Ben-Levy, had asked Ben-Levy to stay on as Head of Systems. (A:l37;525). There was no legitimate basis to remove Ben-Levy as Head of Systems and the reason testified to by Maida is demonstrably false, abjectly pre-textual and discriminatory per se. (A: 136;428;524-5).

Defendants now assert that the basis for the move was, in addition to concerns regarding his medical condition, a department-wide reorganization. However, that reorganization allegedly took place over the summer of 2007, several months before the demotion. (A:l34;138;244;56 1 -2;568-9;573 ;575). Defendants provided no evidence that all managers were moved or demoted; presumably because other managers who were not over 40, had not gone on medical leave and had not complained about disparate treatment were not moved or reorganized. One need only to look at the comparators identified by Gaertner to know that Ben-Levy was treated more poorly than others similarly situated. The District Court simply accepted Defendants' reorganization justification without addressing the several month lag, the testimony of Maida and the successful completion of Ben-Levy's rehabilitation. These facts are not mere speculation and clearly are sufficient to defeat summary dismissal of Ben-Levy's case.

SUMMARY OF ARGUMENT

1. *Effective summary of argument – clean, simple, states each point as a sentence.*

I. The district court's summary judgment order was erroneous because Catsimatidis was not the plaintiffs' FLSA "employer" under the proper legal standard. At minimum, there were genuine disputed issues of material fact that precluded a grant of summary judgment in plaintiffs' favor.

A. The "economic reality" test this Court has adopted to determine "employer" status under the FLSA requires a focus on the officer's actual relationship with the particular employees in question. This focus achieves the statute's objective of expanding liability without eviscerating the corporate form.

B. The district court did not apply the "economic reality" test or focus on Catsimatidis's relationship with the store employees in question. Instead, it looked at Catsimatidis's overall corporate control and supervision. That was plainly improper under this Court's precedent. The district court's approach would impose personal liability on virtually every senior corporate officer, in contravention of Congress's intent in enacting the FLSA.

C. Had the district court applied the correct standard, it would have been clear that Catsimatidis was entitled to summary judgment. The undisputed facts demonstrate that he did not hire or fire the employees in question; he did not control their schedules or conditions of employment; he did not control the methods or rates of their pay; and he did not maintain their employment records.

D. At minimum, and regardless of the proper legal standard, there were genuinely disputed issues of material fact that precluded a grant of summary judgment in plaintiffs' favor. There was considerable evidence in the record that Gristede's supermarkets are professionally managed, and Catsimatidis's involvement has been quite limited for over a decade.

II. The summary judgment order was erroneous as to plaintiffs' NYLL claims for the additional reason that the New York courts have held that there is no personal liability for corporate officers under the NYLL.

2. *Effective summary of argument in prose – straightforward, not too long, clearly sets out the questions at issue in the case:*

The district court's October 3, 2011 Opinion and Order should be vacated and/or reversed. As a threshold matter, the district court lacked jurisdiction over NNIC's motion to disqualify counsel. Requests to disqualify counsel neither satisfy the requirements for a district court's diversity jurisdiction nor do they raise a federal question. Indeed, such a request does not present a "case" or "controversy" under Article III of the United States Constitution. The district court's order should therefore be vacated and the case remanded with instructions to dismiss for lack of jurisdiction.

Even assuming the district court had jurisdiction over NNIC's motion to disqualify, the decision below should still be reversed. A federal district court does not have the power under the FAA to disqualify counsel in a private arbitration. Under the FAA, a federal court's powers with respect to a private arbitration are limited to (1) compelling arbitration, (2) confirming an arbitration award, (3) appointing an arbitrator, and (4) vacating or modifying an award. A federal court has no other power to interfere in private arbitration, and has no power to sanction or disqualify counsel. The district court erred in doing so here.

The district court also erred because its disqualification order was beyond the scope of the court's inherent powers. The district court incorrectly believed that it had the inherent power to disqualify counsel in a private arbitration, and also incorrectly concluded that it could apply its Local Rules to alleged conduct in an arbitration. A court's inherent powers do not extend to sanctioning parties or counsel in proceedings not before the court, and the district's Local Rules are similarly confined to actions by counsel in proceedings before that court.

The district court also abused its discretion by ordering disqualification of counsel. The court failed to hold NNIC to the high standard of proof required for attorney disqualification, and it mistakenly attributed conduct by Insco's former arbitrator to Insco and its counsel. As a result, the court incorrectly believed that the e-mails at issue related to "live and contested" matters in the arbitration at the time they were sent to Insco's counsel, and also incorrectly found that Insco's counsel violated non-binding private guidelines applicable only to arbitrators. And, despite sanctioning counsel with disqualification for conduct taken solely to protect Insco's interests, the district court did not find that counsel acted in bad faith, which is required for such a sanction.

STANDARD OF REVIEW:

1. *When the standard of review is well understood, as will be the case in the vast majority of appeals (particularly those from grants of dismissal under 12(b)(6) or grants of summary judgment), there is no need to explain it extensively. If you feel the need to be any more detailed than the following examples, it is probably best to do so in the actual discussion section, as it is likely to be an issue in the case:*

> The standard of review applicable to a *sua sponte* dismissal made pursuant to 28 U.S.C. § 1915(e) or 42 U.S.C. § 1997e for failure to state a claim is *de novo*. *See Giano v. Goord*, 250 F.3d 146, 150 (2d Cir. 2001). To survive dismissal for failure to state a claim, a complaint must simply "give the defendants fair notice of what the . . . claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quotation marks and citation omitted); Fed. R. Civ. P. 8(a)(2). Especially "when the plaintiff proceeds *pro se*, as in this case, a court is obliged to construe his pleadings liberally, particularly when they allege civil rights violations." *McEachin v. McGuinnis*, 357 F.3d 197, 200 (2d Cir. 2004); *see also Harris v. Mills*, 572 F.3d 66, 72 (2d Cir. 2009) (noting courts are "obligated to construe a *pro se* complaint liberally"). The court must accept the material facts alleged in the complaint as true and construe all reasonable inferences in the plaintiff's favor. *See Hernandez v. Coughlin*, 18 F.3d 133, 136 (2d Cir. 1994).

2.

> This Court reviews a district court's decision to grant summary judgment *de novo*. *Miller v. Wolpoff & Abramson, L.L.P.*, 321 F.3d 292, 300 (2d Cir. 2003). Summary judgment is appropriate only if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see Miller*, 321 F.3d at 300.
>
> On a motion for summary judgment, "all factual inferences must be drawn in favor of the non-moving party." *Miller*, 321 F.3d at 300. This means the Court is "required to resolve all ambiguities and draw all permissible factual inferences in favor of [Catsimatidis]." *Terry v. Ashcroft*, 336 F.3d 128, 137 (2d Cir. 2003). It also means the Court must "mak[e] all credibility assessments in his favor," *McCarthy v. N.Y. City Technical Coll.*, 202 F.3d 161, 167 (2d Cir. 2000), and "must disregard all evidence favorable to [plaintiffs] that the jury is not required to believe," *Reeves v. Sanderson Plumbing Prods. Inc.*, 530 U.S. 133, 151 (2000); *see In re Dana Corp.*, 574 F.3d 129, 152 (2d Cir. 2009).

ARGUMENT:

1. *You will not always be able to cite direct authority for every argument you make. Nonetheless, when you only cite a case that cuts against your argument, followed by extensive arguments devoid of citation (particularly when those arguments refer to the Constitution or legal principles), it highlights the novel and unsupported nature of the argument:*

> When conducted in the United States, wiretaps by federal law enforcement are largely governed by Title III of the Omnibus Crime Control and Safe Streets Act of 1968 [18 U.S.C.§§2510-2520], including a provision which requires the Government to provide a defendant with a copy of the court order and accompanying application for the interception. 18 U.S.C.§2518(9). However, this Court has held that those provisions do not automatically apply outside the United States. See *Stowe v. Devoy*, 588 F.2d 336, 341 (2d Cir. 1978); *United States v. Maturo*, 982 F.2d at 60. It is clear, therefore, that if the Jamaican wiretap orders had been authorized by a United States District Court Judge for execution in this country, then the affidavits would have been turned over to the defense. No different result should obtain where the wiretap orders were authorized by a foreign justice and the intercepted conversations themselves used by the United States Government in its case in chief against the defendant. The fundamental unfairness of a defendant's inability to challenge critical evidence of this nature is outrageous. It is unfathomable that the Government should be able to use evidence of this type without any oversight by a United States judge by hiding behind the fact that the eavesdropping warrant was issued by a foreign court even where a review of the record reveals that it was done at the behest or with the assistance of American law enforcement.
>
> The arguments put forth by the Government and the district court against disclosure of the requested documents are flawed. The issue should not be viewed as the Government being forced to request documents from the Jamaican government solely for the purpose of giving them to a third party – the defense – just because the Government did not intend to use the documents in their direct case. The Government and the district court themselves should have wanted to obtain the documents from the Jamaican government so they could conduct their own review of them. If a trial is truly the truth-seeking function it was created to be, then the Government and the district court should have wanted to have those affidavits and applications to ensure that the interception orders were properly obtained by Jamaican authorities. The Government should not seek to introduce and base a conviction on evidence that was illegally or unethically obtained. And without reviewing those underlying affidavits and applications, there was no way of knowing that they were properly obtained.
>
> The Government wants us, meaning the American people, and specifically Mr. Lee, to take the word of the Jamaican government that the wiretaps were legally obtained just because they were authorized by a Jamaican court. In opposition to Mr. Lee's motion to suppress the wiretap evidence, the Government argued that "the existence of the court authorization for the wiretaps, [demonstrates that] the JCFND/VU properly followed the

law of Jamaica when intercepting the defendants over wire communications..." [Govt's Opp. to Motion to Suppress at p. 9 (A115)] and that "the JCFND/VU followed its own laws and did not act improperly under Jamaican law". *Id*. at 12 [A118]. This argument is ridiculous given that in the United States, even though a judge authorizes a warrant, there is a review process to which a defendant is entitled before the evidence obtained from the search is used by the Government in court. We do not just take anyone's word for it. Just because a warrant is obtained in a foreign court should not mean that the defendant is not entitled to constitutional protections. To do so is to give the Government entirely too much freedom and the ability to circumvent the Fourth Amendment by going out and getting other nations to obtain evidence with limited if any oversight by American courts. By allowing this type of evidence to be admitted at trial with no review, the Government is being given the option of having another nation with whom we have a close law enforcement relationship such as Jamaica get a wiretap or other search order and then use the evidence obtained pursuant to that order in their direct case. We do not know what kind of rights the people of the issuing country have and we certainly do not know if they value the rights of their citizens the way that we do in this country. In other words, by allowing this, we are giving American law enforcement the ability to circumvent our Constitution with little if any oversight and that is not what our Constitution guarantees American citizens.

GENERAL THINGS NOT TO DO:

1. *Don't rely so much on citations, abbreviations, and your own shorthand that your brief ends up looking like it is written in code:*

> As in *AFEC,* 131 S.Ct. at 2816-17&n.5, Vermont law imposing political-committee burdens neither bans nor otherwise limits spending for political speech. *See* BLUE.43-44. Nevertheless, strict scrutiny remains preferable to exacting scrutiny *post-Citizens United*. BLUE.45- 46; *compare* BLUE.43-44 (describing political-committee burdens that are "onerous" under *Citizens United) and MCCL-III,* 692 F.3d at 872 ("onerous") *with AFEC,* 131 S.Ct. at 2824 (applying strict scrutiny *post- Citizens United* to "a substantial burden" on political speech (citing *Davis v. FEC,* 554 U.S. 724, 740 (2008) (citing, in turn, *MCFL,* 479 U.S. at 256))); *MCCL-III,* 692 F.3d at 875.
>
> Even if exacting scrutiny applies, RED.14-15; RED.20; CDGREEN. 20; BLUE.46; BLUE.56, Vermont law imposing political-committee burdens is unconstitutional as applied to VRLC's speech, because VRLC is neither under the control of, nor does it have the major purpose of nominating or electing, candidates. BLUE.53-55; *see MCCL- III,* 692 F.3d at 872.
>
> Saying the Supreme Court has not applied the major-purpose test to state law, CD-GREEN.19, is unpersuasive, because the Supreme Court has not accepted such a case. BLUE.52. Pages 914-16 of *Citizens United* do not address the test, RED.25-26, because they address *non*-political committee reporting requirements, not full-fledged political-committee burdens. BLUE.48; *see MCCL-III,* 692 F.3d at 875 n.9.
>
> Holding that the test does not apply to state law "cannot be right[.]" BLUE.52. And even if the test were a *Buckley* narrowing gloss, RED.21-22; CD-GREEN.15-16; *contra* BLUE.51, it would still apply to state law. *MCCL-III,* 692 F.3d at 872. *Madigan* holds otherwise*,* 697 F.3d at 486-91, by disregarding *MCCL-III. See id.* at 470 n.1.

2. *Don’t belittle your opponent with snide, colorful, or “humorous” remarks – it makes you look immature, and it makes your arguments fail even harder if they are incorrect:*

> Repeatedly, defendants taunt plaintiffs for their Opening Brief having omitted to mention the "internal documents" showing that LBREP III properties had gained 2.4% in value by June 30, 2008. Thus, the "2.4% report" would seem a good place to begin to dismantle defendants' argument, but alas, that must wait until defendants' reading of the Form 8-K is considered.
>
> The response to this merry line of argument is this: . . .
>
> The irony of defendants' obvious pleasure in pointing out that plaintiffs actually "relied on" the "2.4% report" purporting to show a 2.4% value increase is that plaintiffs' intention was to illustrate the absurdity of a claim that LBREP's properties were gaining value as the U.S. and Global market were in steep decline.

3. *Be careful with citations. It's not a big deal if some unusual document is not cited perfectly according to bluebook standards as long as it looks like you put some effort into it, but basic federal and state cases should be cited correctly and consistently. Avoid these common errors:*

a. Federal cases should not use superscript:

> *John Morrell v. Frozen Food Express, Inc.*, 700 F.2d 256, 258 (5th Cir. 1983).

b. Do not use inconsistent citation styles within the same brief (or the same sentence!):

> "The *prima facie* case under the Carmack Amendment is straightforward: a plaintiff must show "(1) delivery in good condition; (2) arrival in damaged condition; and (3) the amount of damages." *REI Transport, Inc. v. C. H. Robinson Worldwide, Inc.*, 519 F.3d 693, 699 (C.A. 7(Ill.) 2008), citing *Am. Nat'l Fire Ins. Co. v. Yellow Freight Sys*., 325 F.3d 924, 929 (7th Cir.2003)

c. Do not use parallel citations for Supreme Court cases (even though Westlaw often displays them this way in published cases). If there is a U.S. Reporter citation available, use that; if not, use the S. Ct. citation. The same is true for state cases: pick one reporter (and only one reporter) and stick to it:

> Compare *Int'l Union of Elec., Radio and Mach. Workers v. Robbins & Myers, Inc.*, 429 U.S. 229, 238, 97 S.Ct. 441, 50 L.Ed.2d 427 (1976), *with Burnett v. New York Cent. R. Co.*, 380 U.S. 424, 434-35, 85 S.Ct. 1050, 13 L.Ed.2d 941 (1965).

> The New York Court of Appeals clarified the scope of this law in *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank*, 85 N.Y.2d 20, 623 N.Y.S.2d 529 (1995). The same interpretation has been applied by other state courts. *See, e.g., Guggenheimer v. Ginzburg*, 372 N.E.2d 17 (1977).