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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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HYE SUN KANG,
:
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Plaintiff, :
:
-against- :
:
:
L'OREAL USA, INC., AND :
BLOOMINGDALE'S, INC., :
:
Defendants. :
-----X

18-CV-11682 (VEC)

ORDER

VALERIE CAPRONI, United States District Judge:

WHEREAS on August 3, 2020, Bloomingdale's, Inc. and L'Oreal USA, Inc. filed Motions for Summary Judgment in this matter, Dkts. 71, 75; and

WHEREAS on February 18, 2021, the parties appeared for oral argument on the Motions;

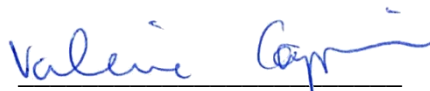
IT IS HEREBY ORDERED that for the reasons stated at the hearing, Bloomingdale's Motion for Summary Judgment is GRANTED in part and DENIED in part and L'Oreal's Motion for Summary Judgment is DENIED in its entirety.

IT IS FURTHER ORDERED that by no later than **Friday, March 5, 2021**, the parties must file a joint letter proposing a reasonable schedule for expert discovery and a trial date after July 1, 2021. In the joint letter, the parties must further inform the Court whether they would like a referral to Magistrate Judge Moses for a settlement conference.

The Clerk of Court is respectfully directed to close the open motions at docket entries 71 and 75.

SO ORDERED.

**Date: February 18, 2021
New York, New York**



**VALERIE CAPRONI
United States District Judge**

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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 HYE SUN KANG,

4 Plaintiff,

5 v.

18-CV-11682 (VEC)
Telephone Conference

6 L'OREAL USA, INC., and
7 BLOOMINGDALE'S, INC.,

8 Defendants.

9 New York, N.Y.
10 February 18, 2021
10:59 a.m.

11 Before:

12 HON. VALERIE E. CAPRONI,

13 District Judge

14 APPEARANCES

15 PASHMAN STEIN WALDER HAYDEN PC

Attorneys for Plaintiff

16 BY: JAEYOUN JOHN KIM

17 CLIFTON BUDD & DeMARIA LLP

Attorneys for Defendant L'ORÉAL USA, Inc.

18 BY: ARTHUR J. ROBB

19 SCHOEMAN UPDIKE KAUFMAN & GERBER LLP

Attorneys for Defendant Bloomingdale's Inc.

20 BY: STEVEN GERBER

21 MACY'S INC. LAW DEPARTMENT

Attorneys for Defendant Bloomingdale's Inc.

22 BY: BETTY THORNE TIERNEY

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1 (The Court and all parties appearing telephonically)

2 THE COURT: Good morning, everybody. This is Judge
3 Caproni.

4 For the plaintiff, who do I have?

5 MR. KIM: It is John Kim from Pashman Stein Walder
6 Hayden, Judge. I believe one of the guests on the line is
7 my -- well, he was an associate, now he's been promoted to
8 counsel, but Tim Malone, from my firm, as well.

9 THE COURT: Okay. But you're going to be doing the
10 talking?

11 MR. KIM: I will be.

12 THE COURT: Who do I have for Bloomingdale's?

13 MR. GERBER: Good morning, your Honor. Let me
14 introduce Betty Tierney, she's admitted pro hac vice. She's in
15 St. Louis and she will be speaking on behalf of Bloomingdale's.

16 This is Steven Gerber from Schoeman Updike speaking
17 now.

18 THE COURT: So, Ms. Tierney is going to be handling
19 the argument?

20 MR. GERBER: That's correct, your Honor.

21 THE COURT: Ms. Tierney, do you have a camera? Are
22 you on camera?

23 MS. TIERNEY: I am on camera. Do you all see me?

24 THE COURT: I don't see you. So keep talking long
25 enough for me to get you.

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1 MS. TIERNEY: Okay. Your Honor, I'm right here in
2 St. Louis.

3 THE COURT: You're not a cat, I bet.

4 MS. TIERNEY: I'm not a cat. Although, I love the
5 picture of Ms. Caliendo's cat.

6 Does anybody else see me?

7 THE COURT: No. It looks like your camera came off.

8 THE DEPUTY CLERK: I can see her, Judge.

9 THE COURT: You can see her?

10 THE DEPUTY CLERK: Yes.

11 MS. TIERNEY: And I can see myself.

12 THE COURT: Ms. Tierney, I'm going to ask you to go
13 out and come back in. Let's see if that fixes it.

14 While she's doing that, I have Mr. Robb for L'Oréal?

15 MR. ROBB: Yes, your Honor. Good morning. Arthur
16 Robb with Clifton Budd & DeMaria for L'Oréal. And also
17 participating is my colleague, Kathryn Cronin. I'll be doing
18 the speaking, your Honor.

19 THE COURT: Ms. Tierney, you seem to be back in, but I
20 can't --

21 MS. TIERNEY: Did that help, Judge?

22 THE COURT: It does. I see you. But someone needs to
23 mute your microphone, because I'm hearing an echo.

24 MR. ROBB: If I may, your Honor. It sounds like --
25 Betty, maybe do you have two audio sources open, like your

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1 phone and your computer? They're reverbing off of one another.

2 MS. TIERNEY: Well, you couldn't hear me on my
3 computer. Can you hear me now?

4 MR. GERBER: Yes, we can hear you on the computer.

5 MS. TIERNEY: But I can't hear you.

6 THE COURT: You cannot hear us?

7 MS. TIERNEY: No, your Honor. I can see your lips
8 moving, but I can't -- I don't know what the problem is.
9 That's why I had my phone on, I couldn't get the sound to work.

10 THE COURT: That's fine. You can use your phone, just
11 mute your computer. Mute the little --

12 MS. TIERNEY: I think you said use my phone when it's
13 my turn to speak?

14 THE COURT: Sure. Can you hear me now? Ms. Tierney,
15 can you hear me? Can you hear me?

16 MS. TIERNEY: Did that help at all? Can I hear you
17 guys now?

18 THE COURT: Can you hear me?

19 MS. TIERNEY: Your Honor, I think I have audio now.

20 THE COURT: You do, but you need to mute your
21 computer.

22 MS. TIERNEY: Got it. I'm not sure how to quite do
23 that.

24 THE COURT: I think you may have just done it.

25 THE DEPUTY CLERK: Judge, I muted her. It's Angela.

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1 I muted her.

2 THE COURT: Perfect. Okay, we took care of you.

3 Ms. Tierney, can you hear me?

4 MS. TIERNEY: Yes, your Honor, I can. Can you hear
5 me?

6 THE COURT: We can.

7 MS. TIERNEY: Thank you, your Honor. I apologize.

8 THE COURT: Not a problem. The technical things in
9 the time of COVID, we've come to be very patient.

10 Okay. So, we're here on the motion for summary
11 judgment by the defendants. Ms. Tierney, you're arguing for
12 Bloomingdale's. This is your motion. So, you have the floor.

13 MS. TIERNEY: Thank you, your Honor.

14 There are two main claims in the complaint. One, of
15 course, is the negligent misrepresentation and the other is the
16 race discrimination claim. The negligent misrepresentation
17 claim I'm not going to spend very much time on, unless your
18 Honor has specific questions. I think that's fully captured,
19 at least our arguments are fully captured in the briefing.

20 THE COURT: I agree.

21 MS. TIERNEY: Thank you, your Honor.

22 The primary issue in this case, from my perspective,
23 is we have a race case with no race evidence or no evidence of
24 race discrimination.

25 The primary evidence that has been put forth by our

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1 opponent is the fact that Ms. Kang is, in fact, of Asian
2 ancestry, as was Mr. Chen, who was the fraudster, for lack of
3 better terminology, who was involved in the process of
4 defrauding Bloomingdale's out of tens of thousands of dollars.

5 The other piece of evidence of Asian discrimination,
6 if you will, comes from the interview with asset protection,
7 which is our version of loss protection.

8 What Ms. Kang will argue is that, well, during the
9 course of this conversation, they asked me questions about
10 Asian ancestry. Now, if you look at this transcript – and the
11 transcript of the interview is produced in its totality, and it
12 is transcribed – you can see from the conversations, there were
13 communications about ethnicity, but they were brought up by
14 Ms. Kang. Ms. Kang talked about her customers being Chinese,
15 that she had Korean customers, that her Japanese customers
16 liked a certain type of product. So, that's how the ethnicity
17 issue came up.

18 But the questions about which Ms. Kang alleges there
19 is some type of issue stems from Shanine Gray and Teela Escobar
20 asking about how she communicated with the fraudsters and how
21 she communicated with the individuals coming into the store.
22 And this is relevant for a very important reason. There was
23 suspected collusion with Ms. Kang and the fraudsters.

24 So, understanding -- one of the theories of questions,
25 for example, was whether she knew them, whether she was friends

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1 with them. When you're trying to spare out the truth and
2 determine whether or not someone is acting collusively, you
3 certainly want to know what the relationship is. Is there a
4 friendship, is there some type of business relationship, that
5 sort of thing. So those questions were certainly part of the
6 conversation and they were a relevant part of the conversation.

7 The other piece that's really relevant is, the request
8 is related to how the communications took place, and that was
9 relevant because of the story that was being told by Ms. Kang.
10 Ms. Kang said that Mr. Chen was, in fact, representing a group
11 of buyers who did not speak English, and so he was the conduit
12 for them for their purchases. So, whether or not he spoke
13 English, was he able to communicate with Ms. Kang, was there a
14 methodology in which they could communicate, was this really
15 necessary. So those questions were also asked just as part of
16 the investigation. There is nothing suspicious about that,
17 there is nothing discriminatory about that. It's simply an
18 asset protection investigator trying to get to the truth of the
19 facts that are being represented and being set forth.

20 That's the evidence that we have of race
21 discrimination. That's it in a nutshell. There is nothing
22 else, Judge.

23 But what's really important is looking at what
24 happened here and why it happened. There are two key pieces of
25 this. One is when the investigation started and then when the

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1 interview was conducted. Both of these occurred because of
2 issues related to fraudulent customer charges. The
3 investigation itself began because a customer called loss
4 prevention asset protection and recorded a charge on her card
5 that was fraudulent, that she had not made in the
6 Bloomingdale's location. When they researched that, they found
7 out that it was the YSL counter and it was Ms. Kang who had run
8 the transaction. The investigation started at that point in
9 time and it was focused on the YSL counter. It was focused to
10 some extent on Ms. Kang, but they were looking at the counter
11 in general to see what was going on, what policy violations
12 were taking place and so on.

13 The actual interview itself might never have taken
14 place, except for the fact that George Kornieb, who was one of
15 the asset protection officers, a few weeks before the
16 interview, had been in the stockroom and had found a bag of
17 merchandise that had not been charged to a consumer. It's
18 unusual to have a bag of merchandise in the stockroom. It's
19 not supposed to be taken off the floor until it's actually sold
20 somebody so it can be available to other customers. So this
21 was suspicious. So he marked the bag so that if something
22 happened with the bag, he would be aware of it.

23 The day of the interview, this bag was actually taken
24 by Ms. Kang to the counter and she began to ring up some of the
25 merchandise. Mr. Kornieb was alerted, he understood this was

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1 the bag he had marked, he thought there was merchandise that
2 was being sent out of the store without being paid for, and so
3 he looked up the transaction as it was being rung and saw that
4 it was being charged to a current employee, Rachel Isanscot.
5 Ms. Isanscot was in the store and Mr. Kornieb reached to
6 Ms. Isanscot to see if she had, in fact, authorized the
7 purchase; she had not. So, they knew that this was being a
8 fraudulent transaction. As soon as the young man took the bag,
9 he was detained. Asset protection, when they have suspected
10 collusion and the customer is detained, they will then sit down
11 and interview the employee, and that's what happened with
12 Ms. Kang. The fear being, of course, that the employee knows
13 their partner in crime, so to speak, has been apprehended, may
14 not come back and they may not have an opportunity to speak
15 with them in the future.

16 So that's the two incidents that led. None of that
17 has anything to do with her ethnicity, it has solely to do with
18 fraudulent charges to a customer.

19 Now, what Ms. Kang will say in response to that, well,
20 I had two coworkers who were equally involved, and they were
21 not detained, and they were of Latin-Hispanic heritage, and so
22 that is the discrimination. But that's really not true. They
23 weren't equally involved. In our reply brief, one of the
24 things we did was we set out to the transactions. We looked at
25 the transactions by associate number. Each transaction that

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1 (technical interruption). Ms. Kang, for example, has an
2 associate number, Mr. Oliveira and Mr. Rodriguez. Those are
3 the three individuals that we're talking about.

4 When you do the analysis, Ms. Kang rang 97 percent of
5 the 204 transactions that were rang for Mr. Chen. 97 percent.

6 THE COURT: Can I interrupt you for just a second.

7 MS. TIERNEY: Yes, your Honor.

8 THE COURT: That analysis did not look at sales that
9 were rung to the loyalty card of Karen Zweig, even though there
10 would be reason to believe that Karen Zweig's loyalty number
11 was also linked to Mr. Chen, the primary fraudster.

12 MS. TIERNEY: And what happened with that
13 investigation - you can look at the notes from AP - during the
14 interview, Ms. Kang mentioned Oliveira and Rodriguez. So those
15 investigations took place after Ms. Kang was actually spoken
16 to. And that is addressed in the reply briefs, because the
17 company considered them two separate investigations, but there
18 is one.

19 THE COURT: That's fine. Excuse me. But the jury
20 might not look at it that way. A jury might say, look, all
21 three of them are working at the same counter, they all have
22 transactions that have reason why loss protection should be
23 interested in them, and yet, the only person who got frog
24 walked in handcuffs out of the store was Ms. Kang, who shares
25 an ethnicity or race, which is the theory of the plaintiff,

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1 with the bad guy.

2 MS. TIERNEY: Sure. But the issue is that, number 1,
3 there is two different sets of cards, your Honor. Third-party
4 cards are different from Bloomingdale's cards. Ms. Kang was
5 involved solely with Bloomingdale's cards.

6 THE COURT: Sorry, let me interrupt you for a second.

7 That's right, from the standpoint of ease and
8 investigation. It is obviously easier for Bloomingdale's to
9 investigate fraudulent charges against its own cards versus
10 fraudulent charges against American Express cards, which may or
11 may not ever be reported. But you're hanging your hat on
12 violation of Bloomingdale's policies, and regardless of whether
13 the policy was violated with a Bloomingdale's card or was
14 violated with an American Express card, many of the policies
15 that you're talking about – so taking credit card numbers from
16 a telephone and entering them, entering lots of different
17 credit card numbers until you finally get one to go through –
18 they don't have anything to do with what the underlying card
19 is; right?

20 MS. TIERNEY: Well, not really. I would disagree with
21 you, Judge, and here's why.

22 First of all, we know that the charges to the
23 Bloomingdale's cards were fraudulent, and we have a loss of
24 \$40,000. \$20,000 to what Ms. Kang rang for herself, \$20,000
25 for what she rang for Rodriguez. We have no evidence that

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1 anything done by Mr. Oliveira was fraudulent, we have no
2 evidence whatsoever, and there is none in the record. And
3 there is no evidence that Bloomingdale's was ever charged back
4 for those, no evidence whatsoever.

5 But the other thing is, there is a lot of differences
6 between Rodriguez and Kang. What Kang did was, if her
7 colleague was at the counter, she would take the product to the
8 elevator, she would take the product to a door so that they
9 could have easy access. What Oliveira did, he had 17
10 transactions, and that's in the reply brief for Zweig.

11 So, first of all, you have a number of transactions
12 that are different. You have the fact that there is not a loss
13 at all to Bloomingdale's with respect to the third-party cards.
14 You also have the fact that the company is trying to make a
15 decision about how to use its resources. They know the
16 third-party cards are not going to cooperate, we're not going
17 to get any more information from them, and we don't think we've
18 had a loss yet. So why do we waste our resources there.

19 THE COURT: I'm sorry. Are you acknowledging that all
20 of these reasons that you're giving are not the real reason?
21 You have said that the reason you fired this woman or banned
22 her from the store was because of violations of policy. She
23 didn't fill out the right form to use a card when the card
24 wasn't present, she broke up sales of more than six products
25 into multiple charges. All of these things that you're arguing

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1 for me are the nondiscriminatory neutral reason why she was
2 fired. Those are also true of Oliveira and Rodriguez.

3 MS. TIERNEY: The only thing that Mr. Rodriguez --
4 excuse me, not Rodriguez. They're not true of Rodriguez. I
5 don't think they're true of Rodriguez at all.

6 With respect to Oliveira, he did take numerous credit
7 cards. That is the only thing we know that he did.

8 With respect to Ms. Kang, it is just not a matter of
9 not doing a memo order, it's not taking the credit cards. She
10 also had send orders. When you have a phone order, you're
11 required to send it, you're not required to pick it up. She
12 allowed all of those to be picked up, every one of them. I
13 think 5 of the 17 by Oliveira were picked up, the other 12 were
14 sends.

15 The issue is, I mean, the company has a right to look
16 at its resources and decide what is valid. There is no
17 evidence -- and the people who made this decision was Fred
18 Becker and Chris Castellani. Those are the two individuals.
19 She made the decision about the interview. There is not one
20 shred of evidence, your Honor, in the record that either one of
21 them had an animus for people of Asian ancestry or bias of
22 people who are of Latin ancestry. There is not a shred of it.
23 They said and testified they looked at the fact they had
24 third-party charges and could they get any information to find
25 out about the fraud, and they couldn't, they knew that going

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1 in. So they had a resource determination to make.

2 Ms. Kang was not only violating policy, but they
3 believed her to be in collusion with the fraudster. And a lot
4 of that was her behavior, her surreptitious behavior of how she
5 delivered the merchandise. The fact that we know now from the
6 WeChat that, at least one point in time when asset protection
7 was looking interested in Mr. Chen and his representative, she
8 warned Mr. Chen not to send the individual back in because
9 asset protection was interested in him. I asked her in her
10 deposition, I asked her why she did not just talk to asset
11 protection and find out what was going on if nothing was
12 (technical interruption) or inappropriate, why did she not just
13 talk to asset protection and get them to explain to her what
14 their concerns were and she could alleviate the issue. She
15 couldn't answer the question. She said she didn't remember.
16 But the issue was clearly from those WeChat messages, your
17 Honor. She was warning them off, asset protection was looking
18 at it. So, there is sufficient evidence to suggest that
19 Ms. Kang was, in fact, in collusion with Mr. Chen, and that's
20 the biggest issue and difference between her and Oliveira.

21 Another distinction, Ms. Kang would divide her
22 transactions into numerous pieces when she was ringing them,
23 presumably to stay under the radar. When I asked her that
24 question at deposition, she also couldn't answer. She didn't
25 know why she had done that.

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1 When you look at Oliveira, he is sitting there, he is
2 ringing the transactions. There may be 20 items, he's not
3 breaking them into pieces, he's just taking the cards as they
4 are coming, and the company decided that the only thing he's
5 doing is taking too many cards. That is a training
6 opportunity. There is no evidence of collusion. That's the
7 final determination, the collusion factor and the loss to the
8 company, \$40,000 or so versus nothing.

9 THE COURT: Okay.

10 MS. TIERNEY: I think that's pretty much it, your
11 Honor, unless you have questions. I'm looking through my
12 notes, but I think I hit the highlights, and I certainly could
13 answer additional questions, but that's it for me at the
14 moment, your Honor.

15 THE COURT: Hang on a second. Let me see if I have
16 anything.

17 Okay. Let me hear from L'Oréal.

18 MR. ROBB: Thank you, your Honor.

19 In the interest of time, I don't see any useful
20 purpose in retreading over the ground just covered.

21 THE COURT: I agree.

22 MR. ROBB: Obviously, L'Oréal submits that if
23 Bloomingdale's prevails on its motion, then likewise, there
24 would be no viable basis for plaintiff to proceed against
25 L'Oréal.

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1 However, L'Oréal has the additional threshold
2 argument, which I'll address, and that is Ms. Kang, concededly,
3 is not claiming that L'Oréal affirmatively acted with
4 discriminatory intent at any point on the relevant timeline.
5 Rather, Ms. Kang is seeking to hold L'Oréal liable for the
6 alleged discrimination engaged in by representatives of
7 Bloomingdale's.

8 In the briefing, Ms. Kang kind of floats in and out
9 of -- there is the cat's paw theory of liability, which is
10 discussed in the papers, and more generally, Ms. Kang floats in
11 and out of concepts of agency and negligence. I mean, that's
12 what we're talking about here, is how can Ms. Kang hold
13 Bloomingdale's liable for the conduct of an arm's length
14 business partner, it would have to be under a concept of agency
15 or a concept of negligence.

16 THE COURT: You said that backwards, but I understand
17 what you mean. How could L'Oréal be held responsible for
18 Bloomingdale's.

19 MR. ROBB: Thank you, your Honor.

20 And just at the outset, I don't think it was seriously
21 contested in the papers, but I'll just say it on the record,
22 and that is Ms. Kang has alleged that L'Oréal and
23 Bloomingdale's are joint employers, and the parties, the
24 defendants have not moved for summary judgment on that
25 question, but I would simply note that a finding of a joint

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1 employer relationship is not in and of itself sufficient to
2 confer liability. That's a jurisdictional hook. It tells us
3 Title 7, in state and local statutes, allow a plaintiff to sue
4 his or her employer. So that's the hook that allows Ms. Kang
5 to try to go after Bloomingdale's, to call us all joint
6 employers.

7 But there still has to be some basis, some basis in
8 fact, some basis in law to say look, L'Oréal, you messed up and
9 here's how you messed up. Well, one way that Ms. Kang could
10 seek to hold L'Oréal liable would be to say, well,
11 Bloomingdale's is your agent. That kind of relationship, it
12 doesn't fit here. What you typically see in an agency
13 relationship is – and this is just a hypothetical, your Honor,
14 to illustrate it – if L'Oréal owned a particular business and
15 hired Bloomingdale's to run it, the actions of Bloomingdale's
16 could be imputed, arguably, to L'Oréal. But that's not our
17 case here. This is, Bloomingdale's owns the store,
18 Bloomingdale's operates the store, L'Oréal is nothing more than
19 an arm's length business partner. L'Oréal sells products to
20 Bloomingdale's and, in connection with driving sales, L'Oréal
21 provides ancillary services in the nature of beauty advisers
22 who assist customers. That's it. And so, there are no facts
23 cited by Ms. Kang.

24 There is no legal authority cited by Ms. Kang for the
25 proposition that an arm's length vendor in a retail location is

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1 the master in the master-servant relationship as between the
2 vendor and the security team that is responsible for policing
3 the store. And that's what we're talking about here, your
4 Honor. We're not talking about some agency relationship with
5 respect to making schedules or payroll or kind of
6 employment-related activities. We're talking about the
7 investigative function of Bloomingdale's in policing its own
8 store. L'Oréal didn't contract for Bloomingdale's to do that,
9 there was no express or implied understanding as between
10 L'Oréal and Bloomingdale's, that Bloomingdale's was somehow
11 policing the store for L'Oréal's benefit. There are simply no
12 facts.

13 And again, not surprisingly, plaintiff cannot cite a
14 single case where liability was found on an agency theory under
15 similar facts. It just doesn't work logically or legally.
16 There was no agency relationship with respect to the conduct
17 complained of.

18 Likewise, there are no facts from which a jury could
19 reasonably conclude that L'Oréal was negligent in terminating
20 Ms. Kang's employment.

21 Just to summarize what L'Oréal knew and when L'Oréal
22 knew it, it's undisputed that Ms. Kang was facilitating
23 high-volume fraud, multiple transactions, multiple product
24 curb, multiple credit cards, multiple deniers. We know
25 Ms. Kang was picked up off the sales floor by the asset

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1 protection team. We know that the L'Oréal management team in
2 store had no prior knowledge of the investigation, was not
3 provided any information regarding the nature of the
4 investigation regarding who were the underlying customers at
5 issue, whether any other L'Oréal employees were also under
6 investigation. None of that information was ever disclosed to
7 L'Oréal's in-store management team, none of that information
8 was ever disclosed to L'Oréal's corporate team.

9 THE COURT: Did they pursue it?

10 MR. ROBB: 100 percent, your Honor. It's undisputed
11 in the record.

12 So, just to go further down the timeline to flesh out
13 what we knew and when we knew it, the first information that
14 L'Oréal has concerning any issue at the YSL counter comes from
15 Ms. Kang herself. Ms. Kang reaches out -- I think first she
16 reached out to the account executive and then to HR, but,
17 basically, she says, look, they brought me in, they asked me
18 questions, they were concerned about -- they asked a lot of
19 questions about multiple cards and volume transactions. For
20 her part, Ms. Kang did not deny facilitating those
21 transactions, she simply said she wasn't in on the fraud.
22 Okay, fine. So we reach out -- we meaning L'Oréal corporate --
23 on multiple fronts. We reach out to our in-store management
24 team. What do you guys know about this? We don't know
25 anything. And that tracks with what Ms. Kang testified to.

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1 Ms. Kang testified, well, I didn't know and I didn't share with
2 my managers the nature of the transactions at issue. Ms. Kang
3 says, well, everybody knew about Mr. Chen. Well, okay. They
4 knew he was a good customer, but Ms. Kang also testified that
5 she kept to herself. She never told anyone the number of
6 transactions, the number of cards that were denied in
7 processing those transactions, the geographic dispersion of
8 those credit cards where, for example, she's using a card with
9 a Long Island zip code and that gets declined, so she uses a
10 Beverly Hills zip-coded card to complete that same transaction.
11 The management team had none of that information because
12 Ms. Kang kept that, secreted that information. She didn't
13 share that with anyone, even though she should have, even
14 though all of the other deponents, the managers, the coworkers
15 who testified about those data points. Those really sound like
16 red flags. If I had known, I would have told her to go tell
17 asset protection.

18 So, HR did reach out to the in-store management team;
19 that was a dead end. Our HR team reached out to Bloomingdale's
20 HR team, and we're told she's banned from the store, I can't
21 give you anything more; so that was a dead end. So then HR
22 reached out to our security folks. We had our VP reach out to
23 his counterpart at Bloomingdale's to see if that would be
24 possibly another pipeline of information. He was told, no,
25 we're not going to give you any more information. It was

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1 described, in general terms, we've got multiple incidents of
2 fraud facilitated by your employee here, Ms. Kang, and that's
3 it.

4 We asked, L'Oréal asked and were denied access to
5 investigative files, surveillance footage. None of that
6 information was forthcoming. I think the record evidence is
7 clear and undisputed that that's the general operational
8 practices of Bloomingdale's asset protection team. They keep
9 their investigations on a need-to-know basis. Ms. Kang, for
10 her part says, well, there is no written policy that says that.
11 Well, okay, that's interesting, but not particularly relevant.
12 The undisputed fact is whether it's written or not. The
13 undisputed practice, according to all of the record evidence,
14 is that that was (technical interruption) Bloomingdale's did
15 their business.

16 So, from our perspective, from L'Oréal's perspective,
17 we exhausted all available leads in terms of getting at what
18 happened here. In the end, what we were left with was a
19 summary statement from Bloomingdale's, Ms. Kang facilitated
20 this fraud and she's banned from the store. And for her part,
21 Ms. Kang admits that she facilitated the fraud, she denies
22 complicity, but she admits it.

23 So, the underlying facts are not disputed. The
24 position for which L'Oréal hired Ms. Kang no longer exists or,
25 more precisely, she is no longer able to fulfill it. Our folks

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1 in corporate are saying whether she was in on it or not, what
2 was she doing? Why was she continually and, over a period of
3 time, missing all of the obvious warning signs that should have
4 been escalated but, for some reason, were not? And so, in the
5 end, L'Oréal's HR and the legal team felt comfortable going
6 forward with a termination at that point.

7 So, you go through all of it and you say, where are
8 the facts that should have led L'Oréal's corporate team to
9 conclude that what's really going on here is Ms. Kang must be a
10 victim of discrimination, so we better do more than we're
11 doing. The answer, of course, your Honor, is there is nothing
12 there. There were no available facts that would have
13 reasonably triggered, in anyone's mind, knowing what L'Oréal
14 knew and what information was available to it, there are no
15 facts upon which one could reasonably conclude that L'Oréal
16 missed signs of discriminatory bias. Really, your Honor, it's
17 is that simple.

18 THE COURT: So, the local L'Oréal manager that you had
19 on site, that person knew nothing about the investigation of
20 Kang, but did L'Oréal know that all this involved Mr. Chen and
21 did they ask their local on-site manager about Mr. Chen?

22 MR. ROBB: No. No, your Honor. We didn't know that
23 and we wouldn't have known that. Again, you've got asset
24 protection team, they're behind their curtain doing their
25 investigation and they're reviewing sales records and they know

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1 who they're looking at, but L'Oréal didn't and wouldn't have
2 known that unless Bloomingdale's shared it, and the undisputed
3 evidence is that they did not.

4 The in-store management team had no prior awareness
5 that an investigation was happening at all. The first
6 indication that the in-store management team received was when
7 Ms. Kang was picked up off the sales floor. We were as
8 surprised as anyone and we asked, again, we asked in-store, we
9 asked at the HR level, and we asked at the asset protection
10 level, what's going on here? And the answer is, we don't share
11 those details.

12 So, the answer is no, your Honor, we didn't have that
13 information and we couldn't have had it.

14 THE COURT: Okay. Thank you.

15 Mr. Kim.

16 MR. KIM: Thank you, your Honor.

17 If I might just say, I wish I had the opportunity to
18 appear before you in person to do this, but I thank you very
19 much for the opportunity to do it in some fashion.

20 THE COURT: Me, too.

21 MR. KIM: Hopefully, that will all go back to
22 something close to normal some day soon.

23 THE COURT: Soon.

24 MR. KIM: Your Honor, I'll say we all know that, under
25 the applicable standards, that plaintiff here must first

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1 establish a prima facie case of discrimination. Bloomingdale's
2 and L'Oréal, both defendants, they concede the first three
3 factors and only the fourth is in dispute, whether adverse
4 employment action occurred under circumstances giving rise to
5 an inference of discriminatory intent.

6 Now, we briefed this. The Second Circuit has said
7 that that burden on a prima facie case is minimal. The Second
8 Circuit in *Abdu-Brisson v. Delta Air Lines, Inc.* has said that
9 a plaintiff can make this showing of disparate treatment simply
10 by pointing to the adverse employment action and the many
11 employees who suffered no such fate. And make no mistake,
12 Judge, we submit that the plaintiff has done that. The
13 defendants may try to parse it this way or that, and they look
14 for fine ways to distinguish, but the bottom line is, at best,
15 Ms. Kang was fired for violating policy violations that her
16 coworkers also routinely violated, as they have testified in
17 depositions and in sworn-to certifications. And, at worst, she
18 was fired because they thought she was a criminal selling
19 products to a fraudster named Kevin Chen, also known as Gang
20 Chen, who was using fraudulent credit cards, and that's the
21 same thing every single one of her coworkers at the L'Oréal
22 counter did in some capacity. That's 100 percent of her
23 coworkers. Either way, plaintiff has met its initial burden.

24 We know then that the burden shifts. The defendant
25 must produce, through admissible evidence, reasons for its

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1 action, which if believed by a trier of fact, would support a
2 finding that unlawful discrimination was not the cause of the
3 employment action. We know that the defendants have tried to
4 do that. They have said that the firing was in no way racially
5 motivated. They said that it was based on policy violations of
6 conducting remote sales, which your Honor knows it means that
7 the customer is not physically present without filling a memo
8 order. They have said that the firing was based on the policy
9 violation of not allowing presales to leave the store before
10 the sale date, and that's why an item is sold and held for a
11 customer until the designated sale date. They have said that
12 even if she is not in on it, Ms. Kang exercised grossly bad
13 judgment. So that's what the defendants for their part have
14 done.

15 Then the burden shifts back to plaintiff. The
16 plaintiff's evidence must show circumstances that would be
17 sufficient to permit a rational finder of fact to infer that
18 the employment decision was more likely than not based, in
19 whole or in part, on discrimination. It's not an absolute.
20 Was it based at least in part on discrimination. This can be
21 done by showing that the defendants' given reasons were
22 pretext, and we submit, Judge, that we have done this.

23 On the policy of remote sales without a memo order,
24 we've presented fact certifications from coworkers, like Jason
25 Rodriguez, who is currently a Bloomingdale's employee, and

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1 Marco Ruiz, that they did remote sales all the time, that it
2 was encouraged, that they never filled out memo orders didn't
3 even know what they were. We've submitted deposition testimony
4 from Carlos Oliveira, also at the L'Oréal counter, who is still
5 there today, stating that he routinely conducted remote sales
6 and never, ever used a memo order, he had never even heard of
7 them. We submitted evidence from Gina DaSilva, Ms. Kang's
8 direct manager, who testified both in her certifications and in
9 deposition testimony that her team was encouraged to do remote
10 sales all the time, and although she recalled the term, she
11 knew that her team did not use memo orders.

12 The same thing with the presales policies. The
13 depositions and the certifications show that the team members
14 at the L'Oréal counter routinely disregarded such policy, if
15 there was any to begin with, as we've never been given a
16 written policy on these presales.

17 And even if your Honor were to believe that Ms. Kang
18 engaged in violating real policies that were enforced,
19 Bloomingdale's 30(b)(6) witness, Mr. Becker, said that those
20 policy violations should result in retraining and not firing.
21 When asked about policy violations, Mr. Becker said at his
22 deposition, quote, "Again, thus from time to time, any person
23 do something that they're not supposed to do and we retrained,
24 yes."

25 He also said:

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1 "Q. What is the company's view of an associate who rings up a
2 fraudulent transaction, but does so without knowing that it was
3 a fraudulent card involved without any intent?

4 "A. Sure. Well, that's when we would go back to the
5 retraining, because that happens consistently."

6 THE COURT: But Mr. Kim, does it happen over and over
7 again for the same customer?

8 MR. KIM: Judge, she was never retrained once on this
9 customer.

10 THE COURT: No, but your testimony is, sure, look,
11 employees take fraudulent cards, they get retrained when that
12 happens. The fact scenario here, though, is an employee taking
13 multiple fraudulent cards from the same person.

14 MR. KIM: Right, Judge. So, I think we need to -- I'd
15 like to try to paint, I think, a more accurate picture for you
16 of a salesperson on the floor here.

17 There is a reason that it's not just Ms. Kang, that
18 was also Mr. Oliveira and (technical interruption) who are
19 trying the card multiple times. The employees are taught to
20 focus on the customer. They are trained specifically, if you
21 get a credit card that doesn't work, the next thing you do is
22 say, do you have another card. It happens all the time.
23 People's credit cards run into limits. People don't exercise
24 great fiscal responsibility. I, myself, Judge, for whatever
25 reason, have been in a store and have my card declined and they

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1 say, do you have another card.

2 Look, Judge, this is a very particular circumstance.
3 This was not some one-off customer who came in with 13
4 different credit cards that declined. This was a well-known
5 customer to Ms. Kang who had been introduced to her by her
6 managers. Everybody on her team knew him. She's met him in
7 person several times. They're all getting her -- they're
8 trying to -- they're patting her on the back when she makes
9 sales. They're saying, hey, can you get him to buy some stuff
10 at the Armani counter. She was not in any kind of mindset that
11 this man was a fraudster.

12 The credit card thing is not the red flag that the
13 defendants make it out to be. And the most important point
14 there, Judge, the most important point there is that Ms. Kang
15 should get to have her credibility weighed. She should get to
16 tell her story to a jury and the fact finder should get to
17 determine whether or not she's being credible. She should get
18 to try to convince them to say, what I did was reasonable.
19 That is something that the fact finder gets to do.

20 If I may continue, Judge?

21 THE COURT: Of course. Of course.

22 MR. KIM: So, saying that retraining is not what the
23 defendants did there. Our position that the policy violations
24 were pretext. Instead, what they did was they called the
25 police, they told the police that they had an employee insider

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1 working with an outside group to commit fraud. Detective
2 Sberna was the police officer who arrested Ms. Kang. At her
3 deposition, she said, quote, "I believe I got a phone call that
4 day, that night on this specific matter. I know that she had
5 said that they were looking at a collusive employee."

6 "Q. When you say collusive employee, what do you mean?

7 "A. Basically, dirty employee. Someone who was pretty much
8 hacking into other people's accounts, obtaining people's --
9 basically, identity theft."

10 MR. KIM: Ms. Kang's Bloomingdale investigative
11 summary, which was written before her interview, stated, quote,
12 "It is suspected at this time that Kang is working with outside
13 groups who obtained compromised credit cards and used Kang's
14 position in YSL to charge these compromised cards."

15 Your Honor, let's not pretend that if Ms. Kang had not
16 even remotely violated any policies, but was acting together
17 with outside criminals to commit fraud, that defendants would
18 not have fired her. The policy violation reason is a pretext.
19 And they were wrong. Ms. Kang was not part of some fraud
20 group. As I said before, she was introduced by one of her
21 managers. She's never received any money from this group.
22 That's not in dispute here. She didn't work for them. She
23 didn't know them. She didn't meet them outside the store. The
24 DA dropped all charges without so much as a plea negotiation,
25 without an interview, without even a conversation. I'm aware

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1 that your Honor was once, herself, a prosecutor, and I know
2 that prosecutors don't just do that for no reason if they have
3 any kind of decent evidence or a belief that the defendant
4 committed a crime. The question here is why they thought
5 Ms. Kang was in on it and committing a crime, when, in fact,
6 her conduct was the same as her coworkers.

7 As your Honor is aware, they all sold to this group,
8 the whole four-person team, to some extent. Bloomingdale's own
9 records show that Mr. Oliveira had a greater amount of sales to
10 Mr. Chen than Ms. Kang did. Exhibit E to my certification is
11 the Bloomingdale's investigative summary on Carlos Oliveira.
12 They determined that he was selling to Kevin Chen, manually
13 entering credit cards from his phone. And again, he didn't
14 know what a memo order was, let alone use them. Exhibit I to
15 my certification is the investigative summary of Jason
16 Rodriguez. He also had some sales, albeit fewer in volume, to
17 Kevin Chen and his group, and the investigative summary noted
18 it. But no one called the police on Carlos Oliveira or Jason
19 Rodriguez. No one told the police that they were dirty
20 employees. No one even spoke to them about their so called
21 policy violations. No one disciplined them, no one retrained
22 them, and if these policy violations were so important, then
23 were they not even mentioned to these employees, who
24 Bloomingdale's, on record, on summaries, noticed were keying in
25 transactions from their phones without memo orders.

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1 Bloomingdale's own investigator could not find any
2 distinction between Ms. Kang's conduct and that of her
3 coworkers. Shanine Gray testified that she saw, quote, "no
4 meaningful differences in her conduct." And she thought,
5 quote, "the police should have been called on them, too."
6 Mr. Becker, the 30(b)(6) witness, could not identify why
7 Bloomingdale's determined that Kang was colluding with
8 outsiders to commit fraud while they felt that Oliveira merely
9 needed retraining. Becker admitted that Oliveira's conduct,
10 which was similar to Kang's, was, quote, "suspicious," and
11 quote, "in retrospect, could also appear colluding." The main
12 difference between Ms. Kang and her coworkers was that she was
13 Asian, the same race as the fraudsters, and they were not.

14 Now, we have put forth evidence that defendants
15 thought that she was working with them because they were all
16 Asian, evidence of the bias. At Ms. Kang's interrogation they
17 asked her whether the others working with Chen and Kang were,
18 quote, "also Asian."

19 I'm sorry, your Honor. I'm just getting word that my
20 laptop is running low on battery, I'm just going to plug that
21 in.

22 THE COURT: Good idea.

23 MR. KIM: Okay. Good. I thought that was plugged in.
24 I apologize, your Honor.

25 THE COURT: That's okay.

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1 MR. KIM: She was asked whether others working with
2 Chen and Kang were also Asian. She was asked if she was
3 friends with them, if she knew them from before, prompting her
4 to clarify, no, she didn't know them and was not related to
5 them. They asked her if the customers Chen were buying for
6 were all also Asian. They said, quote, "When you speak to him,
7 do you speak to him in English or how do you speak to him?"
8 And Judge, you can look for yourself in the transcript, that
9 question was not asked because of anything that Ms. Kang
10 raised. They said, so this is the first time. She said, yeah,
11 this is the first time I've seen this check and today, Bobby
12 that was the guy out there --

13 THE COURT: I'm sorry. Back up.

14 MR. KIM: Yup.

15 THE COURT: Do that again, but do it slower.

16 MR. KIM: Yes, Judge. Ms. Kang says, yeah, this is
17 the first time I've seen the check and then today, and this was
18 not Bobby, but that guy out there.

19 THE COURT: This was not who?

20 MR. KIM: Bobby.

21 THE COURT: Bobby, okay.

22 MR. KIM: One of the people in the crime ring.

23 THE COURT: Right.

24 MR. KIM: And Ms. Gray says HL? And Ms. Kang says,
25 yeah. And then Ms. Gray says, okay, when you speak to him, do

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1 you speak to him in English or how do you speak to him.

2 This is not something that she was raising up. This
3 was a question that they asked. It's not something that
4 naturally flowed from the conversation, as my adversaries have
5 been saying.

6 THE COURT: It's pretty thin, though, pretty thin as
7 evidence. Even I recognize that the threshold inquiry is low,
8 but I would suggest that your evidence is pretty thin.

9 MR. KIM: Well, your Honor, especially in employment
10 cases, I think your Honor is well versed that, oftentimes,
11 evidence of discrimination is not blatant. People are smart.
12 They don't write things out there. That's why we have fact
13 finders listen to the facts and circumstances and decide for
14 themselves.

15 What is beyond that, what we submit, is that
16 Bloomingdale's absolutely believed that Ms. Kang knew Chen and
17 was colluding with him before that interview, because it said
18 so --

19 THE COURT: Had colluded. They clearly believed that
20 she is a witting participant in the fraud.

21 MR. KIM: Right. Your Honor, I want to address the
22 one difference that they try to point out between Ms. Kang and
23 what her coworkers did. They claim that Mr. Rodriguez did it
24 less and they claim that Mr. Oliveira did it with American
25 Express cards instead of Bloomingdale's cards.

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1 First off, that's not entirely true. We've shown
2 evidence that Mr. Oliveira also rang up Bloomingdale's cards,
3 and the defendants respond to that by trying to cut even finer.
4 They say, yes, yes, he did some Bloomingdale's cards, but when
5 somebody used the Bloomingdale's cards, they did it in person
6 and not remote, so no problem. They had one of their employees
7 arrested for selling to this group. They had one of the
8 customers arrested, but it's fine for Mr. Oliveira to sell to
9 them, as long as he's using an American Express card for remote
10 sales and Bloomingdale's cards only for in-person sales? That
11 doesn't make any sense. It's just not credible. In any event,
12 a jury should get to decide if that's a credible distinction.

13 They also claim that a big difference is that the
14 American Express cards are third-party cards so they won't bear
15 any liability from the loss, but that's not true either. Their
16 30(b)(6) witness, Mr. Becker, was asked, quote:

17 "Q. With regard to a third-party credit card like American
18 Express, you gave testimony that as long as all policy is
19 followed, then Bloomingdale's would not be responsible for the
20 loss amount; is that fair?

21 "A. Yes.

22 "Q. Okay. And when you say policy is followed, what do you
23 mean by that?

24 "A. That the transaction would have been chip read or if, for
25 some reason, that's not read, you see the attempt and then

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1 there is a swipe. If it's been keyed, then we take a loss."

2 MR. KIM: His testimony was that if it was an
3 in-person sale, then they're not liable for the loss, but if it
4 is a remote sale, they are liable. We have supplied a large
5 amount of undisputed evidence that Oliveira's American Express
6 sales were nearly all remote sales, keyed-in transactions,
7 Judge.

8 THE COURT: But isn't Bloomingdale's argument that
9 none of those got reversed back to Bloomingdale's, that is
10 either they were legitimate uses of the American Express card
11 or, for whatever reason, the legitimate cardholder never
12 reported the charge as a fraudulent charge and therefore, it
13 never got reversed back to Bloomingdale's?

14 MR. KIM: Your Honor, I believe that they are making
15 an argument on that theory and principle, but they have not
16 shown us any evidence, one way or the other, what happened with
17 those American Express charges. We don't know, and we don't
18 have a fact witness who has come out and said, this is exactly
19 what's happened here with those American Express card charges.
20 All they have said is, well, in theory, third-party credit
21 cards like American Express, we wouldn't bear the
22 responsibility. But we don't have on the record here any kind
23 of fact assertion that that is what happened in this case.
24 That's a trial issue, Judge.

25 In their reply brief, Bloomingdale's tries to parse it

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1 all out. As your Honor identified, they tried to engage in
2 some very creative math and they say that most of the sales
3 under the Gang Chen customer number were made by Ms. Kang, and
4 they use that as the reason of their assumption that she is the
5 one insider is reasonable.

6 As your Honor noticed, they don't include all of
7 Mr. Oliveira's sales to Kevin Chen under the different customer
8 number, Karen Zweig, and if you include those transactions, the
9 numbers are much closer. They try to say that they have no
10 reason to think that transactions to the Zweig customer number
11 were fraudulent. Respectfully, Judge, that's nonsense.

12 Oliveira's investigative report says, upon reviewing
13 transactions under the loyalist of Gang Chen and watching
14 corresponding video of an unidentified male, made two
15 purchases; one transaction was under the Gang Chen loyalist
16 number, the other loyalist number for Zweig Karen. So they
17 knew. That's what caused them to investigate transactions
18 under the Zweig number to begin with, it's because they
19 observed the same person transacting under both. So how could
20 they claim that they did not think that those sales were to the
21 same group, when their summary report states exactly that.

22 The defendants, including L'Oréal, also claim that
23 Ms. Kang was either complicit or had such bad judgment that she
24 deserved to be fired, that she was reckless, that she didn't
25 know, that she should have known, that she didn't act

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1 reasonably. As I've said before, Judge, the record evidence
2 shows, first off, that Mr. Oliveira was doing the exact same
3 thing. At one point, he had 13 credit card transactions
4 declined before one went through. But, more importantly, your
5 Honor, is what I said before, that my client has given
6 testimony as to why she was defaulting to her training and why
7 what she was doing was reasonable under the circumstances.

8 Judge, I would just like to say, also, I think what
9 we're going to be able to get out at trial here with expert
10 testimony is that this kind of customer is not so uncommon in
11 this industry. They're nicknamed whales and they come and buy
12 in large quantities. The salespeople who were selling to them,
13 they all think that they're buying for other people. That's
14 what they think they're doing. A lot of times this happens and
15 it's not necessarily a fraudster. The same things happen where
16 they come in with multiple credit cards, different zip codes,
17 this is a common thing in their industry, and we're going to be
18 able to show some testimony on that from an expert.

19 THE COURT: Let me ask you to spend a little bit of
20 time on why L'Oréal should be kept in this case.

21 MR. KIM: Absolutely, Judge. L'Oréal says that they
22 have no reason to think that Ms. Kang's firing had any racial
23 bias, but they don't dispute that didn't really conduct an
24 investigation, they just say that it was reasonable that they
25 didn't.

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1 THE COURT: Well, they ask as many questions as they
2 could ask. They're putting an employee in someone else's
3 store, the store says she's a witting participant in a fraud
4 scheme, they don't really dig under that, but they can't really
5 dig under that. I mean, kind of what more did you want them to
6 do? On the face of things, there is nothing obvious about this
7 that would have put them on notice that Ms. Kang was being
8 terminated because she was Asian.

9 MR. KIM: Sure, Judge. That's the thing, their entire
10 focus is on what their corporate officers and managers did,
11 what their VPs did, that Bloomingdale's doesn't have to tell
12 their corporate officers what happened and that they didn't
13 tell them what happened. But what they don't address -- and
14 this is something that I can see that your Honor has picked up
15 on. What they don't address is that they did not even bother
16 to investigate with Ms. Kang's own sales team. The L'Oréal
17 in-store management at the counter and the store knew exactly
18 what was going on. All the employees knew exactly what was
19 going on. They all knew that L'Oréal was selling -- the entire
20 team was selling to Kevin Chen. They encouraged it, they asked
21 Ms. Kang to convince him to buy from the related brands, but
22 when they were arrested, L'Oréal didn't bother to go ask
23 Ms. Kang's own manager what happened at the store. That's
24 crazy, Judge. That is burying your head in the sand.

25 THE COURT: You're saying they didn't ask the manager

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1 what's going on with Mr. Chen?

2 MR. KIM: Yeah, with Ms. Kang, with Mr. Chen, with all
3 of it.

4 THE COURT: They said they did ask what's going on
5 with Ms. Kang and the manager said she didn't know anything
6 about it until the woman was taken off the floor.

7 MR. KIM: With the counter manager, Judge, I don't
8 believe that they put in evidence that they spoke to the
9 counter manager in that fashion. If they could point out to
10 that somewhere in their briefing, I'd be happy to address it
11 more. I could see Mr. Robb over there, if they could find
12 that. But they didn't talk to her team and they didn't ask
13 what happened with Chen. That is, for sure, they didn't -- the
14 entire team, the entire sales team, including the counter
15 manager including any submanagers, they all knew this customer
16 and this group.

17 THE COURT: Hang on one second. Let me put you on
18 mute.

19 MR. KIM: Sure, Judge.

20 THE COURT: Mr. Kim, let me interrupt you for a
21 second.

22 Mr. Robb, I see you looking intently at your computer,
23 and that might suggest you're looking for where you referenced
24 this. I don't recall that in the record, so what can you point
25 me to that suggests L'Oréal took the step of actually talking

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1 to the team that was at the L'Oréal counter?

2 MR. ROBB: I'm searching, your Honor.

3 THE COURT: I'm going to let you continue to search
4 then --

5 MR. ROBB: If I may reserve a minute or two to
6 respond, I'll speak to it then, your Honor.

7 THE COURT: You may.

8 Mr. Kim, go ahead.

9 MR. KIM: Right, Judge.

10 And our point is a jury should get to determine if
11 L'Oréal acted reasonably. A jury should get to decide whether
12 or not they should have talked to their own managers and
13 employees in the store and at the counter.

14 THE COURT: Is that enough? Is it enough, in a joint
15 employer context, that the second employer didn't dig, that is
16 I think you concede that there is no evidence that L'Oréal had
17 a discriminatory motive. All they knew was Bloomingdale's says
18 she's in on the fraud, fine, you're out. Is it enough that
19 they did not dig, which is what you want them to do?

20 MR. KIM: We believe so, Judge.

21 First off, in our briefing, we submit that
22 Bloomingdale's was L'Oréal's agent in matters of security and
23 loss prevention, because L'Oréal is not underground, they don't
24 have their own security team underground.

25 THE COURT: How is Bloomingdale's operating as

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1 L'Oréal's agent? It's Bloomingdale's product. They have
2 bought it from L'Oréal, it's their product.

3 MR. KIM: My understanding, Judge, is that in that
4 particular store, it works that way, that Bloomingdale's buys
5 the product and L'Oréal agents are selling that product. And
6 in some stores it doesn't work that way, and L'Oréal --

7 THE COURT: Okay, but you're stuck with the 59th
8 Street flagship Bloomingdale's store.

9 MR. KIM: Fair enough, Judge. My point on that whole
10 thing was what we have here is, we have a unique situation with
11 this joint employer situation, with these big department stores
12 with their venders. This is not a like a typical guy in a
13 mom-and-pop shop with an employee. This is a very unique
14 situation.

15 THE COURT: I agree.

16 MR. KIM: They are sharing their resources here. One
17 of the ways they're sharing their resources is Bloomingdale's
18 is doing all the security for them. In that capacity, as a
19 security, we submit they were acting as agents.

20 THE COURT: I'm sorry to interrupt you again, but how
21 is it security for L'Oréal? L'Oréal has no risk. They have
22 only an upside, that is if their employees do a good job
23 dragging people to their counter and making them up and
24 persuading them to buy this cosmetic versus that cosmetic, that
25 rebounds ultimately to L'Oréal's benefit, because

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1 Bloomingdale's sells more products and therefore, they'll buy
2 more products. L'Oréal has no downside on this. A robber
3 could rob Bloomingdale's blind and L'Oréal does not lose a
4 penny. So how is Bloomingdale's L'Oréal's agent?

5 MR. KIM: Because, Judge, they still have an interest.
6 They have an interest in having their employees not violate the
7 law and be criminals and get their product -- Judge, the whole
8 relationship is symbiotic because --

9 THE COURT: I agree with that, but symbiotic is
10 different from an agency relationship. An agency relationship
11 is a very specific relationship.

12 MR. KIM: Judge, I think that the struggle is that
13 these sort of unique situation constructs create these fissures
14 in the law that maybe don't appear to fit as neatly.

15 Our position here is that, in this unique construct,
16 in this position, in this situation, that they have this
17 symbiotic relationship, and maybe Bloomingdale's technically
18 owns the product, but if something bad happens with that
19 product, if they keep having problems, if they keep having
20 money charged back, then L'Oréal is not getting to sell the
21 next batch of products to Bloomingdale's. L'Oréal certainly
22 has an interest in having proper security in making sure that
23 their employees follow the law, and we submit that those
24 responsibilities are given to Bloomingdale's in their
25 relationship in this instance for security purposes.

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1 And Judge, we've also pointed out in our briefing that
2 the cat's paw theory requires the employer to conduct an
3 independent investigation. And Judge, we cite to a string of
4 cases on that point, *English v. Colorado Department of*
5 *Corrections, Stimpson v. City of Tuscaloosa*. In all those
6 cases, they make clear that an employer has to conduct an
7 independent investigation. And I know L'Oréal thinks it did
8 enough by having their corporate officers and VPs check with
9 their counterparts at Bloomingdale's to be told not money or
10 business, which is great for them, less liability for them to
11 have to hear anything, but what they could have done and what
12 they should have done is just talked to their own sales team in
13 the store and their own managers in the store.

14 THE COURT: So your theory is that if they were
15 negligent, that is that they did not take due care – and due
16 care would have included talking to their own employees, which
17 may or may not have led to a different result, but be that as
18 it may – that because they failed to exercise due care, they
19 are potentially on the hook for the underlying bad motive of
20 Bloomingdale's.

21 MR. KIM: That's right, Judge. That's what we submit.

22 THE COURT: Okay. Anything further, Mr. Kim?

23 MR. KIM: No, Judge. That's it.

24 THE COURT: All right. I'm going to give
25 Bloomingdale's and L'Oréal both the final word. Just a couple

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1 of minutes.

2 Anything you want to add, Ms. Tierney?

3 MS. TIERNEY: Yes, your Honor, and very briefly. I
4 will do my best to be as brief as possible. Just a couple of
5 points.

6 I think it's important to note - and this goes to one
7 of your initial questions - that the Kang investigation was
8 resolved. Ms. Kang had been discharged or removed from the
9 store before the Oliveira and Rodriguez cases came up, but
10 something that counsel said is not accurate, and that relates
11 to this whole issue of the card being present and keying in.
12 The issue with the remote sale is the keying in. That is the
13 concern. The card is not present and you have to have the memo
14 order to find out if it's fraudulent or not. If the card is
15 present and somebody uses the card and it's fraudulent, that is
16 not attributed to the employee. There is no reason they should
17 suspect the card is fraudulent.

18 So, what we had in the Kang investigation with respect
19 to Oliveira and Rodriguez, Rodriguez actually only rang five
20 transactions, and those five were at the request of Kang. She
21 had a big sale with Chen, and she said in her deposition, "I
22 asked him to ring these." Everything else attributed to
23 Rodriguez's number was on the ring remote by Kang, she rang
24 those sales, and that's why the percentage is so high for her.

25 With respect to Oliveira, when you look at the Kang

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1 investigation itself, there are 15 transactions, five occurred
2 before we have records and five at the end were return
3 transactions, and frankly, a return is not something we were
4 concerned about. There are five transactions in the record
5 that we have during the Kang investigation attributed to
6 Oliveira. All five of those were with the card present and the
7 customer signing off on the sales receipt. That is not a
8 policy violation. There is absolutely nothing wrong with that
9 transaction. So, in the Kang investigation, there was no
10 evidence of anything done wrong by Oliveira --

11 THE COURT: But wait a minute. I'm sorry. These are
12 transactions with Mr. Chen, who you believe is a major
13 fraudster. So, how can you say that all of those transactions
14 are not suspicious? You have five transactions with a guy who
15 you believe is a major scamster.

16 MS. TIERNEY: That's true, but if the card is present,
17 there is no reason that the employee should suspect him of
18 being a fraudster. That's the point.

19 THE COURT: Okay.

20 MS. TIERNEY: We're looking at this after the fact,
21 Judge. What we're looking at -- and that's how we have to
22 adjudicate it. So you look at it and you say, okay, he rings
23 five transactions, there is a person present with a card that
24 goes through and they sign off on it, is that legitimate? Yes,
25 it is. There is no indication that there is a policy violation

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1 or anything that should have raised a flag for Oliveira. There
2 is absolutely nothing. And the company -- what Becker
3 testified at the 30(b)(6) was they felt that Kang was the
4 conduit to Chen. She was the one who brought him to the
5 counter, she's the one that asked Rodriguez to ring sales, she
6 was the connection that she was the one that bore
7 responsibility because of that connection.

8 Now, when they started doing the investigation of
9 Oliveira, they came up with the 17 transactions to Zweig.
10 While the investigation says that there was a person who made
11 two transactions to Zweig and to Chen, none of the other
12 transactions were related to Chen at all, they were Zweig. And
13 the only relationship --

14 THE COURT: Why do you say --

15 MS. TIERNEY: -- the only connection we found in this
16 case was the WeChat app. There is an address that's the same,
17 but nobody knew that at the time, Judge. There is absolutely
18 no evidence in the record of that, none.

19 THE COURT: But there was a single person that was
20 buying product under the Chen loyalty number, Chen, who you
21 believe is a fraudster, and also under the Zweig loyalty
22 number, a single human, two loyalty numbers. At a minimum,
23 doesn't that create a question of fact for the jury to deal
24 with?

25 To be quite clear, as I told Mr. Kim, I think the

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1 evidence of discrimination here is thin. You've got lots of
2 good arguments on your side. On the other hand, there are
3 these hanging chad questions of was the thing that pushed
4 Bloomingdale's over the edge to walk Kang out of the store the
5 fact that she and the fraudster were Asian. Because you've got
6 all this other stuff where you can explain, yes, it's not this,
7 it's not that, it's American Express, it's not Bloomingdale's,
8 it was done this way, not that way, but a jury looking at all
9 this could say, yeah, but the real thing that distinguishes
10 them is that Kang is Asian and the bad guy is Asian. And so
11 there was a sense that they were in this together, they knew
12 each other, they were friends outside, they were talking to
13 each other in a foreign language. Apparently, the asset
14 protection person was not recognizing the difference between
15 Korean and Chinese, but put that to one side.

16 MS. TIERNEY: Well, with respect to that particular
17 aspect of the interview process, HL did not speak English, and
18 that's the person they were talking about. And so she has
19 represented that I'm dealing with Chen because these other
20 people don't speak English, yet the people he's sending into
21 the store don't speak English, and that's why that line of
22 questioning was relevant, because HL did not speak a word. So
23 that's why how you speak to him, he doesn't speak English, and
24 so that was why that question was relevant.

25 But, your Honor, you're right. The evidence is thin

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1 of race discrim, but the issue -- and I think that that
2 certainly is in our favor, but the issue is there is nothing to
3 suggest that Becker or Castellani decided not to interview
4 Rodriguez or Oliveira because of their race. The record is
5 devoid of evidence. It's not that there is little evidence,
6 there is none.

7 THE COURT: But what evidence is clear and is in the
8 record is that they were not interviewed and they were not
9 retrained.

10 MS. TIERNEY: That is true. And Becker said, I
11 directed they be retrained, we did have some change in HR, and
12 I don't know what happened there, but Becker said that I
13 directed that. That was his direction as the AP director. So,
14 was there a shortcoming somewhere else, perhaps. But Becker is
15 the one that said, look, when I go to interview them, but they
16 need to be retrained. He certainly gave that direction. So he
17 did not make a decision based on race.

18 With respect to Kang, there is sufficient evidence of
19 collusion. The fact that the company decided there was
20 conclusion, they had decided to walk her out and call the
21 police, there is nothing, Judge, that suggests that it's
22 because of her race. We would submit that there is just
23 nothing.

24 Then there was a comment, Becker did testify that he
25 was not aware of any fraud with respect to Oliveira. That is

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1 in the record. It's one of our statements of fact.

2 And I think that's all I wanted to focus on.

3 But the AP department does treat each investigation
4 separately. I think that's an important piece of the puzzle,
5 is they look at each other -- they don't look at Oliveira as
6 part of Kang's investigation, they look at what they can show
7 and what they can prove based on Oliveira. If they can't prove
8 it, they're not going to do anything about it because it's not
9 right --

10 THE COURT: Look, I get your argument on that, and in
11 many ways, that's an incredibly positive way of people to look
12 at it. The problem is that law enforcement might say the same
13 thing, oh, I view everybody walking down the street the same
14 way. But if the reality is the police are disproportionately
15 stopping young black men, you can sort of conclude from that
16 that maybe there is a racial aspect of this. Here you're
17 saying asset protection looks at this all differently, and yet,
18 what I'm looking at, one step removed, is asset protection
19 seems to have had a very different reaction when the fraudster
20 and the saleslady were of the same race and a very different
21 reaction from the fraudster and the salesperson who were of a
22 different race. I may have said that wrong. Same race, they
23 had one reaction; different race, they had a different
24 reaction.

25 The only question, again, Ms. Tierney, I'm not

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1 accusing asset protection of being a bunch of racists, but the
2 question is whether that's enough to get them to the jury. So
3 let the jury sort it out.

4 MS. TIERNEY: I think it's so speculative, Judge.
5 When you look at the other evidence Fred Becker presented;
6 number 1, at that time, there was a significant investigation
7 into Chanel, an Asian ring, and the two people indicted were
8 white. His comment to Mr. Kim in the deposition was, you can't
9 follow the race, fraudsters will compromise whoever they can,
10 and if we just focused on race, we would never catch anybody,
11 you've got to look at the evidence. And that's what Fred said
12 they did and that's the evidence of the record and we
13 (technical interruption) Judge.

14 Thank you for your time. I appreciate it.

15 THE COURT: Thank you. Mr. Robb.

16 MR. ROBB: Yes, your Honor. Thank you. I'll try to
17 be brief.

18 Just a quick legal point and then I'll come back to
19 the fact questions.

20 One of the last things that counsel said, I think in
21 response to a question, was that L'Oréal, under the cat's paw
22 theory of liability, was obligated to conduct an independent
23 investigation to insulate itself from liability.

24 Well, of course, as I mentioned at the top, your
25 Honor, cat's paw is a gloss on theories of agency and

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1 negligence, and so you don't get to the notion of an obligatory
2 independent investigation, unless you're dealing with facts and
3 circumstances that suggest an agency relationship or some sort
4 of duty to act on a negligence theory. The obvious typical
5 example, in most cases where cat's paw is at issue, is when
6 you're dealing with a lower level supervisor who makes a
7 recommendation up to a decision maker and you've got an agency
8 relationship there, and so the company, the entity, in order to
9 sanitize the decision-making under the cat's paw theory, needs
10 to conduct an investigation.

11 Those obviously aren't our facts, as we've been
12 talking about. As I indicated, Bloomingdale's clearly was not
13 L'Oréal's agent for purposes of its asset protection function,
14 number 1. Number 2, there were no facts upon which a
15 reasonable person would conclude that Ms. Kang may have been
16 experiencing some unlawful discrimination.

17 And just going back to the question you asked about
18 our efforts to investigate, your Honor, I'm reading from the
19 declaration of Mark Michelle, it's Exhibit D to our moving
20 papers, and starting at paragraph 6, Mr. Michelle declares as
21 follows:

22 "I took several actions to gather facts and better
23 understand the situation. First, I contacted the management
24 team responsible for the Bloomingdale's 59th Street account,
25 none of whom had any information concerning the details of what

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1 happened." So he's talking to our in-store management team.

2 And that tracks with what they've said. Ms. Kang says
3 I didn't share any of the suspicious details of these
4 transactions with my manager, with any of the Bloomingdale's
5 people. And the Bloomingdale's asset protection team
6 testified, yeah, we wouldn't have shared the details of our
7 investigation with the counter people or anyone else. And
8 Ms. DaSilva, who was the counter manager testified, no, I
9 didn't know anything about this, I was as surprised as anyone
10 when I heard when Ms. Kang was pulled off the floor. So,
11 number 1, we had no prior knowledge. Number 2, we did talk to
12 the people in store --

13 THE COURT: Hang on a second, Mr. Robb. You had no
14 prior knowledge of what in the "of what appears to be" that
15 asset protection was looking at Kang. There seems to be
16 substantial evidence that your employees were aware of Mr. Chen
17 and that he was a big buyer, that lots of people were selling
18 him goods.

19 MR. ROBB: Okay. But that's point A. But to get to
20 point D, which is we are -- point D is we, L'Oréal, is
21 responsible or can be held liable for the alleged
22 discrimination engaged in by Bloomingdale's asset protection.
23 You can't skip points B and C. Point B is, okay, point A is
24 our people know that there is this whale of a customer out
25 there in the world and Ms. Kang is selling to him, that's point

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1 A. Point B is he's doing some things that are red flags,
2 multiple credit cards with disbursed geographic locations and
3 multiple denials and all those sorts of things. We don't have
4 that information because Kang didn't share it and
5 Bloomingdale's didn't share it. Point C is, well, you picked
6 me up for facilitating the fraud, but what about my coworkers
7 who were also facilitating fraud? Well, L'Oréal doesn't know
8 that Mr. Chen is the customer at issue. So, on what basis are
9 we to connect up that, well, they pulled Ms. Kang off the
10 floor. And part B --

11 THE COURT: But ask Ms. Kang --

12 MR. ROBB: I'm sorry, your Honor?

13 THE COURT: Ask Ms. Kang. Ms. Kang knows why she was
14 removed.

15 MR. ROBB: Well, your Honor, respectfully, what legal
16 obligation does -- in the absence of more facts; right? The
17 facts are as I described. The undisputed facts are as I just
18 described them, which is Ms. Kang admits that she did the
19 thing, and it's undisputed that she's been banned from the
20 store from doing the thing. The only question is what was her
21 level of culpability, was it knowing or was it just negligent
22 on her part?

23 For our part, L'Oréal says, you know, we don't really
24 care, you're out, period. My question is, could we have done
25 more? Yeah, we could have, but was it negligent for us not to

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1 do more? What facts did we have? We didn't know that Chen was
2 the customer. We didn't know that asset protection was looking
3 at other L'Oréal employees for arguably engaging in similar
4 conduct. Ms. Kang, it seems as though -- and mind you, nowhere
5 in this has Ms. Kang argued L'Oréal shouldn't have fired me
6 over this. It seems as though what they're saying is, if you
7 had known about these other people, maybe you would have fired
8 them, too. Well, maybe that's so, your Honor, but the point
9 is, there were no facts upon which L'Oréal -- what we knew at
10 the time, there were no facts upon which L'Oréal or any
11 reasonable person in L'Oréal's shoes could have concluded
12 what's going on here must be discriminatory; therefore, we
13 better do more. We asked the questions, we got dead ends
14 across all fronts, but we got to do more because this is really
15 discrimination. There is not a shred of evidence to suggest
16 it, your Honor, not a shred. We didn't know that they were
17 looking at other non-Asian employees and we didn't know who the
18 customer or customers -- we now know, with the benefit of
19 hindsight in discovery in the lawsuit, that the focus of the
20 investigation was this one particular fraudster whom other
21 employees may have also been selling to, but that wasn't known
22 at the time. Ms. Kang kept those details to herself.

23 So again, your Honor, we judge negligence and the duty
24 of care based upon the facts as they existed at the time and as
25 they were available to us. Under those standards, not 20/20

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1 hindsight, but under those standards, there is no legal basis
2 to say that L'Oréal was required to do more than it did. Could
3 they have done more than they did? Yeah, maybe, but there is
4 no basis upon which plaintiff can say we were legally required
5 to do more. And that's the point, your Honor.

6 THE COURT: Let me go back to Mr. Kim for just a
7 second.

8 Mr. Kim, what is your best evidence that L'Oréal had
9 any red flags that would have suggested they should do further
10 inquiry?

11 MR. KIM: Sure, Judge. If you would, if I could
12 correct something that Mr. Robb said.

13 First off, Gina DaSilva was not the manager at the
14 time of the arrest. She had been the manager up to a certain
15 point, but she was no longer -- she wasn't there. So, anything
16 that Mr. Robb says about talking -- what Gina said at her
17 deposition about what happened that day and talking to her,
18 it's not true, because she wasn't there anymore. She wasn't
19 employed at that store at that time anymore.

20 Also, Judge, looking at this affidavit that Mr. Robb
21 pointed out, it says: "I took several actions to gather facts
22 and better understand the situation. First, I contacted the
23 management team responsible for the Bloomingdale's..." --

24 THE COURT: Wait. Mr. Kim, we have a court reporter.
25 You're reading at about 300 words a minute. I can't see the

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1 court reporter, but I know what he is doing right now. Slow
2 down.

3 MR. KIM: Thank you, Judge.

4 THE COURT: Back up and slow down.

5 MR. KIM: I apologize to the court reporter. I will
6 slow down. So, sorry about that.

7 Anyway, it says: "I took several actions to gather
8 facts and better understand the situation. First..." --

9 THE COURT: I'm sorry, who are you quoting?

10 MR. KIM: This is Mark Michelle, I believe his name is
11 spelled.

12 THE COURT: This is the affidavit that --

13 MR. KIM: That Mr. Robb brought up.

14 THE COURT: Okay.

15 MR. KIM: "First, I contacted the management team
16 responsible for the Bloomingdale's 59th Street account, none of
17 whom had any information concerning the details of what
18 happened."

19 Judge, that management team responsible for the
20 Bloomingdale's 59th Street account, we believe is corporate.
21 That's not the in-store managers, that's not the same thing.
22 This does not say who it spoke to, when it spoke to them. If
23 they had spoken to the managers in the store, the team members
24 in the store, if it had just done that step, they would have
25 known an awful lot. They had an employee who has been with

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1 them for many, many years, who has done very well with them,
2 never had any kind of negative employment review, who just got
3 arrested. Not just let go by Bloomingdale's for some routine
4 reason, but arrested. They didn't bother to go and talk to the
5 counter manager at the store or the employees there. And, your
6 Honor raised it --

7 THE COURT: But Mr. Kim, I may share your outrage from
8 an employee relations perspective, but from a legal
9 perspective, what I'm struggling for is a legal theory that
10 obligated them to do that. I don't buy your agency theory.
11 Bloomingdale's was not L'Oréal's agent. That's just not what
12 the relationship is.

13 I'm struggling to see, if there was a red flag, then I
14 could see the notion that it was negligent and that's enough to
15 get you into the line of cases that holds a joint employer
16 responsible for them not to inquire further, but in some
17 respects, the argument you just made cuts against you, that is
18 this wasn't just Bloomingdale's saying out of our store.
19 Bloomingdale's was sufficiently persuaded that she was a
20 witting participant in a fraud scheme, that they called the
21 police. L'Oréal, I'm going to give them credit for believing,
22 hey, look, if the police made an arrest, there is at least
23 probable cause to believe she was participating in a fraud. So
24 it wasn't just like Bloomingdale's said, get this woman out of
25 our store. It was that they said, she's a witting participant

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1 in a fraud scheme, she did these number of bad transactions,
2 and she was arrested.

3 So, where is the red flag for L'Oréal that says you
4 need to inquire further or you're going to be complicit in not
5 just getting rid of a bad employee, but in discrimination?

6 MR. KIM: Your Honor, I think that if you look at it,
7 as L'Oréal is just its corporate officers, not on site, then
8 maybe you are right. Maybe you don't have the red flag that
9 you're talking about.

10 But, if L'Oréal includes the managers on the ground in
11 the store and their knowledge is imputed through the law, and
12 if you include them as part of the management team, as part of
13 the knowledge, collectively, that L'Oréal has, then they
14 certainly have red flags, they certainly saw that something was
15 going on that would have at least warranted a conversation with
16 Mr. Kang where they were to ask her what happened here.

17 Ms. Kang, for her part, she could have probably said
18 more, but you're talking about a young woman who was in
19 absolute shock. You're talking about a young woman who has
20 never committed any crime, no criminal history whatsoever.
21 This is not somebody who has a lot of experience in this area.
22 This shook her to her core. It was not easy for her to have
23 any conversations with anybody about this. And maybe in
24 retrospect, she could have been more -- I guess she could have
25 volunteered more things quickly, but I think it's on them, too.

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1 I think that they should have asked her a couple of questions
2 about what happened here.

3 And I think the point is, Judge, did they do enough, I
4 believe, is a jury question. Did they do enough is a jury
5 question. This is not something that means that L'Oréal is
6 found liable. I think that the question here, on summary
7 judgment, is whether or not the jury should get to decide
8 whether or not they did enough.

9 THE COURT: Okay. Here's what we're going to do,
10 we're going to take a seven-minute break, so come back at
11 12:40. Don't close Skype, but you're free to turn off your
12 camera and your mic, but come back at 12:40, please.

13 (Recess)

14 THE COURT: Okay, looks like we have everybody back.
15 Thank you.

16 I'm now ready to rule on the motion for summary
17 judgment. Hye Sun Kang alleges that Bloomingdale's and L'Oréal
18 discriminated against her based on her race in violation of
19 Title VII of the Civil Rights Act and in violation of the New
20 York State Human Rights Law. See second amended complainant or
21 the SAC, docket 32, at paragraphs 32 to 43. Kang also alleges
22 a negligent misrepresentation claim under New York law against
23 Bloomingdale's only. That's the second amended complainant,
24 paragraphs 44 to 52. Bloomingdale's and L'Oréal moved
25 separately for summary judgment to dismiss all counts. See

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1 dockets 71 and 75. For the reasons I will now explain,
2 Bloomingdale's motion is granted in part and denied in part,
3 and L'Oréal's motion is denied in its entirety.

4 Summary judgment is appropriate when there is no
5 genuine dispute as to any material fact and the movant is
6 entitled to judgment as a matter of law. In deciding a motion
7 for summary judgment, the Court must construe the facts in the
8 light most favorable to the non-moving party and draw all
9 reasonable inferences against the moving party.

10 I will start with Bloomingdale's motion for summary
11 judgment on Kang's discrimination claims. This portion of
12 Bloomingdale's motion is denied. Both Title VII and the New
13 York State Human Rights Law, or NYSHRL, prohibit employers from
14 discriminating against employees based on the person's race,
15 ethnicity, or national origin. Discrimination claims brought
16 pursuant to Title VII and NYSHRL are analyzed using the burden
17 shifting framework set forth in *McDonnell Douglas Corp. v.*
18 *Green*. Under that framework, the plaintiff bears the initial
19 burden of proving, by a preponderance of evidence, a prima
20 facie case of discrimination; it is then the defendant's burden
21 to proffer a legitimate non-discriminatory reason for its
22 actions; the final and ultimate burden is on the plaintiff to
23 establish that the defendant's legitimate reason is, in fact,
24 pretext for unlawful discrimination.

25 To establish a prima facie case, the plaintiff must

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1 show: One, that she is a member of a protected class; two,
2 that she was qualified for the position she held; three, that
3 she suffered an adverse employment action; and four, that the
4 adverse employment action occurred under circumstances giving
5 rise to an inference of discriminatory intent. *Holcomb v. Iona*
6 *Coll.*, 521 F.3d 130, 138 (2d Cir. 2008) (citing *Feingold v. New*
7 *York*, 366 F.3d 138, 152 (2d Cir. 2004)). Bloomingdale's
8 assumes, for the purposes of summary judgment, that the first
9 three criteria are met, but it contends that Kang cannot meet
10 the fourth criteria, that Bloomingdale's decision to bar her
11 from the store gives rise to an inference of race
12 discrimination. That's Bloomingdale's memorandum of law,
13 docket 73 at 17.

14 Kang argues that she was treated differently than her
15 three colleagues on the sales team at the Yves Saint Laurent
16 counter at Bloomingdale's. She argues that, although all four
17 of them engaged in similar practices, she was the only one
18 accused of being involved in fraud, banned from the store, and
19 for whom the police were called, leading to her arrest. See
20 SAC paragraph 34, plaintiff's response, docket 82 at 3 and 5.
21 Kang alleges that she was subjected to this disparate treatment
22 because she is of Asian descent, just like a customer who
23 perpetrated fraud, although Kang herself is of Korean descent,
24 while the client in question, Gang Chen, is Chinese.
25 Plaintiff's 56.1 statement, docket 87, paragraphs 18, 48 to 49.

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1 There is no dispute that Bloomingdale's suspected that
2 Kang was involved in the fraud perpetrated by Chen and his
3 associates. After speaking with Kang (the only person of east
4 Asian descent who worked at the Yves Saint Laurent or YSL
5 counter), Shanine Gray, a Bloomingdale's employee, concluded
6 that Kang was in fact working with persons involved in fraud
7 and was knowingly processing fraudulent transactions. See
8 Bloomingdale's 56.1 statement, docket 86, paragraph 84.
9 Moreover, the NYPD detective involved in Kang's arrest
10 testified that she was called by Bloomingdale's about a
11 "collusive employee," who was "working with another individual
12 to commit this scheme of identity theft." Plaintiff's 56.1
13 statement, paragraph 36, citing Sberna deposition, docket 74-18
14 at 12, line 2 to 13, line 6; plaintiff's response at 15, note
15 17, citing Sberna deposition at page 82, line 3, through 83,
16 line 3. There is no dispute that no other employee was accused
17 by Bloomingdale's of knowingly being involved in the fraud.
18 Plaintiff's response at 3 and 5.

19 In construing the facts in the light most favorable to
20 Kang, a reasonable jury could conclude that Kang's race was a
21 factor in Bloomingdale's suspicion that she was a knowing
22 participant in Chen's fraud. Bloomingdale's asset protection
23 asked Kang whether Chen's associate was "also Asian," whether
24 she knew Chen and his crew from before, and whether they spoke
25 in English or in some other language. Kang interviewed

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1 transcript, docket 84-8 at 13, 14 to 15, and 35. Additionally,
2 Kang felt it was necessary to explain that she did not
3 personally know Chen or his associates, and to repeat twice
4 that she was not related to them. *Id.* at 23. Under these
5 circumstances, a jury could conclude that Kang's race played a
6 role in Bloomingdale's decision to focus on her and to accuse
7 her of knowingly being involved in the fraud, giving rise to an
8 inference of discriminatory intent.

9 Moving to the second step of the *McDonnell Douglas*
10 framework, Bloomingdale's argues that it had many legitimate
11 and nondiscriminatory reasons for taking the actions it did
12 against Kang, all of which boil down to Kang exercised poor
13 judgment in her dealings with Chen and violated a plethora of
14 Bloomingdale's policies. For example, Bloomingdale's argues
15 that Kang used bad judgment by failing to be suspicious when
16 Chen used multiple credit cards with zip codes from across the
17 country, and when she accepted alternative credit card numbers
18 to process transactions when cards were declined.

19 Bloomingdale's memorandum of law at 6, 7, and 19. But a
20 reasonable jury could credit Kang's explanation, that she
21 understood Chen was a group buyer for several clients around
22 the country and that he would use the credit cards of his
23 end-purchasers to make the purchases. Plaintiff response at 1
24 and 11. Kang has consistently given this explanation, noting
25 at her interview with Bloomingdale's asset protection that she

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1 was under the impression that Chen was "kind of like the middle
2 man between...six, seven, eight buyers." Kang interview
3 transcript at 9.

4 On the policy front, Bloomingdale's asserts that Kang
5 violated its policies regarding the completion of "memo orders"
6 in connection with telephone sales; receiving and retaining
7 credit card numbers via text; delivering product at locations
8 away from the YSL counter; allowing presale merchandise to
9 leave the store; and selling more than 6 of the same item to a
10 single customer.

11 As to each of them, plaintiff has raised a question of
12 fact. The questions of fact range from whether the policy
13 really existed; whether violation of the policy was largely
14 tolerated; and whether violation of the policy was really a
15 firing offense. I will discuss only two of these issues.

16 Bloomingdale's argues that Kang violated its phone
17 order verification policy, which requires that associates fill
18 out a "memo order" before processing a sale taken over the
19 phone. Defendant's memorandum of law at 4. Bloomingdale's
20 asserts that this policy requires that all phone orders be
21 shipped to the address associated with the credit card. *Id.*
22 There is no dispute that Kang failed to fill out "memo orders"
23 when processing phone orders and that she allowed Chen or his
24 associates to pick up such purchases at the store.
25 Bloomingdale's memorandum of law at 5 and 20; Bloomingdale's

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1 56.1 statement, paragraphs 39, 49. But Kang disputes whether
2 this really was Bloomingdale's policy. Some of her former
3 colleagues testified that they had never heard of or used memo
4 orders and that they had not been instructed to fill them out
5 before completing phone sales. Plaintiff's 56.1 statement,
6 paragraph 7; plaintiff's response at 8, 8 to 9, and note 3.
7 Bloomingdale's argues that the witnesses to whom plaintiff
8 points were L'Oréal employees and that Bloomingdale's employees
9 were well aware of the memo order policy. Bloomingdale's 56.1
10 statement, paragraph 25. That was Bloomingdale's reply.
11 Bloomingdale's also argues that one of Kang's L'Oréal
12 colleagues, Hanan Elsaadiny, had heard of and used memo orders.
13 *Id.* But these discrepancies just demonstrate that there is a
14 genuine dispute of material fact; a reasonable jury could
15 conclude that Bloomingdale's did not require memo orders for
16 phone sales or alternatively, if the policy did exist, that
17 Bloomingdale's had not adequately trained the employees who
18 worked at the YSL counter regarding the policy.

19 Bloomingdale's also argues that Kang violated its
20 diverter policy, which aims to prevent buyers from reselling
21 products by prohibiting a customer from purchasing more than
22 six of the same item without the sales clerk obtaining special
23 permission. Bloomingdale's memorandum of law at 5 to 6,
24 Bloomingdale's 56.1 statement, paragraph 40. Bloomingdale's
25 argues that Kang violated this policy when she divided products

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1 into multiple sales transactions to circumvent this rule.
2 Bloomingdale's memorandum of law at 5 to 6. But Kang's former
3 coworker, Jason Rodriguez, testified that it was commonplace to
4 break up transactions in this way and did not understand that
5 doing so constituted a violation of the policy. Plaintiff's
6 response at 9 to 10. Kang also testified that dividing up
7 transactions in this manner was not a violation and was a
8 routine practice at the YSL counter. Bloomingdale's 56.1
9 statement, paragraph 128, the plaintiff's response to that
10 paragraph.

11 In short, without going policy by policy, an example
12 of alleged poor judgment by example of alleged poor judgment,
13 viewing the evidence in the light most favorable to plaintiff,
14 there is a question of fact whether the reasons given are
15 legitimate, nondiscriminatory reasons for the adverse action
16 taken against Kang.

17 Moving to the final step of the *McDonnell Douglas*
18 framework, Kang argues that Bloomingdale's proffered reasons
19 are pretext for unlawful discrimination. Kang argues that her
20 three former coworkers engaged in similar practices, yet it was
21 only she who was banned from the store and arrested.
22 Plaintiff's response at 3; Bloomingdale's 56.1 statement,
23 paragraph 139, plaintiff's response. With respect to Kang's
24 colleague, Hanan Elsaadiny, I agree with Bloomingdale's that
25 even in the light most favorable to Kang, there is insufficient

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1 evidence to demonstrate that she engaged in practices similar
2 to those of Kang.

3 Kang's colleague, Jason Rodriguez, however, is a much
4 closer call. Rodriguez testified that he routinely sold
5 products over the phone or by text message without using memo
6 orders. Plaintiff's response at 8 to 9, note 3; Bloomingdale's
7 56.1 statement, paragraph 29, plaintiff's response.

8 Bloomingdale's captured some of these problematic transactions
9 on video. Plaintiff's 56.1 statement, paragraph 25. He also
10 testified that it was routine to divide purchases into multiple
11 transactions to avoid the six item diverter policy.

12 Plaintiff's response at 8 to 9, note 3; Bloomingdale's 56.1
13 statement, paragraph 128. But I agree with Bloomingdale's that
14 he was dissimilar to Kang when it came to his interactions with
15 Chen. The vast majority of Rodriguez's sales to Chen were
16 processed in "ringer mode," where Kang rang the sales but gave
17 Rodriguez credit for them. Bloomingdale's reply, docket 85 at
18 3 to 4. Kang admits that when Rodriguez rang anything for Chen
19 "it was because [Kang] gave him the sales." Bloomingdale's
20 56.1 statement, paragraph 21, Bloomingdale's reply. But
21 construing the facts in the light most favorable to Kang, a
22 reasonable jury could find that Rodriguez similarly violated
23 the Bloomingdale's policies, despite his lack of direct
24 involvement with Chen, demonstrating that Bloomingdale's
25 proffered reasons for its adverse treatment of Kang – the

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1 violation of store policies – was pretextual.

2 With respect to Carlos Oliveira, Kang's remaining
3 colleague at the YSL counter, a reasonable jury could conclude
4 that he engaged in practices nearly identical to Kang.
5 Bloomingdale's asset protection investigated Oliveira, albeit
6 after they began investigating Kang. As part of its
7 investigation into Oliveira, asset protection reviewed video of
8 an unidentified male making two purchases, one under Chen's
9 Bloomingdale's loyalist number and one under the loyalist
10 number of Karen Zweig. See Oliveira investigative summary,
11 docket 84-10 at 1. As Bloomingdale's notes, all of Chen's
12 purchases turned out to be fraudulent. Bloomingdale's
13 memorandum of law at 1. Accordingly, a reasonable jury could
14 have concluded that Bloomingdale's should have suspected that
15 purchases linked to Zweig's loyalist number were likely
16 fraudulent, as well.

17 Moreover, Oliveira processed some of these
18 transactions in the same way as Kang processed Chen's
19 transactions, by entering credit card numbers he had on his
20 phone, including one where he keyed in 13 different credit card
21 numbers before one finally went through. Plaintiff's 56.1
22 statement, paragraphs 27 and 28. Like Kang, he also designated
23 at least some of these purchases for in-store pickup. Again,
24 plaintiff's 56.1 statement at paragraph 29. While
25 Bloomingdale's responds that not all of the transactions linked

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1 to the Zweig loyalist account were rung by Oliveira, and that
2 some of these transactions involved in-store purchases,
3 Bloomingdale's does not dispute that for at least some of the
4 transactions in question, Oliveira keyed in credit card numbers
5 he received over text message and that he tried multiple cards
6 until one went through. Plaintiff's 56.1 statement, paragraphs
7 27 to 29, Bloomingdale's response. Moreover, in their
8 depositions, Bloomingdale's employees recognized that
9 Oliveira's conduct was similar to Kang's conduct. Gray
10 testified that Oliveira was "an associate who is at the same
11 counter who is processing transactions in the same manner."
12 Gray deposition, docket 84-4 at 503, lines 18 through 23. Fred
13 Becker, Bloomingdale's corporate director of loss prevention,
14 testified that Oliveira's conduct seemed more suspicious in
15 retrospect. Becker deposition, docket 84-3 at page 299, lines
16 15 through 300, line 15.

17 But Bloomingdale's contends that Kang is different
18 than Oliveira and her other colleagues because she was the main
19 contact with Chen and, therefore, it was reasonable to conclude
20 that she was a witting participant, and not a dupe.
21 Bloomingdale's reply at 1 to 5. But a jury could reasonably
22 conclude that Bloomingdale's detailed analysis is flawed
23 because it was based on a nonrepresentative sample. It only
24 reviews transactions linked to Chen's loyalist number. Kang
25 testified that she assigned Chen's purchases to his loyalist

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1 number, even though she believed he was a group buyer, to
2 create a purchase history. Bloomingdale's reply at 2. But it
3 appears from the record that not all employees did this. The
4 investigative summary shows that at least some of Oliveira's
5 transactions linked to Chen were credited to the Zweig loyalist
6 number. Oliveira investigative summary at 1. A jury may
7 credit Kang's testimony that she remembers Oliveira ringing up
8 40 or 50 transactions for Chen that were linked to other
9 loyalty numbers. Plaintiff's response at 12 (citing
10 plaintiff's 56.1 statement, paragraph 30), even though
11 Bloomingdale's argues that it has no records of such
12 transactions. Under these circumstances, a genuine dispute of
13 material fact remains as to whether Kang was Chen's primary
14 contact, whether she and Oliveira rivaled for that title, and
15 whether, regardless of who was the primary contact,
16 Bloomingdale's conclusion that Kang's contact was witting was
17 based, in part, on the fact that both she and Chen are both of
18 Asian descent.

19 Bloomingdale's further argues that Oliveira and Kang
20 are different, because the purchases Oliveira processed linked
21 to the Zweig account involved American Express cards, whereas
22 the transactions Kang processed linked to the Chen account
23 involved Bloomingdale's cards. Bloomingdale's memorandum of
24 law at 13. Bloomingdale's argues this difference is
25 significant because Bloomingdale's does not have the resources

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1 to investigate fraud on third-party issued cards and there is
2 no evidence that American Express ever challenged these
3 transactions. Bloomingdale's memorandum of law at 13, citing
4 Bloomingdale's 56.1 statement, paragraph 135. But even if
5 that's true, a reasonable jury could find that these
6 differences are insufficient to explain the radically different
7 treatment of the two employees, particularly sets
8 Bloomingdale's as hanging its hat on violations of store
9 policies, not being a witting participant in fraud.
10 Bloomingdale's investigation, including video surveillance,
11 demonstrates that Oliveira violated the same alleged policies
12 that Bloomingdale's claims were the reason Kang was terminated.
13 He keyed in credit card numbers from his phone, he tried
14 multiple cards until one would go through, he allowed in-store
15 pickups of such purchases, he did not use memo orders and more.
16 Additionally, even without evidence from American Express, a
17 reasonable jury could conclude that Bloomingdale's was aware
18 that the Zweig purchases were likely fraudulent, as the same
19 man picked up purchases linked to both Chen and Zweig.

20 Yet Oliveira faced no consequences – and was not even
21 retrained on the policies on which Bloomingdale's relies as the
22 reason for its treatment of Kang – while Kang was banned from
23 the store and arrested. Remarkably, Oliveira did not even know
24 that he had been investigated until his deposition in this
25 matter. Plaintiff's response at page 16, note 18. Gray claims

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1 she wanted to interview Oliveira, but was denied permission by
2 her managers. Bloomingdale's reply at 6. Bloomingdale's
3 asserts that after Kang was banned from the store, the YSL
4 counter staff was designated for retraining. But such
5 retraining never happened. A reasonable jury could find that
6 this is evidence of pretext: The employee whose race matched
7 the fraudster was barred from the store and arrested, whereas
8 the remaining employees who violated the same policies were not
9 even retrained.

10 In short, while Bloomingdale's has evidence from which
11 the jury could find that it reasonably concluded Kang was a
12 witting participant in fraud, and that she violated all kinds
13 of store policies. When the facts are viewed in the light most
14 favorable to Kang, a reasonable jury could also conclude that
15 Bloomingdale's discriminated against Kang based on her race.
16 For that reason, Bloomingdale's motion for summary judgment on
17 the Title VII and NYSHRL claims is denied.

18 Next I will discuss L'Oréal's motion for summary
19 judgment. L'Oréal's motion is also denied.

20 Kang alleges that L'Oréal discriminated against her
21 when they terminated her employment a month after she was
22 banned from the 59th Street Bloomingdale's. Plaintiff's
23 response at page 6 and 27. L'Oréal adopts and incorporates
24 Bloomingdale's arguments in its motion. L'Oréal memorandum of
25 law, docket 76 at page 1, note 1. To the extent that L'Oréal

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1 argues that it fired Kang for her alleged lack of judgment in
2 handling Chen's transactions, the reasoning I provided to deny
3 Bloomingdale's motion on those grounds similarly applies to
4 L'Oréal. When the facts are construed in the light most
5 favorable to Kang, she has demonstrated that there are genuine
6 disputes of material fact about whether she exhibited bad
7 judgment or whether that was a pretextual reason why she was
8 discharged.

9 The parties discussed two theories under which L'Oréal
10 could be held liable for the allegedly discriminatory conduct:
11 Liability as a joint employer, see *Lima v. Adecco*, 375 F. App'x
12 54, 55 (2d Cir. 2010), or cat's paw liability, see *Vasquez v.*
13 *Empress Amb. Serv., Inc.*, 835 F.3d 267, 271-72 (2d Cir. 2016).
14 Cat's paw liability "refers to a situation in which an employee
15 is fired or subjected to some sort of other adverse employment
16 action by a supervisor who himself has no discriminatory
17 motive, but who has been manipulated by a subordinate who does
18 have such a motive and intended to bring about the adverse
19 employment action." *Vasquez* 835 F.3d at 272. Cat's paw
20 liability involves cases of alleged discrimination where the
21 biased individual and the decision maker both work for the same
22 defendant employer. Because a theory of joint employer
23 liability more readily captures the situation at play in this
24 matter, for purposes of this motion, I need not grapple with
25 whether and if so how cat's paw liabilities could apply in this

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1 case.

2 For the purpose of this motion only, both
3 Bloomingdale's and L'Oréal assume a joint employment
4 relationship. Bloomingdale's memorandum of law at 15, note 4;
5 L'Oréal memorandum of law at 2, note 2. But the joint
6 employment relationship does not implicate vicarious liability
7 on its own as each employer is only liable for its own actions.
8 *Al-Kaysey v. L-3 Servs., Inc.*, No. 11-CV-6318, 2013 WL 5447830,
9 at *3 (E.D.N.Y. Sept. 27, 2013); see also *Woodman v. WWOR-TV,*
10 *Inc.*, 411 F.3d 69, 89 (2d Cir. 2005).

11 A joint employer may be liable if it: One, knew or
12 should have known of the discriminatory conduct; two, played a
13 role in the adverse employment action; and three, failed to
14 take prompt corrective measures under its control. See e.g.,
15 *Lima v. Addeco*, 634 F. Supp. 2d 394, 400-01 (S.D.N.Y. 2009),
16 *aff'd*, 375 F. App'x 54 (2d Cir. 2010); *AT&T v. N.L.R.B.*, 67
17 F.3d 446, 451 (2d Cir. 1995), as clarified on reh'g (Sept. 29,
18 1995).

19 With respect to the first element, a genuine dispute
20 of material fact remains as to whether L'Oréal should have
21 known that race may have played a role in Bloomingdale's
22 decision to ban Kang from the store. The nature of the
23 relationship between the two employers is a decisive factor in
24 determining whether the employer in question should have known
25 of the discriminatory conduct. Compare *Coleman v. Nonni's*

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1 *Foods, LLC*, 2015 WL 8773467, at *4 (S.D.N.Y. Dec. 14, 2015)
2 (finding that a staffing agency could not have known about the
3 alleged discrimination because it was not involved in the other
4 employer's day-to-day operations and it was never informed of
5 the discriminatory remarks in question) and *Lima*, 634 F. Supp.
6 2d at 401-02 (same) with *Popat v. Levy*, 328 F. Supp. 3d 106,
7 121 (W.D.N.Y. 2018) (finding that an entity providing academic
8 support and clinical care for a university was sufficiently
9 involved in the supervision, discipline, hiring, and firing of
10 employees and was presented as part of the main employer in
11 question such that plaintiff had stated a claim with respect to
12 this element).

13 While this is a very close case, a reasonable jury
14 could find that the relationship between Bloomingdale's and
15 L'Oréal was closer to the situation in *Popat* than to the
16 situation in *Coleman* and *Lima*. In its 56.1 statement, L'Oréal
17 states that it has "a long-standing vendor relationship" with
18 Bloomingdale's, that L'Oréal hires and pays the YSL staff, that
19 it orients new hires to L'Oréal policies and procedures, and
20 that counter sales associates report to an on-site counter
21 manager and business executive, both of whom are L'Oréal
22 employees. See L'Oréal's 56.1 statement, docket 83, paragraphs
23 3 through 5, which were undisputed. Additionally, L'Oréal
24 provides sales goals and conducts performance reviews of its
25 beauty advisers. See plaintiff's 56.1 statement, paragraph 4,

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1 which was undisputed.

2 Finally, I would note that L'Oréal did not simply
3 accept Bloomingdale's explanation. They spent a month
4 conducting a fruitless inquiry of loss protection at
5 Bloomingdale's rather than just talking to their own employees
6 about Kang and Chen. In short, a reasonable jury could
7 conclude that L'Oréal plays a large enough role in the joint
8 employment of its employees that it should be held liable for
9 the alleged discrimination because it should have known that
10 there were indications that Bloomingdale's was discriminating.

11 With respect to the second element, it is undisputed
12 that L'Oréal played a role in the adverse employment action.
13 While Bloomingdale's barred Kang from its store on April 19th,
14 2017, it was L'Oréal that terminated her employment a month
15 later on May 18, 2017. L'Oréal memorandum of law at 6 and 10.

16 As to the third element, a reasonable jury could
17 conclude that L'Oréal failed to take prompt corrective measures
18 within its control. In *Lima*, the district court found that
19 defendant employment agency could not be liable in part because
20 plaintiffs could not demonstrate that the agency had failed to
21 take corrective measures. *Lima*, 634 F. Supp. 2d at 400-01
22 (citing *Watson v. Adecco Empl. Servs., Inc.*, 252 F. Supp. 2d
23 1347, 1356-57 (M.D. Fla. 2003)). Applied to this case, a
24 reasonable jury could find that L'Oréal could have taken
25 corrective measures within its control: L'Oréal could have

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1 further investigated the matter or could have placed Kang at a
2 different location rather than firing her. See also *Signore v.*
3 *Bank of Am., N.A.*, 2013 WL 6622905, at *6 (E.D. Va. Dec. 13,
4 2013) (listing possible corrective measures).

5 In short, while I find it a very close question,
6 whether L'Oréal can be held liable for the adverse employment
7 actions it took against Kang, it involves questions of fact to
8 be determined at trial. Accordingly, L'Oréal's motion for
9 summary judgment is denied.

10 Bloomingdale's also moves for summary judgment on
11 Kang's common law claim of negligent misrepresentation, which
12 Kang brought against only Bloomingdale's. Kang alleges that
13 Bloomingdale's provided false information to L'Oréal, which led
14 to her firing, and to the NYPD, which led to her arrest. SAC
15 paragraphs 46 and 49. This portion of Bloomingdale's motion is
16 granted.

17 "Under New York law, the elements for a negligent
18 misrepresentation claim are that: One, the defendant had a
19 duty, as a result of a special relationship, to give correct
20 information; two, the defendant made a false representation
21 that he or she should have known was incorrect; three, the
22 information supplied in the representation was known by the
23 defendant to be desired by the plaintiff for a serious purpose;
24 four, the plaintiff intended to rely and acted upon it; and
25 five, the plaintiff reasonably relied on it to his or her

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1 detriment." *Hydro Inv'rs, Inc. v. Trafalgar Power Inc.*, 227
2 F.3d 8, 20 (2d Cir. 2000).

3 Kang argues that L'Oréal and the NYPD relied on
4 Bloomingdale's representations, not that she herself relied on
5 them. SAC paragraphs 46 and 49. Therefore, even in the light
6 most favorable to Kang, I find there is no set of facts under
7 which Kang could satisfy the fourth and fifth elements of this
8 cause of action, which require that Kang demonstrate that she
9 herself intended to and reasonably relied on the alleged false
10 representations.

11 Kang argues that case law supports an expansion of
12 these criteria to include third party reliance in certain
13 circumstances. Plaintiff's response at 33. But most of the
14 case law Kang relies upon is inapposite, as it relates to the
15 first element of the cause of action, whether a defendant has a
16 duty to a plaintiff as a result of a special relationship.
17 Kang is right that this element has been expanded in certain
18 circumstances to include third parties who rely on
19 misrepresentations conveyed to them by the original observers.
20 See plaintiff's response at 33 to 34, (citing *Prudential Ins.*
21 *Co. v. Dewey, Ballantine, Bushby, Palmer & Woods*, 80 N.Y.2d
22 377, 384 (1992); *Credit Alliance Corp. v. Arthur Anderson &*
23 *Co.*, 65 N.Y.2d 536, 553 (1985), amended by 66 N.Y.2d 182
24 (1985); *Kinsey v. Cedant Corp.*, 576 F.Supp.2d 553, 559 (S.D.N.Y.
25 2008); *Abu Dhabi Comm. Bank v. Morgan Stanley & Co.*, 2013 WL

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1 837536, at *3 (S.D.N.Y. March 6, 2013). But in those four
2 cases, the third party relying on the alleged
3 misrepresentations was the plaintiff in the action. While
4 those plaintiffs argued that they met specific criteria to show
5 the duty element had been satisfied, the fact that the
6 plaintiffs in those cases relied on the alleged
7 misrepresentations was not in question.

8 The only case Kang cites that supports the proposition
9 that negligent misrepresentation can encompass third party
10 reliance is *Santiago v. Greyhound Lines*, 956 F. Supp. 144
11 (N.D.N.Y 1997). In that case, the court allowed a negligent
12 misrepresentation claim to proceed that was brought by a bus
13 driver against a doctor who made false statements to Greyhound,
14 the plaintiff's employer. *Id.* at 153 to 54. Kang is correct
15 that her situation is analogous to those facts. But I decline
16 to apply *Santiago's* reasoning to the matter at hand. *Santiago*
17 was decided on January 30, 1997, a few months before the Second
18 Circuit clearly held that under New York law, "a cause of
19 action for negligent misrepresentation can be maintained only
20 when the plaintiff himself or herself relies on statements made
21 by the defendant." *King v. Crossland Savings Bank*, 111 F.3d
22 251, 258 (2d Cir. 1997); see also *Gorman v. Rensselaer Cty.*, 98
23 F. Supp. 3d 498, 504-05 (N.D.N.Y. 2015) (same).

24 Accordingly, I find, as a matter of law, that Kang
25 cannot make out a New York common law claim of negligent

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1 misrepresentation. Bloomingdale's motion for summary judgment
2 on this claim is, therefore, granted.

3 I'm going to order the parties to meet and confer on
4 the following issues. I heard someone, during the course of
5 today's argument, suggest that they want some expert discovery.
6 I had pushed expert discovery off to see whether the plaintiffs
7 survive summary judgment, she has now, so expert discovery can
8 employ forward. The parties need to meet and confer, figure
9 out a reasonable schedule for your expert discovery,
10 recognizing that we're still kind of in the era of COVID, and
11 propose a schedule for expert discovery, propose a trial date.

12 As of right now, we are having jury trials in the
13 Southern District of New York, particularly civil jury trials
14 because we don't need as many jurors and therefore, we can
15 space them out pretty easily. Do not pick a date for your
16 trial before July 1. We've already put in requests for
17 second-quarter juries and this case was not on my list. So,
18 the earliest I can request a jury would be third quarter. So
19 that would start in July.

20 Lastly, talk to each other and then let me know
21 whether you want a referral to your magistrate judge for a
22 settlement conference. Your magistrate judge is Magistrate
23 Judge Moses. I don't know what her schedule is looking like,
24 but I'm confident she'll be able to fit you in for a conference
25 sometime in the next couple of months.

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1 With that, is there anything further from the
2 plaintiff, Mr. Kim?

3 MR. KIM: No, your Honor. Thank you.

4 THE COURT: Anything further from Bloomingdale's,
5 Ms. Tierney?

6 MS. TIERNEY: No, your Honor. Thank you very much for
7 your time today.

8 THE COURT: Stay warm out there in St. Louis. I
9 gather it's incredibly cold.

10 MS. TIERNEY: I think it's about 9 degrees today, so
11 it's a heat wave.

12 THE COURT: Oh, it's balmy. You'll be fine.

13 Anything further from L'Oréal, Mr. Robb?

14 MR. ROBB: No, your Honor. Thank you.

15 THE COURT: Thank you, everybody. So meet and confer,
16 I'll give you to the end of the month to get back to me with
17 the proposed schedule.

18 MS. TIERNEY: Thank you, Judge.

19 MR. ROBB: Thank you, your Honor.

20 THE COURT: Thank you, all. Stay safe.

21 * * *