UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

JANELL WINFIELD, TRACEY STEWART, and SHAUNA NOEL,

Plaintiffs,

-against- 15-CV-5236 (LTS) (KHP)

CITY OF NEW YORK,

Defendant.

----------x

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION FOR A PROTECTIVE ORDER TO BAR THE DEPOSITION OF DEPUTY MAYOR ALICIA GLEN

Craig Gurian
Anti-Discrimination Center, Inc.
1745 Broadway, 17th Floor
New York, New York 10019
(212) 537-5824
Attorney for Plaintiffs

Mariann Meier Wang
Cuti Hecker Wang LLP
305 Broadway, Suite 607
New York, New York 10007
(212) 620-2600
Attorney for Plaintiffs

Craig Gurian
Roger D. Maldonado
On the brief

April 24, 2017

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

COURT FILINGS AND HEARING TRANSCRIPTS

CITY COUNCIL HEARING TRANSCRIPTS

PRESS RELEASES AND MEDIA PUBLICATIONS

PRESS RELEASES AND MEDIA PUBLICATIONS (CONT.)

CITY REPORTS AND CORRESPONDENCE

INTRODUCTION

On February 23, 2017, this Court ordered that plaintiffs' deposition of Alicia Glen, defendant's Deputy Mayor for Housing and Economic Development, be conducted in May 2017.[1] The parties have since provisionally set aside June 1 for that deposition. On April 4, 2017, defendant moved for a protective order to bar the deposition. Defendant's motion omits more than it says: absent from the submission is any sworn statement from Deputy Mayor Glen averring that she has no personal knowledge of the issues related to this litigation; there is not even any statement from defendant affirmatively describing what her involvement has actually been. *Cf. Pisani v. Westchester Cty. Health Care Corp.*, 2007 WL 107747, at *2 (S.D.N.Y. Jan. 16, 2007) (in case permitting deposition of Deputy County Executive, court notes that, "[c]uriously," the Deputy County Executive "has not submitted an affidavit as to his involvement or non-involvement" with the subject matter of the litigation).

In fact, and by her own account, the Deputy Mayor has an unparalleled role in both overseeing and participating in the work of HPD, the Planning Department, and the Economic Development Corporation (EDC). Ms. Glen has publicly declared her own belief in the importance of the policy at issue, for which she has articulated justifications that are either inconsistent with other statements she has made, or with the policy as it actually operates. It is she who wrote a letter to an advocate in 2014 advising that the outsider-restriction policy was under review. It is also Deputy Mayor Glen who personally signed at least two of the City's affirmatively furthering fair housing (AFFH) certifications – certifications signed with full knowledge of the segregation that operates as an impediment to fair housing choice in this City. Deputy Mayor Glen has also spoken publicly in ways that cast doubt on the City's justification related to the importance

[1] *See* excerpt of Court conference of Feb. 23, 2017, annexed to the Craig Gurian Decl. Opposing Mot. for Protective Order to Bar Dep. of Deputy Mayor Glen ("Gurian Decl."), Apr. 24, 2017, as Ex. 1, at 107-08.

of keeping long-term residents in place. She has witnessed, directly and indirectly, various expressions of opposition to affordable housing developments, and has admitted to having a sanguine view of opposition to development experienced from the City Council, a view very different from defendant's posture that a policy that perpetuates segregation is nonetheless justified by the need to placate that very opposition from the Council.

The impressions, observations, and conclusions that the Deputy Mayor has drawn from her involvement and oversight are unique and at the heart of this case. Her views and actions cannot appropriately be probed without deposition on oral examination.

Finally, Mayor de Blasio has made it clear that he is personally involved with the outsider-restriction policy specifically, and, more generally, that an operating principle of the administration is to accept the idea of community resistance to "outsiders." As such, the deposition of Deputy Mayor Glen is also a reasonable, good-faith step to see if it will be possible to avoid having to take the Mayor's deposition, and has to be understood within that context.

ARGUMENT

POINT I

DEPUTY MAYOR GLEN IS PERSONALLY INVOLVED IN OVERSEEING DEFENDANT'S OUTSIDER-RESTRICTION POLICY AND IN DEFENDING AND DECIDING WHETHER TO MODIFY IT; SHE PROVIDES A UNIQUE AND IMPORTANT PERSPECTIVE WITH RESPECT TO DEFENDANT'S JUSTIFICATIONS FOR ITS CONDUCT, AND PERSONALLY CERTIFIED DEFENDANT'S COMPLIANCE WITH ITS AFFH OBLIGATIONS.

In *Lederman v. N.Y.C. Dep't of Parks & Recreation*, 731 F.3d 199 (2d Cir. 2013), the plaintiffs did *not* contend that the proposed deponents (then-Mayor Bloomberg and a former deputy mayor) had "first-hand knowledge about the litigated claims." *Id.* at 203. Here, by contrast, Deputy Mayor Glen indisputably has extensive first-hand knowledge. Specifically, she has personally defended the policy, as in a 2016 City Council hearing on mandatory inclusionary

housing:

> I do think [community preference is] fundamental to the notion of . . . what are we delivering for communities when we're asking them to become bigger, broader, *more diverse* and how does that work in terms of how the people who have lived in that neighborhood for years will experience that growth.[2]

She has also said that people who have been part of a neighborhood during "the years where there was significant disinvestment," particularly those "where prices are really skyrocketing," are "our primary concern."[3] She wrote to a community activist (Michelle de la Uz) in June 2014 to advise that the policy was under review, and that, after the review, "the City will engage with various stakeholders, including the Fifth Avenue Committee, to get feedback."[4]

Based only on the above, it is already clear that there are a wide range of important questions relevant to the litigation that the Deputy Mayor can uniquely address. For example, she can: (1) confirm that part of the reason defendant wants to compensate communities in the form of an outsider-restriction policy is the fact that defendant, through development, is asking those communities to become "more diverse"; (2) explain how this pandering to concerns about a perceived problem with greater diversity could possibly be a legitimate interest of defendant; (3) explain the claimed review of the outsider-restriction policy, her assessment of it, and the potential alternatives (if any) that were considered; (4) explain the purposes she cites for the policy when, for example, the policy is not structured so that it is targeted to those who were in neighborhoods where there actually *was* significant disinvestment, let alone targeted to the subset of people who

---

[2] *See* excerpt of hearing transcript of Feb. 9, 2016 meeting of the City Council's Subcommittee on Zoning and Franchises, annexed to Gurian Decl. as Ex. 2, at 159 (emphasis added).

[3] *See* excerpt of transcript of NYC Mayor's Office press conference on Jan. 12, 2017, annexed to Gurian Decl. as Ex. 3, at 9.

[4] *See* letter from Deputy Mayor Glen to Michelle de la Uz of the Fifth Avenue Committee, June 24, 2014, annexed to Gurian Decl. as Ex. 4.

lived in such neighborhoods when the disinvestment was occurring; and (5) explain defendant's interest in ranking some New Yorkers' need for affordable housing (the long-timers that the Deputy Mayor described as defendant's "primary concern") ahead of the need of other New Yorkers desperate for affordable housing. *Cf.* *United States v. City of New York*, 2009 WL 2423307, at *2-3 (S.D.N.Y. Aug, 5, 2009) (holding that Mayor Bloomberg would be deposed in view of statements he made suggesting "his direct involvement in the events at issue in the case").

The Deputy Mayor has involved herself, too, in other issues bearing on plaintiffs' intentional discrimination, disparate impact, and perpetuation of segregation claims. For example, in a published interview focusing on gentrification and displacement, she stated that "[t]he reason why so many people are pissed is that they have been *conditioned to the fear of change*."[5] Fear of *racial and ethnic* change is hardly a new or unusual phenomenon. Plaintiffs should be able to examine the Deputy Mayor as to whether the fear of change she mentioned includes fear of racial and ethnic change. It is central to plaintiffs' intentional discrimination case that, when defendant offers outsider-restriction as a salve, defendant is being influenced by racial considerations.

Moreover, from the perspective of less-discriminatory-alternatives that are pertinent to the impact and perpetuation claims, the obvious question that arises for the Deputy Mayor is what steps, if any, defendant has taken to try to *decondition* New Yorkers to the fear of change.[6]

In the same interview, the Deputy Mayor contradicts the alleged justifications for the outsider-restriction policy with three of her comments. First, she rejects the assumption that movement away from a neighborhood necessarily represents a negative phenomenon: "I think it's

[5] *See* excerpt of *Vice* magazine interview with Deputy Mayor Glen, Nov. 8, 2015, annexed to Gurian Decl. as Ex. 5, at 6 (emphasis added).

[6] To the extent defendant responds that Ms. Been can address this or other points, *see infra* at Point II.

already a value statement to assume that it's bad if people move into other neighborhoods that are further away because that just runs afoul of the history of the world."[7] Second, she makes the important distinction between displacement that occurs because of "bad behavior" (such as illegal evictions, which she says defendant will not tolerate) and "the fact that neighborhoods change."[8] In view of these perspectives, the Deputy Mayor is an important deponent with respect to why concrete steps to prevent displacement (like anti-harassment measures) are not a better way of dealing with displacement, rather than the policy, which has no impact on the scope of displacement at all.

Third, and perhaps most telling, is this statement from the Deputy Mayor:

> You have all of these people like you and my kids who can't live in the neighborhoods they grew up in. Is that so terrible? I'm not so sure that it is. My grandparents didn't live in the neighborhood they grew up in either. Change isn't per se bad. *The biggest issue is not that you guys can't live in the Village anymore, it's that you may not be able to live anywhere*.[9]

That the key issue, as identified by Ms. Glen, is the ability to be able to afford to live *somewhere* in the City (as opposed to living in one's existing neighborhood in particular) is critical both in terms of identifying defendant's real, rather than stated, interest and in terms of whether there is a fit between that interest and the outsider-restriction policy. An equal-access lottery accomplishes the goal of finding New Yorkers a place to live somewhere in the City, and works as least as well as outsider-restriction in doing so, while better facilitating what should be the City's interest in mobility (more people have more options available). Finally, the policy is simply unrelated to the number of available apartments throughout the City. Plaintiffs have the right to probe all of these

[7] *Id.* at 5.

[8] *Id.* at 5-6.

[9] *Id.* at 5 (emphasis added).

critical issues through the Deputy Mayor's unique lens, experience, and past statements.

Another of defendant's justifications is its alleged need to overcome resistance from "neighborhoods throughout the City *and their elected representatives*" to affordable housing developments being built.[10] The question then becomes how Council Members would react to a world without the policy. This is necessarily a hypothetical inquiry: not what Council Members would *prefer* if they had their druthers, but, rather, what they would *do* if outsider-restriction were not one of the carrots able to be offered in the development-approval context. In this regard, the Deputy Mayor is reported to have "shrugged off the political opposition as standard operating procedure in dealing with the 51-member Council."[11] The Deputy Mayor's impression of the Council – that despite various posturing, a housing agenda can make a "[h]uge amount of progress"[12] – suggests that the Council is ultimately a flexible body and would come around to supporting affordable housing with carrots other than outsider-restriction.

Finally, in at least 2015 and 2016, Deputy Mayor Glen personally signed, on behalf of the City, the AFFH certification that is required by federal regulation. For those years, the certification stated that:

> The jurisdiction will affirmatively further fair housing, which means it has completed an analysis of impediments to fair housing choice within the jurisdiction, is taking appropriate actions to overcome the effects of any impediments identified through that analysis, and maintains records reflecting that analysis and actions in this regard.[13]

---

[10] Commissioner Been Decl. Supp. Mot. to Dismiss, Oct. 2, 2015, at 4, ECF 18 (emphasis added).

[11] *See Politico* article on the City's housing agenda, Jan. 3, 2017, annexed to Gurian Decl. as Ex. 6, at 3.

[12] *Id.* at 2-3.

[13] *See* excerpts of NYC Consolidated Plan Appendices for 2015 and 2016, annexed to Gurian Decl. as Ex. 7 and 8, respectively, at Certifications 1 (same page for both). The Deputy Mayor also signed the certifications stating that the City would conduct and administer its Community Development Block Grant

As the signatory, it was Ms. Glen who had to conclude that defendant was taking appropriate actions to overcome the effects of identified impediments, such as this one already recognized by the City in 2014:

> [N]early half of the city's neighborhoods remain dominated by a single racial or ethnic group. The inequality and lack of diversity in many neighborhoods means that some families do not have access to the education, jobs, and other opportunities others enjoy. It also means that low income households often are unable to find homes in the neighborhoods in which they would like to live.[14]

The Deputy Mayor will be able to describe the extent to which defendant evaluated the impact of outsider-restriction on the impediment of residential segregation, if at all; why the City retains outsider-restriction; how the acknowledged problem of Section 8 housing-voucher holders being concentrated in lower-income neighborhoods[15] and the problem of the City's policy of disproportionately placing affordable housing in low-income minority neighborhoods[16] could be ameliorated by having an equal-access lottery system; and the relative importance of complying with the federal AFFH obligation as an interest of the City.

---

in conformity with the Fair Housing Act and implementing regulations. *See* Ex. 7 & Ex. 8 at Certifications 4 & 5 (same pages for both).

[14] *See* excerpt of 2014 NYC Consolidated Plan AFFH Addendum, annexed to Gurian Decl. as Ex. 9, at AFFH-8.

[15] In the course of a letter that Deputy Mayor Glen wrote on a proposal to change payment standards, she stated that the City "recognize[d] that this data" regarding the "significantly higher number of HPD voucher holder households" in just 10 zip codes "may reaffirm HUD's concern about the concentration of voucher holders in lower income neighborhoods . . . ." *See* letter from Deputy Mayor Glen to the Department of Housing and Urban Development's (HUD) Office of General Counsel, July 2, 2015, annexed to Gurian Decl. as Ex. 10, at 2.

[16] *See* letter from High-cost Cities Housing Forum (of which the City is a member) to HUD, September 17, 2013, annexed to Pls.' Letter Br. Regarding Disc. Disputes ("Pls.' Disc. Letter"), Jan. 20, 2017, ECF 70, as Ex. 5, at PLTF_0175.

Deputy Mayor Glen can be expected to have unique, personal knowledge regarding the full range of claims and justifications in this case, and defendant's motion should be denied. *See City of New York*, 2009 WL 2423307, at *3 (ordering deposition of Mayor Bloomberg).

POINT II

THE INFORMATION SOUGHT VIA THE DEPOSITION OF DEPUTY MAYOR GLEN IS NOT OTHERWISE AVAILABLE.

Deputy Mayor Glen's perspective is unique for any administration official other than the Mayor.[17] As she has put it, "I get to work in quick time, but I also get to sit with the Planning Department, with EDC, with HPD to think about what is the future city going to look like. *That's a treat I don't think anybody else gets*."[18] As such, she is able to acquire a broad view of the factors bearing on housing policy, including the outsider-restriction policy. Thus, for example, when defendant takes the view that it is important for long-term residents to participate in the benefits of development, the Deputy Mayor would be able to identify the broad neighborhood benefits from a variety of forms of development (whether business development or streetscape improvement or otherwise) that accrue to residents of a community regardless of whether they move into newly built affordable housing. When defendant takes the view that outsider-restriction helps counter Council Member opposition to affordable housing, Ms. Glen has the broadest familiarity with all available incentives other than the policy that can be made available.

The Deputy Mayor, of course, oversees and supervises the work of HPD and the Planning Department, and can reasonably be expected to be in the decision-making loop when it comes to

[17] *See* Point III, *infra,* for why the deposition of the Deputy Mayor is an appropriate step to see if it is possible to avoid deposing Mayor de Blasio himself.

[18] *See* highlighted quote from *Real Estate Weekly* article on Deputy Mayor Glen, Jan. 25, 2017, annexed to Gurian Decl. as Ex. 11, at 4 (emphasis added).

decisions about the policy and, more broadly, what plaintiffs contend is the *actual* overarching policy by which defendant seeks to placate those who want to maintain the racial status quo. When the City told HUD that it was difficult to discuss issues like the causes of fair housing barriers "against the backdrop of local politics,"[19] did the Deputy Mayor agree? What about the backdrop of local politics does the Deputy Mayor, in light of her extensive participation in meetings involving opposition to rezoning and affordable housing -- including meetings not necessarily attended by other deponents -- believe is toxic to frank discussion of racial issues?

Motivation is, of course, critical to this case (both in terms of the intentional discrimination prong and in terms of the justifications defendant advances), and there is no substitute for the observations, impressions, conclusions, and recommendations of the Deputy Mayor. If this were not the case, a governmental party could simply put forward a selected spokesperson to tell a selected story, with no opportunity to impeach through the testimony of relevant witnesses. In *City of New York*, 2009 WL 2423307, for example, the court underscored that then-Mayor Bloomberg believed that the firefighter tests being challenged as discriminatory were in fact job-related. *Id.* at *2. Surely it was not the case that Mayor Bloomberg was the *only* City official who believed that. But his involvement and his statement "raise[d] the question of the basis for *the Mayor's* belief" that the challenged exams were job-related. *Id.* at *3 (emphasis added). Accordingly, the deposition was ordered. *Id.*

Similarly, in the *Pisani* case, involving termination of plaintiff's employment, plaintiff had already taken the deposition of a party defendant who testified to conversations he had with the Westchester Deputy County Executive, a non-party. *Pisani*, 2007 WL 107747, at *1, *3.

[19] *See* highlighted portion of excerpt of letter from Commissioner Been and Director/Chair Weisbrod to HUD regarding the proposed AFFH assessment tool, Nov. 24, 2014, annexed to Pls.' Disc. Letter, ECF 70, as Ex. 8, at PLTF_0198.

Nevertheless, the Court held that the Deputy County Executive's personal involvement with the issue meant that information from him "cannot be gleaned from another source . . . ." *Id.* at 3.

This is a sensible outcome. There will be many matters where a high government official either did not have involvement with the matter at issue or where a fact to be established is sufficiently cut-and-dried that any of a number of officials can provide the necessary information. But where the official is personally involved and where the matter involves motivations, judgments, and the like, one source cannot be substituted for another; each may have a differing view. Nowhere is this more true than in matters of discrimination and segregation, where the opportunity to depose multiple participants is what may reveal inconsistencies or contradictions and thus lead to evidence of pretext. Accordingly, defendant's suggestion that it is sufficient for plaintiffs to rely on former Commissioner Been, defendant's official spokesperson for the case, is entirely misplaced.

In terms of the Deputy Mayor's certification of compliance with defendant's AFFH obligations, there is an added reason why testimony is not interchangeable. The signing of any certification, let alone one required by federal regulations, requires the person certifying to exercise a duty of care. The basis for that person's certification should be able to be inquired about directly.

Neither the public statements of the Deputy Mayor nor document discovery from her are an adequate substitute for a deposition on oral examination. As for public statements such as interviews, *Sherrod v. Breitbart*, 304 F.R.D. 73 (D.D.C. 2014) is instructive. In that case, the Government sought to quash the deposition of the Secretary of Agriculture. The Secretary had issued a public statement and held two press conferences about a decision he had made, and the Government proffered that the Secretary was ready to ratify these statements under penalty of perjury. *Id.* at 76. But this was not adequate: "The press, which had very different motivations

than do the parties to this case, did not ask the type of probing follow-up questions counsel expect to ask at this deposition regarding who he spoke to, what information he was presented with and considered, and how, if at all, different factors influenced his decision." *Id.* The court continued: "The public statements the Secretary *chose to make* cannot possibly substitute for the answers to questions specifically directed to his underlying reasoning." *Id.* (emphasis added).

Similar and additional considerations apply to document discovery as a substitute for oral examination. Even if the subjects for oral examination were to arise in written materials,[20] the documents cannot be probed with the flexibility of oral examination, particularly in respect to questions of factors considered, alternatives pursued, and potentially multiple motivations for conduct. *Cf. Sherrod,* 304 F.R.D. at 76 (rejecting the option of written questions because even those "lack the flexibility of oral examination, the latter of which allows the questioner to adjust on the fly and confine his questions to the relevant ones while still satisfying himself and his client that a particular line of inquiry has been exhausted").

POINT III

THE DEPOSITION OF DEPUTY MAYOR GLEN REPRESENTS AN APPROPRIATE MECHANISM IN PLAINTIFFS' GOOD-FAITH EFFORT TO SEE IF THE DEPOSITION OF MAYOR DE BLASIO CAN BE AVOIDED.

Defendant does not deny that Mayor de Blasio is the ultimate decision-maker when it comes to defendant's outsider-restriction policy. The Mayor has opined that "[t]he law says that when we create affordable housing, we have the right to split it 50 percent for people from the surrounding community – 50 percent city-wide lottery open to all . . . ."[21] He has claimed that

[20] Even in 2017, communications are often not reduced to writing, especially when dealing with issues of race or other politically sensitive matters.

[21] *See* excerpt of transcript of Mayor de Blasio's appearance on NBC's "Ask the Mayor", Apr. 18, 2016, annexed to Gurian Decl. as Ex. 12, at 5.

outsider-restriction is a "very fair approach" because "folks who have built up communities deserve a special opportunity to get affordable housing that's created"[22] (even though the policy does not target "folks who have built up communities"; and even as he elsewhere averred that "the root" of the terrible problem of school segregation is "really, obviously" housing segregation[23]).

The Mayor has admitted that, in connection with gentrification, "we have to recognize that the response before this administration came into office, the response of the city government was to do absolutely positively nothing," adding that gentrification as a phenomenon is 15 to 20 years old.[24] In other words, though defendant tries to link the need for outsider-restriction to gentrification and resulting displacement, a less-discriminatory-alternative – acting to control the excesses of gentrification – was unfortunately not employed for 15-20 years of the policy.

The Mayor has recently taken to a new level the philosophy of trying not to upset those who prefer the status quo. He explicitly critiqued previous efforts to site homeless shelters by saying that government has made it harder because "we've sent people all over and there's not a sense of the people who are being served are from my very own community – *they are just like me* – and that's something we need to change."[25]

In pursuing this path, the Mayor is explicitly aware that shelter residents (who are

---

[22] *See* excerpt of transcript of Mayor de Blasio's remarks at Queens affordable senior housing groundbreaking, Aug. 21, 2015, annexed to Gurian Decl. as Ex. 13, at 4.

[23] *See* highlighted portion of excerpt of transcript of Mayor de Blasio's appearance on WNYC's "Brian Lehrer Show", June 16, 2016, annexed to Gurian Decl. as Ex. 14, at 3.

[24] *See* excerpt of transcript of Mayor de Blasio's Brooklyn town hall meeting on affordable housing, Mar. 14, 2016, annexed to Gurian Decl. as Ex. 15, at 26.

[25] *See* excerpt of transcript of Mayor de Blasio's speech on the City's homelessness plan, Feb. 28, 2017, annexed to Gurian Decl. as Ex. 16, at 7 (emphasis added).

disproportionately African-American) will be geographically placed in starkly unequal concentrations: "If [a] community board has 50 people in [the] shelter system, we want [them to] have some kind of capacity like that. If they have thousands, we want them to have capacity for the people from their neighborhood, even if it means enough capacity for thousands of people."[26]

All of the foregoing issues, along with the Mayor's reasoning and the decision-making process,[27] would make the deposition of the Mayor appropriate. Plaintiffs, however, are prepared to see whether the deposition of Deputy Mayor Glen, the mayoral deputy with the broadest portfolio over the relevant issues, would be enough to make such a deposition unnecessary. *Cf.* *Bogan v. City of Boston*, 489 F.3d 417, 424 (1st Cir. 2007) (holding that plaintiff should have sought discovery from Mayoral aides before seeking to depose Mayor).

POINT IV

DEFENDANT'S CITED CASES ARE INAPPOSITE.

In six of defendant's cases, the party seeking the depositions failed to contend that the proposed deponents had personal knowledge about the litigated claims, or else the moving party showed that no such knowledge existed: *Lederman*, 731 F.3d at 203; *Moriah v. Bank of China*

[26] *Id.* at 13.

[27] Deliberative process privilege should not apply where the decision-making process itself is at issue. *See* *Burbar v. Inc. Vill. of Garden City*, 303 F.R.D. 9, 14 (E.D.N.Y. 2014) ("As noted in *Children First Foundation,* the 'historical and overwhelming consensus and body of law within the Second Circuit is that when the decision-making process itself is the subject of the litigation, the deliberative process privilege cannot be a bar to discovery' and the privilege 'evaporates.' 2007 WL 4344915, at *7 (collecting cases and holding that privilege was inapplicable where plaintiff alleged that government defendants acted in an arbitrary manner in rendering a policy decision). For example . . . in *Azon* [*v. LIRR*], the court held that the privilege was inapplicable to documents that contained information critical to the plaintiff's employment discrimination claim. 2001 WL 1658219, at *3; *see also* *Mitchell v. Fishbein*, 227 F.R.D. 239, 250 (S.D.N.Y.2005) (collecting cases)."). *See also* *ACORN v. Cty. of Nassau*, 2008 WL 708551, at *4 (E.D.N.Y. Mar. 14, 2008) ("When the decision making process is itself at issue, particularly in a civil rights action, the deliberative process privilege and other privileges designed to shield that process from public scrutiny may not be raised as a bar against disclosure of relevant information; it must yield to the overriding public interest in challenging discrimination.") (citing *Torres v. CUNY*, 1992 WL 380561, at *8 (S.D.N.Y. Dec. 3, 1992)).

Ltd., 72 F. Supp. 3d 437, 441 (S.D.N.Y. 2014); *Murray v. Cty. of Suffolk*, 212 F.R.D. 108, 109 (E.D.N.Y. 2002); *Marisol A. v. Giuliani*, 1998 WL 132810, at *5 (S.D.N.Y. Mar. 23, 1998); *L.D. Leasing Corp., Inc. v. Crimaldi*, 1992 WL 373732, at *1 (E.D.N.Y. Dec. 1, 1992); *Todd v. Hatin*, 2014 WL 5421232, at *1 (D. Vt. Oct. 24, 2014). Here, by contrast, Deputy Mayor Glen is integrally involved across the range of claims and justifications.

Bogan is a case where the plaintiffs had only scant evidence of personal involvement by the Mayor of Boston, the proposed deponent. *Bogan,* 489 F.3d at 423-24. The court concluded that prior to seeking the deposition of the Mayor, the plaintiffs should have sought discovery from his aides. *Id.* at 424. Here, by contrast, there is ample evidence of Deputy Mayor Glen's involvement with the core issues, and plaintiffs are following the *Bogan* path of seeking her deposition to assess whether the deposition of Mayor de Blasio can be avoided.

Richmond Boro Gun Club, Inc. v. City of New York, 1992 WL 314896, at *2 (E.D.N.Y. Oct. 13, 1992), is a case that references a prior ruling disallowing a deposition, in part, because plaintiffs did not demonstrate that the information sought would be "essential" to its case. "Essential" is not a factor that the Second Circuit, 11 years later, chose to make part of the test.

Vill. of Arlington Heights v. Metro Hous. Dev. Corp., 429 U.S. 252 (1977), was not a "high government official" case. The possibility of legislators being called to the stand was included as part of its listing of "subjects of proper inquiry in determining whether racially discriminatory intent existed." *Id.* at 268. To the extent that it characterized trial testimony from the decision-making body as occurring in "some extraordinary instances," it left it to other courts to determine the privileges that would apply. *Id.* *Lederman* is in fact the Second Circuit's standard on deposing high government officials (with its interpretation of "extraordinary"), and as discussed above, case law has made clear that concerns about intruding into the deliberative process do not apply when

the decision making process is itself at issue.[28]

Finally, the court in *New York v. Oneida Indian Nation of N.Y.*, 2001 WL 1708804 (N.D.N.Y. Nov. 9, 2001), was not asked to or failed to engage in the necessary assessment of how different participants in the same event could have different motivations and rationales.

POINT V

A FULL-DAY DEPOSITION IS APPROPRIATE.

The parties have reserved the day of June 1 for the deposition. Unlike other cases where there is a limited topic on which the challenged deponent may have information, here the Deputy Mayor has information across a wide range of subjects, and thus plaintiffs anticipate needing most or all of the seven hours allowed by the rules. Defendant offers no statement of hardship, only saying that the deposition would force the Deputy Mayor "set aside hours from her very busy schedule . . . ."[29] This is not an adequate showing to limit the duration of the deposition.[30]

CONCLUSION

Defendant's motion for a protective order should be denied.

Dated: New York, New York
April 24, 2017

Craig Gurian

Craig Gurian
Anti-Discrimination Center, Inc.
1745 Broadway, 17th Floor
New York, New York 10019
(212) 537-5824
Attorney for Plaintiffs

[28] *See supra* Footnote 27.

[29] *See* Def.'s Mem. of Law Supp. Mot. for Protective Order to Bar Dep. of Deputy Mayor Glen, Apr. 4, 2017, at 1, ECF 111.

[30] It would be unfair to permit defendant to make new assertions on this point on reply, and the Court should not consider such arguments.