UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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JANELL WINFIELD, TRACEY STEWART,
SHAUNA NOEL, and EMMANUELLA SENAT

Plaintiffs,

- against -

CITY OF NEW YORK,

Defendant.

15 CV 5236 (LTS)(KHP)

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DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF CROSS-MOTION FOR PROTECTIVE ORDER AND IN OPPOSITION TO MOTION TO COMPEL THE DEPOSITION OF MAYOR BILL DE BLASIO

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PRELIMINARY STATEMENT

Defendant submits this memorandum of law in opposition to Plaintiffs' motion to compel the deposition of Mayor Bill de Blasio and in support of its cross-motion for a protective order, pursuant to Rules 26(c) and 30(d)(3)(B) of the Federal Rules of Civil Procedure ("FRCP"), to bar the deposition of Mayor de Blasio in this action. See Exhibit A to the Sadok Declaration, dated July 23, 2018.[1] This action arises from the implementation, expansion and maintenance of the New York City Department of Housing Preservation and Development ("HPD") community preference policy, which provides, in short, that up to 50% of affordable housing units in a new affordable housing project be provided to members of the community district within which the project is located.[2] Plaintiffs assert that the community preference policy violates the Fair Housing Act and NYC Human Rights Law, alleging it intentionally discriminates against Blacks and Latinos, perpetuates segregation, and has a disparate impact on Blacks and Latinos.[3]

Plaintiffs demand that the Mayor set aside several hours from his very busy schedule for a deposition despite the fact that he is not a named defendant, despite that there are no allegations against him directly, and despite that Plaintiffs have not proffered any valid reason for needing his deposition. The law does not allow the deposition of high-ranking officials unless there is a showing of exceptional circumstances, and Plaintiffs have failed to meet that burden.

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[1] Letter exhibits are annexed to the Sadok Declaration, dated July 23, 2018.

[2] A fuller explanation of the policy is found in footnote 2 to the City's Answer to the Second Amended Complaint, ECF 469.

[3] Plaintiffs are two African-American women. Thus, they do not have standing to challenge the community preference policy on behalf of Latinos.

Plaintiffs' reliance upon a variety of quotes from public appearances, interviews and news articles do not demonstrate exceptional circumstances necessitating the Mayor's deposition. Plaintiffs have not demonstrated that the Mayor has unique first-hand knowledge of information that is relevant and necessary to their claims or that the information cannot be obtained from another source. Instead, Plaintiffs have provided a wish list of questions they would like to ask the Mayor on a variety of topics, many of which are only tangentially related, at most, to the claims raised in this case. In an attempt to bolster this "wish list" into something worthy of a deposition, Plaintiffs exaggerate the significance of minimally relevant issues, mischaracterize the Mayor's statements and other deponents' testimony, make baseless factual conclusions and presumptions, and attempt to create conflict purportedly requiring clarification where no conflict actually exists. In short, the information Plaintiffs seek is neither relevant nor necessary to Plaintiffs' claims, nor unique to the Mayor.

Not only have Plaintiffs not shown that the Mayor has any unique, first-hand knowledge of information necessary for their case, but there are alternative means to receive information about the Mayor's purported involvement in the issues raised in this case, namely, his emails which Defendant has already search and produced,[4] the emails of Deputy Mayor Alicia Glen, and other key advisors in the Office of the Mayor, the New York City Department of Housing Preservation and Development ("HPD"), the New York City Department of City Planning ("DCP"), and the New York City Department of Social Services ("DSS"). Plaintiffs have also already deposed the current and four former HPD Commissioners, the former Director of the Department of City Planning, the current Executive Director of the Department of City

[4] The City's collection, review, and production of the Mayor's email is not complete.

Planning, and the current Commissioner of the Department of Social Services (of which DHS is part).[5] The Mayor relies upon his senior advisors to brief him on issues around the community preference policy, and he does not believe he has "any unique factual information about the community preference policy." See Declaration of Bill de Blasio, dated July 23, 2018 ("de Blasio Dec.") at ¶ 22. Therefore, Plaintiffs' motion to compel should be denied, and the City's cross-motion for a protective order barring the deposition of Mayor de Blasio should be granted.

ARGUMENT

PLAINTIFFS HAVE NOT SHOWN "EXCEPTIONAL CIRCUMSTANCES"

Defendant opposes Plaintiffs' motion to compel and cross-moves for a protective order of Mayor Bill de Blasio's deposition pursuant to FRCP Rules 26(c) and 30(d)(3)(B) on the basis that the deposition will cause undue burden and Plaintiffs have not met their burden of showing that there are "exceptional circumstances" necessitating his testimony. Mayor de Blasio is a high-ranking government official. It is well-settled that high-ranking governmental officials should not be called for a deposition unless a party can show "exceptional circumstances" for such deposition. Lederman v. N.Y. City Dep't of Parks & Rec., 731 F3d 199, 203 (2d Cir. 2013), cert. denied, 134 S. Ct. 1510 (2014).[6]

[5] Other high-level HPD staff have been deposed, including former and current Deputy and Assistant Commissioners.

[6] See also Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 268 (1977) (in a racial discrimination challenge to a rezoning denial, the Supreme Court held that a decisionmaker's testimony on the purposes of a challenged action is only warranted in "extraordinary instances")[6]; Friedlander v. Roberts, 2000 U.S. Dist. LEXIS 14248, at *10, 2000 WL 1772611 (S.D.N.Y. Sep. 28, 2000) (granting the City's motion for a protective order to bar the deposition of Mayor Guiliani); Murray v. County of Suffolk, 212 F.R.D. 108 (E.D.N.Y. 2002) (precluding deposition of Suffolk County Police Commissioner where there was nothing to suggest that the information sought from the Commissioner was unavailable from other sources); Lederman v. Giuliani, 2002 U.S. Dist. LEXIS 19857, *5-6, 2002 WL 31357810 (S.D.N.Y. 2002) (precluding testimony of high-ranking city officials who did not have unique personal knowledge that would assist the plaintiffs in the furtherance of their claims); New York v. Oneida Indian Nation of N.Y., 2001 U.S. Dist. Lexis 21616, *11-12, 2001 WL 1708804 (N.D.N.Y. 2001) (refusing to compel testimony of Governor and his Secretary where there was no indication that the Governor's and his Secretary's knowledge was unique and personal); L.D. Leasing Corp. v. Crimaldi, 1992 U.S. Dist. LEXIS

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The Second Circuit has explained that "exceptional circumstances" means either (1) that "the official has unique first-hand knowledge" relevant to the claims or (2) "that the necessary information cannot be obtained through other, less burdensome or intrusive means." Lederman, 731 F3d 199 at 203. See also Moriah v. Bank of China Ltd., 72 F. Supp. 3d 437, 440 (S.D.N.Y. 2014);Bogart v. City of N.Y., 2015 U.S. Dist. LEXIS 113311, at *23-24 n.12, 2015 WL 5036963 (S.D.N.Y. Aug. 25, 2015). This test is not satisfied by merely showing that the testimony will yield relevant evidence; in addition to being unique to the high-ranking official, the evidence sought must be essential to Plaintiffs' case. See Richmond Boro Gun Club, Inc. v. City of New York, 1992 U.S. Dist. LEXIS 15983, *3-5, 1992 WL 314896 (E.D.N.Y. Oct. 13 1992) (distinguishing between relevant and essential testimony).

As the party seeking these depositions, it is Plaintiffs' burden to prove they meet the exceptional circumstances standard before they can be allowed to depose the Mayor. See Todd v. Hatin, 2014 U.S. Dist. LEXIS 151832, 2014 WL 5421232 (D. Vt. Oct. 23, 2014); Marisol A. v. Giuliani, 1998 U.S. Dist. LEXIS 3719, at *8, 1998 WL 132810 (S.D.N.Y. Mar. 23, 1998). Moreover, courts have strictly enforced the requirement that the party seeking the deposition of a high-ranking official must meet their burden to show exceptional circumstances. See e.g. Lederman, 2002 U.S. Dist. LEXIS 19857 at *4-5.

This rule is based upon strong public policy considerations. The deposition of a high-ranking government official "must not hinder the official's ability to perform his or her duties." Adler v. Pataki, 2001 U.S. Dist. LEXIS 18428 at *4, 2001 WL 1708801 (N.D.N.Y. Nov.

18683, 1992 WL 373732 (E.D.N.Y. 1992) (finding that Mayor need not testify where he has no relevant first-hand knowledge and examination that probes the mental processes of the Mayor is prohibited by *Morgan* (citing to United States v. Morgan, 313 U.S. 409, 422)).

13, 2001). See also Marisol A., 1998 U.S. Dist. LEXIS 3719 at *10 ("In weighing the concerns of those seeking depositions of government officials, courts must place 'reasonable limits' so as to conserve the time and energies of public officials and prevent the disruption of the primary functions of the government.") (internal citations omitted). The Second Circuit has recognized that high-ranking officials have "greater duties and time constraints than other witnesses," and that "[i]f courts did not limit these depositions, such officials would spend 'an inordinate amount of time tending to pending litigation.'" Lederman, 731 F.3d at 203 (quoting In re United States (Kessler), 985 F.2d 510, 512 (11th Cir. 1993) and Bogan v. City of Bos., 489 F.3d 417, 423 (1st Cir. 2007), respectively).

A. An "Unmatched Perspective" Does not Satisfy the Uniqueness Standard

Apparently conceding that they are unable to establish that the Mayor has unique first-hand knowledge relevant to their claims, Plaintiffs propose a new standard, namely that the Mayor has an "unmatched perspective" "as to [his] own, specific views." Such proposed standard is the exact opposite of exceptional circumstances and contrary to the law. See Pls.' Memo at 3. Indeed, the Second Circuit has held that the Plaintiffs must demonstrate that "the official has unique *first-hand knowledge*"— not a unique or unmatched perspective. See Lederman 731 F.3d at 203 (emphasis added). See also Marisol A., 1998 U.S. Dist. LEXIS 3719 at *2 (holding that it must be shown that a high-ranking official have "*relevant information* that cannot be obtained from any other source.") (emphasis added). Having a unique perspective should never be the justification for any deposition other than, perhaps, an expert witness. The purpose of a deposition is to learn facts, not to explore the opinions and points of views of others. Further, if "perspective" were to be the standard to determine if a high-ranking official can be deposed, then high-ranking officials would be deposed all the time, completely undermining the strong public policy behind the exceptional circumstances standard. Contrary to Plaintiffs'

position, they are not entitled to multiple depositions, in particular of high-ranking officials, simply to get different perspectives on the same facts.[7]

The cases relied upon by Plaintiffs do not support Plaintiffs' assertion that an "unmatched perspective" satisfies the exceptional circumstances standard. Plaintiffs' reliance upon United States v. City of N.Y., 2009 U.S. Dist. LEXIS 68167, 2009 WL 2423307 (E.D.N.Y. Aug. 5, 2009) is misplaced. In United States, Mayor Bloomberg had voluntarily provided sworn testimony before the Senate addressing the litigation and his positions on key issues in the case (i.e. that the challenged test was "job-related.").[8] The court in United States did not rely only on this testimony, but also on "other record evidence of the Mayor's involvement in the facts underlying this dispute." Id. at *12. Here, the Mayor has not volunteered any sworn testimony about this litigation (or than his Declaration in Opposition, dated July 23, 2018), or even about any of the issues raised in the litigation.[9]

Plaintiffs' attempt to equate former Mayor Bloomberg's statement that the challenged test was "job-related" with Mayor de Blasio's statement that "the 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 – to community members, and people in any other part of the five boroughs." likewise fails. Pls.' Ex 8. First, as already noted,

[7] In fact, asking fact witnesses for their opinions and hypothetical questions is not appropriate and will have little probative value. See e.g. Bank Brussels Lambert v. Chase Manhattan Bank, N.A, 1996 U.S. Dist. LEXIS 6503 *14-15, 1996 WL 252374 (S.D.N.Y. May 13, 1996); Handschu v. Special Servs. Div., 2003 U.S. Dist. LEXIS 20, at *20-22, n. 8, 2003 WL 26474590 (S.D.N.Y. Jan. 2, 2003).

[8] Prior to this voluntary testimony before the Senate, the City had moved to quash the former Mayor's deposition and succeeded on their motion. United States v. City of N.Y., 2009 U.S. Dist. LEXIS 68167 at *4 (E.D.N.Y. Aug. 5, 2009).

[9] Contrary to Plaintiffs' assertions, this Court's reliance upon United States in granting Deputy Mayor Glen's deposition, was not about her unique perspective but her "statements, coupled with her [role] and directly overseeing

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former Mayor Bloomberg's statement was voluntary sworn testimony before the Senate about the litigation in question. Mayor de Blasio's statement was not sworn testimony, nor was it a statement about this litigation. Rather, it was part of a response to a question on affordable housing in East New York during an NBC program "Ask the Mayor." The questioner did not even mention the litigation. See Pls.' Ex. 8. Moreover, the Mayor was already asked about the basis for this statement in an interrogatory posed to the City. The City responded that "the Mayor does not specifically recall his basis or bases for making this statement." Thus, as Mayor de Blasio has no recollection of the basis for this statement, it does not serve as a legitimate basis to depose him, let alone satisfy the exceptional circumstances standard.[10]

Plaintiffs' reliance upon Pisani v. Westchester Cty. Health Care Corp., 2007 U.S. Dist. LEXIS 3202, 2007 WL 1007747 (S.D.N.Y. Jan. 16, 2007) is likewise misplaced. In Pisani, the plaintiff brought a claim for breach of contract for being terminated from his job and sought to depose the Deputy County Executive who personally considered and decided to terminate him. The Court found that the information sought from the Executive could not be learned from another source because the Executive's "personal, and apparently significant, involvement in the termination of plaintiff's employment." Pisani, 2007 U.S. Dist. LEXIS 3202 at *9-10. The Court also considered that the Executive had "not submitted an affidavit as to his involvement or non-involvement in the termination of Pisani's employment."[11] Id. at *7.

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agencies like HPD, [which] suggest[ed] that Deputy Mayor Glen has direct involvement with the community preference policy…." Pls.' Ex. 3 at 15:3-7.

[10] Plaintiffs assert that this response necessitates follow up due to the use of the term "specifically," however, the City already clarified in a letter and then again in Court. See Exs. E and F. The Mayor agrees with the City attorney's clarifications. See de Blasio Dec. at ¶ 9.

[11] The plaintiffs in Pisani also only sought a 45 minute deposition at the Deputy Executive Director's office. Id. at 10 n.4. In United States, the plaintiffs sought and were granted only a 3 hour deposition of former Mayor Bloomberg. Plaintiffs here have not even sought a limited deposition, and noticed the deposition for their counsel's offices. See Def.'s Ex. A (ECF 483).

Here, unlike the Executive's direct involvement in terminating the Pisani plaintiff, the Mayor was not personally involved with the determination to create the policy or increase the percentage of the community preference policy. See de Blasio Dec. at ¶ 7. It was already a long-standing policy that had been used by HPD through several mayoral administrations before the current Mayor was elected. Id. at ¶ 7. Moreover, any involvement he had regarding decisions around the implementation of community preference policy and its role in affordable housing issues has been through meetings and communications with Deputy Mayor Glen, HPD Commissioner Torres-Springer, or former HPD Commissioner Been, all of whom have been deposed already.[12] See de Blasio Dec. at ¶ 7. Unlike in Pisani, the Mayor has submitted a declaration, explaining that he does not have unique information.[13] See de Blasio Dec. at ¶¶ 8, 22. Finally, unlike in Pisani, the challenge here is not to a specific decision that the Mayor was directly involved in, but to an ongoing policy whose implementation is part of the regular responsibility of HPD. Therefore, because it is clear that Plaintiffs have failed to meet their burden of demonstrating that the Mayor has "unique first-hand knowledge" and their proffered "unmatched perspective" standard is contrary to the law, it must be rejected by this Court.

B. Plaintiffs' Attempt to Demonstrate that the Mayor has Unique First-Hand Knowledge because he "Defends" the Policy and Makes Decisions Fails

Contrary to Plaintiffs' assertions, the fact that the Mayor has discussed the community preference policy publically is not "evidence" that the Mayor has unique first-hand

[12] Additionally, the Mayor's email has been collected, searched, reviewed, and responsive non-privileged documents have been produced. As document review continues, additional email from the Mayor may be produced.

[13] Moreover, to the extent that Plaintiffs' allege that "decisions" to reject alternatives were made by the Mayor, as the Mayor explained, these discussions were in the context of resolving this litigation. See de Blasio Dec. at ¶¶ 7 and 11. Therefore, the basis for these decisions and discussions around them are protected by the work-product privilege and the attorney-client privilege. Id. at ¶ 12.

knowledge. Common sense dictates that the Mayor needs to be able to speak with the press and the public about issues of their concern, whether or not there is litigation around the issue. This is especially true given that the litigation was commenced relatively early in the Mayor's first term, while the Mayor was pursuing the most ambitious affordable housing policy in the United States (the passage of zoning text amendments to provide for and facilitate mandatory inclusionary housing). If the exceptional circumstances standard could be met every time a high-level elected official responded to a question or discussed a matter that happens to be related to a subject of litigation, it would be rendered meaningless. The entire point of the standard is a recognition that high-ranking officials may have some knowledge or involvement with the matter at issue in litigation, but may only deposed if that information is unique, first-hand, necessary for Plaintiffs claims and cannot be provided by less burdensome means.

(a) Statements Regarding the "Defense" of the Policy

Moreover, the specific statements Plaintiffs point to, and their reasoning for "needing" to ask questions about these statements falls flat. For instance, Plaintiffs' claim that one of the Mayor's statements that "folks who have built up communities deserve a special opportunity to get affordable housing that's created[]" conflict with former HPD Commissioner Been's testimony purportedly rejecting this concept as a rationale for the policy is an obvious attempt to create an illusion of pretext that must be "probed" where no such evidence of a pretext exists. See Pls.' Memo at 4-5. Ms. Been's testimony, read in context, is addressing the preference eligibility requirements, and was stating that the eligibility was not needs based. See Been Dep. I at 31:15-19. The Mayor's statement was an expression of one of the reasons for the community preference policy. In fact, this policy rationale is one that Ms. Been herself expressed in her October 2, 2015 Declaration in Support of Defendant's Motion to Dismiss ("Been Decl."). Specifically, Ms. Been stated that the community preference provides an

opportunity for "people who have endured years of unfavorable conditions, and who *deserve* a chance to participate in the renaissance of their neighborhoods[]" to remain in their neighborhoods. See Been Decl. at ¶ 8 (emphasis added) (ECF 18).[14] Thus, as the Mayor's statement is wholly consistent with Ms. Been's and the City's statements regarding one of its rationales for the policy, there is no "conflict" to be probed at all, let alone by deposing the Mayor.

Plaintiffs' arguments regarding the desire to "explore" the Mayor's statements surrounding the diversity of community districts likewise lack merit. Plaintiffs attempt to justify their inquiry of the Mayor by attacking the Mayor's statements as factually inaccurate. In support of their attack, however, Plaintiffs themselves rely upon their own unsupported version of the "facts."[15] However, the demographic facts speak for themselves, and the Mayor's testimony about them will not change that. Further, the Mayor has stated that "those statements were not based upon specific facts, statistics or data" and thus further exploration around those statements will be to no end. de Blasio Dec. at ¶ 10.

Plaintiffs' conclusion that the Mayor's statements regarding the diversity of community districts is an attempt to "pretend that [community preference] would not have a disparate impact" and is "evidence of defendant's avoidance of the reality of residential racial segregation, and of consciousness of guilt" is preposterous. Disparate impact must be established simply by a comparison of the demographics of the City-wide population to the

[14] Similar language for the rational of the community preference policy has been expressed by other deponents as well. See e.g. Ex. G (Perine Dep. 211:25 – 214:21).

[15] Plaintiffs' footnote citing to facts the City allegedly was aware of, are not the facts about the diversity of the community district. Pls.' Memo at n. 11. Moreover, Plaintiffs cite to their own allegations set forth in their First Amended Complaint. These allegations have not yet been established as facts.

demographics within a community district. The Mayor's comments about those statistics is not probative of that analysis whatsoever.

Similarly, Plaintiffs' desire to question the Mayor about the basis for his statement that the "vast majority" of applicants applying for a community preference unit have been in the neighborhood a "long time" "in light of the finding of the Beveridge Report that an [redacted] Pls.' Memo at 6; Pls.' Ex 10. Plaintiffs are taking the Beveridge Report conclusions as established facts in this case, when the reality is that the Beveridge Report is a premature preliminary expert report which the City's expert—(and certainly not the Mayor)—will rebut during expert discovery. Even taking, arguendo, the Beveridge Report's [redacted] as true, that does not in any way contradict the Mayor's statement about how long the applicants eligible for the community preference have lived in the community district. Plaintiffs are conflating two separate issues (numbers of out-of-CD applications vs. length of residency of in-CD applicants) in an attempt to create a conflict to justify the Mayor's deposition where none exists.[16]

Plaintiffs' arguments surrounding the Mayor's statement that the "50-50 split speaks to both parts of the reality," fail for the same reasons. Plaintiffs seek the Mayor's opinions in light of Plaintiffs' versions of the facts, not to discover relevant facts that they believe the Mayor actually uniquely possesses. Moreover, Plaintiffs have attempted to debunk

[16] It should be noted that even if such a conflict did exist, here, or elsewhere, that does not mean that the Mayor has unique first-hand knowledge necessary to Plaintiffs' claims. At most, it shows the Mayor has a different perspective. However, a different perspective does not satisfy the exceptional circumstances standard.

the City's rationales for the community preference policy with several other deponents.[17] Plaintiffs do not need to, nor are entitled to, depose the Mayor for this purpose.[18]

Finally, as to the Mayor's statements regarding the "integrative impact" of the affordable housing lottery,[19] Plaintiffs will have to prove their prima facia case of perpetuation of segregation through their expert's analysis, not the Mayor's generic statement. Pls.' Ex. 10. Moreover, even if, arguendo, Plaintiffs' were correct that the corollary of such statement is that the "preference part of the lottery does not reflect the total diversity of the city," their conclusion that the community preference policy causes a perpetuation of segregation is misplaced. Again, if Plaintiffs are to reach that conclusion, they will have to do so with many more steps of analysis, and a showing of causation, none of which have anything to do with the Mayor's prospective testimony. Finally, how Plaintiffs hope to use the Mayor's expected testimony is not a demonstration that the Mayor has unique, first-hand knowledge necessary to Plaintiffs' claims and not otherwise available. Thus, Plaintiffs' self-serving proffer does not meet the exceptional circumstances burden.

(b) The Mayor's Statements as to "Decisions" on the Policy

[17] See e.g., Ex. I (Been Dep. I at 19:05 – 23:7), Ex. D (Torres-Springer Dep. at 261:3-265:24).

[18] Plaintiffs often spend a significant amount of time during depositions pursuing convoluted, lengthy hypotheticals on the topic of the "fairness" of the 50-50 split (among other topics). The witnesses have difficulty responding because of the incorrect presumptions underlying the questions as well as the fact that the questions ask the witnesses to speculate. See e.g. Ex. C (Been Dep. II 79:2–87:05); Ex. H (Murphy Dep. 237:10 -242:12); Ex. I (Been Dep. 25:23-27:18); The desire to undertake such inquires is not a valid basis for obtaining a deposition of the Mayor.

[19] Plaintiffs' characterization of this statement as one that the Mayor "let-slip" is inaccurate and self-serving. Plaintiffs are attempting to paint a picture that the City avoids speaking about race when in fact, Plaintiffs' own exhibits show otherwise. See e.g. Ex. 10 (Mayor noting that "of course we want a more integrated society in every way.") Even if the City does not speak about race in the way Plaintiffs wish they did, that is not evidence of intentional discrimination.

Plaintiffs' argument that because the Mayor has made decisions regarding the community preference policy, they are entitled to depose him, fails. High-ranking officials are the ultimate decision-makers on any number of issues presented to them. That does not, however, translate into a showing that the official has unique, first-hand knowledge on the issue that cannot be provided in a less burdensome manner. Here, Plaintiffs have failed to meet that burden.

More specifically, as to the "decision to change the policy, and to reject other changes", Pls.' Memo at 8, the Mayor explained in his declaration that "[a]ny decisions regarding potential changes to the policy were made for the purposes of resolving this litigation." de Blasio Dec. at ¶ 11.[20] The Mayor further clarified that "[w]hile certain approaches were not pursued for settlement, [he] ha[s] not considered changing the community preference policy for any reason other than to facilitate resolution of this litigation."[21] Id. at ¶ 11. Thus, the testimony sought of the Mayor is privileged.[22] Id. at ¶ 12.

As to the email regarding the [redacted]. See de Blasio Dec. at ¶ 14. Plaintiffs already asked Ms. Been about this email exchange. See Pls.' Ex. 12; Ex. I (Been Dep. 261:12-266:2). As to the Mayor's offer in the email [redacted]

[20] Ms. Been's similarly testified that she was not aware of any decisions the Mayor made about community preference policy outside of the settlement discussions. Pls.' Ex. 11 at 215.

[21] That Ms. Been's testimony suggests that she made "tweaks" to the community preference policy that had been approved by the Mayor for purposes of settlement does not undermine this assertion. If anything, it shows the degree of autonomy that Ms. Been exercised as HPD Commissioner, and that the Mayor alone was not the decision maker about all aspects of the community preference policy.

[22] Moreover, Plaintiffs' reliance upon Ms. Been's testimony about these "decisions" is inappropriate. The City objected to the majority of the questions, and thus her responses will likely not be admissible evidence.

[redacted] See de Blasio Dec. 13. [redacted]

[redacted] Therefore, the Mayor's involvement with the [redacted] project is neither unique to him, nor probative.

C. The Mayor's Testimony Will Not Shed "Unique Light" on the City's Rationale Regarding Preventing Displacement[23]

Contrary to Plaintiffs' arguments, the Mayor has not "injected himself into the validity of the anti-displacement justification directly in connection with the lawsuit." Pls.' Memo at 10. As explained above, simply because there is ongoing litigation does not mean that the Mayor's responses to questions by the press about the community preference policy are statements about the City's position in the litigation. Furthermore, the statements Plaintiffs rely upon do not demonstrate unique knowledge.

For instance, Plaintiffs' reliance upon the Mayor's statement about prior administrations doing "positively nothing" is not an admission and does not reflect unique knowledge on past administrations' actions or inactions. Pls.' Memo at 10. A single statement by the current Mayor does not erase the anti-displacement programs and policies of the past. While the Mayor may have opinions about past administrations' actions or inactions, they are just that, opinions. Plaintiffs have the testimony of three former HPD Commissioners that served during the Bloomberg administration. Plaintiffs should have (and did) ask about the Bloomberg administration's anti-displacement programs and policies. See e.g. Ex. J (Cestero Dep. 219:22-220:18), and Ex. K (Donovan Dep. 113:2 – 113:12). Furthermore, the Mayor has acknowledged

[23] Preliminarily, it is important to understand that the prevention of displacement, which is what the Plaintiffs seek to ask the Mayor about, is only one of several stated reasons for the community preference policy.

that during past the Bloomberg administrations there were anti-displacement programs, and that his administration's policies and programs developed and added to these. See de Blasio Dec. ¶ 17.

Finally, Plaintiffs have already probed into the validity of the City's anti-displacement rationale through a series of questions of other deponents. Plaintiffs acknowledge this fact, and even describe (albeit inaccurately) Mr. Murphy's testimony. See Pls.' Memo at 10. See also footnote 17, supra. Plaintiffs have pointed to nothing that gives reason to believe that the Mayor has additional or unique information that has not already been shared.

D. The Mayor's Statements and Prospective Testimony Regarding Gaining Legislative Approval is Not Necessary for Plaintiffs' Claims

Plaintiffs' arguments as to why the Mayor's public statements about his ability to achieve various policy initiatives are highly relevant to this case are fundamentally flawed because: 1) they are based upon Plaintiffs' incorrect notion of the City's defenses; and 2) based on incorrect presumptions that the community preference policy causes a disparate impact, and that the City has known about this but chosen to do nothing. Moreover, the probative value of prospective testimony alone does not satisfy the exceptional circumstances standard. More than relevant, the information must be necessary, and unique first-hand knowledge that cannot be obtained from a less burdensome source.

Contrary to Plaintiffs' assertion, the City has not pursued a defense that "without [the community preference policy] CMs would, independent of a proposal's merits, reject actions needed to facilitate affordable housing." Those are Plaintiffs' exaggerated words, not the City's.[24] The City instead has explained that one justification for the community preference

[24] Plaintiffs' attempt to support this characterization of the City's defense by citing to Commissioner Torres-Springer's deposition testimony is misleading. Commissioner Torres-Springer did not state the quoted language in

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policy is that it addresses a fear of displacement which causes opposition to affordable housing projects and rezonings to facilitate affordable housing, and thus helps get the projects and rezonings approved.

In any event, probing into the Mayor's statements regarding obtaining legislative approval will not be probative of the City's defense. As the Mayor has explained, the Mayor was "not referencing the role of the community preference policy when making those statements."[25] See de Blasio Dec. at ¶ 16. Furthermore, the Mayor's public comments on his successes has no impact on the evidence that the City will present regarding community and Council member opposition to affordable housing that must be appropriately responded to in order to garner approval of a project or rezoning.

Nor do the Mayor's statements reflect a "cho[ice] not to try to change the CM minds." Pls.' Memo at 13. This double negative is not only confusing, but is a self-serving attempt to convert maintaining the status quo (i.e. the community preference policy that had been in place for over two decades) into an active choice to not change the policy. This new purported "choice" to "not" change the policy is further exaggerated by Plaintiffs' incorrect presumptions that the policy has a disparate impact, and that the City knew about this disparate impact. Plaintiffs have yet to establish, nor will be able to establish, either as "facts."[26]

Pls.' n.34. That language is a quote of Plaintiffs' question to the Commissioner. The fact that Ms. Torres-Springer answered the question, as she is obligated to do so unless a privilege is asserted, does not mean that the City has asserted this defense. See Pls.' Ex. 19.

[25] In fact, the Mayor's statement "there's always a path to yes" was not even made by the Mayor in the context of a discussion about affordable housing. This statement was made in the context of obtaining the State Legislature's approval to extend Mayoral control over schools. See Pls.' Ex. 20.

[26] Moreover, even if the City was aware of or suspected a disparate impact and maintained the policy, that decision does not make the policy violative of the Fair Housing Act, under a disparate treatment or disparate impact theory of liability. The City has one or more legitimate government interests in maintaining the policy. Plaintiffs conveniently ignore the City's rights to have a mixed-motive and legitimate interests for the policy even if a

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Finally, as to the Mayor's relationship with Speaker Johnson, the Mayor does not recall Speaker Johnson raising his consideration of a reduced community preference policy, nor has the Mayor seen the relevant interview. See de Blasio Dec. ¶ 19. Thus, Plaintiffs' flawed, self-serving arguments about why the Mayor's statements are probative fail, and Plaintiffs have not demonstrated that the Mayor has unique facts that need to be discovered.

E. School Segregation is Not Relevant to this Case and thus the Mayor's Statements or Proposed Testimony on Such Issues are Not Probative

Plaintiffs' proffer as it relates to the Mayor's purported knowledge or opinions regarding school segregation should not be considered by the Court. This case is not about school segregation.[27] It is specifically about the community preference policy, and whether that policy perpetuates segregation. Contrary to Plaintiffs' assertion, a jury will not be asked to weigh the City's community preference policy against other interests of the City, such as an interest in the integration of schools (as Plaintiffs assert). Pls.' Memo at 14. If Plaintiffs' meet their burden to demonstrate that the community preference policy caused a disparate impact or perpetuation of segregation the question before a judge or jury will be whether the City has a legitimate government interest in maintaining that policy.[28] Texas Dept. of Hous. & Com. Affairs v. Inclusive Com.Projects135 S. Ct. at 2512.

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disparate impact or intent to discriminate is established. Texas Dept. of Hous. & Community Affairs v. Inclusive Communities Projects, Inc., 135 S. Ct. 2507, 2514-2515 (2015); Mhany v. County of Nassau, 819 F3d 581, 617 (2d Cir 2016).

[27] In fact, responding to similar arguments, this Court denied document discovery on school segregation issues as "far[] afield. See Ex. O (Tr. of Feb 16, 2017 conference at 64:10). The notion that Plaintiffs' could satisfy their burden of showing exceptional circumstances on an issue the Court has already determined to be lacking in relevance flies in the face of reason.

[28] To the extent Plaintiffs understand the "legitimate" prong to be a weighing of the City's interests against other interests, Plaintiffs have cited to no authority for such interpretation, nor is the City aware of any.

Beyond lacking relevance to this case, simply because the Mayor has spoken in public on issues, and expresses opinions on issues, does not mean he has unique, first-hand information necessary to Plaintiffs' claims. Plaintiffs' proposed question as to why the Mayor and others will not end the community preference policy even if they have purportedly acknowledged that ending the policy will "maximize the lottery's integrative effect" is no different than asking the Mayor what he understands the rationales behind the community preference policy to be. As the Mayor has explained, he "ha[s] … discussed the rationales behind the community preference policy with the senior members of my team, including Deputy Mayor Glen and former HPD Commissioner Been" and he has "no reason to believe that I have unique factual information about the community preference policy." de Blasio Dec. at ¶ 22. Therefore, Plaintiffs' proffer regarding the Mayor's statements surrounding school segregation fails.

F. Plaintiffs' Arguments around the Mayor's Knowledge about the "Fear of Racial Change" Lack Merit

Plaintiffs' pursuit of this line of questioning of the Mayor will not lead to probative evidence whatsoever. First, Plaintiffs' theory that the City has a policy of unwillingness to stand up to those seeking to maintain the racial status quo, and that the community preference policy is one manifestation of that policy, is easily rebutted. [29] Second, even if, arguendo, this theory of liability were viable, the "evidence" Plaintiffs seek regarding the

[29] As Plaintiffs point out, the Mayor has stated that the lottery has an "integrative effect." See Pls.' Memo at 6, 15. Further, Council Members, who under Plaintiffs' theory are infected with discriminatory motive (i.e. a desire to maintain the racial status quo) most often vote to approve affordable housing (the opposite of exclusionary zoning). As former HPD Commissioner Shaun Donovan testified "council members and others were pushing for higher percentages of affordable housing and deeper targeting of affordable housing" and if fear of racial change "had been the primary motivating factor, I think they would have been arguing in the opposite direction." Ex. K (Donovan Dep. 109:9-110:2). Moreover, the community preference policy is not applied on re-rentals, meaning that any purported "maintenance of the racial status quo" is only temporary. Plaintiffs have spent a significant amount of time in other depositions pursuing "evidence" for this "maintenance of the racial status quo" theory. See e.g. Ex. I (Been Tr. 114:7-120:3) and Ex. M (Weisbrod Tr. 49:19-51:22). The Mayor should not likewise be subject to questions toward no probative end.

Continued…

City's homeless and school policies is not probative circumstantial evidence. As this Court has explained previously, "the scope of evidence relevant [to establishing discriminatory intent] has been circumscribed by the courts. See Vill. of Arlington Heights, 429 U.S. at 267; United States v. Yonkers, 837 F.2d 1181, 1221 (2d Cir. 1987)."[30] Feb. 1, 2018 Decision and Order, ECF 259.

Finally, Plaintiffs' arguments are based upon a legally unsupported notion of the City's obligation to affirmatively further fair housing, as well as an exaggerated significance of the role that affirmatively furthering fair housing issues play in this litigation.[31] Whether and why the City does or does not have a plan specifically addressed to ending residential racial segregation or achieving full integration is not probative of whether the City has intentionally discriminated by maintaining the community preference policy. The Mayor should not be subjected to questions about issues tangentially related to the litigation and sought only to prove a theory that so obviously will not succeed.[32]

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[30] The Court then continued to list the Arlington Heights factors. See ECF 259. Those factors include: historical background of the decision, specific sequence of events leading up to the decision, contemporary statements by decision makers, departures from normal procedure, and substantive departments. Arlington Heights v. Metro Hous. Dev. Corp., 429 U.S. 252, 267-68 (1977)Plaintiffs' reliance upon its unsupported deliberate disregard theory is a concession that it does not think it can prove its intentional discrimination case through the Second Circuit's factors to show intent.

[31] Plaintiffs have asserted that they will attempt to show an inference of discriminatory intent by showing that the City has deliberately disregarded these obligations. The court has limited discovery on affirmatively furthering fair housing to only insofar as it relates to the community preference policy. See Ex. L (Tr. February 16, 2017 conference at 36-40). Moreover, this case does not allege a cause of action for failing to comply with AFFH obligations, nor does such a private cause of action exist. See Inclusive Cmtys. Project v. US Dep't of Treasury, 2016 U.S. Dist. LEXIS 150064, at *13-14 (N.D. Tex. Oct. 28, 2016). Finally, the Second Circuit has not recognized that "deliberate disregard" is a probative factor in intentional discrimination under the Fair Housing Act. See United States v. Yonkers, 837 F.2d 1181, 1221; Arlington Heights v. Metro Hous. Dev. Corp., 429 U.S. 252, 267-68 (1977).

[32] Moreover, the only statement of the Mayor that Plaintiffs point to does not satisfy the exceptional circumstances standard. The article in which the Mayor discusses "fear" and "uncertainly" makes clear what "fear" the Mayor is speaking about. That Plaintiffs believe (or hope) that there is some other explanation (racialized component of fear) is not a basis to depose the Mayor.

CONCLUSION

In sum, Plaintiffs have failed to establish that the Mayor has unique first-hand information necessary to Plaintiffs' claims that cannot be provided in a less burdensome manner. The testimony they seek is the Mayor's perspective, not facts. Moreover, the probative value of the majority of the testimony Plaintiffs seek is minimal, as it is based on Plaintiffs' overly broad concept of the issues in the case and novel theories about how they can prove their claims. Finally, Plaintiffs have posed the same or similar questions, or could have, to many senior members of the Mayor's administration who have already been deposed.[33] In light of the foregoing, Plaintiffs' motion to compel should be denied in its entirety and Defendant's cross-motion for a protective order to prohibit the deposition of Mayor de Blasio should be granted in its entirety.

Dated: New York, New York
July 23, 2018

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[33] In the event that the Court orders a full day deposition of the Mayor, the City reserves its rights to seek relief in accordance with FRCP 30(d)(3)(B).