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

Plaintiffs,

- against -

CITY OF NEW YORK,

Defendant.

15 CV 5236 (LTS)(HKP)

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DEFENDANT'S MEMORANDUM OF LAW IN OPPOSOSITION OF PLAINTIFFS' OBJECTION PURSUANT TO F.R.C.P. 72(A) TO OVERTURN THE COURT'S SEPTEMBER 14, 2017 ORDER GRANTING DEFENDANT'S MOTION TO QUASH THE DEPOSITION SUBPOENA OF CITY COUNCIL MEMBERS RITCHIE J. TORRES AND RAFAEL L. ESPINAL JR. AND FOR A PROTECTIVE ORDER PROHIBITING DOCUMENT DISCOVERY FROM SIX COUNCIL MEMBERS

ZACHARY W. CARTER
Corporation Counsel of the
City of New York
Attorney for Defendant
100 Church Street
New York, New York 10007
(212) 356-4371

SHERYL R. NEUFELD,
MELANIE V. SADOK,
FRANCES POLIFIONE
Of Counsel.

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CITY'S MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' OBJECTION

PRELIMINARY STATEMENT

Defendant submits this memorandum of law in opposition to Plaintiffs' objection seeking to overturn Judge Parker's September 14, 2017 oral order quashing the subpoenas for depositions of New York City City Council Members ("Council Member" or "CM") Ritchie J. Torres and Rafael L. Espinal, and granting a protective order prohibiting document discovery from Council Members Rafael Espinal, Ritchie Torres, Melissa Mark-Viverito, Laurie Cumbo, Robert Cornegy, and Antonio Reynoso (collectively the "six Council Members"). Plaintiffs' Objection should be rejected as Plaintiffs fail to show that Judge Parker's decision is clearly erroneous or based on legal error.

This action arises from the implementation, expansion and maintenance of the New York City Department of Housing Preservation and Development's ("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 ("community preference policy").[1] Plaintiffs assert that the community preference policy violates the Fair Housing Act and the NYC Human Rights Law, alleging it intentionally discriminates against Blacks and Latinos, perpetuates segregation, and has a disparate impact on Blacks and Latinos.

Plaintiffs demand that these local legislators set aside hours from their very busy schedules to prepare and appear for depositions, and to produce documents, despite the fact that neither the Council nor the individual Council Members are defendants, despite the fact that the

[1] A fuller explanation of the policy is found in footnote 2 to the City's Amended Answer to the Amended Complaint, Doc. 51.

Amended Complaint does not challenge a Council action, despite the fact that there are no allegations against the Council or the individual Council Members, despite Plaintiffs' own admission that HPD is "responsible for implementing and overseeing" the community preference policy that they challenge (see Amended Compl. ¶ 132, Doc. 16), and finally, despite the fact that that their testimony and documents are protected by the legislative privilege. Plaintiffs make this demand simply because there are affordable housing projects in these Council Members' districts and because they have allegedly been vocal on affordable housing issues in the press—in other words because they are elected officials in a City that needs affordable housing, and are doing their jobs by addressing matters of concern.

Judge Parker's order granting the City's motions to quash and for a protective order is neither clearly erroneous nor affected by an error of law. Judge Parker considered Plaintiffs' arguments and properly held that Plaintiffs failed to meet their burden to show "exceptional circumstances" for these depositions, and that the ESI discovery sought was proportional to the needs of the case. The Council Members are not named defendants, and there are no allegations against them or even directly related to them. Moreover, as Judge Parker explained, the "the outsider restriction policy[2] was not and is not a legislative enactment. It was and is a policy established and maintained by mayors administratively." Ex. A at 9:4-6. Judge Parker further noted that, "[i]t is HPD, not a city council or its members that's responsible for implementing and maintaining the community preference policy." Ex. A. at 9:9-10. Thus, the Court properly found that Plaintiffs failed to explain "what unique first-hand knowledge the Council Members possess that is relevant to the claims in the case." Ex. A at 8:25-9:1-2.

[2] Plaintiffs refer to the community preference policy as "the outsider restriction policy."

With regard to the ESI discovery sought, Judge Parker held that Plaintiffs did not sufficiently articulate what documents they are seeking from the Council Members, and why those documents are likely to be relevant. The Court specifically explained that Plaintiffs have already received documents from HPD and the Mayor's office, and thus, to the extent there were communications with the Council Members regarding the community preference policy, Plaintiffs "are already getting those communications." Ex. A. at 12:3. Thus, the Court rationally concluded that "the burden and expense of the ESI sought it [sic] not proportional of the need of the case considering the minimal relevance of the discovery sought." Ex. A at 12:7-9.

Plaintiffs' objection fails to demonstrate that Judge Parker's decisions are based upon an error of law or are clearly erroneous. Instead, Plaintiffs repeat many of the same meritless arguments made in their opposition to the City's motion, including, again, attempting to impose a different legal standard to the issues before the Court. In a classic red herring, Plaintiffs also attempt to distract the Court by dedicating several pages of argument to characterizing deposition testimony that was not before Judge Parker when she made her decision and has no bearing on this motion. Most importantly, Plaintiffs fail to point to any error or law or abuse of discretion—they simply disagree with the Court's ruling. However, it has already been established in this case that the fact that "reasonable minds may differ on the wisdom of granting [a party's] motion is not sufficient to overturn a magistrate judge's decision." Winfield v. City, 2017 U.S. Dist. LEXIS 182021 at *6 (S.D.N.Y. Nov. 2, 2017)(quoting Edmonds v. Seavey, No. 08 CV 5646(HB), 2009 WL 2150971, at * 2 (S.D.N.Y. July 20, 2009)).

Therefore, as Judge Parker's decision is neither clearly erroneous nor effected by an error of law, it is entitled to deference and should not be disturbed.

ARGUMENT
POINT I

THE APPLICABLE STANDARD OF REVIEW

Pursuant to Rule 72(a) of the Federal Rules of Civil Procedure ("FRCP"), Plaintiffs are objecting to a decision to grant the City's motion to quash depositions and for a protective order barring document discovery from City Council members issued by Magistrate Judge Parker on the record during a compliance conference on September 14, 2017 (the "Disputed Order"). See Exhibit A. Rule 72(a) specifies that a district judge may only modify or set aside an order if the order is clearly erroneous or contrary to law.

Courts have widely found that the standard set forth in Rule 72(a) is a "highly deferential standard," and that magistrate judges "are afforded broad discretion in resolving nondispositive disputes and reversal is appropriate only if their discretion is abused." See Thai Lao Lignite Co. v. Gov't of the Lao People's Republic, 924 F. Supp. 2d 508, 511-12 (S.D.N.Y. Feb. 11, 2013) (citing Ritchie Risk-Linked Strategies Trading, Ltd. v. Coventry First LLC, 282 F.R.D. 76, 78 (2d Cir. 2012)).

As found by this Court, a magistrate judge's order is only clearly erroneous "where on the entire evidence, the [district court] is left with the definite and firm conviction that a mistake has been committed." Urban Box Office Network, Inc. v. Interfase Managers, L.P., 2005 U.S. Dist. LEXIS 14007, at *4 (S.D.N.Y. July 12, 2005) (internal quotations and citations omitted). This Court has further held that a magistrate judge's order is only contrary to law "when it fails to apply or misapplies relevant statutes, case law or rules of procedure." Tiffany & Co. v. Costco Wholesale Corp., 2013 U.S. Dist. LEXIS 150495, at *3-5 (S.D.N.Y. Oct. 18, 2013) (internal quotations and citations omitted).

In sum, "[a] magistrate judge's resolution of discovery disputes deserves substantial deference," and the objecting party "carries a heavy burden." Dubai Islamic Bank v. Citibank, N.A., 211 F. Supp. 2d 447, 448-49 (S.D.N.Y. 2001) (internal citations omitted). See also Samad Bros., Inc. v. Bokara Rug Co., Inc., 2010 U.S. Dist. LEXIS 132446 (S.D.N.Y. Dec. 13, 2010) (Keenan, J.) (internal citation omitted). Plaintiffs have not met this burden.

POINT II

THE COURT'S DECISION THAT PLAINTIFFS DID NOT MEET THEIR BURDEN TO SHOW EXCEPTIONAL CIRCUMSTANCES IS NEITHER CLEARLY ERRONEOUS NOR AN ERROR OF LAW

Relying upon the Second Circuit authority Lederman v. City, Judge Parker held that Plaintiffs must show that the "official has unique firsthand knowledge related to the litigative [sic] claims or that the necessary information cannot be obtained through other less burdensome or intrusive means." Ex. A at 8:16. Judge Parker then found that Plaintiffs did not meet this burden.

Judge Parker first addressed the fact that Plaintiffs had failed to explain what unique first hand knowledge the council members possess that is relevant to the claims in the case. Judge Parker emphasized that the policy at issue in this case, the community preference policy, "was not and is not a legislative enactment." Ex. A at 9:4. Judge Parker further explained that "[e]ven if city council were responsible for the policy, which it is not, it would be the actions of the counsel [sic] as a whole that are relevant and not the subjective beliefs or

motivations of a single counsel [sic] member." Ex. A at 9:20-23, citing Brown v. Gilmore, 2000 U.S.D. Lexis 21623 at 20 (E.D. Va. Oct. 26, 2000), aff'd 258 F.3d 265 (4th Cir. 2001).[3]

Finally, Judge Parker's decision responded to Plaintiffs' arguments that they need the depositions to rebut the City's asserted defenses. Judge Parker rationally determined that "plaintiffs already have access to publicly available materials that illustrate whether opposition to affordable housing development as been articulated in the past." As to Plaintiffs' desire to pose hypotheticals about what these council members would do in the event there were no community preference policy, the Court reasonably held that in light of the access to public information that addresses whether there is community opposition to affordable housing, the council members' speculation in response to these hypotheticals "is not probative [of] the issues in this case." Ex. A at 11: 2.

A. Judge Parker Properly Held that Plaintiffs Failed to Meet the Exceptional Circumstances Standard

Judge Parker's decision that Plaintiffs did not meet their burden to show that exceptional circumstances warrant the requested depositions is entitled to deference. 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. See Lederman v. N.Y. City

[3] In Brown, the court looked to the purpose of legislation in order to determine whether the legislation violated the Establishment Clause. The plaintiffs in Brown alleged that the stated purpose of the legislation was a "sham" and a "pretext" and pointed to statements in the media in support of their assertions. The court held that "'what is relevant is the legislative purpose of the statute, not the possibly [improper] motives of the legislators who enacted the law.'" Brown 2000 U.S.D. Lexis 21623 at 20. (quoting Bown v. Gwinnett Cty. School Dist., 895 F. Supp. 1564, 1575-76(N.D. Ga. 1995) which was citing Board of Educ. of Westside Community Sch. v. Mergens, 496 U.S. 226, 249, 110 L. Ed. 2d 191, 110 S. Ct. 2356 (1990)). Similarly, here, the motives and opinions of the few council members that Plaintiffs seek to depose or obtain discovery from are simply not relevant, especially in light of the public record.

Dep't of Parks & Rec., 731 F3d 199, 203 (2d Cir. 2013), cert. denied, 134 S. Ct. 1510 (2014) (affirming protective order barring the depositions of then Mayor Bloomberg and former Deputy Mayor Skyler).[4] The Second Circuit has explained that "exceptional circumstances" means that (1) "the official has unique first-hand knowledge" or (2) "that the necessary information cannot be obtained through other, less burdensome or intrusive means." Id. See also Moriah v. Bank of China Ltd., 72 F. Supp. 3d 437, 440 (S.D.N.Y. 2014)(granting motion to quash subpoena for deposition of Majority Leader of the United States House of Representatives); 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).

This rule is based upon strong public policy considerations. Permitting 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. 13, 2001). The Second Circuit has recognized that high-ranking officials have "greater duties and time constraints than other witnesses" and that "[i]f courts did

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[4] See also 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);

Continued…

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). See also Marisol A. by Forbes v. Giuliani, 1998 U.S. Dist. LEXIS 3719, at *10-11, 1998 WL 132810 (S.D.N.Y. Mar. 23, 1998). The Council Members here are no exception. See Declaration of Serena Longley, dated April 4, 2017 ("Longley Dec.") ¶¶ 10-12, 14-16, 33 (ECF Doc. 115); Declaration of Patrick A. Bradford, dated May 2, 2017 ("Bradford Dec.") ¶11 (ECF Doc. 129). Accordingly, depositions of high level government officials are permitted only upon a showing by Plaintiffs that there are "exceptional circumstances" justifying each deposition.

As Judge Parker held, Plaintiffs did not demonstrate that Council Members Torres and Espinal have any unique first-hand knowledge relevant to the claims in this case. Instead, Plaintiffs' arguments to the Court focused on the questions they want to ask the Council Members and the information they are assuming they will obtain. In fact, the questions and information described are generic and could be asked of anyone, as they seek opinions, not facts.[5] Thus, it is evident that Plaintiffs have chosen these Council Members not because they have unique first-hand knowledge about the issues, but because they think they will answer their generic questions in a manner that they like. Furthermore, asking fact witnesses for their

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L.D. Leasing Corp. v. Crimaldi, 1992 U.S. Dist. LEXIS 18683, 1992 WL 373732 (E.D.N.Y. 1992) (finding that Mayor need not testify where he has no relevant first-hand knowledge).

[5] For example, Plaintiffs desire to ask questions such as whether a Council Member would vote for affordable housing if it there was no community preference, (Pls' Opp. Memo at 8), what "differences, if any, between what existing residents of the district deserve from the City versus what those New Yorkers who want to move to the district deserve" (id.), and "the importance of affordable housing to CM's district" (Pls' Opp. Memo at 7).

opinions, and for responses to 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).

Moreover, the Council Members cannot speak for the entire Council on these opinion questions, let alone the City. The City Council is not even the decision maker for the policy at issue in this case. Thus, the opinions of two individual Council Members, who were hand-picked by Plaintiffs, on hypothetical scenarios, are simply of no consequence to this litigation and certainly do not satisfy the exceptional circumstances standard. Applying the "unique first-hand knowledge" standard in the manner Plaintiffs propose (i.e. to obtain opinions about general issues discussed in the press) would undermine its purpose and impose a tremendous burden on the City Council members.

Nor, do the articles relied upon by Plaintiffs demonstrate that the Council Members have unique first-hand knowledge. The articles simply reflect that the Council Members made public statements about issues of controversy and importance to them and the City. Plaintiffs cannot satisfy the exceptional circumstances standard, as they attempt to do, by asserting that City Council Members vote and make public statements about issues in the City. Such logic would open up each and every vote of a Council Member to deposition inquiry for simply doing their jobs. It would also, most assuredly, chill the work of the City Council. See Longley Dec. ¶ 33. Therefore, Judge Parker's Order quashing the subpoenas for depositions of Council Member Torres and Council Member Espinal is entitled to deference by this Court.

B. Plaintiffs' Arguments for Why the Disputed Order is Erroneous Lack Merit

Despite Plaintiffs' best efforts, their arguments as to why the Disputed Order is erroneous amount to repetition of the arguments the Court rationally rejected, red-herrings based upon "evidence" that had not been presented to Judge Parker, and an attempt to change the legal standards to meet their needs. Plaintiffs' arguments can be categorized into four main arguments. First, they assert that the Council Members have a "unique perspective" and thus satisfy the "unique first-hand knowledge" standard. Second, they assert that the information sought is relevant to their claims. Third, they assert that the discovery sought is necessary to rebut Defendant's defenses. Finally, they assert that the public record is not sufficient. Plaintiffs' arguments lack merit and fail to demonstrate that the Disputed Order is clearly erroneous or based upon an error of law.

(i) The Council Members do Not Have Unique First-Hand Knowledge

Plaintiffs make three primary arguments for why they believe the Council Members have unique first-hand knowledge. None of the arguments are persuasive, let alone demonstrate that Judge Parker abused her discretion in finding otherwise. First, Plaintiffs argue that the Council Members have "unique perspective" because an "individual CMs particularized reasoning as to why he or she supports the [community preference policy] is unique to that CM." While that may be a true statement, unique "perspective" is not the standard. In order to justify the deposition of a high-ranking government official, the witness must have "unique knowledge"—in other words, information or facts about the claims raised, that others do not have. See e.g. Moriah v. Bank of China Ltd., 72 F. Supp. 3d 437 (S.D.N.Y. Dec. 17, 2014). However, Plaintiffs are not looking to learn facts through the depositions of these Council

Members, but are looking for opinions and responses to hypothetical questions. Every person will have a unique opinion or perspective on an issue, especially a hypothetical scenario, as that is the nature of opinions and hypotheticals. Such a standard is the exact opposite of the exceptional circumstances standard.

Second, Plaintiffs assert that the Council Members have first-hand knowledge of their motivations and thought processes in reaching land use decisions. However, knowledge of motivations is also not unique knowledge of information or facts about the claims raised in this case. Moreover, such testimony into the motivations and internal deliberations of a council member regarding a land use action would likely be protected by the legislative privilege.[6] Furthermore, there are no land use decisions being challenged in this litigation and the Council Members are not the decision makers regarding the community preference policy.

Finally, Plaintiffs' argument that the Council Members have unique first-hand knowledge because they are "well-suited to receive and understand feedback from local communities" again misses the point. Being "well-suited" is not the same as having unique first-hand knowledge of information or facts about the claims raised raised in the complaint.

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[6] The Council Members are local legislators, and they are each asserting legislative privilege with regard to their testimony (for Torres and Espinal) and their documents. See Longley Dec. ¶¶ 5, 18 and 26. The legislative privilege protects local legislators from, among other things, "questions regarding their subjective motivations, deliberations, and thought processes regarding their legislative function." Joseph's House & Shelter, Inc. v. City of Troy, 641 F. Supp. 2d 154, 158 (N.D.N.Y. 2009) (citing Orange v. County of Suffolk, 855 F Supp. 620 (E.D.N.Y. 1994)). Furthermore, as noted by the Supreme Court in Tenney v. Brandhove, it is "not consonant with our scheme of government for a court to inquire into the motives of legislators." 341 U.S. 367, 377 (1951). The Court in Tenney also supported the assertion of legislative privilege even if motivation of the legislators was questioned, stating that the "claim of an unworthy purpose does not destroy the privilege[.]" See also Las Vegas v. Foley, 747 F.2d 1294 (9th Cir. 1984). Simply put, the privilege exists to prevent the court from inquiring into legislators' motivations. ACORN v. Cty. of Nassau, 2007 U.S. Dist. LEXIS 71058, at *3-7 (E.D.N.Y. Sep. 25, 2007)("ACORN I").

Moreover, , through discovery Plaintiffs have already been provided several Community Board and Borough President Recommendations, as well as City Planning Commission Reports, that summarize public testimony and submissions, all of which also reflect community feedback received as part of the public review process. See Ex. A at 10:7-8, 12-16; Declaration of Melanie V. Sadok, dated December 29, 2017 ("Sadok Dec.") ¶¶5 and 6.

Plaintiffs' reliance upon United States v. City of New York, 2009 WL 2423307 (SDNY Aug. 5, 2009) and Sherrod v. Breitbard, 304 F.R.D. 73 (D.D.C. 2014), in support of their arguments that Plaintiffs' have established unique first-hand knowledge is misplaced. In both of those cases, the deponents were the decision makers. Moreover, the testimony sought was not opinions, but the factual basis for statements and decisions that were directly relevant to the case. Furthermore, in United States v. City of N.Y., 2009 U.S. Dist. LEXIS 68167, 2009 WL 2423307 (E.D.N.Y. Aug. 5, 2009) Mayor Bloomberg had explicitly made statements about the litigation and its issues in voluntary, sworn testimony elsewhere and the Court considered that testimony as a basis to allow the former Mayor to be deposed.[7] There is no comparable prior, sworn testimony about the litigation here which Plaintiffs point to and that necessitates follow-up questions. At most, here, Plaintiffs point to broad comments on issues that are of general concern to council Members, but that are not directly related to this litigation. See Longley Dec. ¶¶ 6-8. Therefore, Plaintiffs have again failed to demonstrate exceptional circumstances, and more importantly, failed to demonstrate that Judge Parker's decision must be overturned.

(ii) The Discovery Sought is Not Relevant

Plaintiffs' arguments regarding the purported "relevance" of the "unique perspective" the Council Members have likewise lack merit and do not serve as a basis to disturb Judge Parker's decision. In an attempt to misdirect the Court, Plaintiffs argue that the Disputed Order is erroneous because the discovery sought is relevant to establishing intentional discrimination through demonstrating "that racial animus was a significant factor in the position taken by the persons to whose position the official decision-maker is knowingly responsive[]" Plfs' Objection Memo at 3. Plaintiffs are attempting to improperly conflate two different legal standards. Even if, arguendo, Plaintiffs may be permitted to demonstrate intentional discrimination under such a theory, that is not the dispute before the Court. All that is before the Court is whether the Council Members must be deposed, and specifically whether they meet the exceptional circumstances test. Simply because Plaintiffs may be attempting to prove their case through this theory does not mean that they should be permitted to depose Council Members without meeting the exceptional circumstances standard. Plaintiffs' attempt to conflate these issues fails.[8]

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[7] It should be noted that before former Mayor Bloomberg's Senate testimony, the Court had previously granted a motion to quash his deposition in the case.

[8] Plaintiffs' argument is also a red-herring, conveniently serving as the vehicle by which Plaintiffs can impose upon the Court several pages of arguments and conclusions drawn by mischaracterizing deposition testimony that: i) has nothing to do with the Council Member's first-hand knowledge of the issues in the case; and ii) was not included in the motion record before Judge Parker. Plaintiffs' objection reads more like a motion for summary judgment than a motion on a discreet discovery matter. The Court should not be fooled or swayed by these arguments. Moreover, "Rule 72(a) precludes the district court from considering factual evidence that was not presented to the magistrate judge." Thai Lao Lignite 924 F. Supp. 2d at 512 (citing Haines v. Liggett Grp., Inc., 975 F.2d 81, 91 (3d Cir. 1992) and State Farm Mut. Auto. Ins. Co. v. CPT Med. Servs., 375 F. Supp. 2d 141, 158 (E.D.N.Y. 2005)).

Even if, arguendo, this standard had a role in this motion, under United States v. Yonkers Bd. of Educ., 837 F.2d 1181, 1216-17 (2d Cir. 1987), and MHNY Mgmt. v. Cty. Of Nassau, 819 F.3d 581 (2d Dir. 2016), the cases relied upon by Plaintiffs, the appropriate scope of discovery should be directed to determining what influenced the "decision-makers," and whether the decision makers had "knew" that those they were being responsive to were motivated by racial animus. In Yonkers and MHNY, the council or board members whose testimony was used as evidence were part of the body that had made the decision at issue in the litigation. See Yonkers, 837 F.2d at 1186; MHNY 819 F.3d at 589. Here, as Plaintiffs concede, and Judge Parker recognized, the "[community preference policy] in [] affordable housing lotteries was not and is not a legislative enactment[,]" Plffs. Obj. Memo at 2. See Ex. A at 9:4. HPD and the office of the Mayor, not City Council (or these individual Council Members) are the decision makers. Thus, through this motion, Plaintiffs are not seeking discovery on what motivates and influences the decision-makers, but are seeking discovery as to what motivates and influences the parties that purportedly influence the decision makers. Furthermore, any discovery obtained from the Council Members is meaningless unless Plaintiffs can show that the decision makers "knew" that same information. See Yonkers, 837 F.2d at 1225. Thus, discovery from the Council Members is simply not probative of the intentional discrimination claims.

Finally, Plaintiffs' remaining arguments that the individual Council Members have relevant information because one Council Member is effectively the decision maker on land-use issues and can likewise influence the administration, also fail. There are no land-use decisions at issue in this case, and to the extent a Council Member communicated with the administration to influence a particular land use decision, as Judge Parker explained, those

communications would be found in the administration's files, from which ample discovery has been provided. See Ex. A at 12:3.

(iii) Rebutting City's Defenses

Plaintiffs insist that in order to rebut the City's defenses, they must depose the Council Members with hypothetical questions as to what positions they would take on land use actions if there were no community preference policy. Plaintiffs' argument in support of their posing hypothetical questions is circular. On the one hand, Plaintiffs assert that they are entitled to this discovery because the City's defenses must be "supported by evidence and may not be hypothetical or speculative," and the deposition testimony will apparently show that the City's defenses are not supported by evidence. Plffs. Obj. Memo at 12 (citations omitted). Yet, the "evidence" they seek to obtain through the depositions are speculative answers to hypothetical questions. Plaintiffs clearly do not recognize that their arguments are circuitous.

Moreover, Plaintiffs conveniently disregard the fact that Judge Parker found the "speculation" sought through the depositions to be "not probative [to] the issues in this case" because "plaintiffs already have access to publically available materials that illustrate whether the opposition to affordable housing development has been articulated in the past. And if so, where that opposition's coming from, and how the City reacts to it." Ex. A at 10:7-11.

Judge Parker's rejection of the need for hypothetical questions and reliance upon the public record is grounded in the law. For instance, in Goldstein v. Pataki, 516 F.3d 50, 62 (2d Cir. 2008), the Court held that allegations of pretext based on a single commissioner's alleged subjective motivations, do not entitle a party to discovery from that commissioner. Furthermore, the courts have found that speculative questions in a deposition are not probative. See 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) ("Discovery should not be predicated on CLS's theory of what might have happened…In the absence of a factual basis for this theory of concerted action, CLS may not walk through…files so that its speculation can be explored."); 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) (finding that the NYPD Commissioner was not to be deposed because the probative value of his deposition would be minimal as the questions likely to be asked of him would be hypothetical questions and "answer to what police activities…might or might not have permitted or forbade in hypothetical fact situations would have no probative value whatsoever.") Finally, the Supreme Court has held that the public record can be probative of discriminatory intent. See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 268 (1977). Therefore, as Plaintiffs' argument itself is circular, and as Judge Parker's decision is supported by the law, it is entitled to deference.

(iv) The Public Records are Adequate

Plaintiffs' arguments that the public records are inadequate lacks merit and is not supported by the law. First, it is noteworthy that Plaintiffs assert that the public records are inadequate without even representing that they have searched them. Nor do they point to a single statement in the public records to support their arguments that further more invasive discovery is required.[9]

[9] Typically, the expansion of discovery is not based upon speculation about what may be found, but is based upon documents already produced that serve a basis for expanding discovery into a specific area or custodian. Here, approximately 12,754 documents have been produced to Plaintiffs, yet they do not cite to any specific document or testimony in support of their quest for additional discovery from the Council Members. Plaintiffs' characterization of deposition testimony also fails to support the expansion of discovery to the Council Members at issue.

Furthermore, even in circumstances where the Council Member is the decision maker and intentional discrimination has been alleged, the Supreme Court has held that the public record is probative, and that "the legislator's testimony on the purposes of the action is only warranted in exceptional instances and would likely be privileged." Arlington Heights, 429 U.S. at 268 (holding that "legislative or administrative history may be highly relevant, especially where there are contemporary statements by members of the decision making body, minutes of its meetings or reports" [and] clarifying that a legislator's testimony on the purposes of the action is only warranted in exceptional instances and would likely be privileged.) The decisions is Yonkers and MHNY (the cases Plaintiffs rely upon in support of their argument that they are entitled to the depositions) also strongly support the use of the public record. Indeed, the testimony discussed in those cases is testimony from public hearings, or trial—not depositions. See Yonkers, 837 F.2d at 1221; MHNY, 819 F.3d at 591-98.

As to Plaintiffs' concerns about "masked" discrimination, the Second Circuit court in MHNY made its decisions regarding "veiled" language not based upon deposition testimony as to the "true" intent or motivations behind public statements, but again, based upon the public records and trial testimony. See MHNY, 819 F.3d at 609-09. Thus, not only is Plaintiffs' reliance on Yonkers and MHNY misplaced because the legal standard for proving intentional discrimination is not a substitute for the legal standard to obtain depositions or discovery from high-ranking officials, but Judge Parker's reliance upon the fact that Plaintiffs have access to publically available material, and discovery from the decision-makers, is consistent with the decisions and legal standards set forth in Yonkers and MHNY. It is Plaintiffs' interpretation of these cases that is clearly erroneous.

Finally, Plaintiffs' discussion of the City's homeless policy and statements made by the Mayor regarding that policy, is a red-herring. The homeless policy is not being challenged here, and the deponents at issue are Council Members, not the Mayor.[10] Whether these two Council Members had conversations with the Mayor regarding a policy that is not being challenged in this litigation is not a basis to depose these very busy legislators, but is another failed attempt to misdirect the Court from the actual issues under review.

In sum, while Plaintiffs may disagree with Judge Parker's decision, there is no clear error of law or of fact that necessitates overturning the decision. See Winfield, 2017 U.S. Dist. LEXIS 182021 at *6. Therefore, Judge Parker's decision granting the motion to quash the depositions of Council Member Torres and Council Member Espinal is entitled to deference.

POINT III

JUDGE PARKER'S DENIAL OF ESI FROM SIX COUNCIL MEMBERS IS ENTITLED TO DEFERENCE

Judge Parker's decision prohibiting document discovery from the six Council Members is also entitled to dereference. Here, relying upon the standard set forth in Fed. R. Civ. P. 26(b), Judge Parker appropriately issued a protective order preventing ESI discovery from the six Council Members because "the burden and expense of the ESI sought it [sic] not proportional of the need of the case considering the minimal relevance of the discovery sought." Ex. A at 12:7 In so ruling, the Court correctly reasoned that Plaintiffs did not sufficiently articulate "what documents they are seeking from the city council and why the ESI is likely to be relevant." Ex. A at 11:17-18. Judge Parker, being actively involved in the oversight of the discovery in this

[10] Nor did Plaintiffs raise these arguments before Judge Parker.

case, and the many discovery motions, further took into consideration the scope of discovery already obtained by Plaintiffs in the case as well as the scope of the discovery sought by Plaintiffs. Consequently, and having already acknowledged that the community preference policy is not a legislative act, and that Plaintiffs had access to the public records as well as records from HPD and the Office of the Mayor, the Court correctly concluded "that it is not clear what additional relevant documents city council would possess that are not duplicative of documents obtained from another source." Ex. A. at 12:5-6.

A. Judge Parker's Decision is Not Clearly Erroneous

Judge Parker's decision should not be disturbed. It is well-settled that a court may "issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense" upon a finding of good cause, which in complex cases need not be highly particularized. Fed. R. Civ. P. 26(c); Winfield, 2017 U.S. Dist. LEXIS 182021 at *7; In re Terrorist Attacks on September 11, 2001, 454 F. Supp. 2d 220, 222 (S.D.N.Y. 2006). Fed. R. Civ. Pro. 26(b)(1) provides that "[p]arties may obtain discovery regarding any nonprivileged matter that is **relevant** to any party's claim or defense and **proportional to the needs of the case,** considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and **whether the burden or expense of the proposed discovery outweighs its likely benefit.**" (emphasis added). "Proportionality and relevance are 'conjoined' concepts; the greater the relevance of the information in issue, the less likely its discovery will be found to be disproportionate." Vaigasi v. Solow Mgmt. Corp., 2016 U.S. Dist. LEXIS 18460 at *43, 2016 WL 616386 (S.D.N.Y. Feb. 16, 2016).

Judge Parker has managed the discovery in the case, and thus is in the best position to assess the scope of the discovery sought in light of the scope of the discovery already being undertaken and its relevance to the case. The City has conducted document discovery from fifty custodians, from HPD, DCP, DSS and the Office of the Mayor, resulting in the review of approximately 290,879 documents. See Stramiello Dec. ¶ 4; Sadok Dec. ¶ 4. The City has produced approximately 12,754 documents. See Stramiello Decl. ¶ 4. The City has already spent approximately $538,600 on the processing, review and production of documents to Plaintiffs, and expects to spend another $18,500 to complete the supplemental discovery it is currently undertaking of EIS from DCP and DSS. See Stramiello Decl. ¶ 3.

Despite this extensive discovery from the executive branch, including HPD and the Office of the Mayor, who are the key custodians involved in the community preference policy, Plaintiffs are seeking to expand discovery by approximately one million additional emails from six more custodians. See Longley Dec. ¶ 30. However, in so doing Plaintiffs have failed to explain what they are specifically seeking from the discovery from the Council Members, and have failed to point to any other documents produced in discovery already to support this additional discovery. Moreover, Plaintiffs have access to the legislative records and to public statements, and have had seven depositions to date with several more already scheduled (including a second deposition of former Commissioner Been). See Sadok Dec. ¶ 3; Longley Dec. ¶ 19. In other words, Plaintiffs have no basis for seeking this discovery, but are simply hoping to find documents to support their theories.

It is well-established that "[d]iscovery may not…be used to impose unnecessary burden on an adversary or to seek information that has no or minimal relevance to the claims or defenses," Vaigasi, 2016 U.S. Dist. LEXIS 18460 at *23, Therefore, Judge Parker's conclusion

that "[g]iven the scope of the ESI that the City is already reviewing, its not proportional to drastically increase the ESI review population to include documents that don't appear to be particularly relevant or that can be obtained through other sources[,]" Ex. A at 12:11-16, is a correct application of the standard for discovery, is not clearly erroneous or affected by an error of law, and should not be disturbed.

B. Plaintiffs' Arguments as to Why the ESI Should be Granted Lack Merit

Plaintiffs make two primary arguments in support of their motion. First, they argue the Disputed Order is erroneous because they did clearly identify the documents they are seeking from the Council Members. Second, Plaintiffs argue that the discovery will not be burdensome.[11] Plaintiffs' arguments fail.

As to Plaintiffs' first argument, they cite to their original papers in which they advise the Court that they are seeking documents from all of the same document requests that they sought documents from the executive branch. Plaintiffs had 91 document demands in that demand, and after motion practice, 73 document demands remained. In other words, Plaintiffs are looking for authority to go on a fishing expedition, without any specific documents in mind, or any specific demands that would be most appropriate for the legislative branch. In fact, Plaintiffs now concede that that the "CMs, as a practical matter, will not have responsive documents in respect to many of the requests." Gurian Dec. ¶8, filed Sept. 28, 2017 (ECF Doc. 187). In an attempt to appear reasonable, only after having lost the motion, Plaintiffs attempt to convince this Court to allow more limited discovery than was sought in the motion before Judge

[11] Plaintiffs also take issue with the Court's decision on the minimal relevance of the information sought. However, for the reasons set forth in Point II, *supra*, this argument also lacks merit.

Parker. According to Mr. Gurian's declaration, Plaintiffs have identified ten requests that "they will be pursuing in regard to the six CMs."

Unfortunately, this is too little, too late. The Court must determine whether the Judge Parker's decision was clearly erroneous, and this attempt to limit the scope of discovery sought was simply not before Judge Parker when she made her decision, and thus should not be considered. See Thai Lao Lignite 924 F. Supp. 2d at 512. Moreover, even if considered by this Court, this newly imposed limit should not be a basis to allow the discovery. Notwithstanding the new limitation, Plaintiffs have still not provided specific information about the type of documents they seek (for example, about specific projects, or communications with certain third parties) or why these specific Council Members are likely to have responsive documents. Plaintiffs' lack of specificity is evidence that they have no factual basis to support obtaining this discovery, only a speculative theory of the case.[12]

Plaintiffs' second argument, that the application of search terms and predictive coding will greatly reduce the review population such that the review of the approximately one million emails will not be burdensome, is simply not based in reality. First, the Relativity Assisted Review ("RAR") algorithm has not been trained with any documents from the Council Members, and thus "[i]t is impossible to estimate the effect of utilizing previously-trained RAR software on a new data set, especially on from a new agency with new custodians." Stramiello Dec. ¶ 7. Additionally, because the RAR has not been trained on Council Members' documents, additional training rounds by the Law Department case team would be necessary before a

[12] Additionally, as discussed above, these documents will not be probative of intentional discrimination unless proven that HPD and or the Office of the Mayor knew about them. Furthermore, they will likely be subject to the legislative process privilege.

managed review team could undertake the responsiveness review. See Stramiello Dec. ¶ 7. Even assuming, arguendo, that Plaintiffs' estimate of 40,000 documents were accurate, it is estimated that this additional review would cost approximately $108,000.[13] See Stramiello Dec. ¶ 10.

Furthermore, given that what Plaintiffs seek consists of internal communications concerning legislative activity and decisions, the legislative process privilege would be applicable. The six Council Members have advised that they intend to assert the privilege. See Longley Decl. ¶ 26. However, because it is a personal privilege, potentially each document in which the privilege is to be asserted would need to be reviewed by counsel and the Council Member to make a determination as to whether the privilege ought to be asserted or waived. This imposes a tremendous additional burden on the already very busy, high-ranking officials. See Bradford Dec. ¶ 11. In sum, discovery from "the non-party council members based solely on their being elected officials who speak publicly about controversial issues facing their districts and the City of New York [] will grind the City Councils' ability to perform its legislative functions to a halt: both because of the time and resources required to review documents and because of the chilling effect it will have on the free exchange of ideas among legislators and their staff members if they are deprived of privileged space to consider legislative matters." Longley Dec. ¶ 33.

[13] This is assuming that the review of legislative documents is undertaken in the same manner as the documents from the executive branch. Any review will have to be carefully coordinated with the Office of the General Counsel to the City Council, and thus there may be additional steps to the review process, in addition to the legislative process privilege review.

Therefore, as Plaintiffs' arguments lack merit, they have failed to meet their burden, and Judge Parker's decision that the ESI discovery sought is not proportional to the needs of the case should not be disturbed.

POINT IV

FUNDAMENTAL FAIRNESS IS NOT THE APPLICABLE STANDARD

Recognizing that despite 24 pages of argument, they have failed to demonstrative that that Judge Parker's decision is affected by an error of law or clearly erroneous, Plaintiffs attempt a hail Mary argument asserting that the Court should disregard the well-established standards for determining whether depositions of high-ranking officers and discovery should be permitted, and substitute it for a "fundamental fairness" standard. Plaintiffs attempted this argument before Judge Parker as well, who appropriately disregarded it. Plaintiffs do not allege that Judge Parker's decision is flawed for not granting or not even addressing such an argument, as it clearly is not erroneous to not address an argument to apply a standard other than the applicable legal standard. Now, in a desperate move, Plaintiffs again hope that this Court will be swayed to consider the alleged "unfairness" of the application of the applicable legal standards. Plaintiffs rely upon cases around the waiver of the attorney-client privilege when the advice of counsel has been asserted. However, neither that privilege nor that defense have anything to do with the issues before the Court—namely the scope of discovery and whether high-ranking officials ought to have their busy schedules disrupted for a deposition.[14] Thus, as Judge Parker appropriately did, this Court should disregard such arguments.

[14] Moreover, the City does not intend to use the Council Member's individual records or individual testimony to support its defenses, but instead will rely upon the public records and documents and Continued…

CONCLUSION

In sum, as Plaintiffs have failed to meet their burden to demonstrate that Judge Parker's decision is affected by an error of law or clearly erroneous, the decision is entitled to deference. Judge Parker properly determined that Plaintiffs failed to meet their burden to show "exceptional circumstances" necessitating the depositions, and that the document discovery from the Council Members is disproportionate to the needs of the case in light of the Council Members' role with the policy at issue (i.e. not the administrator or decision maker) and in light of the extensive discovery already undertaken by the City. Consequently, Judge Parker's decision to quash the subpoena for the depositions of Council Members Torres and Espinal, and to issue a protective order prohibiting document discovery from the six Council Members should not be disturbed.

In light of the foregoing, Plaintiffs' objection seeking to overturn the Disputed Order should be denied in its entirety.

Dated: New York, New York
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ZACHARY W. CARTER
Corporation Counsel of the City of New York
Attorney for Defendant
100 Church Street, Room 5-192
New York, New York 10007
(212) 356-4371

By: Melanie V Sadok
MELANIE V. SADOK

testimony produced to Plaintiffs in discovery. Consequently, Plaintiffs are not entitled to such records. See e.g. Favors v. Cuomo, 2013 U.S. Dist. LEXIS 189355, at *49 (E.D.N.Y. Feb. 8, 2013) 2015 WL 7075960 (privilege protects from discovery "unless the [D]efendant[] intend[s] to use such documents later in this litigation.")