UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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SHAUNA NOEL and EMMANUELLA SENAT,

Plaintiffs,

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

CITY OF NEW YORK,

Defendant.

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PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR RECONSIDERATION OF THE COURT'S MAY 8, 2019 OPINION AND ORDER (ECF 745)

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

INTRODUCTION

Plaintiffs respectfully seek this Court's reconsideration of its ruling (ECF 745) affirming the Magistrate Judge's denial of plaintiffs' application to depose Mayor de Blasio (ECF 545)[1] in this civil rights action seeking to enjoin a discriminatory policy that the Mayor himself has actively sought to expand, promote and definitively maintain.

Plaintiffs are aware that motions for reconsideration should not be made, and are not granted, lightly. As this Court has explained in another case, the moving party must show "an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." *Rajamin v. Deutche Bank Nat. Tr. Co.*, 2013 WL 1285160, at *2 (S.D.N.Y. Mar. 28, 2013) (citation omitted).

Plaintiffs believe this standard is readily satisfied. New evidence and developments within this action have all come to light in the period since prior briefing was fully submitted. They provide previously unavailable insight into the need for the Mayor's deposition testimony. Likewise, law of the case as articulated only after the briefing was fully submitted critically impacts the relevant analysis. Both developments further help to uncover and emphasize how crucial the Mayor's live testimony is to Plaintiffs' case, and how the erroneous reasoning of the underlying *Magistrate Opinion* could not properly have been accepted by ECF 745.

[1] This Court's May 8, 2019 affirmance, ECF 745, and the Magistrate Judge's underlying ruling, *Winfield v. City of New York*, 2018 WL 4350246 (S.D.N.Y. Sept. 12, 2018) ("*Magistrate Opinion*"), are annexed as Exhibit 1 and 2, respectively, to the Declaration of Craig Gurian, dated May 20, 2019 (Gurian Decl.").

POINT I

THIS COURT'S DECEMBER 2018 DECISION ON PRIVILEGE ISSUES, RELEVANCE, AND MOTIVATION CONTRADICTS THE UNDERLYING MAGISTRATE JUDGE OPINION DENYING THE DEPOSITION AND NEEDED TO BE TAKEN INTO ACCOUNT.

In December 2018 – *after* both the issuance of the Magistrate Opinion denying the deposition and the briefing of plaintiffs' objections to that decision – this Court sustained plaintiffs' objections with respect to the scope and method of analyzing deliberative process privilege. *Noel v. City of New York*, 2018 WL 6786238 (S.D.N.Y. Dec. 12, 2018).[2] Notably, this Court made clear that plaintiff's intentional discrimination claims focus not only on the motivations of defendant's policy makers in *adopting* the outsider-restriction policy in affordable housing lotteries, but also in "continuing" the policy. *Id.* at *5. Likewise, it was not just evidence as to *motivations* for action regarding potential changes to the policy that this Court found to be "highly relevant" to plaintiffs' claims, but also *motivations* for "inaction." *Id.* (emphasis added).

That aspect of the December 2018 decision conflicts with two key premises underlying the Magistrate Opinion. In claiming that the necessary circumstances to warrant the Mayor's deposition were not present, the Magistrate Judge explicitly focused on the fact that the policy was adopted "long ago," that it was modified in 2002, "again by another administration," and has, in the words of the Magistrate Opinion, "*simply continued in effect* since then." *Magistrate Opinion*, 2018 WL 4350246, at *1 (emphasis added). This conflict is dispositive. What the Magistrate Judge dismissed as "simply continuing" a policy is exactly what this Court had identified as part of the *focus* of plaintiffs' intentional discrimination claims.

Moreover, when the Mayor, in the course of admitting his decision-making role as to the

[2] Annexed to the Gurian Decl. at Ex. 3.

outsider-restriction policy,[3] stated that he has "not considered changing the community preference policy for any reason other than to facilitate resolution of this litigation,"[4] that was not supposed to end the inquiry; on the contrary, it should have reminded the Magistrate Judge that one of the factual questions at hand was what his – the Mayor's – motivations were for his "inaction."[5]

Indeed, the Magistrate Opinion's failure to recognize that intent and motivation in intentional discrimination cases are fundamentally *factual* questions is another core premise of the Magistrate Opinion in irreconcilable conflict with this Court's subsequently rendered decision *Noel v. City of New York*, 2018 WL 6786238. The reasons *why* the Mayor believes what he does about the policy (or the justifications for the policy) and the reasons *why* the Mayor chose not to consider changing the policy (given, for example, what he knew about outsider-restriction *not* being integrative), all constitute unique factual information about intent and motivation upon which a deposition is properly premised. *Cf. State of New York v. U.S. Dep't of Commerce,* 333 F. Supp. 3d 282, 288 (S.D.N.Y. 2018) (holding that it "nearly goes without saying that Plaintiffs

[3] *See* plaintiffs' memorandum of law in support of their objections to the Magistrate's Opinion, ECF 566 ("Plaintiffs' Opening Brief"), annexed to Gurian Decl. as Ex. 4, at 2-3. Defendant's opposition brief and plaintiffs' reply brief are annexed to Gurian Decl. at Ex. 5 and Ex. 6, respectively. *See* plaintiffs' reply brief, at 3 (citation and exhibit omitted) [Redacted]

[4] *See* July 23, 2018 Declaration of Mayor Bill de Blasio, ECF 497 ("BdB Decl."), Ex. 7 to Gurian Decl., at ¶ 11.

[5] The Magistrate's Opinion was factually mistaken when it stated that the Mayor had no personal involvement in the "modification and administration" of the policy." *Magistrate Opinion*, 2018 WL 4350246, at *2. He both accepted and rejected various modifications to the policy. *See* Plaintiffs' Opening Brief, at 2-3. The Magistrate Opinion was also both legally and factually mistaken in asserting that "there is no evidence that Mayor de Blasio made any affirmative decision about the longstanding policy. . . ." *Magistrate Opinion*, 2018 WL 4350246, at *2. Legally, because it repeats the error of ignoring that the reasons for continuing the policy are a central part of the case; factually, because it ignores, *inter alia*, the Mayor's reference in his declaration to "*my decisions to reject certain alternatives to the community preference policy*. . . ." *See* BdB Decl., at ¶ 11 (emphasis added).

cannot meaningfully probe or test, and the Court cannot meaningfully evaluate," the decision-making official's "intent and credibility without granting Plaintiffs an opportunity to confront and cross-examine him.").[6] It was a critical error for the Magistrate Opinion to treat the circumstance that some *information* about the challenged policy known to the Mayor was also known to other witnesses[7] as sufficient, let alone conclusive, proof that the Mayor's *intent and motivations* was identical to that of other witnesses or discernable from other witnesses.

ECF 745 could not have taken this Court's December 2018 decision in *Noel v. City of New York*, 2018 WL 6786238 into account because the two central premises of the Magistrate Opinion discussed above are entirely incompatible with that decision. If the Court were to do so now, plaintiffs' objections would of necessity be sustained.

POINT II

NEW EVIDENCE HIGHLIGHTS THE SIGNIFICANCE OF THE FAILURE OF THE MAGISTRATE OPINION TO RECOGNIZE THAT WITNESSES ARE NOT INTERCHANGEABLE.

The Magistrate's Opinion accepted uncritically the Mayor's self-serving declaration that he has "no reason to believe that [he] h[as] any unique factual knowledge about the community preference policy." *Magistrate Opinion*, 2018 WL 4350246, at *2 (citation omitted). The theme that runs through the Magistrate Opinion is that plaintiffs do not need to depose the Mayor because they have had the opportunity to depose others. Newly obtained evidence highlights the error in that premise.

A central justification put forward by defendant for its outsider-restriction is the assertion

[6] The decision was later vacated on other grounds (mootness) by the District Judge who had issued it. *State of New York v. U.S. Dep't of Commerce,* 351 F. Supp. 3d 502, 680 (S.D.N.Y. 2019).

[7] [Redacted]

See Point III, *infra.*

that *the policy prevents displacement*. Indeed, at the deposition of Vicki Been – who at the time was in between her previous stint as Commissioner of HPD and her current stint as Deputy Mayor for Housing and Economic Development – Ms. Been testified that "the *best* tool that we have to prevent displacement is the Community Preference . . . ."[8]

Yet just last month, the Mayor re-introduced Ms. Been in her new role at a press conference. In an off-the-cuff moment, he directly contradicted Ms. Been's deposition testimony. His focus was not new construction (as to which outsider restriction applies) or even rezoning. The Mayor wanted to focus on housing *preservation*:

> I really want to say this because I think it hasn't gotten the attention it deserves. [Preservation] is the *ultimate anti-displacement tool*. A lot of discussion about rezoning and that's a good discussion to have but the *simplest, strongest, clearest anti-displacement tool* is to protect a working family in their apartment, in their neighborhood, subsidize it, protect it for decades ahead.[9]

The sharp discordance is highly relevant not just from the point of view of disparate impact (defendant has to show that a policy is *necessary* to achieve its goals and the Mayor's public statement clearly indicates that Ms. Been had been exaggerating the relative importance of outsider-restriction to such a goal), but also from the point of view of intentional discrimination (the false or exaggerated role of outsider-restriction is evidence of pretext).

The fact of the discordance demonstrates anew that the Magistrate Opinion was fatally flawed in not recognizing either that perspectives of participants can vary (*i.e.*, constitute unique facts about motivation and intent) or that no one else can explain the Mayor's views as he can.

To allow the Mayor, the ultimate policy maker on outsider-restriction, to be siloed off from

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[8] *See* excerpts of transcript of April 10, 2018 deposition of Vicki Been ("Been II"), annexed to Gurian Decl. as Exhibit 8, at 24:2-4 (emphasis added).

[9] *See* an excerpt of transcript of April 4, 2019 press conference, "Mayor de Blasio Appoints Vicki Been as Deputy Mayor for Housing and Economic Development," annexed to Gurian Decl. as Ex. 9, at 2-3 (emphasis added).

the reach of the fact-finding process (as provided for by the Magistrate Opinion) is clear error and manifestly unjust.

POINT III

NEW EVIDENCE OF [Redacted]

UNDERLINE THE EXISTENCE OF COMMUNICATIONS ABOUT WHICH ONLY THE MAYOR CAN PROVIDE A FULL ACCOUNT.

The Magistrate Opinion discounted the Mayor's active participation in the outsider-restriction policy: "[T]hat the Mayor may have defended the policy in a general way in some public statements consistent with the City's position in this case does not mean he has unique knowledge or involvement in the administration of the policy." *Magistrate Opinion*, 2018 WL 4350246, at *2.

Some of the evidence that directly contradicts the Magistrate Opinion in this regard was submitted to the Court and has never been addressed by any ruling. We respectfully submit this has been an oversight that has resulted in clear error. In any event, new evidence has since been developed in this case that further emphasizes the significance of the underlying evidence of the Mayor's active role defending the policy that is being challenged here.

In fact, [Redacted]

.[10]

In August 2016, [Redacted]

[10] *See* Plaintiffs' Reply Brief, at 8, n.26, referencing a July 2015 email containing the quoted language.

[Redacted]

"[11]

But as made clear only *after* the full briefing on our objections to the denial of the Mayor's deposition, in the January 2019 deposition of James Patchett (former chief of staff to the deputy mayor for housing and economic development), the Mayor did [Redacted]

.[12]

Critically, what was made clear for the first time in the January 2019 deposition of Mr. Patchett is that often, the Mayor is the *only* person who can provide a first-hand account of [Redacted] It was a normal practice for the Mayor to conduct calls *on his own* after having received general written talking points. [Redacted]

.[13] As Mr. Patchett also testified:

> A. …Usually if the Mayor were going to speak with [the HUD Secretary] on [a] phone call, he would just call him on his cell phone.
>
> Q. You would not necessarily dial in?
>
> A. Definitely not.

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[11] *See* plaintiffs' Ex. 296, identified at the Jan. 16, 2019 deposition of James Patchett. The document which includes the referenced email from the Mayor, is annexed to Gurian Decl. as Ex. 10.

[12] *See* excerpts of transcript of Jan. 16, 2019 deposition of James Patchett ("Patchett Depo."), annexed to Gurian Decl. as Ex. 11, at 132:25-136:21 and 170:24-171:16 [Redacted]

at 170:13-22 [Redacted] and at 178:12-13

[Redacted]

).

[13] *See id*. at 178:18-179:5.

Q. Or would you be with the Mayor while he spoke to him on his cell phone?

A. Usually not. I mean, occasionally the [Redacted]

[14]

[Redacted]

.

These newly discovered facts should be taken into account in recognizing that the Magistrate Opinion was clearly in error in treating information only able to be gotten from the Mayor at deposition as interchangeable with that available from others.

POINT IV

THE MAYOR'S TESTIMONY WOULD PROVIDE UNIQUE INSIGHT INTO NEWLY-DISCOVERED EVIDENCE REGARDING DEFENDANT'S [Redacted]

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New information that defendant focuses its rezonings [Redacted]

it is the Mayor who ultimately makes the call as to rezoning strategy, and it is he who needs to be deposed to explain why [Redacted]

As this Court has pointed out, one of the facts from which an inference of discriminatory intent can be drawn is the following allegation: "As recently as the Bloomberg administration

[14] *See* Patchett Depo., at 134:18-135:7.

(2001-2014), Plaintiffs allege that white and black neighborhoods were treated differently when it came to zoning: increases in density occurred most frequently in neighborhoods with disproportionately high African-American or Latino populations and decreases in density occurred most frequently in white neighborhoods." *Winfield v. City of New York*, 2016 WL 6208564, at *7 (S.D.N.Y. Oct. 24, 2016).

Vicki Been, while in a pre-Commissioner stint at the Furman Center,[15] had co-authored a policy brief relating to rezonings during a portion of the Bloomberg Administration (2003-2007).[16] She was asked about the brief during her April 2018 deposition. Ms. Been confirmed upzoning to increase residential density facilitates affordable housing construction and that downzoning to reduce residential density would tend to make it more difficult to add to the affordable housing supply.[17] She referred to upzoning (rezoning to add capacity) as something that makes it "more likely that the Fair Housing will pencil out."[18]

She then confirmed that she still believed the following, recited from the policy brief, to be true of the Bloomberg-era rezonings:

> Upzoned lots tended to be located in census [tracts] with a higher proportion of non-white residents than the median [tract] in the city.
>
> Downzoned lots, on the other hand, were more likely to be located in [tracts] with a higher share of non-Hispanic white residents than the city median.
>
> And contextual only rezoned lots were located in areas with still higher shares

[15] Ms. Been returned to the Furman Center after she concluded her service as HPD Commissioner and before she returned to City service in her current position as Deputy Mayor for Housing and Economic Development.

[16] The policy brief is entitled, "How Have Recent Rezonings Affected the City's Ability to Grow?" ("Rezonings") and was marked as Ex. 105 at Ms. Been's April 2018 deposition. An excerpt of the policy brief is annexed to Gurian Decl. at Ex. 12.

[17] *See* Been II, at 75:4-76:10.

[18] *See id.*, at 75:23-76:3.

> of non-Hispanic white residents.
>
> The opposite trend exists for both black and Hispanic residents. Upzoned lots were more likely to be in areas that have a higher share of black and Hispanic residents than the city median while downzoned and contextual-only rezoned lots both were in areas with smaller shares of black and Hispanic residents.[19]

Ms. Been also stated that race was intended to be encompassed in the term "socioeconomic characteristics" when she and her co-authors had written, "The variation in the patterns of rezonings among communities with different socioeconomic characteristics calls for a larger conversation about how the benefits and burdens of development should be shared across the City."[20]

Despite the racially-disparate pattern pointed to in the policy brief, and despite the call for a "larger conversation," [Redacted]

Through a talking-point document not available to plaintiffs until after briefing on the objections was completed, defendant's description of its approach is as follows (a bullet point part of the suggested answer to " [Redacted] "):

[Redacted]

. . . .[21]

[Redacted]

. It is not disputed that it is the Mayor that ultimately sets administration

[19] *See id.*, at 76:16-77:24.

[20] *See id.*, at 78:8-22.

[21] *See* excerpt of "City Limits Panel Discussion: Fair Housing in a Rezoned City," annexed to Gurian Decl. as Ex. 13, at 4 (Bates number NYC_0166779). The full document was identified and marked as Exhibit 278 at the January 10, 2019 deposition of Leila Bozorg.

policy as to where to rezone.[22] *His* unique reasons for [Redacted] – including *his* unique view of the *political* realities of what doing so would encompass – need to be probed, as they were not probed in the Magistrate Opinion.

POINT V

NEW EVIDENCE CONTRADICTS THE MAYOR'S CLAIM THAT OUTSIDER-RESTRICTION IS AN IMPORTANT TOOL WORKING IN FAVOR OF FAIR HOUSING.

Vicki Been has testified that, "The mayor has expressed to me that the *Community Preference is an important aspect of his approach to Fair Housing* and that it helps to prevent displacement."[23] Plaintiffs view has been that this assertion represents a combination of pretext and consciousness of guilt: that is, defendant, including the Mayor, knows full well that outsider-restriction operates to deny on the basis of race a level playing field for New Yorkers to access housing in the neighborhood of their choice (to make the choice to move out of one's segregated community district harder than the choice to remain in one's segregated community district). Because of the Magistrate Opinion, plaintiffs have not been able to question the Mayor directly.

But new evidence – from defendant's own proposed expert – underlines the importance of probing the Mayor's apparent view. Criticizing the reports of two of plaintiffs' experts,

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[22] As an illustration, an email produced subsequent to the briefing on plaintiffs' objections (partially redacted) bears the subject line "Rezoning Decision Memo feedback" and lists as the attachment an updated decision memo on "Neighborhood Rezonings." [Redacted]

This cover email, Bates NYC_0195400, is annexed to Gurian Decl. as Ex. 14; the underlying decision memo was withheld from production on the basis of privilege.

[23] *See* Been II, at 63:15-19 (emphasis added). Note that the acknowledgment of outsider-restriction being an important aspect of his (the Mayor's approach) belies the attempt of the Magistrate Opinion to separate the Mayor from the policy.

defendant's own proposed expert, Professor Edward Goetz, states that they have "*mistakenly* assumed that the Community Preference policy is meant to be an integrative policy."[24] He articulated the same point at his deposition. Professor Goetz had been asked to confirm that "to you it's not problematic in any way that a particular area that is characterized by dominance of one racial group would have better odds than people from the rest of the city who were much more racially diverse?"[25] He first explained that the imbalance would not bother him because, defendant was doing "other things" to pursue the "objectives of integration."[26] He then distinguished what outsider-restriction does from the objectives of integration: "[T]he community preference policy is *aimed at a different set of objectives*."[27]

Defendant will undoubtedly attempt to harmonize Ms. Been's recitation of outsider-restriction as part of what the Mayor considers "his approach to fair housing" with the admission of defendant's expert that the policy is "aimed at a different set of objectives." But that presentation cannot be cross-examined. It is the Mayor, who needs to be queried directly about "his approach." And ECF 745 could not have taken the contradiction between the Mayor's rationale and defendant's expert testimony into account because that contradiction did not emerge until after the briefing to this Court (indeed, the Goetz Rebuttal Report was not submitted to plaintiffs until after ECF 745 was rendered).

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[24] *See* excerpt of May 10, 2019 report of Professor Edward Goetz ("Goetz Rebuttal Report"), annexed to Gurian Decl. as Ex. 15, at 12 (emphasis added).

[25] *See* excerpt of April 5, 2019 deposition of Edward Goetz, annexed to Gurian Decl. as Ex. 16, at 112:10-17.

[26] *See id*., at 112:19-23.

[27] *See id*., at 112:24-113:3 (emphasis added).

POINT VI

THE LOGISTICS OF THE DEPOSITION CAN BE ARRANGED TO MINIMIZE ANY BURDEN ON THE MAYOR.

The Magistrate Opinion explained that the purpose of the high-governmental official doctrine is "to protect the ability of the official to perform his or her governmental duties without the interference of civil litigation." *Magistrate Opinion*, 2018 WL 4350246, at *1. As it happens, and unknown until after ECF 745 was decided, Mayor de Blasio has just decided to take a very substantial amount of time, on an ongoing basis, away from his governmental duties as Mayor in order to run for the Democratic Party nomination for President. Plaintiffs will certainly cooperate to schedule the deposition on one of the extensive number of days that the Mayor will be out of the City not performing his governmental duties, if that arrangement is more convenient to him.

CONCLUSION

For the reasons stated, ECF 745 should be reconsidered, and, upon reconsideration, plaintiffs' objections to the Magistrate Opinion should be sustained and defendant's cross-motion for a protective order overturned.

Dated: New York, New York
May 20, 2019

Craig Gurian

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

SHAUNA NOEL and EMMANUELLA SENAT,

Plaintiffs,

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

CITY OF NEW YORK,

Defendant.

----------x

DECLARATION OF CRAIG GURIAN IN SUPPORT OF PLAINTIFFS' MOTION FOR RECONSIDERATION OF THE COURT'S MAY 8, 2019 OPINION AND ORDER (ECF 745)

CRAIG GURIAN, an attorney admitted to practice before this Court, pursuant to 28 U.S.C. §1746, declares that the following is true and correct:

1. I am co-counsel for plaintiffs and submit this declaration in support of plaintiffs' motion for reconsideration of the Court's May 8, 2019 Opinion and Order (ECF 745) overruling plaintiffs' objections to the September 12, 2018 opinion and order of the Magistrate Judge (ECF 545) by which the Magistrate Judge denied plaintiffs' motion to compel the deposition of Mayor Bill de Blasio and granted defendant's motion for a protective order precluding that deposition.

2. A copy of this Court's May 8, 2019 Opinion and Order (ECF 745) is annexed hereto as Ex. 1.

3. A copy of the Westlaw version of the underlying Opinion and Order of the Magistrate Judge (ECF 545), *Winfield v. City of New York*, 2018 WL 4350246 (S.D.N.Y. Sept. 12, 2018) ("*Magistrate Opinion*") is annexed hereto as Ex. 2.

4. A copy of the Westlaw version of this Court's Opinion and Order (ECF 655) sustaining

plaintiffs' objections to the Magistrate's ruling as to deliberative process privilege and highlighting elements of plaintiffs' intentional discrimination case relevant to the instant motion, *Noel v. City of New York*, 2018 WL 6786238 (S.D.N.Y. Dec. 12, 2018), is annexed hereto as Ex. 3.

5. The previous briefing to this Court on plaintiffs' objections to the Magistrate Opinion is annexed hereto as follows:

(a) Plaintiffs' September 26, 2019 brief (ECF 566, "Plaintiffs' Opening Brief"), is annexed hereto as Ex. 4;

(b) Defendant's October 19, 2018 brief in opposition (ECF 604, "defendant's opposition brief"), is annexed hereto as Ex. 5; and

(c) Plaintiffs' November 6, 2019 reply brief (ECF 626, "plaintiffs' reply brief") is annexed hereto as Ex. 6.

Please note that the associated declarations and exhibits have not been attached.

6. A copy of the July 23, 2018 Declaration of Mayor Bill De Blasio, submitted in opposition to plaintiffs' motion to compel his deposition, ECF 497, is annexed hereto as Ex. 7.

7. Excerpts of the transcript of the April 10, 2018 deposition of Vicki Been ("Been II") are annexed hereto as Ex. 8.

8. An excerpt of the transcript of the April 4, 2019 press conference, "Mayor de Blasio Appoints Vicki Been as Deputy Mayor for Housing and Economic Development," is annexed hereto as Ex. 9.

9. An email exchange including the Mayor, identified at the January 16, 2019 deposition of James Patchett and marked as plaintiffs' Ex. 296, is annexed hereto as Ex. 10.

10. Excerpts of the transcript of the January 16, 2019 deposition of James Patchett are annexed hereto as Ex. 11.

11. A Furman Center policy brief co-authored by Vicki Been, entitled, How Have Recent Rezonings Affected the City's Ability to Grow," was marked as plaintiffs' Ex. 105 at Ms. Been's April 2018 deposition. An excerpt of that policy brief is annexed hereto as Ex. 12.

12. A "talking point" document, "City Limits Panel Discussion: Fair Housing in a Rezoned City," was identified and marked as Ex. 278 at the Jan. 10, 2019 deposition of Leila Bozorg. An excerpt of that document is annexed hereto as Ex. 13.

13. A copy of a June 10, 2016 email bearing the subject line "Rezoning Decision Memo Feedback," Bates No. NYC_0195400, is annexed hereto as Ex. 14.

14. An excerpt of the May 10, 2019 rebuttal report of defendant's expert Professor Goetz ("Goetz Rebuttal Report") is annexed hereto as Ex. 15.

15. An excerpt of the transcript of the April 5, 2019 deposition of Professor Edward Goetz is annexed hereto as Ex. 16.

I declare under penalty of perjury that the foregoing statements are true and correct to the best of my knowledge and belief. Executed on May 20, 2019.

Craig Gurian

Craig Gurian

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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SHAUNA NOEL and EMMANUELLA SENAT,

Plaintiffs,

-v- No. 15 CV 5236-LTS-KHP

CITY OF NEW YORK,

Defendant.

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MEMORANDUM ORDER

Before the Court is an objection (Docket Entry No. 565), filed by Shauna Noel and Emmanuella Senat (collectively "Plaintiffs") pursuant to Federal Rule of Civil Procedure 72(a), to an opinion and order entered by Magistrate Judge Katharine H. Parker on September 12, 2018, Winfield v. City of New York, No. 15-cv-05236, 2018 WL 4350246 (the "September 12th Order"), denying Plaintiffs' motion to compel the deposition of New York City Mayor Bill De Blasio and granting defendant City of New York's ("Defendant") corresponding cross-motion for a protective order.

A party may file an objection to an order issued by a magistrate judge with a district judge within 14 days of service of a copy of that order. Fed. R. Civ. P. 72(a). The district judge shall not disturb the order unless such "order is clearly erroneous or contrary to law." 28 U.S.C. § 636(b)(1)(A) (LexisNexis 2017).

After careful consideration of Judge Parker's September 12th Order and the submissions of both parties, the Court concludes that Judge Parker's order was neither clearly

erroneous nor contrary to law. Plaintiffs' objection is, therefore, overruled and Judge Parker's order stands.

This order resolves Docket Entry No. 565.

SO ORDERED.

Dated: New York, New York
May 8, 2019

/s/ Laura Taylor Swain
LAURA TAYLOR SWAIN
United States District Judge

2018 WL 4350246
Only the Westlaw citation is currently available.
United States District Court, S.D. New York.

Janell WINFIELD, Shauna Noel, and Emmanuella Senat, Plaintiffs,
v.
CITY OF NEW YORK, Defendant.

15-CV-05236 (LTS) (KHP)
|
Signed 09/12/2018

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OPINION AND ORDER

KATHARINE H. PARKER, UNITED STATES MAGISTRATE JUDGE

***1** This civil rights case involves a challenge to New York City's Community Preference Policy. Under the policy, 50% of certain affordable housing units are reserved for individuals living within the Community District where the housing project is located. Plaintiffs contend that the policy has a disparate impact on Blacks and Latinos and perpetuates segregation. They also contend that the City has intentionally discriminated against Blacks and Latinos by adopting and maintaining the policy. The policy has existed for many years and since 2002 in its current form. The Court assumes the parties' familiarity with the factual and procedural background of the case.

Plaintiffs have conducted extensive discovery, including the depositions of at least 18 individuals. Importantly, Plaintiffs have taken the depositions of the current Commissioner and former Commissioners of the Department of Housing Preservation and Development ("HPD"). HPD is responsible for the implementation and administration of the Community Preference Policy. Plaintiffs now move to compel the deposition of Mayor Bill de Blasio so that they can question him about the policy. The City has cross-moved for a protective order pursuant to Federal Rules of Civil Procedure 26(c) and 30(d)(3)(B). For the reasons set forth below, Plaintiffs' motion (Doc. No. 483) is **DENIED** and Defendant's cross-motion (Doc. No. 494) is **GRANTED**.

DISCUSSION

It is well-settled that high-ranking governmental officials should not be called for a deposition unless the party seeking the deposition can show that "exceptional circumstances" warrant it. *Lederman v. N.Y. City Dep't of Parks & Rec.*, 731 F.3d 199, 203 (2d Cir. 2013), *cert. denied*, 571 U.S. 1237 (2014). "Exceptional circumstances" might exist where the official has "unique first-hand knowledge" relevant to the claims in the case or where the information sought is unobtainable through other, less burdensome means. *Id.* The rationale for the rule is to protect the ability of the official to perform his or her governmental duties without the interference of civil litigation. *See Bey v. City of New York,* No. 99-cv-3873 (LMM) (RLE), 2007 WL 1893723, at *1 (S.D.N.Y. June 28, 2007). As the parties seeking the deposition, Plaintiffs bear the burden of showing that the deposition of the Mayor is appropriate under these criteria. *See Todd v. Hatin*, No. 2:13-cv-05, 2014 WL 5421232 (D. Vt. Oct. 24, 2014); *Marisol A. v. Giuliani*, No. 95-cv-10533 (RJW), 1998 WL 132810 (S.D.N.Y. Mar. 23, 1998).

Having carefully reviewed the parties' briefs and accompanying documents, the Court finds that Plaintiffs have not shown exceptional circumstances warranting the Mayor's deposition in this case. The Community Preference Policy was adopted long ago, well before Mayor de Blasio was in office. It was modified in 2002, again by another administration, and has simply continued in effect since then. The Commissioner of HPD who was responsible for modifying the policy in 2002 has been deposed, as have the Commissioners since then. Plaintiffs also deposed Deputy Mayor Alicia Glen. Plaintiffs have had a full opportunity to question various HPD Commissioners about the reasons for the policy, the means by which the policy operates, and whether

alternatives or changes to the policy were discussed with various mayors over time, including Mayor de Blasio. Further, the City has produced non-privileged emails and other documents pertinent to the policy, including emails and memos between the Commissioners and the Mayor's office, to supplement oral testimony.

***2** In addition, Mayor de Blasio has submitted an affidavit stating that "[a]s Mayor, [he] ha[s] relied upon information on the community preference policy provided to [him] through briefings and other communications by [his] Deputy Mayors and Commissioners (and Directors) and other senior staff" and that he has "no reason to believe that [he] ha[s] any unique factual information about the community preference policy." (Doc. No. 497, Declaration of Bill de Blasio ("de Blasio Decl.") ¶¶ 7, 8, 22); *see also Friedlander v. Roberts*, Nos. 98-cv-1684 (RMB) & 98-cv-8007 (RMB), 2000 WL 1471566 (S.D.N.Y. Sept. 28, 2000). The Mayor also states that any changes to the policy he considered were only in the context of a settlement of this litigation and thus are privileged and not subject to discovery. (de Blasio Decl. ¶¶ 11-13.) Given Mayor de Blasio's lack of personal involvement in the adoption, modification, and administration of the policy, his deposition simply is not warranted. This case does not present exceptional circumstances because (1) the Mayor does not have unique first-hand knowledge of the policy and (2) other discovery has provided the key information needed by Plaintiffs to prosecute their claims.

This case is not similar to the situation in *United States v. City of New York*, cited by Plaintiffs, in which Mayor Michael Bloomberg was required to appear for a deposition. In that case, then Mayor Bloomberg provided sworn testimony before the United States Senate concerning issues central to the case that reflected personal knowledge about and involvement in those issues. No. 07-cv-2067 (NGG) (RLM), 2009 WL 2423307, at *2-3 (S.D.N.Y. Aug. 5, 2009). The court found that a three-hour deposition was warranted. In this case, however, Mayor de Blasio has not offered sworn testimony suggesting personal involvement in the administration of the Community Preference Policy or special knowledge about the policy. To the contrary, his affidavit confirms that Plaintiffs have already deposed the officials most knowledgeable about the policy. To the extent Plaintiffs argue that this Court should order the deposition of the Mayor for the same reasons it ordered the deposition of the Deputy Mayor, their argument fails. Deputy Mayor Glen served as an interface at times between the Mayor and the HPD Commissioner and has knowledge of any communications with the Mayor on the policy that the HPD Commissioners do not have. Thus, this Court believed that a short deposition of the Deputy Mayor was warranted and could provide information that Plaintiffs seek without the need to also depose the Mayor.

Similarly, Plaintiffs' reliance upon *Pisani v. Westchester Cty. Health Care Corp.* is misplaced. *See* No. 05-cv-7113 (WCC), 2007 WL 107747 (S.D.N.Y. Jan. 16, 2007). Pisani challenged the termination of his employment. The deposition of the official who personally made the challenged employment decision was appropriately noticed because the reasons for the termination decision could not be learned from another source. *Id.* at *3-4. The court in *Pisani* also considered that the official had "not submitted an affidavit as to his involvement or non-involvement in the termination of Pisani's employment." *Id.* at *2. In this case, there is no evidence that Mayor de Blasio made any affirmative decision about the longstanding policy, and the current and former HPD Commissioners were fully questioned about the policy and communications with the Mayor about it. Further, the Mayor's affidavit makes clear that the deposition will not result in discovery of any unique first-hand information relevant to the prosecution of this case.

Moreover, none of the proposed questions that Plaintiffs suggest they would ask the Mayor seek relevant information unobtainable from another source. The Deputy Mayor and HPD Commissioners could have provided answers as to why the City believes the policy is fair or why the policy does or does not require applicants from the Community District to provide the number of years they have lived in a neighborhood. Other information Plaintiffs seek from the Mayor, such as demographic information about Community Districts, can be obtained from another source. While Plaintiffs state they wish to cross-examine the Mayor concerning whether the policy has a disparate impact, the Mayor is not the best source of this information. Rather, experts who are evaluating data will present information on disparate impact. Additionally, many of Plaintiffs' proposed areas of questioning assume facts that the City disputes and will merely result in arguments rather than the provision of relevant information. Others seek answers to hypothetical questions or call for speculation.

Finally, that the Mayor may have defended the policy in a general way in some public statements consistent with the City's position in this case does not mean he has unique knowledge or involvement in the administration of the policy. Indeed, his affidavit confirms that he does not.

CONCLUSION

***3** For all of the foregoing reasons, Plaintiffs' Motion to Compel the Deposition of Mayor Bill de Blasio is **DENIED** and Defendant's Cross-Motion for a Protective Order is **GRANTED**.

SO ORDERED.

All Citations

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United States District Court, S.D. New York.

Shauna NOEL and Emmanuella Senat, Plaintiffs,
v.
CITY OF NEW YORK, Defendant.

No. 15 CV 5236-LTS-KHP
|
Signed 12/12/2018

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MEMORANDUM OPINION AND ORDER

LAURATAYLOR SWAIN, United States District Judge

***1** Before the Court is an objection (Docket Entry No. 293) (the "Objection"), filed by Shauna Noel and Emmanuella Senat (collectively "Plaintiffs") pursuant to Federal Rule of Civil Procedure 72(a), to an opinion and order entered by Magistrate Judge Katharine H. Parker on February 1, 2018, Winfield v. City of New York, No. 15-cv-05236, 2018 WL 716013 (the "February 2018 Order"), ruling that the City of New York ("Defendant" or the "City") could claw back and withhold, in substantial part, on deliberative process privilege grounds a previously disclosed document (the "Clawback Document"), and upholding Defendant's deliberative process, attorney-client, legislative and/or work product privilege claims, at least in part, as to 12 documents and four deposition questions (together with the Clawback Document, the "Disputed Materials"). After considering carefully the submissions of both parties, the Court sustains Plaintiffs' objections, in part, sets the February 2018 Order aside insofar as it addresses the deliberative process privilege and returns the matters to the Magistrate Judge for further proceedings consistent with this Memorandum Opinion and Order.

BACKGROUND

Familiarity with the factual context of the underlying case, of which the Court has jurisdiction pursuant to 28 U.S.C. sections 1331 and 1343 and 42 U.S.C. section 3613(a), is presumed.

In the underlying case, Plaintiffs claim Defendant has discriminated against them in violation of the Fair Housing Act, 42 U.S.C. § 3604, and the New York City Human Rights Law, NYC Admin. Code § 8-107, through its Community Preference Policy of allocating "50% of units in affordable housing lotteries to individuals who already reside in the community district where the new affordable housing units are being built." Winfield v. City of New York, No. 15-CV-05236-LTS-KHP, 2017 WL 2880556, at *1 (S.D.N.Y. July 5, 2017), objections overruled, No. 15 CV 5236-LTS-KHP, 2017 WL 5054727 (S.D.N.Y. Nov. 2, 2017).

"During a conference on June 5, 2017, Plaintiffs' counsel handed up ... several documents that the City had produced in discovery in redacted form, including [the Clawback Document, which is] a presentation Bates-stamped 21052-21089 entitled 'Affirmatively Furthering Fair Housing: A Preliminary Guide to NYC's Submission.' As the title suggests, the presentation is a preliminary overview of the City's prospective submission in response to [the U.S. Department of Housing and Urban Development's ('HUD')] new Affirmatively Furthering Fair Housing ('AFFH') rule which requires HUD program participants, such as New York City, to submit an Assessment of Fair Housing ('AFH') in 2019. Upon reviewing the presentation, counsel for the City indicated that she believed the document should have been withheld in its entirety on privilege grounds and that it had been inadvertently produced." February 2018 Order, 2018 WL 716013, at *2. Plaintiffs argue that the Clawback Document provides circumstantial evidence that the Community Preference Policy is motivated by discriminatory intent because it contains acknowledgements by Defendant that members of the public opposed unspecified city housing policies. Plaintiffs assert that such opposition is based on a desire to maintain

the current racial status quo in certain neighborhoods, and that Defendant implemented the Community Preference Policy as a knowing accommodation of such opposition.

***2** In response to Plaintiffs' repeated assertions that Defendant had over-designated other responsive documents as confidential, the Magistrate Judge directed Defendant, at a July 21, 2017, conference, to identify 80 documents from its privilege log for her further review. Id. at *3. The City responded to the direction by confining its privilege claims to 27 documents. Id.

Plaintiffs deposed Carl Weisbrod, the former Chairman of the City Planning Commission and Director of the New York City Department of City Planning and Vicki Been, the former Commissioner of the New York City Department of Housing Preservation and Development, on July 27, 2017, and August 2, 2017, respectively. Id. at *1, 3. Defendant's counsel asserted the deliberative process privilege and directed Been and Weisbrod not to respond to 20 questions. Id. at *3. By letter dated September 1, 2017 (Docket Entry No. 177), Plaintiffs requested privilege rulings from the court on these 20 questions, and Defendant then withdrew its objections to six of Plaintiffs' questions. Id.

In her February 2018 Order, the Magistrate Judge overruled Plaintiffs' objection to Defendant's privilege assertion as to the Clawback Document and also overruled Plaintiffs' objections to Defendant's privilege claims as to all but 12 of the remaining 27 documents (the objections to four of these 12 documents were sustained only in part). See generally id. Twelve of Defendant's remaining 14 privilege-based objections to Plaintiff's deposition questions were sustained in whole or in part. Id. at *18-21.

Plaintiffs object to the Magistrate Judge's determination that the deliberative process privilege protects 12 of the documents that the court allowed the City to withhold, bearing Bates numbers 56994 and NYCPRIV 00017, 00218, 00242, 00393, 00399, 00548, 00726, 00885, 01023, 01156, and 01648, and the information sought by the deposition questions denominated as Been Nos. 4, 5, 9, and 10. (Objection ¶¶ (b), (c).) The February 2018 Order also upheld Defendant's claims of other privilege protections as to several of the documents and deposition questions.

In evaluating Defendant's deliberative process privilege claims, the February 2018 Order rejected Plaintiffs' contention that the privilege is entirely inapplicable when litigation is focused on government decision making, and instead recognized the privilege as a qualified one and engaged in a two-step analysis. First, to determine whether the Disputed Materials were within the broad scope of potential protection by the privilege, the court examined whether and to what extent the materials for which Defendant had claimed the privilege are both deliberative and pre-decisional. February 2018 Order, 2018 WL 716013 at *5.

Finding that the Disputed Materials met those threshold criteria, the court next examined whether the privilege claim should be upheld as to each challenged item in the particular circumstances of this case. Id. at *5-6. The February 2018 Order acknowledged that some courts in this circuit "have held that deliberative process privilege is per se inapplicable in a case[, such as here,] where the government's decision-making process was itself the subject of the litigation," but adopted the balancing test applied in Rodriguez v. Pataki, 280 F. Supp. 2d 89, 99-101 (S.D.N.Y. 2003), to determine on a document-by-document basis whether the disclosure of the Disputed Materials is warranted, a methodology to which Plaintiffs do not object. February 2018 Order, 2018 WL 716013 at *5-6; (see Pls.' Mem. in Supp. of their Objection to the February 2018 Order ("Pls.' Mem."), Docket Entry No. 294, 7-34 (analyzing the Rodriguez factors without objection to their application)). Under the Rodriguez standard, a court, "in deciding whether and to what extent the [deliberative process] privilege should be honored," should weigh such factors as: "(i) the relevance of the evidence sought to be protected; (ii) the availability of other evidence; (iii) the 'seriousness' of the litigation and the issues involved; and (iv) the role of the government in the litigation" against "the possibility of future timidity by government employees who will be forced to recognize that their secrets are violable," in "balanc[ing] the extent to which production of the information sought would chill ... deliberations concerning ... important matters ... against any other factors favoring disclosure." 280 F. Supp. 2d at 100-101 (quoting In re Franklin Nat'l Bank Secs. Litig., 478 F. Supp. 577, 583 (E.D.N.Y. 1979)). " 'If consideration of the first four factors leads to the conclusion that they outweigh the risk addressed by the fifth – possible future timidity – then the demanded document ought to be

disclosed,' despite the claim of privilege." February 2018 Order at *10 (quoting Favors v. Cuomo, 11-CV-5632 (DLI)(RR)(GEL) 2013 WL 11319831 at *11 (E.D.N.Y. February 8, 2013)). Although Plaintiffs do not object to the use of the Rodriguez construct, they contend that the Magistrate Judge misapplied the standard. (See Pls.'s Mem. at 7-34.)

***3** In applying the relevance element of this analysis, the February 2018 Order used a "heightened standard" in excess of that which would ordinarily apply in a discovery determination under Federal Rule of Civil Procedure 26(a), finding that, to qualify as relevant in the deliberative process context, the material must be "central 'to the proper resolution of the controversy.' " February 2018 Order, 2018 WL 716013 at *10, 18 (citing Five Borough Bicycle Club v. City of New York, No. 07-CV-2448 (LAK), 2008 WL 4302696, at *1 (S.D.N.Y. Sept. 16, 2008)).

In evaluating the seriousness of the current action, the February 2018 Order acknowledged that "every federal case is serious" but held that the seriousness of a case in the deliberative process privilege context turns on the whether the public's interest in the outcome of the case "favor[s] disclosure or ... favor[s] ... protecting the ability of the City officials to function properly in their roles without the distraction of civil litigation." February 2018 Order, 2018 WL 716013 at *11 (internal quotation marks and citations omitted). In the February 2018 Order, the Magistrate Judge found that, although claims of "racial discrimination raise serious issue[s] of public concern," compelling disclosure of material not relevant to "core issues of this case—whether the Community Preference Policy was adopted or maintained for discriminatory motives and/or has a racially disparate impact"—would impermissibly chill Defendant's deliberations regarding serious housing issues. Id. at *11, 18. For this reason, the February 2018 Order concluded that the seriousness factor "weighs against disclosure." [1] Id. at *11, 18.

In evaluating the availability of other evidence, the February 2018 Order concluded that the underlying HUD data contained and discussed in the Clawback Document was already available to Plaintiffs and that "[a]ny remaining privileged material in the [Clawback Document] is ... not central to this litigation," and thus found that the availability-of-other evidence factor weighed against disclosure. Id. at *11. Similarly, the February 2018 Order found that, because most of the other Disputed Materials did not meet the heightened standard of relevance, the availability-of-other-evidence factor was neutral with respect to those documents. [2] Id. at *18. The February 2018 Order largely upheld Defendant's invocation of the deliberative process privilege. The court also ruled on the validity of claims of attorney-client, work product, and legislative process privileges that were asserted in Defendant's privilege log or put forward in the context of depositions, upholding many of those claims. In their objection, Plaintiffs attack the Magistrate Judge's interpretation and application of the Rodriguez standard in connection with the deliberative process privilege claims, and also challenge the rulings upholding other privilege claims on legal and factual grounds.

DISCUSSION

***4** A party may file an objection with a district judge to an order issued by a magistrate judge within 14 days of service of a copy of that order. Fed. R. Civ. P. 72(a). The district judge shall not disturb the order unless such "order is clearly erroneous or contrary to law." 28 U.S.C. § 636(b)(1)(A) (LexisNexis 2017). A ruling is "clearly erroneous where on the entire evidence, the [district court] is left with the definite and firm conviction that a mistake has been committed." Equal Emp't Opportunity Commission v. Teamsters Local 804, No. 04 CV 2409-LTS, 2006 WL 44023, at *1 (S.D.N.Y. Jan. 9, 2006) (internal quotation marks and citations omitted). An order is considered to be " 'contrary to law' when it 'fails to apply or misapplies relevant statutes, case law or rules of procedure.' " Collens v. City of New York, 222 F.R.D. 249, 251 (S.D.N.Y. 2004) (citation omitted). However, 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." Edmonds v. Seavey, No. 08 CV 5646-HB, 2009 WL 2150971, at * 2 (S.D.N.Y. July 20, 2009) (internal quotation marks and citation omitted). "[M]agistrate judges are afforded broad discretion in resolving nondispositive disputes and reversal is appropriate only if their discretion is abused." Thai Lao Lignite (Thailand) Co. v. Gov. Lao People's Democratic Republic, 924 F. Supp. 2d 508, 511 (S.D.N.Y. 2013) (internal quotation marks and citations omitted).

Objections to Deliberative Process Privilege Analysis

The Magistrate Judge's analysis and conclusions concerning Defendant's invocation of the deliberative process privilege are the primary focus of Plaintiffs' objections. Plaintiffs argue, in short, that the February 2018 Order erred in applying a limited definition of "relevance" for purposes of the Rodriguez balancing test, and that the Order's evaluation of each of the other criteria improperly conflated consideration of the importance of the privilege with analysis of other, separate, elements of the balancing test.

The Court respectfully disagrees with the interpretation of the Rodriguez test that underlies the February 2018 Order's careful analysis of the City's deliberative process privilege claims. The February 2018 Order will, accordingly, be set aside insofar as it addresses the deliberative process privilege, and the privilege issues will be returned to the Magistrate Judge for further consideration in light of the discussion that follows.

As noted above, the February 2018 Order treats the relevance element of the Rodriguez test as one that applies a narrow, heightened standard, recognizing only evidence that is "central to the proper resolution of the controversy" as potentially subject to exemption from the protection of the deliberative process privilege. February 2018 Order, 2018 WL 71603 at *10 (internal quotation marks and citations omitted). The Court finds no support for this proposition in the authorities cited. Rather, relevance is defined broadly in the first instance by Federal Rule of Evidence 401 for all evidentiary and discovery purposes. Federal Rule of Civil Procedure 26(b)(1) and applicable privilege doctrines impose restrictions on the scope of discovery, but not on the basic contours of the universe of relevant information. While it is true that, as the district court observed in Five Borough Bicycle Club, "[t]he more important the presumptively privileged information is to the proper resolution of the controversy, the more likely the party seeking the discovery is to prevail" in a controversy concerning invocation of the deliberative process privilege, id., 2008 WL 4302696 at *1, the Rodriguez test must be applied to all relevant pre-decisional deliberative material that is sought. The weight of the relevance factor in the final balancing analysis will vary with the court's assessment of the degree to which the evidence tends "to make [a fact that is of consequence in the resolution of the action] more or less probable than it would be without the evidence." See Fed. R. Evid. 401.

***5** Each Rodriguez element must nonetheless be analyzed separately in the first instance. The February 2018 Order accurately recognizes that Plaintiffs' intentional discrimination claims focus on the motivations of City policy makers in adopting, and continuing, the Community Preference Policy. Evidence specific to that policy, and to motivations for action or inaction regarding potential changes to that policy, is highly relevant to Plaintiffs' claims. On the other hand, while evidence of information available to or considered by policy makers in connection with City housing policies and practices more generally may well be relevant to the Community Preference Policy claims within the meaning of Rule 401, the first Rodriguez factor carries less weight when the evidence sought does not pertain directly to the specific policy as to which claims have been asserted.

The second factor – availability of other evidence – must be considered for each item of Disputed Material that is relevant, wherever that material falls on the spectrum of relevance. The depth of inquiry as to availability may, logically, vary with the degree of relevance. [3]

The third factor – seriousness of the case and the issues involved – goes, as the February 2018 Order recognizes, "to the nature of the claims themselves." Id., 2018 WL 71603 at *11. Here claims of racial and ethnic discrimination in the formulation of affordable housing allocation policy are, objectively, serious. Because the nature of the claims does not vary, although the relevance of the evidence to proof of those claims may vary, the February 2018 Order errs in its importation of the fifth factor ("whether the public interest weighs in favor of disclosure") in assessing this third factor. See id. The weight of this third factor may thus be a constant in the balancing exercises with respect to the various items of Disputed Material, with relevance and other variables playing more significant roles in specific determinations as to whether to uphold the privilege.

The February 2018 Order correctly characterized and applied the fourth – role of government – Rodriguez factor to evidence falling within its narrow definition of relevance. See id. at *12. In the proceedings that follow the issuance of this Memorandum Opinion and Order, the fourth factor must also be considered in connection with each item of Disputed Material that is within the broader spectrum of relevance.

These four factors, analyzed independently, must then be weighed as a group against the fifth factor – the potential chilling effect that disclosure would have on government employees and thus on robust governmental decision making processes – in determining whether the claim of deliberative process privilege should be upheld with respect to the particular item of Disputed Material. The weight of the relevance factor is likely to play a significant, although not necessarily determinative, role in this exercise, as efforts to glean circumstantial evidence by examining deliberations and communications across wide areas of governmental functioning raise greater prospects of impeding the City government's ability to "promote the quality of agency decisions" through the "encourage[ment of] candid discussion between officials," than do more targeted inquiries focused on the motivation of decision makers in implementing or continuing the specific challenged policy. See Macnamara v. City of New York, 249 F.R.D. 70, 77 (S.D.N.Y. 2008) (quoting Nat'l Council of La Raza v. Dep't of Justice, 411 F.3d 350, 356 (2d Cir. 2002)) (internal quotation marks omitted). To the extent the information sought consists of evidence as to whether community groups or other third parties have communicated information indicative of bias to the City, the availability of information regarding those communications from other sources may also play a significant role in the balancing phase of the Rodriguez inquiry.

***6** Accordingly, the February 2018 Order is set aside insofar as it addresses the claims of deliberative process privilege issues, and those issues are recommitted to the Magistrate Judge for further proceedings consistent with the foregoing discussion. The Magistrate Judge's determinations with respect to the other claims of privilege are not modified or set aside, since briefing may have been incomplete, both before the issuance of the February 2018 Order and upon the objections. The Magistrate Judge may in her discretion permit further submissions in connection with those determinations.

This Memorandum Opinion and Order resolves Docket Entry No. 293.

SO ORDERED.

All Citations

Slip Copy, 2018 WL 6786238

Footnotes

1 The February 2018 Order did not explain its analysis of the Rodriguez factors in connection with the deposition questions as extensively as it addressed its reasoning regarding the documentary evidence. See 2018 WL 716013 at *19-20.

2 The February 2018 Order did, however, conclude that, in addition to not being relevant, drafts of the Inwood NYC Action Plan (NYCPRIV00885) and the East New York Affordable Housing Strategy (NYCPRIV01023) were publicly available in their final form, and that this factor thus weighed against disclosure. 2018 WL 716013 at *18. The February 2018 Order also found that the characterizations contained in the NYCPRIV00726 email chain were unlikely to be available from other sources and that the availability-of-other-evidence factor favored disclosure in connection with that document. Id.

3 The February 2018 Order erroneously relied on relevance in conducting its evaluation of the availability of other evidence. For example, after finding that the relevant HUD data discussed in the Clawback Document had already been provided to Plaintiffs for analysis, the February 2018 Order concluded that other information contained in the Clawback Document and information in several of the other documents subject to Plaintiffs' objections was not relevant under the Order's narrower standard, and on that basis concluded that the availability-of-evidence factor weighed against the disclosure of the Clawback Document and was neutral with respect to most of the other documents that Plaintiffs claim should not be protected. February 2018 Order, 2018 WL 716013 at * 11, 18.

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

JANELL WINFIELD, SHAUNA NOEL,
and EMMANUELLA SENAT,

Plaintiffs,

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

CITY OF NEW YORK,

Defendant.

----------x

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' OBJECTIONS TO THE MAGISTRATE JUDGE'S OPINION AND ORDER OF SEPTEMBER 12, 2018 (ECF 545) DENYING PLAINTIFFS' MOTION TO COMPEL THE DEPOSITION OF MAYOR BILL DE BLASIO AND GRANTING DEFENDANT'S CROSS-MOTION FOR A PROTECTIVE ORDER

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September 26, 2018

TABLE OF CONTENTS

TABLE OF CONTENTS (CONT.)

TABLE OF AUTHORITIES

CASES

INTRODUCTION

Mayor de Blasio has unique and irreplaceable knowledge of and personal involvement with multiple issues central to plaintiffs' claims and defendant's justifications, including decisions as to whether and in what form to continue the outsider-restriction policy ("ORP") in defendant's affordable housing lotteries; neither his knowledge, rationales, motivations, nor credibility can be determined without taking his deposition. As such, taking his deposition is fully compatible with the "high official" standard set forth in *Lederman v. N.Y. City Dep't of Parks & Rec.*, 731 F.3d 199, 203 (2d Cir. 2013) (emphasis added) (providing that either a demonstration "that the official has unique first-hand knowledge related to the litigated claims *or* that the necessary information cannot be obtained through other, less burdensome or intrusive means" is a sufficient showing). *See United States v. City of New York* ("*Bloomberg*"), 2009 WL 2423307, at *2-3 (S.D.N.Y. Aug. 5, 2009) (ordering then-Mayor Bloomberg's deposition in view of statements he made and other record evidence suggesting "his direct involvement in the events at issue in the case"); *see also State of New York v. U.S. Dep't of Commerce,* 2018 WL 4539659, at *3 (S.D.N.Y. Sept. 21, 2018) (holding that it "nearly goes without saying that Plaintiffs cannot meaningfully probe or test, and the Court cannot meaningfully evaluate," the decision-making official's "intent and credibility without granting Plaintiffs an opportunity to confront and cross-examine him.")

Nevertheless, when plaintiffs moved to compel the Mayor's deposition and defendant cross-moved for a protective order, the Magistrate Judge denied plaintiffs' motion and granted defendant's cross-motion. *Winfield v. City of New York* ("*Magistrate Judge Opinion*" or "*MJO*"), 2018 WL 4350246, at *3 (S.D.N.Y. Sept. 12, 2018).[1] The MJO ignored or misread the record and failed to apply governing standards of law and must therefore be overturned.

[1] The MJO is annexed to the Sept. 26, 2018 Declaration of Craig Gurian ("Gurian Decl.") as Ex. 1.

POINT I

THE MAGISTRATE JUDGE OPINION IGNORED THE MAYOR'S CLOSE INVOLVEMENT IN, AND THE DECISIONS HE MADE ABOUT, THE OUTSIDER-RESTRICTION POLICY.

The MJO states that the Mayor lacked personal involvement in the "adoption, modification, and administration" of outsider-restriction and that, since a modification of the ORP in 2002, the policy "has simply continued in effect since then." *MJO*, at *2, *1. These statements proceed from an erroneous premise and are demonstrably false and misleading. First, the MJO chose to ignore a central feature of this case: defendant's violation of the Fair Housing Act and New York City Human Rights Law is *continuing*. It is continuing because defendant, throughout the de Blasio administration to the present, has *maintained* the outsider-restriction policy. A decision to maintain a policy is no less a decision (and reflects no lower level of personal involvement) than a decision to modify or abandon a policy.

In fact, as confirmed by former HPD Commissioner Vicki Been, potential changes to outsider-restriction policy *were* discussed with the Mayor. One was reduction in the preference from 50 percent to 30 percent "with various and assorted carve-outs."[2] Another was "an alternative that involved a series of what you might call tweaks to the Community Preference that I discussed with him. . . ."[3] Ms. Been could not recall all of the "tweaks," but one was the practice of "nesting."[4] It is undisputed that the reduced percentage was *not* adopted. The tweaks, however (including "nesting") *were* adopted.[5] In short, the ORP was changed subsequent to 2002 *and* there

[2] *See* tr. excerpts of Apr. 10, 2018 deposition of Vicki Been ("Been II"), Ex. 2 to Gurian Decl., at 212:21-213:2.

[3] *See id.* at 213:8-12.

[4] *See id* at 213:14-21. Nesting refers to the practice of counting for purposes of community preference a person who receives a disability set-aside apartment and who lives in the CD where the development is being built, as well as to the practice of counting for purposes of municipal employee preference those CD residents who also happen to be municipal employees. In other words, under the change, one household checks multiple preference or set-aside boxes.

[5] *See, id.,* 213-8-12.

is clear-cut evidence that it was the Mayor who was the ultimate decision-maker as to whether outsider-restriction would continue and, if so, in what form. The Mayor himself confirmed this in his declaration, referencing the testimony of Ms. Been. "I understand that Plaintiffs seek to ask me questions about *my decisions to reject certain alternatives to the community preference policy* in follow-up to testimony provided by former HPD Commissioner Been."[6]

There is additional evidence of the Mayor's personal commitment to outsider-restriction. When he first learned of the commencement of this lawsuit, he said, [Redacted]

[7] Moreover, Ms. Been stated that the Mayor has told her that outsider-restriction is "an important aspect of his approach to fair housing . . . ."[8] There again: an unequivocal characterization of the maintenance of outsider-restriction as being part of *the Mayor's* approach. And in his declaration, the Mayor made clear his continuing commitment to maintaining the policy: "I have not considered changing the community preference policy for any reason other than to facilitate resolution of this litigation."[9]

As will be explained in Point II, *infra*, the "whys" for the Mayor's maintaining outsider-restriction constitute critical and unique information that only the Mayor can provide, something the Magistrate Judge Opinion failed altogether to appreciate. At this juncture, however, it is necessary to deal with the MJO's recitation that "[t]he Mayor also states that any changes to the policy he considered were only in the context of a settlement of this litigation and thus are

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[6] *See* July 23, 2018 Declaration of Mayor Bill de Blasio, ECF 497 ("BDB Decl."), Ex. 3 to Gurian Decl., at 4, ¶ 11 (emphasis added).

[7] *See* July 7-8, 2015 email chain including Ms. Been and Mayor de Blasio, Bates 93696-98, Ex. 4 to Gurian Decl., at Bates 93696. In that same email chain, the Mayor [Redacted]

Id. at Bates 93698.

[8] *See* Been II, at 63:10-18.

[9] BDB Decl., at 4, ¶ 11

privileged and not subject to discovery." *MJO*, at *2. If the MJO treated this statement as somehow reducing the need for the Mayor's testimony, doing so was clearly erroneous. The fact that the Mayor and his subordinates considered settlement at no time supplanted the fact that the Mayor continued to be the City's chief executive in charge of determining, on a continuing basis and as part of his normal duties, what policies to keep and what policies to change or abandon.[10]

Indeed, it should be clear that, while *communications* may sometimes be privileged, the *substantive information* that one comes to have and that is thus available to inform one's policy-making, as well as how that information ultimately bears on one's policy-making, cannot.[11] The Mayor is not an exception to this rule, has not asserted in his declaration that he attempts to cordon off litigation-related information, and could not fulfill his Mayoral obligations if he did. (As would be expected from any official, both Vicki Been and her successor as HPD Commissioner, Maria Torres-Springer, have confirmed that they would not cordon off information yielded from the litigation from the policy decision-making process as to outsider-restriction.[12])

Even if one did not treat the Mayor's personal involvement in defendant's settlement discussions as evidence of *additional and unusual* personal involvement in the outsider-restriction policy, his underlying decision-making about outsider-restriction renders the MJO's judgment that the Mayor lacked personal involvement clearly erroneous and contrary to law.

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[10] Even under the Magistrate Judge's improperly broad view of deliberative process privilege (plaintiffs' objections pending), an official's own thoughts are not shielded by privilege from being probed. *See Winfield v. City of New York*, 2018 WL 716013, at *20 (S.D.N.Y. Feb. 1, 2018) (ordering answer to question as to deponent's "own thoughts").

[11] *Cf. Upjohn Co. v. United States*, 449 U.S. 383, 395 (1981) ("The privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney . . . ."); *Allen v. W. Point-Pepperell Inc.*, 848 F. Supp. 423, 428 (S.D.N.Y. 1994) (ordering that "plaintiffs and [their attorney] must disclose to defendants all facts of which they were aware at all times relevant to this action, whether or not those facts were communicated by plaintiffs to[their attorney] and whether or not those facts were learned by plaintiffs from [their attorney]").

[12] *See* Been II, at 95:2-96:11 and tr. excerpts of May 10, 2018 deposition of Maria Torres-Springer, Ex. 5 to Gurian Decl., at 280:8-282:15.

POINT II

THE MAGISTRATE JUDGE OPINION FUNDAMENTALLY FAILS TO UNDERSTAND THAT "UNIQUE INFORMATION" IS NOT LIMITED TO DATA POINTS OR RECITATION OF FACTUAL EVENTS, BUT ALSO ENCOMPASSES EVIDENCE OF INTENT, MOTIVES, AND THE PLAUSIBILITY OF LESS-DISCRIMINATORY ALTERNATIVES.

A. Evidence of intent and motivation as unique information

It is certainly true that one high-ranking official can have factual information about specific data points that other officials do not. But intent and motivation are factual questions, too. The reasons *why* a high-ranking official holds her or his beliefs or directs policy in a particular direction (that is, an official's *intent and motivations*) constitute unique factual information upon which a deposition is properly premised. Thus, in *Bloomberg,* the court explained that then-Mayor Bloomberg had expressed his belief that the firefighter tests being challenged as discriminatory were in fact job-related. *Bloomberg*, at *2. Mayor Bloomberg, of course, was not the only City official who believed that or who had information about Fire Department hiring demographics. But his involvement and his statement "raise[d] the question of the basis for *the Mayor's belief*" that the challenged exams were job-related. *Id.* at *3 (emphasis added). Accordingly, the deposition was ordered. *Id.* (Note that the MJO's *only* attempt to distinguish *Bloomberg* from this case is the idea that, Mayor de Blasio, unlike his predecessor in office, "has not offered sworn testimony . . . ." *MJO*, at *2. The distinction is immaterial: the court in *Bloomberg* saw the sworn testimony as only one element of the evidence of the Mayor's personal involvement, *Bloomberg*, at *3, and it is the *substance and fact* of personal involvement, not the form, that is the touchstone.

It is important to reemphasize here that one central theory of plaintiffs' intentional discrimination case is that defendant's desire to maintain outsider-restriction arises "from efforts to maintain the support of community boards, local politicians, and advocacy groups who want to preserve the existing racial or ethnic demographics of particular districts, and apprehension that

the abandonment of the policy would generate 'race– or ethnicity-based' opposition from those same actors." *Winfield v. City of New York*, 2016 WL 6208564, at *7 (S.D.N.Y. Oct. 24, 2016) (*quoting* First Amended Complaint, ¶ 161-63).[13] In this type of case, "because discriminatory intent is rarely susceptible to direct proof, a district court facing a question of discriminatory intent must make a 'sensitive inquiry into such circumstantial and direct evidence of intent as may be available.'" *Winfield*, 2016 6208564, at *7 (citations omitted). In other words, the decision-maker needs to be questioned closely about motive, and probing inconsistencies in conduct or explanation, as well as excuses for conduct that turn out to be false, is absolutely essential.

The MJO studiously avoided this: it treats the Mayor's declaration as definitive proof of lack of unique knowledge or involvement: "his affidavit," the MJO writes, "confirms that he does not" have such information. *MJO*, at *2. In fact, the declaration was no more than an exercise in misdirection. It speaks to *sources* of information and to not believing he has any "unique *factual* knowledge,"[14] but it does not and cannot deny that how the Mayor's own thoughts and process of weighing the various factors pertaining to outsider-restriction – including considerations that cut against the policy – represent a blend and balancing that is personal to him.

Accordingly, the MJO strives to contain the evidence within an artificial framework that does not speak to motive or intent. For example, the MJO asserts that plaintiffs sought demographic information about community districts from the Mayor. *MJO,* at *2. Immediately thereafter, the MJO administers the supposed coup de grâce: demographic information can be gotten from others. *Id.* But plaintiffs' actual point was that it was necessary to probe what has

[13] *Winfield*, like *United States v. Yonkers Bd. of Educ.*, 837 F.2d 1181, 1226 (2d Cir. 1987) and *MHANY Mgmt., Inc. v. Cty. of Nassau*, 819 F.3d 581, 606 (2d Cir. 2016) before it, stands for the proposition that municipal officials who are knowingly responsive to those with race-based views, like wanting to maintain the residential racial status quo, are engaging in intentional discrimination).

[14] *See, e.g.,* BDB Decl., at 2, ¶6 and at 7, ¶ 22 (emphasis added).

every indication of being a pretextual statement made by the Mayor. The Mayor was responding to a reporter having posited that the ORP "leads to less integration" because "there's less movement of people around the city."[15] The Mayor's *unscripted* response was to try to rebut the argument that outsider-restriction leads to less integration by stating that "Community Board districts are very diverse, in and of themselves."[16] In fact, community districts ("CDs") are, in general, far more racially and ethnically homogenous than the city as a whole – facts well known to defendant.[17] The Mayor needs to be questioned about his statement not because there is no other source of information about residential demographics by CD, but because the Mayor's own attempt to paint a false picture of demographics within individual CDs in order to cover-up the segregated residential reality is probative of intentional discrimination.

The MJO is similarly misleading when it states that plaintiffs want to "cross-examine the Mayor concerning whether the policy has a disparate impact" and when it concludes that "the Mayor is not the best source of this information." *MJO* at *2. In fact, the Mayor *knew* from multiple sources that outsider-restriction has a disparate impact, and plaintiffs wish to question him about the importance or lack of importance he ascribes to that fact and its consequences; why he has not acted to confront residential racial segregation; and the options he has passed up to do so. He has acknowledged being briefed by, among others, former Commissioner Been.[18] As such,

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[15] *See* tr. excerpt "Mayor de Blasio Announces a Record-Breaking 20,325 Affordable Apartments and Homes Financed in Last Fiscal Year, Enough for 50,000 New Yorkers," July 13, 2015, Ex. 6 to Gurian Decl., at 9-10.

[16] *See id.*

[17] *See*, *e.g.*, excerpt of Affirmatively Furthering Fair Housing: A Preliminary Guide to NYC's AFH Submission, Ex. 7 to Gurian Decl., Table 3, at 8 (showing consistently high levels of segregation in New York City based on the dissimilarity index as measured between Blacks and Whites). *See also* First Amended Complaint (ECF 16), at 8-10, 13, ¶¶ 42-60, 76 (documenting pervasive segregation at the CD level using publicly-available data from defendant's Planning Department. The Planning Department data is annexed as Ex. 8 to Gurian Decl.).

[18] *See* BDB Decl., at 7, ¶ 22.

he would have known that, in Ms. Been's own assessment, "*there was less race-based impact as the Community Preference was lowered*[.]"[19] Indeed, earlier this year, when the Mayor appeared on the *Inside City Hall* television program and was questioned about the ORP, the Mayor let slip that he actually does understand that defendant can generate an integrative impact *by having a lottery that proceeds citywide.* He stated that "50 percent [of the units] go to anyone and everyone in the whole city, reflecting the total diversity of the city *and that certainly has integrative impact*."[20] The corollary, of course, is that the preference part of the lottery does *not* reflect the total diversity of the city and thus has a segregation-perpetuating impact.[21]

Why the Mayor is prepared to continue with a policy where 50 percent of the units do *not* have the integrative impact he understands the citywide approach to have is a central question about which he needs to be asked. (For example, "Why did you reject the 30 percent alternative, Mr. Mayor, when Ms. Been had explained to you that it had less discriminatory impact?"). Why not use a preference shared between the CD where a development was being developed and another CD (not necessarily contiguous with the first) so as to create a combined preference area whose demographics more closely mirrored those of the city as a whole than did the single CD?[22]

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[19] *See* Been II, at 189:11-190:4 (emphasis added).

[20] *See* tr. excerpt of "Mayor de Blasio Appears Live on Inside City Hall," Jan. 17, 2018, Ex. 9 to Gurian Decl., at 3 (emphasis added).

[21] The Mayor also has available the Beveridge Report, submitted to the Court on behalf of plaintiffs 15 months ago. That report, which analyzed more than [Redacted] applications from more than [Redacted] New Yorkers across more than [Redacted] developments, showed that, [Redacted] the City's preference polic [Redacted]

As an illustration, Professor Beveridge pointed to the [Redacted] lotteries he analyzed where the CD preference area has a White majority: [Redacted]
. *See* Beveridge Report, June 1, 2017, the main body of which is annexed as Ex. 10 to Gurian Decl.

[22] Ms. Been acknowledged that this was one of the options that had been considered and rejected by defendant. *See* Been II, at 208:21-210:12. This alternative's rejection occurred after the Mayor already knew that defendant, [Redacted]

See Aug. 2014 emails between the Mayor and Ms. Been, Bates 53602-53605, Ex. 11 to Gurian Decl., at 53604-05. Plaintiffs are entitled to ask the Mayor why applying the more racially balanced multi-district approach [Redacted]

The answers will allow plaintiffs to see what factors the Mayor weighs and to probe for explanations that either are pretextual, reflective of consciousness of guilt, or are inconsistent with the Mayor's normal pattern of conduct.[23]

The Mayor's further statements during the *Inside City Hall* interview – that those who want to stay "have some rights in the equation" and that "50-50 split speaks to both parts of the reality" (integration and the desire to stay)[24] – raise more questions. First, affordable housing is a limited resource that defendant makes available only to a small percentage of those who need it. As such, the Mayor is not deciding *whether* to allocate the limited resource, but whether or not to do so in a way that maximizes desegregation. Second, to what extent does the Mayor define his responsibility to include an obligation to those many New Yorkers who are willing to move out of a neighborhood for affordable housing, including those New Yorkers who do not want to be disadvantaged in their chances to move to neighborhoods of opportunity? And, third, the Mayor's facile 50-50 equation itself needs exploration. As with the Mayor's inaccurate recitation of the internal demographics of Community Districts in order to disguise the impact of outsider-restriction, he choose to language – a "50-50 split" – that gave the appearance of balance. What he failed to say was that there is no balance in the size of the insider and outsider groups: there are many fewer insiders than outsiders per lottery.[25] In other words, the Mayor was again seeking to

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was not acceptable to him. Plaintiffs should also be allowed to ask the Mayor whether he thinks he is capable of persuading New Yorkers that a preference-sharing system would be fair in principle and objective in administration.

[23] *See Winfield*, 2016 WL 6208564, at *7 (citations omitted) (identifying as one type of evidence of intent substantive departures from the normal policy pattern).

[24] *See* tr. excerpt of "Mayor de Blasio Appears Live on Inside City Hall," Jan. 17, 2018, at 3.

[25] *See, e.g.*, tr. excerpts of Nov. 3, 2017 Alicia Glen deposition ("Glen Depo."), Ex. 12 to Gurian Decl., at 167:14-168:2 (the proposition that "there are a lot fewer people competing for the apartments from inside than there are competing for the other apartments from the outside" is "generally . . . mathematically correct"); *see also* Beveridge Report, at 2-3, ¶ 6 (finding [Redacted]).

cover up the impact of the challenged policy. The MJO did not grapple with any of the foregoing.

B. Additional evidence relating to intent and motivation

The Mayor has defended the ORP by saying "[w]e believe that's a very fair approach because folks who have built up communities *deserve* a special opportunity to get affordable housing that's created."[26] But outsider-restriction does not, in fact, distinguish between "folks who have built up communities" and insiders of more recent vintage.[27] Moreover, members of the Mayor's administration have squarely rejected the notion that some New Yorkers "deserve" affordable housing more than others. "It's not the justification," former HPD Commissioner Vicki Been testified. The "reason why we have community preference is not about [deserving]," she continued, adding that she did not "think you can make those [kinds of] determinations."[28]

The Mayor's offering a rationalization for the policy that does not fit how the policy actual works is most obviously a pretext – critical evidence to be explored in any discrimination case. Alternatively, one cannot exclude the equally inculpatory possibility that the term "folks who have built up communities" is a euphemism for "those in the racial group that dominates the community," a view of "deserving" that *does* accord with how the policy works. Either way, the Mayor needs to be questioned. That questioning would of necessity include inquiry as to why the Mayor's view of "deserving" does not take account of the "outsider" New York City family who has long lived in a *non*-gentrified neighborhood with poor schools, an above-average crime rate, etc. Only via deposition can plaintiffs probe the Mayor's rationale for constricting that outsider family's chances to be able to move into a neighborhood of opportunity.

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[26] *See* tr. excerpt of "Mayor de Blasio, Queens Officials and the Arker Companies Break Ground on 154 New Affordable Homes for Low-Income Seniors," Aug. 21, 2015, Ex. 13 to Gurian Decl., at 4 (emphasis added).

[27] *See* tr. excerpts of Aug. 2, 2017 Vicki Been deposition ("Been I"), Ex. 14 to Gurian Decl., at 19:16-23:7.

[28] *See id.* at 31:6-34:9.

The Mayor also asserted in 2016 that "[t]he law says that when we create affordable housing, we have the right to split it 50 percent for people from the surrounding community" and the rest citywide.[29] The assertion is uncannily similar to the statement that caused former Mayor Bloomberg's deposition to be ordered. *See Bloomberg*, at *2 ("I think that in fact the tests were job related and were consistent with business necessity."). Both statements involve the official holding the same position voluntarily inserting himself into the case by offering his own synthesis of the law and the facts. The MJO did not grapple with these issues.[30]

C. Unexplained inaction

Bear in mind, as the MJO did not, the broader canvas of what defendant knew about the consequences of residential segregation. At the top of the list is school segregation as it relates to housing segregation. "Many of our school districts don't afford us that opportunity at the elementary school level because you can have a huge geography that is overwhelmingly people of one particular background and that is the reality in New York City," as the Mayor has explained.[31] According to him, "[t]he schools didn't create segregation. Segregation is based on economics and structural racism and then that plays out in employment *and in housing and then eventually*

[29] *See* tr. excerpt of "Mayor de Blasio Appears on NBC's Ask the Mayor," Apr. 18, 2016, Ex. 15 to Gurian Decl., at 5.

[30] In the face of the Mayor's long and continuing involvement in outsider-restriction, the citation by the MJO *of Friedlander v. Roberts*, 2000 WL1471566 (S.D.N.Y. Sept. 28, 2000) to try to analogize there having been no reason to believe that Mayor Giuliani had any unique factual information in that case with Mayor de Blasio's claim of no unique factual information here is wholly inapposite. *Friedlander* involved an impromptu press conference that Mayor Giuliani gave at the scene of a building that had just been demolished by the Department of Buildings ("DOB") for being unsafe where the only question was not whether Mayor Giuliani had any involvement with the decision to demolish the building, but whether he could recall the name of the DOB official who advised had him that the building had to be demolished. He could not. *See Friedlander*, 2000 WL 1471566, at *1-3. Even in Giuliani circumstance – where all that involved was a single piece of factual information that the then-Mayor could not recall – not motive, intent, or policy factors – the Court found that it was a "close question" as to whether Mayor Giuliani should be subject to deposition. *Id.* at *1. With the substantially greater involvement of Mayor de Blasio over the course of years, the need for his deposition is not a close call.

[31] *See* tr. excerpt of "Mayor de Blasio Appears Live on Inside City Hall," June 12, 2017, Ex. 16 to Gurian Decl, at 3.

all that affects who goes to school where. . . . to suggest the schools can solve this problem *without first focusing on the root causes*, I think it's a mistake. . . . We can't solve the problem to the degree I think a lot of people would like to if we don't go at all those other issues first . . . ."[32]

In light of the Mayor's view, one would think that he would be aggressive in tackling residential segregation, including taking the modest step of having affordable housing lotteries that provide equal access to all financially eligible households, regardless of where they live in the City and regardless of the location to which they wish to move. Unless, of course, defendant's approach is to avoid making racial change. There is, in fact, much to suggest that the City is indeed apprehensive about grappling directly with residential racial segregation, and it is only the Mayor that can provide answers as to why desegregation is not a priority of his. For example, instead of being active in respect to fighting housing segregation, by his own description a key root cause of school segregation, the Mayor threw up his hands: "We cannot change the basic reality of housing in New York City," he asserted.[33] Why not?

And, it turns out, despite the Mayor's recitation of a long history of housing discrimination and segregation, the City does not (to Deputy Mayor Glen's knowledge) have a plan to end residential racial segregation.[34] Indeed, Ms. Glen, the deputy mayor for housing and economic development, did not "ever recall having a conversation with [the Mayor] about housing patterns in New York City" and what can be done about them: "That is not something we've talked about."[35] And according to a published report: "One person who worked on the [Mayor's] housing

[32] *See* tr. excerpt of "Mayor de Blasio Appears Live on the Brian Lehrer Show," May 11, 2018, Ex. 17 to Gurian Decl., at 7 (emphases added).

[33] *See* excerpt of New York Times, "De Blasio, Expanding an Education Program, Dismisses Past Approaches," May 11, 2017, Ex. 18 to Gurian Decl., at 1.

[34] Glen Depo., at 262:18-24.

[35] *Id.* at 264:4-265:9.

plan and would only speak on background said de Blasio was singularly focused on building more affordable housing and *integration did not factor into the strategy.*"[36] This is not principally a question of whether there is a formal "requirement" to have a plan to address residential racial segregation (although defendant, as a recipient of federal funds, is required to certify each year that it is taking steps to overcome impediments to fair housing choice); it is, rather, powerful evidence – no plan to end racial segregation in 2018 in one of the nation's most segregated cities? – that defendant under this Mayor's leadership (as with his predecessors) is not as serious about tackling residential segregation (even though it knows it is important to do so) as a jurisdiction that has a concrete plan.[37] This inaction in the face of knowledge that action is important is part of the mosaic of evidence of an overarching policy of defendant's accommodating itself to those who wish to retain the racial status quo, and the Mayor needs to be questioned about it.

That unwillingness is part of a pattern. On the school segregation side, public pressure is now causing some shift in policy;[38] but, as has been widely pointed out, "Mayor de Blasio shied

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[36] *See* excerpts of Politico New York, "50 years after Fair Housing Act, New York City still struggles with residential segregation," Apr. 23, 2018, Ex. 19 to Gurian Decl., at 10 (emphasis added).

[37] Note that Council Member ("CM") Torres has criticized the Mayor's silence on what the administration means by remaining "committed to the principles" of the Assessment of Fair Housing: "Mayor Bill de Blasio's silence on this issue suggests that fair housing is not as much of a priority as his administration would like us to believe." *See* CM Torres Letter to the Editor, Crain's New York Business, "Mayor's fair-housing pledge doesn't inspire confidence," Jan. 20, 2018, Ex. 20 to Gurian Decl., at 2.

[38] *See* excerpt of New York Times, "As Calls for Action Crescendo, de Blasio Takes on Segregated Schools," June 3, 2018, Ex. 21 to Gurian Decl., at 1 (quoting the Mayor as follows: "Even a few years ago, there were strong voices talking about the lack of diversity in some of our schools . . . But that has now become a crescendo – it's become so intense in the city, this demand for fairness."). It is a reasonable hypothesis that the change in the politics of the issue was what "liberated" the Mayor to act. Indeed, the Mayor has just recently explained, that "I have believed for a long time that the most profound social change comes from the grass roots [*sic*] but also the most lasting social change." *See* excerpt of New York Times, "De Blasio Acts on School Integration, but Others Lead Charge," Sept. 20, 2018, Ex. 22 to Gurian Decl., at 2. If policy as to segregation in schools depends on the relative political strength of opponents and supporters of racial change, that is probative of the likelihood of the same considerations being at work in the housing context. And if the Mayor is waiting for "grassroots" demand for residential racial integration, history says that he will be waiting for a long time. These are questions about the Mayor's own fundamental philosophy of whether, when, and how to push for integration that only the Mayor can answer. It is within the context of those fundamental views that he allows outsider-restriction to continue.

away from even using the word segregation for years . . . ."[39] (This observation is consistent with the admission from Ms. Been that administration policy was to intentionally downplay or avoid outright the language of fair housing or race.[40]). The MJO did not grapple with these issues.

D. Inaction at odds with the Mayor's philosophy of governance

Defendant continues to pursue the defense that without outsider-restriction, CMs would, independent of the merits of proposals, reject actions needed to facilitate affordable housing development.[41] Mayor de Blasio's statements and conduct are highly relevant to this issue. He articulates a sense of how to navigate the local political terrain qualitatively different from that espoused by other administration officials. For example, the Mayor "downplayed the idea that some [CMs] have placed roadblocks to his affordable housing agenda," and said "[t]here's only been a couple of times where there was actually a disagreement that didn't get resolved."[42]

The Mayor has explained how he was able to overcome resistance to a new way of thinking about affordable housing, specifically the concept of mandatory inclusionary housing (MIH):

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[39] *See, e.g.*, excerpt of New York Daily News, "City Council may create office to fix racial segregation in schools," May 23, 2018, Ex. 23 to Gurian Decl., at 2.

[40] Ms. Been explained that disagreements about racism and racial biases are different from other public policy issues because "when you are talking about racism and racial biases, it's a hard conversation. People don't tend [to] do all that well in those conversations in my experience." Been I, at 205:2-206:25. According to Ms. Been, "I think fair housing . . . shuts people down . . . in my experience, it doesn't lead to the best of conversations. *When you invoke fair housing, it shuts people down*." *Id.* at 207:24-208:6 (emphasis added). Defendant's approach of not speaking in the language of fair housing or race as opposed to "diverse communities" was not random; on the contrary, Ms. Been acknowledged that the chosen path was "a tactic, a question of tactics." *Id*. 210:17-211:12.

[41] For example, Ms. Torres-Springer testified that several current CMs would take the view (whether or not using the precise wording described here) that: "I'm going to deny my constituents and other New York City residents desperately needed affordable housing because HPD is now using a lottery system that gives all New York City households an equal chance to compete in each affordable housing lottery they enter." *See* Torres-Springer Depo., at 199:22-201:23, 204:20-205:3, 205:8-23, and 206:15-208:14. But she was unable to quantify the risk that various of the CMs would take that view; didn't know which might instead say "I strongly regret that there is no more community preference policy, but now I'm going to try to get what other things I can from my constituents"; and did not ask *any* CMs how, if at all, their support for affordable housing would be affected if the ORP percentage were scaled back. *See id.* at 209:8-23, 214:17-215:2, and 121:8-124:8.

[42] *See* Politico New York, "De Blasio says Council opposition not an obstacle to affordable housing goals," July 17, 2017, Ex. 24 to Gurian Decl., at 2.

> We were talking about thinking about our City in a whole new way . . . . And you're never surprised, when you put a whole new way of thinking on the table, that there's immediate resistance. It's normal, it's human . . . . I'm never 100 percent surprised when the community board disagrees with something emanating from City Hall. So, the early going was tough. But we rallied . . . . It was an example of a really broad coalition for change . . . . On that day we showed that things could really be done differently, and that we could marshal all our forces in the interest of working people and low-income New Yorkers and everyday New Yorkers who are just struggling to make ends meet – that we could actually change our policies profoundly and be on their side.[43]

The Mayor's perceptions as to managing and resolving CM opposition require exploration. But his latter statements – especially his recounting of the MIH process – are even more crucial. They reflect a working political philosophy that it is necessary *and* feasible to: (a) resist unwarranted opposition; (b) bring together a "really broad coalition"; (c) work in the interests of all New Yorkers; and (d) change minds and thus "change our politics profoundly."

The choice *not* to try to change CM minds *on the particular issue* of the importance of having an equal-access lottery with no disparate impact *when the Mayor has been prepared to take on other, initially difficult, fights* bears not only on question of the "necessity" of the ORP, but also on the availability of the less-discriminatory alternative of educating CMs to the harms of continuing a segregation-perpetuating lottery-system. Finally, it is probative of defendant's unwillingness to fight against those who wish to maintain the residential racial status quo. The MJO did not grapple with these issues.

E. Failure to utilize the Mayor's unique experience or to consider changing circumstances.

In a television interview broadcast in May 2018, City Council Speaker Corey Johnson said that, though he had supported the ORP in the past, "I'm willing to say when I've been wrong in

[43] *See* tr. excerpt "Mayor de Blasio Delivers Remarks at NYSAFAH Housing for all Conference," May 11, 2016, Ex. 25 to Gurian Decl., at 4-5.

the past, and this may be an instance where I've been wrong in the past."[44] He continued: "[I]f we're going to have a real conversation about school segregation and housing segregation and how they're linked, we have to do a better job at integrating communities. And so I'm open to learning more about the data, to understanding what we need to do to fully integrate communities across New York City."[45] The exchange proceeded further:

> **Speaker Johnson:** And if that means us scaling back on the percentage that we allow for right now, I would be open to have that conversation.
> **Errol Louis:** Okay, that's interesting. I mean, it's refreshing to hear that. And that there's nothing magical about 50 percent. You know 40 percent, 30 percent, this percent, that percent . . . .
> **Speaker Johnson:** [Interjecting] Twenty percent, twenty-five percent, you have to—yeah.
> **Errol Louis:** Agreed, totally agreed.
> **Speaker Johnson:** [Interjecting] There's a greater good we have to look at.[46]

The Mayor, defendant's chief executive officer, has a unique relationship with a Council Speaker, defendant's chief legislative officer, both in terms of knowing his counterpart and negotiating with him. The Mayor acknowledges meeting with Speaker Johnson regularly.[47] Has the Mayor now taken the initiative to open the dialog in which the Speaker was ready to engage? Is the Mayor willing to acknowledge that outsider-restriction as a strategy to secure CM support appears less necessary to him than it had before learning of the Speaker's new views?[48] How

[44] The NY1 News interview, with Errol Louis, aired on May 3, 2018. Quoted material represents our best effort at an accurate transcription. The relevant portion of the interview commences at approximately the 1:25 mark.

[45] *Id.*

[46] *Id.*

[47] BDB Decl., at 6, ¶ 19.

[48] Presumably the Mayor has also been briefed or is otherwise aware that the current Speaker has a more nuanced view of "member deference" than his predecessor. *See* tr. excerpt of June 28, 2018 Jordan Press deposition, a key liaison between HPD and CMs, Ex. 26 to Gurian Decl., at 79:16-80:2 ("Under the new speaker it's been made clear that council leadership wanted to make sure that projects were not being voted down without a more comprehensive review, meaning, that if the answer was going to be no that it wasn't solely going to be because one member had maybe a limited set of reasons or didn't have a robust set of reasons to turn it down."). Does the greater difficulty for

would the Mayor bring his talent for assembling a "broad coalition" to "change our politics profoundly" to the task of explaining to CMs the downsides of outsider-restriction? Or, if he were not willing to do so, why is he not willing to expend political capital in this instance? The MJO did not grapple with these issues.

POINT III
THE MAYOR'S TESTIMONY IS NEEDED REGARDING KNOWLEDGE OF, AND ACCOMMODATION TO, FEAR OF RACIAL CHANGE.

Defendant's witnesses have been loathe to acknowledge the phenomenon that, in today's New York, there are people in White neighborhoods and in neighborhoods dominated by other racial groups where racial change or the prospect of racial change makes them feel uncomfortable. However, Matthew Murphy, defendant's deputy commissioner for policy and strategy at HPD, after noting that he "can't speak for every resident," ultimately admitted that "I think it's likely and I think people correlate that change [neighborhood racial change] to development, new housing development. So *as a result they oppose housing development*, especially Affordable Housing Development."[49] When asked a follow-up question about whether there is anything politically sensitive about broaching the idea of desegregating neighborhoods that are currently segregated by race or ethnicity, Mr. Murphy went on to acknowledge there was, and specified a relevant consequence: "I believe so, yes, *especially voting against Affordable Housing Projects*."[50]

The Mayor's own view on this question is key: he sets affordable housing policy (including, as noted, the ORP element of that policy). The Mayor has said there is "tremendous" fear of and "uncertainty" about development: "The fear out there is very real," adding that "I

CMs to baselessly turn down a project have any impact on how the Mayor balances his perceived need to use outsider-restriction to woo CMs versus the pressing need for residential integration?

[49] *See* tr. excerpt of Mar. 16, 2018 Matthew Murphy deposition, Ex. 27 to Gurian Decl., at 215:3-20 (emphasis added).

[50] *See id.* at 215:21- 216:5 (emphasis added).

understand it."[51] The Mayor's testimony is crucial to comprehend the extent to which he understands the racialized component of fear, and as to his response to it in setting policy

POINT IV

IT WAS ERROR FOR THE MAGISTRATE JUDGE OPINION TO ACCEPT THE MAYOR'S DECLARATION UNCRITICALLY; THAT DECLARATION ITSELF DEMONSTRATES WHY THERE IS NO ALTERNATIVE TO TAKING THE MAYOR'S DEPOSITION.

Whereas the Magistrate Judge had recognized in the case of Deputy Mayor Glen that her attempts to explain her statements through the vehicle of a declaration were inadequate because "plaintiffs are entitled to ask follow-up questions and seek clarifications based on these statements" and "[n]o other witness could provide this information besides Glen herself,"[52] the MJO ignored this principle and instead treated the Mayor's declaration as dispositive.

Take first the Mayor's attempt to try to understate his role (and make it less likely to have his deposition ordered) by asserting that "I do not micro-manage the Deputy Mayors or City agency Commissioners."[53] The statement, as plaintiffs pointed out, is contradicted by the Mayor's widely known reputation as a micro-manager.[54] But the MJO failed to take account of the Mayor's intentionally understating his role, and likewise failed to recognize why it was so important for plaintiffs to question someone who was using his declaration to evade accountability.

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[51] *See* excerpts of Mayor de Blasio op-ed, New York Daily News, "Why our housing plan must pass: Mayor de Blasio urges the City Council and advocates to get behind his zoning reforms," Mar. 9, 2016, Ex. 28 to Gurian Decl. at 3, 6.

[52] *See* tr. of excerpt of Sept. 14, 2017 Court Conference (ECF 183), Ex. 29 to Gurian Decl., at 13:21-15:21 (directing deposition of Ms. Glen).

[53] BDB Declaration, at 2, ¶ 5.

[54] *See, e.g.*, excerpt of Wall Street Journal, "De Blasio Keeps City Agencies on Short Leash," Apr. 13, 2016, Ex. 30 to Gurian Decl., at 1-2 ("New York Mayor Bill de Blasio has taken a more hands-on and ideological approach than his predecessor in managing the city's 44 agencies . . . . In the de Blasio era, commissioners are required to provide weekly reports, submit so-called decision memos to multiple layers of review . . . according to documents and current and former city officials . . . . Mr. de Blasio said last week he was 'aggressive' managing agencies and was 'very proud of being a hands-on leader.'"); excerpt of Politico New York, "To avoid deposition on housing policy, de Blasio claims he is not a micromanager," July 24, 2018, Ex. 31 to Gurian Decl., at 2 ("Mayor Bill de Blasio is often described as a micromanager . . . .").

Second, the MJO also failed to consider the cautionary words of one of the Mayor's own deputy mayors, Alicia Glen. She explained at her deposition that one cannot necessarily take Mayor de Blasio's public statements at face value.[55]

Third, the MJO failed to consider that the Mayor chose to claim that his information came from others only when convenient. When not convenient – as with trying to explain away his remarks about in-CD diversity – he said those remarks "were not based upon specific facts, statistics, or data, but rather reflect my general impressions having lived and worked in the City for many years."[56] Not only should that disclaimer have made the MJO more skeptical of relying on the Mayor's general assertion about only relying on staff, it raises a key and obvious question: what other elements of outsider-restriction policy, and fair housing policy more generally – including assertions as to why outsider-restriction is claimed to be "necessary" – are not based on facts or data, but just upon the Mayor's "general impressions?"

Fourth, the declaration reveals time and time again why it is not an acceptable substitute for a deposition. Unlike in a deposition, the Mayor cherry-picks what he wishes to discuss and what he does not wish to discuss, there is no way to refresh his recollection, and no way otherwise to cross-examine the document. For example, the Mayor selects excerpts from various depositions, and states "I agree with their statements . . . ."[57] So, for example, in the portion of the

[55] Glen had been shown an article describing the Mayor as "downplay[ing] the idea that some [CMs] have placed roadblocks to his affordable housing agenda," and quoting him as saying "[t]here's only been a couple of times where there was actually a disagreement that didn't get resolved . . . ." Glen explained that "if you are the mayor of the City of New York speaking to a reporter, you are probably going to shrug it off so it doesn't look like you are not being able to get your agenda through." Glen did not *know* why the Mayor took the posture he did, but believed "it was for political purposes because he was in the middle of an election campaign." *See* Glen Depo., at 24:3-27:21. An excerpt of the article referenced, Politico New York, "De Blasio says Council opposition not an obstacle to affordable housing goals," July 17, 2017, is annexed as Ex. 24 to Gurian Decl.

[56] *See* BDB Decl., at 3-4, ¶ 10.

[57] *See id.* at 6, ¶ 18.

deposition of current HPD Commissioner Torres-Springer cited by the Mayor, the witness was asked whether there were CMs who would reject affordable housing if HPD were to turn to an equal-access lottery system.[58] Ms. Torres-Springer responded that there were many CMs for whom "it's possible that they could feel that way, generally."[59] What the Mayor chose *not* to do was either agree or disagree with the limited list of CMs for whom Ms. Torres-Springer went on to say there was a "risk" of their taking that view, or either agree or disagree with her statement that it was "hard" to "describe the risk" and that *she couldn't quantify the risk at all.*[60] Does the Mayor agree regarding the CMs who pose the risk? Does he agree that the risk upon which defendant's "CM opposition" justification rests cannot be quantified? Why has he prioritized an unquantified risk over the goal of maximizing the integrative impact of new affordable housing development?[61]

The Mayor chooses *not* to mention the lack of a plan to end residential segregation, and so there is no way to confirm why this policy area has been neglected.

The MJO does not even take notice when the Mayor's declaration contradicted an earlier, unscripted statement. Responding to a question about gentrification, the Mayor had said that, prior to his administration, City government's response "was to do absolutely positively nothing."[62] In the declaration, by contrast, he states that he is aware that the Bloomberg administration had anti-displacement programs in place that the current administration has expanded on and added to.[63]

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[58] *See* BDB Decl., at 6, ¶ 18; *see also* Torres-Springer Depo., at 202:3-204:10.

[59] *See* Torres-Springer Depo., at 202:3-204:10.

[60] *See id.* at 204:12-209:23 (*i.e.*, that which directly follows the excerpt cited by the Mayor).

[61] More broadly, the limited assertions made by the Mayor in his declaration leave plaintiffs without information about what other contentions or admissions from administration officials with which the Mayor agrees or disagrees, without information as to what factors the Mayor balanced, and without information of how he weighed such factors.

[62] *See* tr. excerpt of "Mayor de Blasio Hosts Town Hall Meeting with Brooklyn Residents to Discuss Affordable Housing," Mar. 14, 2016, Ex. 32 to Gurian Decl., at 25-26.

[63] *See* BDB Decl., at 5-6, ¶ 17.

Not only does this kind of contradiction deserve to be explored, not ignored, but the attempt at damage control raises more questions. For example, what aspects of anti-displacement policy were missing in previous administrations? Now that the Mayor has done more with respect to concrete anti-displacement work than his predecessor, why would it still be necessary to pretend that the ORP is an anti-displacement tool?

Both in his declaration and in defendant's previous response to an interrogatory, the Mayor's memory fails him in terms of his basis for saying that "[t]he law says that when we create affordable housing, we have the right to split it 50 percent for people [from] the surrounding community. . . ."[64] Refreshing the recollection of a witness can only be accomplished at a deposition. *See State of New York,* 2018 WL 4539659, at *3 (holding that "[a]t a minimum," plaintiffs are entitled to make "good-faith efforts to refresh [the Cabinet Secretary's] recollections of these critical facts and to test the credibility of any claimed lack of memory in a deposition. Indeed, there is no other way they could do so.").

More generally, case law makes clear that neither public statements nor other document discovery is an adequate substitute for deposition on oral examination. As for public statements such as interviews, *Sherrod v. Breitbart*, 304 F.R.D. 73 (D.D.C. 2014) is instructive. In that case, the United States sought to quash the deposition of the Secretary of Agriculture. The Secretary had issued a public statement and held two press conferences about a decision he had made, and the government proffered that the Secretary was ready to ratify these statements under penalty of perjury. *Id.* at 76. But this was not sufficient: "The press, which had very different motivations than do the parties to this case, did not ask the type of probing follow-up questions counsel expect to ask at this deposition regarding who he spoke to, what information he was presented with and

[64] *See* BDB Decl., at 3, ¶ 9.

considered, and how, if at all, different factors influenced his decision." *Id.* The court continued: "The public statements the Secretary *chose to make* cannot possibly substitute for the answers to questions specifically directed to his underlying reasoning." *Id.* (emphasis added).[65]

The MJO's failure to consider the impropriety of accepting the Mayor's declaration uncritically or to consider the need for follow-up questioning based on that declaration was clearly erroneous and contrary to law.

POINT V

OTHERS ARE NOT ADEQUATE SUBSTITUTES FOR THE MAYOR.

The MJO, we are constrained to say, was disingenuous when it stated that "the current and former HPD Commissioners were fully questioned about the policy and communications with the Mayor about it." *MJO,* at *2. The assertion ignores the fact that the decision currently on appeal about deliberative process and other privilege assertions severely curtailed inquiry into deliberations, including deliberations with the Mayor, and allowed for attorney-client privilege and work-product doctrine to expand from their normal and appropriate parameters dealing with communication to improperly exclude questioning about information.[66]

Moreover, as already has been explained, the Mayor's personal involvement is clear, and it is he who can best explain how he balances various factors in formulating policy, including the fact of resistance to residential racial change.[67] Beyond this, there are multiple occasions on which

[65] *See also Sherrod*, 304 F.R.D. at 76 (rejecting option of written questions because those "lack the flexibility of oral examination . . . which allows the questioner to adjust on the fly and confine his questions to the relevant ones while still satisfying himself and his client that a particular line of inquiry has been exhausted").

[66] *See* discussion, *supra*, at 4.

[67] The MJO's attempt to distinguish *Pisani v. Westchester Cty. Health Care Corp.*, 2007 WL 107747 (S.D.N.Y. Jan. 16, 2007) is unavailing. The MJO states that the "[d]eposition of the official who personally made the challenged employment decision was appropriately noticed because the reasons for the termination decision could not be learned from another source." *MJO,* at *2. On its face, the decision says otherwise. The official to be deposed (the Deputy County Executive) was not a party and is *not* said to have made the decision to fire the plaintiff. *Pisani*, 2007 WL 107747, at *4. Instead, he was found to have "advised" a named individual defendant, Richard Berman, who was the Chairperson of defendant Westchester County Health Care Corporation, in respect to various options about continuing

witnesses confirmed the necessity of questioning the Mayor directly. For example, at the Glen deposition, plaintiffs asked the deputy mayor to confirm that the Mayor is "pretty dubious that much can be done about residential segregation"; her response: "You would have to ask him."[68] And information on the Mayor's views as to racial politics in New York City – which the former City Planning Director acknowledged is still a force after 50 years, including in the housing context[69] – could not be obtained from Ms. Glen because she explained that, "[n]o, I don't believe we've ever had a conversation like that."[70]

At the second session of the Been deposition, plaintiffs tried to learn about the Mayor's views concerning the existence of opposition to residential integration, but Ms. Been explained that, in the period from early 2014 to the time of the deposition in April 2018, she and the Mayor had never had a discussion on that issue.[71]

On the question of the Mayor's views as to whether it is difficult to get community support for fair housing, current HPD Commissioner Torres-Springer could not help because she did not recall having any conversations with the Mayor on that topic.[72] On the question of whether, as

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or not continuing plaintiff's employment. *Id.* at *1, *4. It was in fact Berman who had issued a public statement in conjunction with plaintiff's termination. *Pisani v. Westchester Cty. Health Care. Corp.*, 424 F. Supp. 2d 710, 713-14 (S.D.N.Y. 2006). In other words, there is no evidence in the record that it was the Deputy County Executive who "personally made" the challenged employment decision and there were other sources – most obviously Berman – available to speak to reasons for the termination. But the Deputy County Executive was required to sit for a deposition anyway. *Cf. Bloomberg*, at *3 (emphasis added) (the Mayor's apparent direct involvement in the events at issue in the case and the statements he made "raise[d] the question of the basis for *the Mayor's belief* . . ."); *see also Lederman v. Giuliani*, 2002 WL 31357810, at *2 (S.D.N.Y. Oct. 17, 2002) (stating that the City's decision not to seek to preclude Mayor Giuliani's deposition "makes sense" because it was the mayor who knew his motivations and intentions best).

[68] Glen Depo., at 262:25-263:6.

[69] *See* tr. excerpt of deposition of Carl Weisbrod, July 27, 2017, Ex. 33 to Gurian Decl., at 99:22-101:20 (stating "[o]ver 50 years of working in New York City, racial politics are always in the ether" as a "fact of life" and recognizing "[a]dvocacy in relation to housing policy is not immune from that").

[70] Glen Depo., at 215:24-216:23.

[71] *See* Been II, at 15:15-23.

[72] Torres-Springer Depo., at 143:18-144:6.

Deputy Mayor Glen suggested, the Mayor was downplaying for political reasons the idea of CMs placing roadblocks to his affordable housing agenda, Ms. Torres-Springer first declined to answer the question directly as to whether she knew what the Mayor meant; then said she did not know who would know what he meant; and, then, in response to the question as to whether the Mayor would know what he meant, she testified, "That would have to be a question posed to him."[73]

In the end, only Mayor de Blasio can explain how *he* knits together the practical and political issues relating to how defendant responds to issues with a race-based salience.

POINT VI

THE MAGISTRATE JUDGE'S OPINION RENDERS CONCLUSORY ASSERTIONS THAT ARE NEITHER TIED TO ANY SPECIFICS NOR CONSONANT WITH LAW.

The MJO complains that some of plaintiffs' proposed questioning "assume[s] facts that the City disputes and will merely result in arguments rather than the provision of relevant information," or "seek[s] answers to hypothetical questions or call[s] for speculation." *MJO*, at *2. It is, of course, impossible either for plaintiffs or for this Court to have a meaningful opportunity to respond because absolutely no specifics are provided. What is clear, however, is that it is *not* the case that the predicate for a question at a deposition is the existence of an undisputed fact. If, for example, Mayor de Blasio does not accept plaintiffs' premises regarding his knowledge of the impact of outsider-restriction, the questioning will tease out what he *does* understand and the bases for his position. A witness' rejection or reframing of a proposition is not the *opposite* of the provision of relevant evidence it is precisely the kind of probing that yields relevant evidence as to motive and intent.

[73] *See* Torres-Springer Depo., at 12:6-18:9. Likewise, it is only the Mayor who could answer the question of whether Ms. Torres-Springer was accurately reflecting de Blasio administration views in answering the question, "In your mind is it pretty clear cut that African Americans, as a group, do not share equally in opportunity in New York City?" with "I don't think there is anything clear cut about that question actually." *Id.* at 59:21-60:4.

As for the concern about speculation and hypothetical questions, this is an issue that has unfortunately eluded understanding throughout this case. It is *defendant's* asserted justification (and burden to prove) that outsider-restriction is *necessary*. This is just another way of saying that, without outsider-restriction *in the future*, defendant will *hereafter* be prejudiced in its ability to get CM approval of affordable housing development. As such, the basis for why CMs will supposedly act in a certain way in the future – that they will reject desperately needed affordable housing instead of, say, being convinced to support a project with other community benefits, or instead of being persuaded that outsider-restriction is pernicious (an argument that the administration has never tried) – is necessarily at issue. It is the Mayor who has unmatched knowledge of the political considerations that CMs are dealing with; the ways to rally public, organizational, and elected official support; the "carrots" that are available; and the circumstances under which he is and is not prepared to expend political capital. Thus, the MJO's complaint is ill-founded.

CONCLUSION

The MJO ignored substantial evidence of information that can only be provided by the Mayor and, as explained herein, was clearly erroneous and contrary to law. Plaintiffs' objections should be sustained, plaintiffs' motion to compel the Mayor's deposition granted, and defendant's cross-motion for a protective order denied.

Dated: New York, New York
September 26, 2018

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

JANELL WINFIELD, TRACEY STEWART,
SHAUNA NOEL, and EMMANUELLA SENAT

Plaintiffs,

- against -

CITY OF NEW YORK,

Defendant.

15 CV 5236 (LTS)(KHP)

----------x

DEFENDANT'S MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' OBJECTION TO MAGISTRATE PARKER'S DECISION DENYING PLAINTIFFS' MOTION TO COMPEL THE DEPOSITION OF MAYOR BILL DE BLASIO AND GRANTING THE CITY'S CROSS-MOTION FOR A PROTECTIVE ORDER

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October 19, 2018

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Cases **Pages**

Statutes

PRELIMINARY STATEMENT

Defendant submits this memorandum of law in opposition to Plaintiffs' objection (ECF 565) seeking to overturn Judge Parker's September 12, 2018 order denying Plaintiffs' motion to compel the deposition of Mayor de Blasio and granting the City's cross-motion for a protective order (ECF 545) (the "Order"). Plaintiffs' Objection should be rejected as Plaintiffs failed to demonstrate that the Order is clearly erroneous or contrary to the law.

After carefully considering Plaintiffs' proffer of "evidence," the parties' arguments and the Declaration of Mayor de Blasio, dated July 23, 2018,[1] Judge Parker properly found that Plaintiffs failed to meet their burden of establishing exceptional circumstances necessitating the deposition of the Mayor. Plaintiffs have now failed to meet their burden to establish that the Order is clearly erroneous or affected by an error of law. Plaintiffs' objection is simply a repetition of the same meritless arguments made before Judge Parker. Even in the few attempted attacks on the Order, Plaintiffs have not demonstrated an error in the Order, but simply disagree with the findings and decision. 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 Plaintiffs have not established that Judge Parker's Order is clearly erroneous or contrary to the law (nor can they), the Order is entitled to deference and should not be disturbed.

[1] Mayor de Blasio's July 23, 2018 Declaration is annexed to Gurian's declaration dated September 26, 2018 as Exhibit 3 and was originally filed as ECF 497. An unredacted version of the declaration, along with unredacted versions of the City's papers presented to Judge Parker, and the City's unredacted opposition brief will be provided to Judge Swain's chambers.

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").[2] The community preference policy was established in the late 1980s, was expanded to 50% in 2002, and remains at 50%. In 2015, Plaintiffs commenced this action challenging this long-standing policy as violating the Fair Housing Act and the NYC Human Rights Law.

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.

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,

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

mischaracterize the Mayor's statements and other deponents' testimony, and make baseless factual conclusions and presumptions. In short, the information Plaintiffs seek is neither relevant nor necessary to Plaintiffs' claims, nor unique to the Mayor. Therefore, Magistrate Judge Parker's order denying Plaintiffs' motion to compel and granting the City's cross-motion for a protective order is neither clearly erroneous nor contrary to the law and must 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 denying Plaintiffs' motion to compel the deposition of Mayor de Blasio and granting the City's cross-motion for a protective order. Rule 72(a) specifies that a district judge may only modify or set aside an order by a magistrate judge 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 ORDER IS NOT CLEARLY ERRONEOUS OR CONTRARY TO LAW AND IS ENTITLED TO DEFERENCE

Magistrate Judge Parker properly determined that Plaintiffs did not demonstrate exceptional circumstances warranting the Mayor's deposition in this case. Judge Parker applied the standard established by the Second Circuit in Lederman v. NYC Dep't of Parks and Rec., 731 F.3d 199, 203 (2d. Cir 2013), namely that the party seeking the deposition of a high ranking official must demonstrate that "the official has 'unique first-hand knowledge' relevant to the claim in the case or [that] the information sought is unobtainable through other, less burdensome means." (quoting Lederman), Order at *2. Judge Parker acknowledged the strong public policy rationale for the rule, "to protect the ability of the official to perform his or her governmental duties without the interference of civil litigation." Order at *2 (citing Bey v. City of New York, No. 99-cv-3873, 2007 WL 1893723, at *1 (S.D.N.Y. June 28, 2007). See also Lederman, 731 F.3d at 203 (officials have "greater duties and time constraints than other witnesses," and "[i]f courts did not limit these depositions, such officials would spend 'an inordinate amount of time tending to pending litigation." (internal citations omitted); Adler v. Pataki, 2001 U.S. Dist.

LEXIS 18428 at *4, 2001 WL 1708801 (N.D.N.Y. Nov. 13, 2001); 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).

Judge Parker also addressed facts pertinent to whether the Mayor had unique first-hand knowledge about the community preference policy, rationally concluding that he does not. Judge Parker properly noted that the community preference policy was adopted "well before Mayor de Blasio was in office…was modified in 2002…by another administration and has simply continued in effect since then." Order at *2. Judge Parker further credited the Mayor's sworn-statements in his declaration. The Order specifically relies upon the Mayor's statements that "[a]s Mayor, [he] ha[s] relied upon information on the community preference policy provided to [him] through briefings and other communications by [his] Deputy Mayors and Commissioners (and Directors) and other senior staff…[and that he has] no reason to believe that [he] has any unique factual information about the community preference policy." See Order at *3, quoting ECF 497, Declaration of Bill de Blasio).

The Order further reasonably finds that "other discovery has provided the key information needed by Plaintiffs to prosecute their claims." Order at *3. Magistrate Parker relies upon the facts that there have been at least 18 individuals deposed, including the current and many former Commissioners of HPD (including the Commissioner who was responsible for modifying the policy in 2002), and including Deputy Mayor Alicia Glen. Judge Parker also

relies upon the fact that the City has produced emails and other documents between the Commissioner's and the Mayor's office.[3] Order at * 3.

In short, Judge Parker's decision considered the "evidence" provided by Plaintiffs, the arguments briefed by the parties and the Mayor's declaration. The Order properly applied the facts to the law and is neither contrary to the law, nor an abuse of discretion. Therefore the Order is entitled to deference and should be upheld in its entirety.

Plaintiffs' attempt to suggest that this well-reasoned, evidence-based decision is erroneous is actually nothing more than a meritless disagreement with the Magistrate Judge's findings and conclusions. Plaintiffs' mere disagreement is insufficient to overturn the Order. See Winfield, 2017 U.S. Dist. LEXIS 182021 at *6.

A. The Order Properly Finds that the Mayor Does not Have Close Involvement with the Community Preference Policy

Plaintiffs first attack the Order by suggesting that it allegedly "ignored" the Mayor's close involvement in and decisions about the community preference policy. Plaintiffs rehash the same meritless arguments they made before Judge Parker.[4] In particular, Plaintiffs argue that the City has made a "decision to maintain" the policy, and that because the Mayor has

[3] The City has undertaken a supplemental collection and review of the Mayor's emails and HPD Deputy Commissioner Matthew Murphy's emails, and is reviewing for the first time the current HPD Commissioner Maria Torres-Springer's email, and the email of Deputy Commissioner Leila Bozorg. Thus, Plaintiffs are likely to obtain additional email correspondence with the Mayor. See Sadok Declaration dated October 19, 2018, at ¶ 5.

[4] Plaintiffs attempt to give greater importance to their arguments by asserting that there is a "continuing" violation of the Fair Housing Act and NYC Human Rights Law. Plaintiffs forget that this is merely an unproven allegation, which the City disputes. Many of Plaintiffs' arguments are based upon the similar incorrect presumption—that the community preference policy has been found to be illegal and that the City is applying it anyway.

made decisions not to settle this case,[5] he is "the ultimate decision-maker as to whether [the community preference] policy would continue." Pls.' memo at 3.

Contrary to Plaintiffs' argument, no decision to maintain the community preference policy was made when this administration began its tenure. As the Mayor explained, "[t]he community preference policy is just one of many long-standing policies in place prior to [his] being elected as Mayor. When [he] began [his] first term as Mayor in 2014, the community preference policy had already existed for over twenty-five years." de Blasio Dec. at ¶ 7. The Mayor further 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.[6] The Mayor 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."[7] Id. at ¶ 11. Any "decision" not to settle this lawsuit, but to defend it, is not the same as a decision to maintain this longstanding policy.

Further, contrary to Plaintiffs' assertions, they cannot properly question the Mayor about his evaluation of settlement options with counsel, as those communications are privileged. Id. at ¶ 12. Plaintiffs' argument that "substantive information" that "one comes to have" from privileged discussions somehow loses its privilege if thought about for any other

[5] 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.

[6] Ms. Been similarly testified that she was not aware of any decisions the Mayor made about the community preference policy outside of the settlement discussions. See Ex 1 to Sadok Declaration dated October 19, 2018.

[7] 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.

purpose lacks merit and support in the law. See Pls.' Memo at 4. First, the Mayor has already made clear that he has not considered modifying the community preference policy outside of settlement discussions. See de Blasio Dec. at ¶ 11. Second, Plaintiffs' proposition is unsupported by the law. The cases Plaintiffs rely upon do not speak to this outrageous proposition, but address those circumstances in which facts communicated to an attorney may not be privileged.[8] One has nothing to do with the other. If settlement discussions, including discussions about potential alternatives or modifications to a policy for the purposes of settlement, were not privileged and could become a basis for liability for the very case the settlement discussions relate to (let alone any other case), as Plaintiffs are suggesting, the City would never be able to consider settlement or engage in settlement negotiations. Plaintiffs' entire approach is contrary to the law, contrary to good public policy, and is nothing more than a desperate concession of the weakness of the "evidence" found in the tremendous amount of discovery provided to Plaintiffs in this case.[9] That the Court did not adopt Plaintiffs' unsupported argument that they are entitled to depose the Mayor based upon his involvement in

[8] Plaintiffs' reliance upon Judge Parker's holding that Ms. Been's testimony of her "own thoughts" were not covered by the attorney client privilege is of no moment. The discussions and thoughts regarding policy alternatives or modifications for settlement are also protected by the work product privilege. Finally, Ms. Been did testify regarding various policy modifications that were considered and rejected. See Ex. 2 at 208–213 annexed to the Gurian Declaration (ECF 567-2). Thus, the Mayor's testimony on these issues, to the extent he was even involved in the decisions that Ms. Been discussed, would be duplicative.

[9] There have been 18 individual fact depositions of current and former City employees, plus an extensive 30(b)(6) depositin of the City (four of five parts have been completed). The depositon of one other City employee is scheduled. See Sadok Declaration dated October 19, 2018 at ¶ 3. Over 22,590 documents have been produced from more than 50 custodians. See id. at ¶ 3. As noted above, two new custodians' email is being searched and produced, and the Mayor's and one other's email is being searched again for more recent documents. See id. at ¶ 5.

settlement decisions for this case, and credited the Mayor's assertion of privilege, is clearly not erroneous or an error of law.

Plaintiffs' claim that the Mayor has a "personal commitment" to the community preference policy likewise fails. Even if, arguendo, the Mayor has a "personal commitment" to the community preference policy, that does not mean he has unique factual information about the policy that cannot be obtained from others or by document discovery. Moreover, the Mayor's statement, that the community preference policy is "crucial to all affordability efforts" is simply a statement that is consistent with the City's position in this case, and neither this nor other statements of this kind demonstrate that the Mayor has direct and personal involvement with or unique knowledge about the community preference policy.

High-ranking officials are often the "ultimate decision-makers" on any number of issues. 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. "Indeed, that ["ultimate decision-maker" argument] could justify the deposition of a high-ranking government official in almost every…case, contrary to the teachings of Lederman." State of New York v. United States DOC. 2018 U.S. Dist. LEXIS 162088, at 19 (S.D.N.Y. Sept. 21, 2018). Plaintiffs must demonstrate not just that the Mayor is the "decision-maker," but that he has been personally and directly involved in any of the "decisions" regarding the community preference policy at issue in this case. Plaintiffs have failed to do so and, thus, Judge Parker's Order holding the same is not erroneous.

B. The Order Properly Requires that Plaintiffs Demonstrate that the Mayor Possesses Unique Facts not Unique Opinions, Intent or Motive

Obviously conceding the weakness of their "unique perspective" argument made to Judge Parker, see Pls.' September 26, 2018 Memo at 3 (ECF 484), Plaintiffs have attempted to

re-characterize their argument to be that the Mayor has unique "intent and motivations" which they claim are "factual questions." Pls.' Memo at 5. Plaintiffs again miss the point. Characterizing the factual information the Mayor has as his own "intent or motive" for "why [he] holds…his beliefs or directs a policy in a particular direction" is no different than their abandoned "unique perspective" argument. Each person has unique opinions, and reasons for those unique beliefs or opinions. By that standard, every person would have unique factual information by virtue of having an opinion and reasons (or motives) for that opinion, thereby undermining the purpose of the exceptional circumstances standard. A "unique intent or motive" standard is the exact opposite of exceptional circumstances and contrary to the law. See Pls.' Memo at 5. 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). The purpose of a deposition is to learn facts, not to explore the opinions and points of view of the deponent. Contrary to Plaintiffs' position, they are not entitled to multiple depositions, in particular of high-ranking officials, simply to get different perspectives on or motivations regarding the same facts.

Plaintiffs' reliance upon United States v. New York City, 2009 U.S. Dist. LEXIS 68167, 2009 WL 2423307 (E.D.N.Y. Aug. 5, 2009) for the proposition that the Mayor's beliefs are relevant, and insistence that Judge Parker improperly distinguished the case, fails. Plaintiffs claim that the Order is erroneous because in distinguishing United States Judge Parker only focused on the form of the testimony, i.e. sworn versus unsworn statements. Pls.' Memo at 5. Plaintiffs' argument, however, conveniently disregards the Order's discussion of the nature of

the sworn testimony. Specifically, the Order properly distinguished United States, explaining that while Mayor Bloomberg had provided "sworn testimony before the United States Senate concerning issues central to the case that reflected personal knowledge about and involvement in those issues[,]…Mayor de Blasio has not offered sworn testimony suggesting personal involvement in the administration of the Community Preference Policy or special knowledge in the policy." Order at *4 (emphasis added). The Order further notes that the Mayor's "affidavit confirms that Plaintiffs have already deposed the officials most knowledgeable about the policy." Order at *4. In any event, United States is not binding precedent, and thus not following it does not make the Order contrary to the law.[10]

Even if, arguendo, probing a deponent's "motive" may be appropriate in a deposition, and even if a witnesses' motive may be central to a case, Plaintiffs' have failed to demonstrate how the Mayor's motive or intent is unique and necessary to this case.[11] The Mayor has not been personally and directly involved in any decision at issue in this case. Moreover, the Deputy Mayor for Economic Development and the current and most recent HPD Commissioner (both a part of the de Blasio administration) have been deposed, and have been asked questions

[10] The same applies to Plaintiffs' disagreement with the Order's discussion of Pisani v. Westchester, 2007 U.S. Dist. LEXIS 3202, 2007 WL 1007747 (S.D.N.Y. Jan. 16, 2007). Pisani is not binding law, and thus even if the Court did not properly distinguish it, it is of no moment. Moreover, Pisani is distinguishable, as the deponent was personally and directly involved in the decision at issue in the litigation.

[11] This case is unlike New York State v. United States DOC, 2018 U.S. Dist. LEXIS 162088 (S.D.N.Y. Sept. 21, 2018). There, the motive of Secretary Ross was directly at issue as the claim in the case was that his stated reasons for adding the citizenship question were not the actual reasons the questions were added. Moreover, there the court concluded that Secretary Ross was personally and directly involved, in an "unusual degree" in making that decision. Id. at 19. Here, Plaintiffs have not established that the Mayor has been personally and directly involved in any relevant decision, and therefore his motive is irrelevant.

to probe their "intent or motive" surrounding the community preference policy. The Mayor also stated in his declaration that:

> "[he] was not the Mayor when the community preference policy was enacted or when the applicable percentage was increased, nor did [he] have any personal involvement with either of those events. Any involvement [he] ha[s] had as Mayor regarding the implementation of the 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. Any decisions [he] was involved with as Mayor around changing or modifying the community preference policy have been in the context of attempting to resolve this litigation.

De Blasio Dec. at ¶ 7. Consequently, as the Mayor has not been personally and directly involved in the "decisions" about or administration of the community preference policy, there is no reason to explore the Mayor's motive for such "decisions." Further, given that his limited involvement has been with senior members of his administration, all of whom have been deposed about their intent and motives, any information that the Mayor may have is not unique and could be provided by others.

Additionally, Plaintiffs point to no "evidence" to suggest that the Mayor actually has a motive or intent other than what has been stated by him in the public realm. Indeed, Plaintiffs make self-serving, conclusory statements and mischaracterizations of other witness testimony to support their fishing expedition. As explained more fully in section A(d), supra, Plaintiffs simply hope to cross-examine the Mayor about his public statements, in an attempt to create "evidence" of the Mayor's "true motive" without having first provided any evidence that the Mayor's public statements may not be reflective of the Mayor's true intent and motive. Thus, as the Mayor has not been directly and personally involved in any decision in the case, and because Plaintiffs have no basis to question the validity of the Mayor's intent and motive, they

are not entitled to depose the Mayor. See State of New York, 2018 U.S. Dist. LEXIS 162088 (S.D.N.Y. Sept. 21, 2018).

C. The Order Properly Rejects Plaintiffs' Circumstantial Evidence Argument

Plaintiffs next argue that the Order "avoided" discussing the fact that the motive- and intent-oriented questions will lead to valid circumstantial evidence which they are entitled to use to attempt to prove their intentional discrimination claim, Pls.' Memo at 6, lacks merit. Simply because the Order does not directly respond to each and every one of Plaintiffs' arguments, does not mean it was not considered and properly rejected. The Order notes that it is based upon a review of "the parties' briefs and accompanying documents." Order at 2.

Moreover, the Order's rejection of Plaintiffs' circumstantial evidence argument was not erroneous, but was consistent with the purpose of the exceptional circumstances standard. The exceptional circumstances standard requires that the official have actual factual knowledge that is necessary for Plaintiffs to prove their claims. While Plaintiffs may use circumstantial evidence to prove their case, that does not mean that they are entitled to gather such circumstantial evidence through the deposition of a high-ranking official. The exceptional circumstances standard is in place to prevent high-ranking officials from having to get involved in litigation that they are not directly and personally involved with. Lederman, 731 F.3d at 203. Plaintiffs have not even identified what circumstantial evidence they have reason to believe the Mayor will uniquely possess that is necessary to their claims, but instead only argue what Plaintiffs' hope to learn from the Mayor. As Plaintiffs have not demonstrated that the Mayor has unique and factual knowledge necessary to their claims (in the form of direct or circumstantial evidence) they are not entitled to depose the Mayor, and it was not erroneous for Judge Parker to deny Plaintiffs' motion.

Furthermore, the "circumstantial evidence" sought by Plaintiffs is well beyond the appropriate scope of probative circumstantial evidence. Plaintiffs seek to depose the Mayor about issues and policies that are at most, only tangentially relevant to this case in order to support an unviable theory of liability. Specifically, Plaintiffs seek to depose the Mayor about segregation related issues (school segregation, fear of racial change, whether there is a plan to end segregation) based upon their theory that they will be able to demonstrate intentional discrimination by showing that the City has a policy of being responsive to those that want to maintain the racial status quo, and that the community preference policy is one manifestation of that policy.[12] It is evident that Plaintiffs are attempting to cast as wide a net as possible to "catch" evidence of discriminatory intent in broad housing policy and segregation issues, with the hope that the alleged discriminatory intent they assume exists related to other policies and issues can then be used as to support their claims that the community preference policy is intentionally discriminatory.

However, as Judge Parker has explained previously, "the scope of evidence relevant [to establishing discriminatory intent] has been circumscribed by the courts. See Vill. of

[12] 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. As Plaintiffs point out, the Mayor has stated that the lottery has an "integrative effect." See Pls.' Memo at 12. 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 annexed to the Sadok Declaration, dated July 23, 2018 (Donovan Dep. 109:9-110:2) (ECF 496-11). 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) (ECF 496-9) and Ex. M (Weisbrod Tr. 49:19-51:22) (ECF 496-13). The Mayor should not likewise be subject to questions toward no probative end.

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Arlington Heights, 429 U.S. at 267; United States v. Yonkers, 837 F.2d 1181, 1221 (2d Cir. 1987)." Feb. 1, 2018 Decision and Order, ECF 259. According to the Courts, the factors to consider in establishing circumstantial evidence of discriminatory intent 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 departures. Arlington Heights v. Metro Hous. Dev. Corp., 429 U.S. 252, 267-68 (1977). See also Winfield v. City of N.Y., No. 15CV5236-LTS-DCF, 2016 U.S. Dist. LEXIS 146919 (S.D.N.Y. Oct. 24, 2016). Therefore, as Plaintiffs' theory of liability is not supported by the law, discovery toward that end lacks probative value and is nothing more than a fishing expedition.[13] Plaintiffs must not be permitted to undertake such a fishing expedition,[14] especially through the deposition of the Mayor, and especially when they have failed to demonstrate exceptional circumstances necessitating the deposition on these topics.

[13] Even if, arguendo, this theory of liability can be properly pursued, the only statement of the Mayor that Plaintiffs point to on the topic of "fear of racial change" does not help Plaintiffs meet their burden of demonstrating exceptional circumstances. The article in which the Mayor discusses "fear" and "uncertainty" makes clear what "fear" the Mayor is speaking about (i.e., "fear of displacement, fear of more people moving in and driving up rents, fear of taller buildings that change the look of our streets."). See Ex. 2 to the Sadok Declaration dated October 19, 2018.[13] That Plaintiffs believe (or hope) that there is some other explanation (i.e. a racialized component of the fear) is not a basis to depose the Mayor.

[14] Plaintiffs have been permitted discovery in pursuit of this non-viable theory of liability. Not only have Plaintiffs probed these issues with deponents, the City retrained its assisted-review technology and undertook a second document production based upon an expanded concept of responsiveness that is more inclusive of these tangential issues.

D. The Order Properly Holds that Plaintiffs Seek to Cross-Examine the Mayor Based Upon Issues in Factual Dispute[15]

Plaintiffs' attempted attack on the Order's statement that Plaintiffs seek to depose the Mayor to "cross-examine" him fails. The arguments asserted actually demonstrate that Plaintiffs are in fact seeking to cross-examine the Mayor. Plaintiffs insist the Mayor "knew" certain facts and want to ask him why he has or has not acted in a certain way in light of those facts. That is not fact gathering, but cross-examination. Plaintiffs likewise seek to cross-examine the Mayor about his declaration. See Pls.' Memo at pp. 18–21 (ECF 566).

Additionally, as the Order recognized, "many of Plaintiffs' proposed areas of questioning assume facts that the City disputes." In other words, the alleged "facts" Plaintiffs claim are the basis for their questions have not been proven to be facts, and are actually nothing more than self-serving unsupported characterizations of public statements.

For instance, Plaintiffs' proposed questions about the Mayor's "choice to not" try to persuade Council Members or Speaker Johnson to modify the community preference policy is based upon the erroneous presumptions that the community preference policy violates applicable law, that the City acknowledges this, has an obligation to change it, and yet continues

[15] For a more complete response to Plaintiffs' particular proffers, please see Section B of the City's July 24, 2018 Memorandum of Law (ECF 498) and Section C of the City's August 8, 2018 Sur-Reply Memorandum of Law (ECF 523). While for the most part, Plaintiffs have repeated the same arguments they made to Judge Parker, they have relied upon new documents. Specifically, Exhibit 22 to Gurian's September 26, 2018 declaration was not included in Plaintiffs' motion to compel. Plaintiffs also added pages to some transcript excerpts (see Ex. 2, Excerpts of depo of Vicki Been [Been 2], at 63) (ECF 567-2); Ex. 12, Excerpts of depo of Alicia Glen, p.216) (ECF 567-12). Consequently, these new documents and transcript excerpts were not considered by Judge Parker and should not be considered by this Court. See 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)). Moreover, Plaintiffs have removed some pages from transcript excerpts (ECF 567-5 omits p. 202, which was included in ECF 515-2; ECF 567-14 omits pp. 64, 86–87, 93, which were included in ECF 515-5; ECF 567-19 omits pp. 2 and 4 which were included in ECF 485-28) and have not included 10 of

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to apply it. Plaintiffs ignore that there has been no finding that they have met their burden of proof, and that the City has asserted defenses that it intends to prove in the event Plaintiffs do meet their burden. Contrary to the underlying presumption of the question, the Mayor has no obligation to persuade people to accept a modified community preference policy, and thus it is irrelevant why he allegedly has "not chosen" to do so.

Plaintiffs' arguments about needing to probe whether the City has a plan to end residential racial segregation are similarly flawed. The City does not have an obligation to have a plan to end residential racial segregation, so whether the City has a plan, and why or why not, is irrelevant to this case.[16] Nor is this case about residential segregation generally.[17] While Plaintiffs' claim that the community preference policy perpetuates segregation, that will be proven or disproven through data analysis undertaken by experts, and not the Mayor's or any other witnesses' testimony. The Mayor should not be required to sit for a deposition based upon Plaintiffs' proposed cross-examination style questions that are based upon incorrect presumptions of fact about irrelevant or tangentially relevant issues to obtain circumstantial evidence with little to no probative value.

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the exhibits previously relied upon. See ECF 485-3, ECF 485-9, ECF 485-14, ECF 485-17, ECF 485-18, ECF 485-20 ECF 485-22; ECF 485-26; ECF 485-31; ECF 485-32.

[16] It is simply beyond dispute that the City has many policies and programs that, among other things, address residential racial segregation. Plaintiffs had ample opportunity to explore such policies with prior deponents but instead asked only the narrow question based on Plaintiffs' erroneous presumptions of the City's obligations to have a "plan to end residential racial segregation." Pls.' Ex. 12 at 262 (ECF 567-12). If Plaintiffs had approached their depositions as actual fact-finding opportunities rather than only seeking carefully worded "admissions" or quotes for the press (or an attempt to create a basis to depose the Mayor), the purported need to depose the Mayor about this issue would not have ensued. Plaintiffs' failure to properly depose prior deponents should not serve as the basis to depose the Mayor.

[17] Plaintiffs' arguments regarding school segregation likewise fail. This case does not challenge school segregation.

Plaintiffs' arguments surrounding the Mayor's statement that the "50-50 split speaks to both parts of the reality," fail for these 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 the City's rationales for the community preference policy with several other deponents.[18] As Magistrate Judge Parker properly found, Plaintiffs do not need to, nor are entitled to, depose the Mayor for this purpose.

As to the Mayor's statements regarding the "integrative impact" of the affordable housing lottery and that community board districts are "very diverse, in and of themselves",[19] Plaintiffs simply conclude that the Mayor's statements are an "attempt to paint a false picture…to cover-up the segregated residential reality." Pls.' Memo at 11. No facts in this case have been established regarding the diversity of community districts, nor have Plaintiffs cited to any evidence that the Mayor himself knew otherwise. Further, Plaintiffs will have to prove a prima facia case of perpetuation of segregation through their expert's analysis, not the Mayor's generic statement. 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 has anything to do with the Mayor's prospective testimony. Finally, how Plaintiffs hope to use the Mayor's expected testimony about these statements (i.e. to attempt to prove intentional discrimination) is not a

[18] See e.g., Ex. I (Been Dep. I at 19:05 – 23:7) annexed to Sadok Dec. dated July 23, 2018 (ECF 496-9), Ex. D (Torres-Springer Dep. at 261:3-265:24) annexed to Sadok Dec. dated July 23, 2018 (ECF 496-4).

[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. Pls.' Ex. 9 at 2 (ECF 567-9) (Mayor noting that "of course we want a more intergraded [sic] 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.

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.

Furthermore, 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 10. 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 (ECF 567-14). 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.").[20] 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 a "conflict" that necessitates deposing the Mayor.

Additionally, to the extent Plaintiffs believe that pretext exists because the rationale articulated does not "fit how the policy actually works," Plaintiffs have questioned

[20] 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). Similar language for the rationale of the community preference policy has been expressed by other deponents as well. See e.g. Ex. G to Sadok Declaration dated July 23, 2018 (Perine Dep. 211:25 – 214:21) (ECF 496-7).

many deponents, including the current and several former HPD Commissioners, about this alleged lack of "fit" between the policy and this and other rationales for the policy. See Ex. I annexed to Sadok Dec. dated July 23, 2018 (Been Dep. I at 19:05 – 23:7) (ECF 496-9), Ex. D annexed to Sadok Dec. dated July 23, 2018 (Torres-Springer Dep. at 261:3–265:24) (ECF 496-4). There is no reason for Plaintiffs to make the same inquiry of the Mayor.

In short, Plaintiffs' proffer is nothing more than the Mayor's public comments about the broad issues he and his administration deal with on a daily basis. None of those statements demonstrate that the Mayor has direct and personal involvement or unique information about the community preference policy. Thus, the Order properly concluded that simply because the "Mayor may have defended the policy in a general way in some public statements consistent with the City's position in this case does not mean he has unique knowledge or involvement…" Order at *5.

The Mayor must be able to speak publicly about issues facing the City without fear of being deposed in the event that any number of those issues becomes the topic of litigation. Since taking office, the Mayor has been named as a defendant or respondent, either in his official or individual capacity, approximately 150 times. See Sadok Sur-Reply Dec. dated August 8, 2018, at ¶5 (ECF 522). The Mayor is not named in this suit whatsoever. If the Mayor had to be deposed in each of those lawsuits, and others where he is not even named, simply because of public statements that are part of him doing his job, the Mayor would be spending an inordinate amount of time in depositions. This is contrary to the purpose of the exceptional circumstances standard. See Lederman, 731 F.3d at 203.

E. The Order Properly Relied upon the Mayor's Declaration

Plaintiffs' argument that Judge Parker should not have credited the Mayor's sworn declaration lacks merit. Specifically, Plaintiffs argue that because Judge Parker found that Deputy Mayor Alicia Glen's declaration required follow-up questions, the Mayor's declaration likewise requires follow-up questions. Plaintiffs cite no case law to support such a proposition, nor does such a proposition make any sense. If every declaration, no matter its content, necessitated follow up questions, then declarations could never be relied upon to support motions to quash depositions, let alone motions to dismiss or summary judgment motions. Such a result is untenable.

Further, the questions Plaintiffs seek to pose are attempts to impeach the Mayor's sworn statements about his lack of unique knowledge, and not "follow-up" questions regarding purported factual assertions. Plaintiffs are not entitled to depose the Mayor to try to attempt to impeach his sworn statements in an effort to demonstrate that contrary to those statements he actually has unique knowledge to meet the exceptional circumstances standard. Such an approach would render the exceptional circumstances standard meaningless. Simply because Plaintiffs may have questions about the Mayor's statements does not render the Court's decision to credit the sworn declaration clearly erroneous.

Plaintiffs' reliance upon State of New York v United States DOC, 2018 U.S. Dist. LEXIS 162088 (S.D.N.Y. Sept. 21, 2018) and upon Sherrod v. Breitbart, 304 F.R.D. 73 (D.D.C. 2014) for the proposition that a deposition is necessary to follow up on issues raised in the Mayor's declaration is misplaced. Neither case holds that a deposition of a high-ranking official is necessary to question that official about statements made in his declaration in opposition to the deposition. Moreover, while both cases address the use of a deposition as opposed to other forms

of fact discovery (or public statements), by no means do they do so as a substitute for the exceptional circumstances standard.

For instance, in State of New York, the court found that Secretary Ross was the ultimate decision maker on the decision at issue in the case (whether to add a citizenship question to the census survey) who had unique factual knowledge about the decision that was central to the case. The court further held that the record before the Court that included apparently contradictory statements about key issues to the case put the Secretary's credibility directly into question. Id. at 19-23. After having found that the exceptional circumstances had been met, the Court noted that other forms of discovery would not allow for refreshing of the Secretary's recollection, or testing the Secretary's credibility, and thus rejected those alternative forms of discovery. Id. at 23.

In Sherrod, the Court determined that the proposed deponent "alone has precise knowledge" of what was considered in making the decision that was at issue in that case. The Court rejected the notion that public statements about that decision were a substitute for a deposition because there was not an opportunity for follow-up.

Here, Plaintiffs are trying to rely upon these cases to circumvent the exceptional circumstances standard, a proposition that neither case supports. Unlike in those cases, Plaintiffs have not met their burden to establish that the Mayor has unique factual information necessary to Plaintiffs' claims (nor can they). Nor have Plaintiffs demonstrated that the Mayor's credibility is in question, and is central to the case (as was the case in State of New York).

Plaintiffs rely upon a single article to try to demonstrate a basis to impeach the Mayor's declaration. That article addresses the Mayor's management style—an issue that is by no means central to this case. Nor does Plaintiffs' self-serving mischaracterization of Deputy

Mayor Glen's deposition testimony about the reality of politics put the Mayor's credibility into question. See Pls.' Memo at 19 fn55. These attempts to put the Mayor's credibility into question are by no means similar to the nature of the apparently contradictory evidence that was before the court in State of New York (e.g. formal memos, testimony before Congress, deposition testimony of others). See State of New York, 2018 U.S. Dist. LEXIS 162088 (Sept. 21, 2018 SDNY) at 22-23. Nor is the Mayor's credibility central to the case. The Mayor is not the "relevant" witness whose motive and credibility must be examined. Id. at 23.

Therefore, as Plaintiffs have cited to nothing credible to demonstrate that the Mayor's declaration is not reliable, and because the desire to cross-examine a witness about a declaration is not sufficient to meet the exceptional circumstances standard, the Order's reliance upon the Mayor's sworn statements is not clearly erroneous and should not be disturbed.

F. The Order Did Not Err in Finding that Other Less Burdensome Discovery Was Available

Plaintiffs' arguments for why "others are not adequate substitutes for the Mayor" lack merit. First, Plaintiffs claim that the Order's conclusion that current and former HPD Commissioners were "fully questioned" is erroneous because of privilege assertions confuses the issues. Plaintiffs are not entitled to depose the Mayor simply because the City asserted privileges during other deponent's depositions. That testimony is not "unavailable elsewhere"–it is simply privileged. Moreover, there is no reason to believe that the City would not likewise assert privilege for similar questions asked of the Mayor.

Moreover, Plaintiffs' assertion that "multiple witnesses confirmed the necessity of questioning the Mayor directly" is disingenuous. The examples Plaintiffs provide are circumstances where the witnesses could not speak to the Mayor's opinions on broad

tangentially relevant topics such as racial politics and segregation. None of the examples point to testimony about the community preference policy itself.

Plaintiffs' examples clearly demonstrate that Plaintiffs do not believe that the Mayor has unique factual knowledge, and are not interested in obtaining facts from the Mayor that they cannot obtain elsewhere, but instead are simply interested in the Mayor's opinion on any number of topics. Even if opinion testimony were appropriately sought and relevant, because the Mayor does not have unique, direct and personal involvement in the administration of the community preference policy (the only policy challenged in this case) or the "decisions" challenged in this case, there is no need for the Mayor's personal opinions whatsoever, let alone on the broad, tangentially related (at most) issues of segregation or racial politics. In short, it is thus irrelevant that Plaintiffs are unable to obtain the Mayor's opinions on these topics through other witnesses.

G. The Order's Statements Regarding Plaintiffs' Factual Presumptions and Hypothetical Questions Are Proper

Plaintiffs claim that the Order must be overturned because of its alleged unsupported statements that the Plaintiffs' proposed deposition questions "assume facts that the City disputes" and that Plaintiffs' "seek answers to hypothetical questions." Pls.' Memo at 24. First of all, while Judge Parker may not have outlined the "specifics" in support of her statements, such specifics were in the record before her. The City pointed out several of the incorrect presumptions that served as the basis of Plaintiffs' questions. There was no need for the Court to restate them. Further, contrary to Plaintiffs' assertion, the issue is not whether a witness could correct these presumptions at a deposition, but that Plaintiffs' proffer for needing the deposition was exaggerated and baseless given the flawed assumptions is relied upon.

As to the hypothetical questions, Plaintiffs' questions regarding what witnesses believe Council Members would do if there was no community preference policy are hypothetical questions. 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). While Plaintiffs may believe that the answer would provide important information for them, it still does not mean that the nature of the question is appropriate, or that they have met the exceptional circumstances standard to allow any questioning, let alone hypothetical questions.

CONCLUSION

In light of the foregoing, Plaintiffs' objection seeking to overturn Magistrate Judge Parker's September 12, 2018 Order denying Plaintiffs' motion to compel and granting Defendant's cross-motion for a protective order to prohibit the deposition of Mayor de Blasio should be denied in its entirety.

Dated: New York, New York
October 19, 2018

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By: __/s/_____
MELANIE V. SADOK

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

JANELL WINFIELD, SHAUNA NOEL,
and EMMANUELLA SENAT,

Plaintiffs,

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

CITY OF NEW YORK,

Defendant.

----------x

PLAINTIFFS' MEMORANDUM OF LAW IN REPLY TO DEFENDANT'S OPPOSITION TO PLAINTIFFS' OBJECTIONS TO THE MAGISTRATE JUDGE'S OPINION AND ORDER OF SEPTEMBER 12, 2018 (ECF 545)

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October 26, 2018

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATIONS

INTRODUCTION

Defendant's opposition brief claims that the purpose of a deposition is "not to explore the opinions and points of view of the deponent," exactly the opposite of the fact-finding process that is necessary in a discrimination case; that Mayor de Blasio was not involved in decisions about the outsider-restriction policy, when record-evidence and his own declaration show that he was; that the nature of the Mayor's commitment to outsider-restriction is not relevant to the determination of these objections, when it demonstrates his central and *personal* role in the active maintenance of outsider-restriction; that evidence of pretext should be ignored, instead of taken into account as controlling case law requires; that it was appropriate to take the Mayor's declaration at face value and that the Mayor's credibility is not "central to the case," even though there is evidence of his both resorting to pretext and evasion; and that the heart of defendant's justification – that Council Members will not support affordable housing development in their districts in the absence of the outsider-restriction policy ("ORP") – should not be tested, even though he, the Mayor, is uniquely suited to assess and influence projected Council Member conduct.[1]

The mistaken premises, aimed at undergirding the challenged decision, in fact simply mimic the way that decision failed to appreciate the relevant facts, the relevant law, or the need and proper manner of integrating them. These are not "reasonable minds may differ" disputes; they are failures that render the challenged decision clearly erroneous and contrary to law.

ARGUMENT

POINT I
DEFENDANT SEEKS TO CREATE A FALSE DICHOTOMY BETWEEN FACTS ON THE ONE HAND AND MOTIVATION ON THE OTHER.

The "ultimate fact" is whether discrimination has occurred, and the "factfinder's disbelief

[1] Defendant's propositions referenced in this paragraph are found in ECF 604, defendant's Oct. 19, 2018 brief in opposition ("Def. Brief"), at 10, 11-12, 9, 19-20, 21-23, and 25, respectively.

of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination." *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 510, 511 (1993). Determining motivation is not a simple task. "[Q]uite obviously, discrimination is rarely admitted," and thus plaintiffs are most often obliged to rely on the "cumulative weight of circumstantial evidence." *MHANY Mgmt. v. Cty. of Nassau*, 819 F.3d 581, 610-11 (2d Cir. 2016) (citation omitted).

A key element in these assessments is determination of credibility. *See id.* at 611 (citing "incredible" statements of municipal officials about not knowing the racial composition of the town as evidence of knowledge that citizen opposition to affordable housing was race-based). *See also Vega v. Hempstead Union Free School Dist*., 801 F.3d 72, 87 (2nd Cir. 2015) (citation omitted) (holding discrimination plaintiffs are entitled to create a "mosaic" by identifying "'bits and pieces of evidence' that together give rise to inference of discrimination"); *Kaytor v. Electric Boat Corp.*, 609 F.3d 537, 548 (2d Cir. 2010) (citations omitted) (noting proof of discrimination "often requires an assessment of individuals' motivations and state of mind . . .").

That motivation is *subjective* does not remove it from the realm of facts or factfinding; on the contrary, the opinions and views of the ultimate decisionmaker are precisely what need to be probed in order to be *able* to reach a factual determination. Failure to appreciate this was error.

POINT II

DEFENDANT THOROUGHLY MISCHARACTERIZES THE MAYOR'S ROLE IN OUTSIDER-RESTRICTION.

Defendant claims that although the Mayor declared that he has "not considered changing the community preference policy for any reason other than to facilitate resolution of this litigation," that does not mean that he made a decision to maintain the policy.[2] But it most certainly does.

[2] *See* Def. Brief, at 7.

When a policy is being actively discussed and the ultimate decisionmaker is not changing it, that is a decision to maintain – not just for the purposes of litigation, but as a matter of an administrative policy that the Mayor has the authority to change unilaterally at any moment (the Mayor confirmed this it was *his* decision to reject certain alternatives to the ORP).[3]

In fact, the Mayor was actively involved in outsider-restriction in a variety of contexts, as made clear to the Court below and in our opening brief to this Court.[4] Moreover, despite the Mayor's attempt to downplay his role, there is even more evidence of it. [Redacted]

It is implausible that the Mayor's views were not central to why outsider-restriction was maintained as a matter of administration policy, independent of any lawsuit. [Redacted]

The attempt to cabin the Mayor's personal participation to internal settlement discussions is without merit. Defendant, faced with the uncomfortable (and obvious) point that the Mayor

[3] *See* discussion in ECF 566, plaintiffs' Sept. 26, 2018 opening brief to this Court ("Pls. Obj. Brief"), at 2-3, and note that, even in the absence of settlement of the lawsuit, the Mayor did approve a change to the policy, one that involved the "nesting" of outsider-restriction with other preferences and set-asides. *Id.*

[4] *See* ECF 484, plaintiffs' July 9, 2018 brief in supp. of motion to compel ("Pls. Motion to Compel brief"), at 4-9; ECF 513, plaintiffs' July 31, 2018 reply brief in supp. of motion to compel ("Pls. Motion to Compel Reply Brief"), at 2-3; and Pls. Obj. Brief, at 2-16.

[5] *See* June 12, 2014 email chain (emphasis added), annexed as Ex. 1 to the Oct. 26, 2018 declaration of Craig Gurian ("Gurian Oct. 26 Decl.").

[6] *See* Pls. Obj. Brief, at 7-8 (underscoring Mayor's awareness that Ms. Been held this view).

cannot "unlearn" *facts* he has obtained, regardless of the source, when he engages in *governing*, asserts without authority that plaintiffs have put forward an "outrageous proposition."[7] In fact, the proposition is neither outrageous nor new. *See Allen v. W. Point-Pepperell Inc.*, 848 F. Supp. 423, 428 (S.D.N.Y. 1994) (emphasis added) (ordering that "plaintiffs and [their attorney] must disclose to defendants all facts of which they were aware at all times relevant to this action, whether or not those facts were communicated by plaintiffs to [their attorney] and *whether or not those facts were learned by plaintiffs from [their attorney]*").

Were this Court to sustain plaintiffs' objections, plaintiffs would not be asking the Mayor what he said to his attorneys or what they said to him; they would be asking him why, as a matter of governance, he chooses to continue outsider-restriction. That questioning has to do with facts in his possession – whether related to his understanding that lottery units made available citywide are integrative;[8] or with his reaction to the fact that, in at least one case, HUD rejected a developer's request to apply outsider-restriction to a building overseen by that agency because to do so "would serve to heighten the current segregative housing patterns" in New York City;[9] or otherwise.

POINT III
NEITHER EVIDENCE OF PRETEXT, DEVIATION FROM ESTABLISHED PATTERNS, NOR OF MENDACITY SHOULD HAVE BEEN IGNORED.

Defendant acknowledges that the decision being challenged relied on the Mayor's statement that he had no unique factual information.[10] But reliance on that statement was error for multiple reasons. First, the Mayor's "no unique facts" assertion was *not* directed to his *own*

[7] *See* Def. Brief, at 7-8.

[8] *See* Pls. Obj. Brief, at 8.

[9] *See* Feb. 2016 email chaining referencing and attaching Apr. 2015 HUD letter, jointly annexed as Ex. 2 to Oct. 26 Gurian Decl. The cited statement from HUD is at page 3 of the HUD letter.

[10] *See* Def. Brief, at 5.

motivations for acting and not acting. Second, a declaration designed for the purpose of avoiding being subject to deposition cannot properly be unaccepted uncritically. Third, the Court below had evidence of statements in the declaration being at odds with the facts. For example, the Mayor specifically wanted the Court to believe the he does "not micro-manage the Deputy Mayors or City Agency Commissioners," a claim widely known to be false.[11] The attempt to mislead the Court in this respect is reason to question the veracity of other portions of the declaration.

Defendant accuses plaintiffs of trying to "cast as wide a net as possible to 'catch' evidence of discriminatory intent in broad housing policy and segregation issues," and puts forth the *non sequitur* that this case "does not challenge school segregation."[12] But what defendant disparages is nothing more than the use of circumstantial evidence specifically recognized as necessary by this Court, following controlling precedent. *Winfield v. City of New York*, 2016 WL 6208564, at *7 (S.D.N.Y. Oct. 24, 2016) (citations omitted) ("Because discriminatory intent is rarely susceptible to direct proof, a district court facing a question of discriminatory intent must make a 'sensitive inquiry into such circumstantial and direct evidence of intent as may be available.'").

So it is notable that defendant has *no* substantive response whatsoever to the fact that the Mayor shied away from even using the word "segregation" for years.[13] It is likewise notable that defendant cannot explain away the mismatch between the Mayor's identification of racial patterns

[11] *See* Pls. Obj. Brief, at 18, n.54, As pointed out in Pls. Motion to Compel Reply Brief, at 6 n.24, the Mayor is very much the micromanager: "*See, e.g.*, Wall Street Journal, 'De Blasio Keeps City Agencies on Short Leash,' Apr. 13, 2016 . . . ('New York Mayor Bill de Blasio has taken a more hands-on and ideological approach than his predecessor in managing the city's 44 agencies . . . In the de Blasio era, commissioners are required to provide weekly reports, submit so-called decision memos to multiple layers of review . . . according to documents and current and former city officials . . . Mr. de Blasio said last week he was 'aggressive' managing agencies and was 'very proud of being a hands-on leader.''); Politico New York, 'To avoid deposition on housing policy, de Blasio claims he is not a micromanager,' July 24, 2018 . . . ('Mayor Bill de Blasio is often described as a micromanager…')."

[12] *See* Def. Brief at 14 and 17 n.17

[13] *See* Pls. Obj. Brief, at 13-14.

in housing as a key driver of racial patterns in schools *versus* his lack of policy or action to deal with housing segregation.[14] Defendant's further assertion that "[i]t is simply beyond dispute that the City has many policies and programs that, among other things, address residential racial segregation,"[15] is belied by the record. Deputy Mayor Glen, for example, acknowledged that she was unaware of any plan to end residential segregation.[16] Even if it were correct to say that there is not a *requirement* to have such a plan, despite AFFH rules,[17] the issue of *why* the Mayor does not treat reducing residential segregation as a priority is highly relevant to his motivations.

More precisely, if the Mayor *wants* there to be less residential segregation, the question is, "What stands in his way of acting, especially since an easy first step would be to have all affordable housing lottery units open on an equal-access basis to all income-qualified New Yorkers?" (the Mayor *does* understand citywide allocation to be integrative). It is no stretch to explore whether his reticence has to do with a desire to avoid angering those who prefer to maintain the racial status quo. This is especially true because the Mayor himself has boasted that he *is* prepared to take on difficult battles and change minds and thus "change our policies profoundly."[18] Why not in respect to replacing outsider-restriction with equal access?

Defendant must be aware of the salience of the Mayor's having *defended* the ORP on the basis that community districts are "very diverse, in and of themselves."[19] A false explanation is

[14] *See id.* at 12-13.

[15] *See* Def. Brief, at 17 n.16.

[16] *See* Pls. Obj. Brief, at 12-13.

[17] *Cf.* 24 C.F.R. 91.225(a)(1) (2015).

[18] *See* Pls. Obj. Brief, at 14-15.

[19] *See id.* at 6-7.

evidence of pretext.[20] So defendant, lacking any explanation, felt itself obliged to tell this Court that "[n]o facts in this case have been established regarding the diversity of community districts."[21] This is neither true nor credible. As Deputy Mayor Glen testified, for example, "I'm aware that New York City is still a city that is deemed to be quite racially segregated."[22]

Defendant's objections to other evidence of Mayoral pretext are similarly wanting. For example, it has no substantive response to plaintiffs' highlighting of the Mayor's statement on allocation of units to the effect that the "'50-50 split speaks to both parts of the reality" (integration and the desire to stay).[23] The observation was not designed to get the Mayor's opinion "in light of Plaintiffs' version of the facts."[24] On the contrary, the observation underlines *the Mayor's* version of the facts: that a community preference for 50 percent of units represents a balance (a "50-50 split") when it is readily apparent (there is no dispute on this point) that the outsider applicant group that cannot compete for 50 percent of the outsider-restriction units is much larger than the insider applicant group that: (a) has priority for the outsider-restriction units; and (b) is permitted to compete for the balance of the units as well. In view of the Mayor's misdirection, the needed questioning relates once again to the *factual* determination of the *Mayor's own motivations* as to the ORP. His misleading suggestion of "balance" is yet more evidence of consciousness of guilt.

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[20] *Cf. United States v. Apple*, 952 F. Supp. 2d 638, 693 n.59 (S.D.N.Y. 2013), *aff'd*, 791 F.3d 290 (2d Cir. 2015), *cert. denied*, 136 S. Ct. 1376 (2016) (finding that defendants' denials of existence of discussions, "in the face of overwhelming evidence to the contrary, strongly supports a finding of consciousness of guilt"). In connection with plaintiffs' New York City Human Rights Law claim, *see Bennett v. Health Mgmt. Sys., Inc.*, 92 A.D.3d 29, 42 (N.Y. App. Div. 1st Dep't 2011) (citations omitted), *aff'd* by N.Y.C. Local Law 35 of 2015 and codified at N.Y.C. Admin. Code § 8-130(c) (holding resort to pretext, like flight from crime, is evidence indicative of consciousness of guilt).

[21] *See* Def. Brief, at 18.

[22] *See* tr. excerpt of Nov. 3, 2017 Glen deposition, annexed as Ex. 3 to Gurian Oct. 26 Decl., at 111:16-112:3. *See also* Pls. Obj. Brief, at 7 n.17 (identifying defendant's own data / assessment as to segregation existence and intensity).

[23] Pls. Obj. Brief, at 9.

[24] *See* Def. Brief, at 18.

Defendant fails to address at all the fact that the Mayor asserted in 2016 that "[t]he law says that when we create affordable housing, we have the right to split it 50 percent for people from the surrounding community" and the rest citywide.[25] Perhaps this is because doing so would draw too much attention to the fact that the statement is so similar to a statement made by former Mayor Bloomberg that was part of what caused that Mayor's deposition to be ordered. *See United States v. City of New York* ("*Bloomberg*"), 2009 WL 2423307, at *2-3 (S.D.N.Y. Aug. 5, 2009) (reciting as among bases for deposition the Mayor's having volunteered his opinion of applicable law: "I think that in fact the tests were job related and were consistent with business necessity"). There is no meaningful distinction between *Bloomberg* and this case. *Bloomberg* is not predicated on that Mayor's uniquely having had access to *data*; a unique element was what *he*, the Mayor, *thought* about the job relatedness and business necessity of the firefighter tests at issue.[26]

Lastly, defendant misses the point when it comes to the lack of fit between the Mayor's stated objective of the policy ("[w]e believe [we have] a very fair approach because folks who have built up communities *deserve* a special opportunity to get affordable housing that's created") on the one hand,[27] and the policy's actual parameters on the other. The ORP does not identify the subgroup of insiders who have "built up communities," or limit the policy to them, or help outsiders who have persevered through difficult circumstances. Defendant's only response is to deny that Commissioner Been said that the policy was not about what people deserve.[28] First, she

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[25] *See* Pls. Obj. Brief, at 11.

[26] In *Bloomberg*, evidence of direct Mayoral involvement included receiving "letters about firefighter testing and hiring from various high-ranking government officials, including members of the City Council, then-State Senator David Paterson, as well as members of the U.S. Congress." *Id.* at 2 n.2. Mayor de Blasio, *inter alia*, was [Redacted]

[27] *See* Pls. Obj. Brief, at 10.

[28] *See* Def. Brief, at 19.

really did say that deservingness is "not the justification."[29] Second, "only" talking about eligibility requirements simply *highlights* the lack of fit between what the Mayor claims as justification for the challenged policy and the policy having no criteria to ensure that it is those who the Mayor cites as deserving are the ones who are being helped. This conflict is evidence of apparent Mayoral pretext, and other witnesses are no substitute. As the Mayor stated when trying to explain away his claim of the internal diversity of community districts, his comments were not based on "specific facts, statistics, or data, but rather reflect my general impressions having lived and worked in the City for many years."[30] As with the community district composition comment, one cannot treat (as the challenged decision did) the Mayor's understanding of and motivation for maintaining the policy as fungible with that of others. It is unique to him and his impressions.

POINT IV

DEFENDANT IS WRONG TO SAY THAT MAYORAL TESTIMONY CENTRAL TO ITS JUSTIFICATION FOR ITS POLICY IS UNNECESSARY.

A core justification for maintaining the ORP is that, without it, Council Members ("CMs") would not support affordable housing development in their districts. This is a forward-looking prediction of what the consequences would be of policy modification. Of necessity, therefore, plaintiffs must ask about: (a) defendant's evidentiary bases, if any, to conclude the predicted consequences will occur; and (b) whether CMs' views are malleable (*i.e.*, whether there is a less discriminatory alternative). Contrary to the presumption in defendant's brief, there is not a requirement of a finding as to one element of a claim (the existence of disparate impact, say) before having discovery as to other elements (whether it is *necessary* for defendant's interest to maintain ORP, whether there are less discriminatory alternatives, whether not pursing such alternatives

[29] *See* Pls. Obj. Brief, at 10.

[30] *See id.* at 19 (*quoting* ECF 497, July 23, 2018 declaration of Mayor de Blasio, at 3-4, ¶ 10).

reflects the impermissible influence of those who seek to keep the segregated status quo).

Accordingly, questions about future consequences are not impermissibly "hypothetical."[31] We know that the City Council Speaker, Corey Johnson, has expressed openness to modification of the ORP.[32] The Mayor acknowledges in his declaration that he does "have regular interactions with the City Council Speaker," but does not recall Speaker Johnson "having expressed such thoughts to me."[33] The relevance here is manifold. For example: (1) it is the Mayor whose position vis-à-vis the Speaker uniquely enables him to discuss and assess the possibility of modification; (2) not recalling the Speaker having expressed thoughts about modification of the ORP begs the question of why the Mayor did not proactively bring up modification to the Speaker – why was this not an issue as to which the Mayor was prepared to expend political capital; and (3) what is the Mayor's unique assessment of the willingness of Council Members to accept modification of the ORP, now that the Mayor has for at least some months known that the Speaker himself is open?

CONCLUSION

For the reasons stated, plaintiffs' objections should be sustained.

Dated: New York, New York
October 26, 2018

Craig Gurian

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[31] *Cf.* Def. Brief, at 25. *Handschu v. Special Servs. Div.*, 2003 WL 26474590, at *7 and *7 n.8 (S.D.N.Y. Jan. 2, 2003), involved hypothetical questions would lead the Court into "peripheral factual disputes." Similarly, in *Bank Brussels Lambert v. Chase Manhattan Bank, N.A.*, 1996 WL 252374, at *5 (S.D.N.Y. May 14, 1996), the court held there could not be "speculation" in "the absence of a factual basis for this theory." Here, by contrast, the factual dispute over what will happen is the *central* dispute on the justification, and the Council Speaker has demonstrated that views on outsider-restriction can in fact be malleable. *See* text accompanying n.32, *infra.*

[32] *See* Pls. Obj. Brief, at 15-17.

[33] *See* ECF 497, July 23, 2018 declaration of Mayor de Blasio, annexed as Ex. 4 to Gurian Oct. 26 Decl., at 6, ¶ 19.

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.

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DECLARATION OF BILL DE BLASIO IN SUPPORT OF DEFENDANT'S CROSS-MOTION FOR A PROTECTIVE ORDER

15-cv-5236 (LTS)(KHP)

Bill de Blasio, pursuant to 28 U.S.C. §1746, states that the following is true, under penalty of perjury:

1. I am the Mayor of the City of New York. I am not named, either individually or officially, as a defendant in this action.

2. I submit this Declaration in support of the Defendant's opposition to Plaintiffs' motion to compel and Defendant's cross-motion for a protective order to bar my deposition.

3. As Mayor, I am the chief executive officer for a City with 8.6 million residents and over 380,000 City employees.

4. As Mayor, I set broad objectives and goals, and with the oversight of my Deputy Mayors, the agencies undertake to reach such goals through their own internal policies, procedures and tools. While I am sometimes briefed on specific decisions being made by an agency, I typically do not have unique knowledge on the subject, and base my approval (or disagreement) of the agency's decision upon the information provided to me.

5. Additionally, I do not micro-manage the Deputy Mayors or City agency Commissioners. I recognize that they are professionals with expertise in their fields, and that they work with personnel that have specialized expertise in their areas of jurisdiction.

6. Due to my vast responsibilities, I rely on briefings from my Deputy Mayors, senior staff, and agency Commissioners to understand the policies and procedures being used by City agencies in carrying out their respective missions and responsibilities. This also applies to my oversight of HPD, the agency that created and implements the community preference policy, being challenged in this litigation. My knowledge as Mayor of the community preference policy has been obtained through my oversight and involvement with City-agencies, and predominantly through my work with HPD and Vicki Been, HPD's former Commissioner. [1]

7. The community preference policy is just one of many long-standing policies in place prior to my being elected as Mayor. When I began my first term as Mayor in 2014, the community preference policy had already existed for over twenty-five years. I am advised that the last notable change to the community preference policy occurred in 2002, when the preference percentage was increased to 50%. I was not the Mayor when the community preference policy was enacted or when the applicable percentage was increased, nor did I have any personal involvement with either of those events. Any involvement I have had as Mayor regarding the implementation of the 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. Any decisions I was

[1] I also have a general understanding of this litigation from communications with senior administration staff and attorneys from the New York City Law Department and my office.

involved with as Mayor around changing or modifying the community preference policy have been in the context of attempting to resolve this litigation.

8. Plaintiffs attach several articles and transcripts that include statements made by me purporting to show that I have unique, first-hand factual information relevant to this litigation. However, as further explained below, I do not believe I have any factual knowledge relevant to the community preference policy that is not also shared by Deputy Mayor Glen and my current and former HPD commissioners. It is also important to note that I speak with the press at press conferences or events typically once or twice of week, and I give interviews with the press typically two to four times per week on a broad range of topics. As a result, it should not be surprising that there are situations where I do not recall the specific facts and circumstances surrounding a particular statement.

9. For instance, as provided by the City's Fifth Responses and Objections to Plaintiffs' First Set of Interrogatories, I do not specifically recall the basis for my statement "The law says that when we create affordable housing, we have the right to split it 50 percent for people form the surrounding community…" See Pls. Ex. 9. The City's attorney's representation to clarify the City's prior response that "[t]he use of the term "specifically" [in the interrogatory response] was not intended to imply that there was any general recollection of the basis or bases for the statement quoted in the interrogatory" is an accurate statement. See Exhibit E to the Sadok Declaration.

10. As to my statements that community districts are very diverse, or that the vast majority of people applying for affordable housing in their community districts have been in their neighborhoods a long time, see Pls. Ex. 10, it is important to note that those statements

were not based upon specific facts, statistics, or data, but rather reflect my general impressions having lived and worked in the City for many years.

11. I understand that Plaintiffs seek to ask me questions about my decisions to reject certain alternatives to the community preference policy in follow-up to testimony provided by former HPD Commissioner Been. See Pls Memo at 7; Pls. Ex. 11 at 208-214. Any decisions regarding potential changes to the policy were made for the purposes of resolving this litigation. While certain approaches were not pursued for settlement, I have not considered changing the community preference policy for any reason other than to facilitate resolution of this litigation.

12. To the extent Ms. Been's testimony suggests that I had approved a proposal for small modifications or "tweaks" to the community preference policy which were adopted, I do not recall discussions about small modifications or tweaks, but rather only broad strategic discussions about the litigation in which Law Department attorneys participated. See Pls. Ex. 11 at 213:8-21.

13. It is my understanding that these discussions were initiated at the request of the Law Department, and that the proposals before me had been carefully vetted through the Law Department. Law Department attorneys were always present during these discussions. I am advised that my deliberations and discussions on alternatives or changes to the community preference policy are privileged, and that is how I also understood them. I have not waived the privilege over these discussions and have not authorized anyone else to waive that privilege.

14. I understand that Plaintiffs seek to ask me questions about my email correspondence with Ms. Been regarding [redacted]

[redacted]

15. I understand that Plaintiffs are also seeking to inquire about my response to Ms. Been that [redacted] because they believe that it will undermine the City's arguments regarding the justifications for the community preference policy, and in particular that it is needed to help overcome community and Council Member opposition to affordable housing projects and rezonings. However, this project had already been approved by the Council, [redacted] does not reflect a belief that I can obtain approvals by the Council without or a with a modified community preference policy.

16. Similarly, Plaintiffs point to other statements in which I purportedly tout my ability to get affordable housing and other projects passed through the City Council. See Pls. Exs. 2 and 21. While my administration has been highly successful in obtaining the approval of Mandatory Inclusionary Housing ("MIH") and several affordable housing projects and rezonings, the statements pointed to by Plaintiffs do not reflect a belief one way or another about whether we would have been able to achieve those accomplishments without the community preference policy or with a modified community preference policy. I was not referencing the role of the community preference policy when making those statements.

17. I understand that Plaintiffs assert that my statement about past administrations "having done nothing" is an admission on behalf of the City that past administrations have done nothing in response to gentrification pressures. See Pls. Ex. 15. I am aware that the Bloomberg administration had anti-displacement programs in place. My

administration's anti-displacement programs and policies expand upon and add to those programs and policies.

18. It is my understanding that Deputy Mayor Glen, former HPD Commissioner Been and current HPD Commissioner Torres-Springer testified about their opinions on whether affordable housing would be passed through City Council with the elimination or modification of the community preference policy. See Transcript of Alicia Glen, dated November 3, 2017, at 131:10-133:20 and 143:11-145:21, Transcript of Vicki Been, dated April 10, 2018, at 26:1-28:22; Deposition Transcript of Maria Torres-Springer, dated May 10, 2018, at 202:3-204:10, annexed to the Sadok Declaration as Exhibits B, C, and D, respectively. I agree with their statements referenced above, and do not have any unique information to share on this topic given my more limited interactions with City Council members and staff.

19. While I do have regular interactions with the City Council Speaker, currently Speaker Corey Johnson, I have not seen the Speaker's interview with Errol Louis in which he purportedly mentions considering a reduction in the percentage of the community preference policy, nor do I recall Speaker Johnson having expressed such thoughts to me.

20. Plaintiffs also mischaracterize the work the City undertook in response to opposition to MIH. Pls. Memo at 12. We listened to the opposition, and responded to it through modifications to our proposal to the extent feasible and appropriate, in order to garner support for the mandatory construction of affordable housing throughout the City.

21. Deputy Mayor Glen, and former HPD Commissioner Been and former DCP Director Weisbrod were the senior team members that coordinated the administration's substantive response to opposition to MIH. They briefed me on their strategy as needed.

22. I understand that Deputy Mayor Glen, former HPD Commissioner Been, HPD Commissioner Torres-Springer, and former DCP Director Weisbrod have all been deposed in this litigation. As Mayor, I have relied upon information on the community preference policy provided to me through briefings and other communications by my Deputy Mayors and Commissioners (and Directors) and other senior staff. I have also discussed the rationales behind the community preference policy with the senior members of my team, including Deputy Mayor Glen and former HPD Commissioner Been. During those conversations we were in agreement on the important role of the community preference policy. I have no reason to believe that I have any unique factual information about the community preference policy.

23. Therefore, as my knowledge of the facts surrounding this litigation are not unique, and due to my vast responsibilities and extremely busy schedule serving the people of New York City, I respectfully request that a protective order to be granted barring my deposition in this case and that Plaintiffs' motion to compel be denied in its entirety.

Dated: New York, New York
July 23, 2018

BILL DE BLASIO

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x
JANELL WINFIELD, TRACEY STEWART and SHAUNA NOEL,
Plaintiffs,
-against-
Civil Action No.: 15-CV-5236 (LTS)(KHP)
CITY OF NEW YORK,
Defendant.
----------x

April 10, 2018
9:20 a.m.

VIDEOTAPED DEPOSITION of VICKI BEEN, held at the law offices of the Anti-Discrimination Center, located at 1745 Broadway, New York, New York 10019, before Anthony Giarro, a Registered Professional Reporter and a Notary Public of the State of New York.

disproportionate impact. But the best tool that we have to present displacement is the Community Preference which litigation like this claims is also a Fair Housing problem. So it feels like there's tension there, or there's -- there's a difficulty in serving both purposes.

Q I just want to make sure I understood your answer. And I just want to go back to what I think that you had said.

Did I hear you correctly to say that Community Preference is the best tool that you have for fighting displacement?

MS. SADOK: Objection.

A Yeah. I think that I have said it's the best tool we have for fighting displacement. It's not the only tool. And it doesn't work by itself. But it's one of the tools and in combination with rent reg, et cetera.

Q I think we've made the

VICKI BEEN

MS. SADOK: Objection.

A Yes.

Q What's described here is this half and half. Does that make sense? They're talking about one-half of the housing and the other half of the housing.

A Mm-hmm.

Q Is that half and half what the mayor considers a balanced approach to the city's Fair Housing obligations?

MS. SADOK: Objection.

A I'm not in the mind of the mayor. The mayor has expressed to me that the Community Preference is an important aspect of his approach to Fair Housing and that it helps to prevent displacement.

MR. GURIAN: Move to strike.

MS. SADOK: We object to that.

Q This is describing half of the housing being aimed at those at risk of displacement and the other half taking

VICKI BEEN

Exhibit 105 for identification, as of this date.)

Q This is one of the policy briefs, titled How Recent Rezoning Affected the City's Ability to Grow.

You're familiar with this one --right?-- because you coauthored it?

A I did.

Q I recognize there are a lot of factors that go into whether or not one has the ability to build Affordable Housing. I'm not trying to say that upzoning or downzoning is the only factor as I'm sure you weren't in the report.

Is it fair in general to say that when there's upzoning, greater density permitted, that that creates more of an opportunity for Affordable Housing construction than would otherwise be the case?

MS. SADOK: Objection.

A It's fair to say that the more -- yes. It's fair to say that if there's been a rezoning to add capacity,

right, that it's more likely that the Fair Housing will pencil out.

Q And conversely in a downzoning circumstance, it's less likely that the Affordable Housing or as much Affordable Housing would pencil out; is that fair?

MS. SADOK: Objection.

A That is correct.

Q So may I ask you to look at page 9 of the report? I guess I should say this also, though not quite as vivid as Housing 2.0 is also a very handsome report.

Do you see in that last paragraph where it says, "Upzoned lots tended to be located in census tracks with a higher proportion of non-white residents than the median track in the city. Downzoned lots, on the other hand, were more likely to be located in tracks with a higher share of non-Hispanic white residents than the city median. And contextual only rezoned lots were located

in areas with still higher shares of non-Hispanic white residents." Do you see that?

A Mm-hmm.

Q You believe those findings to be true?

MS. SADOK: Objection.

A Yes.

Q And then continuing on page 10, "The opposite trend exists for both black and Hispanic residents. Upzoned lots were more likely to be in areas that have a higher share of black and Hispanic residents than the city median while downzoned and contextual-only rezoned lots both were in areas with smaller shares of black and Hispanic residents."

Do you see that?

A Mm-hmm.

Q Is that true?

MS. SADOK: Objection.

A True, to the best of my ability, yes.

Q And lastly, if I may ask you

to turn to page 16.

A I'm sorry. I just need to understand if this is -- is this the report that was based upon the regression analysis? Just one second. Okay. Go ahead.

Q On page 16, that last sentence, you and your colleagues wrote, "The variation in the patterns of rezonings among communities with different socioeconomic characteristics calls for a larger conversation about how the benefits and burdens of development should be shared across the city." Do you see that?

A Yes.

Q When the term "socioeconomic characteristics" was used, was that intended to encompass racial characteristics?

A Yes.

Q Thank you. I'll take those two back, if you don't mind.

A (handing.)

STATE OF New York)
) :ss
COUNTY OF New York)

I, VICKI BEEN, the witness herein, having read the foregoing testimony of the pages of this deposition, do hereby certify it to be a true and correct transcript, subject to the corrections, if any, shown on the attached page.

Vicki Been

VICKI BEEN

Sworn and subscribed to before me, this 25th day of May, 2018.

Kristin E Silberman

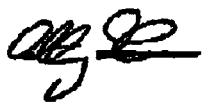
Notary Public

KRISTIN E SILBERMAN
NOTARY PUBLIC STATE OF NEW YORK
NEW YORK COUNTY
LIC. #01SI6137116
COMM. EXP. 2/22/22

C E R T I F I C A T I O N

I, ANTHONY GIARRO, a Shorthand Reporter and a Notary Public, do hereby certify that the foregoing witness, VICKI BEEN, was duly sworn on the date indicated, and that the foregoing, to the best of my ability, is a true and accurate transcription of my stenographic notes.

I further certify that I am not employed by nor related to any party to this action.



ANTHONY GIARRO

INSTRUCTIONS TO WITNESS

Please read your deposition over carefully and make any necessary corrections. You should state the reason in the appropriate space on the errata sheet for any corrections that are made.

After doing so, please sign the errata sheet and date it.

You are signing same subject to the changes you have noted on the errata sheet, which will be attached to your deposition.

It is imperative that you return the original errata sheet to the deposing attorney within thirty (30) days of receipt of the deposition transcript by you. If you fail to do so, the deposition transcript may be deemed to be accurate and may be used in court.

ERRATA

I wish to make the following changes, for the following reasons:

PAGE LINE

12 25 CHANGE: "texted" to "e-mailed"

REASON: The City has filed a Declaration by the deponent (ECF Document 362-1) to clarify misstatements by deponent regarding the existence of text messages which, upon subsequent reconsideration and recollection by deponent and explained in greater detail in the aforementioned Declaration, were actually e-mail communications and not text messages.

24 3 CHANGE: "present" to "prevent"

REASON: Deponent stated "prevent" but reporter transcribed incorrectly.

30 10-11 CHANGE: "math" to "map"

REASON: Deponent stated "map" but reporter transcribed incorrectly.

32 20 CHANGE: "forward" to "hard"

REASON: Deponent stated "hard" but reporter transcribed incorrectly.

48 23 CHANGE: "mentioning" to "mandatory"

REASON: Deponent stated "mandatory" but reporter transcribed incorrectly.

72 20-22 CHANGE: "whether -- to the best of my knowledge, I haven't looked at it recently. The new construction…" to "whether-- to the best of my knowledge, I haven't looked at it recently -- the new construction…"

REASON: Clarify intent of statement.

115 18 CHANGE: "there" to "their"

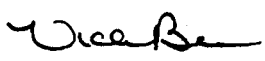
REASON: Clarify intent of statement.

117 20 CHANGE: "rooted" to "routed"

REASON: Deponent stated "routed" but reporter transcribed incorrectly.

231 7 CHANGE: "evaluate" to "evaluated"

REASON: Deponent stated "evaluated" to reflect past tense but reporter transcribed incorrectly.



WITNESS' SIGNATURE

May 25, 2018
DATE

MayorFirst LadyNewsOfficials

Transcript: Mayor de Blasio Appoints Vicki Been as Deputy Mayor for Housing and Economic Development

April 4, 2019

Mayor Bill de Blasio: Good morning, everybody. So, I want to say at the outset that it's a special pleasure to make a major announcement of this nature. Every time we add to our team it is an opportunity to express our values and to recommit ourselves to our mission. In this case the value that really jumps here, and the reason we came here was to make sure that New York City remains a city for everyone. I've talked about this over the years, it was the core of so much of what was talked about back in 2013. It remains the most urgent issue today. The issue I hear the most about from my constituents in all those town hall meetings and the call-ins to the radio program and everything else, unquestionably, the number one issue is affordability and the concern people have keeping New York City a place for everyone, keeping New York City really New York City. Protecting the soul of this place, keeping ourselves consistent with our great history.

So, the appointment I'm making today really responds to that imperative. It's all about ensuring that New York City remains affordable for working people. And we've got a lot more work to do to make that happen. But we have the right person to lead us forward in that effort. I want to say that there's a lot of talented people out there and we conducted a nationwide search, looked at some very able and accomplished people but – I guess this is a little bit like the moral of the story in the Wizard of Oz, there's no place like home. It turned out the exact right person was right here under our nose the whole time. And Vicki Been did such an outstanding job as HPD Commissioner, was such a valued member of this team. I remember many a day in this room talking about some of the most complex and pressing issues – and what was so clear throughout, Vicki's intelligence, her experience, her analytical ability, her ability to see solutions that often times others didn't see. And her heart, her driving desire to get it right and ensure that working people can live in the greatest city in the world. I admired it many a time. And it is very, very gratifying to announce her as our new Deputy Mayor because she is the right person for the job.

So, I want to just say a few more words and then a couple more words in Spanish before we hear from Vicki. And I want to welcome her family who is with us here today as well. Important to say at the outset, we have a situation here, classic, there's a real continuity in this announcement and there's also an imperative to go a lot farther – continuity because Vicki's predecessor, Alicia Glen, did an outstanding job. What she achieved with the affordable housing plan, that Vicki was such a

central player in, should be the stuff of legend because not too often in government do we get to be ahead of schedule, but that was the norm with the affordable housing plan and obviously there are so many other great examples of progress in terms of protecting everyday New Yorkers – the work we have all done and done with the Council to stop evictions, the work we have done to help keep people in their homes in so many ways. But there's also the very exciting work that's been done on the economic development side, particularly the growth of our technology community. We want to keep all that going and who better to keep it going than one of the architects of it?

But we must go farther. And today is a clear statement of purpose. We have to go a lot farther when it comes to protecting affordability. The challenges, in many ways, have gotten greater. And we have tools that work and we are going to take them farther and we are going to find new tools and I guarantee if there is anyone in this city, and I mean this as a literal statement, if there is anyone in this city creative enough, smart enough, thoughtful enough, to find new and better ways to do things, that person is Vicki Been. So I've seen it live, as I said, and it's not just a matter of her abilities, it's her values, in so many of the conversations over the last years Vicki was the person who drew upon her own personal experience to talk about how important it was to get it right when it came to protecting affordability and building more affordability. She took it very personally in the best sense and you'll hear a bit about her own story, her own New York story and her own life story but it's important to note Vicki is not someone born with a silver spoon in her mouth. She is the first person in her family to go to college. She came here to New York City with nothing more than an internship and was only able to live here because she had an affordable apartment. But like so many great New York City success stories, she took that opportunity and she ran with it, ended up going to NYU Law School, one of our great institutions, became a clerk for U.S. Supreme Court Justice Harry Blackmun, worked on the Iran Contra investigation, one of the most important investigations in the last few decades in this country, she was right in the mix of it. And that was a statement of her devotion to public service but also her ability. People who got chosen to work on that investigation were the best of the best.

As everyone knows she spent time studying the issues of affordability and how to create a better urban environment. She's devoted a lot of her life to that as an academic. But what was so impressive to me was she took that academic knowledge and put it into practice so effortlessly, I was deeply, deeply impressed by that. It's not everyone who can take the abstract knowledge and then be dropped into the intensity of New York City government and convert that – those ideas, those concepts into action. And I saw it live from Vicki year after year. So as she returns to City government, she comes in with a mandate from me but she also comes in with her own strong values. We have to go farther, we have to accelerate the work we are doing in terms of preserving affordable housing and this is crucial, the preservation of affordable housing is 60 percent of our affordable housing plan. It's really the essence and the work horse of the affordable housing plan – keeping people in their neighborhoods, in affordable apartments. We are going to do more of that faster. We have to do – and I have to say, that is – I really want to say this because I think it hasn't gotten the attention it deserves. This is the ultimate anti-displacement tool. A lot of discussion about rezoning and that's a good discussion to have but the simplest, strongest, clearest anti-displacement tool is to protect a working family in their apartment, in their neighborhood, subsidize

it, protect it for decades ahead. That's what this administration has been doing but we are going to do even more under Vicki's leadership.

We have more to do to make sure our affordable housing plan reaches lower income New Yorkers. We have more to do to ensure that seniors can reach affordable housing, a growing part of our population. We have a lot to do to make fundamental change at our Housing Authority but the good news is we have a great game plan and people ready to make to the changes we need, and Vicki will be a central architect of all we do at this point forward to turn around NYCHA. Our residents in public housing deserve a lot better and I think for the first time in decades there's a plan in place and the leadership in place to achieve that change. And, of course, Vicki's going to focus on jobs, she's going to focus on economic development but she comes onto the playing field at a propitious moment. This city has over 4.5 million jobs, the most in our history but we ain't done. We intend to create an even stronger and more diverse economy, and Vicki will lead the way.

So for all of those years that Vicki served us, we were all very fortunate and we could tell we had a great talent among us and she stuck with it a long time, took a little break, went out to think great thoughts again, and now she is back. So, Vicki, I am going to say a few words in Spanish but on behalf of a lot of people in this building are feeling what am I feeling right now – we are so happy to have you back and we welcome you.

[Applause]

The quick Spanish version –

[Mayor de Blasio speaks in Spanish]

With that, I now get to call you by a new name, I get to call you Deputy Mayor for Housing and Economic Development, Vicki Been.

[Applause]

Deputy Mayor Vicki Been, Housing and Economic Development: Thank you so much, Mr. Mayor. I am deeply honored to be asked to rejoin your team as Deputy Mayor. It's an awesome responsibility and I am humbled to take it on. But I am also super excited and grateful for the opportunity to work with the Mayor and his incredible team to make the city an even better place to live. This city has given me and my family so much and I want to be part of making sure that it gives everyone the opportunities that it gave me. Growing up, I couldn't have imagined ever being in a room like this. I couldn't have imagined the life I have been lucky to live.

I grew up in a tiny mining town, Naturita, Colorado, a hundred miles from New Mexico, 20 miles from Utah, a thousand people on a really good day in a really boom economy. My father was an auto mechanic and moved us there during the boom years when Naturita and the surrounding area were mining uranium and processing it into vanadium for the Cold War. But we arrived just in time for the bust and that bust continued for much of my childhood and continues to mark the area even today.

Redacted per

Protective Order (ECF 82)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JANELL WINFIELD, SHAUNA NOEL and EMMANUELLA SENAT,

Plaintiffs,

vs.

Case No.: 15-cv-05236 (LTS)(KHP)

CITY OF NEW YORK,

Defendant.

January 16, 2019
9:45 a.m.

Deposition of JAMES PATCHETT, taken by Plaintiffs, held at the offices of Cuti Hecker Wang, LLP, 305 Broadway, New York, NY 10007-3664, pursuant to agreement, before Elizabeth F. Tobin, a Registered Professional Reporter and Notary Public of the State of New York.

there were sort of the policy people at HUD and there were also the sort of regulatory compliance people at HUD and they were not necessarily on the same page and the Mayor was trying to have this conversation with Castro to give him an appreciation for the importance of the Community Preference policy in the City and also why New York was so different from other cities.

Q. Other than what you just described, do you have any other memory of these conversations, either your preparatory conversations with the Mayor, or the Mayor's conversation with Castro?

A. I mean, my only other recollection of it is that I recall the Secretary being -- generally having a positive relationship with the Mayor so I think my recollection is that he said he would -- that he was responsive at least and heard the Mayor's concerns.

I don't know that it ultimately was substantive to the outcome. But I do know that they had a conversation and at least in one of them in which the Secretary heard his concerns and said he would, you know, look into it.

Q. Did I understand your testimony earlier

to say that you were present for one of the conversations?

A. There was at least one conversation with the Secretary where I was there. I think the rest mostly happened over the phone or I was not there. The one where I was there, I actually can't remember specifically if we talked about the fair housing issues or not.

Q. The one that you are remembering but you're not sure --

A. Yeah.

Q. -- if it addressed this or not, was it in person?

A. It was.

Q. And was there anyone else present?

A. Holly Leicht.

Q. And where did it take place?

A. It was not at City Hall. It was in a -- I think it was in -- somewhere maybe in the Rockaways or something. It was at an event where the Secretary and the Mayor were together and I think we briefly met either before or after in a side room of a library or a school or something.

Q. Do you remember about how long the

meeting was?

A. I would say it was maybe 30 minutes.

Q. Did you know Holly Leicht from the days when she was in city government?

A. No.

Q. Did you know her from anything else?

MS. SADOK: Objection.

A. I mean, it's a little hard for me to distinguish. I didn't know her personally prior to my interaction with her when she was in HUD and I was at the City.

Q. So just to be clear, in terms of your recollection, this was the only time you were present for a Mayor de Blasio's/Secretary Castro conversation, whether on the phone or in person?

A. I think so. That's my recollection. Usually if the Mayor were going to speak with him on phone call, he would just call him on his cell phone.

Q. You would not necessarily dial in?

A. Definitely not.

Q. Or would you be with the Mayor while he spoke to him on his cell phone?

A. Usually not. I mean, occasionally the

J. Patchett - CONFIDENTIAL

[Redacted]

J. Patchett - CONFIDENTIAL

[Redacted]

[Redacted]

J. Patchett - CONFIDENTIAL

[Redacted]

[Redacted]

J. Patchett - CONFIDENTIAL

[Redacted]

CERTIFICATE

STATE OF NEW YORK)
) ss.
COUNTY OF SUFFOLK)

I, Elizabeth F. Tobin, a Registered Professional Reporter and Notary Public within and for the State of New York, do hereby certify:

That James Patchett, the witness whose deposition is hereinbefore set forth, was duly sworn by me and that such deposition is a true record of the testimony given by such witness.

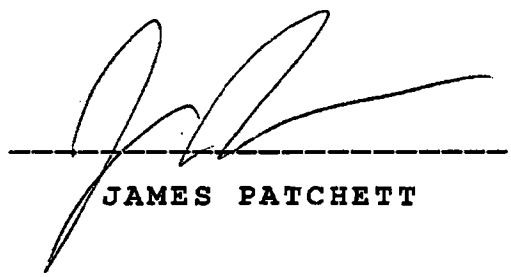
I further certify that I am not related to any of the parties to this action by blood or marriage and that I am in no way interested in the outcome of this matter.

E F Tobin

ELIZABETH F. TOBIN, RPR

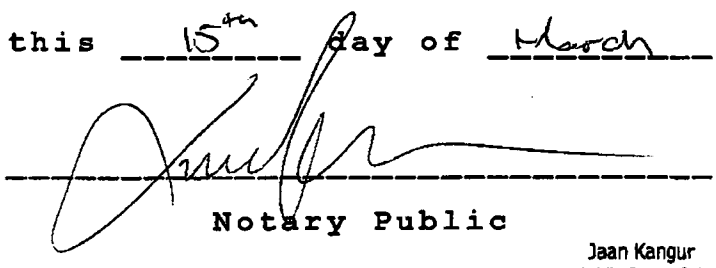
STATE OF _____)
) :ss
COUNTY OF _____)

I, JAMES PATCHETT, the witness herein, having read the foregoing testimony of the pages of this deposition, do hereby certify it to be a true and correct transcript, subject to the corrections, if any, shown on the attached page.



JAMES PATCHETT

Sworn and subscribed to before me,
this 15th day of March, 2019.



Notary Public

Jaan Kangur
Notary Public State of New York
No. 01KA6310065 Qualified in Queens County
Certificate Filed in New York County
Commission Expires 8/18/2022

ERRATA

I wish to make the following changes, for the following reasons:

PAGE LINE

11 24 CHANGE: "reported." to "reported to her."

REASON: Clarify the statement.

17 21 CHANGE: "that at" to "that is at"

REASON: Transcription error.

70 17 CHANGE: "gentrification being" to "gentrification and being"

REASON: Clarify the statement.

76 16 CHANGE: "members." to "members' issues."

REASON: Clarify intent of the statement.

77 9-10 CHANGE: "don't have" to "don't recall having"

REASON: Clarify the statement.

77 20 CHANGE: "specifically I involved" to "specifically involved"

REASON: Transcription error.

80 18 CHANGE "there" to "that"

REASON: Transcription error.

80 21 CHANGE "was" to "wasn't"

REASON: Transcription error.

97 4 CHANGE "entitles" to "a positive thing"

REASON: Transcription error and clarify intent of statement.

110 4 CHANGE "was certainly HUD's" to "was HUD's"

REASON: Clarify intent of the statement.

112 7 CHANGE: "app" to "ask"

REASON: Transcription error.

135 2 CHANGE: "But office: to "But his office"

REASON: Clarify intent of the statement.

145 4-5 CHANGE: "they're resonant" to "they resonate"

REASON: Transcription error.

145 17 CHANGE: "inner governmental" to "intergovernmental"

REASON: Transcription error.

176 25 CHANGE: "you're" to "your"

REASON: Transcription error.

203 13 CHANGE: "political people who want" to "political people. The policy people want"

203 14 CHANGE: "they think" to "the political people think"

REASON: Clarify intent of the statement.

203 20 CHANGE: "was a not uncommon" to "was not an uncommon"

REASON: Transcription error.

203 21 CHANGE: "it's frustration" to "it's a frustration"

REASON: Transcription error.

219 4 CHANGE: "on" to "in"

REASON: Transcription error.

WITNESS' SIGNATURE

3/15/19
DATE

SUBSCRIBED AND SWORN TO
BEFORE ME THIS 15th DAY OF March 2019.

NOTARY PUBLIC

Jaan Kangur
Notary Public State of New York
No. 01KA6310065 Qualified in Queens County
Certificate Filed in New York County
Commission Expires 8/18/2022

FURMAN CENTER
FOR REAL ESTATE & URBAN POLICY
NEW YORK UNIVERSITY
SCHOOL OF LAW • WAGNER SCHOOL OF PUBLIC SERVICE

MARCH 2010

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POLICY BRIEF

How Have Recent Rezonings Affected the City's Ability to Grow?

In October 2009, the Bloomberg Administration celebrated its 100th rezoning, a significant milestone for a massive and unprecedented rezoning agenda that has affected more than one-fifth of the City and has significant implications for the City's development landscape.[1] These rezonings reflect a wide range of goals: advancing the City's economic development agenda; accommodating expected population growth (PlanNYC 2030 estimates the City will grow by one million new New Yorkers by 2030 over its 2000 population); and responding to the varied needs and preferences of the City's diverse neighborhoods.

Some of these rezonings apply to only a few blocks, while others cover large stretches of land and have major implications for development at a neighborhood and even borough level. As individual rezonings were proposed and debated, each faced scrutiny, and sometimes a great deal of controversy, within the communities they would affect. Yet despite the close attention local stakeholders paid to each rezoning, there has been no comprehensive analysis of the net impact these land use decisions have had on the City's overall ability to accommodate new growth, or on how the outcomes of these rezoning actions square with the City's stated development, environmental and transportation goals. The Furman Center has filled this gap by conducting the first statistical analysis of the cumulative impact of New York City's recent rezonings. We set out to answer several key questions:

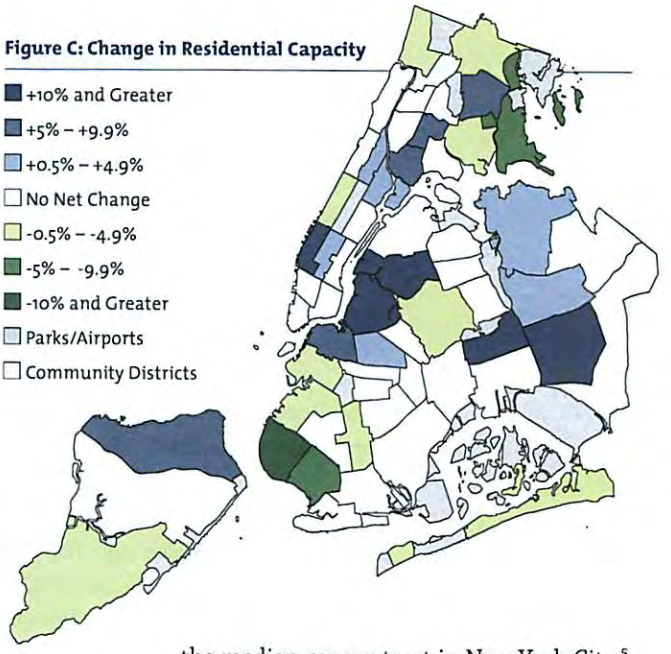
- How have the rezonings changed the City's capacity for new residential development?
- Where has new residential capacity been added? Where has existing capacity been lost?
- What are the characteristics of communities that gained capacity? Of those that lost capacity?
- How does the location of new/lost capacity relate to the City's public transportation infrastructure?
- Does the location of new/lost capacity correspond to market demand and population growth?
- How likely is it that new capacity will be developed for residential use?

This policy brief summarizes our findings for each of these questions, and identifies areas where researchers and policymakers ought to explore these issues in greater detail.

[1] The "one-fifth" calculation excludes the City's park land. See press release, celebrating the 100th rezoning for more detail: http://nyc.gov/html/dcp/html/about/pr102809.shtml.

Manhattan increased by 2.8% and 2.3% respectively, while Staten Island and Brooklyn saw more modest net increases (1.4% and 1.2% gains, respectively).[4] Residential capacity in the Bronx was static. We have looked at these changes at the community district level as well. As seen in Figure C, there was a significant range among community districts: those in South East Queens had the biggest gains in residential capacity and those in South West Brooklyn had the greatest declines.

Figure C: Change in Residential Capacity



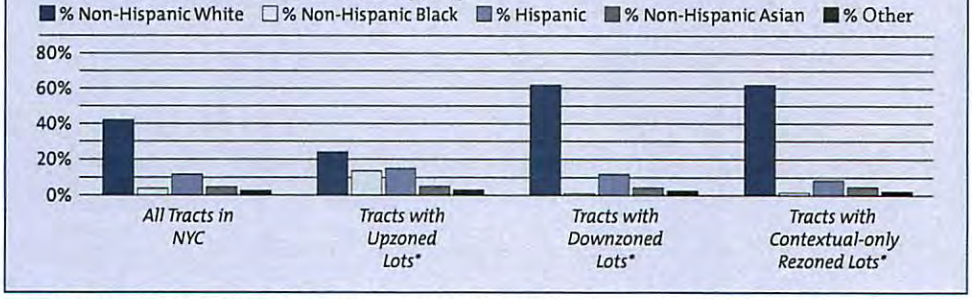
But looking at the borough or even the community district totals does not tell us enough about what kinds of neighborhoods gained or lost capacity or the characteristics of the residents of the communities that gained or lost residential capacity. To do this, we studied the socioeconomic characteristics of the census tracts in which the rezoned lots were located, and compared them to the characteristics of the median census tract in New York City.[5] We found several significant differences.

First, as Figure D shows, upzoned lots tended to be located in census tracts with a higher proportion of non-white residents than the median tract in the City. Downzoned lots, on the other hand, were more likely to be located in tracts with a higher share of non-Hispanic white residents than the City median, and contextual-only rezoned lots were located in areas with still higher shares of non-Hispanic white residents.

[4] In 2004, the City adopted changes to the Zoning Resolution designating much of Staten Island a "Lower Density Growth Management Area." This action added or enhanced several requirements for new residential development in affected areas, such as minimum off-street parking and rear yard dimensions. This resulted in an effective net decrease in capacity in Staten Island that is not reflected in our results, because the changes did not move lots into different zoning districts or explicitly alter their maximum FAR.

[5] We use median values rather than mean values because of the great variation among New York City neighborhoods. Using a mean value for some of these variables skews the values upwards or downwards depending on the variable. For information about how we calculate socioeconomic and demographic characteristics of tracts where rezoned lots were located, see the methodological notes at the end of this document.

Figure D: Median Racial/Ethnic Demographics of Residents in All NYC Census Tracts and Census Tracts Where Rezoned Lots Were Located (2000)



Weighted by the number of indicated type of lots in each census tract. See the methodological notes at the end of the document for more information.

The opposite trend exists for both black and Hispanic residents. Upzoned lots were more likely to be in areas that have a higher share of black and Hispanic residents than the City median, while downzoned and contextual-only rezoned lots both were in areas with smaller shares of black and Hispanic residents than the City median. The share of Asian residents did not vary greatly from one kind of rezoned area to another.

Table B compares the average median income for the census tracts in which rezoned lots were located to the City's median income. It shows that on average, upzoned lots were located in areas with significantly lower income than the City median ($44,444 compared to $53,724). Downzoned lots also were located in areas with lower median income than the City, though they were more affluent than upzoned areas. On average, contextual-only rezoned lots were in areas with a median income much higher than that of the City ($65,489 compared to $53,724).

Finally, we looked at the homeownership rate of rezoned areas, and found a pattern similar to that of household income. As Table C shows, upzoned lots were located in areas with a much lower homeownership rate than the City median (30.8% compared to 44.8%). Downzoned lots also were in areas with homeownership rates that were lower than the City median, but slightly higher than the rate for upzoned areas. Again, the biggest difference was for the contextual-only rezoned lots, which were located in areas with very high rates of homeownership (65%).

Unpacking all of the causes and implications of these socioeconomic differences is beyond the scope of this paper, but the differences between the populations of areas subject to the different types of rezonings raises important questions about public participation in the land use process that the Furman Center plans to address in future work.

How well does the location of new capacity relate to the City's public transportation infrastructure?

The City's PlaNYC 2030 articulates a goal of creating housing by "continu(ing) publicly-initiated rezonings (that) pursue transit-oriented development." As Table D reveals, for the most part, it looks like the upzonings have done just that: 73% of upzoned lots are

Table B: Median Income for Census Tracts Where Rezoned Lots Were Located (2007 $)

All Tracts in NYC	*Tracts with Upzoned Lots**	*Tracts with Downzoned Lots**	*Tracts with Contextual-only Rezoned Lots**
$53,724	$44,444	$51,195	$63,550

Table C: Median Homeownership Rate for Census Tracts Where Rezoned Lots Were Located (2000)

All Tracts in NYC	*Tracts with Upzoned Lots**	*Tracts with Downzoned Lots**	*Tracts with Contextual-only Rezoned Lots**
44.8%	30.8%	35.7%	63.5%

Table D: Percent of Rezoned Lots Within 1/2 a Mile of a Rail Station Entrance (2007)

All NYC Lots	*Upzoned Lots*	*Downzoned Lots*	*Contextual-only Rezoned Lots*
49.5%	73.4%	58.9%	29.0%

**Weighted by the number of indicated type of lots in each census tract. See the methodological notes at the end of the document for more information.*

Policy Implications

This on-going research agenda will improve our understanding of how the recent rezonings have affected residential development, and point to ways in which the land use process might be improved to ensure efficient and fair zoning changes. But even these preliminary findings suggest some important lessons for policymakers.

Do not rely on rezonings alone to generate new housing

Given competing development pressures in areas where new residential capacity has been added, there is good reason to be concerned that these types of rezonings may not generate adequate numbers of new units. Additional tools, such as subsidies, reforms to tax policy, reducing other regulatory barriers, and increasing City investment in housing may be required to produce the number of new housing units the City needs to grow.

Rezoning decisions should be tied to a comprehensive plan for infrastructure development

The fact that a majority of downzoned lots were located near transit, despite the City's announced goal of channeling growth to transit rich neighborhoods, raises questions about whether rezoning decisions are sufficiently coordinated with infrastructure planning. Such coordination can be difficult without a bird's eye view of the cumulative effect of each of these individual rezonings, but we hope this comprehensive analysis of the 2003 to 2007 rezonings will spur new thinking about the kinds of questions that must be asked during each individual rezoning study. The Mayor recently announced new efforts to improve interagency coordination; those efforts could provide an opportunity for the City to approach rezonings through more of a multi-agency lens.

Similarly, these findings raise questions about the appropriate timing of new infrastructure investment. Should upzonings lead or follow investment in infrastructure or other economic development activities? Should agencies like the Department of Environmental Protection, the Department of Education, the Metropolitan Transit Authority, or the Department of Transportation be required to develop infrastructure plans to accompany large-scale upzonings? Similarly, should agencies like the Department of Housing Preservation and Development and the New York City Economic Development Corporation be required to develop plans for investing in affordable housing and business development to ensure that the upzonings succeed in bringing development to the area?

Ensure that the benefits and burdens of growth are fairly distributed

Rezonings involve some tension between the goals of an individual neighborhood and the needs of the City as a whole. If an individual downzoning preserves one neighborhood's character, for example, it may either limit the City's growth, or shift the burden of accommodating the City's growth to some other neighborhood. Our finding that the demographics of contextual-only rezoned areas differ dramatically from those of upzoned areas raises many questions. As discussed above, there is no general agreement on whether it is good or bad for one's neighborhood to be upzoned or downzoned. However, the variation in the pattern of rezonings among communities with different socio-economic characteristics calls for a larger conversation about how the benefits and burdens of development should be shared across the City.

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Protective Order (ECF 82)

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Protective Order (ECF 82)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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SHAUNA NOEL and EMMANUELLA SENAT,

Plaintiffs, 15-CV-5236 (LTS) (KHP)

-against-

CITY OF NEW YORK,

Defendant.

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EXPERT REBUTTAL REPORT OF PROFESSOR EDWARD GOETZ, Ph.D. IN RESPONSE TO THE FEBRURARY 15, 2019 EXPERT REPORTS OF PROFESSOR KRYSAN AND PROFESSOR ORFIELD

neighborhoods.[34] The authors then present an analysis showing that when controlling for a range of "established mobility predictors... kin location is an important noneconomic driver of mobility." They also find that although Crowder's previous research had shown the kin ties were an important factor in black neighborhoods,[35] the influence of kin ties are equally strong among blacks and whites. That is to say, the influence of kin is an issue in relocation generically, not just for people of color. Finally, the authors note that their findings are important for the operation of subsidized housing programs and that such programs should consider "the substantial social and economic costs" that many low-income households would face by separating from kin networks.

Informal systems of support are especially important for low-income people who substitute favors and reciprocal assistance for the kinds of goods and services that others purchase on the market.[36] Informal exchanges of childcare, transportation, and other daily routines are not simply matters of friendship and family relationships, but rather they constitute strategies of survival and getting-by for people of limited means. These reciprocal relationships are common within kin networks and are built up over time with neighbors and acquaintances living nearby. Such considerations are important elements of the residential location decisions of low- and moderate-income households.[37]

C. Housing policy in New York City is a multi-pronged strategy to address a range of public policy objectives.

Both Prof. Krysan and Prof. Orfield repeatedly apply the wrong criteria for assessing the Community Preference Policy and New York City housing policy generally. They concern themselves only with integration-serving policy objectives and this leads them to apply evaluative criteria that are not realistic in their unidimensional focus and are not tied to the primary objectives of the Community Preference Policy.

This repeated tendency on the part of both of the plaintiffs' experts reflects five deficiencies in their arguments: 1) They have mistakenly assumed that the Community Preference Policy is meant to be an integrative policy; 2) They have confused the allegation in this lawsuit (that the Community Preference Policy perpetuates segregation) by substituting a different standard for

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[34] On this they cite Robert L. Bach and Joel Smith, 1977. "Community Satisfaction, Expectations of Moving, and Migration." *Demography* 14: 147-167; and Joong-Hwan Oh, 2003. "Social Bonds and the Migration Intentions of Elderly Urban Residents: The Mediating Effect of Residential Satisfaction." *Population Research and Policy Review* 22: 127-146.

[35] Kyle D. Crowder and Scott J. South, 2005. "Race, Class, and Changing Migratin Patterns Between Poor and Nonpoor Neighborhoods." *American Journal of Sociology* 110: 1715-1763; and Scott J. South and Kyle D. Crowder, 1998. "Leaving the 'hood: Residential Mobility Between Black, White, and Integrated Neighborhoods." *American Sociological Review* 63: 17-26.

[36] See, e.g., Kathryn Edin and Laura Lein, 1997. *Making Ends Meet: How Single Mothers Survive Welfare and Low-Wage Work.* New York: Russell Sage Foundation, 1997.

[37] Spring et al., *op cit*; Boyd, *op cit*; Dawkins, *op cit*.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

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SHAUNA NOEL and EMMANUELA SENAT,

Plaintiffs,

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CITY OF NEW YORK,

Defendant.

----------x

VIDEOTAPE DEPOSITION OF EDWARD GOETZ

New York, New York

April 5, 2019

9:36 a.m.

Reported by:

ERICA L. RUGGIERI, RPR

GOETZ

chances of the incumbent group insiders be than outsiders?

MS. SADOK: Objection.

A. My answer would be the same. That I don't -- I would not judge the -- the program by any ratio of the differential odds as you posed the question.

Q. So to you it's not problematic in any way that a particular area that is characterized by dominance of one racial group would have better odds than people from the rest of the city who were much more racially diverse?

MS. SADOK: Objection.

A. So in that hypothetical -- in that hypothetical, sorry, it would not because the city is doing other things to -- to pursue objectives of integration in disbursing affordable housing. And the community preference policy is

GOETZ

aimed at a different set of objectives. So -- so it would not be a problem to me.

Q. So in that -- just to stick with that -- those white majority community districts. If the chances of getting an apartment were ten times better for that, for people in the majority white community district than outsiders, that's not a problem?

MS. SADOK: Objection.

A. Well, we don't know the profile of those who are applying for those units in the majority white neighborhood. Even in majority white community districts in New York there are thousands and thousands of people of color. So -- so the question as you've posed it does not cause any problems for me.

Q. Okay. I appreciate the -- I appreciate the -- the clari- -- the clarification.

STATE OF NEW YORK)
) :ss
COUNTY OF NEW YORK)

I, EDWARD GOETZ, the witness herein, having read the foregoing testimony of the pages of this deposition, do hereby certify it to be a true and correct transcript, subject to the corrections, if any, shown on the attached page.

_____
EDWARD GOETZ

Sworn and subscribed to before me, this _____ day of _____, 201_.

_____
Notary Public

STATE OF NEW YORK)
ss.:
COUNTY OF NEW YORK)

I, ERICA L. RUGGIERI, RPR and a Notary Public within and for the State of New York, do hereby certify:

That I reported the proceedings in the within-entitled matter, and that the within transcript is a true record of such proceedings.

I further certify that I am not related by blood or marriage, to any of the parties in this matter and that I am in no way interested in the outcome of this matter.

IN WITNESS WHEREOF, I have hereunto set my hand this 11th day of April, 2019.

Erica Ruggieri

ERICA L. RUGGIERI, RPR, CSR, CLR