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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MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION TO DETERMINE THE SUFFICIENCY OF DEFENDANT'S ANSWERS AND OBJECTIONS TO PLAINTIFFS' REQUESTS TO ADMIT

Craig Gurian
Anti-Discrimination Center, Inc.
250 Park Avenue, Suite 7097
New York, New York 10177
(212) 537-5824
Co-Counsel for Plaintiffs

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

June 7, 2019

On the brief:
Craig Gurian
Roger D. Maldonado

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INTRODUCTION

Rule 36 of the Federal Rules of Civil Procedure underlines the obligation of a party in receipt of requests for admissions to respond directly to requests to the maximum extent reasonably possible. *See* FRCP 36(a)(4). Defendant has chosen the opposite path, using a wide range of tactics. Sometimes, it is simply a matter of misstatements. Thus, to explore a salient and important example, defendant claims not to be able to answer Request 36. That Request states, "Admit that, in the New York City context, a community district can be measured as relatively diverse on the racial diversity index, yet have an African American population sharply below the citywide percentage of African Americans."[1] Defendant proffers three false or irrelevant bases for not responding to this request: (1) the premise is "vague and unclear"; (2) does not "correspond to how HPD understands that the racial diversity index is intended to be used as explained in Plaintiffs' Exhibit 41" [a Furman Center report explaining the formula for the diversity index and setting out that index for each community district]; and (3) "is not an index that is used by the City."

Let's take the last unequivocal statement – the racial diversity index is not an index that is used by the City – first. Defendant's statement is false. In fact, in a Sept. 5, 2014 letter from Vicki Been, then Commissioner of HPD, to HUD officials,[2] Ms. Been makes brief reference to the dissimilarity index, trying to diminish its utility in the multi-racial context of New York, and then

[1] The full set of plaintiffs' Requests to Admit, with instructions and definitions, is annexed to the June 7, 2019 Declaration of Craig Gurian ("Gurian Decl.") as Ex. 1. Defendant's full response, including general objections and modifications to the wording of two responses, is annexed to Gurian Decl. as Ex. 2. An Excel sheet captures in a single document for the Court's convenience: (a) the contested requests; (b) defendant's responses; (c) plaintiffs' offers, where made, to modify request language to satisfy defendant objections; (d) briefing notes, in the style of that submitted by both sides in connection with the recent dispute regarding privilege; and (e) additional information guiding the Court as to where plaintiffs are seeking to have the request admitted as worded; where plaintiffs are seeking to have the Court order an amended answer, including order that the amended answer strike extraneous averments and other statements; and where plaintiffs are seeking to have the Court order answers where defendant has refused to admit or deny. That table is annexed to Gurian Decl. as Ex. 3 (the "Disputed RTA Appendix") (an Excel version is being provided to the Court in addition to the PDF version that is being filed on ECF). The document highlights in red text the portions of defendant's responses that plaintiffs seek to have stricken.

[2] Annexed to Gurian Decl. as Ex. 4.

spends the rest of the letter describing and relying on the racial diversity index as part of her attempt to allay concerns that "in some instances, [community preference] might 'lock in' the existing racial or ethnic majority in a neighborhood, and might make it more difficult for racial or ethnic groups not already represented in a community to move into the neighborhood."[3] In other words, defendant (contrary to its assertion) has not only used the racial diversity index, it has done so in the context of trying to defend its outsider-restriction policy to an oversight agency, and

[4] Defendant, in other words, is familiar with and has relied on the index.

Ms. Been, who helped develop the racial diversity index, was deposed about that index. She confirmed that a community district ("CD") can be relatively diverse compared to other community districts but still be segregated: "yes, absolutely." As an example, she understood that Queens CD 2 had a racial diversity index that was relatively high (the ninth most diverse of 59 community districts), notwithstanding the fact that African-Americans were, per the data available in Furman's 2016 State of the City report, only 1.5 percent of the population of that community district. In other words, asked at her deposition, "[I]n that kind of circumstance the [racial diversity index] doesn't convey the stark absence of African-Americans?" she answered, "It does not,".[5]

So, returning to Request 36, the premise – that, "in the New York City context, a community district can be measured as relatively diverse on the racial diversity index, yet have an

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[3] The quoted passage is found in *id.* at 3. The racial diversity index is discussed in *id.* at 2-4 and is presented for each community district in *id.* at 5-8 (appendix to the letter).

[4] *See* Been Sept. 5, 2014 letter to HUD, at 4.

[5] *See* tr. excerpts of Aug. 2, 2017 deposition of Vicki Been ("Been I"), annexed to Gurian Decl. as Ex. 5, at 245:18-21 (regarding developing the measure); at 246:20-247:7 (regarding a community district with a relatively high racial diversity index still being segregated); and 247:22-250:15 (regarding the racial diversity index not capturing a stark absence of African-Americans in a community district).

African American population sharply below the citywide percentage of African Americans" – is clear in its meaning. The proper answer – "admit" – is understood by Ms. Been, defendant's HPD Commissioner when she testified at deposition, now defendant's Deputy Mayor for Housing and Economic Development. Defendant's other objection – that the premise does not correspond to how defendant understands the index is supposed to be used – is a *non sequitur*. The Request is not about how the index is supposed to be used; it goes to the fact that the racial diversity index itself has a key limitation: it is a measure that does not capture the fact that even a community district that is considered relatively racially diverse pursuant to the racial diversity index can be highly segregated for African-Americans. "How the index is supposed to be used" has nothing to do with the limitations of the measurement, and the refusal to admit is without any proper basis.

Other common stratagems employed by defendant are either to refuse to answer, to provide a partial admission that leaves unclear what is being denied and why, or to object whenever a request calls for factual *characterization*. Thus, the objection "vague and unclear" is applied to a vast array of easily understood words and terms as basic as, *e.g.*, "routinely," "predominantly," "concentrated," "constructing," "maintain," "otherwise," "stronger," "more comprehensive," "family and social connections," "land-use actions," "material role," and "some actions."

Yet another stratagem employed by defendant is to restate the request for admission in different words so that it is not clear what of the request as posed is being admitted or denied. The problem is strongly exacerbated by: (a) general objections that defendant purports to incorporate into each response; and (b) the locution "Subject to those objections" (or the equivalent) prefacing more than 100 responses. The latter makes it impossible to understand what part of the request defendant is admitting and *why* (and sometimes what) defendant is denying.

And then there are broad categories of refusals to answer that go well beyond rulings that

have been made by this Court (concerning the Mayor, the Department of Education (DOE), and Council Members (CMs)). Finally, there are a bevy of responses that are otherwise not fully responsive to the requests.

POINT I
GOVERNING LEGAL PRINCIPLES AND THEIR APPLICATION.

"[R]elevance is defined broadly in the first instance by [FRE] 401 for all evidentiary and discovery purposes. [FRCP] 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." *Noel v. City of New York*, 2018 WL 6786238, at *4 (S.D.N.Y. Dec. 12, 2018). *See also* 8B Charles Alan Wright and Arthur R. Miller, *Federal Practice and Procedure* § 2254 (3d ed. 2019) ("Relevance is given a very broad reading in the context of Rule 26(b) and this is now clearly the test to be applied to Rule 36.").

"In responding to a properly stated request, a party must make 'reasonable inquiry' of 'information known or readily obtainable by him' that allows him to fairly admit or deny the request. Fed.R.Civ.P. 36(a) and Advisory Committee Notes to 1970 amendment. He may not give lack of information or knowledge as a reason for failure to admit or deny unless he has made such inquiry." *T. Rowe Price Small-Cap Fund, Inc. v. Oppenheimer & Co., Inc.*, 174 F.R.D. 38, 43 (S.D.N.Y. 1997) (citation omitted). Importantly, "[b]ecause rule 36 admission requests serve the highly desirable purpose of eliminating the need for proof of issues upon trial, there is a strong disincentive to finding an undue burden [in responding] where the responding party can make the necessary inquiries without extraordinary expense or effort...." *Id.* (citation omitted). As specified in the Disputed RTA Appendix, there are numerous instances where defendant identifies no inquiries at all, and numerous others where the claimed burden is exaggerated. *Cf.* *Diederich v. Dep't of Army*, 132 F.R.D. 614, 619 (S.D.N.Y. 1990) (holding that "'reasonable inquiry' includes

investigation and inquiry of any of defendant's officers, administrators, agents, employees, servants, enlisted or other personnel, who conceivably, but in realistic terms, may have information which may lead to or furnish the necessary and appropriate response. In this connection, relevant documents and regulations must be reviewed as well.").

It is impermissible for a party answering requests for admissions to rephrase requested admissions in response so as to "deliberately inject[] ambiguity into its answer and [leave] unclear what it [is] denying and the reason for the denial." *Beberaggi v. New York City Transit Auth.*, 1994 WL 18556, at *4 (S.D.N.Y. Jan. 19, 1994). As specified in the Disputed RTA Appendix, defendant will often rephrase a request that can easily be admitted as posed by plaintiffs.

Another problem is the qualification of denials or admissions with the introductory phrase "subject to those objections," or the equivalent. As for general objections, it is clear that they are not acceptable and should be ignored unless specifically directed to particular requests. *See, e.g., Henry v. Champlain Enterprises, Inc.*, 212 F.R.D. 73, 80 (N.D.N.Y. 2003) ("Rule 36 is quite clear that the objection must be addressed to the specific matter with reasons 'therefore stated.' This global guard tactic [of general objections] is greatly frowned upon . . . Unless these objections are raised as to a specific request to admit, this Court will ignore them completely."); *see also Hallmark Licensing LLC v. Dickens Inc.*, 2018 WL 6573435, at *11 (E.D.N.Y. Dec. 13, 2018) (citations omitted) ("Any objection interposed must be directed at and specifically related to a particular request . . . . Thus, '[g]eneral objections without any reference to a specific request to admit are meritless.'"). Defendant's general objections pollute each and all of its responses (including a handful of otherwise unqualified admissions) and should not be permitted.

The introductory phrase "subject to those objections" (or to "these objections," etc.) is used, as the Court can see in the Disputed RTA Appendix, more than 100 times. It prevents

plaintiffs from knowing, depending on the particular circumstance, which portion of a request is being admitted or denied, and whether a partial denial is based on anything *other than* the objections. Plaintiffs sought to have this issue resolved, asking defendant to use the alternative formulation, "Notwithstanding those objections" or "Independent of those objections," so as to clarify what was being admitted or denied and why, but defendant declined to do so, or to provide any other clarification.[6] Thus, the Court will find a large number of items in the Disputed RTA Appendix where both the lack of clarity of the response and the lack of merit of the objections need to be ruled upon. The practice leaves unclear what is being "conclusively established," FRCP 36(b), and in many cases fails to constitute "fairly responding" to the Requests. FRCP 36(a)(4).

This Court's review of the sufficiency of defendant's answers and objections, and the remedies for objections that are not justified and answers that are not compliant with FRCP 36, are all governed by FRCP 36(a)(6).

POINT II
DEFENDANT'S BOILERPLATE INVOCATION OF THE "VAGUE AND UNCLEAR" OBJECTION IS IMPROPER AND MUST BE REJECTED.

This flavor of defendant's lack of responsiveness occurs so frequently, and is so overstated, that it merits a separate point. Plaintiffs have already identified a series of terms that are common and easily understood yet are claimed by defendant to be "vague and unclear."[7] Defendant even claims that the word "any" is vague and unclear.[8]

Another example, and a particularly revealing one, concerns Request 52 ("Admit that, in New York City, many New Yorkers have cross-borough commutes to work"). Defendant objects

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[6] *See* Gurian Decl. at ¶¶ 3-6.

[7] *See* Introduction, *supra,* at 3.

[8] *See* responses to Requests 118-120 in Disputed RTA Appendix.

that the term "many" is vague and unclear. It is not. The objection is particularly inapt where defendant has found years ago (when the City was less crowded) that there were more than a *million* New Yorkers commuting to work cross-borough every day.[9]

The indiscriminate use of the "vague and unclear" objection needs to be scrutinized closely to prevent a party from undermining the salutary issue-limiting purposes of FRCP 36. *Cf.* *Fifth Ave. of Long Island Realty Assocs. v. Caruso Mgmt. Co., Ltd.*, 2009 WL 10709081, at *1-2 (E.D.N.Y. June 3, 2009) (finding that "[t]he terminology in the request is straightforward and unambiguous and the objection on the grounds that the term 'rights' is undefined, vague and ambiguous is without merit," and making equivalent findings with respects to the terms "assets," "operations," "agent," and "binding").

POINT III
REQUESTS RELATED TO MAYOR DE BLASIO'S KNOWLEDGE OR BELIEFS ARE ENTIRELY PROPER.

Defendant's dual premises – that factual admissions in relation to the beliefs of the head of defendant's executive branch are off-limits because this Court barred plaintiffs from deposing him, and that factual admissions as to the beliefs of defendant cannot be derived from what is known from statements of the Mayor – are baseless.

While this Court's ruling protecting Mayor de Blasio from sitting for a deposition has prejudiced plaintiffs by limiting their ability to probe the Mayor's intent and motivations in *continuing* the outsider-restriction policy,[10] the ruling neither held nor suggested that the Mayor

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[9] *See*, *e.g.*, the data table on the website of defendant's Department of Planning showing "NYC Residence to NYC Workplace" (2010 5-year American Community Survey data).

[10] Plaintiffs' 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. *Noel*, 2018 WL 6786238, at *5. Evidence as to defendant's motivations for action regarding potential changes to outsider-restriction *and* as to defendant's *inaction* in respect to the policy are both "highly relevant" to plaintiffs' claims. *Id.* There is no basis to believe that the Mayor's motivation is necessarily identical to or interchangeable with the motivations of others, and, in any event, the case is not at the stage where fact-finding to select a particular

was to be immune from all of the fact-gathering or fact-confirming processes set out in Rules 26 through 36 of the Federal Rules of Civil Procedure.

For example, part of document discovery (and of supplemental document discovery) required defendant to search for documents as to which the Mayor is a custodian. The fact that mayoral documents were required to be searched for in discovery is incompatible with the notion that information from or about the Mayor could not be a basis for admissions.

Likewise, the Mayor was not immune from providing information in connection with interrogatories that plaintiffs had posed. On the contrary, Interrogatory No. 6 had stated:

> Specify the basis or bases of Mayor de Blasio's April 18, 2016 statement that, "The law says that when we create affordable housing, we have the right to split it 50 percent for people from the surrounding community – 50 percent city-wide lottery open to all – to community members, and people in any other part of the five boroughs[.]"[11]

Defendant reported that it had "searched its records and spoken to the Mayor and his staff" to try to respond, but the "Mayor does not recall his basis or bases for making this statement."[12] That

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interpretation of motivation (one of the ultimate legal questions in the case) is permitted. Plaintiffs have shown that the Mayor's active, personal role in the policy includes, *inter alia*: (a) [Redacted]

(*see* June 12, 2014 Alicia Glen email, Bates 124985, annexed to Gurian Decl. at Ex. 6 (emphasis added)) (b) deciding which modifications to the policy that he wanted to adopt and which which he not want to adopt (*see* excerpts of July 23, 2018 declaration of Mayor de Blasio (ECF 497) ("BdB Decl."), annexed to Gurian Decl. as Ex. 7 at 4, ¶ 11 (emphasis added) (acknowledging "*my decisions* to reject certain alternatives to the community preference policy" and asserting "I have not considered changing the community preference policy for any reason other than to facilitate resolution of this litigation"); *see also* tr. excerpts of Apr. 10, 2018 deposition of Vicki Been ("Been II"), annexed to Gurian Decl. as Ex. 8, at 212:21-213:21 (citing discussion of alternatives to current outsider-restriction policy with Mayor, including adopted "tweaks")); and (c) [Redacted]

see Aug. 19-23 email chain between Mayor and staff, plaintiffs' deposition Exhibit 296, annexed to Gurian Decl. as Ex. 9, at 1 [Redacted]

[11] *See* excerpt of Defendant's Fifth Response to Plaintiffs' First Set of Interrogatories, annexed to Gurian Decl. as Ex. 10, Interrogatory No. 6 and Response thereto, at 10-11. The transcript of the relevant Mayoral media appearance is here: https://www1.nyc.gov/office-of-the-mayor/news/366-16/transcript-mayor-de-blasio-appears-nbc-s-ask-mayor.

[12] See Defendant's Fifth Response to Plaintiffs' First Set of Interrogatories, at 10-11.

defendant was required to secure this information is again incompatible with the idea that the Court had ruled or contemplated walling the Mayor off from the case entirely.

And, lastly, the Court has underlined on numerous occasions that plaintiffs should look to public records to prove their case.[13] Ironically (and improperly), even when what is at issue is a public statement by the Mayor, defendant would have this Court believe that the statement is not an adequate or appropriate predicate for a request for admission. As it happens, it is even more important than usual to have confirmation through admissions when it comes to statements of the Mayor in light of former Deputy Mayor Alicia Glen's testimony to the effect that one cannot necessarily take the Mayor's statements at face value.[14]

So there is nothing unusual about plaintiffs seeking admissions as to the Mayor's beliefs, as they have done as specified in the Disputed RTA Appendix. One example (Request 33) is that defendant is not willing to admit (or deny) that "Mayor de Blasio has believed since at least the beginning of his mayoralty and continues to believe that New York City is characterized by a substantial level of residential racial segregation." The existence of substantial residential segregation has been an issue in the case since paragraph 1 of the complaint.[15] There are multiple good-faith bases for seeking the admission. For example, the Mayor has explained on multiple

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[13] *See, e.g.*, tr. excerpt of Sept. 14, 2017 court conference (ECF 183), annexed to Gurian Decl. as Ex. 11, at 10:3-16 (directing plaintiffs to "publicly available materials" like records from City Planning Commission and City Council meetings in lieu of granting CM depositions to test defendant's justifications for outsider-restriction).

[14] *See* tr. excerpts of Nov. 3, 2017 deposition of Alicia Glen ("Glen depo."), annexed to Gurian Decl. as Ex. 12, at 26:13-27:21 (explaining why the Mayor had downplayed to a reporter the extent of CM opposition to his affordable housing agenda, Glen stated, "you're confusing politics and the mayor wanting to, as the mayor, make it clear that he has some political juice and he can get things done . . . . I don't know why he was saying he was downplaying it, but I believe it was for political purposes because he was in the middle of an election campaign"). *See also* BdB Decl., at 3-4, ¶ 10 (explaining that his public statement 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 for a long time" were only reflective of the Mayor's "general impressions having lived and worked in the City for many years" and not a statement "based upon specific facts, statistics, or data").

[15] *See, e.g.*, First Amended Complaint (ECF 16), ¶ 1 ("Defendant City of New York "the City") has been and continues to be characterized by extensive residential segregation on the basis of race, ethnicity, and national origin.").

occasions that residential segregation in many parts of the City limits the ability of the City to achieve more school integration.[16] What is unusual and unacceptable is that defendant refused to admit or deny the request. The admission, *inter alia*, would eliminate from the litigation the possibility that the Mayor was setting policy as to outsider-restriction in the absence of knowledge of the depth of residential segregation in the City.

We can already hear the objection from defendant that plaintiffs are preceding from "disputed premises" about the outsider-restriction policy. The argument is unavailing. A party gets to build its evidence piece-by-piece (in other words, the price of getting discovery, or, in this instance, a confirmatory admission, is *not* agreement on the ultimate issues in the case). The point of the obligation to respond to requests to admit is to narrow sub-disputes to the extent possible, and there is no real dispute either as to New York being one of the most highly segregated cities in the country or as to the fact that the Mayor has recognized this as being true.

The extreme lengths to which defendant goes to evade resolving any factual issue regarding the Mayor is shown by its refusals to respond to requests concerning what is universally understood to be, in significant part, a pernicious consequence of residential segregation: the scourge of racial segregation in New York City schools. Request 86 asks defendant to admit that, in its judgment, "a significant portion of the racial and ethnic segregation that exists at the elementary school level has been and remains a function of racially and ethnically segregated neighborhoods" (defendant

[16] *See, e.g.*, Kate Taylor, "De Blasio, Expanding an Education Program, Dismisses Past Approaches," *New York Times*, May 11, 2017, annexed to Gurian Decl. as Ex. 13, at 2 (emphasis added) (responding to school segregation question, Mayor suggested there was not much he could do: "We cannot change *the basic reality of housing in New York City*"); tr. excerpt of Mayor de Blasio June 9, 2017 press conference, annexed to Gurian Decl. as Ex. 14, at 9 (emphasis added) ("If we were a small, little place and all the different people of different backgrounds were really next to each other, this would be an easy equation. We are a huge sprawling place. *We have a lot of separation of different populations*."); tr. excerpt of Mayor's appearance on Inside City Hall, June, 12, 2017, annexed to Gurian Decl. as Ex. 15, at 3 (emphasis added) (describing limits on integrating elementary schools, Mayor said: "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*.").

refused to admit or deny); Request 86(a) asks defendant to admit that the Mayor "has made one or more public statements to the effect that residential segregation is a significant historic and contemporary underlying cause of school segregation." Here, too, defendant refuses to admit or deny (despite the Mayor's public statements, including the one provided as an illustration in the Disputed RTA Appendix). These facts, plaintiffs should note, are important. The school segregation consequence is a fact that would normally intensify the City's interest in reducing and eliminating residential racial segregation. That it has not (a fact that plaintiffs get to prove separately) suggests other motivations, consistent with plaintiffs' theory of defendant's pandering to those who wish to preserve the residential racial status quo, are at play.

The refusals to admit or deny extend to material directly on point with defendant's articulated justifications for the disparate impact caused by the outsider-restriction policy. Request 135 asks defendant to admit that the Mayor believes that "in the course of the Giuliani and Bloomberg administrations, defendant's efforts to fight negative impacts of gentrification and to fight involuntary displacement were materially inadequate"; Request 135(a) seeks an admission that the Mayor has made one or more public statements to that effect.

Bear in mind the relevance to both the impact and intentional discrimination claims: defendant seeks to prove that outsider-restriction is a necessary means by which to achieve an anti-displacement agenda in order to justify the policy's disparate impact. Not only will the Mayor's knowledge that *for 20 of the years that outsider-restriction has been in place* the City failed to use available alternative steps to fight displacement and gentrification rebut the premise that outsider-restriction was "necessary" for this purpose, but also confirmation of the Mayor's statements undercut the credibility of attempts to soft-pedal the failures of previous administrations in these respects. Those attempts to soft-pedal, in turn, serve as evidence of consciousness of guilt.

The obligation to admit here is clear, as it is with many other attempts of defendant to stonewall in response to plaintiffs' Requests. The Mayor has, in fact, stated that, "over the last particularly 15, 20 years, gentrification has had just a rampant impact and it's changed the nature of the city. But guess what? The city government didn't respond. There was no policy. There wasn't even a serious discussion in this city."[17] Shown that article, Alicia Glen testified that:

> I believe the mayor feels pretty strongly that the Bloomberg Administration didn't have policies that were focused on maintaining affordability and keeping people in their houses, and, as you know, he ran on a platform of growing inequality and that he wanted to change that arch. And I think he disagrees with a lot of the Bloomberg era policies. That's pretty straightforward.[18]

Thus the fact is that the Mayor did make statements of the type that Request 135(a) sought to address, and had the beliefs that Request 135 sought to address.[19] That it is inconvenient for defendant to admit these things is not a legitimate basis for refusing to do so. And the substance of the statements quoted here highlights the frivolousness of the claim that words used in the Requests were vague or inadequate: one cannot read these statements and not come away with the understanding that, in the Mayor's view, the City's efforts to fight involuntary displacement were (to put it mildly) "materially inadequate."[20]

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[17] *See* tr. excerpt of Mayor's Mar. 21, 2016 appearance on NPR, annexed to Gurian Decl. as Ex. 16. *See also* tr. excerpt of Mayor's Mar. 14, 2016 town hall meeting in Brooklyn, annexed to Gurian Decl. as Ex. 17, at 26 (discussing people feeling like they cannot live in their own neighborhoods anymore, Mayor stated, "we have to recognize that the response before this administration came into office, the response of the city government was to do absolutely positively nothing."); tr. excerpt of Mayor's appearance on Inside City Hall, Dec. 9, 2015, annexed to Gurian Decl. as Ex. 18, at 9 ("We saw gentrification change the reality – many, many people displaced, nothing from government to address it."); and tr. excerpt of Mayor's remarks at Church of God of Prophecy, Nov. 22, 2015, annexed to Gurian Decl. as Ex. 19, at 3 ("The prices went up and up, people were forced out, and what did our city government do over those last 10 or 20 years when that was happening? Well, in most cases, nothing.").

[18] *See* Glen depo., at 160-5-15.

[19] As things stand now, plaintiffs are not able to depose the Mayor as to the factual bases and specifics of a statement that strongly cuts against any argument that outsider-restriction was a "necessary" means to prevent displacement for most of the time it has been in existence (that is, the 20 years of the Bloomberg and Giuliani administrations).

[20] If defendant actually thought that the answer differed as between the Mayor's view of the Giuliani administration versus the Bloomberg administration, its obligation was to specify the difference in respect to Request 135, and to simply answer the question based on the Mayor's statements in respect to Request 135(a).

Defendant will not even respond to the Request to admit that "Mayor de Blasio in the course of his mayoralty wanted to have more than 50 percent of units in a housing lottery subject to community preference." *See* response to Request 176. [Redacted]

[21] *See* response to Request 176a. [Redacted]

[22]

Other improper responses relating to the Mayor are discussed in Point IV and specified in the Disputed RTA Appendix.

POINT IV
REQUESTS RELATED TO SCHOOLS AND THE DEPARTMENT OF EDUCATION (INCLUDING THOSE INVOLVING MAYOR DE BLASIO) ARE ENTIRELY PROPER.

In respect to Requests that relate to DOE, the reporting relationship between the schools' Chancellor and the Mayor, communications between the Chancellor and the Mayor, the existence of segregation in the schools context, and/or to race-based resistance to changes in school admissions policies or catchment area boundaries, defendant attempts to evade answering by relying principally on two decisions by which this Court curtailed plaintiffs' ability to seek evidence via deposition to prove its case.[23] The first was the decision to preclude plaintiffs' from taking Mayor de Blasio's deposition (ECF 545); the second was the decision to deny plaintiffs'

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[21] *See* June 10, 2014 James Patchett email, Bates 130327, annexed to Gurian Decl. as Ex. 20.

[22] *See* June 12, 2014 Alicia Glen email, Bates 124985 (emphasis added).

[23] There are 24 DOE-related requests, including subparts, encompassing Requests 81-97. Defendant refused to answer 21 of them, provided incomplete or misleading answers to two (Requests 93 and 94), and admitted one (Request 97).

application to take an FRCP 30(b)(6) deposition of a DOE representative (ECF 720).

As to Mayor de Blasio, plaintiffs have already explained in Point III that he was not (and cannot properly be) excluded from the case. As will be seen, most of the Requests related to his belief or knowledge are confirmatory of his public statements. As will also be seen, defendant takes a kitchen-sink approach to its evasion on matters related, for example, to segregation in the schools. It would be "unduly burdensome," defendant claims, to admit that "the existence of racial and ethnic segregation in New York City schools, is, in defendant's judgment, a major problem."[24]

As to the decision to deny plaintiffs the ability to take an FRCP 30(b)(6) deposition of a representative of DOE in the context of a stipulation and order than had been entered last summer (ECF 518), *see* ECF 720, two things need be said.

First, neither the decision nor the underlying stipulation had anything to do with requests to admit. ECF 518, ¶ 27, which in general only permitted plaintiffs new discovery for good cause, specifically and explicitly carved out requests to admit from that rule: "In respect to new fact discovery *other than requests to admit*, which the City reserves its rights to seek a protective order barring and/or object to individual requests, plaintiffs shall not seek such fact discovery except to the extent that there is good cause for seeking such discovery."[25] Note that there is nothing referenced about any *category* of request to admit – education-related or otherwise – that is prohibited. This should be dispositive of the lack of merit of defendant's argument.

Second, plaintiffs are constrained to bring to the Court's attention a fundamental error in ECF 720's interpretation of the relevant provisions of ECF 518. Plaintiffs had asked the Court to compare the way that paragraph 27 of ECF 518 treated Housing and Neighborhood study

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[24] *See* response to Request 81.

[25] *See* ECF 518, ¶ 27.

("HANS") material with the way it treated other matters dealt with in the stipulation, including DOE depositions.[26] Without addressing paragraph 27, the Court reached the broad conclusion that plaintiffs made a "strategic decision [to abandon depositions of DOE personnel] that they cannot revisit now." *See* ECF 720, at 6.

In fact, the strategic decisions made by both parties compel a different conclusion. Paragraph 27 of ECF 518 barred additional discovery of HANS material *even if there could be a showing of good cause* but did *not* include other categories of discovery dealt with in the stipulation (including DOE discovery) from that bar. Defendant had demanded a bar as to *all* topics dealt with in the stipulation, but, in the face of active negotiations in which plaintiffs were unwilling to concede that point, defendant ultimately gave up on its demand for an all-inclusive (DOE-encompassing) bar.[27]

In summary, not only did ECF 518 not limit any requests to admit, that stipulation cannot properly be read to suggest any decision on plaintiffs' part to abandon DOE discovery altogether, let alone a decision to abandon a core element of its theory of the case from the outset; a failure to compel responses to plaintiffs' DOE-related requests for admission would compound the prejudice imposed by the Court's preclusion of any DOE deposition.

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[26] *See* plaintiffs' application for permission to take a single FRCP 30(b)(6) deposition of a DOE representative (ECF 711), Section IV, at 5-6.

[27] **Plaintiffs respectfully direct the Court's attention to the documentation of this fact set out in the accompanying declaration at 4-7, ¶¶ 11-23.** In negotiations that ultimately resulted in ECF 518, defendant had sought to exclude from the possibility of additional fact discovery all issues that were the subject of limitation in the stipulation: "Plaintiffs shall not seek additional discovery, even with a showing of good cause, *regarding any of the issues resolved by this Stipulation or the so-ordered Stipulation (ECF _)* (emphasis added). This all-inclusive language – which would have barred further discovery, *inter alia*, as to HANS, as to DOE personnel, and as to certain document requests – was presented in defendant's July 25, 2018 draft, and it reappeared in defendant's July 31, 2018 draft unchanged in substance. Plaintiffs rejected defendant's all-inclusive language, and defendant nevertheless went forward. In other words, *both sides* made a strategic decision to accept a final provision (paragraph 27) that only barred future good-cause discovery in relation to one of the several kinds of discovery that it originally sought to bar (HANS discovery, not DOE discovery and not document requests). In other words, *both sides* knew, *inter alia*, that good-cause DOE discovery was *not* being barred and proceeded on that basis. *See* Gurian Decl., at 4-7, ¶¶ 11 -23.

* * *

The one thing that defendant *has* admitted with regards to DOE is that, "of the agencies reporting to Mayor de Blasio, the agency most likely to have the most direct and detailed information about fear of and resistance to greater racial or ethnic integration in schools, including especially information about fear of and resistance to school zoning or admissions-policy changes, is the Department of Education." *See* Response to Request 97. One of plaintiffs' experts, Professor Myron Orfield, has reported that:

> where there is fear of changes in school assignment or zoning procedures out of proportion to any realistic concern, and where the changes have a racial element, *officials can only reasonably suppose that concerns about school-based demographic change extend to concerns about residential racial change.*
>
> . . . Appeals to protect "our schools" are a classic form by which race-based resistance to outsiders is expressed (mostly in white neighborhoods). But, in New York City, these comments appear in nonwhite communities, too.[28]

Defendant had the opportunity to cross-examine Professor Orfield on this point at his deposition; defendant chose not to do so. Defendant had the opportunity to have its opposing expert offer the contrary conclusion about the link between fears of racial change in the school context and fears of racial change in the residential context, but the expert, Professor Edward Goetz, did not do so. Even if the opinion had been disputed, there is a clear basis that confirming matters related to the existence of fear of racial change in schools is probative of the existence of the fear of racial change in the residential context.

An important issue is confirming that this information does in fact get to the decision-makers regarding the outsider-restriction policy (and thus get to be part of what they know about fear of racial change).[29]

[28] *See* excerpt of Feb. 15, 2019 Orfield expert report, annexed to Gurian Decl. as Ex. 21, at 16, ¶¶ 60 and 63.

[29] Footnote 29 appears at the bottom of page 17.

So in terms of how information gets to the Mayor, "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."[30] The DOE Chancellor is not an exception to the rule. Indeed, as Alicia Glen testified, "I believe the chancellor has a weekly meeting with the mayor. She reports directly to the Mayor."[31]

In other words, the ultimate decision-maker, the Mayor, gets information from DOE. We will turn in a moment to Requests dealing with the substance of what DOE knows and attempts to know, but – especially now that it has been acknowledged that DOE is the agency best suited to have information and fear and resistance to racial change in schools (*see* Response to Request 97) – the first thing that Requests can do is to eliminate from the case the need to litigate over either reporting relationships between DOE and the Mayor, or over the general content of that reporting.[32] This is what Requests 90-92 seek to do: confirm regular reporting, that the reporting includes important issues related to the schools, and that the reporting includes, at least in general

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[29] One key decision-maker is the Mayor (even if one were to leave aside all of the evidence of the Mayor's active, personal involvement, there is no dispute that, as an administrative policy, the Mayor has the authority to decide to stop maintaining outsider-restriction in its current form at any time).

[30] *See* BdB Decl., at 2, ¶ 6.

[31] *See* Glen Depo., at 215:18-23.

[32] It is also the case that information from DOE flows to others who participate or who can participate in the decision-making process about outsider-restriction. ECF 720 states that "Leila Bozorg, HPD's Deputy Commissioner for Neighborhood Strategies, who has been interacting with various communities on fair housing issues . . . stated that she had not had any direct conversations with representatives from the DOE regarding school integration and community opposition to it." *See* ECF 720, at 4. But Ms. Bozorg, when asked whether *she* had spoken to the agency's DOE partners on the issue of fear of racial change in schools, did *not* say that such conversations did not exist. Instead, she referenced that, in general, there were "many" direct conversations with "our DOE partners" in connection with the Assessment of Fair Housing ("Where We Live") process; and volunteered, "I have another colleague who works more directly with our interagency partner on this initiative," namely, then-Deputy Commissioner Matt Murphy. *See* tr. excerpts of Jan. 10, 2019 deposition of Leila Bozorg ("Bozorg depo."), annexed to the Gurian Decl. as Ex. 22, at 95:24-96:10. Mr. Murphy, of course, had been involved in thinking about outsider-restriction for years. In other words, there is ample reason to believe that another route for information about resistance to racial change in schools to reach HPD was through Mr. Murphy. Note that Ms. Bozorg, even from just reading the newspaper, was aware of the fact that "there was significant tension about the change of [school] boundaries." *See id. at* 95:9-23.

terms, "issues arising in the schools context that relate to segregation, to racial and ethnic bias, and to resistance to efforts to achieve more racial integration." Defendant has the answers to these questions; there is no legitimate basis to refuse to respond.

The substance of information known either to DOE or to the Mayor or to defendant generally is probative of the extent to which defendant recognized that opposition to racial change is an active and potent factor in New York City (and, not incidentally) in New York City politics. Thus, for example, defendant's response to Request 93 is entirely inadequate. The portions of the request that defendant appears to be denying – that it has been informed by multiple participants in its "Where We Live" Assessment of Fair Housing process that "predominantly white and affluent communities often block attempts for integration in schools that would provide low-income communities increased access to quality schools; and that often school integration efforts are viewed by white families as taking opportunities away from their children" – are taken directly from a document prepared and produced by defendant.[33]

Then, the response to Request 94, which appears to be defendant admitting that it believes the observations referenced in Request 93, is actually limited by the multiple objections to Request 93, and thus it is entirely unclear what is being admitted. Moreover, the response to Request 94 is unresponsive: it seeks (by incorporating Request 93's objections and responses) to limit the response to "HPD's knowledge of what it learned during the Where We Live NYC process . . . ." *See* Response to Request 93. That is not what Request 94 asks. That follow-on request asks what *defendant* believes. It appears that defendant has not tendered a response to the request posed.

Defendant will not even admit that, in its judgment, it is important to reduce racial and

[33] *See* Where We Live education roundtable qualitative data synthesis, annexed to Gurian Decl. as Ex. 23, at 5 (the cited materials appear with the "integration efforts" bullet" under "community opposition." Ms. Bozorg confirmed at her deposition that the two "plus signs" (as appeared next to "integration efforts") represented "discussed at multiple tables." *See* Bozorg depo., at 101:25-102:5.

ethnic segregation in New York City Schools; or that "when proposals to change school admissions policies or to change the catchment area from which a school draws its students bring the prospect of a change in school demographics . . . it is often the case that strong opposition arises"; or that DOE officials "attempt to understand the reasons for such opposition." *See* Responses to Requests 83, 88, and 89, respectively. Defendant knows or can readily learn the answers to these questions; there is no basis to refuse to answer.

Defendant goes so far as refusing to answer Request 87 ("Admit that Mayor de Blasio believes that existing residential demographic patterns limit the extent to which the problem of school segregation can be full solved in New York City."). This despite the Mayor having stated publicly, in response to a question about school segregation, "We cannot change the basic reality of housing in New York City"; having stated, "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"; and having stated, "If we were a small, little place and all the different people of different backgrounds were really next to each other, [achieving school integration] would be an easy equation. We are a huge sprawling place. We have a lot of separation of different populations."[34] (This is also another example of a frivolous claim of responding being "unduly burdensome").

Other examples relating to education are specified in the Disputed RTA Appendix.

POINT V
REQUESTS RELATED TO COUNCIL MEMBERS ARE ENTIRELY APPROPRIATE.

A critical set of questions as to whether the outsider-restriction policy is *necessary* is whether, to what extent, and why Council Members (CMs) would cease to support land-use actions

[34] *See*, respectively, "De Blasio, Expanding an Education Program, Dismisses Past Approaches," at 2; Mayor on Inside City Hall, June, 12, 2017, at 3 (emphasis added); and Mayor de Blasio June 9, 2017 press conference, at 9.

needed to facilitate affordable housing development if the policy were either reduced to cover a smaller percentage of units or eliminated altogether. Requests 19 and 20 and their subparts address these issues.

Defendant complains that the Requests relate to "hypothetical scenarios"; but a justification that outsider-restriction is necessary because, without it, affordable housing production would be curtailed, is *defendant's* prediction of future consequence that *defendant* must prove by *factual evidence*. In other words, defendant cannot meet its burden of persuasion that a policy is "necessary" to achieve a legitimate governmental objective if it cannot show what would happen in the absence of the policy. *Cf.* 24 C.F.R. § 100.500(b)(2) (2019) ("A legally sufficient justification must be supported by evidence and may not be hypothetical or speculative."); *see also MHANY Mgmt., Inc. v. Cty. of Nassau*, 2017 WL 4174787, at *7 (E.D.N.Y. Sept. 19, 2017) ("The Court can only consider interests advanced by the Defendants that are substantial, legitimate, and non-discriminatory. Those interests 'must be supported by evidence and may not be hypothetical or speculative.' 20 C.F.R. § 100.500(b)(2).").

It is a factual question (raised by *defendant's justification*, it bears repeating) as to whether defendant knows what CMs would do in the circumstances described. It is a factual question as to how many units of affordable housing, if any, would be affected by CM opposition to affordable housing development that was triggered by a reduction or elimination of outsider-restriction. (To the extent that defendant is saying that it can't know, that means it does not know.[35] And that is probative of the weakness of defendant's justification that the policy is necessary to secure CM support for affordable housing development.) Requests 19 and 20 assess these factual questions.

[35] *Cf.* Been I, at 74:4-17 ("I don't have an alternate . . . universe where I have tested out the community preference versus . . . not having a community preference on actual disputes"), and at 75:3-10 (conceding that "I don't have any way of assessing 'but for'" with regards to whether housing would not be built "but for" community preference).

It is also important for a fact-finder, when considering the likelihood of a CM rebuffing affordable housing in an environment where outsider-restriction had been eliminated by Court order, to understand that the interposition of CM opposition: (1) would be reducing the availability of affordable housing needed both by his or her constituents and by other residents of New York City; and (2) would not be effecting any reinstitution of the community preference policy. *See* Request 20(d). In other words, the opposition would hurt the City and the CM's constituents and would not bring back outsider-restriction. Those facts make it less likely that CMs would actually behave that way, and thus make it less likely that outsider-restriction is necessary.

(It must be noted that, long after defendant successfully had depositions of CMs barred, defendant is now admitting that "the best source for providing a CM's own explanation for why he or she would or would not act in the future in the ways referenced by Requests Nos. 19 and 20 is the CM himself or herself." *See* Response to Request 21.)

Other improper and/or inadequate answers to questions relating to CMs and defendant's legislative arm are specified in the Disputed RTA Appendix.[36]

POINT VI
DEFENDANT'S OTHER TYPES OF OBJECTIONS LACK MERIT.

One set of Requests deal with the question of whether defendant, during specified time periods, analyzed the policy for potential disparate impact or perpetuation of segregation. *See* Requests 39-43 and their subparts.

Contrary to defendant's position, even if the requests had asked for the substance of any analyses, the substance would not be protected because: (a) attorney-client privilege only protects communications, not the facts learned through the communications; (b) former HPD

[36] Note too that defendant's objection to the use of the term "land-use actions" on the basis of vagueness is frivolous – it has been well-understood that what is at issue is CM support either for particular projects or for land-use actions (*e.g.*, a rezoning) that would permit an affordable housing development to go forward.

Commissioner (and current Deputy Mayor) Vicki Been acknowledged unequivocally that she would not cordon off information she learned in either the "HUD compliance review" or this litigation from her decision-making process about the outsider-restriction policy.[37] Information that is used for policy making purposes cannot be protected by work-product or otherwise.

But these requests *do not* ask for the substance; they merely seek confirmation that analyses were performed, thereby eliminating from the litigation any question that defendant did not know (or did not have the opportunity to find out) the racial impact of the policy. No litigation strategy is revealed. The Requests also resolve the question of whether the administration informed CMs (what it considers a key group for which outsider-restriction exists) of potential downsides to outsider-restriction. *See* Requests 39a, 40a, 41a, 42a, and 43a.

The Requests are not about a particularized type of disparate impact or perpetuation of segregation analysis, but rather *any* type of *either* such analysis at all. The difficulty of responding to a "compound" request is invented: if there were a "split" answer, defendant could have taken fewer words than it did to instead respond, for example, that "Defendant admits that disparate impact analysis was performed and denies that perpetuation of segregation analysis was performed." The same is true with what was or was not shared with legislative branch officials.

Another type of problem arises where defendant avoids a request's key characterization. For example, Request 67 asks defendant to admit that: "City-supported housing in New York City is *concentrated* in high-poverty neighborhoods that tend to be predominantly African-American or Latino" (emphasis added). After a variety of meritless objections, defendant offers the qualified admission there are "some" completed City-supported housing projects that are "located in census tracts that are currently high-poverty and/or majority African-American or Latino."

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[37] *See* Been II, at 95:2-96:11. *See also* tr. excerpts of May 10, 2018 deposition of Maria Torres-Springer, annexed to Gurian Decl. as Ex. 24, at 280:8-282:15 (making analogous concession).

Defendant knows much more. Indeed, its "Where We Live" website[38] has narrative and mapping that belies defendant's response. Thus: "Government-assisted housing is concentrated, but not exclusively located, in high-poverty neighborhoods in New York City." This statement is accompanied by maps of what defendant calls "City-Assisted Housing," "HUD-Supported Place-Based Housing," and "HUD-Supported Vouchers."[39]

The same web page has mapping of the "Racial and Ethnic Composition of High Poverty Areas," other relevant mapping, and text that explains that, "Black and Hispanic New Yorkers are overrepresented in areas of high poverty as compared to their overall shares in New York City."[40]

So, in addition to objections to words and phrases used in the Request being without merit, defendant's language does not fairly respond to the Request, which deals with *concentration*, not with there being "some" projects or vouchers in the identified areas.

A variety of other objections, refusals to respond, and improperly limited qualified admissions are identified in the Disputed RTA Appendix.[41]

POINT VII
DEFENDANT'S AVERMENTS AND OTHER STATEMENTS THAT ARE NOT PERTINENT TO EITHER AN ADMISSION OR DENIAL SHOULD BE STRICKEN.

As specified in the Disputed RTA Appendix, defendant will frequently insert an averment or other statement that has no other function than to explain away what is being admitted, or to

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[38] "Where We Live" is defendant's name for its assessment of fair housing or "analysis of impediments to fair housing choice" process.

[39] *See* https://wherewelive.cityofnewyork.us/explore-data/where-new-yorkers-live/.

[40] *See* id.

[41] Plaintiffs' acknowledge that there is nothing to be done at this stage when defendant, simply and without qualification or objection, denies a request, as when defendant denies – in the face of multiple pieces of evidence to the contrary – that it knew, prior to August 2016, that the outsider-restriction policy was a potential impediment to fair housing choice. *See* Request 107 and defendant's response thereto in the Disputed RTA appendix. These kinds of denials, however, should inform the Court's understanding of the deeply resistant approach the defendant adopted when responding to the RTAs.

otherwise take the opportunity to promote the arguments and positions it has in the case. Thus, for example, when defendant, in responding to Request 101, is obliged to admit that, in "the period from approximately 1990 to the present, it believes that fear of and resistance to neighborhood residential racial change may exist among some residents, officials, and/or self-proclaimed neighborhood advocates" (Response to Request 101),[42] it "avers" that "the community preference policy was not put in place in response to such fear of and resistance to neighborhood residential change that may exist." That averment has nothing to do with admitting or denying a request asking for an admission about what defendant believes about the existence of racial change, and everything to do with defendant's view of an issue to be litigated. The inclusion of the averment is neither appropriate nor consistent with the purpose of FRCP 36 to narrow the issues for trial.

It is also a practice that takes, for example, a clear admission where the fact-finder can say without qualification, "This is what is being admitted," and seeks to force the fact-finder to instead engage in a process of saying, "I think there is an admission, but it may not be as much as I thought it to be because of the additional material provided." Request 151 provides an illustration. Defendant's Response is already non-compliant because it evades the issue of whether *only* lottery applicant households who have been informed by a developer of a disposition of the application (*e.g.*, rejected for being under-income) are permitted under lottery rules to lodge an appeal with the developer (as opposed to applicants who have *not* been informed of a disposition). But the admission that is made ("that lottery applicants have the right to appeal a rejection or ineligibility determination when they receive notification of that determination") is further confused by the addition of information that "it is HPD's understanding that developers, HPD and HDC frequently receive and respond to complaints and/or inquiries from applicants who have not yet been reached

[42] The partial admission, it should be noted, does not fairly respond to the request and is otherwise not compliant with defendant's FRCP 36 obligations, as specified in the Disputed RTA Appendix.

for processing or have not yet been provided a disposition." Is this meant to qualify the admission? Do complaining and inquiring applicants among those who have not been reached or not yet provided a determination have a right to appeal? (The answer to this last question happens to be "no," but the extraneous averment makes it more difficult to know that.)

The Disputed RTA Appendix specifically identifies dozens of such extraneous averments and statements. As part of the Court's authority to order amended answers, the Court should order that the extraneous material be stricken from those amended answers.

CONCLUSION

The Court should determine that defendant's objections are not justified; determine that defendant's answers are not compliant with FRCP 36; order defendant to respond to RTAs that defendant has refused to admit or deny; order that some of the requests as to which defendant has propounded non-compliant answers be deemed admitted as written (or, in some cases, as plaintiffs have reframed them to meet defendant's purported objections); and order in respect to other of the non-compliant answers that amended answers be served (including order defendant to strike – not include – extraneous material in the amended answers), all as specified in this brief and in the Disputed RTA Appendix.

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Craig Gurian

Craig Gurian
Anti-Discrimination Center, Inc.
250 Park Avenue, Suite 7097
New York, New York 10177
(212) 537-5824
Co-counsel for Plaintiffs