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

Plaintiffs,

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

CITY OF NEW YORK,

Defendant.

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MEMORANDUM OF LAW IN REPLY TO DEFENDANT'S OPPOSITION TO PLAINTIFFS' OBJECTIONS TO THE MAGISTRATE JUDGE'S ORAL DECISION OF SEPTEMBER 14, 2017 DENYING ALL DISCOVERY FROM NEW YORK CITY COUNCIL MEMBERS

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

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

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INTRODUCTION

Understandably, defendant seeks to frame the September 14, 2017 oral decision of the Magistrate (the "Oral Decision")[1] as one upon which reasonable minds can differ.[2] But that framing is entirely inapposite here, where the Oral Decision was built on a failure to understand either the nature of plaintiffs' causes of action, including plaintiffs' claim that defendant's policy caters to those who wish to maintain the residential racial status quo, or the nature of defendant's justification defense that outsider-restriction in affordable housing lotteries is necessary because, without it, Council Members ("CMs") will in the future no longer support land-use actions needed for affordable housing development . As all of the Oral Decision's foundational premises were incorrect, the conclusions of the Oral Decision were clearly erroneous and contrary to law.

If one does not appreciate the cause of action or defendant's justification, one cannot appreciate the evidence bearing on that cause of action or justification. If one does not appreciate what evidence would be relevant, one cannot adequately or accurately engage in a balancing of the expense of discovery versus its likely benefit, nor understand *where* that evidence may be found. If one does not understand that defendant's justification is not a justification that is capable of being validated in real-time (unlike what can be done with a challenged standardized school exam or job test), but is instead an invocation of a potential *future* event, then one cannot understand that evidence tending to show that all CMs would not necessarily be motivated to act in the way defendant predicts is highly probative.

If a decision pays no heed to the fact that CM *future* conduct is at the center of defendant's attempt to make out a justification defense, then that decision necessarily ignores the basic

[1] The excerpt of the Sept. 14 Court Conference comprising the Oral Decision was annexed to the Sept. 28, 2017 Decl. of Craig Gurian (ECF 187) as Ex. 1.

[2] Def. Mem. of Law in Opposition to Plaintiffs' Objections, Jan. 2, 2018 (ECF 237) ("Def. Mem."), at 3.

principle that a party cannot be permitted to bring an entire subject matter into a case as a sword and then get to shield such evidence on that subject matter as it wishes.

The stakes involved in this matter are extraordinarily high. It is always important to vindicate the commands of the Fair Housing Act, of course; here, the question is whether millions of applicants for many tens of thousands of apartments – defendant's most-recently announced plan involves the construction in the aggregate of 120,000 units of affordable housing – will compete on a level playing field, independent of race.

On that basic question of the opportunity to compete fairly, Professor Andrew Beveridge has already found that [Redacted]

.[3]

And the City, discovery has already shown, has long been heedless of its fair housing responsibilities. When, for example, the outsider-restriction policy was expanded in 2002 to cover not just 30 percent of apartments, but fully 50 percent, the HPD Commissioner at the time did not even bother to investigate why defendant had limited the preference to 30 percent in the first place;[4] it never occurred to or "dawned on" her that raising the percentage could risk perpetuating segregation – the issue was "never raised."[5]

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[3] Decl. of Prof. Andrew A. Beveridge, June 1, 2017, ¶ 7, at 3. Plaintiffs are herewith submitting a copy of the Beveridge Report, which contains no individually identifiable information, as a standalone exhibit *in camera*, because it remains subject to a protective order, over Plaintiffs' objection.

[4] Excerpt of trans. of deposition of Jerilyn Perine, Oct. 26, 2017, at 187:21-188:16, annexed to Feb. 2, 2018 Decl. of Craig Gurian ("Gurian Feb. 2, 2018 Decl.") as Ex. 1.

[5] *Id.* at 191:8-192:6.

According to Alicia Glen, defendant's current Deputy Mayor for Housing and Economic Development, it would be a "tragedy" if the outsider-restriction policy preference for insiders were cut back down to 30 percent from 50 percent,[6] but "not necessarily" a tragedy for there to be a city where there is still a lot of residential separation between and among different racial and ethnic groups.[7] Even though the Deputy Mayor knew that "New York City is still a city that is deemed to be quite racially segregated,"[8] she admitted that, as far as she was aware, the city did not have a plan for ending residential racial segregation.[9]

Finally, it is undisputed that, if CMs were to reject affordable housing because the outsider-restriction policy was no longer available, doing so would not be in the interest of the City.[10]

POINT I

THE FAILURE OF THE ORAL DECISION TO RECOGNIZE THE CRITICAL ROLES OF INDIVIDUAL CITY COUNCIL MEMBERS RENDERS THAT DECISION CLEARLY ERRONEOUS AND CONTRARY TO LAW.

The Oral Decision makes clear that its primary basis for finding a "lack of relevance" of CMs to this case – what it claims "proves" lack of relevance – was the fact that outsider-restriction is an administratively established and maintained policy.[11] Secondarily, the Oral Decision

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[6] Excerpt of trans. of deposition of Alicia Glen, Nov. 3, 2017 ("Glen Depo."), at 142:25-143:5, annexed to Gurian Feb. 2, 2018 Decl. as Ex. 2.

[7] *Id.* at 262:8-17.

[8] *Id.* at 111:25-112:2.

[9] *Id.* at 262:18-24.

[10] *See* excerpt of trans. of deposition of Vicki Been, Aug. 2, 2017, at 294:18-295:4, annexed to Gurian Feb. 2, 2018 Decl. as Ex. 3; *see also* Glen Depo., at 133:21-134:11 (also specifying that such conduct would not be in the interest of the CMs' own constituents).

[11] Oral Decision, at 9:3-15.

asserted, if outsider-restriction were a Council enactment, only the "actions of the coun[cil] as a whole . . . are relevant and not the subjective beliefs and motivations of any single coun[cil] member."[12] Neither proposition is correct.

First, it is clear that the Oral Decision relies on the mistaken belief that only the "enactor" (whether defendant's executive arm, or, alternatively, its legislative arm) can be responsible for intentional discrimination. This premise is clearly erroneous and contrary to law. When a decision-maker is *influenced* by those motivated by racial animus, that is enough to make out the claim. *See*, *e.g.*, *Winfield v. City of New York*, 2016 WL 6208564, at *7 (S.D.N.Y. Oct. 24, 2016). And a desire to maintain the racial and ethnic status quo of a neighborhood is the functional equivalent of racial animus (*i.e.*, is a motivation impermissibly based on race).

There is nothing in the law that requires that this influence needs to be exercised by a legislative body, as opposed to one or more citizens, or one or more CMs. The Oral Decision erred again by failing to recognize that the admonition to look only to the "actions of the Council" is applicable only to determining the intent of a legislative purpose in enacting a statute.[13] As the Oral Decision itself recognized, the enactment of a statute is not at issue here.[14]

It is not disputed that defendant's executive arm is influenced by defendant's CMs: the espoused justification for the policy recites the need to satisfy CMs. So, whether CMs are motivated by a desire to maintain the ethnic and racial status quo of their districts is of central

[12] Oral Decision, at 9:20-23.

[13] As such, the cases cited in Def. Mem., at 6 n.3, including the one case cited by the Oral Decision, *Brown v. Gilmore*, 2000 U.S.D. Lexis 21263, at 20 (E.D. Va. Oct. 26, 2000), are inapposite to a situation like this case (where the motivation for a legislative enactment is not at issue).

[14] Similarly, defendant's assertion that a CM "cannot speak for the entire Council," Def. Mem., at 9, is a *non sequitur*. The CM is exercising influence (or deciding the relative importance of different factors relevant to supporting or opposing affordable housing developments in the CM's district) by him or herself.

relevance. And it would be a mistake to think that such a desire would need to be expressed specifically in relation to the outsider-restriction policy for that information to be relevant. As plaintiffs have repeatedly explained to the Court below,[15] one of their theories of the case is that it is the overarching policy of defendant to be responsive to those who want to retain the racial status quo, and the outsider-restriction policy is but one expression of that overarching policy. Thus, whether the expressed race-based concern is specifically linked to outsider-restriction in lotteries,[16] or, more generally, is linked to opposition to neighborhood change, matters not. Either way, defendant fully understands that keeping the racial status quo will be popular and changing the racial status quo will be controversial, and is therefore probative of whether defendant's executive arm is being influenced to take action consistent with that desire.[17] *See Winfield*, 2016 WL 6208564, at *7 (citation omitted) (underlining the fact that 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").

Defendant's response is to contend that "any discovery obtained from the Council Members is meaningless unless Plaintiffs can show that the decision makers 'knew' that same

[15] *See, e.g.*, Plaintiffs' Mem. of Law in Opposition to Defendant's Motion for CM Protective Order and Motion to Quash, Apr. 24. 2017 (ECF 125), at 3-4.

[16] As we have argued in the past, it is actually least likely for these kinds of sentiments to be expressed specifically in connection with the outsider-restriction policy because CMs (and others) have had no reason to believe that defendant's executive branch would abandon the policy. *See id.* at 11. The race-influenced sentiments would more likely arise in connection with discussions reflecting opposition to neighborhood demographic change (often "coded"), gentrification, or changes in school attendance zones.

[17] *See Winfield*, 2016 WL 6208564, at *7 (emphasis added) (identifying as among the facts "from which an inference of discriminatory intent can be drawn" plaintiffs' allegation that "the policy is racially motivated, arising 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*. [First Amended Complaint, ¶¶ 161-63].). It is not that CMs or other actors have to link the outsider-restriction policy to their opposition to local demographic change, it is defendant that can make such a link on its own.

information.'"[18] The response misunderstands the nature of discovery. Evidence of all the elements of a claim does not necessarily come in one neat packet, or, to put it another way, a party does not need to establish all links in the chain simultaneously to make discovery of some of the links relevant (although an answer at a deposition as to what concerns were shared with whom, or an email to a CM from an aide summarizing an in-person meeting with an HPD official, could certainly do that). But even if that did not happen, the evidence of improper CM motivation would center the search for what executive branch officials knew (*e.g.*, the basis of questions *to* executive branch officials) and would be part of questioning of other witnesses and of building the "mosaic" of evidence that is so often necessary in discrimination cases. *See Vega v. Hempstead Union Free Sch. Dist.,* 801 F.3d 72, 86 (2d Cir. 2015); *see also Winfield*, 2016 WL 6208564, at *7 (citation omitted) (holding that discriminatory intent may be "inferred from the totality of relevant facts").

The question of whether defendant's CMs illegally influence defendant's executive branch officials on the basis of race, of course, is not the only issue as to which CMs are central. When it comes to making deals on individual development projects, the local CM is effectively the decision maker because of the custom of other CMs deferring to the local CM's views.[19] It is defendant's theory that, if there were not the outsider-restriction policy, CMs would not agree to land-use measures needed to facilitate affordable housing development. To prove that theory, defendant needs evidence that, in a city without outsider-restriction, CMs would act as defendant predicts (defendant has not produced such evidence). Plaintiffs' task is to raise questions about whether

[18] Def. Mem., at 14.

[19] Deputy Mayor Glen has noted that, if local member deference were eliminated, then the administration's task would cease to be "trying to negotiate a deal with one person," Glen Depo., at 52:17-53:4; in other words, the current practice is to negotiate a deal with one CM.

CMs would do so.[20] *See* Point IV, *infra*, for a discussion of why it is clearly erroneous and contrary to law to permit a party to introduce a subject matter area into a case (use a sword) and then seek to withhold evidence on that subject that it unilaterally, as a matter of litigation strategy, chooses not to present (use a shield).

Not surprisingly, there are a host of concerns that come up when CMs think about projects in their districts. The main recurring themes according to Deputy Mayor Glen[21] are these:

> I would say the ones that obviously are heavily focused on is what incomes they're serving; how low are we going; how high are we going. Endless negotiations around whether or not we will change the income mix to reflect whatever councilperson's particular view of what incomes they like to see in a project. Endless discussions around participation of local nonprofits; endless discussions around whether or not there are ways in which we can accommodate more local small businesses; endless discussions around to what extent we can have MWB [minority and women business] participation in the development process; endless discussions about shadows and sort of – height and shadows are a very big piece of this also.[22]

Discovery from CMs would attempt, *inter alia,* to determine where outsider-restriction fits in terms of relative importance to these other concerns; how important CMs find the construction of affordable housing to be; and whether CMs would be prepared to spite their constituents (and the rest of the City) by opposing affordable housing development if outsider-restriction were off the table.

Such discovery would also look into the potential of less discriminatory alternatives, *i.e.,*

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[20] The Oral Decision completely failed to grapple with the implications of the Beveridge Report in connection with the discovery sought by plaintiffs. The fact that the Beveridge Report demonstrates conclusively [Redacted]

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[21] *See* Glen Depo., at 33:3-8 ("A. I think those are some themes that are consistent. Q. Are there others? A. I just gave you, sort of, a big catalog of things that seem to be there a lot.")

[22] *Id.* at 31:15-32:11.

Stage 3 in a disparate impact case. Some of those alternatives could be simple. For example, asked about whether she had ever left a meeting with a CM about a project or a rezoning or other step to facilitate affordable housing with the view that the CM she was speaking to was ill-informed in any way, Deputy Mayor Glen said, "They're council people. Of course."[23] The colloquy continued as follows:

> Q. I'm really asking you what kinds of things were they ill-informed about. I'm just going to give you an example. Like what the provisions of 421a are, basic principles of housing finance --
>
> A. All of the above. They are often extremely confused and ill-informed and not that smart.
>
> Q. Okay. So it sounds, from your answer, that to delineate each area would take a very long --
>
> A. I think we would be here for a month if you wanted a list of every time a city councilperson didn't understand what was going on in a particular project or a rezoning.[24]

Assuming, *arguendo*, that not all CMs want to maintain the residential racial status quo (and, to be clear, plaintiffs do *not* believe that all CMs hold such views), it may well be the case that questioning a CM could uncover the fact that one of the less discriminatory alternatives available to defendant is to educate CMs as to the pernicious consequences of residential segregation (and outsider-restriction's role in perpetuating those patterns), to the fact that outsiders would have the same household incomes as insiders (demonstrating that outsider-restriction has nothing to do with preventing gentrification), to the fact that outsiders need affordable housing as much as insiders, and to the fact that many insiders are interested in the opportunity to move elsewhere.

[23] Glen Depo., at 72:10-20.

[24] *Id.* at 73:3-20.

POINT II

DEFENDANT'S (AND THE ORAL DECISION'S) FALSE DICHOTOMY BETWEEN "FACTS" ON THE ONE HAND AND "OPINIONS" OR "SPECULATION" ON THE OTHER MUST BE REJECTED BECAUSE COUNCIL MEMBER MOTIVATION AND FUTURE CONDUCT IS AT ISSUE.

The basis of defendant's justification defense is premised on an assumption about how a CM will act in the future.[25] Accordingly, what is necessary for both sides – defendant, who has the burden of persuasion, and plaintiffs, who have the task of preventing defendant from meeting that burden – are indicia to allow a factfinder to determine whether or not defendant's hypothesis is likely true or not. Typically, in the civil rights context, motivations are used to determine the legality of past conduct (for example, in the run-of-the-mill employment discrimination case). The *subjectivity* of motivation does not remove it from the factual realm. The alleged wrongdoer is asked to explain his conduct, and that explanation is probed and assessed. Here, CM motivations and statements have to be assessed with a view towards what, if anything, they tell the factfinder about whether outsider-restriction is actually *necessary* to achieve a significant policy of defendant, something that can only be assessed from the point of view of "what would happen if outsider-restriction were not in place." While "what would you do?" is one question, there would obviously be many more questions to determine whether the answer was simply self-serving or a reflection of a position that was consistent with the issues and values important to the CM and the City as a whole. Those issues and values are likely to be found in CM documents. And depositions of CMs will allow for a direct assessment of how the CM would balance and resolve competing considerations.

[25] As previously discussed, a justification must be "necessary"; something cannot be necessary if there is not proof that its absence in the relevant circumstances (a not-yet-existing lottery system where outsider-restriction does not exist) would cause the feared untoward result.

All this is entirely different from the case cited by defendant: *Handschu v. Special Servs. Div.*, 2003 WL 26474590, at *7 and *7 n.8 (S.D.N.Y. Jan. 2, 2003), where hypothetical questions would lead the Court into "peripheral factual disputes." Here, by contrast, the factual dispute over what will happen is the central dispute on the justification.

POINT III

THE ORAL DECISION'S CONCLUSION THAT SUBSTITUTE EVIDENCE IS AVAILABLE TO PLAINTIFFS IS CLEARLY ERRONEOUS AND CONTRARY TO LAW AS THE CMs HAVE UNIQUE INFORMATION (THE DEPOSITION STANDARD) AND THE DOCUMENTS SOUGHT ARE NOT DUPLICATIVE OF EITHER AGENCY DISCOVERY OR THE PUBLIC RECORD.

CM *motivation* is crucial both as to the nature of the influence they choose to exert and in terms of whether they would really reject affordable housing in a circumstance where outsider-restriction was not available. Defendant's attempt to distinguish cases involving unique information held by high government officials is without merit.[26] One such case required Mayor Bloomberg to submit to a deposition, *United States v. City of New York*, 2009 WL 2423307 (E.D.N.Y. Aug. 5, 2009); the other required the Secretary of the Department of agriculture to do the same, *Sherrod v. Breitbart*, 304 F.R.D. 73 (D.D.C. 2014). The CMs are the decision makers when it comes to their support of, or opposition to, affordable housing in the absence of outsider-restriction, and they are best suited to explain their motives both for why they would support or oppose this housing, and in respect to whether the racial composition of the districts should be maintained. *Cf. Id.* at 76 (highlighting the fact that "[t]he Secretary alone has precise knowledge of what factors he considered and how they influenced his ultimate decision," a proposition that might be paraphrased as "the CM alone has precise knowledge of what factors are important to

[26] *See* Def. Mem., at 12.

him and how he would resolve them in making his ultimate decision"); and *City of New York*, 2009 WL 2423307, at *2 (noting the central importance of the personal involvement of the high ranking official in the determination as to whether to order a deposition, something that, by definition, is true in the CM context).[27]

Defendant takes the position that "the questions and information described are generic and could be asked of anyone,"[28] but this is palpably untrue. The best source of information about a CM's motivation is the CM.

The public record is no substitute for other documentation. As noted previously:

> Municipal officials acting in their official capacities seldom, if ever, announce on the record that they are pursuing a particular course of action because of their desire to discriminate against a racial minority. Even individuals acting from invidious motivations realize the unattractiveness of their prejudices when faced with their perpetuation in the public record.

Smith v. Town of Clarkton, N.C., 682 F.2d 1055, 1064 (4th Cir. 1982); see also *MHANY Mgmt., Inc. v. Cty. Of Nassau*, 819 F.3d 581, 609 (2d Cir. 2016) (citation omitted) ("Anti-discrimination laws and lawsuits have 'educated' would-be violators such that extreme manifestations of discrimination are thankfully rare . . . [but] [d]iscrimination continues to pollute the social and

[27] Defendant's citations to cases where depositions were denied for lack of personal knowledge are inapposite because they all fall into one or more of the following categories (each case that fits into multiple categories is only listed once): plaintiffs conceded that the officials' did not have unique, personal knowledge (*L.D. Leasing Corp., Inc. v. Crimaldi*, 1992 WL 373732, at *1 (E.D.N.Y. Dec. 1, 1992); *Lederman v. N.Y.C. Dept' of Parks & Rec.*, 731 F.3d 199, 203 (2d Cir. 2013); and *Murray v. Cty. of Suffolk*, 212 F.R.D. 108, 109 (E.D.N.Y. 2002)); the deponents swore under oath that they possessed no personal knowledge of the relevant issues (*Moriah v. Bank of China Ltd.*, 72 F. Supp. 3d 437, 441 (S.D.N.Y. 2014) and *Friedlander v. Roberts*, 2000 WL 1772611, at *1 (S.D.N.Y. Nov. 21, 2000)); or the court deemed it apparent that the officials did not have any unique knowledge (*Bogart v. City of New York*, 2015 WL 5036963, at *9 n.12 (S.D.N.Y. Aug. 26, 2015) and *Lederman v. Giuliani*, 2002 WL 31357810, at *2 (S.D.N.Y. Oct. 17, 2002)). Here, by contrast, it is inescapable that only CMs Espinal and Torres can explain their own motivations, values, and considerations bearing on matters relevant to this case.

[28] Def. Mem., at 8.

economic mainstream of American life, and is often simply masked in more subtle forms.").[29]

Finally, the Oral Decision and defendant are incorrect to suggest that records from CMs would be duplicative of material produced by HPD or the Mayor's office.[30] As plaintiffs pointed out to the Court early on, "little of political horse-trading and decision-making goes on in public view; the same is true for the development of a CM's thought-process."[31] There could, for example, be an in-person meeting between a CM's aide and an HPD official that is only documented in the aide's email back to the CM.[32]

POINT IV

THE ORAL DECISION WAS CLEARLY ERRONEOUS AND CONTRARY TO LAW IN IGNORING THE FACT THAT DEFENDANT CANNOT BE ALLOWED TO INTRODUCE A SUBJECT MATTER (USING IT AS A SWORD) AND THEN DEPLOY A SHIELD TO RESTRICT PLAINTIFFS' ABILITY TO RESPOND IN TERMS OF THAT SUBJECT MATTER.

The Oral Decision was not premised on the existence of legislative privilege, though defendant sought to have the Court adopt that position; moreover, were that privilege to be considered, defendant is wrong to claim that it is "likely" that material sought would be protected.[33]

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[29] Nor is defendant's argument that "the public record is probative" and therefore "adequate," Def. Mem., at 16-17, a compelling one. The fact that the public record may be probative says nothing about it being probative to the exclusion of all other sources. In the very next paragraph of the Supreme Court case defendant cites to make this point, the Court made clear that the "foregoing summary identifies, *without purporting to be exhaustive*, subjects of proper inquiry in determining whether racially discriminatory intent existed." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268 (1977) (emphasis added).

[30] *See* Oral Decision, at 11:24-12:3, and Def. Mem., at 19, respectively.

[31] *See* plaintiffs' letter of March 23, 2017 (ECF 99), at 1, annexed, without its accompanying exhibits, to Gurian Feb. 2, 2018 Decl. as Ex. 4.

[32] *See id.* at 1-2 for this and other examples of how and why relevant communications are not necessarily captured by discovery of HPD and the Mayor's Office.

[33] Def. Mem., at 11. First, many materials and discussions represent not legislative activity but the type of "cajoling" that is not covered by legislative privilege. *See Gravel v. United States*, 408 U.S. 606, 625 (1972) (underscoring that when legislators "cajole" or "exhort with respect to administration" of a statute by

Defendant's citation of *Favors II*[34] is highly misleading. In fact, privilege may not be used as a shield and a sword ("In fairness, the Senate Majority should not be permitted to selectively disclose analyses of these disparities, while shielding other documents on this subject."); and documents related to "defenses, or arguments put in issue, by the defendants" are to be disclosed. *Favors II*, 2015 WL 7075960, at *12-13.

This principle is consistent with what defendant unfortunately describes as plaintiffs' "desperate move"[35] in citing *In re Cty. of Erie*, 546 F.3d 222 (2d Cir. 2008) and *United States v. Bilzerian*, 926 F.2d 1285 (2d Cir. 1991).[36] Those cases make clear that *even the much-stronger attorney-client privilege* "cannot at once be used as a shield and a sword," *Bilzerian*, 926 F.2d at 1292 because of "the type of unfairness to the adversary that results in litigation circumstances when a party uses an assertion of fact to influence the decisionmaker while denying its adversary access to privileged material potentially capable of rebutting the assertion." *Erie*, 546 F.3d at 229 (citation omitted).

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executive agencies, "such conduct, though generally done, is not protected legislative activity"). Second, even if some materials were legislative in nature, the applicable balancing test, *see Favors v. Cuomo* ("*Favors II*"), 2015 WL 7075960, at *10 (E.D.N.Y. Feb. 8, 2015), cuts strongly in favor of disclosure. CM evidence would be highly relevant; there is no substitute for the information; and the challenged conduct is wholly the conduct of City government. Moreover, the seriousness of the litigation and the issues involved – racial discrimination and segregation – could not be greater. *Cf. Favors v. Cuomo* ("*Favors I*"), 285 F.R.D. 187, 219 (E.D.N.Y. 2012) ("[I]t is indisputable that racial [discrimination] and malapportionment claims in redistricting cases 'raise serious charges about the fairness and impartiality of some of the central institutions of our state government,' and thus counsel in favor of allowing discovery."). Finally, any potential "chilling effect" would be outweighed by race-based considerations. See, e.g., *ACORN v. Cty. of Nassau* ("*ACORN II*"), 2009 WL 2923435, at *4 (E.D.N.Y. Sep. 10, 2009) (holding "if any of the withheld documents reveal that racial considerations played any role in the legislative deliberations regarding the re-zoning of the Social Services site, then the factors regarding legislative privilege would warrant production of those documents").

[34] Def. Mem., at 24-25, n.14.

[35] Def. Mem., at 24.

[36] Plaintiffs' Opening Objections Brief, at 24-25.

Defendant is engaged in precisely this type of unfairness: it wants the factfinder to accept that CMs would not approve land-use actions needed to facilitate affordable housing decisions, but at the same time deny plaintiffs the access they need to the CMs (or their documents) to rebut defendant's cherry-picked (and not yet revealed) evidence. Defendant's attempt to save its position by disclaiming the use of individual records or individual testimony[37] is unavailing in view of the *Erie* principle, the consonant *Favors II* principle, and the self-evident proposition that a party chooses what it presents based on what will help its case, not hurt it. The Oral Decision did not consider the sword-and-shield problem, and, as such, was clearly erroneous and contrary to law in failing to do so.

POINT V

THE ORAL DECISION WAS CLEARLY ERRONEOUS AND CONTRARY TO LAW IN RESPECT TO ITS DETERMINATION OF BENEFIT VERSUS BURDEN.

The Oral Decision failed altogether to appreciate the core relevance of CM discovery (Points I and II, *supra*), thereby assigning a discovery "benefit" of zero. Its proportionality analysis was thus irretrievably flawed. That the discovery sought comes with some cost[38] is not surprising, especially in a case involving a decades-long practice that constitutes a continuing civil rights violation. What adds to the Oral Decision's failure to actually engage in proportionality analysis is the fact that the discovery sought involved just six of 51 CMs in office at the time of the subpoenas, just two of those same 51 CMs in terms of depositions, and no CMs from earlier eras. That fact should have cut in favor of discovery. Moreover, as should be clear from our previous

[37] Def. Mem., at 24 n.14.

[38] *See* Def. Mem., at 20, citing a declaration first prepared for this Court and not reviewed or considered by the Magistrate Judge.

brief, the small sample represents CMs with differing *types* of unique information, naturally selected from among those who have made statements bearing on matters relevant to the case.

As for not explaining the documents being sought from the Council,[39] the Oral Decision erred here, too. In fact, plaintiffs explained at a conference that:

> If Your Honor were inclined to let us take a bigger sample of the council, we would do it. But the fact that we don't have all 51 council members and are asking for documents from six *and it's the same document requests from November 1st where we defined the City to include both its executive officers and its legislative officers*, those are the requests that are pend -- those are the requests that are pending.[40]

No further inquiry was made, nor need it have been. The request addressed the defendant City of New York. It is common that different custodians have records responsive to different subsets of requests. That turns out to be the case here (just as HPD and the Mayor's Office tended to have records responsive to different requests). The requests that plaintiffs have focused on here[41] highlight the fact that CM discovery will not cause an undue burden.

CONCLUSION

The Oral decision was clearly erroneous and contrary to law and must be reversed.

Dated: New York, New York
February 2, 2018

Craig Gurian

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

[39] *See* Oral Decision, at 11:16-18; Def. Mem., at 21-22.

[40] *See* excerpts of June 5, 2017 Court Conference (ECF 162), at 80:9-25 (emphasis added), annexed to Gurian Feb. 2. 2018 Decl. at Ex. 5.

[41] Plaintiffs' Opening Objections Brief, at 24 and 24 n.39.