UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT
Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 13-3088 Caption [use short title]

Motion for: Reconsideration by the En Banc Court

Floyd

-against-

City of New York

Set forth below precise, complete statement of relief sought:

Reconsideration by the En Banc Court of the October 31, 2013 Mandate

MOVING PARTY: Floyd (Plaintiff/Appellee)
☑ Plaintiff ☐ Defendant
☐ Appellant/Petitioner ☑ Appellee/Respondent

OPPOSING PARTY: City of New York (Def./Appellant)

MOVING ATTORNEY: [name of attorney, with firm, address, phone number and e-mail]
Jenn Rolnick Borchetta
Beldock Levine & Hoffman LLP, 99 Park Ave.
New York, NY (212) 490-0400
jborchetta@blhny.com

OPPOSING ATTORNEY:
Celeste Koeleveld
New York City Law Department, 100 Church St.
New York, NY (212) 356-2300
ckoeleve@nyc.law.gov

Court-Judge/Agency appealed from: United States District Court for the Southern District of NY (Scheindlin, D.J.)

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):
☑ Yes ☐ No (explain):

Opposing counsel's position on motion:
☐ Unopposed ☑ Opposed ☐ Don't Know

Does opposing counsel intend to file a response:
☑ Yes ☐ No ☐ Don't Know

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:

Has request for relief been made below? ☐ Yes ☐ No
Has this relief been previously sought in this Court? ☐ Yes ☐ No
Requested return date and explanation of emergency:

Is oral argument on motion requested? ☐ Yes ☑ No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? ☐ Yes ☑ No If yes, enter date:

Signature of Moving Attorney: Jenn R. Borchetta **Date:** 11/11/2013 Service by: ☑ CM/ECF ☐ Other [Attach proof of service]

ORDER

IT IS HEREBY ORDERED THAT the motion is **GRANTED DENIED**.

FOR THE COURT:
CATHERINE O'HAGAN WOLFE, Clerk of Court

Date: By:

Form T-1080 (rev. 7-12)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----------X

Docket No. 13-3088

DAVID FLOYD, *et al*.,

Plaintiffs-Appellees,

-against-

THE CITY OF NEW YORK,

Defendant-Appellant.

----------X

PLAINTIFFS-APPELLEES' MOTION FOR RECONSIDERATION BY THE EN BANC COURT OF THE OCTOBER 31, 2013 MANDATE

BELDOCK LEVINE & HOFFMAN LLP
99 Park Avenue, Suite 1600
New York, New York 10016
(212) 490-0400

CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, New York 10012
(212) 614-6464

COVINGTON & BURLING LLP
The New York Times Building
620 Eighth Avenue
New York, New York 10018-1405
(212) 841-1000

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PRELIMINARY STATEMENT

Plaintiffs-Appellees ("Plaintiffs") brought this action – perhaps one of the most significant civil rights cases in a generation – to challenge a policy and widespread practice of suspicionless and race-based stops and frisks by Defendant-Appellant the City of New York (the "City"), and the City's deliberate indifference to these mass constitutional violations for a decade. After presiding over a nine-week trial and hearing testimony from over 100 witnesses (resulting in an 8,000 page trial transcript), the district court (Hon. Shira A. Scheindlin, J.) issued a 198-page opinion finding the City liable under the Fourth and Fourteenth Amendments. Judge Scheindlin separately ordered the parties to engage in a process to develop remedies, subject to the district court's future review and approval.

On October 31, 2013, in the context of ruling on a motion for a stay of the remedial process pending appeal, a motions panel of this Court (Hon. Cabranes, Walker, Parker, JJ.) (the "Panel") issued an apparently unprecedented and procedurally defective order removing the district judge. Without briefing from the parties, the Panel found that Judge Scheindlin "ran afoul" of the Code of Conduct for United States Judges (the "Mandate", attached to Declaration of Jenn Rolnick Borchetta, Esq., dated November 11, 2013 ("Borchetta Decl."), as Ex. A). In two footnotes in its summary mandate, the Panel without explanation found that an "appearance of impropriety" stemmed from: (1) the judge's routine suggestion, six

years ago (at a conference in which she denied the plaintiffs' contempt motion against the City), that if the plaintiffs had evidence of continuing constitutional violations they could file a new case as "related" to *Daniels v. City of New York*, a case then before her that also challenged the constitutionality of the NYPD's stop-and-frisk practices; and (2) media interviews the judge gave during the pendency of *Floyd*, in which she refused to discuss the merits of that case, but did defend herself against attacks during the trial by the Defendant.

The Panel's decision is a perfect storm of procedural irregularity. The Panel (1) raised the removal issue *sua sponte*, without notice to the parties or the district court judge, without any request or complaint from the parties, and long after the City waived an opportunity to seek removal; (2) based its decision impermissibly on matters outside the appellate record; and (3) denied the parties an opportunity to be heard on alleged improprieties, even though Plaintiffs may suffer prejudice from reassignment to a judge unfamiliar with the complexities of this case. Given the Panel's stay of all proceedings before the district court and the opportunity to consider alleged improprieties in the ordinary course of merits briefing, the removal of Judge Scheindlin appears gratuitous and deeply flawed.

This extraordinary action merits review by the full court. First, in its haste to remove the district judge, the Panel exercised appellate jurisdiction in contravention of strict congressional prohibitions against piecemeal appellate

review and long-standing precedent in this Court. Because this Court lacks jurisdiction over the City's underlying appeal, the Panel entered the Mandate without authority.

Second, impugning the ethics of a district court judge who for years presided over a significant proceeding, when the parties themselves never raised the issue, must follow appropriate procedural rules to ensure any resulting removal or reassignment is fair, warranted, and just. The Panel here dispensed with even the most basic procedures – notice and an opportunity to be heard – without evident need, and offered no explanation for such extraordinary action. Plaintiffs – and the hundreds of thousands of New Yorkers they represent – may and have already suffered substantial prejudice by the unprecedented actions of a panel of this court and by reassignment to a judge unfamiliar with the complicated and extensive facts of this case – familiarity that is necessary to ultimately impose fair and effective relief. It is not apparent that the Panel even considered this potential prejudice.

The rules of procedure and the principles of due process must have meaning in this Court. Accordingly, to "correct clear error" and "prevent manifest injustice," *Doe v. New York City Dep't of Social Serv's*, 709 F.2d 782, 789 (2d Cir. 1983), this Court should recall the Mandate and review and reconsider the Panel's rulings en banc. *Calderon v. Thompson*, 523 U.S. 538, 549-50 (1998) ("[T]he courts of appeals are recognized to have an inherent power to recall their

mandates, subject to review for an abuse of discretion." (citation omitted)); *see also Sargent v. Columbia Forest Prods., Inc.*, 75 F.3d 86, 89 (2d Cir. 1996) ("Our power to recall a mandate is unquestioned." (citation omitted)).

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs filed this action almost six years ago following the City's failure to comply with a settlement agreement in *Daniels v. City of New York*, No. 99 Civ. 1695 (S.D.N.Y. filed Mar. 8, 1999), a putative class action alleging, as this case does, that the City's stop-and-frisk policy and practice violated the Fourth and Fourteenth Amendments. The City's failure to comply with the *Daniels* settlement that had been so-ordered by Judge Scheindlin in part formed the basis of the *Floyd* complaint, *see* 08 Civ. 1034, Dkt # 50 ¶¶ 5, 120, 128 (S.D.N.Y. Oct. 20, 2008) (alleging City's failure to abide by the terms of the *Daniels* settlement), and was found at the *Floyd* trial to be evidence of the City's deliberate indifference to racial discrimination. *See* Dkt # 22 (Civil Appeal Pre-Argument Statement ("Form C")) at 224. The attorneys representing the parties in both cases are the same. *Compare* No. 99 Civ. 1695 (Attorney Jonathan C. Moore appearing on behalf of plaintiffs; attorney Heidi Grossman appearing on behalf of defendants), *with Floyd v. City of New York*, No. 08 Civ. 1034 (S.D.N.Y. filed Jan. 31, 2008) (same). When Plaintiffs filed *Floyd*, they marked it as a related to *Daniels* pursuant to governing local rules, and Judge Scheindlin accepted *Floyd* as related. Dkt # 22 (Form C) at 34; *see*

also Civil Cover Sheet, No. 08 Civ. 1034, Borchetta Decl., Ex. C. In almost six years of litigation, the City never questioned the marking of these cases as related.

Floyd went to trial in March of 2013, and evidence closed nine weeks later. Dkt # 22 (Form C) at 89, 114. It was perhaps the most highly publicized civil rights trial in a generation. In the midst of trial, media suggested that Judge Scheindlin harbored bias against law enforcement based on a report from the office of Mayor Michael Bloomberg. *See, e.g.*, Ginger Adams Otis & Greg B. Smith, *Federal Judge to Rule on Stop-and-Frisk Case Bias Against Cops: Report*, N.Y. Daily News, May 15, 2013 ("An internal report by Mayor Bloomberg's office paints the judge who will soon rule on the NYPD's stop-and-frisk policy as biased against law enforcement . . . .").

Two months after evidence closed, Judge Scheindlin issued a finding of liability and an order directing the parties to participate in a process to develop remedial proposals. *See* Dkt # 22 (Form C) at 129-365. On August 16, 2013, the City noticed its appeal of the liability and remedies orders. *See* Dkt # 22 at 4. In its statement of issues to be presented on appeal, the City did not include a question concerning judicial bias or an appearance of impropriety. Dkt # 22 at Addendum B. The City thereafter moved this Court for a stay of remedies pending appeal, but it did not include in its motion an argument concerning Judge Scheindlin's

acceptance of *Floyd* as related to *Daniels*, judicial bias, or an appearance of impropriety. Dkt # 72, 206.

Despite this, at oral argument on the stay application, Judge Cabranes *sua sponte* queried of the City whether comments Judge Scheindlin made during a court conference in *Daniels* and comments attributed to her in news articles raised an appearance of impropriety, although no questions were asked of Plaintiffs' counsel on this point by anyone on the Panel. He suggested to the City that they might include such an argument in their appeal. Two days later, the Panel stayed proceedings in the district court, removed Judge Scheindlin, and assigned itself to hear the merits of this appeal. *See* Dkt # 247; Borchetta Decl., Ex. A. Plaintiffs were provided no opportunity to brief this issue and no advance notice that the Panel would raise the issue at oral argument.

The Mandate explains the basis for removing Judge Scheindlin in one paragraph and two footnotes. The Panel held that Judge Scheindlin "ran afoul of the Code of Conduct for United States Judges . . . ." It cites the canons related to disqualification and the appearance of impropriety. It does not cite Canon 3(A)(6), which regulates judicial comments to the public.

With respect to the *Daniels* conference, the Mandate quotes Judge Scheindlin and cites "generally" to a *New York Times* article. But the Panel in part relies upon a conference colloquy that does not appear in the cited *Times* article, or

any other article cited. The transcript of the December 21, 2007 court conference (the "*Daniels* Transcript") (Borchetta Decl., Ex. B), containing those comments is nowhere in the record on appeal, was not submitted with the stay application, and is not available on the electronic docket of the *Daniels* action.

With respect to press statements, the panel does not identify the comments it found improper and instead cites news articles. None of the comments in those articles concerned the merits of any pending or impending action. Given its directive staying all proceedings in the district court, the Panel had no appropriate reason to immediately remove Judge Scheindlin.[1]

ARGUMENT

1. The Panel Lacked Appellate Jurisdiction.

The Panel lacked jurisdiction to enter the Mandate. The City concedes that no final order has issued in this action and invokes appellate jurisdiction for interlocutory review of grants of injunctions under 28 U.S.C. § 1292(a)(1). *Id.*; *see also* Dkt # 44 at n.1. This Court has repeatedly and unequivocally held that "Section 1292(a)(1) functions only as a narrowly tailored exception to the policy against piecemeal appellate review." *Sahu v. Union Carbide Corp.*, 475 F.3d 465,

[1] The Panel directed a briefing schedule under which the City is afforded 148 days to prepare its 28,000-word opening brief and Plaintiffs are afforded 35 days to prepare their responsive brief. Plaintiffs reserve the right to seek the entire 91 days afforded them under the rules. *See* Local Circuit Rule 31.2(a)(1)(B).

467 (2d Cir. 2007) (citations and internal quotation marks omitted); *Henrietta D. v. Giuliani*, 246 F.3d 176, 181 (2d Cir. 2001). The City concedes that appealing now will result in piecemeal appeals, including an appeal of any subsequent remedial order. Dkt # 143 at 13. This concession alone confirms the absence of jurisdiction.

The liability order is a declaratory judgment, and the remedies order compels the City to engage in a process for developing remedial proposals and nothing more.[2] *Floyd v. City of New York*, No. 08 Civ. 01034 (SAS), 2013 U.S. Dist. LEXIS 132881, at *6-8 (S.D.N.Y. Sept. 17, 2013); *see also* Dkt ## 76, 170, 171, 208. This Court and others have long held that, in complex institutional reform cases such as this, appellate courts should avoid interfering with a district court's development of remedies until completed, and that jurisdiction is absent when parties are compelled only to submit remedial proposals. *See, e.g.*, *Taylor v. Bd. of Educ.*, 288 F.2d 600, 602 (2d Cir. 1961) (Friendly, J.); *Spates v. Manson*, 619 F.2d 204 (2d Cir. 1980) (Friendly, J.); *Henrietta D.*, 246 F.3d 176; *Bridgeport v. Bridgeport Guardians Inc.*, No. 05-2481-cv, 2007 U.S. App. LEXIS 28662 (2d Cir. Dec. 11, 2007); *Jackson v. Fort Stanton Hosp. and Training Sch.*, 964 F.2d

[2] For this reason, there is unquestionably no irreparable harm to the City from the liability and remedies orders. The Panel found only that the orders will have the "effect of causing" the City's "actions." Borchetta Decl., Ex. A at 2. A finding of *irreparable harm*, not mere effect, is necessary to obtain a stay. *Nken v. Holder*, 556 U.S. 418, 435 (2009); *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 22 (2008).

980, 988-89 (10th Cir. 1992); *Groseclose v. Dutton*, 788 F.2d 356 (6th Cir. 1986); *Hoots v. Pennsylvania*, 587 F.2d 1340 (3d Cir. 1978).

The district court's remedies order compels only participation in a process to develop remedial proposals that would be binding *if and only if* the court agrees with their scope and content *and* obligates compliance pursuant to subsequent court order. This Court therefore lacks jurisdiction over the appeal, and accordingly lacked authority to enter the Mandate. *See Kamerling v. Massanari*, 295 F.3d 206, 212 (2d Cir. 2002); *Henrietta D.*, 246 F.3d at 179; *Ammi v. Holder*, 326 Fed. Appx. 483, 484 (10th Cir. 2009) (summary order) ("a prerequisite for consideration of a motion for stay pending appeal is appellate jurisdiction over the underlying appeal."). *See also Taylor*, 288 F.2d at 601-02 (raising jurisdictional question and dismissing appeal *sua sponte* in context of stay application).

Exercising appellate authority where none exists was the Panel's first error.

2. <u>The Panel Effectively Disqualified Judge Scheindlin Without Authority</u>.

At the time the panel issued its order removing Judge Scheindlin from this case, the City had no right to seek disqualification. "It is well-settled that a party must raise [a] claim of a district court's disqualification at the earliest possible moment after obtaining knowledge of facts demonstrating the basis for such a claim." *Apple v. Jewish Hosp. & Med. Ctr.*, 829 F.2d 326, 333-34 (2d Cir. 1987) (citations omitted); *see also United States v. Brinkworth*, 68 F.3d 633, 640 (2d Cir.

1995). Timeliness ensures fair invocation of the disqualification rules. *Apple*, 829 F.2d at 334 ("A movant may not hold back and wait, hedging its bets against the eventual outcome."); *see also LoCascio v. United States*, 473 F.3d 493, 497-98 (2d Cir. 2007).[3] The City never sought recusal or reassignment at any point: Not when *Floyd* was accepted as related to *Daniels*; not in the almost six years since *Floyd* was filed; not when articles forming the basis of the Mandate were published; not in the two months thereafter before issuance of the liability ruling; not in its statement of issues on appeal; not in its stay application. The City's failure to seek reassignment or recusal when *Floyd* was accepted as related raises not merely a matter of laches: it constituted a waiver of any right to recusal. *See United States v. Bayless*, 201 F.3d 116, 127 (2d Cir. 2000).

Even assuming, *arguendo*, that the City had not waived a right to seek recusal, the Panel could not properly disqualify Judge Scheindlin. The standard for disqualification of a judge based on an alleged appearance of impropriety "is whether an objective and disinterested observer, knowing and understanding all of

[3] Indeed, circuit courts across the country emphasize that timeliness is a critical element of an application for recusal. *In re Abijoe Realty Corp.*, 943 F.2d 121, 126-67 (1st Cir. 1991); *In re Kensington Int'l Ltd.*, 368 F.3d 289, 312 (3d Cir. 2004); *United States v. Owens*, 902 F.2d 1154, 1155-56 (4th Cir. 1990); *Travelers Ins. Co. v. Liljeberg Enter's*, 38 F.3d 1404, 1410 (5th Cir. 1994); *Callihan v. E. Ky. Prod. Credit Ass'n*, 895 F.2d 1412 (6th Cir. 1990); *United States v. Patrick*, 542 F.2d 381, 390 (7th Cir. 1976); *Fletcher v. Conoco Pipe Line Co.*, 323 F.3d 661, 664 (8th Cir. 2003); *E. & J. Gallo Winery v. Gallo Cattle Co.*, 967 F.2d 1280, 1295 (9th Cir. 1992); *Willner v. Univ. of Kan.*, 848 F.2d 1023, 1028-29 (10th Cir. 1988); *United States v. Barrett*, 111 F.3d 947, 952-53 (D.C. Cir. 1997).

the facts and circumstances, could reasonably question the court's impartiality." *SEC v. Razmilovic*, 728 F.3d 71, 86 (2d Cir. 2013) (citations omitted); *In re IBM Corp.*, 45 F.3d 641, 643 (2d Cir. 1995). Because the Panel did not seek to obtain, nor did it know, all relevant facts and circumstances, it could not have made this determination. The opinions of pundits and politicians are notably irrelevant to this inquiry. *Cf. Bayless*, 201 F.3d at 126-27 ("[T]he existence of the appearance of impropriety" is not to be determined "by considering what a straw poll of the only partly informed man-in-the-street would show . . . .").

(A) Acceptance of *Floyd* as Related Is Not a Basis for Disqualification.

Intrajudicial events – that is, comments and decisions made in the course of judicial proceedings – are almost never a basis for disqualifying a judge. *Liteky v. United States*, 510 U.S. 540, 556 (1994). Intrajudicial events are not a basis for recusal unless the judge considers extrajudicial material or evinces a "deep-seated and unequivocal antagonism that would render fair judgment impossible." *Id*. at 556. The Panel clearly erred in hinging recusal on intrajudicial comments and decisions.

The Panel committed extraordinary error in removing Judge Scheindlin based on trivial intrajudicial comments plucked out of context without regard to the fairness she exhibited during years of litigation. *Id*. ("A judge's ordinary efforts at courtroom administration . . . remain immune."); *see also Razmilovic*, 728 F.3d

at 86. The record does not support the notion that Judge Scheindlin caused Plaintiffs to file *Floyd* and mark it as related to *Daniels*. At the *Daniels* conference, Judge Scheindlin was considering the plaintiffs' motion to modify a settlement agreement, compel the City's specific performance of certain terms, and extend the agreement's expiration date. Judge Scheindlin sided with the City, denied the plaintiffs' motion, and noted proper procedures for plaintiffs to follow (procedures obviously known to the plaintiffs' attorneys) should they have evidence supporting new claims against the City for racial profiling and unconstitutional stop-and-frisk practices. *See* Borchetta Decl., Ex. B at 3-11, 14-15, 41-42. A full reading of the *Daniels* Transcript, *see id*., leaves no question that Judge Scheindlin's comments were impartial. This demonstrates the importance of process. *See Andrade v. Chojnacki*, 338 F.3d 448, 459-60 (5th Cir. 2003) (opining, where party moved for recusal for the first time at the appellate level, that "these circumstances emphasize the wisdom behind the procedural rules – limiting supplementation of the appellate record; deeming waiver or forfeiture of issues not raised in the trial court; and restricting the scope of appellate review – that are designed to confine appellate review to fact finding that occurs in the trial court.").

Regardless, accepting *Floyd* as related to *Daniels* is not a basis for removal. The local rules on relatedness compel judges to accept cases as related where it would serve judicial efficiency, and "district court[s] should be accorded

considerable latitude in applying local procedural rules . . . ." *Dedji v. Mukasey*, 525 F.3d 187, 192 (2d Cir. 2008) (Cabranes, J.); *see also* 28 U.S.C. § 137; *Buck v. Cleary*, No. 07-1753-cv, 2009 U.S. App. LEXIS 20384, at *2-3 (2d. Cir. Sept. 14, 2009) ("We accord 'considerable deference' to a district court's interpretation and application of its own local rule, and review such rulings for abuse of discretion." (citing *LoSacco v. City of Middletown*, 71 F.3d 88, 92 (2d Cir. 2001))); *Whitfield v. Scully*, 241 F.3d 264, 270-71 (2d Cir. 2001). There can be no reasonable doubt that it served judicial efficiency to mark *Daniels* and *Floyd* as related given the congruence of parties, attorneys, discovery, and claims. The City's failure to ever take issue with the cases being marked as related indicates that it was apparent to all that the cases were in fact related.

Plaintiffs have not found a single case in which this Court predicated an appearance of impropriety on application of the related case doctrine. The Panel's opinion threatens to transform routine, discretionary decisions into a basis for judicial disqualification. Indeed, this is already happening. *See U.S. v. Vilar*, Civ. No. 05-621 (RJS), Dkt 621 (S.D.N.Y. Nov. 7, 2013) (motion seeking recusal of Judge Sullivan "in accordance with" the *Floyd* panel opinion because of "impropriety and appearance of impropriety" in an alleged misuse of the related case rule) (quoting *Floyd v. City of New York*, No. 13-3088).

(B) Press Statements Were Not a Basis to Disqualify.

Judges are free to speak publicly, and the fact of press interviews is not itself improper. *See Andrade*, 338 F.3d at 459-60; *United States v. Haldeman*, 559 F.2d 31, 36 (D.C. Cir. 1976) (en banc) (per curiam). Judge Scheindlin expressly refused to comment on the merits of *Floyd*, and instead spoke only to illuminate her practices. The public had an interest in understanding the jurist overseeing the trial of this historic proceeding, particularly in light of the attacks Defendant released against her through the media. *Cf. In re Marshall*, 721 F.3d 1032, 1043-44 (9th Cir. 2013). Once media began questioning Judge Scheindlin's impartiality during the trial, she arguably had an obligation to educate the public on her judicial approach. *See* ABA Model Code of Judicial Conduct Canon 1.2 cmt. 6 (2011) ("A judge should initiate and participate in community outreach activities for the purpose of promoting public understanding of and confidence in the administration of justice.").

3. Reassignment Would Not Be Appropriate Under Supervisory Authority.

Under 28 U.S.C. § 2106, this Court has authority to reassign cases on remand, but "[t]hat is an extreme remedy, rarely imposed." *United States v. City of New York*, 717 F.3d 72 (2d Cir. 2013) (citations omitted) (hereinafter "*Vulcans*"); *see also United States v. Awadallah*, 436 F.3d 126, 135 (2d Cir. 2006) (Parker, J.) ("Remanding a case to a different judge is a serious request rarely made and rarely

granted."). It is reserved for "unusual circumstances where both for the judge's sake and the appearance of justice, an assignment to a different judge is salutary and in the public interest, especially as it minimizes even a suspicion of partiality." *United States v. Robin*, 553 F.2d 8, 10 (2d Cir. 1977) (en banc) (internal citations and quotation marks omitted); *see also Mackler Prod's Inc. v. Cohen*, 225 F.3d 136, 146-47 (2d Cir. 2000). Surely, the Mandate fails to serve these purposes.

Preliminarily, the Panel did not merely reassign this action; the Mandate without serious question constituted a *de facto* disqualification if not an express one. The appropriate inquiry is therefore whether disqualification was proper under the exacting standards of 28 U.S.C. § 455. But even assuming the Panel was acting pursuant to Section 2106, its summary removal of the judge presiding over a highly publicized civil rights case without even an explanation of its reasoning *damaged* the appearance of justice. *See, e.g.*, Editorial Board, *A Bad Ruling on Stop-and-Frisk*, N.Y. Times, Oct. 31, 2013; Emily Bazelon, "*Shut Up, Judge!*", Slate Magazine, Nov. 3, 2013.

In considering whether to reassign *Floyd*, the Panel should have considered "whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness." *Robin*, 553 F.2d at 10.[4] The undue

[4] The only other basis for Section 2106 reassignment – when the original judge would have great difficulty applying appellate determinations, *see Robin*, 553 F.2d

waste of judicial resources and potential prejudice to Plaintiffs from a reassignment – after almost six years of litigation, a nine week trial, and a finding of liability, and before remedies have been developed or so-ordered – is tremendous. *Cf. id.* at 11; *Vulcans*, 717 F.3d at 100 n.28; *United States v. Microsoft Corp*., 253 F.3d 34, 108 (D.C. Cir. 2001) (refusing to apply retroactive disqualification after bench trial even where judge "destroyed the appearance of impartiality" because doing so "would unduly penalize plaintiffs . . . ."). Even the most diligent judge might never achieve the same familiarity with the facts necessary to best tailor remedies as the judge who oversaw the lengthy trial in this case. A new judge will undoubtedly require significant time to learn the extensive and complex factual record, and such familiarity must necessarily precede the so-ordering of remedies. Removing the judge familiar with the factual record of this case will delay justice for mostly minority New Yorkers who have already waited too long.

Having left the public to speculate about the basis for removal while simultaneously holding that the "appearance of impartiality" was compromised "*surrounding this litigation*," the Mandate invited the public to unfairly question the soundness of the liability ruling. Indeed, on the morning of Saturday, November 9, 2013, the City moved this Court to "immediately vacate [Judge Scheindlin's] ruling" based on the Mandate. Dkt # 265. Put aside that the City long

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at 11 – is inapplicable here, as the Panel expressed no opinion on the merits of the appeal.

ago waived any right to seek Judge Scheindlin's recusal: the City is by this motion attempting to circumvent procedures – applicable to every other appellant who comes before this Court – that require arguments seeking to overturn district court orders to be presented in merits briefs. Worse still, the City is requesting expedited briefing on their motion, suggesting that Plaintiffs be given three business days, including Veterans Day, to respond, despite that Plaintiffs are entitled to ten days under the motion rules. *See* Fed. R. App. P. 27(a)(3)(A). Undermining the liability ruling in this manner has prejudiced Plaintiffs and deprived them of basic due process.

4. A New Appellate Panel Should Be Randomly Assigned.

Contrary to this Court's customary practices, the Panel assigned itself to hear the merits of this appeal. Yet the Panel rushed to judgment about the district court's purported partiality and took apparently unprecedented action in removing her without basic process and without regard to potential prejudice to Plaintiffs. The Panel further inappropriately considered extrajudicial materials. *See Liteky*, 510 U.S. at 556; *Razmilovic*, 728 F.3d at 86. In so acting, the Panel has undermined the appearance of justice. This Court should therefore randomly reassign a different panel for all further proceedings in *Floyd*. Because the Panel expressed no judgment on the merits and has not yet reviewed the trial record, reassignment would not hinder judicial efficiency.

CONCLUSION

WHEREFORE, based on the foregoing, Plaintiffs respectfully request that this Court: (1) recall its mandate; (2) reverse the Panel's decision to remove Judge Scheindlin or, in the alternative, direct that the issue be briefed with the merits; and (3) randomly assign a different panel for all further proceedings in this appeal.

Dated: New York, New York
November 11, 2013

Respectfully submitted,

- s -

Jonathan C. Moore, Esq.
Jenn Rolnick Borchetta, Esq.
BELDOCK LEVINE & HOFFMAN LLP

Darius Charney, Esq.
Baher Azmy, Esq.
Sunita Patel, Esq.
Chauniqua Young, Esq.
CENTER FOR CONSTITUTIONAL RIGHTS

Eric Hellerman, Esq.
Kasey L. Martini, Esq.
COVINGTON & BURLING LLP

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

– X

DAVID FLOYD, *et al.*,

Plaintiffs-Appellees,

-against-

THE CITY OF NEW YORK,

Defendant-Appellant.

– X

Docket No. 13-3088

DECLARATION IN SUPPORT OF MOTION FOR RECONSIDERATION BY THE *EN BANC* COURT

JENN ROLNICK BORCHETTA, declares under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the following is true and correct:

1. I am an associate at the law firm of Beldock, Levine & Hoffman, LLP, co-counsel for Plaintiffs-Appellees in the above-captioned appeal.

2. I submit this declaration in support of Plaintiffs-Appellees' Motion for Reconsideration by the *En Banc* Court of the October 31, 2013 Mandate issued by a motions panel of this Court (Hon. Cabranes, Walker, Parker J.J.). Dkt # 247.

3. Plaintiffs-Appellees have advised Defendant-Appellant City of New York of our intention to file the Motion for Reconsideration by the *En Banc* Court, and the City has indicated that it opposes our motion and intends to file an opposition.

4. For the reasons set forth in the accompanying memorandum of law, this declaration, and exhibits attached hereto, Plaintiffs-Appellees' motion should be granted.

5. Attached hereto as Exhibit A is a true and correct copy of the October 31, 2013 Mandate issued by the motions panel, Dkt # 247.

6. Attached hereto as Exhibit B is a true and correct copy of the transcript of the December 21, 2007 court conference in *Daniels v. City of New York*, 99 Civ. 1695 (SAS) (S.D.N.Y.).

7. Attached hereto as Exhibit C is a true and correct copy of the civil cover sheet in *Floyd v. City of New York*, 08 Civ. 1034 (SAS) (S.D.N.Y. Jan. 31, 2008).

Dated: New York, New York
November 11, 2013

/s/
JENN ROLNICK BORCHETTA

CORRECTED MANDATE

13-3123; 13-3088
Ligon, et al. v. City of New York, et al.; Floyd, et al. v. City of New York, et al.

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 31st day of October, two thousand thirteen.

Present:

John M. Walker, Jr.,
José A. Cabranes,
Barrington D. Parker,
Circuit Judges.

Jaenean Ligon, et al.,
Plaintiffs-Appellees.

v. 13-3123
City of New York, et al., (Corrected)
Defendants-Appellants,

David Floyd, et al.,
Plaintiffs-Appellees.

v. 13-3088
City of New York, et al.,
Defendants-Appellants,

Pending before the Court is a motion filed by Appellants City of New York et al. seeking a stay of the District Court's August 12, 2013 remedial order and preliminary injunction ("Remedies Opinion").

It is hereby ORDERED that the District Court's January 8, 2013 "Opinion and Order," as well as the August 12, 2013 "Liability Opinion" and "Remedies Opinion," each of which may or will have the effect of causing actions to be taken by defendants or designees of the District Court, or causing restraints against actions that otherwise would be taken by defendants, are STAYED pending the disposition of these appeals.

The appeal by defendants in both (consolidated) actions shall continue in the normal course, under the following schedule:

Defendants shall perfect their appeals by January 24, 2014.

Plaintiffs shall file by February 28, 2014.

Defendants shall reply by March 14, 2014.

Oral argument shall be heard on a date after March 14, 2014, to be set by the Court in due course.

The cause is REMANDED to the District Court for the sole purpose of implementation of this Order, and the mandate shall otherwise remain with this Court until the completion of the appeals process.

Upon review of the record in these cases, we conclude that the District Judge ran afoul of the Code of Conduct for United States Judges, Canon 2 ("A judge should avoid impropriety and the appearance of impropriety in all activities."); *see also* Canon 3(C)(1) ("A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned . . . ."), and that the appearance of impartiality surrounding this litigation was compromised by the District Judge's improper application of the Court's "related case rule," *see* Transfer of Related Cases, S.D.N.Y. & E.D.N.Y. Local Rule 13(a),[1] and by a series of media

[1] In a proceeding on December 21, 2007 involving the parties in *Daniels v. City of New York*, No. 99 Civ. 1695 (S.D.N.Y. filed Mar. 8, 1999), the District Judge stated, "[I]f you got proof of inappropriate racial profiling in a good constitutional case, why don't you bring a lawsuit? You can certainly mark it as related." She also stated, "[W]hat I am trying to say, I am sure I am going to get in trouble for saying it, for $65 you can bring that lawsuit." She concluded the proceeding by noting, "And as I said before, I would accept it as a related case, which the plaintiff has the power to designate." Two of the attorney groups working on behalf of plaintiffs in *Daniels*, a case

interviews and public statements purporting to respond publicly to criticism of the District Court.[2]

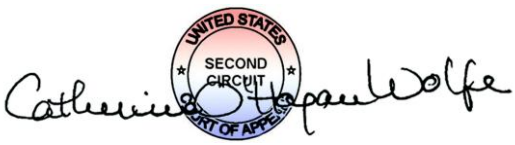
Accordingly, we conclude that, in the interest, and appearance, of fair and impartial administration of justice, UPON REMAND, these cases shall be assigned to a different District Judge, chosen randomly under the established practices of the District Court for the Southern District of New York. This newly-designated District Judge shall implement this Court's mandate staying all proceedings and otherwise await further action by the Court of Appeals on the merits of the ongoing appeals.

In taking these actions, we intimate no view on the substance or merits of the pending appeals, which have yet to be fully briefed and argued.

The mandate shall ISSUE FORTHWITH for the sole purpose of implementation of this Order and shall otherwise remain in this Court.

In the interest of judicial economy, any question, application, or further appeal regarding the scope of this Order or its implementation shall be directed to this panel, which will hear the case on the merits in due course.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk



A True Copy
Catherine O'Hagan Wolfe, Clerk
United States Court of Appeals, Second Circuit

challenging the New York Police Department's stop-and-frisk practices, helped file *Floyd* the next month. *See generally* Joseph Goldstein, *A Court Rule Directs Cases Over Friskings to One Judge*, N.Y. Times, May 5, 2013.

[2] *See, e.g.*, Mark Hamblett, *Stop-and-Frisk Judge Relishes her Independence*, N.Y. Law Journal, May 5, 2013; Larry Neumeister, *NY "Frisk" Judge Calls Criticism "Below-the-Belt*," The Associated Press, May 19, 2013; Jeffrey Toobin, *A Judge Takes on Stop-and-Frisk*, The New Yorker, May 27, 2013.

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

DANIELS,

Plaintiff,

v.

THE CITY OF NEW YORK,

Defendant.

----------x

New York, N.Y.
December 21, 2007
4:50 p.m.

Before:

HON. SHIRA A. SCHEINDLIN,

District Judge

(In open court)

MS. GROSSMAN: Your Honor, may I just bring one issue to your attention?

THE COURT: Not until I reach you.

Good afternoon, Mr. Moore.

MR. MOORE: Good afternoon, Judge.

THE COURT: Good afternoon, Ms. Costello.

MS. COSTELLO: Yes, good afternoon, your Honor.

THE COURT: Mr. Franklin.

And who is the person in between all of you?

MS. COSTELLO: Your Honor, this is Garrett Wright, he is a recent law graduate from our office.

THE COURT: And good afternoon, Ms. Grossman and Ms. Donahue.

Yes, what is it?

MS. GROSSMAN: There may be some reference to some confidential material during our conference, and I just wanted to bring that to the Court's attention, in that we believe the courtroom might have to be sealed for a very brief moment. For now, plaintiff's counsel is not prepared to raise those issues while we have other people here in the courtroom.

I think we are fine to keep the courtroom open.

THE COURT: I know who two of the people are, they are here on the criminal case. Who are the other people?

A VOICE: We are with the Center for Constitutional

Rights.

THE COURT: Are you both attorneys?

A VOICE: I am an attorney.

I am a paralegal.

THE COURT: They are -- I understand your point. As soon as I can, I'd be happy to get the criminal case out of the courtroom. As soon as I can.

Let me get started on this matter of Daniels versus The City of New York.

I have a letter from the plaintiffs dated December 14, 2007. And they are seeking a number of things. But I suppose on the most immediate basis they are seeking some kind of an order extending the Court supervision by no less than a few months, for the sole purpose of letting them fully brief the request for relief in this letter. So there is no rush.

So they are saying, the best way to have no rush and have no air is to have the defendant consent to a two-or-three month adjournment minimally, just so everybody can get these issues fully briefed and on the table. And if the Court denies all the relief, so be it.

But rather than have them work it out in eight or nine days, you are saying just to get some kind of interest of justice extension or something.

So I won't go into the rest of the relief they seek, more in terms of summarizing the letters, but the largest

overall summary is that there has been a lack of compliance in various ways with the stipulation of settlement. And so the Court should modify the stipulation of settlement order, specific performance of certain aspects of the stipulation of settlement.

And then they ask for the third point of relief, which is what I think you were referring to, where they think there should be a modification of the protective order as to some of the terms that have been declared confidential.

One reason is they say the Court will have to use some of the confidential information to determine what to do with the motion. But, secondly, they are saying some of it has been disclosed by the defendant in another context, and it is already much discussed, and you should withdraw the designation if it has been publicly disclosed.

Then I received a letter in response dated December 19, but actually received in chambers December 20, which was yesterday. And yesterday was a relatively busy day on the bench. So the long and short of it, I haven't had a chance to study the attachments carefully. But I did have the opportunity to read the letter, which itself was long, I guess, the pages aren't numbered so I can't tell how many, there is a lot of single-spaced pages, five or six. And I did read them.

And the quick summary of the defense letter is that plaintiffs want to pretend that the settlement agreement says

things it doesn't say. So the alleged breaches aren't breaches at all, because the settlement doesn't require the defendant to do what the plaintiffs say is a breach.

And defendants write a number of times in the letter, plaintiffs may have wanted the stipulation of settlement to say these things, but it doesn't. And there were intense and detailed settlement negotiations. And if they didn't get what they didn't get, they can't complain about it now.

And so the defendant opposes all the requests for relief, opposes any modification of the stipulation, opposes any order for specific performance, opposes any extension of the December 31 deadline, and opposes the modification of the protective order.

All of that said, it would nonetheless be helpful to the Court and all the parties, in the nine days remaining between now and the 31st of December, to be -- deny this in an orderly fashion by extending the deadline.

If the defendant refuses to do that, then the city is will write briefs every day for the next nine days. And if that's how you want to spend your Christmas and New Year's, that's up to you.

You may have the better of all the arguments, but I need to get enough of a record to figure it out. And if you want to do that much all through Christmas and New Year's.

Who is carrying the lead?

MR. MOORE: Ms. Costello.

THE COURT: Well, Ms. Costello, I think you have sought of the burden to make your oral argument the equivalent of a reply letter. I think you need to answer all the points that Ms. Grossman made in her very thorough submission point by point. Because her points, as you notice, stay closely away from the merits, so to speak. And they try not to tell me about whether or not, you know, there is a policy of discrimination, or whether your statistics show discrimination. They want to talk procedure and they want to talk about what is or isn't in the stipulation. What rights you have or don't have in the stipulation.

And I understand that is a contract and they are saying, no matter how bad things may be, that's not part of this lawsuit.

Do you have another lawsuit to bring?

But they placed some interesting alliance on the Latino Officers Association of The City of New York, where they quoted the Court as denying any further relief. And they thought that was a pretty good precedent for them. And it did seem to be a pretty good precedent for them.

For example, at one point the Court -- now there is no guarantees in discrimination in the settlement document, and that Court said, quote, even a convincing demonstration of persistent discrimination would not mean that the defendants

are violating the provisions of the settlement agreement.

That, sort of, is exactly the situation I may be in. You may be sort of seeing problems that are all very interesting but not part of this settlement agreement. So I think you need to give me a reply brief, if you wish, orally.

MS. COSTELLO: Yes, your Honor. I can try my best.

One point that the city raises about just the fact that there are no in substantial remedies in the consent decree.

THE COURT: I have the consent decree. I think somebody attached it as Exhibit A.

MS. GROSSMAN: Yes, your Honor.

THE COURT: So you are going to have to show me, don't tell me you disagree, show me the language.

MS. COSTELLO: In section C1, your Honor, in section C1.

Let me just back up one second, your Honor. I think there were two ways, and this is part of what we would like to brief for the Court, there are two ways that the Court could extend the life of the consent decree and also grant our request for modification. One is within the Court's equitable powers and the second is standard under Ruffo for modification.

I think what Ms. Grossman's letter focuses on is the straight reading, the non-compliance and specific performance and contempt proceeding that would result, flow from that which

the dispute resolution mechanism in the agreement itself, if you look at the standard under Ruffo, a much more flexible standard that takes into account the public interest and the change in circumstances. The city doesn't address that at all.

THE COURT: No, they never cite Ruffo, I don't think they did. I read it fairly quickly.

MS. COSTELLO: Under the standard in Ruffo, we think that the modification would be appropriate.

Putting that aside for the moment, and just looking at the language of the consent decree, section C1 of the stipulation requires that the NYPD shall have a written policy regarding racial or ethnic or national origin profiling, that complies with the United States Constitution and the New York State Constitution.

And I think that we have shown that there is evidence of racial profiling going on.

THE COURT: Even if there is evidence of racial profiling, that paragraph doesn't have anything to do with that.

It says that the NYPD shall have a written policy that complies with the Constitution of both the United States and New York State. Okay, that's what they have to have.

Do they have -- let me give you an example, let's say they had a written policy that complies with it, and that they violated it all the time. They wouldn't have violated

paragraph 1. Paragraph 1 says you have to have a written policy that complies with the --

MS. COSTELLO: -- if you read paragraph C1 in connection with, which requires training on the policy, training on the officers in stop and frisk procedures, in section E there is a provision in there for palm cards which go out to individuals in the community. If they believe they have been improperly stopped and frisked they can file a complaint with the Civilian Complaint Review Board.

We think that all of that means there was an implication of this policy --

THE COURT: -- you are asking me to rewrite your settlement agreement. This is hypothetical, it is not a fact.

I don't want anybody to be confused by reading the record. I am saying hypothetically if they have a written policy that complies with the Constitution of the United States and of New York State, regarding racial and ethnic origin profiling, they satisfied number 1, paragraph C1.

Even if there were evidence that they were violating their own policy, they still say that.

Number 1 only requires them to have appropriate written policy.

That seems to be the whole point of this notion that there is no guarantees in this agreement. Nowhere in the agreement is the city guaranteed that it will not have an

inappropriate racial profiling. There is no guarantee in here. It is exactly the same thing that Judge Kaplan was trying to say.

MS. COSTELLO: If you look at section C2, which says that the NYPD may alter the policy --

THE COURT: -- let me read that.

It says: (Reading) The NYPD may alter the racial profiling policy at any time in compliance with paragraph C1.

That just means if they have the policy that isn't in compliance, and they want to make a written policy that is in compliance, I don't see that number 2 provides you the guarantee that you seem to be talking about.

MS. COSTELLO: I think number 2 also relates to altering the policy. And I think that the intent of this agreement was not to bargain for a policy that meant nothing that the NYPD could just go out and violate people's Fourth Amendment rights and Fourteenth Amendment rights with no recourse to plaintiffs. I think that would --

THE COURT: -- maybe it is an -- why don't you file a lawsuit?

MS. COSTELLO: We did, we are here.

THE COURT: No, you are struggling with the December 31, 2007 deadline in a 1999 case. And if you got proof of inappropriate racial profiling in a good constitutional case, why don't you bring a lawsuit? You can certainly mark it as

related.

How could it not be related to this whole long seven or eight years we have lived together on this case? Because you are trying to put a square peg in a round hole. And trying to force yourselves to argue what the settlement means, that it doesn't mean if you have a timely lawsuit -- you seem to have compiled interesting arguments Ms. Grossman has not rebutted -- maybe she did, that's why we didn't do something, because we didn't want them to write this letter, she -- let's just say she hasn't substantially responded to your letter. If one had only your letter, it would look like you have a lawsuit. So instead of struggling to telling me about a stipulation of settlement, why don't you craft a lawsuit?

MS. COSTELLO: We could, but the only other issue is --

THE COURT: That's what would I like to turn to.

Can we talk about the noncompliant?

MR. MOORE: Judge, could I just say a few things, before we do that? About the notion that what we were bargaining for was simply a piece of paper that had no substance to it.

THE COURT: I didn't say it had no substance. But it didn't have the word guarantee. Didn't she write in her letter there were no guarantees? And Judge Kaplan talked about that in his settlement. I didn't have time to read his decision, I

only read these two letters. Sometimes a Judge has some time and sometime not. I didn't have a lot of time, especially the city's letter just came in yesterday.

MR. MOORE: To the extent that given my involvement with the case in the beginning, I can shed any light on that, on what our understanding was, about what we were bargaining for.

We believed that we were getting a policy that the city would put into effect. That was, it is reason why we brought the lawsuit. And certainly as Ms. Costello said, there were not just -- they didn't just agree to change the written policy, they agreed to do several things.

THE COURT: But we have to find them chapter and verse, because their argument -- I'd like to interrupt you just for a minute, and take this criminal case.

(Recess)

THE COURT:: I think you were speaking, Mr. Moore.

MR. MOORE: I had been making a general observation about my understanding in the course of our negotiating this decree.

I find it hard to believe that The City of New York would, in effect, say to this Court, or to anybody, well, we have a policy, but we don't have to follow it.

THE COURT: I was saying as a hypothetical. I didn't say they said --

MR. MOORE: -- I think they say that in their letter, that we can change the policy -- we can -- as long as we have a written policy, we can essentially do whatever we want.

I just think that if that's, in fact, what the position of the city of New York is, it is a significant difference from what we understood we were getting, which was a policy that had some substance to it. Not just a policy on paper.

It's sort of like passing the Thirteenth Amendment abolishing slavery as long as we have an amendment that you can't have slavery. But in practice we still have slavery.

It seems to me it is a hyper technical interpretation of the words in the decree. The decree was meant to address what we believed was a serious issue with respect to racial profiling which, apparently, has not gone away. And even their own Rand study that they commissioned, suggests that at least with respect to the frisks, maybe not the stops, but even the frisks, that there is a racial disparity, that's their own expert's testimony, their own expert's report.

So I just find the notion that we were tying to basically engage in a law school exercise of getting a policy that had no substance --

THE COURT: -- well --

MR. MOORE: -- contrary to my understanding and contrary --

THE COURT: -- I will quote from page 4 of the letter, the first full paragraph.

(Reading) In conclusion, it is important to state that plaintiffs vigorously bargained for a provision which would create for an obligation on the part of the defendants to guarantee that there would be no racial profiling. The city refused to agree to such a term for reasons here are negotiated.

MR. MOORE: I don't know, there is no citation to that, there is no -- it is sort of, in a way, it was -- maybe it was by being silent they hoped that we wouldn't say to you, say to the city, and you are going to comply with that, you are going to actually implement the policy.

I don't think -- I mean, a municipality that agrees to adopt a policy should be then saying, now that we have adopted a written policy, we don't have to implement it in practice. When, in fact, they were making -- they were, you know, there was information sent out that there was a racial --

THE COURT: -- what I am trying to say -- I am sure I am going to get in trouble for saying it, for $65 you can bring that lawsuit. You can simply --

MR. MOORE: $350.

THE COURT: I knew I had it wrong.

The city violates its own written policy, the city has a policy that violates -- they have violated their policy, here

is the proof of it, please give us the remedy. Injunction or damages, or whatever lawyers ask for in compliance.

So for $350 you can bring that lawsuit and it is timely.

I don't understand why we have to potentially have, you know, months of briefing when it does fit under this stipulation or it doesn't, that Ruffo applies or it doesn't that the Court has the power to extend the supervision, that we want an immediate appeal to the circuit. Why do you need that if you have a lawsuit? Bring it. They have a written policy, right?

MS. GROSSMAN: Yes, your Honor.

THE COURT: If you think they are violating their written policy, sue them.

MS. COSTELLO: Your Honor, just two quick points. One is about the point your Honor's raising about just filing a new lawsuit.

The one issue for us in that particular scenario is that the protective order is still in effect. Once this case ends, we have to give back all of the data. So unless the Court is prepared to modify the protective order and lift it, we would not have the benefit of that data until we filed a new case and engaged in discovery and battles with the city to get that same information again, and then another battle over a protective order again.

So we see it in the interests of judicial economy, if the Court would lift the protective order in this case, since under the language of the stipulation -- and we pointed, if the information is otherwise made publicly available.

THE COURT: That's something I do want to talk to the city about.

If it is publicly available, then I don't understand why you can't use publicly-available information in drafting your suit, or for whatever other purpose. If something is publicly available and I can get it and anybody who is in the public library can get it, or using the Internet can get it, if anybody calls the city's green book office, can get it, then it is public.

Can you do this from public information or not?

MS. COSTELLO: It is not that publicly available.

THE COURT: You can't have it both ways. If it is public you can use it and I don't think the city can ever argue that you can't.

Once you backtrack and say it is really not public, then you are making their argument.

MS. COSTELLO: It is public. The only problem is that the information that the city has put out, just as Ms. Grossman's letter said, it is our data, we can use it however we would like to. The information that's been put out by the Rand Corporation, and we have a copy of the study, is that the

Rand Corporation and the NYPD's spin using magic wands about what the data means, our analysis and conversation with an expert shows us different things, that the Rand information has used benchmark and other statistical methods to explain away. So it is publicly available in the sense that the NYPD and the Rand publication has written details in the Daily News and otherwise made that information available. But in the sense the data that we have that may differ from what the city has put out, is not publicly available. Because that's our analysis and that's our impressions and our statisticians and numbers of what the patterns show.

So our information is different than what the city has, some of which is the same.

Rand reached some of the same conclusions about the data. But they have also ignored some of the other information, particularly racial disparities and the frisks leading to arrests and the weapons recovery that we think are indicative of racial profiling.

MR. FRANKLIN: Your Honor, in terms how the data is collected, we have the data on discs from the city, which makes it that much easier to compute.

This information is public, but it is public in hard copies. And so it is public not only through the Rand study, but also through the study that they, the city, gave to the city counsel. But they are both access to the data is here,

but it is in a format which is highly unusable in terms of making statistical analysis and breaking down data, which would take us months to recompile.

THE COURT: As I was saying earlier, Ms. Costello responded with how difficult it would be to get the material again. There is enough in the public record to craft the suit. And then in that suit simply say, we want produced all that was produced in the 1999 lawsuit.

I don't know how you could lose getting it. It may be a question of whether it is still going to be under protective order or not. But I can hardly imagine not getting it. You know what I am saying? It is so obvious to me that any Judge would require them to reproduce it to you in the same format that you have it, that you will have it again. Whether or not it remains confidential.

MR. FRANKLIN: We'll have it again, but we have to go through the same process we have gone through. We have to turn everything back to the city under this protective order. So if we get it back we have to again recalculate the same information that we already have.

THE COURT:: You have to go through recalculating? Why would that be?

MR. FRANKLIN: Because under the protective order we have to give them back that information.

THE COURT: Not just what they gave you?

MR. FRANKLIN: If my reading is correct, it's what they gave us and --

MS. COSTELLO: -- everything derived from the UF250 database. So it is the actual physical discs that the data is contained on, which are thousands and -- tens -- hundreds of thousands of entries, as well as any information that we derived. So any of the work that our statistician has done with coding, would have to be given back to the city. We couldn't retain that information.

THE COURT:: Your attorney work product and published material, all that stuff would have to go back?

That seems odd to me. I don't know why it can't be stored under the terms of confidentiality. This is not practical.

MS. COSTELLO: Your Honor, if I could, I am just going to take one minute and look at the protective order to make sure.

MR. FRANKLIN: Unless the city disputes that.

THE COURT: We aren't getting too far off the substance, are we?

MR. MOORE: Judge, the protective order --

THE COURT:: -- where is that? Do I have that?

MR. MOORE: I don't think you have a copy.

THE COURT: Do you have that, Ms. Grossman? Is that attached --

MS. GROSSMAN: -- your Honor --
MR. MOORE: -- I can hand you up a copy, Judge.
THE COURT:: This is June 31, 2000 -- I'm sorry -- January 31, 2000. Yes, it will be eight years this January.
MR. MOORE: Paragraph 7, I think, is the provision that is at issue here.
THE COURT:: Let's read it. (Reading) Within 30 days after the termination of this case, including any appeals, the confidential materials, including all copies, notes and other materials containing or referring to information derived therefrom, shall be returned to the producing party's attorneys, or upon their consent, destroyed. And all persons who possess such materials shall verify their return or destruction by affidavit furnished to the producing party's attorneys. And paragraph 8 says: (Reading) The terms of this order may be modified by further order of the Court.
So obviously 30 days after termination of this case is January 30, 2008, right? If the case terminates December 31 --
MS. GROSSMAN: -- I think, your Honor, the termination date was the termination when we entered into the effective date of the agreement.
THE COURT: It couldn't be, because -- they would have owed this stuff back to you years ago.
MS. GROSSMAN: They did. They returned all documents they were required to return when the agreement was executed,

and when it was finalized by the Court.

So the agreement incorporates the protective order and basically says that the plaintiffs need to return the documents, maintain the confidentiality, and return them after the agreement sunsets. That's expected after the agreement terminates.

The protective order was, the plaintiffs were subject to the protective order, to maintain the confidentiality, but --

THE COURT: -- I am not following you at all.

I still say they don't have to return all that they now still retain until January 30, 2008, thirty days after the termination of this case.

I am still supervising this case, that's why you are worried about my extending it even one day, because my supervision runs out on December 31, '07. So I still have this case. So, therefore, it is not 30 days after the termination of this case. They are talking about the very material they have --

MR. MOORE: We got material --

THE COURT: -- as recently as October. So, of course, you didn't return it 30 days after the case number was closed. Obviously it is not due back till January 30 or 31st of 2008.

All I am saying is, by then if you have a lawsuit pending and need the very same material, and I have the

authority to modify the terms of this order by a further order of the Court, which the city agreed to, then I will, and I will say, you have the material, hold on to it, remains confidential, somebody says otherwise, and use it as you need to use it in your new lawsuit.

I don't want to play games here, if there is a violation of the city's racial profiling policy -- that's not what it is called,.

MR. MOORE: That's what it is called.

THE COURT: Okay. Strange. Kind of a --

MR. MOORE: -- it should be nonracial.

THE COURT: Yes. If there is a violation of it, there is a violation, and that's a lawsuit, and that's that.

It still strikes me as making it more difficult, a square peg in a round hole, to force it into this stipulation of settlement, and got into all these questions about you tried to get a guarantee.

You didn't get a guarantee, you fought for it, but they stood firm and they didn't get it to you. La, la, la. But okay, this is only the beginning. We can go through their whole letter and respond to all their points. We didn't get too far. You were going to -- we started with C1.

MR. MOORE: Just one second, Judge.

THE COURT: Yes.

(Discussion off the record)

MS. GROSSMAN: Your Honor, if I may just address the issue of the confidentiality.

THE COURT: Yes.

MS. GROSSMAN: If you were to look at paragraph 4 -- I'm sorry, H4.

THE COURT: What stipulation of settlement, A4?

MS. GROSSMAN: H4.

THE COURT: Yes, okay.

MS. GROSSMAN: If you would bear with me, your Honor. If I could just walk you through the first and explain what it refers to. The first on paragraph 4 page 11 it says, all confidential documents --

THE COURT: -- wait a minute, I am on page 11 -- oh, H, okay.

MS. GROSSMAN: (Reading) All confidential documents subject to the January 31, 2000 protective order, and copies made thereof, produced to plaintiffs by defendants prior to the effective date, shall be returned to the Corporation Counsel's office upon the effective date. Unless prior to that date defendants have expressly authorized the retention of specific documents itemized in writing by plaintiffs until, at the latest, the termination of the stipulation.

Now, let me just take a break. That information was all the documents provided during the litigation. The plaintiffs complied with that provision in the agreement and

returned all the documents to the city with the exception of a few items that they wrote -- put in writing, and they were allowed to maintain.

Now we move on to all documents provided to plaintiffs in any form by defendants under the terms and during the course of this stipulation shall be deemed confidential, and plaintiffs shall return to the Corporation Counsel's office all such documents, and any copies made thereof, upon the termination of this stipulation.

So at the very least we know that posteffective date of the agreement, the plaintiffs, under the terms of this agreement, which they contracted for, which we all agreed to, are to be returned to the city.

THE COURT: Well, that's good, but I don't think it is good enough. Because I think the Court's order is ambiguous or contradictory to that by saying that it extends to 30 days after the termination of this case.

Now, you want to interpret the phrase termination of this case differently than I do. I don't have it in front of me, I will find it. Actually it is attached to this in the protective -- the protective order --

MR. FRANKLIN: -- it's the last attachment.

THE COURT: I have it dated January 31, 2000. Is that part of the stipulation of settlement -- yes, it must be, Exhibit C to the stipulation of settlement. And the exhibit

itself says, the very date of the termination of this case. So I have essentially two clauses of the same stipulation of settlement that disagree. And --

MR. MOORE: -- essentially what we are talking about is 30 days.

THE COURT: Oh, I understand. But the city does not want you to have these to be able to craft this complaint. And it also seems childish to me. It is in your letter, it is all there already.

As I say, I have got two conflicting clauses in front of me, they are both part of the settlement,.

MS. GROSSMAN: I believe, your Honor, if you were to look at paragraph 4, the plain meaning --

THE COURT: -- 4?

MS. GROSSMAN: -- the same --

THE COURT: -- H4.

MS. GROSSMAN: H4.

THE COURT:: I know what H4 said, I don't even argue that it is wrong, but it conflicts with Exhibit C. Exhibit C tells me that within 30 days of termination of the case, and I say this case is open until the Court's supervision ends on December 31 of 2007 --

MR. MOORE: -- Judge --

THE COURT: -- and it says that I have the power to modify that protective order at any time.

In terms of this -- by further order of the Court.

So I certainly have the power to modify that protective order until December 31 of '07.

And so to that extent, I surely would modify it to my own reading of it, which is 30 days after the case terminates, which is January 30, '08.

I am happy to keep going with your letter if you want to go through chapter and verse, and try to still make your points in your letter, try to convince me. I don't like the idea of having to work on it in the next eight days under that gun. But that's what it is coming to. It does not seem to me that would be.

MS. COSTELLO: Your Honor, putting aside the issue of the modification as it relates to the racial profiling issues.

THE COURT: Let's turn to something else then.

MS. COSTELLO: The specific performance issues other than that which would include the training.

THE COURT:: Let's talk about it. The city wrote about that too. I don't see a subheading actually called training.

Ms. Grossman can tell me where in this letter it is?

MR. MOORE: Subsection C.

THE COURT: Subsection C. There it is, training, okay.

MS. COSTELLO: Basically under the agreement section,

and I will point the Court to C5, and actually section E, of the stipulation --

THE COURT: -- E is the one they refer to?

MS. COSTELLO: Yes.

THE COURT: Training.

MS. COSTELLO: We've had several conversations with the city through letters and verbally about the fact that there has never been any verification that the training specified in section E has occurred.

The city's position is, as I understand it, is that we are not entitled to it. And we would disagree with that.

THE COURT: Let's look at the plain language of the settlement agreement.

I don't know how much we are going to have to read, but we will read as much as we have to.

1: The NYPD has conducted in-service training regarding the racial profiling policy, which has been presented to NYPD commands. The NYPD shall provide annual in-service training regarding the racial profiling policy.

2: The NYPD shall maintain that portion of the police academy curriculum that pertains to training regarding the racial profiling policy.

3: The NYPD shall continue to train police officers about the legal and factual bases for conducting and documenting stop, question and frisk activity. Continue to

implement the police academy curriculum for training police officer recruits about the legal and factual bases for conducting and documenting stop, question and frisk activity. And continue to provide training for police academy instructors.

MR. MOORE: -- Judge --

THE COURT: -- about the legal and factual bases for conducting for and -- and then all I can say is that paragraph 4 says, the NYPD shall continue to train, and 5 says the NYPD shall continue to provide training.

Number 6 says, the police academy will continue to consider informally, factual incidents brought to its attention for use in training.

7 says, the NYPD is reviewing the recruit curriculum and is part of the process, the Commissioner will conduct a review.

8 says, the NYPD will continue to provide full promoted sergeants and lieutenants with training,

9: The municipal defendants have provided to -- and 10 says: The NYPD shall continue to document training provided for in this stipulation in the same manner and consistent with existing practices and procedures employed by the NYPD.

Now, I have read it all. Nowhere does it say they will turn anything over to class counsel or report to class counsel.

MR. MOORE: To verify, the word verification does not appear.

THE COURT: Or report or turn over --

MR. MOORE: -- if you look at subsection C5 of the agreement.

THE COURT: Okay, let me now turn to C5.

The NYPD shall supervise, monitor and train officers regarding the racial profiling policy as set forth below.

MR. MOORE: So that's an affirmative duty on the NYPD.

THE COURT: That's true.

MR. MOORE: To supervise, monitor and train officers regarding the racial profiling.

In order to determine whether they are fulfilling their duty, whether they have lived up to the terms of this agreement, we would argue that they should tell us what they are doing.

THE COURT: Why didn't you get that into the agreement? Why didn't you say, shall produce on a quarterly basis its training materials for counsel's review?

There is nothing in there. There are no obligations other than to do it. But not to let you know through documentation.

MR. MOORE: But if they are not doing it, the only way we can know if they are not doing it is by asking them if they are doing it.

THE COURT: I understand.
MR. MOORE: It seems to me that that's an inherent obligation on the part of the city.
THE COURT: But this thing was signed January 9, 2004. I mean, that's almost four years ago. Did you ever write them a demand letter and say, please document that you are doing training? Or we believe you are -- or we believe you are not doing training, we are worried about that, please send us copies --
MS. COSTELLO: -- we did --
THE COURT:: -- why are we doing this on December 21 of '07?
MS. COSTELLO: We did, your Honor, we asked in April, and some of those letters were provided to the Court.
THE COURT: '07?
MS. COSTELLO: Yes, this year. We asked them in February, in April.
THE COURT: For what?
MS. COSTELLO: For proof that they were conducting the training in accordance --
THE COURT: -- and their response was?
MS. COSTELLO: That they did not read the stipulation to require it.
THE COURT: Why didn't you come to court then? It is nine days before December 31.

MS. COSTELLO: Part of this, your Honor, is that we were attempting to work it out with the city. Ms. Grossman and I, in September, were --

THE COURT: -- I hear you. But the position you put me in is to have some kind of real brief motion, you would like to brief these issues, you would like to brief Ruffo and its progeny orally. You want your brief due on 10 a.m. on the 26th and their brief at 10 on the 28th, and the reply on the 31st?

MS. COSTELLO: That's what we proposed, there be six months of extension.

THE COURT: Haven't we been down that road once?

MS. COSTELLO: Yes, we have, your Honor. Some of the cases that we cited before we would still say that the equitable power of the Court --

THE COURT:: Didn't I do it and undo it?

MS. COSTELLO: You did undo it.

THE COURT: And wrote an opinion too.

MS. COSTELLO: Part of that, your Honor, was that we had not followed the dispute resolution in the decree and we have --

THE COURT: -- they wrote you didn't. Didn't you write that, Ms. Grossman, they didn't follow the dispute resolution again?

MS. GROSSMAN: That's right.

MS. COSTELLO: We disagree.

THE COURT: But I am not being given much time to understand that. They are saying you didn't, they are saying something about 30 days. In what way didn't they file a dispute resolution --

MS. GROSSMAN: -- they were supposed to wait until 30 days to seek relief from the Court.

THE COURT: Wait until 30 days from what?

MS. GROSSMAN: From the date that they have, gave notification to us. The notification that they are required to give is by fax and hand service.

THE COURT: And they faxed you a letter.

MS. GROSSMAN: Friday evening.

THE COURT: December what?

MS. GROSSMAN: November 30, Friday evening, 7:03 p.m. And they did not deliver a document by hand Friday for us to have notice. And it wasn't until Monday, December 3, there was no by hand delivery at all. So they haven't complied with the terms of the agreement in terms of giving proper notice, which then would bring us beyond the December 31 sunset provision in terms of when they would be able to seek relief from the Court.

The first time they raised the issue about the racial profiling was on November 30.

MR. MOORE: Judge --

MS. GROSSMAN: -- the first time they raised an issue about another item concerning joint community forums was on

November 30.

THE COURT: Which falls within the 30 days. But you are saying out of the technicality, the reason that it is important was because, that's important because you weren't in the office at 7:03 on a Friday night and didn't see it until Monday.

The city is saying it didn't have actual notice on November 30, but on December 3.

MR. MOORE: We were before you in April, and we were raising the issues about the fact that they hadn't produced the database. And, you know, we didn't get that until October.

THE COURT: I know --

MR. MOORE: -- that sort of sidetracked us a little bit. And I think, though, that now that we have had the data --

THE COURT:: -- but that didn't relate to things like not having proof of training, and proof of community forum, which you didn't think was going on. There were other complaints that you could have raised in time to get some real rulings on violations or not.

I might have still said at the end of the day, with respect to training, they undertook no obligation to report to you, you would argue back, no, but they took on an obligation to do it, how are we supposed to judge compliance if we can't get discovery. But discovery is different than a reporting

requirement.

MR. MOORE: I guess it brings me to my other point which if, in fact, the city is of the opinion that all they have to do is have a written policy, and they have a written policy, what harm is there to the city in agreeing to extend this for two months, three months, whatever it may be, if in fact, as they say, are all that it requires them to do is have something on paper that says we won't engage --

THE COURT: -- you don't know if they have a written policy?

MR. MOORE: I do know that they implemented a written policy. There was -- I haven't looked at it in the last few weeks. But I do believe there is a written policy.

My point is that if, in fact, all they are required to do under this settlement agreement is to have a written policy, what harm is there in extending this agreement for a couple of months, for us to resolve these issues and decide, for instance, decide whether we want to just put this thing to bed and, you know, start another case. If that's what we want to do.

If we believe that that evidence of racial profiling is there, you make a very strong point about trying to put a square peg in a round hole, whatever that might be. But my point is, what harm would there be -- I guess the answer is, it's a common-sense argument. It is not a lawyerly argument.

That's the problem.

THE COURT: Unfortunately we all chose this profession, and some days we ask yourselves why.

Lawyers have the right to stand on technicalities. The Supreme Court issued some opinion last year that said, yes, the federal Judge -- that -- the Supreme Court said you are time barred, you have to file an appeal ten days after judgement, telling your attorney you want an appeal is not enough. You should have listened to that Federal Judge.

The consenting Justices were outraged, but there you have it. The other justices thought it was a fine thing to say it on the technicality. The District Judge told the prisoner you have that time. A career prisoner should have known better than a federal Judge. The law is full of technicalities.

Why doesn't the city agree to extend it? Because they don't want to. And if they don't have to, they don't want to.

What am I going to do? Tell them, practically speaking, he's right, why don't you give us all time to brief this and decide this? They could say, that's very nice, but we decline.

You want me to get it on the -- would you agree to extend this two to three months? We can get a briefing schedule.

MS. GROSSMAN: Your Honor, I am not authorized to agree to that.

MS. COSTELLO: I have one point on the training issue, Exhibit 1 to our letter, the December 4 letter that I wrote to Ms. Grossman. If you look at the third page -- page 2 at the bottom --

THE COURT: -- I got a problem, the November 30 letter --

MS. COSTELLO: -- no, I'm sorry, the letter that we delivered to the Court last Friday.

THE COURT:: Oh, yes.

MS. COSTELLO: Exhibit 1 to that.

THE COURT:: Exhibit 1 is the November 30 letter.

MS. COSTELLO: Maybe it is Exhibit 2, your Honor.

THE COURT: Exhibit 2 is the February 16 letter.

MS. COSTELLO: There should be a September 4 letter, your Honor.

THE COURT: That's Exhibit 3. Page 2 at the bottom.

MS. COSTELLO: On the next page we explain to the city that we think they are not in compliance with the training requirements, just as we thought they were not in compliance with the auditing of the training requirements.

THE COURT: But you didn't bring it to my attention, is all I am trying to say. Of course, now what you are saying is you did satisfy the dispute resolution mechanism. Is that your argument, that by the September 4 letter you did, in fact, satisfy the dispute resolution requirement?

MR. MOORE: Yes.

MS. COSTELLO: As Ms. Grossman and I had conversations in which we were attempting to see if the city would give us some documentation showing that the training had occurred.

THE COURT: Ms. Grossman, did the plaintiff satisfy the dispute resolution by raising the issue on September 4?

MS. GROSSMAN: On the training?

THE COURT: In writing.

MS. GROSSMAN: The one piece on the training, yes. But when I mentioned that the issue about the racial profiling was first -- first --

THE COURT: -- but we got lots of issues. Let's deal with training.

So they satisfied the dispute --

MS. GROSSMAN: -- yes.

THE COURT: What flows from the fact that they said the dispute resolution mechanism on the training point? And you raised some kind of defense.

MS. GROSSMAN: I'm sorry, your Honor, were you addressing me?

THE COURT: I said, what flows from the fact that they satisfied the dispute resolution mechanism.

MS. GROSSMAN: Our response to that, your Honor, was that they misinterpreted the agreement, that they are rewriting the agreement.

THE COURT: Meaning procedurally, if they satisfied the dispute resolution mechanism by giving you 30 days, what flows from that, they are allowed to come to court.

MS. GROSSMAN: Yes.

THE COURT: So they alluded to come to court on that one because they satisfied the dispute -- and they want to say because of, in their view, of the training requirement being violated, that is a basis for this Court to extend supervision, and/or compel specific performance.

MS. GROSSMAN: Your Honor, the agreement is very specific. It permits specific performance. And then I would submit, your Honor, that they have to provide sufficient notice to the Court to enable all parties to perform. And to give seven days. And to give notice on this schedule is not what I believe is contemplated by the agreement.

THE COURT: Well, I don't know. They satisfied the dispute resolution mechanism, we all agree with that, on this issue, and they, then they have the right to come to court. And they have come to court.

I can say, based on their complaint regarding training, I need to have full briefings in order to give the Court an appropriate amount of time to decide whether there has been a violation. I have to extend the deadline to decide the motion properly.

MS. GROSSMAN: We would submit, your Honor, that

that's not the dispute -- that is not a remedy available under the agreement.

THE COURT: The remedy you agreed to is, they can bring a dispute to court after giving you 30 days notice.

MS. GROSSMAN: But there is no --

THE COURT: -- inherent power. I can't decide a motion that's not briefed. It is timely, it was brought before the expiration of this agreement, they satisfied the dispute resolution mechanism, the Court has the power to operate its own docket. I can't decide a motion, an important one, that's not briefed.

Is there any other exhausted issue, so to speak, besides the training one? Should we continue with the letter since they agreed that you -- what's the next one?

MS. GROSSMAN: Your Honor, I would just add on the training piece, there is no good-faith belief given. What we just walked through of the verification that there was an absence of language --

THE COURT: -- but Mr. Moore makes some practical point. There is no point in the city agreeing to do something, there is no way to find out whether they did comply. Otherwise you have a right without a remedy. You have a meaningless agreement.

That cannot be the intent of the parties to say, we will provide training but ha, ha, if we don't, you can't find

out and you can't take us to go task for it. That can't make sense.

MS. GROSSMAN: Your Honor --

THE COURT: -- but I am going to run out of time and patience shortly. I would like to move right past the training to the next exhaustive claim. Is there another --

MS. GROSSMAN: -- may I just be heard once on the training?

THE COURT: No.

MS. GROSSMAN: To talk -- we had negotiations on the document being --

THE COURT: -- no.

MS. GROSSMAN: -- bank added to the agreement and we rejected it --

THE COURT: -- no --

MS. GROSSMAN: -- the plaintiffs wrote --

THE COURT: -- no, I don't want to hear anymore about training. I want to hear other issues that are ready for the Court.

What other issues have you exhausted?

MS. COSTELLO: We are going to concede the other two issues, they are minor. We think the training is the --

THE COURT: -- the city says they have a right to stand on the technicality on the violation of the racial profiling policy, you didn't give them the notice till December

3, so you can't bring that one to court in time for the stipulation of settlement to expire. So the only one that's live is the training.

If that's all we have to do between now and the 31st, maybe we can brief it and decide it. It is one issue not five, not four, not six.

I still say, putting a square peg in a round hole and all you have to do is bring a lawsuit, my interpretation of that protective order is that you have the documents till the end of January.

MR. FRANKLIN: Your Honor, can we take two minutes?

THE COURT: Please.

(Recess)

THE COURT: Mr. Moore.

MR. MOORE: Judge, after consulting with my colleagues, I think we have come to a position that if we have -- if the Court is willing to permit us to hold the data that we have until the end of January, 30 days after the expiration of this agreement, we would be willing to withdraw this motion at this point. And engage in this process of bringing another lawsuit or not.

THE COURT: I think I said it many times on this record, that that's my interpretation of this agreement. And that is the way I am ruling, that's what it said, 30 days after the termination of this case, which to me it finally

terminates, termination December 31, '07, they remain confidential. But that doesn't mean you can't use them.

MR. MOORE: To the extent that some of the materials have already been made public, --

THE COURT: -- what's public is public. If you cite to the Rand study, publicly, nobody can criticize you for that. If they do, they weren't acting in good faith. If I can get the Rand study on the Internet, it is public --

MR. MOORE: -- you can go to the NYPD website, your Honor.

THE COURT: There you go, that's public. You can use that. And as I said before, I would accept it as a related case, which the plaintiff has the power to designate.

I think this current motion is withdrawn. Thank you.

ALL COUNSEL: Thank you, your Honor.

o0o

08 CV 01034

JS 44C/SDNY
REV. 12/2005

CIVIL COVER SHEET

The JS-44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for use of the Clerk of Court for the purpose of initiating the civil docket sheet.

PLAINTIFFS
DAVID FLOYD and LALIT CLARKSON

DEFENDANTS
CITY OF NEW YORK, et al.

ATTORNEYS (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER
Center for Constitutional Rights
666 Broadway, 7th Fl, New York, NY 10012 212-664-6439

ATTORNEYS (IF KNOWN)
Andrea Costello; Kamau Franklin;
Darius Charney; Jonathan Moore

JAN 31 2008

CAUSE OF ACTION (CITE THE U.S. CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE A BRIEF STATEMENT OF CAUSE)
42 U.S.C. s 1983 - Violation of Federal Constitutional and Civil Rights

Has this or a similar case been previously filed in SDNY at any time? No ☒ Yes? ☐ Judge Previously Assigned

If yes, was this case Vol. ☐ Invol. ☐ Dismissed. No ☐ Yes ☐ If yes, give date _____ & Case No. _____

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NATURE OF SUIT

CONTRACT
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[ ] 120 MARINE
[ ] 130 MILLER ACT
[ ] 140 NEGOTIABLE INSTRUMENT
[ ] 150 RECOVERY OF OVERPAYMENT & ENFORCEMENT OF JUDGMENT
[ ] 151 MEDICARE ACT
[ ] 152 RECOVERY OF DEFAULTED STUDENT LOANS (EXCL VETERANS)
[ ] 153 RECOVERY OF OVERPAYMENT OF VETERAN'S BENEFITS
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Q4018

Check if demanded in complaint:

CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

DEMAND $_____ OTHER _____

Check YES only if demanded in complaint
JURY DEMAND: ☒ YES ☐ NO

DO YOU CLAIM THIS CASE IS RELATED TO A CIVIL CASE NOW PENDING IN S.D.N.Y.? IF SO, STATE:

JUDGE Shira A. Scheindlin DOCKET NUMBER 99 Civ. 1695

NOTE: Please submit at the time of filing an explanation of why cases are deemed related.

(SEE REVERSE)

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ORIGIN

☒ 1 Original Proceeding ☐ 2a. Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from (Specify District) ☐ 6 Multidistrict Litigation ☐ 7 Appeal to District Judge from Magistrate Judge Judgment

☐ 2b. Removed from State Court AND at least one party is a pro se litigant

(PLACE AN x IN ONE BOX ONLY)

BASIS OF JURISDICTION

☐ 1 U.S. PLAINTIFF ☐ 2 U.S. DEFENDANT ☒ 3 FEDERAL QUESTION (U.S. NOT A PARTY) ☐ 4 DIVERSITY

IF DIVERSITY, INDICATE CITIZENSHIP BELOW. (28 USC 1332, 1441)

CITIZENSHIP OF PRINCIPAL PARTIES (FOR DIVERSITY CASES ONLY)

(Place an [X] in one box for Plaintiff and one box for Defendant)

	PTF	DEF		PTF	DEF		PTF	DEF
CITIZEN OF THIS STATE	[ ]1	[ ]1	CITIZEN OR SUBJECT OF A FOREIGN COUNTRY	[ ]3	[ ]3	INCORPORATED and PRINCIPAL PLACE OF BUSINESS IN ANOTHER STATE	[ ]5	[ ]5
CITIZEN OF ANOTHER STATE	[ ]2	[ ]2	INCORPORATED or PRINCIPAL PLACE OF BUSINESS IN THIS STATE	[ ]4	[ ]4	FOREIGN NATION	[ ]6	[ ]6

PLAINTIFF(S) ADDRESS(ES) AND COUNTY(IES)

David Floyd
1359 Beach Blvd.
Bronx, NY 10472
Bronx County

Lalit Clarkson
Malcolm X Blvd. Apt. 6J
New York, NY 10037
New York County

DEFENDANT(S) ADDRESS(ES) AND COUNTY(IES)

City of New York
c/o Office of Corporation Counsel
100 Church Street
New York, NY 10007
New York County

Mayor Michael Bloomberg
City Hall
New York, NY 10007
New York County

Commissioner Raymond Kelly
New York City Police Department
1 Police Plaza
New York, NY 10038
New York County

DEFENDANT(S) ADDRESS UNKNOWN

REPRESENTATION IS HEREBY MADE THAT, AT THIS TIME, I HAVE BEEN UNABLE, WITH REASONABLE DILIGENCE, TO ASCERTAIN THE RESIDENCE ADDRESSES OF THE FOLLOWING DEFENDANTS:

Police Officer Rodriguez
Police Officer Goodman
Police Officer Jane Doe
Police Officer John Doe # 1
Police Officer John Doe # 2

Check one: THIS ACTION SHOULD BE ASSIGNED TO: ☐ WHITE PLAINS ☒ FOLEY SQUARE
(DO NOT check either box if this a PRISONER PETITION.)

DATE 1/31/2008

RECEIPT #

SIGNATURE OF ATTORNEY OF RECORD andrea costello Andrea Costello

ADMITTED TO PRACTICE IN THIS DISTRICT
[ ] NO
[x] YES (DATE ADMITTED Mo. Jan Yr. 1999)
Attorney Bar Code # AC6197

Magistrate Judge is to be designated by the Clerk of the Court.

Magistrate Judge _____ is so Designated.

J Michael McMahon, Clerk of Court by _____ Deputy Clerk, DATED _____.

UNITED STATES DISTRICT COURT (NEW YORK SOUTHERN)