SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 17

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BROADWAY TRIANGLE COMMUNITY COALITION, et al.,

Plaintiffs-Petitioners,

Index No. 112799/09

-against-

MICHAEL BLOOMBERG, et al.

Defendants-Respondents.

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PLAINTIFFS' POST- HEARING BRIEF IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

Taylor Pendergrass
Arthur Eisenberg
New York Civil Liberties Union Foundation
125 Broad Street, 19th Floor
New York, NY 10004
(212) 607-3300

Diane L. Houk
Emery Celli Brinckerhoff & Abady LLP
75 Rockefeller Plaza, 20th Floor
New York, NY 10019
(212) 763-5000

Martin Needelman
Brooklyn Legal Services Corp, A
256 Broadway
Brooklyn, NY 11211
(718) 487-2300

Shekar Krishnan
Weil, Gotshal & Manges LLP
767 Fifth Avenue
New York, NY 10153
(212) 310-8283

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INTRODUCTION

The Broadway Triangle sits at the center of Williamsburg and Bedford-Stuyvesant, two Brooklyn neighborhoods marred by decades of racial and religious segregation. On a map, different racial and religious households living in and around the Broadway Triangle appear as different pieces of a puzzle, with each piece defining a different racial, ethnic, or religious community whose borders meet, but do not overlap. Near the heart of the Broadway Triangle is a heavily segregated White Hasidic community.

In 2006, the City decided to begin a long-awaited process to bring a significant amount of much-needed affordable housing to the Broadway Triangle. Planning and building this affordable housing would require millions of dollars in public funds, including federal housing dollars, obligating the City to ensure its actions would make inroads toward integrating the community. The City, however, failed to even consider these consequences. Instead, the City worked exclusively to support the affordable housing plans of United Jewish Organizations, and its partner Ridgewood Bushwick Senior Citizens Council. The City provided financial and property commitments for City-owned land and rezoned the area in conformance with those plans, ignoring the overwhelming needs and protestations of the community and doggedly pursuing a path that would perpetuate longstanding segregation and housing discrimination.

The Plaintiffs seek a preliminary injunction prohibiting the City from taking any further steps to advance these discriminatory affordable housing plans. Statistical evidence submitted in support of Plaintiffs' motion establishes that implementation of these plans will cause an adverse impact and perpetuate segregation. Defendants have failed to show that there are no less discriminatory alternatives. Plaintiffs are likely to succeed on the merits of their claims, and a preliminary injunction should enter, pending trial.

PROCEDURAL BACKGROUND

Plaintiffs-Petitioners ("Plaintiffs) commenced this action against the Defendants-Respondents ("Defendants" or "City") on October 14, 2009, by Order to Show Cause seeking a temporary restraining order. On December 20, 2009, Plaintiffs filed an Amended Complaint[1] and Motion for Preliminary Injunction. On December 22, 2009, the Court entered a temporary restraining order prohibiting the Defendants from "taking any further steps to implement the current rezoning plan and associated transfers of city owned land in the Broadway Triangle Urban Renewal Area," and scheduled a hearing on Plaintiffs' Motion for a Preliminary Injunction. Defendants opposed the Plaintiffs' Motion for Preliminary Injunction, and moved for summary judgment on all of Plaintiffs' claims.

In support of their Motion for a Preliminary Injunction, Plaintiffs submitted substantial evidence of the discriminatory effects of Defendants' actions, as well as evidence of intentional discrimination.[2] A hearing was held on March 11, 2010. The Court and counsel conducted a site visit of the Broadway Triangle area on April 16, 2010. In an order issued on May 20, 2010, the Court held that Plaintiffs had shown that they would suffer irreparable injury if the injunction were not granted, and that the balance of equities favored an injunction, satisfying two of the three preliminary injunction factors. *See* Order at 18 (May 20, 2010) ("May 2010 Order"). The

[1] The Plaintiffs' amended complaint alleges Defendants' acts violate the (1) U.S. CONST. amend. XIV § 1; (2) Civil Rights Act of 1964, tit. VI, 42 U.S.C. § 2000d *et seq*; (3) Fair Housing Act, 42 U.S.C. §§ 3601 *et seq.*; (4) N.Y. CONST. art. I, § 11; (5) N.Y. EXEC. LAW § 296 *et seq.* and NEW YORK CITY CODE § 8-101; (6) Uniform Land Use Review Procedure, NYC CHARTER 197-c; and (7) State Environmental Quality Review, N.Y. ENVTL. CONSERV. L. §§ 8-0101 *et seq.* ("SEQRA"); and (8) Environmental Quality Review ("CERA"), 62 N.Y. CITY REV. CODE § 5-02(d). The Court granted summary judgment to Defendants on Plaintiffs' CERA and SEQRA claims.

[2] *See* Affidavit of Robert Solano (March 5, 2010); Affidavit of Father Jim O'Shea (March 5, 2010); Affidavit of Martin S. Needelman (March 5, 2010).

Court reserved ruling on Plaintiffs' Motion for Preliminary Injunction, however, finding that an additional evidentiary hearing was necessary to focus on "probative statistics supporting the claim of disparate impact." *See* May 2010 Order at 15.

In the summer of 2010, the parties conducted limited discovery prior to the evidentiary hearing. Further judicial proceedings were stayed on October 21, 2010, on grounds that the "U.S. Attorney for the Eastern District of New York has undertaken an investigation into the very same issues that are the subject of the litigation"[3] and because it was unclear whether specific affordable housing plans remained eligible for state and federal tax credits.[4] The Court also modified the temporary restraining order, over Plaintiffs' objections, to "clarify that it applies only to the specific sites that the parties have been addressing, i.e., 100 Throop Avenue, 35 Bartlett Street and 31 Bartlett Street, and otherwise remains in effect."

The Court lifted the stay of judicial proceedings on May 20, 2011, and scheduled an evidentiary hearing for July 13, 2011. Plaintiffs' pre-hearing brief, submitted on July 11, 2011, explained that they would focus their presentation of additional evidence on their claims that Defendants' actions cause a discriminatory effect in violation of the Fair Housing Act by (1)

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[3] *See also, e.g.,* Joseph Goldstein and Sarah Ryley, *Feds eye Lopez low-rise plan as Hasid favor*, N.Y. POST (Oct. 10, 2010) ("Sources say federal prosecutors are investigating whether a Lopez-backed proposal for new low-income, low-rise apartments was a political favor to Hasidic Jews, who prefer living close to ground level because they don't ride elevators on the Sabbath. The Brooklyn US Attorney's Office is weighing whether to make a case that the project is discriminatory, intended for religious Jews while leaving Blacks and Hispanics out in the cold").

[4] On October 13, 2010, Peter Kiernan, counsel to the Governor, sent a letter to the court indicating that the five letters of commitment for state tax credits for properties connected to the Broadway Triangle were no longer effective, but that an extension request was pending for 100 Throop. *See* Ltr. from Peter Kiernan to Hon. Emily Jane Goodman (Oct. 13, 2010). Extensions for the tax credits awarded for 100 Throop and 35 Bartlett were subsequently granted by the State of New York. *See* Letters from the New York State Division of Housing and Community Renewal to RBSCC Senior Citizens Council (January 31, 2011), attached as Exhibit E to Defendants' Affirmation in Support of Motion to Renew (February 17, 2011). There is no evidence that such extensions have been issued for 31 Bartlett.

perpetuating existing racial and national origin segregation and (2) causing an adverse impact that would unjustifiably and disproportionately exclude minorities from affordable housing. *See* p. 2-3.

The Court held an evidentiary hearing on Plaintiffs' motion for preliminary injunction over eight days between July 14 and September 14, 2011.[5] Plaintiffs presented four witnesses: Dr. Lance Freeman, qualified as an expert in demographic analysis and residential segregation; Jay Marcus, qualified as an expert in affordable housing development and finance; Rob Solano Executive Director of Churches United for Fair Housing; and Juan Ramos, chair of the Broadway Triangle Community Coalition ("BTCC"). Defendants' witnesses included Purnima Kapur, the Director of the Brooklyn Office of the Department of City Planning ("DCP"); Patrick Blanchfield, Director of Environmental Planning at the Department of Housing Preservation and Development ("HPD"); Joe Toris, HPD Director of Marketing; Holly Leicht, former HPD Deputy Commissioner for Development; and Elyzabeth Gaumer, Director of HPD's Department of Policy, Research, and Program Evaluation.

STATEMENT OF FACTS[6]

Residential segregation is a persistent impediment to fair housing throughout New York City. In Brooklyn, patterns of racial, religious, and ethnic residential segregation are obvious and severe, with non-Hispanic Black ("Black"), non-Hispanic White ("White) and Hispanic households living in separate areas of the borough. Yiddish-speaking[7] households are heavily

[5] Hearing was held on July 13, 15, 18, 19, 20, and 22, and September 13 and 14, 2011.

[6] The Plaintiffs have submitted extensive proposed findings of fact in conjunction with this brief. In this section, Plaintiffs provide only a summary of those facts.

[7] The U.S. Census does not gather data on religion. *See* PPFF at ¶ 19.

concentrated in two parts of the borough. *See* Plaintiffs' Proposed Findings of Fact ("PPFF") at ¶¶ 17-23; Ex. 5, 8.

In the Williamsburg and Bedford-Stuyvesant neighborhoods of Brooklyn, residential segregation has persisted for decades. Community District 1 ("CD1"), which comprises the Williamsburg neighborhood, is only 6% Black. Community District 3 ("CD3"), which comprises the Bedford-Stuyvesant neighborhood, is located immediately to the south of CD1 across Flushing Avenue, and is 77% Black. A heavily concentrated White Yiddish-speaking population lives at the border of CD1 and CD3, in an area with few Black or Hispanic households. *See* PPFF at ¶¶ 17-23; Ex. 7-11.

At the border of these two racially and religiously segregated communities also sits the "Broadway Triangle," an area of largely undeveloped and underdeveloped land bounded by Broadway, Flushing, and Union Avenues, and previously zoned for manufacturing use. A highly segregated White and Yiddish-speaking population lives to the northwest of Broadway Triangle. Racial and religious discrimination against non-Hasidic members of the Williamsburg community, including the use of racial quotas in housing, has been the subject of repeated litigation and remedial plans over many years.[8] *See* PPFF at ¶¶ 10, 11, 15-16, 22; Ex. 7-11.

In 2006, the Defendants began a process to develop the Broadway Triangle, including the construction of desperately needed affordable housing. As this process got underway, the Defendants did not analyze, or even consider, how their plans to develop affordable housing in the Broadway Triangle would impact the severe longstanding residential segregation in that area, even though they were required to do so as recipients of federal housing funds. *See* PPFF at ¶¶ 24, 25.

[8] *See also* May 2010 Order at p. 17; Plaintiffs Memorandum of Law in Support of Preliminary Injunction at pgs. 28-20 (Dec. 20, 2009) (detailing housing discrimination litigation).

United Jewish Organizations ("UJO") and Ridgewood Bushwick Senior Citizens Counsel ("RBSCC") proposed to develop 100% affordable rental housing in the Broadway Triangle using millions of dollars in city, state, and federal financial assistance, and a grant of City-owned land. Since the 1960s, UJO's mission has been to serve a particular portion of the Hasidic community in Brooklyn. UJO had only limited previous experience in the development and marketing of small-scale affordable housing projects and had never done any major affordable housing projects on its own. In the past, UJO has intervened to defend the use of housing practices that were found to be discriminatory. RBSCC is located outside of Community Districts 1 and 3, has not historically provided services to either neighborhood, and has never developed affordable housing in the Broadway Triangle, CD1, or CD3. *See* PPFF at ¶¶ 10-13.

UJO and RBSCC sought to develop rental buildings with 100% affordable rental housing units on three large City-owned sites in the Broadway Triangle, at 100 Throop, 35 Bartlett, and 31 Bartlett. According to the City's projections and assumptions, the affordable housing to be developed on these three sites represented 40% of the affordable units to be built on City-owned land in the Broadway Triangle. *Id.* at ¶ 26.

The Defendants were aware of concerns from longtime Broadway Triangle and CD1 and CD3 residents, including members of the BTCC, about the potentially discriminatory and segregative impacts of these proposals. Despite this, the Defendants did not evaluate whether proceeding to develop affordable housing plans with just these two developers—one that served a particular religious group, the other of which had no ties to the community—in a neighborhood scarred by decades of segregation and discrimination would lead to adverse impacts against minorities or perpetuate segregation. The City did not support any proposals for affordable

housing in the Broadway Triangle other than those proposed by UJO and RBSCC. *Id.* at ¶ 10-13, 27-28, 30.

The Defendants had numerous alternatives at their disposal to develop affordable housing in the Broadway Triangle, other than proceeding solely with the plans proposed by UJO and RBSCC. The Defendants could have solicited proposals from additional developers using a request for proposal process. The Defendants could have considered other development plans or other developers. At the very least, the Defendants could have scrutinized the UJO and RBSCC proposals to ensure that what was being planned would promote integration and not adversely impact minorities. Defendants, however, did none of these things. *Id.* at ¶ 10-13, 27-28, 30.

Instead, Defendants continued to provide support solely for the UJO and RBSCC housing proposals, in at least four critical areas. First, the City provided commitments demonstrating that the City was prepared to give UJO and RBSCC control of City-owned land in Broadway Triangle so that UJO and RBSCC could obtain essential tax credits to finance the proposals. Second, Defendants confirmed that UJO and RBSCC would be eligible for millions of dollars in City financing, including federal Community Development Block Grant ("CDBG") funds. Third, Defendants rezoned the Broadway Triangle area from manufacturing to residential use. Fourth, Defendants conducted an environmental review in conjunction with the proposed rezoning. *Id.* at ¶¶ 30-35.

Specifically, Defendants supported the proposals by providing "contingent site control" and "soft commitment" letters to UJO and RBSCC, both of which were prerequisites to successfully apply for financing. At the time the Defendants provided these letters, UJO and RBSCC gave Defendants copies of their applications to the State of New York for state and federal tax credits. *Id.* at ¶¶ 32, 34, 37.

The applications reflected that UJO and RBSCC did not disclose the existence of prior housing discrimination litigation or remedial plans in the area. The applications also reflected that 43% of the affordable units would be 3- and 4-bedroom apartments. This number was significantly out of proportion with Defendants' own Consolidated Plan, which showed that the need for affordable housing[9] among large related households was only 11%. *Id.* at ¶¶ 37-40. In addition, U.S. Census data available to the Defendants showed that Yiddish-speakers were the only demographic group in CD1 and CD3 that needed more large apartments (3- and 4-bedrooms) than small apartments (0 to 2-bedrooms). This data also showed that Black and Hispanic households in these Community Districts overwhelmingly needed small apartments. *Id.* at ¶¶ 55-62. The relatively low proportional need for large apartments was also reflected in the City's public housing waiting list, which showed that only approximately 9% of families needed large apartments. *Id.* at 38. Nevertheless, the Defendants pressed forward and initiated an environmental review and rezoning process scheduled to be completed simultaneously with the disposition of the City-owned land to UJO and RBSCC. *Id.* at ¶ 35.

The Defendants proposed to rezone the Broadway Triangle in a manner that would limit base building heights to 60 feet and maximum building heights to 70 feet in the northern section of the Broadway Triangle. In the southern portion of the Broadway Triangle, base building heights would be limited to 65 feet, with a maximum building height of 80 feet. These height limits were consistent with the plans proposed by UJO and RBSCC, but in direct conflict with pressing citywide needs to maximize affordable housing development. The Defendants never considered what effects this proposed rezoning would have on residential segregation or on minority households. *Id.* at ¶¶ 44-45.

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[9] Households with less than 80% area median income would qualify for the affordable housing to be built in the Broadway Triangle. *See* PPFF at ¶ 38.

The Defendants justified these building height restrictions as being consistent with the context of the surrounding area. While the building heights within the Broadway Triangle are typically lower rise due to its manufacturing use zoning designation, the surrounding area within a one-half mile circumference, as well as streets immediately adjacent to the area, contain a variety of low, medium, and tall buildings. In gathering information about the context of building heights, the Defendants' environmental analysis looked only inward into the Broadway Triangle area and did not document the building heights immediately adjacent. *Id.* at ¶ 47. Within approximately 1000 ft. of the Broadway Triangle there are numerous tall buildings reaching 12, 16, 20, and 22 stories. *See* Ex. C. In fact, there is a 10-story residential building located immediately adjacent to one of the proposed housing developments at issue in this case. *See* Ex. 63.

The Defendants also rejected zoning classifications that would permit more affordable housing, on the grounds that it would have unacceptable adverse impacts. In their environmental analysis of the proposed rezoning, however, Defendants considered only one higher density alternative that relied upon unrealistic assumptions causing the greatest adverse impacts. Defendants assumed that 100% of the City- and privately-owned sites in the Broadway Triangle would be developed to their maximum potential density if rezoned to a higher residential zoning classification. Defendants also limited their evaluation to one type of "higher density" zoning alternative without considering any other alternatives, for example, (1) varying allowable building heights within the Broadway Triangle between avenues and streets; or (2) increasing heights within the privately-owned land in the northern portion of the area. *Id.* at ¶¶ 49-52.

While Defendants carefully examined the effects of proposed development on "traffic," "noise," "shadows," and a host of other variables during the review process, they made

absolutely no effort to evaluate the segregative impacts of the proposed rezoning. Other zoning alternatives were, in fact, available that would have had a less segregative and adverse impacts. *Id.* at ¶53-54.

Finally, Defendants mandated use of a residency preference ensuring that applicants from the predominantly White CD1 would get a 50% preference for all affordable units and excluding residents of the predominantly Black CD3 from the preference, even though these residents lived immediately adjacent to the proposed housing. Defendants never analyzed whether the residency preference was likely to perpetuate segregation, or whether it would have an adverse impact. Defendants were aware that the CD1 residency preference had previously led to dismally low numbers of Black tenants in recent Brooklyn affordable housing developments such as Schaefer's Landing (9%) and Palmer's Dock (4%). *Id.* at ¶¶ 64-72, 85-87. Defendants had also extended residency preferences to more than one Brooklyn Community District under similar circumstances (where the housing was near the border of two Community Districts) in the past. Nevertheless, Defendants restricted the residency preference in the Broadway Triangle solely to CD1.

ARGUMENT

Plaintiffs' request for preliminary injunctive relief focuses on their claims that the Defendants' actions violate the Fair Housing Act ("FHA"), 42 U.S.C. § 3604(a) ("otherwise making [housing] unavailable") by causing a discriminatory effect.[10] At the preliminary injunction stage, Plaintiffs must show (1) a likelihood of success on the merits of their claims; (2) irreparable injury in the absence of an injunction; and (3) that the balance of equities favors

[10] While Plaintiffs are entitled to preliminary injunctive relief as a result of the likelihood of success on their FHA disparate impact claims, Plaintiffs are not withdrawing any of their other claims and intend to prove all remaining claims, including their intentional discrimination claims, at trial on the merits after full pre-trial discovery.

the injunction. *See Pamela Equities Corp. v. 270 Park Avenue*, 62 A.D.3d 620, 620 (1st Dept. 2009). The Court has already held that Plaintiffs have shown they would suffer irreparable injury if the injunction is not granted, and that the balance of equities favors an injunction, satisfying two of the three preliminary injunction factors. *See* May 2010 Order at 18. The only factor remaining to be decided is whether Plaintiffs are likely to succeed on the merits of their FHA discriminatory effect claim based on "probative statistics supporting the claim of disparate impact." *See* May 2010 Order at 15.

One of the primary objectives of the FHA is to promote racially integrated communities and to lessen residential segregation. *See Otero v. New York City Housing Authority*, 484 F.2d 1122, 1134 (2d Cir. 1973). Racial integration benefits the community as a whole, not just particular minority groups. *Id.* (citing *Trafficante v. Metropolitan Life Insurance Co.,* 409 U.S. 205, 210 (1972) (holding that tenants' "loss of important benefits from interracial associations" was injury sufficient to confer standing). Accordingly, under the FHA, the Defendants are prohibited from adopting or implementing housing policies or practices that create or maintain residential segregation.

Furthermore, as recipients of federal funding, the Defendants have a duty to affirmatively further the goals of the FHA. *See* 42 U.S.C. § 3608, *see also* Point II-A, *infra*. A defendant is liable for inaction or omissions that result in a discriminatory effect in violation of the FHA, just as the defendant would be liable for taking affirmative steps that result in a discriminatory effect. *See, e.g., United States v. City of Yonkers*, 96 F.3d 600, 617-18 (2d Cir. 1996) ("Government officials . . . are not permitted to engage in deliberate conduct or *deliberate omissions* that have the foreseeable effect of perpetuating known segregation . . .") (emphasis added).

Were Plaintiffs' FHA claim being litigated on the merits after full discovery, the initial burden of proof would rest with the plaintiff to make a *prima facie* showing of discriminatory effect. *See Huntington Branch, N.A.A.C.P. v. Town of Huntington*, 844 F.2d 926, 935-36 (2d Cir. 1988). A *prima facie* case of discriminatory effect may be made by showing that a defendant's actions either (1) perpetuate residential segregation, harming the community in general; *or* (2) disproportionately impact a minority group. *Id.*; *see also Suffolk Hous. Services v Town of Brookhaven*, 109 AD2d 323, 335 (2d Dep't 1985), aff'd, 70 NY2d 122 (1987) ("There are two kinds of racially discriminatory effects which a facially neutral decision about housing can produce. The first occurs when that decision has a greater adverse impact on one racial group than on another. The second is the effect which the decision has on the community involved; if it perpetuates segregation and thereby prevents interracial association it will be considered invidious under the Fair Housing Act independently of the extent to which it produces a disparate effect on different racial groups").

After the plaintiff has made a *prima facie* showing, the burden shifts to the defendant to prove that "its actions furthered, in theory and in practice, a legitimate, bona fide governmental interest and that no alternative would serve that interest with less discriminatory effect." *See Huntington* 844 F.2d at 936. The FHA, thus, imposes a heavy presumption against housing policies or practices that have a discriminatory effect. *Id.* In light of the FHA's mandate to lessen residential segregation in communities, where a government regulation or practice conflicts with the duty to integrate, the government's interest "must yield." *Otero*, 484 F.2d at 1135; *see also Hart v. Cmty. Sch. Bd. Of Brooklyn, N.Y. Sch. Dist. No. 21,* 383 F.Supp. 699, 754 (E.D.N.Y. 1974) (finding that duty to integrate takes precedence over a local government's other policies and procedures).

The evidence in this case convincingly demonstrates that Plaintiffs will be able to satisfy their *prima facie* burden at trial by showing the City's actions will both perpetuate segregation and adversely impact minorities. Conversely, Defendants are unlikely to meet their burden under any circumstances. The uncontroverted evidence shows that Defendants' actions were taken in violation of federal law, precluding any argument that their asserted justifications are legitimate. The evidence also demonstrates that Defendants cannot show there were no less discriminatory alternatives available to satisfy their interests. In fact, the evidence highlights some of the many less segregative and discriminatory alternatives readily available.

I. PLAINTIFFS HAVE DEMONSTRATED THAT DEFENDANTS' ACTIONS WILL CAUSE AN ADVERSE IMPACT AND PERPETUATION OF SEGREGATION

The evidence available at the preliminary injunction stage demonstrates that Plaintiffs will be able to establish their *prima facie* case at trial by showing that Defendants' affordable housing plans will perpetuate segregation and cause an adverse impact. First, statistical evidence shows that the affordable housing built under zoning restrictions and the CD1 residency preference will adversely impact Blacks and Hispanics and perpetuate segregation. Second, Defendants' failure to adopt or enforce meaningful affirmative marketing guidelines will exacerbate these effects. In combination, this evidence shows that the affordable housing plans will result in segregated housing benefitting Whites and Hasidism and adversely impacting Black and Hispanic households.

A. Statistical Evidence Establishes that Affordable Housing Built Under Existing Plans, Zoning Restrictions, and the CD1 Residency Preference Will Perpetuate Segregation and Cause an Adverse Impact

The affordable housing plans contain a disproportionate number of large apartments (43%). In addition, zoning restrictions significantly limit the height of affordable housing that

can be built in the Broadway Triangle, and the City mandates a residency preference that favors the predominantly White CD1. Statistical evidence clearly shows that, in combination, the affordable housing plans, restrictive zoning heights, and residency preference will adversely impact minorities and perpetuate segregation, as detailed below.

First, the evidence shows that the number of large apartments is significantly out of proportion with the need among individuals who will qualify for the affordable housing. Defendants' Consolidated Plan shows that, at most, large related households make up only 11% of those who would qualify for the affordable housing to be built in the Broadway Triangle. *See* Ex. 60; PPFF at ¶ 38. The need for large apartments is similarly low, around 9%, for persons on the City's public housing waiting list. *See* PPFF at ¶ 38.

The relatively low proportional need for large apartments among lower-income households is further substantiated by statistical analysis of U.S. Census data. Using census data to approximate the need for small and large apartments in CD1 and CD3, Plaintiffs' demographic expert calculated the number of individuals who would qualify for Broadway Triangle affordable housing based on the specific income bands that would be served by the particular bedroom configurations at 100 Throop and 35 Bartlett. *See* PPFF at ¶¶ 55-57.

The statistical analysis shows that among individuals who would qualify for affordable housing in the Broadway Triangle there is an overwhelming need for small apartments as compared to large apartments, whether looking at CD1, CD3, or CD1 and CD3 combined. *See* Ex. 12; *See* PPFF at ¶¶ 57-61. Breaking this need down by race, the data shows that Blacks and Hispanics in CD1 and CD3 who would qualify for affordable housing overwhelmingly need small apartments. *See* Ex. 57, 58; PPFF at ¶¶ 58-59. The statistical analysis also shows the need in terms of absolute numbers. Approximately 90,000 Blacks and Hispanics who qualify for

affordable housing are in need of small apartments in CD1 and CD3. *See* PPFF at ¶ 59. In striking contrast, the only demographic category where the need for large apartments outweighs the need for small apartment is among Yiddish-speakers. *Id.* at ¶¶ at 59-61.[11]

Comparing the proposed affordable housing plans to the proportional need among the Black, Hispanic, and Yiddish-speaking demographics clearly demonstrates that there will be an adverse impact against Blacks and Hispanics. As Plaintiffs' demographic expert testified, the affordable housing plans are likely to result in a disproportionately high number of affordable units in the Broadway Triangle being rented to Yiddish-speaking households, and a disproportionately low number of units being rented to Black and Hispanic households that overwhelmingly need small apartments. *See id.* at ¶ 63. Zoning that permitted taller buildings would allow for additional affordable units that could more proportionately meet the housing needs of CD1 and CD3 residents and reduce this adverse impact. *Id.*

The CD1 residency preference only exacerbates these adverse impacts. With the addition of the CD1 residency preference, the adverse impact is especially significant for Blacks, who are projected to represent only 3% of the proposed housing residents. *See* Ex. 59; PPFF at ¶¶ 64-66.

In addition to adversely impacting minorities, such a result will also clearly reinforce existing segregation in CD1 and CD3. The combination of proposed bedroom distributions, height restrictions, and the CD1 residency preference will ensure that affordable housing built in the Broadway Triangle is occupied disproportionately by the same White and Hasidic households who already live in that area, and continue to exclude Blacks and Hispanics from the area. *Id.* at ¶¶ 63-66. This result is buttressed by evidence that in two other recent Brooklyn

[11] Defendants' analysis also confirms that Yiddish-speakers are the only category for which the need for large apartments is unambiguously greater than the need for smaller apartments. *See* PPFF ¶ 92.

affordable housing developments, the same CD1 residency preference resulted in low numbers of Black tenants, reinforcing existing segregation patterns in the predominantly White CD1. *Id.* at ¶¶ 85-87.

B. Defendants' Failure to Adopt and Enforce an Adequate Affirmative Marketing Plan will Perpetuate Segregation and Cause an Adverse Impact

In addition, Defendants' failure to adopt and enforce adequate affirmative marketing guidelines, as required when federal housing funds are used, will augment these discriminatory effects. As discussed above, Blacks and Hispanics will be adversely impacted by the affordable housing plans even assuming that the pool of applicants proportionately reflects the actual community needs in CD1 and CD3. These impacts will be even more severe, however, given that Defendants' enforcement of meaningful affirmative marketing by developers of affordable housing is virtually nonexistent.

As recipients of federal housing funds, the City must adopt and enforce an affirmative marketing plan that requires, among other things, developers to articulate a plan for reaching the "demographic group least likely to apply" for the affordable housing. *See* PPFF at ¶¶ 73-77. The evidence shows that Defendants do not require any such plan, but instead assert that developers meet this obligation by placing a single ad in a "citywide," "ethnic," and "local" newspaper. *Id.* at ¶ 73. Notably, Defendants would permit UJO to market affordable housing to be built squarely in a predominantly Hasidic neighborhood using a Yiddish-language newspaper serving only that community. *Id.* at ¶ 76. Defendants do not require developers to articulate any kind of meaningful affirmative marketing plan, and they do little to nothing with the limited information that they require developers to submit. *Id.* at ¶ 77.

Defendants place great emphasis on the fact that the process for selecting tenants for affordable housing is done by random lottery. But this focus entirely misses the point that the

results of a random lottery will only be as diverse as the pool from which the tenants are drawn. Defendants' failure to require meaningful affirmative marketing will permit the applicant pool itself to be skewed toward the racial and religious demographic that is the *most* likely to be reached by UJO's marketing—White Hasidim who are already familiar with and served by UJO.[12] While this is not to criticize UJO's mission to serve a particular part of the Hasidic community, it is certainly the case that this mission can be expected to perpetuate residential segregation unless checked by the City. Thus, even assuming a completely random lottery process, Defendants' failure to require any meaningful affirmative marketing will result in an even greater adverse and segregative impact than statistically predicted.

II. DEFENDANTS CANNOT MEET THEIR BURDEN TO SHOW THAT NO LESS DISCRIMINATORY ALTERNATIVES WERE AVAILABLE

Plaintiffs' are very likely to establish their *prima facie* case at trial. Conversely, the evidence and testimony presented at the preliminary injunction hearing indicates that it will be extremely unlikely—if not impossible—for Defendants to meet their burden of showing that there were no less segregative or discriminatory alternatives available to serve their interests. Defendants cannot meet this burden where uncontroverted evidence makes clear that Defendants never evaluated whether their actions would affirmatively further fair housing, in violation of federal law. As a result, Defendants cannot plausibly claim that the significant segregative and adverse impacts of their actions are justified by legitimate interests, nor can they claim their interests cannot be served by less discriminatory alternatives. Indeed, even the limited evidence available at this stage indicates numerous less discriminatory alternatives were available.

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[12] The likelihood of this result is buttressed by past evidence that the Hasidic community has, in fact, historically been overrepresented in large apartments in other publicly-financed housing in the Williamsburg area. *See* May 2010 Order at p. 17, citing *Ungar v. NYCHA*, 2009 U.S. Dist. LEXIS 3578 (S.D.N.Y. 2009).

A. <u>Defendants' Interests Cannot be Legitimate Where Pursued in Violation of Federal Law</u>

Defendants effectuated the Broadway Triangle affordable housing and rezoning plans, including a CD1 residency preference requirement, without ever evaluating whether their actions would "affirmatively further fair housing," even though the City was required to do so by the FHA and federal regulations. Because Defendants' actions in the Broadway Triangle were undertaken in contravention of federal law requiring them to conduct this analysis and prohibiting them from taking any actions that did not affirmatively further fair housing, any justifications advanced by the Defendants cannot be "legitimate" under the *Huntington* analysis.

Like all recipients of federal housing funds, Defendants were obligated to ensure their actions in the Broadway Triangle would "affirmatively further fair housing" by promoting integration and avoiding adverse impacts against minorities. *See* 42 U.S.C. § 3608(e)(5) (mandating that HUD shall "administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of [the Fair Housing Act]"); 42 U.S.C. § 5304(b)(2) (requiring all recipients of federal housing grant funds to certify that "the grant will be conducted and administered in conformity with the Civil Rights Act of 1964 [42 U.S.C. § 2000a et seq.] and the Fair Housing Act [42 U.S.C. § 3601 et seq.], and the grantee will affirmatively further fair housing"); *Comer v. Cisneros*, 37 F.3d 775, 792 (2d Cir. 1994) (holding that recipients of federal CDBG funds must affirmatively further fair housing and handle funds in conformance with applicable civil rights laws); *Otero*, 484 F.2d at 1133-34 (finding defendant was "under an obligation to act affirmatively to achieve integration in housing" pursuant to Section 3608); *United States ex rel. Anti-Discrimination Ctr. Of Metro. N.Y. v. Westchester Cnty., N.Y.*, 668 F.Supp.2d 548, 566 (S.D.N.Y. 2009) (holding that recipients of federal housing funds are obligated to conduct analysis of impediments to fair housing).

How a federal grantee, such as the City, fulfills its obligations to affirmatively further fair housing are carefully and clearly laid out in several laws and regulations. *See* 24 C.F.R. § 570.601; 24 C.F.R. § 91.225 (requiring grantees to certify compliance with Section 570.601). Under these laws, recipients of federal housing funds must "conduct[] an analysis to identify impediments to fair housing choice within the jurisdiction, take appropriate actions to overcome the effects of any impediments identified through that analysis, and maintain records reflecting the analysis and actions in this regard." *See* 24 C.F.R. § 570.601 (admitted as Ex. 71).

A defendant's asserted justifications for taking actions which will have a discriminatory effect can never be "legitimate" or "bona fide" where those actions were undertaken in violation of the law. As this Court has held, regardless of what interest a defendant asserts in developing housing in a particular way, that interest "can never trump the obligation to act lawfully, i.e., without violating the Fair Housing Act." *See Hirschmann v. Hassapoyannes*, 811 N.Y.S.2d 870, 877 (N.Y. Sup. Ct. 2005) (Goodman, J); *see also Langlois v. Abington Housing Authority*, 234 F.Supp.2d 33, 70 (D.Mass. 2002) (finding no legitimate interest in residency preference where defendants had not "met their duty to affirmatively further fair housing, which included an obligation to *investigate the potential effects of their proposed residency preferences before their implementation*") (emphasis added).

Before moving forward with the affordable housing plans and rezoning in the Broadway Triangle, Defendants were required by law to evaluate whether their actions would impede fair housing and, if so, to take steps to overcome those impediments. The uncontested evidence shows, however, that from the very beginning of the planning process until the filing of this litigation, the Defendants systematically ignored these legal obligations. Defendants did not analyze whether impediments to fair housing would result by allowing only UJO and RBSCC to

develop affordable housing plans for specific sites in Broadway Triangle, *see* PPFF at ¶ 28, and they failed to take any action when those plans reflected designs vastly out of step with low-income Black and Hispanic renters' needs in the community, *id.* at ¶¶ 36, 39. Likewise, Defendants did not examine whether the rezoning would impede fair housing, *id.* at ¶¶ 25, 45, 49, nor did Defendants consider the segregative and adverse consequences of the CD1 residency preference, *id.* at ¶ 68.

Defendants' "Affirmatively Furthering Fair Housing Statement" ("AFFH"), meant to reflect general compliance with these federal obligations, is most notable for what it does not contain. The AFFH is devoid of any discussion of the degree of residential segregation in New York City, and reflects no effort to examine whether Defendants' affordable housing developments, or residency preference, have any impact—good, bad, or indifferent—on residential segregation. *See id.* at ¶¶ 80-83. This analytical omission is not surprising, however, considering that HPD has never collected data for the purpose of analyzing impediments to fair housing in affordable housing, and HPD's former deputy commissioner, Ms. Leicht, has no knowledge of any HPD official even making any policy recommendations to decrease residential segregation in New York City. *Id.* at 82.

Defendants assert that the discriminatory effects shown by the Plaintiffs are justified by several governmental interests, discussed *infra*. Regardless of the specific interest asserted, however, it is axiomatic that a discriminatory effect cannot be justified by an illegal act, and that a governmental interest cannot be "legitimate" if it is pursued in violation of the law. Regardless of Defendants' asserted justifications, the evidence is clear that Defendants pursued these interests without ensuring their actions affirmatively furthered fair housing, as they were

required to do under federal law. Such justifications are therefore illegitimate under any analysis and cannot possibly justify the discriminatory effects they are likely to cause.

B. Defendants Have Failed to Show That Affordable Housing Built Under Existing Plans, Zoning Restrictions and the CD1 Residency Preference is the Least Discriminatory Alternative

Defendants have failed to present any evidence that the Broadway Triangle affordable housing plans and rezoning were the least discriminatory alternatives available to satisfy their interests. This failure, by itself, is more than sufficient to conclude Defendants will be unable to carry their burden at trial. In addition, even at this preliminary injunction stage, evidence of a number of less discriminatory alternatives has emerged.

Specifically, Defendants have presented no evidence establishing that the specific housing proposals made by UJO and RBSCC were the least discriminatory options for developing affordable housing in the Broadway Triangle. *See* PPFF at ¶¶ 25-30. To the contrary, the evidence shows that Defendants could have ensured the plan proportionately met the needs of Black and Hispanic residents in CD1 and CD3; solicited additional and more inclusive development proposals using a request for proposal process; and/or taken an active role in the development and oversight of the specific developments proposed by UJO and RBSCC.[13] These alternatives would have resulted in the development of affordable housing in the Broadway Triangle with significantly less segregative and adverse effects. *Id.* at 29.

Defendants also cannot show that their interests in "contextual zoning" could not have been satisfied with less discriminatory alternatives. There are three points worth considering in

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[13] Defendants have also presented no evidence that would suggest that any of these approaches would be financially infeasible. In fact, Ms. Leicht conceded that affordable housing could be built in buildings taller than seven stories using the same low-cost construction methods. *See* PPFF ¶ 82.

this regard. First, Defendants never evaluated the segregative and adverse impacts of the zoning they proposed, or of any other zoning alternatives, and therefore have little basis for plausibly arguing that the proposed rezoning was the single least discriminatory alternative available to meet their interests in contextual zoning. *Id.* at ¶ 45.

Second, the Court (after an extensive site visit) found that Defendants' interest in contextual zoning could have been satisfied while permitting taller buildings. *See* May 2010 Order at 6. This finding was buttressed by additional evidence presented during the hearing showing that Defendants have adopted an unreasonably restrictive view of the neighborhood "context," ignoring numerous tall buildings in the immediate vicinity, in order to justify the rezoning. *Id.* at ¶¶ 47-48; Ex. C.

Finally, the evidence indicates that alternative contextual zoning configurations would have less discriminatory effects. For example, zoning that would permit higher density in certain portions and blocks of the Broadway Triangle would have been consistent with contextual planning principles, Defendants' citywide plans, and would have had a less discriminatory effect. *See* PPFF at ¶¶ 51-54. It is very likely that at trial, after full merits discovery (including depositions of Defendants' planners) and with expert analysis and review, other less discriminatory alternatives will emerge. At the preliminary injunction stage, the available evidence is more than sufficient to conclude that Defendants cannot meet their burden.

Similarly, Defendants have presented no evidence establishing that their interest in mitigating environmental impacts could not have been satisfied with less discriminatory alternatives. *Id.* at ¶¶ 49-52. When examining the potential "adverse impacts" of the rezoning, Defendants completely ignored any impacts the rezoning would have on residential segregation

or what percentage of the affordable housing would likely be rented to tenants of different racial and demographic groups. *Id.*

In fact, Defendants analyzed only one other higher density alternative, and based their analysis on the assumption that every City and privately-owned site in the Broadway Triangle would be built to 100% of maximum allowable density. *Id.* at ¶ 52. The evidence already indicates that numerous less discriminatory alternatives (which Defendants never considered) were available that would have had acceptable environmental impacts. For example, zoning only portions of the Broadway Triangle for higher density, or analyzing higher density impacts using a more realistic assumption that the rezoning impacts would fall somewhere in between the 0% and 100% density extremes analyzed by Defendants. *Id.* at ¶¶ 50-54. Given the lack of evidence presented by Defendants and the existence of these less discriminatory alternatives, Defendants cannot show there was no less discriminatory alternative with acceptable environmental impacts.

Finally, the evidence convincingly demonstrates that Defendants will not be able to meet their burden to justify the CD1 residency preference. *Id.* at ¶¶ 67-72. Defendants have not, and cannot, plausibly argue that the CD1 residency preference is the least discriminatory means for ensuring that longtime community residents have an opportunity to obtain affordable housing. This is particularly true given the existence of an obvious less discriminatory alternative—extending the residency preference to include CD3. Defendants have, in fact, extended residency preferences to two Community Districts in Brooklyn in precisely these circumstances in the past. *Id.* at ¶ 71.

III. EVIDENCE OF DISCRIMINATORY INTENT WEIGHS IN FAVOR OF FINDING THAT PLAINTIFFS WILL SUCCEED ON MERITS OF THEIR DISCRIMINATORY EFFECT CLAIM

There is also ample evidence of discriminatory intent, weighing in favor of finding that Plaintiffs will succeed on their discriminatory effects claims. Defendants' refusal to take any action to consider, evaluate, or remedy the discriminatory effects of the affordable housing plans, even after being informed on numerous occasions of those effects, indicates that Defendants intentionally facilitated the discriminatory motives of UJO and RBSCC.

While not required to prove a discriminatory effect claim, proof of discriminatory intent weighs heavily in favor of finding a discriminatory effect in violation of Section 3604 of the FHA. *See Huntington*, 844 F.2d at 936; *Arlington Heights*, 429 U.S. at 265-66 (holding that "smoking gun" evidence of racial, ethnic, or national origin discrimination is rarely available, and thus discriminatory intent may be inferred from circumstantial evidence and the totality of the circumstances) (citing *Washington v. Davis*, 426 U.S. 229, 242 (1976)). In examining all the evidence, a court should consider, *inter alia*, (1) whether the challenged law bears more heavily on one group than another; (2) the historical background of the decision; and (3) the specific sequence of events leading up to the challenged decision. *See Arlington Heights*, 429 U.S. at 266-68.

The uncontroverted evidence shows that community residents had informed Defendants of their serious concerns about the exclusionary nature of Defendants' planning process, the lack of outreach to the affected community, and the Defendants' exclusive conversations with UJO and RBSCC about the proposed rezoning and affordable housing plans. *See* PPFF at ¶¶ 27, 36. There is no dispute that the City knew that the Hasidic community was heavily segregated

precisely where the affordable housing was proposed to be constructed, and that discrimination by a certain segment of the Hasidic community against minorities had been the subject of past litigation in the Williamsburg area. *Id.* at ¶¶ 11, 21-22.

The uncontroverted evidence also shows the need for large apartments among the qualified population was relatively small, by any measure. *Id.* at ¶ 38, 55-61. Even a cursory review of UJO and RBSCC's applications for federal and state tax credits reveals that the proposed bedroom configurations were out of proportion with this need. *Id.* at ¶¶ 38-39, 63. Similarly, the applications failed to disclose the long history of discrimination lawsuits in the neighborhood despite the requirement that such information be provided. *Id.* at ¶¶ 40.

Despite all of this, Defendants steadfastly refused to take any meaningful action to address the concerns raised,[14] and they repeatedly ignored federal mandates that required them to evaluate the potential segregative and adverse impacts of these actions and to keep records of those evaluations. *Id.* at ¶¶ 25, 28, 36, 39, 45, 49, 68. Instead, Defendants (1) advanced the projects and provided financial and property commitments; (2) conducted an environmental review that considered only one single higher density alternative and rejected it based on unrealistic assumptions; and (3) enacted a low-density rezoning that conformed precisely to the contours of the UJO and RBSCC proposals and was disturbingly out-of-step with pressing citywide and community need.

This evidence compels the conclusion that discriminatory intent motivated this affordable housing plan and that Defendants facilitated this intentional discrimination through their acts and—in particular—their omissions. Defendants' refusal to evaluate the potential discriminatory

[14] To be sure, under federal law the City was obligated to affirmatively identify these impediments themselves, and it was not necessary for others to bring them to the City's attention. *See* Section II-A, *supra.*

effects of the affordable housing plans and the rezoning evidences more than just a reckless disregard of federal law and community concerns. It reflects Defendants' purposeful and deliberate attempt to avoid any public acknowledgement or internal documentation of the discriminatory impacts of their actions, and it is compelling circumstantial evidence of discriminatory intent.

Plaintiffs have not yet had the opportunity to take depositions of any defendants (in particular, HPD and City supervisors), or any depositions of the UJO and RBSCC developers. Nor have Plaintiffs yet had the opportunity to obtain discovery reflecting communications among the defendants, developers, and other third parties about these projects and the concerns being raised by Plaintiffs and others during the planning, development, and rezoning process. The existing evidence indicates that Plaintiffs will discover additional corroborative evidence of intentional discrimination once full merits discovery is underway. At this stage, the available evidence of intentional discrimination strongly weighs in favor of finding that Plaintiffs will succeed on their discriminatory effect claims.[15]

IV. OTHER FACTORS WEIGH IN FAVOR OF FINDING THAT A PRELIMINARY INJUNCTION IS APPROPRIATE

Several other factors support a finding that Plaintiffs will succeed on the merits of their discriminatory effect claims, and that a preliminary injunction is appropriate. First, Plaintiffs are seeking only to require Defendants to eliminate obstacles to fair housing rather than suing to compel Defendants to build housing, weighing in favor of Plaintiffs' claims and the likelihood of their ultimate success on the merits. *See Huntington Branch, NAACP*, 844 F.2d at 936.

[15] At trial, Plaintiffs intend to also fully prove their discriminatory intent claims under the FHA, independent of their discriminatory effects claims.

Second, Plaintiffs' are likely to succeed on the merits of their discriminatory effect claims in light of the heavy presumption against any policy conflicting with the FHA's unambiguous mandate to promote integration. *See, e.g., Otero*, 484 F.2d at 1135 (holding that where a government regulation or practice conflicts with the duty to integrate, the government's interest "must yield"). The available evidence indicates that Defendants cannot come close to meeting their burden of showing that these discriminatory effects are justified by legitimate government interests that could not be satisfied by any less discriminatory alternatives. Plaintiffs' likelihood of success is augmented by legal precedent making clear that any close questions must be resolved in favor of actions that will further the FHA's objectives.

Finally, Defendants' complete failure to evaluate whether their actions would affirmatively further fair housing buttresses the Courts' previous finding that the equities weigh in favor of an injunction. The evidence shows that from the beginning of the planning process to the filing of this litigation and at every step along the way, the Defendants failed to consider how their actions would impact existing residential segregation or adversely impact minorities. *See* PPFF at ¶¶ 25, 28, 36, 39, 45, 49, 68. The City's "unclean hands" move the balance of equities even further in Plaintiffs' favor. *See Levy v. Braverman,* 24 AD2d 430, 430 (1st Dep't 1965).

V. A PRELIMINARY INJUNCTION SHOULD ENTER STAYING THE REZONING AND ALL TRANSFERS OF CITY-OWNED LAND IN THE BROADWAY TRIANGLE

Plaintiffs have established that they are likely to succeed on the merits of their claims, that there will be irreparable injury in the absence of an injunction, and that the equities are in favor of an injunction. Accordingly, a preliminary injunction should enter.

Plaintiffs have demonstrated that the combined effects of the affordable housing plans, restrictions on zoning heights, and residency preference will cause an adverse impact and

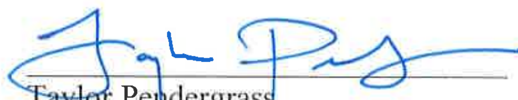
perpetuate segregation. The evidence also shows that the rezoning itself (and the environmental impact analysis that preceded it) was illegitimate *ab initio*, as it was enacted without conducting any analysis of whether it would affirmatively further fair housing. Furthermore, the evidence overwhelmingly demonstrates that the rezoning itself was undertaken in specific contemplation of the challenged affordable housing proposals and was part and parcel of intentionally discriminatory acts and omissions. Finally, an alteration in the zoning designations may very well be of critical importance to securing meaningful relief to remedy the discriminatory conduct at issue in this case. The Plaintiffs have already demonstrated that even modest modifications in the Broadway Triangle rezoning would allow a range of less discriminatory outcomes. Defendants should not be permitted to benefit from, or take actions relying upon, zoning designations that are likely to be found discriminatory and thus may be modified as a result of permanent injunctive relief awarded at trial.

In light of the evidence and the law submitted in support of Plaintiffs' Motion for a Preliminary Injunction, a preliminary injunction should be entered prohibiting Defendants from implementing any part of the rezoning or transferring any City-owned land in the Broadway Triangle including, but not limited to, 100 Throop, 35 Bartlett, and 31 Bartlett.

CONCLUSION

Plaintiffs have satisfied all elements warranting a preliminary injunction. A preliminary injunction should enter prohibiting Defendants from taking any further actions to implement the rezoning or to transfer any City-owned land in the Broadway Triangle, pending trial.

DATED: New York
Oct. 14, 2011



Taylor Pendergrass
Arthur Eisenberg
New York Civil Liberties Union Foundation
125 Broad Street, 19th Floor
New York, NY 10004
(212) 607-3300

Diane L. Houk
Emery Celli Brinckerhoff & Abady LLP
75 Rockefeller Plaza, 20th Floor
New York, NY 10019
(212) 763-5000

Shekar Krishnan
Weil, Gotshal & Manges LLP
767 Fifth Avenue
New York, NY 10153
(212) 310-8283

Martin Needelman
Brooklyn Legal Services Corp. A
256 Broadway
Brooklyn, NY 11211
(718) 487-2300

On the brief: Dana Wolfe, Student
Brooklyn Law School