

Exhibit B



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BY EMAIL

Honorable Shira A. Scheindlin
United States District Judge
Southern District of New York
500 Pearl Street
New York, New York 10007

Re: Floyd v. City of New York, et al., 08 Civ. 1034 (SAS)

Your Honor:

We write to request respectfully an additional five pages for defendants' five-page reply brief in further support of their *Daubert* motion seeking to exclude the opinions, reports and testimony of plaintiffs' proposed expert, Jeffrey Fagan. While defendants are quite cognizant of the Court's page limits and do not seek to burden the Court with more pages than are necessary, certain concessions made by plaintiffs in their opposition brief regarding the flaws in Fagan's prior reports warrant additional space for defendants' reply. In response to defendants' moving papers, plaintiffs' opposition acknowledges for the first time that Fagan's initial reports and analyses relied on a now admittedly flawed categorization scheme in which Fagan catalogued millions of police stops as legally "justified," "legally insufficient," or "indeterminate". See, e.g., 2/02/12 Declaration of Jeffrey Fagan (Dkt #189) at ¶15 ("On page 50 of my First Report, I inadvertently stated that 'Stops are of indeterminate legality if the circumstance or circumstances listed are (all) conditionally justified, and no additional circumstances are indicated. The report should have stated [. . .]"; *id.* at ¶16 ("In Appendix D of my expert report, I inadvertently stated that stops based solely on 'Actions indicative of engaging in drug transactions is not coded as an unconditionally justified stop factor..."); *id.* at ¶17 ("As stated in paragraph 14, my computer coding instructions originally classified stops based on two or more conditionally justified stop circumstances as 'Indeterminate.' This was due to an inadvertent computer coding error, which I have since corrected."). See also Plaintiffs' Memorandum of Law in Opposition to Defendants' motion, at 8-9.

Further, plaintiffs only now clarify that Fagan's opinion is based on his coding scheme, which defendants received belatedly in this litigation, long after first requesting it (see 12/19/11

Declaration of Heidi Grossman (Dkt #180) at ¶11). A significant upshot of Fagan's errors is that he now concludes that the number of stops that he claims must be classified as "indeterminate" has been reduced by nearly 40%. (Compare 10/15/10 Report of Jeffrey Fagan, Ph.D. (filed under seal as Dkt #132), at 55 ("Overall, 68.9 percent of all stops were classified as legally justified. About one in four (24.4 percent) were classified as indeterminate...") with 2/02/12 Declaration of Jeffrey Fagan (Dkt #189), at ¶17 ("Under the corrected coding instructions, the percentage of stops classified as 'Indeterminate' is approximately 15.46%.")). This brings the total stops which Fagan's coding scheme classifies as "justified" to nearly 80% (i.e., 77.84%). Given that these percentages refer to a total pool of over 2.8 million stops, such changes to Fagan's methodology have an enormous impact. In effect, Fagan now has a new opinion. Unfortunately, defendants were compelled to use much of their fifteen pages in their moving brief to explain Fagan's failings, space which could have been spent addressing other issues. Given the significance of the expert reports in this case, including the effect of Fagan's opinions on the issues in the pending motion for class certification,¹ defendants respectfully request permission to submit a ten-page reply brief so that defendants will have an opportunity to more fully address the basis for their *Daubert* motion in light of these recent developments.

We sincerely appreciate the Court's time and consideration of our request.

Respectfully,



Heidi Grossman

Cc: Darius Charney, Esq. By Email

¹ See *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2553-2554 (U.S. 2011) (even in a case where, unlike here, discovery had not concluded and summary judgment motions had not been made, the Supreme Court expressed doubt that *Daubert* does not apply to expert testimony at the certification stage of class-action proceedings).