UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---------- x

DAVID FLOYD et al.,

Plaintiffs, 08 Civ. 01034 (SAS)

-against- Jury Trial Demanded

THE CITY OF NEW YORK et al.,

Defendants.

---------- x

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT
OF THEIR MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Pages

Cases

Pages

Pages

Pages

Statutes and Rules

PRELIMINARY STATEMENT

Defendants respectfully submit this memorandum of law in support of their motion for summary judgment pursuant to Fed.R.Civ.P. 56 to dismiss various claims of plaintiffs Floyd and Ourlicht and claims against the City of New York, Mayor Bloomberg and Commissioner Kelly. Defendants respectfully refer the Court to Defendants' Statement of Facts Pursuant to Local Rule 56.1, dated February 2, 2011,[1] for the background facts for their motion.

I. THE INDIVIDUAL OFFICERS' MOTION FOR SUMMARY JUDGMENT[2]

The Fourth Amendment allows an officer to stop and question someone if reasonable suspicion exists that they are, have been or are about to engage in criminal conduct. *Terry v. Ohio*, 392 U.S. 1, 22 (1968).[3] The Fourth Amendment allows an officer to frisk someone if a reasonable officer would suspect an individual of a violent crime, of carrying a weapon or contraband or for the officer's safety. 392 U.S. at 27, 30. The Fourteenth Amendment prohibits enforcement of the law based on a discriminatory purpose, such that similarly situated individuals may not be treated differently based on race or national origin. *See Brown v. City of*

---

[1] All paragraph cites refer to the paragraphs of Defendants' Rule 56.1 Statement.

[2] At the conference on January 26, 2011, the Court permitted defendants to move for summary judgment on two alleged incidents, one in which NYPD officers were identified and one in which they were not. Thus, defendants have moved on the alleged February 2008 incidents of David Floyd (officers identified) and the alleged June 6 or June 9, 2008 incident of David Ourlicht (officers not identified). Defendants have not moved on the remaining five incidents at this time but reserve their right to do so.

[3] A police officer has "reasonable suspicion" when "aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that a suspect is engaging in criminal activity." *United States v. Jackson*, 652 F.2d 244, 248 (2d Cir. 1981). Whether an officer possessed reasonable suspicion depends on the totality of the circumstances present at the time of the stop, *Alabama v. White*, 496 U.S. 325, 330 (1990), and "must be based on common sense judgments and inferences about human behavior." *United States v. Cortez*, 449 U.S. 411, 418 (1981). Reasonable suspicion is an objective standard and the subjective intentions or motives of the officer making the stop are irrelevant." *United States v. Bayless*, 201 F.3d 116, 133 (2d Cir. 2000). In fact, the Supreme Court held that "officers are not required to ignore the relevant characteristics of a location in determining whether the circumstances are sufficiently suspicious to warrant further investigation." *Illinois v. Wardlow*, 528 U.S. 119, 124, (2000).

Oneonta, 221 F.3d 329, 337 (2d Cir. 2000), *cert. denied*, 534 U.S. 816 (2001). There is no genuine issue of material fact that the alleged stop, question and frisk activity was constitutionally valid, and plaintiffs cannot meet their burden by a preponderance of the evidence that NYPD was responsible for any alleged unconstitutional acts.

Floyd February 2008 Alleged Incident (56.1 ¶¶438-474)

Floyd testified that while walking on the path adjacent to the house in which he lived at 1359 Beach Avenue, he met the basement tenant, a black male, who told him that he was locked out and asked for help; Floyd testified that he told the tenant that he would get the key from upstairs. ¶438. Floyd testified that he went inside the house and retrieved seven to ten spare keys, some on chains and some loose, which he carried in his hand as he went back outside. ¶439. Floyd testified that he and the basement tenant went down to the basement apartment door, which was visible from the street, and started trying the keys; he told the tenant that he was not sure which key it was. ¶¶440, 443. Floyd testified that he tried the keys at first, and then it was back and forth with both he and the basement tenant trying the keys. ¶441. Floyd testified that they eventually found the right key after trying five or six keys for a minute or two. ¶¶442, 453. Before they opened the door, three officers came up and stopped them. *Id.*

Floyd testified that when he first noticed two of the officers, they were on his right side, in his peripheral vision, and he had his back to them. ¶444. Floyd testified that the officers said something to effect that Floyd and the tenant were to stop what they were doing, asked them what they were doing, and frisked them. ¶445. Floyd testified that the officer who frisked him reached into both of his front pockets; he had his phone in his right front pocket and his keys in his left front pocket and maybe some change. ¶¶446-47.

Floyd testified that after the officers frisked them, they were turned around to face the officers and were asked: what they were doing; to produce identification; why the basement tenant did not have identification; and whether they lived there. ¶448. Floyd gave them his Louisiana driver's license and, after the officer expressed that the address on the license did not match the address of the building, Floyd handed the officers a bill, which he retrieved from a bag that he had with him, that had the address of the house. ¶449. Floyd testified that after he showed the officers the bill, at least one officer went with the basement tenant around the back of the house to try to enter, which they did. ¶450. Floyd testified that in response to Floyd's question about why they had been stopped, an officer who was waiting with him in the front of the house told him there had been a number of robberies in the area. ¶451. Floyd testified he did not know of any gang or crime problems in the area. ¶452. Floyd testified that before the officers left, he asked for their names and badge numbers, which they provided. ¶455.

NYPD Sergeant Kelly and Officers Hernandez and Joyce stopped Floyd when they saw him in front of a house, jostling a lock in an area in which the officers knew there had been a midday burglary pattern. ¶¶456-57, 461, 463, 465. Both POs Joyce and Hernandez noticed the two men at the door nervously looking back behind them. ¶¶457, 461. All of the officers suspected that the men could be committing the violent felony of burglary. ¶¶457, 461, 463, 465. Sergeant Kelly noticed a bag at Floyd's feet, which he suspected could have contained burglary tools and reasoned that because he suspected the men of committing the violent felony of burglary, the men might have a weapon. ¶¶464-65. Sergeant Kelly hoped that the two men had been frisked for safety reasons since they were suspected of a violent crime. ¶466. PO Joyce filled out the UF250 for the stop and noted that the crime suspected was burglary. ¶458; *see also* ¶467. Although no officer recalls if they frisked Floyd, the UF250 indicates that PO

Joyce put his hands on Floyd during the stop and PO Joyce testified that he most likely did so since he noted it on the UF250. ¶¶459-60, 462-63, 466. Officer Hernandez patted down the basement tenant, who was an African-American male. ¶¶438, 463.

Based on the totality of the circumstances, the officers had reasonable suspicion to stop Floyd for burglary and frisk him for safety concerns. The officers witnessed Floyd undisputedly trying to unlock the front door and had knowledge of midday burglaries in the area. The UF250 corroborates the officers' testimony. These undisputed facts clearly establish that the officers had reasonable suspicion for the stop, question and frisk. Even if this Court finds that Floyd's actions did not give rise to reasonable suspicion as a matter of law, the officers are entitled to qualified immunity because reasonable officers could differ about whether or not Floyd's actions constituted reasonable suspicion based solely on the facts to which Floyd testified. *See Pearson v. Callahan*, 555 U.S. 223, 129 S. Ct. 808, 813 (2009); *see also Caceres v. Port Authority*, 2011 U.S. App. LEXIS 1929, at 3-8 (2d Cir. January 31, 2011).

Further, there is no basis to conclude that the stop, question and frisk violated the Fourteenth Amendment. Floyd testified that the officers said nothing about race during the stop and admitted that he would not know if the stop was based solely on race. ¶454. That the officers were patrolling an area known to them for midday burglaries shows that their presence was not due to the racial make-up of the area but due to the crime in the area. There is no evidence that others of another race were present in the area, let alone engaged in the same conduct as Floyd or similarly situated to him in any way. Consequently, there is no evidence that any person similarly situated to Floyd of a different race was treated differently than Floyd.[4]

[4] Floyd testified that other than the April 20, 2007 and February 2008 stops, and an arrest in 2005, he has never been stopped in New York. ¶468. Although the propriety of the April 20, 2007 stop is not at issue in this motion, Floyd is not able to identify the any NYPD officers

As for any argument that plaintiffs may make to infer that the officers stopped Floyd to meet a quota of some kind thereby rendering the stop without reasonable suspicion or otherwise constitutionally infirm, there is no proof that this stop was proximately caused by such a quota nor is there any evidence that these officers are aware of any quotas at NYPD. ¶¶469-74. Similarly, there is no evidence that this stop was proximately caused by any constitutional deficiencies in training, supervision or any other NYPD system.

June 6 or June 9, 2008 Incident Alleged By David Ourlicht (56.1 ¶¶475-518)

Ourlicht alleges that one morning in June 2008 between 9:00 a.m. and 10:00 a.m., he was sitting on a bench with his friend, an African-American male, outside the Johnson public housing complex located in Harlem, New York, where three other African-American males were sitting in the same area.[5] ¶¶475-80. Ourlicht testified that after about ten minutes on the bench, he noticed two male uniformed police officers walking through the housing complex as if they were going somewhere – not strolling or walking slowly. ¶¶481-82.

Ourlicht testified that when the two officers reached the corner where the building began, the officers turned, had drawn their weapons and were screaming, "Get on the floor, get on the floor!" and "There's a gun around here. Everybody get on the floor!" ¶483. Ourlicht testified and alleged that as the two officers were screaming, a blue and white police van marked 9466

---

involved in the alleged stop. Even if one of the two stops in Floyd's allegations withstands summary judgment, however, Floyd will not have standing to seek injunctive relief as there is no likelihood that he is facing imminent harm, and any injunctive claims that he brings on behalf of himself or as a putative class representative should be dismissed. *See City of Los Angeles v. Lyons*, 461 U.S. 95 (1983); *Shain v. Ellison*, 356 F.3d 211 (2d Cir. 2004).

[5] The Second Amended Class Action Complaint alleges that this incident took place on June 9, 2008. ¶476. Ourlicht testified that although he did not recall the exact date of the incident, he knows that it occurred on the same day that he had an appointment with, and saw, his attorneys in this lawsuit; however, at no time after the deposition did plaintiff or plaintiffs' counsel disclose the date of that meeting. ¶477. To the extent that plaintiff relies on the date of the incident to support his claim, plaintiff failed to disclose the date as required by Fed.R.Civ.P. 26.

arrived, and three or four officers exited the van. ¶484. Ourlicht testified that all of the officers were running when they exited the van and had their guns out and that all of the officers at the scene were white males in dark blue uniforms with NYPD patches. ¶¶485-86.

Ourlicht testified that while he was on the ground, the officers told him that they had received reports that there was a gun "around here." ¶487. Ourlicht testified that while he was on the ground, the officers patted him down: the officers lifted him up by the belt "check[ed] underneath [him], and check[ed his] pockets. And they didn't even go in. They didn't take anything out of [his] pockets." ¶488. Ourlicht testified that the officers told all of the individuals that had been sitting outside to lay on the ground and lifted them up by the belts and searched them. ¶489. Ourlicht testified that after about ten minutes of laying on the ground, the officers told all of the men they could get up. ¶490. Ourlicht testified that the officers apologized, but explained there were reports of a gun and asked all of the men for their names. ¶¶491-92. Ourlicht testified that the officers asked Ourlicht for identification, and he told them that he did not have identification with him and gave the officer his name, which the officer wrote down. ¶493. Ourlicht testified that after the officers searched him and the other men, two of the officers went into the building. ¶494. Ourlicht testified that it was possible that some officers went into the building while he was laying on the ground. ¶495.

By Ourlicht's own account, it is clear that the individuals who were involved in the alleged incident had an emergency concerning a report of a gun in Ourlicht's vicinity and that they were securing the area and the nearby building to ensure that no one had a gun or would get hurt. A factfinder cannot reasonably infer that the officers' actions, as described by Ourlicht himself, resulted from a lack of reasonable suspicion or that the search was not warranted. If a factfinder were to infer otherwise, it would require believing that, despite the action and words

spoken by the uniformed individuals, per Ourlicht's own account, the officers were screaming lies about a gun report and coming to the scene separately (walking through the complex and driving up in a van) but acting in concert with the same fallacious urgency. Such an inference is simply not reasonable and not sufficient to defeat summary judgment. *See Jeffreys v. Rossi*, 275 F. Supp. 2d 463, 478 (SAS) (S.D.N.Y. 2003), *aff'd*, 426 F.3d 549 (2d Cir. 2005). Nor is there any basis to infer that Ourlicht was treated differently from any other individual of a different race at the scene; all of the other men were also African-American and the testimony supports that they were all treated as Ourlicht was. ¶¶475, 479-80.

Moreover, Ourlicht cannot establish by a preponderance of the evidence that the uniformed individuals were from the NYPD. First, a search for an NYPD van numbered 9466 found that such a van existed and was assigned to PSA5, the command in which the alleged incident took place. ¶¶510-11. However, police documents show that NYPD van 9466 was not at the alleged location at the alleged time on June 6 or June 9, 2008. *Id.* The documents include the activity logs of four of the officers who were assigned to the van, which show they were elsewhere on both dates, and, on June 6, 2008, show that the assigned officers were not all males. *Id.*[6] Moreover, when Ourlicht viewed the photos of the officers assigned to the van at the photo array procedure discussed below, he affirmatively stated that he did not recognize them. ¶512.

Second, Ourlicht did not definitively identify any officers even after viewing 402 photographs which included the photographs of the NYPD officers on patrol from PSA5 on June 6 and on June 9, 2008, during the second platoon, which covers the alleged time of the incident.

---

[6] At a minimum, plaintiffs were put on notice of NYPD's attempts to identify the van and its whereabouts and the officers assigned to it by May 11, 2009, but they did not seek to depose anyone who conducted the search. Thus, any claim that they may attempt to raise now that defendants failed to disclose these efforts must fail. ¶517; *see also* ¶518 (discovery produced regarding efforts to identify the officers allegedly involved in the incident).

¶¶500, 503; *see* ¶¶496-503 & Declaration of Detective Santos Albino, dated February 2, 2011 ("Albino Dec."), ¶¶6-7, 9-11 (cited therein). Ourlicht viewed a photo array for each PSA5 officer, which included a photo of the PSA5 officer and five photos of other officers from other commands as fillers. ¶¶496-503 & Albino Dec. at ¶¶6-7, 9-11 (cited therein).[7] Out of the total 402 photos, Ourlicht signed the photos of eleven officers whom he thought may have been the NYPD officers present at the incident that occurred on June 6 or June 9, 2008. ¶504. Of these eleven individuals, only one was assigned to PSA5 at the time of the alleged incident and he was on duty at the time on both June 6 and June 9, 2008. ¶¶505-07. However, according to the entries in his activity log, he was not at the location of the alleged incident on June 6, 2008 (¶506), and he was the desk sergeant in the stationhouse on June 9, 2008 (¶507). No plausible inference can be drawn that this officer was at the alleged incident.

Notwithstanding any complaints that plaintiffs may have about the photo arrays, Ourlicht remained unable to identify any individuals definitively as having been involved in the alleged incident, even after defendants produced the photo arrays, the names and locations on each photo array of each officer depicted in the arrays, and the memo books of all of the officers depicted in the arrays from PSA5. ¶516. Any issues that plaintiffs may have raised about the arrays being improper because they contained fillers were necessarily cured by defendants' production of the identifying information about the PSA5 officers depicted in the arrays.

---

[7] Plaintiffs agreed to this procedure beforehand and defendants expended time and resources creating the arrays in reliance on this agreement. ¶513. Nevertheless, at the photo array procedure on August 24, 2009, plaintiffs informed defendants that they objected to the use of fillers. ¶514. After the photo array procedure, plaintiffs again objected to the use of fillers and this Court ordered that the remaining future photo arrays should be assembled without fillers; by this time, there were no remaining photo arrays to be done for the Ourlicht incidents. ¶515. To the extent that plaintiffs may now claim that the photo array procedures were deficient, they should be estopped from doing so. Moreover, at no time were defendants ordered to redo the procedures after this Court heard plaintiffs' objections to the use of fillers.

Additionally, in response to defendants' requests to admit that four PSA5 officers were not involved in the alleged stop, plaintiff denied the request and stated affirmatively for the first time that three of these officers may have been involved in the alleged stop, which Ourlicht did not do when he saw their photos at the photo array.[8] ¶509. Ourlicht's inability to identify definitively any NYPD officers is further underscored by any argument that plaintiffs may raise that, although he signed the photos of eleven officers at the photo array procedure, he did not rule out that other officers whose photos he did not sign may have been at the scene. His uncertainty that any of the officers were involved in the alleged incident renders him incapable of meeting his burden of proof by a preponderance of the evidence that members of NYPD were involved in the incident. Ourlicht's uncertainty remains, despite the reasonable and diligent efforts of defendants to identify NYPD officers who could have been at the scene.

Ourlicht's own limited general descriptions that the individuals had on dark blue uniforms with NYPD patches (¶486), with no detail about the patches and no testimony about NYPD badges or shields or names – and no attempt to get names even though the officers took the time to get his – cannot establish by a preponderance of the evidence that the individuals were from NYPD. Nor can the alleged presence of a blue and white van marked 9466, which defendants have shown that no reasonable juror can infer was at the scene of the alleged incident. Plaintiff's claim should be dismissed because plaintiff cannot show that NYPD was involved.[9]

---

[8] Other than the August 24, 2009, photo array procedure, defendants were not on notice of nor did they attend any other photo array procedure attended by David Ourlicht. ¶508.

[9] In the absence of identified NYPD officers and documentation that the incident even occurred, plaintiffs cannot prove that the stop was proximately caused by impermissible quotas, or by any alleged constitutional failings in NYPD's training, supervision, discipline or other systems. Finally, although the propriety of Ourlicht's two other alleged stops are not at issue now, defendants believe that once those stops are reviewed by the Court, one of which also involves unidentified officers, Ourlicht will not have standing to seek injunctive relief behalf of himself or

II. THE CITY'S MOTION FOR SUMMARY JUDGMENT

To establish municipal liability pursuant to 42 U.S.C. § 1983, a plaintiff must show that a municipal policy or custom was the cause of the deprivation of constitutional rights. *E.g., City of Canton v. Harris*, 489 U.S. 378, 385 (1989). To satisfy this standard, the plaintiff must (1) "prove the existence of a municipal policy or custom" and (2) "establish a causal connection – an 'affirmative link' – between the policy and the deprivation of his constitutional rights". *Vippolis v. The Village of Haverstraw*, 768 F.2d 40, 44 (2d Cir. 1985) (citing *Oklahoma City v. Tuttle*, 471 U.S. 808, 822-23 (1985)), *cert. denied*, 480 U.S. 916 (1987).

A municipal policy can be formally adopted or otherwise expressly established by a municipal policymaker. *Amnesty Am. v. Town of West Hartford*, 361 F.3d 113, 125 (2d Cir. 2004). A municipal policy also can exist where a municipality is faced with a sufficiently persistent or widespread pattern of misconduct and does nothing, thereby acquiescing in or tacitly authorizing its subordinates' unlawful actions. *Reynolds v. Giuliani*, 506 F.3d 183, 192 (2d Cir. 2007). In such an instance, the municipality can be held liable if it was deliberately indifferent to the need for the training or other supervision of its employees and failed to take meaningful steps to address that need. *Id.* In addition, where a valid policy is unconstitutionally applied by a police officer, the employer municipality can be liable if the officer has not been adequately trained, supervised or disciplined. *See, e.g., Harris*, 489 U.S. at 387-88; *Reynolds*, 506 F.3d at 192. However, "plaintiff must also demonstrate that, through its deliberate conduct, the municipality was the 'moving force' behind the injury alleged [by showing] the *requisite degree of culpability* and . . . a *direct causal link between the municipal action and the deprivation of federal rights*." *Board of the County Comm'rs v. Brown*, 520 U.S. 397, 404

---

as a putative class representative. *See City of Los Angeles v. Lyons*, 461 U.S. 95 (1983); *Shain v. Ellison*, 356 F.3d 211 (2d Cir. 2004).

(1997) (emphasis added); see also *Reynolds*, 506 F.3d at 192 (noting the "stringent causation and culpability requirements" in failure-to-train, failure-to-supervise and failure-to-discipline cases). There is no genuine issue of material fact to support municipal liability pursuant to plaintiffs' Fourth or Fourteenth Amendment claims.

A. Plaintiffs' Fourth Amendment Claims Against the City

Plaintiffs allege that they have been stopped, questioned and/or frisked by NYPD officers without reasonable, articulable suspicion, and that the City is liable for these allegedly improper practices because of its policy, practice and/or custom in this regard.

The Fourth Amendment Policy/Custom Claims. Initially, plaintiffs cannot establish that the City has any written or other formal or informal policy that requires or even permits the stopping, questioning and/or frisking of persons without reasonable suspicion. *See Pembaur v. City of Cincinnati*, 475 U.S. 469, 481 (1986); *Amnesty Am.*, 361 F.3d at 125. The City's policy is reflected in various documents, including the Patrol Guide provisions governing stop, question and frisk practices, Grossman Dec. Exh. C (PG 212-11 Stop and Frisk), the policy prohibiting racial profiling, ¶¶17-18, and various training materials. ¶¶182-246.

Also without merit is plaintiffs' assertion that there is a custom of unconstitutionally stopping, questioning and/or frisking people to which the City has acquiesced. *See Amnesty Am.*, 361 F.3d at 126 (citing *Sorlucco v. New York City Police Dep't*, 971 F.2d 864, 870-71 (2d Cir. 1992)). First, plaintiffs cannot establish "a *widespread* practice [of unconstitutional stops, questions and/or frisks] that, although not authorized by written law or express municipal policy, is 'so *permanent* and *well settled* as to constitute a 'custom or usage' with the *force of law*.'" *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988) (quoting *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 167-68 (1970); emphasis added). In fact, the evidence in this case shows that the widespread practice within the NYPD includes oversight of the constitutional quality of officer

stop, question and frisk practices at all levels in the chain of command.[10] ¶¶2-59 (audits and self-inspection); ¶¶92-152 (CompStat); ¶¶153-80 (Operation Impact); ¶¶181-84 (Impact Overtime); ¶¶182-90 (Anticrime); ¶¶247-70 (supervisory structure); ¶¶271-80 (paperwork review); and ¶¶281-91 (performance evaluations) ¶¶304-437 (discipline).

Second, even if plaintiffs were able to provide some evidence of a "widespread practice", they cannot further establish that the City has consciously ignored any constitutional deprivations caused by subordinates or otherwise acquiesced to such constitutional deprivations by being deliberately indifferent to them. *Amnesty Am.*, 361 F.3d at 126. The evidence in this case is that the City has in place a training, monitoring, supervision and discipline system to address any departures from its stated policy regarding stops, questions and frisks. *Reynolds*, 506 F.3d at 195-97; *see also Adickes*, 398 U.S. at 167-68. Under the supervisory structure pursuant to which police officers and their supervisors operate, supervisors[11] are able to observe their subordinates' actions to determine whether they understand and follow the law regarding stop, question and frisk and/or need additional guidance and training. *See generally* ¶¶247-91. For example, supervising officers review subordinates' paperwork (including review and sign-off of UF250s[12]), patrol the same areas as and/or work together with subordinates, maintain radio contact with subordinate officers throughout the officers' tours, and respond to and direct law enforcement activities, as appropriate, including at radio runs and the scene of arrests, which supervisors must approve. *See id.*

---

[10] Moreover, QAD command/unit audits from 2003-09 show satisfactory or above ratings for the vast majority of stop, question and frisk activity in the NYPD commands. ¶¶44-48.

[11] Supervisors are answerable to their supervisors, including the Chief of Patrol's Office. ¶¶247-70.

[12] The primary document that records a stop, question and frisk is the UF250 form.

Also, the NYPD has in place an elaborate monitoring system regarding compliance with its stop, question and frisk and prohibition against racial profiling policies. The NYPD Quality Assurance Division ("QAD") audits the NYPD's stop, question and frisk practices, and has integrated review of such practices into its existing audit cycle of NYPD commands and units.[13] ¶¶23-27. This audit includes protocols and worksheets for a Department-wide examination of UF250 forms to ensure compliance with PG 212-11 Stop and Frisk.[14] ¶¶28-33. QAD audits have shown that Department-wide stops are based on reasonable suspicion as reflected in the UF250 forms. ¶¶29, 44-48. The NYPD also requires precinct self-inspections, which evaluates UF250s and their compliance with PG 212-11 Stop and Frisk and the prohibition against racial profiling. ¶¶35-43. While the overall audit results were favorable,[15] commands and units implemented corrective measures to address noted deficiencies, including a comprehensive memo book review, random Integrity Control Officer inspections, and additional instruction, training and discipline. ¶¶49-59. Other examples of NYPD monitoring efforts include the study by the Rand Center on Quality Policing ("Rand") (which found, using internal and external benchmarks, that racial differences in the rates of frisk, search, use of force, and arrest between white and nonwhite suspects were much smaller than the raw statistics appeared to show and did not indicate the need for a large-scale restructuring of the NYPD's stop, question and frisk

---

[13] Class counsel in Daniels, some of whom are counsel in this matter, agreed to this and the other audit protocols in the Daniels Settlement. ¶¶4-5, 23-25.

[14] These audits include an examination of the boxes checked on the UF250s. Since the checked boxes represent a substantive justification for a stop, the audit confirms that a UF250 with the required checkmarks indicates a valid stop, absent indicia to the contrary on the remainder of the form. *See* ¶29; Grossman Dec. Exh. P at 2 ¶¶ 1-4.

[15] Significantly, the last two audits showed that only three (2008) and eight (2009) of the 136 commands needed some improvement, which represented 2008-09 pass rates of 95% and 94%, respectively. ¶48.

policies), ¶¶60-69, the subsequently implemented Rand recommendations, ¶¶70-91, and the CompStat review process. ¶¶92-152.

The NYPD also has provided significant accredited training regarding stop, question and frisk practices and racial profiling in various major training levels, including: (1) police academy training, ¶¶195-206; (2) later "in-service" or "in-Tac" training, precinct-based training, and Operation Impact training, where officers receive additional stop, question and frisk instruction, ¶¶207-22, 226-27; (3) special unit training, including plainclothes training that covers stop, question and frisk and the law of reasonable suspicion, ¶¶223-25; and (4) promotional training for sergeants and above, which includes further stop, question and frisk training and training on the law of reasonable suspicion. ¶¶228-31; *see also* 232-46, 300-03 (officer testimony showing the lack of deficiencies in the training regarding reasonable suspicion and racial profiling).

Finally, the NYPD's comprehensive "progressive discipline" provides that officers who fail to adhere to Departmental policy regarding stop, question and frisk are appropriately dealt with. This discipline structure includes the Civilian Complaint Review Board ("CCRB"), where stop, question and frisk complaints are addressed under its "abuse of authority" jurisdiction, ¶¶312-53, the Department's Internal Affairs Bureau ("IAB"), which separately investigates instances of misconduct[16], ¶¶354-72, and the Office of the Chief of Department. ¶¶373-74; *see also* ¶¶ 292-97, 304-11. Where appropriate, progressive discipline utilizes increasingly severe steps or measures to deal with substandard work behavior and/or misconduct. Discipline ranges from verbal admonishment or "Instructions" to "Command Discipline" and "Charges and Specifications", and corrective action includes training or other direction from commanders or

[16] In addition to the IAB, each Patrol Borough has its own Investigations Unit. ¶¶298-99.

training units, loss of vacation days and suspension or termination.[17] ¶¶375-410. Officer performance also is monitored through the NYPD performance monitoring program regardless of the outcome of a disciplinary proceeding if an officer receives over a certain number of complaints. ¶¶411-37. In light of the above, plaintiffs' claim that the City has an unconstitutional stop, question and frisk policy should be dismissed.

The Fourth Amendment Failure to Train, Supervise and Discipline Claims. Plaintiffs also apparently contend that the unauthorized conduct of the officers in their particular cases were the result of the City's deliberately indifferent failure to train, supervise and/or discipline[18] those officers.

To establish a claim for municipal liability based on "failure to train", plaintiffs must point to (1) inadequacies in the City's training program in this regard and (2) offer evidence of the causal relationship between those inadequacies and their alleged constitutional harms. *Amnesty Am.*, 361 F.3d at 129-30. Furthermore, plaintiffs must establish "deliberate indifference" with respect to the City's training of the defendant officer. *See Harris,* 489 U.S. at 390 (where training is deemed inadequate, the question remains whether the "need for more or different training [was] so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been

---

[17] The use of Instructions may be particularly appropriate in an area such as stop, question and frisk encounters, where officers are asked to apply laws under circumstances that may require the officer to make decisions regarding reasonable suspicion and officer safety in a matter of seconds. ¶¶387-89. In this regard from January 1, 2007 to October 31, 2010, of 1,037 officers with substantiated CCRB allegations, only two members of the service received subsequent complaints for the same misconduct having previously received Instructions on that substantiated misconduct. ¶¶390-94.

[18] While it is not clear whether plaintiffs intend to pursue any inadequate hiring/screening claims, there simply is no evidence thereof, let alone evidence establishing the "rigorous requirements of culpability and causation" necessary for municipal liability in such a case. *See Brown*, 520 U.S. at 411-12.

deliberately indifferent to the need"). To establish a failure-to-supervise or failure-to-discipline claim, plaintiffs' burden is essentially the same. *See Reynolds*, 506 F.3d at 193 (failure to supervise); *Amnesty Am.*, 361 F.3d at 128 (same); *Vann v. City of New York*, 72 F.3d 1040, 1049-51 (2d Cir. 1995) (failure to discipline); *Searles v. Pompilio*, 652 F. Supp. 2d 432, 443 (S.D.N.Y. 2009) (quoting *Batista v. Rodriguez*, 702 F.2d 393, 397 (2d Cir. 1983)) (same).

As discussed in pages 11-15, *supra*, plaintiffs cannot point to any evidence that would establish that the City has been deliberately indifferent with respect to training, supervising or disciplining any of the defendant officers, or that such failure(s) by the City caused their particular constitutional injuries.[19] *Monell* liability does not lie where a municipality was merely negligent with respect to training, supervision or discipline or that its program in that regard was merely inadequate. *Brown*, 520 U.S. at 410; *Harris*, 489 U.S. at 390-91. It is insufficient for plaintiffs to merely show that a particular officer might have been unsatisfactorily trained, *Harris*, 489 U.S. at 390-91; *Okin v. Village of Cornwall-on-Hudson Police Dep't*, 577 F.3d 415, 440 (2d Cir. 2009), or that some officers failed to recall the substance of their training at a deposition. *Okin*, 577 F.3d at 441; *see also Reynolds*, 506 F.3d at 197 ("natural presumption" against "deliberate choice"); *Amnesty Am.*, 361 F.3d at 130 (noting plaintiffs' failure to rule out possibility of mere negligent administration or officers disregarding their training). "In virtually every instance where a person has had his or her constitutional rights violated by a city employee, a § 1983 plaintiff will be able to point to something the city "could have done" to prevent the unfortunate incident." *Harris*, 489 U.S. at 392. However, to permit a plaintiff to go forward on a lesser standard of municipal fault would "engage the federal courts in an endless

[19] To the contrary, the evidence establishes no deficiencies upon which *Monell* liability can rest. *See* ¶¶ 237-46, 300-03 (officer testimony establishing their understanding that the Fourth Amendment requires reasonable suspicion and the Fourteenth Amendment prohibits racial profiling).

exercise of second-guessing" municipalities, "an exercise . . . federal courts are ill suited to undertake, as well as one that would implicate serious questions of federalism." *Id.*; *see also Reynolds*, 506 F.3d at 197-98. Accordingly, plaintiffs' *Monell* claims based on failure to train, supervise and/or discipline should be dismissed.

Allegation of "Quotas". Plaintiffs ("on information and belief") also advance a rather tenuous claim that the NYPD has "productivity standards" that put "pressure" on officers to "conduct increased *stops and frisks*", which in turn causes such officers to "engage[] in widespread suspicionless *stops and frisks* of individuals" . . . "to satisfy the productivity standards". *See* Second Amended Class Action Complaint ("Complaint") ¶¶ 114 & 125 (emphasis added).

To establish *Monell* liability based on a "quota theory", a plaintiff would need to establish a quota policy *and* that such policy caused the stop instead of reasonable suspicion. *See Franceschi v. City of Seal Beach*, 1993 U.S. App. LEXIS 23131, at 4-5 (9th Cir. 1993); *Floyd v. City of New York*, 2010 U.S. Dist. LEXIS 63481, at 2 n.2 (S.D.N.Y. 2010). Moreover, since "productivity standards" or "quotas" are not unconstitutional on their face, plaintiffs would have to establish that the City has been on notice that the policy was causing unconstitutional violations and that it has been deliberately indifferent to its duty to take appropriate steps to stop such unconstitutional activity. Plaintiffs' proof in this regard fails for three reasons.

First, plaintiffs' evidence does not show any *stop and frisk* quotas. Plaintiffs' evidence at best indicates only that in certain instances there has been *summons and/or arrest* thresholds indicated vaguely by precinct supervisors and that *stop and frisk* activity should be increased.

There is scant, if any, arguable evidence of *stop and frisk* quotas, which is the subject of plaintiffs' Complaint.[20]

Second, even assuming the possibility of a stop and frisk quota policy, which defendants deny, the evidence is insufficient to establish that such policy could have caused any of the alleged constitutional injuries. *See Tuttle*, 471 U.S. at 824 n.8 ("The fact that a municipal 'policy' might lead to 'police misconduct' is hardly sufficient to satisfy *Monell's* requirement that the particular policy be the 'moving force' behind a *constitutional* violation.").

Finally, plaintiffs' evidence of "pressure" (as plaintiffs characterize it) to increase stop and frisk or, more vaguely, law enforcement activity in general commences *after* the most recent incident in the Complaint is alleged to have occurred (June 6 or 9, 2008). Such evidence is insufficient to establish the necessary causal link between a municipal policy and the alleged constitutional deprivations. *See, e.g., Dejesus v. Village of Pelham Manor*, 282 F. Supp. 2d 162, 176 (S.D.N.Y. 2003); *Woo v. City of New York*, 1996 U.S. Dist. LEXIS 11689, at 18-20 (S.D.N.Y. 1996). Under such circumstances, it is not possible for the City to have been the "moving force" behind the stops alleged by plaintiffs. *See Brown*, 520 U.S. at 404.

B. Plaintiffs' Equal Protection Claims Against the City

As set forth in *Brown v. City of Oneonta*, 221 F.3d 329 (2d Cir. 2000), *cert. denied*, 534 U.S. 816 (2001), "[t]here are several ways for a plaintiff to plead intentional discrimination that violates the Equal Protection Clause. A plaintiff could point to a law or policy that 'expressly classifies persons on the basis of race.' Or, a plaintiff could identify a facially neutral law or policy that has been applied in an intentionally discriminatory manner. A plaintiff could also

[20] Whereas evidence subsequent to the alleged constitutional deprivations can sometimes be sufficient circumstantial evidence of a past *policy*, such evidence cannot be "too sparse" to support a finding that the future conduct was indicative of a past policy. *See Dejesus v. Village of Pelham Manor*, 282 F. Supp. 2d 162, 175-76 (S.D.N.Y. 2003). In any event, as noted *infra*, such subsequent evidence is not probative of causation. *See id.* at 176.

allege that a facially neutral statute or policy has an adverse effect and that it was motivated by discriminatory animus."[21] 221 F.3d at 337 (citations omitted). In the latter two instances, it is plaintiffs' burden to further establish discriminatory purpose.[22] *See McCleskey v. Kemp*, 481 U.S. 279, 292 (1987); *Washington v. Davis*, 426 U.S. 229, 239-41 (1976). Discriminatory purpose means "more than intent as volition or intent as awareness of consequences". *Personnel Administrator v. Feeney*, 442 U.S. 256, 279 (1979). Rather, it means the decisionmaker "selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group". *Id.* Disparate impact, standing alone, is insufficient to establish such discriminatory intent.[23] *See, e.g., Davis*, 426 U.S. at 242; *Brown*, 221 F.3d at 338.

Plaintiffs appear to advance two theories under the Equal Protection Clause: (1) the City has a policy or custom of stopping, questioning and/or frisking Latinos and African-Americans based exclusively on their race, or, if there is no such policy or custom, the alleged unconstitutional actions of the individual officers were caused by the City's deliberately indifferent failure to train or otherwise adequately supervise or discipline those officers; and (2) the City has a policy of targeting minority neighborhoods with NYPD resources, and that such policy has the effect of violating plaintiffs' constitutional right of equal protection. For the

---

[21] To prevail on a selective prosecution theory, plaintiffs would have to show they were treated differently from other similarly situated individuals and discriminatory intent. *Cine SK8, Inc. v. Town of Henrietta*, 507 F.3d 778, 790 (2d Cir. 2007); *see also Orgain v. City of Salisbury*, 305 Fed. Appx. 90, 99-100 (4th Cir. 2008).

[22] Only when the government expressly classifies persons on the basis of race is a plaintiff relieved of the obligation to make an extrinsic showing of discriminatory animus or discriminatory effect. *Jana-Rock Constr., Inc. v. New York State Dep't of Economic Dev.*, 438 F.3d 195, 204-05 (2d Cir. 2006).

[23] Of course, in any case alleging municipal liability under section 1983, causation and fault (which can vary in scope depending on the nature of the violation alleged) also are matters that must be addressed. *See, e.g., Brown*, 520 U.S. at 403-12; *Harris*, 489 U.S. at 385-92; *Okin*, 577 F.3d at 438; *Llerando-Phipps v. City of New York*, 390 F. Supp. 2d 372, 382 (S.D.N.Y. 2005).

reasons set forth below, plaintiffs have failed to raise sufficient issues of material fact to preclude summary judgment on either of these theories.

The Improper Racial Profiling Claims. Plaintiffs' claim in this regard is not facially neutral, as they are asserting the City has a policy or custom of unconstitutional racial profiling. As with plaintiffs' Fourth Amendment claim, plaintiffs cannot establish that the City has any written or other formal or informal policy that requires or permits the stopping, questioning and/or frisking of members of the public based solely on race.[24] *See Pembaur*, 475 U.S. at 481; *Amnesty Am.*, 361 F.3d at 125. In fact, the City's policy, which prohibits the use of race, color, ethnicity or national origin as the determinative factor in taking law enforcement action, is expressly the opposite. ¶¶16-19.

Regarding any claim by plaintiffs that the City has an unconstitutional custom based on a "widespread practice" of racial profiling in lieu of constitutional stops, questions and/or frisks, such claim fails for the same reasons their similar Fourth Amendment claim fails – namely, the evidence shows that the City's practice has been the opposite of what plaintiffs are claiming, both with respect to actual City policy (as noted above) and the City's monitoring and training (as noted below). *See Martin v. Lakewood Police Dep't*, 266 Fed. Appx. 173, 178 (3d Cir. 2008) (dismissing the racial profiling *Monell* claim where the plaintiff failed to proffer evidence of a policy or custom in the face of an express police department policy prohibiting such profiling); *Llerando-Phipps v. City of New York*, 390 F. Supp. 2d 372, 382 (S.D.N.Y. 2005) (conclusory allegations of an unconstitutional racial profiling policy insufficient). In addition, the in-depth

---

[24] Defendants note that it is not enough for plaintiffs to establish, with respect to their claims against the individual defendants or the City, that there are instances where the NYPD has or might use race as *a factor* in stopping a person. *See Brown*, 221 F.3d at 337-38. Rather, plaintiffs must establish, as they have alleged, that *the City's* policy is to use race in lieu of reasonable suspicion. *Id.*

review of NYPD street encounters in 2006 by Rand, which examined the racial distribution of stops against external and internal benchmarks and assessed stop outcomes, did not indicate the need for a large-scale restructuring of NYPD's stop, question and frisk policies.[25] ¶¶60-69.

In any event, plaintiffs cannot establish that the City consciously ignored any racial profiling caused by subordinates or otherwise acquiesced to such racial profiling by being deliberately indifferent. *See Amnesty Am.*, 361 F.3d at 126. The same training, monitoring, supervision and discipline system discussed with respect to plaintiffs' Fourth Amendment claims apply with equal force here.[26] In addition, plaintiffs cannot point to any evidence to establish that the City has been deliberately indifferent with respect to training, supervising or disciplining any of the defendant officers, *see, e.g., Reynolds*, 506 F.3d at 192, or that such failure(s) by the City proximately caused their particular constitutional injuries. *See Okin*, 577 F.3d at 438 (quoting *Eagleston v. Guido*, 41 F.3d 865, 878 (2d Cir. 1994), *cert. denied*, 534 U.S. 808 (1995)): plaintiffs must adduce sufficient evidence "that the policy or practice was the proximate cause of plaintiff's injury"). Accordingly, plaintiffs' equal protection claims should be dismissed.

The Equal Protection Claims Based on Deployment of Police Resources. To the extent plaintiffs claim deprivation of their equal protection rights based on the NYPD's deployment of officers to predominantly African-American and/or Latino neighborhoods, it is

---

[25] Despite Rand's positive findings, the City implemented many of Rand's recommendations. ¶¶70-91. The City implemented these recommendations despite the NYPD's data, which established that stops involving minorities correlated with suspect descriptions, further indicating a lack of racially motivated stops. ¶¶150-52.

[26] Furthermore, the City's monitoring system specifically addresses racial profiling in the context of self-inspections and QAD audits, ¶¶2-59, and the City's training regimen addresses reasonable suspicion and racial profiling. ¶¶191-246, 300-03.

clear that defendants have a legitimate law enforcement purpose for deployments and that plaintiffs cannot prove any discriminatory motive by the City in making such deployments.

Initially, plaintiffs do not have any statistical evidence from which *reliable* inferences could be drawn that the City's policy with respect to police resource deployment has a discriminatory effect on African-Americans and/or Latinos with respect to police officer stops, questions and/or frisks. *See generally Chavez v. Illinois State Police*, 251 F.3d 612, 640-45 (7th Cir. 2001). But even assuming plaintiffs could provide sufficient evidence of such an adverse discriminatory effect, plaintiffs cannot further establish, as they must, any *discriminatory purpose* by a City decisionmaker against either of those two groups or that the City's deployment policy was the proximate cause of their alleged injuries.[27]

Here, nothing in the record demonstrates that the City's method for deploying police resources was originally established or continued *because* it would accomplish the collateral goal of depriving plaintiffs of their rights. *McCleskey*, 481 U.S. at 298; *Feeny*, 442 U.S. at 279. The individual plaintiffs' personal stories of alleged racial profiling (even if true) are insufficient, since the officers in question are not government "decisionmakers". *See, e.g., Feeny*, 442 U.S. at 279; *Bailey v. City of New York*, 2003 U.S. Dist. LEXIS 7254, at 22 (S.D.N.Y. 2003).

Nor can plaintiffs point to any other indicia of discriminatory purpose by the City (or any of the individual defendants, for that matter). *See generally Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 264-69 (1977); *Jana-Rock Constr., Inc. v. New York State Dep't of Economic Dev.*, 438 F.3d 195, 212 (2d Cir. 2006). As noted *supra*, evidence of a disparate impact, standing alone, is insufficient to establish discriminatory intent. *See, e.g.,*

---

[27] Plaintiffs cannot argue that the City's policy of deploying police resources to high crime areas is not race-neutral. *See, e.g., Pyke v. Cuomo*, 567 F.3d 74, 77 (2d Cir.), *cert. denied*, 130 S. Ct. 741 (2009); *Brown*, 221 F.3d at 337-38.

Davis, 426 U.S. at 242; *Brown*, 221 F.3d at 338. *McCleskey v. Kemp* is instructive on this point. In that case, the Court rejected, as evidence of discriminatory purpose, substantial disparities in the death penalty rates for black defendants when the victim was white.[28] The Court noted the difference between the nature of the venire-selection process or Title VII cases, on the one hand, and the capital sentencing process, on the other. *See* 481 U.S. at 293-97. Specifically, the court noted that in the latter situation – characterized as "challenges to decisions at the heart of the State's criminal justice system", the implementation of which "necessarily requires discretionary judgments", *id.* at 294 – each case was subject to unique circumstances and considerations. *Id.* at 297. As such, the Court held "we would demand exceptionally clear proof before we would infer that the discretion had been abused", which the Court held was absent in the case. *Id.* The Court further held that the analysis failed to establish "that the State as a whole had a discriminatory purpose". *Id.* at 297-98 ("There was no evidence then, and there is none now, that the Georgia Legislature enacted the capital punishment statute to further a racially discriminatory purpose.").

The same considerations apply to the present case. Even assuming plaintiffs' data evidence shows a disparity of the number of stops, questions and frisks for minorities vis-à-vis non-minorities, the similarly unique nature of each stop, question and frisk dictates that discriminatory purpose cannot be extrapolated from such data. *Cf. McCleskey,* 481 U.S. at 313 ("Where the discretion that is fundamental to our criminal process is involved, we decline to assume that what is unexplained is invidious."). Moreover, in the absence of other evidence that the City acted "because of" and not merely "in spite of" such alleged disparities, there is no

---

[28] The statistical study in question, accepted as accurate by the Eleventh Circuit *en banc* court and the Supreme Court for purposes of their opinions, ranged from 6% to 20%, depending on how the regression analysis was performed. *See McCleskey*, 481 U.S. at 287 n.5; *McCleskey v. Kemp*, 753 F.2d 877, 896 (11th Cir. 1985) (en banc), *aff'd*, 481 U.S. 279 (1987).

evidence of discriminatory purpose by the City. Plaintiffs certainly cannot assert that their alleged statistical disparities rise to the level of those present in *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (in the relevant group, *all* Chinese nationals denied permits and *all but one* non-Chinese national given a laundry permit) or *Gomillion v. Lightfoot*, 364 U.S. 339 (1960) (a city redistricted to exclude 395-96 of the 400 black voters while not excluding a single white voter).[29] *See McCleskey*, 481 U.S. at 293 n.12.

In fact, the record in this case shows that the City's deployment policies are based entirely on legitimate law enforcement concerns, not racial bias. In determining where to deploy such resources, the City primarily relies on the CompStat process, which includes the mapping of crime and identification of high-crime and other problematic areas, and various meetings to discuss and analyze the data. ¶¶92-152. CompStat uses objective information, often from arrest and complaint data derived from third-party sources like crime victims and witnesses. *Id.* There simply are no racial motivations built into this process. *See Pyke v. Cuomo*, 567 F.3d 74, 77 (2d Cir.), *cert. denied*, 130 S. Ct. 741 (2009); *Brown*, 221 F.3d at 339. Accordingly, plaintiffs' equal protection claims based on the City's deployment of its police resources should be dismissed.[30]

---

[29] Assuming discriminatory intent, the City's anti-racial profiling policy and other training, monitoring, supervision and discipline procedures and policies, discussed *supra*, negate any inference of discrimination based on race in the deployment of police resources. *Cf. Davis*, 426 U.S. at 246 (affirmative efforts by police department to diversify police force negates inference of discriminatory intent).

[30] Plaintiffs' arguments that there should be less NYPD focus on a high-crime neighborhood that happens to populated primarily by African-Americans and/or Latinos would require the City to walk an impossibly fine constitutional line, since the *failure* of the City to adequately provide adequate police protection in such areas could itself subject the City to an equal protection claim. *See Deshaney v. Winnebago County Dep't of Social Services*, 489 U.S. 189, 197 n.3 (1989). Such allegations run the risk of being counterproductive to the effective allocation of police resources and should not be lightly entertained. *See Marshall v. Columbia Lea Regional Hosp.*, 345 F.3d 1157, 1167 (10th Cir. 2003).

C. Plaintiffs' Title VI Claims Against the City

To prevail on their Title VI claim, *see* 42 U.S.C. § 2000d ("discrimination under [a] program or activity receiving Federal financial assistance"), plaintiffs must – but cannot – establish the required *intentional* discrimination, *Alexander v. Sandoval*, 532 U.S. 275, 280-81 (2001), as discussed in Point II-B, *supra*, or "similarly situated" elements. *T.R. Hoover Community Dev. Corp. v. City of Dallas*, 2009 U.S. Dist. LEXIS 58412, at 18-19 (N.D. Tex. 2009); *see also Orgain v. City of Salisbury*, 305 Fed. Appx. 90, 99-100 (4th Cir. 2008) (in an equal protection case alleging an improperly heightened discriminatory police presence in a particular location, the court held that public safety disparities precluded a "similarly situated" finding).

III. NO CLAIMS EXIST AGAINST BLOOMBERG OR KELLY

Any "supervisory liability" claim against Mayor Bloomberg and/or Commissioner Kelly in their individual capacities must be dismissed. Here, there is no evidence that any of the non-police officer defendants participated directly or had personal involvement in the alleged constitutional violations. *Ashcroft v. Iqbal*, ___ U.S. ___, 129 S. Ct. 1937, 1948 (2009) (supervisory claims lie only where official took own actions; mere knowledge or acquiescence is insufficient); *see also Bellamy v. Mount Vernon Hosp.*, 2009 U.S. Dist. LEXIS 54141, at 27 (S.D.N.Y. 2009), *aff'd*, 2010 U.S. App. LEXIS 14981 (2d Cir. 2010). Further, any claim(s) by plaintiffs that supervisory liability for Mayor Bloomberg and Commissioner Kelly exists because they created the alleged unconstitutional policy or custom that deprived one or more plaintiffs of their constitutional rights must fail for the same reasons already articulated with respect to plaintiffs' *Monell* policy and custom claims. In any event, these defendants are entitled to qualified immunity. *See Pearson v. Callahan*, 555 U.S. 223, 129 S. Ct. 808, 815 (2009).

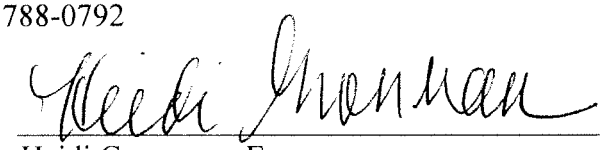
CONCLUSION

For the foregoing reasons, Defendants' Motion for Summary Judgment should be granted in its entirety.

Dated: New York, New York
February 9, 2011

Respectfully submitted,

MICHAEL A. CARDOZO
Corporation Counsel of the City of New York
Attorney for Defendants
100 Church Street
New York, New York 10007
(212) 788-0792

By: 
Heidi Grossman, Esq.

Of counsel:
Linda Donahue, Esq.
Judson Vickers, Esq.