SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
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In the Matter of GWEN CARR, et al.,

Petitioners,

- against -

BILL DE BLASIO, Mayor of the City of New York, et al.

Respondents.

Index No. 101332/2019
(Edwards, J.)

Mot. Seq. No. ___

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MEMORANDUM OF LAW IN SUPPORT OF MOTION TO REARGUE OR RENEW AND TO MAKE EVIDENCE SUPPORTING THIS MOTION PART OF THE SECTION 1109 RECORD

Petitioners GWEN CARR, ELLISHA FLAGG GARNER, CONSTANCE MALCOLM, LOYDA COLON, JOO-HYUN KANG, MONIFA BANDELE, KESI FOSTER, and MARK WINSTON GRIFITH (collectively, the "Petitioners") respectfully submit this memorandum of law in support of their motion, pursuant to CPLR Section 2221, for leave to reargue or, in the alternative, to renew Petitioners' application to the Court to compel the testimony of City officials parallel in rank and senior to Deputy Commissioner Joseph Reznick.[1]

For the motion to renew, Petitioners rely on evidence not before the Court at the time of its ruling, including the testimony yesterday of Deputy Commissioner Reznick and two affidavits submitted herewith of: (1) Maya Wiley, the former Chair of the Civilian Complaint Review Board and former Counsel to the Mayor, dated October 27, 2021, ("Wiley Affidavit"); and

[1] Petitioners' prior application, which the Court denied, sought testimony from 16 witnesses. These 16 witnesses are listed below on page 5 and are referred to herein as the "Excluded Witnesses." The motion to reargue, which under New York law is based on matters that were before the Court at the time of the initial ruling, seeks testimony from the Excluded Witnesses. The motion to renew, which is based on new facts presented to the Court herewith, seeks testimony from Mayor Bill de Blasio, Police Commissioner Dermot Shea, former Police Commissioners William Bratton and James O'Neill, First Deputy Police Commissioner Benjamin Tucker, and Deputy Police Commissioner Kevin Richardson. These six potential witnesses are referred to herein collectively as the "High-Ranking Officials."

(2) Donovan Richards, currently the Borough President of Queens in New York City and the former Chair of the New York City Council Public Safety Committee, also dated October 27, 2021, ("Richards Affidavit"). Petitioners further move that the Wiley and Richards Affidavits be made a part of the record to be filed with the New York County Clerk pursuant to New York City Charter Section 1109.

PRELIMINARY STATEMENT

A motion to reargue under CPLR Section 2221(d) is properly granted upon a showing that the court "overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision." *Sachar v. Columbia Pictures Indus.*, Inc. 129 A.D.3d 420, 421 (1st Dep't 2015) (citation omitted). Here, leave to reargue should be granted because the Court's Order, dated July 23, 2021, (Dkt. No. 67), finding that the Excluded Witnesses should not be compelled to testify, misapprehended the Excluded Witnesses' level of involvement in the NYPD's disciplinary and investigatory process arising from the stop, arrest, and tragic killing of Eric Garner.

Leave to renew under CPLR Section 2221(e) is properly granted where "pertinent facts . . . were not set forth before [the court] that would have affected [its] order." *Martinez v. Estate of Carney*, 129 A.D.3d 607, 608 (1st Dep't 2015). Yesterday's testimony of Deputy Commissioner Reznick demonstrated that while the Internal Affairs Bureau ("IAB") investigates misconduct, other members of the NYPD, including the Department Advocate's Office (DAO"), have decision making authority as to whether discipline should be imposed. The Richards and Wiley Affidavits further underscore the limited role of the IAB and address the important role of the DAO. The Richards and Wiley Affidavits also address the involvement of senior City

officials during high-profile administrative investigations of police conduct *and* such officials' apparent awareness of the investigation specifically arising from the killing of Mr. Garner.[2]

For these reasons, and as more fully explained below, Petitioners respectfully request that leave to reargue and renew be granted, and that the Court grant Petitioners' request to compel testimony from the Excluded Witnesses or, at a minimum, from the High-Ranking Officials.

PETITIONERS' PRIOR APPLICATION

On June 29, 2021, Respondents filed a letter with the Court objecting to a proposed witness list provided by Petitioners to Respondents on June 25, 2021, (Dkt. Nos. 48, 49). On June 30, 2021, the Court held a conference, during which the parties addressed whether senior City officials should be called as witnesses during the summary inquiry. After the conference, by order also dated June 30, 2021, the Court set a briefing schedule concerning which witnesses should be compelled to testify during the summary inquiry, (Dkt. No. 54). Pursuant to the briefing schedule, Petitioners filed, on July 8, 2021, a memorandum of law in support of its application that the City be compelled to produce senior officials for testimony during the summary inquiry, (Dkt. No. 55). On July 15, 2021, Petitioners filed a proposed witness list indicating the general subject areas that each witness would address, (Dkt. No. 59). On July 16, 2021, Respondents submitted a memorandum of law in opposition to Petitioners' motion, (Dkt. No. 61).

Of the subject areas ordered for the summary inquiry, the area of discipline and oversight was the salient one for Petitioners' motion to compel the testimony of senior City officials. The

[2] The testimony of Deputy Commissioner Reznick and the Richards and Wiley Affidavits are new evidence that Petitioners did not possess at the time of the initial motion. *See* CPLR § 2221(e)(3) (requiring "reasonable justification for the failure to present . . . facts on the prior motion"); *see generally Matter of Beiny*, 132 A.D.2d 190, 209-210 (1st Dep't 1987) ("A motion for renewal is . . . properly made to the motion court to draw its attention to material facts which, although extant at the time of the original motion, were not then known to the party seeking renewal and, consequently, were not placed before the court." (citation omitted)).

key issue was which City officials are necessary to provide transparency concerning Petitioners' alleged violations and neglect of duties concerning oversight of NYPD officer's alleged misconduct arising from the arrest and killing of Eric Garner. In sum, Petitioners argued that senior City officials, including the Mayor and the Police Commissioners, were essential to the oversight and disciplinary process concerning Mr. Garner.

Petitioners pointed the Court to specific parts of Justice Madden's Decision and Order, dated September 24, 2020, (Dkt. No. 22), addressing the role of senior City officials in the decision making process. (*See*, *e.g.*, Dkt. No. 55 at 8-9, citing Dkt. No. 22 at 31-32 ("As the chief executive officer of the City, respondent Mayor DeBlasio is 'responsible for the effectiveness and integrity of city government operations'," and "[c]ertainly, the death of an unarmed man during a police arrest raises questions of both the effectiveness and integrity of city government with regard to which the mayor has responsibilities") and Dkt. No. 22 at 40 (the Police Commissioner has the "duty to determine whether information from sealed records was made available to the press, and if so, by whom, how that information was released, and what if any disciplinary action should be taken with respect to any person responsible.").

Petitioners' motion papers also cited several public statements by the Mayor indicating that he had knowledge of investigations arising from Mr. Garner's killing, (Dkt. No. 55 at 11-14), and addressed the significant roles Former Police Commissioners James O'Neill and Bill Bratton and Police Commissioner Shea had in determining whether and how the NYPD exercised its investigative and disciplinary powers in the wake of Mr. Garner's killing, (*id.* at 16-18).

In denying Petitioners' motion to compel the Excluded Witnesses to testify, the Court held: "Petitioners failed to establish their need to call most of the high-ranking public officials

included on their list of potential witnesses in lieu of calling other public officials who may have more direct knowledge of the subject matter of this inquiry." (Dkt. No. 67 at 4.) The Court specifically found that "several other individuals appear to have personal knowledge of the subject matter and they appear to be as competent, if not more competent, to testify as to the material facts to be addressed during the summary inquiry." (*Id.*) Accordingly, the Court denied Petitioners' request that the following City officials be required to testify:

1. New York City Mayor Bill de Blasio;
2. Former First Deputy Mayor Anthony Shorris;
3. First Deputy Mayor Dean Fuleihan;
4. Chief Medical Examiner Barbara A. Sampson;
5. Former Police Commissioner William Bratton;
6. Former Police Commissioner James O'Neill;
7. Police Commissioner Dermot Shea;
8. First Deputy Police Commissioner Benjamin Tucker;
9. Deputy Police Commissioner Kevin Richardson;
10. Lt. Luis F. Gutierrez;
11. Lt. Steven Dreyer;
12. Richmond University Medical Center ("RUMC") EMT/Paramedic Nicole Palmeri;
13. RUMC EMT/Paramedic Stefanie Greenberg;
14. RUMB EMT/Paramedic Daniel Machuca;
15. RUMC EMT/Paramedic Roseann Vitale; and
16. RUMC EMT/Paramedic Daniela Garcia.

(Dkt No. 67 at 7.)

ARGUMENT

I. LEAVE TO REARGUE SHOULD BE GRANTED

A motion to reargue under CPLR Section 2221(d) is properly granted upon a showing that the court "overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision." *Sachar v. Columbia Pictures Indus., Inc.* 129 A.D.3d 420, 421 (1st Dep't 2015) (citation omitted); *see also* CPLR § 2221(d)(2) (motion to reargue "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in

determining the prior motion, but shall not include any matters of fact not offered on the prior motion").[3]

Petitioners respectfully submit that the Court's July 23, 2021 Decision and Order misapprehended the role that the Excluded Witnesses had in the investigatory process arising from Mr. Garner's killing. The key premise for the July 23, 2021 Decision and Order is that witnesses other than the Excluded Witnesses "appear to be as competent, if not more competent, to testify" here. But, that is not the case. In particular, the NYPD Police Commissioner is the final decision maker for NYPD disciplinary decisions; no one can be as or more competent to discuss why discipline was imposed (in the case of Sergeant Kizzy Adonis) or was not imposed on other officers. Likewise, the Commissioner is appointed by and reports to the Mayor, who by his own admission, was personally engaged with the investigation arising from Mr. Garner's killing. As noted by Justice Madden's Decision and Order, the Commissioner and the Mayor have specific duties requiring them to oversee this type of investigation. Indeed, a failure to oversee would be a neglect of duty under Section 1109. No other witnesses could speak to their unique and indispensable roles but the Mayor and the Police Commissioners themselves.[4]

[3] A motion for leave to reargue must be "made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry." No notice of entry has been entered on the docket for the Court's Order, dated July 23, 2021, (Dkt. No. 67).

[4] By way of example, only the Mayor can answer these questions set forth in Petitioners' initial application: (1) why the Mayor waited for the Department of Justice investigation to conclude before the City went forward with the administrative hearing concerning former Officer Daniel Pantaleo; (2) whether the Mayor ever inquired about whether NYPD officers who participated in the arrest of Mr. Garner were reassigned, investigated, or faced disciplinary charges pending the conclusion of the Department of Justice's investigation; (3) if, at the time the Mayor spoke with members of the Garner family and promised an "expeditious" investigation, he had contemplated waiting for the Staten Island District Attorney or Department of Justice decisions; and (4) what effect, if any, did demands from Mr. Garner's family, other petitioners, or others for an investigation and termination of officers involved in Mr. Garner's death have on the Mayor, including whether the City took any responsive steps. (Dkt. No. 55 at 15.)

For the foregoing reasons, the Court should grant the Petitioners' request for leave to reargue and grant the Petitioners' request to compel testimony from the Excluded Witnesses.

II. LEAVE TO RENEW SHOULD BE GRANTED

Independent of the grounds for granting leave to reargue, the Court should grant leave to renew based on the testimony of Deputy Commissioer Reznick and the Richards and Wiley Affidavits, which were not before the Court when it issued its ruling. *See Martinez v. Estate of Carney*, 129 A.D.3d 607, 608 (1st Dep't 2015) (leave to renew under CPLR § 2221(e) is properly granted where, as here, new and "pertinent facts . . . were not set forth before [the court] that would have affected [its] order."); CPLR § 2221(e)(2), (3) (motion to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination" and "shall contain reasonable justification for the failure to present such facts on the prior motion").

Deputy Commissioner Joseph Reznick's testimony made clear that the imposition of discipline is within the domain of the Department Advocate's Office ("DAO"), not the Internal Affairs Bureau. (Transcript of Testimony of Deputy Commissioner Joseph Reznick ("Reznick Tr.") at 286:1-3.) ("It would go directly from an [IAB] investigator to the Department Advocate's Office, and it would be up to them to prepare and subsequently serve charges on the member."); (Reznick 287:14-22) (Q: "[O]nce you recommend . . . charges to the DAO, what then is the IAB's role in the DAO's evaluation of whether to pursue or prosecute? A: That's strictly up to them. We don't influence them. . . . [T]hey are distinct and different than us. They are the prosecutors. We are the investigators."). While Deputy Commissioner Reznick has the authority to place an officer on modified duty, the authority to do so is not limited to IAB.[5]

[5]*See generally*, NYPD Patrol Guide, 401-02, Procedure No. 206-07, (eff. Aug. 1, 2013) ("The Police Commissioner, a deputy commissioner, a hearing officer assigned to the Office of Deputy Commissioner - Trials, the Chief Surgeon, Deputy Chief Surgeon, a civilian director, or a uniformed member of the service in

The Wiley Affidavit also makes clear that IAB's decision making is limited and that the NYPD official in charge of the Department Advocate's Office ("DAO") is the person who decides whether an administrative proceeding will go forward: "For IAB investigations, while the IAB conducts the investigation and is tasked with deciding whether to recommend Charges and Specifications, the IAB does not make final determinations related to serving Charges and Specifications. The [DAO] and Deputy Commissioner in charge of DAO determine whether, when and what Charges and Specifications will be served." (Wiley Aff. ¶ 8; *see also* Richards Aff. ¶ 7 ("The senior officer in charge of the IAB may not have final authority concerning whether disciplinary actions are brought against officers or on questions of timing or the scope of what misconduct is included in disciplinary reviews, plea discussions, or proceedings.").

Yet, here, no DAO witness is scheduled to testify. Respondent, Deputy Commissioner Kevin Richardson, who oversaw the DAO during the relevant time period, is among the Excluded Witnesses. This omission is critical. Given the NYPD's disciplinary structure, as set forth in the Richards and Wiley Affidavits, Deputy Commissioner Richardson had to have been a key decision maker for discipline arising from Mr. Garner's killing (Wiley Aff. ¶ 17) ("Based upon the City's disciplinary process set forth above, Deputy Commissioner Richardson was a key decision maker concerning why Charges and Specifications were not served on Officer Pantaleo earlier."); Richards Aff. ¶ 7 ("[DAO] and the Deputy Commissioner in charge of DAO [*i.e.*, Deputy Commissioner Richardson] participate in determining whether and when Charges and Specifications (formal administrative disciplinary charges) will be served on an officer and can influence whether lesser discipline is considered instead.").

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the rank of captain or higher may suspend a member of the service (uniformed or civilian) or place a uniformed member of the service on modified assignment when, in their opinion, such action is necessary.")

New evidence set forth in the Richards and Wiley Affidavits also show that City officials senior to Deputy Commissioner Kevin Richardson must have been involved in the disciplinary process. (Wiley Aff. ¶ 18 ("Based upon my experience in City government, it would be customary that Deputy Commissioner Richardson would have consulted officials senior to him during this post-2015 decision-making process period. The chain of command for such consultations is from Deputy Commissioner Richardson to First Deputy Commissioner Benjamin Tucker to Police Commissioner William Bratton (prior to September 2016) or Police Commissioner James O'Neill (after September 1, 2016); Richardson Aff. ¶ 7 ("In high-profile matters, NYPD personnel who are senior to the Deputy Commissioner in charge of the DAO, may determine whether and when formal administrative charges are brought, and such senior officers may direct IAB to broaden or narrow the scope of an IAB investigation. Senior NYPD personnel who may participate in relevant discussions and decisions before an administrative discipline trial takes place include the First Deputy Commissioner of the NYPD and the Police Commissioner. In all matters, the Police Commissioner retains disciplinary authority, including the ability to require or block administrative charges being brought on an officer.").[6]

Indeed, as noted in the Richards Affidavit, "After the killing of Eric Garner, a new NYPD unit was formed that was tasked to report monthly to the NYPD First Deputy Commissioner on police conduct resulting in deaths, including reporting on open cases such as the killing of Eric Garner." (Richards Aff. ¶ 7.) This monthly reporting is noted in The Report of the Independent Panel on the Disciplinary System of the New York City Police Department (the "Report"), which

[6] *See also* Reznick Tr. 279:20-25 ("I just work for the New York City Police Department. I don't work for the mayor. I don't work for City Hall. I *answer to* two people on this job, and that's the police commissioner and the first deputy commissioner. I take no orders. I take no suggestions. I take nothing from any other person.") (emphasis added).

was issued by a panel appointed by Police Commissioner James O'Neill, chaired by former United States Attorney Mary Jo White, and also composed of Judge Barbara Jones (ret.) and former United States Attorney Robert Capers. (Richars Aff. ¶ 6 & n. 1.)[7]

Moreover, as one would expect, the Mayor and Police Commissioner are also involved in high profile disciplinary matters. (Wiley Aff. ¶ 13 ("[I]n high profile matters, the Mayor and the First Deputy Mayor, to whom the NYPD and the CCRB both report, Corporation Counsel and/or their respective staffs are briefed throughout the process, from the investigatory phase to the adjudicative phase to the post-adjudicative determination phase."); *id.* ¶ 18 ("[I]t would have been customary, for a high-profile matter like this, that the Mayor and the First Deputy Mayor, and/or their respective staff, would have been briefed and consulted periodically during the decision-making process by the Police Commissioner."); Richards Aff. ¶ 9 ("Deputy Commissioner Kevin Richardson . . ., First Deputy Commissioner Benjamin Tucker, the three Police Commissioners who have served in their roles since the death of Eric Garner, and Mayor Bill de Blasio . . . declined to comment [to Richards] on specifics concerning an open investigation surrounding the officer involved in the death of Eric Garner. However, they indicated knowledge of and input into the disciplinary process, but were not at liberty to disclose information about an open investigation.").

For the foregoing reasons, the Court should grant Petitioners' request for leave to renew and grant Petitioners' request to compel testimony from the High-Ranking Officials.

[7] The Report can be found here: https://www.independentpanelreportnypd.net/assets/report.pdf.

CONCLUSION

For the reasons set forth above, Petitioners respectfully request that the Court enter an Order pursuant to CPLR Section 2221 granting Petitioners' leave to reargue to compel testimony from the Excluded Witnesses or, in the alternative, to renew their motion to compel testimony from the High-Ranking Officials. Petitioners further request that the Richards and Wiley Affidavits be made a part of the record to be filed with the New York County Clerk pursuant to New York City Charter Section 1109.

Respectfully submitted,

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