SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

R.C., J.J., and A.G., suing under pseudonyms, On behalf of themselves and all others similarly situated,

Plaintiffs,

-against-

THE CITY OF NEW YORK and JAMES P. O'NEILL, New York City Police Department Commissioner, in his official capacity,

Defendants.

Index No. 153739/2018
Justice Lyle E. Frank

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO LIFT THE STAY OF DISCOVERY PURSUANT TO CPLR 3214(B) AND TO SCHEDULE A PRELIMINARY CONFERENCE

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INTRODUCTION

Plaintiffs commenced this putative class action on April 24, 2018, to challenge widespread statutory and constitutional violations arising from the use and dissemination of Sealed Arrest Information[1] by the New York City Police Department ("NYPD" or "Department"). Compl., Dkt. No. 2 ("Compl."). To date—almost one year after filing—no discovery has taken place because of an automatic stay that went into place when Defendants filed a motion to dismiss last summer. Defs.' Mot. Dismiss, Dkt. No. 38 ("MTD"). Defendants' motion, however, only contests certain theories of liability for proving the Plaintiffs' claims and, even if granted, will not fully dispense with even a single claim; all of the claims will move forward regardless of how the Court decides the motion. Meanwhile, Defendants continue to violate Plaintiffs' statutory and constitutional rights every day, including—just last month—providing a putative class member's Sealed Arrest Information to the media right before a citywide election in an apparent attempt to undermine his bid for public office.

A stay of discovery in this action does not serve judicial efficiency and it allows Defendants to continue violating Plaintiffs' rights. For the reasons stated herein, Plaintiffs respectfully ask the Court to lift the stay on discovery and schedule a preliminary conference so that this case can proceed expeditiously toward trial. Plaintiffs further request that the preliminary conference include oral argument on the motion to dismiss.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs allege that the NYPD routinely uses and discloses Sealed Arrest Information in violation of CPL 160.50 and 160.55 (the "Sealing Statutes"). *See* Compl., *passim*. Pursuant to the Sealing Statutes, "all official records and papers" related to an arrest on criminal charges that terminated in favor of the accused or that terminated in non-criminal violations "shall be sealed

[1] All capitalized terms not defined herein have the meaning set forth in the Complaint.

and not made available to any person or public or private agency." CPL 160.50(1)(c); CPL 160.55(1)(c). The purpose of the Sealing Statutes is to robustly protect people accused but not convicted of crimes from suffering any stigma or consequences because of the accusations. Compl. ¶ 7; *see also* Pls.' Opp'n to Defs.' Mot. Dismiss, Dkt. No. 41 at 14-21 ("MTD Opp."). The Sealing Statutes create a mechanism for the NYPD to obtain or share sealed arrest records; to do so, the NYPD must obtain a court order upon a showing that the interests of justice require unsealing. Compl. ¶ 9; MTD Opp. at 10-13. Despite this—and despite courts repeatedly holding that the Sealing Statutes' protections are broad and their exceptions narrow, MTD Opp. at 5-13—the NYPD collects information about every person it has arrested and disseminates this information throughout the Department, even where the prosecutor declined to pursue charges or where a trial resulted in acquittal. Compl. ¶¶ 2, 34-52, 82. The NYPD's systemic violations of the law include maintaining and using photographs and fingerprints from sealed arrests, in contravention of the requirement under the Sealing Statutes that it must *destroy* such photographs and fingerprints. Compl. ¶¶ 9, 34, 91, 104. Indeed, NYPD policy directs detectives, in the ordinary course of investigations, to review Sealed Arrest Information that the NYPD shares in interconnected databases. Compl. ¶¶ 57-60. The NYPD's policies and practices in violation of the Sealing Statutes affect thousands of predominantly Black and Latino people in this city, all of whom are members of the putative class. Compl. ¶¶ 1, 12, 14.

The NYPD's violations also include routinely sharing Sealed Arrest Information with people and entities outside of the Department. Compl. ¶¶ 70-81. Again, this has occurred despite the fact that the Sealing Statutes prohibit the NYPD from sharing such records "with any person or public or private agency." CPL 160.50(1)(c); 160.55(1)(c). NYPD detectives shared the sealed arrest records of Named Plaintiffs R.C., J.J., and A.G. with prosecutors, Compl. ¶¶ 101-05, 120-

23, 141-45, and Plaintiffs allege that disclosures to prosecutors are a widespread practice. Compl. ¶¶ 70-72. Plaintiffs further allege that the NYPD shares Sealed Arrest Information with outside governmental agencies, Compl. ¶ 75, and—regularly—with the media. Compl. ¶¶ 77, 79, 80.

The NYPD's practice of disclosing Sealed Arrest Information to the media has continued unabated. In the year since this case was filed, Plaintiffs have identified at least eight instances in which it appears that the media published Sealed Arrest Information provided by the NYPD, including one leak that occurred only days before this motion. Affirmation of Jenn Rolnick Borchetta, dated March 28, 2019, submitted herewith ("Borchetta Aff.") at 2. These flagrant violations of the Sealing Statutes include that on February 24, 2019, "law enforcement" sources disclosed to The Daily News the details of an arrest by the NYPD of New York City Public Advocate Jumaane Williams. Borchetta Aff. at 3. The arrest at issue was from ten years ago, and it had been dismissed and sealed. *Id.*

At the time of this disclosure, Mr. Williams was a candidate running for the position of Public Advocate in an election scheduled to be held two days later. Borchetta Aff. at 6. Given the NYPD's widespread access to and internal dissemination of sealed arrest records, Compl. ¶¶ 57-60, it is reasonable to conclude that NYPD personnel would have access to Mr. Williams's sealed arrest records, and that the NYPD was the "law enforcement" source of the unlawful external disclosure. Other media outlets picked up the news and wrote additional stories about the sealed arrest the day before the election. Borchetta Aff. at 4. Given the timing, and the fact that Mr. Williams had already served for years as a City Council representative of a district in Brooklyn, the NYPD's disclosure on the eve of the citywide election appears to have been an effort to smear Mr. Williams and undermine his bid for the Public Advocate's office.

Meanwhile, on July 23, 2018, Defendants filed a motion to dismiss in which they argued it does not violate the Sealing Statutes to share Sealed Arrest Information with officers and detectives inside the Department, *see* MTD, *passim*, despite the Sealing Statutes' prohibition against sharing that information with "any person." CPL 160.50(1)(c); CPL 160.55(1)(c). Plaintiffs assert three claims—namely, violations of (1) CPL 160.50; (2) CPL 160.55; and (3) procedural due process—and Defendants' motion does not seek dismissal of any of them; instead, it only seeks to preclude Plaintiffs from advancing one theory of liability at trial. MTD, *passim*. Defendants' motion expressly does not move to dismiss allegations concerning: the maintenance and use of photographs and fingerprints related to sealed arrests; widespread disclosures to prosecutors; sharing of sealed records with outside agencies; or regular disclosures to the media. *See* MTD at 2. Indeed, Defendants do not seek to preclude Plaintiffs from arguing that disclosures outside the Department violate the Sealing Statutes, and their motion does not in any way seek to narrow Plaintiffs' allegations concerning external disclosures. *See* MTD, *passim*. Nor do Defendants seek to dismiss Plaintiffs' allegation that the NYPD's dissemination of Sealed Arrest Information throughout the Department "creates a substantial risk of unlawful disclosure" of sealed arrest records. *Compare* MTD *with* Compl. ¶ 81. No matter how the Court decides the motion, all three of Plaintiffs' claims will survive.

ARGUMENT

I. Lifting the Discovery Stay Would Serve Judicial Efficiency and Protect Plaintiffs.

Discovery is automatically stayed when a defendant files a motion to dismiss, but the Court may lift the stay in its discretion. CPLR 3214(b). *See also Polsky v. 145 Hudson St. Assocs., L.P.*, 100 A.D.3d 426, 426 (1st Dep't 2012) (affirming order lifting discovery stay as proper exercise of the court's discretion). The purpose of an automatic stay "is to prevent

unnecessary disclosure where a party has made a potentially dispositive motion, thereby rendering disclosure moot or limiting the scope of disclosure." 4 N.Y. Prac., Com. Litig. in New York State Courts § 32:21 (4th ed.). Under the liberal discovery standard set out in CPLR 3101(a), Plaintiffs are entitled to "full disclosure of all matter material and necessary in prosecution" of their action "regardless of the burden of proof." *See also Forman v. Henkin*, 30 N.Y.3d 656, 661 (2018) (opining that the discovery statute is to be "interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy . . . .") (internal citation and quotation omitted); *City of New York v. Maul*, 118 A.D.3d 401, 403 (1st Dep't 2014) (compelling disclosure under the "liberal standard for discovery.").

The automatic stay does not serve the purpose of avoiding unnecessary disclosure in this action because there will be no meaningful difference in discovery whether the Court grants or denies the motion. Defendants did not move to dismiss any of the allegations that the NYPD improperly maintains and disseminates photographs and fingerprints contrary to the requirement that these records be destroyed or returned to the person arrested. *See* MTD at 2. Defendants did not move to dismiss the allegations that the NYPD routinely discloses Sealed Arrest Information to prosecutors, to the media, and to others outside the Department. *Id.* The outcome of the motion to dismiss will not limit or otherwise affect discovery on those allegations, and staying discovery on these allegations does not serve judicial efficiency.

Defendants similarly did not move to dismiss Plaintiffs' allegations that the manner in which the NYPD maintains and shares Sealed Arrest Information within the Department contributes to the disclosures that the NYPD makes outside the Department. Therefore, information concerning the NYPD's internal maintenance and handling of Sealed Arrest Information will establish whether the NYPD's policies and practices concerning internal

dissemination cause external disclosures in violation of Plaintiffs' rights. For example, despite an NYPD policy directing detectives not to share Sealed Arrest Information with prosecutors, NYPD detectives shared all three of the Named Plaintiffs' sealed arrest records with prosecutors. *See* Compl. ¶ 62. Information concerning the access given to those detectives is relevant to establishing Plaintiffs' claims that their Sealed Arrest Information was unlawfully disclosed outside the Department, even if Plaintiffs were restricted from arguing that internal dissemination of sealed information within the Department alone violates the law. Plaintiffs are therefore entitled to discovery on internal dissemination regardless of how the motion is decided,[2] and delaying discovery only serves to delay resolution of the action.

In contrast, maintaining the stay would permit Defendants to persist in violating Plaintiffs' rights. The NYPD continues to disseminate Plaintiffs' Sealed Arrest Information throughout the Department, and every day that goes by is an opportunity for the NYPD to disclose that information to external sources. Sealed Arrest Information can be and is used against putative class members despite the Sealing Statutes' prohibitions. NYPD sources have shared Sealed Arrest Information with those outside the Department even after this case was filed, including repeated disclosures to the media. The NYPD's disclosure of Mr. Williams's sealed arrest to The Daily News when voters were considering his candidacy for citywide office is precisely the kind of attempted stigmatization that the Legislature sought to prevent by enacting the Sealing Statutes. *N.Y. State Comm'n on Judicial Conduct v. Rubenstein*, 23 N.Y.3d 570, 579-80 (2004) ("the legislative objective" in enacting the Sealing Statutes "was to remove

[2] In the event the Court lifts the stay, it should do so without restricting the scope of discovery. Defendants would retain their right to object to discovery as irrelevant or burdensome, and the Court should assess any objections to specific demands as they arise. *Forman*, 30 N.Y.3d at 662 ("[W]hen courts are called upon to resolve a [discovery] dispute, discovery requests must be evaluated on a case-by-case basis with due regard to the strong policy supporting open disclosure.") (internal quotation and citation omitted).

any stigma flowing from an accusation of criminal conduct terminated in favor of the accused") (quoting *People v. Patterson*, 78 N.Y..2d 711, 716 (1991)); *Lino v. City of New York*, 101 A.D.3d 552, 556 (1st Dep't 2012) ("[T]he Legislature enacted CPL 160.50 and 160.55 to remove any stigma related to *accusations* of criminal conduct.") (citing *Patterson*). A City Council member has called for an investigation into the disclosure of Mr. Williams's sealed arrest. Borchetta Aff. at 5. Yet the NYPD's disclosures to media in violation of the Sealing Statutes affect members of the putative class who have much less power than the Public Advocate. The persistence of disclosures gives renewed urgency to expeditiously resolving this action so that Plaintiffs can proceed to trial and secure an injunction that will protect their rights.

The Court should therefore exercise its discretion to order discovery to commence.

II. A Preliminary Conference is Necessary and Appropriate.

The Court has discretion to order a preliminary conference on any matter that would be helpful. *See* Uniform Civil Rules for the Supreme Court and the County Court, §§ 202.12(h) (permitting a motion for a preliminary conference) and (j) (giving the court discretion to order "such conferences as the court may deem helpful or necessary in any matter before the court"). Pursuant to the Differentiated Case Management system, the clerk has designated this case as "standard," such that discovery should be completed within twelve months after filing of the Request for Judicial Intervention (Req. for Judicial Intervention, Dkt. No. 12 ("RJI")). *See id.* at § 202.19(b). "[A] preliminary conference shall be ordered by the court to be held within 45 days after the [RJI] is filed," regardless of what motions are made. *Id.* at § 202.19(b)(1). Plaintiffs filed the RJI eleven months ago, on the same day the case was filed. *See* RJI. A preliminary conference would assist in resolving the motion to dismiss, and it would facilitate entry of an

expeditious discovery schedule to bring this case to conclusion so that Plaintiffs' rights can be protected. This Court should therefore hold the preliminary conference as soon as practicable.

Additionally, Plaintiffs respectfully renew their request for oral argument before this Court on the motion to dismiss, so that they may have an opportunity to clarify their claims and the facts and law that compel denial of Defendants' motion. Plaintiffs requested oral argument on the motion to dismiss and oral argument was held before Justice Alexander Tisch on November 14, 2018. Before Justice Tisch decided the motion, the action was transferred to this Court. The motion papers collectively run more than sixty pages long. In their Motion to Dismiss and Reply, Defendants included policy arguments that obfuscate the violations Plaintiffs seek to challenge and a litany of irrelevant hypothetical scenarios that distort the legal issues before the court, *see* MTD Opp. at 21-24. They also improperly raised new arguments in their reply papers. *See e.g.,* Defs.' Reply in Supp. of MTD, Dkt. No. 47 at 14-20. Given the importance of the claims that Plaintiffs raise, Plaintiffs respectfully request that oral argument be reheard by this Court, or in the alternative that the parties be permitted to address any questions raised by the Court at the preliminary conference. Counsel to Defendants has consented to a conference. *See* Borchetta Aff. at 7.

CONCLUSION

WHEREFORE, for the reasons stated herein and in the accompanying affirmation from Jenn Rolnick Borchetta, Plaintiffs respectfully ask this Court to lift the stay of discovery and schedule a preliminary conference.

Dated: Bronx, New York
March 28, 2019

Respectfully submitted,

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