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 IAS Pt. 52

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR A PRELIMINARY INJUNCTION AND TO DE-DESIGNATE

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INTRODUCTION

In this class action challenging the NYPD's violation of state sealing statutes, the City of New York produced NYPD trainings that instruct officers that [redacted] These instructions are contrary to the plain text of Sections 160.50 and 160.55 of the Criminal Procedure Law (collectively, the "Sealing Statutes"), longstanding precedent, and a prior decision of this Court. Such instructions have likely caused and are likely to continue to cause NYPD personnel to access and use Sealed Arrest Information in violation of the class members' statutory rights—the central harm Plaintiffs seek to end through this lawsuit and a harm that cannot be undone once NYPD personnel have accessed the sealed records. Given that the NYPD admits that it maintains over six million sealed records relating to more than 3.5 million people in at least fourteen interconnected databases that are accessible to NYPD personnel, these instructions represent a significant, imminent, and ongoing risk that the class members' rights will be violated in a manner that will be difficult to remedy after-the-fact. And this is a violation of rights that primarily affects people of color: The vast majority of the records at issue concern Black and brown people.

Plaintiffs bring this motion for limited preliminary relief: (1) restraining and enjoining Defendants from instructing NYPD personnel that [redacted] in violation of the Sealing Statutes, (2) requiring Defendants to issue a FINEST training message stating that NYPD personnel may not access and use Sealed Arrest Information without a court order, and (3) prohibiting Defendants from providing NYPD

[1] All capitalized terms not defined herein have the meaning set forth in the class-action complaint, ECF No. 2 ("Complaint") in the above-captioned action.

personnel with access to Sealed Arrest Information for law enforcement purposes without a court order.

The relief sought herein is necessary to prevent irreparable harm to the plaintiff class pending the resolution of this litigation, which is already in its third year and is proceeding at a halting pace. Through this lawsuit, Plaintiffs ultimately seek, inter alia, a permanent injunction that would require specific reforms and procedures to prevent the NYPD from illegally using Sealed Arrest Information for investigatory purposes in any manner absent a court order, as well as injunctive relief preventing the NYPD's ongoing external disclosures of Sealed Arrest Information to the press, prosecutors, and other agencies. By the instant motion, Plaintiffs seek more limited, provisional relief to protect Plaintiffs' statutory rights while litigation continues in light of the ongoing irreparable harm to the class.

Additionally, Plaintiffs respectfully ask the Court to remove the cloak of secrecy shielding this motion from the public. On an interim basis, Plaintiffs submit this memorandum and the underlying trainings under seal, with redactions in the publicly-filed version that conceal certain information about the trainings, because Defendants improperly designated the trainings as confidential and those measures are therefore required. There is, however, no basis for this confidentiality designation, and Plaintiffs therefore also seek a court order removing the confidentiality designation from the trainings, ordering Defendants to produce de-designated versions of these trainings, and directing the clerk to unseal the present motion and documents filed herewith.

FACTUAL AND PROCEDURAL BACKGROUND

A. Procedural History

This action was filed over three years ago on behalf of a now-certified class of millions of people to challenge the NYPD's widespread use of Sealed Arrest Information in violation of the

Sealing Statutes. In that time, Defendants moved to dismiss, opposed class certification, and sought to avoid disclosure of centrally relevant information. The Court denied all of these attempts to maintain Defendants' pattern and practice of violating the Sealing Statutes. *See* ECF Nos. 65, 132, 168. In addition to this extensive motion practice, Defendants have dragged their heels on discovery so that, three years into litigation, Plaintiffs have received a small fraction of the information to which they are entitled.

Specifically, on April 24, 2018, Plaintiffs R.C., J. J., and A.G., on behalf of themselves and a class of similarly situated individuals, filed the complaint in this action, challenging the illegal use and disclosure of Sealed Arrest Information by the NYPD. *See* Complaint. Through this action, Plaintiffs seek declaratory and injunctive relief to end the NYPD's unlawful practices in violation of the Sealing Statutes. Plaintiffs allege that the NYPD has a policy and practice of using Sealed Arrest Information internally in the ordinary course of law enforcement activities and that the NYPD regularly discloses Sealed Arrest Information outside of the NYPD, both in violation of the Sealing Statutes.

On July 23, 2018, Defendants filed a motion to dismiss, arguing that the Sealing Statutes do not prohibit the NYPD's internal use of Sealed Arrest Information absent a court order. *See* Mem. of Law in Supp. of Defs.' Mot. to Dismiss the Compl. Pursuant to CPLR Rule 3211(A)(7) and Section 7804(F), ECF No. 38. On April 30, 2019, this Court rejected Defendants' argument, denying the motion to dismiss and holding that the NYPD may not access and use Sealed Arrest Information absent a court order. *See* Decision and Order, ECF No. 65 ("MTD Opinion") at 4. The Court's MTD Opinion found that there is no "language [in the Sealing Statutes] by which it should be inferred . . . that the NYPD is permitted to use sealed arrest information maintained in its possession for investigatory purposes or otherwise." *Id.* The Court determined that the plain

language of the Sealing Statutes "pertains to sealed arrest information within a police agency's (i.e., the NYPD's) own possession." *Id*. Thus, the MTD Opinion makes clear that "to access and use sealed arrest information" the NYPD must "move ex parte and demonstrate to the court 'that justice requires that such records be made available to it.'" *Id.* Simply put, "if [the NYPD] were seeking sealed information for an investigation, it would have to make an application to the court." *Id.* at 10.

On September 5, 2019, the Court granted Plaintiffs' motion for class certification. ECF No. 132. The parties have since been engaged in a prolonged discovery process, in which Defendants have repeatedly missed their own stipulated deadlines. *See* Affirmation of Niji Jain in Supp. of Pls.' Mot. for a Preliminary Injunction and to De-Designate ("Jain Affirmation" or "Jain Aff.") ¶ 12-14. Most recently, Defendants are in violation of Court-ordered deadlines for discovery responses on May 24, June 1, and July 1, 2021, which were for discovery requests propounded in July 2019. *See* ECF No. 162.

B. Ongoing Violations of the Sealing Statutes

Since the Court's MTD Opinion confirmed that the NYPD may not use Sealed Arrest Information absent a court order, the NYPD has continued to access, use, and externally disclose Sealed Arrest Information. In its responses to Plaintiffs' interrogatories, Defendants admitted that NYPD databases contain records of over six million sealed arrests, and that these records identify over 3.5 million unique individuals. *See* Jain Aff., Ex. 2 at 7-8. Moreover, the NYPD has stated that each of these databases "can be used in investigations of alleged or potential criminal activity" and that some of these databases "may be accessed via smartphones, tablets, computer terminals and other devices connected to the NYPD's computer system." *See* Jain Aff., Ex. 1 at 7-10.

Both prior to and since the MTD Opinion, criminal defense attorneys at The Bronx Defenders have received documents and records from prosecutors that contain the NYPD logo and that otherwise appear to come from the NYPD and which include Sealed Arrest Information. *See* Affirmation of Ann H. Mathews, Managing Director of the Bronx Defenders Criminal Defense Practice ("Mathews Affirmation" or "Mathews Aff.") ¶¶ 6, 12-16. In addition to the violation of privacy that occurs each time the NYPD unlawfully accesses a class member's Sealed Arrest Information, the NYPD's use of Sealed Arrest Information for "internal" investigative purposes increases the risk that individuals will be targeted for surveillance or investigation based on Sealed Arrest Information and that prosecutors will rely on Sealed Arrest Information in subsequent prosecutions without a court-issued unsealing order. *Id.* ¶¶ 12-16. Furthermore, Plaintiffs have been subject to new criminal charges when sealed records are utilized for investigatory purposes, such as when witnesses are shown sealed photographs for identification purposes. *Id.* ¶¶ 8-11.

C. NYPD Training Presentations and Motion to Compel

On July 12, 2019, Plaintiffs propounded their first set of document requests and interrogatories. Among other requests, Plaintiffs requested "[a]ll training materials concerning Sealed Arrest Information, Sealed Photographs, and/or Sealed Fingerprints, including but not limited to materials concerning the maintenance, access, distribution, or Disclosure, either internally or externally, of Sealed Arrest information, Sealed Photographs, and/or Sealed Fingerprints." *See* Jain Aff., Ex. 1 at 21-22. On September 13, 2019, in response to this request,

Defendants produced five trainings, each of which appears to be a similar version of the same underlying training module.[2] Some are dated and some are undated. *See* Jain Aff., Exs. 3-7.

The Sealing Statutes make clear that sealed records on file with any police agency "shall . . . not [be] made available to any person or public or private agency." CPL 160.50(1)(c); CPL 160.55(1)(c). Moreover, as the court's MTD Opinion explains, "to access and use sealed arrest information, the NYPD would have to move ex parte and demonstrate to the court 'that justice requires that such records be made available to it.'" MTD Opinion at 4. Despite this, each of the trainings misstates this clear law as follows:

[2] Defendants' Responses and Objections to these discovery requests also stated that Defendants are continuing to search for responsive information and would supplement their responses as additional responsive information became available. *Id.*

[redacted]

Included among these trainings was an undated[3] PowerPoint presentation entitled [redacted] *See* Jain Aff., Ex. 1 at 9-10, 21-22; Ex. 6. Like the other versions of the training, this presentation generally appears to [redacted] Instructor notes in this training include additional misstatements of the black letter law on sealing, as follows:

[redacted]

Notably, Defendants sought to conceal these instructor notes through months of meet-and-confers and motion practice by arguing—and representing to the Court—that the instructions were attorney-client communications. *See* Jain Aff. ¶ 7. Following *in camera*

[3] While this particular PowerPoint presentation was undated, Defendants have stated that the presentation was created around February 2018. *See* Aff. of Michael Fitzpatrick in Opp. to Pls.' Mot. to Compel, at 2, ECF No. 165.

review of the unredacted presentation, the Court granted Plaintiffs' motion to compel and directed the City to produce an unredacted version of the presentation, holding that the training notes were neither privileged attorney-client communications nor attorney work product and that the discoverability of the notes "far outweighs any possible confidentiality" because they were "central to this case." Decision and Order on Motion, ECF No. 168.

On July 1, 2021, Plaintiffs advised Defendants of their intent to seek this preliminary injunction, proposed a briefing schedule, and gave Defendants one final opportunity to de-designate the trainings at issue here. *See* Jain Aff. ¶ 10. The parties agreed to a briefing schedule, but Defendants did not consent to removing the confidentiality designation on the presentations. *Id.*

ARGUMENT

The NYPD's trainings contain directions contrary to the Sealing Statutes while, at the same time, the NYPD provides officers with routine access to millions of sealed arrest records. Because this will likely result in ongoing and imminent violations of the class members' rights, Plaintiffs are entitled to a preliminary injunction restraining use of the trainings, correcting misstatements of the law, and prohibiting Defendants from granting NYPD personnel access to sealed records for law enforcement purposes without a court order. A preliminary injunction may be issued where defendants are engaged in ongoing conduct "in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual" or "where the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff." CPLR 6301. The plaintiffs must demonstrate a likelihood of success on the merits, irreparable injury in the absence of provisional

relief, and a balance of equities in their favor. *Chrysler Corp. v. Fedders Corp*., 63 A.D.2d 567, 569 (1st Dep't 1978). To establish a likelihood of success on the merits, "[a] prima facie showing of a reasonable probability of success is sufficient; actual proof of the petitioner's claims should be left to a full hearing on the merits." *Barbes Rest. Inc. v. ASRR Suzer 218, LLC*, 33 N.Y.S.3d 43, 45 (1st Dep't 2016). The second two elements are often considered together, balancing the equities "[i]n view of the threat of [the] irreparable injury." *Teytelman v. Wing*, 773 N.Y.S.2d 801, 811 (Sup Ct. N.Y. Cty. 2003).

Here, Plaintiffs demonstrate a strong likelihood of success on the merits given the plain statutory text and the clear holding in the MTD Opinion. Plaintiffs further demonstrate that the misstatements of law in the trainings combined with access to Sealed Arrest Information will likely lead NYPD personnel to access and use the class members' Sealed Arrest Information, resulting in ongoing irreparable harm absent provisional relief. Given the size of the class, the rights at stake, and the absence of any governmental interest in continuing to provide instructions that violate the law, the balance of the equities also weighs in Plaintiffs' favor.

I. Plaintiffs Have Demonstrated a Strong Likelihood of Success on the Merits

A finding of a likelihood of success on the merits does not require "conclusive proof," and "issues of fact do not preclude a finding of likelihood of success on the merits." *Ruiz v. Meloney*, 810 N.Y.S.2d 216, 218 (2d Dep't 2006); *see also Barbes Rest. Inc.*, 33 N.Y.S.3d at 45 ("A prima facie showing of a reasonable probability of success is sufficient; actual proof of the petitioners' claims should be left to a full hearing on the merits."); *Weissman v. Kubasek*, 493 N.Y.S.2d 63, 64 (2d Dep't 1985) (same). Defendants' trainings violate longstanding principles of law, and Plaintiffs have a strong likelihood of ultimate success on the merits.

As the Court explained in the MTD Opinion, the clear text of the Sealing Statutes prohibits the NYPD from using Sealed Arrest Information for law enforcement purposes absent a court order. CPL 160.50 states that sealed arrest information that is "on file with . . . any . . . police agency . . . shall be sealed and not made available to any person or public or private agency." As the MTD Opinion states, "the plain reading of the words" makes clear that this applies to "sealed arrest information within a police agency's (i.e., the NYPD's) own possession." MTD Opinion at 4. The MTD Opinion also explains that the New York legislature, in providing the exceptions in subdivision (d) of CPL 160.50(1), "implicitly rejected the idea that a law enforcement agency like the NYPD could use sealed information the way defendants claim is permissible." MTD Opinion at 10. And, the Court's reasoning was premised on longstanding precedent concerning the meaning of that text. *Id.* at 4-7. Thus, except for enumerated exceptions in CPL 160.50(1)(d) that are inapplicable here, NYPD personnel may not access or use sealed records, including for law enforcement purposes, without a court order.

Statements in all of the produced trainings fundamentally mischaracterize CPL 160.50. The text of all the presentations inform officers that they [redacted] in blatant violation of the law. The training dated [redacted] for instance, informs trainees that [redacted] Jain Aff., Ex. 3 at CR/NYPD000063 (emphasis in original). An updated training, dated [redacted] similarly states that [redacted] Jain Aff., Ex. 7 at CR/NYPD000102 (emphasis in original). Multiple versions of the training, including the [redacted] version, go on to instruct trainees that, for example, [redacted]

[redacted] Jain Aff., Exs. 3 at CR/NYPD000069, 4 at CR/NYPD000073 and CR/NYPD000079, 5 at CR/NYPD000086, 6 at CR/NYPD000096, and 7 at CR/NYPD000109. Inconsistent with the text of CPL 160.50, the instructor notes that Defendants sought to conceal for months state that [redacted] Jain Aff., Ex. 8 at RC/NYPD001514.

Given the clarity of the statutory text, longstanding case law, and the MTD Opinion on these points, Plaintiffs have satisfied their burden. The trainings at issue impermissibly instruct NYPD personnel that [redacted] Therefore, on their face, the trainings clearly violate the principles of law articulated in the MTD Opinion, which in turn was premised on longstanding New York precedent. Meanwhile, Defendants admit to providing officers with access to over six million sealed arrest records on over three million people who are all members of the class. Plaintiffs have therefore shown a strong likelihood of success on the merits.

II. Plaintiffs Are Suffering and Will Continue to Suffer Irreparable Harm Without Relief

Failing to restrain the NYPD from improperly instructing officers on the law and from providing officers with access to Sealed Arrest Information poses irreparable harm to Plaintiffs and millions of class members. A harm is irreparable "when it cannot be adequately compensated in damages or there is no set pecuniary standard for the measurement of damages." *Bd. of Higher Ed. of City of New York v. Marcus*, 311 N.Y.S.2d 579, 585 (Sup. Ct. Kings Cty. 1970) (citation omitted). While the threat of harm cannot be speculative, plaintiffs "only have to

demonstrate 'a potential' that irreparable injury will result if a preliminary injunction is not awarded to them." *Brad H. v. City of New York*, 712 N.Y.S.2d 336, 344 (Sup. Ct. N.Y. Cty. 2000), *aff'd*, 276 A.D.2d 440 (1st Dep't 2000) (quoting *Chernoff Diamond & Co. v. Fitzmaurice, Inc.,* 234 A.D.2d 200, 201 (1st Dep't 1996)). As explained herein, in the Mathews Affirmation, and in the Complaint in this action, class members face ongoing and irreparable harm the instant an NYPD employee views Sealed Arrest Information, as well as other injuries that flow from that initial violation. These harms will continue unless the Court enjoins the NYPD from instructing its personnel that [redacted] requires the NYPD to issue corrective statements consistent with that directive, and prohibits the NYPD from providing personnel access to such records for law enforcement purposes absent a court order.

Here, the millions of class members whose arrest information should be sealed under the Sealing Statutes face ongoing violations of their statutory rights. Courts have found irreparable harm where the defendant violates or threatens to violate a statutory right. *See, e.g.*, *Brad H.*, 712 N.Y.S.2d at 344 (failure to provide discharge planning and mental health services to people released from jail in violation of New York Mental Health Hygiene Law). The legislative history of the Sealing Statutes affirms the importance of the statutory rights at issue here as consistent with and protective of New Yorkers' right to the presumption of innocence. *See, e.g.*, *New York State Comm'n on Jud. Conduct v. Rubenstein*, 23 N.Y.3d 570, 579-81 (2014) ("the Legislature's objective in enacting CPL 160.50 and the related statutes . . . was to ensure that the protections provided be consistent with the presumption of innocence.") (quoting *People v. Patterson*, 78 N.Y.2d 711, 716 (1991)) (alterations in original). Relatedly, the Sealing Statutes protect individuals from facing heightened suspicion from police and from facing further

negative consequences based on mere allegations of wrongdoing. Put simply, someone with arrests terminated in their favor should not be treated as more suspicious than someone who was never arrested. As described *supra* in Section C, the trainings at issue instruct officers that they [redacted], and indeed, the NYPD has admitted that it provides officers with access to over six million of those records pertaining to over three million class members in at least fourteen databases. Jain Aff., Ex. 2 at 7-10. Moreover, recent evidence indicates that the NYPD continues to access, use, and disclose Sealed Arrest Information. *See* Mathews Aff. ¶¶ 6-16. This unlawful use of class members' Sealed Arrest Information subjects millions of class members to heightened suspicion and other negative consequences, which has a disproportionate impact on over-policed Black and brown New Yorkers who, because of racialized policing tactics, are most likely to have an arrest or arrests that were subsequently resolved in their favor and sealed.

Moreover, these sealed records not only contain information about a person's arrest, but also other private and personal information, [redacted] *See* Jain Aff., Ex. 3 at CR/NYPD000069. As such, class members suffer harms that cannot be undone, including the erosion of their right to the presumption of innocence, heightened suspicion, and violation of their privacy, the instant an NYPD employee violates their statutory rights and views Sealed Arrest Information.

In addition to the statutory violation, this misuse of records leads to reputational harms and a myriad of other injuries, including potential targeting for future law enforcement efforts. *See* Mathews Aff. ¶¶ 7-11. Courts have repeatedly recognized the specific type of harms that flow from the statutory violations at issue here—release of sensitive information and reputational

harms—as bases for finding irreparable harm. *See, e.g.*, *CPTS Hotel Lessee LLC v. Holiday Hosp. Franchising LLC*, 171 A.D.3d 484, 485 (1st Dep't 2019) (harm to business reputation constitutes irreparable harm); *Data Track Acct. Servs., Inc. v. Lee*, 291 A.D.2d 827, 827 (4th Dep't 2002) ("repeated disclosures of confidential information" by plaintiffs' former attorney constitutes irreparable injury for a permanent injunction); *cf. Sylmark Holdings Ltd. v. Silicone Zone Int'l Ltd.*, 783 N.Y.S.2d 758, 772 (Sup. Ct. N.Y. Cty. 2004) (misappropriation of trade secrets constitutes irreparable harm). Beyond these harms class members suffer each time their information is accessed, Plaintiffs may face questioning about sealed arrests, Compl. ¶ 95; be improperly labeled as "recidivists," *id.* ¶¶ 53-56; and even face new criminal charges, *see, e.g., id.* ¶¶ 85-116 and Mathews Aff. ¶¶ 7-11, all on the basis of the NYPD's unlawful access to and use of Sealed Arrest Information.

Plaintiffs—disproportionately Black and brown people—face likely violations of their privacy rights, reputational harm, targeting by police, and even improper interrogation and prosecution if the NYPD's practices continue unabated, and money damages will not adequately compensate them. Courts have found irreparable harm in situations like this, where the injuries are serious but monetary relief is inadequate or difficult to measure, even if damages are ultimately available. *See, e.g.*, *Pantel v. Workmen's Circle/Arbetter Ring Branch*, 289 A.D.2d 917, 918 (3rd Dep't 2001) (mental and emotional distress stemming from movement of family members' gravesites); *Gallivan v. Cuomo*, 71 Misc. 3d 589, 604 (Sup. Ct. Erie Cty. 2021) (economic loss when it results from "loss of business relationships, goodwill, and market share"); *Teytelman v. Wing*, 773 N.Y.S.2d 801, 811 (Sup. Ct. N.Y. Cty. 2003) (loss, reduction or delay of food stamps); and *Brad H.*, 712 N.Y.S.2d at 344 (mental health consequences for people discharged from jail without mental health discharge planning). Here, the harms that flow from

the NYPD's illegal internal use of Sealed Arrest Information are cumulative and compounding. When the NYPD uses Sealed Arrest Information to ensnare someone in the criminal legal system, this increases the threat of future injury given that they are, as a result, "in the system." Even if a court could monetarily compensate the NYPD's victims for these violations, the enhanced risk of future injury remains incalculable and unknowable. Moreover, the fact that the NYPD's use of Sealed Arrest Information occurs behind closed doors means that many class members will never know or have any meaningful ability to learn that their statutory rights have been violated, leaving them with no recourse. The inability to remedy such harms with damages is the essence of irreparable injury.

While Defendants continue to unnecessarily prolong discovery in this case, including, for example, by forcing the parties to litigate the training notes at issue here, there is a substantial risk that the NYPD will continue training and directing its officers to violate Plaintiffs' statutory rights. Meanwhile, without preliminary injunctive relief, Plaintiffs will largely have no recourse and will be irreparably harmed as the NYPD continues to subject millions of class members to an illegal cycle of arrest and targeting based on Sealed Arrest Information that disproportionately impacts Black and brown New Yorkers.

III. The Equities Weigh in Favor of Preliminary Injunctive Relief for the Class

With respect to whether the "balance of the equities tips in plaintiffs' favor," the irreparable harm to Plaintiffs without the injunction will be greater than any harm to Defendants if the injunction is granted. *See Felix v. Brand Serv. Grp. LLC*, 101 A.D.3d 1724, 1726 (4th Dep't 2012).

The NYPD's trainings permitting [redacted] cause class members to be targeted for surveillance and prosecution, result in reputational harm, and exacerbate the

risk of stigmatizing external disclosures. These harms impact a class of over 3.5 million people as of 2019, a number that has undoubtedly grown as additional people have had arrests dismissed or otherwise sealed pursuant to the Sealing Statutes. *See* Jain Aff., Ex. 2 at 7-8. On the other hand, the preliminary injunction Plaintiffs seek would cause no cognizable harm to Defendants; the order would merely require the NYPD to comply with black letter law—something the NYPD should already be doing. To the contrary, no government or public interest could be advanced by permitting and continuing to train NYPD officers to violate the law. Moreover, as recognized in the MTD Opinion, the NYPD can satisfy any legitimate need for access to sealed records by obtaining a court order via an *ex parte* motion. *See* MTD Opinion at 4.

Any administrative costs related to updating trainings are low considering the significant costs to millions of people in the plaintiff class. *Brad H.*, 712 N.Y.S.2d at 344 (rejecting argument that bureaucratic work and costs were sufficient to defeat motion for preliminary injunction). Moreover, the need to prevent an illegal cycle of arrest and targeting based on Sealed Arrest Information that disproportionately impacts Black and brown New Yorkers outweighs any consequences to the NYPD. Thus, the balancing of the equities strongly favors awarding preliminary injunctive relief.

MOTION TO DE-DESIGNATE

In a continued attempt to veil these trainings in a cloak of secrecy, Defendants improperly marked them as confidential, when there is nothing confidential about them. The presentations unequivocally sit beyond the confines of the Stipulation and Order for the Production and Exchange of Confidential Information in place in this action (the "Confidentiality Order"). *See* ECF No. 136. The only categories of information covered by the Confidentiality Order are personal identifying information and Sealed Arrest Information. Specifically, the

Confidentiality Order defines "Confidential Material" as: "(i) any and all documents, or any and all information contained within those documents, containing confidential personal information (including but not limited to home address, telephone number, SSN, date of birth, or medical, dental or mental health records) regarding a Plaintiff or a Plaintiff's family members," and "(ii) any Sealed Arrest Information."[4] *Id.* at ¶ 2(b). The trainings at issue should be de-designated for the simple reason that they do not contain any personal information or Sealed Arrest Information. As discussed *supra*, these trainings generally describe [redacted] The NYPD may not shield these trainings from public access by improperly designating them as Confidential under the narrow Confidentiality Order negotiated and stipulated to by both parties.

Further, the subject matter of the trainings and this ongoing litigation implicate the public's First Amendment interests in having access to these documents, as well as strong First Amendment and common law presumptions of public access to judicial proceedings and documents. *See, e.g.*, *Danco Lab'ys, Ltd. v. Chem. Works of Gedeon Richter, Ltd.*, 274 A.D.2d 1, 6 (1st Dep't 2000). The trainings impact a class of several million people, all of whom have particularized interests in understanding how the NYPD trains its officers with respect to accessing their Sealed Arrest Information. As this litigation continues, these individuals' only practical way of knowing what is happening in this case is through court filings. With respect to documents filed with the court, confidentiality is "clearly the exception, not the rule," and the First Department has authorized sealing only in limited circumstances. *Gryphon Domestic VI, LLC v. APP Int'l Fin. Co., B.V.*, 28 A.D.3d 322, 324 (1st Dep't 2006); *In re Will of Hofmann*,

[4] The Confidentiality Order also covered police disciplinary records protected under Civil Rights Law 50-a prior to its repeal, but that is no longer germane.

284 A.D.2d 92, 93-94 (1st Dep't 2001). New York state law clearly establishes the presumption that the public should have access to judicial documents absent likelihood of harm to a compelling interest, and Defendants can show no such harm here. *See Mosallem*, 76 A.D.3d at 349 ("A finding of 'good cause' presupposes that public access to the documents at issue will likely result in harm to a compelling interest of the movant. . . . Confidentiality is clearly the exception, not the rule.") (internal citations and quotation marks omitted); *Gryphon*, 28 A.D.3d at 324 (noting "the broad constitutional presumption . . . that the public is entitled to access to court proceedings," and stating that "any order denying access must be narrowly tailored to serve compelling objectives, such as a need for secrecy that outweighs the public's right to access.").

Plaintiffs respectfully move the Court to de-designate the presentations, order Defendants to produce de-designated versions, and direct the clerk of the Court to unseal the instant motion and supporting documents on the public docket.

CONCLUSION

WHEREFORE, for the reasons stated herein and in the accompanying Jain and Mathews Affirmations, Plaintiffs respectfully ask this Court to issue an order: (1) restraining and enjoining Defendants from instructing NYPD personnel that they [redacted] in violation of the Sealing Statutes; (2) requiring Defendants to issue a FINEST message,[5] to be read at ten consecutive roll calls immediately following a decision from this Court granting this motion, stating that NYPD personnel may not access and use Sealed Arrest Information without a court order; (3) prohibiting Defendants from providing NYPD personnel with access to Sealed Arrest Information for law enforcement purposes without a court order; (4) removing the confidentiality designation from the relevant trainings, requiring

[5] "The NYPD's 'FINEST' messaging system allows the transmission of legal directives to the NYPD's commands." *Rodriguez v. Winski*, 444 F. Supp. 3d 488, 493 (S.D.N.Y. 2020) (citation omitted).

Defendants to produce de-designated versions, and requiring the clerk of the Court to unseal this motion and related filings; and (5) granting any such other and further relief as the Court may deem just and appropriate.

With respect to the FINEST message, Plaintiffs respectfully request an order specifying that: (a) the FINEST message shall be read at ten consecutive roll calls in all NYPD commands following the standard procedure for communication of FINEST messages; (b) for those officers who do not participate in roll calls, the FINEST message shall be conveyed in the manner that such officers customarily receive such messages; and (c) upon completion of these readings, Defendants shall notify Plaintiffs' counsel in writing that the reading has occurred and provide a copy of the FINEST message to Plaintiffs' counsel.

Dated: New York, New York
July 8, 2021

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