

20-2789(L)

Uniformed Fire Officers Association et al. v. de Blasio et al.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

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1 At a stated term of the United States Court of Appeals for the Second Circuit,
2 held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the
3 City of New York, on the 16th day of February, two thousand twenty-one.
4

5 PRESENT: AMALYA L. KEARSE,
6 PIERRE N. LEVAL,
7 RAYMOND J. LOHIER, JR.,
8 *Circuit Judges.*

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11 UNIFORMED FIRE OFFICERS ASSOCIATION;
12 UNIFORMED FIREFIGHTERS ASSOCIATION OF
13 GREATER NEW YORK; POLICE BENEVOLENT
14 ASSOCIATION OF THE CITY OF NEW YORK,
15 INC., CORRECTION OFFICERS' BENEVOLENT
16 ASSOCIATION OF THE CITY OF NEW YORK,
17 INC., SERGEANTS BENEVOLENT ASSOCIATION,
18 LIEUTENANTS BENEVOLENT ASSOCIATION,
19 CAPTAINS ENDOWMENT ASSOCIATION,
20 DETECTIVES' ENDOWMENT ASSOCIATION,

21 *Plaintiffs-Appellants-Cross-Appellees,*
22

v.

No. 20-2789-cv(L)

No. 20-3177-cv(XAP)

BILL DE BLASIO, IN HIS OFFICIAL CAPACITY AS
MAYOR OF THE CITY OF NEW YORK, CITY OF
NEW YORK, NEW YORK CITY FIRE
DEPARTMENT, DANIEL A. NIGRO, IN HIS
OFFICIAL CAPACITY AS THE COMMISSIONER
OF THE FIRE DEPARTMENT OF THE CITY OF
NEW YORK, NEW YORK CITY DEPARTMENT OF
CORRECTIONS, CYNTHIA BRANN, IN HER
OFFICIAL CAPACITY AS THE COMMISSIONER
OF THE NEW YORK CITY DEPARTMENT OF
CORRECTIONS, DERMOT F. SHEA, IN HIS
OFFICIAL CAPACITY AS THE COMMISSIONER
OF THE NEW YORK CITY POLICE DEPARTMENT,
NEW YORK CITY POLICE DEPARTMENT,
FREDERICK DAVIE, IN HIS OFFICIAL CAPACITY
AS THE CHAIR OF THE CIVILIAN COMPLAINT
REVIEW BOARD, CIVILIAN COMPLAINT
REVIEW BOARD,

Defendants-Appellees,

COMMUNITIES UNITED FOR POLICE REFORM,

Intervenor-Defendant-Appellee-Cross-Appellant.

FOR PLAINTIFFS-APPELLANTS-
CROSS-APPELLEES:

ANTHONY P. COLES, DLA Piper
LLP, New York, NY; Courtney
Gilligan Saleski, DLA Piper
LLP, Philadelphia, PA

FOR DEFENDANTS-APPELLEES:

ELINA DRUKER, Scott Shorr,
Richard Dearing, *for* James E.

1 Johnson, Corporation Counsel
2 of the City of New York, New
3 York, NY

4 FOR INTERVENOR-DEFENDANT-
5 APPELLEE-CROSS-APPELLANT:
6
7
8
9
10
11
12
13
14
TIFFANY R. WRIGHT, Howard
University School of Law,
Washington, DC (Alex V.
Chachkes, Christopher J.
Cariello, Rene A. Kathawala,
Orrick, Herrington & Sutcliffe
LLP, New York, NY, *on the*
brief); Baher Azmy, Darius
Charney, Center for
Constitutional Rights, New
York, NY

15 FOR AMICUS CURIAE NEW YORK
16 CITY COUNCIL PROGRESSIVE
17 CAUCUS:
18

Aaron Marks, Joseph M.
Sanderson, Kirkland & Ellis
LLP, New York, NY

19 FOR AMICI CURIAE NAACP LEGAL
20 DEFENSE AND EDUCATIONAL
21 FUND, INC., LAWYERS' COMMITTEE
22 FOR CIVIL RIGHTS UNDER LAW,
23 LATINOJUSTICE PRLDEF, LAW FOR
24 BLACK LIVES:
25
26
27
28
29
30
31
32
Chris A. Hollinger, O'Melveny
& Myers LLP, San Francisco,
CA; Paul Wooten, O'Melveny
& Myers LLP, New York, NY;
Joe Greenbaum, Arthur Ago,
John Fowler, Lawyers'
Committee for Civil Rights
Under Law, Washington, DC;
Jin Hee Lee, Ashok Chandran,
NAACP Legal Defense and
Educational Fund, Inc., New
York, NY; Juan Cartagena,
LatinoJustice PRLDEF, New
York, NY

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33
34

FOR AMICUS CURIAE NEW YORK
CIVIL LIBERTIES UNION:

Molly K. Biklen, Christopher
Dunn, New York Civil
Liberties Union Foundation,
New York, NY; Jamie L. Wine,
Lawrence E. Buterman, Samir
Deger-Sen, Latham & Watkins
LLP, New York, NY

FOR AMICI CURIAE NEW YORK
STATE ASSOCIATION OF POLICE
BENEVOLENT ASSOCIATIONS,
AFFILIATED POLICE ASSOCIATIONS
OF WESTCHESTER, ROCKLAND
COUNTY POLICE BENEVOLENT
ASSOCIATIONS:

Andrew C. Quinn, The Quinn
Law Firm, P.L.L.C., White
Plains, NY

FOR AMICI CURIAE THE
REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS, 31
NEWS MEDIA ORGANIZATIONS:

Katie Townsend, Bruce D.
Brown, The Reporters
Committee for Freedom of the
Press, Washington, DC

FOR AMICUS CURIAE JUSTICE
COMMITTEE INC.:

David L. Kornblau, Russell M.
Squire, Covington & Burling
LLP, New York, NY

FOR AMICUS CURIAE LAW
ENFORCEMENT ACTION
PARTNERSHIP:

Joel D. Bertocchi, Brian S.
Fraser, Akerman LLP, New
York, NY

FOR AMICI CURIAE GIRLS FOR
GENDER EQUITY, TRANSGENDER
LAW CENTER:

Joel M. Cohen, Shireen Barday,
Katherine M. Marquart, Maya
H. Nuland, Sarah L. Segal,
Gibson, Dunn & Crutcher,

1		New York, NY; Julie Hamilton,
2		Gibson, Dunn & Crutcher,
3		Denver, CO
4		
5	FOR AMICUS CURIAE NEW YORK	Pamela S.C. Reynolds, Littler
6	STATE BLACK, PUERTO RICAN,	Mendelson, P.C., Fairport, NY
7	HISPANIC & ASIAN LEGISLATIVE	
8	CAUCUS:	
9		
10	FOR AMICUS CURIAE NEW YORK	Jeffrey P. Mans, Law Office of
11	STATE LAW ENFORCEMENT	Jeffrey P. Mans, Albany, NY
12	OFFICERS UNION, DISTRICT	
13	COUNCIL 82, AFSCME, AFL-CIO:	
14		
15	FOR AMICUS CURIAE THE POLICE	James B. Tuttle, The Tuttle
16	CONFERENCE OF NEW YORK, INC.:	Law Firm, Clifton Park, NY
17		
18	FOR AMICUS CURIAE SYRACUSE	Roger W. Bradley, Elizabeth A.
19	POLICE BENEVOLENT	Genung, Melvin & Melvin,
20	ASSOCIATION, INC.:	PLLC, Syracuse, NY
21		
22	FOR AMICUS CURIAE NEW YORK	Richard S. Corenthal, Paul K.
23	STATE PROFESSIONAL FIRE	Brown, Archer, Byington,
24	FIGHTERS ASSOCIATION:	Glennon & Levine LLP,
25		Melville, NY; Nathaniel G.
26		Lambright, Blitman & King
27		LLP, Syracuse, NY
28		
29		
30	FOR AMICI CURIAE FORMER	Joshua Colangelo-Bryan,
31	PROSECUTORS ALVIN BRAGG,	Anthony P. Badaracco,
32	TARYN MERKL, CHIRAAG BAINS,	Dorsey & Whitney LLP,
33	NATHANIEL AKERMAN, G.	New York, NY
34	MICHAEL BELLINGER, RICHARD	

1 F. ALBERT, ROLAND G. RIOPELLE,
2 ISABELLE A. KIRSHNER,
3 ALEXANDER RIAS, LAUREN-
4 BROOKE EISEN, XAVIER
5 DONALDSON:

6
7 FOR AMICI CURIAE COMMON
8 CAUSE/NEW YORK,
9 REINVENT ALBANY,
10 CITIZENS UNION, BETANYC:

Sean Murphy, Kamel Aitelaj,
Milbank LLP, New York, NY

11
12 FOR AMICI CURIAE SUFFOLK
13 COUNTY POLICE CONFERENCE,
14 INC., SUFFOLK COUNTY POLICE
15 BENEVOLENT ASSOCIATION,
16 INC., METROPOLITAN
17 TRANSPORTATION AUTHORITY
18 POLICE BENEVOLENT
19 ASSOCIATION, INC:

Alex J. Kaminski, Davis &
Ferber, LLP, Islandia, NY

20
21 Appeal from an order of the United States District Court for the Southern
22 District of New York (Katherine P. Failla, *Judge*).

23 UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED,
24 AND DECREED that the order of the District Court is AFFIRMED.

25 This appeal arises from the repeal of § 50-a of the New York Civil Rights
26 Law, which for decades shielded law enforcement disciplinary records from
27 public disclosure. Shortly after the repeal, New York City (the “City”)

1 announced its intention to proactively publish certain types of disciplinary
2 records and provide other records upon request consistent with its obligations
3 under New York’s Freedom of Information Law (FOIL), N.Y. Pub. Off. Law
4 §§ 84–90. Several unions (the “Unions”) representing uniformed members of the
5 New York City Police Department (“NYPD”), the New York City Fire
6 Department (“FDNY”), and the New York City Department of Correction
7 (“DOC”) filed this action against the City, the NYPD, the FDNY, the DOC, the
8 Civilian Complaint Review Board (“CCRB”), and their principal officers. The
9 Unions moved to preliminarily enjoin any disclosure of allegations of
10 misconduct against their members that are unsubstantiated, unfounded, or non-
11 final, or that resulted in an exoneration or a finding of not guilty. The District
12 Court (Failla, L) denied the motion in substantial part, but granted a limited
13 preliminary injunction in favor of the Unions, which we explain further below.
14 The Unions appealed from the denial of their motion, and Communities United
15 for Police Reform (“CPR”), which intervened in this case, cross-appealed from
16 the District’s Court’s limited preliminary injunction. Another panel of this Court
17 granted a stay of the District Court’s order pending disposition of this appeal.

1 We assume the parties’ familiarity with the underlying facts and prior
2 record of proceedings, to which we refer only as necessary to explain our
3 decision to affirm.

4 1. The Unions’ Appeal: Preliminary Injunction in Aid of Arbitration

5 We review the District Court’s order for abuse of discretion. See SG
6 Cowen Sec. Corp. v. Messih, 224 F.3d 79, 81 (2d Cir. 2000).

7 Each of the Unions’ collective bargaining agreements (“CBAs”) contains an
8 arbitration provision, and the Unions ask the Court to enjoin the NYPD’s and the
9 CCRB’s planned disclosures pending adjudication of their claims in arbitration.
10 Under New York law, which governs the CBAs, a court may issue a preliminary
11 injunction in aid of arbitration if the movant demonstrates that (1) absent a
12 preliminary injunction, an award in arbitration “may be rendered ineffectual,”
13 (2) the movant is likely to succeed on the merits of the claim to be arbitrated,
14 (3) there is a “danger of irreparable harm” to the movant should preliminary
15 relief be denied, and (4) the balance of the equities “tips in the petitioner’s favor.”
16 Id. at 81–84.

1 Here, the Unions assert that the planned disclosures will violate two
2 provisions common to all of their CBAs. The District Court denied the Unions'
3 motion for a preliminary injunction only as it related to the first provision, which
4 states that upon an officer's "written request to the Chief of Personnel," NYPD
5 "will . . . remove from the Personnel Folder investigative reports which, upon
6 completion of the investigation are classified 'exonerated' and/or 'unfounded.'" App'x 1528. We agree with the District Court that this provision does not
7 conflict with the planned public disclosures, substantially for the reasons set
8 forth in the District Court's decision. Special App'x 19–21. Removal of such
9 records from a personnel file, as called for by the CBAs, does not require
10 eliminating them from all of the City's records. There is no contention that the
11 City has failed to adhere to its obligation to remove the records from personnel
12 files or has improperly considered them in connection with personnel decisions
13 (such as promotion or termination). Moreover, to the extent that this claim
14 implicates records that must be disclosed under FOIL, the NYPD cannot bargain
15 away its disclosure obligations. Matter of M. Farbman & Sons v. N.Y.C. Health
16 & Hosps. Corp., 62 N.Y.2d 75, 80, 476 N.Y.S.2d 69, 71 (1984). The District Court

1 therefore acted within its discretion when it concluded that the Unions failed to
2 demonstrate a likelihood of success on the merits in the arbitration of this claim.

3 See SG Cowen, 224 F.3d at 84.

4 2. The Unions' Appeal: Preliminary Injunction Pending Resolution of
5 Remaining Claims

6 “[D]istrict courts may grant a preliminary injunction where a plaintiff
7 demonstrates irreparable harm and meets either of two standards: (a) a
8 likelihood of success on the merits, or (b) sufficiently serious questions going to
9 the merits to make them a fair ground for litigation, and a balance of hardships
10 tipping decidedly in the movant’s favor.” Trump v. Deutsche Bank AG, 943 F.3d
11 627, 635 (2d Cir. 2019) (quotation marks omitted), vacated and remanded on
12 other grounds, 140 S. Ct. 2019 (2020). We do not decide whether the Unions
13 must satisfy one standard or the other here because we conclude that the District
14 Court did not abuse its discretion under either standard.

15 A. Irreparable Harm

16 The Unions assert that law enforcement officers will have fewer
17 employment opportunities in the future if records of the allegations against them
18 that prove to be unfounded or unsubstantiated are disclosed, even though each

1 record will reveal the outcome of the investigation. But the District Court noted
2 that future employers were unlikely to be misled by conduct records that
3 contained “dispositional designations” specifying that allegations of misconduct
4 were unsubstantiated, unfounded, or that the accused officer was exonerated.
5 See Special App’x 14–15. As the District Court also noted, despite evidence that
6 numerous other States make similar records available to the public, the Unions
7 have pointed to no evidence from any jurisdiction that the availability of such
8 records resulted in harm to employment opportunities. Id. For these reasons,
9 the District Court did not abuse its discretion when it determined that the
10 asserted harm was speculative and that the Unions had failed to demonstrate on
11 this record that the officers will suffer irreparable harm to their employment
12 opportunities that cannot be remedied by an award of lost wages. In general,
13 “irreparable harm is not shown in employee discharge cases simply by a
14 showing of financial distress or difficulties in obtaining other employment
15 ‘however severely they may affect a particular individual.’” Stewart v. INS, 762
16 F.2d 193, 199 (2d Cir. 1985) (quoting Sampson v. Murray, 415 U.S. 61, 92 n.68
17 (1974)).

1 We also address the Union’s more general assertion of heightened danger
2 and safety risks to police officers. We fully and unequivocally respect the
3 dangers and risks police officers face every day. But we cannot say that the
4 District Court abused its discretion when it determined that the Unions have not
5 sufficiently demonstrated that those dangers and risks are likely to increase
6 because of the City’s planned disclosures. In arriving at that conclusion, we note
7 again that many other States make similar misconduct records at least partially
8 available to the public without any evidence of a resulting increase of danger to
9 police officers. See App’x 1035–36, 1163, 2140–42.

10 B. The Merits

11 The Unions also have not raised sufficiently serious questions on the
12 merits of their claims. First, the Unions assert a “stigma-plus” claim under the
13 Federal and New York State Constitutions. Under both federal and state law,
14 stigma-plus claims require the plaintiff to adequately demonstrate an “injury to
15 one’s reputation (the stigma) coupled with the deprivation of some ‘tangible
16 interest’ or property right (the plus), without adequate process.” DiBlasio v.
17 Novello, 344 F.3d 292, 302 (2d Cir. 2003); see Matter of Lee TT. v. Dowling,

1 87 N.Y.2d 699, 708, 642 N.Y.S.2d 181, 187 (1996). The Unions fail to demonstrate
2 that any officer will be deprived of a tangible interest or property right. We have
3 held that diminished future employment opportunities resulting from a
4 damaged reputation, as opposed to some independent legal detriment, are not
5 sufficient. See Sadallah v. City of Utica, 383 F.3d 34, 38–39 (2d Cir. 2004).¹

6 The Unions’ equal protection claims fare no better. Because law
7 enforcement officers are not a protected class for equal protection purposes, they
8 must show that there is no rational and nondiscriminatory basis to treat their
9 records differently from the records of other public employees. See Sensational
10 Smiles, LLC v. Mullen, 793 F.3d 281, 284 (2d Cir. 2015). Even the Unions
11 recognize that “the unique responsibilities of law enforcement officers set them
12 apart.” Unions Br. 56. Because the public has a stronger legitimate interest in the
13 disciplinary records of law enforcement officers than in those of other public
14 employees, the District Court correctly determined that there was a rational,
15 nondiscriminatory basis for treating the two sets of records differently.

¹ We assume, without deciding, that the protections provided by the New York State Constitution are equivalent to their federal counterparts, as no party has suggested otherwise.

1 Next, the Unions contend that when officers entered plea agreements in
2 disciplinary proceedings, those agreements implicitly incorporated § 50-a of the
3 Civil Rights Law. Again, we disagree. The New York Court of Appeals has
4 cautioned that a contract “does not transform all statutory requirements that may
5 otherwise be imposed under [the governing] law into contractual obligations,”
6 and it has “decline[d] to interpret [a contract] as impliedly stating something
7 which [the signatories] have neglected to specifically include.” Skanska USA
8 Bldg. Inc. v. Atl. Yards B2 Owner, LLC, 31 N.Y.3d 1002, 1007, 74 N.Y.S.3d 805,
9 807–08 (2018) (quotation marks omitted). “[R]ead[ing] into . . . contracts terms
10 that do not exist based on then-existing statutory language, . . . would protect
11 against all changes in legislation, . . . [and] severely limit the ability of state
12 legislatures to amend their regulatory legislation.” Am. Econ. Ins. Co. v. State of
13 N.Y., 30 N.Y.3d 136, 154, 65 N.Y.S.3d 94, 107 (2017) (quotation marks omitted).
14 The Unions do not point to any legislative history in support of their argument,
15 or to any evidence that the parties to the plea agreements intended to incorporate
16 § 50-a as the Unions suggest. Nor do the Unions argue that § 50-a “affect[s] the
17 validity, construction, and enforcement” of the plea agreements. Id.

1 The Unions also argue that the City’s decision to publish certain
2 disciplinary records without individualized review is arbitrary and capricious
3 under Article 78 of the New York Civil Practice Law and Rules. See N.Y.
4 C.P.L.R. §§ 7801, 7803(3). Substantially for the reasons provided by the District
5 Court in its order, we reject their argument. As the District Court observed, the
6 City appears to still recognize those specific FOIL exemptions that are designed
7 to protect against unwarranted invasions of personal privacy or endangering a
8 person’s safety. See N.Y. Pub. Off. Law § 87(2)(b), (f).

9 Alternatively, the Unions assert that it was arbitrary and capricious for the
10 City to change without explanation its established practice of asserting that
11 records relating to unsubstantiated allegations should be withheld under FOIL’s
12 exemption for documents whose disclosure would constitute an unwarranted
13 invasion of privacy. See Unions Br. 48–51; Matter of Charles A. Field Delivery
14 Serv., Inc., 66 N.Y.2d 516, 520, 498 N.Y.S.2d 111, 115 (1985). But that practice, if it
15 ever existed, appears to have ended no later than 2017. See App’x 1614, 1643.
16 And any change in the CCRB’s position was adequately explained by the
17 Mayor’s public remarks following the repeal of § 50-a. See Transcript: Mayor de

1 Blasio Holds Media Availability, NYC.gov (June 17, 2020), available at
2 [https://www1.nyc.gov/office-of-the-mayor/news/446-20/transcript-mayor-de-](https://www1.nyc.gov/office-of-the-mayor/news/446-20/transcript-mayor-de-
3 blasio-holds-media-availability)

4 C. Balance of the Equities

5 As for the balance of the equities, the Unions argue that the equities favor a
6 preliminary injunction because disclosure of information is permanent, while
7 those who seek information will suffer only delay if an injunction is entered. We
8 do not doubt the sincerity of the Unions' concerns. As several amici point out,
9 however, delay for victims unable to obtain information about the status of their
10 complaints is itself costly both for them and for various other stakeholders in the
11 criminal justice system, see, e.g., Brief for Former Prosecutors as Amici Curiae
12 Supporting Intervenor-Defendant-Appellee-Cross-Appellant 6–10, as well as the
13 press, see Brief for The Reporters Committee for Freedom of the Press & 31 News
14 Media Organizations as Amici Curiae Supporting of Intervenor-Defendant-
15 Appellee-Cross-Appellant 15–21. Because the Unions' stated interests are
16 counterbalanced by other important policies, the District Court did not abuse its

1 discretion in determining that the balance of the equities does not tip in their
2 favor.

3 3. CPR's Cross-Appeal

4 The District Court granted the Unions' motion for a preliminary injunction
5 in aid of arbitration as it related to the second provision of the CBAs relevant to
6 this appeal, Section 8.² Under Section 8, a police officer who has "been charged
7 with a 'Schedule A' violation as listed in [the] Patrol Guide," proceeds to a
8 disciplinary trial on such charge, and is not determined guilty may "petition the
9 Police Commissioner for a review for the purpose of expunging the record of the
10 case." App'x 1528. On its cross-appeal, CPR argues that the District Court's
11 decision to enjoin the disclosure of these records was an abuse of discretion
12 because the NYPD cannot bargain away its FOIL obligations. See CPR Br. 22–29,
13 70–73.³ But on this record, we conclude that enforcing Section 8 would not affect



² The relevant provision appears in Section 8 of most, but not all, CBAs. Like the District Court, we refer only to its usual location for ease and clarity.

³ We are not persuaded by the Unions' contention that CPR lacks standing to appeal because it is not a signatory to the CBAs. CPR is injured by the injunction because it prevents the NYPD from fulfilling CPR's FOIL request for documents covered by this provision. CPR argues that the CBAs impermissibly deprive it of rights guaranteed by FOIL.

1 those obligations. As the City notes, “Schedule A” lists “technical violations,”
2 City Br. 16, such as “[i]mproper uniform or equipment” and “[r]eporting late for
3 duty,” N.Y. Police Dep’t Patrol Guide 206-03 Schedule A (effective April 20,
4 2017). And under New York law, “a law enforcement agency may redact records
5 pertaining to technical infractions . . . prior to disclosing such records” pursuant
6 to FOIL. N.Y. Pub. Off. Law § 89(2-c). Accordingly, we conclude that the District
7 Court did not abuse its discretion in preliminarily enjoining disclosure of these
8 records. If CPR can show that “Schedule A” violations include anything other
9 than “[t]echnical infraction[s]” as defined by New York law, see N.Y. Pub. Off.
10 Law § 86(9), it may move the District Court for appropriate relief, see Weight
11 Watchers Int’l, Inc. v. Luigino’s, Inc., 423 F.3d 137, 141 (2d Cir. 2005).

12 We have considered the Unions’ remaining arguments and conclude that
13 they are without merit. For the foregoing reasons, the District Court’s order is
14 AFFIRMED.

15 FOR THE COURT:
16 Catherine O’Hagan Wolfe, Clerk of Court

**United States Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007**

DEBRA ANN LIVINGSTON
CHIEF JUDGE

Date: February 16, 2021
Docket #: 20-2789cv
Short Title: Uniformed Fire Officers Associ v. DeBlasio

CATHERINE O'HAGAN WOLFE
CLERK OF COURT

DC Docket #: 20-cv-5441
DC Court: SDNY (NEW YORK CITY)DC Docket #: 20-cv-5441
DC Court: SDNY (NEW YORK CITY)
DC Judge: Failla

BILL OF COSTS INSTRUCTIONS

The requirements for filing a bill of costs are set forth in FRAP 39. A form for filing a bill of costs is on the Court's website.

The bill of costs must:

- * be filed within 14 days after the entry of judgment;
- * be verified;
- * be served on all adversaries;
- * not include charges for postage, delivery, service, overtime and the filers edits;
- * identify the number of copies which comprise the printer's unit;
- * include the printer's bills, which must state the minimum charge per printer's unit for a page, a cover, foot lines by the line, and an index and table of cases by the page;
- * state only the number of necessary copies inserted in enclosed form;
- * state actual costs at rates not higher than those generally charged for printing services in New York, New York; excessive charges are subject to reduction;
- * be filed via CM/ECF or if counsel is exempted with the original and two copies.

**United States Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007**

DEBRA ANN LIVINGSTON
CHIEF JUDGE

Date: February 16, 2021
Docket #: 20-2789cv
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CATHERINE O'HAGAN WOLFE
CLERK OF COURT

DC Docket #: 20-cv-5441
DC Court: SDNY (NEW YORK CITY)DC Docket #: 20-cv-5441
DC Court: SDNY (NEW YORK CITY)
DC Judge: Failla

VERIFIED ITEMIZED BILL OF COSTS

Counsel for

respectfully submits, pursuant to FRAP 39 (c) the within bill of costs and requests the Clerk to prepare an itemized statement of costs taxed against the

and in favor of

for insertion in the mandate.

Docketing Fee _____

Costs of printing appendix (necessary copies _____) _____

Costs of printing brief (necessary copies _____) _____

Costs of printing reply brief (necessary copies _____) _____

(VERIFICATION HERE)

Signature