

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

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CORNELL HOLDEN, MIGUEL MEJIA, :
MALCOM RUSSELL, and MARCOS POLONIA :
on behalf of themselves and all others similarly :
situated, :

Plaintiffs, :

-against- :

THE PORT AUTHORITY OF NEW YORK AND :
NEW JERSEY; THE PORT AUTHORITY :
POLICE DEPARTMENT; and MICHAEL :
OPROMALLA, SHAUN KEHOE, JOHN TONE, :
JORDAN ESPOSITO, MICHAEL DEMARTINO, :
RICHARD AYLNER, PAUL MILLER, JOHN :
FITZPATRICK, MARK MONTERO, VIJAY :
SEETARAM, MELVIN CRUZ, MARTIN :
JAYCARD, PAUL O’DELL and OFFICERS :
JOHN DOE 1-93, sued in their individual capacities :
and official capacities as officers of the Port :
Authority Police Department, :

Defendants. :

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1:17-cv-02192-JGK-RWL

**SECOND AMENDED CLASS
ACTION COMPLAINT**

Plaintiffs Cornell Holden, Miguel Mejia, Malcom Russell, and Marcos Polonia on behalf of themselves and all others similarly situated (collectively, “Plaintiffs”), through their undersigned attorneys, submit this Amended Class Action Complaint, and allege as follows:

INTRODUCTION

1. This class action seeks declaratory, injunctive, and monetary relief to redress the deprivation of Plaintiffs’ rights under the Constitution and laws of the United States. The tactics of Defendant Port Authority Police Department (“P.A.P.D.”) and its officers should not and indeed cannot stand. They are deplorable indicia of a governmental agency that cares not about law or liberty, choosing to violate both with baseless abandon. Those tactics evince a policy

and/or pattern and practice of unlawful discrimination, targeting, and false arrests of men using Port Authority Bus Terminal (“P.A.B.T”) restrooms.

2. Specifically, Plaintiffs bring this action pursuant to 42 U.S.C. § 1983 in response to Defendants’ policy and/or pattern and practice of unlawful discrimination, targeting, and false arrests of men using “P.A.B.T” restrooms.

3. Defendants’ wrongful conduct includes the specific and deliberate targeting by P.A.P.D. officers of men that such officers perceive as gay or bisexual, and/or gender non-conforming, and/or men who have sex with men, using P.A.B.T. restrooms.

4. P.A.P.D. officers engage in a pattern and practice of targeting and wrongly arresting men that such officers perceive as gay or bisexual, and/or gender non-conforming, and/or men who have sex with men, on baseless charges including public lewdness and exposure, falsely claiming that they were engaged in illegal conduct at P.A.B.T. restroom urinals.

5. P.A.P.D. officers were deliberately targeting men for arrests on the discriminatory basis of actual or perceived sexual orientation, actual or perceived gender expression, and/or to boost “quality of life” arrest statistics at P.A.B.T. and/or individual P.A.P.D. officers’ arrest statistics. P.A.P.D. officers make such arrests knowing or believing that many of those arrested would ultimately be effectively forced to plead guilty to lesser charges such as disorderly conduct to avoid the public embarrassment and humiliation, potential jail sentences and fines, and potential reputational and professional harm associated with the false charges.

6. The tactics employed by P.A.P.D. officers to conduct such targeted arrests are an exercise in unconstitutional bias. Some of that conduct was designed to attempt to entice men who are gay or bisexual, and/or men who have sex with men into exposing themselves to men at

other urinals. For example, plainclothes P.A.P.D. officers at times pretend to use urinals next to targeted individuals in P.A.B.T. men's restrooms. These urinals are separated by privacy walls. Some P.A.P.D. officers proceed to stare at the targeted man while he is using the urinal. In some cases, the officer may actually step back from the urinal in order to see around the privacy wall, in an effort to view the targeted man's hands and genitals. In others, the officer may intentionally expose himself to the man in an effort to entice him to react lewdly. Based solely on the officer's report of his observations, the targeted man is then arrested by a team of P.A.P.D. officers when he exits the restroom.

7. Upon information and belief, P.A.P.D. officers specifically target men that P.A.P.D. officers perceive as gay or bisexual (based on appearance), and/or gender non-conforming (a person assigned male at birth wearing what a P.A.P.D. officer believes to be non-masculine attire or jewelry)¹, and/or men who have sex with men, for such unlawful and unconstitutional treatment.

8. Indeed, following the wrongful arrest of Plaintiff Cornell Holden, Mr. Holden overheard P.A.P.D. officers congratulating the arresting officer and explicitly referring to him as "the gay whisperer," presumably because of the arresting officer's pattern and practice of arresting men that he perceived as gay or bisexual, and/or gender non-conforming, and/or as a man who has sex with men.

9. This policy and/or pattern and practice of unlawful and unconstitutional discriminatory conduct is perpetuated not only by the arresting officers, but also by officers who are senior and/or had supervisory duties, such as: supervisors who instructed officers to use such

¹ "Gender non-conforming" is generally defined as relating to a person whose behavior or appearance does not conform to prevailing cultural and social expectations about what is appropriate to the gender that person was assigned at birth.

tactics; supervisors who signed off on the arrest paperwork of the targeted individuals without sufficiently inquiring about the officer's probable cause; tour commanders on the shifts during which the targeted individuals were arrested; and commanding officers who initiated plainclothes patrols with officers new to policing without sufficient training or supervision. Indeed, these officers with supervisory duties at a minimum reviewed, endorsed, and validated the arrests of the targeted individuals.

10. Without judicial intervention there will be no end to Defendants' invasive, unlawful, and unconstitutional practices despite being put on notice through lawsuits and articles. The P.A.P.D. has conducted, and continues to conduct, unlawful discrimination, targeting, and false arrests of men that P.A.P.D. officers perceive as gay or bisexual, and/or gender non-conforming, and/or men who have sex with men, using P.A.B.T. restrooms. Because such conduct is ongoing, there is a threat of recurrent injuries to Plaintiffs. The named Plaintiffs and other class members are at risk of further violations of their rights at the hands of the P.A.P.D.

11. Indeed, the Port Authority and P.A.P.D. officers have been found liable for similar misconduct in the past. Therefore, Defendants knew or should have known that the policies and/or practices alleged herein were unlawful and unconstitutional.

12. On November 18, 2004, after a four-day trial, a jury returned a verdict in favor of Alejandro Martinez, who was arrested outside the men's room at the PATH station concourse of the World Trade Center and charged with public lewdness (he was accused by the arresting officer of having engaged in public masturbation). At trial, the jury was supplied with evidence sufficient to conclude that the Port Authority had a custom that led to widespread public lewdness arrests *without regard to probable cause*.

13. The jury awarded Mr. Martinez substantial damages. Despite the jury finding of liability and the substantial monetary award, Defendants have not modified or instituted any protocol, training, supervision or monitoring of these plainclothes patrols or types of arrests to prevent it from happening again, causing the pattern of unconstitutional arrests to reoccur. Defendants continue to engage in the unlawful and unconstitutional policy and/or pattern and practice alleged herein.

14. To end these unlawful activities, Plaintiffs seek on behalf of themselves and all others similarly situated a permanent injunction restraining P.A.P.D. officers from conducting such unlawful and unconstitutional tactics and arrests. Plaintiffs also seek declaratory judgment and monetary damages provided for under the law, as allowed under F.R.C.P. 23(b)(2) and (b)(3).

JURISDICTION AND VENUE

15. Jurisdiction of this Court is predicated upon 28 U.S.C. §§ 1331 and 1346.

16. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391 and because, *inter alia*, (1) Defendants The Port Authority of York and New Jersey and Port Authority Police Department are located in this judicial district and (2) all relevant events took place in this judicial district.

PARTIES AND OTHER RELEVANT PERSONS

17. At all times relevant to this action, Plaintiff Cornell Holden (“Mr. Holden”) was a resident of New York, New York. Mr. Holden was arrested on May 12, 2014, when he exited a P.A.B.T. restroom. He was charged with Public Lewdness under N.Y.P.L. § 245.00, and Exposure of a Person under N.Y.P.L. § 245.01.

18. At a court appearance in Criminal Court of the City of New York, County Of New York, Part C, on December 9, 2014, before the Hon. Robert Mandelbaum, all charges against Mr. Holden were dismissed.

19. At the time of his arrest, Plaintiff Miguel Mejia (“Mr. Mejia”) was a resident of New York, New York. Mr. Mejia is now a resident of New Jersey. Mr. Mejia was arrested on July 9, 2014, when he exited a P.A.B.T. restroom. He was charged with Public Lewdness under N.Y.P.L. § 245.00.

20. On November 17, 2014, following a trial in Supreme Court of the State of New York, County of New York, Criminal Term Part 1, the trial judge, the Hon. Larry Stephen, entered a verdict of not guilty on the charge against Mr. Mejia.

21. At a court appearance on October 18, 2016, all charges against Mr. Mejia were dismissed.

22. At all times relevant to this action, Plaintiff Malcom Russell (“Mr. Russell”) was a resident of New York, New York. Mr. Russell was arrested on September 23, 2014, when he exited a P.A.B.T. restroom. He was charged with Public Lewdness under N.Y.P.L. § 245.00, and Exposure of a Person under N.Y.P.L. § 245.01.

23. Upon information and belief, Mr. Russell’s records have been sealed.

24. At all times relevant to this action, Plaintiff Marcos Polonia (“Mr. Polonia”) was a resident of New York, New York. Mr. Polonia was arrested on August 14, 2014, when he approached a urinal in a P.A.B.T. restroom. He was charged with Public Lewdness under N.Y.P.L. § 245.00, and Exposure of a Person under N.Y.P.L. § 245.01.

25. On or around October 8, 2014, Mr. Polonia learned that the District Attorney’s office declined to prosecute his case.

26. Defendant The Port Authority of New York and New Jersey is and was at all times relevant herein a governmental entity created and authorized under the laws of the States of New York and New Jersey. Its corporate office is located in New York, New York. It is authorized by law to maintain a police department, which acts as its agent in the area of law enforcement and for which it is ultimately responsible.

27. Defendant Port Authority Police Department is headquartered in Jersey City, New Jersey, with precincts located across New York, New York, including in the Port Authority Bus Terminal. The Port Authority of New York and New Jersey and the Port Authority Police Department together are referred to herein as the “Municipal Defendants.”

28. Defendant Officers Michael Opromalla, Shaun Kehoe, John Tone, Mark Montero, and Vijay Seetaram; Sergeants Jordan Esposito, Martin Jaycard, Melvin Cruz and Paul Miller; Lieutenants Michael DeMartino, Richard Aylmer, and Paul O’Dell; Captain John Fitzpatrick; and Officers John Doe 1-93 (collectively the “Officer Defendants”) are and/or were at times relevant herein duly appointed and acting officers, servants, employees and agents of Defendant The Port Authority of New York and New Jersey and/or Defendant Port Authority Police Department. At all times relevant herein, they were acting under the direction and control of Defendant The Port Authority of New York and New Jersey and/or Defendant Port Authority Police Department, and were acting pursuant to either official policy, or the custom, practice, and usage of Defendant The Port Authority of New York and New Jersey and/or Defendant Port Authority Police Department.

29. Defendant Officer Michael Opromalla is an officer of the Port Authority Police Department. Upon information and belief, he was a P.A.P.D. officer at all times relevant to this litigation. Officer Opromalla made 14 public lewdness arrests in 2014.

30. Upon information and belief, Officer Opromalla was one of the P.A.P.D. officers who arrested Mr. Holden on May 12, 2014. Upon information and belief, Officer Opromalla was the arresting officer on 13 similar cases in 2014. Officer Opromalla is sued in his individual and official capacity.

31. Defendant Officer Shaun Kehoe is an officer of the Port Authority Police Department. Upon information and belief, he was a P.A.P.D. officer at all times relevant to this litigation. Officer Kehoe made five public lewdness arrests in 2014.

32. Upon information and belief, Officer Kehoe was one of the P.A.P.D. officers who arrested Mr. Holden on May 12, 2014. Officer Kehoe is sued in his individual, official, and supervisory capacity.

33. Defendant Officer John Tone is an officer of the Port Authority Police Department. Upon information and belief, he was a P.A.P.D. officer at all times relevant to this litigation. Officer Tone made five public lewdness arrests in 2014.

34. Upon information and belief, Officer Tone was one of the P.A.P.D. officers who arrested Mr. Mejia on July 9, 2014. Officer Tone is sued in his individual and official capacity.

35. Defendant Officer Mark Montero is an officer of the Port Authority Police Department. Upon information and belief, he was a P.A.P.D. officer at all times relevant to this litigation. Officer Montero made four arrests for public lewdness in 2014.

36. Upon information and belief, Officer Montero was one of the P.A.P.D. officers who arrested Mr. Russell on September 23, 2014. Officer Montero is sued in his individual, and official capacity.

37. Defendant Officer Vijay Seetaram is an officer of the Port Authority Police Department. Upon information and belief, he was a P.A.P.D. officer at all times relevant to this litigation. Officer Seetaram made 14 arrests for public lewdness in 2014.

38. Upon information and belief, Officer Seetaram was one of the P.A.P.D. officers who arrested Mr. Polonia on September 23, 2014. Officer Seetaram is sued in his individual and official capacity.

39. Defendant Sergeant Jordan Esposito is an officer of the Port Authority Police Department. Upon information and belief, he was a P.A.P.D. officer at all times relevant to this litigation. Sergeant Esposito was involved in three public lewdness arrests in 2014.

40. Upon information and belief, Sergeant Esposito was the P.A.P.D. officer who signed off on the arrest paperwork for Mr. Holden on May 12, 2014.² Sergeant Esposito is sued in his individual, official, and supervisory capacity.

41. Defendant Sergeant Martin Jaycard is an officer of the Port Authority Police Department. Upon information and belief, he was a P.A.P.D. officer at all times relevant to this litigation, and was a sergeant at the time of Plaintiffs Malcom Russell's and Marcos Polonia's arrests. Sergeant Jaycard was involved in 11 public lewdness arrests in 2014. Upon information and belief, Sergeant Jaycard was the P.A.P.D. officer who issued the desk appearance ticket number for Mr. Russell on September 23, 2014. Sergeant Jaycard is sued in his individual, official, and supervisory capacity.

42. Defendant Sergeant Melvin Cruz is an officer of the Port Authority Police Department. Upon information and belief, he was a P.A.P.D. officer at all times relevant to this

² Upon information and belief, signing off on arrest paperwork entails reviewing the allegations reported by the arresting officers for probable cause and verifying the probable cause identified by the arresting officers as sufficient for making an arrest.

litigation. Upon information and belief, Sergeant Cruz was the P.A.P.D. officer who signed off on the arrest paperwork for Mr. Polonia on August 1, 2014. Sergeant Cruz is sued in his individual, official, and supervisory capacity. This was the only lewdness arrest that Sergeant Cruz was directly involved in.

43. Defendant Lieutenant Michael DeMartino is an officer of the Port Authority Police Department. Upon information and belief, he was a P.A.P.D. officer at all times relevant to this litigation, and was a sergeant at the time of Plaintiffs' arrests. Upon information and belief, Lieutenant DeMartino was the P.A.P.D. officer who issued the desk appearance ticket number for Mr. Holden on May 12, 2014, and signed off on the arrest paperwork for Mr. Mejia on July 9, 2014. Lieutenant DeMartino is sued in his individual, official, and supervisory capacity.

44. Defendant Lieutenant Paul O'Dell is an officer of the Port Authority Police Department. Upon information and belief, he was a P.A.P.D. officer at all times relevant to this litigation, and was a lieutenant at the time of Plaintiffs arrests.

45. Upon information and belief, Lieutenant O'Dell was the P.A.P.D. officer who signed off on the arrest paperwork for Mr. Russell on September 23, 2014. Lieutenant O'Dell is sued in his individual, official, and supervisory capacity.

46. Defendant Sergeant Paul Miller was an officer of the Port Authority Police Department during the relevant time period. Upon information and belief, Sergeant Miller was a desk sergeant at the time of putative class members' arrests. Sergeant Miller is sued in his individual, official, and supervisory capacity. Furthermore, the deposition testimony of Officer Opromalla revealed Sergeant Miller to be one of the individuals who instructed officers to use tactics that target men who have sex with men for arrests without probable cause.

47. Defendant Captain John Fitzpatrick was Commanding Officer of the Port Authority Police Department at the Bus Terminal from November 2014 until January 2017. Captain Fitzpatrick is sued in his individual, official, and supervisory capacity. Upon information and belief, the Commanding Officer is responsible for supervising the entire command, as well as tactical and strategic decision-making for police efforts. Furthermore, the deposition testimony of Officer Opromalla revealed Captain Fitzpatrick to be one of the individuals who instructed officers to make the arrests at issue in this case.

48. Defendant Officers John Doe 1-93 are officers of the Port Authority Police Department. Upon information and belief, they were P.A.P.D. officers at all times relevant to this litigation. Upon information and belief, Officers John Doe 1-93 engaged in the unconstitutional conduct alleged herein, including specifically the arrests of members of the class. Defendant Officers John Doe 1-93 are sued in their individual, official, and supervisory capacity. The true names and total number of Officers John Doe 1-93 are unknown to Plaintiffs, and therefore Plaintiffs sue Defendants by such names. Plaintiffs will request leave to amend their Complaint to state the true name of Defendant Officers John Doe 1-93 if discovered.

49. At all times relevant herein, Defendant Officers Michael Opromalla, Shaun Kehoe, John Tone, Mark Montero, and Vijay Seetaram; Sergeants Jordan Esposito, Martin Jaycard, Melvin Cruz, and Paul Miller; and Lieutenants Michael DeMartino, Richard Aylmer, and Paul O'Dell; Captain John Fitzpatrick; and Officers John Doe 1-93 were acting under color of the laws, statutes, ordinances, regulations, policies, customs, and usages of Defendant The Port Authority of New York and New Jersey and/or Defendant Port Authority Police Department, and were acting in the course and scope of their duties and functions as officers, agents, servants, and employees of Defendant The Port Authority of New York and New Jersey

and/or Defendant Port Authority Police Department, and otherwise engaged in conduct incidental to the to the performance of their lawful functions in the course of their duties. At all times relevant herein, they were acting for and on behalf of Defendant The Port Authority of New York and New Jersey and/or Defendant Port Authority Police Department, with the power and authority vested in them as officers, agents, servants, and employees of Defendant The Port Authority of New York and New Jersey and/or Defendant Port Authority Police Department.

50. Upon information and belief, The Port Authority of New York and New Jersey; Port Authority Police Department; Officers Michael Opromalla, Shaun Kehoe, John Tone, Mark Montero, and Vijay Seetaram; Sergeants Jordan Esposito, Martin Jaycard, Melvin Cruz, and Paul Miller; Lieutenants Michael DeMartino, Richard Aylmer, and Paul O'Dell; Captain John Fitzpatrick; and Officers John Doe 1-93 are responsible for the injuries and damages suffered by Plaintiffs caused by the acts alleged in this Complaint.

FACTS

The Port Authority Police Department and Its Pattern and Practice of Unlawful and Unconstitutional Discriminatory Conduct

51. According to its website, “the Port Authority operates the largest and busiest bus terminal in the nation, accommodating 57 million bus passengers and more than 2.2 million bus movements in 2007. On a typical weekday, nearly 200,000 passenger trips passed through the PABT on 7,000 bus movements.”³

52. The P.A.P.D. is responsible for the patrol of the Holland and Lincoln Tunnels; the Bayonne, Goethals, and George Washington Bridges; the Outerbridge Crossing; Newark, John F. Kennedy, and LaGuardia Airports; the Port Authority Bus Terminal; the PATH train and

³ *About the Port Authority Police Department*, THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY, <http://www.panynj.gov/police/about-police.html> (last visited Jan. 19, 2017).

stations; and the Port Authority Marine Terminals. The P.A.P.D. employs more than 1,700 officers. P.A.P.D. officers are empowered to detain and arrest individuals, and initiate prosecutions, at their discretion.

53. Starting in 2014, the Commanding Officer in the Bus Terminal Command started using officers, new to the Bus Terminal, some straight out of the Port Authority Police Academy, for plainclothes patrols without sufficient protocol, training, or supervision. One purpose of these patrols was to target “quality of life” crimes including, at times and depending on who was conducting the patrol, lewd behavior at urinals in the restrooms. These plainclothes patrols include P.A.P.D. officers entering P.A.B.T. restroom facilities.

54. As identified in documentation provided by the New York State Division of Criminal Justice Services in response to a Freedom of Information Law request, under N.Y.P.L. § 245.00 the P.A.P.D. arrested 74 individuals in 2014, 22 individuals in 2015, 20 individuals in 2016, and 5 individuals in 2017 (as of August 18, 2017). As such, from January 1, 2014, through August 18, 2017, the P.A.P.D. made 121 arrests under N.Y.P.L. § 245.00 for public lewdness at locations patrolled by the P.A.P.D.

55. Upon information and belief, P.A.P.D officers arrested at least 69 individuals in 2014 in the P.A.B.T. on public lewdness charges; most of those arrested were accused of masturbating in P.A.B.T. restrooms; and, according to court records, those individuals were allegedly observed by plainclothes officers often standing next to them at an adjacent urinal.⁴

⁴ Exhibit A, Joseph Goldstein, *Lawyers Challenge Lewdness Arrests at Port Authority Bus Terminal*, NEW YORK TIMES (Oct. 7, 2014), <https://www.nytimes.com/2014/10/08/nyregion/lawyers-challenge-lewdness-arrests-at-port-authority-bus-terminal.html>.

56. Upon information and belief, P.A.P.D. officers engage in a pattern and practice of specifically targeting men using P.A.B.T. restrooms that P.A.B.T. officers perceive as gay or bisexual (based on appearance), and/or gender non-conforming (a person assigned male at birth wearing what a P.A.P.D. officer believes to be non-masculine attire or jewelry), and/or men who have sex with men, for arrest on charges including Public Lewdness under N.Y.P.L. § 245.00 and/or Exposure of a Person under N.Y.P.L. § 245.01.

57. The P.A.P.D.'s targeting operations often proceed in a typical manner. A plainclothes P.A.P.D. officer will approach or wait at a urinal in a P.A.B.T. restroom, sometimes for up to ten minutes, waiting for a man to approach the urinals. The P.A.P.D. officer will then pretend to use the urinal next to or near a targeted individual. The P.A.P.D. officer may then stare at the targeted individual, make gestures, or grab his own genitals, even expose his own genitals and/or peer over or around the privacy divider separating the urinals. In some cases, the P.A.P.D. officer may step back from the urinal and attempt to look around the urinal's privacy wall at the individual's hands and genitals, and then exit the bathroom. When the targeted individual reacts to the behavior of the P.A.P.D. officer, the officer will exit the restroom.

58. When the targeted individual exits the restroom, P.A.P.D. officers will then arrest him on charges of Public Lewdness under N.Y.P.L. § 245.00 and/or Exposure of a Person under N.Y.P.L. § 245.01.

59. In support of the charges, P.A.P.D. officers sign a sworn affidavit using identical or nearly identical language, provided by an assistant district attorney, when describing the alleged behavior of the arrestee. P.A.P.D. officers claim, in boilerplate language they have been given by the District Attorney's office, that the targeted individual was observed masturbating.

Very often these recitations include no individualized facts or circumstances and no factual support for the conclusion that any conduct occurred in public.

60. The officers' repeated use of boilerplate language, the implausibly high arrest rate for such alleged conduct of at least 69 arrests in 2014, sometimes with arrests for public lewdness occurring twice in one hour, or four times in two days, the non-credible nature of the allegations (observations of masturbation at P.A.B.T. urinals – separated by privacy walls – in a crowded public restroom during rush-hour periods), and the officers' entrapment-like conduct at the urinals all support the conclusion that these were unlawful, unconstitutional, targeted arrests made by P.A.P.D. officers on the discriminatory basis of actual or perceived sexual orientation, and/or to boost "quality of life" arrest statistics at P.A.B.T. and/or individual P.A.P.D. officers' arrest statistics. While these practices continue today, the statistics further demonstrate a severe drop in the number of arrests effected in 2015 through the present.

61. Officer testimony further revealed that no additional protocols, training, or supervision is provided for officers completing plainclothes patrols. Indeed, Officer Tone articulated that "reasonable suspicion" is the appropriate standard for effecting public lewdness arrests, not probable cause.

62. Such targeting, and the concomitant arrest and criminal charges, results in, among other things, severe emotional and mental distress and trauma, potential jail sentences and fines, fear of law enforcement, fear of using the P.A.B.T and other Port Authority facilities, discomfort in using public restrooms, public embarrassment and humiliation, and potential and/or actual reputational and professional harm for the falsely accused victims.

63. Upon information and belief, Defendants are continuing their discriminatory, unlawful, and unconstitutional conduct. Similar lewdness arrests have occurred in 2017 and 2018, subsequent to the initiation of this case.

The Port Authority Police Department's Failure to Supervise Officer Conduct

64. Upon information and belief, Sergeants, Tour Commanders, and the Commanding Officer of the Port Authority Bus Terminal play an active role in the on-the-job training, instruction, and supervision of officer patrols, review of arrest paperwork, and prosecution of criminal cases by the Assistant District Attorney.

65. Sergeants and tour commanders are responsible for overseeing the patrols and arrests completed during their assigned shifts. Indeed, both supervisors are required to review and sign off on the paperwork of any arrest completed by officers under their supervision.

66. Officer testimony demonstrated that "reviewing" the arrest paperwork means ensuring that the forms are properly completed and that the narrative description includes all the elements of the listed charge.

67. One supervisor testified that he "checks for probable cause" by confirming with each arresting officer that probable cause existed, but does not further investigate the facts of the case or ask for the facts that supported their conclusions that, for example, a man was masturbating or that he was in public.

68. The Commanding Officer is further required to review and sign off on arrest paperwork for the cases prosecuted by an assistant district attorney, providing another level of supervision and review for arrests of this nature.

69. Despite the three levels of supervisory review, named Plaintiffs and class members suffered false arrests based on unconstitutional policing practices. The chain of

command at the Port Authority Police Department failed to adequately supervise the officers conducting plainclothes patrols in the men's restrooms at the Port Authority Bus Terminal, causing plaintiffs' false arrests.

70. Upon information and belief, the Port Authority Police Department is continuing to fail to adequately supervise officer conduct resulting in false arrests for public lewdness and exposure of a person.

Martinez v. Port Authority (2005)

71. The Port Authority and P.A.P.D. officers have been found liable for similar false arrests in the past. As a result, Defendants knew or should have known that the policies and/or practices alleged herein were unlawful and unconstitutional.

72. On February 1, 2000, Alejandro Martinez was arrested outside the men's room at the PATH station concourse of the World Trade Center. (Exhibit B, Martinez v. Port Authority, No. 01 Civ. 721 (PKC), 2005 WL 2143333, at *1 (S.D.N.Y. Sept. 2, 2005.)) He was charged with public lewdness, and remained in law enforcement custody for approximately 19 hours before he was released. (Id.) He was one of seven men arrested in separate alleged incidents of public lewdness in a single restroom of the World Trade Center's PATH station during an approximately 2.5-hour morning window. (Id.) Each individual was accused by the arresting officer of having engaged in public masturbation. (Id.)

73. Mr. Martinez was the only one of the seven arrestees who did not plead guilty to a reduced charge of disorderly conduct. (Id.) He proceeded to trial in state court, and after a one-day bench trial, he was acquitted. (Id.)

74. Mr. Martinez subsequently brought a civil action in the Southern District of New York against the Port Authority and three individual P.A.P.D. officers, asserting claims under 42 U.S.C. § 1983. (Id.)

75. At trial, Mr. Martinez “submitted evidence sufficient for a reasonable jury to conclude that his arrest was part of a Port Authority pattern or practice to conduct ‘sweep’ arrests ... for the crime of public lewdness, without regard to probable cause.” (Martinez, 2005 WL 2143333, at *5.) Mr. Martinez demonstrated that “the documentation of the public lewdness arrests contained nearly identical descriptions of the circumstances surrounding the acts of public lewdness.” (Id. at *6.) Mr. Martinez also submitted evidence “establishing that the Port Authority had a custom of performing public lewdness arrests pursuant to a quota.” (Id. at *7.) The evidence at trial was sufficient for the jury to conclude “that based on the exhibits and testimony, these arrests occurred without probable cause.” (Id. at *7, 8 (“the jury was supplied with evidence sufficient to conclude that the Port Authority had a custom that led to widespread public lewdness arrests without regard for probable cause.”))

76. On November 18, 2004, after a four-day trial, a jury returned a verdict in Mr. Martinez’s favor. (Id. at *1.)

77. The trial jury awarded Mr. Martinez damages in the amount of \$1,104,000, which the judge remitted to \$464,000. (Id.)

78. Despite the finding of liability in the Martinez case, and the substantial damage award, Defendants continue to engage in the unlawful and unconstitutional acts alleged herein. Defendants failed to modify any protocol, training, supervision protocol or monitoring of these plainclothes patrols or public lewdness arrests, causing these types of unconstitutional arrests to reoccur.

The Port Authority Police Department's Failure to Investigate Its Pattern and Practice of Unlawful and Unconstitutional Discriminatory Conduct

79. On October 7, 2014, the New York Times released an article detailing the false arrests of named plaintiffs Cornell Holden and Miguel Mejia (the "New York Times Article").

80. Despite the highly public nature of this article and the serious nature of the allegations therein, Defendants took no steps to investigate or correct the unconstitutional pattern and practice of policing that resulted in the false arrests of named Plaintiffs and class members.

81. Upon information and belief, no internal investigation was ever conducted following the publication of the New York Times Article and, despite the filing of this lawsuit, and notwithstanding discovery therein, no investigation into this practice has been conducted to date.

82. Deposition testimony further revealed that no disciplinary action was taken against any Port Authority Police Officer related to the types of policing described herein, despite the unconstitutional and entrapment-style tactics used by police officers to effect these false arrests. Similarly, there was no change of protocol, no provided training, and no additional supervision of plainclothes patrols in men's bathrooms despite the potential for invasion of commuter's privacy resulting from these patrols.

83. Furthermore, while the New York Times Article provided recent examples of officer misconduct, the Port Authority was on notice that this pattern and practice of policing is unconstitutional given the findings in the Martinez case in 2005.

84. Despite being on notice for more than a decade, and again put on notice in 2014, Defendants have taken no steps to investigate, correct or prevent false arrests for public lewdness and exposure of a person of men standing at urinals in P.A.B.T. restrooms.

The Arrest of Plaintiff Cornell Holden

85. At or around 9:05 a.m. on May 12, 2014, Plaintiff Cornell Holden was using a urinal in a P.A.B.T. restroom.

86. While at the urinal, Mr. Holden noticed a person he later learned to be P.A.P.D. Officer Opromalla watching him from an adjacent urinal. P.A.P.D. Officer Opromalla then stepped back from his urinal, looked around the privacy wall between the urinals in an apparent effort to see Mr. Holden's hands and genitals, and left the restroom.

87. When Mr. Holden exited the restroom, he was arrested by other P.A.P.D. officers. He was handcuffed in a public space in the P.A.B.T., in plain view of numerous P.A.B.T. patrons, and led to the P.A.P.D. detention facility.

88. Mr. Holden was charged with Public Lewdness under N.Y.P.L. § 245.00, and Exposure of a Person under N.Y.P.L. § 245.01.

89. Mr. Holden was in P.A.P.D. detention for several hours. During that time, he was fingerprinted and photographed.

90. Defendant P.A.P.D. Lieutenant Michael DeMartino issued the desk appearance ticket number. Defendant P.A.P.D. Sergeant Jordan Esposito signed off on the arrest paperwork. Defendant P.A.P.D. Lieutenant Richard Aylmer was the tour commander at the time of the arrest.

91. While in a holding cell following his arrest, Mr. Holden overheard a P.A.P.D. officer being congratulated on the arrest, and being referred to by other P.A.P.D. officers as "the gay whisperer."

92. At the time of the arrest, Mr. Holden had no criminal history.

93. On June 27, 2014, Defendant P.A.P.D. Officer Opromalla signed a sworn affidavit in support of the charges. In that affidavit, Officer Opromalla falsely claimed that he observed Mr. Holden masturbating at a P.A.B.T. restroom urinal.

94. Upon information and belief, Mr. Holden was targeted for arrest by P.A.P.D. officers, including Officer Opromalla, because of his appearance, in that his clothing, hairstyle, and jewelry were such that P.A.P.D. officers perceived him to be gay or bisexual and/or gender non-conforming and/or a man who has sex with men.

95. Following his arrest, Mr. Holden pleaded not guilty and staunchly maintained his innocence. As a result, he was forced to appear in court a number of times over the succeeding months. This included court appearances on July 2, 2014; September 8, 2014; October 29, 2014; and December 9, 2014. Mr. Holden was presented with plea offers by the New York County Assistant District Attorney's Office, all of which he refused.

96. At a court appearance on December 9, 2014, the New York County District Attorney's Office moved to dismiss the charges against Mr. Holden. The charges were dismissed and the record was sealed.

97. Mr. Holden has a reasonable fear of future wrongful arrests arising out of his lawful use of the P.A.B.T. and P.A.B.T. restrooms.

The Arrest of Plaintiff Miguel Mejia

98. At or around 5:04 p.m. on July 9, 2014, Plaintiff Miguel Mejia was using a urinal in a P.A.B.T. restroom.

99. While at the urinal, Mr. Mejia noticed a person he later learned to be a P.A.P.D. officer watching him. After Mr. Mejia turned his head to look at him, the P.A.P.D. officer left the restroom.

100. When Mr. Mejia exited the restroom, he was arrested by other P.A.P.D. officers. At the time of his arrest, Mr. Mejia was not told why he was being arrested. He was handcuffed in a public space in the P.A.B.T., in plain view of numerous P.A.B.T. patrons, and led to the P.A.P.D. detention facility.

101. Mr. Mejia was in P.A.P.D. detention for approximately three hours. During that time, he was fingerprinted and photographed.

102. Mr. Mejia was charged with Public Lewdness under N.Y.P.L. § 245.00.

103. Defendant P.A.P.D. Lieutenant Michael DeMartino signed off on the arrest paperwork as the desk sergeant. Defendant P.A.P.D. Lieutenant Richard Aylmer was the tour commander at the time of the arrest.

104. At the time of the arrest, Mr. Mejia had no criminal history.

105. On July 23, 2014, Defendant P.A.P.D. Officer John Tone signed a sworn affidavit in support of the charges. In that affidavit Officer Tone falsely claimed that he observed Mr. Mejia masturbating at a P.A.B.T. restroom urinal. P.A.P.D. Officer Shaun Kehoe was also involved in the arrest of Mr. Mejia.

106. Upon information and belief, Mr. Mejia was targeted for arrest by P.A.P.D. officers, including Officer Tone and/or Officer Kehoe, because of his appearance, in that his clothing, tattoos, and jewelry were such that P.A.P.D. officers perceived him to be gay or bisexual and/or gender non-conforming and/or a man who has sex with men.

107. Following his arrest, Mr. Mejia pleaded not guilty and staunchly maintained his innocence. As a result, he was forced to appear in court a number of times over the succeeding months. This included court appearances on August 19, 2014 and October 14, 2014. Mr. Mejia

was presented with plea offers by the New York County Assistant District Attorney's Office, all of which he refused.

108. On November 17, 2014, Mr. Mejia was tried before the Hon. Larry Stephen of the Supreme Court of the State of New York, New York County, Criminal Term Part 1. He testified in his own defense. At the conclusion of the trial, Mr. Mejia was acquitted.

109. Mr. Mejia has a reasonable fear of future wrongful arrests arising out of his lawful use of the P.A.B.T. and P.A.B.T. restrooms.

The Arrest of Plaintiff Malcom Russell

110. At or around 4:55 p.m. on September 23, 2014, while running errands, Plaintiff Malcom Russell approached a urinal in a P.A.B.T. restroom to urinate.

111. Prior to Mr. Russell even removing his penis from his pants to urinate, he was approached by a P.A.P.D. officer in plainclothes.

112. The officer told Mr. Russell he was under arrest for "soliciting." Mr. Russell was then taken to the P.A.P.D. precinct in the Port Authority Bus Terminal.

113. Mr. Russell was in P.A.P.D. detention for approximately three hours. During that time, he was fingerprinted and photographed.

114. Mr. Russell was charged with Public Lewdness under N.Y.P.L. § 245.00 and Exposure of a Person under N.Y.P.L. § 245.01.

115. Defendant P.A.P.D. Sergeant Jaycard signed off on the arrest paperwork as the desk sergeant. Defendant P.A.P.D. Lieutenant Paul O'Dell was the tour commander at the time of the arrest.

116. Defendant former Captain John Fitzpatrick signed off on the Police Criminal Complaint Follow-Up Report as the Commanding Officer of the Port Authority Bus Terminal.

117. Upon information and belief, Mr. Russell was targeted for arrest by P.A.P.D. officers, including Defendant P.A.P.D. Officer Montero, because of his appearance, in that his clothing, tattoos, and jewelry were such that P.A.P.D. officers perceived him to be gay or bisexual, and/or gender non-conforming, and/or a man who has sex with men.

118. Following his arrest, upon information and belief, the arrest paperwork was sealed.

119. Mr. Russell has a reasonable fear of future wrongful arrests arising out of his lawful use of the P.A.B.T. and P.A.B.T. restrooms.

The Arrest of Plaintiff Marcos Polonia

120. At or around 5:10 p.m. on August 1, 2014, while on his way to catch a bus to teach a Zumba class, Plaintiff Marcos Polonia entered a P.A.B.T. restroom to urinate.

121. Upon entering the restroom, Mr. Polonia observed an individual who he later determined to be Defendant Vijay Seetaram standing at a urinal, attempting to make eye contact with men using the restroom.

122. Mr. Polonia initially approached a urinal on the same side of the restroom as Officer Seetaram and felt Officer Seetaram watching him.

123. Because he found Officer Seetaram's behavior odd and off-putting, Mr. Polonia decided to use the urinals on the other side of the restroom.

124. Officer Seetaram then followed Mr. Polonia to the other side of the restroom while holding his own genitals and gestured as if he were masturbating.

125. Mr. Polonia, feeling extremely uncomfortable entered a stall to attempt to use the restroom, but could not. He then attempted to use a urinal, but again was too uncomfortable to use the restroom.

126. Mr. Polonia then exited the restroom and walked to his bus gate, where he observed Officer Seetaram running up to him and calling him back and away from the bus.

127. Officer Seetaram then placed Mr. Polonia under arrest for public lewdness and exposure of a person.

128. Mr. Polonia was in P.A.P.D. detention for several hours. During that time, he was fingerprinted and photographed.

129. Mr. Polonia was charged with Public Lewdness under N.Y.P.L. § 245.00 and Exposure of a Person under N.Y.P.L. § 245.01.

130. Defendant P.A.P.D. Sergeant Cruz signed off on the arrest paperwork as the desk sergeant. No tour commander is listed in Mr. Polonia's arrest record.

131. Upon information and belief, Mr. Polonia was targeted for arrest by P.A.P.D. officers, including Defendant P.A.P.D. Officer Seetaram, because of his appearance, in that his brightly colored and slim fitting exercise clothing were such that P.A.P.D. officers perceived him to be gay or bisexual, and/or gender non-conforming, and/or a man who has sex with men.

132. Mr. Polonia was never prosecuted for either charge. On or around October 8, 2014, Mr. Polonia learned that the District Attorney's office declined to prosecute.

133. Mr. Polonia has a reasonable fear of future wrongful arrests arising out of his lawful use of the P.A.B.T. and P.A.B.T. restrooms.

Council Member Dromm's Letter to The Port Authority

134. As cited above, on October 7, 2014, the New York Times published an article addressing the pattern of arrests at the P.A.B.T. that is the subject of this Complaint. (Exhibit A.)

135. Following the publication of that article, New York City Council Member Daniel Dromm, from New York City's 25th District, wrote a letter to the Port Authority, dated October 10, 2014. (Exhibit C.)

136. Council Member Dromm wrote:

I am writing to express my deep concern over policing practices at the Port Authority Bus Terminal. A recent *New York Times* article has shed light on the pernicious pattern of Port Authority Police Department (PAPD) officers arresting certain men for lewdness. Despite the dearth of complaints, the PAPD seems to have stationed officers in the bathroom to arrest men for allegedly masturbating.

It appears from the article that gay men are being targeted. I am deeply disturbed by what looks like the anti-lesbian, gay, bisexual and transgender profiling, which harkens back to a very dark time in this country when the members of the LGBT community were routinely harassed by law enforcement. I have painful memories of my own false arrest on a similar charge as a teenager, and many other gay men have similar stories.

Putting aside the LGBT dimension, I would like to say how utterly creepy and intrusive such a violation of someone's personal space is. Why you would be putting any resources into patrolling bathrooms to monitor how people urinate is beyond comprehension.

These arrests and their prosecution are completely unacceptable. I expect such false and apparently discriminatory arrests to end immediately.

137. Despite Council Member Dromm's letter, Defendants continue to engage in the unlawful and unconstitutional acts alleged herein.

P.A.P.D.'s False Arrests Have Continued

138. Upon information and belief, despite the above-described incidents that should have alerted P.A.P.D. that officers engage in a pattern and practice of targeting and wrongly arresting men on baseless charges including public lewdness and exposure, falsely claiming that they were masturbating at P.A.B.T. urinals, P.A.P.D. failed to train or retrain officers in non-discriminatory practices, failed to investigate these incidents or the patterns of incidents, failed to consistently systematically monitor or audit these arrests for discriminatory patterns, failed to ensure supervisors were consistently monitoring individual arrests for discrimination, and failed to consistently supervise and/or discipline officers who did make these arrests based on discriminatory reasons. As a result of these failures, these unconstitutional arrests have continued.

139. For example, on March 13, 2016, Jeffrey K. Reed was arrested after using a P.A.B.T. restroom. (Exhibit D, Notice of Claim of Jeffrey K. Reed.)⁵ A plainclothes P.A.P.D. officer told Mr. Reed that he had been observed masturbating at a urinal. (Id.) He was held in custody for approximately four hours. (Id.) He was charged with Public Lewdness and Exposure of a Person. (Id.) Mr. Reed pleaded not guilty to the charges. (Id.)

140. On October 18, 2016, the charges against Mr. Reed were dismissed. (Id.)

141. Mr. Reed subsequently filed a notice of claim against The Port Authority of New York and New Jersey, claiming, *inter alia*, false arrest and violation of his statutory and

⁵ Mr. Reed is not a named Plaintiff in this action.

constitutional rights arising out of “the customs and practices of the Port Authority of New York and New Jersey and its police department.” (Id.)

The Named Plaintiffs’ Injuries

142. As a direct and proximate result of the above conduct by Defendants, and each of them, the named Plaintiffs have been harmed, which harm includes, but is not limited to:

143. Violations of their constitutional rights to be free from unreasonable and unlawful searches and seizures, including discriminatory targeting and intrusions into reasonable expectations of privacy;

144. Violations of their constitutional rights to due process, including liberty interests in self-expression, bodily integrity, and privacy;

145. Violations of their constitutional rights to equal protection, including to be free from discriminatory application of the law;

146. Severe emotional and mental distress and trauma arising out of, among other things, intimidation, harassment, and public humiliation, threats of potential jail sentences and fines, and potential and/or actual reputational and professional harm; and

147. Other harm according to proof.

CLASS ACTION ALLEGATIONS

148. All claims set forth in the First and Second Causes of Action are brought by the named Plaintiffs individually and on behalf of all other similarly situated persons pursuant to Rules 23(a), 23(b)(2), and 23(b)(3) of the Federal Rules of Civil Procedure.

149. The named Plaintiffs propose the First and Second Causes of Action be certified on behalf of the following class: persons who, because they are (1) male, (2) gay or bisexual, and/or gender non-conforming, and/or have sex with men, or perceived to be gay or bisexual,

and/or gender non-conforming, and/or have sex with men by P.A.P.D. officers, and (3) used a Port Authority Bus Terminal restroom urinal and were arrested by the P.A.P.D. for offenses under N.Y.P.L. § 245.00 and/or N.Y.P.L. § 245.01 from 2014 through the present.

150. The claims of the proposed class representatives and those of the putative class members in the First and Second Causes of Action raise common questions of law and fact concerning, *inter alia*, whether Defendants have implemented, enforced, encouraged, and/or sanctioned a policy, practice, and/or custom of:

Targeting men using a restroom urinal at the Port Authority Bus Terminal for false arrest and criminal charges including public lewdness and exposure, by falsely claiming that they were masturbating at urinals.

151. These questions are common to the named Plaintiffs and to the members of the putative class because Defendants have acted and will continue to act on grounds generally applicable to both the named Plaintiffs and putative class members.

152. Upon information and belief, members of the putative class are so numerous that joinder of all class members is impracticable.

153. The claims of the named Plaintiffs are typical of the claims of the members of the putative class.

154. The named Plaintiffs will fairly and adequately protect the interests of the members of the putative class.

155. The named Plaintiffs are represented by counsel who are experienced in federal class action, including those involving civil rights issues.

156. The issues common to the class predominate any individual issues of law or fact.

157. In addition to the foregoing reasons, class action is the superior vehicle for litigating Plaintiffs' claims due to the financial burden and emotional toll of individual litigation, and the embarrassing nature of the false charges.

158. As set forth above, Defendants have acted on grounds generally applicable to the members of the putative class, thereby making appropriate final injunctive and corresponding declaratory relief with respect to the class as a whole.

CLAIMS FOR RELIEF

FIRST CAUSE OF ACTION: 42 U.S.C. § 1983 CLAIM OF FOURTH AMENDMENT VIOLATIONS (Against Officer Defendants)

159. Plaintiffs bring this claim for declaratory, injunctive, and monetary relief against Officer Defendants to redress continuing and likely future violations of the Fourth Amendment to the United States Constitution.

160. Upon information and belief, Officer Defendants have, in violation of the Fourth Amendment to the United States Constitution, officially engaged in, encouraged, supervised, or otherwise sanctioned a policy, practice, and/or custom of: (i) identifying and targeting men, including Plaintiffs, using restroom urinals at the P.A.B.T., on the basis that they were perceived to be gay or bisexual, and/or gender non-conforming, and/or have sex with men; and (ii) unlawfully and wrongfully stopping, searching including by intruding on reasonable expectations of privacy by looking over or around privacy dividers, seizing, and falsely arresting and charging those targeted men, including Plaintiffs, without probable cause in violation of the Fourth Amendment to the United States Constitution.

161. As a result of the P.A.P.D.'s failures, there exists a credible threat that the named Plaintiffs and putative class members will be subjected to false arrest and baseless criminal charges in the future.

162. Plaintiffs will suffer irreparable and repeated injury unless the Court orders equitable relief. Such injury includes, *inter alia*, the deprivation of Plaintiffs' constitutionally protected rights under the Fourth Amendment of the United States Constitution.

163. For reasons including, but not limited to, those stated herein, an actual dispute exists between Plaintiffs and Officer Defendants, in which the parties have genuine and opposing interests that are direct and substantial, and of which a judicial determination will be final and conclusive.

164. Compelling Officer Defendants, their agents, employees, and successors in office, and all persons acting in concert with them, to comply with the dictates of the United States Constitution does not impose an improper or undue burden on Officer Defendants, and, in fact, it serves the public interest by ensuring compliance with well-established Constitutional protections.

165. Monetary damages are warranted in this case and should be awarded. However, monetary damages alone cannot adequately address the injuries suffered by named Plaintiffs and members of the putative class.

166. The named Plaintiffs and the putative class are entitled to the issuance of a permanent injunction prohibiting Officer Defendants from engaging in the unlawful and unconstitutional practices alleged herein.

167. Specifically, Plaintiffs are entitled to permanent relief enjoining and restraining Officer Defendants, their agents, employees, successors in office, and all others acting in concert

with them from identifying and targeting men, including Plaintiffs, using restroom urinals at the P.A.B.T., on the basis that they were perceived to be gay or bisexual, and/or gender non-conforming, and/or have sex with men, and unlawfully and wrongfully searching, seizing, and falsely arresting and charging those targeted men without probable cause, including Plaintiffs.

168. The dispute entitles the named Plaintiffs and the putative class to a declaratory judgment that by engaging in the acts and conduct complained of herein, Officer Defendants denied Plaintiffs their Fourth Amendment rights and protections, including, but not limited to, the right to be free from unreasonable searches and seizures, and false arrest and baseless charges, in violation of the United States Constitution. Such judgment will serve a useful purpose in clarifying and settling the legal issues in the case.

169. Specifically, Plaintiffs are entitled to a declaration that Officer Defendants' acts, practices, policies, customs, and/or omissions, including identifying and targeting men, including Plaintiffs, using restroom urinals at the P.A.B.T., on the basis that they were perceived to be gay or bisexual, and/or gender non-conforming, and/or men who have sex with men, and unlawfully and wrongfully searching, seizing, and falsely arresting and charging those targeted men, including Plaintiffs, without probable cause, have deprived Plaintiffs of their rights under the Fourth Amendment to the United States Constitution and 42 U.S.C. § 1983.

170. Plaintiffs are also entitled to a declaration that Officer Defendants' acts, practices, policies, customs, and/or omissions, as detailed above, violate the Fourth Amendment to the United States Constitution on its face and as applied.

171. The named Plaintiffs and the putative class are entitled to compensatory damages for economic harm, pain and suffering, and emotional and mental distress in an amount to be

determined at trial against Officer Defendants jointly and severally, together with interest and costs.

172. The named Plaintiffs are entitled to punitive damages in an amount to be determined at trial against Officer Defendants, whose actions constituted outrageous conduct, were reckless, and showed a callous indifference to and willful disregard of Plaintiffs' rights as set forth above.

173. The named Plaintiffs and the putative class are entitled to reasonable attorneys' fees and costs to be paid by Officer Defendants pursuant to 28 U.S.C. § 2412; and

174. The named Plaintiffs and the putative class are entitled to such other and further relief as the Court deems just and equitable.

**SECOND CAUSE OF ACTION: 42 U.S.C. § 1983 CLAIM OF FOURTEENTH
AMENDMENT VIOLATIONS
(Against Officer Defendants)**

175. Plaintiffs bring this claim for declaratory, injunctive, and monetary relief against Officer Defendants to redress continuing and likely future violations of the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

176. Upon information and belief, Officer Defendants have, in violation of the Fourteenth Amendment to the United States Constitution engaged in, encouraged, supervised, or otherwise sanctioned a policy, practice, and/or custom of: (i) identifying and targeting men, including Plaintiffs, using restroom urinals at the P.A.B.T., on the basis that they were perceived to be gay or bisexual, and/or gender non-conforming, and/or men who have sex with men, in violation of, *inter alia*, Plaintiffs' liberty interests in self-expression, bodily integrity, and privacy in protecting those choices from being policed as well as in using urinals shielded by privacy dividers outside of government view; and (ii) unlawfully and wrongfully searching, seizing,

arresting, and charging those targeted men, including Plaintiffs, thus subjecting these men, including Plaintiffs, to discriminatory treatment in violation of the Fourteenth Amendment to the United States Constitution.

177. The policy, practice, and/or custom of false arrests addressed herein violated Plaintiffs' rights to due process, because such false arrests and the concomitant baseless charges of public lewdness and/or exposure were unfair and not impartial, and deprived Plaintiffs of their liberty without due process of law.

178. The policy, practice, and/or custom of false arrests and baseless charges addressed herein, of men that P.A.P.D. officers perceive as gay or bisexual, and/or gender non-conforming, and/or men who have sex with men, violated Plaintiffs' equal protection rights because such false arrests were based upon impermissible and discriminatory considerations.

179. The named Plaintiffs and putative class members are at risk of prospective constitutional deprivations at the hands of Officer Defendants because Officer Defendants' policy, practice, and/or custom detailed above is ongoing, and Plaintiffs still have cause to use the P.A.B.T. and may have cause to use P.A.B.T. restroom urinals.

180. As a result, there exists a credible threat that the named Plaintiffs and putative class members will be subjected to false arrest and baseless criminal charges in the future.

181. Plaintiffs will suffer irreparable and repeated injury unless the Court orders equitable relief. Such injury includes, *inter alia*, the deprivation of Plaintiffs' constitutionally protected rights under the Fourteenth Amendment of the United States Constitution.

182. For reasons including, but not limited to, those stated herein, an actual dispute exists between Plaintiffs and Defendants, in which the parties have genuine and opposing

interests that are direct and substantial, and of which a judicial determination will be final and conclusive.

183. Compelling Officer Defendants, their agents, employees, and successors in office, and all persons acting in concert with them, to comply with the dictates of the United States Constitution does not impose an improper or undue burden on Officer Defendants, and, in fact, it serves the public interest by ensuring compliance with well-established Constitutional protections.

184. Monetary damages are warranted in this case and should be awarded. However, monetary damages alone cannot adequately address the injuries suffered by named Plaintiffs and members of the putative class.

185. The named Plaintiffs and the putative class are entitled to the issuance of a permanent injunction prohibiting Officer Defendants from engaging in the unlawful and unconstitutional practices alleged herein.

186. Specifically, Plaintiffs are entitled to permanent relief enjoining and restraining Officer Defendants, their agents, employees, successors in office, and all others acting in concert with them from identifying and targeting men, including Plaintiffs, using restroom urinals at the P.A.B.T., on the basis that they were perceived to be gay or bisexual, and/or gender non-conforming, and/or men who have sex with men, unlawfully and wrongfully searching, seizing, and falsely arresting and charging those targeted men, including Plaintiffs.

187. The dispute entitles the named Plaintiffs and the putative class to a declaratory judgment that by engaging in the acts and conduct complained of herein, Officer Defendants denied Plaintiffs their Fourteenth Amendment rights and protections, including, but not limited to, the rights to due process and equal protection, including, but not limited to, the right to be free

from unreasonable searches and seizures, false arrests and baseless charges, and impermissible and discriminatory targeting, and Plaintiffs' liberty interest in self-expression of gender identity in public without fear of arrest, in violation of the United States Constitution. Such judgment will serve a useful purpose in clarifying and settling the legal issues in the case.

188. Specifically, Plaintiffs are entitled to a declaration that Officer Defendants' acts, practices, policies, customs, and/or omissions, including identifying and targeting men, including Plaintiffs, using restroom urinals at the P.A.B.T., on the basis that they were perceived to be gay or bisexual, and/or gender non-conforming, and/or men who have sex with men, and unlawfully and wrongfully searching, seizing, and falsely arresting and charging those targeted men, including Plaintiffs, have deprived Plaintiffs of their rights under the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983.

189. Plaintiffs are also entitled to a declaration that Officer Defendants' acts, practices, policies, customs, and/or omissions, as detailed above, violate the Fourteenth Amendment to the United States Constitution on its face and as applied.

190. The named Plaintiffs and the putative class are entitled to compensatory damages for economic harm, pain and suffering, and emotional and mental distress in an amount to be determined at trial against Officer Defendants jointly and severally, together with interest and costs.

191. The named Plaintiffs are entitled to punitive damages in an amount to be determined at trial against Officer Defendants, whose actions constituted outrageous conduct, were reckless, and showed a callous indifference to and willful disregard of Plaintiffs' rights as set forth above.

192. The named Plaintiffs and the putative class are entitled to reasonable attorneys' fees and costs to be paid by Officer Defendants pursuant to 28 U.S.C. § 2412; and

193. The named Plaintiffs and the putative class are entitled to such other and further relief as the Court deems just and equitable.

**THIRD CAUSE OF ACTION: 42 U.S.C. § 1983 CLAIM OF FOURTH AMENDMENT VIOLATIONS
(Against Municipal Defendants)**

194. Plaintiffs bring this claim for declaratory, injunctive, and monetary relief against The Port Authority of New York and New Jersey and the Port Authority Police Department to redress continuing and likely future violations of the Fourth Amendment to the United States Constitution.

195. Upon information and belief, the Municipal Defendants have, in violation of the Fourth Amendment to the United States Constitution, officially implemented, enforced, encouraged, and/or sanctioned a policy, practice, and/or custom of: (i) identifying and targeting men, including Plaintiffs, using restroom urinals at the P.A.B.T., on the basis that they were perceived to be gay or bisexual, and/or gender non-conforming, and/or have sex with men; and (ii) unlawfully and wrongfully stopping, searching, seizing, and falsely arresting and charging those targeted men, including Plaintiffs, without probable cause in violation of the Fourth Amendment to the United States Constitution.

196. The named Plaintiffs and putative class members are at risk of prospective constitutional deprivations at the hands of Municipal Defendants because Defendants' policy, practice, and/or custom detailed above is ongoing, and Plaintiffs still have cause to use the P.A.B.T. and may have cause to use P.A.B.T. restroom urinals. Officer deposition testimony revealed that the P.A.P.D. failed to provide protocol regarding what constitutes invasion of

privacy when surveilling bathrooms in plainclothes, failed to train or retrain officers in non-discriminatory practices, failed to investigate these incidents or the patterns of incidents, failed to consistently systematically monitor or audit these arrests for discriminatory patterns, failed to ensure supervisors were consistently monitoring individual arrests for discrimination and sufficient probable cause, and failed to discipline officers who did make these arrests based on discriminatory reasons. As a result of these failures, these unconstitutional arrests have continued.

197. As a result of the Municipal Defendants' failures, there exists a credible threat that the named Plaintiffs and putative class members will be subjected to false arrest and baseless criminal charges in the future.

198. Plaintiffs will suffer irreparable and repeated injury unless the Court orders equitable relief. Such injury includes, *inter alia*, the deprivation of Plaintiffs' constitutionally protected rights under the Fourth Amendment of the United States Constitution.

199. For reasons including, but not limited to, those stated herein, an actual dispute exists between Plaintiffs and Municipal Defendants, in which the parties have genuine and opposing interests that are direct and substantial, and of which a judicial determination will be final and conclusive.

200. Compelling Municipal Defendants, their agents, employees, and successors in office, and all persons acting in concert with them, to comply with the dictates of the United States Constitution does not impose an improper or undue burden on Municipal Defendants, and, in fact, it serves the public interest by ensuring compliance with well-established Constitutional protections.

201. Monetary damages are warranted in this case and should be awarded. However, monetary damages alone cannot adequately address the injuries suffered by named Plaintiffs and members of the putative class.

202. The named Plaintiffs and the putative class are entitled to the issuance of a permanent injunction prohibiting Defendants from engaging in the unlawful and unconstitutional practices alleged herein.

203. Specifically, Plaintiffs are entitled to permanent relief enjoining and restraining Municipal Defendants, their agents, employees, successors in office, and all others acting in concert with them from identifying and targeting men, including Plaintiffs, using restroom urinals at the P.A.B.T., on the basis that they were perceived to be gay or bisexual, and/or gender non-conforming, and/or have sex with men, and unlawfully and wrongfully searching, seizing, and falsely arresting and charging those targeted men without probable cause, including Plaintiffs.

204. The dispute entitles the named Plaintiffs and the putative class to a declaratory judgment that by engaging in the acts and conduct complained of herein, Municipal Defendants denied Plaintiffs their Fourth Amendment rights and protections, including, but not limited to, the right to be free from unreasonable searches and seizures, and false arrest and baseless charges, in violation of the United States Constitution. Such judgment will serve a useful purpose in clarifying and settling the legal issues in the case.

205. Specifically, Plaintiffs are entitled to a declaration that Municipal Defendants' acts, practices, policies, customs, and/or omissions, including identifying and targeting men, including Plaintiffs, using restroom urinals at the P.A.B.T., on the basis that they were perceived to be gay or bisexual, and/or gender non-conforming, and/or men who have sex with men, and

unlawfully and wrongfully searching, seizing, and falsely arresting and charging those targeted men, including Plaintiffs, without probable cause, have deprived Plaintiffs of their rights under the Fourth Amendment to the United States Constitution and 42 U.S.C. § 1983.

206. Plaintiffs are also entitled to a declaration that Defendants' acts, practices, policies, customs, and/or omissions, as detailed above, violate the Fourth Amendment to the United States Constitution on its face and as applied.

207. The named Plaintiffs and the putative class are entitled to compensatory damages for economic harm, pain and suffering, and emotional and mental distress in an amount to be determined at trial against Municipal Defendants jointly and severally, together with interest and costs.

208. The named Plaintiffs are entitled to punitive damages in an amount to be determined at trial against Municipal Defendants, whose actions constituted outrageous conduct, were reckless, and showed a callous indifference to and willful disregard of Plaintiffs' rights as set forth above.

209. The named Plaintiffs and the putative class are entitled to reasonable attorneys' fees and costs to be paid by Municipal Defendants pursuant to 28 U.S.C. § 2412; and

210. The named Plaintiffs and the putative class are entitled to such other and further relief as the Court deems just and equitable.

**FOURTH CAUSE OF ACTION: 42 U.S.C. § 1983 CLAIM OF FOURTEENTH
AMENDMENT VIOLATIONS
(Against Municipal Defendants)**

211. Plaintiffs bring this claim for declaratory, injunctive, and monetary relief against Municipal Defendants to redress continuing and likely future violations of the Due Process

Clause and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

212. Upon information and belief, Municipal Defendants have, in violation of the Fourteenth Amendment to the United States Constitution, officially implemented, enforced, encouraged, and/or sanctioned a policy, practice, and/or custom of: (i) identifying and targeting men, including Plaintiffs, using restroom urinals at the P.A.B.T., on the basis that they were perceived to be gay or bisexual, and/or gender non-conforming, and/or men who have sex with men, in violation of, *inter alia*, Plaintiffs' liberty interests in self-expression, bodily integrity, and privacy in protecting those choices from being policed and (ii) unlawfully and wrongfully searching, seizing, arresting, and charging those targeted men, including Plaintiffs, thus subjecting these men, including Plaintiffs, to discriminatory treatment in violation of the Fourteenth Amendment to the United States Constitution.

213. The policy, practice, and/or custom of false arrests addressed herein violated Plaintiffs' rights to due process, because such false arrests and the concomitant baseless charges of public lewdness and/or exposure were unfair and not impartial, and deprived Plaintiffs of their liberty without due process of law.

214. The policy, practice, and/or custom of false arrests and baseless charges, addressed herein, of men that P.A.P.D. officers perceive as gay or bisexual, and/or gender non-conforming, and/or men who have sex with men, violated Plaintiffs' equal protection rights because such false arrests were based upon impermissible and discriminatory considerations.

215. The named Plaintiffs and putative class members are at risk of prospective constitutional deprivations at the hands of Municipal Defendants because Municipal Defendants' policy, practice, and/or custom detailed above is ongoing, and Plaintiffs still have cause to use

the P.A.B.T. and may have cause to use P.A.B.T. restroom urinals. Officer deposition testimony revealed that the P.A.P.D. failed to train or retrain officers in non-discriminatory practices; failed to investigate these incidents or the patterns of incidents; failed to consistently systematically monitor or audit these arrests for discriminatory patterns; failed to ensure supervisors were consistently monitoring individual arrests for discrimination and sufficient probable cause; and failed to discipline officers who did make these arrests based on discriminatory reasons. As a result of these failures, these unconstitutional arrests have continued.

216. As a result, there exists a credible threat that the named Plaintiffs and putative class members will be subjected to false arrest and baseless criminal charges in the future.

217. Plaintiffs will suffer irreparable and repeated injury unless the Court orders equitable relief. Such injury includes, *inter alia*, the deprivation of Plaintiffs' constitutionally protected rights under the Fourteenth Amendment of the United States Constitution.

218. For reasons including, but not limited to, those stated herein, an actual dispute exists between Plaintiffs and Municipal Defendants, in which the parties have genuine and opposing interests that are direct and substantial, and of which a judicial determination will be final and conclusive.

219. Compelling Municipal Defendants, their agents, employees, and successors in office, and all persons acting in concert with them, to comply with the dictates of the United States Constitution does not impose an improper or undue burden on Municipal Defendants, and, in fact, it serves the public interest by ensuring compliance with well-established Constitutional protections.

220. Monetary damages are warranted in this case and should be awarded. However, monetary damages alone cannot adequately address the injuries suffered by named Plaintiffs and members of the putative class.

221. The named Plaintiffs and the putative class are entitled to the issuance of a permanent injunction prohibiting Municipal Defendants from engaging in the unlawful and unconstitutional practices alleged herein.

222. Specifically, Plaintiffs are entitled to permanent relief enjoining and restraining Municipal Defendants, their agents, employees, successors in office, and all others acting in concert with them from identifying and targeting men, including Plaintiffs, using restroom urinals at the P.A.B.T., on the basis that they were perceived to be gay or bisexual, and/or gender non-conforming, and/or men who have sex with men, unlawfully and wrongfully searching, seizing, and falsely arresting and charging those targeted men, including Plaintiffs.

223. The dispute entitles the named Plaintiffs and the putative class to a declaratory judgment that by engaging in the acts and conduct complained of herein, Municipal Defendants denied Plaintiffs their Fourteenth Amendment rights and protections, including, but not limited to, the rights to due process and equal protection, including, but not limited to, the right to be free from unreasonable searches and seizures, false arrests and baseless charges, and impermissible and discriminatory targeting, and Plaintiffs' liberty interest in self-expression of gender identity in public without fear of arrest, in violation of the United States Constitution. Such judgment will serve a useful purpose in clarifying and settling the legal issues in the case.

224. Specifically, Plaintiffs are entitled to a declaration that Defendants' acts, practices, policies, customs, and/or omissions, including identifying and targeting men, including Plaintiffs, using restroom urinals at the P.A.B.T., on the basis that they were perceived to be gay

or bisexual, and/or gender non-conforming, and/or men who have sex with men, and unlawfully and wrongfully searching, seizing, and falsely arresting and charging those targeted men, including Plaintiffs, have deprived Plaintiffs of their rights under the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983.

225. Plaintiffs are also entitled to a declaration that Defendants' acts, practices, policies, customs, and/or omissions, as detailed above, violate the Fourteenth Amendment to the United States Constitution on its face and as applied.

226. The named Plaintiffs and the putative class are entitled to compensatory damages for economic harm, pain and suffering, and emotional and mental distress in an amount to be determined at trial against Municipal Defendants jointly and severally, together with interest and costs.

227. The named Plaintiffs are entitled to punitive damages in an amount to be determined at trial against Municipal Defendants, whose actions constituted outrageous conduct, were reckless, and showed a callous indifference to and willful disregard of Plaintiffs' rights as set forth above.

228. The named Plaintiffs and the putative class are entitled to reasonable attorneys' fees and costs to be paid by Defendants pursuant to 28 U.S.C. § 2412; and

229. The named Plaintiffs and the putative class are entitled to such other and further relief as the Court deems just and equitable.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs request that the Court:

1. Issue a Declaratory Judgment on behalf of the named Plaintiffs and the putative class with respect to the First and Second Causes of Action

declaring that Defendants' acts, practices, policies, customs, and/or omissions violate the Plaintiffs' rights under the Fourth and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983 by, *inter alia*, identifying and targeting men, including Plaintiffs, using restroom urinals at the P.A.B.T., on the basis that they were perceived to be gay or bisexual, and/or gender non-conforming, and/or men who have sex with men, and unlawfully and wrongfully searching, seizing, and falsely arresting and charging those targeted men, including Plaintiffs.

2. With respect to the claims set forth in the First and Second Causes of Action, issue an order under F.R.C.P. 23(b)(2) permanently enjoining and restraining Defendants, their agents, employees, successors in office, and all others acting in concert with them from engaging in unconstitutional, unlawful and discriminatory acts, practices, policies, customs, and/or omissions of identifying and targeting men using restroom urinals at the P.A.B.T., on the basis that they were perceived to be gay or bisexual, and/or gender non-conforming, and/or men who have sex with men, and unlawfully and wrongfully searching, seizing, and falsely arresting and charging those targeted men, including Plaintiffs, by claiming that they were masturbating at P.A.B.T. urinals;
3. Award the named Plaintiffs and the putative class compensatory damages for economic harm, pain and suffering, and emotional and mental distress in an amount to be determined at trial against Defendants jointly and severally, together with interest and costs, under F.R.C.P. 23(b)(3), for

violations of the Fourth and Fourteenth Amendments to the United States Constitution;

4. Award the named Plaintiffs and the putative class punitive damages in an amount to be determined at trial against Defendants, whose actions constituted outrageous conduct, were reckless, and showed a callous indifference to and willful disregard of Plaintiffs' rights under the Fourth and Fourteenth Amendments to the United States Constitution;
5. Award the named Plaintiffs and the putative class reasonable attorneys' fees and costs to be paid by Defendants pursuant to 28 U.S.C. § 2412; and
6. Grant the named Plaintiffs and the putative class such other and further relief as the Court deems just and equitable.

DEMAND FOR JURY TRIAL

Plaintiffs demand a trial by jury on all claims and issues properly triable by a jury.

New York, New York

November 28, 2018

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EXHIBIT A



New York

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Lawyers Challenge Lewdness Arrests at Port Authority Bus Terminal



Cornell Holden, a 28-year-old baker who was arrested when leaving a Port Authority Bus Terminal bathroom in May, says he was wrongly charged.

BRYAN THOMAS FOR THE NEW YORK TIMES

By JOSEPH GOLDSTEIN

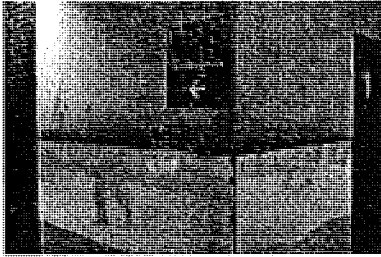
OCTOBER 7, 2014

For some of the more than 100,000 travelers who use the Port Authority Bus Terminal each day, a second-floor men's room is their first or last stop in New York City. The facilities are what you might expect: toilets, urinals, hand dryers.

But above the row of sinks, a posted sign offers an atypical note of caution: "Restrooms are patrolled by plain clothes officers."

It is not an idle warning.

Port Authority police officers have arrested more than 60 people this year in the bus terminal on public lewdness charges, a sevenfold increase over the same period last year. Most of those arrested were accused of masturbating in the second-floor bathroom. According to court records, they were observed by plainclothes officers, who were often standing next to them at an adjacent urinal.



A sign for the men's bathroom on the second floor of the bus terminal, where dozens of people have been arrested and charged with lewdness this year.
BRYAN THOMAS FOR THE NEW YORK TIMES

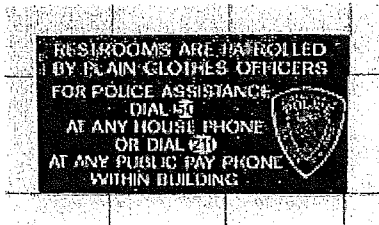
At least a dozen of those arrested are represented by the Legal Aid Society, whose lawyers say their clients — some of whom say they were merely urinating — were victims of aggressive and intrusive police tactics.



The effort by the Port Authority police is part of a crackdown on quality-of-life crimes at the bus terminal.

The bathroom is hardly a hotbed of sexual activity. Capt. John Fitzpatrick, the Port Authority police commander who oversees the bus terminal, acknowledged that complaints about sexual behavior in the men's room "are few and far between."

Nonetheless, an average of two arrests on lewdness or exposure charges are made each week, leading to the puzzling, recurring sight of men being handcuffed as they leave the bathroom.



A notice is posted inside the bathroom.
BRYAN THOMAS FOR THE NEW YORK TIMES

“Sometimes they are nicely dressed people,” said Dolma Tsering, 39, who sells hats and shawls from a kiosk near the men’s room. “I don’t know the reason.”

The Legal Aid Society argues that the police are overzealously enforcing laws against lewdness and exposure and, as a result, are arresting innocent men.

In a motion filed in August, a Legal Aid lawyer argued that the Port Authority’s interpretation of the law seemed to criminalize the use of public urinals.

“Surely, the use of a urinal in a public bathroom requires that man expose his unclothed penis,” wrote the lawyer, Caroline Glickler. The motion also noted that the urinals in question “are separated by partitions designed to enhance privacy” and the fact that her client, Cornell Holden, was standing at a urinal “indicates an attempt to have privacy.”

Mr. Holden, a 28-year-old baker, said he noticed that a bald man at the urinal next to him — who he later learned was a plainclothes police officer — was looking at him. A privacy divider, as well as a duffel bag slung over Mr. Holden’s shoulder, separated them.

“While I’m using the bathroom, he stepped back and kind of looks at me and then walks off,” Mr. Holden recalled. As he left, two officers approached him, asking what he had just been doing. “I said: ‘Nothing. I was using the bathroom,’” Mr. Holden said. “They pulled me aside, asked for my ID and then put handcuffs on me.”

Captain Fitzpatrick, the police commander, said that in cases where an arrest is made, officers have witnessed an act of public lewdness.

“They are not sidling up to somebody, trying to sneak a peek and misrepresenting what the person is doing,” the captain said. “There is no mistaking their behavior.”

In Mr. Holden’s case, the plainclothes officer, Michael Opromalla, filed an affidavit accusing Mr. Holden of rubbing himself in a manner “consistent with masturbation.”

"I was able to see the defendant do so while I was standing inside the public bathroom in a urinal adjacent to the urinal at which the defendant was standing," the officer continued.

"I wasn't committing a lewd act," Mr. Holden said of his arrest, on May 12. "I was peeing in the beginning, but I was shaking off when the guy stepped back and looked at me."

Mr. Holden said he wondered whether he had been targeted because the officer had assumed he was gay.

"I wore a leather jacket, fitted clothes. I guess that fits the description of a homosexual male," he said. "I was like, O.K., although I'm gay, I wasn't doing anything."

Held at a police station inside the bus terminal, Mr. Holden said he overheard a police officer refer to the bald plainclothes officer as "the gay whisperer."

Another man, who asked to be identified only by his first name, Miguel, said that while he urinated he also noticed a man, who he later learned was a police officer, watching him.

"You know how when you have a feeling someone is looking at you?" Miguel, 43, said of the episode, on July 9. "So I look over and see someone is smiling at me. It was like a smirk." He described the man as stocky and wearing blue shorts.

Miguel said he "paid it no mind," washed his hands and left the men's room. Walking toward his bus to New Jersey, he was arrested. The officer kept saying, "Oh, you know what you did," when Miguel asked why he had been arrested.

Miguel said he was not sure whether he had been targeted. "Anyone who would have gone next to that man, who would have stood in that particular urinal, would have gotten the rap that I got," he said.

But Miguel wondered whether his appearance played a role. "The way I was dressed that day — shorts, tank top, I was with my gym bag — I wasn't dressed in a way that someone would pay attention to me in a respectful way," he said.

A third man, a 38-year-old Mexican immigrant who works in a supermarket, shared a similar account of his arrest on May 30. He said that while he was urinating, the man next to him gave him a look, smiled and left.

The man, who requested anonymity because he was embarrassed and wanted to put the ordeal behind him, agreed to a deal in which the charges would be dropped if he stayed out of trouble for six months.

Asked about the current crop of cases, a spokeswoman for the Manhattan district attorney's office said in a statement that prosecutors have "offered the Legal Aid Society the opportunity to bring in any defendants who claim that they were arrested improperly to speak with us. They declined to do so. If they do, we will investigate their claims." But Tina Luongo, a Legal Aid lawyer, said many of the men felt humiliated "and don't want to be brought into law enforcement to be asked very personal questions."


In the past, there has been some evidence that Port Authority officers patrolling the men's room have arrested innocent people.

One lawsuit emerged from a 2003 arrest of a 64-year-old man who said he had been struggling to urinate when officers accused him of masturbating. Two months before the arrest, the man had had surgery for prostate cancer, leaving him mostly incontinent and probably unable to get an erection, according to a doctor's letter. The suit has since been dropped.

In 2005, a federal jury found that the police regularly conducted sweeps "for the crime of public lewdness, without regard to probable cause," as a federal court decision summarized the result. During that trial, which focused on a men's room at a PATH station, officers testified that they arrested as many as 30 people for public lewdness in a single shift in the 1990s. The jury awarded \$1.1 million to a man who had been arrested, although a judge reduced the amount.

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EXHIBIT B

 KeyCite Yellow Flag - Negative Treatment
Distinguished by [Peterkin v. Riverbay Corp.](#), N.Y.Sup., April 26, 2010

2005 WL 2143333

Only the Westlaw citation is currently available.

United States District Court,
S.D. New York.

Alejandro MARTINEZ, Plaintiff,

v.

THE PORT AUTHORITY OF NEW YORK
AND NEW JERSEY; Police Officer Paul
Nunziato, Shield # 865; Police Officer Patrick
Callaghan, Shield # 816; Police Officer
Thomas Miller, Shield # 1000, Defendants.

No. 01 Civ. 721(PKC).

|
Sept. 2, 2005.

MEMORANDUM AND ORDER

[CASTEL, J.](#)

*1 On February 1, 2000, during his morning commute from New Jersey to Lower Manhattan, plaintiff Alejandro Martinez was arrested outside the men's room at the PATH station concourse of the World Trade Center. He was charged with the crime of public lewdness, and remained in law enforcement custody for approximately 19 hours before release. Martinez was one of seven men arrested in separate alleged incidents of public lewdness in a single restroom of the World Trade Center's PATH station concourse between the hours of 6:05 a.m. and 8:30 a.m. As factual support for the charge, each was accused by the arresting officer of having engaged in public masturbation.¹

Mr. Martinez was the only one of the seven arrestees who did not plead guilty to a reduced charge of disorderly conduct. He proceeded to trial in state court, and after a one-day bench trial, he was acquitted of the charge of public lewdness.

Mr. Martinez subsequently initiated this action. He asserted claims under [42 U.S.C. § 1983](#) for false arrest and malicious prosecution. After discovery closed, I set the case for trial. Defendants filed no motion for

summary judgment. On November 18, 2004, after a four-day trial, the jury returned a verdict in Martinez's favor on his claims against defendants Paul Nunziato, Patrick Callaghan and the Port Authority of New York and New Jersey ("Port Authority"), and awarded compensatory damages in the amount of \$1,104,000: \$1,000,000 in damages for emotional distress, mental anguish and loss of liberty on the false arrest claim, \$1,000 in therapy expenses on the false arrest claim, \$100,000 in damages for emotional distress and mental anguish on the malicious prosecution claim, and \$3,000 in legal fees on the malicious prosecution claim. The jury awarded no damages for therapy expenses on the malicious prosecution claim, and no punitive damages against Nunziato or Callaghan.²

Defendants now move, pursuant to [Rules 50\(b\)](#) and [59\(a\)](#), [Fed.R.Civ.P.](#), for judgment as a matter of law, or, in the alternative, for a new trial, and for remittitur of the damages awarded to the plaintiff by the jury.

For the reasons explained below, the defendants' motions for judgment as a matter of law or for a new trial are denied. The jury award is remitted to \$464,000.

Rule 50(b) and 59(a) Standards

Under [Rule 50\(b\)](#), a party may move for judgment as a matter of law or move for a new trial within ten days of the entry of judgment. Judgment was entered on November 29, 2004, and on December 13, defendants timely filed their motions. [Rule 6\(a\)](#), [Fed.R.Civ.P.](#) [Rule 50\(b\)](#) permits the Court to allow the judgment to stand, to order a new trial, or to direct entry of judgment as a matter of law. In considering a [Rule 50\(b\)](#) motion, a court should be deferential to the jury's role as the trier of fact. In [Reeves v. Sanderson Plumbing Products, Inc.](#), 530 U.S. 133, 150 (2000), the Supreme Court held that a court considering a [Rule 50](#) motion should review the evidence "taken as a whole." The trial court weighs all evidence in favor of the non-moving party, and must not make credibility determinations. *Id.* "That is, the court should give credence to the evidence favoring the nonmovant as well as that 'evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that the evidence comes from disinterested witnesses.'" *Id.* at 151.

*2 Pursuant to [Rule 59\(a\)\(1\)](#), a party may move for a new trial in an action that was tried before a jury. [Rule 59](#) is broadly worded, and gives the Court discretion to grant a new trial if the verdict is against the weight of the evidence or if a damages award is excessive. [Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d §§ 2805–07](#). A court should not set aside a jury verdict and grant a new trial unless the verdict was “seriously erroneous.” [Piesco v. Koch](#), 12 F.3d 332, 345 (2d. Cir.1993). However, “[u]nlike a motion for judgment notwithstanding the verdict, a new trial motion may be granted even if there is substantial evidence to support the verdict.” [Bevevino v. Saydjari](#), 574 F.2d 676, 683 (2d Cir.1978). As the Second Circuit has explained:

The trial judge, exercising a mature judicial discretion, should view the verdict in the overall setting of the trial; consider the character of the evidence and the complexity or simplicity of the legal principles which the jury was bound to apply to the facts; and abstain from interfering with the verdict unless it is quite clear that the jury has reached a seriously erroneous result. The judge's duty is essentially to see that there is no miscarriage of justice. If convinced that there has been then it is his duty to set the verdict aside; otherwise not.

Id. at 684.

A conditional order for remittitur under [Rule 59](#) requires a plaintiff to choose between accepting the reduction of a verdict found to be excessive, or of submitting to a new trial. *See* [Kirsch v. Fleet Street, Ltd.](#), 148 F.3d 149, 165 (2d Cir.1998). A trial judge has discretion to overturn a jury award for excessiveness, and to order a new trial if the successful plaintiff refuses to agree to the reduced award. *Id.* “Where there is no particular discernable error,” the Second Circuit has held, “a jury's damage award may not be set aside unless ‘the award is so high as to shock the judicial conscience and constitute a denial of justice.’” *Id.* (quoting [O'Neill v. Krzeminski](#), 839 F.2d 9, 13 (2d Cir.1988)).

It is unclear from the defendants' papers the extent to which their motion relies upon [Rule 59\(a\)](#), as opposed

to [Rule 50\(b\)](#). They contend that the jury's finding of liability on the part of the Port Authority pursuant to [Monell v. Dep't of Social Services of City of New York](#), 436 U.S. 658 (1978), was against the weight of the evidence. The remainder of their motion is premised entirely on evidentiary rulings made during trial.³ Nevertheless, I address the motion as seeking judgment as a matter of law, or, alternatively, a motion for a new trial.

Background

Consistent with [Rule 50](#), I describe the facts of this case in the light most favorable to Mr. Martinez, the non-moving party. According to Martinez's testimony, at approximately 6:05 a.m. on February 1, 2000, he entered the men's room at the PATH train station at the World Trade Center. (Trial Tr. at 69) He stood at a urinal, urinated, and departed the men's room. (Trial Tr. at 69) Officers Paul Nunziato and Patrick Callaghan, who are defendants in this action, then arrested Martinez. (Trial Tr. at 70) Officer Nunziato told Martinez that he had observed him masturbating in the men's room, an assertion that Martinez immediately denied. (Trial Tr. at 70) According to Martinez, Officer Nunziato told Officer Callaghan that he “set a good trap” when he arrested Martinez. (Trial Tr. at 71) The two officers directed Martinez to wash his hands, and when Martinez reiterated his innocence, Officer Nunziato said, “If you want, I can break your teeth.” (Trial Tr. at 76–77) Martinez was placed in a cell at the WTC PATH Station, where the six additional public lewdness arrestees were brought that morning. (Trial Tr. at 79) According to Martinez, Nunziato stated that the men were going to remain there until the officers finished paperwork and “make our quota.” (Trial Tr. at 79)

*3 Martinez and the other men arrested for public lewdness were transported to 100 Centre Street for processing. (Trial Tr. at 88) At approximately midnight, Martinez met with an attorney and appeared before a judge. (Trial Tr. at 90–91) The judge offered to release Martinez if he would plead guilty to disorderly conduct. (Trial Tr. at 90–92) Disorderly conduct is a violation under New York law, not a crime. (N.Y. Penal L. § 10.00(3) and (6)) After consulting with his attorney, Martinez pleaded not guilty to the public lewdness charge rather than plead guilty to the disorderly conduct offense. (Trial Tr. at 91–92) Martinez was released at approximately 1 a.m. (Trial Tr. at 93)

The case against Martinez proceeded to trial before the Hon. Analisa Torres on September 29, 2000 in the Criminal Court of the City of New York, New York County. The only trial witnesses were Martinez and the arresting officers, Nunziato and Callaghan. Martinez described his emotional state during trial as “desperate, nervous.” (Trial Tr. at 97) Judge Torres found Martinez not guilty. (Criminal Trial Tr. at 82)

Martinez described his arrest and prosecution as frightening, and testified that following the arrest, he experienced difficulty sleeping and became socially withdrawn. (Trial Tr. at 97–99) He stopped attending social gatherings, volunteer activities, and sporting events. (Trial Tr. at 98) More generally, he described himself as feeling anxious whenever he was in the presence of law enforcement officers. (Trial Tr. at 100) Martinez also asserted that he did not visit family members in Cuba because he feared that his arrest and prosecution would complicate his passage. (Trial Tr. at 103)

In his complaint, Martinez alleged that the individual defendants, acting under color of state law, violated his rights under the Fourth and Fourteenth Amendments to the United States Constitution, thereby giving rise to a claim under 42 U.S.C. § 1983. He alleged that he was arrested and prosecuted without probable cause, and that the Port Authority of New York and New Jersey (“Port Authority”) had a *de facto* policy of unconstitutionally arresting men without probable cause for public lewdness at the World Trade Center’s PATH station. (2d AC ¶¶ 18–29) Martinez also brought state law claims against the individual defendants for false arrest, false imprisonment, and malicious prosecution, and asserted that the Port Authority was liable for the defendants’ conduct under a theory of respondeat superior. (2d AC ¶¶ 30–37)

This case originally was assigned to the Hon. Loretta A. Preska, U.S.D.J., who set a discovery schedule and directed the parties to engage in settlement discussions. In January 2003, the plaintiff filed his First Amended Complaint (“1st AC”) and Magistrate Judge Eaton established a new discovery schedule. The action was subsequently assigned to my docket. In an order of July 9, 2004, I allowed plaintiff to amend his complaint to drop two claims—negligence and conspiracy—and to add an alternative theory to his *Monell* claim. The *Monell* claim had previously been limited to assertions

that the defendants targeted homosexuals for arrest and that the Port Authority inadequately trained and supervised its law enforcement officers. The alternate theory asserted that the Port Authority had a policy, custom or practice of arresting men for public lewdness at the PATH concourse men’s room without probable cause, and without observing a lewd act capable of being seen by a casual passerby. (2d AC ¶ 25) Plaintiff’s amended pleading (“2d AC”) was filed on July 16, 2004. No request was made by defendants’ counsel to reopen discovery in light of the amendment.

*4 Plaintiff’s counsel wrote to me on August 16, 2004 advising that earlier that day he had received discovery requests from defendants’ counsel, who asserted that defendants would not file a previously scheduled summary judgment motion until two weeks after receiving responses to their discovery requests, and then only if, in defendants’ judgment, no further discovery was necessitated by those responses. In response to the August 16 letter, I ordered as follows: “Defendants’ motion for summary judgment must be filed no later than September 2, 2004 or it will be deemed waived.” (Docket Entry # 37, August 20, 2004) By setting the date more than a month away, I gave defense counsel adequate time to prepare the motion or to seek leave to conduct the requested discovery. Defendants’ counsel did neither. In a letter dated September 24, 2004, defendants’ counsel wrote to the Court stating that he was unable to file a summary judgment motion because the plaintiff failed to produce discovery requests that defendants made after the 2d AC was filed. Counsel for defendant never sought relief from the discovery cut-off, never brought to the Court’s attention a discovery dispute over the content of his post cut-off discovery requests (either under Local Rule 37.2 or otherwise) and never sought relief from my August 20 order. Nor did defendants’ counsel ever adequately explain what additional evidence the Port Authority required as to its own alleged pattern or practice. I set a trial date for November 15, 2004.

A jury was impaneled on November 15, 2004 and, after the close of evidence, it reached a verdict on November 18. On November 18, the jury returned a verdict finding Officers Nunziato and Callaghan liable on all claims, and finding that the Port Authority employed a policy and practice of making arrests on public lewdness charges without probable cause. (Trial Tr. at 675–79) For the false arrest claims, the jury awarded Mr. Martinez \$1,000,000

for emotional distress, mental anguish, and loss of liberty, and \$1,000 in therapy expenses. (Trial Tr. at 676) The jury also found that Mr. Martinez suffered \$100,000 in damages arising from the emotional distress and mental anguish caused by his malicious prosecution, and awarded him an additional \$3,000 in legal expenses. (Trial Tr. at 676) The jury found no liability on the part of Officer Miller, and did not assess punitive damages against any defendant.

Discussion

A. Plaintiff presented evidence sufficient for a jury to find liability on his *Monell* claim

The defendants argue that the Port Authority is entitled to judgment as a matter of law on the plaintiff's *Monell* claim against the Port Authority. They assert that Martinez failed to establish that the Port Authority had an unconstitutional policy or practice that resulted in a deprivation of the plaintiff's constitutional rights by arresting men perceived to be gay, or arresting men without probable cause at the PATH concourse.

*5 To succeed on a claim under *Monell v. Dep't of Social Services of City of New York*, 436 U.S. 658, 694-95 (1978), a plaintiff must establish that a violation of the Constitution occurred pursuant to official municipal policy. This may be done by establishing that constitutional rights have been violated pursuant to a “policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers” or “pursuant to governmental ‘custom’ even though such a custom has not received formal approval through the body's official decisionmaking channels.” *Id.* at 690-91. However, a municipality may not be held liable pursuant to a theory of *respondeat superior*. *Id.* at 691.

A custom need not be the result of formally instituted policy. *Id.* at 691. The municipality's conduct must, however, be “the moving force of the constitutional violation.” *Id.* at 694. The Second Circuit has held that municipal inaction, such as the persistent failure to discipline subordinates who violate civil rights, may support an inference of an unlawful municipal policy under *Monell*. *Batista v. Rodriguez*, 702 F.2d 393, 397 (2d Cir.1983) (citing *Turpin v. Mailet*, 619 F.2d 196, 201, 202 (2d Cir.), cert. denied, 449 U.S. 1016 (1982)).

Mr. Martinez submitted evidence sufficient for a reasonable jury to conclude that his arrest was part of a Port Authority pattern or practice to conduct “sweep” arrests (which are also known as “directed enforcements”) for the crime of public lewdness, without regard to probable cause. According to the testimony of Officer Robert Sbarra, who was the Operations Captain of PATH system police officers during the time of plaintiff's arrest, on the morning of February 1, 2000, the plaintiff was the first of seven men arrested for public lewdness between 6:05 a.m. and 8:30 a.m. (Trial Tr. at 212) Sbarra's responsibilities included deploying and monitoring the personnel under his supervision. (Trial Tr. at 207) The testimony of Sbarra, as related to arrest statistics for public lewdness, indicated a pattern in which public lewdness arrests peaked for brief periods of time, followed by several months in which no public lewdness arrests were made. During Sbarra's examination by the defendants' counsel, he testified that on one day in January 1997, 30 public lewdness arrests at one WTC PATH station restroom occurred in an eight-hour time period. (Trial Tr. at 238) Officer Sbarra also testified that during another directed enforcement in February 1997, 30 arrests occurred in an eight-hour period, and in March 1997, 25 arrests occurred in approximately eight hours. (Trial Tr. at 238-39) In 1999, there were no public lewdness arrests for the months of February through December at the WTC PATH station men's room. (Trial Tr. at 228) From January to April of 2000, there were 46 public lewdness arrests in the WTC PATH station men's room, including the seven arrests on the morning of February 1. (Trial Tr. at 228)

*6 Under the express terms of the statute, it is not sufficient that a person expose private or intimate body parts: they must do so “lewdly.” N.Y. Penal L. § 245.00. As interpreted by the New York Court of Appeals, the crime of public lewdness “was aimed at protecting the public—in essence, unsuspecting, unwilling, nonconsenting, innocent, surprised, or likely-to-be offended or corrupted types of viewers—from the sight of offensive activities and materials.” *People v. McNamara*, 78 N.Y.2d 626, 631 (1991) (holding that the interior of parked vehicle in well lit area was not a public place). To constitute public lewdness, the act must take place “(a) in a public place or (b) in private premises under circumstances in which he may be readily observable from either a public place or from other private premises, and with the intent that he be so observed.” Prosecutions for public lewdness may

arise from an act of masturbation or other sexual conduct undertaken in full public view. *See, e.g., Matter of Paul R.*, 131 A.D.2d 764, 516 N.Y.S.2d 790 (2d Dep't 1987) (noting that if juvenile appellant had been an adult, he would have been guilty of a public lewdness offense for openly masturbating in the window of a private residence while uttering obscene comments); *People v. Darryl M.*, 123 Misc.2d 723, 726, 475 N.Y.S.2d 705, 709 (N.Y. City Crim. Ct.1984) (“In the instant case, defendant's actions of repeatedly stroking his covered erect penis in public, in addition to rubbing his covered erect penis against the buttocks of three females, in public, is exactly the kind of behavior which the Legislature intended to encompass by utilizing the phrase ‘any other lewd act’ in the context of § 245.00.”).

The jury considered evidence that the Port Authority conducted intensive sweeps that resulted in high numbers of public lewdness arrests during short bursts of time. While, as the defendants point out, there is nothing *per se* unconstitutional about law enforcement sweeps, the plaintiff's *Monell* claim was premised on the contention that the Port Authority had an established practice of arresting men for public lewdness in the men's room at the World Trade Center's PATH station concourse without regard to probable cause. Officer Nunziato, who arrested Martinez for public lewdness, testified that he personally observed Mr. Martinez openly and publicly masturbating at one of the men's room urinals. (Trial Tr. at 251) By contrast, Mr. Martinez testified that he merely urinated and had never masturbated in a public bathroom. (Trial Tr. at 69, 76) The jury credited the testimony of Mr. Martinez over the testimony of Officer Nunziato as to the circumstances of the arrest. From Mr. Martinez's testimony, the jury concluded that Mr. Martinez was arrested without probable cause.

In his questioning of Officer Miller, the plaintiff's counsel pointed out that the documentation of the public lewdness arrests contained nearly identical descriptions of the circumstances surrounding the acts of public lewdness. (Trial Tr. at 289–91) Although Martinez was the only one of the seven individuals arrested on February 1 who testified, the jury had before it the documents pertaining to each of the arrests, and heard testimony pertaining to the circumstances of these arrests, which happened in rapid succession over approximately two-and-a-half hours.

*7 In addition, Mr. Martinez testified that while he was in police custody, Officer Nunziato explicitly stated that the arrests were made pursuant to a quota:

Q. Now, during the time that these things were going on, what was the general demeanor of the police officers, the three police officers in the room?

A. They humiliated us.... And he said, no, you're going to be here until we finish the paperwork and we make our quota.

Q. Were there any other conversations that you heard between—well, first of all, who was the police officer who said that?

A. Nunziato.

(Trial Tr. 79–80)⁴ The jury was entitled to credit Mr. Martinez's testimony as establishing that the Port Authority had a custom of performing public lewdness arrests pursuant to a quota. Moreover, Mr. Martinez testified that Officer Miller said to Officer Nunziato, “oh, how fast, you caught one really fast,” to which Nunziato replied, “well, I set a good trap.” (Trial Tr. at 71) The jury also had before it documents describing each of the seven arrests. The jury was entitled to conclude that the testimony of the officers was not credible, and that based on the exhibits and testimony, these arrests occurred without probable cause.

The jury also was entitled to credit the defendants' testimony that the Port Authority did not train its officers as to the procedures for conducting directed enforcements. Officer Sbarra testified that he did not personally provide training as to public lewdness arrests, and Officer Nunziato testified that he received no formal training on how to conduct directed enforcement actions. (Trial Tr. at 237, 243) Officer Callaghan indicated, however, that he received training from other officers and from assistant district attorneys. (Trial Tr. at 313)

The defendants' post-trial motion argues that the officers' lack of training is immaterial to the *Monell* claim, a contention that has no basis in law. A municipality's policy or custom may be demonstrated in its failure to train or supervise officers. *City of Canton, Ohio v. Harris*, 489 U.S. 378, 388–89 (1989). Liability attaches “where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact.” *Id.*

at 388. In *Dodd v. City of Norwich*, 827 F.2d 1, 5 (2d Cir.1987), the Second Circuit held that a *Monell* claim arose when a city trained a police officer to handcuff a suspect while holding a gun, thus posing a risk that the gun could discharge against the suspect during an altercation. See also *Cowan ex rel. Estate of Cooper v. Breen*, 352 F.3d 756 (2d Cir.2003) (affirming district court's denial of defendant's summary judgment motion, since questions of fact existed as to whether the municipality's training or lack thereof caused officer's fatal shooting of a fleeing suspect). If a municipality is aware that inadequately trained employees will enforce a policy, but elects not to train them, the municipality may incur liability. *Amnesty America v. Town of West Hartford*, 361 F.3d 113, 125 (2d Cir.2004) (citing *City of Canton*, 489 U.S. at 387).

*8 Nunziato's testimony made clear that the arrest procedures employed during a sweep differed from typical arrest procedures, with paperwork and processing performed on an expedited basis. (Trial Tr. at 276–77) The jury may logically have inferred that the practices of the Port Authority during the sweep differed from the practices used in a routine arrest, and that the officers were not trained to conduct arrests during a sweep so as to comport with the constitutional guarantee that a person not be arrested except upon probable cause to believe that he has committed a crime.

Although the jury was supplied with evidence sufficient to conclude that the Port Authority had a custom that led to widespread public lewdness arrests without regard for probable cause, it may also have concluded that the *Monell* violation arose from a “decision officially adopted and promulgated by [the Port Authority's] officer[].” *Monell*, 658 U.S. at 690. A single unconstitutional act may establish *Monell* liability, provided that it occurred under the direction of a person whose edicts or acts reflect official policy. *Rookard v. Health & Hosp. Corp.*, 710 F.2d 41, 45 (2d Cir.1983). As Judge Lumbard observed, “[t]he difficulty, of course, lies in identifying those officials whose actions, because they may fairly be treated as the municipality's own actions, establish policy. Where an official has final authority over significant matters involving the exercise of discretion, the choices he makes represent government policy. An official has final authority if his decisions, at the time they are made, for practical or legal reasons constitute the municipality's final decisions.” *Id.* (citation omitted). *Monell* liability is not predicated on whether a given official is a

policymaker, but rather, whether the official has been delegated authority in a manner that his or her decision may be “fairly attributable to the municipality.” *Id.* at 45 n. 3.

Nunziato and Miller testified that Sbarra—who held the title of commanding officer at the time—directed the sweep of February 1. (Trial Tr. at 245) Sbarra described his title as that of “assistant chief, police chief of patrol for the Port Authority Police.” (Trial Tr. at 205) In his deposition, Sbarra testified that he was the commanding officer of the WTC PATH station at the time of Martinez's arrest; at trial Sbarra testified that he was the “operations captain” and reported to a commanding officer. (Trial Tr. at 205–06) At the time of the February 2000 sweep, Sbarra had 100 officers working under his command. (Trial Tr. at 206) He was responsible for police activity at 13 stations in the PATH system. (Trial Tr. at 207) Officer Sbarra testified as follows:

Q. Your job overall, one way of saying your job was you were in charge of addressing criminal activity that you suspected was going on or came to light in the PATH train stations?

A. Yes.

Q. You were in charge of directing operations to deal with specific criminal problems that might occur?

*9 A. Yes.

Q. One of those problems was public lewdness in some of the public bathrooms. Is that right?

A. That was one of the problems, yes.

Q. Now, part of your job was to review the arrest that officers under your command did make, correct?

A. Yes.

(Trial Tr. at 208) Given the evidence as to Sbarra's responsibility over the individual defendants and his decision to direct sweeps targeted to public lewdness arrests in the PATH station men's room, the jury, in the context of all other evidence, could reasonably conclude that he established a policy that prompted widespread public arrests without regard to probable cause.

Therefore, considering the trial evidence as a whole, I conclude that a reasonable jury could have concluded that

the Port Authority had a policy, custom or practice of initiating public lewdness arrests as part of “sweeps” to clear the restrooms of persons subjectively viewed by the Port Authority as undesirable, regardless of whether there was probable cause to make the arrests.

B. Defendants were not entitled to an instruction regarding Mr. Martinez's pantomime at the criminal trial

As part of his defense to the criminal charge, Mr. Martinez was asked by his lawyer at trial “to stand up and simply show us by pantomime, if you understand what I mean, the motions you made with your hand as you finished urinating before you zipped up your pants and left. Just show us how you urinated that day.” (Criminal Trial Tr. at 64) Martinez mimicked the motions he made while securing his zipper at the men's room urinal. (Criminal Trial Tr. at 64) After the demonstration, his lawyer at the criminal trial stated as follows: “Let the record reflect that Mr. Martinez made a motion that could be misled [sic] as an up and down, back and forth motion with his hand as he's finished pretending urinating.” (Criminal Trial Tr. at 65) I admitted Martinez's counsel's description of the pantomime from the criminal trial, but denied defendants' request to have Martinez engage in a reenactment of the pantomime. This, defendants assert, was error.

The defendants conducted Martinez's deposition on January 28, 2004, at which point their attorney asked Mr. Martinez to reenact the pantomime he performed at the criminal trial. Plaintiff's counsel objected, and the parties telephoned Magistrate Judge Eaton for a ruling as to whether Mr. Martinez must perform the pantomime. Magistrate Judge Eaton ruled that it was sufficient for Mr. Martinez to verbally describe his gestures, and that a pantomimed reenactment was unnecessary. (Martinez Dep. at 43–45, 49–51)

Thereafter, defendants' argued that the plaintiff's failure to perform the pantomimed demonstration was deliberate and that the defendants were entitled to have the court instruct the jury that it should draw a negative inference because the plaintiff did not perform the pantomime. Defendants also argued that Mr. Martinez should be precluded from reenacting a pantomime performed during his criminal trial.

*10 I noted that Magistrate Judge Eaton had previously directed that there be no pantomime, and that the parties

had informally raised the issue at a pretrial conference before me. (Trial Tr. at 36) I also stated on the record that I had previously upheld Magistrate Judge Eaton's ruling, and had obtained plaintiff's counsel's representation that the plaintiff would not rely upon any in-court pantomime as part of his case. (Trial Tr. at 36)

During trial, the defendants' counsel questioned Martinez about the pantomime gestures in the criminal trial. (Trial Tr. at 187) Mr. Martinez confirmed that he motioned with his hands to reenact the appearance of zipping up his pants once he finished urinating. (Trial Tr. at 187, 196) At that time, I instructed the jury that, prior to the commencement of trial, I had ruled that Mr. Martinez did not need to perform the pantomime, and that it would be adequate for him to verbally describe his gestures. (Trial Tr. at 195) In questioning Mr. Martinez, the defendants' counsel quoted from the on-the-record description of the pantomime made at the underlying criminal trial. (Trial Tr. at 197) Mr. Martinez stated that he agreed with his counsel's characterization of his gestures at the criminal trial. (Trial Tr. at 197–98)

Defendants' specific point is that plaintiff obtained an acquittal in the criminal trial by performing a demonstration of action that, in defendants' view, would have been sufficient to establish probable cause for his arrest. However, ordering a reenactment of the events of February 1, 2000 would have had slight probative value. The physical gestures would be imprecise, and there would be no adequate way for a jury to compare the gestures it viewed with the gestures seen by Judge Torres or those that occurred on February 1, 2000.

The pantomime risked creating unfair prejudice, a confusion of the issues, and misleading the jury. [Rule 403, Fed.R.Evid.](#) Martinez described the experience of performing the pantomime at his criminal trial as being “very, very difficult, very embarrassing, very embarrassing.” (Trial Tr. at 203) If it was error to exclude the demonstration, defendants were not prejudiced by it. Of far greater probative value was plaintiff counsel's description of the reenactment to Judge Torres, which was published to the jury over plaintiff's objection. (Trial Tr. at 196) Specifically, the jury was informed that at the conclusion of the demonstration in the criminal trial, Martinez's counsel stated: “Let the record reflect that Mr. Martinez made a motion that could be misled [sic] as an up and down, back and forth motion with his

hand as he's finished pretending urinating.” (Trial Tr. at 196) Martinez confirmed that it was an accurate representation. Defendants were free to argue to the jury that the plaintiff's conduct was sufficiently close in resemblance to public masturbation to give rise to probable cause.

C. The summations in Mr. Martinez's criminal trial were not evidence, and were properly excluded from trial

*11 Defendants contend that the Court erred by excluding certain comments made by plaintiff's counsel, Michael Spiegel, during his closing argument at the underlying criminal trial. The Joint Pretrial Order contained the parties' stipulation to the admission of the entire transcript of the criminal action. Plaintiff's counsel later sought to exclude the following passage from Mr. Spiegel's summation:

I suppose it is possible that Police Officer Nunziato mistook the innocent gesture of Mr. Martinez finishing up urinating for a lewd act. And I suggest that that raises a reasonable doubt as to whether or not what was actually being engaged in the bathroom that day was a lewd act or was a totally innocent hand motion which is routinely made by men at urinals.

(Criminal Trial Tr. at 75)

A final pretrial order may be modified to prevent manifest injustice, [Rule 16\(e\), Fed.R.Civ.P.](#), and I permitted the plaintiff to object belatedly to a small, non-testimonial portion of the transcript. I ruled that, consistent with [United States v. McKeon](#), 738 F.2d 26 (2d Cir.1984), Mr. Spiegel's statements of advocacy at the criminal trial were inadmissible. *McKeon* observed that an admission of fact by an attorney made during argument may be admitted at a subsequent trial. *Id.* at 30 (citing [Oscanyan v. Arms Co.](#), 103 U.S. 261, 263 (1880)). *McKeon* held, however, that “[s]peculations of counsel, advocacy as to the credibility of witnesses, arguments as to weaknesses in the prosecution's case or invitations to a jury to draw certain inferences should not be admitted.” *Id.* at 33. Moreover, any inconsistency “should be clear and of a quality which obviates any need for the trier of fact to explore other events at the prior trial.” *Id.* To be admissible evidence

in a later action, counsel's statements during argument must be the equivalent of testimonial statements uttered by a party. *Id.*; see also [Maurizio v. Goldsmith](#), 84 F.Supp.2d 455, 464 (S.D.N.Y.1999) (arguments made in state court briefs were of an argumentative nature, and not admissions of fact), *aff'd*, 230 F.3d 518 (2d Cir.2000).⁵

Mr. Spiegel's comments in closing argument in the criminal trial fall within the category of speculation that *McKeon* deemed inadmissible. His remarks were couched purely as supposition and suggestion. In “suppos[ing] that it is possible” that Officer Nunziato mistook Mr. Martinez's gestures for an act of public lewdness, Mr. Spiegel made an argument as to whether the state satisfied the burden of proof in the criminal trial. His observation as to what Nunziato may have seen was framed as a theory and a matter of speculation. As such, Spiegel was offering a hypothetical scenario and theorizing as to Officer Nunziato's state of mind when he arrested Mr. Martinez. This falls within *McKeon*'s concerns as to not admitting speculations of counsel or invitations to draw inferences. [McKeon](#), 738 F.2d at 30. In contrast, applying *McKeon* to plaintiff's counsel's factual description of the so-called pantomime, I concluded, over plaintiff's objection, that it contained a sufficient factual basis to have the qualities of an admission and allowed it into evidence.

*12 Lastly, if I was in error in this regard, there was no prejudice to the defendants because any factual content in the omitted portion of the summation quoted above was substantially cumulative of plaintiff's counsel's description of the so-called pantomime, which I allowed into evidence.

The defendants' motion, to the extent premised on this ground, is denied.

D. No missing witness charge was warranted as to Rosalba and Dr. Fogari

At trial, the defendants requested that the Court give the jury a missing witness instruction as to an individual named Rosalba,⁶ and a physician named Dr. Fogari, who prescribed certain anti-anxiety medications to Martinez.

Then, as now, the defendants' basis for seeking a missing witness charge was not altogether clear. Defendants argue that these witnesses were available to the plaintiff, “and without reason he failed to call them (or to identify them per Rule 26).” (Def.Mem. Pt. V) They cite to [Magee v.](#)

Paul Revere Life Ins. Co., 178 F.R.D. 33 (E.D.N.Y.1998), in which the district court upheld discovery sanctions levied by a Magistrate Judge upon a party that failed to produce a key witness, and *McDowell v. Eagle Trans. Corp.*, 303 A.D.2d 655, 656, 758 N.Y.S.2d 79, 80 (2d Dep't 2003), in which the New York Appellate Division, Second Department, held that a missing witness charge should have been given as to four physicians who might have acted as third-party witnesses in an insurance dispute.

Defendants' arguments as to the necessity of a missing witness charge have no basis in governing law. *United States v. Torres*, 845 F.2d 1165, 1169 (2d Cir.1988), explained the conditions that necessitate a missing witness charge:

When a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction and fails to produce such witnesses, the jury may infer that the testimony, if produced, would be unfavorable to that party. However, when a witness is equally available to both sides, the failure to produce is *open* to an inference *against both parties*. No instruction is necessary where the unrepresented testimony would be merely cumulative.

(quotation marks and internal citations omitted; emphasis in original). In the context of instructing on evidentiary inference, witness availability implicates the totality of circumstances including the witness's relation to the parties, not just physical presence or accessibility. *Id.* at 1170. “[C]ourts have been reluctant to find a witness practically unavailable when it appears that the defense has no real interest in calling the witness to the stand, but merely is engaged in a form of gamesmanship in an effort to obtain a missing witness charge.” *Id.* It is within the trial court's “sound discretion” whether to issue a missing witness charge. *Id.* at 1170–71.

According to Martinez's testimony, Rosalba is a social worker at a gay community center in New York, the Gay and Lesbian Anti–Violence Project. (Trial Tr. at 94) For about a year after his arrest, Martinez met with Rosalba for counseling sessions. (Trial Tr. at 95) Rosalba did not charge for their sessions, and recommended that Martinez visit a psychologist or psychiatrist. (Trial Tr. at 181–

82) She ultimately referred him to Barbara Fried, who testified at trial. (Trial Tr. at 182)

*13 At plaintiff's deposition, defendants' counsel questioned Mr. Martinez about his sessions with Rosalba. (Martinez Dep. at 98–99, 102, 105–06) He also questioned him about treatment administered by Dr. Fogari, whose role apparently was limited to prescribing anti-anxiety drugs. (Martinez Dep. at 14, 17, 112–13) In his opposition papers, the plaintiff contends that Rosalba's identity and last known address were contained in medical records in the defendants' possession, a contention that the defendants do not dispute. These materials were introduced at trial as Exhibit 20. Because the defendant was aware of Rosalba and Dr. Fogari prior to commencement of trial, and did not seek to call them, a missing witness instruction is not warranted.

Lastly, in his closing argument, the defendants' counsel commented on the plaintiff's decision not to call Rosalba as a witness. (Trial Tr. at 583, 586) He stated the following:

Who was Ms. Rosalba? Why wasn't she called? Wouldn't she have a better idea of exactly what his initial complaints were after the arrest? Or maybe she wasn't called because the plaintiff, in discussing this retraumatization that he suffered because of the arrest, admitted to Ms. Rosalba that he was in fact guilty of public lewdness. Where is the physician?

(Trial Tr. at 586) In *Torres*, the Second Circuit observed that, assuming *arguendo* the trial court erred in not issuing a missing witness instruction, any error was remedied when the trial court permitted counsel to address any possible inferences during summation. 845 F.2d at 1170. Thus, even if a missing witness charge was warranted as to Rosalba, defendants remedied that error by attempting to draw inferences as to her absence.

In the Joint Pretrial Order, the defendants indicated that they intended to call Dr. Fogari as a witness. (JPTO at 6) They elected not to do so.

The defendants' motion, to the extent that it is premised upon the failure to give a missing witness charge for Rosalba or Dr. Fogari, is denied.

E. *It was Not Error for Adamowicz and Fried to Testify* Defendants next contend that Frank Adamowicz (who is Mr. Martinez's life partner of 24 years) and Ms. Fried should have been precluded from testifying because they were not identified in Mr. Martinez's Rule 26(a)(1) initial disclosures.

In pretrial argument of the defendants' *in limine* motion, counsel contended that the plaintiff violated Rule 26 by waiting until three weeks before trial to state his intention to call Adamowicz and Fried, rather than disclosing their identities at an earlier point in time. (Trial Tr. at 26) Plaintiff's counsel argued that his failure ought to be excused because this lawsuit commenced on January 30, 2001, less than two months after the "initial disclosures" provisions of Rule 26(a)(1) became mandatory in this District, and neither plaintiff nor defendants served automatic disclosures. (Trial Tr. at 28)

Defendants' did not serve any discovery requests until the discovery period closed. (Trial Tr. at 26–27) The defendants served no interrogatories, requests to admit, or notices of deposition. (Trial Tr. at 27) Not until discovery closed, and the plaintiff amended his complaint to voluntarily dismiss claims of negligence and conspiracy and add an additional theory to his *Monell* claim did the defendants' counsel serve a written discovery request. (Trial Tr. at 26) Significantly, when defendants' counsel questioned Mr. Martinez at his pretrial deposition, counsel inquired about the counseling that Ms. Fried provided, and about the nature of Mr. Martinez's relationship with Mr. Adamowicz. (Martinez Dep. at 4–5, 78, 81, 85, 99, 102–05)

*14 Defendants were not prejudiced by the late addition of Adamowicz and Fried to the witness list. Prior to trial, on October 29, 2004, I directed plaintiff's counsel to make Adamowicz and Fried available to have their depositions taken in order to cure any prejudice that the plaintiff's late listing caused to the defendants. Defendants' counsel then telephoned Mr. Spiegel, who told him that Mr. Adamowicz shared an address with Mr. Martinez, and that Ms. Fried's address was included in materials already produced to the defendants. (Trial Tr. at 31) Plaintiff's counsel informed defendants' counsel that Mr. Adamowicz was available for deposition at a time of the defendants' choosing. (Trial Tr. at 31–32) According to the plaintiff's counsel, defendants' counsel

did not subsequently call with a deposition date. (Trial Tr. at 32) As to Ms. Fried, plaintiff's counsel telephoned her in an effort to find a suitable deposition date. (Trial Tr. at 32) Either a relative or a family friend had been involved in an accident, and Ms. Fried was away on travel. (Trial Tr. at 32) Plaintiff's counsel arranged a potential deposition date, which he then communicated by fax to the defendants' counsel. (Trial Tr. at 32) The date was Friday, November 12, with the trial scheduled to commence the following Monday. (Trial Tr. at 33) Defendants' counsel did not respond to the fax, and offered the following explanation to the Court:

Mr. Spiegel sent me a fax on November 6, which was a Saturday. In effect it was November 8. And I did not respond to that. And frankly, I—and I'll be quite honest with the Court—I felt that at this time offering her deposition on November 12 was something that I just could not comply with, that I would not be able to make myself available on November 12 to take the deposition of a witness for a trial that was supposed to start today.... It was just impossible. And I declined to respond to Mr. Spiegel.

(Trial Tr. at 33–34) At that point, I noted that I previously had made myself available to the parties to resolve any conflicts that might arise over the scheduling of depositions. (Trial Tr. at 34) Although the defendants' counsel wrote to Mr. Spiegel on November 3, 2004 complaining that he had not been provided with witness addresses and copied that letter to the Court, defendants' counsel made no application for relief as to the depositions of either Adamowicz or Fried. Defendants made no effort to seek the Court's intervention on scheduling matters or to seek a brief adjournment of the trial.

A trial court has discretion to preclude testimony as a sanction for discovery violations.⁷ As Judge Koeltl noted in *Ebewo v. Martinez*, 309 F.Supp.2d 600, 607 (S.D.N.Y.2004), “[c]ourts in this Circuit recognize that preclusion of evidence pursuant to Rule 37(c)(1) is a drastic remedy and should be exercised with discretion and caution.” Many courts in this District have found that “flagrant bad faith” and “callous disregard” of the Federal Rules are necessary prerequisites to witness

preclusion. *See, e.g., Ward v. National Geographic Society*, 2002 WL 27777, at *2 (S.D.N.Y. Jan. 11, 2002).

*15 True, Adamowicz and Fried were not identified as trial witnesses until relatively late in this litigation. When Adamowicz and Fried were identified as trial witnesses approximately three weeks prior to trial, I declined to preclude them as trial witnesses but instead required the plaintiff to make them available for depositions. When defendants encountered scheduling difficulties for the depositions, they sat on their rights. I conclude that by failing to pursue the depositions of Adamowicz and Fried after I ordered them to be made available, the defendants waived a court-ordered remedy that would have cured or eliminated any possible prejudice. Any lingering prejudice to the defendants was self-inflicted.

The defendants' motion, to the extent that it is premised on the late addition of Adamowicz and Fried to plaintiff's witness list, is denied.

F. Plaintiff's arguments on summation were not improper

Defendants argue that a new trial is warranted because in Mr. Spiegel's closing argument, he alluded to the choices and motives of other persons arrested for public lewdness. According to the defendants, the plaintiff's counsel "was asking the jury improperly to identify with plaintiff ... urge[d] the jury to speculate and to accept Spiegel's unsworn testimony about evidence in the criminal trial, and to consider hearsay conversations from unidentified individuals." (Def. Mem. at Pt. VII)

During his summation, plaintiff's counsel suggested that Mr. Martinez's arrest and prosecution, both of which he claimed were pursued without probable cause, illustrate the reasons why similarly positioned arrestees did not challenge their arrests and instead pleaded guilty to disorderly conduct violation. (Trial Tr. at 608) Defendants' counsel promptly objected, at which point, in the middle of the plaintiff's summation, I instructed the jury that they may not engage in speculation, and only should draw reasonable inferences. (Trial Tr. at 608–09) I thereafter sustained the defendants' objection to a different statement in Mr. Siegel's summation, which implied that the individual defendants were aware of the typical resolution of public lewdness arrests. (Trial Tr. at 610–11) I reminded the jury that a lawyer's argument does not constitute evidence, and that the jury's recollections

of fact control. (Trial Tr. at 611) During the plaintiff's summation, I overruled defendants' objections to, *inter alia*, plaintiff's argument that an innocent person would be unlikely to challenge a public lewdness arrest because of the stigma attached for being prosecuted for such conduct; plaintiff's reference to Martinez's criminal acquittal; and plaintiff's argument as to why the pantomime occurred at the criminal trial. (Trial Tr. at 612–13, 19)

Contrary to the assertions of defendants' counsel, Mr. Spiegel did not offer fact testimony in his summation, or engage in impermissible speculation. Based on my review of those portions of the trial transcript cited by the defendants, Mr. Siegel's argument was well within the boundaries of fair comment on the evidence. His statements did not exceed the bounds of the trial evidence, nor did he encourage the jury to engage in impermissible speculation. In the instance where I sustained the defendants' objection, I addressed the jury to remind them that their recollection must control their determinations as triers of fact. Also, in my preliminary instructions to the jury and again in my closing instructions, I informed the jury that lawyers' arguments are not evidence. (Trial Tr. at 37, 636–37) If the defendants desired a more particularized instruction to the jury, they should have requested it.

*16 Because plaintiff's summation contained nothing more than fair argument as to permissible inferences to be drawn from the evidence, the defendants' motion for a new trial, to the extent premised upon this ground, is denied.

G. Ms. Fried did not offer expert testimony, and her fact testimony was permissible

Defendants argue that Barbara Fried testified as a *de facto* liability expert. They contend that her status as an "expert witness," coupled with the late notice they received of plaintiff's intention to call her, should have precluded Fried's testimony. The argument is meritless.

Fried describes herself as a social worker and psychotherapist. (Trial Tr. at 410) Martinez was referred to her for counseling, and Ms. Fried testified about her yearlong treatment of Martinez. (Trial Tr. at 411) Ms. Fried did not offer any opinion on causation or future damages.

A witness may qualify as an expert if he or she is "specially employed to provide expert testimony in the case," or if "duties as an employee of the party regularly involve

giving expert testimony.” Fed. R. Civ. Proc. 26(a)(2)(B). In *Byrne v. Gracious Living Industries, Inc.*, 2003 WL 446474, at *2 (S.D.N.Y. Feb. 25, 2003), Judge Kaplan differentiated the roles of a treating physician and those of an expert. “A treating physician who is called to testify on information acquired solely in that role, as opposed to giving an opinion formulated for trial, is not an expert for purposes of Rule 26(a)(2)(A).” *Id.* *Byrne* observed that most courts hold that so long as a witness testifies solely to the patient's treatment or care, he or she is not a witness subject to the written report requirements of Rule 26, notwithstanding any opinion testimony he or she may offer. *Id.*

The Advisory Committee Notes to the 1993 amendments of Rule 26(a)(2) state: “A treating physician, for example, can be deposed or called to testify at trial without any requirement for a written report.” *Byrne* observes that the expert disclosure rules intend to allow the opposing party to take effective discovery of an expert, a concern that is irrelevant when the opposing party is aware of the treating physician's identity and is not prejudiced by his or her testimony. 2003 WL 446474, at *2. See also *Derienzo v. Metropolitan Transit Authority & Metro-North Rail Road*, 2004 WL 67479, at *2 (S.D.N.Y. Jan 15, 2004) (“[A] doctor is not precluded from testifying to facts learned and opinions formed in the course of treatment by virtue of the fact that a party did not make the expert disclosures required under Rule 26(a)(2) because the doctor is not an ‘expert’ subject to the Rule.”); *Zanowic v. Ashcroft*, 2002 WL 373229, at * 2 (S.D.N.Y. Mar. 8, 2002) (“[t]here can be no serious dispute” that a treating physician is “free to testify to opinions he formed” during treatment without submitting an expert disclosure pursuant to Rule 26(a)(2)) (collecting cases); *Chiquita Int'l Ltd. v. MIV Bolero Reefer*, 1994 WL 177785, at *1 (S.D.N.Y. May 6, 1994) (“[T]he relevant distinction is not between fact and opinion testimony but between those witnesses whose information was obtained in the normal course of business and those who were hired to make an evaluation in connection with expected litigation.”).

*17 The defendants point to no testimony that can be characterized as expert testimony. During the course of her testimony, plaintiff's counsel asked whether Ms. Fried observed signs indicating that Mr. Martinez suffered from sexual compulsions. (Trial Tr. at 429) Defendants' counsel objected, and I instructed Ms. Fried to limit her testimony solely to what she observed during the course of treatment.

(Trial Tr. at 429–430) Ms. Fried testified that she “saw no signs whatsoever of sexual compulsivity or any kind of acting out....” (Trial Tr. at 430) Her testimony was limited to what she observed from her treatment of Mr. Martinez.

Prior to trial, defendants' counsel pointed to Ms. Freed's desired hourly fee of \$125 as indicia that she would testify as an expert. The Code of Professional Responsibility permits a fact witness to be paid “[r]easonable compensation ... for the loss of time in attending, testifying, preparing to testify or otherwise assisting counsel.” DR 7–109(c)(2), 22 N.Y.C.R.R. § 1200.40. The payment of fees to Ms. Freed did not render her an expert.

Lastly, the defendants argue that Ms. Fried's testimony “is worthless” because on cross-examination, she testified that she did not evaluate Mr. Martinez's truthfulness during their sessions. (Def. Mem. at Pt. VIII) However, that argument goes to the weight of her testimony, not to its admissibility.

H. Officer Miller

Defendants argue that this Court should find that plaintiff established no prima face case against Officer Miller, and that the claim against him should be dismissed on the basis of qualified immunity. Because the jury returned a verdict finding no liability on the part of Officer Miller, these arguments are moot, and I do not consider them.

2. Defendants' Motions to Remit Plaintiff's Damage Award

The defendants argue that the damage awards against them are excessive as a matter of law and should be subject to remittitur. Having viewed the evidence as a whole and reviewed the damage awards in comparable false arrest and malicious prosecution trials, I conclude that remittitur is appropriate as to the award for “[e]motional distress, mental anguish and loss of liberty damages” arising from Martinez's false arrest, from an amount of \$1,000,000 to \$360,000. I do not remit the \$1,000 in therapy expenses on the false arrest claim, the \$100,000 in damages for “[e]motional distress and mental anguish damages” on the malicious prosecution claim, or the \$3,000 in legal expenses awarded on the malicious prosecution claim.

Three witnesses testified as to the damages incurred by Mr. Martinez: Barbara Fried, Frank Adamowicz,

and Mr. Martinez himself. Plaintiff also introduced Ms. Fried's notes from the 41 therapy sessions that she conducted with Mr. Martinez during the course of her treatment of him.

Further description of the events of February 1, 2000 is helpful in understanding the nature of the injuries that Martinez incurred. As Martinez exited the WTC PATH Station men's room, he heard a whistle, and Callaghan and Nunziato motioned him toward them. (Trial Tr. at 70) They instructed Martinez to wash his hands in the men's room; when Mr. Martinez asked why, Officer Nunziato told Martinez that he had been masturbating in the men's room. (Trial Tr. at 70, 76) According to Martinez, when he denied so doing, Officer Nunziato responded, "Are you calling me a liar? If you want, I can break your teeth." (Trial Tr. at 76-77) Martinez testified that he was one of seven individuals in custody for public lewdness, and the officers "were laughing at us," and that Nunziato said to them, "oh, so why don't you go to the gay places, you faggot, you queer." (Trial Tr. at 79-80) Martinez testified that while he was being processed at 100 Centre Street, "everybody was laughing at us" and mocking the arrestees. (Trial Tr. at 89) He also testified that he was injured because Callaghan placed him in handcuffs that were too tight. (Trial Tr. at 82) He was released from custody at approximately 1 a.m., roughly 19 hours after his arrest. (Trial Tr. at 93)

***18** Martinez testified that after the arrest, he experienced sleeplessness, loss of appetite, and bouts of anxiety. (Trial Tr. at 97) For a period of time, he stopped working as a volunteer at senior citizen functions, attending church, and going to sporting events. (Trial Tr. at 98-100) Martinez testified that in the weeks after his arrest, he briefly contemplated suicide. (Trial Tr. at 106) He did not travel to Cuba to visit his ill mother for fear that the arrest would preclude re-entry to the United States. (Trial Tr. at 103) During this post-arrest period, Mr. Martinez allowed his previously filed application for U.S. citizenship to lapse because he "was afraid of going to Immigration and [he] was afraid of going to jail or being deported." (Trial Tr. at 66)

Martinez ultimately received therapy from Rosalba and Ms. Fried. (Trial Tr. at 181-83) Fried concluded that Martinez suffered from [post-traumatic stress syndrome](#). (Trial Tr. at 419) She testified that he was uncomfortable leaving his home, and had fears of being followed. (Trial

Tr. at 423) She testified that he expressed being anxious in the presence of law enforcement officers, even those whom he already knew personally. (Trial Tr. at 423-24) Fried confirmed that Martinez expressed to her that he had contemplated suicide. (Trial Tr. at 424) She also testified that Martinez reported physical symptoms, such as feelings of coldness and numbness. (Trial Tr. at 443-44)

Frank Adamowicz, who resides with Martinez and whose relationship with Martinez has been formalized as a domestic partnership, (Trial Tr. at 450) testified as to the damages Mr. Martinez incurred following his arrest and prosecution. Adamowicz testified that Martinez became withdrawn, and was uneasy with routine outings and social gatherings. (Trial Tr. at 458-59) Adamowicz corroborated Martinez's account that he was uneasy in the presence of police officers, even those whom he knew personally. (Trial Tr. at 459, 474-75) Martinez also made utterances that referred to the possibility of his death, Adamowicz testified. (Trial Tr. at 461) Adamowicz testified that he observed Martinez display physical symptoms, and that Martinez's "was no longer the person he was prior to that event." (Trial Tr. at 468)

On June 21, 2000, Martinez and Adamowicz were traveling through the World Trade Center while on their way to a court appearance in Martinez's criminal prosecution. (Trial Tr. at 101) While on an escalator, Martinez heard someone shout his name, and saw that it was Officer Nunziato.⁸ (Trial Tr. at 101) Nunziato and Callaghan were together. (Trial Tr. at 101) According to Martinez, Nunziato was waiting for him, and when he saw Martinez and Adamowicz, "he cracked up laughing." (Trial Tr. at 101) Nunziato followed them through the concourse. (Trial Tr. at 101) Hoping that Nunziato would stop following him, Martinez stepped into a retail establishment. (Trial Tr. at 102) Martinez testified that when he exited the store, he saw Nunziato and Callaghan standing outside. (Trial Tr. at 102) He testified that Nunziato was striking the palm of his hand with a rolled-up newspaper, and that "he was looking at me and smiling at the same time." (Trial Tr. at 102) Adamowicz corroborated this account. (Trial Tr. at 465) Martinez testified that he was "terrified" by the encounter. (Trial Tr. at 102)

***19** "[W]here the jury has found a constitutional violation and there is no genuine dispute that the violation resulted in some injury to the plaintiff, the plaintiff

is entitled to an award of compensatory damages as a matter of law.” *Kerman v. City of New York*, 374 F.3d 93, 124 (2d Cir.2004). Compensatory damages may include out-of-pocket expenses and other monetary harms, and arise from injury to reputation, personal humiliation, and mental anguish and suffering. *Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 307 (1986). Similarly, a plaintiff unlawfully deprived of liberty is entitled to compensatory damages for the loss of “intangible rights.” *Kerman*, 374 F.3d at 124. The damages recoverable for the loss of liberty are separable from damages caused by physical harm, embarrassment, or emotional suffering. *Id.* at 125–26.

A jury award should not be sustained “where the damages awarded are so excessive ‘as to shock the judicial conscience.’” *Raucci v. Town of Rotterdam*, 902 F.2d 1050, 1058 (2d Cir.1990) (quoting *Martell v. Boardwalk Enterprises, Inc.*, 748 F.2d 740, 750 (2d Cir.1984)). A court also must pay “due deference to the fact-finding role of the jury” when evaluating claimed excessive damages. *Gardner v. Federated Dep’t Stores, Inc.*, 907 F.2d 1348, 1353 (2d Cir.1990). “[W]hen § 1983 plaintiffs seek damages for violations of constitutional rights, the level of damages is ordinarily determined according to principles derived from the common law of torts.” *Memphis Community School Dist.*, 477 U.S. at 306. As Judge Schwartz observed, damages arising out of an emotional distress claim are not always easily translated into a dollar amount, and the law does not provide a precise formula for reducing such injuries to a monetary value. *Sulkowska v. City of New York*, 129 F.Supp.2d 274, 308 (S.D.N.Y.2001) (citing *Mathie v. Fries*, 121 F.3d 808, 814 (2d Cir.1997)). However, it is appropriate for a court considering a motion for remittitur to consider the value of jury awards that arose from the same cause of action. *See, e.g., Gardner*, 907 F.2d at 1353.

The jury's awards of damages for false arrest or malicious prosecution redress different phases in Martinez's ordeal. Damages on a false arrest claim compensate for injuries from the beginning of custody to arraignment, and malicious prosecution damages compensate for post-arraignment injuries. *Hygh v. Jacobs*, 961 F.2d 359, 366 (2d Cir.1992). In turn, false arrest is subdivided into two compensatory components: (1) deprivation of liberty and (2) tangible injury, which includes physical harm, embarrassment, and emotional suffering. *See Kerman*, 374 F.3d at 125–26. “[T]he damages for deprivation

of liberty redress the denial of free movement and the violation done to [an individual's] dignity as a result of the unlawful detention, and not the physical and mental injuries arising from the incident.” *Gardner* 907 F.2d at 1353. Thus, damages awarded for deprivation of liberty are independent of damages awarded for physical and mental injuries, and deprivation of liberty damages may be awarded even in the absence of physical or mental harm. *Kerman*, 374 F.3d at 126 (citing *Woodard v. City of Albany*, 81 A.D.2d 947 (3d Dep't.1981)). As to Martinez's false arrest claim, the verdict form, agreed upon by the parties, did not require the jury to award damages for loss of liberty separate from damages arising from emotional distress and mental anguish. The jury charge made clear the governing standard for each component of the award. Therefore, I separately analyze the two components of the \$1,000,000 false arrest award: emotional injury and the loss of liberty.

A. Plaintiff's False Arrest Award

*20 False arrest awards vary widely. When adjusted to 2005 dollars, they have generally ranged between \$10,000 and \$300,000.⁹ *See Gardner*, 907 F.2d at 1353 (ordering the remittitur of a \$300,000 jury award to \$200,000 (roughly \$297,000 in 2005 dollars) for approximately 8 hours of imprisonment); *Roundtree v. City of New York*, 208 A.D.2d 407 (1st Dep't 1994) (ordering a remittitur amount to \$200,000 (roughly \$262,000 in 2005 dollars) for 3.5 days of imprisonment); *Stile v. City of New York*, 172 A.D.2d 743 (2d Dep't 1991) (ordering a remittitur amount of \$150,000 (roughly \$214,000 in 2005 dollars) for 28 hours of imprisonment); *Martinez v. Gayson*, 1998 WL 564385, at *6 (E.D.N.Y. June 30, 1998) (ordering a remittitur amount of \$160,000 (roughly \$191,000 in year 2005) for five hours of imprisonment); *Bert v. Port Authority of New York and New Jersey*, 166 A.D.2d 351, 351 (1st Dep't 1991) (awarding \$100,000 (roughly \$142,000 in year 2005) for three hours of imprisonment and humiliation); *Hollender v. Trump Village Co-op .*, 97 A.D.2d 812 (2d Dep't 1983) (ordering a remittitur amount of \$10,000 (roughly \$19,000 in year 2005) for false arrest); *Mason v. City of New York*, 949 F.Supp. 1068, 1076 (S.D.N.Y.1996) (ordering a remittitur amount of \$10,000 (roughly \$12,400 in year 2005) for 2 hours of imprisonment).

Two prior jury awards are particularly helpful in analyzing the *quantum* of damages awarded to Martinez.

In *Sulkowska*, the plaintiff protested the city's unlawful seizure of her establishment, a bar. 129 F.Supp.2d at 283–84. She was falsely arrested and imprisoned for approximately a half-day, without physical injury. In a bench trial, Judge Schwartz awarded her \$275,000 (\$302,020 in 2005 dollars) for past and future pain and suffering. *Id.* at 309. The court concluded that malicious prosecution damages would be minimal, since the plaintiff's injuries were primarily attributable to her arrest and pre-arraignment detention, so the award amount effectively was compensation for false arrest. *Id.* at 307.

In *Komlosi v. Fudenberg*, 2000 WL 351414, at *16 n. 12 (S.D.N.Y.2000), the plaintiff, a psychologist, was falsely accused of sexually abusing patients. *Id.* at *2–3. While his employer commenced an internal investigation, law enforcement arrested him and filed charges of rape and forcible sodomy. *Id.* at *3. He remained in custody for two weeks, and although the charges against him ultimately were dismissed, the accusations garnered press attention, including an article in the New York Post. *Id.* at *3. The plaintiff undertook psychiatric therapy and was diagnosed with post-traumatic stress disorder. *Id.* At trial, the jury awarded the plaintiff \$6.6 million on his false arrest and malicious prosecution claims, approximately \$5.23 million of which was to compensate for non-economic loss. *Id.* at *15. The district court granted remittitur of non-economic damages to \$500,000. *Id.* at *17.

*21 Other false arrest awards have exceeded this range, but were undifferentiated lump sums that arose from multiple torts. See *Ismail v. Cohen*, 899 F.2d 183 (2d Cir.1990) (upholding a lump sum award of \$650,000 in compensatory damages (roughly \$967,000 in 2005 dollars) for deprivation of constitutional rights, discrimination, assault, battery, false arrest, malicious prosecution, and abuse of process).

I first consider the award for the loss of liberty that Martinez suffered as a result of the false arrest. I conclude that Martinez should be compensated for his loss of liberty in the sum of \$160,000. In *Gardner*, the plaintiff was falsely arrested and accused of theft by security guards in a Manhattan department store. *Gardner*, 907 F.2d at 1353. After store security held Gardner, threatened him, and called him a “blond faggot,” he was handed over to the police and transferred to Central Booking to be imprisoned an additional six hours. *Id.* During this time,

Gardner was assaulted and sustained multiple physical injuries, resulting in jaw injury, hearing impairment, and ear inflammation. *Id.* at 1350–51. At trial, the jury awarded \$650,000 for pain and suffering and \$150,000 for deprivation of liberty. *Id.* at 1351. On appeal, the Second Circuit surveyed the then-existing damages awards for the loss of liberty in comparable false arrest cases, and concluded that the sum of \$150,000 “exceeds awards sanctioned in similar New York cases.” The Second Circuit granted a remittitur of damages for deprivation of liberty from \$150,000 to \$50,000. *Id.* at 1353.

Martinez was held for approximately 2.5 times the duration of Gardner's imprisonment.¹⁰ I take this into account in concluding that in light of the circumstances of Martinez's arrest, an award of \$160,000 for deprivation of liberty does not shock the judicial conscience. Martinez's confinement lasted from just after 6 a.m. on February 1 until shortly after midnight on February 2. Accepting the jury's conclusion that Martinez was falsely arrested during a typical morning commute and unlawfully held for a period of time extending late into the night, an award of \$160,000 is not inconsistent with other false arrest awards, and is not a sum that shocks the judicial conscience.

I now consider the false arrest damages for mental anguish and emotional distress. “The measure of damages for pain and suffering or emotional distress is ... not easily translated into a dollar amount. Consequently, the law does not provide a precise formula by which pain and suffering and emotional distress may be properly measured and reduced to monetary value.” *Sulkowska*, 129 F.Supp.2d at 308. Other courts have given substantial awards for emotional distress resulting from false arrest. See *Gonzalez v. Bratton*, 147 F.Supp.2d 180, 208–09 (S.D.N.Y.2001) (upholding a compensatory award of \$250,000 for emotional distress resulting from a false arrest that included a physically invasive strip search).

*22 On the evidence before the jury, an award above \$200,000 would exceed a permissible award for the pain and suffering that Martinez faced as a result of the false arrest. Martinez was not subjected to physical assault. The evidence supports a conclusion that he experienced considerable anguish because of his arrest. This included sleeplessness, loss of appetite, anxiety bouts, cessation of social, volunteer, and church activities, ideations of suicide, and concerns about his immigration status. (Trial Tr. at 97–100, 103, 106) Much of Martinez's testimony

was corroborated by the testimony of Ms. Fried and Mr. Adamowicz. Martinez also allowed his application for U.S. citizenship to lapse out of fear that the arrest would have repercussions on the process. (Trial Tr. at 66) The jury credited Martinez's testimony, and in light of the injuries to which he testified and the damages awarded in comparable cases, including *Gonzalez*, an award of \$200,000 does not shock the judicial conscience.

Lastly, the jury's award of \$1,000 for the plaintiff's therapy bills does not shock the judicial conscience.

B. Plaintiff's Malicious Prosecution Award

The jury awarded \$100,000 on Martinez's malicious prosecution claim. I conclude that remittitur is unwarranted as to this award. Martinez appeared in state trial court to defend himself from the charge of public lewdness, a highly stigmatizing charge. The jury in this case concluded that Martinez was prosecuted without probable cause. Martinez stated that the trial made him feel desperate, nervous, and "like a madman." (Trial Tr. at 96–97) Jurors also heard testimony from Martinez and Adamowicz about the intimidating conduct of Nunziato on June 21, 2000 while Martinez was en route to a court appearance. (Trial Tr. at 101–02, 465) The damages awarded for malicious prosecution are in line with other awards for the same tort. See *King v. Macri*, 993 F.2d 294 (2d Cir.1993) (upholding a \$75,000 award for a malicious prosecution claim (\$100,950 in 2005 dollars)); *Gentile v. County of Suffolk*, 926 F.2d 142 (2d Cir.1991) (upholding a \$75,000 award for a malicious prosecution claim (\$107,100 in 2005 dollars)).

The jury award for Martinez's malicious prosecution claim is consistent with other jury awards, and that remittitur is not appropriate. In addition, the jury's award of \$3,000 in attorneys' fees expended by Martinez in the underlying criminal trial is consistent with the evidence and does not shock the judicial conscience.

3. Plaintiff's Motion for Attorneys' Fees

Section 1988 to Title 42 of the U.S.Code provides attorneys' fees for the prevailing party in an action under 42 U.S.C. § 1983: "[T]he court, in its discretion, may allow the prevailing party ... a reasonable attorney's fee as part of the costs." "[A] prevailing plaintiff 'should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.'" *Hensley v.*

Eckerhart, 461 U.S. 424, 429 (1983) (quoting S.Rep. No. 94–1011, p. 4 (1976), U.S.Code Cong. & Admin. News 1976, p. 5912). Although the fee awards vary with the facts of each case, two questions govern whether attorneys' fees should be awarded: "First, did the plaintiff fail to prevail on claims that were unrelated to the claims on which he succeeded? Second, did the plaintiff achieve a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award?" *Id.* at 434. "Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. Normally this will encompass all hours reasonably expended on the litigation, and indeed in some cases of exceptional success an enhanced award may be justified." *Id.* at 435.

*23 Following *Hensley*, the *quantum* of attorneys' fees should be determined by "the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Id.* at 433. The party seeking fees should submit evidence showing hours and rates, and the absence of evidence may warrant a reduced award. *Id.* Courts also should be alert to excessive fee requests, signaled by overstaffing and redundant billing. *Id.* at 434. "[T]he fee applicant bears the burden of establishing entitlement to an award and documenting the appropriate hours expended and hourly rates. The applicant should exercise 'billing judgment' with respect to hours worked, and should maintain billing time records in a manner that will enable a reviewing court to identify distinct claims." *Id.* at 437 (internal citation omitted). Attorneys' rates should be calculated "in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation." *Blum v. Stenson*, 465 U.S. 886, 896 (1984). In addition to attorneys' fees, a section 1988 award may include out-of-pocket expenses incurred by an attorney that ordinarily are charged to clients. *LeBlanc–Sternberg v. Fletcher*, 143 F.3d 748, 763 (2d Cir.1998).

In scattershot fashion, the defendants oppose the plaintiff's application for attorneys' fees. Their opposition includes a reiteration of the defendants' disagreement with the jury's verdict; defendants' skepticism as to the existence of a retainer agreement between Mr. Martinez and his counsel; an assertion that Mr. Martinez's employment in food services for a major insurance underwriter indicates that he can afford to pay his own attorneys' fees; an argument that some of the plaintiff's document discovery

proved unfruitful; an argument that no fees should be awarded for the work of any attorney other than plaintiff's lead trial counsel; and an assertion that the 25 hours expended on the plaintiff's *in limine* motions was excessive.

In opposing the application for attorneys' fees, the defendants have not shown that the plaintiff's employment status is relevant to the application, nor have they set forth a basis in law as to how a retainer agreement or the defendants' disagreement with the jury verdict would inform the Court's disposition of the attorneys' fees issue. I therefore reject these arguments as bases for not awarding attorneys' fees.

I consider the defendants' argument that attorneys' fees should be limited because, they contend, the plaintiff's document discovery was unfruitful. Defendants argue that prior to taking the depositions of the defendants, the plaintiff engaged in extensive document discovery of the Port Authority in search of documents to support the plaintiff's assertion that an anti-homosexual bias influenced the Port Authority's conduct. Defendants assert that because there was no documentary evidence to support this theory, "discovery was futile from its inception and indefensible as strategy." (Def. Mem. at 3) Presumably, this argument is directed toward *Hensley*'s initial threshold question of whether the plaintiff prevailed on his claims.

***24** Although the trial court has discretion to reduce a lodestar fee based on the number of hours expended on a severable, unsuccessful claim, *see Green v. Torres*, 361 F.3d 96, 98 (2d Cir.2004) (per curiam), the defendant has not raised any authority showing that attorneys' fees should be reduced when document discovery relevant to a plaintiff's successful claims does not produce a smoking gun. I note that the jury found in the plaintiff's favor on his *Monell* claim that the Port Authority conducted sweeps without regard to probable cause. Pretrial discovery into the Port Authority was necessary for the prosecution of this action, and the plaintiff contends that the round of discovery that defendants frame as meritless yielded documents that were introduced as trial exhibits, and helped to frame counsel's questioning of witnesses at trial.

Although that round of document discovery may not have yielded a smoking gun, there is no evidence indicating that it was frivolous, dilatory or otherwise constituted harassment. *See Kennelly v. State of Rhode Island*, 682

F.2d 282, 283 (1st Cir.1982) (per curiam) (upholding attorneys' fees award for plaintiff's police misconduct claim because "[i]n the course of pretrial discovery, it was incumbent upon plaintiffs' counsel to explore the degree of participation of the municipal defendants in the incident in question."). Based on the record before me, I conclude that plaintiff's attorneys' fees should not be reduced based on the results of this round of document discovery.¹¹

I next consider the defendants' argument that any award should exclude plaintiff's attorneys other than Mr. Spiegel. Defendants posit that, because Mr. Spiegel was lead trial counsel responsible for witness examinations and arguments to the jury, all work performed by his co-counsel was duplicative and unnecessary. Although the defendants' rationale is not altogether clear, they appear to argue that because all of the evidence and most of the legal argumentation in this action was funneled through Spiegel, only Spiegel's time should have been included in an attorneys' fees award.

The plaintiff proffered comprehensive time records for the following individuals: 1.) Michael Spiegel, plaintiff's lead trial counsel; 2.) Alicia Amezcua, a lawyer and associate of Mr. Spiegel; 3.) Irum Taqi, another lawyer and associate of Mr. Spiegel; 4.) Jeffrey Rothman, another of Mr. Spiegel's associates; 5.) Larissa Chernock, a paralegal; and 6.) Lauren Stephen-Davidowitz, another paralegal. (Spiegel Dec. Exs. A, C-D) Plaintiff also submits a declaration from Joshua Fuld Nessen, a former associate of Spiegel's whose billing records were lost in the attacks of September 11, 2001. (attached at Spiegel Dec. Ex. C) Mr. Nessen proffers copies of memoranda that reflect the results of his legal research for this case, and estimates that he spent at least 40 hours working on this matter. (Nessen Dec. ¶ 7) Scott A. Korenbaum, who assisted with legal arguments at trial, has submitted a declaration setting forth details as to the hours worked and services rendered since October 2004. (Korenbaum Dec. Ex. B) Plaintiff also proffers documentation supporting the \$6,050.26 costs incurred in litigating the claim, including copying expenses, costs for on-line computer research, and transcript preparation fees and compensation for a courtroom interpreter. (Spiegel Dec. Ex. E)

***25** The defendants have not directed the Court to any portion of the record to support their contention that plaintiff's attorneys engaged in redundant services. Defendants challenge the work performed by Ms.

Amezcuca. (Spiegel Dec. Ex. C) She spent roughly 17 hours researching and writing the motion to compel, approximately 10 hours drafting and researching the Complaint, and approximately four hours drafting interrogatories. (Spiegel Dec. Ex. C) Mr. Spiegel spent approximately 2.5 hours reviewing and revising the Complaint, approximately one hour working on plaintiff's interrogatories, and approximately 13 hours researching and writing the motion to compel. (Spiegel Dec. Ex. A) I do not consider these amounts of time excessive or redundant. Similarly, there appear to be no redundancies or excesses in the billing records of Mr. Taqi, who spent a total of 9.8 hours preparing discovery materials that were provided to the defendants, drafting a letter to opposing counsel on discovery issues, and drafting the First Amended Complaint. (Spiegel Dec. Ex. C) Defendants also argue that the paralegals utilized in this case performed redundant tasks, an assertion that they do not support with any citation to the record. I reject the defendants' contention that the services rendered by Mr. Spiegel, his present and former associates and paralegals were excessive, redundant or otherwise improper.

Defendants have not set forth any basis for the Court to deny attorneys' fees incurred by Mr. Korenbaum, who was co-counsel at trial but not a part of Mr. Spiegel's law firm. Defendants argue that it was excessive for Mr. Korenbaum and Mr. Spiegel to spend 25 hours researching and drafting *in limine* motions. (Def. Mem. at 5) Moreover, they contend that Mr. Korenbaum's trial presence was redundant. (Def. Mem. at 5) Both of these contentions are without merit. The 25 hours spent on the *in limine* motions was not excessive given the evidentiary issues implicated therein. In addition, Mr. Korenbaum's trial role focused on the legal and evidentiary issues that arose, as well as witness preparation. (Korenbaum Dec. ¶ 13) This was neither an unreasonable nor duplicative allotment of trial responsibilities.

I conclude that the fees incurred by the plaintiff's attorneys are sought for prevailing claims, and that the plaintiff achieved a level of success in his claims that warrant an award of attorneys' fees under 42 U.S.C. § 1988.

Next, I consider whether the hourly rates sought by the plaintiff are reasonable. "The statute and legislative history establish that 'reasonable fees' under § 1988 are to be calculated according to the prevailing market rates in the relevant community, regardless of whether plaintiff

is represented by private or nonprofit counsel." *Blum*, 465 U.S. at 886. "The legislative history explains that 'a reasonable attorney's fee' is one that is 'adequate to attract competent counsel, but ... [that does] not produce windfalls to attorneys.'" *Id.* at 897 (ellipsis and alteration in original). Coming on the heels of *Hensley*, *Blum* reinforced that attorneys' fees under section 1988 should be based upon an attorney's reasonable hours times a reasonable rate. *Id.* at 897.

*26 Plaintiff proffers declarations from two attorneys experienced in litigating police misconduct actions. Robert L. Herber states that in 2002, he was awarded fees at the then-current rate of \$400 per hour. (Herbst Dec. ¶ 11, attached at Spiegel Dec. Ex. B) Jonathan C. Moore also states that in 2003, he was awarded compensation at the rate of \$400 per hour. (Moore Dec. ¶ 10, attached at Spiegel Dec. Ex. B) These declarations are uncontested by the defendants.

Mr. Spiegel's customary rate is \$400 per hour. (Spiegel Dec. ¶ 34) Mr. Korenbaum's customary rate is \$325 per hour. (Korenbaum Dec. ¶ 9) These rates are in keeping with other hourly rates found reasonable by courts in this District. *Davis v. New York City Housing Authority*, 2002 WL 31748586, at *3 (S.D.N.Y. Dec. 6, 2002) (\$375 a reasonable hourly fee for seasoned litigator with eighteen years' experience); *Gonzalez v. Bratton*, 147 F.Supp.2d 180, 211–12 (S.D.N.Y.2001) (collecting cases, with \$425 per hour the highest rate cited). These hourly rates are warranted in light of Mr. Spiegel's and Mr. Korenbaum's experience. Mr. Spiegel received his law degree from New York University in 1984, and subsequently clerked for a judge in this District. (Spiegel Dec. ¶ 3) He has been litigating constitutional claims since 1985, including police misconduct cases. (Spiegel Dec. ¶¶ 3–5) Mr. Spiegel has litigated more than 20 police brutality cases and has represented a small number of death-eligible criminal defendants. (Spiegel Dec. ¶¶ 9–10) Mr. Korenbaum has practice law for sixteen years, including five years at the New York City Law Department defending police misconduct actions and other constitutional law claims. (Korenbaum Dec. ¶¶ 5, 8)

Mr. Spiegel spent a total of 490.9 hours on this case. (Spiegel Dec. ¶ 34) Mr. Korenbaum spent 107.7 hours. (Spiegel Dec. ¶ 36) Mr. Spiegel's associates recorded 159.1 hours on this case, at the rate of \$150 per hour, and his paralegals recorded 40.6 hours at the rate of \$75 per hour.

(Spiegel Dec. ¶¶ 37–38) The billing records are detailed as to the tasks performed by each attorney, and billed to the tenth of an hour.

Considering that this action was actively litigated for nearly four years, including multiple discovery disputes, a moderate level of document production, five depositions, and preparation for and the conduct of a four-day trial, plaintiff's attorneys 757.7 total hours (including the time of paralegals) is not unreasonable. Moreover, based on the uncontested declarations of Mr. Herber and Mr. Moore, and the declarations of Mr. Korenbaum and Mr. Spiegel as to their hourly rates, I conclude that the hourly rates are reasonable.

Having reviewed the billing records of plaintiff's attorneys and their staff, I grant plaintiff's application for costs and attorneys' fees in the amount of \$264,322.76.

Conclusion

The defendants' motions pursuant to [Rule 50](#) and [Rule 59, Fed.R.Civ.P.](#), are DENIED, except to the extent

that the defendants seek a new trial and/or remittitur of the jury award on the false arrest claim. A new trial on compensatory damages (other than therapy expenses) arising out of the plaintiff's false arrest claim is GRANTED, unless plaintiff accepts remittitur of damages on the false arrest claim (other than for therapy expenses) from \$1,000,000 to \$360,000. Plaintiff shall, in a written submission to be filed with the Court within 10 days hereof, accept or reject the amount as remitted.

*27 If remittitur is accepted, plaintiff's total damages (excluding attorneys' fees) would be \$464,000.

The plaintiff's application for costs and attorneys' fees is GRANTED in the sum of \$264,322.76.

SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2005 WL 2143333

Footnotes

- 1 "A person is guilty of public lewdness when he intentionally exposes the private or intimate parts of his body in a lewd manner or commits any other lewd act (a) in a public place, or (b) in private premises under circumstances in which he may readily be observed from either a public place or from other private premises, and with intent that he be so observed." [N.Y. Penal L. § 245.00](#) (McKinney's 2000).
- 2 As a governmental entity, the Port Authority is immune from punitive damages. See [Vernon v. Port Authority of New York and New Jersey](#), 220 F.Supp.2d 223, 232 n. 6 (S.D.N.Y.2002).
- 3 Elsewhere, the defendants imply that the Court erred in not permitting them to take discovery from non-party Gay and Lesbian Anti-Violence Project. (Hoey Dec. at 4) Defendants offer no legal justifications for this argument and do not contend that it is a basis for granting their post-trial motions, so I do not consider it.
- 4 Defendants' counsel did not contemporaneously object to this testimony. Had defendants objected or moved to strike this testimony, it nonetheless would have been admissible against Nunziato for the truth of its content because it constitutes an admission by a party-opponent. [Fed.R.Evid. 801\(d\)\(2\)](#). The other defendants sought no limiting instruction.
- 5 Defendants cite to [Rothstein v. Carriere](#), 373 F.3d 275 (2d Cir.2004), as support for their contention that Mr. Spiegel's summation should have been admitted. Although it considered a malicious prosecution claim under New York law, [Rothstein](#)'s relevance to the admissibility of Mr. Spiegel's prior summation is not clear. Another opinion cited by the defendants, [United States v. Bakshinian](#), 65 F.Supp.2d 1104, 1107–08 (C.D.Cal.1999), evaluated [McKeon](#) in a context specific to federal prosecutions, and held that the government is entitled to less leeway under [McKeon](#) than is a criminal defendant. [Bakshinian](#) did not address facts analogous to those here.
- 6 Rosalba is also identified as "Rose Alba" and "Rosealba." All three spellings appear in the transcript and in the parties' submissions.
- 7 Rule 37(c)(1) states in part: "A party that without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1), or to amend a prior response to discovery as required by Rule 26(e)(2), is not, unless such failure is harmless, permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed."
- 8 Adamowicz testified that Nunziato spoke Martinez's name in "a loud voice" and that the name was "scream[ed]." (Trial Tr. at 462)

- 9 Prior jury verdicts and judicial remittiturs are proper benchmarks in deciding the highest amount of an award that is not shocking to the judicial conscience. *Consorti v. Armstrong World Industries, Inc.*, 72 F.3d 1003, 1013 (2d Cir.1995), *rev'd on other grounds*, 518 U.S. 1031 (1996). Here, rather than merely offering the observation that, for example, in comparing a ten-year-old award to the jury's actions in this case, there should be some upward adjustment for inflation, I have used a perhaps crude adjustment mechanism provided by the United States Bureau of Labor Statistics on its website. (<http://data.bls.gov/cgi-bin/cpicalc.pl>) Of course, using such a mechanism *de hors* the record for directly calculating a party's damages would be impermissible. Here, I used it as nothing more than a tool in looking at case law that, itself, provides a benchmark. I note that the plaintiff utilized a different online inflation calculator on a site maintained by the National Aeronautics and Space Administration.
- 10 Gardner was held for an undisclosed period of time at the store and an additional six hours at Central Booking.
- 11 Elsewhere in their papers, defendants single out one of Mr. Spiegel's associates, Jeffrey A. Rothman, arguing that Mr. Rothman's discovery work should not be covered by attorneys' fees. Because this discovery was not without merit, I reject this contention.

(Q G R I ' R F X P H Q W

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EXHIBIT C



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THE COUNCIL OF
THE CITY OF NEW YORK
DANIEL DROMM
COUNCIL MEMBER, 25TH DISTRICT, QUEENS

CHAIRPERSON
EDUCATION

COMMITTEES
CIVIL RIGHTS
CIVIL SERVICE & LABOR
IMMIGRATION
OVERSIGHT & INVESTIGATIONS

SUB-COMMITTEE
NON-PUBLIC SCHOOLS

October 10, 2014

Michael A. Fedorko, Superintendent of Police/Director of Public Safety
Port Authority of New York & New Jersey
241 Erie Street, Room 302
Jersey City, NJ 07310

Dear Mr. Fedorko:

I am writing to express my deep concern over policing practices at the Port Authority Bus Terminal. A recent *New York Times* article has shed light on the pernicious pattern of Port Authority Police Department (PAPD) officers arresting certain men for lewdness. Despite the dearth of complaints, the PAPD seems to have stationed officers in the bathroom to arrest men for allegedly masturbating.

It appears from the article that gay men are being targeted. I am deeply disturbed by what looks like the anti-lesbian, gay, bisexual, and transgender profiling, which harkens back to a very dark time in this country when the members of the LGBT community were routinely harassed by law enforcement. I have painful memories of my own false arrest on a similar charge as a teenager, and many other gay men have similar stories.

Putting aside the LGBT dimension, I would like to say how utterly creepy and invasive such a violation of someone's personal space is. Why you would be putting any resources into patrolling bathrooms to monitor how people urinate is beyond comprehension.

These arrests and their prosecution are completely unacceptable. I expect such false and apparently discriminatory arrests to end immediately.

Thank you for your time and consideration. I look forward to your response.

Sincerely,

A handwritten signature in black ink, appearing to read "Dromm", with a long horizontal stroke extending to the right.

Daniel Dromm
New York City Council Member, 25th District

cc: Hon. Cyrus R. Vance, Jr., New York County District Attorney

EXHIBIT D

In the Matter of the Claim of

JEFFREY K. REED,

- against -

THE PORT AUTHORITY OF
NEW YORK AND NEW JERSEY

TO: PORT AUTHORITY OFFICE OF THE SECRETARY

PLEASE TAKE NOTICE that the undersigned claimants hereby make claim and demand against the City of New York as follows:

1. The name and post office address of each claimant and of the attorney:

Claimants:

JEFFREY K. REED
100 Irving Place
Staten Island, NY 10304

Attorneys:

GOLDBERG & ALLEN, LLP
49 West 37th Street, 7th floor
New York, New York 10018

2. The nature of the claim:

False arrest; malicious prosecution; intentional and negligent infliction of emotional distress; violation of claimants' statutory and constitutional rights; violation of claimants' civil rights arising from the negligent hiring, negligent training, negligent supervision, and negligent retention of Port Authority Police Officers and from the customs and practices of the Port Authority of New York and New Jersey and its police department.

3. The time when, the place where and the manner in which the claim arose:

- a. Claimant Jeffrey K. Reed is a 53 year-old man who was at all relevant times a resident of Richmond County, New York.
- b. On Sunday, March 13, 2016, at about 4:30 p.m., Claimant, having left work shortly before, was at the Port Authority bus terminal on Eighth Avenue in Manhattan.
- c. Claimant needed to urinate and went into an open bathroom on the third level of

the facility.

- d. The urinals in the bathroom were separated by a partition with a length from approximately Claimant's shoulder to below his knee.
- e. As Claimant walked to a urinal against the wall, he noticed two males standing in the bathroom.
- f. Before Claimant began to urinate, an unknown Hispanic male approached the urinal next to him.
- g. At this point, Claimant noticed that the other two men had left the bathroom.
- h. Because this Hispanic male was mumbling to himself and appeared drunk, Claimant felt uncomfortable and went into a private stall to urinate.
- i. Claimant subsequently exited the stall and the bathroom.
- j. One of the two previously observed males, herein designated as John Doe Officer 1, approached Claimant, displayed a badge and asked if he knew why he was being stopped.
- k. Claimant replied that he did not and was told that it was because he was observed by the other male, subsequently identified as Police Officer Vijay Seetaram, masturbating at the urinal.
- l. Claimant denied doing any such act and asked for a supervisor.
- m. Claimant was handcuffed and placed against a wall together with the Hispanic male whom he had observed at the urinals.
- n. Claimant was approached by Police Officer John Doe 2, purporting to be a supervisor, who stated that "his men were trained" to make these arrests.
- o. Claimant was held in custody for approximately 4 hours and released with a Desk

Appearance Ticket.

- p. Claimant was arraigned and pleaded not guilty on the complaint of Officer Vijay Seetaram in New York County Criminal Court on April 20, 2016 on multiple charges including Public Lewdness, PL §245.00 and Exposure of a Person, PL §245.01.
- q. Claimant refused all offers to dispose of the charges and insisted on a trial.
- r. On October 18, 2016, the charges against Claimant were dismissed on the motion of the District Attorney.

4. The items of damage or injuries claimed are:

- a. Money damages for the intentional and negligent violation of claimants' constitutional and statutory rights.
- b. Money damages for the infliction of emotional distress on the claimants.
- c. Money damages for the false arrest of the claimants.
- d. Punitive damages for the blatant disregard of claimant's statutory and constitutional rights.

PLEASE TAKE FURTHER NOTICE that, this claim is filed within ninety (90) days after the claim has accrued, as required by law. Claimants present this claim for adjustment and payment.

You are hereby notified that, unless the claim is adjusted and paid within the time provided by law from the date of presentation, then Claimants shall commence a plenary action on this claim.

Dated: New York, New York
December 20, 2016

JAY K. GOLDBERG, ESQ.
GOLDBERG & ALLEN, LLP
Attorneys for Claimants
49 West 37th Street, 7th Floor
New York, New York 10018

To: Port Authority of NY and NJ
4 World Trade Center
150 Greenwich Street, 23rd Floor
New York, New York 10007