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SUMMARY ORDER AND JUDGMENT, U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT (FEBRUARY 6, 2024)

23-663
Garland v. NYFD

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUMMARY ORDER

JOHN GARLAND, VINCENT BOTTALICO, TIMOTHY A. HEATON, JOSEPH BEVILACQUA, JOSEPH CICERO, JOSEPH COLUMBIA, ANDREW COSTELLO, JAMES DANIEL DALY, III, VINCENT DEFONTE, KENNETH DEFOREST, SALVATORE DEPAOLA, BRIAN F. DOYLE, NATHAN EVANS, CHRISTOPHER FILOCAMO, KEVIN GARVEY, CHARLES GUARNEIRI, DANIEL J. OSHEA, MARGOT LOTH, MICHAEL LYNCH, DENNIS O'KEEFFE, BRIAN PATRICK SMITH, KURT PFLUMM, CHRISTOPHER RAIMONDI, PAUL SCHWEIT, JOSEPH T. JOHNSON, DAVID BUTTON, PAUL PARR, MARK SINCLAIR, DANIEL BAUDILLE, JOHN DREHER, THOMAS OLSEN, GIUSEPPE ROBERT PENORO, MATTHEW CONNOR, NICHOLAS MULLGAN, RANDALL SANTANA, ANTHONY PERRONE, SCOTT ETTINGER, ANTHONY MASTROPIETRO, RASHAAD TAYLOR, ANTHONY RUGGIERO, JOSEPH MURDOCCA, KEITH KLEIN, PAUL VASQUENZ, MARK HENESY, RYAN K. HALL,

JUDE PIERRE, MICHELLE SANTIAGO, ROBERT DITRANI, BRIAN T. DENZLER, MICHAEL MCGOFF, CHRISTOPHER INFANTE, GEORGE J. MURPHY, THOMAS FEJES, JOHN COSTELLO, BRANDON PHILLIPS, JOSEPH DEPAOLA, BRENDAN MCGEOUGH, JASON CHARLES, ANTHONY C. CARDAZONE, OWEN FAY, MICHAEL FADDA, JOSEPH M. PALMIERI, JARED DYCHKOWSKI, JOHN TWOMLEY, MATT KOVAL, GLENN CLAPP, ROBERT YULI, MATTHEW SINCLAIR, TIM RIVICCI, JOHN ARMORE, MICHAEL SAMOLIS, FELICIA J. TSANG, WILLIAM JOHN SAEZ, ROSARIO CURTO, DAVID SUMMERFIELD, KEVIN ERKMAN, BERNADETTE MEJIA, DANIEL YOUNG, SEAN FITZGERALD, CRAIG LEAHY, DANIEL STROH, STEPHEN INGUAGIATO, STEPHEN BUTTAFUCCO, PHILLIP J. DARCEY, AINSLEY ATWELL, and RODNEY COLON,

Plaintiffs-Appellants,

v.

NEW YORK CITY FIRE DEPARTMENT, DANIEL A. NIGRO, JOHN DOE #1-10, JANE DOE #1-10, CITY OF NEW YORK, HENRY GARRIDO, DISTRICT COUNCIL 37, AFSCME AFLCIO, LOCAL 2507, DISTRICT COUNCIL 37, AFSCME AFLCIO, LOCAL 3621 and DISTRICT COUNCIL 37, AFSCME AFL-CIO,

Defendants-Appellees,

UNIFORMED FIRE OFFICERS ASSOCIATION, LOCAL 854 INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, AFFILIATED WITH THE AFL-

CIO and UNIFORMED FIREFIGHTERS ASSOCIATION OF GREATER NEW YORK,

Defendants.

No. 23-663

Appeal from a judgment of the United States District Court for the Eastern District of New York (Matsumoto, J.).

Before: Steven J. MENASHI, Sarah A. L. MERRIAM, Circuit Judges., Stephen A. VADEN, Judge.[1]

Upon due consideration, it is hereby **ORDERED, ADJUDGED,** and **DECREED** that the judgment of the district court is **AFFIRMED**.

The plaintiffs in this case are current or former employees of the New York City Fire Department ("NYFD"). In October 2021, the NYFD instituted mandatory vaccination against COVID-19 for all employees. The plaintiffs failed to comply with the vaccine mandate, were suspended without pay, and, in some cases, were eventually fired. They brought a class action, asserting that the NYFD had violated their rights under the Due Process Clause of the Fourteenth Amendment. The district court dismissed their action for failure to state a claim. We assume the parties' familiarity with the facts, procedural history, and issues on appeal.

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[1] Judge Stephen A. Vaden of the United States Court of International Trade, sitting by designation.

I

On October 20, 2021, the New York City Commissioner of Health ordered all New York City employees to be vaccinated against COVID-19. Pursuant to the commissioner's order, all non-exempt employees were required to provide proof of vaccination by October 29. John J. Hodgens, the Chief of Operations of the NYFD, issued a memorandum to all NYFD employees on October 21, implementing the commissioner's order. The memorandum informed employees that they could submit requests for religious or medical exemptions prior to October 27. Employees who failed to submit proof of vaccination or to request an accommodation by the applicable deadline would be placed on leave without pay ("LWOP") status on November 1. If an employee's accommodation request was denied, the employee could appeal to a city-wide panel, which was to complete its review by November 25, 2021. Employees would not be placed on LWOP status during the pendency of an appeal.

The city sought to bargain with the firefighters' unions regarding the impact of the vaccine mandate. One of the unions—District Council 37 ("DC37"), which represents emergency medical services personnel—entered into an agreement with the city which provided, *inter alia*, that members could not be placed on LWOP status before December 1, 2021. The other two unions—the Uniformed Fire Officers Association ("UFOA") and the Uniformed Firefighters Association ("UFA")—did not come to an agreement with the city, and the UFA challenged the vaccine mandate in New York state court and before the New York Public Employment Relations Board.

The plaintiffs all failed to submit proof of vaccination or to request an accommodation by the applicable deadline and were placed on LWOP status. The plaintiffs commenced this action on November 24, 2021, seeking a preliminary injunction and a declaratory judgment against the NYFD and the unions. Their complaint asserted a cause of action for violation of their procedural due process rights under the Fourteenth Amendment, along with related claims under 42 U.S.C. § 1983. On December 6, 2021, the district court denied the plaintiffs' request for a preliminary injunction, holding that they had not established a substantial likelihood of success on the merits. *See Garland v. New York City Fire Dep't*, 574 F. Supp. 3d 120, 127 (E.D.N.Y. 2021). The plaintiffs filed an amended complaint on January 5, 2022, asserting "primarily the same causes of action as in the original complaint" but adding "a request for the Court to issue a declaratory judgment that the DC37 Agreement 'was entered into without any contractual authority' and therefore the Plaintiffs' suspension without pay violated their due process rights" as well as "a § 1983 conspiracy claim based on the DC37 Agreement." *Garland v. City of New York*, 665 F. Supp. 3d 295, 301 (E.D.N.Y. 2023). On March 29, 2023, the district court granted the defendants' motions to dismiss the amended complaint, relying largely on the reasoning in its order of December 6, 2021. The district court denied the plaintiffs leave to amend the complaint a second time on the ground that amendment would be futile. This appeal followed.

II

"We review a district court's grant of a motion to dismiss *de novo*, accepting as true all factual claims in the complaint and drawing all reasonable inferences in the plaintiff's favor." *Altimeo Asset Mgmt. v. Qihoo 360 Tech. Co.*, 19 F.4th 145, 147 (2d Cir. 2021) (quoting *Henry v. County of Nassau*, 6 F.4th 324, 328 (2d Cir. 2021)). "Although we generally review denials of leave to amend for abuse of discretion, in cases in which the denial is based on futility, we review de novo that legal conclusion." *Shimon v. Equifax Info. Servs. LLC*, 994 F.3d 88, 91 (2d Cir. 2021).

III

"To determine whether a plaintiff was deprived of property without due process of law in violation of the Fourteenth Amendment, we must first identify the property interest involved. Next, we must determine whether the plaintiff received constitutionally adequate process in the course of the deprivation." *O'Connor v. Pierson*, 426 F.3d 187, 196 (2d Cir. 2005). The district court held, and the defendants do not dispute, that the plaintiffs have a constitutionally protected property interest in their pay and continued employment with the NYFD. Therefore, we need only decide whether the plaintiffs received constitutionally adequate process.

A

Although the plaintiffs have not raised stand-alone state-law claims in this case, their briefing has focused on the argument that the process by which NYFD imposed the vaccine mandate violated New York state and municipal law. The New York City Administrative Code provides that firefighters "shall

be removable only after written charges shall have been preferred against them, and after the charges shall have been publicly examined into, upon such reasonable notice of not less than forty-eight hours to the person charged." N.Y.C. Admin. Code § 15113. New York courts generally hold, however, that procedures such as these need not be followed when a public employee is terminated for "failure to satisfy a qualification of employment unrelated to job performance, misconduct, or competency." *Garland*, 574 F. Supp. 3d at 127 (citing cases). The district court therefore held that the plaintiffs were not entitled to the process described in section 15-113 before being placed on LWOP status or terminated pursuant to the vaccine mandate.

The plaintiffs, however, argue that vaccination was not a valid "qualification of employment" because the NYFD did not bargain with the UFOA and the UFA before imposing the vaccine mandate. As the plaintiffs observe, the New York Court of Appeals has held that "the Taylor Law (Civil Service Law § 200 *et seq*.) generally requires bargaining between public employers and employees regarding the terms and conditions of employment." *Schenectady Police Benev. Ass'n v. New York State Pub. Emplt. Rels. Bd.*, 650 N.E.2d 373, 375 (N.Y. 1995). Because the NYFD did not engage in collective bargaining with the UFOA and the UFA before imposing the vaccine mandate, the plaintiffs contend, the vaccine mandate was not a valid condition of employment with respect to the members of those unions. For that reason, they argue, terminating unvaccinated UFOA and UFA members without the process described in section 15-113 of the New York City Administrative Code violated their

statutory rights. In addition, the plaintiffs assert that it was a violation of their right to due process under the Fourteenth Amendment.

The plaintiffs advance a plausible argument that the process by which the NYFD imposed and enforced the vaccine mandate violated state and municipal law. As the New York Court of Appeals has observed, New York's policy of collective bargaining for public employees is "'strong' and 'sweeping.'" *Schenectady Police*, 650 N.E.2d at 375 (quoting *Cohoes City Sch. Dist. v. Cohoes Teachers Ass'n*, 358 N.E.2d 878, 880 (N.Y. 1976)). Both this court and many New York state courts have held that vaccination is a "condition of employment." *We the Patriots USA, Inc. v. Hochul*, 17 F.4th 266, 294 (2d Cir. 2021); *see also Garland*, 665 F. Supp. 3d at 307 n.8 (noting that "nearly all . . . New York state courts to address the issue have found that the Vaccine Mandate was a condition of employment" and citing cases). That would bring the vaccine mandate within the scope of the Taylor Law. Moreover, the New York City Office of Collective Bargaining has held that the City and the NYFD were obligated to bargain with the firefighters' unions over at least some aspects of the vaccine mandate's implementation.[1]

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[1] While it held that the city and the NYFD were obligated to bargain with the unions, the Office of Collective Bargaining declined to order the reinstatement of firefighters who had been terminated for failure to comply with the vaccine mandate partly because "[o]ver eleven months [had] passed since the Vaccine Mandate was issued, and the deadlines to be vaccinated as well as the need to address reasonable accommodation requests have come and gone." J. App'x 548. However, the Office of Collective Bargaining also noted that the unions had not requested reinstatement for members who had been terminated; rather, the

However, as noted, the plaintiffs have not raised stand-alone state-law claims in this action; rather, they have invoked alleged violations of state and municipal law only to support their federal due-process claim. Even if the plaintiffs established violations of state or municipal law, it is well established that "a violation of state law does not *per se* result in a violation of the Due Process Clause." *Tooly v. Schwaller*, 919 F.3d 165, 172 (2d Cir. 2019). The Supreme Court has explained that the "minimum procedural requirements" of due process are "a matter of federal law" and "are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985) (alteration omitted) (quoting *Vitek v. Jones*, 445 U.S. 480, 491 (1980)). We too have previously recognized that "the failure to comply with all or any requirements of New York State Civil Service Law may not *per se* result in a violation of the due process clause of the Fourteenth Amendment." *Tooly*, 919 F.3d at 173 (quoting *Tooly v. State Univ. of N.Y.*, No. 7:13-CV-01575, 2017 WL 6629227, at *5 (N.D.N.Y. Oct. 2, 2017)). Rather, a court must "assess whether [the defendant's] conduct violated the procedural guarantees of the federal Due Process Clause, as laid out by the Supreme Court." *Id.* We therefore

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unions sought relief that "was limited to a declaration that the City violated its obligation to negotiate in good faith and an order that the City bargain in good faith over implementation of policies related to the Vaccine Mandate." *Id.* at 548 n.10. Therefore, it appears to remain undecided whether the plaintiffs would be entitled to reinstatement if they successfully argued in a state court proceeding that the implementation and enforcement of the vaccine mandate violated state and municipal law.

proceed to analyze whether the process afforded to the plaintiffs satisfied the minimum standards of that clause.

B

We have explained that "[t]he touchstone of due process . . . is 'the requirement that a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it.'" *Spinelli v. City of New York*, 579 F.3d 160, 169 (2d Cir. 2009) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 348-49 (1976)). In the case of a public employee who may be terminated only for cause, "procedural due process is satisfied if the government provides notice and a limited opportunity to be heard prior to termination, so long as a full adversarial hearing is provided afterwards." *Locurto v. Safir*, 264 F.3d 154, 171 (2d Cir. 2001).[2] We conclude

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[2] We have noted that "[t]he Supreme Court distinguishes between deprivations of liberty or property occurring as a result of established governmental procedures, and those based on random, unauthorized acts by government officers." *Locurto*, 264 F.3d at 172 (citing *Parratt v. Taylor*, 451 U.S. 527, 541 (1981), *overruled on other grounds by Daniels v. Williams*, 474 U.S. 327 (1986)). When the government deprives a citizen of a protected liberty or property interest "in the more structured environment of established state procedures, rather than random acts, the availability of postdeprivation procedures will not, ipso facto, satisfy due process." *Hellenic Am. Neighborhood Action Comm. v. City of New York*, 101 F.3d 877, 880 (2d Cir. 1996) (citing *Hudson v. Palmer*, 468 U.S. 517, 531 (1984)). The plaintiffs advert to this distinction in their reply brief in arguing that the availability of an Article 78 proceeding, coupled with the pre-deprivation process afforded them, did not satisfy the constitutional minimum. *See* Reply Br. 21. In *Locurto*, however, we held that the distinction between random acts and established procedures was "immaterial" because in either case notice, a limited pre-deprivation opportunity to be heard, and a full post-deprivation

that the process afforded to the plaintiffs satisfied this minimum constitutional standard.

The October 21 memorandum to all NYFD employees provided the plaintiffs with constitutionally adequate notice. Indeed, the plaintiffs do not argue on appeal that they did not receive sufficient notice. The decisive question for this appeal is thus whether the plaintiffs were afforded an adequate opportunity to be heard.

With respect to plaintiffs who sought a religious or medical exemption, we conclude that the city provided an adequate opportunity to be heard by allowing NYFD employees to make an exemption request and pursue an appeal to a citywide panel if the request was denied. These plaintiffs also had access to additional post-deprivation process in the form of an Article 78 proceeding and the grievance procedures under their collective-bargaining agreements. The plaintiffs assert in their reply brief that the accommodation process "was a sham" because "in reality, there was little chance that any Appellant would have received an actual accommodation." Reply Br. 20. According to the plaintiffs, out of approximately 3,200 appeals from denials of accommodation requests, only about 100 were successful. *See id.* If the accommodation process was indeed a sham—that is, if the NYFD or the citywide panel indiscriminately denied all or most meritorious accommodation requests—that might indeed violate the requirements of the Due Process Clause, pursuant to which the opportunity to be heard "must

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adversarial hearing in the form of an Article 78 proceeding afforded all the process that was due. *Locurto*, 264 F.3d at 175. Here, the distinction has similarly limited force.

be granted . . . *in a meaningful manner*." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) (emphasis added). But the plaintiffs have not alleged sufficient facts to allow the plausible inference that the accommodation process was a sham. Neither the plaintiffs' amended complaint nor their briefing indicates whether the accommodation requests that were denied were frivolous or meritorious. For that reason, the plaintiffs have failed to state a claim that the putative class members who requested accommodations were denied due process. *See Tongue v. Sanofi*, 816 F.3d 199, 209 (2d Cir. 2016) ("The Court must . . . consider[] whether the 'factual content' 'allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'") (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

This does not end the analysis. The plaintiffs argue that "for those Appellants who did not have either a religious or medical reason for not taking the vaccine, there was no due process at all." Reply Br. 20. The firefighters without a religious objection or medical contraindication to prevent them from taking the vaccine were nonetheless entitled to an opportunity to argue that they could not be terminated for refusing to take the vaccine because the implementation and enforcement of the vaccine mandate violated New York law. But as their counsel conceded at oral argument, the plaintiffs had the opportunity to raise this issue in an Article 78 proceeding, and some NYFD employees have in fact done so successfully. Given the availability of subsequent judicial review under Article 78, the city did not violate the plaintiffs' right to due process by not affording an opportunity to make this argument prior to being terminated or placed on LWOP

status. "[A] pre-termination hearing does not purport to resolve the propriety of the discharge, but serves mainly as a check against a mistake being made by ensuring there are reasonable grounds to find the charges against an employee are true and would support his termination." *Locurto*, 264 F.3d at 173-74 (citing *Loudermill*, 470 U.S. at 545-46). We conclude that those plaintiffs who did not have a religious objection or medical contraindication were also afforded constitutionally sufficient process.

For these reasons, the process afforded to the members of the putative class satisfied the minimum standard set by the federal constitution. While the plaintiffs may have a plausible argument that the process by which the vaccine mandate was implemented and enforced violated state law—in particular, New York's Taylor Law—it is well-established that violations of state law do not, ipso facto, amount to a violation of the federal Due Process Clause. Because the plaintiffs were provided with notice and an opportunity to be heard—including an opportunity to raise their state-law arguments in an Article 78 proceeding—we conclude that there was no federal constitutional violation.

IV

Because the plaintiffs did not suffer a due process violation, their remaining arguments cannot prevail. Without an underlying constitutional claim, their § 1983 conspiracy claim fails as a matter of law. *See Singer v. Fulton Cnty. Sheriff,* 63 F.3d 110, 119 (2d Cir. 1995). The plaintiffs' class claims were also correctly dismissed because a plaintiff in a putative class action "must state a claim in its own right to survive a motion to dismiss." *Plumber & Steamfitters Loc. 773*

Pension Fund v. Danske Bank A/S, 11 F.4th 90, 101 (2d Cir. 2021). If the named plaintiffs fail to state a claim that their constitutional rights were violated, they cannot maintain an action to vindicate the rights of a class of similarly situated plaintiffs.

In addition, the district court appropriately denied the plaintiffs leave to amend on the ground that amendment would be futile, observing that the plaintiffs had already had multiple opportunities to state a cognizable claim. The district court observed that

> after extensive briefing, evidentiary submissions, and a show cause hearing, the Court allowed Plaintiffs an opportunity to amend their complaint. Despite the Court's detailed analysis of Plaintiffs' factual allegations and claims in its December 2021 Order, Plaintiffs have again failed to allege facts supporting their claims. Under these circumstances, and because further amendments would not cure the deficiencies discussed in this opinion, any amendment would be futile.

Garland, 2023 WL 2682406, at *12 (citations omitted). Even with the opportunity to amend, moreover, the plaintiffs decided not to assert claims under state law. Under these circumstances, it was appropriate for the district court to deny leave to amend. *See City of Pontiac Policemen's and Firemen's Ret. Sys. v. UBS AG*, 752 F.3d 173, 188 (2d Cir. 2014) (affirming the denial of leave to amend when the "[p]laintiffs have already had one opportunity to amend their complaint," it was "unlikely that the deficiencies raised with respect to the Amended Complaint were unforeseen by the plaintiffs when they amended," and the "plaintiffs have identified no additional facts or legal theories—

either on appeal or to the District Court—they might assert if given leave to amend").

* * *

We have considered the plaintiffs' remaining arguments, which we conclude are without merit. For the foregoing reasons, we affirm the judgment of the district court.

FOR THE COURT:

/s/ Catherine O'Hagan Wolfe
Clerk of Court
[SEAL]

**ORDER AND JUDGMENT,
U.S. DISTRICT COURT FOR THE
EASTERN DISTRICT OF NEW YORK
(MARCH 31, 2023)**

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

JOHN GARLAND, ET AL.,

Plaintiff,

v.

CITY OF NEW YORK, ET AL.,

Defendants.

No. 21-cv-6586(KAM)(CLP)

Before: Hon. Kiyo A. MATSUMOTO,
United States District Judge.

A Memorandum and Order of Honorable Kiyo A. Matsumoto, United States District Judge, having been filed on March 29, 2023, granting City Defendants' Motion to Dismiss and DC37 Defendants' Motion to Dismiss in their entirety; and denying leave to amend; it is

ORDERED and ADJUDGED that City Defendants' Motion to Dismiss and DC37 Defendants' Motion to Dismiss are granted in their entirety; and that leave to amend is denied.

Brenna B. Mahoney
Clerk of Court

By: /s/Jalitza Poveda
Deputy Clerk

Dated: Brooklyn, New York
March 31, 2023

**MEMORANDUM AND ORDER,
U.S. DISTRICT COURT FOR THE
EASTERN DISTRICT OF NEW YORK
(MARCH 29, 2023)**

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

JOHN GARLAND, ET AL.,

Plaintiff,

v.

CITY OF NEW YORK, ET AL.,

Defendants.

No. 21-cv-6586(KAM)(CLP)

Before: Hon. Kiyo A. MATSUMOTO,
United States District Judge.

MEMORANDUM AND ORDER

KIYO A. MATSUMOTO, United States District Judge:

Named Plaintiffs, employees of the New York City Fire Department ("FDNY")[1], commenced this action on November 24, 2021, against the City of New York, then–FDNY Commissioner Daniel A. Nigro, and

[1] Named Plaintiffs include FDNY officers, firefighters, and employees of the Emergency Medical Service ("EMS"). (ECF No. 27, Amended Complaint ("Amended Compl.") at ¶¶ 1-86, 108-09.)

unnamed John and Jane Does (collectively, "City Defendants"). (ECF No. 1, Complaint ("Compl.").) Defendants were responsible for implementing and enforcing the City's COVID-19 vaccination mandate ("Vaccine Mandate") covering all City employees, as detailed in an October 20, 2021 order issued by the Commissioner of Health ("COH Order") requiring all City employees to provide documentation of at least a first dose of a COVID-19 vaccine by October 29, 2021 or be "excluded from the premises at which they work[ed] beginning on November 1, 2021." (ECF No. 15-1, Exhibit A ("Ex. A") at 3.) The day after the COH Order was issued, on October 21, 2021, the FDNY issued a memorandum notifying FDNY employees about the Vaccine Mandate, the COH Order, and the procedures for FDNY employees to obtain a religious or medical accommodation ("October Memorandum"). The Vaccine Mandate was revoked by the City on February 10, 2023 and is no longer in effect.[2]

At the time the original complaint was filed on November 24, 2021, Plaintiffs had not received at least one dose of the COVID-19 vaccine, and had been suspended without pay, at least temporarily, by FDNY.[3]

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[2] *See* N.Y.C. Board of Health, Order Rescinding Orders Requiring COVID-19 Vaccination in Child Care and Early Intervention Programs, for Nonpublic School Staff, and for Individuals Working in Certain Child Care Programs (2023); *Pani v. Empire Blue Cross Blue Shield*, 152 F.3d 67, 75 (2d Cir. 1998) ("[A] district court may rely on matters of public record in deciding a motion to dismiss under Rule 12(b)(6).").

[3] The original complaint stated that nine Plaintiffs had been "returned to pay status," but did not state if those Plaintiffs had received at least one dose of the COVID-19 vaccine. (ECF No. 1, Compl. at ¶ 65.) Since then, at least 27 Plaintiffs have become

(ECF No. 1, Compl. at ¶¶ 62-63, 65.) Plaintiffs sought preliminary injunctive relief and asserted that the implementation of the Vaccine Mandate and subsequent consequences violated their procedural due process rights by violating (a) their statutory rights to a specific removal process under N.Y.C. Admin. Code § 15-113 and (b) their contractual rights to a specific removal process under their applicable collective bargaining agreements ("CBA"). (*Id.* at ¶¶ 67-71, 99-109.) Plaintiffs also asserted claims under 42 U.S.C. § 1983 against City Defendants for violating Plaintiffs' procedural due process rights, and a claim against Defendant Nigro for his alleged participation in these violations. (*Id.* at ¶ 110-15.)

On November 24, 2021, Plaintiffs moved for a preliminary injunction to restore them to pay status and prohibit City Defendants from "disciplining" them further. (ECF No. 5, Motion for Preliminary Injunction.) After providing the parties with an opportunity to present evidence and submissions before, during, and after a show cause hearing, the Court denied Plaintiffs' motion for injunctive relief in a Memorandum and Order ("December 2021 Order") dated December 6, 2021. (ECF No. 24, Order Denying Preliminary Injunction ("December 2021 Order").)

Plaintiffs filed an amended complaint ("Amended Complaint"), adding Defendants District Council 37, AFSCME AFL-CIO ("DC37"), a union that represents FDNY's emergency medical services ("EMS") employees, and Harry Garrido, DC37's Executive Director

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vaccinated and "have returned to active duty" at FDNY. (ECF No. 27, Amended Compl. at ¶ 105.)

(collectively, "DC37 Defendants").[4] (ECF No. 27, Amended Complaint ("Amended Compl.") at ¶¶ 92-93, 120-21.)

Presently before the Court are City Defendants' motion to dismiss and DC37 Defendants' motion to dismiss. For the reasons set forth below, Defendants' motions to dismiss are GRANTED.

BACKGROUND

The Court first reviews the factual and procedural background of the Court's December 2021 Order denying Plaintiffs' motion for a preliminary injunction. (ECF No. 24, December 2021 Order, at 3-6.) The Court also reviews the operative Amended Complaint, accepting as true for purposes of Defendants' motions the factual allegations in the complaint and drawing all reasonable inferences in Plaintiffs' favor. *Melendez v. City of New York*, 16 F.4th 992, 1010 (2d Cir. 2021). The Court, however, is "not bound to accept as true a legal conclusion couched as a factual allegation." *Drimal v. Tai*, 786 F.3d 219, 223 (2d. Cir. 2015) (internal quotation marks omitted); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("[T]he tenet that a court must accept

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[4] The Court granted leave to Plaintiffs to file an amended complaint, *inter alia*, to add necessary parties. (ECF No. 24, December 2021 Order at 8; 12/14/2021 Order.) The Amended Complaint added the Uniformed Firefighters Association of Greater New York; Uniformed Fire Officers Association, Local 854 International Association of Firefighters, affiliated with the AFL-CIO; and two local affiliates of the DC37 union, District Council 37 AFSCME AFL-CIO Local 2507 and District Council 37 AFSCME AFL-CIO Local 3621. (ECF No. 24, December 2021 Order at 7; ECF No. 27, Amended Compl.) Plaintiffs stipulated to dismissals without prejudice of their claims against each of these defendants. (ECF Nos. 63-66.)

as true all of the allegations contained in [an amended] complaint is inapplicable to legal conclusions.").

I. December 2021 Order

In the Court's December 2021 Order, the Court determined that because Plaintiffs requested a mandatory injunction—one that "alters the status quo by commanding a positive act"—they were required to establish a "clear" or "substantial" likelihood of success on the merits of their claims. (ECF No. 24, December 2021 Order, at 6 (citing *D.D. ex rel. V.D. v. N.Y.C. Bd. of Educ.*, 465 F.3d 503, 510 (2d Cir. 2006) (citation omitted)).) The Court found that Plaintiffs failed to do so and denied injunctive relief.[5] (*Id.* at 10.)

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[5] The evidentiary record before the Court regarding Plaintiffs' motion for injunctive relief included the following: an affidavit by Plaintiffs' attorney Austin Graff (ECF No. 5-1); affidavits by four individual Plaintiffs who had not received at least one dose of the COVID-19 vaccine (ECF Nos. 5-2, 5-3, 5-4, 5-5); the COH Order (ECF No. 15-1); an arbitration award between the Department of Education ("DOE") and an union of DOE employees regarding an exemption process for the Vaccine Mandate based on religious and medical requests (ECF No. 15-2); an agreement between DC37 and FDNY regarding exemption processes for the Vaccine Mandate and termination processes based on noncompliance ("DC37 Agreement") (ECF No. 15-3; ECF No. 21-1); filings from an Article 78 proceeding initiated by an FDNY union challenging the Vaccine Mandate (ECF Nos. 15-4, 15-5); filings from an Office of Collective Bargaining ("OCB") proceeding initiated by an FDNY union challenging the Vaccine Mandate (ECF Nos. 15-6, 15-7, 15-8); the OCB decision denying injunctive relief to the FDNY union (ECF No. 15-9); affidavits from three human resources officials at FDNY (ECF Nos. 15-10, 20-1, 20-2); and the FDNY's October Memorandum regarding the procedures for FDNY employees to provide proof of vaccination or to obtain a religious or medical exemption (ECF No. 17-1).

First, as to Plaintiffs' procedural due process claims, although Plaintiffs had a protected property interest in their pay and continued employment, the Court found that Plaintiffs had been provided constitutionally adequate process before being deprived of their property interests. (*Id.* at 10.) Quoting the Second Circuit's holding in *Adams v. Suozzi*, 517 F.3d 124, 128 (2d Cir. 2008), the Court noted that "there is no due process violation where, as here, pre-deprivation notice is provided and the deprivation at issue can be fully remedied through the grievance procedures provided for in a collective bargaining agreement." (ECF No. 24, December 2021 Order at 14-15.) The Due Process Clause would be implicated only if Plaintiffs could establish that "the grievance procedures in a collective bargaining agreement [were] an inadequate remedy," which Plaintiffs had not done. (*Id.* at 15 (quoting *Adams*, 517 F.3d at 128).)

During the show cause hearing for the preliminary injunction, the three EMS Plaintiffs who belonged to the DC37 union challenged the agreement that DC37 had negotiated with the City regarding the leave and separation procedures for City employees who did not comply with the Vaccine Mandate ("DC37 Agreement").[6]

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[6] The DC 37 Agreement established, in relevant part: (1) the processes by which an employee could request an exemption or accommodation based on religious and/or medical grounds, and appeal an adverse determination on their request before an independent arbitration panel (while remaining on payroll and maintaining health benefits pending their request or appeal, as long as the request was made prior to 11:59 P.M. on October 27, 2021); (2) options to either voluntarily separate from service with certain compensation benefits, or elect extended LWOP status while maintaining health benefits until June 30, 2022; and (3) that as of December 1, 2021, the FDNY could seek to unilaterally

(*Id.* at 5-6.) The Court's December 2021 Order noted that, generally, "a union member has no standing to enforce the collective bargaining agreement between their employer and union against the employer directly," but that even if the EMS Plaintiffs *had* standing, they could not show a clear or substantial likelihood of success on the merits of their procedural due process claims. (*Id.* at 8-9 (citation omitted).)

Overall, the Court concluded that "the pre-deprivation and post-deprivation processes afforded to Plaintiffs were constitutionally adequate." (*Id.* at 16.) The Court found the following:

> Plaintiffs received ample pre-deprivation notice, via the [October Memorandum] from Hodgens, the Chief of Operations of the FDNY, of: (1) the [COH] Order, (2) the requirement to submit proof of vaccination by October 29, 2021, (3) their ability to seek reasonable accommodation by October 27, 2021; and (4) their placement on [leave without pay] status if they failed to comply with the Order and did not submit an accommodation request by the October 27 deadline.

(*Id.* at 16-17.) Moreover, the Court found that Plaintiffs were provided with an opportunity to be heard before a final decision. (*Id.* at 17.) The opportunity to respond

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separate employees who had not provided proof of vaccination, had not obtained or requested an accommodation, and had not opted for either separation option. (*See* ECF No. 21-1, Exhibit C.) The DC 37 Agreement further provided that employees who opted to extend their LWOP to June 30, 2022, could return to their positions upon demonstrating compliance with the Vaccine Mandate. (*Id.*)

need not be a formal hearing. *Ezekwo v. N.Y.C. Health & Hosps. Corp.*, 940 F.2d 775, 786 (2d Cir. 1991). Indeed, any FDNY employees who challenged whether the Vaccine Mandate should apply to them not only "had the opportunity to seek a religious or medical accommodation," they also "remain[ed] on pay status pending the decision on their request or appeal, so long as their accommodation requests were submitted prior to October 27, 2021." (ECF No. 24, December 2021 Order at 17.) This Court found that the only reason that the vast majority of named Plaintiffs had been suspended without pay was because they requested an accommodation too late. (*Id.* at 17.) Therefore, Plaintiffs could not claim that they were deprived of due process simply by "not having availed themselves of the pre-deprivation opportunity to be heard." (*Id.* at 18.)

The Court also concluded that there were sufficient post-deprivation procedures to establish constitutionally adequate process. (*Id.*) Any FDNY employee granted an accommodation would be restored to payroll and provided back pay, and there was an appeal process for any employee whose reasonable accommodation request was denied. (*Id.*) The Court further found that FDNY employees also had other avenues to challenge the Vaccine Mandate and the COH Order, including through an Article 78 Proceeding in New York State Supreme Court. (*Id.* at 20 (citing *Hellenic Am. Neighborhood Action Comm. v. City of N.Y.*, 101 F.3d 877, 881 (2d Cir. 1996) ("[A]n Article 78 proceeding is a perfectly adequate post-deprivation remedy.")).)

Second, because "[f]ederal constitutional standards rather than state statutes define the requirements of procedural due process," the Court found that it did not

need to consider whether state or municipal procedural law, such as N.Y.C. Admin. Code § 15-113, was correctly followed or applied. (ECF No. 24, December 2021 Order, at 10-11 (quoting *Robison v. Via*, 821 F.2d 913, 923 (2d Cir. 1987)).) Nevertheless, the Court concluded that § 15-113 was irrelevant to determining adequate process for FDNY employees because (1) the Second Circuit had held that the Vaccine Mandate was a condition of employment (albeit in the healthcare context); and (2) "the termination of a public employee based on the employee's failure to satisfy a qualification of employment unrelated to job performance, misconduct, or competency [did] not implicate the disciplinary procedures set forth section 15-113." (*Id.* at 11, 13-14.)

Accordingly, the Court denied Plaintiffs' motion for a preliminary injunction.

II. The Operative Amended Complaint

Following the Court's denial of Plaintiffs' preliminary injunction motion, Plaintiffs filed an Amended Complaint on January 5, 2022, adding the DC37 Defendants. (ECF No. 27, Am. Compl.) In the operative Amended Complaint, Plaintiffs assert primarily the same causes of action as in the original complaint, adding only (1) a request for the Court to issue a declaratory judgment that the DC37 Agreement "was entered into without any contractual authority" and therefore the Plaintiffs' suspension without pay violated their due process rights, and (2) a § 1983 conspiracy claim based on the DC37 Agreement between FDNY and DC37. (*Id.* at ¶¶ 186, 238.) Plaintiffs' Amended Complaint also adds several allegations related to the DC37 Agreement, including that (1) "[p]ursuant to the Taylor Law (N.Y. Civil Service Law § 200, *et. seq*.),

[the City] was required to bargain with its unions [about] the impact of the Vaccine Mandate . . . "; (2) "DC37 entered into an agreement with [the City] regarding the impact of the Vaccine Mandate, which provides that on or after December 1, 2021, [the City] may unilaterally separate DC37 members from their employment with the FDNY if the members have not obtained a COVID-19 vaccine"; and (3) the DC37 Agreement "authorized [the City] to suspend without pay the members of DC37 who did not take a COVID vaccine." (*Id.* at ¶¶ 129, 133-43.)

The Amended Complaint also includes new factual allegations related to the reasonable accommodation and appeals process. (*Id.* at ¶¶ 144-50.) The Amended Complaint alleges that as "part of [the City's] implementation of the Vaccine Mandate," the City "offered those FDNY employees who have either a medical or religious reasons for not taking a vaccine an opportunity to seek a reasonable accommodation to exempt the employee from the Vaccine Mandate." (*Id.* at ¶ 144.) Plaintiffs allege in the Amended Complaint that seventy-seven out of the eighty-six total Plaintiffs have requested a medical or religious accommodation to be exempt from the Vaccine Mandate; seventy-one Plaintiffs have been denied and six were awaiting an initial determination; thirty-seven Plaintiffs have appealed the denial of their request for a reasonable accommodation; and one Plaintiff's appeal has been denied, while thirty-six are awaiting a decision. (*Id.*)

Finally, the Amended Complaint contains two exhibits: the COH Order, Exhibit A, and the DC37

Agreement, Exhibit B.[7] (ECF No. 27-1, Ex. A; ECF No. 27-2, Exhibit B.) Given that the Amended Complaint discusses the FDNY's reasonable accommodation policy at relative length, the Court also determines that the FDNY's October Memorandum regarding the procedures for FDNY employees to obtain a religious or medical accommodation—which was submitted by Plaintiffs to the Court prior to the show cause hearing —is "integral" to the Amended Complaint. *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220, 230 (2d Cir. 2016) (a court may "consider [a document] where the [amended] complaint relies heavily upon its terms and effect, thereby rendering the document integral to the [amended] complaint" (internal quotation marks omitted)). "Even where a document is deemed 'integral' to the complaint, it must be clear on the record that no dispute exists regarding the authenticity or accuracy of the document." *Id.* at 231 (internal quotation marks omitted). "It must also be clear that there exist no material disputed issues of fact regarding the relevance of the document . . . [because of] a concern that a plaintiff may lack notice that the material will be considered." *Id.* (internal quotation marks omitted).

Here, Plaintiffs' Amended Complaint alleges that there was a process for seeking reasonable accommodations from the Vaccine Mandate and discusses the number of Plaintiffs at various stages of the process; FDNY employees were notified of that process as provided in the FDNY's October Memorandum. Indeed,

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[7] Although Plaintiffs submitted the DC37 Agreement as Exhibit B in the Amended Complaint, Plaintiffs later filed a letter stating that they incorrectly filed the wrong agreement and attaching a corrected Exhibit B. (ECF No. 27-2, Exhibit B; ECF No. 62, Letter; ECF No. 62-1, Corrected Exhibit B.)

Plaintiffs' opposition to Defendants' motions to dismiss relies heavily on the FDNY's October Memorandum and argues that it was improperly imposed, thus causing a procedural due process violation. *Thomas v. Westchester Cnty. Health Care Corp.*, 232 F. Supp. 2d 273, 275 (S.D.N.Y. 2002) (documents are "integral" where plaintiff had to rely on their content "to explain what the actual unlawful course of conduct was on which the [d]efendants embarked"); (ECF No. 73, Plaintiffs' Mem. at 9-10.) The Court finds that the October Memorandum is integral to the Amended Complaint because Plaintiffs' allegations and opposition to Defendants' motions to dismiss rely on and relate to the document, thus establishing that Plaintiffs do not challenge its authenticity, accuracy or relevance. (ECF No. 73, Plaintiffs' Mem. at 2-4, 8-10.) Additionally, Plaintiffs submitted the October Memorandum to the Court before the show cause hearing on Plaintiffs' motion for a preliminary injunction, and it was discussed extensively at the hearing and in the Court's December 2021 Order denying the motion for a preliminary injunction. (ECF Nos. 17-1, 24.) Accordingly, the Court concludes that the FDNY's October Memorandum is "integral" to the Amended Complaint.

III. Defendants' Motions to Dismiss

On June 13, 2022, City Defendants moved to dismiss the Amended Complaint under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. (ECF No. 68, City Defendants' Motion; ECF No. 69, City Defendants' Memorandum in Support; ECF No. 75, City Defendants' Reply.) On June 14, 2022, DC37 Defendants also moved to dismiss under Rule 12(b)(6) for failure to state a claim. (ECF No. 71, DC37 Defendants' Motion; ECF No. 72, DC37 Defendants'

Memorandum in Support; ECF No. 74, DC37 Defendants' Reply.)

On September 28, 2022, Plaintiffs filed for leave to provide supplemental briefing or amend their memorandum in opposition brief to Defendants' motions to dismiss regarding a recent New York Supreme Court decision about the Vaccine Mandate. (ECF No. 77, Motion to Amend.) City Defendants opposed. (ECF No. 78, Response.) On October 3, 2022, the Court denied Plaintiffs' motion, explaining that the Court would review all relevant case law in rendering its decision. (10/03/2022 Order.) On October 10, 2022, Plaintiffs filed a second motion to amend or supplement their briefing regarding an Office of Collective Bargaining ("OCB") decision about the Vaccine Mandate. (ECF No. 79, Second Motion.) The Court again denied Plaintiffs' motion, for the same reasons. (10/13/2022 Order.) On October 25, 2022, Plaintiffs filed a third motion to amend or supplement their briefing, regarding another New York Supreme Court decision about the Vaccine Mandate. (ECF No. 82, Third Motion.) The Court again denied Plaintiffs' motion. (10/26/2022 Order.)

On February 13, 2023, in light of the City's announcement that it had discontinued the Vaccine Mandate for City employees on February 10, 2023, the parties were ordered to advise the Court of their respective views as to which issues in the instant action, if any, were mooted, and which issues subsisted. (02/13/2023 Order.) The parties responded, all acknowledging that some live issues remained, given that employees who had been suspended or terminated for failure to show proof of vaccination would not be

automatically reinstated to their prior positions with back pay. (ECF Nos. 84; 85; 86.)

LEGAL STANDARD

To survive a motion to dismiss pursuant to Rule 12(b)(6), a complaint must contain sufficient factual matter, accepted as true, to "'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the conduct alleged." *Id*. When considering a motion to dismiss under Rule 12(b)(6), a district court must "accept as true all factual allegations in the complaint and draw all reasonable inferences in favor of the non-moving party." *Pollok v. Chen*, 806 F. App'x 40, 44 (2d Cir. 2020) (summary order) (citation omitted).

In considering a 12(b)(6) motion, the court may refer to "documents attached to [the complaint] or incorporated in it by reference, documents 'integral' to the complaint and relied upon in it, and facts of which judicial notice may properly be taken." *Grant v. Cnty. of Erie*, 542 F. App'x 21, 23 (2d Cir. 2013) (summary order); *see also Chambers v. Time Warner, Inc*., 282 F.3d 147, 153 (2d Cir. 2002) (clarifying that "*reliance* on the terms and effect of a document in drafting the complaint is a necessary prerequisite to the court's consideration of the document on a dismissal motion; mere notice of possession is not enough." (emphasis in original)). "[A] district court may [also] rely on matters of public record in deciding a motion to dismiss under Rule 12(b)(6)[.]" *See Pani v. Empire Blue Cross Blue Shield*, 152 F.3d 67, 75 (2d Cir. 1998).

DISCUSSION

I. Declaratory Judgment and Injunctive Relief

In Plaintiffs' Amended Complaint, the first and second "causes of action" request a declaratory judgment, presumably under the Declaratory Judgment Act ("DJA"), and the "third cause of action" requests injunctive relief. (ECF No. 27, Amended Compl.) The DJA "provides a remedy, not a cause of action." *KM Enters., Inc. v. McDonald*, No. 11-CV-5098 (ADS) (ETB), 2012 WL 4472010, at *19 (E.D.N.Y. Sept. 25, 2012), *aff'd*, 518 F. App'x 12 (2d Cir. 2013). "Similarly to declaratory relief, a request for injunctive relief is not a separate cause of action." *Id.* at *20 (alteration and internal quotation marks omitted); *see also Chiste v. Hotels.com L.P.*, 756 F. Supp. 2d 382, 406–07 (S.D.N.Y. 2010) ("Declaratory judgments and injunctions are remedies, not causes of action.") Because Plaintiffs' first, second, and third "causes of action" request remedies, rather than plead a separate claim, the first, second, and third "causes of action" are dismissed for failure to state a claim.

II. Procedural Due Process Claims

A procedural due process claim requires a plaintiff to establish that (1) he or she possesses a protected liberty or property interest, and (2) was deprived of that interest without constitutionally adequate process. *See O'Connor v. Pierson*, 426 F.3d 187, 196 (2d Cir. 2005); *see also Ciambriello v. Cnty. Of Nassau*, 292 F.3d 307, 313 (2d Cir. 2002). Pre-deprivation processes "need not be elaborate," and the Constitution "mandates only that such process include, at a minimum, notice and the opportunity to respond." *O'Connor*, 426 F.3d

at 198 (citing *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 545 (1985).

Defendants argue that the law of the case doctrine precludes re-litigation of Plaintiffs' procedural due process claims, in light of the Court's comprehensive December 2021 Order denying a preliminary injunction. (ECF No. 69, City Defendants' Memorandum in Support, at 8-12.) The law of the case doctrine holds that "when a court has ruled on an issue, that decision should generally be adhered to by that court in subsequent stages of the same case,' unless 'cogent' and 'compelling' reasons militate otherwise." *Johnson v. Holder*, 564 F.3d 95, 99-100 (2d Cir. 2009) (emphasis added) (quoting *United States v. Quintieri*, 306 F.3d 1217, 1225 (2d Cir. 2002)). The Court notes, however, that the "preliminary determination of likelihood of success on the merits in a ruling on a motion for preliminary injunction is ordinarily tentative, pending a trial or motion for summary judgment." *Goodheart Clothing Co., Inc. v. Laura Goodman Enters., Inc.*, 962 F.2d 268, 274 (2d Cir. 1992). The Court also acknowledges that "[a] party . . . is not required to prove [their] case in full at a preliminary-injunction hearing, and the findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at a trial on the merits." *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981) (citations omitted).

The Court need not decide here whether the law of the case doctrine applies to prevent this Court's reconsideration of the factual and legal issues discussed in its December 2021 Order denying Plaintiffs' motion for a preliminary injunction. *Cf. Cangemi v. United States*, 13 F.4th 115, 140 (2d Cir. 2021) (the law-of-the-case doctrine is "discretionary and does not limit

a court's power to reconsider its own decision prior to final judgment" (quoting V*irgin Atl. Airways, Ltd. v. Nat'l Mediation Bd.*, 956 F.2d 1245, 1255 (2d Cir. 1992))). As discussed below, however, the Court finds that (1) the Amended Complaint's factual allegations, which are mostly conclusory, add little to Plaintiffs' prior allegations; and (2) the legal analysis for the preliminary injunction in the December 2021 Order sufficiently overlaps with the issues—based on the current factual allegations and the asserted claims—before the Court on the instant motions to dismiss such that the Court reviews its prior analysis in assessing Plaintiffs' current claims. For the reasons set forth below, the Court concludes that Plaintiffs' Amended Complaint fails to state plausible procedural due process claims.

a. Repeated and Conclusory Factual Allegations

First, Plaintiffs' Amended Complaint, although filed after the Court's December 2021 Order denying the Plaintiffs' motion for a preliminary injunction, adds very few new facts to the complaint before the Court in its December 2021 Order denying a preliminary injunction. The Amended Complaint adds additional Plaintiffs and the DC37 Defendants, and provides updates as to each Plaintiff's vaccination status and the status of seventy-seven of the Plaintiffs' reasonable accommodation requests. (ECF No. 27, Amended Compl. at ¶¶ 92-93, 144-50.) Unlike the original complaint, however, the Amended Complaint acknowledges that "[a]s part of [the City's] implementation of the Vaccine Mandate," the City "offered those FDNY employees who have either a medical or religious reasons for not taking a vaccine an opportunity to seek

a reasonable accommodation to exempt the employee from the Vaccine Mandate." (*Id.* at ¶ 144.) As noted previously, the Court also determines that the FDNY's October Memorandum describing accommodation procedures is "integral" to the Amended Complaint. *Nicosia*, 834 F.3d at 230.

The Amended Complaint also includes ostensibly new factual allegations regarding the DC37 Agreement to support Plaintiffs' claim that the DC37 Agreement violated Plaintiffs' due process rights. (*Id.* at §§ 129, 133-43.) Plaintiffs' allegations concerning the DC37 Defendants and the DC37 Agreement, however, are all legal conclusions devoid of specific facts: *e.g.*, "DC37 conspired with [the City] by entering into an agreement . . . that violated the DC37 members-Plaintiffs' constitutional rights." (*Id.* at ¶ 138.) Courts are "not required to credit conclusory allegations or legal conclusions couched as factual allegations." *Nielsen v. Rabin*, 746 F.3d 58, 62 (2d Cir. 2014) (internal quotation marks omitted). Indeed, the only non-conclusory allegations in the Amended Complaint concerning the DC37 Agreement are the following: (1) "DC37 entered into an agreement . . . regarding the impact of the Vaccine Mandate, which provides that on or after December 1, 2021, [the City] may unilaterally separate DC37 members from their employment with the FDNY if the members have not obtained a COVID-19 vaccine"; and (2) "DC37's Agreement with [the City] authorized [the City] to suspend without pay the members of DC37 who did not take a COVID vaccine." (ECF No. 27, Amended Compl. at ¶¶ 133, 134.)

Therefore, the factual allegations currently before the Court, although less than the full evidentiary record before the Court in its December 2021 Order

denying the motion for a preliminary injunction, contain no new, non-conclusory factual allegations that would upend the Court's prior legal analysis.

b. Repeated Claims

Second, Plaintiffs' Amended Complaint asserts primarily the same causes of action as the original complaint and which this Court considered in the December 2021 Order. In addition to the "causes of action" for declaratory judgments and injunctive relief, discussed above, Plaintiffs now assert a § 1983 claim against Defendants for violating their procedural due process rights; a § 1983 conspiracy claim against Defendants for conspiring to violate their procedural due process rights; and a § 1983 claim against individual Defendants Nigro, Garrido, and John and Janes Does based on "direct participation and aiding and abetting" the City's violation of Plaintiffs' due process rights. (ECF No. 27, Amended Compl. at ¶¶ 197-245.) The only new claim in the Amended Complaint is the § 1983 conspiracy claim. The underlying constitutional violation alleged in each cause of action is that Defendants violated Plaintiffs' due process rights by suspending Plaintiffs without pay if they refused to comply with the Vaccine Mandate. (*Id.*) Therefore, Plaintiffs' instant claims raise issues identical issues to the claims addressed and decided by the Court in denying the preliminary injunction. (ECF No. 24, December 2021 Order at 10-20.)

Furthermore, because Plaintiffs sought both a prohibitory and mandatory injunction in their motion for a preliminary injunction, the Court previously reviewed Plaintiffs' legal arguments under the higher pleading standard for a mandatory injunction. The

Court found that Plaintiffs failed to satisfy the standard for a mandatory injunction by demonstrating a "clear" or "substantial" likelihood of success on the merits of their procedural due process claims, rather than merely a likelihood of success. (*See* ECF No. 5-8, Plaintiffs' Preliminary Injunction Memorandum at 4); *see also Tom Doherty Assocs. v. Saban Entm't, Inc.*, 60 F.3d 27, 33-34 (2d Cir. 1995) (plaintiffs seeking a mandatory injunction must meet higher standard and must show a "clear" or "substantial" likelihood of success on the merits); *D.D. ex rel. V.D. v. N.Y.C. Bd. of Educ.*, 465 F.3d 503, 510 (2d Cir. 2006) (where the injunctive relief sought is a mandatory injunction, or an injunction that "alters the status quo by commanding a positive act," the movant must meet the higher standard of "mak[ing] a clear or substantial showing of a likelihood of success on the merits.").

Having reviewed Plaintiffs' procedural due process allegations at length—and now examining any well-pleaded factual allegations in the Amended Complaint, exhibits, and incorporated or integral documents—the Court concludes on the merits that "the pre-deprivation and post-deprivation processes afforded to Plaintiffs were constitutionally adequate," and, therefore, Plaintiffs' Amended Complaint fails to state a claim and must be dismissed. (ECF No. 24, December 2021 Order, at 16). Plaintiffs received ample pre-deprivation notice of procedures regarding the Vaccine Mandate, via the FDNY's October Memorandum informing FDNY employees about (1) the COH order; (2) the requirement to submit proof of vaccination by October 29, 2021; (3) the ability to seek reasonable accommodation and be exempted from the Vaccine Mandate by October 27, 2021; and (4) the placement

of non-compliant employees on [leave without pay] status if they failed to comply with the COH Order and did not submit an accommodation request by the October 27 deadline. (ECF No. 17-1, October 21, 2021 Memorandum ("Oct. Mem.") at 4, 15; ECF No. 27, Amended Compl. at ¶ 144.)

Further, accepting all well-pleaded factual allegations as true for purposes of Defendants' motions to dismiss, Plaintiffs were provided with an opportunity to be heard prior to a final decision. The opportunity to respond need not be a formal hearing. *Ezekwo,* 940 F.2d at 786. Here, as acknowledged in the Amended Complaint, any FDNY employee who challenged whether the Vaccine Mandate should apply to them had the opportunity to seek a religious or medical accommodation through an exemption to the Vaccine Mandate. (ECF No. 27, Amended Compl. at ¶ 144.) Indeed, the COH Order itself stated, in plain language, that it should not be "construed to prohibit any reasonable accommodation otherwise required by law." (ECF 27. 125-1, Ex. A.) And any FDNY employees who submitted reasonable accommodation requests before the October 27, 2021 deadline were *not* suspended without pay: only employees who sought reasonable accommodation after October 27, 2021 were placed on leave without pay while awaiting a reasonable accommodation decision. (ECF No. 17-1, Oct. Mem. at 4, 16-17, 2425.) In addition to the above process, DC37 Plaintiffs had access to additional time to seek an accommodation beyond the October 27 deadline—through November 5, 2021—as a result of the DC37 Agreement. (ECF No. 62-1, Corrected Exhibit B, at 2.)

The Court finds that the post-deprivation procedures were constitutionally adequate. The City required

that any denial of a reasonable accommodation request "must provide written information to the employee whose request has been denied and include a link to . . . [the City's] online appeals request portal." (ECF No. 17-4, Oct. Mem. at 25.) Any employee who was denied a reasonable accommodation could file an appeal within three days. (*Id.*) If an appeal was denied, the employee was required to submit proof of the first dose of a COVID-19 vaccine within three business days and, if required, of the second dose within 45 days. (*Id.*) If the employee refused to be vaccinated within the given timeframe after the appeal was denied, the employee would remain on LWOP status. (*Id.*) Finally, Plaintiffs had other post-deprivation avenues, such as an Article 78 proceeding, to address the COH Order and subsequent consequences. *Hellenic Am. Neighborhood Action Comm.*, 101 F.3d at 881 ("[A]n Article 78 proceeding is a perfectly adequate post-deprivation remedy."). Accordingly, the Court concludes, on the merits, that Defendants provided constitutionally sufficient pre-deprivation and post-deprivation process, and that Plaintiffs fail to state a procedural due process claim.

c. Intervening Law

Moreover, although the Court decides the instant motions to dismiss on the basis of Plaintiffs' Amended Complaint and attached and integral exhibits, the Court notes that there has been no change in intervening law since the Court's December 2021 Order finding that Plaintiffs procedural due process rights were not violated, despite a substantial amount

of litigation concerning the Vaccine Mandate.[8] *See, e.g.*, *Marciano v. de Blasio*, 589 F. Supp. 3d 423, 436 (E.D.N.Y. Mar. 8, 2022) (plaintiff received constitutionally sufficient minimum process for NYPD vaccine

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[8] The Court's procedural due process findings are not based on the process required by state or municipal statutes. Moreover, there has not been a substantial change in intervening law concerning this Court's finding that the Vaccine Mandate was a condition of employment. *See Andre-Rodney v. Hochul*, No. 21-cv-1053 (BKS)(CFH), 2022 WL 3027094 (N.D.N.Y. Aug. 1, 2022) (vaccine was condition of employment for healthcare workers); *D'Cunha v. Northwell Health Sys.*, No. 22-cv-0988 (MKV), 2023 WL 2266520 (S.D.N.Y. Feb. 28, 2023) (same); *Commey*, 2022 WL 3286548 (finding vaccination to be condition of employment for porter); *Kane*, 2022 WL 3701183 (vaccine was condition of employment); *Marciano*, 589 F. Supp. 3d at 436 (same). Although—as Plaintiffs noted in their third request to supplement their memorandum of law in opposition to Defendants' motions to dismiss (ECF No. 81)—one New York Supreme Court judge has found that the Vaccine Mandate was not a condition of employment, nearly all other New York state courts to address the issue have found that the Vaccine Mandate was a condition of employment. *Compare Garvey v. City of New York*, 77 Misc. 3d 585 (N.Y. Sup. Ct., Richmond Cnty., Oct. 24, 2022) (finding mandate was not a condition of employment), *with Clarke v. Bd. of Educ. of City School*, No. 160787/21, 2023 WL 2124546 (N.Y. App. Div. 1st Dep't, Feb. 21, 2023) (finding mandate was a condition of employment); *N.Y.C. Mun. Labor Comm. v. City of N.Y.*, 2022 NY Slip Op. 22121 (Apr. 21, 2022 N. Y. Sup. Ct.) (same); *O'Reilly v. Bd. of Educ. of City School District of City of New York*, No. 16104/21, 2023 WL 2124731, at *1 (N.Y. 1st Dep't, Feb. 21, 2023) (same). Plaintiffs argued in their first and second requests to amend their briefing that another New York Supreme Court judge and the OCB have found that although the Vaccine Mandate *could* be a condition of employment, it was improperly imposed under municipal law. (ECF Nos. 77, 79.) As discussed extensively below, however, the Court bases its procedural due process finding on constitutional standards, not on state or municipal standards.

policy); *Kane v. de Blasio*, No. 21-cv-7863 (NRB), 2022 WL 3701183, at *12 (S.D.N.Y. Aug. 26, 2022)(constitutionally sufficient minimum process was provided for DOE workers); *cf. Donohue v. Hochul*, No. 21-CV-8463 (JPO), 2022 WL 673636, at *7 (S.D.N.Y. Mar. 7, 2022) (public-school mask mandate did not implicate procedural due process concerns); *Commey v. Adams*, No. 22-CV-0018 (RA), 2022 WL 3286548, at *6 (S.D.N.Y. Aug. 11, 2022) (no procedural due process concerns because mandate was legislative in nature); *Collins v. City Univ. of New York*, No. 21-cv-9544 (NRB), 2023 WL 1818547, at *10 (S.D.N.Y. Feb. 8, 2023) (same); *Mongielo v. Hochul*, No. 22-CV-116-LJV, 2023 WL 2307887, at *17 (W.D.N.Y. Mar. 1, 2023) (same).

III. Plaintiffs' Opposition to the Motion to Dismiss

In their opposition to Defendants' motions to dismiss, Plaintiffs' central argument is that, contrary to the findings in the Court's December 2021 Order, the Vaccine Mandate was not a condition of employment, and thus Defendants' COH Order suspending Plaintiffs without pay violated Plaintiffs' procedural due process rights.[9] (ECF No. 73, Plaintiffs'

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[9] Plaintiffs also argue that Defendants violated New York City Charter Section 487(a) when the FDNY issued the October Memorandum concerning the City's newly imposed Vaccine Mandate. (ECF No. 73, Plaintiffs' Mem. at 9.) New York City Charter Section 487(a) provides that the FDNY Commissioner "shall have sole and exclusive power and perform all duties for the government, discipline, management, maintenance and direction of the fire department and the premises and property in the custody thereof." N.Y.C. Charter § 487(a). Plaintiffs argue, circularly, that because the Chief of Operations of the FDNY John Hodgens, rather than FDNY Commissioner Nigro, circulated

Mem. at 12-13, 19-21.) In their opposition, Plaintiffs assert several arguments in support of their claim that the Vaccine Mandate was not a condition of employment: they first contend that because City Defendants failed to negotiate and bargain with FDNY unions concerning the new condition of employment, which Plaintiffs contend is required under New York Civil Service Law Section 201.4, the Vaccine Mandate was invalidly imposed. (*Id.* at 12.) Plaintiffs also argue that, even though the FDNY *did* bargain and negotiate with DC37 concerning the Vaccine Mandate, the resulting DC37 Agreement was never ratified by DC37's union members. (*Id.* at 14-16.) Plaintiffs assert that under New York City Admin. Code Section 12-307(a)(4), the DC37 Agreement could not amend the existing procedures of DC37's collective bargaining agreement without ratification by its members. (*Id.* at 14-16.) They contend that the DC37 Agreement was invalid, meaning that the Vaccine Mandate could not

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the FDNY's October Memorandum alerting FDNY employees as to City's newly imposed Vaccine Mandate, the Vaccine Mandate was issued in violation of § 487(a) and was invalid. (ECF No. 73, Plaintiffs' Mem. at 9-10.) Plaintiffs confuse the Vaccine Mandate (the City's vaccine requirement); the COH Order (the order from the Commissioner of Health imposing the Vaccine Mandate); and the FDNY's October Memorandum (the memorandum informing FDNY employees about the Vaccine Mandate. (*See* ECF NO. 17-1.) Plaintiffs' argument is frivolous on its face, as the logical inference that Plaintiffs urge the Court to draw is that the FDNY Commissioner's name must be on every memorandum issued to FDNY employees or the memorandum will violate § 487(a). (*Id.*; ECF No. 73, Plaintiffs' Mem. at 9.) In any case, because the Court looks to "federal constitutional standards rather than state [or local] statutes" to define the requirements of procedural due process, as discussed above, Plaintiffs' argument is meritless. *Robison*, 821 F.2d at 923.

become a condition of employment as to the DC37 member-Plaintiffs. (*Id.*) In other words, Plaintiffs premise their due process claims on the assertion that (1) Defendants failed to follow state and municipal procedural requirements in imposing the Vaccine Mandate; (2) the Vaccine Mandate therefore was not a condition of employment; (3) if the Vaccine Mandate is not a condition of employment, the COH Order is invalid; and thus (4) Defendants' suspension of Plaintiffs without pay violated Plaintiffs' procedural due process. (*Id.* at 12-16.)

As the Court has repeatedly stated, however, "the Court looks to federal constitutional standards rather than state statutes to define the requirements of procedural due process." (ECF No. 24, December 2021 Order, at 10-11 (citing *Robison*, 821 F.2d at 923).) Courts repeatedly have held that state statutes do not determine constitutional due process requirements. *See, e.g.*, *Loudermill*, 470 U.S. at 541 ("In short, once it is determined that the Due Process Clause applies, the question remains what process is due. . . . The answer to that question is not to be found in the [state] statute."); *Russell v. Coughlin*, 910 F.2d 75, 78 n.1 (2d Cir. 1990) ("[T]he fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action . . . does not settle what protection the federal due process clause requires." (internal quotation marks omitted)); *cf. Liberian Cmty. Ass'n of Connecticut v. Lamont*, 970 F.3d 174, 192 (2d Cir. 2020) ("[C]ases from both the Supreme Court and our Court make clear that the federal procedural due process guarantee does *not* require state officials to inform individuals of all the procedural guarantees they enjoy under state

law."). Indeed, the Second Circuit recently reiterated that a district court failed to properly assess whether a defendant's conduct violated the procedural guarantees of the Due Process Clause where the court examined the due process claim exclusively by assessing a defendant's failure to comply with state law. *See Tooly v. Schwaller*, 919 F.3d 165, 172-73 (2d Cir. 2019) ("[V]iolation of state law does not *per se* result in a violation of the Due Process Clause").

Thus, to the extent that Plaintiffs base their procedural due process claims solely on alleged violations of state and municipal law, as noted above, their claims fail. *See McDarby v. Dinkins*, 907 F.2d 1334, 1337–38 (2d Cir. 1990) ("When the minimal due process requirements of notice and hearing have been met, a claim that an agency's policies or regulations have not been adhered to does not sustain an action for redress of procedural due process violations."); *Bolden v. Alston*, 810 F.2d 353, 358 (2d Cir.1987) ("State procedural requirements do not establish federal constitutional rights. At most, any violation of state procedural requirements would create liability under state law." (citations omitted)). Plaintiffs provide no facts or law supporting a contrary argument, and Plaintiffs cannot add news facts at this stage. As discussed above, Plaintiffs conclusorily argue that they were suspended without due process. (ECF No. 73, Plaintiffs' Mem. at 20 ("If the Vaccine Mandate is not a condition of employment for FDNY employees, then, the City Defendants had no legal right or authority to suspend the Plaintiffs without pay without due process.").) The allegations in the Amended Complaint— establishing that Defendants provided notice and an opportunity to seek accommodations via exemptions—satisfy due

process. Accordingly, because the Court has found that there was constitutionally sufficient process, Plaintiffs' procedural due process claims—the § 1983 claim against all Defendants and the § 1983 claim for "direct participation and aiding and abetting" against individual Defendants—are dismissed for failure to state a claim.

IV. Other Causes of Action

a. Section 1983 Conspiracy

Having dismissed Plaintiffs' claim that Defendants violated their due process rights, the Court also finds that Plaintiffs' allegations are insufficient to state a plausible § 1983 conspiracy claim against Defendants. "To state a § 1983 conspiracy claim, a plaintiff must allege (1) an agreement between two or more state actors, (2) 'to act in concert to inflict unconstitutional injury,' and (3) 'an overt act done in furtherance of that goal causing damage.'" *Barnes v. Abdullah*, No. 11–CV–8168, 2013 WL 3816586, at *9 (S.D.N.Y. July 22, 2013) (quoting *Ciambriello*, 292 F.3d at 324–25); *Sibiski v. Cuomo*, No. 08–CV–3376, 2010 WL 3984706, at *6 (E.D.N.Y. Sept. 15, 2010) (citing same). Notably, "[v]ague and conclusory allegations that defendants have engaged in a conspiracy to violate plaintiff's constitutional rights must be dismissed." *Poole v. New York*, No. 11–CV–921, 2012 WL 727206, at *6 (E.D. N.Y. Mar. 6, 2012); *see also Krug v. McNally*, 368 F. App'x 269, 270 (2d Cir. 2010) ("[C]omplaints containing only conclusory, vague, or general allegations that the defendants have engaged in a conspiracy to deprive the plaintiff of his constitutional rights are properly dismissed; diffuse and expansive allegations are insufficient, unless amplified by specific instances of mis-

conduct." (alteration in original) (internal quotation marks omitted)). Plaintiff "must allege . . . overt acts which defendants engaged in which were reasonably related to the promotion of the alleged conspiracy." *Elmasri v. England*, 111 F. Supp. 2d 212, 218 (E.D. N.Y. 2000) (internal quotation marks omitted.)

Plaintiffs fail to state a § 1983 conspiracy claim. As detailed above, Plaintiffs fail to state an underlying procedural due process claim. Therefore, Plaintiffs' § 1983 conspiracy claim fails as a matter of law. *Singer v. Fulton Cty. Sheriff*, 63 F.3d 110, 119 (2d Cir. 1995) (a § 1983 conspiracy claim "will stand only insofar as the plaintiff can prove the *sine qua non* of a § 1983 action: the violation of a federal right"); *see also AK Tournament Play, Inc. v. Town of Wallkill*, No. 09–CV-10579, 2011 WL 197216, at *4 (S.D.N.Y. Jan. 19, 2011) ("Plaintiffs' § 1983 conspiracy claims against all Defendants must be dismissed because Plaintiffs have failed to allege any violation of any cognizable constitutional right."), *aff'd*, 444 F. App'x 475 (2d Cir. 2011) (summary order); *Mitchell v. Cnty. of Nassau*, 786 F. Supp. 2d 545, 564 (E.D.N.Y. Mar. 24, 2011) ("[A] § 1983 conspiracy claim fails as a matter of law where there is no underlying constitutional violation.").

Additionally, Plaintiffs do not proffer any non-conclusory facts regarding the nature of the conspiracy, Defendants' membership in the conspiracy, or the overt steps taken by any of the Defendants in furtherance of that conspiracy. Apart from "diffuse and expansive allegations" that are not "amplified by specific instances of misconduct," *Krug*, 368 F. App'x at 270 (internal quotation marks omitted), the Amended Complaint is bereft of any facts sufficient to give rise to a plausible § 1983 conspiracy claim. In fact, the Amended Com-

plaint merely refers to a conspiracy based on Plaintiffs' vague and conclusory assertions that "[DC37 Defendants] conspired with [City Defendants] by entering into an agreement with [the City] that violated the DC3 7 members-Plaintiffs' constitutional rights" and "[a]s a result of the conspiracy between [DC37 Defendants] and [City Defendants], the DC37 members-Plaintiffs' constitutional rights have been violated." (ECF No. 27, Amended Compl. ¶¶ 134-143, 216-239.) Plaintiffs' bald allegations, however, do not give rise to a plausible inference that Defendants acted in concert to violate Plaintiffs' constitutional rights. The allegations "constitute the type of vague, conclusory, and general allegations that, standing alone, are routinely found lacking under Rule 12(b)(6)." *Orr ex rel. Orr v. Miller Place Union Free Sch. Dist.*, No. 07–CV–787, 2008 WL 2716787, at *5 (E.D.N.Y. July 9, 2008) (internal quotation marks omitted). Accordingly, Plaintiffs' § 1983 conspiracy claim is dismissed for failure to state a claim.

b. Class Claim

Because Plaintiffs fail to state a claim, their class allegations also fail. *Cf. Xuedan Wang v. Hearst Corp.*, No. 12-CV-793 (HB), 2013 WL 105784, at *3 (S.D.N.Y. Jan. 9, 2013) (noting that where court dismissed a claim under Rule 12(c), motion to strike class allegations could be granted as to that claim.)

V. Leave to Amend

Under Federal Rule of Civil Procedure 15(a), leave to amend a complaint "shall be freely given when justice so requires." Therefore, "[i]t is the usual practice upon granting a motion to dismiss to allow

leave to replead." *Cortec Indus., Inc. v. Sum Holding L.P.*, 949 F.2d 42, 48 (2d Cir. 1991) (citations omitted). A court may, however, dismiss claims without leave to amend where the proposed amendments would be futile. *See Ruotolo v. City of New York*, 514 F.3d 184, 191 (2d Cir. 2008) (citing *Foman v. Davis*, 381 U.S. 178, 182 (1962)). An amendment to the complaint is futile if the "proposed claim could not withstand a motion to dismiss pursuant to Rule 12(b)(6)." *Dougherty v. Town of N. Hempstead Bd. Of Zoning Appeals*, 282 F.3d 83, 88 (2d Cir. 2002), abrogated on other grounds by *Knick v. Twp. of Scott*, 139 S. Ct. 2162 (2019). Leave to amend may also be denied where previous amendments have not cured the complaint's deficiencies. *Ruotolo*, 514 F.3d at 184 (citing *Foman*, 381 U.S. at 182); *see also DeJesus v. Sears, Roebuck & Co., Inc.*, 87 F.3d 65, 72 (2d Cir. 1996) (noting that the Second Circuit has "upheld decisions to dismiss a complaint without leave to replead when a party has been given ample prior opportunity to allege a claim." (collecting cases)).

Here, after extensive briefing, evidentiary submissions, and a show cause hearing, the Court allowed Plaintiffs an opportunity to amend their complaint. (ECF No. 24, December 2021 Order at 8; ECF No. 27, Amended Compl.) Despite the Court's detailed analysis of Plaintiffs' factual allegations and claims in its December 2021 Order, Plaintiffs have again failed to allege facts supporting their claims. Under these circumstances, and because further amendments to the complaint would not cure the deficiencies discussed in this opinion, any amendment would be futile. Therefore, Plaintiffs' complaint is dismissed with prejudice. *See, e.g.*, *Ariel (UK) Ltd. v. Reuters Grp.,*

PLC, 277 F. App'x 43, 45-46 (2d Cir. 2008) (summary order) (stating that the district court did not abuse its discretion in not *sua sponte* granting leave to amend following dismissal of the complaint where plaintiff "had already amended its complaint once, and any amendment would have been futile").

CONCLUSION

For the reasons set forth above, City Defendants' Motion to Dismiss and DC37 Defendants' Motion to Dismiss are GRANTED in their entirety and leave to amend is DENIED. The Clerk of Court is respectfully directed to enter judgment in favor of Defendants and close this case.

SO ORDERED.

/s/ Kiyo A. Matsumoto
U.S. District Judge

Dated: March 29, 2023
Brooklyn, New York

AMENDED COMPLAINT
(JANUARY 5, 2022)

Index No. 21-cv-6586

AMENDED COMPLAINT

Jury Trial Demanded

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

JOHN GARLAND, VINCENT A. BOTTALICO, TIMOTHY A. HEATON, JOSEPH BEVILACQUA, JOSEPH CICERO, JOSEPH COLUMBIA, ANDREW COSTELLO, JAMES DANIEL DALY III, VINCENT DEFONTE, KENNETH DEFOREST, SALVATORE DEPAOLA, BRIAN DOYLE, NATHAN EVANS, CHRISTOPHER FILOCAMO, KEVIN GARVEY, CHARLES GUARNEIRI, DANIEL J. OSHEA, MARGOT LOTH, MICHAEL LYNCH, DENNIS O'KEEFFE, BRIAN PATRICK SMITH, KURT PFLUMM, CHRISTOPHER RAIMONDI, PAUL SCHWEIT, JOSEPH T. JOHNSON, DAVID BUTTON, PAUL PARR, MARK SINCLAIR, DANIEL BAUDILLE, JOHN DREHER, THOMAS OLSEN, GIUSEPPE ROBERT PENORO, MATTHEW CONNOR, NICHOLAS MULLIGAN, RANDALL SANTANA, ANTHONY PERRONE, SCOTT ETTINGER, ANTHONY MASTROPIETRO, RASHAAD TAYLOR, ANTHONY RUGGIERO, JOSEPH MURDOCCA, KEITH KLEIN, PAUL VASQUENZ, MARK HENESY, RYAN K. HALL,

JUDE PIERRE, MICHELLE SANTIAGO, ROBERT DITRANI, BRIAN T. DENZLER, MICHAEL MCGOFF, OWEN FAY, JOSEPH M. PALMIERI, STEPHEN INGUAGIATO, GEORGE J. MURPHY, JOSEPH DEPAOLA, STEPHEN BUTTAFUCCO, MICHAEL SAMOLIS, AINSLEY ATWELL, JOHN COSTELLO, MATTHEW SINCLAIR, GLENN CLAPP, MATT KOVAL, JOHN ARMORS, ROSARIO CURTO, DANIEL STROH, DANIEL YOUNG, FELICIA J. TSANG, KEVIN ERKMAN, JOHN TWOMLEY, CRAIG LEAHY, TIM RIVICCI, MICHAEL FADDA, ANTHONY C. CARDAZONE,DAVID SUMMERFIELD, BRENDAN MCGEOUGH, BRANDON PHILLIPS, CHRISTOPHER INFANTE, BERNADETTE MEDIA, JARED DYCHKOWSKI, THOMAS FEJES, JASON CHARLES, WILLIAM JOHN SAEZ, PHILLIP J. DARCEY, RODNEY COLON, SEAN FITZGERALD, ROBERT YULI, ON BEHALF OF THEMSELVES AND ALL OTHER SIMILARLY SITUATED EMPLOYEES OF THE NEW YORK CITY FIRE DEPARTMENT,

Plaintiffs,

v.

NEW YORK CITY FIRE DEPARTMENT, DANIEL A. NIGRO, IN HIS OFFICIAL AND INDIVIDUAL CAPACITIES, CITY OF NEW YORK, UNIFORMED FIRE OFFICERS ASSOCIATION, LOCAL 854 INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, AFFILIATED WITH THE AFL-CIO, UNIFORMED FIREFIGHTERS ASSOCIATION OF GREATER NEW YORK, DISTRICT COUNCIL 37, AFSCME AFL-CIO, HENRY GARRIDO, IN HIS OFFICIAL AND INDIVIDUAL CAPACITIES, DISTRICT

COUNCIL 37, AFSCME AFL-CIO, LOCAL 2507, DISTRICT COUNCIL 37, AFSCME AFL-CIO, LOCAL 3621, JOHN DOE #1-10, IN THEIR OFFICIAL AND INDIVIDUAL CAPACITIES; AND JANE DOE #1-10 IN THEIR OFFICIAL AND INDIVIDUAL CAPACITIES,

Defendants.

The Plaintiffs by their attorneys, The Scher Law Firm, LLP, alleges the following as their Amended Complaint:

I. Parties, Jurisdiction, and Venue

1. The Plaintiff JOHN GARLAND ("Garland") was and still is a natural person who resides in and is a domiciliary of the County of Richmond, State of New York and is employed as a firefighter with the New York City Fire Department ("FDNY").

2. The Plaintiff VINCENT A. BOTTALICO ("Bottalico") was and still is a natural person who resides in and is a domiciliary of the County of Putnam, State of New York and is employed as a lieutenant with the FDNY.

3. The Plaintiff TIMOTHY A. HEATON ("Heaton") was and still is a natural person who resides in and is a domiciliary of the County of New York, State of New York and is employed as a lieutenant with the FDNY.

4. The Plaintiff JOSEPH BEVILACQUA ("Bevilacqua") was and still is a natural person who resides in and is a domiciliary of the County of Richmond, State of New York and is employed as a firefighter with the FDNY.

5. The Plaintiff JOSEPH CICERO ("Cicero") was and still is a natural person who resides in and is a domiciliary of the County of Richmond, State of New York and is employed as a firefighter with the FDNY.

6. The Plaintiff JOSEPH COLUMBIA ("Columbia") was and still is a natural person who resides in and is a domiciliary of the County of Richmond, State of New York and is employed as a firefighter with the FDNY.

7. The Plaintiff ANDREW COSTELLO ("Costello") was and still is a natural person who resides in and is a domiciliary of the County of Richmond, State of New York and is employed as a firefighter with the FDNY.

8. The Plaintiff JAMES DANIEL DALY III ("Daly") was and still is a natural person who resides in and is a domiciliary of the County of Nassau, State of New York and is employed as a firefighter with the FDNY.

9. The Plaintiff VINCENT DEFONTE ("Defonte") was and still is a natural person who resides in and is a domiciliary of the County of Richmond, State of New York and is employed as a firefighter with the FDNY.

10. The Plaintiff KENNETH DEFOREST ("DeForest") was and still is a natural person who resides in and is a domiciliary of the County of Richmond, State of New York and is employed as a firefighter with the FDNY.

11. The Plaintiff SALVATORE DEPAOLA ("DePaola") was and still is a natural person who resides in and is a domiciliary of the County of Richmond, State of New York and is employed as a firefighter with the FDNY.

12. The Plaintiff BRIAN DOYLE ("Doyle") was and still is a natural person who resides in and is a domiciliary of the County of Queens, State of New York and is employed as a firefighter with the FDNY.

13. The Plaintiff NATHAN EVANS ("Evans") was and still is a natural person who resides in and is a domiciliary of the County of New York, State of New York and is employed as a lieutenant with the FDNY.

14. The Plaintiff CHRISTOPHER FILOCAMO ("Filocamo") was and still is a natural person who resides in and is a domiciliary of the County of Richmond, State of New York and is employed as a firefighter with the FDNY.

15. The Plaintiff KEVIN GARVEY ("Garvey") was and still is a natural person who resides in and is a domiciliary of the County of Nassau, State of New York and is employed as a firefighter with the FDNY.

16. The Plaintiff CHARLES GUARNEIRI ("Guameiri") was and still is a natural person who resides in and is a domiciliary of the County of Nassau, State of New York and is employed as a firefighter with the FDNY.

17. The Plaintiff DANIEL J. OSHEA ("OShea") was and still is a natural person who resides in and is a domiciliary of the County of Suffolk, State of New York and is employed as a firefighter with the FDNY.

18. The Plaintiff MARGOT LOTH ("Loth") was and still is a natural person who resides in and is a domiciliary of the County of Nassau, State of New York and is employed as a paramedic with the FDNY.

19. The Plaintiff MICHAEL LYNCH ("Lynch") was and still is a natural person who resides in and is

a domiciliary of the County of Kings, State of New York and is employed as a firefighter with the FDNY.

20. The Plaintiff DENNIS O'KEEFFE ("O'Keeffe") was and still is a natural person who resides in and is a domiciliary of the County of Nassau, State of New York and is employed as a firefighter with the FDNY.

21. The Plaintiff BRIAN PATRICK SMITH ("Smith") was and still is a natural person who resides in and is a domiciliary of the County of Suffolk, State of New York and is employed as a firefighter with the FDNY.

22. The Plaintiff KURT PFLUMM ("Pflumm") was and still is a natural person who resides in and is a domiciliary of the County of Suffolk, State of New York and is employed as a firefighter with the FDNY.

23. The Plaintiff CHRISTOPHER RAIMONDI ("Raimondi") was and still is a natural person who resides in and is a domiciliary of the County of Richmond, State of New York and is employed as a lieutenant with the FDNY.

24. The Plaintiff PAUL SCHWEIT ("Schweit") was and still is a natural person who resides in and is a domiciliary of the County of Suffolk, State of New York and is employed as a firefighter with the FDNY.

25. The Plaintiff JOSEPH T. JOHNSON ("Johnson") was and still is a natural person who resides in and is a domiciliary of the County of Queens, State of New York and is employed as a Captain with the FDNY.

26. The Plaintiff DAVID BUTTON ("Button") was and still is a natural person who resides in and is

a domiciliary of the County of Nassau, State of New York and is employed as a firefighter with the FDNY.

27. The Plaintiff PAUL PARR ("Pan") was and still is a natural person who resides in and is a domiciliary of the County of Queens, State of New York and is employed as a lieutenant with the FDNY.

28. The Plaintiff MARK SINCLAIR ("Sinclair") was and still is a natural person who resides in and is a domiciliary of the County of Richmond, State of New York and is employed as a firefighter with the FDNY.

29. The Plaintiff DANIEL BAUDILLE ("Baudille") was and still is a natural person who resides in and is a domiciliary of the County of Orange, State of New York and is employed as a firefighter with the FDNY.

30. The Plaintiff JOHN DREHER ("Dreher") was and still is a natural person who resides in and is a domiciliary of the County of Richmond, State of New York and is employed as a firefighter with the FDNY.

31. The Plaintiff THOMAS OLSEN ("Olsen") was and still is a natural person who resides in and is a domiciliary of the County of Kings, State of New York and is employed as a firefighter with the FDNY.

32. The Plaintiff GIUSEPPE ROBERT PENORO ("Penoro") was and still is a natural person who resides in and is a domiciliary of the County of Queens, State of New York and is employed as a firefighter with the FDNY.

33. The Plaintiff MATTHEW CONNOR ("Connor") was and still is a natural person who resides in and is a domiciliary of the County of Kings, State of New York and is employed as a lieutenant with the FDNY.

34. The Plaintiff NICHOLAS MULLIGAN ("Mulligan") was and still is a natural person who resides in and is a domiciliary of the County of Richmond, State of New York and is employed as a firefighter with the FDNY.

35. The Plaintiff RANDALL SANTANA ("Santana") was and still is a natural person who resides in and is a domiciliary of the County of Bronx, State of New York and is employed as a firefighter with the FDNY.

36. The Plaintiff ANTHONY PERRONE ("Perrone") was and still is a natural person who resides in and is a domiciliary of the County of Queens, State of New York and is employed as a firefighter with the FDNY.

37. The Plaintiff SCOTT ETTINGER ("Ettinger") was and still is a natural person who resides in and is a domiciliary of the County of Richmond, State of New York and is employed as a lieutenant with the FDNY.

38. The Plaintiff ANTHONY MASTROPIETRO ("Mastropietro") was and still is a natural person who resides in and is a domiciliary of the County of Nassau, State of New York and is employed as a firefighter with the FDNY.

39. The Plaintiff RASHAAD TAYLOR ("Taylor") was and still is a natural person who resides in and is a domiciliary of the County of Orange, State of New York and is employed as a firefighter with the FDNY.

40. The Plaintiff ANTHONY RUGGIERO ("Ruggiero") was and still is a natural person who resides in and is a domiciliary of the County of

Richmond, State of New York and is employed as a firefighter with the FDNY.

41. The Plaintiff JOSEPH MURDOCCA ("Murdocca") was and still is a natural person who resides in and is a domiciliary of the County of Richmond, State of New York and is employed as a firefighter with the FDNY.

42. The Plaintiff KEITH KLEIN ("Klein") was and still is a natural person who resides in and is a domiciliary of the County of Queens, State of New York and is employed as a firefighter with the FDNY.

43. The Plaintiff PAUL VASQUENZ ("Vasquenz") was and still is a natural person who resides in and is a domiciliary of the County of Richmond, State of New York and is employed as a firefighter with the FDNY.

44. The Plaintiff MARK HENESY ("Henesy") was and still is a natural person who resides in and is a domiciliary of the County of Orange, State of New York and is employed as a lieutenant with the FDNY.

45. The Plaintiff RYAN K. HALL ("Hall") was and still is a natural person who resides in and is a domiciliary of the County of Suffolk, State of New York and is employed as a firefighter with the FDNY.

46. The Plaintiff JUDE PIERRE ("Pierre") was and still is a natural person who resides in and is a domiciliary of the State of New York and is employed as a firefighter with the FDNY.

47. The Plaintiff MICHELLE SANTIAGO ("Santiago") was and still is a natural person who resides in and is a domiciliary of the County of Orange, State of New York and is employed as a lieutenant with the FDNY.

48. The Plaintiff ROBERT DITRANI ("DiTrani") was and still is a natural person who resides in and is a domiciliary of the County of Richmond, State of New York and is employed as a lieutenant with the FDNY.

49. The Plaintiff BRIAN T. DENZLER ("Denzler") was and still is a natural person who resides in and is a domiciliary of the County of Suffolk, State of New York and is employed as a firefighter with the FDNY.

50. The Plaintiff MICHAEL MCGOFF ("McGoff") was and still is a natural person who resides in and is a domiciliary of the County of Richmond, State of New York and is employed as a firefighter with the FDNY.

51. The Plaintiff OWEN FAY ("Fay") was and still is a natural person who resides in and is a domiciliary of the County of Westchester, State of New York and is employed as a lieutenant with the FDNY.

52. The Plaintiff JOSEPH M. PALMIERI ("Palmieri") was and still is a natural person who resides in and is a domiciliary of the County of Rockland, State of New York and is employed as a firefighter with the FDNY.

53. The Plaintiff STEPHEN INGUAGIATO ("Inguagiato") was and still is a natural person who resides in and is a domiciliary of the County of Suffolk, State of New York and is employed as a firefighter with the FDNY.

54. The Plaintiff GEORGE J. MURPHY ("Murphy") was and still is a natural person who resides in and is a domiciliary of the County of Nassau, State of New York and is employed as a firefighter with the FDNY.

55. The Plaintiff JOSEPH DEPAOLA ("Depaola") was and still is a natural person who resides in and is a domiciliary of the County of Rockland, State of New York and is employed as a firefighter with the FDNY.

56. The Plaintiff STEPHEN BUTTAFUCCO ("Buttafucco") was and still is a natural person who resides in and is a domiciliary of the County of Suffolk, State of New York and is employed as a firefighter with the FDNY.

57. The Plaintiff MICHAEL SAMOLIS ("Samolis") was and still is a natural person who resides in and is a domiciliary of the County of Queens, State of New York and is employed as a firefighter with the FDNY.

58. The Plaintiff AINSLEY ATWELL ("Atwell") was and still is a natural person who resides in and is a domiciliary of the County of Kings, State of New York and is employed as a firefighter with the FDNY.

59. The Plaintiff JOHN COSTELLO ("John") was and still is a natural person who resides in and is a domiciliary of the County of Rockland, State of New York and is employed as a firefighter with the FDNY.

60. The Plaintiff MATTHEW SINCLAIR ("Matthew") was and still is a natural person who resides in and is a domiciliary of the County of Richmond, State of New York and is employed as a firefighter with the FDNY.

61. The Plaintiff GLENN CLAPP ("Clapp") was and still is a natural person who resides in and is a domiciliary of the County of Kings, State of New York and is employed as a firefighter with the FDNY.

62. The Plaintiff MATT KOVAL ("Koval") was and still is a natural person who resides in and is a

domiciliary of the County of Richmond, State of New York and is employed as a firefighter with the FDNY.

63. The Plaintiff JOHN ARMORE ("Armore") was and still is a natural person who resides in and is a domiciliary of the County of Suffolk, State of New York and is employed as a firefighter with the FDNY.

64. The Plaintiff ROSARIO CURTO ("Curto") was and still is a natural person who resides in and is a domiciliary of the County of Suffolk, State of New York and is employed as a firefighter with the FDNY.

65. The Plaintiff DANIEL STROH ("Stroh") was and still is a natural person who resides in and is a domiciliary of the County of Richmond, State of New York and is employed as a firefighter with the FDNY.

66. The Plaintiff DANIEL YOUNG ("Young") was and still is a natural person who resides in and is a domiciliary of the County of Queens, State of New York and is employed as a firefighter with the FDNY.

67. The Plaintiff FELICIA J. TSANG ("Tsang") was and still is a natural person who resides in and is a domiciliary of the County of Queens, State of New York and is employed as a EMT with the FDNY.

68. The Plaintiff KEVIN ERKMAN ("Erkman") was and still is a natural person who resides in and is a domiciliary of the County of Richmond, State of New York and is employed as a firefighter with the FDNY.

69. The Plaintiff JOHN TWOMLEY ("Twomley") was and still is a natural person who resides in and is a domiciliary of the County of Richmond, State of New York and is employed as a firefighter with the FDNY.

70. The Plaintiff CRAIG LEAHY ("Leahy") was and still is a natural person who resides in and is a domiciliary of the County of Queens, State of New York and is employed as a lieutenant with the FDNY.

71. The Plaintiff TIM RIVICCI ("Rivicci") was and still is a natural person who resides in and is a domiciliary of the County of Richmond, State of New York and is employed as a firefighter with the FDNY.

72. The Plaintiff MICHAEL FADDA ("Fadda") was and still is a natural person who resides in and is a domiciliary of the County of Putnam, State of New York and is employed as a firefighter with the FDNY.

73. The Plaintiff ANTHONY C. CARDAZONE ("Cardazone") was and still is a natural person who resides in and is a domiciliary of the County of Kings, State of New York and is employed as a lieutenant with the FDNY.

74. The Plaintiff DAVID SUMMERFIELD ("Summerfield") was and still is a natural person who resides in and is a domiciliary of the County of Orange, State of New York and is employed as a firefighter with the FDNY.

75. The Plaintiff BRENDAN MCGEOUGH ("McGeough") was and still is a natural person who resides in and is a domiciliary of the County of Queens, State of New York and is employed as a firefighter with the FDNY.

76. The Plaintiff BRANDON PHILLIPS ("Phillips") was and still is a natural person who resides in and is a domiciliary of the County of Queens, State of New York and is employed as a firefighter with the FDNY.

77. The Plaintiff CHRISTOPHER INFANTE ("Infante") was and still is a natural person who resides in and is a domiciliary of the County of Richmond, State of New York and is employed as a firefighter with the FDNY.

78. The Plaintiff BERNADETTE MEJIA ("Mejia") was and still is a natural person who resides in and is a domiciliary of the County of Bronx, State of New York and is employed as a firefighter with the FDNY.

79. The Plaintiff JARED DYCHKOWSKI ("Dychkowski") was and still is a natural person who resides in and is a domiciliary of the County of Kings, State of New York and is employed as a lieutenant with the FDNY.

80. The Plaintiff THOMAS FEJES ("Fejes") was and still is a natural person who resides in and is a domiciliary of the County of Putnam, State of New York and is employed as a EMT with the FDNY.

81. The Plaintiff JASON CHARLES ("Charles") was and still is a natural person who resides in and is a domiciliary of the County of Manhattan, State of New York and is employed as a firefighter with the FDNY.

82. The Plaintiff WILLIAM JOHN SAEZ ("Saez") was and still is a natural person who resides in and is a domiciliary of the County of Richmond, State of New York and is employed as a firefighter with the FDNY.

83. The Plaintiff PHILLIP J. DARCY ("Darcy") was and still is a natural person who resides in and is a domiciliary of the County of Orange, State of New York and is employed as a lieutenant with the FDNY.

84. The Plaintiff RODNEY COLON ("Colon") was and still is a natural person who resides in and is a domiciliary of the County of Richmond, State of New York and is employed as a firefighter with the FDNY.

85. The Plaintiff SEAN FITZGERALD ("Fitzgerald") was and still is a natural person who resides in and is a domiciliary of the County of Queens, State of New York and is employed as a firefighter with the FDNY.

86. The Plaintiff ROBERT YULI ("Yuli") was and still is a natural person who resides in and is a domiciliary of the County of Kings, State of New York and is employed as a firefighter with the FDNY.

87. The Defendant NEW YORK CITY FIRE DEPARTMENT ("FDNY") was and still is a municipal corporation duly organized under the laws of New York State with its principal place of business is located in the County of Kings, State of New York.

88. The Defendant DANIEL A. NIGRO ("Nigro") was and still is a natural person whose principal place of business is located in the County Kings, State of New York.

89. The Defendant CITY OF NEW YORK ("NYC") was and still is a municipal corporation duly organized under the laws of New York State with its principal place of business is located in the County of New York, State of New York.

90. The Defendant UNIFORMED FIRE OFFICERS ASSOCIATION, LOCAL 854 INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, AFFILIATED WITH THE AFL-CIO ("UFOA") was and still is a labor

organization with its principal place of business located in the County of New York, State of New York.

91. The Defendant UNIFORMED FIREFIGHTERS ASSOCIATION OF GREATER NEW YORK ("Uniformed Firefighters") was and still is a labor organization with its principal place of business located in the County of New York, State of New York.

92. The Defendant DISTRICT COUNCIL 37, AFSCME AFL-CIO ("DC37") was and still is a labor organization with its principal place of business located in the County of New York, State of New York.

93. The Defendant HENRY GARRIDO ("Garrido") was and still is a natural person whose principal place of business is located in the County of New York, State of New York.

94. The Defendant DISTRICT COUNCIL 37, AFSCME AFL-CIO, LOCAL 2507 ("Local 2507") was and still is a labor organization with its principal place of business located in the County of New York, State of New York.

95. The Defendant DISTRICT COUNCIL 37, AFSCME AFL-CIO, LOCAL 3621 ("Local 3621") was and still is a labor organization with its principal place of business located in the County of New York, State of New York.

96. The Defendants JOHN DOE #1-10 ("John Doe") are unknown persons who have directly participated in, have knowledge of, and have had personal involvement in the deprivation of the Plaintiffs' constitutional rights.

97. The Defendants JANE DOE #1-10 ("Jane Doe") are unknown persons who have directly partici-

pated in, have knowledge of, and have had personal involvement in the deprivation of the Plaintiffs' constitutional rights.

98. This is a civil action seeking injunctive relief, declarative judgment relief to protect the Plaintiffs' constitutional rights to due process and property rights (U.S. Constitution, Fourteenth Amendment).

99. This is a civil action seeking a monetary damage award on behalf of the Plaintiffs and against the FDNY, Nigro, and NYC pursuant to 42 U.S.C. § 1983 for a violation of the Plaintiffs' constitutional rights to due process and property rights (U.S. Constitution, Fourteenth Amendment).

100. This is a civil action seeking a monetary damage award on behalf of the Plaintiffs and against the FDNY, Nigro, NYC, DC37, and Garrido pursuant to 42 U.S.C. § 1983 for a conspiracy to violate the Plaintiffs' constitutional rights to due process and property rights (U.S. Constitution, Fourteenth Amendment).

101. This Court has subject matter jurisdiction under 28 U.S.C. § 1331.

102. This Court has personal jurisdiction over the Defendants.

103. Venue is proper in this Court pursuant to 28 U.S.C. §§ 1391(b)(1) and 1391(d), because, the Defendants have offices within this judicial district.

II. Facts

A. Plaintiffs

104. Out of the eighty-six (86) Plaintiffs, sixty (60) Plaintiffs have not taken a COVID-19 vaccine.

105. Twenty-seven (27) Plaintiffs have become vaccinated and have returned to active duty with the FDNY ("Vaccinated Plaintiffs")

106. The twenty-seven (27) Plaintiffs are seeking back pay for any period of time that they were on a suspension without pay in violation of their constitutional rights.

107. The Vaccinated Plaintiffs are: Bottalico, Baudille, Costello, DiTrani, Ettinger, Filocamo, Garvey, Mastropietro, Mulligan, O'Keefe, Perrone, Penoro, Ruggiero, Johnson, Vasquenz, Fay, Buttafuoco, Atwell, Koval, Curto, Stroh, Twomley, Fadda, Summerfield, McGeough, Colon, and Yuli.

108. The Plaintiffs are either: (1) officers in the FDNY; or (2) uniformed firefighters in the FDNY; or (3) emergency medical services personnel employed by the FDNY, but in any event are entitled to due process pursuant to N.Y.C. Administrative Code § 15-113.

109. The Plaintiffs are:

(a) Officers (Bottalico, Heaton, Evans, Raimondi, Johnson, Parr, Connor, Ettinger, Henesy, Santiago, DiTrani, Fay, John, Leahy, Cardazone, Dychkowski, Darcy);

(b) Fire fighters (Garland, Bevilacqua, Cicero, Columbia, Costello, Daly, Defonte, DeForest, DePaola, Doyle, Filocamo, Garvey, Guarneiri, OShea, Lynch, O'Keeffe, Smith, Pflumm,

Schweit, Button, Sinclair, Baudille, Dreher, Olsen, Penoro, Mulligan, Santana, Perrone, Mastropietro, Taylor, Ruggiero, Murdocca, Klein, Vasquenz, Hall, Pierre, Denzler, McGoff, Palmieri, Inguagiato, Murphy, Depaola, Buttafuoco, Samolis, Atwell, Matthew, Clapp, Koval, Amore, Curto, Stroh, Young, Erkman, Twomley, Rivicci, Fadda, Summerfield, McGeough, Phillips, Infante, Mejia, Charles, Saez, Colon, Fitzgerald, Yuli);

(c) Employees of the Emergency Medical Service (Loth, Tsang, Fejes)

B. Defendants

1. FDNY, Nigro, and NYC

110. The FDNY is a State actor.

111. Nigro was the Commissioner of the FDNY during all relevant times that are at issue in this Action.

112. Nigro is a State actor.

113. NYC is a State actor.

2. UFOA

114. The UFOA is the sole collective bargaining agent for the unit consisting of all Lieutenants, Captains, Battalion Chiefs, Deputy Chiefs except those Deputy Chiefs designated as Deputy Assistant Chief of Department, Assistant Chief of Department, and Chief in Charge and Fire Medical Officers, and Supervising Fire Marshals employed by the Employer in the Fire Department of the City of New York.

115. Out of the 86 Plaintiffs, 17 Plaintiffs are members of the UFOA.

116. The UFOA is named as a necessary party to this Action.

3. Uniformed Firefighters

117. The Uniformed Firefighters is the sole collective bargaining agent for the unit consisting of all firefighters and fire marshals (uniformed) employed by the FDNY.

118. Out of the 86 Plaintiffs, 66 Plaintiffs are members of the Uniformed Firefighters.

119. Uniformed Firefighters is named as a necessary party to this Action.

4. DC37. Garrido, Local 2507, and Local 3621

120. DC37 is the sole collective bargaining agent for employees of the FDNY employed in emergency medical services.

121. Garrido is the Executive Director of DC37.

122. Out of the 86 Plaintiffs, 3 Plaintiffs are members of DC37.

123. Local 2507 is the bargaining agent for uniformed emergency medical technicians, paramedics, and fire inspectors employed by the FDNY.

124. Local 2507 is named as a necessary party to this Action.

125. Local 3621 is the bargaining agent for the officers in the emergency medical services in the FDNY.

126. Local 3621 is named as a necessary party to this Action.

C. New York Commissioner of Health's COVID Vaccine Mandate

127. On October 20, 2021, the New York City Commissioner of Health issued an Order requiring all NYC employees and certain NYC contractors to obtain a COVID-19 NYC employees, contractors and others to obtain a COVID-19 vaccine. *See*, Exhibit A, a copy of the October 20, 2021 Order of the Commissioner of Health and Mental Hygiene ("Vaccine Mandate Order").

128. The Vaccine Mandate Order required all NYC employees and certain NYC contractors to provide proof of vaccination no later than October 29, 2021. *See*, Exhibit A.

D. Impact Bargaining With UFOA, Uniformed Firefighters, and DC37

129. Pursuant to the Taylor Law (N.Y. Civil Service Law § 200, et. seg.), NYC was required to bargain with its unions the impact of the Vaccine Mandate Order.

130. The UFOA did not reach a negotiated settlement with NYC regarding the impact of the Vaccine Mandate Order on their members.

131. The Uniformed Firefighters did not reach a negotiated settlement with NYC regarding the impact of the Vaccine Mandate Order on their members.

132. In fact, the Uniformed Firefighters, properly, challenged the Vaccine Mandate in numerous venues, including New York State Supreme Court and before the Public Employment Relations Board ("PERB").

133. DC37 entered into an agreement with NYC regarding the impact of the Vaccine Mandate, which provides that on or after December 1, 2021, NYC may unilaterally separate DC37 members from their employment with the FDNY if the members have not obtained a COVID-19 vaccine. *See*, Exhibit B, a copy of the DC37 agreement, at page 10.

E. DC37's Agreement With. NYC Violated The Plaintiffs' Constitutional Rights

134. DC37's Agreement with NYC authorized NYC to suspend without pay the members of DC37 who did not take a COVID vaccine, thus violating the DC37 members-Plaintiffs' constitutional rights to due process.

135. DC37's Agreement, authorized NYC to suspend without pay the members of DC37 who did not take a COVID vaccine, thus the DC37 members-Plaintiffs' constitutional property right to their pay.

136. DC37 conspired with NYC by entering into an agreement with NYC that violated the DC37 members-Plaintiffs' constitutional rights.

137. Garrido conspired with the NYC by entering into an agreement with NYC that violated the DC37 members-Plaintiffs' constitutional rights.

138. DC37 conspired with Nigro by entering into an agreement with NYC that violated the DC37 members-Plaintiffs' constitutional rights.

139. Garrido conspired with Nigro by entering into an agreement with NYC that violated the DC37 members-Plaintiffs' constitutional rights.

140. As a result of the conspiracy between the DC37 and NYC, the DC37 members-Plaintiffs' constitutional rights have been violated.

141. As a result of the conspiracy between the DC37 and Nigro, the DC37 members-Plaintiffs' constitutional rights have been violated.

142. As a result of the conspiracy between Garrido and NYC, the DC37 members-Plaintiffs' constitutional rights have been violated.

143. The DC37-members-Plaintiffs have suffered without pay since on or about November 1, 2021 and continue every day in violation of their constitutional property right interest in their pay.

F. Reasonable Accommodation Requests

144. As part of NYC's implementation of the Vaccine Mandate Order, NYC has offered those FDNY employees who have either a medical or religious reason for not taking a vaccine an opportunity to seek a reasonable accommodation to exempt the employee from the Vaccine Mandate Order.

145. Out of the eighty-six (86) Plaintiffs, seventy-seven (77) have sought an exemption from the Vaccine Mandate Order.

146. Out of the 77 Plaintiffs who have sought an exemption zero (0) Plaintiffs have received an exemption.

147. Out of the 77 Plaintiffs who did not receive an exemption 71 Plaintiffs have been denied an exemption, 6 are awaiting an initial determination.

148. Out of the 71 Plaintiffs who have been denied an exemption 37 Plaintiffs have appealed the denial of the reasonable accommodation exemption.

149. Out of the 37 Plaintiffs who appealed the denial, zero (0) Plaintiffs have been &anted the exemption on appeal.

150. Out of the 37 Plaintiffs who appealed the denial, one (1) Plaintiff has been denied the exemption on appeal and the other 36 are awaiting a decision on their appeal.

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151. The Plaintiffs' constitutional rights have been trampled on by the FDNY.

152. The Plaintiffs' constitutional rights have been trampled on by Nigro.

153. The Plaintiffs' constitutional rights have been trampled on by NYC.

154. The Plaintiffs' constitutional rights have been trampled on by DC37.

155. The Plaintiffs' constitutional rights have been trampled on by Garrido.

G. Class Allegations

156. NYC's suspension of the Plaintiffs without pay without due process was pursuant to policies, customs, and/or practices of NYC.

157. FDNY's suspension of the Plaintiffs without pay without due process was pursuant to policies, customs, and/or practices of the FDNY.

158. The decision by DC37 to enter into the agreement with NYC was pursuant to policies, customs, and/or practices of DC37.

159. Plaintiffs, on behalf of themselves and of the class of similarly situated persons, seek an Order declaring that NYC's unilateral decision to suspend the Plaintiffs without pay without due process was unconstitutional.

160. Plaintiffs, on behalf of themselves and of the class of similarly situated persons, seek an Order declaring that the FDNY's unilateral decision to suspend the Plaintiffs without pay without due process was unconstitutional.

161. Plaintiffs, on behalf of themselves and of the class of similarly situated persons, seek an Order declaring that NYC's unilateral decision to suspend the Plaintiffs without pay without due process was illegal.

162. Plaintiffs, on behalf of themselves and of the class of similarly situated persons, seek an Order declaring that the FDNY's unilateral decision to suspend the Plaintiffs without pay without due process was illegal.

163. Plaintiffs, on behalf of themselves and of the class of similarly situated persons, seek an Order declaring that the agreement between NYC and DC37 was illegal and unenforceable.

164. Plaintiffs bring this Action on their own behalf and on behalf of all persons similarly situated, pursuant to Federal Rule of Civil' Procedure 23(b)(3). Plaintiffs seek a certification of a class defined as follows: All FDNY employees suspended without pay

for not taking the COVID-19 vaccine who have a statutory or contractual right to charges and a hearing before the employee is disciplined or terminated.

165. Pursuant to Federal Rule of Civil Procedure 23(a), the members of the class are so numerous that joinder of all members is impractical. Plaintiffs do not know the exact number of class members. Plaintiffs are informed and believe, and thereupon allege that there are more than 100 persons in the class defined above.

166. Pursuant to Federal Rule of Civil Procedure 23(a), Plaintiffs are informed and believe, and thereupon allege, that there are question of law and fact common to the class, including but not limited to:

(a) Whether a FDNY officer or member of the uniformed force possesses a property-based, procedural due process right to their pay pursuant to the Fourteenth Amendment to the United States Constitution;

(b) Whether a FDNY officer or member of the uniformed force possesses a procedural due process right to their jobs pursuant to the Fourteenth Amendment to the United States Constitution.;

167. Pursuant to Federal Rules of Civil Procedure 23(a), Plaintiffs' claims are typical of the class they seek to represent. The Plaintiffs have all been suspended without pay without due process. Plaintiffs have the same interests and have suffered the same type of injuries as the proposed class. Each proposed class member suffered actual damage as a result of the challenged conduct. Plaintiffs' claims arose because of the FDNY's policies, customs, and/or practices.

168. Pursuant to Federal Rules of Civil Procedure 23(a), Plaintiffs' claims are typical of the class they seek to represent. The Plaintiffs have all been suspended without pay without due process. Plaintiffs have the same interests and have suffered the same type of injuries as the proposed class. Each proposed class member suffered actual damage as a result of the challenged conduct. Plaintiffs' claims arose because of the FDNY's policies, customs, and/or practices.

169. Pursuant to Federal Rules of Civil Procedure 23(a), Plaintiffs' claims are typical of the class they seek to represent. The Plaintiffs have all been suspended without pay without due process. Plaintiffs have the same interests and have suffered the same type of injuries as the proposed class. Each proposed class member suffered actual damage as a result of the challenged conduct. Plaintiffs' claims arose because of the FDNY's policies, customs, and/or practices.

170. Plaintiffs' claims arose because of the DC37's policies, customs, and/or practices.

171. Plaintiffs' counsel has the resources, experience, and expertise to successfully prosecute this Action against Defendants. Counsel knows of no conflicts among members of the class, or between counsel and any members of the class.

172. Pursuant to Federal Rules of Civil Procedure 23(b)(3), upon certification, class members must be furnished with the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. If this action is certified as a class action, Plaintiffs contemplate that individual notice will be given to class members, at such last known address by first

class mail, as well as notice by publication informing them of the following:

i. The pendency of the class action and the issues common to the class;

ii. The nature of the action;

iii. Their right to "opt-out" of the action within a given time, in which event they will not be bound by a decision rendered in the class action;

iv. Their right to "opt-out" to be represented by their own counsel and to enter an appearance in the case; otherwise they will be represented by the named class plaintiffs and their counsel; and

v. Their right, if they do not "opt-out" to share in any recovery in favor of the class, and conversely to be bound by any judgment on the common issues adverse to the class.

III. Causes of Action

AS AND FOR A FIRST CAUSE OF ACTION FOR DECLARATORY JUDGMENT

173. The Plaintiffs re-state and re-allege the allegations contained in ¶¶ 1 through 172, as if fully set forth herein.

174. The Plaintiffs are officers or members of the uniformed force.

175. The Plaintiffs are employees that possess N.Y.C. Administrative Code § 15-113 rights.

176. The Plaintiffs have been suspended without pay without due process in violation of their statutory rights.

177. There is an actual controversy over whether what the FDNY did to the Plaintiffs, namely suspend the Plaintiffs without pay without due process violating the Plaintiffs' Fourteenth Amendment rights.

178. There is an actual controversy over whether what NYC did to the Plaintiffs, namely suspend the Plaintiffs without pay without due process violating the Plaintiffs' Fourteenth Amendment rights.

179. The Plaintiffs request an Order declaring that what the FDNY did to the Plaintiffs, namely suspend the Plaintiffs without pay without due process violating the Plaintiffs' Fourteenth Amendment rights to due process and to their pay without due process.

180. The Plaintiffs request an Order declaring that what NYC did to the Plaintiffs, namely suspend the Plaintiffs without pay without due process violating the Plaintiffs' Fourteenth Amendment rights to due process and to their pay without due process.

181. The Plaintiffs have no adequate remedy at law.

AS AND FOR A SECOND CAUSE OF ACTION FOR DECLARATORY JUDGMENT

182. The Plaintiffs re-state and re-allege the allegations contained in ¶¶ 1 through 181, as if fully set forth herein.

183. The Plaintiffs have been suspended without pay without due process in violation of their statutory and/or contractual rights and NYC relies upon the

agreement between DC37 and NYC as the basis for the Plaintiffs' suspension without pay.

184. There is an actual controversy over the contractual authority DC37 and NYC had to enter into the agreement.

185. The Plaintiffs request an Order declaring that the agreement between DC37 and NYC was entered into without any contractual authority.

186. The Plaintiffs request an Order declaring that the agreement between DC37 and NYC was entered into without any contractual authority and therefore, the NYC's suspension of the Plaintiffs without pay and without due process, violated the Plaintiffs' Fourteenth Amendment rights to due process and to their pay.

187. The Plaintiffs have no adequate remedy at law.

AS AND FOR A THIRD CAUSE OF ACTION FOR PERMANENT INJUNCTION

188. The Plaintiffs re-state and re-allege the allegations contained in ¶¶ 1 through 187, as if fully set forth herein.

189. The Plaintiffs have a high likelihood of success on the merits because the Plaintiffs possess a property-based, procedural due process right to their pay pursuant to the Fourteenth Amendment to the United States Constitution.

190. The Plaintiffs have a high likelihood of success on the merits because the Plaintiffs possess a procedural due process right to their jobs pursuant to the

Fourteenth Amendment to the United States Constitution.

191. The Plaintiffs have a high likelihood of success on the merits because the FDNY has violated their property-based, procedural due process right to their pay.

192. The Plaintiffs have a high likelihood of success on the merits because NYC has violated their property-based, procedural due process right to their pay.

193. The Plaintiffs have a high likelihood of success on the merits because the FDNY has violated their property-based, procedural due process right to their pay.

194. The Plaintiffs have a high likelihood of success on the merits because NYC has violated their property-based, procedural due process right to their pay.

195. The violation of the Plaintiffs' constitutional rights constitutes irreparable harm.

196. Without a permanent injunction, the Plaintiff will have no adequate remedy at law.

AS AND FOR A FOURTH CAUSE OF ACTION FOR VIOLATION OF 42 U.S.C. § 1983 AGAINST THE FDNY, NIGRO, NYC, JOHN DOE AND JANE DOE

197. The Plaintiffs re-state and re-allege the allegations contained in ¶¶ 1 through 196, as if fully set forth herein.

198. NYC subjected the Plaintiffs to the foregoing acts and omissions without due process of law in a violation of 42 U.S.C. § 1983 thereby depriving Plaintiffs of their rights, privileges and immunities secured by the Fourteenth Amendment of the United States Constitution

199. The FDNY subjected the Plaintiffs to the foregoing acts and omissions without due process of law in a violation of 42 U.S.C. § 1983 thereby depriving Plaintiffs of their rights, privileges and immunities secured by the Fourteenth Amendment of the United States Constitution.

200. NYC through its actions, violated the Plaintiffs' due process rights guaranteed to the Plaintiffs by statute, namely, N.Y.C. Administrative Code § 15-113 under the Fourteenth Amendment of the United States Constitution.

201. The FDNY through its actions, violated the Plaintiffs' due process rights guaranteed to the Plaintiffs by statute, namely, N.Y.C. Administrative Code § 15-113 under the Fourteenth Amendment of the United States Constitution.

202. The Plaintiffs were not provided the opportunity for a fair hearing prior to being deprived of a

constitutionally protected property interest, namely their pay.

203. NYC was barred by statute and/or contract from suspending the Plaintiffs without pay without due process.

204. The FDNY was barred by statute and/or contract from suspending the Plaintiffs without pay without due process.

205. The Plaintiffs, as public employees, who can only be discharged for cause, have a constitutionally protected property interest in his job, and could not be suspended without pay without due process.

206. NYC has denied Plaintiff due process of law by not providing a hearing before an impartial hearing officer resulting in a wrongful, and unlawful leave of absence, and a termination of a constitutionally protected liberty or property interest.

207. The FDNY has denied Plaintiff due process of law by not providing a hearing before an impartial hearing officer resulting in a wrongful, and unlawful leave of absence, and a termination of a constitutionally protected liberty or property interest.

208. The FDNY, Nigro, NYC, John Doe and Jane Doe, acting under color of law, and through their employees, servants, agents and designees, have engaged in a course of action and behavior rising to the level of a policy, custom, and condoned practice, which has deprived Plaintiffs of their rights, privileges and immunities secured by the Constitution and laws in violation of 42 U.S.C. § 1983. These actions were condoned, adopted and fostered by policy makers

including, but not limited to, Nigro, John Doe and Jane Doe.

209. As a direct and proximate result of said acts, Plaintiffs and others similarly situated have suffered and continue to suffer irreparable harm, loss of income, loss of other employment benefits, injury to reputation and good name, damage to their family status, being subjected to scandalous claims and investigations and have suffered and continues to suffer distress, humiliation, great expense, embarrassment, familial distress, and damage to their reputation.

210. As a direct and proximate result of said acts, Plaintiffs and others similarly situated have suffered and continues to suffer suspension, leave of absence, diminished employment, and have suffered and continues to suffer distress, humiliation, familial distress, great expense, embarrassment and damage to their reputation.

211. As a result of NYC's acts, Plaintiffs suffered and are entitled to, damage sustained to date and continuing in a sum in excess of the jurisdictional limits of all State Courts which might otherwise have jurisdiction and this Court, costs and attorney's fees as well as equitable and injunctive relief and any other relief this Court may find and just and proper.

212. As a result of the FDNY's acts, Plaintiffs suffered and are entitled to, damage sustained to date and continuing in a sum in excess of the jurisdictional limits of all State Courts which might otherwise have jurisdiction and this Court, costs and attorney's fees as well as equitable and injunctive relief and any other relief this Court may find and just and proper.

213. As a result of the Nigro's acts, Plaintiffs suffered and are entitled to, damage sustained to date and continuing in a sum in excess of the jurisdictional limits of all State Courts which might otherwise have jurisdiction and this Court, costs and attorney's fees as well as equitable and injunctive relief and any other relief this Court may find and just and proper.

214. As a result of the John Doe's acts, Plaintiffs suffered and are entitled to, damage sustained to date and continuing in a sum in excess of the jurisdictional limits of all State Courts which might otherwise have jurisdiction and this Court, costs and attorney's fees as well as equitable and injunctive relief and any other relief this Court may find and just and proper.

215. As a result of the Jane Doe's acts, Plaintiffs suffered and are entitled to, damage sustained to date and continuing in a sum in excess of the jurisdictional limits of all State Courts which might otherwise have jurisdiction and this Court, costs and attorney's fees as well as equitable and injunctive relief and any other relief this Court may find just and proper.

AS AND FOR A FIFTH CAUSE OF ACTION FOR VIOLATION OF 42 U.S.C. § 1983 AGAINST THE FDNY, NIGRO, NYC, DC37, and GARRIDO

216. The Plaintiffs re-state and re-allege the allegations contained in ¶¶ 1 through 215, as if fully set forth herein.

217. The FDNY is a State actor.

218. NYC is a State actor.

219. Nigro is a State actor.

220. DC37 conspired with NYC to enter into an agreement with NYC that resulted in a violation of the Plaintiffs' constitutional rights.

221. Garrido conspired with NYC to enter into an agreement with NYC that resulted in a violation of the Plaintiffs' constitutional rights.

222. The agreement between DC37 and NYC was the cover given to NYC to subject the Plaintiffs to suspension without pay without due process of law in a violation of 42 U.S.C. § 1983 thereby depriving Plaintiffs of their rights, privileges and immunities secured by the Fourteenth Amendment of the United States Constitution.

223. DC37 and Garrido conspired with NYC and Nigro to provide NYC and Nigro with a basis to suspend the Plaintiffs without pay even though the agreement between DC37 and NYC violated the Plaintiffs' constitutional rights.

224. NYC through its actions, violated the Plaintiffs' due process rights guaranteed to the Plaintiffs by statute (N.Y.C. Administrative Code § 15-113) under the Fourteenth Amendment of the United States Constitution.

225. DC37 conspired with NYC to violate the Plaintiffs' due process rights guaranteed to the Plaintiffs by statute (N.Y.C. Administrative Code § 15-113) under the Fourteenth Amendment of the United States Constitution.

226. Garrido conspired with NYC to violate the Plaintiffs' due process rights guaranteed to the Plaintiffs by statute (N.Y.C. Administrative Code § 15-113)

under the Fourteenth Amendment of the United States Constitution.

227. NYC conspired with DC37 to violate the Plaintiffs' due process rights guaranteed to the Plaintiffs by statute (N.Y.C. Administrative Code § 15-113) under the Fourteenth Amendment of the United States Constitution.

228. Nigro conspired with DC37 to violate the Plaintiffs' due process rights guaranteed to the Plaintiffs by statute (N.Y.C. Administrative Code § 15-113) under the Fourteenth Amendment of the United States Constitution.

229. The Plaintiffs were not provided the opportunity for a fair hearing prior to being deprived of a constitutionally protected property interest, namely their pay.

230. NYC is barred by statute and/or contract from suspending the Plaintiffs without pay without due process.

231. But for the agreement between the DC37 and NYC, NYC would not have had any justification for the violation of the Plaintiffs' constitutional rights.

232. The Plaintiffs, as public employees, who can only be discharged for cause, have a constitutionally protected property interest in his job, and could not be suspended without pay without due process.

233. As a result of the DC37 and NYC conspiracy, NYC has denied Plaintiff due process of law by not providing a hearing before an impartial hearing officer resulting in a wrongful, and unlawful leave of absence, and a termination of a constitutionally protected liberty or property interest.

234. NYC, Nigro, John Doe and Jane Doe, acting under color of law, and through their employees, servants, agents and designees, have engaged in a course of action and behavior rising to the level of a policy, custom, and condoned practice, which has deprived Plaintiffs of their rights, privileges and immunities secured by the Constitution and laws in violation of 42 U.S.C. § 1983. These actions were condoned, adopted and fostered by policy makers including, but not limited to, Nigro, John Doe and Jane Doe.

235. NYC and Nigro in a conspiracy with DC37 and Garrido acting under color of law, and through their employees, servants, agents and designees, have engaged in a course of action and behavior rising to the level of a policy, custom, and condoned practice, which has deprived Plaintiffs of their rights, privileges and immunities secured by the Constitution and laws in violation of 42 U.S.C. § 1983.

236. As a direct and proximate result of said acts, Plaintiffs and others similarly situated have suffered and continue to suffer irreparable harm, loss of income, loss of other employment benefits, injury to reputation and good name, damage to their familial status, being subjected to scandalous claims and investigations and have suffered and continues to suffer distress, humiliation, great expense, embarrassment, familial distress, and damage to their reputation.

237. As a direct and proximate result of said acts, Plaintiffs and others similarly situated have suffered and continues to suffer suspension, leave of absence, diminished employment, and have suffered and continues to suffer distress, humiliation, great expense, embarrassment and damage to their reputation.

238. As a result of the conspiracy between NYC, Nigro, DC37, and Garrido, Plaintiffs suffered and are entitled to, damages sustained to date and continuing in a sum in excess of the jurisdictional limits of all State Courts which might otherwise have jurisdiction and this Court, costs and attorney's fees as well as equitable and injunctive relief and any other relief this Court may find and just and proper.

239. As a result of NYC's acts, Plaintiffs suffered and are entitled to, damage sustained to date and continuing in a sum in excess of the jurisdictional limits of all State Courts which might otherwise have jurisdiction and this Court, costs and attorney's fees as well as equitable and injunctive relief and any other relief this Court may find just and proper.

AS AND FOR A SIXTH CAUSE OF ACTION FOR DIRECT PARTICIPATION AND AIDING AND ABETTING IN VIOLATION OF 42 U.S.C. § 1983 AGAINST THE NIGRO, GARRIDO, JOHN DOE AND JANE DOE

240. The Plaintiffs re-state and re-allege the allegations contained in ¶¶ 1 through 239, as if fully set forth herein.

241. Nigro, Garrido, John Doe, and Jane Doe, individually and collectively did foster and encourage NYC to violate the Plaintiffs' constitutional rights.

242. Nigro, Garrido, John Doe, and Jane Doe, individually and collectively, jointly and severally, violated the Plaintiffs' constitutional rights when they failed to stop NYC from suspending the Plaintiffs without pay without due process.

243. Nigro, Garrido, John Doe, and Jane Doe, individually and collectively knew and had reason to know that NYC violated the Plaintiffs' constitutional rights when NYC suspended the Plaintiffs without pay without due process.

244. Nigro, Garrido, John Doe, and Jane Doe, individually and collectively jointly and severally, did foster and encourage NYC to violate the Plaintiffs' constitutional rights by suspending the Plaintiffs without pay without due process.

245. Based on the foregoing, Nigro, Garrido, John Doe, and Jane Doe directly participated in and/or tacitly condoned the violation of the Plaintiffs' constitutional rights, violating 42 U.S.C.§ 1983.

WHEREFORE, the Plaintiffs demand judgment:

(1) on the First Cause of Action for a declaratory judgment, declaring that what: (1) the FDNY did to the Plaintiffs, namely suspend the Plaintiffs without pay without due process violating the Plaintiffs' Fourteenth Amendment rights to due process and to their pay without due process; and (2) NYC did to the Plaintiffs, namely suspend the Plaintiffs without pay without due process violating the Plaintiffs' Fourteenth Amendment rights to due process and to their pay without due process and

(2) on the Second Cause of Action for a declaratory judgment, declaring that the agreement between DC37 and NYC was entered into without any contractual authority and therefore, the NYC's suspension of the Plaintiffs without pay and without due process,

violated the Plaintiffs' Fourteenth Amendment rights to due process and to their pay; and

(3) on the Third Cause of Action for a permanent injunction, enjoining the FDNY and NYC from violating the Plaintiffs' constitutional rights;

(4) on the Fourth Cause of Action for violation of 42 U.S.C. § 1983 against the FDNY, Nigro, NYC, John Doe, and Jane Doe for violations of the Plaintiffs' Fourteenth Amendment constitutional rights, seeking compensation for damage sustained by the Plaintiffs to date and continuing in a sum to be determined at trial; and

(5) on the Fifth Cause of Action for violation of 42 U.S.C. § 1983 against the FDNY, Nigro, NYC, DC37, Garrido, John Doe, and Jane Doe for violations of the Plaintiffs' Fourteenth Amendment constitutional rights, seeking compensation for damage sustained by the Plaintiffs to date and continuing in a sum to be determined at trial; and

(6) on the Sixth Cause of Action for violation of 42 U.S.C. § 1983 against Nigro, Garrido, John Doe, and Jane Doe for direct participation in and aiding and abetting of the violation of the Plaintiffs' Fourteenth Amendment constitutional rights, seeking compensation for damage sustained by the Plaintiffs to date and continuing in a sum to be determined at trial; and

(7) on all causes of action, an award of attorneys' fees, and costs; and

(8) such other and further relief the Court deems just and fair.

/s/ Austin Graff
THE SCHER LAW FIRM, LLP
One Old Country Road, Suite 385
Carle Place, New York 11514
(516) 746-5040

Dated: Carle Place, New York
January 5, 2022

EXHIBIT A
ORDER OF THE COMMISSIONER OF HEALTH AND MENTAL HYGIENE TO REQUIRE COVID-19 VACCINATION FOR CITY EMPLOYEES AND CERTAIN CITY CONTRACTORS

WHEREAS, on March 12, 2020, Mayor Bill de Blasio issued Emergency Executive Order No. 98 declaring a state of emergency in the City to address the threat posed by COVID-19 to the health and welfare of City residents, and such order remains in effect; and

WHEREAS, on March 25, 2020, the New York City Commissioner of Health and Mental Hygiene declared the existence of a public health emergency within the City to address the continuing threat posed by COVID-19 to the health and welfare of City residents, and such declaration and public health emergency continue to be in effect; and

WHEREAS, pursuant to Section 558 of the New York City Charter (the "Charter"), the Board of Health may embrace in the Health Code all matters and subjects to which the power and authority of the Department of Health and Mental Hygiene (the "Department") extends; and

WHEREAS, pursuant to Section 556 of the Charter and Section 3.01(c) of the Health Code, the Department is authorized to supervise the control of communicable diseases and conditions hazardous to life and health and take such actions as may be necessary to assure the maintenance of the protection of public health; and

WHEREAS, the U.S. Centers for Disease Control and Prevention ("CDC") reports that new variants of COVID-19, identified as "variants of concern" have emerged in the United States, and some of these new variants which currently account for the majority of COVID-19 cases sequenced in New York City, are more transmissible than earlier variants; and

WHEREAS, the CDC has stated that vaccination is an effective tool to prevent the spread of COVID-19 and the development of new variants, and benefits both vaccine recipients and those they come into contact with, including persons who for reasons of age, health, or other conditions cannot themselves be vaccinated; and

WHEREAS, the Department reports that between January 17 and August 7, 2021, people who were unvaccinated or not fully vaccinated accounted for 96.1% of COVID-19 cases, 96.9% of COVID-19 hospitalizations, and 97.3% of COVID-19 deaths in New York City; and

WHEREAS, a study by Yale University demonstrated that the Department's vaccination campaign was estimated to have prevented about 250,000 COVID-19 cases, 44,000 hospitalizations, and 8,300 deaths from COVID-19 infection since the start of vaccination through July 1, 2021, and by information and belief, the number of prevented cases, hospitalizations, and death has risen since then; and

WHEREAS, on August 16, 2021, Mayor de Blasio issued Emergency Executive Order No. 225, the "Key to NYC," requiring that patrons and employees of establishments providing indoor entertainment, dining, and gyms and fitness centers must show proof that

they have received at least one dose of an approved COVID-19 vaccine, and such Order, as amended, is still in effect; and

WHEREAS, on August 24, 2021, I issued an Order requiring that Department of Education employees, contractors, and visitors provide proof of COVID-19 vaccination before entering a DOE building or school setting, and such Order was re-issued on September 12 and 15, 2021, and subsequently amended on September 28, 2021, and such Orders and amendment were ratified by the New York City Board of Health on September 17, 2021 and October 18, 2021; and

WHEREAS, on August 26, 2021, the New York State Department of Health adopted emergency regulations requiring staff of inpatient hospitals and nursing homes to receive the first dose of a COVID-19 vaccine by September 27, 2021, and staff of diagnostic and treatment centers, hospices, home care and adult care facilities to receive the first dose of a COVID-19 vaccine by October 7, 2021; and

WHEREAS, on August 31, 2021, Mayor de Blasio issued Executive Order No. 78, requiring that, beginning September 13, 2021, City employees and covered employees of City contractors be vaccinated against COVID-19 or submit on a weekly basis proof of a negative COVID-19 PCR diagnostic test; and

WHEREAS, on September 9, 2021 President Biden issued an Executive Order stating that "It is essential that Federal employees take all available steps to protect themselves and avoid spreading COVID-19 to their co-workers and members of the public," and ordering each federal agency to "implement, to the

extent consistent with applicable law, a program to require COVID-19 vaccination for all of its Federal employees, with exceptions only as required by law"; and

WHEREAS, on September 12, 2021, I issued an Order requiring that staff of early childhood programs or services provided under contract with the Department of Education or the Department of Youth and Community Development provide proof of COVID-19 vaccination; and

WHEREAS, Section 17-104 of the Administrative Code of the City of New York directs the Department to adopt prompt and effective measures to prevent the communication of infectious diseases such as COVID-19, and in accordance with Section 17-109(b), the Department may adopt vaccination measures to effectively prevent the spread of communicable diseases; and

WHEREAS, City employees and City contractors provide services to all New Yorkers that are critical to the health, safety, and well-being of City residents, and the City should take reasonable measures to reduce the transmission of COVID-19 when providing such services; and

WHEREAS, a system of vaccination for individuals providing City services and working in City offices will potentially save lives, protect public health, and promote public safety; and

WHEREAS, there is a staff shortage at Department of Corrections ("DOC") facilities, and in consideration of potential effects on the health and safety of inmates in such facilities, and of the benefit to public health and employee health of a fully vaccinated cor-

rectional staff, it is necessary that the requirements of this Order for DOC uniformed personnel not assigned to posts in healthcare settings be delayed; and

WHEREAS, pursuant to Section 3.01(d) of the Health Code, I am authorized to issue orders and take actions that I deem necessary for the health and safety of the City and its residents when urgent public health action is necessary to protect the public health against an existing threat and a public health emergency has been declared pursuant to such Section;

NOW THEREFORE I, Dave A. Chokshi, MD, MSc, Commissioner of Health and Mental Hygiene, finding that a public health emergency within New York City continues, and that it is necessary for the health and safety of the City and its residents, do hereby exercise the power of the Board of Health to prevent, mitigate, control and abate the current emergency, and order that:

1. My Order of August 10, 2021, relating to a vaccination or testing requirement for staff in City operated or contracted residential and congregate settings, shall be RESCINDED as of November 1, 2021. Such staff are subject to the requirements of this Order.

2. No later than 5pm on October 29, 2021, all City employees, except those employees described in Paragraph 5, must provide proof to the agency or office where they work that:

    a. they have been fully vaccinated against COVID-19; or

    b. they have received a single-dose COVID-19 vaccine, even if two weeks have not

passed since they received the vaccine; or

c. they have received the first dose of a two-dose COVID-19 vaccine

Any employee who received only the first dose of a two-dose vaccine at the time they provided the proof described in this Paragraph shall, within 45 days after receipt of the first dose, provide proof that they have received the second dose of vaccine.

3. Any City employee who has not provided the proof described in Paragraph 2 must be excluded from the premises at which they work beginning on November 1, 2021.

4. No later than 5pm on October 29, 2021, City agencies that contract for human services contracts must take all necessary actions to require that those human services contractors require their covered employees to provide proof that:

a. they have been fully vaccinated against COVID-19; or

b. they have received a single-dose COVID-19 vaccine, even if two weeks have not passed since they received the vaccine; or

c. they have received the first dose of a two-dose COVID-19 vaccine.

Any covered employee of a human service contractor who received only the first dose of a two-dose vaccine at the time they provided

the proof described in this Paragraph shall, within 45 days after receipt of the first dose, provide proof that they have received the second dose of vaccine.

All such contractors shall submit a certification to their contracting agency confirming that they are requiring their covered employees to provide such proof. If contractors are non-compliant, the contracting City agencies may exercise any rights they may have under their contract.

5. Notwithstanding Paragraphs 3 and 4 of this Order, until November 30, 2021, the provisions of this Order shall not apply to uniformed Department of Corrections ("DOC") employees, including staff serving in Warden and Chief titles, unless such uniformed employee is assigned for any time to any of the following locations: Bellevue Hospital; Elmhurst Hospital; the DOC infirmary in North Infirmary Command; the DOC West Facility; or any clinic staffed by Correctional Health Services.

Uniformed employees not assigned to such locations, to whom this Order does not apply until November 30, 2021, must, until such date, either:

a. Provide DOC with proof that:

i. they have been fully vaccinated against COVID-19; or

ii. they have received a single-dose COVID-19 vaccine, even if two weeks have not

passed since they received the vaccine; or

iii. they have received the first dose of a two-dose COVID-19 vaccine, provided that they must additionally provide proof that they have received the second dose of vaccine within 45 days after receipt of the first dose; or

b. On a weekly basis until the employee submits the proof described in this Paragraph, provide DOC with proof of a negative COVID-19 PCR diagnostic test (not an antibody test).

6. For the purposes of this Order:

"City employee" means a full-or part-time employee, intern, or volunteer of a New York City agency.

"Contract" means a contract awarded by the City, and any subcontract under such a contract, for work: (i) to be performed within the City of New York; and (ii) where employees can be expected to physically interact with City employees or members of the public in the course of performing work under the contract.

"Contractor" means a person or entity that has a City contract, including a subcontract as described in the definition of "contract."

"Covered employee" means a person: (i) employed by a contractor or subcontractor holding a contract; (ii) whose salary is paid in whole or in part from funds provided under a City contract; and (iii) who performs

any part of the work under the contract within the City of New York. However, a person whose work under the contract does not include physical interaction with City employees or members of the public shall not be deemed to be a covered employee.

"Fully vaccinated" means at least two weeks have passed after an individual received a single dose of a COVID-19 vaccine that only requires one dose, or the second dose of a two-dose series of a COVID-19 vaccine as approved or authorized for use by the Food and Drug Administration or World Health Organization.

"Human services contract" means social services contracted by an agency on behalf of third-party clients including but not limited to day care, foster care, home care, health or medical services, housing and shelter assistance, preventive services, youth services, the operation of senior centers, employment training and assistance, vocational and educational programs, legal services and recreation programs.

7. Each City agency shall send each of its human services contractors notice that covered employees of such contractors must comply with the requirement of Paragraph 4 of this Order and request a response from each such contractor, as soon as possible, with regard to the contractor's intent to follow this Order.

8. Nothing in this Order shall be construed to prohibit any reasonable accommodation otherwise required by law.

9. This Order shall not apply to individuals who already are subject to another Order of the Commissioner of Health and Mental Hygiene, Board of Health, the Mayor, or a State or federal entity that requires them to provide proof of full vaccination and have been granted a reasonable accommodation to such requirement.

10. This Order shall not apply to per diem poll workers hired by the New York City Board of Elections to conduct the election scheduled for November 2, 2021.

11. Subject to the authority of the Board of Health to continue, rescind, alter or modify this Order pursuant to Section 3.01(d) of the Health Code, this Order shall be effective immediately and remain in effect until rescinded, except that Paragraph 5 of this Order will be deemed repealed on December 1, 2021.

/s/ Dave A. Chokshi, M.D., MSc
Commissioner

Dated: October 20, 2021

EXHIBIT B
MEMORANDUM OF AGREEMENT
DISTRICT COUNCIL 37, CITY OF NEW YORK, AND THE BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT FOR THE CITY OF NEW YORK

WHEREAS; The Commissioner of the Department of Health and Mental Hygiene has issued an order mandating that all Department of Education staff and other City employees working in school settings be vaccinated against COVID-19 by October 1, 2021; and

WHEREAS; the parties desire to reach agreement regarding a process for requests for exemptions to this mandate and the leave status of those who do not comply with the mandate;

NOW THEREFORE, the parties agree as follows:

I. Exemption and Accommodation Requests & Appeal Process

As an alternative to any statutory reasonable accommodation process, the City of New York (the "City"), the Board of Education of the City School District for the City of New York (the "DOE"), and the District Council 37, (collectively the "Parties") shall be subject to the following Review Process to be implemented immediately for full-time staff and staff who work a regular schedule of 20 or more hours per week employed by the DOE and by the Department of Health and Mental Hygiene (DOHMH) and working in DOE schools. This process shall only apply to (a) religious and medical exemption requests to the mandatory vaccination policy, and (b) medical accommodation

requests where an employee is unable to mount an immune response to COVID-19 due to preexisting immune conditions and the requested accommodation is that the employee not appear at school. This process shall be in place for the 2021-2022 school year and shall only be extended by mutual agreement of the Parties.

Any requests to be considered as part of this process must be submitted via the SOLAS system for DOE employees or to DOHMH's EEO office, on a form created by EEO, for DOHMH employees, no later than 5pm on Tuesday, October 5th.

A. Full Medical Exemptions to the vaccine mandate shall only be considered where an individual has a documented contraindication such that an individual cannot receive any of the 3 authorized vaccines (Pfizer, Moderna, J&J)—with contraindications delineated in CDC clinical considerations for COVID-19 vaccination. Note that a prior immediate allergic reaction to one type of vaccine will be a precaution for the other type of vaccine, and may require consultation with an allergist.

B. Temporary Medical Exemptions to the vaccine mandate shall only be based on the following valid reasons to defer or delay COVID-19 vaccination for some period:

- Within the isolation period after a COVID-19 infection;
- Within 90 days of monoclonal antibody treatment of COVID-19;

- Treatments for conditions as delineated in CDC clinical considerations, with understanding that CDC guidance can be updated to include new considerations over time, and/or determined by a treating physician with a valid medical license responsible for the immunosuppressive therapy, including full and appropriate documentation that may warrant temporary medical exemption for some period of time because of active therapy or treatment (e.g., stem cell transplant, CAR T-cell therapy) that would temporarily interfere with the patient's ability to respond adequately to vaccination;
- Pericarditis or myocarditis not associated with COVID-19 vaccination or pericarditis or myocarditis associated with COVID-19 vaccination.

Length of delay for these conditions may vary, and staff member must get vaccinated after that period unless satisfying the criteria for a Full Medical Exemption described above.

C. Religious exemptions for an employee to not adhere to the mandatory vaccination policy must be documented in writing by a religious official (e.g., clergy). Requests shall be denied where the leader of the religious organization has spoken publicly in favor of the vaccine, where the documentation is readily available (e.g., from an online source), or where the objection is personal, political, or philosophical in nature. Exemption requests shall be consid-

ered for recognized and established religious organizations (e.g., Christian Scientists).

D. There are cases in which, despite an individual having sought and received the full course of the vaccination, they are unable to amount an immune response to COVID-19 due to preexisting immune conditions. In these circumstances, each individual case should be reviewed for potential accommodation. Medical accommodation requests must be documented in writing by a medical doctor.

E. The initial determination of eligibility for an exemption or accommodation shall be made for DOE employees by staff in the Division of Human Capital in the Office of Medical, Leaves and Benefits; the Office of Equal Opportunity; and Office of Employee Relations, and for DOHMH employees by DOHMH's EEO office. These determinations shall be made in writing no later than Friday, October 8th and, if denied, shall include a reason for the denial.

F. If the employee wishes to appeal a determination under the identified criteria, such appeal shall be made in SOLAS to the DOE for DOE employees and to DOHMH's EEO office for DOHMH employees within 48 hours of the agency's issuance of the initial eligibility determination. Those employees who have already applied for an exemption or accommodation and received a determination from DOE shall be notified by DOE of their right to appeal and such appeal shall be made in SOLAS within 48 hours of receipt of such

notification. The request for appeal should include the reason for the appeal and any additional documentation. Following the filing of the appeal, any supplemental documentation may be submitted by the employee to the Scheinman Arbitration and Mediation Services ("SAMS") within 48 hours after the filing of the appeal. If the stated reason for denial of a medical exemption or accommodation request is insufficient documentation, the employee may request from the arbitrator and, upon good cause shown, the arbitrator may grant an extension beyond 48 hours for the employee to gather the appropriate medical documentation before the appeal is deemed submitted for determination.

G. A panel of arbitrators identified by SAMS shall hear these appeals and may request that the employee or the agency submit additional documentation. The assigned arbitrator may also request information from City and/or DOE doctors as part of the review of the appeal documentation. The assigned arbitrator, at his/her discretion, will either issue a decision on the appeal based on the documents submitted or hold an expedited (virtual) factual hearing. If the panel requests a factual hearing, the employee may elect to have a union representative present but neither party shall be required to be represented by an attorney at the hearing. The expedited hearing shall consist of brief opening statements, questions from the arbitrator, and brief closing statements.

Cross examination shall not be permitted. Any documentation submitted at the Arbitrator's request must be provided to the agency at least one business day before the hearing or the issuance of the written decision without hearing.

H. Appeal decisions shall be expedited without full Opinion, and the decision is final and binding.

I. While the exemption/accommodation review process and/or any appeal is pending the individual shall remain on Leave without pay with Health Benefits. Those employees who are vaccinated and have applied for an accommodation will have the ability to use sick and/or annual leave while their application and appeal are pending, should the appeal be granted, these employees will be reimbursed any sick and/or annual leave used retroactive to the date of their initial application.

J. The employing agency shall cover all arbitration costs from SAMS under this process. To the extent that the arbitrator requests additional medical documentation or information from the agency, or consultation with City and/or DOE doctors, arranging and paying for such documentation and/or consultation shall be the responsibility of the agency.

K. An employee who is granted a medical or religious exemption or a medical accommodation under this process and within the specific criteria identified above shall be permitted

the opportunity to remain on payroll while the exemption and/or accommodation is in place, but in no event required/permitted to enter a school building while unvaccinated, as long as the vaccine mandate is in effect. In order to keep the employee on payroll, the agency may, in its discretion:

I. Assign the employee to work outside of a school building (e.g., at DOE administrative offices for DOE employees, or at other DOHMH locations for DOHMH employees) to perform functions as determined by the agency.

II. Assign the employee to work on alternative shifts, with no payment of any shift differentials.

III. Temporarily detail the employee to perform work for another City agency which is not subject to a vaccination mandate.

IV. Assign the employee to continue in their current non-school-based assignment and work location subject to the terms set forth herein or to an alternative non-school-based location to perform functions as determined by the DOE.

L. For those with underlying medical issues granted an accommodation under Section I(D), the agency will make best efforts to ensure that the alternate work setting is appropriate for the employee's medical needs. The agency shall make best efforts to make these assignments within the same borough as the employee's current work location, to

the extent such assignment exists. DOE employees assigned to alternative assignments shall be required to submit to COVID testing twice per week for the duration of the assignment. DOHMH employees so assigned shall be required to comply with DOHMH's testing policy for unvaccinated employees.

M. The process set forth herein shall constitute the exclusive and complete administrative process for the review and determination of requests for religious and medical exemptions to the mandatory vaccination policy and accommodation requests where the requested accommodation is that the employee not appear at school. The process shall be deemed complete and final upon the issuance of an appeal decision. Should either party have reason to believe the process set forth herein is not being implemented in good faith, it may bring a claim directly to SAMS for expedited resolution.

N. A 12-month employee who is granted a full (i.e., not temporary) medical or religious exemption under this process whose exemption or accommodation is not extended past the end of the school year shall have the right to elect to be placed on leave without pay with health benefits through September 5, 2022 pursuant to all the terms and conditions set forth in Section III(B) of this agreement. Such election must be made within two weeks of the date the exemption of accommodation ceased.

II. Leave

A. Any unvaccinated employee who has not requested an exemption pursuant to Section 1, or who has a pending exemption request or has requested an exemption which has been denied, may be placed by the agency on leave without pay effective October 4, 2021 through November 30, 2021. Such leave may be unilaterally imposed by the agency and may be extended at the request of the employee consistent with Section III(B), below. Placement on leave without pay for these reasons shall not be considered a disciplinary action for any purpose.

B. Except as otherwise noted herein, this leave shall be treated consistent with other unpaid leaves at the agency for all purposes.

C. During such leave without pay, employees shall continue to be eligible for health benefits. As with other agency leaves without pay, employees are prohibited from engaging in gainful employment during the leave period.

D. Employees who become vaccinated while on such leave without pay and provide appropriate documentation to the agency prior to November 30, 2021 shall have a right of return to active duty as soon as is practicable but in no case more than one week following notice and submission of documentation to the agency.

E. Pregnancy/Parental Leave

i. Any soon-to-be birth mother who starts the third trimester of pregnancy on or before October 1, 2021 (e.g. has a due date no later than January 1, 2022), may utilize sick

leave, annual leave, and/or compensatory time prior to the child's birth date, but not before October 1, 2021. Upon giving birth, they shall be eligible for paid family leave ("PFL") or FMLA in accordance with existing law and rules.

ii. No documentation shall be necessary for this use of accrued leave, other than a doctor's written assertion that the employee is in her third trimester as of October 1, 2021.

iii. In the event that an eligible employee exhausts accrued leave prior to giving birth, that employee shall be placed on a leave without pay, but with medical benefits at least until the birth of the child. As applicable, unvaccinated employees may be placed in the leave as delineated in Section II(A).

iv. If not otherwise covered by existing FMLA or leave eligibility, an employee who exhausts their leave before the birth of the child will be eligible to be in an unpaid leave with medical benefits for the duration of the maternity recovery period (i.e., six weeks after birth or eight weeks after a birth via C-Section).

v. All other eligibility and use rules regarding use of sick leave, annual leave, compensatory time, paid family leave, and FMLA remain in effect.

vi. Except as provided in this subsection E, no employee placed on leave without pay pursuant to this agreement may return to another leave status (e.g., annual leave, sick leave, FMLA) after going on leave without pay.

III. Separation

A. During the period of October 4, 2021 through October 29, 2021 any employee who is on leave without pay due to vaccination status may opt to separate from the agency. In order to separate under this Section and receive the commensurate benefits, an employee must file a form created by the agency which includes a waiver of the employee's rights to challenge the employee's involuntary resignation, including, but not limited to, through a contractual or statutory disciplinary process. If an employee opts to separate consistent with this Section, the employee shall be eligible to be reimbursed for unused sick leave on a one-for-one basis, up to 100 days to be paid following the employee's separation with documentation including the general waiver and release. Employees who elect this option shall be deemed to have resigned involuntarily effective on the date contained in the general waiver as determined by the agency, for non-disciplinary reasons. An employee who separates under this Section shall continue to be eligible for health benefits through September 5, 2022, unless they have health insurance available from another source (e.g., a spouse's coverage or another job).

B. During the period of November 1st through November 30, 2021, any employee who is on leave without pay due to vaccination status may alternately opt to extend the leave through September 5, 2022. In order to extend this leave pursuant to this Section and continue to receive the commensurate benefits, an employee must file a form created by the agency which includes a waiver of the employee's rights to challenge the employee's voluntary resignation, including, but not limited to, through a contractual or statutory dis-

ciplinary process. Employees who select this option shall continue to be eligible for health benefits through September 5, 2022. Employees who comply with the health order and who seek to return from this leave, and so inform the agency before September 5, 2022, shall have a right to return to active duty as soon as is practicable but in no case more than two weeks following notice to the agency. Existing rules regarding notice of leave intention and rights to apply for other leaves still apply. Employees who have not returned by September 5, 2022 will be deemed to have voluntarily resigned.

C. Beginning December 1, 2021, the agency will seek to unilaterally separate employees who have not opted into separation under Sections III(A) and III(B). Except for the express provisions contained herein, all parties retain all legal rights at all times relevant herein.

FOR THE CITY OF NEW YORK

BY: /s/ Renee Campion
Commissioner of Labor Relations

FOR THE BOARD OF EDUCATION

BY: /s/ Randy Asher
Deputy CEO, Labor Policy

FOR DISTRICT COUNCIL 37

BY: /s/ Henry Garrido
Executive Director

FOR LOCAL 372

BY: /s/ Shaun D. Francois I
President

Dated: October 3, 2021