UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Frank Ricci, et al., *Plaintiffs*, *v.* John DeStefano, et al., *Defendants*.	Civil No. 3:04cv1109 (JBA) May 12, 2010

RULING AND ORDER ON MOTION TO INTERVENE [Doc. # 173]

On December 1, 2009, Michael Briscoe, an African–American member of the New Haven Fire Department ("NHFD"), moved to intervene in this six-year-old case under Federal Rule of Civil Procedure 24. For the reasons that follow, his motion will be denied as untimely.

I. Background

Plaintiffs' suit against the City of New Haven (the "City") and certain of its officials (collectively, "Defendants") sought "to redress the deprivation by [D]efendants of rights secured to the [P]laintiffs" by virtue of Plaintiffs' "hav[ing] been unlawfully denied promotions and opportunities for promotions on account of their race and political association." (Compl. [Doc. # 1] at ¶ 1.) By way of Amended Complaint filed March 26, 2005, Plaintiffs alleged that they had taken promotional examinations designed to establish a list of those eligible for promotions to the ranks of lieutenant and captain in the NHFD, but that after Defendants learned "that white firefighters were the top scorers in both competitive examinations," they "opted to discard the examination results and refuse to

establish an eligible list." (*See* Am. Compl. [Doc. # 29] at ¶¶ 24–42.) Plaintiffs alleged that in so doing, the City made a decision on the basis of race, thereby violated, *inter alia*, Title VII, and injured Plaintiffs in various ways, including by denying them "promotion[s]" and "opportunities for promotion." (*Id.* at ¶ 63.)

Because the "posture of [this] litigation at the time the motion to intervene [wa]s made" is a "[p]articular focus" in considering the motion, *United States v. Pitney Bowes, Inc.*, 25 F.3d 66, 72 (2d Cir. 1994), the principal litigation events reflected on the public docket of this case are relevant. The case was filed on July 8, 2004, proceeded through discovery, and both sides filed summary–judgment motions in November and December 2005, with amended briefing in June and July 2006. Oral argument was held on July 17, 2006. The September 28, 2006 ruling granting Defendants' summary–judgment motion held, in pertinent part, that because the City's decision not to certify the promotional examinations was driven by "motivation to avoid making promotions based on a test with a racially disparate impact," which "does not, as a matter of law, constitute discriminatory intent," the City was entitled to summary judgment on Plaintiffs' Title VII disparate–treatment claim. *Ricci v. DeStefano*, 554 F. Supp. 2d 142, 160 (D. Conn. 2006). The Second Circuit affirmed by summary order, *see* 264 F. App'x 106 (2d Cir. 2008), and later by per curiam opinion accompanying a denial of rehearing *en banc*, *see* 530 F.3d 87 and 530 F.3d 88 (2d Cir. 2008). On June 29, 2009, the Supreme Court reversed, holding that "[o]n the record before [it], there is no genuine dispute that the City lacked a strong basis in evidence to believe it would

face disparate-impact liability if it certified the examination results," and that Plaintiffs therefore "are entitled to summary judgment on their Title VII claim." 129 S. Ct. 2658, 2673, 2681 (2009). The Supreme Court remanded to the Second Circuit, which in turn issued a Mandate of Remand to this Court on October 27, 2009. This Court accordingly entered judgment on liability in favor of Plaintiffs on their disparate–treatment Title VII claim and ordered certification of the promotional examination results and promotion of 14 of the Plaintiffs. (*See* Order dated Nov. 24, 2009 [Doc. # 168].)

Thereafter, on December 1, 2009, Briscoe moved to intervene in this case. His Proposed Intervening Complaint asserts the same allegations as those in a separate suit he had filed on October 15, 2009,[1] and he seeks intervention "simply in order to forestall any argument by the City that the resolution of his underlying claim should be dictated by the choice to file a separate suit rather than moving to intervene here." (Briscoe's Mem. Supp. [Doc. # 173-2] at 1.)

[1] More than five years after Plaintiffs filed this case, Briscoe brought suit against the City regarding the same 2003 lieutenant promotional examination, alleging that the City's decision "to weight the written test 60 percent and the oral exam 40 percent . . . had a disparate impact on African–American candidates" and thereby violates Title VII's disparate–impact provisions. *See* Complaint at ¶¶ 1, 19 (Docket No. 1), *Briscoe v. City of New Haven*, Civil No. 3:09cv1642(CSH) (D. Conn. Oct. 15, 2009). Judge Haight dismissed Briscoe's suit as foreclosed by the Supreme Court's decision in *Ricci*. *See* Memorandum of Decision (Docket No. 101), *Briscoe v. City of New Haven*, No. 3:09cv1642(CSH) (D. Conn. Apr. 28, 2010).

II. Standards

Briscoe moves to intervene both as of right and permissively under Federal Rule of Civil Procedure 24.[2] Both types of intervention require timely motion. *NAACP v. State of New York*, 413 U.S. 345, 365 (1973) ("Whether intervention be claimed of right or as permissive, it is at once apparent, from the initial words of both Rule 24(a) and Rule 24(b), that the application must be 'timely.' If it is untimely, intervention must be denied."). As the Second Circuit has repeatedly explained with respect to intervention motions under Rule 24(a),

> Intervention as of right under Rule 24(a)(2) is granted when all four of the following conditions are met: (1) the motion is timely; (2) the applicant asserts an interest relating to the property or transaction that is the subject

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[2] In pertinent parts, this Rule provides:

(a) INTERVENTION OF RIGHT. On timely motion, the court must permit anyone to intervene who: . . .

(2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

(b) PERMISSIVE INTERVENTION.

(1) *In General*. On timely motion, the court may permit anyone to intervene who: . . .

(B) has a claim or defense that shares with the main action a common question of law or fact. . . .

(3) *Delay or Prejudice*. In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights.

Fed. R. Civ. P. 24(a), (b).

> of the action; (3) the applicant is so situated that without intervention, disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect its interest; and (4) the applicant's interest is not adequately represented by the other parties.

MasterCard Int'l Inc. v. Visa Int'l Serv. Ass'n, Inc., 471 F.3d 377, 389 (2d Cir. 2006); *accord Weisshaus v. Swiss Bankers Ass'n (In re Holocaust Victim Assets Litig.)*, 225 F.3d 191, 197–98 (2d Cir. 2000) ("*Weisshaus*"); *Catanzano v. Wing*, 103 F.3d 223, 232 (2d Cir. 1996); *Pitney Bowes*, 25 F.3d at 70; *Wash. Elec. Coop., Inc. v. Mass. Mun. Wholesale Elec. Co.*, 922 F.2d 92, 96 (2d Cir. 1990); *Farmland Dairies v. Comm'r of New York State Dep't of Agric. & Mkts.*, 847 F.2d 1038, 1043 (2d Cir. 1988); *United States v. State of New York*, 820 F.2d 554, 556 (2d Cir. 1987). The motion "will be denied unless all four requirements are met." *Pitney Bowes*, 25 F.3d at 70; *accord Weisshaus*, 225 F.3d at 197–98 (a putative intervenor's "[f]ailure to meet any one of these requirements suffices for a denial of the motion"); *Farmland Dairies*, 847 F.2d at 1043 ("Failure to satisfy *any one* of these requirements is a sufficient ground to deny the application." (emphasis in original)).

Both Plaintiffs and Defendants oppose Briscoe's intervention as untimely. In the context of Rule 24, "[t]imeliness defies precise definition," *Pitney Bowes*, 25 F.3d at 70, and "when deciding timeliness under Rule 24(a)(2), . . . the determination must be based on all the circumstances of the case," *United States v. New York*, 820 F.2d at 557.

> Factors to consider in determining timeliness include: "(a) the length of time the applicant knew or should have known of [its] interest before making the motion; (b) prejudice to existing parties resulting from the applicant's delay;

> (c) prejudice to [the] applicant if the motion is denied; and (d) [the] presence of unusual circumstances militating for or against a finding of timeliness."

MasterCard Int'l Inc., 471 F.3d at 390 (quoting *United States v. New York*, 820 F.2d at 557). The determination of timeliness applies to both Rule 24(a) and Rule 24(b), since where a district court "could properly find [an applicant's] motion to intervene untimely" under Rule 24(a), there is "no abuse of discretion in the district court's decision denying [the applicant] permissive intervention under Rule 24(b)." *Id.* at 391; *In re Bank of New York Derivative Litig.*, 320 F.3d 291, 300 n.5 (2d Cir. 2003) ("[I]nsofar as we affirm the District Court's denial of [the applicant's] motion to intervene as a matter of right, we need not also examine its denial of permissive intervention"); *Catanzano*, 103 F.3d at 234 (concluding that because Rule 24(a) motion was untimely, therefore Rule 24(b) motion was untimely).

III. Discussion

With a "[p]articular focus" on the "posture of [this] litigation at the time [Briscoe's] motion to intervene [was] made," *Pitney Bowes*, 25 F.3d at 72, the Court considers whether his motion was timely.

Briscoe asserts that his motion is timely because neither Plaintiffs nor Defendants will suffer prejudice if he were to intervene. He argues that "there is no conflict between the promotions that the [P]laintiffs are receiving and the promotional relief that [he] seeks" because the NHFD "has many more lieutenant vacancies than there are eligible *Ricci* [P]laintiffs, so that [he] is not competing with the [P]laintiffs for a scarce resource." (Briscoe's Mem. Supp. at 2.) He further asserts that "[t]he City has no legitimate interest in

barring the promotion of a victim of its discrimination," and that because the examination results were kept under seal and protective order, he did not learn his score until "recently," and thus "had no way to know that he had been harmed by the City's weighting scheme—or even that he was not one of the African American firefighters who would be promoted from the list that the [P]laintiffs in this action wanted the City to certify." (*Id.* at 2–3.) "Under these circumstances," he argues, he

> was in no position even to determine what legal claim he could bring because he did not know what the City had done that had injured him: he did not know whether he was injured by the test or, exactly the opposite, by the City's failure to act on the basis of the test's results. He brought his claim as soon as he learned of the City's adverse action against him.

(*Id.* at 3.)

Opposing intervention, Plaintiffs argue that Briscoe should have known of the case because it attracted substantial media coverage at the outset. Second, even if he did not know of the suit, his "inattention" is not "a justification for delay in pursuing intervention." (Pls.' Opp'n [Doc. # 192] at 12 (citing *Weisshaus*, 225 F.3d at 198).) Third, whether or not Briscoe knew if his interests lay with the Plaintiffs or the City, he knew from the beginning that he had a "'direct, substantial, and legally protectable' interest, a standard that Briscoe's purported interest could have satisfied long before the Supreme Court's determination of the City's Title VII liability." (*Id.* at 13 (quoting *Wash. Elec. Coop., Inc.*, 922 F.2d at 97).) Fourth, Plaintiffs argue, Briscoe's "failure to intervene earlier [cannot] be excused by any lack of standing," given that he can "piggyback off the established standing of plaintiffs in

an already–existing Article III 'case or controversy.'" (*Id.* at 14 (citing *United States Postal Serv. v. Brennan*, 579 F.2d 188, 190 (2d Cir. 1977), and *Dillard v. Chilton County Comm'n*, 495 F.3d 1324, 1336–37 & 1337 n.10 (11th Cir. 2007).) Plaintiffs also assert that both they and Defendants would be prejudiced by intervention given that the case between them "has been pending more than five years and is now, finally, nearing completion" (*id.* at 15), any prejudice to Briscoe "stems only from his own failure to timely intervene to assert [his] interest in [Plaintiffs'] case" (*id.* at 18), and that "[t]he fact that Briscoe seeks to create a new and *different* factual record is irrelevant" to resolution of this case (*id.* at 19). Defendants assert similar arguments. (*See* Defs.' Obj. [Doc. # 184] at 5–13.)

Briscoe responds that he could not have learned of his results on the promotional examination—and thus whether his interests lay with Plaintiffs or the City—before Plaintiffs petitioned the Supreme Court for *certiorari* because the examination results produced in discovery were subject to a protective order. He further asserts that the relief he seeks is not inconsistent with the relief sought by Plaintiffs, and that if he were to prevail the remedy "would produce an even stronger officer corps than the system the City used," so neither Plaintiffs nor Defendants would be prejudiced by his intervention. (Reply Supp. [Doc. # 197] at 1–5.)

A. Notice

"Among the most important factors in a timeliness decision is 'the length of time the applicant knew or should have known of his interest before making the motion.'" *Catanzano*, 103 F.3d at 232 (quoting *Farmland Dairies*, 847 F.2d at 1044).

Briscoe does not address the Plaintiffs' and Defendants' arguments that he had notice of his interest well prior to moving to intervene, and that the lawsuit as originally filed addressed the same issue as the interest he now asserts, that is, the lawfulness of the City's promotional examinations and certification decisions. Both are clearly the case. In 2003 he was an African–American New Haven firefighter who took the same lieutenant promotional examination whose non-certification Plaintiffs—firefighters within the same department in which he worked—alleged in July 2004 was unlawful (*see, e.g.*, Briscoe's Prop. Compl. at ¶ 3), and he does not object to assertions by Plaintiffs and Defendants that he had notice of the lawsuit even before the appeal to the Second Circuit on October 27, 2006 (*see* Notice of Appeal [Doc. # 134]). The media attention received by the litigation, as well as the "heated public meetings" in 2004 resulting from the Plaintiffs' complaint,[3] bolsters the conclusion

[3] Coverage of the suit began at least a month before Plaintiffs filed their original complaint, *see* William Kaempffer, *Racial Tensions flaring up at NHFD: Promotional tests are tinder for lawsuits*, NEW HAVEN REGISTER, June 20, 2004, and right after suit was filed, *see* William Kaempffer, *White firefighters file suit against city*, NEW HAVEN REGISTER, July 9, 2004; William Kaempffer, *FOI officer says city must air test scores*, NEW HAVEN REGISTER, Aug. 30, 2004. Moreover, according to the *New Haven Register*, "[b]etween January and March [of 2004], the city held a series of heated public meeting after discovering that 14 of the top 15 scores on the two tests were held by white firefighters," after which Plaintiffs' complaint to the CHRO was dismissed. William Kaempffer, *Panel tosses firefighters'*

that Briscoe had actual or constructive notice of the litigation. *See, e.g.*, *NAACP v. State of New York*, 413 U.S. at 366–67 (affirming denial of intervention as untimely where lower court "could reasonably have concluded that [putative intervenors] knew or should have known of the [litigation] because," among other things, "of an informative February article in the New York Times discussing the controversial aspect of the suit" published two months before motion to intervene was filed); *United States v. Yonkers Bd. of Educ.*, 801 F.2d 593, 595 (2d Cir. 1986) (putative intervenors "had reason to become aware [of issue on which they sought to intervene] would be considered by the court" because "comments were submitted to the district court and became page one news in the Yonkers local newspaper"); *Tummino v. Hamburg*, 260 F.R.D. 27, 30, 36 (E.D.N.Y. 2009) (putative intervenor had notice where the litigation "has been the subject of considerable discussion and national media coverage"); *In re Bank of New York Derivative Litig. (Kaliski v. Bacot)*, 173 F. Supp. 2d 193, 201 (S.D.N.Y. 2001) (denying motion to intervene as untimely where the "lawsuit has been pending for more than two years, and has garnered no small amount of media attention. Hence, [the applicant] has had notice of this action for some time."), *aff'd sub nom.*, *In re Bank of New York Derivative Litig.*, 320 F.3d at 297, 300–01 (quoting district court).

In light of Plaintiffs' allegations that the "top scorers" on the promotional examinations were white, Plaintiffs' complaint and amended complaint gave notice to Briscoe that this litigation concerned his interest in a system of promotions free of disparate

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discrimination claim, NEW HAVEN REGISTER, Nov. 6, 2004.

racial impact, that the examinations may have had such an impact, that he was not among the "top scorers," and that the examination results were not certified. Certainly, by the time the parties moved for summary judgment, the issue of whether the examinations had a disparate impact on African–Americans was clearly part of this case: on November 4, 2005, the City argued on summary judgment that its legitimate, nondiscriminatory rationale for declining to certify the examination results was that it knew that "certification of the results of the subject exams would have had an adverse impact on African–American candidates and Hispanic candidates in violation of Title VII's prohibition against disparate impact," and it sought to "[a]void[] such violations of Title VII." (Defs.' Mem. Supp. Summ. J. [Doc. # 52-2] at 13.) Briscoe should have been on notice that the Court would address the City's argument that certification of the promotional examinations would have a disparate impact on African–Americans.

Briscoe's argument that he only recently learned how he had scored, and thus whether his interests lay with the City or with Plaintiffs, is unavailing to satisfy the timeliness factor. In the Second Circuit an applicant for intervention need not demonstrate constitutional standing, *see Brennan*, 579 F.2d at 190,[4] so consideration of the timeliness of

[4] This remains the rule in the Second Circuit, notwithstanding developments in the 33 years since the Second Circuit decided *Brennan*. *See Hoblock v. Albany County Bd. of Elections*, 233 F.R.D. 95, 97 (N.D.N.Y. 2005) ("[T]here is no Article III standing requirement in the Second Circuit, with an intervenor only needing to meet the Rule 24(a) requirements and have an interest in the litigation, if there is already a case or controversy in existence between the original parties to litigation who have standing" (citing, *inter alia*, *Brennan*, 579 F.2d at 190)); *Herdman v. Town of Angelica*, 163 F.R.D. 180 186–87 (W.D.N.Y. 1995) ("The

Briscoe's motion is unrelated to whether he has alleged an "injury in fact" sufficient to confer on him constitutional standing to bring a separate lawsuit, *see generally Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992), or, therefore, if or when the Title VII cause of action he asserts accrued.[5] Since Briscoe had notice that a subject of this suit was an exam he had taken that allegedly had racially disparate results, his interest in Plaintiffs' challenge to the examination's results was sufficiently "direct, substantial, and legally protectable" well before he knew the fact—his score—on which he concluded that he had been injured by the City's weighting of the examination, that is, before the date on which he believes his cause of action

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Second Circuit has held that prospective intervenors need not satisfy Article III standing requirements," and despite later cases describing the interest a putative intervenor must assert in terms similar to that required under Article III, "the court has not expressly ruled that prospective intervenors must meet Article III standing requirements, and has implicitly left the question open." (citing *Brennan*, 579 F.2d at 190, and *Schulz v. Williams*, 44 F.3d 48, 52 n.3 (2d Cir. 1994)).

[5] Indeed, Briscoe's argument in favor of timeliness relies on cases addressing the timeliness of a plaintiff's Title VII claim in relation to learning of an employer's adverse action against him, not on cases addressing the timeliness of a motion to intervene. (Briscoe's Mem. Supp. at 3 (citing *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 628 (2007), *Delaware State Coll. v. Ricks*, 449 U.S. 250, 261 (1980), and *Flaherty v. Metromail Corp.*, 235 F.3d 133, 137 (2d Cir. 2000), and describing these cases as holding that a "limitations period [is] triggered by [an] employee's knowledge that [an] adverse action had occurred".) As *Brennan* suggests, this case reflects, and the Supreme Court has implied, a person's "interest" for intervention purposes may arise before any independent cause of action accrues—or even if no such cause of action accrues. *See Diamond v. Charles*, 476 U.S. 54, 68 (1986) ("[A]n intervenor's right to *continue* a suit in the absence of the party on whose side intervention was permitted is contingent upon a showing by the intervenor that he fulfills the requirements of Art. III." (emphasis added)).

accrued.[6] His timely intervention in this litigation would have entitled him to conduct his own discovery and also would have afforded him access to the examination–result list under seal. (*See* Order Re: Discovery Confidentiality [Doc. # 25] at ¶¶ 4–7.)

B. Prejudice to Existing Parties

Briscoe argues that Plaintiffs will suffer no prejudice from his intervention because the relief he seeks is not inconsistent with the relief Plaintiffs seek, and because "[t]he City has no legitimate interest in barring the promotion of a victim of its discrimination" and actually has an interest in Briscoe's prevailing on his suit because it will result in an overall better–qualified firefighter corps.

Whether or not in the abstract or at a policy level the City's "interest[s]" actually lie with Briscoe, both Plaintiffs and Defendants would suffer prejudice, measured from the vantage point of this litigation, *Pitney Bowes*, 25 F.3d at 72, if he were permitted to intervene. Defendants argue that they would suffer prejudice because after five–plus years of litigation they and Plaintiffs are close to a "final resolution" of the matter. (Defs.' Obj. at 8.) And as Plaintiffs argue, "existing parties acquire substantial interests in ensuring their anticipated

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[6] For this reason, the Court's conclusion that Briscoe was dilatory in moving to intervene in this litigation to assert his interests does not address in any way the timeliness or propriety of causes of action he may or did pursue in a separate action, and does not rely on any factual conclusion that he knew his score before moving to intervene. *Cf.* Briscoe's Motion for Reconsideration of Order of Dismissal, *Briscoe v. City of New Haven*, 3:09cv1642(CSH) (D. Conn. Apr. 29, 2010) (seeking reconsideration to correct a "significant factual error," and asserting that Briscoe "was not aware of his score or standing on the list until after the Supreme Court's decision in June 2009").

outcomes come to pass, particularly when resolution of claims is near." (Pls.' Opp'n at 15 (citing *Farmland Dairies*, 847 F.2d at 1044).) Judgment has entered, the City has promoted fourteen of the Plaintiffs, and the parties have briefed two post–remand matters—"(a) the scope and nature of damages to which Plaintiffs are entitled under Title VII, and (b) whether any counts remain for liability adjudication" (Scheduling Order [Doc. # 148] at 1). The existing parties' interest in the finality of judgment on liability on the Title VII claim—which is the interest that intervention would prejudice—is substantial. *Cf. Farmland Dairies*, 847 F.2d at 1044 (affirming denial of intervention where district court had entered summary judgment and granted injunctive relief, after which the existing parties had negotiated settlement of remaining issues, and where "[t]he interests prejudiced by intervention" accruing from these developments "are clearly substantial").

C. Prejudice to Briscoe

An applicant for intervention cannot rely on prejudice that would result from being unable to intervene if the prejudice would "be attributed to [his] own failure to seek intervention when [he] first had reason to become aware that [the matter] would be considered by the court." *United States v. Yonkers Bd. of Educ.*, 801 F.2d 593, 595 (2d Cir. 1986). Briscoe has not precisely articulated what prejudice he would suffer—and indeed he states that his relief is not inconsistent with the Plaintiffs' relief and that he does not seek to "undo[] any of the relief that the [P]laintiffs have sought" (Briscoe's Reply Supp. [Doc. # 197] at 8–9). Notwithstanding these avowals, to the extent his potential prejudice relates to the

scope of remedial relief already ordered and that to which other Plaintiffs may be entitled, this prejudice results from his own "dilatoriness," *Yonkers Bd. of Educ.*, 801 F.2d at 596, by failing to intervene during discovery (i.e., to "fill the holes that the City left, and based on that more complete record[,] . . . be entitled to prevail" (Briscoe's Reply to Defs.' Obj. at 3)) or at summary–judgment briefing.

Nor does Briscoe's view that the City's actions after remand jeopardize his own interests make his otherwise untimely motion timely. Like all private litigants who believe their interests align with public officials who are parties to a particular litigation, Briscoe "should certainly have been aware . . . that the interests represented by the [public official] are not coterminous with [his] own," since public officials are charged with duties and responsibilities unique to their role as representatives of the public, "and not mere individuals and private rights." *See Farmland Dairies*, 847 F.2d at 1044 (noting that private dairy companies' motion to intervene was untimely and that they should have known that state Attorney General's interests were "not coterminous with their own").

D. Exceptional Circumstances

An exceptional circumstance further counsels against intervention in this case: the Supreme Court's determination that Plaintiffs were entitled to summary judgment. Although after "searching for a standard" the Supreme Court announced a new "rule" to "guid[e] . . . employers and courts [in] situations when [the disparate–treatment and disparate–impact] prohibitions could be in conflict," *Ricci*, 129 S. Ct. at 2674–75, the Court

did not remand for a new trial or summary disposition, *see id.* at 2702–03 (Ginsburg, J., dissenting) ("When this Court formulates a new legal rule, the ordinary course is to remand and allow the lower courts to apply the rule in the first instance." (citations omitted)), but instead granted Plaintiffs summary judgment "[o]n the record before [it]," *id.* at 2681 (Kennedy, J., for majority). The Supreme Court remanded to the Second Circuit, which then remanded to this Court "for further proceedings consistent with the opinion of the Supreme Court."

The mandate rule dictates that the Supreme Court's determination of the City's liability to the Plaintiffs under Title VII is not subject to challenge in this action in this Court. "The mandate rule is a branch of the law-of-the-case doctrine. This rule holds 'that where issues have been explicitly or implicitly decided on appeal, the district court is obliged, on remand, to follow the decision of the appellate court.'" *Burrell v. United States*, 467 F.3d 160, 165 (2d Cir. 2006) (quoting *United States v. Minicone*, 994 F.2d 86, 89 (2d Cir. 1993)). The mandate rule "describes the *duty* of the district court on remand." *United States v. Tenzer*, 213 F.3d 34, 40 (2d Cir. 2000) (emphasis added); *see also Burrell*, 467 F.3d at 165 ("To determine whether an issue remains open for reconsideration on remand, the trial court should look to both the specific dictates of the remand order as well as the broader spirit of the mandate." (internal quotation omitted)).

Thus, whether or not a new, separate, or supplemented record—which Briscoe expressly seeks to construct (*see* Briscoe's Reply to Defs.' Obj. at 3)—might demonstrate that

the City has some valid defense to a disparate–treatment claim, or that the City is liable under Title VII's disparate–impact prohibition, the time to have done so is long past and the mandate rule bars further discovery *in this case* and *in this Court* regarding the liability of the City under Title VII.

E. Summary

Each of the factors discussed above counsel against intervention, and there are no compelling or exceptional circumstances that weigh in favor of intervention. The motion to intervene will therefore be denied as untimely.

III. Conclusion

For the reasons stated above, Briscoe's Motion to Intervene [Doc. # 173] is DENIED.

IT IS SO ORDERED.

/s/
Janet Bond Arterton, U.S.D.J.

Dated at New Haven, Connecticut this 12th day of May, 2010.