15 Civ. 06885 (LTS)(HP)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EDREWEENE RAYMOND, et al., individually and on behalf of a class of all others similarly situated,

Plaintiffs,

-against-

THE CITY OF NEW YORK, THE MAYOR OF THE CITY OF NEW YORK, BILL de BLASIO, in his individual and official capacity, COMMISSIONER WILLIAM J. BRATTON, in his individual and official capacity, NYPD CHIEF OF DEPARTMENT JAMES P. O'NEILL, in his individual and official capacity, AND NYPD COMMANDING OFFICER OF PATROL SERVICES, BUREAU CHIEF CARLOS M, GOMEZ, in his individual and official capacity,

Defendants.

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS THE AMENDED COMPLAINT

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PRELIMINARY STATEMENT

The named plaintiffs bring this class action on behalf of themselves and all similarly situated black and Latino police officers claiming that the New York City Police Department's ("NYPD") enforcement of an un-official summons and arrest quota system violates N.Y. Labor Law § 215-a, has a disparate impact on black and Latino police officers, and has resulted in a pattern and practice of discrimination against them. Plaintiffs are attempting to enforce this state law in federal court by invoking three provisions of the Civil Rights Act of 1866, each of which requires a showing of intentional discrimination: 42 U.S.C. §§ 1981, 1985, and 1986. Plaintiffs also assert the same claim under the Human Rights Laws of New York State and City, and N.Y. Labor Law § 215-a. Additionally, five of the twelve named plaintiffs assert individual free speech claims under federal and state law.

The Amended Complaint should be dismissed in part on the following grounds. First, plaintiffs failed to plead facts permitting a plausible inference of intentional racial or national origin discrimination, an element of all Section 1981 and Equal Protection claims. Moreover, the Section 1981 and Equal Protection claims against the individually named defendants must be dismissed because plaintiffs failed to plead facts showing that they were directly and personally responsible for the purported unlawful conduct. Second, the Section 1985 and 1986 claims must be dismissed for failure to plead a conspiracy motivated by purposeful or class-based motivation or overt acts by any of the alleged co-conspirators. They also must be dismissed under the intra-corporate conspiracy doctrine because all of the alleged conspirators are officials or employees of the City. Third, plaintiffs fail to state a constitutional claim of deprivation of benefits because they have constitutionally adequate process available under their collective bargaining agreement and state law. Fourth, plaintiffs fail to state a plausible claim for intentional discrimination or retaliation under State or City law. Fifth, the Court lacks subject matter jurisdiction over

plaintiffs' N.Y. Labor Law § 215-a claim because plaintiffs failed to grieve these claims pursuant to the terms of the applicable collective bargaining agreement. Sixth, plaintiffs' state constitutional claims should be dismissed as they mirror their federal law claims.

STATEMENT OF FACTS[1]

The twelve named plaintiffs work in various precincts and divisions of the NYPD. *See* Declaration of Kathleen M. Comfrey ("Comfrey Decl."), Exhibit A, Amended Complaint ("Compl.")[2], ¶¶ 48-82. All claim that they were required to meet certain monthly quotas for arrests and summonses, but were unwilling to do so. *Id.* All claim that they suffered adverse consequences for failing to meet the unofficial quotas. *Id.* The adverse consequences vary by plaintiff, but include low evaluation scores, undesirable posts, punitive transfers, denial of overtime and time off, mandatory overtime, improperly conducted investigations, unwarranted disciplinary penalties, performance monitoring, and threats of termination. *Id.*

All of plaintiffs' claims turn on the alleged imposition of illegal quotas and penalties in violation of N. Y. Labor Law § 215-a. *See, e.g.,* Compl. ¶¶ 2, 88-91. Plaintiffs contend that the illegal quota system is "used in every work operational unit or sub-unit of the NYPD throughout the five boros of New York and affects all police officers who have to comply or face punitive consequences and lower performance evaluations . . . ." *Id.* ¶ 89. Plaintiffs claim that under this system, minority officers "suffer harsher disciplinary actions and are subjected to lower performance evaluations, than their white counterparts, as a means by the defendant [sic] to compel plaintiff's [sic] compliance with the ascribed quotas." *Id.* Plaintiffs characterize this quota system as "discrimination" and contend that it not only violates N.Y. Labor Law § 215-a,

[1] For purposes of this motion to dismiss only, the facts alleged in the Amended Complaint are taken to be true.

[2] All references to the Amended Complaint are to Ex. A of the Comfrey Declaration.

but it also violates 42 U.S.C. §§ 1981, 1985, and 1986, and New York State and City Human Rights Law. *Id.*

The Amended Complaint, while rife with conclusory allegations, is devoid of factual allegations that support a plausible claim of purposeful race and national origin discrimination or retaliation claims. A number of the allegations pertain to the complaints in or press accounts of other lawsuits. Compl. ¶¶ 8-17. Others are alleged upon information and belief. *Id.* ¶¶ 20-21. The only racially derogatory comment alleged is attributed to a supervisor, Executive Officer Materasso, who is not named as a defendant in this action. *Id.* ¶ 62 (Materasso, the deputy commandant of the 40th Precinct, allegedly referred to the residents of that precinct as "animals").

With the exception of Commissioner Bratton, the allegations as to the individual defendants are limited to a general description of their job responsibilities, coupled with the conclusion, that each of them "knew or should have known of the customs, practices and policies described in this complaint, including but not limited to the maintenance of the illegal quota system by the NYPD and its racially discriminatory effect on the minority community and minority officers" and each "condoned, ratified and/or authorized such practices and policies." Compl. ¶¶ 44–47. The plaintiffs do acknowledge, however, that when Commissioner Bratton took office in January 2014, "he promised to end quotas and the numbers-driven policing culture championed by his predecessor . . . stating 'I want to focus on the quality of police actions, with less emphasis on numbers and more emphasis on actual impact.'" *Id.* ¶ 15.

STANDARD OF REVIEW

To survive a motion to dismiss under Rule 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, 'to state a claim for relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570

(2007)). When deciding whether a plaintiff states a facially plausible claim, the court may not "'assume that the [plaintiff] can prove facts that it has not alleged . . . .'" *Elec. Comm. Corp. v. Toshiba Am. Consumer Prods., Inc.*, 129 F.3d 240, 243 (2d Cir. 1997) (quoting *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 526 (1983)) (alteration in original)). A pleading that offers "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555. Nor does a complaint suffice if it tenders "naked assertion[s]" devoid of "further factual enhancement." *Id.* at 557. Accordingly, a court should "begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." *Ashforth v. Iqbal,* 556 U.S. at 679.

A complaint fails to state a claim "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct." *Iqbal,* 556 U.S. at 679. "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* at 678 (quoting *Twombly*, 550 U.S. at 557). Determining plausibility is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 679. The Second Circuit recently noted that, to survive a motion to dismiss, "[t]he facts required by *Iqbal* to be alleged in the complaint need not give plausible support to the ultimate question of whether the adverse employment action was attributable to discrimination. They need only give plausible support to a minimal inference of discriminatory motivation." *Littlejohn v. City of New York*, 795 F.3d 297, 311 (2d Cir. 2015).

ARGUMENT

POINT I

THE AMENDED COMPLAINT FAILS TO STATE A CLAIM FOR EMPLOYMENT DISCRIMINATION UNDER EITHER 42 U.S.C. § 1981 OR THE EQUAL PROTECTION CLAUSE.

Plaintiffs' Section 1981 and Equal Protection Clause claims must be dismissed because they suffer from multiple defects. *See e.g.* Compl. ¶ 1, 97-108. The Amended Complaint's allegations of discrimination fail to state a claim for relief that is plausible on its face because none of the factual allegations support an inference of intentional employment discrimination based on race or national origin. Proof of disparate impact is insufficient as a matter of law.

A. The Amended Complaint Fails to Plausibly Allege Purposeful Race or National Origin Discrimination.

"To establish a claim under Section 1981, a plaintiff must allege facts in support of the following elements: (1) the plaintiff is a member of a racial minority; (2) an intent to discriminate on the basis of race by the defendant; and (3) the discrimination concerned one or more of the activities enumerated in the statute (i.e., make and enforce contracts, sue and be sued, give evidence, etc.)." *Mian v. Donaldson, Lukin, & Jenrette Sec.*, 7 F.3d 1085, 1087-88 (2d Cir. 1993). To plead a Section 1981 claim of discriminatory application of the law, plaintiffs do not "generally need to plead or show disparate treatment of other similarly situated individuals." *Pyke v. Cuomo*, 258 F.3d 107, 108-09 (2d Cir. 2001). However, they must "plead that the defendant acted with discriminatory purposes." *Iqbal*, 556 U.S. at 676. And they must allege specific facts that permit a plausible inference that the defendants acted "'because of,' not

merely 'in spite of,' [the action's] adverse effects upon an identifiable group." *Iqbal*, 556 U.S. 676-77 (citing *Personnel Administrator of Mass. V. Feeney,* 442 U.S. 256, 279 *(1979).*

Similarly, the Equal Protection Clause of the Fourteenth Amendment requires a showing of purposeful discrimination. *See Phillips v. Girdich*, 408 F.3d 124, 129 (2d Cir. 2005). The Equal Protection Clause "is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985). "A plaintiff may pursue an equal protection claim under a number of theories, including that the defendants treated her differently than a similarly situated individual as a result of intentional or purposeful discrimination or that the defendants applied a facially neutral law or policy to her in an intentionally discriminatory race-based manner." *Guan N. v. New York City Dep't of Educ.*, No. 11 Civ. 4299 (AJN), 2013 U.S. Dist. LEXIS 2204, 49-53 (S.D.N.Y. Jan. 7, 2013) (citing *Doe v. Vill. of Mamaroneck*, 462 F. Supp. 2d 520, 543 (S.D.N.Y. 2006)).

Plaintiffs' Section 1981 and Equal Protection claims fail because the Complaint's factual allegations do not permit a plausible inference that any of the alleged adverse actions occurred as a result of intentional racial or national origin discrimination. The Supreme Court has made clear that Section 1981 and the Equal Protection Clause reach only purposeful discrimination. *Gen. Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 389-91 (1982). Moreover, citing *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 264-65 (1979), the Supreme Court specifically rejected the argument that official action can be held unconstitutional solely because it results in a racially disproportionate impact. In doing so, it stated that "[Even] if a neutral law has a disproportionately adverse impact upon a racial minority, it is unconstitutional under the Equal Protection Clause only if that impact can be traced to a discriminatory purpose." 458 U.S. at 390 (internal citations omitted); *see also, Catapano-Fox v.*

City of New York, No. 14 CV 8036 (KPF), 2015 U.S. Dist. Lexis 75875, at *14-15 (S.D.N.Y. June 11, 2015)(It "is well established that only purposeful, racially motivated discrimination - as opposed to activity that merely has a disparate impact on racial minorities – violates Section 1981 . . . .)(internal citations omitted). Consequently, disparate impact claims, which by their nature do not require a finding of discriminatory intent, are not cognizable under Section 1981 or the Equal Protection Clause.

Here, the Amended Complaint is devoid of any factual allegations that would support an inference of discriminatory intent. It is premised on the theory that plaintiffs have been punished for failing to meet quotas or productivity standards imposed by the NYPD on all police officers. *See e.g.* Compl. ¶¶ 3-4, 19-20, and 22. For each of the named plaintiffs, the Amended Complaint in rote fashion repeats that they were penalized for not meeting quotas and for expressing their opinions about the quota system. *See e.g. Id.* ¶¶ 50-51, 53-54, 56-57, 58, 60, 61-62, 65, 68, 70, 73, 76, 79, and 82. As nothing in the Amended Complaint suggests that the alleged illegal quota system was adopted for a discriminatory purpose, plaintiffs' theory is not actionable under the Supreme Court decisions in *Gen. Bldg. Contractors Ass'n* and *Arlington Heights.*

Moreover, plaintiffs' acknowledgement that the "illegal quota . . . affects all police officers who have to comply or face punitive consequences and lower performance evaluations . . ." undermines the plausibility of plaintiffs' claim. Compl. ¶ 89. As the alleged quota system applied to all police officers regardless of race or national origin, common sense dictates that it was not adopted for the purpose of discriminating against black and Latino officers. *Id.* ¶ 89. Plaintiffs' allegations regarding the universal application of the quota system contradict plaintiffs' race claim because it suggests that all police officers who failed to comply suffered punitive consequences without regard to their race. *See Albert v. Carovano*, 851 F.2d 561, 572

(2d Cir. 1988). In the Amended Complaint, plaintiffs attempted to overcome this glaring deficiency by adding the following conclusory language, unsupported by factual content: "however, minority officers such as the plaintiffs suffer harsher penalties and are subjected to lower performance evaluations, than their white counterparts . . . ." Compl. ¶ 89.

Plaintiffs also contend that they, as opposed to white officers, are disproportionately affected by the quota system "because plaintiffs being minorities working in neighborhoods dominated by minority residents, are unwilling to perform racially discriminatory and unwarranted enforcement actions against the minority community." Compl. ¶ 23. This allegation, however, does not support an inference of intentional discrimination; it is just another conclusory way of saying that the illegal quota system has a disparate impact on black and Latino police officers, and as noted above, such an impact does not constitute a Section 1981 or Equal Protection Clause violation.

The Amended Complaint alleges in the most conclusory of terms that plaintiffs have been subjected to "racially disparate performance evaluations and racially disparate disciplinary actions." Compl. ¶¶ 102-103. The Complaint states that "Defendants [sic] actions had both the intention and effect of depriving plaintiffs of the rights and benefits of their contractual relationship with the Department on the basis of their race, color and or national origin." *Id.* ¶ 106. This is precisely the type of formulaic recitation condemned by the Supreme Court in *Twombly*, 550 U.S. at 555, as it is not supported by factual content.

In particular, plaintiffs contend that the defendants use performance evaluations "as a means of compelling Latino and African-American plaintiffs to enforce racially discriminatory quotas in the predominantly minority communities targeted by the NYPD." Compl. ¶ 102. They couple this bare-boned allegation with the conclusory allegation that while the performance

evaluation system is facially neutral, it is applied unevenly and minority officers are more likely to be charged, investigated and harshly punished than white police officers. *Id.* ¶ 26. The Complaint contains no factual content to support this claim. Plaintiffs do not point to a single white police officer who was similarly situated and treated more favorably than an African-American or Latino officer. They speculate that a "police officer from a precinct located in a predominantly white residential area will receive a positive evaluation while a police officer from a precinct located in a predominantly minority area will receive a negative evaluation for the same exact number of enforcement actions." *Id.* ¶ 25. Even if that were true, it would not support a plausible inference of racial discrimination as nothing in the Complaint suggests that the officers referenced in paragraph 25 are similarly situated. As the officers are alleged to have worked in different precincts, common sense dictates that their performance evaluations would have been completed by different supervisors and they, therefore, are not similarly situated in all material respects. Nor do plaintiffs allege any facts that would support the conclusion that minority officers in a predominantly white residential area receive lower performance evaluations or harsher penalties than their white colleagues in the same precinct.

The Complaint does not plausibly state a selective enforcement claim which requires that plaintiffs show "both (1) that [they] were treated differently from other similarly situated individuals, and (2) that such differential treatment was based on impermissible considerations such as race . . . ." *Brisbane v. Milano*, 443 Fed. Appx. 593, 594 (2d Cir. 2011). Plaintiffs cannot simply recite the elements of a selective enforcement claim. Here, Plaintiffs refer only to one specific incident of alleged selective enforcement. Plaintiff Gonzalez claims that his supervisors conducted an un-warranted investigation into a fall and injury that he sustained on the job, but that NYPD failed to conduct an investigation of an unnamed white police officer

who fell under the same circumstances. Compl. ¶¶ 52-54. Aside from alleging that these officers shared the same civil service title, the Amended Complaint contains no facts that would suggest that these officers were similarly situated or that the decision to investigate plaintiff was motivated by his race or national origin. *Id.*

B. The Amended Complaint Fails to Plausibly Allege the Personal Involvement of the Individual Defendants.

It is well settled that the "personal involvement of defendants in alleged constitutional deprivations is a prerequisite to an award of damages under § 1983." *Wright v. Smith*, 21 F.3d 496, 501 (2d Cir. 1994); *Whidbee v. Garzelli Food Specialties, Inc.*, 223 F.3d 62, 75 (2d Cir. 2000)(§ 1981); *Rosa R. v. Connelly*, 889 F.2d 435, 437 (2d Cir. 1989)(affirming dismissal of §1983 claim against individual defendant as "fatally defective" because of failure to plead that the individual was "directly and personally responsible for the purported unlawful conduct"). A plaintiff must plead that "each Government-official defendant, through the official's own individual actions, has violated the Constitution." *Iqbal*, 556 U.S. at 676. That means that:

> [U]nder Section 1983 and Section 1981 supervisors can be sued individually, without directly participating in the underlying conduct, only if they promulgated unconstitutional policies or plans under which action occurred, or otherwise authorized or approved challenged misconduct. *Stevens v. New York*, 691 F. Supp. 2d 392, 400 (S.D.N.Y. 2009) (citing *Al-Jundi v. Estate of Rockefeller*, 885 F.2d 1060, 1066 (2d Cir. 1989)). "To lay a proper foundation for individual liability, the plaintiff must plead "specific, nonconclusory factual allegations" to establish the participation at the necessary mental state of the individual defendants, or [her] claims against them will be dismissed." *Id.* (citing *Blue v. Koren*, 72 F.3d 1075, 1083-84 (2d Cir. 1995)).

Bermudez v. City of New York, 783 F. Supp. 2d 560, 602 (S.D.N.Y. 2011). Moreover, a defendant "may not be held liable for damages for constitutional violations merely because he held a high position of authority." *Vlahadamis v. Kiernan*, 837 F. Supp. 2d 131, 152 (E.D.N.Y. 2011) (§ 1983) (citing *Black v. Coughlin*, 76 F.3d 72, 74 (2d Cir. 1996).

Plaintiffs' generalized and conclusory allegations regarding Mayor de Blasio, Commissioner Bratton, Chief O'Neill, and Chief Gomez do not meet this standard. As to each, the complaint merely describes their respective high ranking City and NYPD positions and claims that each knew or should have known of the customs, practices, and policies described in the Amended Complaint and condoned, ratified and/or authorized such practices and policies. Comp. ¶¶ 44-47. The Complaint does not allege any specific facts tying any of them to any purposeful, race-based animus in the implementation or promulgation of the alleged quota system. Nor does it allege specific, non-conclusory factual allegations demonstrating that they approved the challenged misconduct with the necessary discriminatory animus. To the contrary, it acknowledges that Commissioner Bratton explicitly stated that he intended to put an end to quotas. *Id.* ¶ 15.

Finally, the Amended Complaint's allegation of vicarious liability, Compl. ¶ 159, does not compensate for plaintiffs' failure to allege specific facts tying the individual defendants to the alleged constitutional violations. In *Iqbal*, the Supreme Court emphasized that "Because vicarious liability is inapplicable to Bivens and § 1983 suits, a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution." *Iqbal*, 556 U.S. at 676. *Iqbal,* therefore, requires dismissal of all claims against the individual defendants.

POINT II

THE AMENDED COMPLAINT FAILS TO STATE A CLAIM UNDER 42 U.S.C. § 1985 OR 1986.

A. Section 1985

Plaintiffs' third cause of action, Compl. ¶¶ 109-114, alleges that "[u]pon information and belief, defendants have and continue to conspire with and amongst each other to deny plaintiffs

and members of their class the rights, privileges and immunities, and the equal protection of the laws to which they are entitled under the laws of the United States in violation of 43 U.S.C. 1985." *Id.* ¶ 112. While plaintiffs do not specify the subparagraph of Section 1985 under which they are proceeding, a fair reading of the Amended Complaint suggests that they are proceeding under subparagraph three.

Section 1985(3)[3] prohibits two or more persons from conspiring for the purpose of depriving any person of the equal protection of the laws or of equal privileges and immunities under the laws. 42 U.S.C. § 1985(3). To adequately plead a claim under Section 1985(3), a plaintiff must allege (1) a conspiracy; (2) for the purpose of depriving a person or class of persons of the equal protection of the laws, or the equal privileges and immunities under the laws; (3) an overt act in furtherance of the conspiracy; and (4) an injury to the plaintiff's person or property, or a deprivation of a right or privilege of a citizen of the United States. *Mian v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 7 F.3d 1085, 1087 (2d Cir.1993)(citing *United Bhd. of Carpenters, Local 610 v. Scott*, 463 U.S. 825, 828-29 (1983)); *Thomas v. Roach*, 165 F.3d 137, 146 (2d Cir. 1999)(citing *Traggis v. St. Barbara's Greek Orthodox Church*, 851 F.2d 584, 586-87 (2d Cir. 1988)). Here the complaint is devoid of factual support for these elements.

To adequately plead a conspiracy claim under Section 1985(3), a plaintiff must allege that the conspiracy was motivated by "some racial or perhaps otherwise class-based, invidious discriminatory animus." *Mian*, 7 F.3d at 1088; *Alvarez v. City of New York*, No. 11 Civ. 5464 (LAK), 2012 U.S. Dist. LEXIS 176840, at *12 (S.D.N.Y. 2012)(Section 1985 conspiracy claim dismissed because it does not allege facts even remotely suggesting a "'racial, or perhaps

[3] 42 U.S.C. § 1983(1) prohibits a conspiracy to interfere with a federal officer's performance of his duties and 42 U.SC. § 1983(2) prohibits a conspiracy to obstruct justice.

otherwise class-based, invidiously discriminatory animus behind the conspirators' actions,'" the existence of which is essential to liability.).

A complaint containing only "'conclusory, vague, or general allegations of a conspiracy to deprive a person of constitutional rights' will be dismissed." *Marcel v. United States*, No. 12-CV-4404, 2011 U.S. Dist. LEXIS 156517 (RRM), at *12-13 (E.D.N.Y. Nov. 8, 2012)(quoting *Ostrer v. Aronwald*, 567 F.2d 551, 553 (2d Cir. 1977)). In *Twombly*, 550 U.S. at 558-59 (internal citation omitted), the Supreme Court, confronted with non-specific antitrust conspiracy allegations, noted "a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed." Here too the parties are facing massive discovery in connection with plaintiffs' wide-ranging conclusory claims of conspiracy. This Court, therefore, should insist that plaintiffs specifically allege facts supporting their conspiracy theory before allowing discovery to proceed on these class-wide claims.

The Section 1985(3) claim also must be dismissed because plaintiffs have failed to show "with at least some degree of particularity, overt acts which the defendants engaged in which were reasonably related to the promotion of the claimed conspiracy." *Simpson ex rel. Simpson v. Uniondale Union Free School Dist.*, 702 F. Supp. 2d 122, 133 (E.D.N.Y. 2010) (quoting *Thomas v. Roach*, 165 F.3d at 146). No such overt actions by the individual defendants have been pled in the Amended Complaint.

Even if plaintiffs had adequately pled each of the elements of a Section 1985(3) claim, their Complaint still would fail to state a Section 1985(3) claim because the intra-corporate conspiracy doctrine immunizes the defendants from suit. "The intra-corporate conspiracy doctrine provides that the officers, agents and employees of a single corporate or municipal

entity, each acting within the scope of his or her employment, legally are incapable of conspiring together." *Cameron v. Church*, 253 F. Supp. 2d 611, 623 (S.D.N.Y. 2003); *see also Jeter v. New York City Department of Educ.*, 549 F. Supp. 2d 295, 303 (E.D.N.Y. 2008)("Generally, the intra-corporate immunity doctrine has been held to preclude liability when the alleged conspirators work for the same organization, . . ., and 'has been extended to apply to individual members of a single governmental entity.")(internal citations omitted). It is well established that a "Section 1985(3) claim is barred "if the conspiratorial conduct challenged is essentially a single act by a single corporation [or municipal entity] acting exclusively through its own directors, officers, and employees, each acting within the scope of his employment." *Dilworth v. Goldberg*, 914 F. Supp. 2d 433, 465 (S.D.N.Y. 2012) (quoting *Herrmann v. Moore*, 576 F.2d 453, 459 (2d Cir. 1978)); *see also Hartline v. Gallo*, 546 F.3d 95, 99 n. 3 (2d Cir. 2008) (affirming dismissal of Section 1985 conspiracy claim where defendants were the Village of Southampton, its Police Department, and Southampton police officers). As a matter of law, therefore, plaintiffs cannot establish a Section 1985(3) conspiracy because all of the alleged conspirators are City officials and employees acting within the scope of their employment: the Mayor, NYPD's Commissioner, NYPD's Chief of Department, and NYPD's Patrol Bureau Chief. Compl. ¶¶ 109–114.

B. Section 1986 Claim

Plaintiffs' third cause of action also alleges that "all of the individual defendants, as public officials, had notice of the conspiracy . . . in violation of Section 1985 and failed and refused to prevent, prohibit and ameliorate the aforementioned conspiracies notwithstanding their abilities to do so. Said failure and/or refusal to prevent, prohibit and/or ameliorate constituted a violation of 42 U.S.C. § 1986." Compl. ¶ 113. Section 1986 creates a cause of action against "[e]very person who, having knowledge that any of the wrongs conspired to be

done, and mentioned in [Section 1985], are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so do to, if such wrongful act be committed." 42 U.S.C. § 1986.

Plaintiffs' Section 1986 claim must be dismissed because "[t]he Second Circuit has repeatedly held that a § 1986 claim is contingent upon a valid § 1985 claim." *J.L. v. Eastern Suffolk Boces*, No. 14-CV-4565 (ADS), 2015 US Dist. Lexis 84759, at *26 (E.D.N.Y. June 29, 2015)(citing *Wang v. Miller*, 356 F. App'x 516, 517 (2d Cir. 2009) ("Because § 1986 claims are contingent upon a valid § 1985 claim, the District Court was also correct in dismissing Wang's § 1986 claim.")); s*ee also Posr v. Court Officer Shield No. 207*, 180 F.3d 409, 419 (2d Cir. 1999) ("[N]o § 1986 claim will lie where there is no valid § 1985 claim.") (citing *Gagliardi v. Vill. of Pawling*, 18 F.3d 188, 194 (2d Cir. 1994)). Therefore, for the reasons stated above, the Court must dismiss plaintiffs' Section 1986 claim because they have not pled a valid Section 1985(3) claim.

Moreover, Section 1986 imposes liability only on individuals who have knowledge of discrimination prohibited under Section 1985. *Graham v. Henderson*, 89 F.3d 75, 82 (2d Cir. 1996). As plaintiffs have not pled any facts suggesting that the individual defendants had knowledge of a conspiracy that was motivated by class-based discriminatory animus, the Section 1986 claim must be dismissed. *Buck v. Bd. of Elections*, 536 F.2d 522, 524 (2d Cir. 1976).

POINT III

THE AMENDED COMPLAINT FAILS TO STATE A DUE PROCESS CLAIM FOR DEPRIVATION OF BENEFITS.

To state a claim for violations of procedural due process, plaintiffs must allege that they were deprived of a protected interest in liberty or property, without adequate notice or opportunity to be heard. S*tewart v. City of New York*, 11 CV 6935 (CM), 2012 U.S. Dist. LEXIS

96998, at *42 (S.D.N.Y July 10, 2012). The Due Process claim is mentioned in paragraphs one and two of the complaint, but is not separately asserted in the enumerated claims that begin with paragraph 92. The claim should be dismissed because the Amended Complaint does not allege what protectable property interest is at issue. Nor does it allege what process plaintiffs were deprived of.

It may be plaintiffs are claiming that they have a property interest in overtime, time off or particular job assignments. *See* e.g., Compl. ¶¶ 2, 66, 68, 70, and 73. If so, courts in this Circuit have consistently held that municipal employees do not have a property interest in benefits such as overtime, vacation days or particular assignments. *See McMenemy v. City of Rochester,* 241 F.3d 279, 287-88 (2d Cir. 2001)(holding that a firefighter did not have a property interest in promotion or in "Fair Consideration for Promotion"); *Sbarra v. Port Auth. of New York & New Jersey*, 10 CV. 8580 (CM), 2011 U.S. Dist. LEXIS 102724, at *34 (S.D.N.Y. Sept. 9, 2011) (holding that there is no property interest in vacation days where "no more than a bare expectation to a particular form of compensation" has been pled); D*ones v. City of N.Y.*, 2008 U.S. Dist. LEXIS 53681, at *27 (S.D.N.Y. July 9, 2008)("Absent extraordinary circumstances, courts in the Second Circuit have not recognized overtime, particular assignments, or the prestige of a given assignment as property interests protected by due process."); *Cassidy v. Scoppetta*, 365 F. Supp. 2d 283 (E.D.N.Y. 2005)("Every court in this circuit that has considered the issue of whether there exists a constitutionally protected property interest in overtime pay has answered in the negative, and with good reason.").

Finally, as plaintiffs have not pled inadequate process either under state law or their collective bargaining agreement, plaintiffs' procedural due process claim fails as a matter of law. *See Stewart v. City of N.Y., 11 CV 6935 (CM),* 2012 U.S. Dist. LEXIS 96998, at *44.

POINT IV

THE AMENDED COMPLAINT FAILS TO STATE A CLAIM UNDER STATE AND CITY HUMAN RIGHTS LAW FOR INTENTIONAL DISCRIMINATION.

As an initial matter, it is unclear whether plaintiffs are proceeding under a disparate treatment theory of liability, a disparate impact theory or both. It also is unclear whether the proposed class includes all African-American and Latino police officers or just those who are patrolling in areas where the residents are predominantly African American and Latino. Second, the State and City Human Rights laws protect employees, not citizens who are subject to unwarranted arrests, stops, stops and frisks, and summonses. Therefore, to the extent plaintiffs are basing the claim on the alleged quota system's effect on any particular community of residents or citizens, Compl. ¶¶ 120-122, the claim fails because residents and citizens are not covered by these statutes and plaintiffs do not have standing to assert claims on these citizen's behalf.

Third, to the extent plaintiffs are asserting a discrimination or retaliation claim, there are no facts in the complaint that support a timely and plausible claim of causation between plaintiff's protected status (race or national origin) or protected activity under these statutes and any adverse employment action. *Aspilaire v. Wyeth Pharm., Inc.*, 612 F. Supp. 2d 289, 308-09 (S.D.N.Y. 2009)(burden is on a plaintiff to show that he complained "of unfair treatment due to his membership in a protected class" and not that he complained "merely of unfair treatment generally."). For example, in paragraph 35, plaintiffs allege in conclusory terms that Officer Diaz has been penalized for reporting and complaining about illegal quotas. However, complaining about or opposing illegal quotas directed at non-employees is not a protected activity under N.Y. Exec. Law. § 296 or N.Y.C. Local Law 59 even if those quotas have a racially discriminatory effect upon the minority community members who are ticketed, arrested

etc. *See*, *Wimmer v. Suffolk Cty. Police Dep't*, 176 F.3d 125, 134-35 (2d Cir. 1999). Even if it were a protected activity, there is no indication as to when Officer Diaz made the report, when NYPD penalized him or what penalty he suffered as a result of the report. Therefore, there is no factual basis supporting a causal link between the report and the action. The specific allegations as to the other named plaintiffs are also deficient in this regard. Moreover, as the alleged quota is applicable to all officers regardless of race, it is not plausible under a disparate treatment theory of liability that the decision to adopt it was based on race or national origin discrimination.

Fourth, the allegations about racially disparate evaluations and racially disparate disciplinary actions are conclusory. Compl. ¶ 26, 123-124. No facts are alleged to support a plausible claim of discrimination or retaliation based on race. Nor does the complaint include any statistics suggesting that the evaluation system or the disciplinary process as it pertains to quotas has a disparate impact on African-American and Latino officers.

POINT V

THE COURT LACKS SUBJECT MATTER JURISDICTION OVER PLAINTIFFS' N.Y. LABOR LAW § 215-A CLAIMS BECAUSE PLAINTIFFS FAILED TO EXHAUST THEIR ADMINISTRATIVE REMEDIES.

New York Labor Law § 215-a provides, in part, that:

> No employer or his or her duly authorized agent shall transfer or in any other manner penalize or threaten, expressly or impliedly, an employee [who is a police officer] as to his or her employment in a manner, including, but not limited to, a reassignment, a scheduling change, an adverse evaluation, a constructive dismissal, the denial of a promotion, or the denial of overtime, based in whole or in part on such employee's failure to meet a quota, established by his or her employer or his or her duly authorized agent, of (a) tickets or

> summonses issued within a specified period of time for violations of provisions of law for which a ticket or summons is authorized by any general, special or local law . . . .

N.Y. Labor Law § 215-a(1).[4]

Section 215-a(1) explicitly provides that "[a]ny employee so transferred or otherwise penalized may cause to be instituted a grievance proceeding pursuant to the provisions of a collective bargaining agreement, if any, or pursuant to the provisions of section seventy-five-a of the civil service law if no collective bargaining agreement exists." *Id.* It also contains a remedial scheme that includes, among other things, compensation for loss of wages arising out of a transfer or penalty. Therefore, Section 215-a does not expressly create a private right of action for individuals covered by a collective bargaining agreement ("CBA") that contains a grievance proceeding. Instead, Section 215-a limits the recourse of such employees to the grievance procedures contained in the applicable CBA.

Here, all police officers employed by NYPD, including the named plaintiffs and putative class members, are represented by a union that negotiated a CBA with the City. *See* Exhibit B, Executed Contract: Police Officers, Art. XXI.[5] Article XXI of that agreement specifically provides a mechanism for bringing a grievance concerning "a claimed violation, misinterpretation or misapplication of the rules or regulations, or procedures of the Police

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[4] Effective September 1, 2015, the day after this action was commenced, the phrase "who is a police officer" was added to this statutory provision. The amended language is bracketed.

[5] The Collective Bargaining Agreement signed between Patrolmen's Benevolent Association and the City of New York is a public record, available at http://www1.nyc.gov/assets/olr/downloads/pdf/collectivebargaining/cbu79-police-patrolmens-benevolent-association-080106-to-073110.pdf. Therefore, this Court may consider it in deciding this motion. *Ehrlich v. Dept. of Educ. of the City of N.Y.*, 2013 N.Y. Misc. LEXIS 5202 (N.Y. Sup. Ct. Nov. 7, 2013) (holding that the Court may consider a publicly available collective bargaining agreement when deciding a motion to dismiss).

Department affecting the terms and conditions of employment, provided that, except as otherwise provided in this Section 1.a, the term "grievance" shall not include disciplinary matters." *Id.* at 24.

Section 215-a unambiguously authorizes the institution of a grievance proceeding to challenge an employment action taken in whole or in part on an employee's failure to meet a summons, arrest or stop quota. That is precisely how the grievance referenced in paragraph 13 of the Amended Complaint was handled.

It is well settled under federal and state law that because the named plaintiffs are covered by a CBA containing a grievance procedure, they may not sue the City of New York or its employees, officers, or officials directly, but, instead are bound to follow the grievance procedure outlined in the CBA and exhaust all administrative remedies prior to seeking judicial relief. *See Healy v. City of N.Y. Dept. of Sanitation*, 04-CV-7344 (DC), 2006 U.S. Dist. LEXIS 86344, *16-17 (S.D.N.Y. Nov. 22, 2006)("Where an employee is subject to a collectively negotiated agreement which contains provisions preventing an employer from taking adverse personnel actions, and which contains a binding arbitration provision for all such allegations, the employee shall grieve his claims and may assert them only before an arbitrator"); *Munafo v. Metropolitan Transp. Auth.*, 98-CV-4572 (ERK), 2003 U.S. Dist. LEXIS 13495, *93-94, (E.D.N.Y. Jan. 22, 2003)(denying leave to amend to assert a cause of action under Civil Service Law § 75 as futile because plaintiff-union member had failed to bring a grievance alleging whistleblower retaliation); *Ehrlich v. Dept. of Educ. of the City of N.Y.*, 2013 N.Y. Misc. LEXIS 5202, 7-8 (N.Y. Sup. Ct. Nov. 7, 2013)(holding that the Court lacked subject matter jurisdiction over the plaintiff's New York Civil Service Law § 75-b claim because § 75-b explicitly states that only employees who lack the protection of a collective bargaining agreement grievance

procedure may pursue an action in court under that provision and plaintiff was covered by a valid CBA that contained a grievance procedure); *Shaw v. Baldowski*, 747 N.Y.S.2d 136, 143 (Sup. Ct. Albany Co. 2002)(an employee may bring an action under § 75-b only where a collective bargaining agreement does not substitute its own grievance procedure for the relief provided by this statute). As such, the Court lacks subject matter jurisdiction over all claims asserted in this action pursuant to Section 215-a.

Furthermore, to the extent the named plaintiffs seek to argue that Section 215-a creates a private right of action, such argument fails. In determining whether a statute creates a private right of action, courts in this Circuit consider the factors laid out by the Supreme Court in *Cort v. Ash*, 422 U.S. 66, 78 (1975); *Watson v. City of New York*, 92 F.3d 31, 36 (2d Cir. 1996). The *Cort* factors are: (1) is the plaintiff one of the class for whose special benefit the statute was enacted?; (2) is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one?; and (3) is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? *Cort*, 422 U.S. at 78.

Applying these factors, N.Y. Labor Law § 215-a does not create a private right of action despite the fact that the first factor is met. With respect to the second factor, it is clear from the plain text of the statute that the legislative intent is to require employees seeking to allege a violation of Section 215-a to utilize the grievance procedure outlined in a CBA, if such grievance procedure is available to the employee. Finally, as to the third factor, the statutory scheme expressly provides for a remedy for alleged violations, i.e., filing a grievance, and therefore it would be entirely inconsistent with the underlying purpose of the legislation to imply a private right of action under Section 215-a. As such, the *Cort* factors demonstrate that Section 215-a does

not create an implied private right of action and, therefore, any claims based on Section 215-a must be dismissed.

POINT VI

PLAINTIFFS' NEW YORK STATE CONSTITUTIONAL CLAIMS SHOULD BE DISMISSED AS THEY MIRROR THE FEDERAL CONSTITUTIONAL CLAIMS.

Plaintiffs' constitutional claims should be dismissed because courts in this Circuit have held that there is no private right of action for state constitutional claims if they mirror Section 1983 claims as they do here. *Wright v. City of Syracuse,* 2014 U.S. Dist. LEXIS 44524, *54 (N.D.N.Y. Mar. 31, 2014); *Flores v. City of Mount Vernon*, 41 F. Supp. 2d 439, 446-47 (S.D.N.Y. 1999)("[No] private right of action exists for violations of the New York State Constitution where a plaintiff has alternate damage remedies available.")

CONCLUSION

For the foregoing reasons, defendants respectfully request that the Court issue an order granting their Motion to Dismiss the aMENDEDComplaint together with such other and further relief as this Court deems just and proper.

Dated: New York, New York
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