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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

3 ADRIAN SCHOOLCRAFT,

4 Plaintiff,

5 v.

10 CV 6005 (RWS)

6 THE CITY OF NEW YORK, ET AL.,

7 Defendants.

8 -----x  
9 New York, N.Y.  
September 17, 2014  
12:01 p.m.

10 Before:

11 HON. ROBERT W. SWEET,

12 District Judge

13 APPEARANCES

14 LAW OFFICE OF NATHANIEL B. SMITH

15 Attorney for Plaintiff

16 BY: NATHANIEL B. SMITH

17 AND

LAW OFFICE OF JOHN DAVID LENOIR

18 BY: JOHN DAVID LENOIR

19 NEW YORK CITY LAW DEPARTMENT

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1 (In open court)

2 (Case called)

3 MS. METTHAM: Good afternoon, your Honor. We're here  
4 for a motion to compel expert discovery from plaintiff's  
5 expert. I don't know if you would like to start with the  
6 easiest part or the more difficult one.

7 THE COURT: That's hard. Well, do whatever you think  
8 is the most persuasive.

9 MS. METTHAM: Well, then I won't start with the most  
10 difficult one for your Honor. Your Honor, plaintiff has  
11 identified two police practices experts, Eli Silverman and Joe  
12 Eterno, and he's presented an expert report for these  
13 individuals. The expert report is very lengthy, and within  
14 that expert report, the experts cite to a large amount of data,  
15 information and research which has not been produced by  
16 plaintiff during discovery or by the experts as part of their  
17 expert report or in a publicly available format in their list  
18 of references that the defendants can access.

19 This data is extremely integral to the City defendants  
20 and Defendant Mauriello's ability to challenge these experts on  
21 issues of CompStat pressure, on issues of police management  
22 practices, and therefore. We've asked plaintiff to produce it.  
23 He has refused, saying that since, for example, their survey on  
24 which some of this data is based was done unrelated to this  
25 case, it shouldn't have to be produced.

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1           So what we're seeking from that, those two surveys  
2 done by Professor Silverman and Eterno from 2008 and 2012 which  
3 they've cited and used in their expert report, one, is raw  
4 data. So they received surveys from hundreds and thousands of  
5 retired police officers. We would like the actual data from  
6 those surveys.

7           Now, the surveys are anonymous. We're not seeking the  
8 names of the individuals or identifying information about them,  
9 but we are seeking the results from the raw data of the surveys  
10 they've completed so that we can compare answers. For example,  
11 the year in which the individual retired, to the amount of  
12 pressure they claim to have been subjected to in an effort  
13 actually to limit this to the time period relevant to this  
14 case, since the individuals surveyed by Silverman and Eterno  
15 have ranged from retirees in the first half of the 20th century  
16 to as recent as the last two years.

17           We're also seeking narrative responses, as both  
18 surveys included narrative sections which allowed the  
19 respondents to expound personally about their feelings, which  
20 the authors, Professor Silverman and Eterno, said they relied  
21 on in coming to their opinions. So we'd like to see the full  
22 narrative responses to understand what data was relied on by  
23 the experts.

24           Moving away from the survey, the experts also relied  
25 on what they called hospital data from 2006 from the Health and

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1 Hospital Corporation, but in the references section, it's just  
2 a link to the Health and Hospitals Corporations' website.  
3 There's no link to any specific data, research, survey on which  
4 they relied. We have no idea what they're referencing.

5 They've also mentioned a number of nonpublic sources  
6 such as PBA statements which were not made public. To access  
7 these statements, you need a membership in the Patrolman's  
8 Benevolent Association. We've asked that these documents on  
9 which they've relied and cited to in their report be provided  
10 to defendants.

11 And, additionally, they've included information about  
12 other whistleblowers that are not a part of the Schoolcraft  
13 matter, a Sergeant Borrelli and an Officer Polanco. They've  
14 cited to recordings and documents on which the experts have  
15 relied that have never been produced to defendants in discovery  
16 in this case and have not been produced afterwards. So, you  
17 know, we're seeking what we believe rule 26 provides, which is  
18 the data and information on which the experts relied in coming  
19 to the conclusions in their report.

20 THE COURT: Anything else?

21 MS. METTHAM: That is the first issue. Would you like  
22 me to address the other ones as well?

23 THE COURT: Sure.

24 MS. METTHAM: Sure. The next issue, your Honor, is  
25 plaintiffs have -- or plaintiff has limited us; so we've asked

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1 for a certain of the experts to have a day and a half, and  
2 other ones two days of deposition testimony. He's only agreed  
3 to produce them each for one day. Plaintiff's position was  
4 that all five different sets of defendants' counsel can depose  
5 them within the seven hours and then, if required, later could  
6 move the Court for additional time after the first deposition.

7 Given that there are five different sets of defendants  
8 who are all defending against claims made in these expert  
9 reports, we require additional time. We know this in advance.  
10 We have spoken among ourselves. It is not our intention to be  
11 duplicative in any fashion in the questioning of these experts,  
12 but I don't think it's reasonable for expert reports that are  
13 dozens of pages long to have only seven hours of deposition  
14 testimony by five different sets of defendants with very  
15 different liabilities.

16 THE COURT: What do you want, a day and a half?

17 MS. METTHAM: For Dr. Lubit, I believe it's two days.  
18 For the one of the medical experts and for Professors Silverman  
19 and Eterno, a day and a half each.

20 THE COURT: Does the city have any experts?

21 MS. METTHAM: At this time, we do not, your Honor.

22 THE COURT: At this time, do you still have time to  
23 designate?

24 MS. METTHAM: Well, your Honor, we do still have  
25 tomorrow. The problem is, without the survey data, we don't

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1 know if we need an expert to analyze the data for us and what  
2 format.

3 THE COURT: All right. Thank you.

4 MS. METTHAM: However, I am aware that the other  
5 defendants have hired experts and do intend to provide expert  
6 reports.

7 THE COURT: Any agreement on those, the time for  
8 those?

9 MS. METTHAM: On the time for the depositions of  
10 those? The Court had provided previously a time line for the  
11 deposition of defendants' experts.

12 THE COURT: But I'm talking about the duration, any  
13 agreement?

14 MS. METTHAM: No, there have not been yet, your Honor.  
15 However, we believe that would be a bit of an easier matter as,  
16 you know, we haven't seen the expert reports, they are not due,  
17 at the very earliest until tomorrow.

18 THE COURT: Okay.

19 MS. METTHAM: But, you know, it would mostly be  
20 rebutting plaintiff's expert, not an indictment of all other  
21 defendants.

22 THE COURT: All right.

23 MS. METTHAM: I hope.

24 THE COURT: Anything else?

25 MS. METTHAM: Yes, your Honor. On a list of cases on

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1 which -- in which the plaintiff's experts have given testimony  
2 in the last four years, as required by rule 26, plaintiff  
3 agreed in his opposition to provide such a list. We just ask  
4 that your Honor order him to do so by a date certain, since the  
5 depositions are beginning a week from today.

6           Additionally is the issue of the expert's  
7 compensation. Plaintiff has provided us with generally, you  
8 know, these experts charge X amount per day and X amount per  
9 hour, but he has not provided us with the amounts that they  
10 were actually compensated for the study. Defendants believe  
11 that, according to rule 26, a party must provide the actual  
12 compensation paid for the study. Plaintiff has not done so.

13           Additionally on the compensation angle, plaintiff has  
14 demanded that the defendant pay, No. 1, in advance for the  
15 expert's deposition time and also that defendants pay all of  
16 the expenses for the travel and travel time of his experts, who  
17 are apparently coming from out of state and from hours away.

18           Defendants challenge that. There's case law from the  
19 Southern District stating that plaintiff can find an expert  
20 within the district without having to burden the defendants  
21 with the cost of that expense. Additionally, that travel time  
22 is improper as it could be used for preparation time, which we  
23 are already paying his experts for.

24           Finally, I had actually brought up the issue with  
25 plaintiff over a month ago that the City cannot pay in advance



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1 for these depositions without certain information. We need  
2 invoices, we need tax identification numbers, we need receipts,  
3 you know, being we have to go through these certain processes  
4 which take two to three weeks, at least, which I informed  
5 plaintiff of. He hasn't yet provided us with the information,  
6 even if we were to agree to pay in advance, to do so.

7 So we ask that your Honor allow defendants to pay the  
8 experts after the deposition for the actual hours expended and  
9 only for preparation time and actual deposition time. Thank  
10 you, your Honor.

11 THE COURT: Anything from the plaintiff?

12 MR. SMITH: Yes, your Honor. On the last issue about  
13 compensating the plaintiff's experts, that's a new issue. It  
14 wasn't in the letter. I can address it now, but I don't have  
15 the case authority that I think supports their position on  
16 that. So I think it's a little bit out of school to bring that  
17 up since it was not in the letters.

18 THE COURT: Well, the payment after, rather than  
19 before, that seems simple. Doesn't it?

20 MR. SMITH: Yes. It's a question of how much.

21 THE COURT: Well, how much. Doesn't it seem clear  
22 that the rates have to be stated and the past compensation has  
23 to be stated?

24 MR. SMITH: That has been done, and the approximate --

25 THE COURT: I didn't understand that from what the

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1 City just told me.

2 MR. SMITH: No, they said they're willing to pay for  
3 deposition time and prep --

4 THE COURT: No, no.

5 MR. SMITH: It's the travel time that I'm hearing that  
6 they're saying --

7 THE COURT: The travel time is agreed it's too much.

8 All right. Okay. So but the City also wants the  
9 amounts that they've been paid in the past for the study.

10 MR. SMITH: And I've provided that information. I  
11 said this is how much they get paid, this is how much they're  
12 charging me on an hourly basis either for the time that they're  
13 doing for me, or one of the doctors says I charge for testimony  
14 deposition or trial on a half day or full day.

15 THE COURT: I'm hearing a disconnect. Yes, ma'am?

16 MS. METTHAM: Your Honor, he has provided the general  
17 rates. He has not actually told us how much plaintiff has paid  
18 him for the study. That's what we're seeking, is what he's  
19 actually compensated the experts.

20 MR. SMITH: Well, all right. Fine. I don't think  
21 they're entitled to that information, but they can certainly  
22 ask the expert in a deposition how much have you billed, how  
23 much have you been paid, but we're getting a little bit out of  
24 school here. The rules don't authorize any of their requests  
25 for all of this information from the experts, which I'd like to

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1 get to the heart of the motion before us today.

2 THE COURT: Yes, well, okay. But I don't see any  
3 reason not to give them the amounts. Although, obviously,  
4 that's something that can be covered in the deposition.

5 MR. SMITH: It seems to me that that's --

6 THE COURT: Yes.

7 MR. SMITH: I mean, that's the right way to handle it.

8 THE COURT: As far as all the exhibits, the data,  
9 we'll just say data. Why not?

10 MR. SMITH: Okay.

11 THE COURT: Raw data, for example, on the surveys.

12 MR. SMITH: Right. I'd be happy to address that. The  
13 federal rules clearly provide what an expert is required to  
14 disclose in an expert report, and what they're required to turn  
15 over is information that they relied upon in preparing the  
16 report.

17 And notwithstanding what the City has said, we have  
18 done that. We have provided them with the information that  
19 they relied upon in generating their reports. So, for example,  
20 both of them wrote a book in 2012, Crime Numbers Game. It's --  
21 and Mr. Silverman wrote an earlier book in 1994 about CompStat  
22 and about how CompStat has changed over the years from actually  
23 what was a very good idea into an idea that created  
24 inappropriate incentives.

25 Anyhow, the rules don't authorize the defendants to

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1 request and do not obligate the experts to turn over all of the  
2 information that they generated over the many years that  
3 they've been studying this area. One of the areas that they  
4 studied in 2008, and then with a follow up in 2009, was a  
5 survey that they sent out to a lot of retired captains and  
6 above.

7 They reported on those surveys. They reported on the  
8 survey -- on one of them in this book. In fact, the questions  
9 and the answers are in a summary, which I sent along with my  
10 letter. So they've been working on police CompStat issues for  
11 many, many years.

12 What the City wants to do is say, well, you rely on  
13 your findings from 2008; so we're entitled to all of the data  
14 that was -- that was used and created in order to reach that  
15 conclusion.

16 The point -- my point is that they didn't, in  
17 preparing these reports, rely on any of that raw data or  
18 anything else. In the academic literature that they are  
19 familiar with and that they contributed to, they relied on many  
20 things. And they cited in an appendix many of these --

21 THE COURT: But their report here.

22 MR. SMITH: Their report here refers to the results of  
23 the 2008 and the 2012 survey and, I mean, there's --

24 THE COURT: Well, so they should provide the 2008  
25 survey.

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1           MR. SMITH: That has already been -- that's in their  
2 book. The survey's in their book and the data -- what the City  
3 wants to do is have them go get file cabinets from almost a  
4 decade ago and pull out all of that, and challenge it. And the  
5 rules don't authorize that. They're required to turn over the  
6 stuff that they looked at in generating their report.

7           If this is correct, then every expert who ever relies  
8 on anything that they ever said in the past, has to turn over  
9 all of the research that they ever conducted in order to rely  
10 on a piece of work that they did in the past. That's why I say  
11 in order to resolve this motion fairly, you have to look at  
12 what the rule requires. The rule doesn't require full-blown  
13 discovery about everything.

14           The experts are not parties in a civil litigation.  
15 They are providing information about what they looked at in  
16 order to generate their report. The irony about this is that  
17 in the Floyd case, they already took Silverman's deposition on  
18 the 2008 survey, and they got the information that Judge  
19 Scheindlin in that case gave them. And Eli Silverman, Dr. Eli  
20 Silverman testified in the Floyd case, and Judge Scheindlin  
21 already found that the surveys show that there was CompStat  
22 pressure being generated on supervisors in the periods under  
23 discussion.

24           So they could rely on their prior writings. They  
25 could also rely on Judge Scheindlin's findings in the Floyd

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1 case, a finding after a bench trial on a fact. So without any  
2 explicit authorization in the federal rules, it's really unfair  
3 to these experts to require them to open up all of their file  
4 cabinets for all of their research if they --

5 THE COURT: What was Judge Scheindlin's determination  
6 with respect to what the experts had to supply?

7 MS. METTHAM: Your Honor, if I may?

8 MR. SMITH: I'll answer that question.

9 MS. METTHAM: To begin with, your Honor, plaintiff  
10 misstated to the Court on multiple occasions. Eli Silverman  
11 was not an expert in the Floyd trial. I was trial counsel in  
12 that matter. I'm very familiar with it. Eli Silverman was a  
13 fact witness that was identified very belatedly. Judge  
14 Scheindlin allowed only limited discovery, both limited  
15 discovery and deposition testimony.

16 MR. SMITH: Your Honor, I object to the interruption.  
17 I really do.

18 THE COURT: Well, let's let the plaintiff finish.

19 MS. METTHAM: Okay.

20 THE COURT: Okay. So what did Scheindlin do?

21 MR. SMITH: Judge Scheindlin, in her opinion and order  
22 resolving the Floyd case, this is --

23 THE COURT: I don't care about the substance. I'm  
24 only interested in what did she do on the issue of the expert  
25 report and the data that underlay it.

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1 MR. SMITH: Oh, what she did was she said you can take  
2 Silverman's deposition, you can have the surveys, not all the  
3 underlying data. And they took his deposition and then  
4 Silverman testified at the Floyd trial about the subject, and  
5 the Court found that --

6 THE COURT: Okay. All right.

7 MR. SMITH: -- that there was this --

8 THE COURT: In other words, the survey, the data  
9 underlying the surveys is appropriate to be turned over.

10 MR. SMITH: She did not order the underlying data to  
11 be turned over. She ordered the surveys, which are the  
12 questions. What happened was they had a 20-question  
13 questionnaire, and they mailed them out to retired guys, and  
14 then they got a whole bunch of responses. And then they took  
15 all that data and they compiled it into summaries. And the  
16 summaries are in the report.

17 And the actual raw data, they didn't have to produce.  
18 They told me that -- you know, they don't want to have to open  
19 up their entire files to the City or to anybody else about  
20 their research. It's a never-ending problem for them. I mean,  
21 this is their --

22 THE COURT: Anything else you want to tell me?

23 MR. SMITH: Yes. It's not just the raw data that  
24 they're asking for. It's electronic databases used to compile  
25 these surveys. They're asking for their notes on those

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1 surveys. They didn't rely on these notes in creating the  
2 report for this case. They're asking for a list of other  
3 researchers or professors who aided them in their prior survey  
4 research, drafts of articles and surveys used by them in the  
5 past.

6 THE COURT: But none of this has been referred to in  
7 the report?

8 MR. SMITH: No, none of it. The raw data wasn't  
9 referred to in the report either.

10 THE COURT: No, I know, but the survey was in the  
11 report.

12 MR. SMITH: The conclusions from the surveys were.

13 THE COURT: Yes.

14 MR. SMITH: That's true. So I think I've covered that  
15 first issue. I would just say, you know, Judge, if you look at  
16 rule 26, it does not open up the experts to this kind of  
17 full-blown discovery. The rules are very clear.

18 If you sit and you read it, it says that they've got  
19 to turn over what they relied on. And I told the experts that  
20 if you want to protect yourself and you don't want to open  
21 yourself up to everything, don't rely on anything, and then you  
22 won't have to turn it over. And so now, if the City is  
23 actually successful in this motion, they're going to -- they've  
24 asked me to reconsider even using the surveys because it's  
25 unfair to them. But anyhow, I'll cross that bridge when I have



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1 to.

2 Moving on to the seven-hour issue versus a day and a  
3 half to two days. You know, I hate to be a stickler for  
4 technicalities, but the federal rules say presumptively seven  
5 hours. And if the defendant or plaintiff thinks they need more  
6 than seven, they have to make a record, they have to show how  
7 they need more.

8 All we hear is a lot of conclusionary statements about  
9 how, well, there's five defendants and, of course, we need a  
10 day and a half or two days. But there's no -- there's been no  
11 showing here that they actually require this. I had to limit  
12 myself to a day for some of the principal defendants in this  
13 case. Mauriello was only a day and not a nickel more, and this  
14 is a huge fact witness in this case.

15 These experts have rendered detailed reports  
16 expressing their opinions. They've provided resumes. They've  
17 provided prior testimony. These defendants are perfectly  
18 capable, I think, of focusing in on what they need, and if they  
19 can show that they need more, the rules require that they do  
20 that. And I respectfully submit to you they haven't shown that  
21 they need more. They just say that they need more.

22 I think that covers it. I'll address this issue about  
23 the time list and the amount of the payments now or I'll  
24 address it in writing. I did some research to support the  
25 propositions that these experts are entitled to one-half of

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1 their travel time. They're coming from Providence, Rhode  
2 Island, the Upper West Side, West Chester and Long Island; so  
3 we're not talking about the other end of the country or the  
4 world.

5 In any event, I've asked for one-half of their hourly  
6 rate, which is consistent with my understanding of the case law  
7 in this circuit. And I also ask, because the experts asked me,  
8 to get the money upfront because they don't want to have to  
9 chase after the defendants to get paid after the depositions.  
10 I agree with your Honor, it's easier to do it after, but it's  
11 their time. They ought to be paid for their time. And if you  
12 want, I'll submit the authority that I have for the position  
13 I've taken. I don't think it's necessary, but I'd be happy to  
14 do so.

15 THE COURT: Okay. Thank you.

16 MS. METTHAM: Your Honor, first address --

17 THE COURT: Excuse the interruption.

18 MS. METTHAM: Sure.

19 THE COURT: This is something that the City must face  
20 all the time.

21 MS. METTHAM: Which part?

22 THE COURT: This business about bills and so on and  
23 advance payments.

24 MS. METTHAM: And typically we pay the experts after  
25 the expert's deposition has been taken.

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1 THE COURT: Let me put it to you differently. Have  
2 you ever advanced the money?

3 MS. METTHAM: I have.

4 THE COURT: Okay. Good.

5 MS. METTHAM: But when I've paid the expert in  
6 advance, I was given an invoice by the plaintiff about a month  
7 prior with all of the information required. It was a  
8 straightforward issue. I paid him. The check actually got  
9 there the day before, but --

10 THE COURT: Okay.

11 MS. METTHAM: -- typically we pay after.

12 To address the issue of Scheindlin, again, I must  
13 stress, your Honor, that Professor Silverman was not an expert  
14 in that case. And the reason that's important is that her  
15 decisions were very much motivated by the fact that he was not  
16 an expert in that case.

17 So plaintiff is also mistaken that we did receive  
18 underlying data from the surveys. We also received the full  
19 narrative data from the surveys

20 THE COURT: I'm sorry?

21 MS. METTHAM: We did receive narrative data from the  
22 surveys in Floyd. So Professor Silverman and Eterno had  
23 narrative responses to certain questions in their surveys in  
24 2008 and 2012. Judge Scheindlin ordered them to produce  
25 certain of those narrative responses from the underlying data.

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1 THE COURT: I'm not getting word.

2 MS. METTHAM: Narrative, summaries? The area where  
3 the respondent to the survey was able to expound without  
4 checking a multiple-choice question. So the raw data from the  
5 actual survey, what the respondent's typed or hand wrote,  
6 which --

7 THE COURT: Was produced?

8 MS. METTHAM: It was produced.

9 THE COURT: And it will be here.

10 MS. METTHAM: I would hope so, your Honor.

11 THE COURT: Yes, it will be here. Okay?

12 MS. METTHAM: Yes, your Honor.

13 THE COURT: And that's consistent with what Judge  
14 Scheindlin did?

15 MS. METTHAM: Yes, she did order the narrative --

16 THE COURT: Okay.

17 MS. METTHAM: -- information.

18 THE COURT: Okay.

19 MS. METTHAM: In terms of the other data, the reason  
20 that there is a difference here in terms of the actual survey  
21 responses is that in the Floyd matter, because he wasn't an  
22 expert, and Professor Silverman was very limited in what he was  
23 allowed to testify on. And he was only allowed to testify on  
24 the pressures that they believed came from stop, question and  
25 frisk information. That was only one of about 24 questions in

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1 the survey. So all of his discovery, his deposition, his trial  
2 testimony was limited to stop, question and frisk pressures.

3 In this matter, the plaintiff's experts have used the  
4 survey data and responses in a much broader way. They're  
5 talking about CompStat data generally on stop, question, frisk,  
6 on summonses, on arrests. They talk about the pressure of  
7 CompStat to -- the impact on constitutional rights.

8 And the issue, your Honor, here is with them as  
9 experts, we need to probe their survey so that we can make an  
10 appropriate Daubert and Kumho Tire motion to exclude these  
11 experts based on how they've conducted the survey on the age,  
12 the numbers of the retirees, when they retired, what kind of  
13 pressure.

14 For example, your Honor, plaintiff's experts -- and  
15 this is Exhibit E to my September 4th motion of their report  
16 and starting on Page 16 are the survey findings. And in the  
17 survey findings the experts have lumped responses into these  
18 subjective categories of low, medium and high and found that  
19 retirees who retired before 1995 felt one way, from 1995 to  
20 2001 felt another, and 2002 until 2012 felt a different way.

21 The reason we need the underlying data is that we  
22 don't believe that these categories are appropriate. We don't  
23 believe that cutting it off before 1995 -- we think that if you  
24 changed that year, so if the respondent said he retired in  
25 2000, that we want to see what retirees in that year said.

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1 Instead of saying plaintiff's experts' category of low, we want  
2 to know if they said a one, a two or a three in response.

3 We just simply need more qualitatively data to be able  
4 to analyze their survey and to challenge their survey  
5 responses. And plaintiff here has said that his experts are  
6 not relying on this data in their report, but again, I would  
7 direct the Court, respectfully, to the report starting on  
8 Page 14, where they spend a dozen pages talking about the 2008,  
9 2012 expert -- I mean surveys, going through the survey  
10 findings and linking it to this case. So instead of simply  
11 saying we've done a survey in the past and this has kind of  
12 changed our opinion, they've heavily relied on it in this  
13 matter.

14 And in terms of the other data on which they've  
15 relied, No. 1, I would direct the Court to Federal Civil  
16 Procedure 262(b)(2), which requires an expert to include the  
17 facts or data considered by the witness in forming their  
18 opinions. So contrary to plaintiff's opinion that the federal  
19 rules simply don't require an expert to provide this  
20 information, it's pretty clearly written that if an expert  
21 relies on data or information, they must include that in their  
22 expert report.

23 And while the survey is one part, plaintiff's experts  
24 also spend a large amount of time talking qualitatively about  
25 CompStat, mentioning non-NYPD data sources which aren't

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1 identified anywhere in the footnote, in the references. They  
2 make their own opinions about evidence that NYPD leadership  
3 altered and misused CompStat, that the CompStat crime reduction  
4 system has been emulated in other cities.

5 They're relying on a lot of information which they  
6 haven't provided data or information on, and we're seeking to  
7 get that data so that we can challenge this report  
8 appropriately, your Honor.

9 MR. SMITH: Can I respond to that, your Honor?

10 THE COURT: I think we will have what we'll call the  
11 Scheindlin rule for the 2008, 2012 surveys. Any identified  
12 fact or literature will be produced. The depositions will be a  
13 day, with the understanding that if more is needed, an  
14 application will be made, and there will be no additional  
15 travel time or anything of that kind. You know, the trouble  
16 with that is we're just putting off that problem, but, okay.

17 Well, let's back up a little bit. Okay. I guess what  
18 we should do is you'll tell me -- it's totally predictable, but  
19 you'll tell me when these depositions are scheduled, and we  
20 will have a conference at the close of the day to determine  
21 whether or not there should be additional. Now, quite frankly,  
22 I'm pretty sure there will be, but okay, we'll see.

23 MS. METTHAM: Your Honor, if I may interrupt to ask a  
24 question about how that would work in reality in that with five  
25 separate defendants, you know, if we're all supposed to split

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1 the first seven hours, you know, if one defendant --

2 THE COURT: You can do whatever you want to do. With  
3 such an array of such skilled and experienced lawyers, I  
4 wouldn't dare contemplate how you should split up your time or  
5 who does what with which and to whom. And if somebody can come  
6 forward and say this is an area that I want to examine on and  
7 it hasn't been covered, well, we'll hear it.

8 MS. METTHAM: And, your Honor, might I just ask that  
9 if a defendant were to finish questioning to allow time for  
10 another defendant, that they would not, you know, give up any  
11 rights to additional questioning on the second date, if the  
12 Court were to grant such a motion?

13 THE COURT: Well, okay. That's interesting. The  
14 plaintiffs will provide an invoice for one-half the travel  
15 time. You know, really. Well, all right. And what have I  
16 missed, anything?

17 MR. SMITH: There's one thing that I need to raise  
18 now, which is the City is saying tomorrow their expert reports  
19 are due and they're not going to provide any, and I'm concerned  
20 that this is going to scuttle the schedule that we already  
21 have.

22 THE COURT: Well, listen, enough is enough. Okay.  
23 Thank you all.

24 MR. KOSTER: Your Honor?

25 THE COURT: I thought so.



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1 MS. METTHAM: Just real quick, your Honor. I just  
2 want a clarification. When you told plaintiff that he must  
3 provide identified facts or literature, to be more specific,  
4 you know, is plaintiff required to provide the narratives? Is  
5 he required to provide the survey responses?

6 THE COURT: Yes. And that was done in the Scheindlin.

7 MS. METTHAM: Not all of the survey responses were  
8 provided in Floyd.

9 THE COURT: What was the distinction?

10 MS. METTHAM: So the narrative responses, the  
11 long-form written responses were provided but not all of the  
12 multiple choice underlying data was provided. And, again, your  
13 Honor, the multiple choice is what we believe is relevant so  
14 that we can look into the actual years that these  
15 individuals --

16 THE COURT: All right. You can have the multiple  
17 choice and the narratives.

18 MS. METTHAM: Thank you, your Honor.

19 MR. RADOMISLI: Your Honor, I don't think your Honor  
20 ruled on whether we have to pay in advance or not.

21 THE COURT: Say it again?

22 MR. RADOMISLI: I'm not sure whether your Honor ruled  
23 on whether we have to pay in advance, or we can see how much  
24 time is actually spent.

25 THE COURT: Well, the transportation in advance. And

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1 I would think that you can't pay in advance when you don't know  
2 how long it's going to go; so....

3 MR. RADOMISLI: Thank you, your Honor.

4 THE COURT: Yes.

5 MR. KOSTER: Your Honor, regarding the deadline to  
6 respond to plaintiff's expert discovery, based on your last  
7 order from plaintiff's motion to compel, there are still  
8 several depositions that the parties have to complete,  
9 including medical defendants. I represent Dr. Aldana-Bernier.

10 In the interest of not having to provide potential  
11 multiple expert reports, whether any reports will be changed or  
12 altered based on further deposition testimony, I'd ask for an  
13 extension of time for the defendants to respond. And I'm  
14 willing -- and I think we'll all be willing to grant the  
15 plaintiff the courtesy that if he needs to amend his expert  
16 report based on the deposition testimony that will be  
17 forthcoming --

18 THE COURT: That seems to make sense.

19 MR. KOSTER: -- that he's allowed to do so.

20 MR. SMITH: No, it doesn't make sense. We have a  
21 schedule. I'm trying to get this case ready for trial, your  
22 Honor. All the defendants' expert reports are due tomorrow.  
23 Last month, in August, I worked very hard with all of my  
24 experts to get expert reports served pursuant to the scheduling  
25 order, and now I'm being told that we're not going to have what

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1 we're supposed to have, or because you dropped your pencil,  
2 we're not going to give it to you and, you know --

3 THE COURT: Wait a minute.

4 MR. SMITH: Well --

5 THE COURT: Factually, are the experts, all the expert  
6 depositions scheduled?

7 MR. SMITH: Mine are. They haven't even designated  
8 who their experts are yet, and now I'm hearing that, although  
9 they were supposed to do it tomorrow --

10 THE COURT: They will do it tomorrow.

11 MR. SMITH: -- it's not going to happen.

12 THE COURT: They will do it tomorrow.

13 MR. KOSTER: Your Honor, just in that sense, I believe  
14 Mr. Smith has misrepresented certain things to the Court in  
15 which he was granted multiple extensions of time to file his  
16 expert reports. This simple request for a short extension on  
17 behalf of the defendants, I don't think is unreasonable.

18 THE COURT: Well, designate. If you have to change  
19 the designation or make another determination, you can try to  
20 do that later based on subsequent events. I don't know how  
21 successful it will be.

22 MR. KOSTER: Thank you, your Honor.

23 MR. SHAFFER: Your Honor, Ryan Shaffer for the City  
24 defendants. Just to give your Honor an idea of something that  
25 is coming your way, so to speak.

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1           Last Friday Mr. Smith identified an additional 17,  
2 perhaps more, fact witnesses despite the fact that he was  
3 ordered to identify those witnesses back in February. The City  
4 defendants do intend to put it in a letter to your Honor  
5 addressing this issue, but since the issue of scheduling is  
6 sort of on the table, I wanted to let your Honor know that that  
7 is coming in your direction.

8           THE COURT: And I take it you're resisting the  
9 additional fact witnesses?

10          MR. SHAFFER: Right, because we're seven months past  
11 the deadline to have disclosed those witnesses and two months  
12 past the deadline for all the fact discovery to be completed.

13          MR. SMITH: What I did, your Honor, is as I've  
14 continued my investigation into the facts of this case -- Now,  
15 look, this is bushwhacking.

16          THE COURT: Of course.

17          MR. SMITH: Of course it is.

18          THE COURT: What, is that unusual?

19          MR. SMITH: No. So then allow me the opportunity to  
20 provide a fulsome response.

21          THE COURT: No, no. I understand, but I'm wondering,  
22 tell me about the schedule, which I'm sort of lost on.

23          MR. SMITH: I'd be happy to. It's right here. I can  
24 hand it up to you. The schedule -- the last schedule was  
25 July 18, and it provided firm dates for fact discovery, expert

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1 discovery and motions. Based on scheduling problems with the  
2 depositions, your Honor, in a letter, an endorsed order moved  
3 back all of the dates set forth in this schedule one week.  
4 That was on consent.

5 And right now, we're scheduled to have all dispositive  
6 motions returnable in this courtroom November 5, and we're  
7 supposed to have expert disclosure completed by October 16th;  
8 so....

9 THE COURT: Now, fact witnesses, when they were  
10 supposed to be -- that was supposed to be completed by --

11 MR. SMITH: There was no deadline for identifying fact  
12 witnesses. My understanding is that you have an ongoing  
13 obligation to supplement your disclosures. The only deadline  
14 that I'm aware of that the Court imposed on me was we -- I'm  
15 sorry, we're going to have to step back.

16 Five or six months ago I learned that there were a  
17 large number of police officers who responded to a website  
18 called Schoolcraft For Justice, and I obtained from prior  
19 counsel a stack of e-mails and correspondence from many, many  
20 police officers responding --

21 THE COURT: Okay.

22 MR. SMITH: -- to basically B2s, and I was concerned  
23 about confidentiality. And your Honor said if you want to use  
24 any of these police officers, you have to identify them out of  
25 this stack. And I did I identified one Lieutenant, whose name

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1 was Joe Ferraro.

2 THE COURT: Okay.

3 MR. SMITH: And because he, for reasons -- I  
4 identified him out of that stack and the City took his  
5 deposition. He also tape recorded one of the other defendants  
6 for conduct that was going on at the eight-one.

7 So in the context of discovery, I've also -- informal  
8 discovery, I've discovered that there are many police officers  
9 that have brought claims for retaliation against the Police  
10 Department for similar kinds of activities, and I served  
11 document demands and interrogatories on the City probably in  
12 February of this year saying give me information about any  
13 claims of retaliation.

14 They objected. Your Honor, unfortunately, from my  
15 perspective, agreed, and so they were not required to turn over  
16 any of that information. When your Honor told me to  
17 supplement, recently, Schoolcraft's financial and emotional  
18 distress damages, I also went through and identified all of  
19 those police officers who I had made document requests for in  
20 February as people who made have knowledge about -- that's  
21 relevant to this case, and that's what happened.

22 And I think I have a continuing obligation to do that.  
23 If I had more information about those officers, I would have  
24 provided that, but the only information I was able to get was  
25 from, you know, a Daily news article or reported decision or

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1 something like that. And so that is, from my perspective as  
2 the counsel for the plaintiff, what happened.

3 THE COURT: But --

4 MR. SMITH: So, you know, I mean, the NYPD has the  
5 names of these people who I believe may have information. I  
6 don't -- I mean, I don't even have sufficient data right now to  
7 send out an investigator for all of them, but I thought, given  
8 the fact that I was told to supplement my discovery, and given  
9 the fact that I wanted to make sure that I was taking this  
10 position that these people may have information --

11 THE COURT: Okay. I think we'll pass it now, and  
12 we'll have a further discussion. But let me ask the City. It  
13 sounds to me as if maybe I made a mistake on the --

14 MR. SMITH: There were about twelve, roughly around  
15 twelve police officers who, according to reported decisions or  
16 newspaper articles, made claims that they were retaliated  
17 against because they objected to --

18 THE COURT: When you say made claims, I mean, what did  
19 they do?

20 MR. SMITH: Well, bring a lawsuit in Federal Court or  
21 defended a -- this came up in a few contexts this way. They  
22 were actually disciplined for -- I don't remember the name of  
23 this officer, but there was one report/decision where an  
24 officer was given charges because he issued a bogus summons,  
25 and he was -- in an administrative proceeding he was charged

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1 with doing something improper.

2 THE COURT: I'm trying to figure out what it is and  
3 how did you identify what you wanted the City to give you?

4 MR. SMITH: Well, in this officer, whose name I don't  
5 remember, the decision that I'm referring to is an  
6 administrative decision which discussed how the officer's  
7 defense to the charge that he issued a summons improperly, this  
8 was in Staten Island, was pressure on him on a regular basis to  
9 issue summonses to satisfy a quota. And so his defense to,  
10 yeah, I made up a bogus summons was, you made me do it.

11 And so I asked -- I identified him, and I apologize I  
12 don't remember his name, but there's a list of like 15, 12,  
13 something like that, of these officers who have made myriad  
14 types of claims alleging that they were being punished  
15 because --

16 THE COURT: I'm trying to understand. You said they  
17 made claims.

18 MR. SMITH: Yes.

19 THE COURT: What is it that they've made claims, for  
20 what, against the City? I mean, what would the City know?

21 MR. SMITH: I don't know. I mean, sitting here today,  
22 I don't have my file. I don't have my information. I really  
23 feel I won't be able to answer your questions more accurately.

24 THE COURT: Okay. We'll pass all of that and wait for  
25 the --



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1 MR. SMITH: Okay.

2 THE COURT: We'll have to have a conference at  
3 whatever time you all think is feasible with respect to the  
4 schedule. Okay. Thank you, all.

5 MR. SMITH: Thank you.

6 MS. METHAM: Thank you, your Honor.

7 (Adjourned)

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