UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BARBARA HANDSCHU, RALPH DiGIA, ALEX McKEIVER, SHABA OM, CURTIS M. POWELL, ABBIE HOFFMAN, MARK A. SEGAL, MICHAEL ZUMOFF, KENNETH THOMAS, ROBERT RUSCH, ANNETTE T. RUBENSTEIN, MICKEY SHERIDAN, JOE SUCHER, STEVEN FISCHLER, HOWARD BLATT, ELLIE BENZONI, on behalf of themselves and all others similarly situated,

71 Civ. 2203 (CSH)

Plaintiffs,

-against-

SPECIAL SERVICES DIVISION, a/k/a Bureau of Special Services; WILLIAM H.T. SMITH; ARTHUR GRUBERT; MICHAEL WILLIS; WILLIAM KNAPP; PATRICK MURPHY; POLICE DEPARTMENT OF THE CITY OF NEW YORK; JOHN V. LINDSAY; and various unknown employees of the Police Department acting as undercover operators and informers,

Defendants.

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF CLASS APPLICATION FOR LEAVE TO CONDUCT DISCOVERY AND FOR A RESTRAINING ORDER

Preliminary Statement

The attorneys for the plaintiff class in the above-captioned action ("class counsel") submit this memorandum of law in support of the application of the plaintiff class to conduct discovery and for a restraining order. A series of published articles, copies of which are attached to the Declaration of Jethro M. Eisenstein submitted herewith, have described an NYPD policy of using undercover officers and confidential informants to gather information about political activity in the Muslim communities of New York City in circumstances where there is no indication of criminal activity. These accounts, if true, suggest that the NYPD is conducting surveillance and maintaining records of such surveillance in violation of the terms of the Modified Handschu Guidelines as set for in Handschu v. Special Services Div., 288 F.Supp. 411, 420-431 (S.D.N.Y. 2003).

Class counsel are empowered and obliged to enforce the terms of the Consent Decree and the Modified Guidelines. To that end, class counsel seek leave to conduct discovery, to determine whether the NYPD has implemented policies in violation of the Modified Handschu Guidelines. As set forth in Point I below, the determination as to whether discovery should be permitted turns upon whether "good cause" for such discovery has

been shown. As shown in the accompanying declaration of Jethro Eisenstein, "good cause" for discovery exists here.

Pending such discovery, plaintiffs also seek an order from this Court requiring the NYPD to preserve its records and databases. Point II below sets forth the standard governing such an application as well as the facts that support such relief here.

Point I

THERE IS "GOOD CAUSE" FOR DISCOVERY INTO THE SURVEILLANCE PRACTICES DIRECTED BY THE NYPD AT THE MUSLIM COMMUNITIES

Rule 26(b)(1) of the Federal Rules of Civil Procedure provides that a "court may order discovery of any" relevant matter "[f]or good cause." The good cause standard is not limited to pre-trial discovery. It applies, as well, to discovery that is to be undertaken to ensure compliance with a consent decree or to enforce its terms. In this regard, Alliance to End Repression v. City of Chicago, 565 F.2d 975(7th Cir. 1977) is instructive. That case, like Handschu, involved a challenge to surveillance and intelligence gathering directed at political groups and individuals by police agencies. As in Handschu, Alliance resulted in a consent decree. In 1991, there

were reports in the *Congressional Record* that FBI officers conducted interviews with "Arab-Americans"; that the officers selected individuals based upon their ancestry and national origin; that those interviewed were questioned about their political beliefs; that those questioned were not suspected of criminal wrongdoing; and that these FBI practices violated the Consent Decree.

The Magistrate Judge in Alliance granted discovery to explore the training that FBI agents were receiving, for the ultimate purpose of determining whether such training might be modified in order to "better assure future compliance" with the consent decree. Alliance to End Repression, 1992 WL 80527 (N.D. Ill.) *2. The Magistrate's decision permitting discovery was affirmed by the District Court which noted that, "[u]nder Fed. R. Civ. P. 26 the discovery sought need only be relevant to these proceedings, or likely lead to the discovery of relevant evidence." Alliance, 1992 WL 159495,*3.

Discovery under Rule 26 to enforce the terms of a consent decree was also permitted in Louisiana Fish Fry Products v. Corry, 2010 WL 1544355,*2 (M.D. Fla. 2010) ("the Plaintiff need only show good cause for the Court to allow discovery of any matter relevant to the subject matter of the action"). In opposing discovery, the defendant argued that reopening discovery was inappropriate in the absence of concrete evidence

of a violation, but the District Court disagreed, concluding that plaintiff's circumstantial evidence of a violation of the consent decree -- even if not dispositive of whether a violation occurred -- would satisfy the "requisite good cause [standard and would be sufficient] to reopen discovery so that Plaintiff may determine whether the Consent Decree has been violated." *Id.* at *6

Similarly, in United States v. District Council, 2007 WL 2324338 (S.D.N.Y. 2007), this Court invoked the Rule 26 good cause standard to allow discovery regarding compliance with a consent decree. And in February, 2008, this Court permitted discovery in this case to determine whether the NYPD's videotaping policy as applied violated the Consent Decree. Handschu v. Special Serv. Div., 2008 WL 515695 (S.D.N.Y. 2008).

In sum, discovery is appropriate if there is "good cause" to believe that defendants have adopted a policy in violation of the Modified Handschu Guidelines as incorporated in the Consent Decree. This standard is satisfied by the circumstances recited in the Eisenstein Declaration, dated October 3, 2011. Under the terms of the Modified Guidelines, NYPD officials "are authorized to visit any place and attend any event that is open to the public, on the same terms and conditions as members of the public generally. Modified Guidelines, Sec. VII (A)(2), 288 F. Supp. 2d 411 at 429. However, the Modified Guidelines further

provide that "[n]o information obtained from such visits shall be retained unless it relates to potential unlawful activity." *Id.* Attached to the Eisenstein Declaration as Exhibits 5 and 6 are an NYPD PowerPoint presentation as well as a disciplinary memorandum within the Intelligence Division of the NYPD, both of which strongly suggest that members of the Intelligence division are expected routinely to maintain records based upon the "rhetoric" they hear in the course of their surveillance of public places.

This impression is reinforced by the testimony of NYPD Assistant Commissioner Lawrence Sanchez before the United States Senate Homeland Security Committee. In response to a question from Senator Joseph Lieberman about how the NYPD goes about preventing radicalization in the Muslim communities, Commissioner Sanchez, a veteran of the CIA (See Eisenstein Exhibit 1, page 2), responded as follows:

> "The key to it was . . . to start appreciating what most people would say would be non-criminal would be innocuous looking behaviors that could easily be argued in a Western Democracy especially in the United States to be protected by First and Fourth Amendment Rights but not to look at them in the vacuum but to look across to them as potential precursors to terrorism.[1]

[1] http://hsgac.senate.gov/public/audio_video/103007video.ram

Based on this evidence, there is reason to believe that the NYPD retains records of surveillance of public places that are not limited to information pertaining to "potential unlawful activity or terrorism." Good cause therefore exists to support the instant request for discovery into these matters.

Point II

THE EVIDENCE PRESENTED ON BEHALF OF THE PLAINTIFF CLASS MEETS THE STANDARD FOR ISSUANCE OF AN ORDER FOR PRESERVATION OF EVIDENCE

It has been observed that orders directing parties to preserve material or documents for discovery are common, but that the reported case law concerning the standards for deciding motions for such relief is scant. Capricorn Power Co., Inc. v. Siemens Westinghouse Power Corporation, 220 F.R.D. 429, 431 (W.D.Pa. 2004).

Capricorn, supra, and the decision of Magistrate Judge James C. Francis in Treppel v. Biovail Corporation, 233 F.R.D. 363 (S.D.N.Y. 2006) set forth the accepted standards governing an application to preserve evidence for discovery. Two general principles emerge from these cases. First, although an order for preservation of evidence is obviously grounded in the

Court's equity power, it is not appropriate to apply the rules governing the issuance of a preliminary injunction to an application of this kind:

> "As one court has observed, there is no reason 'to consider whether plaintiff is likely to be successful on the merits of its case in deciding whether to protect records from destruction . . . [S]uch an approach would be decidedly to put the cart before the horse.' Pueblo of Laguna, 60 Fed.Cl. [133] at 138 n.8 [2004]; see also Capricorn Power Co. v. Siemens Westinghouse Power Corp., 220 F.R.D. 429, 433 (W.D.Pa. 2004) ('proof of a probability of success in litigation is not an appropriate consideration in the determination whether to order preservation of documents').

Treppel, supra, 233 F.R.D. at 370.

Similarly, "a motion for a preservation order can be granted with regard to all items of evidence which are *discoverable* in accordance with Federal Rule of Civil Procedure 26(b)(1), without the necessity of establishing that the evidence will necessarily be relevant and admissible at trial." Capricorn, supra, at 434.

Both Capricorn and Trappel adopted a three-factor balancing test for determining whether a preservation order should issue. The factors are:

1. Level of concern for the continuing existence and integrity of the evidence.

2. Possibility of irreparable harm to the party seeking preservation in the absence of a preservation order.

3. Ability to maintain and preserve the evidence.

See Capricorn, supra, 220 F.R.D. at 433; Treppel, supra, 233 F.R.D. at 371. We deal with these factors in turn below.

The circumstances here provide a basis for concern that the NYPD is intentionally damaging or destroying the evidence

In the AP article of August 24, 2011 (Eisenstein Exhibit 1, page 4), former NYPD officials were quoted as having said that the NYPD regularly shredded documents discussing the surveillance operation because of concern about possible judicial scrutiny. In light of these comments, concern about the continued existence and integrity of the documents is hardly speculative.

Possibility of irreparable harm in the absence of a preservation order

The Modified Handschu Guidelines very clearly prohibit the retention by the NYPD of information obtained from visiting places or attending events open to the public if such information does not relate to potential unlawful or terrorist

activity. Modified Handschu Guidelines §VIII(A)(2), 288 F.Supp.2d 411 at 429. The daily reports filed by police operatives, whether undercover officers or confidential informants (referred to in the articles as "rakers"), are the best evidence as to whether the NYPD has implemented a policy in violation of the Modified Handschu Guidelines. We have reason to believe that such documents exist, and their destruction would irreparably harm our efforts on behalf of the plaintiff class to bring such a violation to the attention to the Court, prove it, and seek relief.

Ability to maintain and preserve the evidence

A preservation order here imposes absolutely no burden on the NYPD. The underlying claim here is that the NYPD is retaining records and that the retention of these records violates the Modified Handschu Guidelines. If the claim is correct, then the NYPD is holding these records for its own purposes (in violation of the Guidelines), and can hardly claim that continuing to hold the records pending the resolution of the plaintiff class motion for discovery is burdensome.

Thus there is reason for concern about destruction of these documents, destruction of these documents would cause irreparable harm to the plaintiff class by impeding its ability

to determine whether, as the available evidence suggests, the Modified Handschu Guidelines are being violated as a matter of policy, and the retention of these documents imposes no burden on the NYPD. We respectfully suggest that the relevant factors strongly support the order for preservation of evidence that we have requested.

Conclusion

For the reasons set forth above, plaintiff class counsel on behalf of the plaintiff class prays that the relief sought herein be granted.

Dated: New York, New York
October 3, 2011

Yours etc.,

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