UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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BARBARA HANDSCHU, RALPH DiGIA, ALEX MCKEIVER, SHABA OM, CURTIS M. POWELL, ABBIE HOFFMAN, MARK A. SAGAL, MICHAEL ZUMOFF, KENNETH THOMAS, ROBERT RUSCH, ANNETTE T. RUBINSTEIN, 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.

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DEFENDANTS' BRIEF IN OPPOSITION TO CLASS COUNSEL'S MOTION FOR INJUNCTIVE RELIEF AND APPOINTMENT OF A MONITOR

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PRELIMINARY STATEMENT

Class Counsel claim that the NYPD has violated the Modified Handschu Guidelines ("Guidelines") ***as a matter of "policy and practice."*** As demonstrated below and in the accompanying detailed declarations, Class Counsel's claim, which is founded on generalized assertions and a few misconstrued documents, is false. In fact, the NYPD rigorously complies with the requirements of the Guidelines and has a number of internal controls in place to ensure that compliance. Indeed, the allegations made by Class Counsel in support of the pending motion -- when examined in the proper, full factual context – actually serve to demonstrate that the NYPD faithfully ***complies*** with the Guidelines, and certainly does not violate the Guidelines as a matter of policy and practice.

Class Counsel's motion asserts two alleged systemic violations of the Handschu Guidelines. First, Class Counsel's motion is predicated on the false allegation that, as a matter of policy and practice, the NYPD conducts *investigations* of individuals and organizations associated with the Muslim religion, pursuant to §V(A)–(D) of the Guidelines, where there is neither a "possibility of unlawful activity" nor a "reasonable indication" of unlawful activity – the two thresholds for investigations under §V of the Guidelines. In other words, Class Counsel make the incendiary allegation that the NYPD's investigations – ***as a matter of policy or practice*** -- are driven solely on the basis of one's religion – specifically the Muslim religion – and nothing more. In support of that inflammatory charge, Class Counsel claim that there is "substantial persuasive evidence." CC Br p.4. As the centerpiece of that purported evidence, Class Counsel put forth a declaration by a former NYPD confidential informant named Shamiur Rahman. When examined in the full factual context, however, it is clear that while Rahman, a confidential informant, was not told the nature of the investigation, the fact is that he was being used as part of an authorized Preliminary Inquiry (in compliance with the Guidelines) that related

to a number of specific individuals, including five who have been under investigation by federal law enforcement agencies for terrorism-related crimes, and one of whom has pleaded guilty to federal terrorism-related crimes. All of Class Counsel's other purported "evidence" of a practice of conducting investigations involving Muslims in violation of the Guidelines fails when analyzed in the proper factual context.

Second, Class Counsel assert a separate basis for relief based on an alleged NYPD policy of *retaining* information in violation of §VIII (A)(2) of the Guidelines. §VIII(A)(2) permits the NYPD to "visit any place and attend any event that is open to the public." Significantly, the authorization to do so under this section does not require a "possibility of unlawful activity" or a "reasonable indication of unlawful activity" which are required for the levels of investigation in §V of the Guidelines discussed above. Moreover, Class Counsel do not claim that the NYPD's visits to public places or the collection of information based upon those visits violates the Guidelines. Class Counsel's claim is limited to the *retention* of information from those visits to public places. As demonstrated below, contrary to that allegation, the retention of the information complained about is related to potential unlawful activity and thus does not violate §VIII(A)(2) of the Guidelines. In addition, the information retained about which Class Counsel appear most concerned – conversations noted in public places - is not done on a systemic basis so as to constitute a widespread policy or practice of the type contemplated by this Court that would warrant relief.

As demonstrated fully below, Class Counsel's motion should be denied in its entirety. The NYPD has not violated the Guidelines as a matter of policy or practice and there is no basis

for the Court to grant any of the relief requested by Class Counsel, especially the extraordinary relief of the appointment of a monitor to be involved in the day to day affairs of the NYPD.[1]

PROCEDURAL HISTORY

Beginning in August 2011, the Associated Press ("AP") published a series of articles which focused primarily on a particular unit of the Intelligence Division known as the Zone Assessment Unit (formerly known as the Demographics Unit). The articles were accompanied by NYPD documents leaked to the press. As a result of these articles and leaked documents, on October 3, 2011, Class Counsel filed a motion to conduct discovery in order to assess whether the NYPD was retaining information from visits to public places in violation of the retention standard set forth in §VIII (A)(2) of the Guidelines.

Significantly, based on this Court's prior admonitions to the parties over the years to engage in discussions and attempt to resolve issues raised without court intervention, we discussed with Class Counsel ways of avoiding further motion practice that would have fully satisfied Class Counsel's concerns about retention of the handful of conversations at issue. Toward that end, the defendants voluntarily gave Class Counsel access to documents and a Rule 30(b)(6) witness. The purpose of the document discovery was to provide Class Counsel an opportunity to see the type of information retained from the Zone Assessment Unit's visits to public places. Defendants then produced the Commanding Officer of the Intelligence Division

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[1] Class Counsel's motion is their first motion employing the explicit authority set forth by this Court allowing Class Counsel to seek equitable relief, even in the absence of a constitutional violation, if "it were shown that the NYPD had adopted a policy that disregards the NYPD Guidelines..." *Handschu IX*, 2008 U.S. Dist. LEXIS 14584, *4-*5 (S.D.N.Y. 2008). Class Counsel now invoke that "power" (CC Br pg.5) and predicate their motion solely on alleged policies and widespread practices that violate the Handschu Guidelines (they do not assert or argue constitutional violations).

as a Rule 30(b)(6) witness to answer Class Counsel's questions about the documents produced and retention generally under §VIII(A)(2). Defendants also agreed to place a litigation hold on the documents sought by Class Counsel's discovery request to insure their preservation pending resolution of their motion.

Pursuant to defendants' offer, in April 2012 defendants produced to Class Counsel a set of documents which were selected based upon Class Counsel's specified and agreed upon criteria of reports generated on specific dates for a three year period. In total, 1,260 documents were produced under an attorneys' eyes only protective order, with the added condition that Class Counsel had to view the documents at the offices of the Law Department. In June 2012, defendants produced for deposition the Commanding Officer of the Intelligence Division, Assistant Chief Thomas Galati.

After being provided the above voluntary discovery, Class Counsel never discussed any concerns they had or responded to defendants' offer for resolution, but instead, filed the pending motion. The instant motion not only challenges retention under §VIII(A)(2) but also alleges for the first time that the NYPD conducts investigations, as a policy or systemic practice, based solely on one's religious status as a Muslim and without any factual or legal predicate.

FACTUAL BACKGROUND

The relevant facts are set out in the accompanying declarations of Deputy Commissioner of Intelligence David Cohen, Assistant Chief and Commanding Officer of the Intelligence Division Thomas Galati, Detective Stephen Hoban, Brian Michael Jenkins, and Peter G. Farrell. We respectfully refer the Court to those declarations for a complete discussion of the facts.

The Constant Threat of Terrorism by Islamists Radicalized to Violence

New York City has been and continues to be a primary target of terrorism. The majority of recent terror plots have either been carried out or planned by Islamists who have been radicalized to violence. Indeed, the most devastating terrorist attack against New York City (and the United States) occurred on September 11, 2001 and was planned and carried out by Islamic extremists. *See Ashcroft v. Iqbal*, 556 U.S. 662, 682 (2009) ("[t]he September 11 attacks were perpetrated by 19 Arab Muslim hijackers who counted themselves members in good standing of al Qaeda, an Islamic fundamentalist group.").

The terror threat against New York City post 9/11 has been real and unabated. The numerous terror plots since 9/11 have included targets such as: the Brooklyn Bridge; Times Square; the Federal Reserve Bank; the Herald Square subway station; the New York Stock Exchange and Citigroup's headquarters; the PATH commuter train tunnel; jet fuel storage tanks at JFK airport; subway tunnels used by the Long Island Railroad; synagogues; and, on numerous occasions, the New York City subway system. Cohen ¶¶ 6, 7.

Other terror plots have had other connections to New York City such as Brooklyn resident Uzair Paracha, who attempted to facilitate an al-Qaeda operative's entry into the United States. That operative intended to blow up gas tanks in the United States and Paracha was subsequently sentenced to 30 years in federal prison. Cohen ¶ 6(D). Another al-Qaeda operative, Mohammed Babar had been a member of a radical Islamist organization known as Al Muhajiroun, was arrested in NYC by the NYPD and the FBI for his role in a plot to bomb various targets in London. Cohen ¶ 6(F). Most recently in April 2013, Dzhokar Tsarnaev and Tamerlan Tsarnaev detonated improvised explosive devices at the Boston Marathon killing several individuals and injuring over 250 more. Information from that investigation revealed that

the Tsarnaev brothers thereafter had planned to travel to Times Square in New York City to detonate more explosives. Cohen ¶ 7(C). The vast majority of post 9/11 terror plots have involved Islamists radicalized to violence and that many of the plots are linked to New York City.

The extent of the continuing threat to New York City is reflected in the fact that within the last 48 months there have been no less than 7 terrorist plots targeting New York City deterred or disrupted; this includes 3 in just the last 6 months. Cohen ¶ 53; *see also* Jenkins ¶¶ 14, 27. In total, there have been twenty five post 9/11 terror plots linked to New York City and the NYPD Intelligence Division played either an exclusive, primary, or significant role in foiling ten of them. Cohen ¶¶ 6, 7, 8. It is against the backdrop of this history of threats to New York City by Islamists radicalized to violence that Class Counsel's claims and the NYPD's conduct must be viewed.

ARGUMENT

POINT I

THE NYPD CONDUCTS INVESTIGATIONS IN ACCORDANCE WITH THE HANDSCHU GUIDELINES

The NYPD's Intelligence Division is steadfast and unwavering in its efforts to conduct investigations involving political activity in accordance with the Modified Handschu Guidelines. Cohen ¶ 10.

The NYPD authorizes and conducts investigations when the facts and circumstances support the corresponding threshold (or predicate) under the Modified Handschu Guidelines. Cohen ¶ 10. It has never been the policy or practice of the NYPD to conduct investigations based solely upon one's religious status as a Muslim. Cohen ¶ 10. Class Counsel's assertion

that the NYPD's Intelligence Division has been conducting investigations of persons or organizations associated with the Muslim faith for years without a criminal predicate is false.

Before addressing the purported "evidence" proffered by Class Counsel in support of their claim, it is important to identify the applicable threshold or predicate necessary to conduct an investigation under the Modified Handschu Guidelines.

The Modified Handschu Guidelines Authorize Investigations Before an Unlawful Act Occurs

Class Counsel's motion papers provide a confusing description of the necessary standard or predicate to conduct investigations under the Guidelines. It is important that these standards be clearly stated because the basis of Class Counsel's claim is that the NYPD -- as a matter of policy – ignores the applicable standards and instead conducts investigations involving political activity purely on the basis of one's religion.

The Guidelines make clear that they authorize investigations ***before*** unlawful activity occurs. *See Modified Handschu Guidelines*, *Preamble* ("the prevention of future attacks requires the development of intelligence and the investigation of potential terrorist activity before an unlawful act occurs"); §II *General Principles* ("the NYPD must, at times, initiate investigations in advance of unlawful conduct."); §V *Levels of Investigation* (the Guidelines "are intended to provide the NYPD with the necessary flexibility to act well in advance of the commission of planned terrorist acts or other unlawful activity."). Allowing investigations to take place well before unlawful activity occurs was at the heart of the modification of the Guidelines that occurred in 2003. *Handschu IV*, 273 F.Supp.2d 327, 340-342 (this Court found that the changed circumstances crystallized by the events of 9/11 demonstrated how the original Handschu guidelines prevented the NYPD from investigating leads which may provide links to planned actions); *see also* Jenkins ¶¶ 17-19.

Section V of the Guidelines sets forth the standards to initiate the various levels of investigation. For the first two levels of investigation – "Checking of Leads" and "Preliminary Inquiries" (§V(A) and (B) of the Handschu Guidelines) – the standard is "***the possibility of unlawful activity.***" These first two levels do not impose a requirement that an unlawful act has been, is being or will be committed but rather only that that there is a possibility of unlawful activity.

The next level – "Full Investigation" (§V(C) of the Handschu Guidelines) – is permitted when there is a "reasonable indication" that an "unlawful act has been, is being, or will be committed." While a Full Investigation does require facts indicating a past, present or future violation, the standard is one of "reasonable indication" which is "substantially lower than probable cause." *See Modified Handschu Guidelines* V(C)(1). Thus, the threshold for conducting a "Full Investigation" pursuant to the Guidelines is substantially lower than the standard for probable cause under the Fourth Amendment. Finally, the same standard of "reasonable indication" is applicable to a "Terrorism Enterprise Investigation." *See Guidelines* §V(D)(1).[2]

The Modified Handschu Guidelines also contain additional authorizations which do not require either a "possibility" or "reasonable indication" of unlawful activity. Specifically, §VIII of the Modified Handschu Guidelines authorizes other activities the NYPD may engage in including: (i) the use of information systems; (ii) visiting public places and events; (iii)

[2] The Guidelines also recognize that a Terrorism Enterprise Investigation "may continue for several years", "may be less precise than that directed against more conventional types of unlawful conduct", and "often requires the fitting together of bits and pieces of information, many meaningless by themselves, to determine whether a pattern of unlawful activity exists." *See Modified Handschu Guidelines* §V(D).

conducting general topical research; (iv) using available online resources and forums; and (v) preparing reports and assessments. *See* §VIII(A) and §VIII(B). The authorizations to conduct the activities specified in (ii) – (iv) above specifically provide that they can be done on the same terms and conditions as the public generally and none require any predicate of unlawfulness.

To the extent Class Counsel argue that a higher standard is required than those set out above, that argument is wrong and should be rejected. *See e.g.*, CC Br. pp. 3-4 (Class Counsel use the phrase "criminal predicate" and also fail to state the definition of "reasonable indication" as defined in the Guidelines).

The NYPD's Intelligence Division Makes Sure
The Thresholds for Investigations Are Met Before Authorizing Investigations

The NYPD's Intelligence Division has in place a robust legal and operative review process to insure that investigations are authorized consistent with the Modified Handschu Guidelines.[3] For example, a full time senior attorney, who reports directly to the NYPD's Deputy Commissioner for Legal Matters, has been assigned to the Intelligence Division since 2004 to provide legal advice to the Deputy Commissioner of Intelligence and the NYPD Intelligence Division generally concerning compliance with the Modified Handschu Guidelines. This same senior attorney also has been responsible for training members assigned to the Intelligence Division regarding the Modified Handschu Guidelines. Presently, that same senior attorney is assisted by a staff of three attorneys and one non attorney (collectively "the Legal Matters Unit"). Members of the Legal Matters Unit participate in the daily activities of the Intelligence Division with the purpose of facilitating the Intelligence Division's compliance with the Modified Handschu Guidelines including, inter alia, the authorization of investigations.

[3] The following facts are found in Cohen ¶ 13-22, 54.

In addition to the role of the Legal Matters Unit, since 2011, an additional attorney working in the Intelligence Analysis Unit ("IAU") has been involved in the preparation of the operative document (the "Investigative Statement") that sets forth the basis for the proposed investigation. That embedded IAU attorney assists the intelligence analysts in preparing Investigative Statements. Once the initial draft of the Investigative Statement by the analyst and IAU attorney is prepared, the Investigative Statement is submitted to and vetted by the Legal Matters Unit. These various levels of review are conducted before Investigative Statements are presented to both the Deputy Commissioner of Intelligence and the Commanding Officer of the NYPD Intelligence Division for consideration.

Prior to the final determination by the Deputy Commissioner and the Commanding Officer, the sufficiency of the predicates are generally reviewed at a meeting attended by members of the executive staff of the Intelligence Division, attorneys from the Legal Matters Unit, and by attorneys from outside the Intelligence Division (the Deputy Commissioner for Legal Matters and the Assistant Deputy Commissioner in charge of the NYPD Legal Bureau). The entire review process is intended to make sure that the appropriate threshold is met before an investigation is authorized.

Class Counsel's "Evidence" Does Not Support Their Claim That Investigations are Conducted Without Meeting The Predicates In The Guidelines

Class Counsel submitted several exhibits in support of their motion that they claim constitute "substantial persuasive evidence" that the NYPD has been conducting investigations into organizations and individuals associated with the Muslim faith and community in New York for years without a criminal predicate of any sort. CC Br. p.4. Properly understood, however, those documents do not support that claim.

First, none of the NYPD documents submitted by Class Counsel were intended to set forth the basis or predicate for an investigation. Cohen ¶¶ 23, 31, 33, 35, 37, 43, 51. The Intelligence Division uses, as stated above, what it refers to as an "Investigative Statement" as the document that sets forth the facts and circumstances, i.e. the predicate, warranting an investigation. Cohen ¶ 11. None of the documents submitted by Class Counsel is an Investigative Statement and so none were intended to set forth the predicate for an investigation. Cohen ¶ 11. Thus, Class Counsel's reliance on the face of the exhibits as evidence that the predicate for the investigation has not been met is fundamentally misguided.

Second, contrary to Class Counsel's assertion, information contained in the exhibits was in fact collected during the course of authorized Handschu Investigations. Cohen ¶¶ 31, 33, 35, 37. Class Counsel have no factual basis for their claim that the collection of information in the documents is evidence of a widespread practice of infiltrating Muslim organizations without any possibility of unlawful activity. Class Counsel's uninformed conclusions are pure speculation and should be rejected.

Third, Class Counsel either do not understand the purpose behind the information in the exhibits they submit or ignore its obvious relevance to the possibility of unlawful conduct. This point is illustrated by a review of some of the exhibits submitted by Class Counsel.

- **Shamiur Rahman**

The utter lack of credible evidence supporting Class Counsel's claims is best displayed by their reliance on a former confidential informant of the NYPD, Shamiur Rahman. Class Counsel submitted a declaration by Rahman as the centerpiece of their evidence that the NYPD's Intelligence Division is conducting investigations solely based on one's religious status as a Muslim. *See* Chevigny Dec ¶¶ 21-22 and Exhibit 2 thereto.

Contrary to the assertions by Class Counsel (and Rahman), Rahman was in fact collecting information related to investigations being conducted in compliance with the Modified Handschu Guidelines. Hoban ¶ 8. Confirmation that the NYPD's investigations are not being conducted based solely on one's religious status is that the group of individuals Rahman was tasked to stay with were subjects of a Preliminary Inquiry and their close associates. Five of those subjects have been under investigation by federal law enforcement agencies for terrorism-related crimes and one of those subjects has pleaded guilty to a federal terrorism-related charge. Hoban ¶¶ 12, 13; Cohen ¶ 25.

The false statements made by Rahman, and Class Counsel's misplaced reliance on them, are no surprise because Rahman was never provided the details of the investigations in which he was used. For example, Rahman was never told who the subjects of the investigation were, his role in the investigation, or the reasons for the investigation. Hoban ¶¶ 3, 8, 9. Rahman may have mistakenly believed that he was "spying" on members of the Muslim community randomly because Rahman was never given these details.

Rahman may have drawn that same erroneous conclusion regarding his attendance at a number of Muslim Student Association ("MSA") events, when in fact he was there because several of the subjects of the investigation were to be in attendance. Hoban ¶¶ 11-13 (subjects had publicly stated they would attend the event); Hoban ¶¶ 15-16 (attended mosques because the subjects of the investigation went there); Hoban ¶¶ 18-19 (attended events held by the Islamic Circle of North America and the Muslim American Society because that is where the group that he had been instructed to stay with headed). In addition, the field reports prepared relating to Rahman's work as a confidential informant confirm that the NYPD was not reporting any

statements by Imams and that Rahman was not engaging in what he calls a "create and capture" strategy. Hoban ¶¶ 15,17; Cohen ¶ 26.

In sum, contrary to Class Counsel's assertions, Rahman was not employed to "infiltrate" mosques or Muslim Student Associations nor was he employed to just randomly "spy on the Muslim community." Hoban ¶¶ 10, 14, 15. Rather, Rahman was used in a controlled manner – and consistent with the Modified Handschu Guidelines -- to gather information about the subjects of authorized investigations, including one who has pleaded guilty to a federal terrorism related charge. Cohen ¶ 25. The true facts behind Rahman's work makes clear that Rahman's declaration is riddled with inaccuracies and provides no support for Class Counsel's claims. Rahman's work as a confidential informant for the NYPD is the quintessential example that dispels Class Counsel's claims and confirms that the NYPD conducts investigations because of its concern for possible unlawful activity.

- **The Danish Cartoon Reporting**

Class Counsel rely upon the reporting related to a controversial Danish cartoon to support their claim that "persons, institution and organizations are subject to surveillance not because of what they do or even say, but because of who they are; religious Muslims." *See* Chevigny Dec. ¶ 40 and Exhibit 9 thereto (the "Danish Cartoon Reporting"). Class Counsel's reliance on the Danish Cartoon Reporting to support their attack against the NYPD demonstrates Class Counsel's lack of understanding as to the purpose and import of the information in the document as it relates to the possibility of unlawful activity.

The Danish Cartoon Reporting was conducted as the result of strong negative and sometimes violent reaction by Muslims worldwide to the publication of cartoons depicting the Prophet Muhammad by a Danish newspaper. Cohen ¶¶ 27-31. The reaction to the Danish

cartoon included violent protests that led to dozens of casualties, including many deaths. Among the violent after-effects, on February 4, 2006, Syrian protestors set fire to the Norwegian and Danish embassies in Damascus. One day later, Lebanese protestors set fire to the Danish embassy in Beirut. Notably, Norway and Denmark both have consulates and missions to the United Nations in New York City.

In the face of these violent events, the NYPD Intelligence Division had to assess the possibility of similar violent reactions occurring here in New York City. The Danish Cartoon Reporting was used to assess that possibility by providing the NYPD with information regarding both unlawful and lawful responses to the worldwide events. Cohen ¶ 28. Class Counsel focus on the "lawful" activity reported but miss the point that such information informs the NYPD regarding the likelihood of violent or other unlawful activity occurring in New York City and therefore helps it make an informed assessment. To not have investigated the obvious possibility of unlawful activity in the face of dozens of casualties worldwide and the burning of embassies abroad would have been recklessly irresponsible. The notion that this reporting is evidence of improper surveillance of Muslims just because of their religious status is pure folly.

- **Plane Crash Reporting**

Class Counsel rely on similar reporting involving the crash of a small plane into an Upper East Side high-rise building. *See* Chevigny ¶ 41 and Exhibit 10 thereto (the "Plane Crash Reporting"). The information contained in the Plane Crash Reporting was collected within the two days following a small plane crash and concerned a potential for terrorism. Cohen ¶ 36. The Intelligence Division was concerned about a possible copycat event. The reporting confirms that fact with a summary that states "there is no known chatter indicating either happiness over the crash, regret that it was not a terrorist attack, or interest in carrying out an attack by similar

method." *See* Exhibit 10 to Chevigny Dec. During this time, there had been a continuous level of concern about terror related operations using aircraft as just less than three months before the October 2006 Plane Crash Reporting the United Kingdom authorities uncovered an al-Qaeda directed plot to use commercial aircraft to attack New York City among other places. Cohen ¶ 36. The Plane Crash Reporting, like the Danish Cartoon Reporting, demonstrates that the Intelligence Division conducts investigations for proper, Handschu Guidelines compliant reasons, not based solely on religious status as Class Counsel claim.

- **Sean Bell Reporting**

Class Counsel's reliance on reporting about the reaction to the shooting and killing of Sean Bell by police officers and their subsequent acquittal of criminal charges is similarly misplaced. *See* Chevigny ¶ 42 and Exhibit 11 thereto (the "Sean Bell Reporting"). The shooting death and subsequent acquittal sparked demonstrations across New York City and over thirty threats of violence against members of the NYPD, including a murder plot against the Police Commissioner. Cohen ¶ 32. The possibility of unlawful activity in the face of these facts is obvious and assessing the likelihood of unlawful activity is basic, responsible policing.

- **Whitewater Rafting Reporting**

In that same document as the Sean Bell Reporting there is reporting about a whitewater rafting trip by the Muslim Student Organization of City College which Class Counsel believe supports their case. Chevigny ¶¶ 42-43 and Exhibit 11 thereto. This is another case where Class Counsel mistakenly rely on the face of the document without an accurate understanding of the investigation at issue. In fact, the undercover police officer's reporting was related to an authorized Handschu Investigation involving one of the individuals on that trip who was a former Al Muhajiroun member. Cohen ¶ 34. Former members and affiliates of Al Muhajiroun

and its offshoots are responsible for numerous terrorist attacks and several members of its New York City Chapter have been convicted and sentenced in Federal Court for terrorism related crimes. Cohen ¶ 34. Thus, the conclusion drawn from the face of the document by uninformed readers such as Class Counsel is wrong. The fact of the matter is that the investigation was being properly conducted under the Modified Handschu Guidelines.

The foregoing exhibits thus provide no support for Class Counsel's motion and certainly are not "substantial persuasive evidence" of wrongdoing by the NYPD.

Class Counsel Completely Mischaracterize
The NYPD's Approach to Investigations Involving Muslims

Class Counsel incorrectly assert that the NYPD's approach to investigations involving Muslims is based on a model of pure intelligence gathering of all things connected to Islam and not on a model of investigations triggered by the possibility of unlawful activity. *See* Chevigny Dec ¶ 23. They claim this alleged model is set out in the document titled "*Radicalization in the West: the Homegrown Threat*" and confirmed in a NYPD document titled "*NYPD Intelligence Division Strategic Posture Report 2006*". *See* Chevigny ¶¶ 24-39. As demonstrated below, the two documents relied upon by Class Counsel do not support their hyperbolic assertion. To the contrary, NYPD conducts investigations where the facts and circumstances support a belief that there is a possibility of unlawful conduct or reasonable indication of it. Cohen ¶¶ 10, 42.

- **Radicalization in the West Report: The Homegrown Threat**

The report entitled *Radicalization in the West: The Homegrown Threat* was the result of research and information sharing between the NYPD and law enforcement agencies and security services in Europe, Canada, Australia and the United States. Cohen ¶ 38. A copy of the *Radicalization in the West Report: The Homegrown Threat* is attached as Exhibit A to the Cohen

Declaration (hereafter, the "Radicalization in the West Report"). Reading the full report, which Class Counsel chose not submit as an exhibit, undermines Class Counsel's assertions.

A review of the full document shows that the purpose of the Radicalization in the West Report was to assist policymakers in understanding the process of homegrown radicalization. Cohen ¶ 38. The report looked at real world examples to explain common elements in the process of radicalization of individuals arrested in terrorist plots in the West and common indicators that might help law enforcement officials identify such individuals in the future. Cohen ¶ 39. The report was not a strategic or operational guide. On the contrary, as the report itself states, it was intended "to assist policymakers and law enforcement officials...by providing a thorough understanding of the kind of threat we face domestically...and seeks to contribute to the debate among intelligence and law enforcement agencies on how to best counter this emerging threat by better understanding what constitutes the radicalization process." Report p. 2.

Contrary to Class Counsel's assertions, the Radicalization in the West Report does not profess a philosophy of gathering intelligence where there is no possibility of unlawful activity. Cohen ¶ 40. The report does not state that association with a Muslim group alone is an indication of terrorism or the basis of an investigation, nor does it state that adherence to a school of theology and religious observance alone provides a basis for investigation. Cohen ¶ 40. Class Counsel's assertions, based on out-of-context citations, are contradicted by the actual report.

Finally, to the extent that the NYPD's Intelligence Division conducts investigations of persons who subscribe to jihadi-Salafi ideology,[4] those investigations are conducted in accordance with the Modified Handschu Guidelines and are based on information received that those individuals are actually promoting violence or that there is a possibility (or in some cases a reasonable indication) that those individuals or their followers may engage in unlawful activity.

Accordingly, the Radicalization in the West Report provides no support for Class Counsel's claims.

- **The 2006 Strategic Posture Report**

In an effort to support the faulty premise taken from their misreading or lack of understanding of the Radicalization in the West Report, Class Counsel assert that the alleged "model" is confirmed in police documents that were made public with news reports in 2011 and 2012 including the NYPD Intelligence Division Strategic Posture 2006 report.[5] *See* Chevigny ¶27 and Exhibit 7 thereto (hereafter the "2006 Strategic Posture Report"). Once again Class Counsel misconstrue the document and draw erroneous conclusions based solely upon the face of the exhibit.

First, the 2006 Strategic Posture Report only contains information that was derived prior to 2006 and much of the information and findings in the report have since changed. Cohen ¶ 44.

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[4] The *Radicalization in The West Report* makes use of the ideological concept of jihadi-Salafi and states that the ideology refers to: "A militant interpretation of the Salafi school of thought that identifies violent jihad as the means to establish and revive the Caliphate." The jihadi-Salafi concept, as used in *Radicalization in the West Report* is defined similarly in a number of academic studies. Cohen ¶ 41.

[5] We have already addressed above why several of the other documents that were previously leaked to the press and made public and subsequently used as exhibits to the pending motion do not support the allegations lodged in this action.

Nevertheless, the 2006 Strategic Posture Report was accurate at the time it was written and several points are worth noting.

For instance, Class Counsel concede that some of the Muslim groups noted in the Strategic Posture Report are known to be associated with violence. *See* Chevigny ¶¶ 28-29. Class Counsel, however, contend that "peaceable" organizations are included in the Strategic Posture Report from which they make the gigantic leap to the assertion that the NYPD must have a policy or systemic practice of conducting investigations without any indication of the possibility of unlawful activity. Their lead example is the inclusion of the organization known as Tabligh-i-Jamaat under the category "extremist groups". *See* Chevigny ¶ 29. But the inclusion of Tabligh-i-Jamaat in the 2006 Strategic Posture Report was not because the NYPD considered it extremist in its own right but rather because it was an organization that was widely known to be exploited by extremist persons. Cohen ¶ 45. Indeed, Tabligh-i-Jamaat had been utilized as a cover for travel by numerous individuals who went on to radicalize to violence and that modus operandi was recently confirmed by the FBI in the recent criminal trial and conviction of Abdel Hameed Shehadeh on terrorism related charges. Cohen ¶ ¶ 45-46.

Similarly, inclusion of other organizations in the 2006 Strategic Posture Report was not the result of the alleged unlawful "model" of investigation asserted by Class Counsel but rather for legitimate concerns. For example, a number of Muslim Student Associations ("MSA") are referenced in the 2006 Strategic Posture Report. While the vast majority of MSAs are law abiding, some have historically been exploited by people with violent goals. Cohen ¶ 47. Since 2001, there have been nine members of MSAs in the New York area alone who have been arrested for plotting terrorist attacks. Cohen ¶ 47. Similarly, the non-governmental organizations referenced in the 2006 Strategic Posture Report were noted as "of concern" because individuals

associated with them may have had connections to terrorist organizations or advocated violence or other unlawful activity. Cohen ¶ 48.

Indeed, an example from the 2006 Strategic Posture Report dispels class counsel's claims. The 2006 Strategic Posture Report noted that there were in excess of two hundred and fifty mosques in New York City. Only fifty-three of those mosques were even identified as "of concern."[6] If Class Counsel's claims were in fact true, a much higher percentage of the more than two hundred and fifty mosques in New York City would have been deemed "of concern" based solely on their identity with Islam Finally, just like all the other NYPD exhibits submitted by Class Counsel, the 2006 Strategic Posture Report was never intended to be a document setting forth the factual or legal basis for any investigation being conducted by the NYPD. Cohen ¶ 51.

Based on all the foregoing, Class Counsel have not demonstrated that the NYPD's Intelligence Division has a policy or systemic practice of conducting investigations based solely upon religion and without the possibility of unlawful conduct. Thus, their request for an injunction and a monitor based on that erroneous assertion should be denied with prejudice. We next turn to Class Counsel's allegation regarding improper retention under §VIII(A)(2) of the Guidelines.

POINT II

THE INFORMATION RETAINED BY THE NYPD FROM VISITS TO PUBLIC PLACES DOES NOT VIOLATE §VIII (A)(2) OF THE GUIDELINES

Class Counsel allege that, in violation of §VIII(A)(2) of the Modified Handschu Guidelines, the NYPD is systematically retaining reports on visits to public places where the

[6] For those that were listed "of concern" some of the reasons are set forth in the 2006 Strategic Posture Report. Cohen ¶¶ 49-50.

information retained does not relate to "potential unlawful or terrorist activity." *See* Chevigny ¶ 9. Notably, Class Counsel do not allege that the information was improperly collected. Their motion is directed only at the retention of information under provision VIII(A)(2) of the Guidelines.[7] §VIII(A)(2) pertains only to information collected from visits to public places and events on the same terms and conditions as members of the public. Prior to discussing retention, it is necessary to provide some background information regarding the Zone Assessment Unit, the unit within the Intelligence Division which is the focus of the allegations.

The Mission of the Zone Assessment Unit

The Zone Assessment Unit, originally known as the Demographics Unit, was created in response to the September 11, 2001 terrorist attack on New York City to provide the NYPD with an understanding of particular ethnic and nationality concentrations within New York City. Galati ¶ 5. The ethnicities and nationalities that the Zone Assessment Unit focused on were ones whose home countries were identified by the federal government as containing incubators for Islamists radicalized to violence – i.e., terrorists. Galati ¶ 5. The goal was to determine where these ethnicities and nationalities were concentrated in the New York City area and to obtain information about the locations and types of businesses or institutions within that area. Galati ¶ 5. Examples of the types of information collected includes common pedigree information such as the name and address of the place visited, the nature of the business or establishment (i.e. restaurant, coffee shop, deli, mosque), the type of building, the general ethnicity of the customers

[7] This part of Class Counsel's motion thus does not involve information collected pursuant to authorized Handschu Investigations pursuant to §V of the Modified Handschu Guidelines and which investigations were the focus of Class Counsel's claims addressed in Point I, supra.

and/or owner, and sometimes the name of the owner.[8] Galati ¶ 13. In addition, on some field reports, a conversation that occurred at the location is noted.

Notably, the Zone Assessment Unit's mission is not limited to understanding the ethnic and nationality concentrations limited to Muslims. The Zone Assessment Unit has conducted similar cataloging as described above of predominantly non-Muslim ethnicities and nationalities in the New York City area for some of the same purposes identified below. Galati ¶ 10.

While the Zone Assessment Unit collected publicly available information about the ethnic concentration within an area, its mission never was to trigger investigations, generate leads, or conduct investigations as contemplated by § V of the Modified Handschu Guidelines. Galati ¶¶ 6, 11.

Retention of the Information Serves Several Important Purposes

The retention of the information collected by the Zone Assessment Unit serves several purposes related to deterring and detecting terrorism and unlawful activity. First, it provides an understanding of where an Islamist radicalized to violence might try to blend in and secrete himself before or after carrying out a terrorist act. A comprehensive understanding of where certain ethnicities are concentrated provides a roadmap in the event the NYPD receives information about the characteristics of an Islamist terrorist who is believed to be secreting himself in the New York City area as he may likely try and blend in by gravitating to a

[8] Based upon Class Counsel's motion, it would appear they are not challenging the collection of so-called "pedigree" information regarding locations, but rather their concern is directed towards retention of the actual substance of the conversations, as Class Counsel alleges those conversations do not relate to terrorist or unlawful activity. (Chevigny Decl. at ¶¶s 8(a), 11, 12, 13, 14, 16, and 17). However, because Class Counsel's motion is unclear, we address all the information retained from the Zone Assessment Unit's visits to public places.

community bearing the same traits as himself.[9] Second, the information assists in identifying where that same terrorist might try and recruit assistance from those with common traits such as language, dialect, region of origin, religious sect, etc. Third, the information assists the NYPD in deploying resources in the face of potential ricochet violence from events taking place here or abroad, such as sectarian or nationalist violence. This allows the NYPD to be in a position to deploy its resources efficiently and effectively when it is necessary to ascertain a community's reaction to current events which the NYPD believes could result in violence. Galati ¶¶ 7, 15. The importance of having the type of information collected by the Zone Assessment Unit on hand to serve the foregoing purposes is recognized not only by the NYPD but also by the FBI. Galati ¶ 16.

Practical Use of The Information Retained

Two recent examples that occurred just last month in April 2013 illustrate how the information retained from the visits to public places by the Zone Assessment Unit is useful and related to potential unlawful activity. First, in the wake of the Boston Marathon bombings, the Zone Assessment Unit was deployed to neighborhoods in which individuals from the Caucasus geographic region, which include Chechens, live in New York City to both help ascertain whether people in these neighborhoods were at risk of victimization through retaliatory acts of violence in response to the bombings and to be prepared in the event the perpetrators came to New York City – which it was subsequently learned that they intended -- and attempted to blend in within an area where persons from the Caucasus geographic region reside and frequent. Galati ¶¶ 8, 17 Similarly, the Zone Assessment Unit responded to the Hazara community in New York

[9] Class Counsel omitted the full response by Chief Galati when they cited his response on page 9 of the Chevigny declaration regarding the Unit's responsibilities as Chief Galati corrected the incomplete transcription of his deposition response via an errata sheet which is contained at the very back of Exhibit 4 to the Chevigny Declaration.

City in response to a suicide attack targeting the leader of the Hazara community in Quetta, Pakistan – the attack was perpetrated by Lashkar-i-Jhangvi, a foreign terrorist organization based in Pakistan. Galati ¶ 9. In both instances the Zone Assessment Unit was able to quickly respond to these neighborhoods because of the previous cataloging efforts identifying where the related ethnic and nationality concentrations lived in New York City.

The Bulk of the Information Retained Does Not Fall Within The Ambit Of the Modified Handschu Guidelines

The Modified Handschu Guidelines are limited in scope to investigation of "political activity," which is defined as "the exercise of a right of expression or association for the purpose of maintaining or changing governmental policies or social conditions." *Handschu v. Special Services*, 273 F. Supp.2d 327, 350. While Class Counsel ignore this limitation, it is hard to see how the bulk of the information collected and retained from the Zone Assessment Unit's visit to public places qualifies as the investigation of political activity. The majority of the information is similar to general phonebook type of information, for example, the name and address of the place visited, the nature of the business or establishment (i.e. restaurant, coffee shop, deli, mosque), and the type of building. The purpose was not to investigate political activity but rather catalog locations for future law enforcement purposes. A review of one of the reports leaked by the press and about which Class Counsel complain demonstrates this point. *See* http://hosted.ap.org/specials/interactives/documents/nypd/nypd-syria.pdf.

Accordingly, the act of collecting or retaining this information does not fall within the Modified Handschu Guidelines and on that basis alone Class Counsel's motion should be denied. In any event, because the information is related to preventing potential unlawful activity as

described above, it nevertheless qualifies for retention, even if the Modified Handschu Guidelines were deemed to apply.

The Limited Number of Conversations Retained Does Not Evidence
A Systemic Practice Or Policy Of Violating §VIII(A)(2) Of The Guidelines

Perhaps recognizing the inapplicability of the Modified Handschu Guidelines to the information discussed above, Class Counsel primarily focuses on conversations retained from the Zone Assessment Unit's visits to public places. *See* Chevigny Decl. ¶¶ 8(a), 11, 12, 13, 14, 16, and 17. Despite Class Counsel's claims to the contrary, it is neither the policy or systemic practice of defendants to report or retain conversations unrelated to potential unlawful activity overheard in public places. Galati ¶¶ 18-23. This point is proven by examining both the sample set of documents chosen and reviewed by Class Counsel as well as a review of all field reports generated by the Zone Assessment Unit over the past three years.

A review of the sample set reviewed by Class Counsel demonstrates that out of 346 visits to public places made by the Zone Assessment Unit, only 31 contained conversations which equates to 8.9% of the time. Galati ¶ 19. A review of all field reports over the most recent three year period demonstrates that out of 4,247 field reports generated by the Zone Assessment Unit, only 207 contained conversations which equates to 4.9% of the time.[10] Galati ¶ 20. These figures do not even take into account that the number of conversations overheard on any particular visit would presumably be greater than one and thus the actual percentage of conversations retained versus heard would be even lower than the percentages just noted. Under

[10] Moreover, the conversations retained rarely identify the names of the individuals participating in the conversation as demonstrated by the fact that only six of the 207 field reports that contained any conversations made reference to a name. Galati ¶ 21. Further, none of the field reports reviewed contained any unique identifying information such as date of birth or social security number. Galati ¶ 21.

either analysis, those statistics invalidate Class Counsel's claim that the NYPD has a policy or systemic practice of retaining conversations.

Moreover, the conversations retained typically related to the potential for unlawful activity. For example, out of the 31 conversations in the sample set, the overwhelming majority were captured at a time when there were current events that caused the NYPD to fear for the safety of residents of New York City. Galati ¶ 19. Similarly, out of the 207 field reports which contained conversations retained over the past three years, 161 relate to reactions to overseas events such as the death of Osama Bin Laden, the arrest of Faisal Shahzad, the Arab Spring, and various terrorist attacks around the world. Galati ¶ 20. As explained in Point I infra, reactions to overseas events help the NYPD assess the potential for unlawful activity to occur here either in the form of violence by or against the affected ethnic concentrations. The language spoken at a location is a piece of information that can be useful because a unique language environment can help law enforcement officers choose which locations to visit first when time is of the essence in reacting to a terror plot or act. Galati ¶ 18.

Finally, as mentioned earlier, defendants discussed with Class Counsel ways to fully satisfy Class Counsel's concerns about retention of the handful of conversations at issue but Class Counsel never responded to that offer. Farrell ¶ 3-5. Based on all the foregoing, Class Counsel's request for injunctive relief and the appointment of a monitor should be rejected by this Court.

POINT III

THE APPOINTMENT OF A MONITOR IS UNWARRANTED

For all the reasons previously stated above in Points I and II, there is no factual basis for the appointment of an auditor or monitor to review the NYPD Intelligence Division's

compliance with the Modified Handschu Guidelines as Class Counsel have failed to demonstrate that the NYPD Intelligence Division has violated the Modified Handschu Guidelines as a matter of policy or systemic practice.

Moreover, there is also no legal basis to support the appointment of an auditor or monitor. The Modified Handschu Guidelines, on their face, do not provide for the appointment of an auditor or monitor to oversee NYPD compliance with the Modified Handschu Guidelines. Class Counsel's request amounts to a request to modify the Modified Handschu Guidelines. In order to do so, Class Counsel would have to meet the legal requirements of Federal Rule of Civil Procedure 60(b) and *Rufo v. Inmates of the Suffolk County Jail,* 502 U.S. 367, 383 (1992) ("a party seeking modification of a consent decree bears the burden of establishing that a significant change in circumstances warrants revision of the decree. If the moving party meets this standard, the court should consider whether the proposed modification is suitably tailored to the change in circumstance"). Class Counsel has not moved pursuant to Rule 60 (b) or requested a modification of the consent decree in the pending motion and thus their request should be denied on that basis alone.

Apparently recognizing that they cannot meet the requirements of Rule 60(b) in any event, Class Counsel argue that a monitor may be appointed pursuant to either Rule 706 of the Federal Rules of Evidence or Rule 53 of the Federal Rules of Civil Procedure but they cite no controlling precedent on point and the circumstances here vary markedly from the cases where a monitor is appointed. For example, Class Counsel's complaint in the instant case is that the NYPD's Intelligence Division conducts Handschu Investigations without the legal and factual predicates required by the Modified Handschu Guidelines. An auditor or monitor in this case would be tasked with making that precise determination. Class Counsel has cited no case, nor

are defendants aware of any, where an auditor or monitor has been appointed to make law enforcement decisions regarding what facts would support the opening of terrorism related investigations.

Class Counsel instead rely on one prior instance in the history of this litigation where an expert was appointed. Their reliance is misplaced. At that time, an expert was appointed to oversee a document production which had stalled. The expert was tasked with a laundry list of items to oversee such as examining the actual filing system and deciding upon indexes and the like. *See Handschu v. Special Servs. Div.,* 1989 U.S. Dist. LEXIS 8267, *3-*4 (S.D.N.Y. 1989). That situation is very different from what a monitor or an auditor would be doing in this instance - making judgment calls as to whether or not an investigation meets the predicates of the Modified Handschu Guidelines. In essence, the monitor's judgment would be usurping the judgments and decisions that the appointed law enforcement officials were put in place to make. *Cf. Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 453-454 (1990) (the Supreme Court upheld the constitutionality of random driver checkpoints to curb drunk driving under the Fourth Amendment stating that "for purposes of Fourth Amendment analysis, the choice among such reasonable alternatives remains with the governmental officials who have a unique understanding of, and a responsibility for, limited public resources, including a finite number of police officers."); *MacWade v. Kelly,* 460 F.3d 260, 274 (2d Cir. 2006) (this Circuit affirmed the constitutionality of random bag searches in the subway and stated " [w]e will not peruse, parse, or extrapolate four months' worth of data in an attempt to divine how many checkpoints the City ought to deploy in the exercise of its day-to-day police power. Counter-terrorism experts and politically accountable officials have undertaken the delicate and esoteric task of deciding how to

best to marshal their available resources in light of the conditions prevailing on any given day. We will not – and *may not* – second guess the minutiae of their considered decisions.").[11]

Finally, Class Counsel rely on *Hepting v. AT&T Corp.*, 439 F.Supp.2d 974 (N.D.Ca. 2006) for the proposition that the appointment of a monitor should not be barred because his role would involve the review of sensitive and confidential information. Aside from the fact that *Hepting* is a district court case from a different circuit and thus is not binding on this Court, it is also distinguishable because that case involved the appointment of an expert who would determine what information was and was not to be *disclosed*, taking into consideration national security concerns. Here, the issue is not one of disclosure but rather whether investigations related to potential unlawful activity including terrorism should be undertaken. Injecting an unwarranted monitor into the NYPD's Intelligence Division would have rippling negative effects with dire consequences. Cohen ¶¶ 54-55.

[11] Similarly misplaced is Class Counsel's reliance on *United States v. City of New York.* In that case, a monitor was appointed after a bench trial had been held regarding both the need for and the scope of injunctive relief to oversee the implementation of testing processes within the FDNY. Likewise, *In Re Joint Eastern and Southern Dist. Asbestos Litig.* involved the district court's appointment of an expert through its bankruptcy court powers to advise the court on a structured settlement which was already in place as part of the bankruptcy proceeding. In neither of those cases would the monitor have to make the type of evaluation Class Counsel is seeking in this case.

CONCLUSION

For all the foregoing reasons, defendants respectfully request that Class Counsel's motion be denied in its entirety and for any such further relief as the Court deems just and proper.

Dated: New York, New York
May 17, 2013

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CERTIFICATE OF SERVICE

I am an Assistant Corporation in the office of MICHAEL A. CARDOZO, Corporation Counsel of the City of New York, attorney for the defendant City of New York. On May 17, 2013, I served the following:

- Defendants' Brief In Opposition To Class Counsel's Motion For Injunctive Relief and Appointment Of A Monitor dated May 17, 2013
- Declaration of Deputy Commissioner of the NYPD Intelligence Division David Cohen dated May 17, 2013
- Declaration of Assistant Chief Thomas Galati dated May 16, 2013
- Declaration of Detective Stephen Hoban dated May 16, 2013
- Declaration of Brian Michael Jenkins dated May 15, 2013
- Declaration of Peter Farrell dated May 17, 2013

by depositing a copy of the above-mentioned, enclosed in a first-class postpaid properly addressed wrapper, in a post office/official depository under the exclusive care and custody of the United States Postal Service, within the State of New York, upon the following counsel of record and also by email:

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I certify under penalty of perjury that the foregoing statements are true and correct.

Dated: New York, New York
May 17, 2013

Alexis L. Leist