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,

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.

71 Civ. 2203 (CSH)

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF CLASS MOTION FOR INJUNCTIVE RELIEF

Preliminary Statement

The attorneys for the plaintiff class in this action ("class counsel") submit this memorandum of law in support of the motion of the plaintiff class for equitable relief in the form of an injunction against ongoing violations by the

defendants, hereinafter referred to as the NYPD, of the current Guidelines for investigations of political activities by the NYPD, and for appointment of an auditor or monitor by this court to insure compliance by the NYPD with the terms of the injunction. This motion is necessitated by surveillance and investigation of Muslim communities in the New York area as detailed in the moving papers.

The court is familiar with the history of this case, and has summarized it in recent opinions, including Handschu v. Special Services Division, 475 F.Supp.2d 331, 332-334 (*Handschu VII*); 2007 WL 1711775 at *1 through *5 (*Handschu VIII*); and 2008 WL 515695 at *1 through *2 (*Handschu IX*). This is a class action, commenced in 1971 to limit police surveillance over political activity, on behalf of a class defined as:

> All individuals resident in the City of New York, and all other persons who are physically present in the City of New York, and all organizations located or operating in the City of New York, who engage in or have engaged in lawful political, religious, education or social activities and who, as a result of those activities, have been, are now or hereafter may be subjected to or threatened by infiltration, physical and verbal coercion, photographic, electronic and physical surveillance, provocation of violence, recruitment to act as police informers and dossier collection and dissemination by defendants and their agents.

As a result of a consent decree, modified on the motion of defendants in 2003, surveillance of political activities by the NYPD is subject to a set of Guidelines which have been made a part of this court's order modifying the consent decree, *Handschu IV*, 273 F.Supp.2d 327, 349-351 (2003) and *Handschu V*, 288 F. Supp. 2d 411, 420-431 (2003).

Under the Guidelines, investigations of political activity can be conducted by the NYPD only based on a "criminal predicate." *Handschu VII*, 475 F.Supp.2d at 337 (". . . each level of investigation of a political activity requires some indication of *unlawful* activity . . ." [emphasis in the original]). Thus under Sec. V (C) of the Guidelines, "a full investigation may be initiated when facts or circumstances reasonably indicate that unlawful act [sic] has been, is being or will be committed. A full investigation may be conducted to prevent, solve or prosecute such unlawful activity." With respect to terrorism investigations, the Guidelines provide, under V (D), that "a terrorism enterprise investigation may be initiated when facts or circumstances reasonably indicate that two or more persons are engaged in an enterprise for the purpose of . . ." furthering goals through unlawful acts or committing crimes specified in the Guidelines. The section further provides, "the standard of 'reasonable indication' is identical to that governing full investigations generally."

Even for a “preliminary inquiry” under Sec. V(B) of the Guidelines, “an allegation or information indicating the possibility of unlawful activity” is required. *Handschu V*, 288 F.Supp.2d at 422-428.

Sec. VIII(A) (2) of the Guidelines, authorizes specified limited NYPD activity to investigate political activity without a criminal predicate: “For the purpose of detecting or preventing terrorist activities, the NYPD is 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." The same section provides, however, that "[n]o information obtained from such visits shall be retained unless it relates to potential unlawful or terrorist activity.” *Handschu V,* 288 F.2d at 429-430.

As detailed in the accompanying declaration of Paul G. Chevigny, which incorporates documents originating from the NYPD and describes discovery conducted pursuant to a stipulation with defendants, and in the supporting declarations of Shamiur Rahman, Linda Sarsour and Faiza Ali, there is substantial persuasive evidence that the defendants are conducting investigations into organizations and individuals associated with the Muslim faith and the Muslim community in New York, and have been doing so for years, using intrusive methods, without a reasonable indication of unlawful

activity, or a criminal predicate of any sort.

As part of the same program, agents of the NYPD have persistently visited public places associated with the Muslim faith and the Muslim community, without detecting evidence of potential unlawful or terrorist activity, and have nonetheless retained detailed records concerning such visits. Moreover, while flouting the requirements of the Handschu Guidelines, the NYPD has publicly claimed to be complying with the requirements of those Guidelines.

For these reasons, class counsel seek an injunctive order from this court requiring the NYPD to adhere to the requirements of the Guidelines, to conduct investigations and inquiries into political activity only in accordance with the Guidelines, and to cease keeping records of visits to public places when the records do not relate to potential unlawful or terrorist activity. Because the NYPD violations of the Guidelines have been so flagrant and persistent, and have been so misrepresented, class counsel also request that the court appoint an auditor or monitor to ensure compliance with the injunctive order.

Under the decisions of this court, class counsel have the power to make the present motion. As this court said in *Handschu X,* 679 F. Supp. 2d 488, 496-7 (2010), class counsel are empowered "to challenge NYPD policies resulting in non-

constitutional violations of the Guidelines"; the decree and guidelines "subject the NYPD to Class Counsel's inquiries into police surveillance policies and potential injunctive relief for the class and against the NYPD." (See also *Handschu IX,* 2008 WL 515695 at *5 (". . . the Section X Reservation does not preclude *Class Counsel* from challenging NYPD *policies* that disregard the NYPD Guidelines." [emphasis in original]) The court has the power and the duty to ensure compliance with the Guidelines. *Handschu VIII,* 2007 WL 1711775 at *10-11 ("Not only does the district court have the authority to ensure compliance [if the NYPD Guidelines are shown to have been repudiated or disregarded]; it has the duty to do so.") See also *Handschu IX*, 2008 WL 515695 at *2.

Point I

THE NYPD IS CONDUCTING SURVEILLANCE AND INVESTIGATIONS OF PERSONS AND ORGANIZATIONS IDENTIFIED WITH ISLAM IN VIOLATION OF THE MODIFIED HANDSCHU GUIDELINES

During the past two years, news reports by the Associated Press, journalist Leonard Levitt and other media have revealed a program of the NYPD dedicated to the intense surveillance of the Muslim communities in New York City and surrounding areas. The news stories were based in part on NYPD documents. Some

of the same documents are offered in support of the present motion.

As the declaration of Paul G. Chevigny and its attachments show, the surveillance has been widespread and intense. It falls into two categories that violate the Guidelines, and will be discussed separately below in this point. First, officers have monitored public places such as ethnic restaurants and mosques, and have kept records of their hundreds of contacts, including records of conversations upon which they have eavesdropped. In the second place, agents of the NYPD, including officers and confidential informants, have infiltrated organizations connected to Islam, including student associations, have attended worship at mosques, and recruited informants, keeping detailed records of all their work for the perusal of analysts. Both of these have been and still are part of a massive program of intelligence.

The collection of "intelligence" about the Muslim community has been the key concept for the NYPD. The police have been gathering and recording information through the most intrusive means, such as infiltrators, in defiance of the standards for surveillance of political activity set out in the Handschu Guidelines.

There is no question that the actions of the NYPD outlined in the present motion are subject to the modified

Handschu Guidelines. The Guidelines apply to investigations of "political activity", permitting those investigations only if they may turn out to encompass criminal activity. Handschu VII, 475 F.Supp.2d at 337 (2007). In this motion, class counsel have focused on the visiting of public places and infiltration of organizations connected with Islam. The motion documents that the NYPD is directing those visits and investigations to political activity. We note that the NYPD has taken the position in public statements that its investigations of the Muslim community are covered by the Guidelines. That is correct as far as it goes. What is pertinent to this motion is that the NYPD has not complied with the Guidelines in conducting these investigations.

The NYPD is investigating organizations associated with Islam precisely because the NYPD is interested in their political activities. The concentration on things Muslim arises out of the prejudice that the NYPD has brought to its program: the NYPD supposes that because an organization is connected to Islam, therefore it is suspect. The present motion addresses NYPD spying on the Muslim community because the police have chosen to make Islam the mark of suspicion of political crime.

A. Visiting Public Places and Keeping Records

As part of its program of intelligence about the Muslim community, officers from the Intelligence Division, part of a unit at first called the "Demographics Unit" and later the "Zone Assessment Unit" (ZAU), visited and still visit places of business and community centers, including restaurants and stores. Limited discovery voluntarily offered by defendants (which included review of representative visit reports of the ZAU and a deposition of Intelligence Division Chief Thomas Galati) revealed that there have been hundreds of such visits, that many places are visited repeatedly and that the visits apparently continue to the present.

As a matter of policy, the NYPD keeps meticulous records of all those visits, including records of conversations, some of which concern politics, which are collected to be examined by analysts. Section VIII (A)(2) of the Guidelines authorizes such visits "for the purpose of detecting or preventing terrorist activities" but states that "no information obtained from such visits shall be retained unless it relates to potential unlawful or terrorist activity." An examination by class counsel of hundreds of the ZAU reports revealed no relation to unlawful or terrorist activity, and the deposition of Chief Thomas Galati confirmed the observation. Chief Galati stated none of the visits during his tenure had

resulted in an investigation of crime. (Deposition of Thomas Galati; Exhibit 4, 96/21).

This record-keeping is an obvious violation of Section VIII (A)(2) the Guidelines, and it is undertaken as a matter of NYPD policy. Accordingly, it warrants an order by this Court that defendants must follow the Modified Guidelines in conducting such investigations.

B. Infiltrating Organizations, Recruiting Informers and Reporting to the NYPD

The NYPD documents accompanying the declaration of Paul G. Chevigny show that the NYPD has sent informants into mosques, to non-governmental organizations, to religious movements and institutions (often designated "extremist groups" even though their purposes are often only theological), and to Muslim Student Associations, among other institutions. Police agents have listened to preaching, to conversations, have recorded names, have recruited and attempted to recruit further informers, and have tried to encourage radical rhetoric in the interests of justifying the intrusions. The NYPD has maintained records of these activities that are collected for intelligence analysts. These intrusive investigations have gone on for at least seven years, and apparently longer, and the evidence shows that they

still continue. When the news reporters exposed the program in 2011 and 2012, the Mayor and the Police Commissioner said that the program had to continue. Chevigny Declaration, paragraph 41. At the end of 2012, a disaffected NYPD informer, Shamiur Rahman, who had infiltrated the Muslim Student Association at John Jay College among other organizations, went public and described the instructions he had received from the NYPD and his regret at what he had done. Chevigny Declaration, paragraphs 20-22.

This intensive program of surveillance of the Muslim community has been conducted pursuant to a theory about how certain organizations and theological beliefs contribute to the "radicalization" of Muslims. The program is dedicated to collection of intelligence about the Muslim community, tracing membership in those organizations and in search, apparently, of radicalization. The evidence shows that investigations conducted under this program are not based on indications of criminal activity or any other version of a criminal predicate.

A criminal predicate is necessary under the Guidelines for inquiries or investigations of the sort that the NYPD has been conducting in the Muslim community. The requirement is fundamental because the guidelines fashioned in settlement of this case as amended in 2003 do not allow general

intelligence investigations or investigations of pure political activity; permissible investigations have always been “confined to [matters] supported by a legitimate law enforcement purpose.” *Handschu VII*, 475 F. Supp. 2d 331 at 337 (quoting the “General Principles” set forth in Section I of the Modified Guidelines).

In *Handschu VII*, this court quoted Section II of the Guidelines: “In its effort to anticipate or prevent unlawful activity, including terrorist acts, the NYPD must, at times, initiate investigations in advance of unlawful activity. <u>It is important that such investigations not be based solely on activities protected by the First Amendment.</u>” 475 F. Supp. 2d 331 at 337 (2007) (emphasis supplied by the Court). The criminal predicate is the mechanism by which the Guidelines protect against such investigations::

> “The Patrol Guidelines implement that policy and that principle in practice by establishing ‘three levels of investigative activity’ in Section V... each level of investigation of a political activity requires some indication of <u>unlawful</u> activity on the part of the individual or organization to be investigated...As I noted in *Handschu IV*, ‘a salient feature of the [Patrol] Guidelines is that they do not do away entirely with the ‘criminal activity requirement’ which is a principal cause of the NYPD’s dissatisfaction with [the Original Handschu [Guidelines].’ 273 F. Supp. 2d at 346.”

475 F.Supp.2d at 337 (emphasis in original).

In connection with Section VI of the Guidelines, concerned with the intrusive investigative techniques of which the NYPD has made systematic use against the Muslim community, this court went on to say, 475 F. Supp. 2d at 338, "It is not necessary for present purposes to recite those techniques in detail, but one notices again the emphasis placed upon an unlawful act as the justification for the use of a particular investigative technique." 475 F.Supp.2d at 338 (emphasis in original). The court noted that Section VI instructs the police to take account of "'(ii) the intrusiveness of a technique, considering such factors as the effect on the privacy of individuals and potential damage to reputation; (iii) the seriousness of the unlawful act; and (iv) the strength of the information indicating its existence or future commission of the unlawful act.' Id.(emphasis in original)."

This court thus recognized that it was a purpose of the Guidelines, as it has always been an aim of this case, to prevent just the sort of program which the NYPD has undertaken against the Muslim community, dedicated to the systematic oversight of persons and individuals for purposes of intelligence and social control through surveillance in the absence of indications of crime.

The evidence advanced in support of this motion shows

that the NYPD has simply flouted the Guidelines in its investigation of the Muslim community. Spokespersons for the NYPD have claimed to comply with the Guidelines, but the evidence shows that the police have not respected the privacy of persons in using intrusive techniques, and have not based their actions upon indications of unlawful acts.

Point II

THIS COURT SHOULD ENJOIN THE VIOLATIONS OF THE GUIDELINES BY THE NYPD

The program of surveillance summarized above and described in the moving papers warrants action by this court. The dangers of unfettered police surveillance against which this case, and the various Guidelines which have been instituted as part of the consent decree were directed, were identified more than thirty years ago in the definition of the class, which includes individuals who engage in lawful religious activities and as a result of these activities are subjected to: ". . . infiltration . . . . photographic, electronic and physical surveillance, provocation of violence, recruitment to act as police informers and dossier collection.." These are the very evils that are being visited on the Muslim community by the NYPD's program of surveillance in violation of the Guidelines.

The NYPD program of surveillance of the Muslim communities as presently implemented inevitably communicates to the people of New York that Muslim identity is inherently probative of disloyalty. When the government acts in this fashion, it brands Muslims as people whose exercise of first amendment rights should be viewed with suspicion. As Justice Brandeis warned in 1928: "Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example." Olmstead v. United States, 277 U.S. 438, 485 (Brandeis, J., dissenting).

The declaration of Paul G. Chevigny, in paragraph 45 through 49 together with the declarations of Shamiur Rahman, Linda Sarsour, and Faiza Ali and the statement of John Jay College President Jeremy Travis offer more details of the injuries that the Muslim community endures. These include the record-keeping on public places that brands them as suspect and makes people afraid to be present in those places, the recruiting of informers, which leads to suspicion and shame in the community, suspicion of political rhetoric, the constant suspicion among members of the community for fear that other members may turn out to be informers, the sense of an invasion of privacy that is created by the knowledge that the community is infiltrated, and a fear of participating in political actions, even in protest against the police tactics. An

atmosphere of fear and resentment is widespread in the community.

A particularly dire effect of the use of police surveillance for purposes of intelligence is that the program is interminable. The present police program has endured for at least seven years, and continues. When surveillance is conducted to detect crime, it will stop when the crime is stopped or the danger passes, but a surveillance program of the sort that the NYPD conducts has no end. Its pervasive injurious effects must increase as people become more aware of the surveillance. This is the essence of a police state.

Organizations and persons in the Muslim community are suffering irreparable harm due to the NYPD program described above. The provisions of the Guidelines are designed for the purpose of preventing such a program, and they should be enforced by this court.

POINT III

THERE IS AUTHORITY UNDER RULE 706 OF THE FEDERAL RULES OF EVIDENCE AND RULE 53 OF THE FEDERAL RULES OF EVIDENCE FOR APPOINTMENT OF AN AUDITOR OR MONITOR

There is substantial authority for the appointment of an auditor to review NYPD compliance with the Handschu

Guidelines, using the discretionary power of the Court under Rule 706 of the Federal Rules of Evidence to appoint an independent expert or using the Court's power under FRCP 53. While the appointment power under Rule 706 has most frequently been utilized to appoint scientific, and specifically medical witnesses, it has not been so limited.

At an earlier stage of this case, the Court appointed an expert under Rule 706 of the Federal Rules of Evidence, with a view "to getting the document disclosure procedure [under the decree] back into operation." Handschu v. Special Services Division, 1989 WL 82397 (S.D.N.Y. 1989) at *1. The order provided that

> "Joseph A. Settanni is appointed by the Court as an expert witness, consultant and monitor in the discipline of professional records and information management. The complete and responsible assistance, by subordinate officers, their superiors and any other requisite personnel of the involved sections of the New York City Police Department is to be provided to Mr. Settanni with respect to all and any aspects and activities concerned with the records and information management work to be accomplished under this order. Defendants are directed to grant access to Mr. Settanni, whenever needed, to all records relevant to the Stipulation Settlement and Order and defendants' obligations thereunder."

Mr. Settani's role as court-appointed expert under Rule

706 was to monitor compliance with an aspect of the Handschu settlement and decree, and the appointment power has been used in other settings to provide on-going supervision and assistance to the court.

For example, in In Re Joint Eastern and Southern District Asbestos Litigation, 982 F.2d 721 (2d Cir. 1992) the District Court and the Bankruptcy Court were required to determine the fairness of the proposed settlement of a class action on behalf of people with asbestos-related illnesses. The settlement fund (from the bankruptcy of Johns-Manville Corporation) was limited, and asbestos-related illnesses have a long latency. Allocation of settlement fund assets between current and future claimants was therefore a central concern, but the prospects for predicting the number of future claimants was unknown. Judge Jack B. Weinstein and the bankruptcy judge jointly appointed an expert pursuant to Rule 706 of the Federal Rules of Evidence to advise the Courts on these issues.

The Court of Appeals vacated the settlement for reasons not here relevant, but strongly endorsed the appointment of experts pursuant to Rule 706:

> "Wholly apart from the authority of the District Court to appoint Rule 706 experts in connection with determining the fairness of the settlement of the class action, we have no doubt of the Court's authority to exercise

> its bankruptcy court powers to appoint experts to advise it on matters that concern the on-going administration of the Chapter 11 proceeding.
>
> * * *
>
> The Trust . . . is the mechanism established under the auspices of the Bankruptcy Court to implement a plan of reorganization. The Bankruptcy Court has continuing responsibilities to satisfy itself that the plan is being properly implemented.
>
> * * *
>
> Toward that end, it is fully entitled to avail itself of expert advice on the difficult matter of estimating future claims against the trust . . . we have no doubt that the role of the experts is within the broad authority of Rule 706."

982 F.2d at 750 (emphasis supplied; internal citations omitted).

An alternative source of authority for the appointment of the auditor or monitor sought here is FRCP Rule 53. In the Title VII employment discrimination action against the New York Fire Department, U.S. v. City of New York, 2011 WL 6131136 (E.D.N.Y. 12/8/11), Hon. Nicholas G. Garaufis issued a permanent injunction against

> "Use as part of any entry-level firefighter selection process, [of] any examination that in any way results in a disparate impact upon black or Hispanic applicants and is not job related for the position of

> entry-level firefighter and consistent with business necessity, or does not otherwise meet the requirements of federal, state, and City EEO laws."

2011 WL 6131136,*4. As part of the same injunctive order, Judge Garaufis appointed a monitor pursuant to FRCP 53, whose duties include "[m]onitoring and reporting on the City's compliance with its obligations under this Order". 2011 WL 6131136, *14.

Judge Garaufis appointed a monitor because efforts to remedy New York's discriminatory firefighter hiring policies had been met with years of intransigence and deliberate indifference on the part of the City. U.S. v. City of New York, 2011 WL 4639832 at *5 (E.D.N.Y. 10/5/11), and the history in this case has been comparable. As documented in *Handschu X*, 679 F. Supp.2d 488 (S.D.N.Y. 2010), "[t]he NYPD [has] made it plain repeatedly that it did not want to pay any attention to Class Counsel's questions or views about whether its surveillance policies violated the Handschu Guidelines", id. at 498, and the evidence marshaled in the accompanying declaration of Paul G. Chevigny makes it plain that the NYPD has been violating the Guidelines as a matter of policy for years. There is ample reason for appointment of a monitor or auditor here and the authority to take such action is clear.

Finally, the nature of the information to be reviewed by

the auditor in this case is no barrier to the appointment, as evidenced by the decision in Hepting v. AT&T Corp., 439 F.Supp.2d 974 (N.D. Ca. 2006). In Hepting, individual claims against AT&T and the United States government for warrantless eavesdropping of telecommunications were met with invocation of the state secret doctrine as well as claims of complete and qualified immunity. The District Court denied motions to dismiss the action outright, but recognized the sensitivity of the information involved in the case:

> ". . . while the court has a duty to the extent possible to disentangle sensitive information from nonsensitive information . . . the court also must take special care to honor the extraordinary security concerns raised by the government here. To help perform these duties, the court proposes appointing an expert pursuant to FRE 706 to assist the court in determining whether disclosing particular evidence would create a "reasonable danger" of harming national security.
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> * * *
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> Although other courts do not appear to have used FRE 706 experts in the manner proposed here, this procedural innovation seems appropriate given the complex and weighty issues the court will confront in navigating any future privilege assertions.
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> * * *
>
> The court contemplates that the individual would be one who had a security clearance for receipt of

> the most highly sensitive information and had extensive experience in intelligence matters. This individual could perform a number of functions; among others, these might include advising the court on the risks associated with disclosure of certain information, the manner and extent of appropriate disclosures and the parties' respective contentions."

439 F.Supp.2d at 1010 (internal citations omitted).

The Ninth Circuit Court of Appeals remanded Hepting to the District Court "in light of the FISA Amendment Act of 2008", 539 F.3d 1157 (9th Cir. 2008), but did not challenge the District Court's proposed appointment of an independent expert in this setting of sensitive security information. There is, thus, authority for use of this Court's power under Rule 706 of the Federal Rules of Evidence in the setting of sensitive information, as will be claimed by the New York Police Department to be the case here.

Based upon proof by the plaintiff class here that the Handschu guidelines are being ignored by the NYPD, this Court will have the power and the duty to enforce the guidelines by injunction, and will have continuing responsibility to satisfy itself that the Handschu guidelines are being properly implemented. Whether appointed pursuant to F.R.Ev. 706 or FRCP 53, the auditor or monitor will provide a means to monitor NYPD compliance with the order and provide other

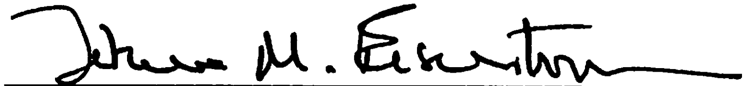
assistance to the court's continuing jurisdiction.

Conclusion

For all the reasons stated above and on the basis of the facts set forth in the declaration of Paul G. Chevigny and supporting papers, the plaintiff class prays that the relief sought herein be granted.

Dated: New York, New York
January 22, 2013

Respectfully submitted,



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