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July 8, 2014

VIA ECF

Hon. Joan M. Azrack
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: *Raza et al. v. City of New York et al.*, 13-cv-3448 (PKC)(JMA)

Dear Judge Azrack:

Pursuant to the Court's July 2, 2014 order, Plaintiffs write to respond to Defendants' June 27 letter ("June 27 Letter") and to request that the Court compel Defendants to collect electronically stored information ("ESI") from NYPD field personnel directly responsible for the surveillance and investigations of Plaintiffs. Defendants' arguments contradict Judge Chen's November 22, 2013 Order, Dkt. No. 28, distort Plaintiffs' claims, and conflict with established law.

Defendants are attempting to re-litigate issues with respect to the scope of discovery that the Court has already decided. In permitting Plaintiffs' first request for production, which seeks "Documents concerning Plaintiffs," the Court expressly held that responsive documents "are clearly relevant," and noted that "Defendants have agreed to produce *all documents and information in their possession regarding Plaintiffs*." Dkt. No. 28 at 7 (emphasis added). Despite this unambiguous ruling, Defendants now seek to withhold information concerning individuals who directly surveilled and investigated Plaintiffs and limit discovery to 16 officials who they contend "are the only persons within the Intelligence Bureau with the authority to propose and authorize the initiation and continuation of investigations relating to the plaintiffs in this case." Dkt. No. 74 at 1-2. Nothing in the Court's order compelling Defendants to produce "all documents they have about or referencing Plaintiffs" permits either the withholding of field officer information or Defendants' proposed limitation to these 16 individuals.

Nevertheless, Defendants argue that all custodians other than these 16 decision-makers are "irrelevant" because Plaintiffs "must demonstrate that an individual with final decision-making authority is responsible for establishing

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final government policy for liability to attach. Dkt. No. 74 at 2 (citation and quotation marks omitted).

This argument mischaracterizes Plaintiffs' claims. Defendants mistakenly imply that this case involves a challenge under *Handschu*, Dkt. No. 74 at 2. It does not. Plaintiffs bring constitutional claims, which are not limited to Defendants' decisions to authorize certain types of *Handschu* investigations.[1] In particular, Plaintiffs allege that Defendants have violated their rights under the First and Fourteenth Amendments by investigating and surveilling Plaintiffs on the basis of their Muslim faith. As the Court has held, Plaintiffs may prove their claims by showing that Defendants have either adopted a discriminatory policy or that they have applied a facially neutral policy in a discriminatory manner. *See* Dkt. No. 28 at 10-11. It is beyond dispute that documents created by the field-level officers engaged in the *actual surveillance and investigation of Plaintiffs* is relevant to the discriminatory application of investigative policies. This evidence could reveal, for example, the officers' evaluations of Plaintiffs' religious speech, beliefs, and practices, and the extent to which these factors were considered in the investigation of Plaintiffs. This evidence could also reveal the implementation and existence of a facially discriminatory policy, as well as the ways in which NYPD surveillance was impermissibly entangled with Plaintiffs' religious speech, beliefs, and practices. Accordingly, this discovery is relevant and proper within the meaning of Federal Rule of Civil Procedure 26(b)(1).

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Defendants' argument also distorts the law of municipal liability by suggesting that the activities of lower-level officers are irrelevant. However, under *Monell v. N.Y.C. Department of Social Services*, 436 U.S. 658, 708 (1978), a plaintiff may establish municipal liability by showing a policy *or* a "custom" or "practice." *See Patterson v. Cnty. of Oneida, N.Y.*, 375 F.3d 206, 226 (2d Cir. 2004) (plaintiff may establish *Monell* liability by showing that "a discriminatory practice of municipal officials was so 'persistent or widespread' as to constitute 'a custom or usage with the force of law' or that a discriminatory practice of subordinate employees was 'so manifest as to imply the constructive acquiescence of senior policy-making officials.'" (internal citations omitted)). Consequently, evidence of the custom or practice of field-level personnel in investigating and surveilling Plaintiffs is relevant to Plaintiffs' claims. Furthermore, how Defendants' policies were implemented in the field may evidence policy-makers' intent. *See Amnesty Am. v. Town of W. Hartford*, 361 F.3d 113, 125-26 (2d Cir. 2004) (Sotomayor, J.) (for *Monell* purposes, the acquiescence of a policymaker may be inferred from the conduct of lower-level employees).

Moreover, Defendants' argument confuses a method by which Plaintiffs may establish *Monell* liability with the scope of discovery, which is necessarily

[1] Plaintiffs' Complaint also specifically alleges that Defendants engaged in unconstitutional acts outside of the context of *Handschu* investigations. *See* Compl. ¶¶ 27-35, 116.

broader. As the Court has explained, with respect to Plaintiffs' claims that "their investigations were prompted or affected in any way by an alleged 'Muslim surveillance program,' the purpose of discovery is to enable a party to obtain potentially relevant information with which to make this determination and argue its position." Dkt. No. 28 at 17. And as the Court also observed, "[l]imiting the scope of discovery is especially inappropriate when, as here, the central fact at issue, discriminatory intent, is difficult to establish." *Id.*

Defendants cite no authority to the contrary. They cite *Jeffes v. Barnes*, 208 F.3d 49 (2d Cir. 2000), *Raphael v. County of Nassau*, 387 F. Supp. 2d 127 (E.D.N.Y. 2005), and *Rubio v. County of Suffolk*, No. 01-CV-1806 (TCP), 2007 U.S. Dist. LEXIS 75344, at *21-22 (E.D.N.Y. Oct. 9, 2007), but those cases all concern motions for summary judgment—not the scope of discovery with respect to a policy, custom, or practice—and therefore are irrelevant.

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Finally, Defendants argue that it would be unduly burdensome to collect documents from field-level personnel.[2] Defendants identify no particular burden associated with collecting documents from field-level personnel other than undercover officers and confidential informants. Such non-specific complaints of burden are insufficient to withstand discovery. *See Anderson v. Sposato*, No. CV 11-5663 (SJF) (WDW), 2014 U.S. Dist. LEXIS 25383, at *8 (E.D.N.Y. Feb. 24, 2014) With respect to undercover officers and confidential informants, Defendants' wholesale objection to collecting any documents possessed by such personnel is improper. [3] There is no reason why parties cannot work together, under the confines of the strong Protective Order entered in this case, to protect the identities of such personnel while also ensuring that Plaintiffs receive responsive documents within their possession.

Sincerely,

s/ Hina Shamsi

Hina Shamsi
Counsel for Plaintiffs

cc: All Counsel of Record (via ECF)

[2] Defendants assert that they "have already begun to produce to plaintiffs the thousands of pages of documents which are relevant to any investigation of the plaintiffs in this case." Dkt. No. 74 at 3. To date, however, Defendants have provided only a single production of fewer than 200 pages of documents, even though document production is scheduled to conclude in less than one month. *See* Dkt. No. 47 at 1.

[3] Defendants' compromise proposal of "Lieutenants who would have covered any investigation of the plaintiffs that may have existed during the relevant time period," Dkt. No. 74 at 3, was not offered when the parties met and conferred and, in any event, is inadequate.