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**BY ECF**

The Honorable Joan M. Azrack  
United States Magistrate Judge  
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 Civ. 3448 (PKC)(JMA)

Dear Judge Azrack:

I am an Assistant Corporation Counsel in the office of Zachary W. Carter, Corporation Counsel of the City of New York, and one of the attorneys assigned to the above-referenced matter. For the reasons set forth herein, defendants write to respectfully request that the Court reconsider its July 9, 2014 ruling which ordered defendants to provide plaintiffs with the responsive electronically stored information ("ESI") of field-level personnel ("field-level ESI") which included the "handlers" of both the undercover officers and confidential informants involved in any investigation of plaintiffs, and the ESI of the undercover officers themselves involved in any investigation of plaintiffs.<sup>1</sup>

By way of background, the Court granted defendants a stay of time to move for reconsideration until August 15, 2014 so that defendants could complete the collection of ESI from the field-level custodians and assess both the cost and burden associated with the Court's order. See Docket Entry ("D.E.") 85. That collection has now been completed. There are 93 field-level custodians<sup>2</sup> and the total raw data size of those 93 custodians is approximately 265 gigabytes (comprising approximately one *million* documents). By way of example, this is almost

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<sup>1</sup> Defendants were granted permission on August 8, 2014 by the Court to file this motion by letter.

<sup>2</sup> Defendants had originally believed there were 127 field-level custodians. However, after further review, there are 93.

four and a half times greater than the total raw data size of defendants' 16 high-level custodians ("high-level custodians") who defendants previously identified as likely to have relevant and material information.<sup>3</sup> For defendants to *host* the field-level ESI will place an undue expense on defendants of \$15,000 per month. For defendants to *review* the field-level ESI will place an undue burden on defendants as they are minimally, if at all, relevant.<sup>4</sup> As such, defendants respectfully request that the Court reconsider its' ruling for the reasons set forth below.

### Standard of Law

Under Local Rule 6.3, reconsideration of an order is appropriate where "the moving party can point to controlling decisions or data that the court overlooked – matters, in other words, that might reasonably be expected to alter the conclusion reached by the court." *City of New York v. Amerada Hess, et al. (In Re: Methyl Tertiary Butyl Ether)*, 04 Civ. 3417 (SAS), 2007 U.S. Dist. LEXIS 74724, at \*4 (S.D.N.Y. Oct. 4, 2007) (granting City of New York's motion for reconsideration); *Adams v. United States*, 686 F. Supp. 617, 618 (S.D.N.Y. 1988); *see also Henderson v. Metro. Bank & Trust Co.*, 502 F. Supp. 2d 372, 375-76 (S.D.N.Y. 2007) (moving party must demonstrate an "intervening change in controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice.").

### Argument

Reconsideration is appropriate here as the facts discussed below were not previously available to the parties or to the Court as they required a collection of the information to determine the size of the field-level ESI and the cost.<sup>5</sup> Now that those may be taken into account, it is evident that the cost and burden imposed on the defendants would far outweigh the minimal relevance, if any, of this discovery to plaintiffs' claims.

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<sup>3</sup> Defendants collected 60.7 gigabytes of data for the high-level custodians. That data accounts for nearly 400,000 documents. As the Court is aware, these documents would need to be reviewed very closely and with great attention to sensitive information and safety concerns not present in the typical case. The parties are in the process of negotiating search terms that would narrow the number of documents defense counsel would need to review, yet plaintiffs latest proposed search terms continue to return in excess of 70,000 documents for the high-level custodians alone. Those 70,000 documents are associated with attachments or e-mails that must also be reviewed, bringing the total number of documents requiring review ("reviewable items") to 130,000 documents. Many of these documents may be multiple pages. However, at this time, defendants are unable to ascertain how many pages would need to be reviewed in total. In addition, it should also be noted that plaintiffs are seeking the ESI of yet another set of defendants' custodians, the so-called "mid-level custodians."

<sup>4</sup> Defendants continue to maintain that any responsive ESI from the field-level custodians is not relevant to plaintiffs' case. Defendants' position as to the relevance of any information from the field-level custodians is set forth in defendants' letter date June 27, 2014 (*See* D.E. 74) and was further reiterated at oral argument before Your Honor on July 9, 2014.

<sup>5</sup> Defendants asked to be able to provide this information to the Court.

Federal Rule of Civil Procedure 26(b)(2)(C)(iii) provides that the Court “on motion or on its own...*must* limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues. *See also Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 316 (S.D.N.Y. 2003) (“Rule 26(b)(2) imposes general limitations on the scope of discovery in the form of a ‘proportionality test[.]’”); *Lineen v. Metcalf & Eddy, Inc.*, 1997 WL 73763, at \*2 (S.D.N.Y. Feb. 21, 1997) (“In determining the limits of discovery, [courts] must balance the plaintiff’s need for the requested data against the burden imposed on the defendant.”) (collecting cases).

### **1. Undue Expense**

In order for defendants to search and review the field-level ESI in our review platform, it would cost an additional \$15,000 *per month* in hosting fees because of the enormous increase in data size. Indeed, this expense to defendants accrues from the moment a search is run on that information and that cost would be incurred every month thereafter through the end of the litigation. In addition, defendants would incur that monthly cost regardless of whether any subsequent searches were conducted or even if data were removed. Given the trajectory of this litigation to date, the additional monthly cost of \$15,000 will quickly total hundreds and hundreds of thousands of dollars.<sup>6</sup>

### **2. Undue Burden**

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<sup>6</sup> In the alternative, should the Court deny defendants’ motion for reconsideration, defendants submit that cost shifting for the review and production of the field-level ESI is warranted here. In *Zubulake*, the Court held that “cost-shifting should be considered only when electronic discovery imposes an “undue burden or expense” on the responding party. The burden or expense of discovery is, in turn, “undue” when it “outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.” 217 F.R.D. at 318. Because of the extraordinary amount of data that plaintiffs are requesting that defendants search and review in order to locate discrete pieces of information, any potentially relevant data is functionally “inaccessible” without the use of some review tool, the vast majority of which charge by volume of data searched. As such, the costs at issue to search this data far exceed those that would be incurred for restoring backup tapes. *See Zubulake*, 217 F.R.D. at 318-22 (Finding that cost shifting is appropriate when the ESI at issue is “inaccessible,” such as when the information is stored on backup tapes). Accordingly, to the extent that the field level ESI is ordered to be produced, defendants request that the Court shift the additional cost associated with hosting that portion of the data in a review platform for the duration of the litigation to the plaintiffs .

Defendants conducted a search of the plaintiffs' names on a sample set consisting of the ESI for 15 of the field-level custodians.<sup>7</sup> The sample set of 15 field-level custodians have 194,000 documents associated with them, totaling 276,000 reviewable items once the related attachments and e-mails are included. Searching this set of data for the plaintiffs' names returned approximately 8,846 documents and 23,629 reviewable items. Many of these documents may be multiple pages, although at this time, we are unable to ascertain how many pages would need to be reviewed in total. Using simple extrapolation of these results on all 93 field-level custodians would return an estimated 54,845 documents and 146,499 reviewable items.

When examining undue burden, the Court should consider the likely relevance of the discovery sought. Defendants have reviewed several hundred documents within the search results of the sample 15 field-level custodians. The documents reviewed thus far do not contain what plaintiffs have specifically stated they are seeking in the field-level ESI, i.e. the "tasking" given to undercovers and confidential informants. (*See* Transcript of Oral Argument of July 9, 2014 at pp. 26,50). This is not surprising. Indeed, as defendants pointed out at oral argument on July 9, 2014, for operational reasons, taskings are seldom communicated electronically. (*See* Transcript of Oral Argument of July 9, 2014 at p.29).<sup>8</sup>

As defendants have previously argued, both by letter (*See* D.E. 74) and at oral argument (*See* Transcript of Oral Argument held on July 9, 2014 at pp. 23-54), any responsive ESI from the field-level custodians is not relevant to plaintiffs' claims here. In this case, plaintiffs' claim that investigations were initiated and continued against them for an improper purpose. Thus, the relevant and material ESI would be from those individuals who were the key decision-makers with regard to any investigation of plaintiffs and/or policy makers within the Intelligence Bureau (the high-level custodians), not field-level personnel. Defendants have already agreed to produce responsive ESI from those high-level custodians, and as we have previously noted, that alone is a substantial amount of information. Indeed, defendants are already incurring a monthly cost of \$12,000 to host ESI previously collected and adding the field-level ESI would increase the cost to \$27,000 per month.

Moreover, as the Court implicitly acknowledged on July 9, 2014, plaintiffs' have not pled a custom or usage claim that undercovers or confidential informants were used unlawfully. (*See* Transcript of Oral Argument held on July 9, 2014 at p. 85-87). This further demonstrates the lack of relevance of any of the field-level ESI.

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<sup>7</sup> Defendants chose a sample of 15 field-level custodians whose total data size would not push defendants over the data volume threshold triggering the additional cost. Defendants could not run a search on all the field-level ESI from the 93 custodians as that would trigger the \$15,000 per month hosting cost, effectively doubling the monthly amount the City is already expending for ESI previously collected.

<sup>8</sup> Notably, plaintiffs have themselves asserted the same argument -- that certain employees or leadership would not communicate electronically regarding mosque business -- as a basis for not including those individuals as custodians to be searched for responsive ESI. While that issue is not yet before the Court, it is worth noting here.

Accordingly, because of the exponential cost to host the field-level ESI, coupled with the fact that the ESI itself is minimally relevant and would require defendants to review potentially hundreds of thousands of documents, defendants respectfully submit that the Court's ruling warrants reconsideration.

Respectfully submitted,

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Assistant Corporation Counsel

cc by ECF: Plaintiffs' Counsel