

April 9, 2007

BY HAND

Hon. Lewis A. Kaplan
United States District Judge
Southern District of New York
500 Pearl Street
New York, NY 10007

Five Borough Bicycle Club, et al. v. City of New York, et al.
07 Civ. 2448

Dear Judge Kaplan:

On behalf of plaintiffs, we write to supplement the record in support of a preliminary injunction by providing the enclosed Certification of Steve Vaccaro and transcript of the deposition of NYPD Lt. Joseph Caneco, taken April 5, 2007. His deposition was set following discussion at the hearing held March 29, 2007 about the conflict between the City's position in this case and an earlier sworn statement by Lt. Caneco. The deposition confirms that Lt. Caneco cannot explain that conflict, or otherwise provide any evidence that the Parade Rules are constitutional. In light of his testimony, the following points are now undisputed:

1. The City's position in this case cannot be supported because it is squarely in conflict with Lt. Caneco's earlier sworn statement. Unable to reconcile his earlier statement with the City's current position, Lt. Caneco attempted to retract his sworn position from 2005, without any reasoned explanation for doing so. In 2005 he stated under oath that "the disruption of regular pedestrian and vehicular traffic was minimal" in "most situations [where] rides had under 100 participants . . . even if the riders did not obey traffic regulations." See Tr. at 163:6 & Px. 3 ¶ 11. At his deposition, he said that "I think I made a mistake" in the 2005 statement (*id.* at 166:23), and admitted that recent Critical Mass rides he observed 2007 at worst "**almost** ha[d] the same [disruptive] impact" as earlier rides which in 2005 he had characterized as having "minimal [disruptive impact] . . . in [his] eyes" (*id.* at 164:16 - 20) (emphasis added).

2. The City has no basis at all for believing that group rides of any particular size are likely to create a traffic disruption. The core of the City's position in this case must be that some numerical threshold for a permit is reasonable, and that 50 is a particularly reasonable number. But Lt. Caneco could not state that group bicycle rides of any particular size are disruptive. Rather, he candidly admitted that it is the conduct of a group — not its size — that determines whether a problem is likely. *See id.* at 36:8 – 51:12, 162:12 – 21 & Px. 2 ¶ 4.
3. The City admits that many of the specific rides that are the subject of the complaint pose no traffic problems. Lt. Caneco admitted that Professor Jackson's ride of 200 to 300 bicyclists conducted on 5th Avenue after midnight would not disrupt traffic. *Id.* at 168:15 – 169:23. Lt. Caneco also admitted that law-abiding 5BBC day trips held on Saturdays and Sundays would not disrupt traffic. *Id.* at 169:24 – 173:8; *see also id.* at 78:3 - 25 (100-person weekend ride would have "minimal" impact); *id.* at 84:15 – 85:5; *id.* at 168:6 – 8 (ride occurring at 6 a.m. on a Sunday, such as 5BBC's Montauk Century, would have "no impact").
4. The City admits that law-abiding group bicycle rides are safe. Lt. Caneco admitted that large groups of cyclists do not "create a host of safety issues" if they observe traffic rules, contrary to the suggestion in paragraph 5 of his Declaration. *Compare id.* at 173:16 – 174:10. Lt. Caneco's testimony makes clear that most of the safety hazards he has attributed to group bicycling are in fact the result of unsafe and illegal conduct by *motorists*. *See id.* at 168:24 – 169:14 (Professor Jackson's group ride creates an "unsafe environment" because participants may be hit by motorists near or exceeding the 25 MPH speed limit); *id.* at 138:8 – 139:24 (bicyclists occupying 2 out of 4 traffic lanes on a roadway create an "unsafe condition" because "befuddled or confused" motorists may accelerate into them); *id.* at 159:15 – 161:12 & Pxs. 6, 2 (Lt. Caneco retracts the assertion in his Declaration that bicyclists who occupy a traffic lane cause motor vehicles to "cut[] into oncoming traffic" in order to pass, admitting that such conduct by a motorist would be unlawful and unsafe).
5. The City's opposition to a preliminary injunction is not supported by competent evidence. Although the City relies heavily on the March 28, 2007 Declaration of Lt. Caneco, he admitted at deposition that he has personally observed only Manhattan Critical Mass group rides that included approximately 100 or more participants, or "splintered off" portions of such groups. *Id.* at 64:25 - 65:5; 39:20. Lt. Caneco has no information that any other group ride (including any Brooklyn Critical Mass ride) has had an adverse effect on traffic or safety. *Id.* at 70:10–72:9, 113:3 – 117:19, 118:2 – 120:19.

6. The City's enforcement of the law against bicyclists is unconstitutionally haphazard and contrary to applicable traffic rules.
- a. Lt. Caneco admitted that (i) NYPD personnel should always attend a permitted event, (ii) he could not recall an instance in which such attendance did not occur, and (iii) he could not explain why NYPD did not attend the February 25, 2007 5BBC group ride for which a parade permit was issued. *Id.* at 180:14 – 181:23.
 - b. It was revealed and ultimately admitted by Lt. Caneco at his deposition that much of the group bicycling activity described in his Declaration as disruptive or unlawful is in fact lawful and safe. *See id.* at 148:20 – 152:4 & Pxs. 6, 7, 157:18 (Lt. Caneco learns of and disagrees with the City's directive that bicyclists ride at least three feet away from parked cars to avoid "dooring"); *id.* at 158:5 - 159:14 & Px. 6 (Lt. Caneco asserts that bicyclists on the road must meet a "certain minimum speed," but he cannot identify the source of this supposed rule); *id.* at 91:13 – 99:20 & Px. 2 ¶4 (Lt. Caneco believes that group bicyclists occupying one lane of a multi-lane roadway "disrupt" and "cork" motorists behind them simply because the motorists must change lanes if they wish to pass); *id.* at 137:13 – 142:23 & Px. 2 ¶ 4 (same with respect to "trapping"); *id.* at 161:21 – 162:11 (Lt. Caneco ultimately admits that a group of 100 bicyclists can occupy all available lanes of a roadway and still proceed lawfully). Because Lt. Caneco apparently believes, incorrectly, that the law requires bicyclists to observe a minimum speed and to keep out of traffic lanes, his assertion that he has "never watched a through and through lawful [Critical Mass] ride" is meaningless. *See id.* at 175:18.

We ask that the Court consider this additional evidence in support of a preliminary injunction. Counsel for Defendants were notified of Plaintiffs' intention to make this submission, and have agreed to make any corrections to Lt. Caneco's deposition transcript by the close of business on Tuesday April 10, 2007 (*see id.* at 8:22) and to respond to this submission if counsel deems it necessary to do so.

Respectfully yours,



Steve Vaccaro

Enclosures

cc: Sheryl Neufeld