

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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FIVE BOROUGH BICYCLE CLUB, SHARON BLYTHE,
JOSH GOSCIAK, KENNETH T. JACKSON, MADELINE
NELSON, ELIZABETH SHURA, and LUKE SON,

Plaintiffs,

- against -

THE CITY OF NEW YORK, RAYMOND KELLY, Police
Commissioner of the New York City Police Department,
JAMES TULLER, Commanding Officer, Patrol Borough
Manhattan South, THOMAS GRAHAM, New York City
Police Department Disorder Control Unit Commander,
DANIEL ALBANO, Lieutenant, New York City Police
Department Legal Bureau, STEPHEN PARAGALLO,
Deputy Chief, New York City Police Department Patrol
Borough Manhattan South, and LT. JOHN DOE and
CAPTAIN JANE DOE, New York City Police Department,

Defendants.

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**PLAINTIFFS’ OPPOSITION
TO DEFENDANTS’ MOTION
FOR RECONSIDERATION
OF THE COURT’S ORDER
DATED NOVEMBER 27, 2007**

07 Civ. 2448 (LAK)

Defense counsel’s letter of December 12, 2007 (the “Corporation Counsel Letter”) provides no basis for granting reconsideration of the Court’s order dated November 27, 2007 (the “Order”) granting in part Plaintiffs’ motion to compel (the “Motion”).

1. ***The Corporation Counsel Letter falls far short of the demanding legal standard for reconsideration.*** Defendants simply have not made the “showing of exceptional circumstances,” nor identified “controlling decisions or factual matters that were put before the Court on the underlying motion” and overlooked, as would be legally required to support reconsideration. *Nemaizer v. Baker*, 793 F.2d 58, 61 (2d Cir. 1986); *Hansel ‘N Gretel Brand v. Savitsky*, No. 94 Civ. 4027, 1997 U.S. Dist. LEXIS 17615, at *3 (S.D.N.Y. Nov. 6, 1997)

(denying reconsideration of an order granting a motion to compel discovery). Instead the Corporation Counsel Letter merely raises issues of burden that the Court expressly considered:

In resolving this dispute, the Court has . . . endeavored to craft a reasonable compromise between the quite obviously well founded concerns of the City in respect of the burden of conducting a massive document search in a department with 35,000 or 40,000 uniformed officers and the plaintiffs' equally obvious interests in getting at the basic facts needed to litigate this case.

The care taken by the Court in "craft[ing] a reasonable compromise" is evident in the decision to grant only some of Plaintiffs' requested relief, and in the precision of the Court's line edits to Plaintiffs' discovery requests. Defendants' wish for a different outcome thus provides no proper basis for a motion to reconsider.

2. ***Any new facts that might be found in the Corporation Counsel Letter should not be considered.*** The Court obviously could not have overlooked information that Defendants previously failed to present. *See Hansel 'N Gretel* at *5 ("it is not appropriate in a motion to reargue to go back and fill in the holes in the record in hopes of changing the result."); *Dietrich v. Bauer*, No. 95 Civ. 7051, 2001 LEXIS 368, at *5 (S.D.N.Y. Jan. 17, 2001) ("Motion practice is not a series of trial balloons where you submit what you think is sufficient, you see how it flies, and if it does not, you go back and try again."). Moreover, Local Rule 6.3, pursuant to which Defendants seek reconsideration, prohibits a party from submitting affidavits. Yet the Corporation Counsel Letter is essentially an unsworn affidavit brimming with purportedly new and important factual details. This attempted end run around Local Rule 6.3 provides an additional basis for denying Defendants' application.

3. ***If the Court does reach the merits of Defendants' application, it should deny reconsideration because Plaintiffs' need for the discovery at issue still outweighs the burden asserted in the Corporation Counsel Letter.*** Plaintiffs' need for the documents responsive to Requests 6 and 7(g) is plain, in light of the allegations in the amended complaint regarding

Defendants' selective prosecution of, retaliation against, and denial of equal protection to Plaintiffs and other group bicyclists, particularly those who associate (or are perceived by NYPD to associate) with Critical Mass. Plaintiffs cannot prove the basic elements of their claims without the ability to compare NYPD activity with respect to Critical Mass rides as compared to other bicycling activity. Defendants do not deny that they have recorded information regarding the date, location and nature of each summons and arrest. That information can be matched to information regarding the dates, times and routes of group bicycle rides to establish the disproportionate and punitive character of Defendants' law enforcement efforts toward Critical Mass. Plaintiffs should be allowed to obtain this central evidence.

For the reasons stated above and in Plaintiffs' Motion, Plaintiffs respectfully request that the request for reconsideration of the Order be denied. I declare under the penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief.

Dated: New York, New York
December 17, 2007

Respectfully submitted,

DEBEVOISE & PLIMPTON LLP

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