UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Jonathan Corbett, Plaintiff v. City of New York Defendant	**___-CV-_____** **MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION WITH INCORPORATED MEMORANDUM**

Plaintiff Jonathan Corbett ("CORBETT") moves this Court under Fed. R. Civ. P. Rule 65 for a temporary restraining order, followed by (and regardless of whether the temporary restraining order is issued) a preliminary injunction to prevent the NYPD from unconstitutional use of terahertz imaging devices ("Scanners") on the general public pending the outcome of this case.

I. Factual Background

For no less than decades, the New York Police Department ("NYPD") has implemented a police tactic known as "stop-and-frisk" (perhaps better known in the legal community as a *Terry* search). *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868 (1968). This variety of search involves an officer patting down the outer garments of an individual whom the officer feels may be armed and dangerous for the sole purpose of identifying weapons for the safety of the officer and others. *Id.* The program has been extraordinarily controversial and resulted in hundreds, if not thousands, of lawsuits and successful motions for the suppression of evidence. *See*, within the last year alone, *Ligon v. New York et. al*, 12-CV-2274 (S.D.N.Y., Jan. 8th, 2013), *Opinion and Order Re: Preliminary Injunction*, *Floyd v. City of New York*, 08-CV-1034 (E.D.N.Y), *Opinion*

and Order Re: Class Certification (D.E. #206, May 16th, 2012), *Matter of Jaquan M.*, 2012 NY Slip Op. 05334, (N.Y. App. D., July 3rd, 2012), *Matter of Darryl C.*, 2012 NY Slip Op. 05118 (N.Y. App. D., June 26th, 2012). Nearly seven hundred thousand stop-and-frisks are now documented annually, and "…according to their own explanations for their actions, NYPD officers conducted at least 170,000 unlawful stops between 2004 and 2009." *See Floyd*, p. 25.

The NYPD now seeks to introduce Scanners that are capable of peering under the clothing of unsuspecting individuals as they walk down the streets, which essentially amounts to a virtual stop-and-frisk. *See* Complaint, Exhibit A. However, unlike traditional stop-and-frisks, the search victim will never even know they have been violated. While stop-and-frisks are abused at an alarming rate even when the courts are watching, an individual instance of a virtual stop-and-frisk via a Scanner would never see judicial review since no one will know when they have happened.

II. Procedural History

Plaintiff filed this action on January 28th, 2013, and filed along with it the instant motion. To the best of Plaintiff's research ability, the issue of police use of Scanners in public settings has never before been litigated by any party[1].

[1] While the Scanners are new technology that have not yet reached the courts, there is a plethora of on-point case law regarding similar but less invasive technologies, such as infrared. *See Kyllo v. United States*, 533 U.S. 27 (2001).

III. Nature of the Injunction Sought

The complaint in this action raises the question of whether reasonable suspicion or probable cause is the appropriate legal standard for the use of the Scanners. Since it is clear that *at least* reasonable suspicion is required to use the scanners, but more opaque as to whether probable cause is required, this motion requests that the Court fashion an injunction using the lower standard of reasonable suspicion.

Plaintiff therefore seeks to have the Defendant enjoined from using Scanners in any public location and on any individual who has not given their explicit consent absent the following circumstances:

1. There exists reasonable suspicion that subject being searched is committing an articulable crime,
2. The officer is conducting the search because they have a reasonable fear that the suspect may be armed and dangerous,
3. The search can be conducted without searching innocent bystanders (*i.e.*, anyone for whom points 1 and 2 cannot be met), and
4. Any individual who is searched will be handed a written form indicating the time, location, and reason for the search, similar to the "UF-250" form used during traditional stop-and-frisks.

IV. Legal Standard

The U.S. Supreme Court has articulated a four-factor balancing test for evaluating motions for temporary restraining orders and motions for preliminary injunctions: (1) a

likelihood of success on the merits; (2) a likelihood of suffering irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in the moving party's favor; and (4) that an injunction is in the public interest. *Winter v. Natural Resources Defense Council*, 555 U.S. 7, 129 S. Ct. 365, 374 (2008).

Injunctions are designed to maintain the "status quo" during litigation, and a "prohibitory injunction" so designed is favored over a "mandatory injunction" that commands action from the non-moving party. *See Cacchillo v. Insmed*, 638 F.3d 401 (2nd Cir. 2011).

Finally, Plaintiff, proceeding *pro se*, is entitled to have his documents construed liberally. *See Marmolejo v. United States*, 196 F.3d 377 (2nd Cir. 1999).

V. Argument

A. Plaintiff is Likely to Succeed on the Merits

Case law makes clear that in order to lawfully use the Scanners, the NYPD would, at a minimum, require reasonable suspicion. *See Terry* (non-consensual police encounters require reasonable suspicion); *see also Ligon* (a detailed analysis of the boundaries of NYPD searches specifically). One could also argue that the Scanners are a search more intensive than a stop-and-frisk as they can detect and identify more than simply weapons, as well as produce an image that can be saved and archived, and are more akin to an infrared search (or even a strip search) that requires probable cause and a search warrant. *See Kyllo v. United States*, 533 U.S. 27 (2001) (visual search aided by technology requires probable cause and a warrant); *Terry* (allowing searches without probable cause only if they are narrowly tailored to detecting weapons that imminently threaten the safety of officers and bystanders).

Regardless of the appropriate standard, it is clear that the NYPD intends to use these devices in the presence of neither reasonable suspicion nor probable cause, but rather to search the general public by posting Scanners in trucks on street corners. *See* Complaint, ¶¶ 20 – 28 and Exhibit A. First, it is entirely impractical to use these devices in a setting in which reasonable suspicion exists, and it strains credulity that the NYPD has any intention of doing so. The devices are mounted in a truck that must be within 25 yards of the suspect to be searched. *Id*. The idea that a police officer would observe behavior on the streets that gives rise to reasonable suspicion, then call in to have a truck brought to the scene to conduct a scan, hoping in the meantime that the suspect does not leave (from noticing a police truck arriving on the scene or otherwise), is absurd. And, even if the use of the Scanners were actually confined to this contrived use case, innocent bystanders would be searched along with the suspect. *Id*, ¶ 21.

The more realistic use case is that the NYPD plans to plant these Scanners on busy street corners and scan whomever they please. This follows with the NYPD's long-standing tradition of searching individuals of whom it has no right to search. *See Ligon, Floyd, Jaquan, Darryl C, ad nauseum.* The NYPD has settled or lost scores of lawsuits and suppression hearings over the last decade, yet every indication is that the police department continues to plow forward – increasing, not decreasing, the quantity of individuals that are subject to stop-and-frisk. *Id.*; Complaint, Exhibits C, D. The NYPD has not, and cannot, explain how if many of the 97,837 stop-and-frisks it conducted in 2002 were conducted on New Yorkers absent lawful grounds, that it reasonably believes that expanding to the 684,330 stop-and-frisks conducted in 2011 would not exponentially compound the rate of unlawful search. Are New Yorkers seven times as suspicious in 2011 as they were in 2002? Crime rate statistics certainly do not support that thought, and the flooding of the courts, including this Court, with lawsuits resultant from stop-

and-frisk put that thought to rest. Although at the time of writing this document a judge has not been assigned to this case, it is a safe bet that Your Honor, whomever that may be, has seen numerous such cases firsthand.

Allowing the NYPD to utilize these Scanners without clear guidelines and a notice requirement not only gives them a new tool to abuse the public, but allows them to escape meaningful judicial review of individual claims of unlawful search and the judgment call made as to what constitutes reasonable suspicion. Since those who are searched will not even know they have been searched, there can be no civil challenges. Even suppression hearings may not be able to address the merits of the constitutional claim: if reasonable suspicion exists, the prosecution could argue "inevitable discovery" since the subject "would have been physically stopped-and-frisked anyway," thereby mooting the constitutional issue.

Consequentially, a "secret search" (defined as a search in which the suspect will know of the search neither before nor after the search is complete) in this – and virtually any context[2] – is *per se* unconstitutional. A secret search crosses the fourth amendment "reasonable" boundary, infringes on fifth amendment right to due process, makes it impossible to determine if our fourteenth amendment right to equal protection has been violated (*e.g.*, by a police department engaging in searches predicated on race), and should reasonable concern any who exercise their first amendment rights that their government can easily – and without detection or recourse – conduct retaliatory searches upon them.

[2] Although certain searches under the Patriot Act and Foreign Intelligence Surveillance Act may be allowed to be kept secret, these searches are strictly scoped to counterterrorism and investigations that implicate national security; notwithstanding, their use is entirely controversial even within that limited context. In the context of general crime fighting on the streets, there can be no successful argument that such searches are anything but constitutionally forbidden.

New Yorkers deserve to know whether their police department may lawfully peer under their clothing *before* they become victims, not after, and if such searches are lawful, they deserve to be protected from secret searches of which they will never be informed.

B. There Is Sufficient Likelihood of Irreparable Harm Absent a Preliminary Injunction

It is clear that in general, the deprivation of a constitutional right constitutes an irreparable injury. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." Klein v. City of San Clemente, WL 3152381, at *8 (9th Cir. 2009) (quoting Elrodv. Burns, 427 U.S. 347 (1976)). The invasion of one's privacy is certainly no more "reparable" than a temporary imposition on one's right to speak, and this Court has already has recognized, in relation to NYPD search abuse specifically, that "[t]he violation of a constitutional right, particularly on an ongoing basis, constitutes irreparable harm for the purpose of a preliminary injunction." *Ligon*, 2012 WL 3597066, at *1; *see also Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996) (noting "the presumption of irreparable injury that flows from a violation of constitutional rights"); *Stauber v. City of New York*, 2004 WL 1593870, at *25 (S.D.N.Y. July 16, 2004) ("The law is well-settled that plaintiffs establish irreparable harm through 'the allegation of fourth amendment violations.'" (*internal citation omitted*).

Civil litigation against the City often times takes several years. For example, those who have sued the City for violating them during the Republican National Convention of 2004 still have active cases *nine years later*. *See Schiller v. City of New York*, No. 04-CV-7922 (S.D.N.Y.). To allow citizens to be subject to unconstitutional search for years while the courts "figure it out" would be reckless and result in certain mounting injuries.

Since even a single scanner can potentially scan millions of New Yorkers per year, and a dozen scanners could scan nearly everyone in the City within a year, Plaintiff, like everyone who traverses the streets of New York, faces a real and significant risk of being personally searched by NYPD Scanners. See Complaint, ¶¶ 22, 23. But, even beyond the risk of actual search is the stifling of the Plaintiff's right to freely travel throughout the city without fear of being victimized. While it is true that Plaintiff must establish more than a mere possibility of being searched to be entitled to injunctive relief, contrast *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), where that plaintiff sought to enjoin police conduct that was shown to be unlawful perhaps a couple dozen times over several years, to the present case, where the NYPD has already been shown to have conducted unknown hundreds of thousands of unlawful stop-and-frisks (see *Floyd*) and is now purchasing machines that are capable of searching millions more and will assist them in avoiding liability by conducting those searches in secret.

C. This Injunction Seeks Only to Maintain the Status Quo, and Therefore No Undue Burden is Placed on the Non-Moving Party

As of filing, it seems that the NYPD is on the cusp of beginning to implement this technology. As the NYPD has never needed the Scanners in the past, and the need to "get guns off the street" is no more acute now than it was for the past many years, the NYPD can claim no burden. The injunction requested is a prohibitory injunction designed to maintain the status quo. See *Cacchillo*. To the extent that the injunction is a mandatory injunction because it requires the NYPD to give notice, it is so only if the NYPD chooses to break the status quo by using the Scanners at all, and even then is a *de minimus* burden.

D. The Public Interest Falls Squarely in Favor of Curtailing New, Abusive Search Methods

The public has an undeniable interest in seeing the NYPD follow the law. Any arguments that public safety will be compromised by forcing compliance with the law are specious and best kept to the politician's soap box: the NYPD's opinion on what will best keep the public safe can never override the constitutional freedoms guaranteed to the people, and the NYPD's attempts to substitute alleged safety for liberty is unwelcome in America. In light of the fact that gun violence in this city is decreasing without the use of these unconstitutional scanners, there can be no doubt that the public's interest is squarely in restraining the NYPD from using its new invasive toy.

E. The Remedy Requested is Appropriate and Minimally Restrictive

Each of the four prongs of the injunction proposed by Plaintiff is a clearly established legal requirement and requires the Court to make no novel conclusions of law. Points one and two were clearly articulated by *Terry*. Point three is rather obvious: the police cannot execute a search against multiple parties simply because they have reasonable suspicion to search one party. A Scanner will search anyone within its viewpoint. The police have an obligation to ensure that the viewpoint of the Scanner contains only one person: the suspect. Point four prevents the NYPD from conducting a "secret search" as discussed above.

Taken all together, the burden placed on the NYPD through these four points is minimal: the first three simply require the NYPD to follow clearly established law, and the fourth is the least intrusive means of ensuring that secret searches are not conducted.

VI. Conclusion

For the above reasons, the Plaintiff respectfully requests the Court grant Plaintiff's motion, first via temporary restraining order, to follow with a preliminary injunction.

Dated: New York, NY

January 28th, 2013

Respectfully submitted,

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