Decided on June 3, 2015

Supreme Court, Bronx County

Collateral Loanbrokers Association of New York, Inc., 835 PAWNIT WESTCHESTER CORP., CHARLES LYONS, BRIAN SILVERMAN, CAPITAL PAWN BROKERS, INC., CAPITAL GOLD AND ESTATE BUYERS, INC., AND DAVID FLOREZ, Plaintiff(s), FOR A DECLARATORY JUDGMENT UNDER CPLR §3001,

against

The City of New York AND BILL DEBLASIO, AS MAYOR OF THE CITY OF NEW YORK, Defendant(s).

303901/14

Plaintiffs' Counsel: Kris, Kriss & Brignola, LLP

Defendants' Counsel: New York City Law Department

Mitchell J. Danziger, J.

In this action for declaratory judgment, plaintiffs move for an order, *inter alia*, granting them a preliminary injunction enjoining defendants from enforcing, *inter alia*, General Business Law § 45, New York City Charter § 435 and §436, Local Law No. 149 and its resulting amendments to New York City Administrative Code §20-267, § 20-273, 20-277, Rules of the City of New York § 1-16, §21-03(a) and (b), §21-04(a) and (c), §21-07(a)-(f), and § 21-08. Plaintiffs contend that because all the foregoing statutes authorize warrantless searches of plaintiffs' records memorializing customer transactions absent a regulatory scheme sufficient to safeguard plaintiffs' right to privacy, the foregoing statutes are unconstitutional facially and as applied insofar as they, *inter alia*, violate Article 1 Section 12 of the New York State Constitution. Thus, plaintiffs aver that they establish entitlement to preliminary injunctive relief by demonstrating a likelihood of success on the merits in this action, that the equities tip in their favor, and that irreparable harm absent injunctive relief will result. Defendants oppose plaintiffs' motion averring,

inter alia, that insofar as each of the statutes challenged, except Local Law No. 149 and the resulting amendments to New York City Administrative Code §20-267, § 20-273, 20-277, were enacted more than six years prior to the commencement of this action, the majority of this action is time barred. Moreover, defendants argue that the foregoing statutes are not unconstitutional under the prevailing law because they merely authorize legally cognizable administrative searches of plaintiffs' record for the sole purpose of ensuring compliance with regulatory requirements. Accordingly, defendants contend that plaintiffs are unlikely to succeed on the merits and, thus, the instant motion should be denied. Plaintiffs oppose defendants' motion seeking dismissal of the amended complaint, averring, *inter alia*, that the six year statute of limitations governing declaratory judgment actions is inapplicable, where, as here, the statutes challenged pose a continuous harm.

For the reasons that follow hereinafter, plaintiffs' motion is granted, in part, and defendants' motion is denied.

The instant a action is for declaratory judgment. The amended complaint, filed November 14, 2014 alleges the following. Pursuant to General Business Law (GBL) § 43, collateral pawnbrokers are required to keep a book memorializing loans issued. GBL § 45 requires that the foregoing book and all other records kept by collateral loan brokers be, at all reasonable times, open [*2]to inspection by members of the New York City Police Department (NYPD). In addition, pursuant to Title 20 (Title 20) of the New York City Administrative Code (New York City Administrative Code [NYCAC] 20-264, et seq.), a dealer in second-hand articles, meaning, one who, *inter alia*, deals in the purchase or sale of second-hand articles, is required to be licensed by the New York City Department of Consumer Affairs (NYCDCA) and pursuant to Rules of the City of New York (RCNY) § 1-16(a) is required to maintain the records promulgated by Title 20, which records, pursuant to RCNY § 1-16(b) shall be made available to the Commissioner of NYCDCA or its representative for inspection. Prior to the promulgation of Local Law No. 149 in 2013, NYCAC § 20-273 and § 20-277 required that dealers in second-hand articles and pawnbrokers keep written transaction records, including a description of every article sold or purchased and the name address, and description of the person to whom the article was sold or from whom it was purchased. Subsequent to and because of Local Law No. 149, NYCAC § 20-273 and § 20-277 now require that dealers of second-hand articles and pawnbrokers maintain the foregoing records in electronic form and in a manner allowing real-time sharing via a website designated by the police commissioner. Pursuant to NYCAC § 20-273 and § 20-277 the foregoing electronic records shall be open to inspection by any police officer, the commissioner or any departmental inspector, judge of the criminal court, or person duly authorized in writing for such purposes by the commissioner or by any judge of the criminal

court, who shall exhibit such written authority to the dealer and such records shall also be open to the inspection of any official or other person identified in, or duly authorized in writing pursuant to, any other applicable state or local law.

Pursuant to RCNY § 1-16(b), the Commissioner or authorized representatives may enter the business premises of a licensee during business hours for the purposes of inspecting or examining the licensee's place of business to verify compliance with the provisions of Title 20, and can inspect or examine any records or documents the licensee is required to maintain pursuant to said chapters and regulations. Pursuant to RCNY 1-16(c) inspections are conducted at least once in every two-year period, and additional inspections will be conducted if an inspection reveals alleged violations of Title 20 of the NYCAC or whenever the NYCDCA receives information alleging violation of Title 20.

New York City Charter (NYCC) § 435 grants the police the authority to inspect and observe any businesses required to have licenses, which pursuant to NYCC § 436, includes pawn brokers and dealers of second-hand merchandise. NYCC § 436 also grants the police the power to inspect establishments, their clerks, employees, books, premises, and merchandise in their possession.

In 1998, the NYPD - via a memorandum (Grasso memo) from George A. Grasso, Deputy Commissioner of Legal Matters with the NYPD - promulgated guidelines which the NYPD was to employ in performing administrative inspections of pawnbrokers and dealers of second-hand merchandise. The Grasso memo, basing the authority to promulgate such guidelines on the NYCC, RCNY, the NYCAD, and due to the propensity of such businesses to traffic stolen goods, indicated that the NYPD can, *inter alia*, set up an inspection program of the transaction books maintained by such businesses and/or demand, in writing, that pawnbrokers and dealers in second-hand merchandise provide lists of items pawned or pledged. In 2013, the NYPD also promulgated Patrol Guide Procedure No. 214-38 (PG 214-38), which, because pawn brokers and dealers of second-hand goods can sometimes unknowingly serve as fences for stolen goods, promulgates a comprehensive inspection procedure for the transaction records pawnbrokers and dealers in second-hand goods are required to maintain. In an effort to determine whether individuals identified as recidivists, parolees, probationers, or known burglars, pursuant to PG 214-38, the NYPD should inspect records within for foregoing establishment at least once every 10 days if those records are not maintained electronically. For records, maintained electronically, PG 214-38 requires those records to be reviewed weekly. RCNY §21-03(a) and (b), §21-04(a) and (c), §21-07(a)-(f), and § 21-08, promulgated as a result of Local Law No. 149 require pawnbrokers and dealers in second-hand merchandise to create electronic transaction records and upload the same to a web-based electronic

transfer service designated by the NYPD known as Leads Online, who then makes those records available to the NYPD.

Plaintiff COLLATERAL LOANBROKERS ASSOCIATION OF NEW YORK, INC. (CLANY) is a statewide association of pawnbrokers doing business in New York. Plaintiff, 835 PAWNIT WESTCHESTER CORP. (Pawnit) is a licensed pawnbroker and second-hand dealer doing business in New York City. Plaintiffs CHARLES LYONS (Lyons), BRIAN SILVERMAN (Silverman), and DAVID FLOREZ (Florez) are customers of Paradise Pawnbrokers, Modell Financial Inc., and and DF Jewelry, Inc., respectively licensed pawnbroker or second-hand dealers. In the course of transacting business with the foregoing entities in New York City, Lyons, Silverman, and Florez were required to disclose personally identifiable information. Plaintiff CAPITAL PAWN BROKERS, INC. (CPB) is a licensed pawnbroker doing business in New York City. Plaintiff CAPITAL GOLD AND ESTATE BUYERS, INC. (CGEB) is a licensed second-hand dealer doing business in New York City. Defendant THE CITY OF NEW YORK (the City) is a municipality having jurisdiction over municipal offices, including the NYPD and the Department of Consumer Affairs (DCA). Defendant BILL DE BLASIO (De Blasio) is the Mayor of and has exclusive authority over the City.

Plaintiffs allege that inasmuch as GBL § 45 authorizes the government to conduct unfettered warrantless administrative inspections of the premises where pawnbrokers and second-hand dealers transact business and the transactional records contained therein, this statute is unconstitutional facially and as applied in violation of Article 1 § 12 of the New York State Constitution (NYSC Article 1 § 12) (first cause of action). Similarly, to the extent that NYCC § 435 and § 436 also authorize the unfettered and limitless warrantless searches by the NYPD of the business premises of pawnbrokers and second-hand dealers for purposes of reviewing the transactional records therein, plaintiffs allege the foregoing statutes are unconstitutional facially and as applied in violation of NYSC Article 1 § 12 (second and third causes of action). Plaintiffs further allege that insofar as the Grasso memo and PG 214-38 are merely an opinion letter and statement of general policy, they are not law and cannot authorize the inspections listed therein (fourth and fifth causes of action). Moreover, insofar as both of the foregoing documents authorize the unfettered and warantless searches of those establishments housing pawn brokers and second-hand dealers, concomitantly authorizing the review of the transactional records listed therein, plaintiffs aver that the documents are unconstitutional facially and as applied, in violation of NYC Article 1 § 12 (*id*.). Because Local Law No. 149, promulgated in 2013, which amended NYCAC §20-267, now requiring that any records required to be kept under NYCAC § 20-273 by pawnbrokers and second-hand dealers be furnished to the NYPD on demand; NYCAC § 20-273, now requiring that

pawnbrokers create an electronic version of all transactional records for real time sharing with the NYPD; and § 20-277, which now requires that the electronic transaction records be uploaded to a website accessible by the NYPD, authorize the warrantless and unlimited access to those records and fail to promulgate any guidelines for such searches, the foregoing law and resulting amendments are unconstitutional facially and as applied in violation of the NYSC Article § 12 (sixth, seventh and eighth causes of action). Plaintiffs also allege that RCNY § 1-16, §21-03(a) and (b), §21-04(a) and (c), §21-07(a)-(f), and § 21-08, promulgated as a result of Local Law No. 149, which require pawnbrokers and dealers in second-hand merchandise to create electronic transaction records and upload the same to a web-based electronic transfer service designated by the NYPD known as Leads Online, who then makes those records available to the NYPD authorizes unbridled review akin to a warrantless search and thus they are unconstitutional facially and as applied, in violation of NYSC Article 1 § 12 (ninth and tenth causes of action). Plaintiffs allege that the disclosure of transactional information imposed by the foregoing statutes imposes an obligation to disclose personally identifiable customer information, which disclosure is barred by the Federal Gramm-Leach-Bliley Financial Services Modernization Act of 1999 (Gramm-Leach), which Act prevents a financial institution such as pawnbrokers from disclosing a customer's nonpublic information, except with exceptions not present here (eleventh and twelfth causes of actions). To the extent that the supremacy clause of the United States Constitution preempts state law when it conflicts with federal law, plaintiffs argue that the foregoing statutes are preempted by Gramm-Leach and, thus, the searches authorized by them are barred (*id*.). Based on the foregoing, plaintiffs seek a declaration that all the foregoing statutes are unconstitutional under [*3]NYSC Article 1 § 12 and because plaintiffs have demonstrated a likelihood of success on the merits, irreparable harm, and that the equities tip in their favor, a preliminary injunction and ultimately a permanent injunction enjoining defendants from enforcing them (thirteenth and fourteenth causes of actions).

Defendants' Motion to Dismiss

To the extent that defendants' motion for dismissal is dispositive - and for the reasons discussed below, denied - the Court will address it first. Defendants' motion pursuant to CPLR § 3211(a)(5) seeking dismissal of the entire action as barred by the six-year statute of limitations prescribed by CPLR § 213(1), is denied inasmuch as the continuous harm doctrine applies and the within action - insofar as it challenges the constitutionality of several laws and statutes, thus, has no applicable statute of limitations.

On a motion to dismiss a complaint pursuant to CPLR 3211 all allegations in the complaint are deemed to be true (*Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]; *Cron v Hargro Fabrics*, 91 NY2d 362, 366 [1998]). All reasonable inferences which can be drawn from the complaint and the allegations therein stated shall be resolved in favor of the plaintiff (*Cron* at 366). In opposition to such a motion a plaintiff may submit affidavits to remedy defects in the complaint (*id.*). If an affidavit is submitted for that purpose, it shall be given its most favorable intendment (*id.*) The court's role when analyzing the complaint in the context of a motion to dismiss, is to determine whether the facts as alleged fit within any cognizable legal theory (*Sokoloff v Harriman Estates Development Corp.*, 96 NY2d 409, 414 [2001]). In fact, the law mandates that the court's inquiry be not limited solely to deciding whether plaintiff has pled the cause of action intended, but instead, the court must determine whether the plaintiff has pled any cognizable cause of action (*Leon v Martinez*, 84 NY2d 83, 88 [1994] ["(T)he criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one."]).

CPLR § 3013, states that

[s]tatements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense.

As such, a complaint must contain facts essential to give notice of a claim or defense (*DiMauro v Metropolitan Suburban Bus Authority*, 105 AD2d 236, 239 [2d Dept 1984]). Vague and conclusory allegations will not suffice (*id.*); *Fowler v American Lawyer Media, Inc.*, 306 AD2d 113, 113 [1st Dept 2003]); *Shariff v Murray*, 33 AD3d 688 (2nd Dept. 2006); *Stoianoff v Gahona*, 248 AD2d 525, 526 [2d Dept 1998]). When the allegations in a complaint are vague or conclusory, dismissal for failure to state a cause of action is warranted (*Schuckman Realty, Inc. v Marine Midland Bank, N.A.*, 244 AD2d 400, 401 [2d Dept 1997]; *O'Riordan v Suffolk Chapter, Local No. 852, Civil Service Employees Association, Inc.*, 95 AD2d 800, 800 [2d Dept 1983]).

A defendant seeking dismissal of an action as barred by the applicable statute of limitations, bears the burden of establishing that the applicable statute of limitations expired prior to the commencement of the action (*Swift v New York Medical College*, 25 AD3d 686, 687 [2d Dept 2006]; *Gravel v Cicola*, 297 AD2d 620, 620 [2d Dept 2002]; *Duran v Mendez*, 277 AD2d 348, 348 [2d Dep 2000]). If defendant meets his burden, in order to avoid dismissal, it is incumbent upon the plaintiff to present evidence establishing that the cause of action falls within an exception to the statute of limitations (*Gravel* at 621).

It is well settled that "in cases where a constitutional question is involved or the legality or meaning of a statute is in question" (*Dun & Bradstreet, Inc. v City of New York*, 276 NY 198, 206 [1937]), an action for declaratory judgment is the appropriate means by which to challenge a law's constitutionality (*id.*; *Saratoga County Chamber of Commerce v Pataki*, 100 NY2d 801, 815 [2003] [Court held that plaintiff's challenge to the constitutionality of Governor's actions in entering into agreements allowing gambling on Indian reservations fell within the ambit of a declaratory judgment action and, thus, the six-year statute of limitations prescribed by CPLR § 213(1).]; *Costantakos v Board of Educ. of City of NY*, 105 AD2d 825, 825 [2d Dept 1984]; *Bunis v Conway*, 17 AD2d 207, [*4]208 [4th Dept 1962]).

While generally, the statute of limitations for a declaratory judgment action involving a constitutional question is six years as prescribed by CPLR § 213(1) (*Saratoga County Chamber of Commerce* at 801; *Costantakos* at 825), it is well settled that "no period of limitation at all is applicable to an action for a declaratory judgment in cases involving a continuing harm, such as the application of an invalid statute" (*Amerada Hess Corp. v Acampora*, 109 AD2d 719, 722 [2d Dept 1985]; *see Davis v Rosenblatt*, 159 AD2d 163, 168 [3d Dept 1990]). Whether the statute of limitations applies to a declaratory judgment action involving a constitutional question hinges, of course, on the allegations asserted and whether the unconstitutional conduct alleged poses a continuous harm. Such application is best highlighted by discussing the foregoing cases in detail. In *Saratoga County Chamber of Commerce*, where plaintiffs sought to declare that the Tribal-State Compact Between the St. Regis Mohawk Tribe and the State of New York - allowing the Tribe to conduct gambling, including baccarat, blackjack, craps and roulette, on the Akwesasne Reservation in Franklin County - the court held that the six-year statute of limitations prescribed by CPLR § 213(1) applied insofar as the Governor signed the compact authorizing the foregoing gambling activities on October 15, 1993 and the action was brought within six years of the publishing of the compact (*id.* at 815). Similarly, in *Costantakos*, the court held that the six-year statute of limitations prescribed by CPLR § 213(1) was applicable to plaintiff's claim that a bylaw excluding plaintiff's teaching experience for purposes of a salary credit was unconstitutional (*id.* at 825). In the foregoing cases, the applicability of CPLR § 213(1) was abundantly clear in that the actions involved declaratory judgment actions challenging the constitutionality of executive action and legislation respectively. While the continuous harm doctrine was never raised, it is clear that the same would have been inapplicable inasmuch as the conduct - the signing of a compact allowing gambling - and legislation - law depriving plaintiff of a salary credit - being challenged presented a one time rather than continuous harm.

By contrast, in *Amerada Hess Corp.*, the court held that plaintiff's challenge to the constitutionality of the Town Board's decision denying his application for the re-zoning of certain parcels of his land was an unconstitutional confiscation of property via a restrictive zoning ordinance (*id*. at 721). Because the court held that such denial harmed plaintiff every day, the court concluded that the six year statute of limitations urged by defendant, purportedly accruing on the date of the initial denial, was inapplicable because defendant's conduct constituted a continuing harm (*id*. at 722). Specifically, the court adopted the holding in *MacEwen v City of New Rochelle* (149 Misc 251 [Supreme Court Westchester County 1933]), which held that an unconstitutional ordinance

> until its repeal or a judicial declaration of its invalidity, the same constitutes at least the equivalent of a continuing invasion of plaintiff's property rights akin to a continuing trespass—a situation in which a new cause of action arises in plaintiff's favor against the defendant city each day

(*id*. at 254; *see Dowsey v Village of Kensington*, 257 NY 221, 228 [1931]).

Here, a review of the amended complaint, and more specifically paragraph 137, evinces that plaintiffs allege that "they have suffered *and continue to suffer irreparable harm*if an injunction is not granted (emphasis added)." Moreover, the allegations in the amended complaint evince that virtually all of the challenged statutes authorize the warrantless inspection of plaintiffs' business transaction records on a continuing basis. Specifically, GBL § 45 authorizes the inspection by the NYPD of a collateral loan broker's records at any reasonable time; RCNY 1-16(b) requires that second-hand dealer make those records required to be kept by by NYCAC § 20-273 - namely those records containing identifying information for those who transacted business with a second-hand dealer - available for inspection by the Commissioner of the NYCDCA on a continuing basis; NYCC § 435 grants the NYPD the authority to inspect the records of any business required to be licensed, which under NYCC § 436, again at any time includes pawnbrokers; and NYCC § 436 similarly grants the NYPD the power to inspect the books and establishments of pawnbrokers and second-hand dealers, again with no limitation on when those inspections can be conducted.

Based on the foregoing, insofar as on a motion to dismiss a complaint pursuant to CPLR [*5]3211 all allegations in the complaint are deemed to be true (*Sokoloff* at 414; *Cron*at 366). Here, according such truth to the amended complaint, it is clear that the statutes whose constitutionality is challenged herein pose a continuous harm. In fact, with the passage of Local Law No. 149, which amended NYCAC § 20-273

and § 20-277 to include an electronic records retention format allowing the real-time sharing of transaction records with the NYPD and also promulgated RCNY §21-03(a) and (b), §21-04(a) and (c), §21-07(a)-(f), and § 21-08 also requiring pawnbrokers and dealers in second-hand merchandise to create electronic transaction records and upload the same to a web-based electronic transfer service designated by the NYPD known as Leads Online, who then makes those records available to the NYPD, here, any fair reading of the amended complaint evinces that the foregoing statutes pose a continuing harm inasmuch plaintiffs are subjected to the statutes' requirements arguably on a daily basis.While it is true that generally, the statute of limitations for a declaratory judgment action involving a constitutional question is six years as prescribed by CPLR § 213(1) (*Saratoga County Chamber of Commerce* at 801; *Costantakos* at 825), it is equally well settled that "no period of limitation at all is applicable to an action for a declaratory judgment in cases involving a continuing harm, such as the application of an invalid statute" (*Amerada Hess Corp*. at 722; *Davis* at 168). Thus, here, defendants' motion seeking dismissal of the instant action on grounds that it is barred by the applicable statute of limitations is denied.

Defendants' motion seeking dismissal of the claims asserted by Lyons, Silverman, and Florez pursuant to CPLR §3211(a)(3) on grounds that they lack standing to sue for purported violations of their right to privacy under NYSC Article 1 § 12 is hereby denied insofar as the pleadings establish that the foregoing plaintiffs have been damaged and will continue to be by the dissemination of their respective transaction records memorializing business with non-party pawnbrokers and/or second-hand dealers.

It is well settled that in order to initiate suit, a party must have legal standing to bring such an action. Initially, legal standing hinged on the existence of a legal right, described as follows:

[t]he court has no inherent power to right a wrong unless thereby the civil, property, or personal rights of the plaintiff in the action or the petitioner in the proceeding are affected. The rights affected must be personal as distinguished from the rights in common with the great body of people

(*Schieffelin v Komfort*, 212 NY 520, 530 [1914]). Over time, however, the threshold inquiry with respect to standing has evolved, so that the relevant inquiry is now injury in fact (*Society of Plastics Industry, Inc. v County of Suffolk*, 77 NY2d 761, 772-773 [1991] ["Whether derived from the Federal Constitution or the common law, the core requirement that a court can act only when the rights of the party requesting relief are affected, has been variously refashioned over the years. Once a legal interests test requiring a litigant to allege injury to a legal interest derived from common or statutory law injury in fact has become the touchstone during recent decades. The existence of an injury in fact—an actual legal stake in the matter being adjudicated—ensures that the party seeking review has some concrete interest in prosecuting the action which casts the dispute in a form traditionally capable of judicial resolution" (internal citation and

quotation marks omitted)]). Under the injury in fact analysis standing exists when the plaintiff has sustained actual injury, meaning that he/she has an actual legal stake in the in the matter being litigated (*id*. at 773 ["Simply stated, a party must show that the in-fact injury of which it complains."]). In order to establish standing, however, not only must a plaintiff demonstrate, injury in fact, meaning actual harm, but a plaintiff must also establish that the injury falls within certain zones of interest protected by law (*id*.; *Caprer v Nussbaum*, 36 AD3d 176, 183 [2d Dept 2006]). An injury falls within the zone of interest if it falls "within the zone of interests or concerns sought to be promoted or protected by the statutory provision or recognized common-law relationship pursuant to which a defendant has acted" (*Caprer* at 183. Stated differently, and injury falls within the zone of interest if the law recognizes the injured party (*id*.), meaning that the injury falls within "the zone of interests or concerns sought to be promoted or protected by the statutory provision under which the agency has acted" (*New York State Ass'n of Nurse Anesthetists v Novello*, 2 NY3d 207, 211 [2004]; *Society of Plastics Industry, Inc*. at 774). When no is standing found, the "pathway to the courthouse is blocked" (*Saratoga County [*6]Chamber of Commerce, Inc*. at 812).

Thus, in *Society of Plastics Industry, Inc*., where plaintiffs - representatives of the plastics industry - sued to overturn a law banning the use of certain plastics by retail food establishments (*id*. at 764). The court dismissed the action concluding that plaintiffs lacked standing to sue because while arguably the law challenged - one banning the very products plaintiffs were in the business of manufacturing - would result in a financial loss to their members, their interests were only marginally related to the purposes of the statute in question (*id*. at 778). More specifically, the injury alleged fell outside the ambit of the zone of interest promoted by the statute challenged because the challenged was based on an environmental interests, which was not germane to plaintiffs' purpose - the sale of plastics (*id*. at 776). Conversely, in *Mahoney v Pataki* (98 NY2d 45 [2002]), the court found that plaintiffs, a group of private attorneys representing defendants in capital cases, had standing to seek a declaratory judgment authorizing legal and paralegal assistance fees under Judiciary Law § 35-b (*id*. at 50). More specifically, the court found that plaintiffs, who had the right to anticipate that pursuant to Judiciary Law § 35-b and its fee schedule, they would be compensated for fees incurred in the representation of criminal capital defendants, had, by defendants' denial of such fees incurred an injury in fact (*id*.). Moreover, the court held that plaintiffs were within the zone of interest for purposes of standing since while they were clearly not the intended beneficiaries of the statute, their interest, that of getting paid for providing legal services, was more than marginal (*id*.).

Here, again, taking all the allegations in the amended complaint - as the Court must, as true (*Sokoloff* at 414; *Cron* at 366) - the amended complaint sufficiently establishes that Lyons, Silverman, and Florez have standing to challenge the constitutionally of the statutes at issue. The amended complaint alleges that the foregoing plaintiffs, as customers of pawnbrokers and/or second-hand dealers, have had, and will continue to have their business transaction information provided to defendants and their agencies

pursuant to the statutes challenged. They further allege that these administrative and warrantless reviews are tantamount to searches, which, thus, violate NYSC Article 1 § 12, namely the security against unreasonable searches, seizures and interceptions.

As discussed above, under the injury in fact analysis, standing exists when the plaintiff has sustained actual injury, meaning that he/she has an actual legal stake in the matter being litigated (*Society of Plastics Industry, Inc.* at 773) and that the injury falls within certain zones of interest protected by law (*id.*; *Caprer* at 183), meaning it falls "within the zone of interests or concerns sought to be promoted or protected by the statutory provision or recognized common-law relationship pursuant to which a defendant has acted" (*Caprer* at 183). Since, an injury falls within the zone of interest if the law recognizes the injured party (*id.*), meaning that the injury falls within "the zone of interests or concerns sought to be promoted or protected by the statutory provision under which the agency has acted" (*New York State Ass'n of Nurse Anesthetists* at 211; *Society of Plastics Industry, Inc.* at 774), here, it is beyond cavil that the individually named plaintiffs establish standing to sue. First, to the extent that the foregoing plaintiffs allege that the statutes at issue violate NYSC Article 1 § 12, they allege injury each and every time their records have been or will be obtained by the warrantless review process promulgated by the statutes being challenged. Moreover, that the foregoing plaintiffs are the object of statutes being challenged insofar as it is the records of their transactions which the statutes seek to inspect is obvious. Equally evident is that insofar as the foregoing plaintiffs as private citizens have a right under NYSC Article 1 § 12 to be free of warrantless searches, the statutes challenged clearly impinge on that right. Accordingly, clearly the foregoing plaintiffs and their alleged injuries fall within the requisite zone of interest.

To the extent that defendants' argument on standing is that plaintiffs have suffered no injuries pursuant to the statutes challenged because they have no expectation of privacy with respect to the records whose warrantless review the statutes authorize, such argument is without merit. As will be discussed in detail hereinafter, *Glenwood TV v Ratner* (103 AD2d 322 [2d Dept 1984], *affd* 65 NY2d 642 [1985]), the case upon which defendants primarily rely for the foregoing proposition may indeed be dispositive if the challenge here were whether the statutes at issue violate the Fourth Amendment of the United States Constitution. However, such case is inapplicable where, as here, [*7]the allegation is that the statutes violate NYSC Article 1 § 12 (*see People v Keta* 79 NY2d 474 [1992]).

Plaintiffs' Motion, inter alia, Injunctive Relief

Plaintiff's motion seeking a (1) declaratory judgment declaring that the statutes challenged are unconstitutional; (2) a preliminary injunction enjoining defendants from enforcing and acting pursuant to the challenged statutes until the disposition of this action; and (3) a permanent injunction enjoining defendants from ever enforcing the challenged statutes is hereby granted, in part, and to the limited extent of granting them a preliminary injunction enjoining defendants from enforcing the statutes during the pendency of this action. The record before this Court establishes that the foregoing statutes, *inter alia*, fail to guarantee the certainty and regularity of application - necessary to provide a constitutionally adequate substitute for a warrant.

CPLR § 6301 describes the grounds upon which the court can grant a preliminary injunction and reads, in pertinent part, as follows:

A preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, or in any action where the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff.

"The function of a preliminary injunction is to provide a provisional remedy by maintaining the status quo pending a full hearing on the merits, rather than to determine the ultimate rights of the parties and mandate corrective action" (*Jamie B. v Hernandez*, 274 AD2d 335, 336 [1st Dept 2000]). Accordingly, the court should not, on a motion for a preliminary injunction, grant the ultimate relief sought in the underlying action (*id*. at 336).

Because a preliminary injunction substantially limits a defendant's rights and is, therefore, an extraordinary provisional remedy, it requires a special showing (*Margolies v Encounter, Inc.*, 42 NY2d 475, 479 [1977]. Accordingly, a preliminary injunction will only be granted when the party seeking such relief demonstrates a likelihood of ultimate success on the merits, irreparable injury if the preliminary injunction is withheld, and a balance of equities tips them in favor of the moving party (*Doe v Axelrod*, 73 NY2d 748, 750 [1988]; *61 West 62 Owners Corp. v CGM EMP LLC*, 77 AD3d 330, 334 [2010], *mod* 16 NY3d 822 [2011]; *Stockley v Gorelik*, 24 AD3d 535, 536 [2005]).

With respect to likelihood of success on the merits, the threshold inquiry is whether the proponent has tendered sufficient evidence demonstrating ultimate success in the underlying action (*Doe* at 750-751). While the proponent of a preliminary injunction need not tender conclusive proof beyond any factual dispute establishing ultimate success in the underlying action (Sau Thi *Ma v Xuan T. Lien*, 198 AD2d 186,

187 [1993], *lv dismissed* 83 NY2d 847 [1994]; *Ying Fung Moy v Hohi Umeki*, 10 AD3d 604, 605 [2004]), "[a] party seeking the drastic remedy of a preliminary injunction must [nevertheless] establish a clear right to that relief under the law and the undisputed facts upon the moving papers" (*Gagnon Bus Co., Inc. v Vallo Transp., Ltd.* 13 AD3d 334, 335 [2004]). This, of course, does not mean that plaintiff must conclusively establish guaranteed success on the merits and, thus, issues of fact raised by the defendant, cannot serve as a basis for denial of any motion seeking a preliminary injunction (*Ma* at 187; *Moy* at 605; *Stockely* at 536;*Demartini v Chatham Green, Inc.*, 169 AD2d 689, 689 [1st Dept 1991]). In *Doe*, plaintiffs, a coalition of various members of the medical and pharmaceutical communities sued seeking declaration that 100 NYCRR 80.67 - which imposed strict control on certain tranquilizing medications - be de declared unconstitutional (*id*. at 749). Plaintiffs also sought a preliminary injunction enjoining defendant, the State from enforcing the challenged regulation (*id*.) The court denied plaintiff's request for a preliminary injunction holding that because plaintiff's failed to establish that defendant "acted outside of the authority constitutionally delegated to him under the Public Health Law or that the regulation was so lacking in reason for its promulgation that it [was] essentially arbitrary" (*id*. at 750 [internal citations and quotation marks omitted]), they failed to establish a likelihood of success on the merits [*8](*id*.). Conversely, in *Stockley*, the court granted plaintiffs' - owners of a condominium - application for a preliminary injunction thereby enjoining defendants - also owners of the condominium - from building a structure, which plaintiffs established would "encroach upon portions of the common elements of the condominium, which may require an easement the defendants did not seek, and would deprive the plaintiffs of the use and enjoyment of certain common elements, as well as portions of their own units" (*id*. at 536). The court held that plaintiffs' evidence established a likelihood of success on the merits insofar as they demonstrated that they had initially authorized defendants' proposed construction without being fully apprised of its extent, which didn't become known until plans were drawn (*id*.).

With regard to irreparable harm, generally the inquiry is whether in the absence of a preliminary injunction, usually to preserve the status quo, any judgment on the underlying action would be rendered ineffectual (*Ma* at 186; *Moy* at 604). When this is the case, the proponent of a preliminary injunction has demonstrated irreparable harm. In *Ma*, plaintiff sued to recover payments from a winning lottery ticket, such winnings held by the defendant (*id*. at 186). Finding that a preliminary injunction was warranted, the court held that since it was clear that defendant intended to spend the proceeds at issue - intending to share the funds with his family - it was clear that absent a preliminary injunction, plaintiff would be irreparably harmed inasmuch as any judgment would be rendered ineffectual (*id*. at 186). The court in *Moy*, similarly held that plaintiff had demonstrated irreparable harm but for the grant of preliminary

injunction. In that case, plaintiff sued to void the transfer of her ownership interest in real property on grounds that such transfer was obtained by fraud (*id*. at 604). In holding that plaintiff established entitlement to a preliminary injunction, the court noted that "[t]he purpose of a preliminary injunction is to maintain the status quo and prevent the dissipation of property that could render a judgment ineffectual" (*id*. 604), and, thus, that absent the preliminary injunction, defendant could transfer the property thereby irreparably harming plaintiff (*id*.).

With regard to the balancing of equities, the same requires that the court look at the prejudice which may accrue to the parties in the event the application for an injunction is granted or denied (*Ma* at 186-187), and usually the equities tip in favor of the party who would be irreparably harmed absent the grant of a preliminary injunction (*id*. at 187). Thus, should the court determine that plaintiff would be irreparably harmed by denial of the preliminary injunction while defendant would suffer little or no harm if said injunction is granted, then a preliminary injunction should be granted (*id*.).

Pursuant to CPLR § 6312(b),

prior to the granting of a preliminary injunction, the plaintiff shall give an undertaking in an amount to be fixed by the court, that the plaintiff, if it is finally determined that he or she was not entitled to an injunction, will pay to the defendant all damages and costs which may be sustained by reason of the injunction

Thus, an undertaking is a condition precedent to the grant of a preliminary injunction and such requirement cannot be waived by the court (*Rourke Developers Inc. v Cottrell-Hajeck Inc.*, 285 AD2d 805, 805 [3d Dept 2001]; *Smith v Boxer*, 45 AD2d 1054, 1054 [2d Dept 1974]). The amount of such undertaking is solely within the court's discretion and should be as much as rationally necessary to compensate defendant for any potential damages should it later be determined that a preliminary injunction was unwarranted (*Clover St. Assoc. v Nilsson*, 244 AD2d 312, 313 [2d Dept 1997]; *Kazdin v Putter*, 177 AD2d 456, 457 [1st Dept 1991]). The undertaking, thus, represents that the amount and indeed the limit of damages to which defendant will be entitled if it is determined that no preliminary injunction ought to have been granted (*Bonded Concrete, Inc. v Town of Saugerties*, 42 AD3d 852, 855 [3d Dept 2007]).

Legislative enactments are generally "afforded a strong presumption of constitutionality, imposing a heavy burden on the party trying to overcome that presumption by proof beyond a reasonable doubt" (*Murtaugh v New York State Dept. of Environmental Conservation*, 42 AD3d 986, 988 [4th Dept 2007], *lv dismissed* 9 NY3d 971 [2007]; *Matter of Carpenter Tech. Corp. v [*9]Commissioner of Taxation & Fin.*, 295 AD2d 830, 834 [3d Dept 2002] *lv denied* 99 NY2d 501 [2002]). Thus,

[a] party mounting a facial constitutional challenge bears the substantial burden of demonstrating that in any degree and in every conceivable application, the law suffers wholesale constitutional impairment. In other words, the challenger must establish that no set of circumstances exists under which the Act would be valid

(*Matter of Moran Towing Corp. v Urbach*, 99 NY2d 443, 448 [2003] [Court denied facial constitutional challenge to Tax Law § 301 and §301-a, which law imposed a tax upon the fuel consumed by vessels engage in interstate commerce and traveling in New York waters. Court held that while in some respects the statute was facially unconstitutional, it could nevertheless be applied in a constitutional way.] *see Cohen v State of New York*, 94 NY2d 1, 8 [1999]). It is clear, however, that when it is established that legislation or governmental action at issue violates the constitution, a party is entitled to declaratory relief (*Saratoga County Chamber of Commerce* at 810-825 [Court held that Governor's decision to enter into agreement permitting gambling on an Indian reservation was legislative in nature and, thus, violated the constitutional doctrine of separation of powers. Court, thus, held that the agreement challenged was unconstitutional, void, and unenforceable.]).

The Fourth Amendment to the United States Constitution (Fourth Amendment) reads as follows:

[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

While not immediately apparent from the plain reading of the Fourth Amendment, the United States Supreme Court has made it clear that the Fourth Amendment does not protect a person's general right to privacy and instead protects a person's right to privacy *vis-a-vis* the government and interference by the same (*Katz v United States*, 389 US 347, 350-351 ["the Fourth Amendment cannot be translated into a general constitutional right to privacy. That Amendment protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all. Other provisions of the Constitution protect personal privacy from other forms of governmental invasion. But the protection of a person's general right to privacy — his right to be let alone by other people — is, like the protection of his property and of his very life, left largely to the law of the individual States" (internal quotation marks omitted).])

Thus, generally, the test for whether the Fourth Amendment has been violated hinges on whether a person has a subjective expectation of privacy with respect to governmental intrusion and whether that expectation is one that society is prepared to recognize as reasonable; in other words, whether that expectation objectively reasonable (*id*. at 361). To that end, the United States Supreme Court has held that warrantless searches of commercial establishments, which searches are pursuant to statute and to, *inter*

alia, ensure compliance with those statutes, does not violate the Fourth Amendment (*Donovan v Dewey*, 452 US 594 [1981]). This is because

unlike searches of private homes, which generally must be conducted pursuant to a warrant in order to be reasonable under the Fourth Amendment, legislative schemes authorizing warrantless administrative searches of commercial property do not necessarily violate the Fourth Amendment. The greater latitude to conduct warrantless inspections of commercial property reflects the fact that the expectation of privacy that the owner of commercial property enjoys in such property differs significantly from the sanctity accorded an individual's home, and that this privacy interest may, in certain circumstances, be adequately protected by regulatory schemes authorizing warrantless inspections

(*Donavan* at 598-599). To pass constitutional muster, however, the warrantelss inspections must be reasonable, meaning, authorized by law and necessary to further governmental interests (*id*. at [*10]599). Moreover, while warrantless inspections of commercial property do not violate the Fourth Amendment when necessary to further a regulatory scheme and such regulatory presence is sufficiently comprehensive and defined such that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes, such inspections do require a warrant when their occurrence is so random, infrequent, or unpredictable that the owner, for all practical purposes, has no real expectation that his property will from time to time be inspected by government officials (*id*. at 599). In fact, where the government "has authorized inspection but made no rules governing the procedures that inspectors must follow, the Fourth Amendment and its various restrictive rules apply" (*Colonnade Catering Corp. v U.S.*, 397 US 72, 77 [1970]), thereby making a warrant necessary to protect the owner from the "unbridled discretion [of] executive and administrative officers" (*Marshall v Barlow's, Inc.*, 336 US 307, 323 [1978]).

Thus, in *Donavan*, where the government sued seeking to enjoin a mining company from refusing to allow the government to inspect its quarries, the court granted judgment in favor of the government upon concluding that the warrantless searches authorized by § 103(a) of the Mine Safety and Health Act of 1977 did not violate the Fourth Amendment (*id*. at 596). Saliently, the Court held that the statute authorizing the warrantless inspection of the quarries prescribed a pervasive inspection program with sufficient certainty and regularly so as to serve as an adequate substitute for warrant (*id*. at 603). The Court so held because the statute required inspection of all mines, specifically defining the frequency of inspections, the standards with which a mine operator was required to comply and such standards were all specifically set forth in the statute (*id*. at 603-604). The Court further held that rather than leaving the frequency and purpose of inspections to the unchecked discretion of government officers, the statute established a predictable and guided federal regulatory presence (*id*. ["the operator of a mine was "not left to wonder about the purposes of the inspector or the limits of his task." (internal quotation marks

omitted)]). By contrast, in *Marshall*, the United States Supreme Court held that the Occupational Safety and Health Act, which empowered government agent to search the work area of any employment facility within OSHA's jurisdiction for safety hazards and violations, was unconstitutional insofar as it purported to authorize inspections without warrant or its equivalent (*id*. at 307). The court so held because the act which authorized the foregoing inspections failed as an adequate substitute for a warrant because it devolved "almost unbridled discretion upon executive and administrative officers, particularly those in the field, as to when to search and whom to search," and unlike a warrant, it failed to "advise the owner of the scope and objects of the search, beyond which limits the inspector is not expected to proceed" (*id*. at 323).

Notably, under the Fourth Amendment, the foregoing requirements are obviated when the statute authorizing an administrative warrantless search is of a pervasively regulated businesses or closely regulated industry, meaning those which have long been the subject of close supervision and inspection (*id*. at 315; *see also U.S. v Biswell*, 406 US 311 [1972]; *Colonnade Catering Corp. v United States*, 397 US 72, [1970]). In such cases, the subjects of the administrative searches, because the history of government oversight is such that no reasonable expectation of privacy can be claimed - because the person engaged in such business accepts, is aware, and consents to regulatory restrictions placed upon him, including random warrantless searches - the threshold for a warrantless search is dimisnished (*Marshall* at 313). The foregoing exception is highlighted by *Colonnade Catering Corp.*, where the United States Supreme Court, although finding that the government's conduct of breaking into a commercial establishment licenced to sell liquor violated the Fourth Amendment, noted that the statute authorizing the warrantless inspection of such premises did not similarly violate the Fourth Amendment (*id*. at 77). The court, while finding that the forcible entry into the commercial premises objectionable, nevertheless held the statute's authorization of a warrantless search was not. (*id*. at 77). In fact, in*Colonnade*, the statute at issue was 26 USC § 5146(b), which read that

[t]he Secretary or his delegate may enter during business hours the premises (including places of storage) of any dealer for the purpose of inspecting or examining any records or other documents [*11]required to be kept by such dealer under this chapter or regulations issued pursuant thereto and any distilled spirits, wines, or beer kept or stored by such dealer on such premises.

(*id*. at 74). Certainly the statute at issue in *Colonnade*, failed to promulgate the pervasive inspection program - replete with sufficient certainty and regularly so as to serve as an adequate substitute for warrant requisite - required by (*Donovan* at 603). However, as discussed both in *Marshall* and *Biswell*, this shortcoming did not violate the Fourth Amendment because the alcohol industry was one with such a

history of government oversight, there could be no reasonable expectation of privacy (*Marshall* at 313; *Biswell* at 35). Hence, the court found the search authorized by the statute being challenged to be constitutional (*id*.).

With respect to the Fourth Amendment and its impact on warrantless administrative searches of commercial establishments and their records, New York has followed the United States Supreme Court's precedent. Thus, in *Glenwood TV, Inc*., (103 AD2d 322), the Appellate Division concluded that NYCAC § B32-472.0 and § 773-13.0 were not unconstitutional under the Fourth Amendment (*id*. at 323). Specifically, in *Glenwood TV, Inc*., petitioners, television/radio repair establishments challenged the constitutionality of the foregoing statutes, specifically, NYCAC § B32-472.0(1), requiring that petitioner's invoices "be open and available for reasonable inspection by the commissioner or other law enforcement officials" (*Glenwood TV, Inc*. at 325). The foregoing challenge was interposed in opposition to administrative proceedings arising from petitioner's refusal to furnish invoices upon being requested to do so by respondents, employees of NYCDCA (*id*. at 324-325). Ultimately, after having lost at the administrative level, petitioners commenced an Article 78 proceeding/declaratory judgment action saliently averring that the administrative searches prescribed by NYCAC § B32-472.0(1) were tantamount to warrantless searches, violating their rights to privacy and, thus, violating their Fourth Amendment rights against warrantless searches and seizures (*Glenwood TV, Inc*. at 326-327). Holding in favor of the respondents, the court held that records required to be kept by a business for purposes of compliance with statutory license requirements were not afforded any privacy and that the "Fourth Amendment is satisfied if the authority to inspect is exercised reasonably and if judicial review is available before a person is ultimately required to submit to an inspection" (*id*. at 328-329). Relying on *Donavan*, the court noted that there were limits to the scope of a warrantless search, such that unbridled administrative searches were inappropriate (*id*. at 330). Nevertheless, the court held that inasmuch as the inspections were limited to required records and the licensees' public areas, the statutory safeguards were sufficient to protect petitioners' legitimate privacy concerns and that the statutes' certainty and regularity, was "sufficiently tailored to goals and enforcement needs" (*id*. at 330), thereby providing a constitutionally adequate substitute for a warrant (*id*.). Significantly, in *Glenwood TV, Inc.,* the court found it important to note that the "discretion [of those performing the administrative searches] is limited through the use of a standard uniform checklist issued to inspectors, and the employment of a computerized random selection process" (*id*. at 330). This is significant because in this Court's view, on its face, NYCAC § B32-472.0(1) - which failed to particularize how and when searches would be conducted, failed to meet the standard in *Donavan*, namely the promulgation of a pervasive inspection program - replete with sufficient certainty

and regularly so as to serve as an adequate substitute for warrant requisite (id. at 603). Thus, apparently, in *Glenwood TV, Inc.*, the court concluded that an otherwise facially unconstitutional statute could survive if constitutional in its application, which is, of course, consonant with the test set by *Matter of Moran Towing Corp*. at 448).

With respect to a constitutional challenge of statutes authorizing warrantless administrative searches, to survive State constitutional scrutiny, when it is alleged that the statute violates NYSC Article 1 § 12, case law imposes a significantly higher burden (*Keta*, 79 NY2d 474; *People v Burger*, [*12]67 NY2d 338 [1986], revd *New York v Burger*, 482 US 691 [1987][FN1]). In *Keta*, the court actually resolved two appeals, the first was *People v Scott* and the second was *Keta*. While the court's decision in *Scott* is did not address administrative warrantless searches of commercial establishments, *Scott* bears discussion, because the court unequivocally discussed New York's view on Fourth Amendment Jurisprudence and more importantly how the same differs from the law governing NYSC Article 1 § 12. In *Scott*, the Court of Appeals was asked to decide whether a warrant to search defendant's property, obtained after the police and a private citizen entered defendant's property, uninvited, and observed that the defendant was growing marihuana should lead to the suppression of the foregoing contraband (*id*. at 479). The court, rejecting the United State Supreme Court's holding in *Oliver v United States* (466 US 170 [1984]) - which held that neither the Fourth Amendment nor NYSC Article 1 § 12 conferred a right to privacy with respect to open fields or lands, even if signs to the contrary were posted - instead embraced the approach enunciated by *Katz* (389 US 347, 60-362) - namely whether a right to privacy exists depends on (1) whether the individual has manifested a subjective expectation of privacy from the challenged search; and (2) if so, whether society would find that expectation objectively reasonable" (*Scott* at 488-490 ["These reasons we are convinced, require us to reject Oliver and to turn instead to our State Constitution for the protection of our citizens' rights."]). The court, however, went further, noting that reasoning in *Oliver* was "not acceptable as a justification under article I, § 12" (*Scott* at 489), that the "texts of article I, § 12 [FN2] and the Fourth Amendment are not the same" (*id*. at 486), that "under the law of this of this State the citizens are entitled to more protection [than was accorded by *Oliver* with respect to NYSC Article 1 § 12]" (*id*. at 486), and that it was not required to

adopt any rigid method of analysis which would, except in unusual circumstances, require us to interpret provisions of the State Constitution in "Lockstep" with the Supreme Court's interpretations of similarly worded provisions of the Federal Constitution

(*id*. at 490).

Against this backdrop, the court in *Keta* was tasked with determining whether VTL §415-a(5)[FN3] - which authorized the police to conduct random and warrantless searches of vehicle dismantling businesses to determine whether such businesses were trafficking in stolen automobile parts - was constitutional under NYSC Article 1 § 12 (*Keta* at 492). The court concluded that although the foregoing statute was found constitutional under the Fourth Amendment by the United States Supreme Court in *New York v Burger* (482 US 691 [1987]), such statute was unconstitutional under NYSC Article 1 § 12 (*Keta* at 492). In *Keta*, defendant sought to appeal the denial of his motion seeking to suppress evidence, which evidence resulted in criminal charges against him (*id*. at 492-493). Such evidence was seized after members of the NYPD arrived at defendant's vehicle dismantling operation and announced they were there to perform an administrative inspection pursuant to VTL § 415-a(5) (*id*.). Defendant obliged and the officers proceeded to scan the vehicle identification numbers of several vehicles, discovering them to be stolen (*id*.). Defendant was arrested and sought to suppress the physical evidence on grounds that it was obtained pursuant to VTL § 415-a(5), which defendant argued was facially unconstitutional insofar as it violated NYSC Article 1, § 12 (*id*.).

In *Keta*, the court once again reiterated its obligation to interpret the provisions of New York's constitution independent of any existing federal analogue (*id*. at 495-496). Specifically the court stated

> that in determining the scope of the guarantees contained in our State Constitution, we—consistent with well-settled principles of federalism—are not bound by decisions of the Supreme Court construing similar provisions of the Federal Constitution

(*id*. at 495-496). Thus, while acknowledging that the Court in *Berger*, found that VTL § 415-a(5), and the warrantless searches it authorized, did not run afoul of the Fourth Amendment, the Court in *Keta* stated that

> [o]ur firm and continuing commitment to protecting the privacy rights embodied within article I, § 12 of our State Constitution leads us to the conclusion that Vehicle and Traffic Law § 415-a (5) (a)'s provisions for warrantless, suspicionless searches of business premises cannot withstand challenge under our State Constitution. While State and Federal uniformity is a worthwhile goal in constitutional decision-making, that goal must yield to the need for a predictable, structured analysis, lest the rules governing official intrusions on individuals' privacy become muddied and the constitutional guarantees represented by article I, § 12 concomitantly diluted. Nowhere is that danger more evident than in this context, where the underlying

issue involves the degree to which government inspectors may enter upon and search commercial establishments without either particularized suspicion (much less probable cause) or advance judicial oversight

(i*d*. at 497 [internal citations and quotations marks omitted]).

Thus, the court in *Keta* concluded that VTL § 415-a(5), authorizing warrantless administrative searches was unconstitutional for two reasons. First, the Court noted that administrative warrantless searches undertaken solely to uncover evidence of criminality could not fall within the ambit of administrative search exception to the warrant requirement imposed by the [*13]Fourth Amendment and indeed NYSC Article 1 § 12 (*id*. at 498). Second, and indeed the gravamen of the courts decision, it held that, even if, as the court in*Berger* concluded, defendants' industry was highly regulated, "the administrative search provisions of Vehicle and Traffic Law § 415-a (5) (a) cannot pass constitutional muster because the essential element of pervasive governmental supervision is lacking" (*id*. at 499). Thus, the court in *Keta* noted that in order to fall within NYSC Article 1 § 12's warrant exception, the regulatory scheme giving rise to warrantless administrative searches must be pervasive and include detailed standards in matters such as the operation of the business and the condition of the premises (*id*. at 499). The court, for purposes of constitutionality, further found it fatal that VTL § 415-a(5) failed to delineate rules, such as the minimum or maximum number of times that warrantless searches would ensue and failed to prescribe standards or required practices beyond the maintenance of a police book, which book memorialized transactions (*id*. at 499-500). Lastly, the court noted that the statute failed to set any limits upon the searches beyond requiring that they be performed during business hours and, as such, the statute granted unlimited discretion and failed to minimize the risk of arbitrary and/or abusive enforcement (*id*. at 500).

Dismissing the import of "the means to end" approach, which the court in *Berger* and the dissent in *Keta* found compelling, namely, the government's substantial interest in conducting warrantless inspections to deter crime, the Court in *Keta* stated

[f]or the same reasons, the dissent's reliance on the staggering statistics attesting to the growth of automobile theft in New York and the economic burdens such crime imposes are hardly a persuasive ground for relaxing article I, § 12's proscription against unreasonable searches and seizures. The alarming increase of unlicensed weapons on our urban streets and the catastrophic rise in the use of crack cocaine and heroin are also matters of pressing social concern, but few would seriously argue that those unfortunate facets of modern life justify routine searches of pedestrians on the street or any other

suspension of the privacy guarantees that are there to protect all of our citizens. The fact is that, regrettably, there will always be serious crime in our society, and there will always be upsurges in the rate of particular crimes due to changes in the social landscape. Indeed, the writs of assistance were themselves a response of the colonial government to an unprecedented wave of criminal smuggling—a crime that also led to intolerable economic losses

(*id*. at 500-501 [internal quotation marks omitted]).

Here, this Court need look no further than the pleadings and the language of the statutes being challenged to conclude that they appear to run afoul of NYSC Article §12. As just discussed, a statute authorizing warrantless administrative searches of a commercial establishment violates NYSC Article § 12 if it authorizes such search solely to uncover evidence of criminality (*id*. at 498). More importantly, such statute also violates NYSC Article 1 § 12, irrespective of whether it applies to a highly regulated industry, if it fails (1) to delineate rules, such as the minimum or maximum number of times that warrantless searches could ensue and fails to prescribe standards or required practices beyond the maintenance of a transaction records (*id*. at 499-500); and (2) to set any limits upon the searches beyond requiring that they be performed during business hours, such that the statute grants unlimited discretion, thus, failing to minimize the risk of arbitrary and/or abusive enforcement (*id*. at 500). In other words, to survive constitutional muster, the statute prescribing the warrantless administrative search or review of records must prescribe pervasive governmental supervision (*id*. at 499).

Here, each and every statute challenged suffers from the second basis upon which the court in *Keta* found that VTL § 415-a(5) is unconstitutional insofar as it violates NYSC Article 1 §12, namely, the absence of pervasive governmental supervision. To be sure, GBL § 45 requires that books and any and all other records kept by collateral loan brokers be, at all reasonable times, open to inspection by members of the New York City Police Department (NYPD). Beyond that, GBL § 45 fails to prescribe the time and frequency of the inspections and fails to set limits on those inspections.

Similarly, RCNY § 1-16(b) authorizes the Commissioner of NYCDCA or its representative to inspect the records required by Title 20 of the NYCAC - which pursuant to NYCAC § 20-273, [*14]include a description of every article sold or purchased and the name address, and description of the person to whom the article was sold or from whom it was purchased - to inspect those records during business hours. While RCNY § 1-16(c) mandates inspections at least once every two years, it nevertheless fails to prescribe how the inspections are to be conducted and fails to set limits on the actions of those inspections.

NYCAC § 20-277, promulgated after the enactment of Local Law No. 149 in 2013 requires that dealers of second-hand articles and pawnbrokers maintain the records required by NYCAC § 20-273 in electronic form and in a manner allowing real-time sharing via a website designated by the police commissioner. Because of Local Law No. 149, NYCAC § 20-273 and § 20-277 now have an electronic records retention component mandating that the foregoing electronic records (previously only required to be maintained in non-electronic form and subject only to an on premises inspection) shall be open to the inspection of any police officer, the commissioner or any departmental inspector, judge of the criminal court, or person duly authorized in writing for such purposes by the commissioner or by any judge of the criminal court, who shall exhibit such written authority to the dealer and such records shall also be open to the inspection of any official or other person identified in, or duly authorized in writing pursuant to, any other applicable state or local law. Thus, neither NYCAC § 20-273 nor § 20-277 prescribe limits on the inspection of records they authorize nor do they promulgate the frequency of inspections and how the same should be performed.

New York City Charter (NYCC) § 435 grants the police the authority to inspect and observe any businesses required to have licences, which pursuant to NYCC § 436, includes pawn brokers and dealers of second-hand merchandise. NYCC § 436 also grants the police the power to inspect the owners of such establishments, their clerks, employees, books, premises, and merchandise in their possession. Neither of the foregoing two statutes, however, prescribe limits on the inspection of records they authorize nor do they promulgate the frequency of inspections and how the same should be performed.

Lastly, RCNY §21-03(a) and (b), §21-04(a) and (c), §21-07(a)-(f), and § 21-08, promulgated as a result of Local Law No. 149 require pawnbrokers and dealers in second-hand merchandise to create electronic transaction records and upload the same to a web-based electronic transfer service designated by the NYPD known as Leads Online, who then makes those records available to the NYPD. Again, the foregoing statutes fail to prescribe limits for the review of the records required to be disclosed and, in fact, in requiring the daily disclosure of those records seem to vest with the NYPD the unbridled discretion which even the court in *Glenwood TV, Inc.*, would invalidate a statute authorizing warrantless searches(103 AD2d, 322, 330).

Based on the foregoing, plaintiffs have established entitlement to a preliminary inunction, enjoining defendants from enforcing any of the statutes challenged herein.

As discussed above, a preliminary injunction shall be granted when the party seeking such relief demonstrates a likelihood of ultimate success on the merits, irreparable injury if the preliminary injunction is withheld, and a balance of equities tipping in favor of the moving party (Doe, 73 NY2d 748, 750; 61 West

62 Owners Corp., 77 AD3d 330, 334; Stockley, 24 AD3d 535, 536). Here, on this record, plaintiffs have established that insofar as the statutes herein suffer the same constitutional afflictions as the statute in *Keta*, the foregoing statues appear to be facially unconstitutional. Significantly, it appears that they suffer from a constitutional impairment because it is likely that no set of circumstances exists under which they can be validly applied (*Matter of Moran Towing Corp.*, 99 NY2d 443, 448). Specifically, at this stage, it is hard to fathom how the foregoing statutes - bereft of any standards on the frequency of searches, setting virtually no limit on how said searches will be conducted and thus, conferring unfettered discretion upon the defendants suffer from the very afflictions the court in *Keta* held afflicted VTL § 415-a(5) - can, in light of their facial unconstitutionality born by this record, be constitutionally applied. In fact, as noted in footnote 1, *supra*, to the extent that the court in *Keta* adhered to the ruling in *Burger* (67 NY3d 338) (*see Keta* 498), it seems that the Court's holding in*Burger* invalidating GBL § 436 stands (*Burger*, 67 NY2d 338, 435 ["Because New York City Charter § 436 and Vehicle and Traffic [*15]Law § 415-a (5) (a) permit such warrantless searches, they are facially unconstitutional."]), which, thus, bolsters this Court's grant of the preliminary injunction.

While arguably, the Grasso memo and PG 214-38 fill the proverbial gap in the foregoing statutes by promulgating the very standards for warrantless inspections which should have been written into the statutes, such argument is, at best, premised on *Glenwood TV, Inc.* (103 AD2d 322, 330 ["Parenthetically we note that discretion is limited through the use of a standard uniform checklist issued to inspectors, and the employment of a computerized random selection process."]), which as discussed does not control where, as here, the allegations are violations of NYSC Article 1 § 12. Thus, since with respect to likelihood of success on the merits, the threshold inquiry is whether the proponent has tendered sufficient evidence demonstrating ultimate success in the underlying action (Doe at 750-751), here, plaintiffs have met their burden.

The Court emphasizes that the foregoing analysis and conclusions are solely a determination that plaintiffs demonstrate a likelihood of success on the ultimate merits of this action *and not* a decision that plaintiffs will ultimately prevail. Given the burden prescribed by our case law, in any action where a preliminary injunction is sought, a court must necessarily discuss the merits of the action and for purposes of assessing whether to grant a preliminary injunction, determine whether the proponent of such relief is likely to prevail on the merits. Thus, the line the court must tread is fine, since it must refrain from making determinations best left for a motion for summary judgment, which of course, here, as discussed below, is premature.

Additionally, insofar as with regard to irreparable harm generally the inquiry is whether in the absence of a preliminary injunction, usually to preserve the status quo, any judgment on the underlying action would be rendered ineffectual (*Ma*, 198 AD2d 186, 186; *Moy*, 10 AD3d 604, 604), here, insofar as plaintiffs allege continuos harm by the alleged violation of their rights under NYSC Article 1 §12, especially with respect to the portions of the statutes that require the daily disclosure of records via electronic means, it is clear that should the Court not grant the preliminary injunction it would in large measure render any eventual judgment in plaintiffs' favor ineffectual.

Lastly, insofar as with respect to irreparable harm, generally the inquiry is whether if in the absence of a preliminary injunction, usually to preserve the status quo, any judgment on the underlying action would be rendered ineffectual (*Ma* at 186; *Moy* at 604), as just noted, it can hardly be credibly argued that should the Court and/or a jury ultimately conclude that plaintiffs should prevail, that any of enumerable warrantless searches or review of records which will inevitably ensue in the interim are not tantamount to irreparable harm.

Logically, if the foregoing statutes ought not be enforced during the pendency of this action, then it is axiomatic that the Grasso memo - promulgating guidelines based on the foregoing statutes and describing how the NYPD should perform administrative inspections of pawnbrokers and dealers of second-hand merchandise pursuant to the same - and PG 214-38 - promulgating a comprehensive inspection procedure for the transaction records pawnbrokers and dealers in second-hand goods are required to maintained under the foregoing statutes - should similarly be the subject of a preliminary injunction enjoining the NYPD from conduction any of the inspections prescribed therein.

The Court notes that the parties fail to suggest and discuss the amount of an undertaking plaintiffs will be required to post now that a preliminary injunction has been granted. Such undertaking is mandatory (*Rourke Developers Inc.* at 805; *Smith* at 1054), and the amount of such undertaking, solely within this Court's discretion, should be as much as rationally necessary to compensate defendants for any potential damages should it later be determined that a preliminary injunction was unwarranted (*Clover St. Assoc.* at 313;*Kazdin* at 457). Here, given the nature of the litigation and the fact that during the pendency of this litigation - where defendants will be enjoined from enforcing the warrantless inspections prescribed by the statutes being challenged - they will argue save money by not having to perform inspections, the measure of damages should it later be determined that no preliminary injunction was warranted is rather negligible. Indeed, the same can be inferred by defendants' failure to address the issue by suggesting an appropriate amount. Nonetheless, the Court can envision a situation where if it is later determined that the statutes herein [*16]are constitutional such that a preliminary injunction should not have been granted, defendants

will have to perform a legion of inspections to make up for the wholesale cessation of inspections authorized by the statutes challenged. This could result in the need for added personnel and a spike in defendants' payroll obligations. Thus, the Court, in its discretion will require plaintiffs to post an undertaking of §150,000.

Plaintiffs' motion seeking a permanent injunction and declaration that the challenged statutes are unconstitutional is hereby denied. Such relief is akin to summary judgment, which cannot be granted at this stage in the litigation.

CPLR §3212(a), the section governing the time within which to make a motion seeking summary judgment reads that such relief can only be accorded "after issue has been joined." Thus, it is well settled that a motion for summary judgment can only be made after the joinder of issue, meaning after the service of a responsive pleading (*Manhattan Real Estate Equities Group, LLC v Pine Equity NY, Inc.*, 27 AD3d 323, 323 [1st Dept 2006]; *Costalas v Amalfitano*, 305 AD2d 202, 204 [1st Dept 2003]; *Yule v New York Chiropractic College*, 43 AD3d 540, 541 [3d Dept 2007]; *Lockheed Martin Corporation v Aatlas Commerce Corp.*, 283 AD2d 801, 802 [3d Dept 2001]. Any motion made prior to joinder of issue must, therefore, be denied (*Manhattan Real Estate Equities Group, LLC.* at 323; *Costalas* at 204).

Here, defendants have yet to interpose an answer and in fact, seek leave to interpose the same after the instant motion is decided.

Having decided that plaintiffs have established entitlement to a preliminary injunction on the foregoing grounds, the Court need not determine whether such relief is required on grounds that the statutes being challenged violate Gramm-Leach. It is hereby

ORDERED upon plaintiff's posting of an undertaking in the amount of $150,000, defendants be hereby enjoined from enforcing any of the statutes which are the subject matter of this action - namely General Business Law § 45, New York City Charter § 435 and §436, Local Law No. 149 and its resulting amendments to New York City Administrative Code §20-267, § 20-273, 20-277, Rules of the City of New York § 1-16, §21-03(a) and (b), §21-04(a) and (c), §21-07(a)-(f), and § 21-08 - pending further order of this Court. It is further

ORDERED that defendants be hereby are enjoined from enforcing any of the procedures outlined in the Grasso Memo and PG 214-38, pending further order of this Court . It is further

ORDERED that defendants serve an answer to the Amended Complaint within thirty (30) days of being served with a copy of Decision and Order with Notice of Entry. It is further

ORDERED that plaintiffs serve a copy of this Decision and Order with Notice of Entry upon plaintiffs within thirty (30) days hereof.

This constitutes this Court's decision and Order.

Dated : June 3, 2015

Bronx, New York

_____MITCHELL J. DANZIGER, J.S.C.

Footnotes

Footnote 1: While the holding in *Burger* (67 NY2d 338 [1986]) was reversed by *New York v Burger* (482 US 691 [1987]), it appears that the Court of Appeals rejected the United States Supreme Court's reasoning and ruling when it stated
[t]hus, we adhere to the view expressed in People v Burger that the so-called administrative search exception to the Fourth Amendment's probable cause and warrant requirements cannot be invoked where, as here, the search is "undertaken solely to uncover evidence of criminality" and the underlying regulatory scheme is in reality, designed simply to give the police an expedient means of enforcing penal sanctions. This principle was a fundamental assumption in administrative-search jurisprudence before Burger. And, notwithstanding Burger, it remains analytically sound, since, without such a limitation, what was originally conceived as a narrow exception would swallow up the rule and permit circumvention of the traditional probable cause and warrant requirements where their protections are most needed. Accordingly, *Burger* (67 NY2d 338) and its holding that GBL § 436 is unconstitutional is arguably still binding on this Court.

Footnote 2: NYSC Article 1 § 12 states, in pertinent part,
[t]he right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Footnote 3: VTL § 415-a (5) (a) provides, in part: Every person required to be registered pursuant to this section shall maintain a record of all motor vehicles, trailers, and major component parts thereof, coming into his possession together with a record of the disposition of any such motor vehicle, trailer or part thereof and shall maintain proof of ownership for any motor vehicle, trailer or major component part thereof while in his possession . . . Upon request of an agent of the commissioner or of any police officer and during his regular and usual business hours, a vehicle dismantler shall produce such records and permit said agent or police officer to examine them and any vehicles or parts of vehicles which are subject to the record keeping requirements of this section and which are on the premises.