

CV - 07 4922

AO 440 (Rev. 8/01) Summons in a Civil Action

UNITED STATES DISTRICT COURT

EASTERN

District of

NEW YORK

ARNO T. HERWERTH, Plaintiff,

SUMMONS IN A CIVIL ACTION

V.

DAVID J. SWARTS, in his individual and official capacity as the Commissioner of the Department of Motor Vehicles of the State of New York, and MARK ELLINGER, in his individual and official capacity of Custom Plates Supervisor of the Department of Motor Vehicles of the State of New York,

CASE NUMBER:

Defendants.

SPATT, J. TOMLINSON, M

TO: (Name and address of Defendant)

DAVID J. SWARTS
NYS Department of Motor Vehicles
6 Empire State Plaza
Albany, NY 12228

YOU ARE HEREBY SUMMONED and required to serve on PLAINTIFF'S ATTORNEY (name and address)

VINCENT M. AMICIZIA, ESQ.
GRESHIN, ZIEGLER & AMICIZIA, LLP
199 EAST MAIN STREET
SMITHTOWN, NEW YORK 11787

an answer to the complaint which is served on you with this summons, within 20 days after service of this summons on you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint. Any answer that you serve on the parties to this action must be filed with the Clerk of this Court within a reasonable period of time after service.

ROBERT C. HEINEMANN

11/27/2007

CLERK

DATE

(By) DEPUTY CLERK

RETURN OF SERVICE

Service of the Summons and complaint was made by me ⁽¹⁾	DATE
NAME OF SERVER (<i>PRINT</i>)	TITLE

Check one box below to indicate appropriate method of service

- Served personally upon the defendant. Place where served:

- Left copies thereof at the defendant's dwelling house or usual place of abode with a person of suitable age and discretion then residing therein.
 Name of person with whom the summons and complaint were left:

- Returned unexecuted:

- Other (specify):

STATEMENT OF SERVICE FEES

TRAVEL	SERVICES	TOTAL
		\$0.00

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Return of Service and Statement of Service Fees is true and correct.

Executed on _____
Date *Signature of Server*

Address of Server

(1) As to who may serve a summons see Rule 4 of the Federal Rules of Civil Procedure.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CV-07 4922

RECEIVED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D.N.Y.

★ NOV 28 2007 ★

-----X
ARNO T. HERWERTH,

Plaintiff,

LONG ISLAND OFFICE
COMPLAINT

-against-

DAVID J. SWARTS, in his individual and
official capacity as the Commissioner of
the Department of Motor Vehicles
of the State of New York, MARK ELLINGER,
in his individual and official capacity of Custom
Plates Supervisor of the Department of Motor
Vehicles of the State of New York,

SPATT, J.
TOMLINSON, M

Defendants.
-----X

Plaintiff, by his attorneys, GRESHIN, ZIEGLER & AMICIZIA, LLP., complaining
of the Defendants, alleges, as and for a Complaint:

INTRODUCTION

1. In this action, Plaintiff alleges, inter alia, that the Defendants violated certain rights guaranteed under the United States Constitution, by wrongfully, and without just cause, and in violation of the First, Fifth and Fourteenth Amendments of the Constitution of the United States of America, prohibiting Plaintiff's exercise of his right to freedom of speech.
2. Defendants are liable to Plaintiff because of, inter alia, their actions in first issuing to plaintiff, and then revoking, a motor vehicle license plate bearing the letters

“GETOSAMA.”

3. Plaintiff seeks a permanent injunction and declaratory relief prohibiting the defendants from revoking and thereafter denying the re-issuance and renewal of the aforesaid motor vehicle license plate. Plaintiff also seeks an injunction and declaratory relief that the actions of the Defendants violated, and continue to violate, Plaintiff's rights under the First, Fifth and Fourteenth Amendments of the United States Constitution; and that the determination(s) and action(s) of the defendants were and are arbitrary and capricious and in violation of New York State law and regulations. Finally, Plaintiff also seeks an award of attorney's fees.

JURISDICTION

4. This action is brought pursuant to 42 U.S.C. §§1983 and 1988; 28 U.S.C. §§2201 and 2202 and the First, Fifth and Fourteenth Amendments to the United States Constitution. Jurisdiction is founded upon 28 U.S.C. §§1331, 1343, 1367 and 42 U.S.C. §§1983 and 1988. Plaintiff invokes the Court's Pendent Jurisdiction to hear and decide claims arising from New York State law.

PARTIES

5. Plaintiff, ARNO T. HERWERTH, is and was at all times relevant herein, a citizen of the United States, residing at 6 Sarah Drive, Hauppauge, County of Suffolk, State of New York 11788.
6. During all relevant times mentioned in the Complaint, Defendant, DAVID J.

SWARTS, was and is the Commissioner of the New York State Department of Motor Vehicles, a duly constituted department of the State of New York existing under the laws of the State of New York.

7. During all relevant times mentioned in the Complaint, Defendant, MARK ELLINGER, was and is employed by the New York State Department of Motor Vehicles as a “ Custom Plates Supervisor”.
8. At all times mentioned herein the Defendants were acting under color of law, to wit, under the color of the statutes, ordinances, regulations, policies, customs and usages of the State of New York and/or the Department of Motor Vehicles of the State of New York (hereinafter, the “Department”).

FIRST CAUSE OF ACTION

9. Plaintiff repeats and reiterates each of the forgoing allegations as if fully set forth herein.
10. Plaintiff is a retired member of the New York City Police Department.
11. The Vehicle and Traffic Law of the State of New York (hereinafter, “VTL”) governs the ownership, use and operations of motor vehicles within the State of New York.
12. Article 14 of the VTL requires and regulates the registration of motor vehicles in the State of New York.
13. By New York State legislation, the State of New York has authorized the issuance of personalized, or “vanity” plates to vehicle registrants.

14. Section 401 of the VTL mandates the registration of motor vehicles and the issuance to the vehicle owner, by the Commissioner the Department, number plates bearing a distinctive number assigned by the Commissioner.
15. Section 402(4) of the VTL provides: "Every annual number plate issued shall remain the property of the state until the correct registration fee is paid."
16. Section 404 of the VTL grants the Commissioner of the Department the power to issue "special number plates" to a registration applicant.
17. These "special number plates" are commonly referred to as "vanity plates."
18. Pursuant to Section 404(a) of the VTL, the Commissioner of the Department shall collect from the registration applicant for a "special number plate" a twenty five dollar (\$25.00) annual service charge in addition to the regular registration fee.
19. Pursuant to Section 404(2) of the VTL, a "special number plate" may consist of letters, numerals or any combination thereof.
20. Pursuant to Section 404(1)(a) of the VTL: "Application for special number plates shall be made in accordance with regulations promulgated by the commissioner with respect to issuance of such number plates."
21. At all times relevant herein, there was in effect a regulation by the Commissioner of the Department cited as 15 NYCRR 16.5.
22. 15 NYCRR 16.5 states, in relevant part:

"No plate shall be issued under this Part which:

(e) is, in the discretion of the commissioner, obscene, lewd, lascivious, derogatory to a particular ethnic or other group, or patently offensive.”

23. On or about late October or early November of 2007, Plaintiff applied to the Department for the issuance of a motor vehicle registration and the issuance of “special number plates.”
24. In his application, Plaintiff sought approval of a “special number plate” bearing the following letters: “GETOSAMA.”
25. “GETOSAMA” obviously refers to Osama Bin Laden, who is widely recognized as being responsible for planning and carrying out the 9/11 tragedy wherein civilians and members of the New York City Police Department, New York City Fire Department and many other brave and innocent souls lost their lives.
26. Plaintiff paid to the Department the required fee and the Department approved Plaintiff’s application and issued Plaintiff a motor vehicle registration with a “special number plate” bearing the aforesaid “GETOSAMA” letters. A copy of the plate, validation sticker and registration card is annexed hereto, as **Exhibit “A”**.
27. On or about November 13, 2007, Defendant MARK ELLINGER, on behalf of the Defendant DAVID J. SWARTS and the Department, informed Plaintiff that Plaintiff’s “special number plate” was being “replaced” with Plaintiff’s former numbered plate.
28. The Defendants followed the aforesaid November 13, 2007 notification with a letter

to Plaintiff, dated November 15, 2007, which reiterated the foregoing and demanded the return of the “GETOSAMA” plates.

29. The aforementioned letter stated, *in haec verba* : “Section 16.5(e) of the Motor Vehicle Regulations prohibits the issuance of any license plate combination that is, ‘in the discretion of the commissioner, obscene, lewd, lascivious, derogatory to a particular ethnic group or patently offensive.’” No other reason for the “replace(ment)” of the “GETOSAMA” plate was given. A copy of the November 15, 2007 letter is annexed hereto, as **Exhibit “B”**.
30. Defendants have committed the aforesaid wrongful acts upon Plaintiff while acting under color of the law, to wit, under the color of the statutes, ordinances, regulations, policies, customs and usages of the State of New York and/or the Department of Motor Vehicles of the State of New York.
31. Defendants committed the aforesaid wrongful acts upon Plaintiff while acting within the scope of their employment with the Department of Motor Vehicles of the State of New York and the State of New York.
32. The foregoing actions alleged above deprived, and continue to deprive, Plaintiff of, inter alia, the following rights under the United States Constitution:
 - a. Freedom of speech; and
 - b. Freedom from the deprivation of life, liberty and property without due process of law.

33. As a result of the foregoing, Plaintiff has suffered, and will continue to suffer, irreparable harm.
34. There is no adequate remedy at law.

AS AND FOR A SECOND CAUSE OF ACTION THE DEFENDANTS

35. Plaintiff repeats and reiterates each of the foregoing allegations as if fully set forth herein.
36. As a result of the foregoing, Defendants deprived, and/or are attempting to deprive, Plaintiff of the continued use, ownership and/or possession of the "GETOSAMA" plates without due process of law.
37. As a result of the foregoing, Defendants have violated Plaintiff's rights under the Fourteenth Amendment of the United States Constitution.
38. As a result of the foregoing, Plaintiff has suffered, and will continue to suffer, irreparable harm.
39. There is no adequate remedy at law.

AS AND FOR A THIRD CAUSE OF ACTION THE DEFENDANTS

40. Plaintiff repeats and reiterates each of the foregoing allegations as if fully set forth herein.
41. As a result of the foregoing, Section 404(1)(a) of the VTL and 15 NYCRR 16.5(e), is unconstitutional, or in the alternative, unconstitutional as applied to Plaintiff under the foregoing set of facts.

42. As a result of the foregoing, Plaintiff has suffered, and will continue to suffer, irreparable harm.

43. There is no adequate remedy at law.

AS AND FOR A FOURTH CAUSE OF ACTION THE DEFENDANTS

44. Plaintiff repeats and reiterates each of the foregoing allegations as if fully set forth herein.

45. The Defendants' decision to replace and demand the return of the aforesaid "GETOSAMA" plates was arbitrary and capricious, as there was no part of the aforementioned regulation – 15 NYCRR 16.5(e) – which was cited by the Defendants as the specific basis upon which the Defendants' actions were taken.

46. The Defendants' decision to replace and demand the return of the aforesaid "GETOSAMA" plates was arbitrary and capricious, as there was no part of the aforementioned regulation – 15 NYCRR 16.5(e) – which could form a legal or legitimate basis of Defendants' actions. To wit, "GETOSAMA" is neither "obscene, lewd, lascivious, derogatory to a particular ethnic or other group, or patently offensive."

47. As a result of the foregoing, the Defendants' aforementioned actions were *ultra vires* and were committed without the authority of law.

48. Plaintiff invokes the pendant jurisdiction of this Court to hear and determine this claim.

49. As a result of the foregoing, Plaintiff has suffered, and will continue to suffer, irreparable harm.
50. There is no adequate remedy at law.

AS AND FOR A FIFTH CAUSE OF ACTION THE DEFENDANTS

51. Plaintiff repeats and reiterates each of the foregoing allegations as if fully set forth herein.
52. The Defendants' decision to replace and demand the return of the aforesaid "GETOSAMA" plates was arbitrary and capricious, because although the VTL grants the Commissioner the power to issue "special number plates", there is no provision of the VTL, or other statute or law, which grants the Commissioner the power to revoke the Commissioner's prior issuance of "special number plates."
53. As a result of the foregoing, the Defendants' aforementioned actions were *ultra vires* and were committed without the authority of law.
54. Plaintiff invokes the pendant jurisdiction of this Court to hear and determine this claim.
55. As a result of the foregoing, Plaintiff has suffered, and will continue to suffer, irreparable harm.
56. There is no adequate remedy at law.

WHEREFORE, Plaintiff requests that this Court enter judgment for Plaintiff and against the Defendants on all causes of action and that the Court:

- a. Issue a judgment declaring that the Defendants' actions in respect to Plaintiff were in violation of Plaintiff's rights under the First, Fifth and Fourteenth Amendment of the United States Constitution and are therefore null and void;
- b. Issue a judgment granting Plaintiff an injunction against the Defendants, prohibiting the Defendants from continuing to violate Plaintiff's rights under the First, Fifth and Fourteenth Amendment to the United States Constitution;
- c. Issue a judgment declaring Defendants' actions null and void as those actions were arbitrary and capricious;
- d. Issue a judgment declaring Defendants' actions null and void as *ultra vires* acts with no basis or authority in law
- e. Issue a judgment granting Plaintiff an injunction against the Defendants, prohibiting the Defendants from revoking, or replacing, Plaintiff's "GETOSAMA" plate and motor vehicle registration;
- f. Issue a judgment declaring Section 404(1)(a) of the VTL and 15 NYCRR 16.5(e), unconstitutional, or in the alternative, unconstitutional as applied to Plaintiff under the foregoing set of facts;
- g. Issue a judgment declaring that Plaintiff's "GETOSAMA" plates are Plaintiff's property;
- h. Award costs of this action, including attorney's fees to the Plaintiff; and
- i. Award such other and further relief as the Court deems just and proper.

DATED: Smithtown, New York
November 27, 2007

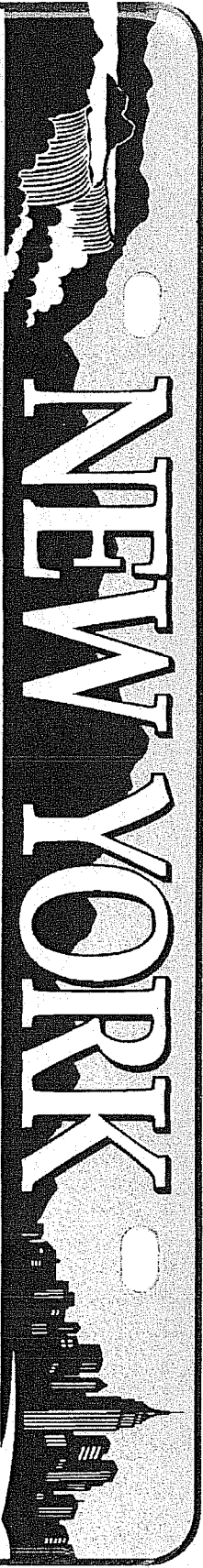
Respectfully submitted,



VINCENT M. AMICIZIA (VA 4187)

GRESHIN, ZIEGLER & AMICIZIA, LLP.
Attorneys for Plaintiff
199 East Main Street
P.O. Box 829
Smithtown, New York 11787
(631) 265-2550

EXHIBIT "A"



NEW YORK

GETTOSAMA

THE EMPIRE STATE



DON'T PEEL STICKER FROM FRONT - SEE BACK!

Keep this document to show to the police and courts.



079579BV



NEW YORK STATE REGISTRATION DOCUMENT



* NYMA *

03/17/09

SRF*SR DWY8968 PAS

GETOSAWA

1993 FORD

SUBN VH

3481 G 6

KJM SPRD8A

NONTRANSFERABLE

1FMCA31UXPZA69082

NOV 02 2007

Expires 03/17/09

* NYMA *

HERWERTH, ARNO, T

6 SARAH DR

HAUPPAUGE NY

11788

ANNUAL CHG

22.50

AMT PAID (INCL ADD CHG)

NO FEE

DUE

VOID IF ALTERED EXCEPT FOR ADDRESS.

3

1FMCA31UXPZA69082
1993 FORD SUBN
GETOSAWA SRF 3
DWY8968 PAS 1

09



X0000058

88111 NY EGAPPAUHH

SARAH DR 9

HERWERTH, ARNO, T

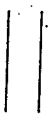


EXHIBIT "B"



STATE OF NEW YORK DEPARTMENT OF MOTOR VEHICLES

CUSTOM PLATES UNIT, 6 EMPIRE STATE PLAZA, ROOM 231, ALBANY NY 12228

DAVID J. SWARTS
Commissioner

Arno T. Herwerth
6 Sarah Drive
Hauppauge, NY 11788

November 15, 2007

Dear Arno,

Per our phone conversation on 11/13/2007 I have replaced plate GETOSAMA with your previous plate # DWY8968 and sent you the registration in a separate envelope along with a stamped addressed envelope to return the GETOSAMA plates to us. Please return these plates to us at your earliest convenience.

Section 16.5(e) of the Motor Vehicle Regulations prohibits the issuance of any license plate combination that is, "in the discretion of the commissioner, obscene, lewd, lascivious, derogatory to a particular ethnic group or patently offensive."

If you would like to order a different plate combination please contact us at 518-402-4838. If you would like a refund I have enclosed form MV-215 for you to fill out and return to the address on the form. I am sorry for any inconvenience.

Mark Ellinger


Custom Plates Supervisor