UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

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Danny Terrance,

Plaintiff,

vs 10-CV-6450T

City of Geneva, New York,

Defendant.

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**REPLY MEMORANDUM OF LAW**
**IN SUPPORT OF DEFENDANT CITY OF GENEVA'S**
**MOTION TO DISMISS**

H. Todd Bullard, Esq.
James P. Nonkes, Esq.
HARRIS BEACH PLLC
*Attorneys for Defendant*
*City of Geneva, New York*
99 Garnsey Road
Pittsford, New York 14534
Telephone: (585) 419-8800

Defendant City of Geneva (the "City" or "Geneva") respectfully submits this Reply Memorandum of Law in support of its motion to dismiss Plaintiff Danny Terrance's Verified Complaint (the "Complaint") pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.[1]

## DISCUSSION

### I. A Rule 12(b)(6) Motion to Dismiss is Appropriate to Dismiss Danny Terrance's Complaint.

In its memorandum of law in support of its motion to dismiss, Geneva has demonstrated that Danny Terrance's challenges to Chapter 285 fail as a matter of law and should be dismissed. In opposition, Danny Terrance argues that Geneva has made arguments more appropriate on summary judgment and that Danny Terrance's challenges to Chapter 285 should survive the motion to dismiss stage simply because they are "plausible" on their face. *See* Plaintiff's Opposition Memorandum, pp. 1-2. Contrary to Danny Terrance's argument, all of his challenges to Chapter 285, which are based on preemption, *ex post facto*, equal protection, due process, and contracts clause grounds, are examined by the courts on a 12(b)(6) motion and are ripe for dismissal in this case. Even taking Danny Terrance's facts as true, which the Court should do on a motion to dismiss, Danny Terrance's Complaint must be dismissed.

To show that Chapter 285 is preempted by state law, Danny Terrance must be able to demonstrate that the state legislature (i) has expressly averred that its sex offender

[1] Counsel respectfully notifies the Court that following the filing of Geneva's motion to dismiss, Danny Terrance has been arrested and incarcerated in the Wayne County Jail. *See* Affidavit of H. Todd Bullard, Esq., sworn to February 10, 2011 (the "Bullard Aff."), at ¶ 3. The Sex Offender Registration Act website states that he is "Incarcerated" and lists his residence as "Wayne County Jail, 7368 Route 31, Lyons, Wayne, New York 14489." *See* February 10, 2011 Screenshot, attached to the Bullard Aff. as Exhibit A. Geneva is unaware of the specific charges but, upon information and belief, Danny Terrance has been released from the Wayne County Jail and has returned to his purported Geneva residence. *See* Bullard Aff., at ¶ 5. If Danny Terrance's residence changes from the address referenced in the Complaint to the Wayne County Jail or to any other address, the issues he raises in his Complaint may be rendered moot.

legislation preempts Chapter 285 or (ii) that it has put in place such a comprehensive and detailed regulatory scheme to cover all aspects of sex offenders that it demonstrates a clear intent to preempt any additional local laws. *See Jancyn Mfg. Corp. v. Cnty. of Suffolk*, 71 N.Y.2d 91, 98 (1987). Danny Terrance's preemption argument is a question of law for the Court to decide on a motion to dismiss. *See Farash v. Cont'l Airlines, Inc.*, 574 F. Supp. 2d 356, 363 (S.D.N.Y. 2008). In *Farash*, the court held that "[a]s this Court accepts plaintiff's version of the conduct (as it must in a motion filed pursuant to Rule 12[b][6]), the question of preemption is a matter of law and a motion to dismiss is appropriate at this time." *Id.*

Danny Terrance's other arguments are similarly ripe for dismissal. In *Degrijze v. Pataki*, 01 Civ. 4170, 2004 U.S. Dist. LEXIS 2260, *5-*9 (S.D.N.Y. Feb. 5, 2004), the court rejected under Rule 12(b)(6) a plaintiff's *ex post facto* challenge to a state law which required convicted felons to provide a DNA sample. The court ruled as a matter of law on a motion to dismiss that

> Although the intent of the statute is not stated in the text of the statute itself, the Court finds that intent of Article 49-B was not to impose punishment for past behavior, but to assist law enforcement officials in solving crimes committed by prior felons and to absolve innocent persons of incorrect accusations. Moreover, the Court cannot find that the statute is so punitive as to negate the legislative intent. Therefore, because Article 49-B is not punitive in nature, Plaintiff cannot succeed on his claim that the statute violates the *Ex Post Facto* Clause.

Thus, the Court dismissed the plaintiff's complaint under Rule 12(b)(6) and ruled that the state law was valid because it did not constitute *ex post facto* punishment.

Danny Terrance's other challenges to Chapter 285 have been dismissed under rule 12(b)(6) in similar cases. In *Green v. Armstrong*, No. 98-3707, 1999 U.S. App. LEXIS 20207 (2d Cir. Aug. 20, 1999), for example, a sex offender challenged his sex offense

reclassification based on uncovered past conduct, which was done without a hearing, on the grounds that it violated his rights to due process and equal protection and constituted *ex post facto* punishment. The district court dismissed all of the sex offender's constitutional challenges pursuant to Rule 12(b)(6), a decision which was upheld by the Second Circuit. The court examined plaintiff's equal protection claim and held that – as Danny Terrance admits is the case here – sex offenders are not members of a protected class and therefore the plaintiff must demonstrate there is "no rational basis" for the legislation or act complained of to survive court review. *Id.* at *6. The court dismissed plaintiff's equal protection claim because there was a "legitimate" or "rational" reason to classify prisoners based on their past sex offenses. *Id.* With respect to the plaintiff's *ex post facto* claim, the court determined that the reclassification cannot be deemed "punishment" as a matter of law and dismissed the complaint. *Id.* at *7-*8.

In several other cases, courts have determined that a plaintiff's constitutional challenges fail on a 12(b)(6) motion to dismiss. *See, e.g.*, *Cecere v. Nassau County*, 274 F.Supp.2d 308, 319 (E.D.N.Y. 2003) (ruling as a "matter of law" that plaintiff's challenge does not run afoul of the equal protect clause); *Rodenhouse v. Palmyra-Macedon Central School Dist.*, No. 07-CV-6438, 2008 WL 2331314 (W.D.N.Y. June 3, 2008) (dismissing due process and equal protection claims as a matter of law); *Hawkins-El III v. AIG Savings Bank*, No. 5 CV 3222, 2006 WL 2008573 (E.D.N.Y. July 13, 2006) (granting 12[b][6] motion to dismiss and finding that plaintiff's contracts clause claim "failed as a matter of law").

Here, taking all of the facts alleged in his Complaint as true, Danny Terrance cannot demonstrate that Chapter 285 is preempted or that it violates any constitutional

rights. Thus, Danny Terrance's Complaint does not withstand judicial scrutiny and must be dismissed.

**II. Danny Terrance's Preemption Claim Must Be Dismissed.**

Danny Terrance cannot establish that Chapter 285 is preempted by state law because the state legislature has neither expressly nor implicitly evidenced its intent to preempt local laws. Indeed, the state legislature has declined to preempt local laws when presented with the opportunity to do so.

Because he cannot point to any clear statement by the state legislature, which is often found when the legislature intends to preempt local laws, (*see, e.g., Green Mt. R.R. Corp. v. Vermont*, 404 F.3d 638, 641-42 [2d Cir. 2005] [noting that federal interstate commerce legislation *explicitly* states that "the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law"]), Danny Terrance instead argues that the state has "demonstrated [an unstated] intent to preempt an entire field and preclude any further local regulation . . . ." Plaintiff's Opposition Memorandum, p. 7. Danny Terrance relies primarily on the Sex Offender Registration Act ("SORA"), which is promulgated by the New York State Department of Criminal Justice Services, to argue that the state legislation is so comprehensive that it provides no room for additional local laws. *See, e.g., id.* at pp. 11-12.

Danny Terrance admits, however, that the state legislature has enacted little with respect to sex offender residency restrictions. He notes that "[t]he State residency restrictions apply only to level three sex offenders who are also subject to probation or discharge." *Id.* at p. 7. This hardly evidences an intent to occupy an entire field.

Danny Terrance also attempts to disregard that the SORA website itself notifies the public and sex offenders that

> [I]f the offender is under parole or probation supervision, other New York State laws may limit the offender from living within 1,000 feet of a school or other facility caring for children. For more indepth information, click here.
>
> Additionally, there may be local laws in a particular county, city, town or village that restrict where a sex offender may live. For information on local laws, it is recommended that you contact the town, village, city or county in which you are interested. For more information about how to protect your children, please refer to question #17.

New York State Division of Criminal Justice Services, Frequently Asked Questions, Answer to #13, available at http://criminaljustice.state.ny.us/nsor/faq.htm (last visited February 10, 2011).

This also is hardly evidence that the state has intended to preempt any and all local residency restrictions. If the state has intended to preempt such restrictions, it is sending a mixed message to say the least. Instead, this is one of several situations where the state has passed certain laws in an area that may be supplanted with local ordinances.

In *Zorn v. Howe*, 276 A.D.2d 51 (3d Dep't 2000), for example, respondent tenant was evicted from his apartment by petitioner landlord pursuant to Ithaca, New York Municipal Code Chapter 177, which provided for summary eviction of tenants who had possessed or used illegal drugs on the premises. Respondent argued, as Danny Terrance does here, that New York State legislation preempted the local law because New York Real Property Law already provided for evictions for certain illegal use. *Id.* at 52-53. The court, however, held that if anything, the challenged ordinance merely *supplemented* the state's statutory scheme and certainly was not inconsistent with it. *Id.* at 55-56 ("The local ordinance merely supplements the State statute by adding additional grounds for

eviction."). Thus, Ithaca's Chapter 177 was not preempted by the state laws which covered the same area.

Here, the state has decided that at a minimum level three sex offenders on probation or parole, *i.e.* recently released or recently convicted high risk sex offenders, may not live within 1,000 feet of a school. The state has left localities with the power to place additional, limited restrictions on where other sex offenders may reside, or where level three sex offenders such as Danny Terrance may reside after their period of parole or probation is over. Danny Terrance attempts to argue that Assembly Bill 4988 evidence's the state's intent that the original "placement" of sex offenders in communities has been a state issue. The Assembly Bill, however, limits its reach to probationary or paroled sex offenders. It notes that there are local residency restrictions placed on other sex offenders but it does not override these restrictions.

Taken together with Real Property Law § 235-f(8) and the holding in *Knudsen v. Lax*, 17 Misc. 3d 350, 355 (N.Y. Sup. Ct. Jefferson Co. 2007), that Section 235-f(8) could allow a landlord to restrict sex offender residency in order to comply with "local laws, regulations, ordinances or codes," Danny Terrance cannot establish that the state has evidenced a clear intent to preempt Chapter 285. Thus, Danny Terrance's preemption argument fails and must be dismissed.

**III. Danny Terrance's Constitutional Challenges Must Be Dismissed.**

As set forth in Geneva's memorandum of law in support of its motion to dismiss, Danny Terrance's various constitutional challenges to Chapter 285 must be dismissed because they lack any merit. In response, Danny Terrance attempts to argue that his constitutional challenges are valid because: (i) "Chapter 285 is not distinguishable from

banishment" and is intended only to "continue the retribution against the Plaintiff for his past criminal action" (Plaintiff's Opposition Memorandum, pp. 15-16); (ii) "Chapter 285 does not bear a rational connection to the purpose of protecting the City's residents" and "does not serve a legitimate governmental interest" because it only prevents sex offenders from residing near school and playgrounds but does not bar sex offenders from visiting these areas (*id.* at pp. 17-19) (iii) Chapter 285 does not provide for an "individualized assessment as to whether the Plaintiff poses a real threat to others" (*id.* at p. 20); and (iv) Chapter 285 is not "reasonable and necessary to serve an important public purpose" or that Chapter 285 is not "rationally connected" to the public purpose (*id.* at pp 21-21).

As Geneva has previously demonstrated, Chapter 285 is not analogous to banishment because, unlike banishment, Chapter 285 restricts only where offenders may reside. Chapter 285 does not "expel" the offenders from their communities or prohibit them from accessing areas near schools or child care facilities for employment, to conduct commercial transactions, or for any purpose other than establishing a residence.

Danny Terrance appears to take exception with the fact that Chapter 285 restricts only residency yet allows sex offenders access to schools and other areas during the day. He argues: "Because Chapter 285 only prohibits a sex offender from sleeping near a school at night, when children are not present, while allowing a sex offender to stay there during the day, when children are present, Chapter 285 does not serve a legitimate government purpose." *Id.* at p. 19. Danny Terrance disregards that setting up a residence allows the sex offender to have a secluded area near a school to which he may bring or invite a child. This is the temptation and the evil Geneva legitimately seeks to avoid by

preventing sex offenders from establishing residences that are near schools and children's parks.

The legitimate purpose of Chapter 285 fatally undermines Danny Terrance's constitutional challenges. In *Zorn v. Howe*, the court similarly upheld a local law allowing eviction of illegal drug users because it was aimed at protecting the health and welfare of the surrounding community. The court stated that

> We are also unpersuaded by respondent's various claims of unconstitutionality. Legislative enactments, including local ordinances such as the one at issue here, carry a strong presumption of validity, imposing a burden on the challenger to prove unconstitutionality beyond a reasonable doubt. The clear purpose and effect of chapter 177 is to protect the health, safety and welfare of the surrounding community.

276 A.D.2d at 56. As in *Zorn*, preventing sex offender residences near a school is rationally related to protecting the health and safety of the surrounding community which is a legitimate government purpose. The fact that Chapter 285 does not bar sex offenders from visiting schools and parks during the day – but only restricts living near these areas – is evidence that the Geneva legislature desires to put in place only the minimal restrictions on sex offenders necessary to protect its children citizens and nothing more.

Elsewhere in his opposition, Danny Terrance states that "recidivism statistics have no relevance to the issue at hand," (Plaintiff's Opposition Memorandum, p. 13), but the high rate of sex offender recidivism, which has been demonstrated by studies and accepted by the United States Supreme Court and other courts, heightens the importance of the local government's desire to minimize recidivism events. It should be noted that as discussed in Geneva's original motion papers, studies show that sex offenders pose not only a high rate of recidivism for another sexual offense but also a high rate of

committing other types of offenses. Although the specific charges are not known at this time, Danny Terrance's recent incarceration is possible evidence of this fact.

Danny Terrance's argument that Chapter 285 is unconstitutional because it does not provide him with an opportunity to challenge whether he currently presents a real threat to children similarly fails. As demonstrated in Geneva's initial brief, the United States Supreme Court holds that laws such as Chapter 285 legitimately rest on a prior conviction alone and need not provide for an additional and continued assessment of whether someone constitutes a current threat. *See Conn. Dept. of Pub. Safety v. Doe*, 538 U.S. 1, 8 (2003). The Supreme Court stated that

> [T]he fact that [the sex offender] seeks to prove – that he is not currently dangerous – is of no consequence . . . [because] the law's requirements turn on an offender's conviction alone – a fact that a convicted offender has already had a procedurally safeguarded opportunity to contest. No other fact is relevant . . . [thus,] States are not barred by principles of 'procedural due process' from drawing classifications [among sex offenders and other individuals].

Here, Chapter 285 applies to all offenders previously convicted of certain sexual crimes against minors. The absence of an individualized assessment does not offend principles of due process.

In sum, Chapter 285 is rationally related to the government interest of protecting the welfare of Geneva's citizens. Even accepting the facts alleged in his Complaint to be true, Danny Terrance fails to establish that Chapter 285 violates any constitutional rights.

## CONCLUSION

For the reasons discussed above, and for the reasons set forth in Geneva's initial brief, the Court should grant Geneva's motion to dismiss Danny Terrance's Complaint in its entirety.

Dated: February 10, 2011
Pittsford, New York

HARRIS BEACH PLLC

By: s/H. Todd Bullard
H. Todd Bullard, Esq.
James P. Nonkes, Esq.
*Attorneys for Defendant*
*City of Geneva, New York*
99 Garnsey Road
Pittsford, New York 14534
Telephone: (585) 419-8800

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