

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NEW YORK**

JOHN NAPOLITANO and DARK STORM )  
INDUSTRIES LLC )

Plaintiffs, )

v. )

COUNTY OF NASSAU )

Defendant. )  
\_\_\_\_\_)

Civil Action No. \_\_\_\_\_

**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

COME NOW the Plaintiffs, JOHN NAPOLITANO and DARK STORM INDUSTRIES LLC (“Plaintiffs”) and all other similarly situated retailers, by and through their undersigned counsel, and complain of the Defendant as follows:

**I. PARTIES**

1. Plaintiff John Napolitano is a natural person and a citizen of the United States and of the State of New York and resides in Nassau County, New York.

2. Plaintiff Dark Storm Industries LLC (“DSI”) is a manufacturer and retailer of firearms and accessories and, *inter alia*, a retailer of electric arms (stun guns and electric dart guns) based in Suffolk County, New York.

3. Defendant County of Nassau is a municipal entity in New York created and authorized under the laws of the State of New York and is responsible for its customs, policies, and practices related to its enforcement of its ban on stun guns and/or electronic arms. Defendant County of Nassau may be served by serving a copy of the summons and complaint to the County of Nassau, 240 Old Country Road, Mineola, New York 11501.

**II. JURISDICTION AND VENUE**

4. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 1343, 2201, 2202 and 42 U.S.C. § 1983 and § 1988.

5. Venue lies in this Court pursuant to 28 U.S.C. § 1391.

### **III. STATEMENT OF FACTS**

6. On March 22, 2019, Judge David N. Hurd of the Northern District of New York found New York's ban on electric arms to unconstitutional. *See Avitabile v. Beach*, 368 F. Supp. 3d 404 (N.D.N.Y. 2019).

7. Prior to Judge Hurd finding that New York's ban on electric arms was unconstitutional, New York law provided the following:

- a. N.Y. Penal Law § 265.00 15-a - "'Electronic dart gun' means any device designed primarily as a weapon, the purpose of which is to momentarily stun, knock out or paralyze a person by passing an electrical shock to such person by means of a dart or projectile."
- b. N.Y. Penal Law § 265.00 15-c - "'Electronic stun gun' means any device designed primarily as a weapon, the purpose of which is to stun, cause mental disorientation, knock out or paralyze a person by passing a high voltage electrical shock to such person."
- c. N.Y. Penal Law § 265.01 - "A person is guilty of criminal possession of a weapon in the fourth degree when:(1) He or she possesses any firearm, electronic dart gun, electronic stun gun..."

8. However, despite the law being held unconstitutional, Defendant has refused to allow sales of electric arms (Tasers and stun guns) to its residents and it is enforcing a law that

has been declared to violate the United States Constitution. This enforcement is *ultra vires* and violates Plaintiffs' rights.

9. Marc Timpano, Lieutenant, Commanding Officer of the Pistol License Section of Nassau County, via email on June 12, 2019, stated:

Folks,

There has been some inquiry regarding our opinion over whether or not you (FFL dealers) are authorized, legally or ethically, to sell stun guns/electronic dart guns to citizens other than to law enforcement members of the service. Please see the ruling below and opinion from NCPD Legal Bureau and be guided accordingly.

Happy Spring everyone and I hope you and your families have an enjoyable summer.

As always, any questions or concerns please do not hesitate to contact me.

Marc

Marc Timpano  
Lieutenant  
Commanding Officer  
Pistol License Section  
[redacted]-7559

On March 22, 2019, the US District Court for the Northern District of New York held that Section 265.01(1) of the NYS Penal as applied to “electronic dart guns” and “electronic stun guns” must be invalidated as unconstitutional. The Court held that tasers and stun guns are in “common use” because the State failed to meet its burden rebutting the prima facie presumption of Second Amend protection that extends to all bearable arms. The State also did not offer a basis to rebut the presumption that tasers and stun guns are typically possessed by law-abiding citizens for lawful purposes, such as self-defense. The Court held that there is no indication that tasers or stun guns have some sort of “special propensity for unlawful use” or that these arms are so “dangerous and usual” that they fall entirely outside the scope of the Second Amendment. Therefore, the Court found that tasers and stun guns are in common use and are typically possessed by law-abiding citizens for lawful purposes like self-defense. The Court also held that a complete ban on the civilian possession and use of tasers and stun guns implicates the Second Amendment right of law-abiding citizens to protect themselves in their own homes with a weapon commonly used for that purpose. The Court held that after a review of the legislative history, a complete ban on tasers and stun guns is not reasonably based on any substantial evidence considered by the state legislature. The State did not introduce substantial evidence from which it could be reasonably inferred that complete bans on tasers and stun guns, even ones kept in the home of a law-abiding

citizen, are “substantially related” to the compelling interests in public safety and crime prevention.

However, this holding IS NOT binding on the Eastern District of New York, and therefore IS NOT binding on the Department, nor is it even persuasive authority. The NDNY did not provide the broad, declaratory relief that the Plaintiff was seeking. Rather, the remedy was only to resolve the dispute amongst the parties of the action. By declining to grant declaratory relief, the NDNY did not intend the decision to be precedent over all courts in the Second Circuit.

Therefore, status quo is maintained and the possession/use of tasers and stuns is prohibited in jurisdictions within the Eastern District of New York pursuant to Penal Law Sec. 265.01(1).

10. This action by Defendant continues to violate Plaintiffs’ Second Amendment and Fourteenth Amendment rights provided by the United States Constitution.

11. The Second Amendment to the United States Constitution provides: “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed.”

12. The Second Amendment guarantees individuals a fundamental right to keep and carry arms for self-defense and defense of others in the event of a violent confrontation. *District of Columbia v. Heller*, 554 U.S. 570 (2008); *McDonald v. Chicago*, 561 U.S. 742 (2010); *Caetano v. Massachusetts*, 136 S. Ct. 1027 (2016).

13. Arms are “‘weapons of offence, or armour of defence.’ 1 Dictionary of the English Language 107 (4th ed.)” They are anything that a man [or woman] wears for his defense, or takes into his hands, or uses in wrath to cast at or strike another.’ 1 A New and Complete Law Dictionary (1771).” *District of Columbia v. Heller*, 554 U.S. at 581.

14. The Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding. *Heller*, 554 U.S. at 582; *Caetano*, slip op. at 1 (per curiam).

15. Given the decision in *Heller* and *Avitabile*, Defendant may not completely ban the keeping and bearing of arms for self-defense that are not unusually dangerous, deny individuals the right to carry arms in non-sensitive places, deprive individuals of the right to keep or carry arms in an arbitrary and capricious manner, or impose regulations on the right to keep and carry arms that are inconsistent with the Second Amendment. *See Caetano v. Massachusetts*, 136 S. Ct. 1027 (2016), *Heller v. District of Columbia*, 801 F.3d 264 (D.C. Cir. 2015); *Palmer v. District of Columbia*, 59 F.Supp.3d 173 (2014).

16. Tasers are arms in common use for self-defense by civilians as well as by law enforcement.

17. Tasers are manufactured and sold by Axon Enterprise, Inc.

18. A Taser is an electronic control device (“ECD”) that uses replaceable cartridges containing inert, compressed nitrogen to fire two small probes that are attached to insulated conductive wires. In the models generally marketed to non-law enforcement persons, the conductive wires are 15 feet (4.5 meter) in length.

19. Taser models generally marketed to law enforcement agencies use conductive wires with lengths up to 25 feet in length.

20. The probes are designed to penetrate the clothing of an attacker and imbed in the attacker’s skin. Electrical energy is sent over the wires into the probes. The charge is transmitted between the two probes and is designed to disrupt the sensory and motor functions to inhibit muscular control of an attacker.

21. With a Taser exposure, the attacker is momentarily incapacitated to allow the person attacked to escape and call for law enforcement assistance, or in the case of a law

enforcement officer, to allow for the apprehension of the suspect without further risk of injury to the officer or the suspect.

22. The Taser's electronic charge lasts from five to thirty seconds depending on whether the civilian or the law enforcement model is employed.

23. The most commonly employed civilian Taser is a one-shot device with a 30 second charge. Once fired the device can still be used as a direct contact stun device in the event of a missed shot or in the event of multiple assailants.

24. Taser International also manufactures Taser devices having the capacity for multiple shots. These multiple shot devices are commonly used by law enforcement personnel in the performance of their duties.

25. Tasers have several advantages over other non-lethal means of self-defense, such as self-defense sprays or contact weapons.

26. First, self-defense sprays must be administered generally within several feet of an assailant while a civilian model Taser can be deployed within 15 feet. The closer distance the assailant must be to a potential victim for the victim to employ a self-defense spray increases the danger to the potential victim. For example, it is generally recognized by law enforcement that an assailant wielding a contact weapon such as a knife or a club can be a lethal threat at distances of 21 feet or closer. *See* Dennis Tueller, *How Close is Too Close*, Police Policies Study Council, available at [http://www.theppsc.org/Staff\\_Views/Tueller/How.Close.htm](http://www.theppsc.org/Staff_Views/Tueller/How.Close.htm) (originally published in the March 1983 Edition of SWAT Magazine).

27. Second, pepper sprays can often be ineffectual against highly intoxicated or highly agitated assailants. *See generally* Steven M. Edwards, et al., *Evaluation of Pepper Spray*, National Institute of Justice, U.S. Dept. of Justice, Office of Justice Programs, Research in Brief (February

1997), available at <https://www.ncjrs.gov/txtfiles/162358.txt>. Tasers, on the other hand, when effectively employed will likely stop an attack from an intoxicated or mentally disturbed attacker.

28. Third, for optimum effect, defense sprays should be deployed at the face of the attacker, which is a small target. The Taser is most effective when deployed at other larger parts of the body of the attacker.

29. Fourth, defense sprays can end up being blown back at the victim if used in a windy environment, resulting in incapacitating the victim rather than the attacker. This is not an issue with a Taser device.

30. Likewise, Tasers have advantages over the variety of contact weapons as well such as police type batons or knives. Allowing an attacker to close to contact distance creates a high degree of danger to a potential victim.

31. Contact weapons can also be more difficult for persons of lesser strength to deploy, compared to a Taser.

32. Moreover, use of any contact weapon, such as a knife or club, carries a high degree of risk of death or serious bodily harm to the assailant, whereas risk of death or serious bodily harm from a Taser is minimal.

33. On a related note, given that use of a knife or club qualifies as the use of deadly force, an individual using a knife or club to defend against a criminal attack, has a high legal standard to meet to sustain a claim self-defense.

34. Tasers have been widely used by law enforcement agencies throughout the United States and the world. More than 18,000 law enforcement agencies use the devices.

35. Studies have shown Tasers to reduce injuries to both law enforcement officers and to suspects. The United States Department of Justice found that Tasers result in fewer injuries to suspects and officers than all other means of subduing suspects.

36. Tasers and other electronic weapons are in common use for self-defense. The Michigan Court of Appeals found that “Hundreds of thousands of Tasers and stun guns have been sold to private citizens,” *People v. Yanna*, 297 Mich. App. 137, 144, 824 N.W. 2d 241, 245 (2012). Concurring in the *per curiam* reversal of the Massachusetts Supreme Judicial Court’s upholding of a ban on stun guns, Justice Alito stated, “While less popular than handguns, stun guns are widely owned and accepted as a legitimate means of self-defense across the country.” *Caetano v. Massachusetts*, 136 S. Ct. 1027, 1033 (2016) (Alito, J., concurring). *See also Avitabile v. Beach*, 368 F. Supp. 3d 404 (N.D.N.Y. 2019) (accepting approximately 4.7 million electric arms as “common use” and protected by the Second Amendment).

37. Mr. Napolitano desires to purchase a stun gun or Taser for self-defense and other lawful purposes in his home.

38. Mr. Napolitano is a competition pistol shooter and maintains an unrestricted carry permit. However, notwithstanding that he can carry firearms, he would prefer to minimize the likelihood that he would have to resort to deadly force in the event he was forced to defend himself or his home from a violent criminal attack.

39. In appropriate circumstances, Mr. Napolitano would prefer to utilize an electric arm for defense of himself, his family and his home due to its proven effectiveness and its proven record of minimizing injury to suspects and/or assailants.

40. Plaintiff Napolitano desires to place an order with DSI for a Taser. However, Plaintiff fears prosecution for possessing and carrying a Taser, so he has refrained from violating



the County of Nassau's *ultra vires* ban on Tasers and stun guns. DSI, after becoming aware of the electronic communication from Lt. Timpano, is now faced with the unenviable position of being prosecuted for selling electric arms to County of Nassau residents despite the electric arm ban being declared unconstitutional and has now refrained from selling to residents of Nassau County due to fear of prosecution. *See* Exhibits "A" and "B".

41. But for the Defendant's custom, policy or practice of enforcing the now-unconstitutional electric arms ban, Plaintiff Napolitano would acquire, possess, carry and where appropriate use a Taser or stun gun to protect himself and his home and Plaintiff DSI would sell, transfer and otherwise provide electric arms to qualified residents of Nassau County.

42. Additionally, because the Defendant is enforcing an unconstitutional ban on the sale of electric arms, for which DSI is a lawful retailer, DSI has suffered economic damages to be determined at trial, due solely to Defendant's unconstitutional actions.

## **COUNT I**

### **U.S. CONST., AMEND. II, 42 U.S.C. § 1983**

43. The Defendant prohibits Plaintiff Napolitano from acquiring, possessing and using a defensive arm in common use, i.e., a Taser or stun gun and prohibits Plaintiff DSI from selling electric arms to residents of Nassau County. As such it violates Plaintiffs' Second Amendment rights.

44. Defendant's laws, customs, practices and policies generally banning the acquisition, possession, carrying and use of Tasers and other electronic arms violates the Second Amendment to the United States Constitution, facially and as applied against the Defendant in this action, damaging Plaintiffs in violation of 42 U.S.C. § 1983. Plaintiffs are therefore entitled to preliminary and permanent injunctive relief against such laws, customs, policies, and practices.

## COUNT II

### Violation of the 14th Amendment via Ultra Vires Conduct

45. All of the foregoing allegations are repeated and realleged as if fully set forth herein.

46. As the Second Circuit has held, ultra vires conduct violates Due Process. *See Cine SK8, Inc. v. Town of Henrietta*, 507 F.3d 778, 779 (2d Cir. 2007).

47. If a government agency does “not have authority for the actions it took” then those actions are “ultra vires and, as a result, sufficiently arbitrary to amount to a substantive due process violation.” *Id.*

48. Here as established above, the Defendant’s actions exceed the scope of their statutory authority and thus violate Plaintiffs’ substantive due process rights.

### PRAYER FOR RELIEF

**WHEREFORE**, Plaintiffs request that judgment be entered in their favor and against Defendant as follows:

1. An order preliminarily and permanently enjoining Defendant, its officers, agents, servants, employees, and all persons in active concert or participation with them who receive actual notice of the injunction, from enforcing a ban on the acquisition, possession, sale, carrying or use of Tasers and other electronic arms;
2. Costs of suit, including attorney fees and costs pursuant to 42 U.S.C. §1988;
3. Damages to be determined at trial;
4. Such other Declaratory relief consistent with the injunction as appropriate; and
5. Such other further relief as the Court deems just and appropriate.

Dated: September 5, 2019.

Respectfully submitted,

**JOHN NAPOLITANO AND DARK STORM INDUSTRIES LLC**

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