UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

---------- x

HAMID HASSAN RAZA; MASJID AL-ANSAR; ASAD DANDIA; MUSLIMS GIVING BACK; MASJID AT-TAQWA; MOHAMMAD ELSHINAWY,

Plaintiffs,

-against-

CITY OF NEW YORK; MICHAEL R, BLOOMBERG, in his official capacity as Mayor of the City of New York; RAYMOND KELLY, in his official capacity as Police Commissioner for the City of New York; DAVID COHEN in his official capacity as Deputy Commissioner of Intelligence for the City of New York,

Defendants.

---------- x

13 CV 3448 (PKC)(JMA)

DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' BRIEFING CONCERNING DEFENDANTS' DISPUTED DISCOVERY REQUESTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....ii

PRELIMINARY STATEMENT.....1

ARGUMENT.....3

I. The *Category I* Requests Seek Relevant, Non-Privileged Information Concerning Liability, Damages And Credibility.....3

A. The *Category I* Requests Seek Information Related To Plaintiffs' Allegations Of Reputational Harm.....3

B. The Category I Requests Are Relevant to Disputed Issues of Material Fact.....7

i. Discovery Concerning Information *Within* the Department's Knowledge is Relevant to Defendants' Defenses.....8

ii. Discovery of Information *Beyond* What Was Within the Department's Knowledge Would Provide Relevant Impeachment Material.....11

II. *The Category II* Requests Seek Relevant, Non-Privileged Information Concerning Economic Damages, Liability, and Credibility.....13

A. Plaintiffs' Financials and Books and Records.....13

B. Plaintiffs' Tax Records Are Discoverable.....17

C. No First Amendment Privilege Attaches to the Information Requested in the *Category II* Requests.....19

CONCLUSION.....22

TABLE OF AUTHORITIES

Cases

Ambrose v. City of New York, 623 F. Supp. 2d 454 (S.D.N.Y. 2009).....10

Anderson v. Hale, 202 F.R.D. 548 (N.D. Ill. May 10, 2001).....21

Berube v. A & P, 2007 U.S. Dist. LEXIS 177 (D. Conn. Jan. 3, 2007) 10

Bolia v. Mercury Print Prods, No. 02-CV-6510T, 2004 U.S. Dist. LEXIS 22730 (W.D.N.Y. Oct.28, 2004) 11

Buckley v. Valeo, 424 U.S. 1, 69-70 (U.S. 1976) 20

Chen v. Republic Restaurant Corp., No. 07 Civ. 3307 (LTS)(RLE), 2008 U.S. Dist. LEXIS 24000 (S.D.N.Y. Mar. 26, 2008) 18

Currie v. City of New York, No. 10 CV 486 (FB), 2012 U.S. Dist. LEXIS 32943 (E.D.N.Y. Mar. 12, 2012) 11

Dongguk Univ. v. Yale Univ., 734 F.3d 113 (2d Cir. 2013) 4

Ehrlich v. Village of Sea Cliff, CV 04-4025 (LDW) (AKT), 2007 U.S. Dist. LEXIS 40215 (E.D.N.Y. June 1, 2007) 15, 16

Fox v. Chemi-Nova, Inc., CV 00-5145 (TCP) (ETB), 2006 U.S. Dist. LEXIS 11463 (E.D.N.Y. Mar. 1, 2006) 8

Hickman v. Taylor, 329 U.S. 495, 500-501 (1947) 3

In re: Grand Jury subpoena For Banking records, No. M11-188 (RO), 1986 U.S. Dist LEXIS 23219 (S.D.N.Y. July 7, 1986) 19

NAACP v. Alabama, 357 U.S. 449, 460 (1958) 19, 20, 21

Nesbitt v. County of Nassau, 2006 U.S. Dist. LEXIS 88262 (E.D.N.Y. Dec. 6, 2006).....10

New York State National Organization of for Women v. Terry, 886 F. 2d 1339 (2d Cir. 1989) 20

NOW v. Sperry Rand, 88 F.R.D. 272 (D. Conn. 1980) 21, 22

Oppenheimer Fund v. Sanders, 437 U.S. 340, 350-351 (U.S. 1978) 3, 6, 11

Palm Bay International, Inc. v. Di Barolo, No. 09-cv-601 (ADS)(AKT), 2009 U.S. Dist. LEXIS 104020 (E.D.N.Y. Nov. 9, 2009) 11, 14

SEC v. Rajaratnam, 622 F.3d 159 (2d Cir. 2010) 3

Schiller v. City of New York, 2006 U.S. Dist. LEXIS 88854 (S.D.N.Y. December 7, 2006).....20

Sherwin-Williams Company v. Spitzer, No. 04-cv-185 (DNH)(RFT), 2005 U.S. Dist. LEXIS 18700 (N.D.N.Y. Aug. 24, 2005) 20, 21, 22

Smith v. Bader, No. 78 Civ. 2793, (RWS), 83 F.R.D. 437 (S.D.N.Y. Aug. 31, 1979).....17, 18

Symphony Fabrics v. Podell Industries, 94 Civ. 4373 (BSJ), 1996 U.S. Dist. LEXIS 12767 (S.D.N.Y. August 30, 1996) 16

Swierkiewicz v. Sorema N.A., 534 U.S. 506 (2002) 10

Village of Arlington Heights v. Metro Housing Dev. Corp., 429 U.S. 252 (1977) 8

Wilkinson v. FBI, 111 F.R.D. 432 (C.D. Cal. 1986) 21

Statutes

Fed.R.Civ.P. 26(b)(1).....3, 8, 10

Fed.R.Evid. 405.....5

Rules

IRS Compliance Guide for 501(c)(3) Public Charities.....17

Preliminary Statement

Plaintiffs ("Plaintiffs") bring this action claiming an unlawful policy and practice of religious profiling and suspicionless surveillance of the Plaintiffs by the New York City Police Department [hereinafter "Defendants", the "NYPD" or the "Department"]. Plaintiffs further allege that, as a result of the NYPD's conduct, they have suffered a broad range of harms, including both economic *(i.e.*, financial loss) and non-economic harms (*i.e.*, reputational injury; diminishment or loss of association of friends, congregants, or other mosques or entities; chilling or curtailment of speech; curtailment of religious practice; suspicion of others).

To defend against these claims, Defendants served discovery requests seeking information probative of liability, damages and standing.[1] The specific requests that are the subject of Plaintiffs' motion (the "Disputed Requests") fall generally into two categories: Documents and Communications concerning Plaintiffs' activities (*Category I*)[2]; and Documents and Communications concerning the financial health and fundraising capabilities of plaintiff Muslims Giving Back ("MGB") (*Category II*).[3] For ease of reference, annexed hereto as **Exhibit A** is a copy of Defendants' First Set of Interrogatories and Requests for Production.

Plaintiffs argue against disclosure of information responsive to Defendants' requests on the following grounds: (1) the information purportedly will be used by the NYPD to "retroactively justify" their conduct; or (2) the requests purportedly seek information that is

[1] Defendants reject Plaintiffs' argument that they have standing by virtue of their expungement claim and reserve their right to challenge standing at a later time.

[2] With respect to requests that seek financial information, these requests – as they are directed at Masjid At Taqwa -- fall into *Category I* because they are not being sought in connection with a claim of economic injury. By contrast, the requests for financial documents pertaining to Plaintiff Muslims Giving Back fall into *Category II* because they relate to MGB's claim of economic harm.

[3] Plaintiffs represent and agree to stipulate that all but MGB withdraw, with prejudice, their claims of economic injury, and Masjid Al Ansar alleges only the discrete economic harm of the cost associated with the purchase of recording equipment (for which we seek proof). Accordingly, Defendants respectfully request the Court to enter an order dismissing, with prejudice, the claims of economic injury of Plaintiffs Masjid At Taqwa, Mohammed Elshinawy, Asad Dandia, Hamid Raza, and Masjid Al Ansar (except for its discrete harm).

either private or protected by the First Amendment associational privilege. Plaintiffs' argument must be rejected because, as will be shown below, this information is (i) probative of Plaintiffs' allegations of reputational harm; (ii) probative of the disputed issues of material fact that underlie this action; and (iii) can be used as impeachment material that is directly related to the issues in this case. Further, the information sought is not privileged or protected by any alleged privacy rights because the Disputed Requests do not seek lists of members, donors, or the like.

In addition, Plaintiffs seek the extraordinary relief of declaratory and injunctive relief in the form of a permanent injunction and appointment of a monitor over the NYPD intelligence Bureau. In view of this extreme relief, together with Plaintiffs' voluntary choice to initiate this action, it would be substantially prejudicial to Defendants to deny them the discovery they need to fully and fairly defend against these claims. Accordingly, as more fully discussed below, Defendants respectfully request that the Court order Plaintiffs to fully respond to Defendants' discovery requests.[4]

[4] As reflected in the Court's April 3rd order, Defendants need not address Plaintiffs' challenges to Defendants' Interrogatories on grounds that these matters are not yet ripe for review. (Defendants therefore respectfully request that the Court disregard client affidavits addressing alleged concerns resulting from disclosure of information responsive to the interrogatories). Defendants reserve their right to respond to these arguments if and when they are brought before the Court at a later time. Similarly, to the extent that Plaintiffs seek to re-litigate requests Nos 1, 2, 4, 27, 31, 32, 34, 35, 37, 38, 43, 50, 51, 55, 56, or 61, these requests were already decided by the Court during the March 19th conference and therefore, are no longer in dispute. See Court's April 3rd Order, directing Defendants' to respond to Plaintiffs' arguments on the "disputed requests." As such, Defendants do not address them. Separately, with respect to requests numbers 3, 7-10, 15-19, 20, 26, 33, 36, 48, 49, 53, 54, 57, 58, 62, and 63, Defendants did not argue the propriety of these requests during the March 19th conference because Defendants had believed that the parties had reach agreement on them. Nevertheless, some of these requests were included in Plaintiffs' brief. We will address those herein.

ARGUMENT

I. The *Category I* Requests Seek Relevant, Non-Privileged Information Related To Liability, Damages and Credibility

A. The *Category I* Requests Seek Information Concerning Plaintiffs' Allegations of Reputational Harm

Plaintiffs allege that they have suffered injury to their reputations as a result of NYPD surveillance. The *Category I* requests (Nos. 5, 6, 11-14, 21-25, 30, 44, 45, 47, 62, 64) are relevant and discoverable because they seek information that bears upon Plaintiffs' reputations. *See* Fed.R.Civ.P. 26(b)(1) (permitting discovery of, *inter alia*, any "nonprivileged matter that is relevant to any party's claim or defense"); *SEC v. Rajaratnam*, 622 F.3d 159, 180-181 (2d Cir. 2010) ("Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation.").

Plaintiffs argue that the requests are overbroad because they do not focus solely on the specific relationships that Plaintiffs alleged in their Complaint were damaged by the NYPD's surveillance.[5] (Pls,' Brief at 24). Defendants, however, are not bound by the four corners of the pleadings in making their discovery requests. "[D]iscovery is not limited to issues raised by the pleadings, for discovery itself is designed to help define and clarify the issues." *Oppenheimer Fund v. Sanders*, 437 U.S. 340, 350-351 (U.S. 1978) (citing *Hickman v. Taylor*, 329 U.S. 495, 500-501 (1947)).

Here, the issue is whether Plaintiffs suffered reputational harm as the result of unlawful surveillance by the NYPD. The requests in *Category I* seek information designed to uncover whether Plaintiffs' reputations may have been affected by facts independent of the NYPD's

[5] Plaintiffs' proposal reflects at attempt to limit Defendants to only one-sided discovery. By limiting the scope of discovery in this fashion, Plaintiffs are impermissibly seeking to produce discovery of only evidence that they may rely upon at trial, which they would ordinarily produced as part of their Rule 26(a) disclosures.

alleged surveillance. Defendants must be permitted discovery of this evidence because it is relevant to their defense of causation. *See, e.g., Dongguk Univ. v. Yale Univ.*, 734 F.3d 113, 130-131 (2d Cir. 2013) (dismissing claim of reputational harm on summary judgment where plaintiff failed to raise any material question of fact that the defendant's conduct was the proximate cause of her reputational injury). The requests in *Category I* seek information concerning Plaintiffs' alleged criminal activity or their ties or dealings with persons or entities of known ill repute (requests nos. 5, 6, 13, 22-25, 47, 30, 52, 64); or their rhetoric (Requests 11, 12). Such persons would include, for example, individuals who have been charged, convicted, or sentenced for crimes, including terror-related related offenses, or people who have testified as character witnesses for criminal defendants who were ultimately convicted of terrorism-related offenses. Similarly, the types of entities that are the subject of the requests are groups that have been designated by the U.S. government as Foreign Terrorist Organizations ("FTOs").

To illustrate, it is believed that Plaintiff Mohammed Elshinawy was a reputed sanctioner of violent extremism with familial ties to terrorism (his father, Ali Elshinawy, was a close associate of Omar Abdel Rahman, the "Blind Sheikh" and was named, along with Mohammed's brother, as an unindicted co-conspirator in the "Landmarks Plot" by the US Attorney for the Southern District of New York). Plaintiff Elshinawy had also made statements and conducted activities in support of violent Jihad. Further, he was suspected of encouraging others to travel overseas to train or fight alongside extremists elements, and convicted terrorists such as Abdel Hameed Shehadeh, Agron Hasbajrami, Carlos Almonte, and Mohammed Alessa had been known to attend Elshinawy's lecturers at Masjid Al Ansar and elsewhere. Defendants cannot be precluded from taking discovery in support of their defense that Plaintiffs' reputations were not

the product of NYPD surveillance, but rather, were arguably the result of Plaintiffs' rhetoric or their known, suspected, or rumored associations with people or organizations of ill repute.

Towards that end, discovery on the *Category I* requests should not be limited to information that was within the Department's possession. While the Department may have some information about a Plaintiff's activities, the facts that shape one's reputation within his community are not entirely within the Department's knowledge. Information relating to Plaintiffs' dealings and relationships is probative that factors that impact their reputations. Accordingly, Defendants should not be precluded from obtaining this information which is required to defend against the allegations in the complaint.

In addition, the *Category I* requests seek information which must be discoverable because Plaintiffs – by alleging reputational harm – have put their character in issue, thereby opening the door to discovery of information concerning their character or reputations – which would include discovery of information both within and beyond the Department's knowledge. Defendants must therefore be afforded discovery to impeach character testimony, as permitted by Rule 405 of the Federal Rules of Evidence (specifically allowing for cross-examination of a character witness through inquiry into relevant specific instances of conduct where the person's character or character trait would be testified to). Here, the ability to impeach a witness regarding a Plaintiff's character or reputation, through use of evidence obtained during the course of discovery, is critical to the Defendants' defense.

Plaintiffs dispute the relevance of Requests Nos. 12 and 30 (seeking information concerning Plaintiffs' rhetoric, and associations with persons or with suspected or confirmed terrorist associations, respectively) on the purported grounds that responsive information to these requests *may* include private communications. (Pls.' Brief at 24.) This argument, however, is of

no moment for several reasons. First, private communications may contain information about a Plaintiff that is known by the community and which could thereby impact the Plaintiff's reputation. Second, Defendants have shown the relevance and import of these non-privileged documents, and therefore, they must be disclosed. *See Oppenheimer Fund, Inc*, 437 U.S. at 351 (defining "relevance" under Fed.R.Civ.P. 26 to be "construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case"). Third, Plaintiffs have failed to meet their burden of demonstrating the alleged private nature of *all* or even *some* of the information that is responsive to Defendants' requests, other than to simply state it is private. Plaintiffs' arguments concerning the inadequacy of the governing Protective Order, which was heavily litigated by the parties over the course of several months, are unavailing.[6] As such, Plaintiffs' arguments must be rejected.

With respect to the requests seeking the financials and books and records of Plaintiff Taqwa, as will be demonstrated in *Section II* below, those records are not protected by the First Amendment associational privilege or any privacy rights.[7] Moreover, requests for this information are proper because they seek information that is relevant. For example, the NYPD had information that a leader of Taqwa may have earmarked large sums raised in the mosque to certain Foreign Terrorist Organizations. In addition, the NYPD had information that unlawful activity had repeatedly occurred at the Taqwa Bookstore and Zam Zam Shop, entities that are believed to be owned or controlled by Masjid At Taqwa. This constitutes some of the information that the Department relied upon in the performance of its duties, and information

[6] Plaintiffs fail to demonstrate the lack of protection afforded by the governing Protective Order which limits use of the material to only litigation of this case, and further limits access of the information to only limited members of the NYPD.

[7] Initially these requests for financials were directed at all plaintiffs because, at that time, Defendants did not yet know who, if any, of the Plaintiffs were asserted a claim of economic injury. Defendants address the need for this information with respect to Plaintiff MGB, which asserts a claim of economic injury, and Masjid At Taqwa, whose financial dealings were in question.

which Defendants will rely upon to defend Plaintiffs' claims of suspicionless surveillance. Defendants' request for Taqwa's financials and books and records are directed at obtaining the documents that Defendants believe will contain information probative of Taqwa's possible financials dealings with FTOs and its relationship with the Taqwa Bookstore and the Zam Zam shop, closely-linked entities suspected of unlawful activity. As such, and contrary to Plaintiffs' arguments, inquiry into these matters has nothing to do with "retroactive justification", but with Plaintiffs' reputations, their characters, and facts which support the basis for NYPD conduct which facts Plaintiffs indicate they will dispute.

Plaintiffs' argument that their financials fall under the protection of the First Amendment privilege should similarly be dismissed for reasons set forth in *Section II* below. Accordingly, Plaintiffs must be compelled to produce responsive information.

B. <u>The Category I Requests Are Relevant to Disputed Issues of Material Fact</u>

Plaintiffs' concede that Defendants are entitled to discovery of information concerning the disputed facts, or so-called "contested facts". (Pls.' Brief at 22-23). They argue, however, they should not be required to produce this information until they have first seen the NYPD's records and determined which pieces of information they will "contest" and which they will not (*i.e.*, their proposal for "sequenced" discovery). They also continue in their objection to producing discovery concerning facts beyond those within the Department's knowledge on grounds that such information will purportedly be used by the NYPD to either "retroactively justify" its conduct, or lead to new avenues of investigation by the NYPD. Plaintiffs' arguments, concerning both the scope of discovery as well as their proposal to "sequence", must be rejected because (a) "sequenced" discovery is not supported by any legal authority, (b) Plaintiffs' apply

the wrong legal standard; and (c) Plaintiffs' concerns are unfounded, especially in light of the robust protective order in place, and are further outweighed by Defendants' need (and entitlement) to discovery of this relevant, nonprivileged information.

i. Discovery Concerning Information *Within* the Department's Knowledge

The *Category I* requests include requests concerning facts and information within the Department's knowledge and upon which the Department relied. As an initial matter, Plaintiffs should not be permitted to contest the information that was relied upon by the Department to support its conduct. The test for the lawfulness of Defendants' conduct stems not from the veracity of these facts, but rather, from Defendants' state of mind, *i.e.*, whether they acted with a discriminatory purpose. *See Village of Arlington Heights v. Metro Housing Dev. Corp.*, 429 U.S. 252, 265 (1977) ("Proof of discriminatory intent or purpose is required to show a violation of the Equal Protection Clause."). As such, Plaintiffs' denial of the veracity of the information is irrelevant.

Nevertheless, Plaintiffs have stated their intention to contest these facts, and as such, Defendants must proceed on the assumption that Plaintiffs' approach will be allowed at the dispositive stage (an approach with which Defendants disagree). Thus, Defendants must be permitted to take discovery regarding this information. As relevant, nonprivileged material, this information is well within the scope of permissible discovery. *See* Rule 26(b)(1)(permitting discovery on any relevant, non-privileged matters); *Fox v. Chemi-Nova, Inc.*, CV 00-5145 (TCP) (ETB), 2006 U.S. Dist. LEXIS 11463, at *25 (E.D.N.Y. Mar. 1, 2006) ("It is a fundamental principle of law that 'parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party . . .' or that is "reasonably calculated to lead to the discovery of admissible evidence.'") (citation omitted).

Plaintiffs argue, however, that they should not be required to respond to requests of this nature until only after they have first viewed the NYPD's documents and determined which pieces of information contained therein they will "elect not to dispute", thereby relieving them of their obligations to produce discovery on facts that they do not dispute. (Pls.' Brief at 23). Plaintiffs' argument, however, fails for several reasons.

First, Plaintiffs have already demonstrated that they dispute certain information held by the Department, yet they continue in their objection to producing discovery concerning this information. *See, e.g.*, Ltr by Hina Shamsi to the Court dated September 11, 2013 (DE # 12) (characterizing Defendants' September 10th letter (DE # 11), which enumerated certain facts underlying the basis for NYPD conduct, as "vilify[ying] our clients through inflammatory insinuation and innuendo, suggesting that Plaintiffs are worthy of criminal investigation").[8] As such, Plaintiffs' request to sequence the discovery is unfounded and Plaintiffs must be compelled to respond to the *Category I* requests now.

Second, it is not sufficient for Plaintiffs to merely "elect not to dispute" a fact. In order to shift the burden from Defendants in proving the strength of the fact, Plaintiffs would have to either admit to it, or stipulate to it. Anything short of that would keep the fact in dispute and the burden on Defendants to prove the fact.[9] (Pls.' Brief at 23). This bolsters Defendants' concern that Plaintiffs would then have the ability to "cherry pick" the facts to contest. In other words, after viewing the Defendants' documents, Plaintiffs will likely evaluate the strength of each piece of information concerning each Plaintiff, and thereafter could quite feasibly contest only

[8] Plaintiffs state that "[n]othing in Plaintiffs' September letters indicates that they intend to dispute every fact in the NYPD's files". (Pls.' Brief at 22, FN 16). Yet, nothing in Ms. Shamsi's September 11th letter (DE # 12) supports this notion, and further, Plaintiffs have yet to admit to, or stipulate to any of these facts and continue to deny them. As such, they remain in dispute and Defendants are entitled to explore information concerning these facts.

[9] As earlier stated, Defendants should not be required to prove the strength of any fact; however, because Plaintiffs may challenge the information that formed the basis of any investigation, Defendants must be permitted to take discovery of these disputed material facts.

those pieces of information that are not as strong or easy to prove. Accordingly, Plaintiffs must be ordered to produce information responsive to these request.

Further, regardless of whether a Plaintiff admits or denies a fact, Defendants are still entitled to take discovery concerning that fact because discovery is not limited to only disputed issues of fact. *See* Fed.R.Civ.P. 26(b)(1). In addition, it is well established that Defendants are entitled to discovery of this critical nature, since it concerns discovery to be used towards Defendants' defense that they acted lawfully. *See Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002) (It is up to the "liberal discovery rules . . . to define disputed facts and issues and to dispose of unmeritorious claims) (*overruled* on other grounds) *quoted in Nesbitt v. County of Nassau,* 05-CV-5513 (JG), 2006 U.S. Dist. LEXIS 88262, *16 (E.D.N.Y. Dec. 6, 2006); *Ambrose v. City of New York*, 623 F. Supp. 2d 454, 465 (S.D.N.Y. 2009) (same); *Berube v. A & P*, 2007 U.S. Dist. LEXIS 177 (D. Conn. Jan. 3, 2007) (affirming grant of discovery of information on disputed issues of material fact which could not be resolved without further factual development). As such, and absent an admission or stipulation to these facts by Plaintiffs, Defendants are entitled to discovery concerning these facts.

In addition, Plaintiffs' argument that "Defendants may rely only on the information they possessed *at the time* they decided to investigate Plaintiffs" has no bearing on civil discovery. (Pls.' Brief at 20). This proposition, as reflected in Plaintiffs' own cases pertains to either (a) the legal standard to be applied on summary judgment for proof of claims and defenses – which is a far more stringent standard than the liberal standards of discovery; or (b) evidentiary rulings in a criminal matter. These principles have little, if anything, to do with broad discovery rules in civil matters. This is especially true since Plaintiffs have now indicated that they will challenge the strength of the information relied upon by the Department. Thus, Plaintiffs are playing both

sides of the coin, by arguing on the one hand that Defendants must be limited to the facts within their possession, and on the other hand, that Plaintiffs get to challenge those facts, and further may do so without providing Defendants with related discovery.

For these reasons, the information requested in the *Category I* requests is germane to the litigation, and therefore, Plaintiffs must be compelled to respond to them.

ii. Discovery of Information *Beyond* What Was Within the Department's Knowledge Would Provide Relevant Impeachment Material

To the extent that the *Category I* requests would lead to the discovery of information beyond what was in the Department's knowledge, Defendants submit that this information must similarly be produced. First, as shown above, information of this nature is relevant to Plaintiffs' allegations of reputational harm. Second, this information constitutes impeachment material on issues directly related to the claims and defense in this case. It is well established that "discovery is not limited to issues raised by the pleadings, for discovery itself is designed to help define and clarify the issues." *Oppenheimer*, 437 U.S. at 350-351 ("Relevance" is to be "construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case."); *Palm Bay International, Inc. v. Di Barolo*, No. 09-cv-601 (ADS)(AKT), 2009 U.S. Dist. LEXIS 104020, *5-*6 (E.D.N.Y. Nov. 9, 2009). This includes discovery of impeachment material. See *Currie v. City of New York*, No. 10 CV 486 (FB), 2012 U.S. Dist. LEXIS 32943, 5-7 (E.D.N.Y. Mar. 12, 2012) ("Generally, [p]arties may utilize discovery to obtain information for impeachment purposes") (alteration in original); *Bolia v. Mercury Print Prods,* No. 02-CV-6510T, 2004 U.S. Dist. LEXIS 22730, 6-8 (W.D.N.Y. Oct. 28, 2004) (permitting discovery of plaintiff's personnel records for impeachment purposes).

Here, Plaintiffs argue that the allegations in the complaint are "particularized" and therefore, do not give "license for Defendants to inquire into all of Plaintiffs' communications or

conduct, in an attempt to find something that would impeach Plaintiffs' credibility." (Pls.' Brief at 24). This argument must be rejected because Plaintiffs' allegations are broad and far-reaching. Indeed, the main thrust of Plaintiffs' complaint is stigmatization and reputational harm which resulted in a broad spectrum of significant injuries, whether in the form of alleged loss of congregants, friends or associates, loss of speaking engagements, curtailment of the ability to practice their religion, curtailment of speech, subjective fears of others, loss of donations resulting in a "significant blow" to the Plaintiff charity, to name a few. Given the breadth and scope of Plaintiffs' alleged injuries, Defendants must be permitted to the information requested in *Category I.*

This is especially necessary in view of the fact that Plaintiffs have already distanced themselves from the facts put forth by Defendants to support their defense (see Shamsi 9/11/13 Ltr, DE # 12), as evidenced by: Taqwa's denial of illegal weapons trafficking, financing FTOs, and participating in and sponsoring events for purposes of training violent extremists to become "jihadist warriors" and engage in Jihad; Masjid Al Ansar and Raza's denial that Ansar's founders, lecturers, and attendees include individuals who were either convicted on terrorism charges or were close to individuals who were convicted on terrorism charges; Mohammad Elshinawy's denial of making statements and conducting activities in support of violent Jihad; Dandia's and MGB's denial of making statements in support of violent Jihad and having ties to individuals convicted of terrorism-related offenses, such as Justin Kaliebe, with whom Dandia allegedly planned to travel to Pakistan.

Further, it is reasonable for Defendants to anticipate a scenario in which a Plaintiff – once confronted with the information that the Department had – would make every attempt to rehabilitate themselves and minimize the strength of that fact. This is especially likely where, as

here, certain information is based on source reporting, making it easy for a Plaintiff to simply deny certain facts. In that event, Defendants would lack the ability to cross-examine the Plaintiff if impeachment material were not disclosed.[10]

II. *The Category II* Requests Seek Relevant, Non-Privileged Information Concerning Economic Damages, Liability, and Credibility[11]

A. Plaintiffs Financials and Books and Records

Plaintiff MGB alleges that it has suffered economic and non-economic injury as a result of NYPD surveillance. It alleges that,

> Once it became public that Rahman had infiltrated Muslims Giving Back as an NYPD informant, the charity was stigmatized, and its reputation and legitimacy within the Brighton Beach community was deeply damaged. Muslims Giving Back has not been able to maintain its previous level of activity in the community. Its ability to raise funds for, and fulfill the charitable goals and activities it was formed to accomplish has suffered greatly.

(Compl. at ¶ 105). MGB further alleges that days "after Rahman disclosed that he was an NYPD informant," plaintiff Dandia was denied the ability to solicit donations from another mosque, Masjid Omar, thereby, causing a "major blow to the charity's viability", including an impeded ability "to raise funds to buy food and serve the community's needs and to raise the $308 per month required to rent the storage facility where it stores donated food." (Compl. at ¶ ¶ 106-107).[12] It further alleges that the "revelation that Rahman was an NYPD informant has also harmed the ability of Muslims Giving Back to publicize its charitable activities and attract new members." (Compl. at ¶ 109).

---

[10] Further, it is not ground for objection that the information sought may ultimately not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. *Oppenheimer Fund*, 437 U.S. at 351; *Barrett v. City of N.Y.*, 237 F.R.D. 39, 40 (E.D.N.Y. 2006) (the information sought "need not be admissible at trial to be discoverable").

[11] The Category II requests are Requests Nos. 21-25, 28, 29, 44, 45, 47, and 64.

[12] In an alleged effort to "compromise" during the parties' meet-and-confers, Plaintiffs offered to stipulate that the rent is $308. This is just another example of Plaintiffs' attempts to thwart Defendants' ability to challenge Plaintiffs' claims and to produce only self-serving discovery.

To defend against these claims, Defendants have asked for information concerning the organization's financials, such as its books and records, bank statements, and lease agreements in order to ascertain the organization's health both before and after the underlying events. *See Category II* requests (Requests Nos. 22, 23, 25, 62). Plaintiffs object to the *Category II* requests on grounds of purported First Amendment Privilege and lack of relevance (*i.e.*, that the requests are overbroad and therefore seek information that is not relevant to their claim of diminished donations). (Pls.' Brief at 7). Plaintiffs' arguments must be rejected because the *Category II* requests *do not seek* protected information such as membership lists or donor lists. They seek information that is both relevant and non-privileged, thereby rendering them well within the scope of permissible discovery.

Plaintiff MGB alleges that surveillance by the NYPD (or, more specifically, disclosure by Rahman that he was an informant for the NYPD and was present at MGB), caused the organization financial harm in the form of lost donors or diminished donations. The *Category II* requests concerning MGB's financials are relevant to test the validity of this claim. Where, as here, the Plaintiff claims economic damages, Defendants are entitled to take discovery of Plaintiffs' financial records in order to fully and fairly test those claims. *See, e.g., Palm Bay International, Inc.*, 2009 U.S. Dist. LEXIS 14020, at *9-*11 (granting defendant's motion to compel 15 years' worth of discovery of plaintiff's financial records – which included plaintiff's annual financial statements, documents concerning plaintiff's profits, income and expenses, depletion data, invoices to demonstrate revenue generated, invoices to demonstrate costs, ledge reports showing its expenses, spreadsheets calculating the total revenue, total expense, profits/losses, etc. – in a breach of contract case where plaintiff alleged the discrete financial injury of economic losses suffered as a result of being supplied defective wine by defendant).

Moreover, where, as here, Plaintiffs seek to rely on selective portions of their financial records to support a damages claim, Defendants are entitled to broader discovery of their financial records in order to test Plaintiffs' calculations of damages. *Ehrlich v. Village of Sea Cliff*, CV 04-4025 (LDW) (AKT), 2007 U.S. Dist. LEXIS 40215, at *11 (E.D.N.Y. June 1, 2007) (where plaintiffs had already produced their general ledgers, profit and loss statements, and tax returns, and where defendants were seeking to verify the information contained in those documents through bank statements, cancelled checks, cash register tapes, credit card receipts, and daily close out worksheets, the court held that the defendants were still "entitled to supporting documentation relied upon by Plaintiffs' expert to clarify and accurately illuminate Plaintiffs' corporate structure and income for purposes of potential rebuttal concerning the amount of damages alleged by Plaintiffs.").

Plaintiff MGB objects to producing any of its financial information, arguing that only information on the discrete issue of donations should be discoverable, and not information concerning the overall health of the organization. MGB, however, has put the overall health and fundraising capabilities of the organization in issue by claiming, in effect, that the organization cannot run itself as a result of diminished donations caused by the NYPD. MGB claims an overall blow to the financial health of the organization, alleging that, not only have donations diminished, but also that it struggles just to pay its $308 monthly rent for its food storage facility – all allegedly because Masjid Omar has distanced itself from MGB after learning of Rahman's presence within the organization. In view of MGB's broad and far-reaching claim of economic injury, Defendants are entitled to access to MGB's financials and books and records.[13] In

[13] Request Number 23 seeks a variety of financial information because it was directed at all Plaintiffs, and therefore, was designed to capture all relevant information. Further, at the time those requests were served, no representations were made concerning which plaintiffs would be alleging economic injury. Given counsel's representation that only MGB asserts economic harm, and given Ansar's discrete alleged harm relating the cost of the camera installation,

addition, as will be further discussed below in connection with production of MGB's tax records, allegations concerning their alleged economic injury resulting from the NYPD are further belied by their tax filings for the year 2011, in which MGB reported a lack of income for the year 2011.

Defendants require discovery of MGB's financials in order to assess the organization's financial health both before and after the alleged events. This entitles Defendants to view the books and records, and cash flow both into the organization and out of it, to determine sources of income. Defendants should not be forced to rely upon Plaintiff's testimony alone, or solely on the summary of data such as the one suggested by Plaintiffs' Counsel – to the exclusion of all other relevant documents.[14] Moreover, the summary that Plaintiffs propose can hardly be deemed reliable. *See, e.g., Symphony Fabrics v. Podell Industries*, 94 Civ. 4373 (BSJ), 1996 U.S. Dist. LEXIS 12767, (S.D.N.Y. August 30, 1996) (finding party's proof of damages "totally unreliable" where only summary compilations were produced, but not the underlying documents); *Ehrlich*, 2007 U.S. Dist. LEXIS 40215, at *11 ("Plaintiffs cannot use these financial records as both a sword and shield--particularly where Plaintiffs have commenced this action and bear the ultimate burden of proof. The more usual and sensible approach would be for the parties to have entered [into a protective order]."). Accordingly, Plaintiffs must be compelled to produce their financials and books and records.

Defendants are willing to narrow (without prejudice) Request Number 23 to MGB's general ledger, profit and loss statements for all fund accounts, income, revenue and gross earnings, membership dues, expenses and expenditures, accounts receivable and accounts payable. For reasons discussed in the section concerning Category I requests, this request is also directed at Taqwa, and further includes the additional information concerning Taqwa's expenditures on security personnel.

[14] Here, the summary is purportedly a compilation of data, without the underlying records (on the donations flowing into the organization and not out) prepared by the American Civil Liberties Union Foundation, as counsel for MGB and Dandia, solely for purposes of prosecuting this case, and solely on the discrete aspect of incoming donations.

B. Plaintiffs' Tax Records Are Discoverable (Requests Nos. 22 and 62)

Plaintiffs object to production of their tax documents on grounds that Defendants cannot show a "compelling need" for the information. As an initial matter, Defendants need not demonstrate a compelling need for this information because tax documents are not privileged. *See, e.g., Smith v. Bader*, No. 78 Civ. 2793, (RWS), 83 F.R.D. 437, 439 (S.D.N.Y. Aug. 31, 1979) (compelling disclosure where plaintiffs had "placed their income in issue by claiming that they [had] suffered a loss due to defendants' actions and it would be inequitable to prevent the defendants from obtaining the evidence necessary to disprove this claim")

In addition, Plaintiff MGB cannot claim privilege over its tax records because, as a public charity and alleged registered 501(c)(3) organization, it is required to make these documents available to members of the public. [15] According to the IRS Compliance Guide for 501(c)(3) Public Charities, a public charity, with limited exception not present here, is required to make publicly available for inspection its annual information return (Form 990 series) with schedules, attachments, and supporting documents filed with the IRS. While the organization need not disclose the names and addresses of contributors listed on Schedule B (which Defendants here do not seek), "[a]ll other information, including the amount of contributions, the description of noncash contributions, and any other information provided will be open to public inspection unless it clearly identifies the contributor." IRS Compliance Guide for 501(c)(3) Public Charities.

Furthermore, a court may order disclosure of tax documents where, as here, "it appears they are relevant to the subject matter of the action, and that there is a compelling need therefore because the information contained therein is not otherwise readily obtainable." *Smith*, No. 78

[15] This argument applies with equal force to Masjid Al Ansar, which similarly claims 501(c)(3) status.

Civ. 2793, 83 F.R.D. at 438. As shown above, Defendants have demonstrated the relevance of and "compelling need" for these records.

Defendants' compelling need is further heightened by several other factors. First, the situation in this case is distinct from that in *Chen v. Republic Restaurant Corp.*, No. 07 Civ. 3307 (LTS)(RLE), 2008 U.S. Dist. LEXIS 24000 (S.D.N.Y. Mar. 26, 2008) – in which the defendants were denied Plaintiffs' tax returns to prove sales volume because the plaintiffs had already produced that information in the form of their financial records which reflected the take-out sales of their business every day for the previous 7 years. *Id.* at *8. Here, Plaintiffs continue to object to production of any and all records concerning their financials. Defendants have been denied access to all other books and records of the organization. Thus, there are no other sources of this information, let alone better or less intrusive ways to obtain the necessary information.

Plaintiffs argue that this information can be just as easily obtainable by deposing Plaintiffs, or by relying upon their attorney-generated compilation of donations, with nothing more. These proposals must be rejected, as they would hamper Defendants' ability to fully defend against Plaintiffs' claims. First, Defendants should not be forced to rely solely on the testimony of Plaintiff; Defendants must be permitted to probe the veracity of Plaintiffs' allegations by viewing their tax documents, which would provide financial information before and after the alleged incident. Second, reliance upon Plaintiffs' counsel's document on the discrete issue of the alleged decline in donations would cause Defendants substantial prejudice. Finally, because both Taqwa's and MGB's credibility is in question, Defendants should be allowed to obtain discovery of Plaintiffs tax filings.

The need for the requested discovery can be further evidenced by the contradictory statements made by MGB and Dandia. These Plaintiffs allege in the complaint that Rahman's

disclosure as an NYPD informant in 2012 resulted in MGB's reputational harm, and hence, diminished donations that have caused the organization to struggle financially. Contrary to these allegations, however, MGB's tax filings for the year 2011 reflect that MGB reported no income for that year. Accordingly, Defendants' request for information concerning MGB's financials are not only probative of MGB's (and Dandia's, as its founder and leader) claim of economic injury, but it is also probative of their credibility. (Requests Nos. 22-25, 64). Having alleged two conflicting statements -- one in a Federal Court pleading, the other in a tax filing – Plaintiffs must be compelled to produce information responsive to the Defendants' requests. Thus, this information is material and not merely collateral to the issues in this case.

C. No First Amendment Privilege Attaches to the Information Requested in the *Category II* Requests

Plaintiffs erroneously argue that they should not be compelled to produce information responsive to Defendants' discovery requests on grounds that the information sought impermissibly infringes upon Plaintiffs' First Amendment rights and rights of privacy. Pls' Brief at 3. Plaintiffs' argument must be rejected for several reasons. As a threshold matter, Defendants are not seeking membership lists, donor lists, or any other kind of information that would be protected by the First Amendment associational privilege. *See NAACP v. Alabama*, 357 U.S. 449, 460 (1958) (denying compelled disclosure of membership lists). [16]

Further, Plaintiffs have failed to demonstrate that the *Category II* requests should garner First Amendment protection. Because Defendants are *not* seeking "protected" information such as the identifies of any members but rather, "technical" information such as financial records, disclosure of this information is less likely to pose a threat of harm. *In re: Grand Jury subpoena For Banking records*, No. M11-188 (RO), 1986 U.S. Dist LEXIS 23219 (S.D.N.Y. July 7, 1986)

[16] To the extent that these documents contain the identities of third parties, Defendants have agreed to redaction with coding.

(finding "technical information" such as financial records are "less likely to chill associational freedom than a request of members' names")

Indeed, the associational privilege's proscription has been extended only to a "limited cache of documents". *Sherwin-Williams Company v. Spitzer*, No. 04-cv-185 (DNH)(RFT), 2005 U.S. Dist. LEXIS 18700, *15-*16 (N.D.N.Y. Aug. 24, 2005). The privilege is designed "to protect an organization's internal activities and documents, such as lists of members, contributors, and political affiliations when the disclosure will adversely affect the organization's ability to advocate or cause members to withdraw or expose them to threats, reprisal, and harassment." *Sherwin-Williams Company*, 2005 U.S. Dist. LEXIS 18700 at *14. Here, Defendants are not seeking any of the aforementioned information.

Further, the privilege is qualified, requiring Plaintiffs to first demonstrate that disclosure will result in alleged infringement of their First Amendment rights. *See Schiller v. City of New York*, 2006 U.S. Dist. LEXIS 88854, at *12 (S.D.N.Y. December 7, 2006) ("[the party resisting discovery] must at least articulate some resulting encroachment on their liberties") (quoting *New York State National Organization of for Women v. Terry*, 886 F. 2d 1339, 1355 (2d Cir. 1989) (alterations in original)). The assertion of the privilege cannot be speculative in nature. *Buckley v. Valeo*, 424 U.S. 1, 69-70 (U.S. 1976) ("We agree with the Court of Appeals' conclusion that *NAACP vs. Alabama* is inapposite where, as here, any serious infringement on First Amendment rights brought about by the compelled disclosure of contributors is highly speculative.")

Here, neither Plaintiff MGB (through declaration of its leader, Plaintiff Asad Dandia), nor Plaintiff Taqwa (through declaration of its assistant imam, Osman A. Adam) has met their burden of demonstrating why their financial information should be protected or how disclosure of their financials will expose them to threats, reprisals, or harassment. *See* Dandia Decl., Pls.'

Brief at Ex. C, at ¶ 7 (alleging that disclosure of information would "reveal the identities of organizations . . . individuals . . . donors" and others); Osman Decl., Pls.' Brief at Ex. D, at ¶ 7 (alleging fear of revealing names of charities). As already established, Defendants are not seeking protected information such as the identities of any donors or donees, and therefore, Plaintiffs' concerns are unfounded. Moreover, the purported harms alleged by Plaintiffs do not, in any way, resemble, nor can they be compared to the real threat of harms facing members of the NAACP, who had demonstrated the "uncontroverted showing that on past occasions revelations of the identity of its rank-and-file members ha[d] exposed [its] members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility." *NAACP v. Alabama,* 357 U.S. at 462.

Further, in *NAACP v. Alabama*, unlike the situation here, the NAACP was the party being sued and from whom disclosure was being compelled. By contrast here, Defendants are seeking discovery from the Plaintiffs, who have voluntarily brought their claims into court. As such, Plaintiffs must be required to produce discovery concerning these claims. The First Amendment "cannot be used to circumvent general and legitimate discovery where the specter of intimidation and reprisal is not present." *Sherwin-Williams Company*, 2005 U.S. Dist. LEXIS 18700 at *15-*16. *See also Wilkinson v. FBI*, 111 F.R.D. 432, 436 (C.D. Cal. 1986) (finding that the privilege is qualified, not absolute, and it can't be used as a "blanket bar to discovery") (*cited in Sherwin-Williams*). Indeed, the Supreme Court "'did not intend to provide publicly identified members of dissident organizations with a nearly impenetrable shield . . . to block general discovery requests.'" *Sherwin-Williams Company*, 2005 U.S. Dist. LEXIS 18700 at *16 (citing *Anderson v. Hale*, 202 F.R.D. 548 (N.D. Ill. May 10, 2001)(citing NAACP v. Alabama, 357 U.S. at 462-63). *See also NOW v. Sperry Rand*, 88 F.R.D. 272 (D. Conn. 1980). Further, as shown above,

the governing protective order provides Plaintiffs with added protection to address their concerns.

The thrust of MGB's argument – as with all other Plaintiffs' arguments – is that Plaintiffs are simply uncomfortable with producing any discovery that does not support their case. "It should be duly noted [however] that once a party initiates or joins an action, 'it cannot realistically hope to pursue [the] suit in a risk-free atmosphere.'" *Sherwin-Williams Company*, 2005 U.S. Dist. LEXIS 18700 at *17 (quoting *NOW v. Sperry Rand*, 88 F.R.D. at 275. Thus, these documents cannot be deemed privileged or private beyond the scope of disclosure.

Even assuming, *arguendo*, that Plaintiffs have met their burden of establishing First Amendment or privacy rights – which they have not – Defendants have nevertheless met their burden of showing a "compelling need" for the information requested in the *Category II* requests by demonstrating their relevance to the claims and defenses of this litigation.[17]

CONCLUSION

By reason of the foregoing, Defendants respectfully request that the Court deny Plaintiffs' application and issue an order compelling Plaintiffs to provide all responsive information to Defendants' Discovery Requests, and for such other and further relief that this Court deems just and proper.

Dated: New York, New York
April 21, 2014

Respectfully submitted,

Cheryl L. Shammas
Senior Counsel

Cc.: Plaintiffs' Counsel (*via* ECF)

[17] Alternatively, if MGB wishes to avoid production of these records, then it may voluntarily dismiss, with prejudice, its claim of economic injury.