UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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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.

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13 CV 3448 (PKC)(JMA)

DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' OBJECTIONS TO DEFENDANTS' INTERROGATORIES PURPORTEDLY ON GROUNDS OF *FIRST AMENDMENT* ASSOCIATIONAL PRIVILEGE AND SO-CALLED "RETROACTIVE JUSTIFICATION"

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PRELIMINARY STATEMENT[1]

This motion addresses Plaintiffs' continuing efforts to block Defendants from obtaining necessary and critical discovery they need to defend against the baseless claims and allegations set forth in the Complaint. In furtherance of those obstructive efforts, Plaintiffs assert an alleged infringement of *First Amendment* rights and purported "retroactive justification" -- neither of which is applicable to the case at bar. Plaintiffs seek to circumvent the Federal Rules of civil discovery in an attempt to use allegations for their own self-serving purposes and block Defendants from accessing discovery (of documents and third-party information) that is material and crucial to the litigation, both to test Plaintiffs' allegations and to have a full and fair opportunity to defend the action. The disputed discovery – concerning matters which Plaintiffs themselves have affirmatively put in issue – goes to the heart of the claims and defenses of this lawsuit. In refusing to produce discovery, Plaintiffs are thereby shifting their burden of proving their case to Defendants to affirmatively disprove Plaintiffs' claims.

Plaintiffs bring this lawsuit alleging unconstitutional surveillance by the NYPD based solely on Plaintiffs' religion, which Plaintiffs allege resulted in various alleged harms to both Plaintiffs and members of their respective organizations. *See, e.g.,* Compl (DE # 1); Elshinawy Decl., Ex. E, ¶ 6, DE # 49-2 (alleging "targeting" by the government "solely" because of religion). The Complaint is 32 pages long and contains 164 paragraphs. Plaintiffs' allegations of harm include both economic injury *(i.e.*, financial loss) and non-economic injury (*i.e.*, reputational/stigmatic injury; diminishment or loss of association of friends, congregants, or mosques; chilling or curtailment of speech; curtailment of religious practice; suspicion of

[1] Defendants hereby incorporate all arguments from their two prior briefs concerning Defendants' disputed document requests to arguments made herein, which concern the disputed Interrogatories on grounds of alleged assocational privilege and "retroactive justification". Similarly, the arguments contained herein apply with equal force to the disputed document requests. Annexed hereto to the Declaration of Cheryl L. Shammas ("Shammas Decl.") as **Exhibit A** is a copy of Defendants' First Set of Interrogatories and Requests for Production.

others). To bolster their claims, Plaintiffs make reference to numerous unidentified individuals in the Complaint as purported evidence of liability and injury, i.e., persons who were allegedly harmed or who have distanced themselves from Plaintiffs.

In order to determine the veracity and credibility of Plaintiffs' assertions, Defendants served a discrete set of Requests for Production of Documents and Interrogatories upon Plaintiffs. Plaintiffs have objected to substantially all of Defendants' requests and have tied up discovery with meritless motion practice. This brief addresses only Plaintiffs' challenges to 31 Interrogatories, which they seek to block purportedly on First Amendment associational privilege (Interrogatories Nos. 1, 5, 6, 8-12, 17-20, 25, 27, 28, 30, 32-35, 37-39, 43-45, 47) and so-called "retroactive justification" by the NYPD (Interrogatories Nos. 26, 53, 55, 56).[2] *See* Pls' Suppl. Briefing dated 3/31/14, Ex. A. Annexed to the Shammas Decl. as **Exhibit B** is a copy of Plaintiffs' Responses and Objections to Defendants' Interrogatories. Contrary to Plaintiffs' arguments, each Interrogatory is narrowly-tailored to seek discovery of the evidence directly alleged in the Complaint and, with very limited exception, each Interrogatory references the specific Complaint paragraph that the request concerns.

Plaintiffs' objections to the Interrogatories on grounds of purported *First Amendment* associational privilege should respectfully be rejected because (1) by initiating the action and affirmatively putting matters in issue, Plaintiffs have waived any such privilege; (2) some or all Plaintiffs lack standing to assert the privilege; (3) Plaintiffs failed to meet their legal burden of demonstrating an alleged infringement of *First Amendment* rights; and (4) even assuming,

[2] Subsequent to the filing of their motion, Plaintiffs advised during the parties' meet-and-confer that they challenge the following Interrogatories even though they were not included in Plaintiffs'' prior briefing: (a) Interrogatories Nos. 1, 30, 32, 33, 35, and 39 to their arguments of alleged associational privilege; and (b) Interrogatory No. 26 to their arguments of alleged retroactive justification. Annexed to Pls' Suppl. Briefing dated 3/31/14, Ex. B is a list of the challenged Interrogatories and the bases for the challenge.

arguendo, they Plaintiffs did meet their burden – which they did not – Defendants' "compelling need" for disclosure outweighs any alleged infringement.

Similarly, Plaintiffs' objections on grounds of "retroactive justification" should respectfully be rejected because (a) they failed to raise the objection in their responses, and thus, have waived it; (b) alleged "retroactive justification" does not provide a legal basis to withhold discovery; and (c) the information improperly withheld by Plaintiffs seeks relevant, non-privileged material that is crucial to the claims and defenses in this action, as similarly discussed in Defendants' prior briefs concerning the disputed requests in Defendants' Requests for Production.

ARGUMENT

POINT I

PLAINTIFFS HAVE WAIVED THEIR RIGHT TO ASSERT THE ASSOCIATIONAL PRIVILEGE[3]

Before even reaching the question of whether the privilege applies, the Court should respectfully reject Plaintiffs' arguments of *First Amendment* Privilege on grounds of waiver.[4]

During the March 19th Court Conference, this Court heard argument concerning the disputed document requests and found that Defendants were entitled to discovery of information specifically alleged in the Complaint. *See* 3/19/14 Tr. 96:18-97:9 (deciding that Defendants were entitled to know the identities of persons who, for example, allegedly stated that they would

[3] To the extent that this Court deems that the individual plaintiffs may assert the privilege on behalf of third parties, the arguments contained hereinafter apply with equal force to those individuals as well.

[4] In their Responses and Objections to Defendants' Interrogatories, Plaintiffs Dandia and MGB failed to object on First Amendment grounds to Interrogatory No. 12. As such, both Dandia and MGB have waived any claim of privilege regarding this request and therefore, should be compelled to provide all responsive information.

cease their activities with FSNYC "largely because they were fearful of being spied upon by an NYPD informant" as referenced in ¶¶ 95-96 of the Complaint). As argued by Defendants in their prior papers (DE ## 53, 57), Plaintiffs have waived any right to assert a *First Amendment* association privilege to block discovery by not only initiating this civil action, but by also affirmatively placing matters in issue by alleging them in the Complaint. *See Independent Productions Corp. v. Loew's, Inc.*, 22 F.R.D. 266, 276-277 (S.D.N.Y. 1958) (holding that plaintiffs, by initiating a civil action and "forcing" defendants into court, had waived their *First Amendment* arguments to block discovery); *Ferrone v. Dan Onorato*, No. 05-cv-303, 2007 U.S. Dist. LEXIS 31097, *2-3 (W.D. Pa. Apr. 27, 2007) ("Given the thrust of the Plaintiffs' lawsuit, . . . the court has difficulty imaging how the [discovery] in question have not been placed "at issue" in this case (assuming, in the first instance, the Plaintiffs are able to identify a cognizable *First Amendment* privilege)). (citing *Blue Lake Forest Prods. v. U.S. Fed. Cl.*, 75 Fed. Cl. 779 (Mar. 29, 2007) ("It has become a well accepted component of waiver doctrine that a party waives his [*First Amendment*] privilege if he affirmatively pleads a claim . . . that places at issue the subject matter of privileged material over which he has control."); *Guadagni v. NYC Transit Authority*, 2009 U.S. Dist. LEXIS 60541 (E.D.N.Y. Jan. 27, 2009) (finding waiver of right to assert *Fifth Amendment* privilege against self-incrimination) (citing *Independent Productions*); *Holmes v. Republic Nat'l Dist. Co., LLC*, Civ. No. 10-1609 (JKB), 2011 U.S. Dist. LEXIS 137972 (D. Md. Dec. 1, 2011) ("A plaintiff cannot thwart an opposing party's defense of its case by claiming the *Fifth Amendment* privilege against self-incrimination in order to keep discoverable evidence out of the opponent's hands") (citing *Independent Productions Corp.*, 22 F.R.D. at 277); *Mt. Vernon Sav. And Loan Ass'n v. Partridge Assocs.*, 679 F.Supp. 522, 529 (D. Md 1987).

In *Independent Productions*, plaintiff sought to block discovery of information concerning his "association with and participation in the Communist Party and other subversive organizations; and his subscription to and reading of so-called subversive books and periodicals." *Id.* at 270. Plaintiff objected on *First Amendment* grounds, arguing that the information sought "would require the disclosure of political beliefs and opinions . . . and the identity of his political associates and associations". *Id.* The court rejected plaintiff's arguments, concluding that, even assuming the existence of *First Amendment* privilege, the court would "nevertheless be compelled to find a waiver of that privilege", stating:

> It would be uneven justice to permit plaintiffs to invoke the powers of this court for the purpose of seeking redress and, at the same time, to permit plaintiffs to fend off questions, the answers to which may constitute a valid defense or materially aide the defense.

Id. at 276. The court further stated that:

> If plaintiffs had not brought the action, they would not have been called on to testify. Even now, plaintiffs need not testify if they discontinue the action. They have freedom and reasonable choice of action. They cannot use this asserted privilege as both a sword and a shield. Defendants ought not be denied a possible defense because plaintiffs seek to invoke an alleged privilege.

Id. at 277.

It would similarly be "uneven justice" to permit Plaintiffs here to affirmatively rely on evidence while at the same time invoke the *First Amendment* to fend off discovery concerning that evidence, which may assist Defendants' defense. Even if arguably Plaintiffs' initiating of the action did not constitute a full waiver of their alleged associational rights, those rights were most certainly waived when Plaintiffs affirmatively placed the unidentified persons at the forefront of the litigation. Plaintiffs may not use the *First Amendment* privilege as both a sword and shield. In this regard, and many others which will be further discussed below, this case is distinct from the cases upon which Plaintiffs rely. Notably, unlike the situations in the cases

cited by Plaintiffs – wherein, for example, the requesting party made wholesale requests for membership lists, and without sufficient need -- Defendants' discovery requests here are narrowly tailored and designed to specifically target the allegations in the Complaint (indeed, with paragraph references). Here, Plaintiffs have opened the door to discovery concerning the veracity of these facts thereby waiving the privilege. Accordingly, they should respectfully be compelled to provide responsive information to the disputed Interrogatories. (Interrogatories Nos. 1, 5, 6, 8-12, 17-20, 25, 27, 28, 30, 32-35, 37-39, 43-45, 47).

POINT II

THE INTERROGATORIES DO NOT SEEK INFORMATION WHICH INFRINGES UPON PLAINTIFFS' PURPORTED FIRST AMENDMENT RIGHTS

A. Plaintiffs Elshinawy, Dandia, and Raza Lack Standing to Assert the Associational Privilege On Behalf of Others[5]

As an initial matter, the individual plaintiffs – Mohammed Elshinawy, Asad Dandia, and Hamid Raza – lack standing in their personal capacities to assert a potential *First Amendment* infringement on behalf of others. Accordingly, all arguments and allegations by the three individual plaintiffs to block disclosure of the identities of persons sought in Defendants' Interrogatories to the individual Plaintiffs, respectively, cannot be considered. *See Wilkinson v.*

[5] Defendants also question the standing of the organizational Plaintiffs. Their efforts to block discovery of their non-party members

> begs the obvious question of how can [Plaintiffs], . . . even [have] standing to bring this action if they can avoid the obligation and risks of initiating this litigation. Conversely, being able to evade the task of discovery creates the quandary that any association may be able to bring a lawsuit and then shirk or even shift the duties imposed by the Federal Rules of Civil Procedure upon either their members or the defendants. Such a scenario, on its face, does not appear to be fair.

Sherwin-Williams, 2005 U.S. Dist. LEXIS 18700 at 21. Because Plaintiffs seek to block discovery of this critical information, they should unquestionably be barred and precluded form relying upon claims of injuries by any congregants or donors for any purpose whatsoever.

FBI, 111 F.R.D. 432, 435 (C.D. Cal. July 28, 1986) ("[Plaintiff] also contends that because many third parties who may wish to remain unidentified are mentioned in her files, the [request] is a potential infringement upon their *First Amendment* rights as well. Because [Plaintiff] *obviously* lacks standing to assert the 'potential' *First Amendment claims* of others, this contention will not be addressed further") (emphasis added). Accordingly, the three individual Plaintiffs should respectfully be compelled to provide all responsive information as follows: Interrogatories to Dandia, Nos. 11, 12, 17-20, 25; Interrogatories to Elshinawy Nos. 43-45, 47.

B. Plaintiffs Have Failed to Make Out an Initial Showing of Arguable First Amendment Infringement, and thus No Balancing is Required[6]

In order to assert the privilege, the resisting party is required to make an initial showing of potential First Amendment infringement. *NYS NOW v. Terry*, 886 F.2d 1339, 1345, 1355 (2d Cir. 1989) (upholding disclosure of information of organization's "employment, assets, and income"). To make this showing, the resisting party is required to put forth evidence of a "a reasonable probability that the compelled disclosure of a party's . . . names will subject them to threats, harassment, or reprisals from either Government officials or private parties." *Buckley v. Valeo*, 424 U.S. 1, 74 (1976); *see also Sherwin-Williams Co. v. Spitzer*, No. 1:04-cv-185(DNH)(RFT), 2005 U.S. Dist. LEXIS 18700, *14 (holding that the association's membership list could not be "cloaked in First Amendment protection" where there was no showing of "reasonable probability that compelling disclosure will lead to some form or specter of harassment, threat, or reprisal of the organization and/or its members"). "The proof may include, for example, specific evidence of past or present harassment of members due to their

[6] Defendants reiterate their application of these arguments to the disputed Document Requests, which motion is currently pending before this Court.

associational ties, or of harassment directed against the organization itself." *Buckley*, 424 U.S. at 74. "A pattern of threats or specific manifestations of public hostility may be sufficient." *Id.*

The alleged encroachment must be explained with specific detail of alleged consequences of compliance. NYS NOW, 886 F.2d at 1355; *see also A & R Body Specialty and Collision Works, Inc. v. Progressive Casualty Ins. Co.*, No. 3:07 CV 929, 2013 U.S. Dist. LEXIS 162331 (D. Conn. Nov. 14, 2013) ("To be cognizable, the interference with associational rights must be 'direct and substantial' or 'significant.'") (quoting *Fighting Finest, Inc. v. Bratton*, 95 F.3d 224, 229 (2d Cir. 1996)); *Doyle v. NYS Div. of Hous.*, 98 Civ. 2161 (JCK), 199 U.S. Dist. LEXIS 3960 (S.D.N.Y. Mar. 30, 1999) (compelling disclosure of association's full membership list where the association failed to show that there was any evidence of a "substantial or significant infringement on their freedom of association [showing] neither a history of retaliation nor even a commonsense practical likelihood of retaliation from the disclosure of membership"). Cf. *Schiller v. City of New York*, No. 04 Civ. 7922 (RJS)(JCF), 2006 U.S. Dist. LEXIS 88854, *12 (S.D.N.Y. Dec. 7, 2006) ("This encroachment cannot be merely speculative . . . and courts have required parties resisting disclosure to produce '*specific evidence* of past or present harassment of members due to their associational ties . . . harassment directed against the organization itself, [or a] pattern of threats or specific manifestations of public hostility.'") (emphasis added);

Importantly, the "privilege is qualified, not absolute; therefore, it cannot be used as a blanket bar to discovery." *Wilkinson*, 111 F.R.D. at 436 (quoting *Anderson v. Hale*, 202 F.R.D. 548 (N.D. Ill. May 10, 2001)) (citing *NAACP*, 357 U.S. at 462-463); *Sherwin-Williams*, 2005 U.S. Dist. LEXIS at *15-16) (the privilege "cannot be used to circumvent general and legitimate discovery where the specter of intimidation and reprisal is not present."). Indeed, it applies only to a "very limited cache" of interests. *Sherwin-Williams*, 2005 U.S. Dist. LEXIS at *15-16);

Blue Lake Forest Prods. v. U.S. Fed. Cl., 75 Fed. Cl. 779, n.1 (limiting associational privilege to group members' political affiliations or conduct that will "adversely affect the organization's ability to advocate or cause members to withdraw or expose them to threats, reprisal, [or] harassment.") (citing *Sherwin-Williams*, 2005 U.S. Dist. LEXIS 18700 at *15-*16); *NOW v. Sperry Rand*, 88 F.R.D. 272, 273 (D. Conn. 1980) (rejecting assertion of *First Amendment* associational privilege and ordering disclosure of the "names, sex, race, current address, occupation and present employer of each and every member of the [NOW]").

Here, Plaintiffs' assertion of the associational privilege fails for several reasons, and must therefore be rejected.[7] First, as discussed above, by asserting the privilege over matters which Plaintiffs have affirmatively put in issue, Plaintiffs are impermissibly seeking to use the privilege as a blanket bar to discovery. *Wilkinson*, 111 F.R.D. at 436. Significantly, Plaintiffs' allegations recycle in whole, or in part, the allegations in the Complaint, which are at issue in this litigation and which Defendants dispute. On this basis alone, the assertion of the privilege must be rejected. Second, Plaintiffs fail to show any real threat of harm to any First Amendment rights.

For example, the three organizational plaintiffs each speculate that disclosure of the identities of the requested persons would result in "discomfort" of congregants and undermine or violate their trust. Taqwa Decl., ¶ 5; Dandia Decl. (on behalf of MGB) at ¶¶ 5-6; Raza Decl. (as Imam of Al Ansar), Ex. B, ¶ 4. But alleged "discomfort" and lack of trust are not the type of harm which are protected by the associational privilege. "The privilege is designed to protect members of groups from harassment and intimidation, *see NOW v. Sperry*, 88 F.R.D. 272, 274 (D. Conn. 1980), and to prevent the 'chilling effect' that disclosure may have on the willingness

[7] As discussed above, the declarations of the individual Plaintiffs (Elshinawy, Dandia, Raza), personally, cannot be considered because these three Plaintiffs may not assert the privilege on behalf of third parties, and thus, no First Amendment privilege applies.

of individuals to associate with the group." *ISKON v. Lee*, No. 75 Civ. 5388 (MJL), 1985 U.S. Dist. LEXIS 22188, **5-14, 23 (finding privilege attached where requesting party served interrogatories containing with over 287 subparts, totaling 56 pages long which were both unrelated to the claims in the case and were harassing and oppressive). Taqwa's allegation of fear of impact on immigration status fails for the same reason. Taqwa Decl., ¶ 5. *See Sherwin-Williams,* 2005 U.S. Dist. LEXIS at *16. (finding that plaintiffs' speculative harms "paled in comparison" to the "real threats of bodily harm and intimidation confronted by the NAACP and its members in 1958");

Third, even assuming these interests are constitutionally protected – which they are not – Plaintiffs nonetheless fail to put forth a scintilla of evidence to substantiate their self-serving and conclusory allegations, which are based entirely on pure speculation. Absent from the record is any credible, undisputable evidence to substantiate Plaintiffs' allegations. *See NAACP*, 357 U.S. at 462 (associational privilege attached where the NAACP made an "uncontroverted showing that on past occasions disclosure of members' identities 'exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility") (*quoted in NYS NOW*, 886 F.2d at 1355). Plaintiffs fail to put forth evidence of past or present evidence of threat of harassment or reprisal by the NYPD. Plaintiffs, in fact, allege that surveillance has occurred for years, yet they have failed to come forward with undisputed evidence to demonstrate the alleged existence of any of their speculative harms.

Finally, for the same reasons, Plaintiffs' allegations that disclosure of the information would result in "fear of scrutiny" by the NYPD should similarly be rejected as conclusory and speculative. *See, e.g.,* Decl. of Dandia (on behalf of MG) (alleging that *many*, not all,[8] of the

[8] Clearly, the identities of those persons who did not express fear should have already been disclosed by MGB, which they were not.

persons whose identities are being sought express their fear of being subjected to NYPD scrutiny "just because they are Muslim"); Raza Decl. (as Imam of Al Ansar), Ex. B, ¶ 4 (alleging general fear of congregants being "scrutinized by the NYPD and potentially subjected to unjustified criminal investigation simply because of our religion."); Taqwa Decl., ¶ 5 (alleging fear of surveillance of the persons whose identities have been disclosed).[9]

Such "generalized fears" are insufficient to warrant any First Amendment protection. *See McCormick v. City of Lawrence*, No. 02-2135(JWL), 2005 U.S. Dist. LEXIS 37397 (D. Kan. July 8, 2005) (Plaintiff's contention "that disclosing his associational activities 'would make [him] unwilling and unable in the future to carry on [his civil rights] activities due to the fear of exposing other persons to the same form of government retaliation, threats and intimidation [he] and others the government is aware of have been subjected to' [are] *[s]uch generalized fears* [which] do not seem to represent the more severe degree of threats, harassment, and reprisal envisioned by the Supreme Court in *NAACP v. Alabama*.") (some alterations in original) (emphasis added); *Doyle v. NYS Div. of Hous.*, 98 Civ. 2161 (JCK), 199 U.S. Dist. LEXIS 3960 (S.D.N.Y. Mar. 30, 1999) (compelling disclosure of association's full membership list where the association failed to show that there was any evidence of a "substantial or significant infringement on their freedom of association [showing] neither a history of retaliation nor even a commonsense practical likelihood of retaliation from the disclosure of membership"). *Cf. Schiller v. City of New York*, No. 04 Civ. 7922 (RJS)(JCF), 2006 U.S. Dist. LEXIS 88854, *12 (S.D.N.Y. Dec. 7, 2006) (privilege attached where plaintiffs showed, by uncontroverted affidavits, a long history of government surveillance and harassment of its members, as well as a detailed description of the efforts of its members to prevent disclosure of their affiliation with the

[9] Taqwa makes similar allegations concerning documents which may reveal the identities of others. Defendants have already addressed that point by expressing their agreement to a redaction and coding of names.

WRL, and where the information sought was not relevant to the claims, and further was publicly available). Here, by contrast, there is no historical showing by Plaintiffs of harassment by the NYPD to them or their members.

Because Plaintiffs have failed to make their initial showing of First Amendment infringement, the Court need not conduct any balancing of Defendants' compelling need for the information against Plaintiffs' alleged stated interest, and discovery should respectfully be compelled. *See NYS Now*, 886 F.2d at 1355 ("Absent a more specific explanation of the consequences of compliance with discovery, defendants failed to make the required initial showing of potential *First Amendment* infringement [and thus] [i[t is unnecessary to weight those interest advanced by the discovery requests"); *McCormick,* 2005 U.S. Dist. LEXIS 37393 at * 23 (upholding magistrate judge's decision not to apply a balancing test where it found that the associational privilege did not apply).

POINT III

DEFENDANTS HAVE DEMONSTRATED "COMPELLING NEED" FOR THE REQUESTED INFORMATION WHICH OUTWEIGHS ANY ALLEGED INFRINGEMENT

Even assuming, *arguendo*, that Plaintiffs are deemed to have their initial burden – which they have not – Defendants' "compelling need" for the information outweighs any alleged infringement. *Local 1814, Internat'l Longshoreman's Assoc. v. Waterfront Comm.* Of NY Harbor, 667 F.2d 267 (2d Cir. 1981) (upholding compelled disclosure of organizational members' names where the government's interest in fighting crime outweighed the "inevitable" chilling on some contributors). In balancing compelling need against alleged infringement, courts may look to several factors, among others, including (1) whether the requesting party has shown that the information goes to the heart of the matter (*Schiller v. Dinler*, 2006 U.S. Dist.

LEXIS 88854); (2) the availability of the information from alternative sources (citing *ISKON)*; and (3) the requesting party's role in the litigation (*Southern Methodist Univ. Ass'n of Women Law Students v. Wynne & Jaffe*, 599 F.2d 707, 714 (5th Cir. 1979); *NOW v. Sperry Rand Corp.*, 88 F.R.D. 272, 275 (D.Conn. 1980)); s*ee also Independent Productions Corp.*, 22 F.R.D. at 28-29 (rejecting assertion of associational privilege and finding "impressive" the following factors in analyzing the privilege: (i) that the party asserting the *First Amendment privilege* was the plaintiffs and not the defendants; (ii) the action was civil not criminal; and (iii) the proceedings in which the privilege was being asserted was during pre-trial discovery and not trial itself).

As an initial matter, both the Supreme Court and the Second Circuit have acknowledged "that there are governmental interests sufficiently important to outweigh the possibility of infringement, particularly when the 'free functioning of our national instructions' is involved") *Buckly v. Valeo*, 424 U.S. 1, 30 (1976) (citing *Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1, 97 (1961)); *Fighting Finest, Inc. v. Bratton*, 95 F.3d 224, 229 (2d Cir. 1996) (stating that "government may engage in some conduct that incidentally inhibits protected forms of association.").

Further, as earlier discussed, the disputed discovery goes to the heart of the claims in this case. Plaintiffs affirmatively introduced it and intend to rely upon it. The disputed Interrogatories seek the identities of persons specifically referenced in the Complaint and constitute evidence upon which Plaintiffs intend to rely to support their case. Plaintiffs argue that their case centers upon "Defendants' discriminatory investigations that have bred significant distrust, fear, and anxiety among Plaintiffs and New York's Muslim communities at large, causing harm to Plaintiffs' religious beliefs, practices, and associations." (Pls' 3/31/14 Brief at 5). Because Defendants seek the identities of the persons referred to by Plaintiffs, the

Interrogatories unquestionably go to the heart of Plaintiffs' claims and are crucial to Defendants' defenses, both to determine the existence of these alleged individuals, and further, to test the allegations of harm alleged in the Complaint. Further, the identities of these unknown persons is not available to Defendants from any alternative sources. Similarly, as Plaintiffs to the action, they made the conscious choice to initiate the lawsuit and force Defendants into court. If Plaintiffs wish not to provide this necessary information in accordance with well-established discovery rules, then they have the option of simply excising the allegations concerning these unidentified individuals from the Complaint. In sum, the compelling need for Defendants to probe the truth of Plaintiffs' allegations outweighs any purported infringement.

The facts and circumstances presented here are distinguishable from those presented in the cases upon which Plaintiffs rely to support their claim of associational privilege. For example, unlike the situation in *NAACP* – where the association was a defendant to the action -- this is not a case where Defendants are seeking an organizational membership list or donor list. As shown above, the requests here are targeted towards testing the veracity of the allegations put forth in the complaint. *See McCormick*, 2005 U.S. Dist. LEXIS 31097 at * 24-*25; *see also United States v. Duke Energy Corp.*, 218 F.R.D. 468, 473 (M.D.N.C. 2003) (permitting discovery that was not a general fishing expedition but was limited to a specific purpose other than inquiry into the organization's associational activities).

POINT IV

THE INTERROGATORIES DO NOT SEEK INFORMATION IN ORDER TO "RETROACTIVELY JUSTIFY" NYPD CONDUCT

Plaintiffs object to Interrogatory Nos. 26, 53, 55, 56 solely on grounds of so-called "retroactive justification", without any legal basis. Accordingly, this argument has no bearing on the disputed Interrogatories discussed above (Interrogatories Nos. 1, 5, 6, 8-12, 17-20, 25, 27, 28, 30, 32-35, 37-39, 43-45, 47). As to the four Interrogatories above (26, 53, 55, 56), Plaintiffs' Responses and Objections to Defendants' Interrogatories fail to include objections for retroactive justification – or even relevance, for that matter – for these four Interrogatories, and thus, they have waived their right to raise it now.[10] On this basis alone, Plaintiffs' arguments should be rejected, and Plaintiffs should be compelled to fully comply with Interrogatories, Nos. 26, 53, 55, 56.

Independently, Plaintiffs' arguments regarding "retroactive justification" to block discovery of certain Interrogatories (as well as document requests) should respectfully be rejected for numerous additional reasons. First, Plaintiffs have failed to point to any legal authority which applies this principle. Second, as shown above on the issue of associational privilege, Plaintiffs -- by questioning whether the NYPD had acted with a legitimate law enforcement purpose – have waived any right to object to discovery concerning them. *See Holmes*, 2011 U.S. Dist. LEXIS 137972 at *5 (dismissing claim of unlawful termination as an appropriate remedy where plaintiff improperly refused to answer questions about the circumstances concerning her termination [on *Fifth Amendment* grounds] while also pressing

[10] Defendants note that Plaintiffs' "retroactive justification" argument was not made in connection with *any* of Plaintiffs' Objections and Responses to Defendants' Interrogatories and Requests for Production. Accordingly, Plaintiffs have waived any right to assert this objection on any discovery requests, thereby providing the Court with an additional basis to reject Plaintiffs' retroactive justification arguments in connection with *all* disputed requests. Annexed to the Shammas Decl. as **Exhibit C** is Plaintiffs' Responses and Objections to Defendants' Requests for Production.

ahead with her suit claiming, in part, unlawful termination") (emphasis added). Here, as already articulated in Defendants' briefs concerning the disputed document requests, the information sought here is probative of disputed issues of fact that the Department relied upon in furtherance of its activity; credibility; reputation and stigma; and constitutes potential impeachment material, all of which bases for disclosure under Rule 26(a). As Defendants have consistently maintained, Plaintiffs are not entitled to contest the veracity of the information relied upon by the Department; nevertheless, they have already contested some information, and have stated their intention to contest other pieces of information, while simultaneously denying any activity.

For example, Interrogatory No. 26 seeks information concerning the identifies of persons who own, manage, operate, or work at the Zam Zam Shop and Taqwa Bookstore, entities which are believed to be closely tied to Plaintiff Masjid At Tawqa. Importantly, these entities are believed to have engaged in conduct which warranted police activity. Moreover, it is entirely proper to seek discovery of an organization's structure. As such, the request is proper and Taqwa should be compelled to fully respond.

Interrogatory No. 53 seeks to identify all fundraising events and the amounts collected at each event, as relevant towards Plaintiffs' claim of economic harm, specifically, diminished donations. Accordingly, Plaintiffs' argument that the NYPD is seeking this information to justify its surveillance is illogical. The information would address the issue of whether Plaintiffs could have suffered financial loss resulting from alleged surveillance by providing a picture of Plaintiffs' financials both before and after the alleged NYPD conduct. Further, Defendants reiterate that for this Interrogatory, the names of donors can simply be redacted and coded. This principle is similarly applied to the document requests seeking financials and Plaintiffs' concerns over revelation of persons' identities, which Defendants do not seek.

Interrogatory No. 55 seeks the identities of the employers of the individual Plaintiffs. The basis for this interrogatory is to test, for example, Plaintiffs' claims of loss of speaking engagements, loss of association, loss of attendees/congregants, as well as curtailment of speech. Discovery concerning their places of employment is probative of those assertions. For example, Plaintiffs' number of speaking engagements may have risen or even remained unchanged, in which case, that would be a fact to rebut each of the above assertions.

Interrogatory No. 56 seeks information concerning Plaintiffs' arrest histories. As articulated in Defendants' prior papers, information concerning Plaintiffs' conduct is directly probative of the issue of liability, i.e., it goes to issues of causation, existence, and scope of alleged injury, including reputational harm; loss of association, economic loss, etc. In other words, Plaintiffs' arrest histories may be the cause or contributing factors to the harms they claim.

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' First Set of Interrogatories and Requests for Production, and for such other and further relief that this Court deems just and proper.

Dated: New York, New York
August 1, 2014

Respectfully submitted,

Cheryl L. Shammas
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