

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,

13 CV 3448 (PKC)(JMA)

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

The main argument in Plaintiffs' Reply, which Plaintiffs raise for the first time, is that they "need not prove either stigmatic harm or reputational harm to establish their constitutional claims" because their alleged "constitutional injuries exist by virtue of stigmatizing discrimination" and thus, they are not required to produce the requested discovery. (Pls.' Reply at 1-3).¹ This argument fails and evidences Plaintiffs' continued efforts to obfuscate the law and issues before the Court, and shirk their discovery obligations.²

Plaintiffs' attempts to minimize the significance of their allegations of reputational injury must be rejected. The Court needs only to look at the four corners of the Complaint to see that it is fraught with allegations of stigmatization and reputational harm resulting from NYPD conduct, and moreover, that it seeks the *extraordinary* and *drastic* relief of declaratory judgment, permanent injunction, and the appointment of a monitor over the NYPD, which are premised upon these alleged injuries. Plaintiffs cannot escape the fact that, in addition to two of the four causes of action being based upon allegations of stigmatization (see ¶¶ 161 and 164), the Complaint contains a slew of allegations of stigmatization and reputational harm which Defendants are entitled to test, starting with ¶ 3 of the Complaint and continuing through ¶ 154, as follows (all emphases added):

- ¶ 3 ("[T]he NYPD has imposed an unwarranted badge of suspicion and **stigma** on . . . Plaintiffs in this action);

¹ Having seen Defendants' Opposition papers, Plaintiffs recognize that there is no basis to block discovery, and now, in a last-ditched effort, raise this unsupported argument for the first time, despite months of meet-and-confers, a court conference, and an 85-page brief (including affidavits and exhibits).

² Notably, despite the Court's March 26th scheduling order (DE # 47), Plaintiffs did not produce any discovery on April 21st, nor have they produced any discovery since January 7th. Notably, that scant production consisted solely of purported NYPD documents, 3 pages of Facebook posts by informant Shamiur Rahman, and some incorporating documents by the 3 organizational plaintiffs. Nothing more. Plaintiffs have failed to produce any Documents that they agreed to produce prior to the March 19th conference, or even the Documents ordered to be produced by Your Honor during the March 19th conference. By contrast, Defendants have produced confidential documents and made documents available for inspection by Plaintiffs on April 21st and on several occasions thereafter. These facts serve as further evidence of the type of lop-sided discovery that Plaintiffs impermissibly seek.

- ¶ 72 (“Had it not been for NYPD surveillance and the existence of these discriminatory and **stigmatizing** ‘indicators,’ **Imam Raza** would not seek to limit his congregation’s presence in the mosque [**Masjid Al Ansar**].”);
- ¶ 105 (“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.”);
- ¶ 133 (“Confirmation in the Associated Press stories that **Masjid At-Taqwa** has been under NYPD surveillance, . . . has **further stigmatized** the mosque as somehow involved with suspicious behavior. This **negative image** constitutes an ongoing harm to Masjid At-Taqwa as a religious community.”);
- ¶ 148 (“Because of the multiple incidents involving Detective O’Gara and other NYPD agents in **Mr. Elshinawy’s** immediate circles, he has acquired a **reputation** as someone who is under NYPD surveillance. That **reputation** has been further entrenched by the common knowledge in New York’s Muslim communities that the NYPD takes a keen interest in Islamic scholars whom it considers Salafi in orientation and also influential”); ¶ 149 (“**Mr. Elshinawy’s reputation** as someone who is under NYPD surveillance has affected the audiences for his religious lectures and his relationships with others in his community. Longtime friends have stopped attending his sermons and, in some instances, stopped associating with Mr. Elshinawy altogether.”); ¶ 152 (“Mr. Elshinawy’s **reputation** as a subject of NYPD surveillance has also caused religious institutions to distance themselves from him”); ¶154 (“Likewise, Mr. Elshinawy’s **reputation** as someone likely to trigger **baseless** NYPD surveillance has **prevented him from being formally recognized as a member or leader within organizations** with whom he works closely.”).

These allegations of injury go above and beyond the type of “assumed” stigmatic injury that Plaintiffs assert in their brief. The breadth of Plaintiffs’ claims of reputational harm is further expanded by their allegations of additional harms flowing from the alleged stigmatic or reputational injury. *See, e.g.*, Compl. at ¶¶ 105 -108 (Plaintiffs MGB and Dandia allege an inability to solicit funds, raise funds, fulfill charitable goals, or pay rent, and further, a damaged relationship with Masjid Omar, which allegedly served as a meeting place for MGB and source of funds); Compl. at ¶¶ 149-155 (Plaintiff Elshinawy alleges loss of friends, reduced attendance at his lectures, loss of relationships with other mosques and organizations, loss of stature, and loss of leadership opportunity); Compl. at ¶¶72 -76 (Plaintiffs Raza and Masjid Al Ansar alleging a decline in mosque attendance); Compl. at ¶ 133 (Plaintiff Masjid At Taqwa alleging a decline in social events and activities, including whitewater rafting, camping, and paintball trips).

Plaintiffs' allegations of stigmatic or reputational harm as a result of NYPD surveillance open the door to the discovery Defendants seek and is relevant to a host of issues, including Plaintiffs' standing.

Defendants must be afforded access to discovery probative of Plaintiffs' reputations, both to test the validity of Plaintiffs' allegations and to impeach Plaintiffs and their character witnesses (as specifically permitted by Fed.R.Evid.R. 405).³ Defendants similarly need the discovery to rebut causation (to show that their injuries are not linked to NYPD conduct) or present alternate theories of it, *i.e.*, that any alleged stigmatization may have resulted from Plaintiffs' own conduct or associations with persons or entities tainted by criminal activity, including, in some cases, terrorism-related convictions. *See, e.g., Allen v. Wright*, 468 U.S. 737, 757-758 (1984) (dismissing plaintiffs' allegations of stigmatic injury in § 1983 discrimination suit for lack of standing where the alleged stigmatic injury was "entirely speculative", and where plaintiffs failed to show that the injury was "fairly *traceable* to the Government conduct" and that the "line of *causation* between the conduct and desegregation ... was attenuated at best").

Indeed, Plaintiffs' reputations could have been shaped by an array of information, and that information may or may not be in the NYPD's possession. Plaintiffs' refusal to engage in discovery on grounds that Defendants "must draw on their own records" to test causation would significantly prejudice Defendants in this case. Quite simply, Defendants would be denied the ability to fairly and effectively confront and cross-examine Plaintiffs about their alleged injuries.

Similarly, the fact that Plaintiffs do not seek monetary damages for their alleged injuries is irrelevant; and on the contrary, this argument only supports Defendants' need for the information sought in the Discovery Requests, since equitable relief is a far more drastic remedy

³ Plaintiffs' reliance on Fed.R.Evid.R. 608 is misplaced. Pursuant to Rule 405, Defendants are permitted to impeach a witness at trial concerning his reputation or character. As such, such evidence must certainly be discoverable during discovery.

than monetary relief and is warranted only in the most extreme circumstances not present here.⁴ See *Medical Soc. of New York v. Toia*, 560 F.2d 535, 538 (2d Cir. 1977) (reversing district court's erroneous grant of interim injunctive relief, stating that such relief "is an extraordinary and drastic remedy which should not be routinely granted."). Plaintiffs should not be permitted to use evidence of reputational or stigmatic injury as a both a sword and shield in blocking discovery under the guise of "assumed" stigmatic injury. Plaintiffs' allegations are intended to support their claims, and Defendants are entitled to discovery to rebut those claims and to support their defenses.

Thus, in arguing that they are not "required to prove stigmatic injury to establish their constitutional claims" because such injuries "exist by virtue of stigmatizing discrimination", Plaintiffs mischaracterize Defendants' argument as suggesting that "stigma" is an element of the claim. (Pls.' Brief at 2).⁵ This is not so. Defendants have argued that the discovery is needed for all of the reasons set forth their papers, *i.e.*, relevance to the alleged existence, scope, and causation of reputational or stigmatic injury; relevance to disputed facts; relevance to Defendants' defenses; relevance to standing; relevance to Plaintiffs' credibility; necessary impeachment material, etc.

⁴ Thus, even under the erroneous theory of "assumed" stigmatic injury, Defendants would nonetheless be entitled to the discovery they seek, as it may reveal that the stigmatic injury is nominal, and thus, equitable relief unwarranted. See *Smith v. Fredrico*, 2013 U.S. Dist. LEXIS 3681, 11-12 (E.D.N.Y. Jan. 8, 2013) (denying plaintiff injunctive relief in § 1983 action where he failed to show that he could not be reasonably compensated with money damages, stating "[T]he mere fact [that the P]laintiff might prefer the equitable remedy over the legal remedy does not make the legal remedy inadequate as a matter of law") (alterations in original) (citations omitted); *Moore v. Consol. Edison Co. of N.Y., Inc.*, 409 F.3d 506, 512 (2d Cir. 2005) ("[B]ecause . . . money damages could make appellees whole for any loss suffered during this period, their injury was plainly reparable.") (citations omitted). Thus, discovery is relevant to determine not only the existence of the alleged injury and its causal connection to NYPD conduct, but also its scope, as this would impact the nature of the relief sought by Plaintiffs, which at best should be limited to monetary damages and not injunctive or declaratory relief.

⁵ Not a single case cited by Plaintiffs stands for the propositions they put forth. In fact, three of the 6 cases cited by Plaintiffs do not even mention the word "stigma"; and as to the 3 other cases, *stigmatization* is discussed only in the *general* context of the potential harms that may result from discrimination (unlike here, where stigmatic injury is discussed specifically with respect to each Plaintiff).

Discovery concerning the *Category I* requests is similarly warranted because Plaintiffs – despite their contentions – have already broadly challenged the truth of information that formed the basis of investigations relating to Plaintiffs. *See, e.g.*, Compl. at ¶¶ 1, 4 (alleging “suspicionless” and “unlawful surveillance . . . all based on [Plaintiffs’] religion and *without any evidence of wrongdoing*.”); Pls.’ Reply at 4 (characterizing Defendants’ information as “innuendo as ‘facts’”); Shamsi Ltr to the Court, DE # 11. Accordingly, Defendants should be able to obtain discovery to rebut Plaintiffs’ denials.

Plaintiffs have also failed to demonstrate any First Amendment protection over the materials sought by Defendants in their *Category I* and *II* requests, and Defendants have shown that their requests seek relevant and non-privileged information. Even assuming protections apply, and they do not, Defendants have demonstrated a “compelling need” for the discovery. Plaintiffs’ conclusory allegations that the Requests seek private information is insufficient as a matter of law and must be rejected. Defendants have established that even so-called private documents and Communications are discoverable. Plaintiffs make absolutely no showing that *some* – let alone *all* – of the responsive information actually falls within the ambit of alleged “private” material (nor do they define what constitutes private versus public).⁶ With respect to all other arguments, Defendants respectfully rest on their opposition papers.⁷

⁶ Plaintiffs’ wholesale rejection of Defendants’ discovery requests is improper because it also excludes materials that are actually not private, such as, for example, Plaintiffs’ online postings – whether on a social media site or in an email – and therefore, are discoverable. *See Gresham v. City of Atlanta*, No. 12-12968, Slip Op. at 2 (11th Cir. October 17, 2013) (Plaintiff’s Facebook page was “set to private,” but was available for viewing by an unknown number of Plaintiff’s “friends,” who of course could potentially distribute the comment more broadly.”); *Anibal Ortiz v. City of New York*, No. 11 civ. 7919 (JMG) (GWG) (S.D.N.Y. Jan. 16, 2013) (ordering plaintiff to produce postings made on Facebook “or any other website”); *Thompson v. Autoliv ASP, Inc.*, No. 2:09-cv-01375 (PMP) (VCF), 2012 U.S. Dist. LEXIS 85143, 13-14 (D. Nev. June 20, 2012) (ordering plaintiff to produce posts from her private social networking site accounts because they were relevant to the claims and as such, privacy concerns were outweighed).

⁷ The Court granted Request No. 60, and therefore, no argument was waived. (Pls.’ Reply at 3, n.3). Similarly, Defendants do not waive any arguments concerning Requests Nos. 2, 4, 18, 34 or any other requests that may be included in Plaintiffs’ brief which the Court had ruled on during the March 19th conference.

Dated: New York, New York
May 8, 2014

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "C Shammass", written over a horizontal line.

Cheryl L. Shammass
Senior Counsel

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