UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

ZHANG Jingrong, ZHOU Yanhua, ZHANG Peng, ZHANG Cuiping, WEI Min, LO Kitsuen, CAO Lijun, HU Yang, GUO Xiaofang, GAO Jinying, CUI Lina, XU Ting, BIAN Hexiang,	:	
Plaintiffs,	:	15 CV 1046 (SLT) (VMS)
v.	:	
Chinese Anti-Cult World Alliance (CACWA), Michael CHU, LI Huahong, WAN Hongjuan, ZHU Zirou, and DOES 1-5 Inclusive ,	:	
Defendants.	:	

DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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PRELIMINARY STATEMENT

Plaintiffs' summary judgment motion improperly seeks to have the Court rule as a matter of law on questions as to which there clearly are, in the least, issues of fact.

First, the Plaintiffs seek "partial summary judgment" that the Falun Gong is a "religion." In doing so, the Plaintiffs ignore that the founder of the Falun Gong, Li Hongzhi, has repeatedly taught that the Falun Gong is not a religion.[1] As the Plaintiffs' expert, Caylan Ford, admitted at her deposition, the Falun Gong is form of qigong, a traditional Chinese exercise discipline of which there are hundreds of schools. Ms. Ford readily admitted that these hundreds of schools of qigong are not religions. While in her opinion the Falun Gong has a more spiritual focus than other similar qigong schools, which she thinks renders it more a religion than an exercise discipline, her testimony only highlights the ambiguity as to how to characterize this admitted qigong movement. Given these admissions by the Falun Gong's founder, and Plaintiffs' own expert, it is not surprising that the Second Circuit has observed that "[i]t is ambiguous whether Falun Gong is a religion or not." *Wang v. Holder*, 474 Fed. Appx. 808, 2012 WL 1172190, at *1 (2d Cir. 2012).

In addition, while the Plaintiffs' brief consists mostly of an incomplete survey of how courts in various circuits define religion in settings (not applicable here) where freedom from government restrictions on religion are at issue, they ignore the Second Circuit's key holding regarding a plaintiff's attempt to use the Ku Klux Klan Act (42 U.S.C. § 1985(3)) to seek damages against other private citizens by claiming religious persecution. In *Jews for Jesus, Inc.*

[1] Li Hongzhi, Essentials for Further Advancement, at C-1-00163 ("We have no required religious regulations of any kind, nor are there any temples, churches or religious rituals. People can come to learn it, or leave as they please – there is no binding membership. ***In what way does it have anything to do with religion***?") (emphasis added) (attached hereto as Exhibit 3 to the Declaration of Tom M. Fini dated January 5, 2018 "Fini Dec."). Exhibits referenced in this brief are attached to the January 5, 2018 Fini Dec.

v. Jewish Community Relations Council of New York, Inc., 968 F.2d 286 (2d Cir. 1992), the Second Circuit held not only that there are fact issues as to whether Jews for Jesus "qualifies as bona fide religious organization," but that there were overlapping fact questions as to "whether the alleged discrimination was based on religious creed or on practices unrelated to such creed." *Id.* at 291. Here, the same types of fact issues exist. Not only is it unclear if the Falun Gong is properly characterized as a religion, but for purposes of 1985(3), the key factual issue is whether the alleged discrimination was motivated by animus toward a religion, as opposed to being the product of disagreement with philosophical or political beliefs which happen to be held by the Falun Gong plaintiffs.

As in the *Jews for Jesus* case, there are clearly issues of fact in this action as to what motivated the Defendants' disagreement with the Plaintiffs. The Defendants' testimony demonstrates that they have no quarrel or disagreement with the Falun Gong's right to practice whatever they wish. Rather, the deposition testimony demonstrates that the confrontations at issue largely arise in response to political speech by the Falun Gong at five tables that they run on Main Street, Flushing. The Falun Gong's speech includes political invective against the Chinese government, as well as the Plaintiffs' controversial view that Chinese-Americans are of lower moral quality than other Americans because they have been brainwashed by the Chinese government.[2] The Defendants will show at trial that their disagreement with these and other controversial views is not based on any animus toward any religion or religious creed, but rather reflect political and philosophical disagreements not covered by Section 1985(3).

The Plaintiffs' request that the Court grant "partial summary judgment" declaring the Falun Gong a religion is particularly inappropriate because not only are there disputed fact issues

[2] *See* Fini Dec., Ex. 10 (attaching deposition testimony of plaintiffs to the effect that Chinese-Americans are of lower moral quality than other Americans).

on that point, but the Plaintiffs' Section 1985(3) claims are defective for the reasons set forth in the Defendants' separate summary judgment motion. As explained in that motion, the Plaintiffs' claims are not cognizable because, among other things, they cannot demonstrate that the Defendants actually interfered with any interstate or intrastate travel of the Plaintiffs, which is an essential element of a 1985(3) claim. This is the exact result reached by the District of Connecticut involving similar 1985(3) claims with respect to the same Falun Gong tables on Main Street. *Chen Gang v. Zhao Zhizhen*, 2016 WL 1275026, at * 4 (D. Conn. Mar. 31, 2016) ("These harms allegedly occurred at Falun Gong communities and religious centers, including at Falun Gong organized rallies and religious gatherings, rather than as Falun Gong practitioners were attempting to exercise a right to travel."). Thus, by asking the Court to prematurely grant "partial" summary judgment that Falun Gong is a religion, the Plaintiffs are asking the Court to needlessly inject itself into a highly controversial topic for no good reason, as the Plaintiffs' 1985(3) claims are subject to summary judgment. In the very least, there are multiple fact issues that make it premature to rule on this discrete issue before trial.

By seeking a partial summary judgment – a declaration from the Court that the Falun Gong is a religion – the Plaintiffs are also engaging in an obvious attempt to use the Court to obtain a quick publicity victory in what is a transparent litigation campaign waged by the Falun Gong to promote their agenda and sue anyone who disagrees with their views. This lawsuit is one of a series of mostly unsuccessful actions that an activist Falun Gong organization has brought, admittedly as part of its campaign to further the Falun Gong's agenda.[3] The website of

[3] The suits are too many to list here, but include the following: *Friends of Falun Gong v. Pacific Cultural Enterprise*, 288 F. Supp. 2d 273 (E.D.N.Y. 2003) (rejecting Falun Gong's claims under Section 1985 and state law claims)*; Chen Gang v. Zhao Zhizhe*n, 2016 WL 1275026 (D. Conn. March 31, 2016) (rejecting Falun Gong claims under Section 1985 and related claims); *Doe I v. Cisco Systems*, 66 F. Supp.3d 1239 (N.D. Cal. Sep. 5, 2014) (rejecting Falun Gong claims against Cisco).

this organization even acknowledges that the claims it asserts are "innovative."[4] But the problem with concocting innovative federal civil rights theories to further an admitted agenda is that often the claims are an obvious stretch. Use of civil rights litigation in this way unfortunately uses up scarce judicial resources that could be better spent on cases where there are truly civil rights abuses and victims who have suffered real damages. In any event, the Plaintiffs' request for a pre-trial declaration that Falun Gong is a religion should be denied, as there are overlapping issues of fact that make resolution of that issue premature and inappropriate.

The Plaintiffs also improperly seek summary judgment to dismiss the Defendants' state law counterclaims, including for assault, battery and negligence. This is plainly improper because the common law assault, battery and negligence claims plainly raise classic fact-intensive "he said, she said" issues that also turn on the credibility of the witnesses as to what happened during the alleged incidents. The Plaintiffs also assert that some of the Defendants' counterclaims are time-barred. In doing so, they ignore that under New York law (CPLR 203(d)), to the extent that the counterclaims offset the damages sought by the Plaintiffs' claims, the claims are not time barred because they indisputably arise out of the same transactions as the Plaintiffs' claims.

The incidents at issue in this case arise out of verbal incidents and a few minor scuffles that have resulted from the vigorous public debate between the Falun Gong and those who dissent from the Falun Gong's controversial teachings. The Falun Gong has set up five tables on the busy streets of Main Street, Flushing, in which they willingly inject into the public forum their controversial political and philosophical ideas. After a major earthquake in China in 2008 that caused tens of thousands of deaths of innocent people, some Falun Gong members publicly

[4] Fini Declaration, Ex. 18 (attaching a true copy of a printout of the Friends of Falun website, touting the innovative claims they bring in federal courts to press their agenda).

celebrated the earthquakes as retribution for the Chinese government's actions. This celebration in the face of death led some residents of Flushing to wish to publicly dissent against the Falun Gong, including the two defendants who helped form defendant CACWA.

Although the incidents alleged in the complaint did not lead to one serious injury or a single hospital visit, the Falun Gong have used this litigation as part of their latest attempt to manufacture Ku Klux Klan Act claims. Since it is the Plaintiffs who chose to literally "make a federal case" out of what are, in reality, state common law "he said, she said" assault claims, it is especially inappropriate for the Plaintiffs to now seek to dismiss the Defendants' counterclaims. The deposition testimony summarized in the opposing Rule 56.1 Statement of Facts clearly establishes that there are two diametrically opposed versions of what occurred during the confrontations, which clearly raise issues of fact as to who was assaulted. In a number of instances, there are even admissions by the Plaintiffs that they precipitated the confrontations at issue because they didn't like being called a "cult" by the Defendants – only highlighting that this case was brought to stifle the Defendants' free speech.

Of course, if the Court follows the District of Connecticut's[5] reasoning and dismisses the 1985(3) claims, the Court has the discretion to decline to exercise supplemental jurisdiction over the state law claims. In any event, by the Plaintiffs' choice, they have brought assault-related claims and cannot unfairly deprive the Defendants of their right to present their version of events and counterclaims to the trier of fact.

STATEMENT OF RELEVANT FACTS

Undisputed Facts Show That, In the Least, There Is Uncertainty And Issues of Fact As to Whether Falun Gong is a Religion

It is Undisputed That The Falun Gong's Founder Has Taught That Falun Gong Is Not A Religion

[5] *Chen Gang v. Zhao Zhizhe*n, 2016 WL 1275026 (D. Conn. March 31, 2016).

It is undisputed that Li Hongzhi has taught that the Falun Gong is not a religion. Def. Rule 56.1 Counterstatement at ¶¶ 1-3.

It is Undisputed That Falun Gong is A Form of Qigong, A Traditional Chinese Exercise Discipline, and That The Hundreds of Versions of Qigong That Exist Are Generally Not Religions

It is undisputed that the Falun Gong is a form of qigong, which is a type of traditional Chinese exercise discipline. Indeed, Plaintiff's expert, Caylan Ford, admitted in her testimony that Falun Gong is a form of qigong and that there are hundreds of schools of qigong. Ford also admitted that generally, the hundreds of forms of qigong that exist are not religions. Def. Rule 56.1 Counterstatement at ¶¶ 4-6.

The Plaintiffs Admitted That They Engage in Political Speech, And The Defendants Testified They Reacted to Such Political Speech, Not That They Are Motivated By Religious Animus

The Plaintiffs testified that while they were at the five tables they set up on Main Street, Flushing, they engaged in political speech aimed at the Chinese government. They also admitted to their belief that Chinese-Americans are of a lower moral quality than other Americans. Def. Rule 56.1 Counterstatement at ¶ 8, Ex. 10. Zhu and Li testified that they are reacting to such controversial views, and are not motivated to oppose the Falun Gong's exercises or practices. Def. Rule 56.1 Counterstatement at ¶¶ 14-19.

The Defendants Clearly Testified that they Were Assaulted By the Plaintiffs During the Confrontations at Issue, and Thus There Are, In The Least, Issues of Fact as to the Defendants' Counterclaims

The Defendants who have asserted counterclaims clearly testified at their depositions that they were assaulted by the Plaintiffs, which clearly raises classic "he said, she said" issues of fact. While Defendant Li testified that she didn't know the names of those who assaulted her because they didn't wear nametags, she clearly testified that, with respect to each of the

confrontations alleged by the Plaintiffs who have now identified themselves, it was the Plaintiff in question who in fact assaulted her. Def. Rule 56.1 Counterstatement at ¶¶ 24-29.

ARGUMENT

I. THERE ARE GENUINE ISSUES OF MATERIAL FACTS AS TO WHETHER (1) FALUN GONG IS A RELIGION AND (2) WHETHER THE DEFENDANTS WERE MOTIVATED BY ANIMUS AGAINST A RELIGIOUS CREED

The Plaintiffs seek a "partial summary judgment" – a declaration from the Court – that the Falun Gong is a religion. In doing so, the Plaintiffs devote pages of their brief to providing an incomplete survey of how the various circuit courts have defined religion where the issue is freedom of religion against government restrictions, which is not the issue here. Pl. Br. at 11-16.

The issues here involve a claim *not* against the government for freedom of religion, but a damages claim brought against private citizens under the Ku Klux Klan Act, 1985(3), a statute that the Supreme Court has repeatedly warned should not be applied so as to transform it into a general federal tort statute. *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993) (The interpretation of § 1985(3) "as a general federal tort law...was to be avoided...by requiring, as an element of the cause of action, the kind of invidiously discriminatory motivation stressed by the sponsors of the limiting amendment.").

As to the pertinent statute, the Plaintiffs completely ignore the key holding and analysis of the leading Second Circuit decision dealing with groups that are not clearly religions, and where the motivation for disagreement with the group is not clearly based on religion: *Jews for Jesus, Inc., v. Jewish Community Relations Council of New York, Inc.*, 968 F.2d 286 (2d Cir. 1992).[6] In that decision, the Second Circuit held that there are two key, overlapping issues that,

[6] Plaintiffs cite *Jews for Jesus* only for the position that religion is a protected class under 1985(3) (Pl. Br. at 9), but conveniently omit the key analysis by the Second Circuit that shows there are issues of fact as to whether the Falun Gong is a bona fide religion, and whether the Defendants were motivated by animus toward a religious creed, as opposed to having political or philosophical disagreements with the Plaintiffs

like here, raised fact issues that prevented summary judgment in favor of the plaintiff: (1) Whether a so-called religion (there, Jews for Jesus) "qualifies as a bona fide religious organization" (the Second Circuit held it could not determine this as a matter of law based on the record before it); and (2) even assuming that the group in question is a bona fide religion, the fact-intensive issued of whether the "alleged discrimination was based on religious creed or on practices unrelated to such creed," such as political or philosophical differences. *Id.* at 291.

The Second Circuit made clear that there were overlapping fact issues as to both questions, and thus properly declined to announce, in the abstract, that Jews for Jesus was a religion, as that would still leave the fact issue of whether the Defendants were motivated by animus against religious creed. As the Second Circuit explained, under § 1985(3), the religious aspects of the organization must be the motivation for the animus. *Jews for Jesus*, 968 F.2d at 291 (2d Cir. 1992). ("On the basis of the present record, we cannot discern...whether the alleged discrimination was based on religious creed or on practices unrelated to such creed."). It is not enough that Defendants are motivated by their disagreement with some aspects of Falun Gong. In *Jews for Jesus*, the court held that this was a second issue of fact that must be tried by the jury. *Id.*

Just as in this case, the Second Circuit held that it was not clear whether the defendants were motivated by animus toward a religious creed, and denied summary judgment. *Id.* at 291. This holding by the Second Circuit is on point here and clearly demonstrates that Plaintiffs' partial motion for summary judgment should be denied.

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as to some of the political and philosophical views they inject at the 5 tables they set up on Main Street, Flushing.

A. <u>There Are Genuine Issues in Dispute as to Whether Falun Gong is a Religion</u>

In *Jews for Jesus*, the court found that, on the record, it could not determine whether Jews for Jesus qualified as a bona fide religious organization. *Jews for Jesus*, 968 F.2d at 291 (2d Cir. 1992). The court held that this was a question of fact to be tried by the jury. *Id.* Similar fact questions exist as to whether the Falun Gong is a religion.

The question of whether the Falun Gong is properly categorized as a religion is an issue concerning which there is great uncertainty. To begin with, the founder of Falun Gong, Li Hongzhi, has repeatedly taught that it is not a religion. For example, in his most forceful denial that it is a religion, he pointed out that it had none of the typical attributes of a religion, and rhetorically asked "***what does it have to do with religion***?":

> We have no required religious regulations of any kind, nor are there any temples, churches, or religious rituals. People can come to learn it, or leave as they please – there is no binding membership. In what way does it have anything to do with religion? Def. 56.1 Counterstatement ¶ 1.

Second, it is not surprising that Li Hongzhi has taught that Falun Gong is not a religion because it is undisputed that Falun Gong is a form of qigong, a traditional Chinese exercise discipline. *Id.* at ¶ 4. Plaintiffs' expert, Caylan Ford, testified that there are hundreds of schools of qigong, and that these hundreds of forms of qigong are not religions. *Id.* at ¶ 5. Ms. Ford testified that in her view, the Falun Gong is "more spiritual versus breathing and exercises," and thus should be considered a religion. *Id.* at ¶ 6. However, this opinion clearly only raises an issue of fact, including whether the founder's teaching that Falun Gong is not a religion should be trumped by Plaintiffs' paid expert's views.[7]

[7] Federal court decisions reveal that some Falun Gong practitioners have testified under oath that "Falun Gong is not a religion but rather the practice of certain physical exercises which contribute to his mental, physical, and ethical well-being." *Yi Xian Chen v. Holder*, 705 F.3d 624, 625 fn. 1 (7th Cir. 2012).

It is noteworthy that the Plaintiffs resisted the deposition of Li Hongzhi, even though he lives in New York. Defendants' Response to Plaintiffs' Statement of Facts ¶ 1; Dkt. No. 48. Instead of cooperating to have Li Hongzhi deposed about his repeated teaching that Falun Gong is not a religion, Plaintiffs instead chose to stipulate to the authentication of the English translations of Li Hongzhi's writings that appear on the official website of Falun Gong. *Id.*; Ex. 1. As noted, in those documents Li Hongzhi clearly teaches that Falun Gong is not a religion. Def. Rule 56.1 Counterstatement at ¶¶ 1-3. Based on this record, just as the Second Circuit concluded that in *Jews for Jesus* the record did not enable it to rule as to whether Jews for Jesus was a religion for purposes of 1985(3), so too here there is clearly uncertainty as to whether the qigong known as Falun Gong is a bona fide religion.

Indeed, the Second Circuit, as well as other circuits, have held that it is ambiguous whether Falun Gong is a religion. *Jin Quan Wang v. Holder*, 474 Fed. Appx. 808, 809, 2012 WL 1172190 (2d Cir. 2012) ("[i]t is ambiguous whether Falun Gong is a religion or not."); *Chun Gao v. Gonzales,* 424 F.3d 122, 125 (2d Cir. 2005) (quoting a State Department report that "Falun Gong does not consider itself a religion and has no clergy or formal places of worship."); *see also, Jiang v. Gonzales*, 140 Fed. Appx. 765, 766 fn. 3, 2012 WL 1519127 (10th Cir. 2005) ("Falun Gong is an international movement, though primarily Chinese, that is often referred to as a 'religion' (or, by its critics, as a 'cult'), though it is not a religion in the Western sense."); *Jin Quan Wang v. Holder*, 474 Fed. Appx. 808, 809, 2012 WL 1172190 (2d Cir. 2012) (referring to the fact that "Falun Gong may not hold itself out as a religion" and to "the ambiguous status of the movement"). *See also*, *TianJie Chen v. Holder*, 365 Fed. Appx. 252, 253-254, 2010 WL 456694 (2d Cir. 2010) (The plaintiff's "testimony that Falun Gong is a religion conflicted with evidence indicating it is not[.]"); *Susu Wei v. Holder*, 314 Fed. Appx. 404, 405 (2d Cir. 2009) ("it

was not improper for the agency to rely on Wei's belief that Falun Gong was a religion (***which practitioners vehemently deny***)") (emphasis added).

While there are some cases where courts, in dicta, have referred to Falun Gong a religion, many of these cases are asylum decisions where the decision does not turn on whether the Falun Gong is a religion, as asylum applicants may receive protection, whether they are persecuted based on religious as opposed to political views.[8]

Plaintiffs' Rule 56.1 Statement of Facts cites to a laundry list of government documents, some of which refer to Falun Gong as a religion. Plaintiffs' Rule 56.1 Statement ¶¶ 40-48. However, as with the asylum cases, the point of these documents is that the Falun Gong was being persecuted, whether for religious or political reasons. Thus, these documents do not involve any formal findings that the Falun Gong is a religion, since the point was that the group was being persecuted for its views, however characterized. *See* Defendants' Rule 56.1 Response ¶¶ 40-48. Thus, these documents simply do not support a premature holding that Falun Gong is a religion as a matter of law.

In addition, there are many other government documents that state that the Falun Gong is not a religion. *E.g., Nak Chen v. Holder*, 380 Fed. Appx. 748, 749 fn. 1 (10th Cir. 2010) ("According to the Country Profile on China prepared by the U.S. Department of State, '[d]espite the mystical nature of Li's teachings, Falun Gong has no clergy or places of worship, and does not represent itself as a religion.'"); *Zhao Di Chen v. U.S. Atty. Gen.,* 381 Fed. Appx. 961, 963 fn. 3 (11th Cir. 2010) (Discussing a 2007 Asylum Profile for China that notes that, "[d]espite the mystical nature of Li's teachings, Falun Gong has no clergy or places of worship,

[8] The fact that Falun Gong practitioners have been granted asylum based on their practice of Falun Gong does not establish that Falun Gong as a bona fide religion, as asylum may be granted on the basis of political views or membership in a particular social group. *See Yiang v. Gonzales*, 198 F. Appx 548, 551 (7th Cir. 2006) ("Persecution of practitioners of Falun Gong has been variously deemed persecution on account of religion, imputed political opinion, and membership in a particular social group").

and does not represent itself as a religion."); *Jiang v. Gonzales*, 156 Fed. Appx. 336, 337 fn. 4 (1st Cir. 2005) (Citing a 2002 International Religious Freedom Report: China (U.S. Dep't of State, 2002) that says that "Falun Gong does not consider itself a religion[.]"). Put simply, these conflicting statements only highlight that there is an issue of fact as to whether Falun Gong is a religion.

B. There is an Issue of Fact Whether the Alleged Discrimination is Based on Animus Toward Purported "Religious" Aspects of Falun Gong, as Opposed to the Controversial Political and Quasi-Scientific Claims They Advance

The issue of whether Falun Gong qualifies as a bona fide religious organization is only one of the two interrelated fact-based issues that the Second Circuit identified in the *Jews for Jesus* decision. *See Jews for Jesus, Inc., v. Jewish Community Relations Council of New York, Inc.*, 968 F.2d 286, 291 (2d Cir. 1992). The Second Circuit held that, apart from whether Jews for Jesus is a religion, there was still the related, overlapping and fact-intensive issue of "whether the alleged discrimination was based on religious creed or on practices unrelated to such creed." *Id*. In *Jews for Jesus*, the defendants argued that their actions were not based on Jews for Jesus' espousal of evangelical Christianity. *Id.* Rather, they claimed that they were motivated by Jews for Jesus' "allegedly deceptive use of Jewish symbols and practices e.g., wearing yarmulkes—which are unrelated and antithetical to JFJ's professed doctrine—to mislead Jews into joining an organization whose beliefs were at odds with the fundamental precepts of Judaism." *Id.* In addressing this issue, the court held that it was a question of material fact, which must be resolved at trial. *Id.* Just as in *Jews for Jesus*, here, there is obviously a fact-based question of whether the Defendants "alleged discrimination was based on religious creed or on practices unrelated to such creed." *Id.*

Thus, the trier of fact in this case will also need to determine whether the alleged motivation of the defendants was animus toward a purported religious creed as opposed to

disagreements with political or philosophical beliefs, which are not covered by Section 1985(3). *E.g.*, *Frasco v. Mastic Beach Property Owners' Association*, 2014 WL 3735870, at * 5 (E.D.N.Y. July 29, 2014) (plaintiffs who claim discrimination because they stand 'in political and philosophical opposition to the defendants, and who are, in addition, outspoken in their criticism of the defendants' political and governmental attitudes and activities do not constitute a cognizable class under Section 1985.'") (*citing Gleason v. McBride*, 869 F.2d 688 (2d Cir. 1989).

Here, the pleadings and deposition testimony of both the defendants and plaintiffs (attached to both 56.1 statements) demonstrate that there are, in the least, factual issues as to the motivation for Defendants' disagreement with the Falun Gong. The Defendants testified that they in no way oppose the Falun Gong's right to practice whatever they wish. Instead, the Defendants testified that they wish to express disagreement with certain controversial teachings of the Falun Gong. These teachings include political rhetoric by the Falun Gong against the Chinese government, and that Chinese-Americans are of lower moral quality than other Americans. Defendants Li and Zhu testified that they were motivated by their disagreement with these controversial views expressed by the Plaintiffs. Def. 56.1 Counterstatement ¶ 14-19. Other views that the Defendants disagree with including the quasi-scientific teaching of Li Hongzhi that modern science supports the conclusion that children of mixed races are inferior. *Id.*

Thus, the evidence will show that while the Defendants do disagree with some of the Plaintiffs' views, these disagreements have to do with political and philosophical differences in opinion, which cannot support a claim under § 1985(3).

Importantly, the confrontations between the Plaintiffs and Defendants always occurred on Main Street, Flushing. The evidence will show that the disputes on Main Street largely involved

political disagreements with the Falun Gong's belief that Chinese-Americans are brainwashed and philosophical disagreements, such as with the Falun Gong's teaching that people do not need to see a doctor when they get ill. *See* Defendants' Second Amended Answer & Counterclaims (Dkt. No. 71) ¶¶ 12-20.

Indeed, the Second Circuit has noted the political aspects of the Falun Gong's message. *Li v. Mukasey*, 529 F.3d 141, 144 fn. 3 (2d Cir. 2008) ("The practice of Falun Gong has been banned by the Chinese government, largely because of "*perceived* anti-government political opinion" by practitioners.") (*citing Gao v. Gonzales*, 424 F.3d 122, 129 (2d Cir. 2005) ("With respect to the perception of Falun Gong itself, the Ninth Circuit has noted that the government's crackdown on Falun Gong practitioners is motivated by a ***perceived anti-government political opinion***.") (internal citations omitted) (emphasis added)). Just as in the *Jews for Jesus* decision, there are clearly issues of fact regarding whether the Defendants' disagreement is with any particular "religious" idea, as opposed to discrete areas of political or philosophical disagreement.

C. Plaintiffs' Request for "Partial Summary Judgment" Is Additionally Inappropriate Because Their 1985(3) Claims Face Other Challenges That Make The Premature Declaration They Seek Patently Premature

The Plaintiffs' request that the Court grant "partial summary judgment" declaring the Falun Gong a religion is particularly inappropriate because not only are there disputed fact issues on that point, but the Plaintiffs' Section 1985(3) claims are subject to Defendants' separate summary judgment motion. As explained in that motion, the Plaintiffs' claims are not cognizable because, among other things, they cannot demonstrate that the Defendants actually interfered with any interstate or intrastate travel of the Plaintiffs, which is required for their claims. This is the exact result reached by the District of Connecticut involving the very same types of 1985(3) claims involving the same Falun Gong tables on Main Street. *Chen Gang v.*

Zhao Zhizhen, 2016 WL 1275026, at * 4 (D. Conn. Mar. 31, 2016) ("These harms allegedly occurred at Falun Gong communities and religious centers, including at Falun Gong organized rallies and religious gatherings, rather than as Falun Gong practitioners were attempting to exercise a right to travel."). Thus, by asking the Court to prematurely grant "partial" summary judgment that Falun Gong is a religion, the Plaintiffs are asking the Court to needlessly inject itself into a highly controversial topic for no good reason, as the Plaintiffs' Section 1985(3) claims are subject to summary judgment.

Even if Plaintiffs' claims survive Defendants' motion for summary judgment, the Court should resist the Plaintiffs' attempts to use the Court to obtain a quick publicity victory in what is a transparent litigation campaign waged by the Falun Gong to promote their agenda and sue anyone who disagrees with their views. This lawsuit is one of a series of mostly unsuccessful actions that an activist Falun Gong organization has brought, admittedly as part of its campaign to further the Falun Gong's agenda.[9] The website of this organization even acknowledges that the claims it asserts are "innovative."[10] But the problem with concocting innovative federal civil rights theories to further an admitted agenda is that often the claims are an obvious stretch. Use of civil rights litigation in this way unfortunately uses up scarce judicial resources that could be better spent on cases where there are truly civil rights abuses and victims who have suffered real damages. The Plaintiffs' request for a pre-trial declaration that Falun Gong is a religion should be denied, as there are overlapping issues of fact that make resolution of that issue premature and

[9] The suits are too many to list here, but include the following: *Friends of Falun Gong v. Pacific Cultural Enterprise*, 288 F. Supp. 2d 273 (E.D.N.Y. 2003) (rejecting Falun Gong's claims under Section 1985 and state law claims)*; Chen Gang v. Zhao Zhizhe*n, 2016 WL 1275026 (D. Conn. March 31, 2016) (rejecting Falun Gong claims under Section 1985 and related claims); *Doe I v. Cisco Systems*, 66 F. Supp.3d 1239 (N.D. Cal. Sep. 5, 2014) (rejecting Falun Gong claims against Cisco).

[10] Fini Declaration, Ex. 18 (attaching a true copy of a printout of the Friends of Falun website, touting the innovative claims they bring in federal courts to press their agenda).

inappropriate.

II. DEFENDANTS' COUNTERCLAIMS SURVIVE SUMMARY JUDGMENT

The incidents in this case involve confrontations that took place on Main Street, Flushing, in which each side asserts it was the other side that initiated the confrontations that led to the threats and scuffles that occurred. Thus, the state-law claims in this case present the classic, "he-said, she-said" dispute, which inherently raises issues of fact that cannot be resolved on summary judgment.[11] Yet, although the counterclaims asserted by Defendants mirror the claims asserted by Plaintiffs, Plaintiffs baselessly seek summary judgment as to the Defendants' claims.

Plaintiffs move for summary judgment as to Defendants' counterclaims on several grounds, all of which are without merit. As explained below, Defendants' counterclaims raise genuine issues of material fact and thus survive summary judgment. In addition, the Defendants' claims are not time barred.

A. The Counterclaims for Negligence Survive Summary Judgment

Plaintiffs assert that the Defendants' counterclaims for negligence are barred as a matter of law because Defendants have also asserted claims, such as assault and battery, in which intentional conduct by the Plaintiffs is alleged. Pl. Br. at 19-20. In making this argument, the Plaintiffs first concede, as they must, that a party is permitted to plead in the alternative. Pl. Br. at 20; Fed. R. Civ. P. 8(d)(2); *see also Burton v. Iyogi, Inc.*, 2015 WL 4385665 at *11 (S.D.N.Y. Mar. 16, 2015) ("it is well settled that parties may plead in the alternative").

Because Defendants are permitted to plead in the alternative, they have properly pled both intentional torts (First and Third Causes of Action) and a negligence claim (Fourth Cause of Action). 2d Am. Answer & Countercl. at ¶¶51-57, ¶¶ 67-77 (Doc. 71). Thus, if the jury does not

[11] In contrast, Plaintiffs' federal law claims suffer from several legal defects, discussed in Defendants' separate motion for summary judgment.

find intent on the part of the Plaintiffs, the Defendants, in the alternative, can ask the jury to find that the Plaintiffs acted negligently. Importantly, Defendants' alternative pleading of negligence mirrors exactly what Plaintiffs' did: In the complaint, Plaintiffs allege claims based on intentional acts, yet also allege negligence claims based on the same exact incidents. Compl. at ¶¶148-155, ¶¶177-182 (Doc. 2).

Plaintiffs ignore their own concession that alternative pleading is permitted, and that they too have alleged both negligence claims and intentional-tort claims premised on the same conduct. *Id.* Instead, Plaintiffs declare that, as a matter of law, if there is an intentional tort alleged, there can be no negligence claim alleged in the alternative. In making this incorrect assertion, the Plaintiffs ignore an important distinction recently pointed out by a court in the Eastern District: that in the cases such as those that Plaintiffs rely on, it was ***undisputed that the defendants had engaged in intentional conduct,*** and thus a negligence claim was not cognizable. *Baker v. 221 N. 9 St. Corp.*, 2010 WL 3824167 at *7 (E.D.N.Y. Sep. 23, 2010).

Here, just as in *Baker*, the Plaintiffs are denying that, to the extent they inflicted injury on Defendants, they acted intentionally. Just as in *Baker,* since the Plaintiffs do not concede that they acted intentionally, the Defendants are permitted to present the jury with the alternative theory that the Plaintiffs acted negligently. *See Baker* (cases cited in support of summary judgment on a negligence claim were distinguishable because "in each of those cases, it was undisputed that the defendant engaged in intentional conduct to harm the plaintiff.").

The ultimate irony of Plaintiffs' argument is that if their argument is accepted, then clearly the Plaintiffs' own claims for negligence would need to be dismissed, *sua sponte*, by the Court pursuant to Fed. R. Civ. P. 56(f).[12] Here, the Plaintiffs have engaged in the same exact

[12] It is well settled that even where a party has not moved for summary judgment, a *sua sponte* grant of summary judgment "is proper if the undisputed record demonstrates that the non-moving party is entitled

alternative pleading as to negligence that they now say is impermissible: they have alleged both intentional assault claims and alternative negligence claims based on the exact same alleged conduct and incidents. Compl. at ¶¶148-155, 177-182. As such, if this Court declines to follow the rationale of *Baker,* then all of the negligence claims in the case, both by the Plaintiffs and the Defendants, must be dismissed.

The Plaintiffs next argue that the Defendants have failed to state a claim for negligence based on a "purported duty to prevent harm as a result of a dangerous situation and the confrontations that [Plaintiffs] intentionally created." Pl. Br. at 20. This argument fails for two reasons. First, as a matter of law, it is well settled that a defendant can be liable for negligence if it affirmatively creates a dangerous condition. *See Miller v. Genoa AG Ctr., Inc.*, 124 A.D.3d 1113, 1116 (3d Dep't 2015) (summary judgment denied where plaintiff created an issue of fact as to whether defendant's conduct affirmatively created the allegedly dangerous condition that led to the injury); *Pandekakes v. United States*, 2000 WL 23275 at *2 (S.D.N.Y. Jan. 6, 2000) (same); *Baker v. 221 N. 9 St. Corp.*, 2010 WL 3824167 at *8 (E.D.N.Y. Sep. 23, 2010) (same).

Second, Plaintiffs again ignore that their negligence claim suffers from the exact same defect they attribute to Defendants' claims. Indeed, the Defendants in their counterclaim used the exact same theory, and same wording, as to negligence that the Plaintiffs asserted in their complaint. Compl. at ¶¶177-179; 2d Am. Answer & Countercl. at ¶¶ 67-77.

B. <u>Defendants' Counterclaims Are Not Time-Barred</u>

Plaintiffs assert that Defendants' counterclaims arising from incidents occurring between 2009 and 2011 are time-barred because they were filed outside the applicable statute of

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to judgment as a matter of law." *Sty-Lite Co. v. Eminent Sportswear Inc.*, 2002 WL 15650 at *6 (S.D.N.Y. Jan. 4, 2002).

limitations period. Pl. Br. at 21-22.[13] Thus, Plaintiffs are not seeking summary judgments on all counterclaims on grounds of timeliness, as it is undisputed that there are 13 claims that are timely.[14]

Plaintiffs argue that Defendants counterclaims arising from incidents occurring between 2009 and 2011 should be dismissed because they are untimely. Pl. Br. at 21-22. However, Plaintiffs completely ignore a key provision of New York law, codified at CPLR 203(d), which allows a defendant to bring otherwise time-barred counterclaims that arise from the same occurrences as the causes of the alleged action, to the extent that such counterclaims offset Plaintiffs' demands. CPLR 203(d).

A long line of authority ignored by the Plaintiff has established that otherwise time-barred counterclaims, *even if raised for the first time in an amended answer*, may be asserted under 203(d), to the extent that they offset the plaintiff's demand. *See e.g, Katz v. Bach Realty, Inc.*, 192 A.D.2d 307-307-308 (1st Dep't 1993) (holding that "all of the proposed counterclaims arise from the same transactions as the causes of action alleged in the plaintiff's complaint, and thus, at the least, may be interposed as setoffs to plaintiff's cause of action pursuant to ...CPLR 203(d) regardless of whether they are otherwise barred by the Statute of Limitations); *Fortin v. Hill & Markes, Inc.*, 767 N.Y.S.2d 710, 711 (3d Dep't 2003) (applying CPLR 203(d) and holding that defendant could assert counterclaims first alleged in an amended answer); *United*

[13] Plaintiffs do not specify exactly which claims are time-barred, and which they concede are not time-barred. Because Plaintiffs, as movants for summary judgment, carry the burden of proof, this lack of specificity is yet another reason summary judgment should be denied.

[14] These 13 undisputedly timely counterclaims comprise: Defendant Zhu's claims against Plaintiff Ting Xu, arising from an incident occurring in September, 2014. (2d Am. Answer & Countercl. at ¶104); Defendant Li's claims arising out of incidents occurring between March and April, 2012 (*Id.* at ¶83), and on February 8, 2014 (*Id.* at ¶86), June 28, 2014 (*Id.* at ¶84), July, 2014 (*Id.* at ¶104) and December 17, 2014 (*Id.* at ¶86); and Defendant Wan's claims arising from incidents occurring on June 28, 2014 (*Id.* at ¶84); July 19, 2014 (*Id.* at ¶109); July 21, 2014 (*Id.* at ¶107); July 24, 2014 (*Id.* at ¶108); August 23, 2014 (*Id.* at ¶106); January 3, 2015 (*Id.* at ¶103); and January 16, 2015 (*Id.* at ¶¶101-102).

States Fid. & Guar. Co. v. Delmar Dev. Partners, 22 A.D.3d 1017, 1020 (3d Dep't 2005) (permitting an amended counterclaim that would otherwise be time-barred, and holding that '[i]t is axiomatic that claims and defenses that arise out of the same transaction as a claim asserted in the complaint are not barred by the statute of limitations, even though an independent action by defendant might have been time-barred at the time the action was commenced."); *Town of Amherst v. Cnty. of Erie*, 247 A.D.2d 869, 869-70 (4th Dep't 1998) (Denying motion to dismiss defendant's counterclaims first brought in an amended answer, and holding that "where a counterclaim arose from the transactions, occurrences, or series of transactions or occurrences, upon which a claim asserted in the complaint depends, CPLR 203(d) authorizes a defendant to interpose that counterclaim to the extent of the demand in the complaint notwithstanding that the counterclaim was barred at the time the complaint was interposed. Thus, a party may assert a claim for equitable recoupment even though a timely counterclaim has not or cannot be filed.").

Federal Courts applying New York Law have long applied CPLR 203(d), and have held that the effect of the claim-saving provision of CPLR 203(d) is to permit parties to assert any counterclaims arising from the same occurrences as those pled in the complaint, regardless of whether such claims are timely, and even if they are first asserted in an amended answer. *See Int'l Fid. Ins. Co. v. Cty. of Rockland*, 98 F. Supp. 2d 400 at n. 2 (S.D.N.Y. 2000) ("The practical effect of [203(d)'s] application is that, to the extent that all or any part of the county's damage claim may be otherwise time-barred, those time-barred damages (once proven) may still be applied as an offset against any damages proven against IFIC by the county"); *Burgee v. Patrick*, 1996 WL 227819 at *6 (S.D.N.Y. May 3, 1996) (allowing Defendant to amend answer to include additional counterclaims, holding that the proposed counterclaims were not time-barred because "203(d) codifies the common law principle of 'recoupment.' Recoupment is the right of a

defendant to have a plaintiff's claim reduced by reason of a claim the defendant has against the plaintiff arising out of the same transaction on which the plaintiff's claim is based").

Because Plaintiff wholly ignored the operation of CPLR 203(d) in their moving papers, summary judgment should be denied on grounds of timeliness, to the extent that Defendants counterclaims act as an offset to Plaintiffs claims.[15]

C. Defendant Zhu's Counterclaims

Plaintiffs assert that that several of Defendant Zhu's counterclaims should be dismissed on summary judgment because they are untimely. Pl. Br. at 21. This argument is without merit, for reasons discussed above.

Plaintiffs seek summary judgment on non-timeliness grounds as to only one of Defendant Zhu's counterclaims, the claim made against Plaintiff Xu Ting. Plaintiffs assert that Defendant Zhu's testimony does not support his counterclaims against Plaintiff Xu Ting, because he only alleges that Ting put a flier in front of him and "lightly scolded" him. *Id.* However, Plaintiffs' assertion is based on a selective quotation from Zhu's testimony that Plaintiffs have taken out of context. Plaintiffs ignore the fact that Defendant Zhu testified, consistent with the allegations in his complaint, that he was threatened with death. Ex. 14 at 134:9–135:20 ("she even said something bad like, you have to go die."); 2d Am. Answer & Countercl. at ¶ 40. Plaintiffs also neglect to mention Zhu's testimony that he was previously thrown from his wheelchair by Plaintiff Bian Hexiang, resulting in Zhu's hospitalization, (*id.* at 101:12 – 102:13) and that Plaintiffs repeatedly mocked and threatened him based on his disability. *Id.* at 80:5 – 80:25; 132:2-10. Such outrageous conduct by Plaintiffs is, unfortunately consistent with a tenet of the Falun Gong: that handicapped individuals deserve to suffer. 2d Am. Answer & Countercl. at

[15] Plaintiffs' claims are not subject to the claim-saving provision of CPLR 203(d), and thus, as set forth in Defendants' motion for summary judgment, those claims filed outside of the applicable statue of limitations should be dismissed as time-barred.

¶¶18-20, ¶¶32-40. Thus, Defendant Zhu has clearly set forth sufficient evidence to raise an issue of fact as to whether Plaintiff Ting's conduct towards him constitutes assault and intentional infliction of emotional distress, or, in the alternative, negligence, resulting in harm to Defendant Zhu.

D. Defendant Li's Counterclaims

Plaintiffs assert that several of Defendant Li's counterclaims should be dismissed because they are untimely. Pl. Br. at 22. This argument is without merit, for reasons discussed above.

Plaintiffs also assert that Defendant Li's counterclaims should be dismissed because she was unable to identify her "purported assailants," or "how any of the incidents occurred." *Id*. However, in making this argument, Plaintiffs selectively quote and mischaracterize Defendant Li's testimony. Indeed, Plaintiffs ignore pages of Defendant Li's deposition testimony making clear that there are factual issues raised by her version of events, and the assaults she suffered at the hands of Plaintiffs.

First, as to Plaintiffs' assertion that Defendant Li's counterclaims should be dismissed because she was unable to identify her attackers, Defendant Li testified that the reason she could not name the individuals who attacked her is that these individuals did not wear their names on their clothing, and thus she did not know their names. Ex. 15 at 225:13-17. Defendant Li clarified that she is now able to identify the Plaintiffs as the individuals who committed assaults and batteries against her because the timing of these attacks match the timing of the incidents alleged in Plaintiffs' complaint. *Id.* at 198:2-18; 225:5-12; 228:4-18. As stated in Defendants' Second Amended Answer & Counterclaims, Plaintiffs, in filing suit, have admitted they were involved with confrontations with Defendant Li, and have thereby identified themselves as the individuals who assaulted Li. 2d Am. Answer & Countercl. at ¶¶35-36.

The fact that Defendant Li did not know (or could not recite with photographic memory) the names of her numerous attackers is irrelevant, and does not, for purposes of summary judgment, vitiate her claims. An analogous set of circumstances was considered by this Court in *Universal Calvary Church v. City of N.Y.*, 2000 U.S. Dist. LEXIS 15153 (S.D.N.Y. Oct. 13, 2000). In that case, the plaintiff alleged he was assaulted and battered by a group of police officers who were making his arrest, but could not identify any of the arresting officers. *Id.* at *86. Despite the defendants' argument that the plaintiff's inability to identify his alleged attackers was fatal to his claim, the court denied summary judgment, holding that the admission of two officers that they had participated in the plaintiff's arrest constituted sufficient evidence of their involvement to raise an issue of fact. *Id.* at *87, *91; *see also Vesterhalt v. City of N.Y.*, 667 F. Supp. 2d 292, 297-98 (S.D.N.Y. 2009) (denying summary judgment on assault and battery claims where it was possible to infer that defendants were involved in the incident).

Consistent with Defendants' counterclaims, and like the officers in *Universal Calvary Church* who admitted they were involved in the arrest of the plaintiff, here, the Plaintiffs who have said they were involved in each encounter have, by their own pleadings, made it undisputed that they are the individuals who interacted with Defendant Li during the incidents. 2d Am. Answer & Countercl. at ¶¶ 35-36. Further evidence of Plaintiffs involvement is provided by Li's testimony confirming that the incidents alleged in the complaint coincide with the dates on which she suffered assaults. Ex. 15 at 228:4-13.

Thus, the facts in this case clearly constitute a sufficient evidentiary basis from which to infer the involvement of Plaintiffs in the assaults on Defendant Li, because Plaintiffs themselves have admitted that they were the individuals involved in the altercation.

Li also described, at deposition, the nature of the various assaults inflicted on her by Falun Gong members. She testified that: on one occasion a Falun Gong member "took all my stuff on the table and threw them on the ground and then punched me" (Ex. 15 at 203:5-8); on another occasion, a Falun Gong member "took out a sharp object and caused [her] to bleed" (*id.* at 204:12-20); and on another occasion, a Falun Gong member "brought big rocks, many, many big rocks and placed them on my table intending on killing me with those rocks and was arrested by the police, and I was given an order of protection." *Id.* at 202:10-17.

In light of the abundant evidence supporting the involvement of Plaintiffs in the assaults against Defendant Li, Plaintiffs' argument that Defendant Li's claims should be dismissed on summary judgment because she was unable to identify her attackers or describe the attacks is without merit.

E. Defendant Wan's Counterclaims

Plaintiffs assert that several of Defendant Wan's counterclaims should be dismissed because they are untimely. Pl. Br. at 22. This argument is without merit, for reasons discussed above.

Plaintiffs also assert that Defendant Wan's counterclaims against Plaintiff Cuiping Zhang arising from an incident occurring on January 3, 2016 are baseless because Defendant Wan testified that she slapped the camera out of Plaintiff Zhang's hands because she thought Plaintiff Zhang was taking pictures of her. Pl. Br. at 22. However, as with Plaintiffs' arguments pertaining to the counterclaims of Defendants Zhu and Li, they improperly point only to selective and mischaracterized quotations from her lengthy deposition testimony. In making this argument, Plaintiffs ignore pages of relevant testimony from Defendant Wan that contradicts their assertion. Specifically, Wan testified that, in addition to shoving a camera in her face, Defendant Zhang hit her and grabbed her hair. Ex. 16 at 23:7–21. Wan further testified that,

leading up to the incident, Plaintiff Zhang had been following and threatening her "everywhere she went." *Id.* at 102:4-103:13. Defendant Wan further testified that Plaintiff Zhang shoved the camera so close to her face that she feared it would hit her. *Id.* Thus, in actuality, Wan's testimony that Plaintiff Zhang continuously stalked and threatened her, before hitting her, grabbed her hair, and aggressively shoved a camera perilously close to her face, provides more than sufficient evidence to raise an issue of fact as to whether Plaintiff Zhang assaulted, battered, intimidated and threatened Wan with imminent bodily harm.

CONCLUSION

For the foregoing reasons, Plaintiffs' motion for summary judgment should be denied.

Dated: New York, New York
January 5, 2018

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