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UNITED STATES DISTRICT COURT
OF THE EASTERN DISTRICT OF NEW YORK

Plaintiffs, ZHANG Jingrong, ZHOU Yanhua, ZHANG Peng, ZHANG Cuiping, WEI Min, LO Kitsuen, LI Xiurong, CAO Lijun, HU Yang, GAO Jinying, CUI Lina, XU Ting, and BIAN Hexiang vs. Chinese Anti-Cult World Alliance (CACWA), Michael CHU, LI Huahong, WAN Hongjuan, ZHU Zirou, & DOES 1-5 Inclusive, Defendants	**PLAINTIFFS' SUR-REPLY** Civil Action No. 15-cv-1046

In Defendants' Reply to Plaintiffs' Opposition to the Motion to Dismiss (hereinafter "Reply Brief" or "Reply"), Defendants raise three arguments that fail to appear anywhere in Defendants' Motion to Dismiss. First, Defendants argue that Plaintiffs' claim under 42 U.S.C. § 1985(3) must fail because there may not be a constitutional right to intrastate travel, and because there is no "requisite showing of state action." Reply Br. at 2-3. Second, Defendants misconstrue the requirement that Defendants act with the "conscious objective" to deprive Plaintiffs of their rights. Rep. Br. at 3. Third, Defendants argue that Plaintiffs have employed "misleading translations of Chinese terms [that] do not establish" invidiously discriminatory animus. Reply Br. at 9-10. Because these arguments are being raised for the first time, Plaintiffs respectfully submit this limited Sur-reply to address these issues.

I. Defendants' Arguments That There Is Not a Clear Right to Intrastate Travel and that the Deprivation of Such a Right Requires State Action Are Without Merit.

In their Reply Brief, Defendants improperly contend, for the first time, that a right to intrastate travel may not even exist, and that, even if it does, a claim of deprivation of such a right under § 1985(3) requires a "showing of state action." Rep. Br. at 2-3. Both of these arguments are wrong as a matter of law.

First, Defendants argue that "[w]hether or not there is even a constitutional right to 'intrastate travel' is unclear, with different Circuit Courts taking different approaches." Rep. Br. at 2. There is, however, nothing unclear about *this* Circuit's holding that such a right exists. *See King v. New Rochelle Municipal Housing Authority*, 442 F.2d 646, 648 (2d Cir. 1971) ("It would be meaningless to describe the right to travel between states as a fundamental precept of personal liberty and not acknowledge a correlative constitutional right to travel within a state."); *see also Spencer v. Casavilla*, 903 F.2d 171, 174 (2d Cir. 1990) ("[O]ur Court has held that the Constitution also protects the right to travel freely within a single state.").[1] Thus, despite Defendants' attempts to muddle the issue, the existence of a constitutional right to intrastate travel is well-established by binding precedent.

Second, Defendants argue that the deprivation of the right to intrastate travel under § 1985(3) requires a "showing of state action." Rep. Br. at 2-3. Defendants' argument flatly contradicts Second Circuit precedent and conflates the right to intrastate travel with Fourteenth Amendment rights. The Second Circuit has explicitly held that "it is clear that a claim under § 1985(3) for violation of the constitutional right to travel may be asserted against private defendants; no state action need be alleged or proven." *Spencer v. Casavilla*, 903 F. 2d 171, 174-75 (2d Cir. 1990). This holding settles the matter. Moreover, Defendants fail to distinguish between rights to travel, which are protected against private encroachment and therefore do not require a showing of state action, and Fourteenth Amendment rights, which protects individuals only against state action. Thus, the Defendants' reliance on *Carpenters v. Scott*, 463 U.S. 825 (1983) is misplaced, as the *Carpenter* plaintiffs

[1] Such a right dates back to pre-American Revolution English law. According to Blackstone, "Personal liberty consists in the power of locomotion, of changing situation, or removing one's person to whatsoever place one's own inclination may direct . . ." 1 W. Blackstone, *Commentaries of the Laws of England* (1765). While a right to intrastate travel has never been explicitly recognized as such by the Supreme Court, the recognition of such a right has been frequently implied. *See*

asserted only deprivations of Fourteenth Amendment rights, not rights to travel. The Second Circuit in *Spencer* declined to ascribe the source of the right to intrastate travel to any particular constitutional provision but rather relied on "constitutional concepts of personal liberty." 903 F. 2d at 174 (quoting *Shapiro v. Thompson*, 394 U.S. 618, 629 (1969)); *accord King*, 442 F.2d at 648.

Thus, Defendants' arguments notwithstanding, Plaintiffs have identified the deprivation of a constitutional right to travel that is protected against private encroachment and therefore does not require a showing of state action.

II. Defendants' Entire Discussion of a Conscious Objective Requirement Is Misplaced.

Defendants contend that deprivation of the right to travel under § 1985(3) must be the "conscious objective of the enterprise, and not merely incidental to it." Rep. Br. at 3 (citing *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993)). This argument appears to be stated now for the very first time. Accordingly, Plaintiffs include the below response.

Bray's conscious objective requirement is satisfied when a plaintiff alleges that the defendant acted "at least in part for the very purpose of producing" the deprivation. *Bray*, 506 U.S. 263, 276 (1993). Plaintiffs' allegations here go well beyond this standard, as they show that Defendants' *sole* purpose was to deprive Plaintiffs of their right to travel through and use the public streets and spaces of Flushing. Defendants "planned, organized, and implemented a campaign of violence and intimidation targeting the Falun Gong community in Flushing," thereby depriving them of access to "public streets and other public spaces." Compl. ¶ 137. Defendants spoke repeatedly of the "eradication" of Falun Gong from Flushing as the purpose of their attacks on Plaintiffs, during the actual attacks themselves. Compl. ¶¶ 101, 102, 118. CACWA-affiliated websites make clear that CACWA was stationed in Flushing to *douzheng* or "violently suppress" Falun Gong, and this objective is touted in materials disseminated by CACWA leaders and supporters. Compl. ¶¶ 59-60.

Defendant Li has publicly stated, "In Flushing, Falun Gong must not be allowed to exist." Compl. ¶ 58. Defendant Wan has said Falun Gong in Flushing will be "eradicate[d]." Compl. ¶ 101.

Defendants' acts of violence, threats, and other forms of intimidation were carried out specifically to deprive Plaintiffs of access to the public streets and spaces of Flushing. Defendants' acts directly served this goal in two ways. First, depriving Falun Gong adherents of their visibility and use of public spaces surrounding the Spiritual Center through violence and intimidation directly achieves Defendant CACWA's organizational purpose of purging Flushing of Falun Gong by suppressing the growth of the Falun Gong community in Flushing. Indeed, Plaintiffs have alleged that Plaintiffs relied on those spaces surrounding the Spiritual Center to introduce Falun Gong to passersby and attract potential new adherents, as well to access the Spiritual Center itself. Compl. ¶¶ 20-23, 26-27. Second, and more importantly, the public visibility of Falun Gong adherents' inability to travel in public streets and spaces without fear of violence directly achieves Defendants' goal of ridding Flushing of the religion and its adherents. All Plaintiffs were, as a result of Defendants' acts of violence and intimidation, placed in fear of traveling in or around the area of the Spiritual Center. Compl. ¶¶ 31, 35.

Without interfering with Plaintiffs' ability to freely and peacefully access the public streets and spaces of Flushing, Defendant could not have hoped to effectively purge Flushing of Falun Gong. Thus, even if it were not the sole reason for the violent assaults and intimidation (which it was), it was a necessary and significant component of Defendants' ultimate objective, i.e., to purge Flushing of Falun Gong. Accordingly, Plaintiffs have at the very least alleged that Defendants acted "at least in part for the very purpose of producing" the deprivation of Plaintiffs' right to intrastate travel. *Bray*, 506 U.S. 263, 276 (1993).

III. Defendants' Arguments Regarding Translations of Chinese Terms Is an Inappropriate Challenge to a Material Issue of Fact.

Defendants also introduce, for the first time, the argument that Plaintiffs "have purposely used hyperbolic translations of Chinese terms, meant to mislead the Court." Rep. Br. at 9. Not only is this argument inappropriately introduced in a reply brief, but it challenges a material issue of fact at the motion to dismiss stage, when the Court "must accept as true all allegations in the complaint and draw all reasonable inferences in favor of the non-moving party." *Gorman v. Consol. Edison Corp.*, 488 F.3d 586, 591-92 (2d Cir. 2007).

Plaintiffs allege that Defendants repeatedly employed language commonly used in "post-Cultural Revolution Chinese Communist Party parlance," including the term *douzheng*. Compl. ¶ 37. Plaintiffs allege that *douzheng* "roughly translates as 'crackdown' or 'violent suppression' or 'violent attack'." *Id.* These factual allegations must be taken as true at the motion to dismiss stage. *Gorman*, 488 F.3d at 591-92. If words "are reasonably susceptible of multiple meanings . . . it is then for the trier of fact, not for the court acting on the issue solely as a matter of law, to determine in what sense the words were used and understood." *Celle v. Filipino Reporter Enterprises Inc.*, 209 F.3d 163, 178 (2d Cir. 2000). Defendants, however, apparently not content to wait until their arguments as to the *legal sufficiency* of Plaintiffs' claims are resolved, introduce – in their Reply Brief – this challenge to the *factual veracity* of Plaintiffs' allegations. Defendants will have ample opportunity, in their Answer to Plaintiffs' Complaint and at trial, to debate the meaning of this term. Plaintiffs will, at such time, be prepared to proffer expert witnesses to testify as to the specific violent and persecutory meaning of this term and its frequent, historically documented usage by Chinese Communist Party authorities to support and justify violent persecutory campaigns against disfavored groups. Plaintiffs will further be prepared to present evidence that this term was understood by the Defendants themselves to carry a violent, persecutory meaning, regardless of how it is defined in Defendants' so-called "authoritative" Chinese-English Dictionary. Because Defendants have raised these issues at this stage, Plaintiffs enclose the expert affidavit of Ryan Mitchell, an authority on the use of Chinese language during persecutory campaigns in recent Chinese history. *See* Exhibit 1.

Plaintiffs further allege that Defendant Chu told an audience of supporters to "PK" Falun Gong, which Plaintiffs describe as "a slang term . . . which roughly means 'battle against' or

'defeat.'" Compl. ¶ 89. This description of the term is not meaningfully distinct from Defendants' literal characterization of the term as meaning "to thoroughly dominate" or "to beat." Rep. Br. at 10. However, as affiant Ryan Mitchell makes clear, "mere literal translations" of terms like "PK" are "misleading without attention to context." *See* Exhibit 1. "'PK', which originated from violent video games and other forms of popular entertainment as a term indicating defeat of a rival (usually in some form of combat), are not neutral and inoffensive when used in the context of violent campaigns against a Party-targeted group like Falun Gong. Rather they imply and call for total defeat of the group so targeted." *Id.* It is therefore not clear on what basis Defendants conclude that Plaintiffs "have chosen to exaggerate the extent and intent of Defendants' language." Rep. Br. at 10. Regardless, Defendants' claims are not appropriate at this stage of litigation. Again, Plaintiffs and Defendants will both have ample opportunity to present evidence as to what meaning Defendant Chu intended to convey when he told his audience, which included CACWA supporters, to "PK" Falun Gong. But now is not the time.[2]

In any event, Plaintiffs' allegations amply demonstrate Defendants' anti-Falun Gong discriminatory animus even setting aside the precise meaning of these terms. Defendants have called Falun Gong practitioners "pets of the Untied States, lapdogs of America," "fucking Falun Gong motherfucker," and "even worse than dogs," and have stated the desire that Falun Gong practitioners "disappear," be "eradicate[d]," and be "kill[ed]." Compl. ¶¶ 79-80, 101-05, 108. Even accepting the Defendants' own definition of *douzheng*, Defendants have repeatedly expressed a desire to "fight" and "combat" Falun Gong. Rep. Br. at 9. Further, Defendants make no attempt to challenge the other persecutory Chinese terms commonly used by Defendants, including *zhuanhua* (forced conversion) and *duifu* (defeat). Compl. ¶¶ 118-19. Together, these statements make plain that Defendants held extremely hostile, violent animus toward Falun Gong practitioners.

[2] Should the Court determine that the precise meanings of these terms is dispositive of the outcome of Defendants' Motion to Dismiss, Plaintiffs would welcome the opportunity to hold an evidentiary hearing on the issue in which "all parties shall be given reasonable opportunity to present all material made pertinent." *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152-53 (2d Cir. 2002).

Plaintiffs note that this argument is only one of Defendants' many challenges to material issues of fact which should be reserved for an answer, a motion for summary judgment, and/or trial. Other such factual challenges include:

- Falun Gong is not a religion. MTD at 12-13; cf. Compl. ¶ 3 "Falun Gong is a peaceful spiritual practice . . . that has much in common with other spiritual practices such as Taoism and Buddhism.").
- Defendants have only acted on their goals to educate and inform the public of the dangerous practices of Falun Gong. Reply Br. at 4; MTD at 10-11; cf. Compl. ¶¶ 5, 26, 34-35, 77, 79, 80-81, 84, 86-87, 101-09, 111-14, 128 (alleging repeated acts of violence and intimidation).
- Plaintiffs' allegations that Defendants are affiliated with Chinese Communist Party authorities are misleading or inaccurate. Reply Br. at 6; cf. Compl. ¶¶ 66-73 (allege ties between the Chinese Communist Party and Defendants CACWA and Chu).
- "CACWA maintains no websites which promote the alleged '*douzheng*' mission. In fact, CACWA has never been affiliated with, known about or published any articles found on the websites cited in Plaintiffs' Complaint." MTD at 14; cf. Compl. ¶ 37 ("According to CACWA materials and affiliate websites, the CACWA was created solely to wage a '*douzheng*' campaign against Falun Gong believers in New York and especially Flushing.)

Defendants' confusion between an Answer and a Motion to Dismiss reflects a larger confusion as to the nature of pleading practice in the federal courts. As a result, Defendants seek to undermine Plaintiffs' right to survive a motion to dismiss based on allegations that must be accepted as true and that "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

CONCLUSION

For the above-stated reasons, the arguments that Defendants raised in their Reply Brief fail, and Defendants' Motion to Dismiss should be denied.

Dated: August 17, 2015

Respectfully submitted,
_____/s/_____
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CERTIFICATE OF SERVICE

I hereby certify that all counsel of record who are deemed to have consented to electronic service are being served with a copy of this document via the Court's ECF System.

Dated: August 17, 2015 _____/s/_____

Terri E. Marsh