

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ERIC E. HOYLE,

Plaintiff,

v.

FREDERICK DIMOND, ROBERT DIMOND,
and MOST HOLY FAMILY MONASTERY,

Defendants.

DECLARATION

Civil Action No. 08-CV-347C

Charles C. Ritter, Jr., hereby declares, under penalty of perjury:

1. I am an attorney admitted to practice before this Court and am a partner with Duke, Holzman, Photiadis & Gresens LLP, attorneys for Defendants Brother Michael (Frederick) Dimond, Brother Peter (Robert) Dimond and Most Holy Family Monastery ("MHFM") in this action.¹

2. I submit this declaration in support of Defendants' motion for an Order compelling Plaintiff to: (1) produce the following: (i) Plaintiff's journal in its entirety; (ii) Plaintiff's scraps of paper on which he recorded "unpleasant events" while at MHFM; (iii) All communications to any Defendant made at Plaintiff's behest, including but not limited to those from embase-exchange@yahoo.com; (iv) Plaintiff's post-departure from MHFM fax to law enforcement concerning defendant Brother Michael (Frederick) Dimond's driving habits; (v) Printouts or electronically saved versions of the MHFM website, presently in Plaintiff's

¹ Duke, Holzman, Photiadis & Gresens LLP was substituted as counsel for Defendants in this action on or about May 12, 2010, in the place of the law firm of Rupp, Baase, Pfalzgraf, Cunningham & Coppola LLC.

possession, including any that Plaintiff reviewed prior to entering MHFM; (vi) Plaintiff's tax returns from 2005 to present, including all forms and schedules thereto; and (2) compelling the continued examination of Plaintiff to these matters.

3. Plaintiff commenced this action by filing a summons and complaint in or about May 2008, alleging, inter alia, that Defendants had engaged in wrongful conduct relating to Plaintiff's entering MHFM in 2005 and Plaintiff's donations of approximately \$1.6 million to MHFM in connection therewith.

4. Defendants bring this motion to compel Plaintiff to produce certain documents and things pursuant to FRCP 37(a), which allows a party to apply to the Court for an Order compelling discovery.

5. Attached hereto as **Exhibit A** is a true copy of Defendants' First Notice to Produce, dated September 10, 2009.

6. Attached hereto as **Exhibit B** is a true copy of Defendants' Second Notice to Produce, dated August 10, 2010.

7. Attached hereto as **Exhibit C** is a true copy of Defendants' Third Notice to Produce, dated November 21, 2010.

8. Attached hereto as **Exhibit D** is a true copy of Plaintiff's Response to Defendants' First Notice to Produce, dated January 25, 2010.

9. Attached hereto as **Exhibit E** is a true copy of Plaintiff's Response to Defendants' Second Notice to Produce, dated December 13, 2010.

10. Attached hereto as **Exhibit F** is a true copy of Plaintiff's Response to Defendants' Third Notice to Produce, dated December 14, 2010.

11. On February 8, 2011, I commenced Plaintiff's deposition. I was not able to complete the examination because of missing documents that had previously been demanded.

12. At Plaintiff's deposition, I made demands, and restated prior demands, for the following materials on the record: (i) Plaintiff's journal in its entirety; (ii) Plaintiff's "scraps of paper" on which he recorded "unpleasant events" while at MHFM; (iii) All communications to any Defendant made at Plaintiff's behest, including but not limited to those from embase-exchange@yahoo.com; (iv) Plaintiff's post-departure from MHFM fax to law enforcement concerning defendant Brother Michael (Frederick) Dimond's driving habits; (v) Printouts or electronically saved versions of the MHFM website, presently in Plaintiff's possession, including any that Plaintiff reviewed prior to entering MHFM; and (vi) Plaintiff's tax returns from 2005 to present, including all forms and schedules thereto.

13. On February 9, 2011, your deponent's firm emailed Plaintiff's counsel itemizing the outstanding demands that were made on the record at Plaintiff's deposition. No response has been received to date. A copy of this email is annexed hereto at **Exhibit G**.

14. Under the Court's present scheduling order, discovery in this action is to be completed on or before March 14, 2011.

I. Plaintiff's Entire Journal is Subject to Disclosure.

15. On or about January 18, 2011 -- after almost two years of litigation -- Plaintiff produced for the first time a heavily redacted copy of portions of his journal (the "Journal") identified by bates numbers HOYLE 005258 to HOYLE 005348.

16. The Journal contains Plaintiff's handwritten notes about his decision to visit MHFM, the time he spent there, and his thoughts about leaving.

17. Annexed hereto as **Exhibit H** is a copy of the redacted portions of the journal Plaintiff produced.

18. The portions of the Journal that have been produced and not redacted clearly indicate that the redacted portions are likely relevant to the instant dispute. For example, many of the portions marked "redacted" precede or immediately follow Plaintiff's writings concerning Defendants. (See e.g., HOYLE 005261, 005263, 005265, 005266, 005267, 005269, 005270, 005271, 005278, 005281, 005283, 005292, 005293, 005294, 005295, 005304).

19. The Journal is also responsive to: (i) Demand No. 3 of Defendants' First Notice to Produce (Exh. A hereto) for "Documents concerning [plaintiff's] religious views created by [plaintiff] between January 2005 and present, including those written under a pen-name" and (ii) Demand No. 3 of Defendants' Third Notice to Produce (Exh. C hereto) for "All documents authored by plaintiff concerning a narrative or description of plaintiff's experience at MHFM...".

20. On January 19, 2011 I wrote Plaintiff's counsel demanding production of the Journal in its entirety. Plaintiff's counsel responded by letter dated January 24, 2011 refusing to produce the Journal in its entirety but failed to identify any grounds that would protect the Journal from disclosure. Attached hereto as **Exhibit I** are copies of both letters.

21. Plaintiff's privilege log, produced on October 15, 2010, does not make any mention of Plaintiff's Journal. A copy of Plaintiff's privilege log is annexed hereto as **Exhibit J**.

22. At minimum, Defendants are entitled to an in camera review of the Journal in its entirety by the Court. See, Rexford v. Olczak, 176 F.R.D. 90, 93 (W.D.N.Y. 1997) (holding that plaintiff's diary, which contained contemporaneous account of meetings, conversations and other events central to the issues in the case, provide relevant evidence that may be useful for impeachment or other trial preparation purposes and defendants were entitled to obtain discovery of the diary in its entirety).

II. Plaintiff's Scraps of Paper detailing "Unpleasant Events" at MHFM.

23. Plaintiff testified at his deposition that he was in possession of "scraps of paper" on which he recorded "unpleasant events" while at MHFM.

24. Such materials are responsive to: (i) Demand No. 2 of Defendants' First Notice to Produce (Exh. A hereto) for "documents in [plaintiff's] possession concerning the defendants"; and (ii) Demand No. 3 of Defendants' Third Notice to Produce (Exh. C hereto) for "All documents authored by plaintiff concerning a narrative or description of plaintiff's experience at MHFM...".

25. Accordingly, Plaintiff is required to produce these materials.

III. Communications to Defendants at Plaintiff's Behest.

26. Demand No. 1 of Defendants' Third Notice to Produce (Exh. C hereto) requests production of "All documents sent by plaintiff to any of the defendants, or sent at the behest, direction or control of Plaintiff, bearing a name or email address other than that of plaintiff, since the commencement of this action."

27. Defendants have received email communications from the email address embase-exchange@yahoo.com and have reason to believe that such communications were made by or on behalf of Plaintiff.

28. At Plaintiff's deposition, demand was made on the record for production of communications to or from embase-exchange@yahoo.com.

29. Accordingly, Plaintiff should be compelled to produce all communications to any Defendant made at Plaintiff's behest, including but not limited to those from embase-exchange@yahoo.com.

IV. Plaintiff's Fax to Law Enforcement About Brother Michael (Frederick) Dimond.

30. Plaintiff testified at his deposition that he sent a fax to law enforcement officials complaining of Brother Michael (Frederick) Dimond's driving habits after Plaintiff's Departure from MHFM.

31. Such communication is relevant to Plaintiff's disparagement of Defendants and must be produced.

32. In addition, this communication is responsive to Demand No. 2 of Defendants' First Notice to Produce (Exh. A hereto) for "documents in [plaintiff's] possession concerning the defendants."

V. MHFM Website Plaintiff Reviewed Prior to Entering MHFM.

33. At Plaintiff's deposition I demanded production of printouts or electronically saved versions of the MHFM website that Plaintiff reviewed prior to entering MHFM.

34. Plaintiff indicated he may be in possession of such materials.

35. As information that Plaintiff reviewed prior to visiting MHFM, this material is relevant to the issue of Plaintiff's claim that Defendants made false representations concerning their affiliation with the Order of Saint Benedict. Furthermore, this material would be responsive to Demand No. 2 of Defendants' First Notice to Produce (Exh. A hereto) for documents in Plaintiff's possession concerning the Defendants.

VI. Tax Documents from 2005 to Present.

36. To date, Plaintiff has produced portions of his 2005 and 2006 tax documents relative to charitable donations made in each of those years. These documents show that Plaintiff declared the funds transferred to MHFM as unconditional completed gifts.

37. Plaintiff's deposition revealed that Plaintiff took a deferred deduction for donations made in prior tax years.

38. Defendants are entitled to the complete returns for 2005 to present in order to establish Plaintiff took deferred deductions during those years, carried those deductions

forward after he left MHFM and because the tax return filings are relevant to Plaintiff's donative intent of the subject funds at issue in this action.

39. The tax documents demanded but not produced to date are relevant to (i) Demand No. 5 of Defendants' First Notice to Produce (Exh. A hereto) for documents concerning donations made by Plaintiff to any religious organization from December 1, 2003 to present; and (ii) Demands Nos. 1 and 6 of Defendants' Second Notice to Produce (Exh. B hereto) for Plaintiff's federal and state tax filings and all documents prepared or signed by Plaintiff concerning the monies transferred to MHFM by Plaintiff, whether the monies were gifts, donations, loans, etc.

40. A continued examination of Plaintiff is necessary and proper relative to the information that must be produced.

41. I hereby certify pursuant to FRCP 37(a)(2)(A) that Defendants in good faith conferred or attempted to confer with Plaintiff's counsel to secure the discovery sought to be compelled without this Court's intervention.

WHEREFORE, the Defendants respectfully request that the Court grant an Order: **(i)** compelling Plaintiff to produce: **(i)** Plaintiff's journal in its entirety; **(ii)** Plaintiff's "scraps of paper" on which he recorded "unpleasant events" while at MHFM; **(iii)** All communications to any Defendant made at Plaintiff's behest, including but not limited to those from embase-exchange@yahoo.com; **(iv)** Plaintiff's post-departure from MHFM fax to law enforcement concerning defendant Brother Michael (Frederick) Dimond's driving habits; **(v)** Printouts or electronically saved versions of the MHFM website, presently in Plaintiff's

possession, including any that Plaintiff reviewed prior to entering MHFM; and (vi) Plaintiff's complete tax returns from 2005 to present, including all forms and schedules thereto; and (2) compelling the continued examination of Plaintiff to these matters.

Dated: March 1, 2011

Buffalo, New York

/s/ Charles C. Ritter, Jr.

Charles C. Ritter, Jr.