UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ERIC E. HOYLE,

Plaintiff,

v.

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

Defendants.

MEMORANDUM OF LAW

Civil Action No. 08-CV-347C

INTRODUCTION

Defendants Frederick Dimond ("Bro. Michael"), Robert Dimond ("Bro. Peter"), and Most Holy Family Monastery ("MHFM") (collectively, "defendants") submit this Memorandum of Law along with the supporting Declarations of Bro. Michael and Charles C. Ritter, Jr., Esq. in support of their motion for summary judgment pursuant to Fed.R.Civ.P. 56 for judgment dismissing the Complaint in its entirety and granting judgment against plaintiff Eric Hoyle ("plaintiff" or "Hoyle") on the specified counterclaims.

The Amended Complaint contains ten (10) causes of action consisting of both legal and equitable theories for recovery of monies plaintiff admits he "donated" to MHFM and for which he took charitable deductions on his tax returns. The legal claims include: violations of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 18 U.S.C. §§ 1961 et seq. ("RICO"), common law fraud, constructive fraud, deceptive trade practices pursuant to N.Y. General Business Law ("GBL") § 349, false advertising pursuant to GBL § 350. Plaintiff also asserts equitable claims for unjust enrichment and money had and received.

In denying a prior motion to dismiss, the Court identified the common factual theme underlying all of the causes of action: "[p]laintiff seeks to recover those monies he donated to MHFM in reliance on their representations regarding their affiliation with the Order of St. Benedict." (Item 41, p. 1). This

Court further explained that the central issue is "whether defendants falsely represented themselves as being affiliated with the Order of Saint Benedict." (Id., at 7). Discovery has revealed that **(1)** there was no misrepresentation by defendants regarding their Benedictine status, and **(2)** Plaintiff understood defendants' religious positions and was at all times aware they were NOT affiliated with "the universally recognized and sanctioned Order of St. Benedict" (Id., at 4).

As for defendants' counterclaims, plaintiff has admitted that he wrongfully took Defendants' property and confidential records, and made statements about defendants that are defamatory per se. These admitted facts establish entitlement to judgment as a matter of law.

For the reasons explained below, defendants' motion for summary judgment should be granted.

UNDISPUTED FACTS

A. Eric Hoyle and His Evolving Religious Beliefs

Plaintiff is a highly intelligent, well educated individual who has spent many years investigating and studying religious doctrine. He is a college graduate, Phi Beta Kappa, and was accepted to Medical School as well as other post-graduate programs. Rather than pursue these programs, plaintiff dedicated himself to religious study and pursuit of a "true" religion.

Plaintiff has produced several documents which describe, in his own words the evolution of his religious beliefs. (Ritter Decl. Exhs. D, E; Hoyle T. 84- 87). His beliefs initially involved various forms of protestant worship. During college, he developed an interest in Bible study which resulted in a progression towards Calvinist/Presbyterian beliefs. He attained Phi Beta Kappa status, but "secular" college studies seemed insignificant. Self-described, he was in a search for the "true religion," and had uncertainty as to which "church" was the correct one. He decided to take a semester off from college, and pursue Christianity "more single-mindedly."

Hoyle was exposed to "Novus Ordo Catholicism" in April 2003. This led Hoyle to a revelation concerning his pursuit of "true" religion: "[i]f the true God established a religion, it is obvious that He would get it right from the start and that it would not change. Certainly he would not need men to come along and reform it …." He began to study a Catholic Catechism. (Ritter Decl. Exh. D, p. 3 @ No. 7).

In the fall of 2003, he enrolled in graduate school at St. John's College. He began to practice the Catholic faith, but was quickly disappointed by Mass services which he characterized as "a cross between a variety show, a kiddie sing-along, and a town meeting." He concluded this type of service "was a disastrous mockery of Catholic worship." (Ritter Decl. Exh. D, p. 3 @ No. 9). He continued to study Catholicism and in February 2004 was invited to attend a traditional Mass in Washington, D.C. where he was introduced to Dr. David White whom he thereafter met with weekly to study the Catholic faith. (Ritter Decl. Exh. D, p. 4 @ Nos. 11-12). During these studies and before he had any dealings with defendants, Hoyle came to conclude that

> the Catholic Church was overthrown from the "inside", by its own purported leaders, in the 1960's and following, a project that is especially to be identified with the rogue council "Vatican II" and with the fabrication of a new Mass, called the Novus Ordo Missae ("New Order of Mass"). The whole project reeks of dishonesty and evil.

(Ritter Decl. Exh. D, p.4 @ No. 12; Hoyle T. 122-23). Hoyle became a confirmed Catholic in June 2004 from Bishop Williamson of the Society of St. Pius X ("SSPX"), a traditional Catholic religious organization not affiliated with the Vatican II religion. (Ritter Decl. Exh. E, p. 2).

Hoyle continued study and his beliefs continued to evolve. As his beliefs evolved, he would abandon his then current religious affiliations as heretical in favor of new ones that he concluded were proper and true. (See, e.g. Ritter Decl. Exh. E, p.2 (offering to do "anything possible" to advance the work of SSPX, an organization he later disavowed)). By March of 2005, Hoyle had begun to move away from SSPX. He had come to the conclusion that the Catholic Church "worldwide is in the most severe crisis of her entire history by far; Vatican officials teach and practice all kinds of heresies. There

has been a numerical collapse in the in the forty years since Vatican II; monks and nuns are nearly extinct." (Ritter Decl Exh. D, p 5 @ No. 15).

Nowhere in plaintiff's self-authored religious biographies does one find any reference to a desire to become a Benedictine monk or even an effort on his part to research Benedictine monasteries. In fact, Hoyle's actions and testimony demonstrate that he viewed the "Benedictine" issue as irrelevant. For example, plaintiff provided financial support to another Benedictine monastery in 2004—Our Lady of Guadalupe—because they held the same beliefs as his SSPX church but he had no concern whether or not they were OSB or truly "Benedictine." (Hoyle T. 87-88). In fact, plaintiff admits that between 2004 through December 31, 2007, he never focused on or researched the Benedictine Confederation or its hierarchy. (Hoyle T. 89-91).

In sum, the record and Hoyle's testimony indisputably establish that pursuit of the "true" Catholic religion was his goal. The desire to become a Benedictine monk alleged in the Amended Complaint and argued in opposition to the prior motion to dismiss is nothing more than an after-the-fact creation of legal counsel.

B. <u>Religious Affiliation and Financial Support</u>

Plaintiff's financial support of various religious organizations mirrors his evolving religious beliefs--- Hoyle provided financial support to those organizations that he found to share his views on religion. As his beliefs evolved, he would denounce his prior affiliations and withdraw his financial support. (Hoyle T. 82).

As part of his religious studies and pursuit of truth, Hoyle would research and evaluate religious organizations. His "prime intention" was to be a "true Catholic" which did not require him to be Benedictine, and he had not and has not investigated or sought out any Benedictine organizations. (Hoyle T. 221). Hoyle does not recall providing financial support to an organization based on whether or not they were affiliated with the Benedictine Confederation, and did not even bother to research

Benedictine issues until after he departed MHFM. (Hoyle T. 82, 87-88, 90-91, 221). Thus, it is undisputed that Hoyle's affiliation with and support for religious organizations, including MHFM, was based on the organization's beliefs concerning Catholic doctrine not whether there was an affiliation with the Benedictine Confederation.

Hoyle's cycle of adopting and then renouncing religious organizations is lengthy and undisputed: he affiliated with over 30 religious organizations between 2000 and 2005. (Ritter Decl. Exh. C, pp. 4-11; see also Hoyle T. 164-65 (Hoyle "dabbled" by making donations of about $60,000 to religious groups "I now find unacceptable")). Plaintiff initially supported Protestant organizations, but "came to believe Protestantism was a false religion." (Ritter Decl. Exh. C., p. 6). Plaintiff then became a supporter of "various organizations that presented themselves as Catholic." (Id., p. 7). The initial "group" of Catholic organizations plaintiff supported "embraced the Second Vatican Council," whereas the second group expressed reservations about the New Mass and related changes. (Id.). Plaintiff "ceased to attend or support" the first group of organizations as he became more aware of "traditional Catholic" doctrine. (Id., p. 8). By mid-April 2005, plaintiff decided "not to attend or support" any of the "Catholic" organizations in the second group. (Id.) This included his rejection of SSPX. (Hoyle T. 102). By this point, plaintiff's beliefs had independently evolved to be "generally the same religious beliefs as promoted by MHFM." (Ritter Decl. Exh. C, p. 8; Hoyle T. 123).

Despite his affiliation with MHFM, plaintiff's cycle of evolving religious beliefs continued: Hoyle eventually concluded that he disagreed with defendants' religious beliefs; he openly denounced them, and withdrew all financial support. He literally reached this decision overnight. On December 30, 2007, MHFM was the only "true Catholic community" Hoyle was aware of (Hoyle T. 61, 109, 151). On December 31, 2007, plaintiff suddenly concluded that defendants' position on mass attendance was heretical. Hoyle's decision to leave MHFM had nothing to do with the "Benedictine" issue, and was

based solely on a disagreement with defendants on the issue of mass attendance- i.e. where and with whom a true Catholic could receive/attend Mass. (Hoyle T. 61, 109, 301; Ritter Decl. Exh. G p. 61-62).

C. Plaintiff Agreed with MHFM's Beliefs, and Promoted it as a Benedictine Community

Plaintiff admits he was fully familiar with MHFM's religious beliefs before he joined MHFM's community and made donations to provide funding for it to spread its message. (Hoyle T. 144). Plaintiff had independently developed his own beliefs about the "true" Catholic religion before he discovered MHFM, and upon reviewing their writings determined that their beliefs were "correct" and consistent with his own. (See Ritter Decl. Exh. F p. 1). Plaintiff admits defendants have not made any "fraudulent statements" relating to their religious beliefs. (Hoyle T. 302).

Plaintiff also admits that before he entered MHFM he knew MHFM was not affiliated with the publicly recognized Order of St. Benedict. He had thoroughly reviewed all of the information on MHFM's website, including the materials where defendants' expressly disavowed any affiliation with Pope John Paul II or "the Benedictine Order under him." (Hoyle T. 257). He knew that defendants condemned as false all of the monasteries that fell under "the publicly recognized Order of Saint Benedict" and agreed with this position. (Hoyle T. 257-59; Item 30 ¶ 12). He admits that defendants never represented that they were affiliated with the Benedictine Confederation. (Hoyle T. 271).

Although not affiliated with the publicly recognized Order of St. Benedict, Hoyle like the defendants, believed that MHFM was a Benedictine monastery because it operated as an independent religious community with adherence to the Rule of St. Benedict. (Hoyle T. 252-53). With full knowledge of the pertinent doctrines which define a Benedictine community, Hoyle agreed that MHFM was a Benedictine monastery. (Hoyle T. 252-53, 254-56, 281). He read, edited, and assisted defendants with the publication of books and other written materials that explained their Benedictine community. (Dimond Decl. ¶¶ 40-41, Exh. I). Hoyle himself promoted MHFM as a Benedictine monastery in verbal discussions, by sending out written materials to the public, and by electronic communications via email

and the MHFM website. (Hoyle T. 252-53, 255, 297-98). Hoyle further promoted MHFM as a Benedictine monastery through the preparation of transcripts for radio broadcasts wherein he stated "we believe we are a true Benedictine monastery." (Hoyle T. 281). Hoyle understood and agreed with all of MHFM beliefs and teachings, including that they were a Benedictine community.

D. Plaintiffs' Malicious and Wrongful Actions Towards Defendants

Plaintiff's admissions during discovery have demonstrated that he has engaged in dishonest and malicious conduct in an effort to "take down" defendants based on his disagreement with their mass attendance beliefs and conclusion they are "heretics." (Ritter Decl. Exh. G. pp. 62-63 (upon leaving MHFM, Hoyle stated "Listen, these guys are heretics, and I'm going to take these guys down. I'm taking them for all they are worth. I'm taking them down")).

Plaintiff admits that in and since 2005 his "primary intention" has been to be a "true Catholic," and that he could do so regardless of whether or not he became Benedictine. (Hoyle T. at 221). Hoyle has not investigated or sought to join any "Benedictine" monastery, including after his departure from MHFM, and his decisions whether to affiliate with an organization are based solely on their religious beliefs concerning Catholicism. (Hoyle T. 82, 87-88, 90-91, 221). Hoyle's dispute with defendants pertains solely to the religious question of what it means to be a "true" Catholic, and his animosity towards those he believes to be "heretics."

In furtherance of his desire to "take them down," Hoyle stole defendants' property in the form of computer records, billings records, and financial records. He also admits that immediately before and shortly after leaving MHFM he accessed MHFM's financial accounts in an effort to transfer all of the assets on deposit to himself. (Hoyle T. at 62-64, 155-56, 159-61). Having failed in his effort to convert MHFM's funds, plaintiff next contacted law enforcement officials falsely claiming that defendants "stole" his money in an effort to have defendants arrested. (Dimond Decl. Exhs. O & P). When law enforcement refused to pursue a criminal charge for theft, plaintiff contacted the police a second time to

report that Bro. Michael was a "dangerous" driver. (Hoyle T. at 207-08). He also contacted MHFM's followers/customers in an effort to terminate their relationships with the MHFM. (See e.g. Dimond Decl. Exhs. L & J).

When plaintiff's malicious efforts of theft and filing of meritless criminal complaints failed, he then came to this Court and made the factual argument that he had been misled concerning defendants' Benedictine status. For example, plaintiff argued that "[t]he Order of Saint Benedict is a world-recognized confederation of some twenty-one monastic congregations following the Rule of Saint Benedict and dating back to 980 A.D… [it has] an international governing body which is recognized by the Roman Catholic Church: the Benedictine Confederation of the Order of Saint Benedict." (Item 26, p. 1). Plaintiff claimed he left MHFM when he learned defendants "were not, in fact, affiliated with the Order of Saint Benedict" and that he was seeking the return of the assets "he transferred to MHFM in reliance" on defendants' misrepresentations regarding their affiliation with the Benedictine Confederation and the Roman Catholic Church a/k/a the Vatican II religion. (Item 26, p. 2).

The light of discovery has revealed this claim to have been a complete fabrication. Plaintiff was in no way misled. To the contrary, in an effort to avoid dismissal Hoyle misled this Court by arguing that he had sought to become affiliated with Vatican II Benedictines. This lawsuit and plaintiff's other actions are all part of his admitted desire and plan to do whatever he could to "take these guys down"—referring to defendants. Indeed the public spectacle of the RICO lawsuit having been filed has caused considerable damage to MHFM and its relationship with its past, current and future followers.

ARGUMENT

I. Absence of Misrepresentation and Reliance Mandates Summary Judgment be Granted Dismissing all Claims

The Court previously denied a motion to dismiss based on a finding that plaintiff had raised a valid secular claim/issue: had he been induced by misrepresentations about defendants' affiliation with

the publicly recognized Order of St. Benedict/the Benedictine Confederation so as to be able to recover donations made to MHFM in reliance thereon. (Item 41, pp. 1, 4, 6-7). The undisputed record now establishes that there was no misrepresentation by defendants and certainly no detrimental reliance by plaintiff. Plaintiff admits that he understood defendants were not affiliated with the publicly recognized Order of St. Benedict before he joined MHFM and made the donations. Plaintiff admits defendants did not make any misrepresentations regarding their religious beliefs, and plaintiff departed MHFM on December 31, 2007 and withdrew his support based solely on his newly formed disagreement with their position on mass attendance. These facts are undisputed.

As plead, plaintiff's various causes of action all allege or require a demonstration of a misrepresentation and either reliance thereon or damages proximately caused as a result thereof. Accordingly, all of plaintiff's claims must be dismissed based on the undisputed factual record.

A. Counts 1 & 2- Fraud and Negligent Misrepresentation[1]

Under New York Law, a claim for fraud has the following elements: (1) knowing misrepresentation of a material fact; (2) reasonable reliance; (3) scienter, and (4) injury. Wells Fargo Bank Northwest, N.A. v. TACA International Airlines, S.A., 247 F. Supp. 2d 352, 364 (S.D.N.Y. 2002); Lama Holding Co. v. Smith Barney Inc., 88 N.Y.2d 413, 421 (1996). Similarly, a claim for negligent misrepresentation "requires that [plaintiff] demonstrate (1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information." Mandarin Trading Ltd. v. Wildenstein, 16 N.Y.3d 173, 180 (2011).

Under these standards, both causes of action fail for several reasons. First, there was no misrepresentation. Unlike the prior motion to dismiss, plaintiff now admits that he knew defendants

[1] Count 10 of the Amended Complaint asserts a claim for vicarious liability against MHFM based on the preceding nine causes of action. This count need not be separately addressed and fails as a matter of law upon a showing that the other nine causes of action must be dismissed.

were not affiliated with the publicly recognized Order of St. Benedict. He shared their views on disavowing as false any monasteries that were so associated. Second, plaintiff admits that there were no misrepresentations by defendants regarding their religious beliefs. He admits that he has affiliated with and supported organizations based on their religious beliefs, and that he was in full agreement with the religious beliefs of defendants until the day he departed MHFM on December 31, 2007 when his own beliefs changed. Third, plaintiff admits that he provided donations to further MHFM's ability to spread its traditional Catholic beliefs which he fully agreed with. In other words, the donations were made based on the religious beliefs of MHFM which Plaintiff admits were not misrepresented. Plaintiff therefore cannot claim that his donations were made in reliance on a false understanding of defendants' Benedictine status because the donations were made to support the traditional Catholic beliefs MHFM promoted and which with Hoyle agreed 100%.

B. Counts 6 & 7- RICO 18 U.S.C. §§ 1962[c] and 1962[[d]

To state a claim for civil damages under RICO, a plaintiff has the burden to (1) demonstrate that the defendant has violated the substantive RICO statute, 18 U.S.C. § 1962; and (2) demonstrate that he was injured in his business or property by reason of the § 1962 violation, 18 U.S.C. § 1964[c]. A substantive RICO violation requires that plaintiff demonstrate "(1) that the defendant (2) through the commission of two or more predicate acts (3) constituting a 'pattern' (4) of 'racketeering activity' (5) directly or indirectly invests in, or participates in (6) an 'enterprise' (7) the activities of which affect interstate commerce." Davis Lee Pharmacy, Inc. v. Manhattan Central Capital Corp., 327 F.Supp.2d 159 (E.D.N.Y. 2004); Moss v. Morgan Stanley Inc., 719 F.2d 5, 17 (2d Cir. 1983).

Plaintiff claims defendants have committed the predicate acts of mail fraud, wire fraud, and bank fraud by promoting MHFM as a Benedictine monastery/community and soliciting donations and financial support based thereon. (Item 42 ¶¶ 86-88; Item 54 ¶ 5). As this Court summarized, plaintiff's RICO claim is premised on the allegation that defendants have made "false representations to the

general public through the MHFM website, the sale and distribution of publications and other media and the solicitation of donations while representing themselves as members of the Order of St. Benedict, and the invitation to individuals such as plaintiff to join the MHFM and donate their personal property, based on the representation that MHFM is a Benedictine community." (Item 41, p. 12; see also Item 54 ¶ 5[C]).

Summary judgment should be granted dismissing the RICO claims for several reasons. First, it is undisputed that defendants never represented or promoted themselves as being affiliated with the publicly recognized Order of St. Benedict. It is uncontroverted that on their website, in their written materials, and in all of their dealings with plaintiff they accurately stated they were not associated with the Vatican II religion and/or the publicly recognized Order of St. Benedict affiliated therewith. Accordingly, there are no misrepresentations to establish the predicate acts of mail fraud and wire fraud necessary to sustain a RICO claim.

Second, Plaintiff admits that he was aware before he entered MHFM that defendants had rejected as false the Vatican II religion and the publicly recognized Order of St. Benedict affiliated with it. Plaintiff had such knowledge before he made any donations to MHFM. Yet, the Amended Complaint asserts that plaintiff's RICO damages are based on the theory that he made donations in reliance on defendants' false representations that they were members of the Order of St. Benedict. (Item 42 ¶ 91). See Biggs v. Eaglewood Mortgage, LLC, 636 F.Supp.2d 477, 480 (D.Md 2009) ("where plaintiffs allege their own first-party reliance in a RICO case predicated on mail fraud, reliance must still be proven as an element of the claim"). Plaintiff has plead a first-party reliance RICO violation, but the record conclusively establishes he did not detrimentally rely on a misrepresentation by defendants. Accordingly, plaintiff's RICO claims must be dismissed.

Third, where a plaintiff asserts mail and or wire fraud as predicate acts to support a RICO claim, he must demonstrate reliance by someone and "that the reliance directly caused harm to the plaintiff."

G & G TIC, LLC v. Alabama Controls, Inc., 2008 WL 4457876 * 4 (M.D. Ga 2008). Here, plaintiff indisputably did not rely on or suffer injury as the result of a misrepresentation. Moreover, plaintiff has not and cannot identify how reliance by anyone else on a purported misrepresentation caused him to suffer an injury.

Fourth, plaintiff participated in disseminating via email, the internet, written publications and verbal discussions the message that MHFM is a Benedictine community. He admits that at all such times he was aware that MHFM was not affiliated with the publicly recognized Order of St. Benedict. Under the facts now admitted by Plaintiff, he was therefore a participant rather than a victim of the supposed RICO enterprise.

For all of these reasons, Plaintiffs RICO based claims must be dismissed.[2]

C. Counts 8 and 9- Deceptive Trade Practices and False Advertising

Plaintiff alleges that defendants engaged in deceptive trade practices and false advertising in violation of GBL §§ 349 and 350, respectively. The elements of GBL § 349 claim require plaintiff to establish a consumer-oriented misrepresentation or misleading practice that caused him injury. Nergin v. Norwest Mortgage, Inc., 263 A.D. 2d 39, 48 (2nd Dep't 1999). The challenged practice must be "deceptive or misleading in a material respect." Alexson v. Hudson Valley Community College, 125 F.Supp.2d 27, 30 (N.D.N.Y. 2000). Similarly, the GBL § 350 claim requires plaintiff to have been injured by a materially deceptive or misleading advertisement as well as the element of reliance. Leider v. Ralfe, 387 F.Supp.2d 283, 292 (S.D.N.Y. 2005).

[2] Plaintiff also alleges defendants have defrauded UPS by "rounding down" when weighing packages to determine the proper charge to pay on items being shipped. (Hoyle T. 282-83). The allegations of "rounding down" do not defeat summary judgment dismissing the RICO claims for several reasons. First, allegedly wrongful acts of "rounding down" are not identified in Plaintiffs' RICO case statement as a predicate act. (See Item 54). Second, the "pattern of racketeering activity" element requires that predicate acts be "related" and have the "same or similar purposes, results, participants, victims…." Davis Lee Pharmacy, 327 F.Supp.2d at 164. Here, the "rounding down" allegations would appear to have UPS as a victim rather than MHFM supporters, and the acts are dissimilar/unrelated to the predicate acts listed in the RICO case statement. Third, plaintiff has offered no competent evidence that this act is wrongful. Fourth, plaintiff admits that he participated in this activity such that he is not a victim and has not been injured. (Hoyle T. 283).

The allegations of the Amended Complaint addressing the misrepresentation element of these causes of action merely reference that MHFM was represented as a Benedictine monastery. (Item 42 ¶¶ 100, 103). Plaintiff now concedes that he understood the nature of defendants' Benedictine status, and that defendants correctly represented and made clear that they were an independent Benedictine community not affiliated with the publicly recognized Order of St. Benedict. Moreover, plaintiff admits he participated for two years in advertising and promoting this message. In the absence of any misrepresentation or damage to plaintiff therefrom, these claims must be dismissed as a matter of law.

D. Counts 3, 4 and 5- Unjust Enrichment, Accounting, Money Had and Received

These are equitable claims that have similar elements. A claim for unjust enrichment requires a plaintiff to demonstrate "that (1) defendant was enriched, (2) the enrichment was at plaintiff's expense and (3) the circumstances were such that equity and good conscience require defendant to make restitution." Piccoli A/S v. Calvin Klein Jeanswear Co., 19 F.Supp.2d 157, 166 (S.D.N.Y. 1998). Similarly, the claim for money had and received requires plaintiff to establish that "(1) defendant received money belonging to plaintiff; (2) defendant benefitted from the receipt of money; and (3) principles of equity and good conscience, defendant should not be permitted to keep the money." Aaron Ferer & Sons Ltd. v. Chase Manhattan Bank, 731 F.2d 112, 125-26 (2d. Cir. 1984). The third element for both causes of action is essentially the same: plaintiff must plead and document circumstances sufficient to warrant the court invoking its equity power. The accounting cause of action is similarly a claim for equitable relief.

All three of these equitable causes of action are premised on the same flawed allegation. To wit, plaintiff seeks relief based on the allegation that he was falsely led to believe that Bro. Michael and Bro. Peter were Benedictine monks, that MHFM was a Benedictine community, and "that they would, indeed, instruct him in the path to becoming a Benedictine monk." (Item 42 ¶¶ 70, 77, 79). Plaintiff now admits that at all times he accurately understood that MHFM was an autonomous Benedictine

community operating under the Rule of St. Benedict with no affiliation to the publicly recognized Order of St. Benedict. The allegations supporting these causes of action have therefore been established to be false based on the undisputed factual record, including plaintiff's own testimony. As such, summary judgment should be granted dismissing these allegations as a matter of law.

II. First Amendment Bars Judicial Determination of Whether MHFM is A Benedictine Community/Monastery

Defendants previously sought dismissal of plaintiff's complaint on First Amendment grounds. The Court denied that motion noting "[t]he court sees the dispute as simply one between plaintiff and defendants, and whether the defendants falsely represented themselves as being affiliated with the Order of Saint Benedict." (Item 41, p. 7). As discussed supra, that issue is now put to rest by plaintiff's admission that there was no such false representation. Defendants contend they are an autonomous Benedictine monastery with traditional Catholic beliefs. Any attempt by plaintiff to challenge defendants' beliefs and litigate whether they are Benedictine is prohibited by the First Amendment.

The First Amendment does not protect religious organizations from "ordinary civil and criminal liability," United States v. Sun Myung Moon, 718 F.2d 1210 (2d Cir. 1983), but "the Supreme Court has held that it is contrary to the First Amendment for a court, either federal or state, to engage in an examination of ecclesiastical doctrine …" Grunwald v. Bornfreund, 696 F.Supp. 838, 840 (E.D.N.Y. 1988). Civil courts have no jurisdiction "in a matter which concerns theological controversy …Indeed, it is the essence of religious faith that ecclesiastical decisions are reached and to be accepted as matters of faith whether or not rationale or measurable by objective criteria." Serbian Orthodox Diocese v. Millivojevich, 426 U.S. 696, 714-15 (1976).

The record contains a detailed explanation of the basis for defendants' assertion that MHFM is a Benedictine community and that Bros. Michael and Peter are Benedictine monks. They have disavowed affiliation with the publicly recognized Order of St. Benedict and the Vatican II religion, and provided

an explanation of why they believe themselves to be traditional Catholics and an autonomous Benedictine community. For over two years, Hoyle agreed and promoted himself and defendants as true Catholics and Benedictines fully aware that he had no affiliation whatsoever with the publicly recognized Order of St. Benedict.

Defendants' Benedictine status is a matter of faith, belief, and religious doctrine. It is a matter of public records that MHFM is long standing religious organization incorporated as a Not-For-Profit corporation under New York law and that it is a 501(C)(3) charitable organization. It is headed by a Superior, Bro. Michael, and seeks to follow traditional Catholic doctrine and the Rule of St. Benedict. For plaintiff to proceed, the Court must review and determine whether defendants' beliefs and faith are "true." Such an inquiry would necessitate that the Court review religious doctrine and judge defendants' faith and belief. The First Amendment prohibits any such inquiry. This would be no different than the Court passing judgment on the mass attendance issue and deciding whether Hoyle or defendants are "true" Catholics. The First Amendment protects defendants' right to interpret religious doctrine and practice their religion as they see fit.

Accordingly, the Amended Complaint should in all respects be dismissed.

III. Doctrine of *In Pari Delicto* Bars Plaintiff's Claims

According to plaintiff's Amended Complaint, defendants were engaged in an ongoing scheme of fraud and racketeering by seeking to raise money based on misrepresentations that they were affiliated with the publicly recognized Order of St. Benedict. Plaintiff has also claimed defendants engaged in fraud by "rounding down" when they determined the proper UPS charge applicable to packages they were shipping. (Hoyle T. 282-83).

Plaintiff readily admits that he participated in both of these practices while residing at MHFM. Specifically, he admits that he repeatedly promoted MHFM as a Benedictine community to the public

through emails, publications, and verbal discussions. Similarly, he admits that he engaged in the practice of "rounding down" when determining the proper UPS charge for a shipment. Moreover, plaintiff admits that he was a wrongdoer in his dealings with MHFM when, upon concluding defendants were heretics, he stole records, computer files, and attempted to transfer all of the monastery's assets to his personal name. Based on plaintiff's allegations in the Amended Complaint and his subsequent admissions, he presents a picture of fraud and deception in which he knowingly participated.

"The doctrine of *in pari delicto* mandates that the courts will not intercede to resolve a dispute between two wrongdoers." Kirschner v. KPMG, LLP, 15 N.Y.3d 446, 464 (2010). The doctrine prevents a party from advancing a claim based "… on his own inequity, or to acquire any rights by his own crime." In re Parmalat Securities Litigation, 383 F.Supp.2d 587, 596 & n. 49 (S.D.N.Y. 2005), (applying North Carolina law on *in pari delicto*). The law "will not extend its aid to either of the parties or listen to their complaints against each other, but will leave them where their own acts have placed them." Stone v. Freeman, 298 N.Y. 268, 271 (1948). The Courts will not "undo the consequences" of a such a transaction, Miltenberg and Samton, Inc. v. Mallor, 1 A.D.2d 458 (1st Dep't 1956)(emphasis added), and will leave the parties to such a transaction "where their own acts have placed them." United Calendar Manufacturing Corp. v. Huang, 94 A.D.2d 176 (2d Dep't 1983). Under these principles, a "defendant is in the stronger position" because the law will leave the parties where it finds them. O'Mara v. Dentinger, 271 A.D. 22, 62 (4th Dep't 1946). The doctrine is applied rigidly and has not been "weakened by exceptions."

Here, plaintiff claims that it was fraud, a violation of RICO, false advertising, and a deceptive trade practice for defendants to make representations that MHFM was a Benedictine monastery, that Bros. Michael and Peter were Benedictine monks, and that they are members of the publicly recognized Order of St. Benedict. However, Hoyle now admits he at all times knew defendants were an autonomous religious community that sought to follow the Rule of St. Benedict, and that they were not

affiliated with the publicly recognized Order of St. Benedict. Hoyle also admits that for over two years he participated in promoting MHFM as a Benedictine monastery/community, and that he himself engaged in the supposedly fraudulent practice of "rounding down" UPS shipping charges.

The tension between plaintiff's allegations and the facts that have been indisputably established triggers the *in pari delicto* doctrine. Defendants dispute that they engaged in fraud or any other wrongful acts. Nevertheless, plaintiff's participation in the promotion of defendants as Benedictine when considered against the allegations of the Amended Complaint that such representations were false leads to the inescapable conclusion that plaintiff now seeks to prove a cause of action premised on an alleged fraudulent scheme in which he participated. Moreover, plaintiff was a knowing participant in the alleged wrongful practice of "rounding down." Under these circumstances, all of plaintiff's claims are barred by the doctrine of *in pari delicto*.

IV. Plaintiff Defamed Defendants as a Matter of Law

Under New York law, the elements of defamation are: (1) a false statement; (2) published without privilege or authorization to a third party; (3) constituting fault as judged by, at a minimum, a negligence standard; and (4) that such publishing caused either special harm or constituted defamation *per se*. Dillon v. City of New York, 261 A.D.2d 34 (1st Dep't 1999). If the words are unambiguous and admit of but one sense, the question of whether they are defamatory is one for the court. Curry v. Roman, 217 A.D.2d 314 (4th Dep't 1995); see, Julian v. American Business Consultants, Inc., 2 N.Y.2d 1 (1956).

Plaintiff accused defendants of stealing money from himself and another former religious of the monastery. Plaintiff has made these false accusations in communications to MHFM clients whom he reached by using the confidential and proprietary information he stole from MHFM upon his departure. For example, he falsely told Stephen Hand that Defendants had stolen money from plaintiff and another person. (Dimond Decl. Exh. N). He even went so far as to make this baseless claim to the New York

State Police shortly after leaving MHFM, telling Trooper Larry LaRose that Brothers Michael and Peter "stole" $1.2 million dollars. (Dimond Decl. Exhs. O & P).

Plaintiff even admits making defamatory statements about defendants. For example, in his Reply (Item 44 at ¶ 61), plaintiff admitted the allegations of defendants' Counterclaims paragraph 174 (Item 43), which alleged: "… plaintiff made such statements, to the effect that defendants allegedly **stole his money**, to others who knew of MHFM and the individual defendants." (emphasis added). Plaintiff further admits that: beginning in or around December 31, 2007, he published and/or caused to be published certain statements about all the defendants, including that the individual defendants stole money from him; when he made these statements of alleged fact, he knew or reasonably should have known that these individuals were vendors, customers, benefactors and/or donors to MHFM; at other times on and after January 1, 2008, he stated to individuals who were acquainted with defendants that the defendants, particularly Brother Michael and Brother Peter, stole money from him. (Item 43 at ¶¶ 154-157, 166, 168, 185; Item 44). These false accusations of a serious criminal offense demonstrate plaintiff's malice in making such statements.

New York courts have held similar statements defamatory. See, Stuart v. Porcello, 193 A.D.2d 311 (3d Dep't 1993) (defamatory to say falsely that an individual lied, stole, defrauded, and misrepresented the organization of which he was president). Divet v. Reinisch, 169 A.D.2d 416 (1st Dep't 1991)(defamatory to state someone is a liar). Similarly, false allegations that an individual had been terminated for "stealing" and "embezzling" have been held sufficient to state a cognizable cause of action for slander. Schenkman v. New York College of Health Prof., 29 A.D.3d 671 (2d Dep't 2006).

Plaintiff had no authority to make these defamatory statements and there is no applicable privilege that protects such statements. See, Scott v. Cooper, 215 A.D.2d 368, 369 (2d Dep't. 1995); see generally, Immuno AG. v. Moor-Jankowski, 77 N.Y.2d 235, 243 (1991). Plaintiff's statements constitute defamation *per se* because the nature of the statements reflects upon defendants' business and profession

as religious. A statement that disparages a person in his or her profession is defamatory. Scott, 215 A.D.2d 368. Because the statements charge defendants with a serious crime and they tend to be injurious to defendants' trade, business or profession, damages are presumed and need not be alleged or proven. Liberman v. Gelstein, 80 N.Y.2d 429 (1992).

Accordingly, the Court should grant summary judgment against plaintiff and against defendants on the claim for defamation.

V. Plaintiff Converted Confidential and Proprietary Information, Misappropriated Trade Secrets and Breached his Fiduciary Duty

A. Conversion of Confidential and Proprietary Information

Under New York law, conversion is the "unauthorized assumption and exercise of the right of ownership over goods belonging to another to the exclusion of the owner's rights." Cardiocall, Inc. v. Serling, 492 F.Supp.2d 139, 153 (E.D.N.Y. 2007). The two key elements of conversion are (1) a party's possessory right/interest in the property, and (2) another's dominion over the property or interference with it. Colavito v. N.Y. Organ Donor Network, 8 N.Y.3d 43 (2006).

In the case at bar, plaintiff departed MHFM and took with him MHFM's confidential and proprietary business information, including: MHFM's Scottrade brokerage account application and records; historical M&T Securities investment account records and other financial records; MHFM's flash drive containing various computer files and databases; the Apple laptop computer plaintiff donated to MHFM when he joined MHFM in September of 2005, which contained databases housing the personal contact information for some of MHFM's more than 90,000 supporters, donors, benefactors, and clients, including credit card information for some; computer passwords; technology purchase information; phone system information; customer ordering data; customer information, and other data

and intellectual property contained on a laptop computer, flash drive, and in hard copy.[3] (Dimond Decl. ¶ 56; Hoyle T. 51).

Plaintiff even admits that: on or about December 31, 2007, he took certain property that rightfully belonged to MHFM; by doing so he interfered with defendants' rights to it; by doing so he exercised dominion and control over it; that the data in the MHFM databases and computers was not shared publicly; that MHFM guarded this information with electronic firewalls to ensure it was secure; that defendants had taken reasonable steps to protect and secure its electronic communications systems so that it was not readily-accessible to the public at large. (Item 43 at ¶¶ 217, 218, 236, 247, see also Item 44).

Despite defendants' efforts to secure a voluntary return of the confidential and proprietary information, it took court intervention by Order of July 21, 2008 (Item 23) granting defendants injunctive relief ordering plaintiff to return all MHFM's confidential and proprietary records. However, by that time, plaintiff had already had the information for over six months and contacted hundreds of MHFM supporters, donors, benefactors, and clients and caused damage to MHFM.

B. Misappropriation of MHFM's Trade Secrets

A cause of action for the misappropriation of a trade secret requires a party to demonstrate that (1) it possessed a trade secret and (2) the alleged tortfeasor used that trade secret in breach of an agreement, confidential relationship or duty, or as a result of discovery by improper means. Cardiocall, Inc., 492 F.Supp.2d at 148. In examining the first prong of this test, courts have held that "[a] trade secret is any formula, pattern, device or compilation of information which is used in one's business, and which gives the owner an opportunity to obtain an advantage over competitors who do not know or use it." Cardiocall, Inc., 492 F.Supp.2d at 148; Softel, Inc. v. Dragon Med. & Scientific Communications,

[3] It is of no consequence that some of the records plaintiff took were electronic. Intangible property in the form of electronic records that are stored on a computer and indistinguishable from printed documents can be the subject matter of a conversion action. Thyroff v. Nationwide Mut. Ins. Co., 8 N.Y.3d 283 (2007) (electronic records stored on a computer can be the subject matter of a conversion action).

Inc., 118 F3d 955, 968 (2d Cir. 1997). When considering whether the information at issue constitutes a trade secret for purposes of a cause of action for misappropriation, there are several factors to consider including (1) the extent to which the information is known outside the business; (2) the value of the information to the business; (3) the amount of effort or money expended by the business in developing the information; and (4) the ease or difficulty with which the information could be properly acquired or duplicated by others. Cardiocall, Inc., 492 F.Supp.2d at 148; North Atlantic Instruments, Inc. v. Haber, 188 F.3d 38, 44 (2d Cir. 1999). It also has been held that customer lists may constitute trade secrets if developed through substantial effort and kept in confidence. See North Atlantic, 188 F.3d at 44.

In this case, the proprietary information that plaintiff took when he left MHFM included the private contact information (i.e., home addresses, telephone numbers, e-mail addresses) for some of MHFM's more than 90,000 supporters, donors, and benefactors as well as some customer credit card information. Such information was compiled only as a result of MHFM's countless hours of work on behalf of MHFM, as well as significant expenditures (approximately $1,000,000) on advertising and promotional costs. The purpose in developing this information was to further MHFM's mission of spreading its religious message of traditional Catholic faith. Given the invaluable nature of the proprietary information taken by plaintiff, the fact that much of that information (if not all of it) is not publicly available and could not be easily located or reproduced, and that it represents the result of all of MHFM's advertising expenditures over a period of years, the information qualifies as a trade secret and plaintiff breached his fiduciary duties to MHFM when he stole it.

C. Plaintiff's Breach of Fiduciary Duty

A fiduciary duty exists between an agent and a principal signifying a relationship of trust and confidence whereby the agent is bound to exercise the utmost good faith and undivided loyalty toward the principal throughout the relationship. See Sokoloff v. Harriman Estates Development, 96 N.Y.2d 409 (2001). While the existence of a fiduciary duty commonly is seen in the context of an employer-

employee relationship, that kind of a relationship is not a condition precedent to finding that a fiduciary duty existed and was breached since a fiduciary duty may well exist where one party reposes confidence in another and reasonably relies on the other's expertise or knowledge. See Sergeants Benevolent Ass'n Annuity Fund v. Renck, 19 A.D.3d 107 (1st Dep't 2005) (a special relationship between the parties will give rise to a fiduciary relationship that will be legally recognized).

In this case, defendants must show only that they placed trust or confidence in plaintiff's integrity or fidelity. See Northeast Gen'l Cmp. v. Wellington Advertising, Inc., 82 N.Y.2d 158, 172-173 (1993); Chasanoff v. Perlberg, 19 A.D.3d 635, 636 (2d Dep't 2005). "The rule embraces both technical fiduciary relations and those informal relations which exist whenever one man trusts in and relies upon another." Northeast Gen'l Cmp., 82 N.Y.2d at 172. Here, because of the trust that plaintiff encouraged defendants to place in him, it is clear that a fiduciary relationship existed and that plaintiff owed a fiduciary duty to MHFM.

Plaintiff made it clear after a short time at MHFM that he had expertise in computer and information technology as well as banking and investments. (Dimond Decl. ¶ 48). For more than two years, plaintiff fervently supported MHFM's mission, and lived and worked there although arguably not an "employee" in the traditional sense of the word. During that time plaintiff was given increasing responsibility to handle various computer and technology-related tasks vital to the continued survival of MHFM. (Id.) Plaintiff not only handled MHFM's online store and telephone, Internet, and mail-generated orders, but as part of that responsibility he managed the confidential and proprietary information that was maintained by MHFM on its customers, clients, supporters and benefactors. (Id. ¶ 49) Plaintiff also was given access to MHFM's Scottrade brokerage account in the early winter of 2007, which contained the majority of MHFM's assets. (Id.). These responsibilities were to be performed solely in keeping with the best interests of MHFM. In the course of plaintiff's abrupt departure from MHFM, without any notice whatsoever, plaintiff took with him most of MHFM's financial and

proprietary business information. (Id.¶ 56). By pilfering much of the information to which he was given access and subsequently using that information against MHFM, plaintiff breached his fiduciary duties to MHFM and Brother Michael Dimond.

Accordingly, the Court should grant summary judgment against plaintiff on the causes of action for conversion, misappropriation of trade secrets and/or breach of fiduciary duty.

VI. Plaintiff's Violation of Lanham Act and Electronic Communications Privacy Act

A. Plaintiff's Unfair Competition Violates the Lanham Act

Liability may be established under the Lanham Act for false representations concerning qualities of goods or services. Toy Manufacturers of America, Inc. v. Helmsley-Spear, Inc., 960 F.Supp. 673 (S.D.N.Y. 1997). A claim of unfair competition under the Lanham Act includes a broad range of unfair practices which include the misappropriation of the skill, expenditures and labor of another. Maharishi Hardy Blechman Ltd. v. Abercrombie & Fitch Co., 292 F.Supp.2d 535, 551 (S.D.N.Y. 2003); American Footwear Corp. v. General Footwear Co. Ltd., 609 F.2d 655, 662 (2d Cir. 1979).

In the present case, plaintiff's representations were used in commerce in that, among other things, he used customer contact information to make them, he directed individuals to his competing website, he utilized a website-based PayPal link to make solicitations, and he unfairly competed with MHFM by making use of MHFM's confidential and proprietary business records. (Dimond Decl ¶ 59). Plaintiff's representations were made in the context of commercial advertising and/or promotion of his website and his newly-found religious beliefs. (Dimond Decl. Exhs. J & K).

As a not-for-profit corporation, MHFM relies entirely on the goodwill of its supporters in order to sustain itself and continue its practice of religion. In this regard, the client base of more than 90,000 individuals that MHFM has developed after years of teaching traditional Catholicism and expending incredible amounts of financial resources is the very heart of MHFM and is what permits MHFM to

exist, function, and continue its teachings. Indeed, without the support of outsiders, MHFM would cease to exist as would its practice of religion. (Id. ¶ 43).

Since absconding from MHFM in December of 2007, plaintiff has commenced a campaign aimed at MHFM which is geared solely toward its destruction. Plaintiff has used the confidential proprietary information he stole from MHFM to contact its supporters and benefactors. As a direct result of that unfair competition, many former supporters no longer donate to MHFM and many others have turned away from MHFM altogether. As MHFM relies solely on the donations of its supporters to continue its practice and teaching of its religious beliefs, plaintiff's campaign against MHFM has caused damage to MHFM. The Court should grant summary judgment as to plaintiff's liability for violation of the Lanham Act.

B. Plaintiff's Unlawful Use of MHFM's E-Mail Constitutes Violation of the Electronic Communications Privacy Act ("ECPA")

ECPA Title I (18 U.S.C. §§ 2510-2522) governs unauthorized interception of electronic communications. Anyone who intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept any electronic communication violates the ECPA. 18 U.S.C. § 2511(1)(a). The statute defines "intercept" is defined as the acquisition of the contents of any electronic communication through the use of any electronic, mechanical, or other device. 18 U.S.C. § 2510(4).

Plaintiff, in his Reply, admits that: (1) that on some occasions after departing MHFM he sent e-mails that purported to originate from the e-mail address "store@mostholyfamilymonastery.com"; and (2) that defendants had taken reasonable steps to protect and secure its electronic communications systems such that it was not readily accessible to the public at large. (Item 44 at ¶¶ 247, 244, see also Item 43 at ¶¶ 105, 103).

In Pure Power Boot Camp, Inc. v. Warrior Fitness Boot Camp, LLC, 759 F.Supp.2d 417 (S.D.N.Y. 2010), a fitness center operator brought action against competing fitness center for tort claims

and trademark and copyright infringement and competing fitness center brought counterclaim, under the ECPA alleging that the fitness center operator had unauthorized access to its e-mail accounts. The court denied summary judgment on the ECPA counterclaim reasoning that the competitor's ***viewing*** of the electronic communications already in storage did not constitute an "interception." Here, plaintiff's actions rose well above a mere viewing. After his abrupt departure on December 31, 2007, he intentionally intercepted – by actually generating and initially transmitting purportedly on behalf of MHFM – emails to MHFM supporters and benefactors. He communicated that MHFM's positions are heretical, and these messages were sent so that they purported to originate from the email address "store@mostholyfamilymonastery.com." (Item 44 at ¶ 247, 244, Item 43 ¶ 105, 103; Item 7-13 ¶ 4-6).

Any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of ECPA may recover from the violator appropriate relief, including reasonable attorneys' fees and litigation costs. 18 U.S.C. § 2520. Successful parties are entitled to recover actual damages in an amount not less than $1,000, punitive damages if the violation is willful or intentional, and costs and reasonable attorneys' fees as determined by the court. 18 U.S.C. § 2520(a). Defendants respectfully request that they be awarded summary judgment on their ECPA claims.

CONCLUSION

Based on the foregoing, it is respectfully requested, that the Court grant defendants' motion for summary judgment (a) dismissing plaintiff's Amended Complaint in its entirety; (b) entering judgment in favor defendants and against plaintiff on the specified counterclaims as to liability; and (c) awarding such other and further relief as the Court deems just and proper.

Dated: January 6, 2012

DUKE, HOLZMAN, PHOTIADIS & GRESENS LLP

s/ Charles C. Ritter, Jr.
Charles C. Ritter, Jr.
Elizabeth A. Kraengel
Attorneys for Defendants