

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ERIC E. HOYLE,

Plaintiff,

DECLARATION

v.

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

Civil Action No. 08-CV-347C

Defendants.

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 the Defendants in this action.¹

2. I submit this declaration in opposition to Plaintiff's motion for an Order (i) partially vacating the preliminary injunction presently in force by deleting the fifth decretal paragraph enjoining Plaintiff from communicating with certain persons; and (ii) compelling Defendants to produce certain documents pursuant to Plaintiff's First Request for Documents, dated July 10, 2009 and oral request during the examination before trial of Defendant Frederick Dimond (whose religious name is Brother Michael).

A. The Injunction Should Continue

3. On July 23, 2008, this Court entered an order (the "Order") directing, inter alia, the following injunctive relief:

Plaintiff shall immediately cease and desist from engaging in any communication

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 Rupp, Baase, Pfalzgraf, Cunningham & Coppola LLC.

with anyone whose identity and/or contact information plaintiff knows as a result of the confidential and proprietary records of the MHFM or as a result of living or working at MHFM. If plaintiff seeks to engage in any communication with such persons for purposes of case preparation or otherwise, he must make application to the court for permission.

4. Annexed hereto as **Exhibit A** is a copy of the Order.

5. Plaintiff's application to partially vacate the preliminary injunction is silent as to the purposes it is sought, whether for case preparation or otherwise. (See, Declaration of K. Wade Eaton, dated July 7, 2011, hereinafter "Eaton Dec.").

6. Defendants recognize that the District courts have continuing power to vacate or modify injunctions where there is a **showing of a change in the operative facts so that the injunction is no longer justified**. System Fed'n. No. 91, Ry. Employees' Dep't, AFL-CIO v. Wright, 364 U.S. 642, 81 S.Ct. 368, 5 L.Ed.2d 349 (1961); United States v. Swift & Co., 286 U.S. 106, 52 S.Ct. 460, 76 L.Ed. 999 (1932); S.C. Johnson & Son v. Johnson, 175 F.2d 176 (2d Cir.), cert. denied, 338 U.S. 860, 70 S.Ct. 103, 94 L.Ed. 527 (1949); Grand Union Equip. Co. v. Lippner, 167 F.2d 958, 960 (2d Cir.1948).

7. In light of such standard Plaintiff's request must be denied as he fails to demonstrate any change in the operative facts that would sustain modification of the injunction sought to be vacated.

8. Since Plaintiff's departure from MHFM, he has embarked on a campaign to reach out to MHFM's supporters in an effort to convince individuals that the monastery and the monks in attendance are or have engaged in criminal activities. His intention and purpose has been and continues to be to damage, injure and destroy defendants. Among other things, plaintiff engaged in an e-mail campaign and started a web page both of which targeted MHFM's followers and customers.

9. Plaintiff has been successful to a large extent as MHFM has received indications from many former supporters that they no longer wish to communicate with or support MHFM (e.g., John Pontrello, Francis Pagnanelli, Najla Zager and Michael Creighton; see, Frederick Dimond Affidavit at Docket # 7-3).

10. The true extent of the damage that has been and will continue to be caused by Plaintiff remains unknown, and Defendants fear that Plaintiff's efforts aimed at the destruction of MHFM and undermining of its teachings will ruin the monastery.

11. Because MHFM relies on support from outsiders, if that support is destroyed, MHFM will be unable to continue its operations.

12. The injunction was, and is, necessary in light of Plaintiff's misappropriation and use of defendant Most Holy Family's ("MHFM") customers and supporters following his departure from MHFM. Plaintiff's conduct and stated intentions before AND after the injunction was granted demonstrate that it should not be vacated.

13. Plaintiff's pre-injunction conduct demonstrated a significant need to enjoin his activities interfering with MHFM's existing customers and supporters, and Plaintiff alleges no new circumstances in his instant application to suggest that his conduct, if not enjoined, would be any different or less egregious today.

14. In MHFM's application for the preliminary injunction, the following salient facts were cited by Brother Michael to demonstrate the need for the preliminary injunction (see, Affidavit of Frederick Dimond, Docket # 7-2) and warrant that the preliminary injunctive relief continue:

- a) MHFM – a monastery and not-for-profit corporation --has for many years maintained an Internet website (www.mosthollyfamilymonastery.com) devoted to

its beliefs and teachings, and also communicates and teaches through Internet and radio broadcasts, e-mail, telephone, regular mail, and maintains a toll-free telephone number where interested persons can call with questions about the monastery, its beliefs, and teachings.

b) MHFM relies almost solely on donations made by supporters in order to sustain itself. While it sells items such as books, monographs, and DVDs, most of these items are sold at either break-even or at a loss as a necessary consequence of trying to broadly disseminate its religious message. MHFM relies on the goodwill it has generated among its supporters, and it depends on reaching new supporters in order to obtain the financial means required to continue its work.

MHFM's Confidential and Proprietary Information

c) After many years of teaching and reaching out to others, MHFM has developed a mailing list of more than 90,000 individuals housed in an electronic database, which contains lists comprised of benefactors, donors, supporters, customers, and other persons who have shown an interest in the work of MHFM by either visiting the website, contacting MHFM by mail or telephone or placing orders at the MHFM online store.

d) The MHFM online store (that Plaintiff helped to build) was created in early 2006, and in order to communicate with individuals who placed orders from

the online store, the plaintiff created an e-mail account (store@mostholymonastery.com) linked to the store.

e) In the course of setting up and operating the MHFM online store, Plaintiff used an Apple laptop (that he had brought with him and donated to MHFM in 2005) to download Internet orders that were placed by MHFM supporters and benefactors. He also would take telephone orders from individuals who called in to MHFM. When an order came in Plaintiff input the personal contact information and credit card data from MHFM supporters in this laptop computer. All these orders included personal contact information given to MHFM by its supporters and benefactors for the sole purpose of ordering materials or making a donation—names, street and municipal addresses, zip codes, telephone numbers, and e-mail addresses. MHFM told its customers that their private information would be kept private by the monastery. In giving Plaintiff the responsibility of operating the online store, the sales site at EBay, and helping with U.S. mail-generated orders and donations, MHFM trusted him to keep customer information confidential and secure.

f) Given the size of MHFM's mailing lists and Plaintiff's detailed work with supporter and benefactor contacts, purchases, and donations, he likely had access to thousands of MHFM supporters during his years at MHFM. When Plaintiff left MHFM, he took with him, among other things, the Apple laptop computer and a flash drive. The Apple laptop computer Plaintiff took when he left MHFM

contained confidential and propriety business records and intellectual property belonging to MHFM. Among other things, the computer contained some of the mailing list information and order information for customers of MHFM. The information about these supporters is not publicly available. MHFM does not post it on its website.

g) Although MHFM has their telephone numbers and email addresses, many people on MHFM's customer list do not have telephone numbers or email addresses that are listed in public directories. At all times, defendants fully intended to keep all credit card information secure.

Plaintiff's Prior Contact of MHFM Supporters

h) Defendants learned from numerous supporters that Plaintiff had, after his departure from MHFM, contacted them by telephone, mail, and e-mail and that he was sending e-mails to MHFM supporters with the e-mail address store@mostholymonastery.com.

i) The e-mails sent by Plaintiff not only appeared to come from the email account for MHFM's online store, but they contained a good portion of MHFM's proprietary business information generated in the months before plaintiff departed the monastery.

j) Defendants became aware that when Plaintiff contacted supporters and benefactors of MHFM, he told them that Brother Peter and Brother Michael had stolen his money. This statement is false.

k) MHFM does not know the number of supporters and benefactors whom MHFM has now lost due to Plaintiff's campaign of untruths.

l) Plaintiff pursued a campaign of falsehoods and untruths against MHFM, Brother Peter Dimond and Brother Michael Dimond with the private contact information for MHFM's supporters and benefactors that he stole from the monastery, which was information that he obtained *only* through his work with and for MHFM.

m) In the weeks that followed Plaintiff's departure, MHFM began to learn that Plaintiff was contacting *many* of MHFM's supporters and benefactors and was using their personal contact information which he had taken from MHFM in order to do so. The supporters and benefactors who have alerted MHFM to Plaintiff's behavior have indicated that Plaintiff has also accused Brother Peter and Brother Michael of (1) kicking him out of the monastery and (2) leaving him out on the street with nothing. MHFM has received numerous indications that Plaintiff has accused Brother Peter and Brother Michael of stealing money from

him and another former postulant of MHFM - accusations that are completely baseless and untrue.

15. The same concerns that existed in July 2008 that warranted granting the preliminary injunction continue to exist today. Even more disturbing is that Plaintiff has not articulated a single reason as to why he should now be permitted to contact MHFM supporters, misuse confidential information of defendants to do so, or any legitimate purpose for such communications.

16. It is apparent that Plaintiffs seeks to renew his attempts to lambaste and defame Defendants with the ultimate goal of destroying MHFM.

17. For example, defendants have learned through discovery that on November 4, 2008, Plaintiff wrote in an email to Bridget Burrows "The lawsuit with MHFM is proceeding slowly" and "The slowness of the process is pretty lousy in my view. **I am talking with my lawyer about putting some key evidence into a public filing so that it can become known and hopefully lead to a particular fact becoming well known among the 'traditionalist' community.**" A copy of the email is annexed hereto as **Exhibit B**.

18. The November 4, 2008, e-mail evidences a purposeful intent by Plaintiff to attempt to circumvent the confidentiality of the proceedings and the preliminary injunction that was directed by this Court in July 2008 by placing his attacks in "public filings" in the lawsuit. Plaintiff recently took a step towards carrying out this objective when his attorney publicly filed the examination before trial transcript of Defendant Brother Michael Dimond despite the fact that it had been designated as "confidential."

19. Another example of Plaintiff's conviction to destroy MHFM was made apparent in the examination before trial of Joseph Myers, who left MHFM together with Plaintiff on December 31, 2007:

Q. What did he [Eric Hoyle] tell you then?

A. Well, you have to understand, he [Eric Hoyle] -- the story is so complex. When we got to the hotel, his determination was that these guys are heretics and I'm going to take these guys down. So that was his determination.

Q. Did he say that to you, sir?

A. Say again?

Q. Did he say that to you?

A. Absolutely.

Q. He said he was going to take these guys down?

A. Yes. As soon as he was convinced that these guys were heretics, when we got to the hotel, that's when he was like, "Listen, these guys are heretics, and I'm going to take these guys down. I'm taking them for all they're worth. I'm taking them down."

Q. Did you have an understanding to whom he was referring?

A. Yes, I did.

Q. What was that?

A. That was Brother Michael and Brother Peter and the whole monastery, basically.

Q. Most Holy Family Monastery?

A. Most Holy Family Monastery, yes, ma'am.

(Joseph Myers EBT Transcript, 62: 10 – 63: 9). A copy of Joseph Myers' EBT Transcript is annexed hereto as **Exhibit C**.

20. Further, Plaintiff admits taking MHFM's supporter contact information:

Q. All right. What did you take, Eric? What did you take as far as the names and addresses and telephone numbers and e-mail addresses? you take?

A. When I left, I took my Apple Macintosh computer, and on it were stored in the e-mail address book many addresses of people with whom I had corresponded while at MHFM, and those departed with me. In addition, I had contact information of customers of MHFM in my e-mail archives, particularly the PayPal receipt, e-mails, of which there were in the hundreds I believe. And aside from that, I don't recall whether I took, or I should say departed with, anything else.

Q. And you literally contacted all of those people with your information or argument about mass attendance, correct?

A. No.

Q. No? How many did you contact?

A. I contacted the ones whose e-mail addresses were in my mail address -- e-mail address book.

(Hoyle EBT Transcript 53:20 – 54:19). Annexed hereto as **Exhibit D** is a copy of Plaintiff's EBT transcript.

21. Plaintiff admits that he took MHFM's bank records, that he attempted to withdraw funds from MHFM's financial account and that he attempted to transfer MHFM funds to himself

Q. You don't like the verb gathering. I'm just saying that when you left, you took with you the monastery's financial records, is that right?

A. That's too general. I took some of -- a few brokerage account records that happened to be in my possession.

Q. It was just a coincidence?

A. What do you mean by coincidence?

Q. You didn't -- they just happened to be in your records, so you just took them because it was more convenient, rather than take them out, to take them with you, or did you intentionally take them with you?

A. As best I recall, I didn't think about it.

Q. Mr. Hoyle, you have to give me honest answers here. You already testified that you went online that morning and tried to process a transaction to transfer money out of the monastery's account to yourself, correct?

A. Yes.

Q. That was a conscious, intentional decision by you to access their financial account and try to transfer the money to yourself, right?

A. Yes.

Q. And you were unsuccessful, correct?

A. I chose not to pursue it.

Q. You were unsuccessful, correct?

A. That's correct, I didn't transfer any money.

Q. You tried to, though?

A. Yes, I began to see how it was done with the intention to do it.

Q. And when you were unable to do it, you knew that later in the day you were going to call and try to straighten it out on the phone, right?

A. No, I don't recall that that was my intention at the time.

Q. That is what you did, in fact, do, though, you called Scottrade once you got to the hotel, right?

A. I believe that's correct, yes.

Q. And the reason for the call was that you were trying to get them to process a transaction out of the monastery's account to your own, correct?

A. Yes.

(Hoyle Depo. Trscript. 159:7 – 161:22).

22. Plaintiff also admitted at his examination before trial contacting various individuals he came to know while at MHFM, and recording those conversations:

Q. I have a question for you regarding telephone calls. There were a large volume of recorded telephone calls that you produced in this lawsuit. Are you familiar with that?

A. Yes. Yes.

Q. And those were telephone calls that you made to various individuals you had had contact with, I believe when you were at the Most Holy Family Monastery, or many of them?

A. Many of them, yes, I believe.

(Hoyle Depo. Trscript. 287:19 – 288:5).

23. In the audio file Bates numbered HOYLE 1298, Plaintiff expressed to Rosemary Andreotti that “I’m just trying to get the story so I can show that he [Brother Michael] was deceiving me so this may lay some of that to rest and may put him out of commission.” (emphasis added).

24. In HOYLE 1300, an audio recording with Bridget Burrows, Plaintiff stated in response to Ms. Burrow’s questions about the status of the lawsuit, that “It’s a way for me to stop up the apostolate to try to get the money back; I would prefer for it to come out publicly in court; they are so overbearing, I think they would look very bad if they had to start giving public testimony, just the way they live there -- better than coming from me and I could just take the transcript and circulate it.” (Emphasis added).

25. Plaintiff argues in support of his application to vacate this portion of the injunction that because Defendants have publicly defended Plaintiff’s lawsuit by publishing commentary on MHFM’s website, www.mostholymonastery.com, he should be permitted

to now communicate with any persons whose contact information Plaintiff knows as a result of the confidential and proprietary records of the MHFM or as a result of living or working at MHFM.

26. The purpose of the preliminary injunction is not to protect “the defendants against knowledge of Plaintiff’s allegations being spread among MHFM clients and supporters” as Plaintiff claims. (Eaton Dec. ¶ 5).

27. Rather, the injunction is necessary because it arises directly from Plaintiff’s improper use of MHFM proprietary and confidential information. Whether and how Defendants have publicly addressed Plaintiff’s lawsuit is wholly unrelated to the core concern of the injunction: Plaintiff’s misuse of Defendants’ confidential and proprietary information.

28. Defendants are free to communicate with their own supporters and customers, and to post information on the MHFM website in defense of Plaintiff’s allegations which were wrongfully disseminated and which are already part of the public domain.

29. Based on the above, the injunction should therefore continue. Plaintiff has not and cannot satisfy the standard for the injunction to be vacated. And, the circumstances and reasons which warranted granting the injunction are the same if not stronger today.

B. Plaintiff’s Motion to Compel Should be Denied

i) July 2009 Discovery Demand

30. Plaintiff seeks *all documents pertaining, relating or referring to the revenue and expenses of Most Holy Family Monastery during the relevant period, including but not limited to all bank records, stock records, records of investments in real property and payments, loans or advances to third parties including individuals, corporations, trusts and partnerships.* (See Eaton

Dec. ¶ 9 and Exh. C thereto). However, this request is a paraphrase of the actual request (which was initially improper and objected to by Defendants as set forth below), which demands:

All documents pertaining, relating or referring to the founding and operations of Most Holy Family Monastery, including but not limited to: (a) its Benedictine charter; (b) all codes, rules, constitutions, by-laws, and other guiding or governing documents of Most Holy Family Monastery; (c) all written policies or procedures now or formerly observed at Most Holy Family Monastery; (d) all written materials provided by Most Holy Family Monastery to its prospective entrants, postulants, novices, or professed brothers, describing the obligations, privileges, or exceptions that apply to them; (e) all materials published, produced, or distributed by Joseph Natale or by Most Holy Family Monastery under his headship; (f) Joseph Natale's acts and communications as head of Most Holy Family Monastery; (g) the admission, changes in status or dismissal of members of Most Holy Family Monastery; (h) the selection of Frederick Dimond as superior of Most Holy Family Monastery; (i) any communications between Most Holy Family Monastery or its members and the publicly recognized OSB organization or its members, including by not limited to St. Vincent Archabbey or its members; (j) defendant's corporate status and corporate filings with officials of the state of New York.

(See Eaton Dec. Exh. C).

31. On or about November 2, 2009, Defendants responded as follows:

Defendants object to this demand on the grounds that it is ambiguous, overbroad, and, in part, not likely to lead to the discovery of admissible evidence. Defendants further object to this demand on the grounds that it is a multi-part demand and is not in compliance with the Local Rules of the Western District of New York. Without waiving these objections, and subject to the general objections above, defendants are producing responsive documents.

32. Annexed hereto as **Exhibit E** is a copy of Defendants' Response to Plaintiff's First Request for Documents ("Defendants' Response"). It has been over 21 months since Defendants' Response, and Plaintiff has never previously challenged the objections set forth in Defendants Response. EBTs and discovery were completed earlier this Spring. Thus, the present motion is untimely and should be denied.

33. Notwithstanding said objections and equally important, Defendants have produced material documents responsive to this request. Defendants produced over 1,100 pages of bank and financial records, including statements and records of transactions from the following accounts:

- 1) COMMUNITY BANK, N.A. - Business Checking Account No. 9444720923
- 2) COMMUNITY BANK, N.A. - Business Checking Account No. 4190203861
- 3) SCOTTRADE - Securities Account No. 18013280
- 4) The Bank of Castile - Non-Profit Checking Account No. 912405724
- 5) M&T Bank - Advanced Business Checking Account No. 9841857478
- 6) M&T Bank - Free Business Checking Account No.9841854582
- 7) M&T Bank - Commercial Savings Account No. 15004211050311
- 8) M&T Securities, Inc. - Brokerage Account No. AZD-356665.

(Produced at Bates Nos. MHFM 000001062-000002199).

34. These records include detailed information concerning MHFM's financial transactions, such as deposit and withdrawal information and images of cancelled checks, and are responsive to Plaintiffs request for "*all bank records*" and "*stock records*" during the relevant period within Defendants' possession, despite the unchallenged objection asserted.

35. Defendants continue to maintain their objection as to the balance of the demand as recited in Plaintiff's Motion, for "*records of investments in real property and payments, loans or advances to third parties including individuals, corporations, trusts and partnerships.*" Responsive information is in the records already provided. However, an objection is proper as to the overly broad and unduly burdensome aspects of this request. For example, the portion of the

request seeking all records for any “payments” is grossly unreasonable and it is unclear how such a request could be material or relevant to Plaintiff’s claims.

ii) Oral Requests at EBT

36. On or about June 8, 2011, following the request for same at Frederick’s Dimond’s examination before trial, Defendants produced the annual reports under MHFM bylaw for the years 2005 through 2010 (“Annual Reports”). (Annexed to Eaton Aff. Exh. F).

37. Plaintiff claims that the Annual Reports produced are not “contemporaneous records which defendant Dimond testified that he had prepared.” (Eaton Dec. 14). However, Plaintiff offers no evidence, argument or theory as to why he contends the Annual Reports are anything other than those requested at Frederick Dimond’s examination before trial.

38. Said Annual Reports were requested, and were duly produced. Plaintiff’s repeated request in the within motion is redundant and moot.

39. Since Defendants have complied with all of Plaintiff’s purported outstanding demands, the instant motion to compel should be denied.

WHEREFORE, the Defendants respectfully request that the Court deny in its entirety Plaintiff’s motion for an Order **(i)** partially vacating the preliminary injunction presently in force by deleting the fifth decretal paragraph enjoining plaintiff from communicating with certain persons; and **(ii)** compelling defendants to produce certain documents pursuant to Plaintiff’s First Request for Documents, dated July 10, 2009 and oral request during the examination before trial of defendant Frederick Dimond; and grant such other and further relief as this Court deems just and proper.

Dated: August 12, 2011

/s/Charles C. Ritter, Jr. _____
Charles C. Ritter, Jr.