UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ERIC E. HOYLE,

Plaintiff,

v.

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

Defendants.

**MEMORNADUM 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 Declaration Charles C. Ritter, Jr., Esq. in opposition of Plaintiff Eric Hoyle's ("Plaintiff") Motion for Leave to file a Second Amended Complaint or an Amended Reply to Counterclaim Designated as Counterclaim.

The proposed Second Amended Complaint contains eight (8) causes of action: common law fraud, constructive fraud, deceptive trade practices, unjust enrichment, money had and received, breach of contract and vicarious liability of MHFM. All of these claims are based on the same core facts that were the basis for Plaintiffs' Amended Complaint which was dismissed, including Plaintiff's assertion that Defendants' misrepresented themselves as Benedictine Monks and that MHFM was associated with the Order of Saint Benedict.

In the alternative, Plaintiff moves to file an Amended Reply to Counterclaim. In truth, this so-called pleading merely reasserts exactly the same causes of action that Plaintiff sets forth

in his proposed Second Amended Complaint under the guise of being a "counterclaim" within the Reply.

For the reasons explained below, this Court should deny Plaintiff's Motion for Leave to file a Second Amended Complaint and Amended Reply to Counterclaim.

## ARGUMENT

### A. Standard for Leave to Amend after Summary Judgment has Been Granted

Fed. R. Civ. P. 15(a) states that a "court should freely give leave when justice so requires." However, this standard is "reversed" when "'a plaintiff seeks to amend a complaint after judgment has been entered and a case has been dismissed.'" The Tool Box, Inc. v. Ogden City Corp., 419 F.3d 1084, 1087 (10th Cir. 2005) (quoting Bressner v. Ambroziak, 379 F.3d 478, 484 (7th Cir. 2004)). In applying this standard, the decision whether or not to grant leave to amend is within the discretion of the district court. Krumme v. WestPoint Stevens, Inc., 143 F.3d 71, 88 (2d Cir. 1988).

The Second Circuit has explained that a motion for leave to amend is properly denied where the district court "finds '[u]ndue delay, bad faith or dilatory motive on the part of the movant . . . undue prejudice to the opposing party . . . [or] futility of amendment'" Dougherty v. Town of N. Hempstead Bd. of Zoning Appeals, 282 F.3d 83, 87 (2d Cir. 2002)). All three alternative grounds for denying leave to amend are present in this case.

In this case, the Court granted Defendants' motion for summary judgment and dismissed the Amended Complaint in June 2012 after several years of discovery. There is no "complaint" for Plaintiff to amend. Plaintiff nevertheless seeks leave to file a Second Amended Complaint which sets forth the same allegations and many of the same causes of action that the Court has

already considered and dismissed. Plaintiff offers no argument or legal authority in support of the motion.

**B. Undue Delay, Prejudice and Futility**

All of the relevant factors which, if individually present, would support denial of granting leave to amend are present in this case. As explained by the Second Circuit,

> One of the most important considerations in determining whether amendment would be prejudicial is the degree to which it would delay the final disposition of the action. Furthermore, a proposed amendment is especially prejudicial when discovery ha[s] already been completed and [non-movant] has already filed a motion for summary judgment.

Krumme v. Westpoint Stevens Inc., 143 F.3d 71, 88 (2d Cir. 1998)(internal citations omitted); Ansam Assocs., Inc. v. Cola Petroleum, Ltd., 760 F.2d 442, 446 (2d Cir. 1985)(allowing plaintiff leave to amend is "especially prejudicial" when discovery has been completed and the non-moving party has filed a motion for summary judgment). It is beyond question that leave to amend is "especially prejudicial" where it is sought "not only years after the case commenced and well after discovery had closed, but while a summary judgment motion" was pending. Christine Falls Corp. v. Algonquin Power Fund, Inc., 401 Fed. Appx. 584, 588 (2d Cir. 2010).

The current case was filed in 2008. Discovery occurred over a period of several years, and was completed over 18 months ago. The Court granted summary judgment dismissing the Amended Complaint in June 2012. The Court denied Plaintiff's motion for reconsideration in November 2012. Plaintiff did not file its motion for leave to amend until May 2013. These circumstances overwhelmingly demonstrate undue delay and prejudice to Defendants if leave to amend were to be granted. Plaintiff offers no excuse or explanation for the delay or any

compelling argument to contradict Second Circuit precedent directing that these circumstances establish prejudice.

Leave to amend should not only be denied because of undue delay and prejudice, it should also be denied as futile. The chart below shows that nearly all of the causes of action in the proposed Second Amended Complaint were asserted in the Amended Complaint and dismissed when summary judgment was granted.

| | **Cause of Action Dismissed by Defendants' Motion for Summary Judgment** | **Cause of Action Reasserted in Plaintiff's Second Amended Complaint** |
|---|---|---|
| Fraud and Negligent Misrepresentation | Yes | Yes |
| RICO Claims | Yes | Not Reasserted |
| New York General Business Law (Deceptive Practices and False Advertising) | Yes | Yes |
| Equitable Claims (Unjust Enrichment, Money Had and Received, and Mandatory Accounting) | Yes | Yes |
| Breach of Contract | Underlying allegations present, but not a separate cause of action | Separate cause of action based on allegations found in Amend Complaint |
| Vicarious Liability of MHFM | Yes | Yes |

Plaintiff's proposed Second Amended Complaint simply reasserts the same claims set forth in the original Amended Complaint and, based on this Court's decisions to grant summary judgment and deny reconsideration, this effort to replead is futile. (See Ritter Decl. ¶¶ 21-32).

A proposed amendment is futile when it "'merely restates the same facts as the original complaint in different terms, reasserts a claim on which the court previously ruled, fails to state a

legal theory, or could not withstand a motion to dismiss.'" Mason v. Town of New Paltz Police Dept., 103 F. Supp. 2d 562, 568 (N.D.N.Y. 2000) (citing Ronzani v. Sanofi S.A., 899 F.2d 195, 198-99 (2d Cir. 1990)). Here, the proposed Second Amended Complaint restates the same facts as the Amended Complaint and reasserts all the claims that were previously dismissed. Also, the Second Amended Complaint would not be able to withstand a motion to dismiss since the Court has already reviewed and dismissed these claims. Finally, this Court has twice specifically addressed Plaintiff's failure to adequately plead or offer evidence of a valid breach of contract claim (Ritter Decl. ¶¶ 29-32), and Plaintiff has made numerous statements under oath which are fatal to such a claim. (Ritter Decl. ¶¶ 33-39).

For these reasons, the Court should deny leave to amend due to futility.

**C. Plaintiff's Proposed "Counterclaim" in an Amended Reply is Improper**

Plaintiff seeks leave to amend his reply to affirmatively assert a counterclaim for relief. Plaintiff's proposed counterclaims in his Amended Reply are improper as they restate the claims made in his Amended Complaint which were previously dismissed by this Court. As such, any amendment would be futile and prejudicial for all of the reasons discussed supra.

Furthermore, FRCP 13 establishes the circumstances under which counterclaims are required and/or permitted. Notably, under "Compulsory Counterclaims" FRCP 13(a)(1) directs that "a pleading must state as a counterclaim any claim that – at the time of its service—the pleader has against an opposing party if the claim (A) arises out of the transaction or occurrence that is the subject matter of the opposing party's claim." (emphasis added). Plaintiff offers no excuse or explanation for failing to include the proposed "counterclaims" in his Reply that was

filed on April 9, 2009. The most logical reason is that all of the proposed counterclaims were asserted in the now dismissed Amended Complaint.

Accordingly, leave to file an Amended Reply with counterclaims should be denied based on undue delay, prejudice, and futility.

Dated: June 11, 2013

DUKE, HOLZMAN, PHOTIADIS & GRESENS LLP

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

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