

Kathleen L. DeSoto
Tessa A. Keller
GARLINGTON, LOHN & ROBINSON, PLLP
350 Ryman Street • P. O. Box 7909
Missoula, MT 59807-7909
Telephone (406) 523-2500
Telefax (406) 523-2595
kldesoto@garlington.com
takeller@garlington.com

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Candace Fisher
SANDERS COUNTY CLERK OF DISTRICT COURT
BY [Signature]
DEPUTY

Joel M. Taylor (*Pro Hac Vice*)
Associate General Counsel
Watchtower Bible and Tract Society of New York, Inc.
100 Watchtower Drive
Patterson, NY 12563
Telephone (845) 306-1000
jmtaylor@jw.org

Attorneys for Defendants/Third-Party Plaintiffs Watchtower Bible and Tract Society of New York, Inc., Christian Congregation of Jehovah's Witnesses, and Thompson Falls Congregation of Jehovah's Witnesses

MONTANA TWENTIETH JUDICIAL DISTRICT COURT, SANDERS COUNTY

ALEXIS NUNEZ and HOLLY
McGOWAN,

Plaintiffs,

v.

WATCHTOWER BIBLE AND TRACT
SOCIETY OF NEW YORK, INC.;
WATCHTOWER BIBLE AND TRACT
SOCIETY OF PENNSYLVANIA, INC.;
CHRISTIAN CONGREGATION OF
JEHOVAH'S WITNESSES and
THOMPSON FALLS CONGREGATION
OF JEHOVAH'S WITNESSES,

Defendants.

Hon. James A. Manley
Cause No. DV 16-84

MOTION TO COMPEL PRODUCTION
OF DOCUMENTS AND
BRIEF IN SUPPORT

WATCHTOWER BIBLE AND TRACT
SOCIETY OF NEW YORK, INC.;
CHRISTIAN CONGREGATION OF
JEHOVAH'S WITNESSES and
THOMPSON FALLS CONGREGATION
OF JEHOVAH'S WITNESSES,

Third-Party Plaintiffs,

v.

MAXIMO NAVA REYES, MARCO
NUNEZ, IVY McGOWAN-
CASTLEBERRY,

Third-Party Defendants.

Defendants/Third-Party Plaintiffs Watchtower Bible and Tract Society of New York, Inc. ("Watchtower NY"), Christian Congregation of Jehovah's Witnesses ("CCJW") and the Thompson Falls Congregation of Jehovah's Witnesses ("Thompson Falls Congregation") (collectively referred to as "Religious Defendants") respectfully move the Court for an order compelling the production of documents requested in discovery. Specifically, the Religious Defendants seek to compel the Plaintiffs Holly McGowan ("McGowan") and Alexis Nunez ("Nunez") to produce all outstanding discovery as follows:

As to Plaintiff Holly McGowan, the Religious Defendants seek responses to:

- Request for Production No. 10 seeking her social network postings and communications;
- Request for Production No. 15 seeking all documents related to her criminal arrest records; and
- Request for Production No. 16 seeking documents related to her recent legal battle on the charge of criminal child endangerment.

As to Plaintiff Alexis Nunez, the Religious Defendants seek responses to:

- Request for Production No. 9 seeking communications between Marco Nunez and Alexis, including unsolicited messages Alexis received through Facebook.
- Request for Production No. 11 seeking her social network postings and communications; and
- Request for Production No. 15 seeking photographs of her taken between 1999-2007.

The parties have met and conferred on these outstanding items but have been unable to reach agreement, and Plaintiffs have refused to produce any documents responsive to the above-noted requests. Decl. Joel M. Taylor Support Defs.' Mot. Compel ¶ 7, Apr. 30, 2018.

This Motion is supported by the following brief in support.

I. INTRODUCTION

This case is about incest. The Plaintiffs accuse their stepfather/step-grandfather, Maximo Reyes ("Reyes"), of childhood sexual abuse but seek to hold the Religious Defendants responsible because Reyes attended religious services as a member of a local congregation . . . like a parishioner. Reyes never held a position of authority in any congregation of Jehovah's Witnesses.

In their First Amended Complaint ("FAC"), Plaintiffs alleged that they suffered emotional harm because of incestuous acts forced on them by Reyes. FAC ¶¶ 32, 38, Nov. 14, 2016. Reyes is related to the Plaintiffs by marriage. He married Joni Reyes, the mother of Plaintiff Holly McGowan and the grandmother of Plaintiff Alexis Nunez. Plaintiff Nunez also testified that her father, Marco Nunez, molested her. 2d Found. Aff. Kathleen L. DeSoto ¶ 3, Apr. 30, 2018 ("2d Aff. DeSoto"), Ex. 1: Dep. Alexis Nunez

33:1-14, Jan. 11, 2018 (“Dep. Nunez”). Nunez is the former husband of Third-Party Defendant Ivy McGowan-Castleberry.

II. DISCUSSION

Pursuant to Montana Rule of Civil Procedure 26(b)(1), the scope of discovery encompasses any non-privileged matter that is relevant to any party’s claim of defense.

“The District Court has the inherent discretionary power to control discovery. . . . based on the [court’s] authority to control trial administration.” *Massaro v. Dunham*, 184 Mont. 400, 404, 603 P.2d 249, 251 (1979).

Montana courts construe discovery rules broadly so as to “make all relevant facts available to the parties in advance of trial and to reduce the possibility of surprise and unfair advantage.” *Perdue v. Gagnon Farms, Inc.*, 2003 MT 47, ¶ 15, 314 Mont. 303, 65 P.3d 570. The purpose of discovery is to promote both the ascertainment of truth and the ultimate disposition of the lawsuit in accordance therewith. Discovery assures the mutual knowledge of all relevant facts gathered by both parties that are essential to a proper course of litigation. *Id.* The tools of discovery “make a trial less a game of blindman’s bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent.” *Richardson v. State*, 2006 MT 43, ¶ 22, 331 Mont. 231, 130 P.3d 634 (citations omitted). To that end, Montana Rule of Evidence 401 defines relevant evidence as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Relevant evidence may include evidence bearing upon the credibility of a witness or hearsay declarant.”

A. Social Media Discovery Is Relevant and Necessary to Rebut Plaintiffs' Alleged Damages.

The Plaintiffs' FAC seeks compensatory damages for emotional harm, including "mental anguish", "physical and mental impairment/disfigurement", "loss of enjoyment and quality of life" — past and future and "loss of established course of life." FAC at 17. In doing so, Plaintiffs have put their personal lives front and center in this litigation. Notably, Plaintiffs have not alleged any economic damages, so the only bases for a jury award are their alleged emotional damages and the damages to their "quality of life." As such, Plaintiffs' refusal to disclose the requested information is unjustifiable.

Neither Plaintiff identifies a privilege that bars disclosure or a burden that would excuse disclosure. In addition, as noted above all of the demands are reasonably calculated to produce relevant evidence, lead to the discovery of admissible evidence, or assist the trier of fact to assess credibility. Consider:

- Request for Production No. 10 to Plaintiff Holly McGowan:¹

All social networking posting and communications, (including but not limited to Facebook, Snapchat, Instagram, Myspace, LinkedIn, YouTube, Twitter, Google Plus, Tumblr, WhatsApp, etc.) by Plaintiff . . . and any other person from 1997 to the present, including photographs, written posts, social media contacts (e.g. "Friends"), and indications of interest in people, places, things, or issues.

- Response from Plaintiff Holly McGowan:

Plaintiff objects to this Request as overly broad and unduly

¹ Request for Production No. 10 to Plaintiff Holly McGowan is identical to Request for Production No. 11 to Plaintiff Alexis Nunez for the period of 2002 to present, and the responses from both Plaintiffs are identical; for these reasons the Religious Defendants seek the same relief as to both Plaintiffs regarding social media discovery.

burdensome. The Request seeks information that is irrelevant to the claims or defenses at issue and is disproportionate to the needs of the case, due to its use of the phrase “[a]ll social networking postings and communications” without limitation. Because this Request is not relevant to any party’s claim or defense and because providing such information will be highly burdensome, it is outside the permissible scope of discovery. Subject to and without waving (sic) the foregoing objection and Plaintiff’s right to amend and/or supplement this Request as discovery proceeds, Plaintiff answers: To the extent any exist, Plaintiff will provide responsive postings and communications that are related to the claims and defenses in this case.

2d Aff. DeSoto ¶ 4, McGowan’s Objections & Resps. Religious Defs.’ 3d Set Reqs.

Prod. at 3, Mar. 14, 2018.

As the Court is well aware, Montana Rule of Civil Procedure 26(b)(2)(B) provides that a party may discover “electronically-stored information” subject to relevancy and privilege objections.

While Montana case law does not squarely address social media discovery, others courts have. For example, one federal district court reasoned, “the content of social networking sites is not protected from discovery merely because a party deems the content to be ‘private.’” *Keller v. Nat’l Farmers Union Prop. & Cas.*, No. CV 12-72-M-DLC-JCL, 2013 U.S. Dist. LEXIS 452, at *10 (D. Mont. Jan. 2, 2013) (quoting *EEOC v. Simply Storage*, 270 F.R.D. 430, 434 (S.D. Ind. 2010)). In addition, in *Reid v. Ingerman Smith LLP*, the District Court judge explained:

Even personal diaries “are discoverable if they contain relevant information regarding contemporaneous mental states and impressions of parties.” *Zakrzewska v. New School*, U.S. Dist. LEXIS 1725, 2008 WL 126594, at *2 (S.D.N.Y. 2008) (granting discovery of plaintiff’s diary because “it would be unfair . . . to permit a plaintiff claiming emotional distress to block discovery of facts that may shed important light on whether any emotional distress actually was suffered”); *Rexford v. Olczak*, 176 F.R.D.

90, 93 (W.D.N.Y. 1997) (defendants entitled to obtain plaintiff's diary where her "contemporaneous account of meetings, conversations and other events central to the issues of this case provide relevant evidence that may be useful").

Reid v. Ingerman Smith LLP, No. CV 2012-0307 (ILG)(MDG), 2012 U.S. Dist. LEXIS 182439, at *4-5 (E.D.N.Y. Dec. 27, 2012).

The *Reid* court ruled that the "photographs and comments that plaintiff posted on her publicly available Facebook pages provide[d] probative evidence of her mental and emotional state, as well as reveal[ed] the extent of activities in which she engages . . . [and were] reflective of her emotional state." *Reid*, 2012 U.S. Dist. LEXIS 182439, at *3-4. Similar to the Plaintiffs herein, the plaintiff in the *Reid* case alleged emotional damages including "mental anguish" as a result of sexual misconduct.

Courts favor disclosure when Defendants make a showing that the review of the information reveals an active lifestyle and Plaintiff is engaging in activities that are inconsistent with the alleged injuries. *Keller*, 2013 U.S. Dist. LEXIS 452, at *10 (citing *Romano v. Steelcase, Inc.*, 907 N.Y.S.2d 650, 653-657 (N.Y. Sup. Ct. 2010)); *Thompson v. Autoliv ASP, Inc.*, No. 2:09-cv-01375-PMP-VCF, 2012 U.S. Dist. LEXIS 85143, at *13 (D. Nev. June 20, 2012) (allowing discovery where material obtained by defendant from plaintiff's Facebook account negated her allegations that her social networking site accounts were irrelevant).

Therefore, the Religious Defendants respectfully request an order from the Court

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compelling Plaintiffs to provide social media discovery.² This information will allow the Religious Defendants to evaluate Plaintiffs' "loss of established course of life" because the social media content will provide relevant information regarding Plaintiffs' social interactions with others. In addition, the social media discovery may provide information concerning independent causes of emotional harm.

B. Plaintiff Holly McGowan's Criminal Records Are Relevant to Her Alleged Damages and Credibility.

During her deposition, Plaintiff Holly McGowan testified that she had been arrested for DUI, criminal endangerment, and shoplifting. 2d Aff. DeSoto ¶ 5, Ex. 3: Dep. Holly McGowan 21-22, Jan. 9, 2018 ("Dep. McGowan"). In addition, she admitted to being presently involved in a criminal child endangerment case. 2d Aff. DeSoto, Ex. 3: Dep. McGowan 208:21-210:13. After conclusion of the deposition, the Religious Defendants served the following requests:

² Request for Production No. 9 to Plaintiff Alexis Nunez is similar in nature to the social media requests in that it seeks communications between Marco Nunez and Plaintiff, including the unsolicited messages Plaintiff Alexis Nunez received through Facebook. Marco is Alexis Nunez's father and was the first person to sexually abuse her as a minor. During her deposition, Plaintiff Nunez testified that since 2012/2013 Marco has repeatedly attempted to contact her through Facebook and that she responds about every six months by telling Marco to leave her alone. 2d Aff. DeSoto, Ex. 1: Dep. Nunez 11:1-12:21. The deposition transcript reflects defense counsel's request for a copy of the most recent exchanges and Plaintiffs' counsel's response of "okay." *Id.* Notwithstanding that agreement, Plaintiff Nunez has not provided documents reflecting any of her communications with Marco. These documents are relevant to Plaintiff Alexis Nunez's claims and the Religious Defendants' third-party claim against Marco. The communications may also speak to independent causes of psychological harm. 2d Aff. DeSoto, Ex. 1: Dep. Nunez 32-34. They may also speak to Plaintiff Nunez's damages claim. Accordingly, the Religious Defendants request an order compelling production of these communications.

- Request for Production No. 15 to Plaintiff Holly McGowan:

All non-privileged documents indicating that Plaintiff Holly McGowan has ever been arrested and all documents relating to those arrests, if any.

- Response from Plaintiff Holly McGowan:

Plaintiff objects to this Request because it seeks information that is not relevant to any party's claims or defense and is not proportional to the needs of the case. Because this request is not relevant to any party's claim or defense and not reasonably calculated to lead to the discovery of admissible evidence, it is outside the permissible scope of discovery. Plaintiff further objects that this request seeks to annoy, embarrass, and oppress Plaintiff.

- Request for Production No. 16 to Plaintiff Holly McGowan:

All non-privileged documents pertaining to Plaintiff Holly McGowan's October 11, 2017, Criminal Child Endangerment felony and subsequent pleas.

- Response from Plaintiff Holly McGowan:

Plaintiff objects to this Request because it seeks information that is not relevant to any party's claims or defense and is not proportional to the needs of the case. Because this request is not relevant to any party's claim or defense and not reasonably calculated to lead to the discovery of admissible evidence, it is outside the permissible scope of discovery. Plaintiff further objects that this request seeks to annoy, embarrass and oppress Plaintiff.

2d Aff. DeSoto, Ex. 2 at 4-5.

Communications related to these criminal proceedings are public information likely to contain reports from mental health care professions, statement of fact from attorneys and other relevant information that may lead to admissible evidence as well as evidence related to the Plaintiff McGowan's credibility. By seeking compensation for damages based on emotional health, she has also put her lifestyle at issue. *See State ex*

rel. Mapes v. Dist. Court, 250 Mont. 524, 530, 822 P.2d 91, 94 (1991).

C. Photographs of Plaintiff Nunez Are Likely to Lead to Admissible Evidence.

Plaintiffs' FAC alleges that they were molested by their step-grandfather, Maximo Nava-Reyes. FAC ¶¶ 32, 38. In attempting to understand the contours of that relationship and generally how Plaintiff Alexis Nunez was progressing emotionally, the Religious Defendants served the following request:

- Request for Production No. 15 to Alexis Nunez:

All photographs of Plaintiff Alexis Nunez taken during the 1999-2007 time period.

- Response from Plaintiff Alex Nunez:

Plaintiff objects to this Request as overly broad and unduly burdensome, and because it seeks information that is not relevant to any party's claims or defense and is not proportional to the needs of the case. Further, this request seeks material that is not within Plaintiff's possession, custody or control. Because providing such information will be highly burdensome, if not impossible, it is outside the permissible scope of discovery. Subject to and without waving (sic) the foregoing objection and Plaintiff's right to amend and/or supplement this Request as discovery proceeds, Plaintiff answers: Plaintiff is willing to meet and confer with Defendants to discuss narrowing this Request.

2d Aff. DeSoto ¶ 6, Ex. 4: Alexis Nunez's Objections & Resps. Religious Defs.' 3d Set Reqs. Prod. at 4-5, Mar. 14, 2018.

Plaintiff Nunez's objections to this request fail to consider the breadth of the allegations in her Complaint. Nunez has demanded compensation for past and future "emotional trauma," "mental impairment/disfigurement," "mental anguish," "loss of enjoyment and quality of life," and "loss of established course of life." FAC at 17-18.

As with Plaintiff McGowan, these allegations have put Plaintiff Nunez's physical and emotional condition at issue in this lawsuit. *See Mapes*, 822 P.2d at 94 (“[W]hen a party claims damages for physical or mental injury, he or she places the extent of that physical or mental injury at issue and waives his or her statutory right to confidentiality to the extent that it is necessary for a defendant to discover whether plaintiff's current medical or physical condition is the result of some other cause.”). Photographs of her address her quality of life damages and speak to her credibility and may also give rise to admissible evidence regarding an independent cause of harm unrelated to these Defendants.

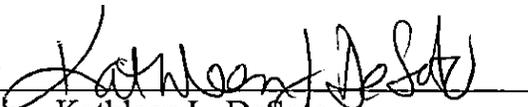
III. CONCLUSION

WHEREFORE, the Religious Defendants respectfully request an Order compelling the Plaintiffs to produce complete responses and documents within the next 15 days.

DATED this 30th day of April, 2018.

Attorneys for Religious Defendants/Third-Party Plaintiffs:

GARLINGTON, LOHN & ROBINSON, PLLP

By 
Kathleen L. DeSoto

CERTIFICATE OF SERVICE

I hereby certify that on April 30, 2018, a copy of the foregoing document was served on the following persons by the following means:

 Hand Delivery
3-4 Mail
 Overnight Delivery Service
 Fax (include fax number in address)
1-2 E-Mail (include email in address)

1. James P. Molloy
Gallik, Bremer & Molloy, P.C.
P.O. Box 70
Bozeman, MT 59771-0070
jim@galliklawfirm.com
Corrie@galliklawfirm.com
Attorneys for Plaintiffs

2. D. Neil Smith
Nix, Patterson & Roach, LLP
1845 Woodall Rodgers Fwy., Ste. 1050
Dallas, TX 75201
dneilsmith@me.com

Ross Leonoudakis
Nix, Patterson & Roach, LLP
3600 N. Capital of Texas Hwy, Ste. B350
Austin, TX 78746
rossl@nixlaw.com
Attorneys for Plaintiffs

3. **PERSONAL & CONFIDENTIAL**
Maximo Reyes
P.O. Box 566
Plains, MT 59859

4. **COURTESY COPY TO:**
Hon. James A. Manley
20th Judicial District Court
106 Fourth Ave. E.
Polson, MT 59860