

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
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BY [Signature]
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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

REPLY TO PLAINTIFFS' RESPONSE
TO DEFENDANTS' MOTION TO
COMPEL PRODUCTION OF
DOCUMENTS

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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, Watchtower Bible and Tract Society of New York, Inc.

("Watchtower"), and Christian Congregation of Jehovah's Witnesses ("CCJW")

(collectively referred to as "the religious defendants") submit this Reply to Plaintiffs'

Response to Defendants' Motion to Compel Production of Documents requiring Plaintiffs

to produce their social media postings that bear on Plaintiffs' mental state, particularly

that either support or belie their claims in this lawsuit.

I. DISCUSSION

A. Plaintiffs' Opposition Misstates the Facts and Law

1. Plaintiff Holly McGowan's Social Media Accounts Likely Contain Relevant Information.

Defendants' REQUEST FOR PRODUCTION NO. 10¹ sought Holly's social media account to assess the extent to which the alleged negligence on the part of the

¹ REQUEST FOR PRODUCTION NO. 10: "All social networking posting and communications, (including but not limited to Facebook, Snapchat, Instagram, Myspace,

Religious Defendants has actually affected her life. In response to the request, Holly objected on the basis that the request was “overly broad and unduly burdensome.” But she further responded: “To the extent any exist, Plaintiff will provide responsive postings and communications **that are related to the claims and defenses in this case.**” 2d Found. Aff. Kathleen L. DeSoto ¶ 4, Apr. 30, 2018 (“2d Aff. DeSoto”), Ex. 2.

Holly has produced only one electronic message string concerning a limited communication between family members discussing this lawsuit. Her self-imposed limitation on the Religious Defendants’ request is without support in the law as Montana Rule of Civil Procedure 26(b)(1), outlines the scope of discovery. That rule encompasses discovery of any non-privileged matter that is relevant to any party’s claim or defense.

Beyond question, Holly has placed the emotional quality of her life front and center in this lawsuit. In the First Amended Complaint Holly claims “loss of enjoyment and quality of life” and “loss of established course of life.” 1st Am. Compl. at 17, Nov. 14, 2016. Her postings, comments by others to her postings, her photos, and e-mails contained in her social media accounts are all highly likely to contain pertinent information about her claims of “loss of enjoyment and quality of life” and “loss of established course of life.” It would be patently unfair and prejudicial to the Religious Defendants if they were not allowed to review the requested discovery.

Plaintiffs’ reliance on *Keller v. National Farmers Union Property & Casualty*

LinkedIn, YouTube, Twitter, Google Plus, Tumblr, WhatsApp, etc.) by Plaintiff Holly McGowan or between Plaintiff Holly McGowan and any other person from the period 1997 to the present, including photographs, written posts, social media contacts (e.g., “Friends”), and indications of interests in people, places, things, or issues.”

Company, No. CV-12-72-M-DLC-JCL, 2013 U.S. Dist. LEXIS 452 (D. Mont. Jan. 2, 2013), is misplaced. The *Keller* court's reasoning only shows that reasonable minds can differ and that this issue of the law is yet unsettled in Montana. *Keller* held that the defendants there had not shown that any publicly available information was inconsistent with plaintiff's claims, a requisite to gaining "carte blanche" access to the plaintiff's non-public social networking accounts. *Keller*, 2013 U.S. Dist. LEXIS 452, at *12-13. The threshold approach adopted by the District Court of Montana is one approach, based on *Romano v. Steelcase, Inc.*, 907 N.Y.S.2d 650, 653 (Sup. Ct. 2010).

Keller was a simple auto wreck case in which the plaintiff alleged to have hurt her head, neck and back, suffering migraine headaches, pain, suffering, emotional distress and lost course of life. *Keller*, 2013 U.S. Dist. LEXIS 452, at *4. Based on those allegations the court found that the defendant's discovery demand for pre-existing medical records to show the plaintiff's treatment and condition before the car accident relevant and discoverable. *Keller*, 2013 U.S. Dist. LEXIS 452, at *5.

On the issue of Ms. Keller's social media, the court discussed *Romano*, where the trial court had found that the plaintiff's public profile on Facebook contained material that was contrary to her claims and her deposition testimony. *Keller*, 2013 U.S. Dist. LEXIS 452, at *10 (citing *Romano*, 907 N.Y.S.2d at 654).

Other courts have not been as restrictive in allowable discovery of social media. *Keller* points to trial courts that have taken positions more in harmony with the spirit of Rule 26(b)(1). See e.g., *E.E.O.C. v. Simply Storage Management, LLC.*, 270 F.R.D. 430, 434 (S.D. Ins. 2010) (The content of social networking sites is not protected from

discovery merely because a party deems the content “private.”).

An example of the approach allowing more open discovery is *Ledbetter v. Wal-Mart Stores, Inc.*, Civil Action No. 06-cv-01958-WYD-MJW, 2009 U.S. Dist. LEXIS 126859, at *4-5 (D. Colo. Apr. 21, 2009) (cited with approval in *Romano*, 907 N.Y.S.2d at 654). The Colorado District Court denied a motion for protective order concerning the plaintiffs’ social networking sites on the ground that the information therein contained allegations about the impact of their injuries on their daily lives. The Court concluded that the social networking pages were relevant and discoverable. *Ledbetter*, 2009 U.S. Dist. LEXIS 126859, at *3-5.

Numerous other courts have reached the conclusion that photos and comments posted in the non-public portion of a plaintiff’s social networking site are discoverable because they provide “probative evidence of [a plaintiff’s] mental and emotional state, as well as reveal the extent of activities in which she engages.” *Reid v. Ingerman Smith LLP*, No. 2012-0307 (ILG) (MDG), 2012 U.S. Dist. LEXIS 182439, at *6 (E.D.N.Y. Dec. 27, 2012) (ordering production of all “social media communications and photographs that reveal, refer, or relate to any emotion, feeling, or mental state . . . [and] that reveal, refer, or relate to events that could reasonably [be] expected to produce a significant emotion, feeling or mental state . . . [and] photographs uploaded by plaintiff as well as photographs uploaded by third parties depicting plaintiff . . .” (internal quotations omitted)); *Crowe v. Marquette Transp. Co. Gulf-Inland, LLC*, No. 14-1130, 2015 U.S. Dist. LEXIS 9198, at *4 (E.D. La. Jan. 20, 2015) (“[I]t is patently clear from even a cursory review that [Facebook information] should have been produced as part of

[plaintiff's] original response."); *Nucci v. Target Corp*, 162 So. 3d 146, 152-155 (Fla. Ct. App. 4th Dist. 2015) (Facebook photographs are "powerfully relevant to the damages issue in lawsuits."); *Loporcaro v. City of N.Y.*, 950 N.Y.S.2d 723 (Sup. Ct. 2012) ("Since it appears that plaintiff has voluntarily posted at least some information about himself on Facebook which may contradict the claims made by him in the present action, he cannot claim that these postings are now somehow privileged or immune from discovery."); *Patterson v. Turner Constr. Co.*, 931 N.Y.S.2d 311, 312 (App. Div. 2011) (While not all Facebook information is necessarily relevant, Facebook material is relevant and discoverable if "it contradicts or conflicts with plaintiff's alleged restrictions, disabilities, and losses, and other claims.").

Plaintiffs' argument is not that their social media postings are not relevant; rather, in a roundabout way they are saying that they want to keep their "private" postings "private." That argument ignores the nature of social networks. For example, Facebook accepts postings of photos, status updates, links and e-mails that a user shares with persons whom the user has accepted as "friends." An average user has close to 500 "friends"² and absent adoption of strict privacy settings, no way to prevent any "friend" from copying and posting or emailing the user's photos, comments, links, status updates or e-mails to the internet or clipping and sharing them with whomever the "friend" desires. In short, posting to Facebook is the antithesis of seeking to keep one's photos, thoughts etc., private. Having done so, Plaintiffs should not now be allowed to shield this

² <http://www.pewresearch.org/fact-tank/2014/02/03/what-people-like-dislike-about-facebook/>.

relevant information from discovery.

Courts that require showing that the public information posted in a plaintiff's social media contradicts something said in pleadings or discovery fail to recognize that many social media users limit their public information to such a degree that nothing there will possibly contradict anything the user says elsewhere. Just as "the devil is in the detail," the contradictory and other relevant information is found in the "private" postings.

Plaintiffs have brought this claim, alleging childhood sexual abuse by their step-father, and seek huge damages from the Religious Defendants. Discovery should be proportional to the damages sought by Plaintiffs, and should reflect the nature of the case and the amount of money sought. Plaintiffs fail to point out any legitimate reason for refusing to comply with the Defendants' request and should be ordered to comply.

2. Alexis May Know the Location of Third-Party Defendant Marco Nunez.

Defendants' original REQUEST FOR PRODUCTION NO. 9 to Alexis sought "All communication between Plaintiff Alexis Nunez and Marco Nunez and any communications (even unsolicited) Plaintiff Alexis Nunez received from Marco Nunez." 2d Aff. DeSoto ¶ 6, Ex. 6. At her deposition Alexis testified that her father has repeatedly attempted to contact her through Facebook and that she responds every month by telling Marco to leave her alone. 2d Aff. DeSoto ¶ 3, Ex. 1: Dep. Alexis Nunez 11:9-12:17, Jan. 11, 2018. At the deposition Defendants' attorney asked for a copy of the most recent exchange and Alexis' attorney responded "Okay." 2d Aff. DeSoto, Ex. 1: Dep.

Nunez 11:16-18. However, despite the clear agreement, to date Alexis has provided no document containing any of her communications with Marco. Since Marco was Alexis' father, the first one to molest her, and is a Third-Party Defendant in this action, the communications between them are clearly relevant.

In addition to refusing to provide details regarding Marco Nunez, Plaintiffs have moved to strike the Defendants' Third-Party Complaint against him. Plaintiffs argue on pages 2-3 of their Response to Defendants' Motion to Compel that their motion to dismiss the Third-Party Complaint is reason enough to decline to provide information about Marco Nunez. Plaintiffs do not argue that they lack information about his whereabouts, which suggests that the electronic discovery sought will likely reveal information about Marco's whereabouts as well as lead to admissible information about Alexis' relationship with the man who first abused her.

Plaintiffs fail to point out any legitimate reason not to comply with the Defendants' original demand and should be ordered to comply with the original request.

B. Plaintiff Holly McGowan's Criminal History Is Relevant

Plaintiff Holly McGowan concedes that the court could "find Plaintiff's criminal history relevant to the limited issue of *emotional health damages*." Pls.' Resp. Defs.' Mot. Compel Prod. Docs. at 4, May 17, 2018 ("Pls.' Resp."). McGowan also rightly points out the Defendants "are already in possession of many documents" related to her criminal history. However, some of the documents are not available to Defendants and are not publicly available because of on-going criminal proceedings that – at the time of her deposition – McGowan testified were "still being litigated" (referring to her DUI

prosecution). 2d Aff. DeSoto ¶ 5, Ex. 3: Dep. Holly McGowan 21:7-14; 208:6-209:25, Jan. 9, 2018. These documents are relevant. They are limited in scope and are in no way an effort to “harass, embarrass, and oppress” Plaintiff as she broadly asserts.

C. Plaintiff Alexis Nunez Placed Her Emotional Health at Issue

Defendants’ REQUEST FOR PRODUCTION NO. 15 to Alexis Nunez requested “All photographs of Plaintiff Alexis Nunez taken during the 1999-2007 time period.” According to her deposition testimony, Alexis was born December 9, 1996 (Dep. Nunez 8, 19, 20). 2d Aff. DeSoto ¶ 6, Ex. 4. Marco left her home in 2000/2001. 4th Aff. Kathleen L. DeSoto ¶ 3, Ex. A: Dep. Nunez 14:6-7. Sometime before leaving the home, Marco molested Alexis. Any photographs of Alexis and Marco, taken either before or after he left the home, will likely provide evidence of the family dynamics, of Alexis’ state of mind when in her father’s company, and of her “established course of life,” which she alleges has been altered.

Defendants offered to limit their requests to photos taken of Alexis over an 8-year timespan at school and during vacations and holidays. So far, she has produced 9 photos taken between 1999-2007 and indicates that she continues to search for other “reasonably responsive pictures in good faith.” Pls.’ Resp. at 5. At the same time, Alexis argues in her Response that she “cannot agree to comply with Defendants (sic.) overbroad and unreasonable request.” Pls.’ Resp. at 5. Defendants’ request is neither overbroad nor unreasonable. Alexis’ claim of loss of enjoyment of her quality of life make photos of her during the time requested highly relevant to her claim and to the defenses in the lawsuit.

Since Maximo Reyes, Marco Nunez, Brandon Pieper and Peter McGowan are all persons who apparently harmed one or both of the Plaintiffs by abusive conduct, social media concerning any of them as well as any comments or postings about, or photos of them, would be relevant to this lawsuit.

Defendants request this Court to order the Plaintiffs to comply with the original request for production of discoverable documents.

II. CONCLUSION

For the foregoing reasons, as well as those expressed in their motion, the Religious Defendants respectfully request that this Court enter an order compelling Plaintiffs to produce those photographs, e-mail and postings of their social media that contain information that pertains to their enjoyment of life, their emotional states, their claims that they were harmed by Maximo Reyes, information about Maximo Reyes' whereabouts, and information about harm done to one or both Plaintiffs by Marco Nunez or Brandon Pieper or Peter McGowan.

DATED this 4th day of June, 2018.

Attorneys for Religious Defendants/Third-Party
Plaintiffs:

GARLINGTON, LOHN & ROBINSON, PLLP

By Kathleen L. DeSoto
Kathleen L. DeSoto

CERTIFICATE OF SERVICE

I hereby certify that on June 4, 2018, a copy of the foregoing document was served on the following persons by the following means:

 Hand Delivery
3, 5 Mail
 Overnight Delivery Service
 Fax (include fax number in address)
1-2, 4 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. Matthew A. McKeon
McKeon Law Firm, PLLC
257 W. Front St., Ste. A
Missoula, MT 59802
matthew@mckeonlawoffice.com
Attorneys for Third-Party Defendant Ivy McGowan-Castleberry

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

A handwritten signature in cursive script, appearing to read "Jackie Rucker", is written over a horizontal line.