

Weld County, Colorado, District Court P.O. Box 2038 Greeley, CO 80632-2038 (970) 351-7300	FILED Document -- District Court 2009CV991 CO Weld County District Court 19th JD Filing Date: Jun 17 2010 3:37PM MDT Filing ID: 31703281
<b>CRAIG D BUCKLEY,</b> <b>Plaintiff,</b>  v.  <b>DREAM STONE, INC, SCOTT MURPHY, EVE</b> <b>MURPHY, and RON MURPHY,</b> <b>Defendants.</b>	<b>Case No: 09CV991</b> <b>Div. 1</b>
<b>ORDER RE: PLAINTIFF'S MOTION TO COMPEL DISCOVERY</b>	

This matter is before the court on the Plaintiff's Motion to Compel Discovery, filed with the court on April 26, 2010. Defendants have filed a response and Plaintiff has filed a reply.

Plaintiff presented the Defendants with written request for discovery on March 31, 2010. Plaintiff's request for discovery contained twenty sections, number 1-20. See Exhibit 1 of Plaintiff's Motion. The Defendants provided a response to Plaintiff objecting to Discovery Requests 1, 2, 4, 5, 6, 7, 8, 10, 13, 14, 16, 17, 18, 19 and 20, stating that the requests were immaterial and irrelevant to Plaintiff's claims for wrongful termination and nonpayment of vacation pay.

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Plaintiff's Discovery Request 9 seeks a witness list from Defendants and Defendants have agreed to provide the actual list of witnesses to Plaintiff at the time the witness list is to be disclosed under the Colorado Rules of Civil Procedure. Defendants recognize their obligation to provide a witness list to Plaintiff within the time requirements of the rules, and no order from the court is necessary at this time.

Defendant informed Plaintiff that the documents requested in Discovery Request 12 did not exist.

Plaintiff has withdrawn Discovery Requests 2, 6, and 15.

Plaintiff challenges Defendants' claims of immateriality and lack of relevance for Discovery Requests 1, 3, 4, 5, 7, 8, 10, 11, 12, 13, 14, 16, 17, 18, 19, and 20, and Plaintiff seeks an order from this court compelling Defendants to provide the items listed in each of those discovery requests.

## **I. LEGAL STANDARD**

Colorado Rule of Civil Procedure 26 provides that “parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party”. It further provides that “[t]he information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence”. Thus, so long as information is relevant, it is discoverable. Colorado Rule of Evidence 401 defines relevant evidence as evidence “having any tendency to make the existence of any fact that is a consequence to the determination of the action more probable or less probable than it would be without the evidence.”

## **II. ANALYSIS**

Plaintiff has raised several claims for relief in his complaint, including, but not limited to, wrongful discharge from employment, breach of implied contract, negligent and intentional infliction of emotional distress, undue influence, and extortion. Plaintiff alleges that the Defendants forced Plaintiff, under threat of termination and financial ruin, to: (1) engage in software piracy and unlawfully distributing pirated computer software internationally; (2) assist Defendants with committing fraud against the Internal Revenue Service, the Colorado Department of Revenue, and the Colorado Department of Labor and Employment; (3) testify untruthfully at another employee’s unemployment benefits hearing; (4) aid Defendants with defrauding numerous customers; and (5) to ignore Defendants’ theft of a Ricoh copier.

The court will consider Plaintiff’s discovery request letter to Defendants as a request for production of documents pursuant to C.R.C.P. 34(a).

Plaintiff filed for unemployment benefits with the Colorado Department of Labor and Employment (“CDLE”) and he was initially awarded unemployment benefits. Defendant’s challenged the award of unemployment benefits and Plaintiff was then denied benefits. Plaintiff appealed and was awarded unemployment benefits. Plaintiff currently has a claim pending before the CDLE for vacation pay he believes Defendants owe to him.

### **A. Plaintiff’s Discovery Request 1**

Plaintiff’s Request 1 seeks copies of all of Dream Stone’s security logs for the period of November 2007 through January 2008, including when the security system was armed or disarmed, and all documents pertaining to monitoring the Dream Stone premises. Plaintiff argues that this information is or may lead to relevant information to show that he was continuously employed by Defendants from July 2006 through September 2008. Plaintiff states that Defendants have asserted in CDLE vacation pay action that Plaintiff worked for Defendants from July 2006 until December 6, 2007, when he quit his job, and then again from December 11, 2007 until October 3, 2008. Plaintiff believes that Defendants are claiming that he was not employed by the company from December 6-10, 2007, in an attempt to avoid paying Plaintiff vacation pay in the CDLE case. Plaintiff

states that the security logs would confirm that he worked for the company between December 6, 2007 and December 11, 2007.

Whether Defendants owe Plaintiff payment for accrued vacation pay is an issue before the CDLE and not this court. The court agrees with Defendants that the security logs and other security documents are not relevant to any of Plaintiff's claims in this case, and the court denies Plaintiff's request to compel production of items listed in Discovery Request 1.

#### **B. Plaintiff's Discovery Request 3**

Plaintiff requests copies of all unemployment filings, reports, replies, and correspondence written by any former employee to/from CDLE, for all employees terminated by Defendants between January 2005 and March 2010.

Defendants responded to Plaintiff that they would provide all information related to Plaintiff's unemployment claim but not for any other employee.

Plaintiff has claimed that he was forced by Defendants, under threat of job termination, to testify untruthfully at an unemployment compensation hearing concerning another employee of Dream Stone. Plaintiff has not provided court with the name of this former Dream Stone employee. The court finds that information pertaining to this other employee's unemployment claim is relevant and the court will order the Defendants to provide this information to Plaintiff. Plaintiff is to provide the Defendants with this person's name.

The court finds that unemployment claims made by employees of Defendants, other than Plaintiff and the employee referenced in the previous paragraph, is not relevant and the Defendants are not required to provide that information to Plaintiff.

#### **C. Plaintiff's Discovery Request 4**

Plaintiff seeks copies of all inspections and findings made by the Occupational Safety and Health Administration ("OSHA") for the period of July 2006 through March 2010. At the outset, the court notes that Plaintiff has requested OSHA reports for October 4, 2008 through March 2010, which is a period of time when Plaintiff was not even employed by Defendants. The Plaintiff has not provided why OSHA reports from this period of time is relevant to his claims against Defendants.

Regarding the period from July 2006 until October 3, 2008, which is when Plaintiff was employed by Defendants, Plaintiff has not established why OSHA reports are relevant to his claims for relief. Therefore the court will not compel Defendants to provide OSHA reports to Plaintiff.

#### **D. Plaintiff's Discovery Request 5**

Plaintiff has requested copies of the time cards and check stubs for all employees for the period between November 2007 and January 2008. Plaintiff argues that this

information is relevant to show that Plaintiff was employed by Defendants between December 6, 2007 and December 11, 2007. Plaintiff states that these time cards and pay stubs will confirm that no other employee worked 48 ½ hours between December 3 and 5, 2007, and this will show that Defendants' claims that he quit on December 6, 2007 and was rehired on December 11, 2007 are false.

This information may be relevant to Plaintiff's CDLE vacation pay claim, but the court fails to see the relevance to the issues raised by Plaintiff in this case. Plaintiff's request for discovery of other employees' time cards and pay stubs is denied.

#### **E. Plaintiff's Discovery Request 7**

In Discovery Request 7, Plaintiff seeks copies of all contracts, receipts, bills, invoices, and e-mails pertaining to Etemplate Systems, Tri-Tech Solutions, Paul Hansen, and Elaine Hansen.

Plaintiff states in paragraph 52 of his motion that the Defendants and witnesses to be called in this case "have admitted that the software may have been pirated". On November 17, 2009, Plaintiff filed a motion for expedited discovery in which Plaintiff asserted that Defendants purchased the Etemplate program from Paul Hansen. Plaintiff and another Dream Stone employee attended a training seminar in North Carolina on the use of the Etemplate program. Plaintiff claimed that Defendant Scott Murphy was upset that the software could only be used on a single machine and he sought a way for the Sentinel security device preventing duplication could be circumvented. Plaintiff states that Scott and Eve Murphy directed Plaintiff to contact a source in Russia to obtain software to "crack" the Etemplate Sentinel security device. Plaintiff indicates that Eve Murphy provided Plaintiff \$400 to purchase the software from Russia and she directed Plaintiff to purchase the software through Plaintiff's personal Paypal account. Plaintiff purchased the software for \$322.95 and informed Eve Murphy that the price was less than \$400. Plaintiff stated that Eve Murphy told him to keep the difference because it was important that the amounts did not match. Plaintiff asserts that he kept a copy of the cracking software and a record of his actions. Plaintiff also asserts that Scott Murphy has provided pirated copies of Etemplate software to other persons.

If these allegations are true, Plaintiff, under threat of being fired from his job, assisted Defendants with copyright violations of protected software belonging to Paul Hansen and/or Etemplate Systems. In the present motion, Plaintiff states that witnesses admitted that the software "may" have been pirated. The use of the word "may" by Plaintiff in his motion for discovery is far less assertive and certain than the language used by Plaintiff in his November 17, 2009 to describe the software piracy. Nonetheless, the court finds that Plaintiff has provided a sufficient basis for the court to compel the Defendants to provide the information requested in Request 7.

#### **F. Plaintiff's Discovery Request 8**

Defendant requests copies of all licensing agreements and/or celebrity endorsements for any company held by Defendants to include, but not limited to, those of Americanacouture.com, and celebrities Halle Berry, Jessica Simpson, Drew Barrymore,

Spike Lee, Christina Aguilera, Alicia Keys, Jennifer Aniston, Sarah Michelle Gellar, Sheryl Crow, and others not specifically mentioned. Plaintiff refers to the motion he filed on November 17, 2009, and incorporates the content of that motion as part of his motion to compel discovery.

The court has again reviewed Plaintiff's motion of November 17, 2009, and in that motion Plaintiff refers to civil and criminal actions in Arizona involving a company called Americana Couture and the owners of that company, Mark and Maryanne Chisholm. The Chisholms were found liable for fraud in the civil case in 2002, and convicted of fraud and theft from investors in the criminal cases in 2009. The Chisholms were sentenced to lengthy terms of incarceration and ordered to pay restitution in the criminal cases. Millions of dollars in civil judgments have been entered against the Chisholms in the civil case.

Americana Couture appears to have been an enterprise specializing in clothing sales, primarily through internet marketing. The celebrities referenced by Plaintiff in his motion appeared in advertisements featuring Americana Couture line of clothing.

Plaintiff has provided copies of electronic mails between Mark Chisholm and Defendant Eve Murphy. Eve Murphy owned, or was affiliated with, companies called Luxestar and Darkhorse Duplication. These companies apparently contracted with the Chisholms and/or Americana Couture to market, produce, distribute, or sell Americana Couture clothing. It is not entirely clear from the information provided by Plaintiff what exactly Eve Murphy or her companies did for or with Americana Couture or the Chisholms. Eve Murphy was not a party in the civil case in Arizona.

Plaintiff has established that there was a business relationship between Eve Murphy and the Chisholms and Americana Couture, but Plaintiff has failed to show how this relationship is relevant to his claims in this case. The documents submitted by Plaintiff prove that the Chisholms misappropriated funds from investors to the tune of millions of dollars; however, Plaintiff has tendered no information to show that Eve Murphy was involved in any way with the Chisholm's criminal or fraudulent acts. More importantly, Plaintiff has failed to show how the acts of the Chisholms, and Eve Murphy's business relationship with them, relate in any way to Plaintiff's claims that Defendants unlawfully terminated his employment. For these reasons the Plaintiff's Discovery Request 8 shall be denied.

#### **G. Plaintiff's Discovery Request 10**

Plaintiff requests complete manufacturing, production, templating, and installation schedules for Dream Stone for the period of time between November 2007 and January 2008. Plaintiff asserts that this information is relevant to rebut Defendants' claims that Plaintiff quit employment on December 6, 2007 and was rehired on December 11, 2007. This information may be relevant in Plaintiff's CDLE claim for vacation pay, but the court fails to see the relevance in this case. Plaintiff's Discovery Request 10 is denied.

## **H. Plaintiff's Discovery Request 11**

In Discovery Request 11, Plaintiff seeks copies of all e-mails, recorded conversations, letters, memos, journals, or diaries to/from any current or former Dream Stone employee regarding the termination of employment, lawsuit, or any matter involving Plaintiff or Pamela Reynolds.

Defendants responded to Request 11 by stating that they will make available to Plaintiff all e-mails, letters, memos retained by Dream Stone regarding Plaintiff's termination of employment. Defendants indicated that they do not have any journals or diaries. With regard to the lawsuit filed in Boulder County involving these parties, Defendants referred Plaintiff to the lawyer who represented Plaintiff in that case.

Plaintiff argues that Defendants have improperly limited the discovery to the letters, e-mails, and other documentation retained by Dream Stone pertaining to Plaintiff's termination of employment. Plaintiff takes the position that "all e-mails, letters, memos to or from any current or former Dream Stone employee and related documents requested should be discoverable as relevant..."

Plaintiff's original Request 11, in which he seeks correspondence between Defendants and current and former employees related to his termination of employment, is appropriate as the content of such correspondence may be relevant to the claims in this case. Likewise, correspondence between Defendants and former and present employees relating to Pamela Reynolds' termination of employment is also appropriate. Ms Reynolds is the significant other of Plaintiff and the circumstances of Ms. Reynolds' termination may be relevant to the termination of Plaintiff.

Plaintiff now seeks to expand his Request 11 to include *all* correspondence between Defendants and former or current employees, regardless of the topic of those correspondences. The request for all correspondence between Defendants and their employees, present or former, is overly broad and will be denied by the court.

## **I. Plaintiff's Discovery Request 12**

Plaintiff requests "copies of all cancelled checks, check stubs, check registry entries, and all other discoverable documents, which, in any way, may indicate misappropriation of funds, unemployment fraud, and/or tax evasion/fraud by Defendants."

Defendants responded to this request by stating that no such documents exist.

Plaintiff argues that Defendants tendered copies of documents in the original CDLE case involving Plaintiff's claim for unemployment benefits, therefore, Defendants have "opened the door" to Plaintiff using the documents in this case. Plaintiff believes that these documents show that Defendants committed tax fraud and violations of labor laws. Plaintiff fails to articulate a factual basis to support his conclusion.

Colorado law provides that bank records are confidential in certain instances. See *Charnes v. DiGiacomo*, 612 P.2d 1117 (Colo.1980) (holding reasonable expectation of

privacy by bank depositor in the bank's records of depositor's financial transactions). Tax returns are also confidential in most instances. "In light of this strong policy in favor of protecting confidentiality of tax returns, we have held that the party seeking the release of a tax return bears the burden of showing a 'compelling need' for the return. Absent a compelling need, a subpoena for a tax return should be quashed." *Alcon v. Spicer*, 113 P.3d 735, 743 (Colo.2005). "We now hold that, because of their confidential nature, tax returns may not be ordered disclosed unless a court finds that they are relevant to the subject of the action and there is a compelling need for information contained in the returns because the information sought is not otherwise readily available." *Stone v. State Farm Mutual Auto Insurance Company*, 185 P.3d 150, 159 (Colo. 2008).

Plaintiff has not shown that Defendants' bank records and tax returns are relevant, which is a far lower standard than showing a compelling need for these records. Plaintiff's Discovery Request 12 is denied.

#### **J. Plaintiff's Discovery Request 13**

Plaintiff requests "copies of all Defendants' medical records, psychological evaluations, doctor prescribed prescriptions, and all other discoverable documents which may indicate, including, but not limited to: bipolar disorder, manic-depressive behavior, and any other psychological diagnosis."

Defendant's responded by stating that these requests are irrelevant and immaterial to Plaintiff's claims for wrongful termination and nonpayment of vacation pay.

Plaintiff argues that these documents are relevant because they relate to Plaintiff's claims that Defendant Scott Murphy displayed wild fits of rage towards Plaintiff and these fits of rage form the basis of Plaintiff's claims for emotional distress. Plaintiff believes that Scott Murphy may suffer from a bipolar disorder.

Plaintiff's claim is based upon outward manifestations of Scott Murphy towards Plaintiff, and it Mr. Murphy's behaviors that are relevant to Plaintiff's claim of emotional distress. Whether Mr. Murphy has or has not been diagnosed with a psychological or personality disorder is not relevant in this case. Medical and psychological records are privileged, and that privilege can only be pierced if the patient has waived the privilege. *People v. Wittrein*, 221 P.3d 1076 (Colo. 2009). A waiver of the privilege can be express or implied. *People v. Sisneros*, 55 P.3d 797 (Colo. 2002). Mr. Murphy has not injected his psychological condition into this case and Plaintiff has not otherwise established that Scott Murphy expressly or impliedly waived this privilege.

Plaintiff's Discovery Request 13 is denied.

#### **K. Plaintiff's Discovery Request 14**

Plaintiff requests "copies of all .jpg, .pmr, and .est files generated on any Dream Stone computer by any Dream Stone employee from November 2007 through January 2008.

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Defendants responded by stating that these requests are irrelevant and immaterial to Plaintiff's claims for wrongful termination and nonpayment of vacation pay.

Plaintiff asserts that this information is relevant to show that he was employed between December 6, 2007 and December 11, 2007. This information may be relevant in Plaintiff's CDLE claim for vacation pay, but the court fails to see the relevance in this case. Plaintiff's Discovery Request 14 is denied.

#### **L. Plaintiff's Discovery Request 16**

Plaintiff requests that Defendants provide copies of all files or executables containing the name "SENTEMUL", which Plaintiff states have been installed on a minimum of five computers belonging to Defendants.

Defendants responded by stating that these requests are irrelevant and immaterial to Plaintiff's claims for wrongful termination and nonpayment of vacation pay.

Plaintiff argues that "SENTEMUL" is the illegally obtained licensing software purchased from Russia that was used to bypass the security device for the Etemplate software. Plaintiff states that he assisted Defendants with obtaining the "SENTEMUL" software for the purpose of using the Etemplate program on more than one of Defendants' computers without paying the licensing fee to Etemplate. Plaintiff indicates that he assisted Defendants because Defendants threatened his job if he did not comply.

The court finds that this information is relevant to Plaintiff's claims and orders Defendants to provide to Plaintiff the information requested in Discovery Request 16.

#### **M. Plaintiff's Discovery Request 17**

Plaintiff requests copies of any bookings, reservations, travel accommodations, hotel accommodations, electronic mail correspondence, which in any way relate to Mr. Bal Silva's travel to Colorado between July 2006 and September 2008. Defendants responded that this information is not relevant or material to Plaintiff's claims in this case.

Plaintiff believes that Mr. Silva received three pirated versions of Etemplate from Scott Murphy, which were "burned" onto three of Mr. Silva's laptop computers by Plaintiff. Plaintiff states that he installed this software onto Mr. Silva's computer because Defendants threatened termination from employment if Plaintiff did not comply.

The court finds that this information is relevant to Plaintiff's claims and orders Defendants to provide to Plaintiff the information requested in Discovery Request 17.

#### **N. Plaintiff's Discovery Request 18**

Plaintiff has requested copies of handwriting samples, predating September 2008, of Eve Murphy, Scott Murphy, and Juan Mireles. Defendant responded to Plaintiff that these requests were not relevant to Plaintiff's claims.

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Plaintiff believes that Defendants will attempt to introduce testimony at trial from these three people that can be refuted by handwriting samples existing prior to September 2008. Plaintiff has not articulated why he believes these handwriting samples will refute the testimony of these three witnesses. Plaintiff's Discovery Request 18 is denied.

**O. Plaintiff's Discovery Request 19**

Plaintiff seeks a copy of the complete .txt formatted job log file contained on the computer Plaintiff used while employed with Defendant. Plaintiff believes this file will contain a record of all work he performed for Defendants from October 2006 through September 2008. Plaintiff asserts that this information is relevant to disprove Defendant's claims that Plaintiff is ineligible to collect earned and accrued wages under the Colorado Wage Act. This information is relevant in Plaintiff's CDLE cases, but does not appear to be relevant to his claims in this case. Plaintiff's Discovery Request 19 is denied.

**P. Plaintiff's Discovery Request 20**

Plaintiff seeks all documents, including motions, discovery materials, and pleadings related to the case of *Todd Coday v. Dream Stone, Inc.*, Weld District Court case 09CV334. Plaintiff believes that information from the *Coday* case is relevant to show that Defendants routinely abused employees at Dream Stone.

It appears that Plaintiff seeks information contained in the court file for the *Coday* case. Plaintiff can obtain copies of documents filed with the court in the *Coday* case through the court clerk's office. There is a fee charged by the court for the search, retrieval, and copying of information from a court file. Plaintiff may be able to view the file through Lexis/Nexis as well.

The court will not order Defendants to provide Plaintiff with the documents contained in the court file in the *Coday* case because Plaintiff can obtain those directly through the court or Lexis/Nexis.

**III. ORDER**

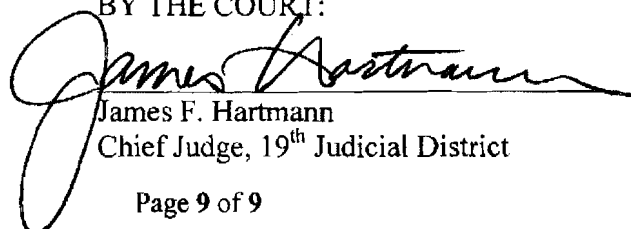
Plaintiff's Discovery Requests 1, 4, 5, 8, 10, 12, 13, 14, 18, 19, and 20 are DENIED.

Plaintiff's Discovery Requests 3 and 11 are GRANTED IN PART, as set forth in this order.

Plaintiff's Discovery Requests 7, 16, and 17 are GRANTED.

Dated: June 17, 2010

BY THE COURT:

  
James F. Hartmann  
Chief Judge, 19<sup>th</sup> Judicial District