IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

GENERAL CONFERENCE CORPORATION OF SEVENTH-DAY ADVENTISTS and GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS,	)	
Plaintiffs,	)	
v.	)	Case No.: 1:06-cv-01207
WALTER MCGILL d/b/a CREATION SEVENTH DAY ADVENTIST CHURCH *et al.,*	)	
Defendant.	)	

OBJECTION TO MOTION TO ADD FURTHER SPECIFICS TO THE COURT'S PERMANENT INJUNCTION ENTERED MAY 28, 2009, AS FURTHER DEFINED BY ORDER ENTERED JANUARY 6, 2010

Dr. David Aguilar, acting *pro se*, respectfully objects to that portion of the aforementioned motion entered by Plaintiffs on July 23, 2015 requesting the Court to add "adventistry.to" and "faithofjesus.to" to the list of enjoined websites and domain names.

Background

I, Dr. David Aguilar, am a Belizean national residing in Belize. I am the owner and operator of the websites www.adventistry.to and www.faithofjesus.to (hereafter referred to as "the websites"), two of several sites named in the Plaintiff's Motion to Add Further Specifics to the Court's Permanent Injunction entered May 28, 2009, as Further Defined by Order Entered January 6, 2010 ("Plaintiff's Motion").

Basis of Objection

1. Lack of Personal Jurisdiction

Pursuant to Fed. R. Civ. P. 12(b)(2), I do hereby assert that the U.S. District Court lacks personal jurisdiction over myself and the websites. As a foreign non-resident non-party to the

instant lawsuit, neither I nor the websites are operating, residing, or conducting business within the jurisdiction of the United States. In order for the aforementioned websites to be enjoined, personal authority must be established pursuant to the Due Process clause of the 4th Amendment.

As the basis of the motion's request to enjoin adventistry.to and faithofjesus.to is the aforementioned injunction against Walter McGill, any action against a website under my ownership must stem from the application of Fed. R. Civ. P 65(d)(2). As the Ninth Circuit held, however:

> "A district court cannot exercise personal jurisdiction over a nonparty to a litigation, on the basis that the nonparty is acting "in active concert or participation," within the meaning of Fed.R.Civ.P. 65(d), with a party who is subject to an injunction, unless personal jurisdiction is established over the nonparty."[1]

As to whether personal jurisdiction can be established over a foreign nonresident, the Ninth Circuit ruled thusly in *Reebok International Ltd. v. McLaughlin:*

> *"*In fine, we do not agree that when a national of a foreign country follows the law of that country in that country it can be dragged halfway around the world to answer contempt charges arising out of a foreign court's ineffective order." [2]

The case in *Reebok* revolved around whether B.I.L., a bank based in Luxembourg, could be held in violation for knowingly aiding in a transfer of funds on behalf of Byron McLaughlin, against whom an injunction had been issued enjoining him and all relevant parties under Fed. R. Civ. P 65(d)(2) from transferring funds. The Ninth Circuit went on to overturn the lower court's ruling, finding that the court did not have personal jurisdiction over B.I.L., as they could not be held liable for violating an injunction that had no authority in their country.

In order to establish personal jurisdiction over individuals operating on the internet, the Federal court proposed a three-pronged test in *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997) to establish whether the "minimum contacts" test for personal jurisdiction had been met:

"Internet makes it possible to conduct business throughout the world entirely from

> a desktop. With this global revolution looming on the horizon, the development of the law concerning the permissible scope of personal jurisdiction based on Internet use is in its infant stages. The cases are scant. Nevertheless, our review of the available cases and materials reveals that the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet. This sliding scale is consistent with well developed personal jurisdiction principles. At one end of the spectrum are situations where a defendant clearly does business over the Internet. If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper. E.g. *CompuServe, Inc. v. Patterson, 89 F.3d 1257 (6th Cir.1996)*. **At the opposite end are situations where a defendant has simply posted information on an Internet Web site which is accessible to users in foreign jurisdictions. A passive Web site that does little more than make information available to those who are interested in it is not grounds for the exercise personal jurisdiction.** E.g. Bensusan Restaurant Corp., v. King, 937 F.Supp. 295 (S.D.N.Y.1996). The middle ground is occupied by interactive Web sites where a user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site. E.g. Maritz, Inc. v. Cybergold, Inc., 947 F.Supp. 1328 (E.D.Mo.1996)."

The websites fall entirely within the second of these categories; they are informational websites only. Neither I nor any portion of the websites are involved in the conducting of business, transactions, or information of a commercial nature, nor are any contracts in place with any resident of the United States or the state of Tennessee to such effect. The websites further have little to no interactivity; they are collections of information available to those who are interested in it.

As such, the court should find that it lacks personal jurisdiction over myself and the websites, and should DENY those portions of the Plaintiff's Motion which relate to the websites.

2. Failure to State a Claim Upon Which Relief Can be Granted

Pursuant to Fed. R. Civ. P. 12(b)(6), I do hereby assert that the Plaintiffs have failed to state a claim by which adventistry.to or faithofjesus.to can be enjoined. No portion of the domain names, "adventistry.to" or "faith of jesus.to," are in violation of the injunction. Further, the wording of the injunction against Mr. McGill is as follows:

> "Defendant and his agents, servants and employees, and all those persons in active concert or participation with them, are forever enjoined from using the mark SEVENTH-DAY ADVENTIST, including the use of the words SEVENTH-DAY or ADVENTIST, or the acronym SDA, either together, apart, or as part of, or in combination with any other words, phrases, acronyms or designs, or any mark similar thereto or likely to cause confusion therewith, in the sale, offering for sale, distribution, promotion, provision or advertising of any products and services, and including on the Internet, in any document name, key words, metatags, links, and any other use for the purpose of directing Internet traffic, at any locality in the United States. […]" (D.E. No. 98)

The websites are entirely operated outside of "any locality in the United States." Their files are neither hosted nor stored within the United States. The domain names are registered in and use the ccTLD of the nation of Tonga. I, myself, am a Belizean national administrating the websites from my home country. As no facet of the websites' operation involves any locality in the United States, and as the injunction explicitly and only enjoins actions at any locality in the United States, the court should find that the Plaintiff has failed to state a factual claim by which the websites may be enjoined. In fact, no explanation of the websites' supposedly infringing nature is contained in the Plaintiff's Motion; they are simply listed among several other websites.

With these facts in mind, the court should find that the websites do not violate the injunction, and DENY those aspects of the Plaintiff's Motion which relate to the websites.

3. The Lanham Act Lacks Extraterritorial Jurisdiction

In *Vanity Fair Mills, Inc. v. T. Eaton Co.*, [3] the Second Circuit applied the tripartite *Bulova* test established in the Supreme Court's ruling in *Steele v. Bulova Watch Co.* [4] to determine whether the extraterritorial application of the Lanham Act, upon which the injunction in the instant case relies, would be warranted. The first of the *Vanity Fair* factors requires that the conduct of the defendant have a substantial effect on United States commerce. The second factor requires that the defendant must be a United States citizen. The third and final factor requires that there must be an absence of conflict with foreign law. The *Vanity Fair* Court noted that "the absence of one of the above factors might well be determinative" and the absence of two factors "is certainly fatal." (234 F 2d 633, 643 (2d Cir 1956))

As I am a non-citizen of the United States, the second factor fails *de facto*. In weighing the "substantial effect" factor, the Ninth Circuit has required the Plaintiffs to demonstrate negative impact on their commerce, [5] while the Second Circuit required "significant" impact be shown. [6] The Plaintiff has to date provided no evidence of any actual negative commercial impact of the existence of these websites, much less have they offered evidence of "significant" impact.

As recently as 2013, the District Court found, based on the *Vanity Fair* factors, that merely operating a website that is accessible in the United States does not satisfy the "substantial effect on U.S. commerce" factor. In *Juicy Couture, Inc. v. Bella Int'l Ltd.*, the Court found that a website operating from Hong Kong with the sole purpose of commercial activity, which further offered international shipping to the United States, was insufficient to show a "substantial effect" due to having only sold $3,000.00 worth of goods to U.S. citizens. The Court also noted that, while great likelihood of confusion can satisfy the "significant impact" factor, to do so relies on proof of actual confusion. As there is no proof of actual confusion or negative impact on U.S. commerce, and as the sites in question have zero commercial interactivity and have generated a total of $0 U.S. in transactions with U.S. citizens, neither the first nor the second prong of the *Vanity Fair* test is satisfied.

As such, the Court should DENY those aspects of the Plaintiff's Motion which relate to the websites.

Respectfully submitted,

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Filing pro se

[1]*Canterbury Belts Ltd. v. Lane Walker Rudkin, Ltd,* 869 F.2d at 33

[2] *Reebok International Ltd v McLaughlin*, 49 F.3d 1387 (9th Cir. 1995)

[3] *Vanity Fair Mills v. T. Eaton Co., 234 F.2d 633, 638-39* (2nd Cir. 1956)

[4] *Steele v. Bulova Watch Co., 344 U.S. 280 (1952)*

[5] *Ocean Garden, Inc. v. Marktrade Co., Inc., 953 F.2d 500* (9th Cir. 1991)

[6] *Atlantic Richfield Co. v. Arco Globus Int'l Co., 150 F.3d 189, 192* (2d Cir.1998)

[7] *Juicy Couture, Inc. v. Bella Int'l Ltd*., No. 12 Civ. 5801, 2013 U.S. Dist. LEXIS 34846 (S.D.N.Y. Mar. 12, 2013)

CERTIFICATE OF SERVICE

I hereby certify that on this the 31st day of August, 2015, a copy of the foregoing document was served via FedEx with Postal Proof of Delivery to the following:

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I hereby certify that on this the 31st day of August, 2015, a copy of the foregoing document was served via First Class Air Mail to the following:

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