

**Case No. 09-5723**

**UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT**

GENERAL CONFERENCE CORPORATION OF SEVENTH-DAY ADVENTISTS;  
GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS, an Unincorporated  
Association,

Plaintiffs - Appellees

v.

WALTER MCGILL, dba Creation 7th Day Adventist Church, et al.,

Defendant - Appellant

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On appeal from the U.S. District Court of Tennessee,  
Western District, at Jackson, Tennessee (Civ. No. 06-1207)

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**BRIEF OF THE APPELLANT**

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**STATEMENT OF CORPORATE AFFILIATIONS**  
**AND FINANCIAL INTEREST**

Pursuant to 6th Cir. R. 26.1, the Appellant makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? **No.**
2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? **No.**

s/Charles L. Holliday  
Counsel for Appellant

Date: August 17, 2009

**TABLE OF CONTENTS**

Corporate Disclosure Form.....i

Table of Contents.....ii

Table of Authorities .....iv

Statement in Support of Oral Argument .....ix

Statement of Jurisdiction ..... 1

Statement of the Issues.....2

Statement of the Case .....3

Statement of the Facts .....6

Summary of Argument .....7

Argument.....11

**I. SUBJECT MATTER JURISDICTION.....11**

**A. Standard of Review..... 13**

**B. Seventh-Day Adventism is a Religion..... 13**

**C. Neutral Principles Cannot be Applied Without Resolving an Underlying Doctrinal Dispute.....17**

**D. An Exception is Necessary for Religious use of Intellectual Religious Property.....23**

**II. FAILURE TO STATE A CLAIM.....25**

**A. Standard of Review.....26**

**B. The Name of a Religion is Inherently Generic.....27**

**III. SUMMARY JUDGMENT.....29**

<b>A. Standard of Review.....</b>	<b>30</b>
<b>B. The Religious Freedom Restoration Act is a Defense to Summary Judgment .....</b>	<b>30</b>
<b>C. The Term “Seventh Day Adventist” Describes a Religion. Plaintiffs’ Evidence Fails to Rebut This and Raises A Genuine Issue of Material Fact as to Whether Plaintiffs’ Mark is Generic.....</b>	<b>36</b>
<b>D. The relevant public and degree of purchaser care establish a Genuine Issue of Material Fact Regarding the Likelihood of Confusion .....</b>	<b>38</b>
Conclusion.....	48
Certificate of Compliance.....	50
Certificate of Service.....	51
Designation of Relevant District Court Documents .....	52

**TABLE OF AUTHORITIES****Cases:**

<i>Alongi v. Ford Motor Co.</i> , 386 F.3d 716 (6th Cir. 2004).....	13
<i>AMF, Inc. v. Sleekcraft Boats</i> , 599 F.2d 341 (9th Cir. 1979).....	45, 46
<i>Bath &amp; Body Works, Inc. v. Luzier Personalized Cosmetics, Inc.</i> , 76 F.3d 743 (6th Cir. 1996).....	27, 36
<i>Benn v. Seventh-Day Adventist Church</i> , 304 F. Supp. 2d 716 (D. Md. 2004).....	14
<i>Blinded Veterans Ass’n v. Blinded Am. Veterans Found.</i> , 872 F.2d 1035 (D.C. Cir. 1989).....	36
<i>Booker v. Brown &amp; Williamson Tobacco Co. Inc.</i> , 879 F.2d 1304 (6th Cir. 1989).....	29
<i>Burgos v. Hopkins</i> , 14 F.3d 787, 790 (2nd Cir. 1994).....	33
<i>Cantwell v. Connecticut</i> , 310 U.S. 296, 303 (1940).....	11, 12
<i>Christian Science Bd. Dir. v. Evans</i> , 520 A.2d 1347 (N.J. 1987).....	27
<i>City of Boerne v. Flores</i> , 521 U.S. 507 (1997).....	31
<i>Daddy's Junky Music Stores v. Big Daddy's Family Music Ctr.</i> , 109 F.3d 275 (6th Cir. 1997).....	13, 41, 44
<i>Dismas Charities, Inc. v. United States DOJ</i> , 401 F.3d 666 (6th Cir. 2005).....	13
<i>Employment Div. v. Smith</i> , 494 U.S. 872 (1990) .....	18
<i>First Independent Missionary Baptist Church v. McMillan</i> , 153 So2d 337 (Fla. D. Ct. App. 1963).....	28
<i>General Conference Corporation of Seventh-Day Adventists v. Raphael Perez</i> , 97 F. Supp.2d 1154 (S.D. Fla. 2000).....	16, 37
<i>Gibson Guitar Corp. v. Paul Reed Smith Guitars, LP</i> , 423 F.3d 539 (6th Cir. 2005).....	39, 40
<i>Graham v. Henderson</i> ,	

89 F.3d 75 (2d Cir. 1996)..... 33

*Guinan v. Roman Catholic Archdiocese,*  
42 F. Supp. 2d 849 (S.D. Ind. 1989).....31

*Gutierrez v. Lynch,*  
826 F.2d 1534 (6th Cir. 1987).....30

*Hammer v. INS,*  
195 F.3d 836 (6th Cir. 1999).....17

*Hankins v. Lyght,*  
441 F.3d 96 (2d Cir. 2006).....31, 32

*Hollings v. Methodist Healthcare, Inc.,*  
474 F.3d 223, 225 (6th Cir.2007).....24

*Homeowners Group, Inc. v. Home Marketing Specialists, Inc.,*  
931 F.2d 1100 (6th Cir. 1991).....39, 42, 43, 46, 47

*Hudspeth v. Figgins,*  
584 F.2d 1345 (4th Cir. 1978).....33

*Hunter v. Ohio Veterans Home,*  
272 F. Supp. 2d 692 (N.D. Ohio 2003).....26, 27

*Interactive Products Corp. v. A2Z Mobile Office Solutions, Inc.,*  
326 F.3d 687 (6th Cir. 2003).....39

*Jacobi v. Blocker,*  
153 F.R.D. 84 (E.D. Va. 1994).....33

*Jandron v. Zuendel,*  
139 F.Supp. 887 (N.D. Ohio 1955).....20, 21

*Jones v. Wolf,*  
443 U.S. 595 (1979).....19

*Maktab Tarighe Oveyssi Shah Maghsoudi, Inc. v. Kianfar,*  
179 F.3d 1244 (9th Cir. 1999).....21, 22

*Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,*  
475 U.S. 574 (1986).....30

*Mattel, Inc. v. Walking Mountain Prods.,*  
353 F.3d 792 (9th Cir. 2003).....45

*McDaniel v. Mirza Ahmad Sohrab,*  
27 N.Y.S.2d 525 (N.Y. 1941).....28

*McDaniel v. Mirza Ahmad Sohrab,*  
29 N.Y.S.2d 509 (N.Y. App. Div. 1941).....28

*Moore, Owen, Thomas & Co. v. Coffey,*  
992 F.2d 1439 (6th Cir. 1993).....34

*Morgan v. Church’s Fried Chicken*,  
829 F.2d 10 (6th Cir. 1987).....26

*Myers v. United States*,  
636 F.2d 166 (6th Cir. 1981).....33

*Nartron Corp. v. STMicroelectronics, Inc.*,  
305 F.3d 397 (6th Cir. 2002).....27

*New Thought Church v. Chapin*,  
159 A.D. 723 (N.Y. 1913).....28

*Ohio Nat’l Life Ins. Co. v. United States*,  
922 F.2d 320 (6th Cir. 1990).....13

*Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial  
Presbyterian Church*,  
393 U.S. 440 (1969).....18, 22

*Purcell v. Summers*,  
145 F.2d 979 (4th Cir. 1944).....12, 28

*Redhead v. Conf. of Seventh-Day Adventists*,  
440 F. Supp. 2d 211 (E.D.N.Y. 2006).....31

*Roskam Baking Co. v. Lanham Mach. Co.*,  
288 F.3d 895 (6th Cir. 2002).....32, 33

*Rweyemamu v. Cote*,  
520 F.3d 198 (2nd Cir. 2008).....31

*Serbian E. Orthodox Diocese v. Milivojevich*,  
426 U.S. 696 (1976).....18, 19

*Seventh-Day Adventists v. Seventh-Day Adventist Kinship International, Inc.*,  
Case No. CV 87-8113 (C.D. Calif. 1991).....3, 14

*Stocker v. General Conference Corporation of Seventh-Day Adventists*,  
39 U.S.P.Q.2D (BNA) 1385, 1996 WL 427638 (T.T.A.B. 1996)..15, 36, 37, 41

*Stone v. Warfield*,  
184 F.R.D. 553 (D. Md. 1999).....33

*Supreme Lodge Knights of Pythias v. Improved Order Knights of Pythias*,  
71 N.W. 470, 471 (Mich. 1897).....8, 43, 44

*The Bd. of Provincial Elders of the S. Province of The Moravian Church v. Jones*,  
159 S.E.2d 545 (N.C. 1968).....27, 41

*The Rosicrucian Fellowship v. The Rosicrucian Fellowship Non-Sectarian Church*,  
245 P.2d 481 (Calif. 1952).....20, 27

*Tomic v. Catholic Diocese of Peoria*,  
442 F.3d 1036 (7th Cir. 2006).....31

*Total Benefits Planning Agency, Inc. v. Anthem Blue Cross & Blue Shield*,  
552 F.3d 430 (6th 2008).....26, 27

*Turbeville v. Morris*,  
26 S.E.2d 821 (S.C. 1943).....28

*Union Nat'l Bank v. Union Nat'l Bank*,  
909 F.2d 839, 845 (5th Cir. 1990).....38

*United States v. Meyers*,  
95 F.3d 1475 (10th Cir. 1996).....30, 35

*United States v. Winddancer*,  
435 F. Supp. 2d 687, 692 (M.D. Tenn. 2006).....24

*Urantia Found. v. Maaherra*,  
895 F. Supp. 1335 (D. Ariz. 1995).....31

*Voyticky v. Vill. of Timberlake, Ohio*,  
412 F.3d 669 (6th Cir. 2005).....13

*Wynn Oil Co. v. Am. Way Serv. Corp.*,  
943 F.2d 595 (6th Cir. 1991).....42, 43

*Zorach v. Clauson*,  
343 U.S. 306 (1952).....9

**U.S. Constitution and Statutes:**

U.S. Const. amend. I.....17

15 U.S.C. § 1114 .....1

15 U.S.C. § 1121 .....1

15 U.S.C. § 1125 .....1

28 U.S.C. § 1291.....1

28 U.S.C. § 1331.....1

28 U.S.C. § 1338.....1

42 U.S.C. § 2000bb .....23, 30

42 U.S.C. § 2000bb-1.....31

42 U.S.C. § 2000bb-3 .....31, 32

42 U.S.C. § 2000e .....24

42 U.S.C. § 2000e-17 .....24

**Rules:**

F.R.C.P. 8(f).....33  
 F.R.C.P. 12(B)(1) .....1  
 F.R.C.P. (B)(6).....1, 26  
 F.R.C.P. (c).....1, 26  
 F.R.C.P. (h) .....1, 26

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David A. Simon, *Register Trademarks and Keep the Faith: Trademarks, Religion and Identity*, 49 IDEA 233, 312 (2009).....9  
 Diego Puig, *Note: To God What is God’s and to Caesar What is Caesar’s: Aesthetic Functionality as a Valve Between Trademark Rights and Religious Freedoms*, 9 J. TECH. L. & POL'Y 81, 101 (2004).....47  
 Jed Michael Silversmith and Jack Achiezer Guggenheim, *Article: Between Heaven and Earth: The Interrelationship Between Intellectual Property Rights and the Religion Clauses of the First Amendment*, 52 ALA. L. REV. 467, 468 (2001).....20  
 K.M. Sharma , *Article: What’s in a Name?: Law, Religion, and Islamic Names*, 26 DENV.J. INT'L L. & POL'Y 151, p. 14-15 (Winter 1998).....19  
 Mark P. McKenna, *Article: The Normative Foundations of Trademark Law*, 82 NOTRE DAME L. REV. 1839, 1915 (2007).....20  
 Restatement of Torts § 729 (1938).....46  
 The Bible, Matthew 22:21 .....7-8

**STATEMENT IN SUPPORT OF ORAL ARGUMENT**

Pastor McGill respectfully submits that oral argument will assist the Court in addressing the issues raised in this appeal, several of which appear to be issues of first impression for this Court, and it will assist the Court in determining whether the District Court had subject matter jurisdiction, whether Plaintiffs' Complaint failed to state a claim, and whether Summary Judgment was proper.<sup>1</sup> Pastor McGill requests an oral argument.

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<sup>1</sup> For clarity and convenience of the Court, the Appellant will refer to the parties by the following titles throughout the Brief: (1) "Pastor McGill" – Walter O. McGill, III, Appellant; (2) "Plaintiffs" – General Conference of Seventh-day Adventists, Appellee, and General Conference Corporation of Seventh-day Adventists, Appellee.

**JURISDICTIONAL STATEMENT**

Plaintiffs commenced this trademark action asserting that jurisdiction was appropriate pursuant to 15 U.S.C. §§ 1114, 1121, 1125 and 28 U.S.C. §§ 1331, 1338. Pastor McGill moved, pursuant to Rules 12(B)(1), (B)(6), (c) and (h) of the Federal Rules of Civil Procedure, to dismiss the Plaintiffs' Complaint on the basis that the District Court lacked subject matter jurisdiction and the Complaint failed to state a claim. The District Court denied Pastor McGill's motion on all counts. The court later granted Plaintiffs partial summary judgment on the trademark and unfair competition claims, and eventually, default on the ancillary claims. Pastor McGill timely filed a Notice of Appeal from that Order. Appellate jurisdiction is proper pursuant to 28 U.S.C. § 1291.

## STATEMENT OF ISSUES

- I. **The words “Seventh Day Adventist” are intellectual religious property that carry great meaning to Pastor McGill and Plaintiffs. Pastor McGill has a sincere religious belief that he must describe his church with these words. Should a court exercise jurisdiction over a religious dispute disguised as a trademark claim that could, in effect, force it to decide that Plaintiffs are the “true” Seventh Day Adventists and exclude Pastor McGill from practicing his faith?**
  
- II. **Adventist Christians’ use of “Seventh Day Adventist” in their church names, together with previous court rulings, and Plaintiffs’ admissions, establish that the term refers to believers of the “Seventh Day Adventism” religion. All believers of a religion may use its name in their church name so long as it is not too similar to another as to cause confusion. Should the District Court have denied Pastor McGill’s Motion to Dismiss any claims that requested injunctive relief for using the name of the religion?**
  
- III. **Summary judgment is appropriate when no genuine issues of material fact exist. Pastor McGill has raised a *prima facie* case under the Religious Freedom Restoration Act, which is a defense to trademark infringement. Old cases and overly broad, outdated surveys are no evidence of a mark’s strength today. Is summary Judgment appropriate when the likelihood of confusion is lessened by the fact that purchasers are likely to exercise a high degree of care and the relevant public readily distinguishes the parties’ goods and services?**

## **STATEMENT OF THE CASE**

The Seventh Day Adventist religion<sup>1</sup> originated from William Miller's prophecies in the early Nineteenth Century. (R. 30-5, Pfaelzer Opinion p. 3). By 1840, its followers were known as Adventists because of their belief that Christ's return was imminent. (R. 30-5, *Id.*). While the major tenants of the religion were in place by 1850, no formal organizational structure was established until September 1860 when a group of delegates selected the name "Seventh-Day Adventist." (R. 30-5, p. 4-5). Plaintiff, the "General Conference of Seventh-day Adventists" was formed in 1863. (R. 30-5, *Id.*).

In 1915, an offshoot movement known as the Seventh Day Adventist Reform Movement formed in Germany. (R. 56-15, encyclopedia entries p. 4). The Seventh Day Adventist Reform Movement still operates today as a worldwide religious organization. (R. 56-8, website). The Branch-Davidian Seventh-Day Adventists are an existing splinter group of the Davidian Seventh-Day Adventist Association, which itself is an offshoot from Plaintiffs that was formally organized in 1942. (R. 56-14, Branch Davidian website; R. 56-15, encyclopedia entries).

Pastor Walter O. McGill, III, was baptized in the Seventh-day Adventist

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<sup>1</sup> Pastor McGill will refer to Seventh Day Adventism as a religion in his Brief. Although certain authorities may classify it as a denomination, this distinction is irrelevant in the context of this case.

Church in 1974. (R. 37-4, McGill Depo. pp. 16 -17). Plaintiffs registered the name “Seventh-day Adventist” in 1981. (R. 30-5, Pfaelzer Opinion p. 6). In 1987, Plaintiffs began suing other denominations that were using the mark. (R. 30-4, The Marik Case: From 1987 to 1990 p. 1).

In 1988, God told Pastor McGill to separate from the Seventh-day Adventist Church. (R. 37-4, McGill Depo. pp. 27-28). Pastor McGill started using the name “Creation Seventh Day Adventist Church” in 1991 because of a divine revelation from God commanding him to use that name. (R. 37-4, McGill Depo. pp. 35, 37). As it is now known, A Creation Seventh Day & Adventist Church in Guys, Tennessee averages attendance of seven to fifteen people, three of whom are members. (R. 37-4, McGill Depo. pp. 7-9). Another Creation Seventh Day & Adventist Church also exists in Canada. (R. 37-4, McGill Depo. pp. 7-9).

Plaintiffs filed a lawsuit in the United States District Court for Western District of Tennessee on September 22, 2006. (R. 1, Complaint). The lawsuit sought injunctive relief and damages under several theories, including federal trademark infringement and unfair competition, unfair or deceptive practices under the Tennessee Consumer Protection Act, common law infringement of marks and unfair competition. (R. 1, Complaint pp. 11, 13, 15, 16). Pastor McGill filed an Answer *Pro se* on October 17, 2006, raising various defenses, including the First Amendment to

the United States Constitution. (R. 4, Answer p. 6).

Pastor McGill subsequently retained counsel and filed a Motion to Dismiss on September 26, 2007, alleging that the District Court lacked subject matter jurisdiction over Plaintiffs' claims, or in the alternative for judgment on the pleadings. (R. 30, Motion to Dismiss). Plaintiffs moved for summary judgment on Oct. 31, 2007. (R. 37-1, Plaintiffs' Motion for Summary Judgment). The parties filed responses and replies to the motions and the District Court denied Pastor McGill's Motion on May 5, 2008. (R. 60, Order Denying Defendant's Motion to Dismiss). The case was then reassigned to the Honorable J. Daniel Breen on May 14, 2008. (R. 62, Order).

Judge Breen held a status conference on May 30, 2008, with the attorneys for the case, at which the parties agreed to mediation. (R. 66, Minute Entry). The court granted Plaintiffs partial summary judgment on their trademark claim on June 11, 2008. (R. 70, Order). On July 24, 2008, Pastor McGill moved to amend the court's previous order regarding mediation on grounds that he was unable to make the initial mediation because he was out of the country and that his religious convictions foreclosed any possible compromise. (R. 71, Motion to Amend Pre-Trial Order p. 2). Plaintiffs did not oppose changing the order. (R. 71, Motion to Amend Pre-Trial Order p. 3). Even though unopposed, the District Court denied the motion on July 25, 2008, and ordered the parties to mediate with the warning that the failure to do so

could result in a default judgment. (R. 74, Order Denying Defendant's Motion to Amend Pre-Trial Order). Pastor McGill later informed the Court that he would not attend mediation. (R. 82, Certificate of counsel p. 1). The matter was referred to Magistrate Judge Edward G. Bryant, who on April 16, 2009, recommended that the court enter default judgment on the remaining claims and granted Plaintiffs injunctive relief. (R. 94, Report and Recommendation). Pastor McGill filed an exception to the Magistrate's Report on April 30, 2009. (R. 95, Objection to Report). The District Court adopted Magistrate Judge Bryant's Report on May 28, 2009. (R. 98, Order Adopting Report). Pastor McGill filed a Notice of Appeal to this Court on June 17, 2009. (R. 99, Notice of Appeal). The District Court entered Judgment on August 6, 2009. (R. 104, Judgment).

### **STATEMENT OF THE FACTS**

Pastor McGill has over 20 years experience as a pastor. (R. 56-9, McGill Supp. Affidavit p. 1). He practices a religion commonly known as "Seventh Day Adventism." (R. 56-3, McGill Affidavit p. 2). His religion requires him to use the words "Seventh Day Adventist" to describe his faith. (R. 56-3, McGill Affidavit p. 2). He is the pastor of "A Creation Seventh Day & Adventist Church" in Guys, Tennessee. (R. 56-3, McGill Affidavit p. 2). His church is a congregation of the worldwide church known as "The Creation Seventh Day (and) Adventist church."

(R. 56-3, McGill Affidavit p. 2). Both churches openly and actively identify themselves as wholly separate from Plaintiffs. (R. 56-3, McGill Affidavit p. 2). One difference between the two churches is their belief about a Victorious Life, i.e. a life without sin. (R. 37-4, McGill Depo. p. 9).

The phrase “Seventh Day Adventist” is intellectual religious property. (*See* R. 1, Complaint pp. 7, 9, 10; R. 56-3, McGill Affidavit p. 2). Pastor McGill uses the term “Seventh Day Adventist” in connection with religious observances. (R. 1, Complaint pp. 7, 9, 10). Several groups use “Seventh Day” and “Adventist” to describe their churches. (R. 30-7, Eternal Gospel website; 56-6, Wikipedia Entry on Denominations pp. 19-20; 56-8, Reform Movement website; 56-14, Branch Davidian website).

Plaintiffs differentiate between “Seventh-Day Adventist” (capitalized “D”) and “Seventh-day Adventist” (lowercase “d”). (R. 30-12, p. 22). Plaintiffs have allowed others to use the following denotation in connection with the name of their church: “Founded in 1990 (or any later year) by Seventh-day Adventist believers.” (R. 30-6, Settlement Agreement p. 3; 30-7, Eternal Gospel Church website).

### **SUMMARY OF THE ARGUMENT**

“Render unto Caesar the things which are Caesar’s, and unto God the things

that are God's"<sup>2</sup> While fairly straightforward in its message, this well-known bible verse has often proven difficult in application. Every grade-school child learns about the Constitution's guarantee of freedom of religion but few ever learn about the difficulties courts face in squaring this ideal with our secular laws.

The parties in this case stand before this Court, because Plaintiffs refuse to acknowledge the very nature of religion. As the Michigan Supreme Court has observed, it is a universal proposition that as a religion grows, differences of opinion over doctrine and practice will develop and new religions will form from those differences:

Nearly all our varieties of churches of the same denomination are the result of secession or withdrawals from the parent church of that name, and it has been the usual course for the new church society to adopt as a permanent part of its name the name of the parent organization. Take one instance: A part of the Methodist Episcopal Church withdrew and established the Protestant Methodist Church. . . . No one has ever questioned the appropriateness of using the parent name as a part of the name of a new society formed under these circumstances.

*Supreme Lodge Knights of Pythias v. Improved Order Knights of Pythias*, 71 N.W. 470, 471 (Mich. 1897). For whatever reason, Plaintiffs have worked for the last twenty years to monopolize the right to use the words "Seventh Day Adventist." They have used the organs of government to pursue what is, for all practical purposes,

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<sup>2</sup> Matthew 22:21.

a religious dispute. As one critic has noted, religious organizations often “disguise” arguments that they are the “true” religion in the language of trademark law in an effort to protect their religious identity—a use for which trademark law was never intended.<sup>3</sup> Courts then superficially analyze the dispute under secular law when in actuality, the religious organization, and sometimes the court, is trying to settle an underlying identity dispute.<sup>4</sup>

Certainly, Plaintiffs are entitled to the law’s protections. They have a right to own and sell property, to sue and be sued. Plaintiffs even have a right to a unique name for their church that is not confusingly similar to other churches. They do not, however, have the right to appropriate the name of a religion and enjoin dissenters from using it. *See Zorach v. Clauson*, 343 U.S. 306, 319 (1952) (Black, J., dissenting) (The First Amendment insures that “no one powerful sect or combination of sects [can] use political or governmental power to punish dissenters whom they [cannot] convert to their faith.”)

This case is a textbook example of why trademark law is ill-suited and an awkward tool for resolving inter-church disputes over intellectual religious property.

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<sup>3</sup> David A. Simon, *Register Trademarks and Keep the Faith: Trademarks, Religion and Identity*, 49 IDEA 233, 312 (2009).

<sup>4</sup> *Id.*

In this particular situation, courts cannot apply neutral principles of law without resolving an underlying doctrinal dispute and, in effect, deciding which people truly are Seventh Day Adventists. For this reason, the District Court should have refused to accept jurisdiction over Plaintiffs' claims. In the alternative, this Court should craft an exception to the methods of resolving church property disputes, which recognizes that some cases involving religious use of intellectual religious property may jeopardize First Amendment values such that a court cannot exercise jurisdiction.

If this Court finds that the District Court did have subject matter jurisdiction to consider Plaintiffs' claims, the Court should find that by all accounts, including Plaintiffs' admissions, "Seventh Day Adventist" is the name of a religion, inherently generic, and free for all to use. If Plaintiffs are entitled to anything, it is a trial on whether Pastor McGill's church name is too similar, not whether he may use the words "Seventh Day Adventist."

Finally, if this Court agrees with the District Court that trademark law is applicable to the facts of this case, the Court should find that Pastor McGill sufficiently alleged the Religious Freedom Restoration Act as a defense. Pastor McGill also has sufficiently rebutted Plaintiffs' evidence to overcome summary judgment. A jury should decide if Plaintiffs' marks have become generic over the last decade or if the relevant public is likely to confuse the two churches.

## ARGUMENT

### I. SUBJECT MATTER JURISDICTION

The issue with respect to subject matter jurisdiction is as follows:

**The words “Seventh Day Adventist” are intellectual religious property that carry great meaning to Pastor McGill and Plaintiffs. Pastor McGill has a sincere religious belief that he must describe his church with these words. Should a court exercise jurisdiction over a religious dispute disguised as a trademark claim that could, in effect, force it to decide that Plaintiffs are the “true” Seventh Day Adventists and exclude Pastor McGill from practicing his faith?**

Civil law and religion have long clashed over how much each should be protected from the other. Courts have struggled with how to provide religious associations with civil law protections without invading the sanctuary. Religious associations have ventured outside the sanctuary and used civil law to grow and strengthen their congregations. The law that has developed applicable to inter-church disputes falls along a spectrum that can be illustrated as follows:

Tangible Prop. — Intellectual Prop. — Intellectual Religious Prop. — Religious Acts — Religious Belief

At one end of the spectrum, the United States Supreme Court has clearly held that one has the freedom to believe whatever one chooses. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (“Freedom of conscience . . . cannot be restricted by law”).

It is also clear that civil law generally protects the right to exercise religious beliefs—no one religion or denomination could claim an exclusive right to worship on Saturday or baptize by immersion. *See Id.* On the other end of the spectrum, it is clear that religious associations can own real property, personal property, and even intellectual property, that civil law will protect. *Purcell v. Summers*, 145 F.2d 979, 985 (4th Cir. 1944).

If two groups claim ownership of the church building, the alter, or a unique design that identifies a denomination's annual fundraiser, courts can use secular law to decide the dispute. This case falls squarely in the middle of the spectrum. It involves the right to exercise one's faith with intellectual religious property—intangible property that carries deep religious significance and conveys core religious beliefs. Just as some faiths require their members to proclaim their beliefs through evangelism, Pastor McGill's faith requires that he use the words "Seventh Day Adventist" to proclaim his beliefs. (R. 56-3, McGill Affidavit p. 2).

This Court should find that a court cannot exercise subject matter jurisdiction over inter-church disputes of intellectual religious property. In the alternative, this Court should hold that the established methods for resolving church property disputes may be inappropriate in cases involving religious use of intellectual religious property, and it should develop an exception, which holds that a court cannot exercise

subject matter jurisdiction where there is (1) religious use of (2) intellectual religious property and the application of neutral principles could, in effect, (3) decide a doctrinal dispute and (4) deprive one party the right to the free exercise of its religion.

**A. Standard of Review**

This Court reviews the District Court's ruling that it had subject matter jurisdiction *de novo*. *Voyticky v. Vill. of Timberlake, Ohio*, 412 F.3d 669, 674 (6th Cir. 2005). Parties cannot consent to, or waive, subject matter jurisdiction. *Alongi v. Ford Motor Co.*, 386 F.3d 716, 728 (6th Cir. 2004). The burden of proof in establishing federal subject matter jurisdiction lies with the party invoking it. *Dismas Charities, Inc. v. United States DOJ*, 401 F.3d 666, 671 (6th Cir. 2005). Where the defendant brings a factual attack on subject matter jurisdiction, no presumption of truth applies to the allegations contained in the pleadings, and the court may consider documentary evidence in conducting its review. *Ohio Nat'l Life Ins. Co. v. United States*, 922 F.2d 320, 325 (6th Cir. 1990).

**B. Seventh Day Adventism is a Religion**

Before deciding if the District Court had subject matter jurisdiction, this Court must first determine the nature of the subject before it. Is "Seventh Day Adventism" a religion, or the name of a particular church? While not dispositive, the distinction is important. Pastor McGill has not claimed a right to use the name of Plaintiffs'

church. He believes that “Seventh Day Adventism” is a religion and he has tried to differentiate A Creation Seventh Day & Adventist Church as much as possible from Plaintiffs’ church while still conveying his beliefs. (R. 56-3, McGill Affidavit p. 2).

Other courts have previously discussed the history of Seventh Day Adventism and concluded that it is a religion. In *General Conference Corporation of Seventh-Day Adventists v. Seventh-Day Adventist Kinship International, Inc.*, 1991 U.S. Dist. LEXIS 21915, Case No. CV 87-8113 (C.D. Calif. 1991), Judge Marina Pfaelzer, found that Seventh Day Adventism the religion predated the church. (R. 30-5, Pfaelzer Opinion p. 13). Judge Pfaelzer held:

Although not determinative, the Court finds it significant that the term “Seventh-day Adventist” appears in a standard American language dictionary. The use of the name “Seventh-day Adventist” by at least two breakaway churches, The Seventh-day Adventist Church, Reform Movement, and the Davidian Seventh-day Adventists Association, without opposition by the General conference also tends to support the view that the term “Seventh-day Adventist” has significance other than to indicate membership in the mother church. More importantly, there is no term that adequately describes an adherent to the religion of Seventh-day Adventism, other than “Seventh-day Adventist.”

(R. 30-5, Pfaelzer Opinion p. 14).

In 2004, Judge J. Frederick Motz found that a Plaintiff had not sued a proper defendant because “[s]imply stated, the Seventh-Day Adventist Church is a religion, not a legal entity.” *Benn v. Seventh-Day Adventist Church*, 304 F. Supp. 2d 716, 721

(D. Md. 2004).<sup>5</sup> Plaintiffs themselves suggested as much in *Benn*, where they argued that the plaintiff in that case had sued a religion:

By naming the “Seventh-day Adventist Church” as a defendant, Plaintiff attempts to sue a religion rather than a religious institution. Presumably, the members of the class that Plaintiff seeks to sue are **those individuals who would describe their religious beliefs as “Seventh-Day Adventist,” whether or not they have formally become members of a Seventh-day Adventist local congregation.**

...

Plaintiff himself abandoned his first three efforts to rescue diversity jurisdiction, and this eleventh hour effort to do so by creating a “Seventh-day Adventist Church” as a jural entity must fail. Our laws do not permit suit against a religion as opposed to a religious institution, and Plaintiff’s attempt to do so offends the most basic principles of our Constitution.

(R. 30-12, pp. 22, 46; *see also* pp. 33, 37, 39) (emphasis added).

Particularly important is Plaintiffs’ argument that individuals may describe their religious beliefs as “Seventh-Day Adventist” (capitalized “D”) even if they are not members of a “Seventh-day Adventist” (lowercase “d”) congregation. Plaintiffs,

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<sup>5</sup> *See also, Stocker v. General Conference Corporation of Seventh-Day Adventists*, 39 U.S.P.Q.2D (BNA) 1385 at \*62 (T.T.A.B. 1996) (Hohein, A.T.J., dissenting in part) (finding that a name originated for a new religion is inherently unregistrable and that Seventh-Day Adventism is the name for a new religion).

apparently, have drawn a distinction between the two and recognize that people may hold a set of religious convictions they describe as “Seventh-Day Adventist” but may not be a member of Plaintiffs association, the “Seventh-day Adventist Church.” It is also telling that Plaintiffs have shied away from directly rebutting the religion argument in this case. From a review of Plaintiffs’ filings, it appears Plaintiffs never directly argued that Seventh-Day Adventism is not a religion. (R. 36, Response to Motion to Dismiss; 37-15, Summary Judgment Memorandum; 59, Reply to response in opposition to summary judgment).

In support of this “don’t look behind the curtain” argument, Plaintiffs relied heavily on *General Conference Corporation of Seventh-Day Adventists v. Raphael Perez*, 97 F. Supp.2d 1154, 1156 (S.D. Fla. 2000), in the District Court. Plaintiffs no doubt favor the *Perez* decision because the court ignored the *Kinship* Court’s finding that “Seventh Day Adventism” was a religion, engaged in a mechanical application of trademark law, and classified the evidence that the religion predated Plaintiffs’ church as “*de minimis*.” *Id.* at 1162.

What Plaintiffs fail to note about *Perez*, however, is that while the case was on appeal, Plaintiffs entered into a settlement agreement allowing Perez to place the following denotation under the name of his church: “Founded in 1990 (or any later year) by Seventh-day Adventist believers.” (R. 30-6, Settlement Agreement p. 3; 30-

7, Eternal Gospel Church website). Plaintiffs' concession in *Perez* allowing the use of their mark in connection with the name of a church supports a finding that a Seventh Day Adventist is an adherent to a religious philosophy.

The fact that *Benn* was decided four years after *Perez* lessens *Perez*'s relevance even more. Plaintiffs' position in *Benn* that "Seventh-Day Adventist" refers to a religion should bar them from arguing otherwise in this case under the doctrine of collateral estoppel. *Hammer v. INS*, 195 F.3d 836, 840 (6th Cir. 1999) (discussing the elements of collateral estoppel). Plaintiff, General Conference Corporation of Seventh-day Adventists, was a party in *Benn*, with a full and fair opportunity to litigate the issue, which actually was litigated, the judge decided the issue in Plaintiffs' favor, and the issue was essential to the Court's judgment that it did not have subject matter jurisdiction. 304 F. Supp. 2d at 721-22. This Court should conclude, therefore, that "Seventh Day Adventism" is a religion.

**C. Neutral Principles Cannot be Applied Without Resolving an Underlying Doctrinal Dispute**

The First Amendment to the U.S. Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend I. Because the First Amendment does not distinguish between religious belief and religious conduct, the Free Exercise Clause must at least

presumptively protect conduct motivated by sincere religious belief, like the belief itself. *Employment Div. v. Smith*, 494 U.S. 872, 893 (1990) (O'Connor, J. concurring). The First Amendment also clearly forbids a court from interpreting the importance of church doctrines to the religion. *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 449 (1969).

The conduct at issue in this case is Pastor McGill's need to use the name of his religion, "Seventh Day Adventism," in the name of his church "A Creation Seventh Day & Adventist Church." Pastor McGill's faith requires that he convey these vital beliefs through the name of the church. (R. 4, Answer p. 6, ¶71). Pastor McGill's conduct is sincere. (R. 37-2, McGill Depo. p. 2, ¶7). Plaintiffs acknowledge, and themselves believe, that these words convey "vital beliefs" about their faith. (R. 30-8, Plaintiffs' website).

The First Amendment "severely circumscribes the role that civil courts may play in resolving church property disputes." *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976) ("Serbian East") (quoting *Presbyterian Church*, 393 U.S. at 449 (1969)). It commands courts to decide church property disputes "without resolving underlying controversies over religious doctrine." *Presbyterian Church*, 393 U.S. at 449. It enjoins persons from using the government for

essentially religious purposes. *Id.* “[W]hen rival church factions seek resolution of a church property dispute in the civil courts there is substantial danger that the State will become entangled in essentially religious controversies or intervene on behalf of groups espousing particular doctrinal beliefs.” *Serbian East*, 426 U.S. at 709.

To resolve disputes, courts have formulated various methods, including the neutral principles of law approach, which allow them to decide property cases using objective, secular laws of trust and property that are well-established and familiar to judges. *Jones v. Wolf*, 443 U.S. 595, 603 (1979). Applying neutral principles, a court can award one group the keys to the sanctuary without determining which group “truly” adheres to the faith. The loser is free to build a new church and set up shop across the street.

In this case, trademark law certainly provides neutral principles, but this Court must consider whether the application of that law will resolve an underlying controversy in doctrine over the “true” adherents to Seventh Day Adventism and prevent the loser from setting up shop, period. Commentators have suggested that applying trademark law to religion is misconceived,<sup>6</sup> that intellectual property laws

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<sup>6</sup> K.M. Sharma, *Article: What’s in a Name?: Law, Religion, and Islamic Names*, 26 DENV. J. INT’L L. & POL’Y 151, p. 14-15 (Winter 1998) (Criticizing the Supreme Court of Pakistan for nonchalantly assuming, in part based on U.S. case law, that “the ennobling concept of religion can be degraded to the mundane level of a routine merchandise (like Coca Cola”).

are “inherently at odds” with the U.S. Constitution’s protection of freedom of religion,<sup>7</sup> and that modern trademark doctrines may unacceptably burden speech.<sup>8</sup>

When a court awards land or personal property to one faction, the other is free to move elsewhere, buy new choir robes, and worship as they desire. When a court enjoins the religious use of intellectual religious property, however, the other group is deprived of the ability to practice its faith. The Supreme Court of California has remarked that some “so-called ecclesiastical functions are so interwoven with civil and property rights that any decision involving the latter must necessarily affect the former.” *The Rosicrucian Fellowship v. The Rosicrucian Fellowship Non-Sectarian Church*, 245 P.2d 481, 489 (Calif. 1952). Such is the case here, where Pastor McGill’s need to exercise his faith through his church’s name is interwoven with intellectual religious property rights.

In *Jandron v. Zuendel*, the United States District Court for the Northern District

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<sup>7</sup> Jed Michael Silversmith and Jack Achiezer Guggenheim, *Article: Between Heaven and Earth: The Interrelationship Between Intellectual Property Rights and the Religion Clauses of the First Amendment*, 52 ALA. L. REV. 467, 468 (2001) (suggesting that the First Amendment was intended to constrain copyright law). The authors do conclude that trademark law is applicable to name disputes but do not consider a situation such as the one presented here, where use of the name is intertwined with worshiping. *Id.* at 525-26.

<sup>8</sup> Mark P. McKenna, *Article: The Normative Foundations of Trademark Law*, 82 NOTRE DAME L. REV. 1839, 1915 (2007).

of Ohio enjoined a church from using the words “Church of Christ, Scientist” or any variant thereof, on grounds that the name was confusingly similar to another. 139 F. Supp. 887, 889 (N.D. Ohio 1955). The court found religious freedom was a nonissue, because the enjoined believers were free to practice the teachings of the denomination’s founder, Mary Eddy Baker, “in whatever manner” they chose. *Id.* What if, however, Baker’s teachings instructed that believers should proclaim the unique nature of their faith as “Christian Scientists” through their church names? *Jandron* illustrates why most cases in this area are distinguishable from the case at bar. It has been suggested that Pastor McGill is free to exercise his faith under a different name. This ignores the crucial distinction that defines this litigation: Pastor McGill’s religion requires that his church name convey the vital beliefs that distinguish it from other religions—namely, that he worships on the biblical Sabbath “Seventh Day,” and he is a believer in the near return of Christ “Adventists.” (R. 4, Answer p. 6 ¶71; R. 30-8, Plaintiffs’ website).

As the District Court noted, the Ninth Circuit has held that courts can apply neutral principles of trademark law to determine intellectual property disputes. (R. 61, Order Denying Motion to Dismiss p. 3) (discussing *Maktab Tarighe Oveyssi Shah Maghsoudi, Inc. v. Kianfar*, 179 F.3d 1244 (9th Cir. 1999)). In *Maktab*, the plaintiffs alleged that the defendants sold plaintiffs’ publications as their own and employed

a colorable imitation of plaintiffs' mark. 179 F.3d 1244. Both parties practiced Sufism and claimed to be the Sufi Order's legitimate successor. *Id.* It is not clear whether the parties disputed the right to use the name of the religion, but the plaintiffs in that case did ask that the defendants be enjoined from representing that they were teachers of the religion. *Id.* at 1250. The court held that particular claim for relief could not be decided by neutral principles but noted in a footnote that, to the extent a request for relief from false designation or origin subsumed the claim, the court could decide the issue through neutral principles. *Id.*

*Maktab* appears contrary to Supreme Court holdings in this area, because the court indicated that the resolution of doctrinal issues was acceptable—collateral damage so to speak—so long as the district court did so while applying neutral principles of law. While the Supreme Court has recognized the neutral principles of law approach as a valid method of resolving property disputes, *Presbyterian Church* and its progeny command that courts do so “without resolving underlying controversies over religious doctrine.” 393 U.S. at 449. Applying neutral principles of property and trust law normally only decides real and personal property issues—the losers are free to open a competing church across the street and worship as their faith dictates. Here, the decision forecloses that option, even if incidentally.

This Court should reject the Ninth Circuit's reasoning in *Maktab* and hold that

the neutral principles of law approach is inappropriate to intellectual religious property issues. In this case, application of neutral principles would result in the court deciding which group truly adheres to the Seventh Day Adventist religion. Pastor McGill and his parishioners cannot practice Seventh Day Adventism across the street. The Court should find that the District Court cannot exercise subject matter jurisdiction in this case.

**D. An Exception is Necessary for Religious use of Intellectual Religious Property**

In the alternative, if the neutral principles of law approach is applicable to intellectual religious property, Pastor McGill proposes that this Court adopt an exception for religious use of intellectual religious property and formulate a new test that holds that a court cannot exercise subject matter jurisdiction where a party shows (1) religious use of (2) intellectual religious property and that applying neutral principles could, in effect, (3) decide a doctrinal dispute and (4) deprive one party the right to the free exercise of its religion. Such an exception would strike a balance between a religious association's right to own property and the individual right to freely exercise one's faith.

This Court has previously adopted a ministerial exception to claims arising from a religious organization's employment practices governed by such neutral

principles of law as Title VII of the Civil Rights Act 42 U.S.C. § 2000e to 42 U.S.C. § 2000e-17 (2009), and the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634 (2009), based on Free Exercise Clause concerns. *See Hollings v. Methodist Healthcare, Inc.*, 474 F.3d 223, 225 (6th Cir. 2007).

A proponent of the proposed exception would bear the burden of proving he is entitled to its protection. Under the first factor, a court could consider whether the use was religious or simply “philosophical and personal” in nature. *United States v. Winddancer*, 435 F. Supp. 2d 687, 692 (M.D. Tenn. 2006). The second factor could be established through looking at the nature of the other party’s use of the challenged property. A person, therefore, could not invoke the exception to use the word “Pepsi” for religious purposes since PepsiCo, Inc., the commercial entity that owns the Pepsi mark, could show that it is not in the business of offering religious goods or services. If a person established the first two factors, the court would then analyze whether a doctrinal dispute actually existed and the effect the court’s decision would have on either parties’ free exercise rights.

For example, if two churches both used depictions of a stack of pancakes and orange juice next to an open bible as a way to promote a breakfast bible study, a court might find that the designs were the subject of religious use but hold that they were mere intellectual property and not intellectual religious property, if the evidence

showed that the designs did not hold deeply religious significance or were mainly used for secular purposes. Perhaps, the court would find that the design was intellectual religious property, because both churches were members of a religion or denomination that placed deeply religious significance on morning worship. Even then, the court could look to the third factor and fourth factors and find that resolving the design issue would not decide a doctrinal dispute or prohibit the other party from morning worship. The exception would not prevent the court from applying neutral principles to resolve the case.

Here, the phrase “Seventh Day Adventist” is intellectual religious property and Pastor McGill’s use is religious. (R. 1, Complaint pp. 7, 9, 10; R. 56-3, McGill Affidavit p. 2). Applying trademark law’s neutral principles would, in effect, decide a doctrinal dispute and award Plaintiffs the right to practice the Seventh Day Adventism religion exclusively while depriving Pastor McGill of the right to exercise his religion. For these reasons, this Court should find that the District Court lacked jurisdiction to hear this case and remand the case with instructions that it be dismissed.

## **II. FAILURE TO STATE A CLAIM**

The issue with respect to failure to state a claims is as follows:

**Adventist Christians’ use of “Seventh Day Adventist” in their**

**church names, together with previous court rulings, and Plaintiffs' admissions, establish that the term refers to believers of the "Seventh Day Adventism" religion. All believers of a religion may use its name in their church name so long as it is not too similar to another as to cause confusion. Should the District Court have denied Pastor McGill's Motion to Dismiss any claims that requested injunctive relief for using the name of the religion?**

In the alternative, this Court should find that the District Court erred in denying Pastor McGill's Motion to Dismiss for failure to state a claim because the term "Seventh Day Adventist" describes someone who practices Seventh Day Adventism, and therefore, is generic.

**A. Standard of Review**

Federal Rule of Civil Procedure 12(h)(2)(B) provides that a defense of failure to state a claim under Rule 12(b)(6) may be raised pursuant to Rule 12(c). *See Morgan v. Church's Fried Chicken*, 829 F.2d 10, 11 (6th Cir. 1987). The Court applies the standard for a 12(b)(6) motion. *Id.* This Court reviews the District Court's ruling *de novo* and applies the same standard as the District Court. *Total Benefits Planning Agency, Inc. v. Anthem Blue Cross & Blue Shield*, 552 F.3d 430, 434 (6th Cir. 2008).

Judgment on the pleadings is proper where the Plaintiff has alleged facts that, even if true, do not entitle Plaintiff to relief. *See Hunter v. Ohio Veterans Home*, 272 F. Supp. 2d 692, 694 (N.D. Ohio 2003). All factual allegations in the complaint must

be presumed to be true, and reasonable inferences must be made in favor of the non-moving party. *Total Benefits*, 552 F.3d at 434. The inquiry is essentially limited to the content of the complaint, although matters of public record, orders, items appearing in the record, and attached exhibits also may be taken into account. *Hunter*, 272 F. Supp. 2d 694.

**B. The Name of a Religion is Inherently Generic**

Even incontestable marks are subject to cancellation if they become generic. *Nartron Corp. v. STMicroelectronics, Inc.*, 305 F.3d 397, 405 (6th Cir. 2002). Normally, whether a term is generic is a question of fact, but as discussed in Section I, Part B of this Brief, “Seventh Day Adventism” is a religion. *Bath & Body Works, Inc. v. Luzier Personalized Cosmetics, Inc.*, 76 F.3d 743, 748 (6th Cir. 1996). The name of a religion is inherently generic and available to all those who practice that religion. *Christian Science Bd. Dir. v. Evans*, 520 A.2d 1347, 1356 (N.J. 1987).

Courts should not enjoin the right to use the name of a religion. *Id.*; *see also*, *The Board of Provincial Elders of the Southern Province of The Moravian Church v. Jones*, 159 S.E.2d 545, 551 (N.C. 1968) (finding injunction prohibiting the use of the word “Moravian” improper and opining that some combination of words including “Moravian” could be constructed so as to avoid confusion); *Rosicrucian Fellowship*, 245 P.2d 481, 495 (Calif. 1952) (affirming trial court’s ruling that both

groups had the right to use the philosophy's name); *Purcell v. Summers*, 145 F.2d 979, 988 (4th Cir. 1944) (enjoining church from using confusingly similar name but suggesting that the terms Methodist and Episcopal were generic and could be used in a new name different enough to avoid confusion); *Turbeville v. Morris*, 26 S.E.2d 821, 833 (S.C. 1943) (noting that just because "Methodist" appears in two competing organization's names does not necessarily cause confusion); *McDaniel v. Mirza Ahmad Sohrab*, 27 N.Y.S.2d 525, 526 (N.Y. 1941) (*aff'd*, *McDaniel v. Mirza Ahmad Sohrab*, 29 N.Y.S.2d 509 (N.Y. App. Div. 1941) (holding that "plaintiffs have no right to a monopoly of the name of a religion. The defendants, who purport to be members of the same religion, have an equal right to use the name of the religion in connection with their own meetings, lectures, classes and other activities"); *New Thought Church v. Chapin*, 159 A.D. 723, 724 (N.Y. 1913) (noting that it could "not be contended for a moment that any body of people, whether incorporated or not, could sustain a claim to the monopoly of the use of the name 'Christian Church' or 'Jewish Church' against persons who taught religion after the Christian or Jewish creeds); *First Independent Missionary Baptist Church v. McMillan*, 153 So. 2d 337, 342 (Fla. D. Ct. App. 1963) (affirming trial court's determination that majority group keep the name First Independent Missionary Baptist Church of Chosen while the minority group be allowed to use the name First Independent Missionary Baptist

Church of Belle Glade).

Plaintiffs' Complaint failed to state a claim to the extent it sought to enjoin Pastor McGill from using the name of his religion under federal or state claims. This Court should dismiss Plaintiffs' Complaint or remand the case to the District Court for a trial, not on whether Pastor McGill may use "Seventh Day Adventist," but on the limited issue of whether his church's name is too similar.

#### IV. SUMMARY JUDGMENT

The issue with respect to summary judgment is as follows:

**Summary judgment is appropriate when no genuine issues of material fact exist. Pastor McGill has raised a *prima facie* case under the Religious Freedom Restoration Act, which is a defense to trademark infringement. Old cases and overly broad, outdated surveys are no evidence of a mark's strength today. Is summary Judgment appropriate when the likelihood of confusion is lessened by the fact that purchasers are likely to exercise a high degree of care and the relevant public readily distinguishes the parties' goods and services?**

##### A. Standard of Review

Generally, the standard for determining whether summary judgment is appropriate is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Booker v. Brown & Williamson Tobacco Co. Inc.*, 879 F.2d 1304, 1310 (6th Cir. 1989). The court must view the facts presented in the light most

favorable to the non-moving party, and draw all reasonable inferences in the non-movant's favor. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). An appellate court applies the same test the district court uses in reviewing a motion for summary judgment. *Gutierrez v. Lynch*, 826 F.2d 1534, 1536 (6th Cir. 1987).

**B. The Religious Freedom Restoration Act is a Defense to Summary Judgment**

This Court should find that the Religious Freedom Restoration Act (“Restoration Act”), 42 U.S.C. §§ 2000bb *et seq.* is applicable to the federal claims in this case and cannot be waived as a defense, or in the alternative, was fairly raised in Pastor McGill's Answer and/or Motion to Dismiss. The District Court, therefore, should have considered the Restoration Act as a defense to Plaintiffs' Motion for Summary Judgment. This Court reviews the District Court's interpretation of the Restoration Act *de novo*. *United States v. Meyers*, 95 F.3d 1475, 1482 (10th Cir. 1996).

The Restoration Act provides that government may only burden a person's exercise of religion, even through rules of general applicability, if the proposed burden meets the compelling interest test established by the Courts. The Restoration Act applies to “all Federal law, and the implementation of that law, whether statutory

or otherwise.” 42 U.S.C. § 2000bb-3(a). The Restoration Act is quite broad, because it amends the entire United States Code. *Rweyemamu v. Cote*, 520 F.3d 198, 202 (2nd Cir. 2008).

Courts in this Circuit do not appear to have considered whether the Restoration Act applies to private party cases, and a split of authority exists in other jurisdictions. *See Hankins v. Lyght*, 441 F.3d 96, 103 n.4 (2nd Cir. 2006) (holding that Restoration Act applies to private party’s ADEA claim); *Guinan v. Roman Catholic Archdiocese*, 42 F. Supp. 2d 849, 853 (S.D. Ind. 1989); *Urantia Found. v. Maaherra*, 895 F. Supp. 1335, 1336-37 (D. Ariz. 1995) (rev’d on other grounds by *City of Boerne v. Flores*, 521 U.S. 507 (1997)); *but see, Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1042 (7th Cir. 2006) (Act only applies to suits involving the government); *Redhead v. Conf. of Seventh-Day Adventists*, 440 F. Supp. 2d 211, 218 (E.D.N.Y. 2006) (applying *Hankins* but noting that *Rweyemamu* and others have criticized).

Section 2000bb-1(c) provides that “[a] person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government.”

As the *Hankins* Court reasoned:

The only conceivably narrowing language is the phrase immediately following: ‘and obtain appropriate relief against a government.’ However, this language would seem most

reasonably read as broadening, rather than narrowing, the rights of a party asserting the RFRA. The narrowing interpretation -- permitting the assertion of the RFRA as a defense only when relief is also sought against a governmental party -- involves a convoluted drawing of a hardly inevitable negative implication. If such a limitation was intended, Congress chose a most awkward way of inserting it.

441 F.3d at 103.

Because trademark laws are enforced almost exclusively through private action, it is hard to imagine when the government would be a party to such an action. A narrow interpretation, then, would go against the Act's stated applicability to "all Federal law, and the implementation of that law, whether statutory or otherwise." 42 U.S.C. § 2000bb-3(a). Additionally, the language "implementation of that law, whether statutory or otherwise" suggests that the law applies to private actions. Certainly, a court applying federal trademark law is implementing the law. This Court should adopt *Hankins'* reasoning and find that the Restoration Act is broad enough to encompass private actions.

This Court should proceed to find that Pastor McGill cannot waive the Act as a defense. This Court has previously held that a defense that bars the right and remedy, such a statute of repose, is a non-waivable defense. *Roskam Baking Co. v. Lanham Mach. Co.*, 288 F.3d 895, 902-03 (6th Cir. 2002). The Restoration Act bars not only Plaintiffs' right, but also their remedy under trademark law, because, if the

law is unconstitutional as applied to Pastor McGill, it prevents the Plaintiffs' cause of action from ever accruing and is more in the nature of a defense of failure to state a claim. *See Id.*

In the alternative, if the Restoration Act can be waived, this Court should find that Pastor McGill fairly raised the defense in his Answer. Pastor McGill filed his *pro se* Answer to Plaintiffs' Complaint on Oct. 17, 2009. (R. 4, Answer). The Answer raised the defense that the First Amendment to the United States Constitution barred Plaintiffs' claims and that his religion mandated that he use the words "Creation Seventh Day Adventist" to describe his faith. (R. 4, Answer p. 6, ¶ 7).

Under Fed. R. Civ. P. 8(f), "all pleadings shall be so construed as to do substantial justice" and this is particularly true where they were drafted by someone who is not an attorney. *Myers v. United States*, 636 F.2d 166 (6th Cir. 1981). *Pro se* plaintiffs are generally given more leeway than parties represented by counsel. *Stone v. Warfield*, 184 F.R.D. 553, 554 (D. Md. 1999). The Pleadings of a *pro se* plaintiff "must be read liberally and should be interpreted 'to raise the strongest arguments that they suggest.'" *Graham v. Henderson*, 89 F.3d 75, 79 (2nd Cir. 1996) (quoting *Burgos v. Hopkins*, 14 F.3d 787, 790 (2nd Cir. 1994)); *see also Jacobi v. Blocker*, 153 F.R.D. 84 (E.D. Va. 1994) (affirming magistrate's opinion citing *Hudspeth v. Figgins*, 584 F.2d 1345 (4th Cir. 1978).

In the alternative, if Pastor McGill did not fairly raise the defense in his Answer, he raised it when he filed his Motion to Dismiss. (R. 30-2, Mem. in Support of Motion to Dismiss p. 12). This Court has previously noted that the failure to raise an affirmative defense does not result in a waiver if the plaintiff receives notice through some other manner and the plaintiff is not prejudiced in its ability to respond. *Moore, Owen, Thomas & Co. v. Coffey*, 992 F.2d 1439, 1445 (6th Cir. 1993).

The District Court found that Plaintiffs would have been prejudiced if the Court allowed Pastor McGill to amend his Answer, because a motion for summary judgment was pending. (R. 61, Order Denying Motion to Dismiss p. 7). Pastor McGill, however, filed his Motion to Dismiss well within the scheduling order's deadline for dispositive motions and before Plaintiffs' Motion for Summary Judgment. (R. 26, Amended Scheduling Order p1.) Plaintiffs addressed the Restoration Act in their Response to the Motion to Dismiss. (R. 36, Response p. 10). Any prejudice to Plaintiffs would have been minimal given that the court continued the trial for seven months shortly after Plaintiffs filed their summary judgment motion. (R. 46, Order Continuing Trial Date). This Court should find that the District Court erred in concluding that Pastor McGill failed to raise the Restoration Act.

To make a *prima facie* case under the Restoration Act, Pastor McGill must

show a (1) substantial burden on (2) a sincere (3) religious belief. *Meyers*, 95 F.3d at 1482. An injunction would impose a substantial burden on Pastor McGill, because his religion requires that he convey his beliefs through these words. (R. 56-3, McGill Affidavit p. 2). His belief is sincere. (R. 37-4, McGill Depo. p. 40). Plaintiffs' Complaint repeatedly alleges that Pastor McGill uses Plaintiffs' marks in connection with religious observances. (R 1, Complaint pp. 7, 9, 10). Pastor McGill, therefore, has raised a *prima facie* case that the Restoration Act applies. A genuine issue of material fact therefore exists and it was error for the district court to grant summary judgment on the trademark and unfair competition claims in light of this defense.

The Restoration Act cannot be waived, because it is really not a new or novel defense; it simply sets the "analytical framework" the trial court is to use in determining whether a particular statute violates the First Amendment. *United States v. Myers*, 95 F.3d 1475, 1482 (10th Cir. 1996). In the alternative, Pastor McGill fairly raised the defense in his Answer and/or Motion to Dismiss. Any failure to raise the defense in an answer did not prejudice Plaintiffs. Plaintiffs responded to the defense before they filed for summary judgment and the court continued the case for seven months shortly after they did file. Pastor McGill raised a *prima facie* claim under the Act, and the District Court erred in granting summary judgment on the unfair competition and trademark claims.

**C. The Term “Seventh Day Adventist” Describes a Religion. Plaintiffs’ Evidence Fails to Rebut This and Raises A Genuine Issue of Material Fact as to Whether Plaintiffs’ Mark is Generic**

Whether a term is generic is a question of fact. *Bath & Body Works, Inc. v. Luzier Personalized Cosmetics, Inc.*, 76 F.3d 743, 748 (6th Cir. 1996). The appropriate “test for genericness is whether the [relevant] public perceives the term primarily as the designation of the article.”<sup>9</sup> *Blinded Veterans Ass’n v. Blinded Am. Veterans Found.*, 872 F.2d 1035, 1039 (D.C. Cir. 1989). As discussed in Section I, Part B and Section II of this Brief, the term “Seventh Day Adventist” refers to an adherent of the Seventh Day Adventism religion.

Plaintiffs moved for summary judgment relying mostly on the incontestible status of its marks, two previous cases, the affidavit expert Harry O’Neill, and a 1999 survey supporting Plaintiffs’ position. Plaintiffs’, and the District Court’s, reliance on the two previous cases is misplaced—one case cited even states as much.<sup>10</sup> (R. 37-

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<sup>9</sup> The District Court defined the relevant public as “Christians and, more specifically, Adventist Christians (that is, those who believe in the nearness of the second coming of Christ). It is these persons who are most likely to avail themselves of [General Conference]’s publications and services.” (R. 70, Order Granting Partial Summary Judgment p. 11 n.5).

<sup>10</sup> Although the *Stocker* Board found in 1996 that petitioners failed to prove that “Seventh-Day Adventist” was generic by a preponderance of the evidence, it noted that each case must be decided on its own facts. 39 U.S.P.Q.2D (BNA) 1385 at \*48.

15, Plaintiffs' Mem. in Support pp. 12-14) (discussing *Stocker v. General Conference Corporation of Seventh-Day Adventists*, 39 U.S.P.Q.2D (BNA) 1385 (T.T.A.B. 1996) and *General Conference Corporation of Seventh Day Adventists v. Perez*, 97 F. Supp 1154 (S.D. Fla. 2000). Cases decided almost a decade earlier provide little evidence of the strength of Plaintiffs' marks today.

The District Court also erred in considering Plaintiffs' outdated survey conducted by Harry O'Neill. In addition to being almost a decade old, O'Neill conducted the survey from the general public, not the more limited relevant public that the District Court had defined as Adventist Christians. (R. 37-11, O'Neill Declaration p. 2; 70, Order Granting Partial Summary Judgment p. 11 n. 5). The general public's opinion in 1999 had no bearing on Adventist Christians' perception of Plaintiffs' marks in 2008. In sum, Plaintiffs rested on their laurels and put forward no relevant evidence to suggest that their marks had not become generic.

On the other hand, Pastor McGill submitted excerpts of his deposition testimony and two affidavits from himself in support of his position. (R. 56-3, 56-9, 56-11). He cited several other denominations that use the term "Seventh-day," "Adventist," or "Seventh Day Adventist." (R. 56-2, Def's Response p. 3, ¶ 17; p. 4, ¶ 19; p. 8, ¶ 43; ). Pastor McGill also submitted copies of the Wikipedia entry on Christian denominations. (R. 56-6, Wikipedia Entry pp. 19-20). As the District

Court noted, Wikipedia is a volunteer-edited online encyclopedia. (R. 70, Order Granting Partial Summary Judgment p. 15).

The Court also should have considered the Plaintiffs' recent use of the mark, such as in the *Benn* case, which used "Seventh-Day Adventist" in a generic manner. (R. 30-12, pp. 22,46; *see also* pp. 33, 37, 39). Plaintiffs names themselves do not use the mark appropriately. While not an absolute rule of law, a convenient test for determining if a mark is generic looks to whether it is used as a noun or adjective. *See Union Nat'l Bank v. Union Nat'l Bank*, 909 F.2d 839, 845 (5th Cir. 1990). Plaintiff, the General Conference Corporation of Seventh-day Adventists, uses the mark as a noun in its name, as opposed to an adjective, i.e. Seventh-day Adventist believers. This supports the conclusion that the mark is generic when used to refer to Plaintiffs' church.

This Court should find that Plaintiffs' failure to put forward timely, relevant evidence to support their motion, coupled with Pastor McGill's evidence, is enough to rebut the incontestible presumption and raise a triable issue of fact. For that reason, the Court should reverse the District Court's grant of summary judgment on the trademark and unfair competition claims.

**D. The Relevant Public and Degree of Purchaser Care Establish a Genuine Issue of Material Fact Regarding the Likelihood of Confusion**

Plaintiffs have the burden to show that Pastor McGill's use of their mark is likely to cause confusion among consumers in order to prove trademark infringement, even with incontestable marks *Interactive Products Corp. v. A2Z Mobile Office Solutions, Inc.*, 326 F.3d 687, 694 (6th Cir. 2003). In the context of a summary judgment motion, Plaintiffs must establish that no issue of material fact exists as to whether Pastor McGill's use of Plaintiffs' terms likely will confuse consumers about the origins of the parties' goods. *Interactive Products Corp.*, 396 F.3d at 694.

The question of whether a likelihood of confusion exists is a mixed question of fact and law. *Gibson Guitar Corp. v. Paul Reed Smith Guitars, LP*, 423 F.3d 539, 548 (6th Cir. 2005). The District Court applied a six-factor test that considers "1) the strength of the senior mark; 2) relatedness of the goods and services; 3) the similarity of the marks; 4) evidence of actual confusion; 5) the marketing channels used; 6) likely degree of purchaser care; 7) the intent of the defendant in selecting the mark; and 8) the likelihood of expansion of the product lines." (R. 70, Order Granting Partial Summary Judgment p 17). These factors have no mathematical precision but are interrelated in effect and simply a guide to the ultimate decision on whether confusion is likely. *Homeowners Group, Inc. v. Home Marketing Specialists, Inc.*, 931 F.2d 1100, 1107 (6th Cir. 1991).

Factual findings must be made with respect to these factors, but whether a

given set of facts establishes a likelihood of confusion is a legal conclusion. *Gibson Guitar*, 423 F.3d at 548. To resist summary judgment, a nonmoving party must establish that genuine factual disputes remain concerning those factors that may be material in the context of the specific case. *Id.* A review of the factors in order of their materiality to this case demonstrates that the court erred in granting summary judgment to Plaintiffs regarding likelihood of confusion.

(6) Likely Degree of Purchaser Care

The District Court found that this factor did not weigh in Plaintiffs' favor:

[I]t is difficult to imagine someone accidentally becoming a member of [Defendant's] church, while believing that it is affiliated with the General Conference, given that the amount of care most people take in selecting a church is significantly greater than the amount of care they might take in making a consumer purchase.

(R. 70, Order p. 22). The Court then concluded that this only decreased the likelihood of confusion minimally, because of the similarity of the Marks. (R. 70, Order p. 22). While this may be true in the secular world, in this case the degree of purchaser care should carry much more weight for two reasons.

First, as the court inferred, the amount of care a person exercises in selecting a church is not in the same league as even the most serious or expensive consumer purchase. (R. 70, Order p. 22). Religion encompasses deeply personal and core

beliefs. People associate church names with “the most sacred of their personal relationships and the holiest of their family traditions.” *Board of Provincial Elders*, 159 S.E.2d at 551.

Second, the court had previously defined the relevant public to consist of “Christians and, more specifically, Adventist Christians (that is, those who believe in the nearness of the second coming of Christ). It is these persons who are most likely to avail themselves of [General Conference]’s publications and services.” (R. 70, Order p. 11, n. 5).<sup>11</sup> By the court’s own definition, the relevant public is a relatively small sub-set of Christian believers who exercise significantly greater care in choosing a church than they do in consumer transactions. The District Court ignored this crucial distinction in discussing the other factors and failed give this factor the weight it deserves in this case. This factor alone established a genuine issue of material fact as to the likelihood of confusion.

(1) Strength of the Mark

The strength of a mark is a factual determination of the mark's distinctiveness. *Daddy's Junky Music Stores v. Big Daddy's Family Music Ctr.*, 109 F.3d 275, 280

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<sup>11</sup> The trial court adopted this “well-reasoned conclusion” from the Trademark Trial and Appeal Board’s decision in *Stocker v. General Conference Corp. of Seventh-Day Adventists*, 39 U.S.P.Q.2d 1385, 1996 WL 427638, at \*17 (Feb. 15, 1996). (R. 70, Order p. 11, n. 5).

(6th Cir. 1997). A distinct mark is one the public readily accepts “as the hallmark of a particular source.” *Homeowners Group*, 931 F.2d at 1107. An incontestible mark is presumed strong. *Wynn Oil Co. v. Am. Way Serv. Corp.*, 943 F.2d 595, 600 (6th Cir. 1991).

The District Court found that Pastor McGill provided no direct evidence of the public’s perception of the mark, and therefore, did not overcome the presumption that Plaintiffs’ mark was strong. (R. 70, Order p. 19). As the court noted, the relevant public is composed of Adventist Christians. (R. 70, Order p. 11, n. 5). Pastor McGill presented direct evidence that several other Adventist churches use the term “Seventh Day Adventist.” (R. 30-7 Eternal Gospel website; 56-8, Reform Movement website; 56-14, Branch Davidian website; 56-15, Encyclopedia entries). It is unlikely these Adventist Christians find Plaintiffs’ mark distinctive. And, the District Court found that, viewed in the light most favorable to Pastor McGill, many of the visitors to Pastor McGill’s website who signed the guest book were Seventh-day Adventists who had a casual interest in Pastor McGill’s church. (R. 70, Order p. 21). Together, these facts establish that a genuine issue of material facts exists as to the strength of Plaintiffs’ mark.

### (3) Similarity of Marks

The District Court analyzed the two churches’ names and found that “it is

foreseeable that members of the public who see the Defendant's church sign in passing may confuse his church with one of the Plaintiffs'." (R. 70, p.20). Pastor McGill, however, testified that the marks are not similar. (R. 56, p. 18). He testified that his church uses the article "the" in front of the worldwide church and "a" in front of local congregations. The Creation Seventh Day & Adventist Church also capitalized "Day" and has dropped the hyphen connecting it to "Seventh." (R. 56-2, Undisputed Facts Response p. 10).

This Court has repeatedly noted that "a court must determine, in the light of what occurs in the marketplace, whether the mark 'will be confusing to the public when singly presented.'" *Homeowners Group, Inc. v. Home Marketing Specialists, Inc.*, 931 F.2d 1100, 1109 (6th Cir. 1991) (quoting *Wynn Oil Co. v. Thomas*, 839 F.2d 1183, 1187 (6th Cir. 1988)). To paraphrase from the Michigan Supreme Court in a case about secret societies, "Every one who knows enough about [churches] to be qualified to join them knows that a different name of a [church] means a different [church]." *Supreme Lodge Knights of Pythias v. Improved Order Knights of Pythias*, 71 N.W. 470, 472 (Mich. 1897). And, a prefix such as "improved" used in relation to a church or society, has a different significance than when used in front of an article. *See Id.* at 472-73. Thus, the "Improved" Knights of Pythias are distinct from the "Supreme" Knights of Pythias, in the same way that there is distinction between

“that of the Episcopal Church and the Reformed Episcopal Church, or that of the Presbyterian Church and the United Presbyterian Church.” *Id.* at 472.

In this case, the marketplace is the realm of religion and Adventist Christians are the relevant public. Pastor McGill has taken several steps to distinguish A Creation Seventh Day & Adventist Church from Plaintiffs. These considerations, coupled with the proper weight this case demands of the purchaser care factor, show that a genuine issue of material facts exists as to the marks’ similarity.

(4) Evidence of actual confusion; (7) Defendant’s intent in selecting the Mark

These factors do not favor either party. Plaintiffs relied heavily on alleged evidence of actual confusion in moving for summary judgment. (R. 70, Order Granting Partial Summary Judgment p. 20). The District Court found no persuasive evidence of actual confusion, but noted that a lack of such evidence was insignificant in determining a likelihood of confusion. (R. 70, Order p. 22). The Court also found that Pastor McGill did not intend to confuse the public in selecting the name for his church, but again, the lack of evidence for this factor made it irrelevant. (R. 70, Order p. 22) (citing *Daddy’s Junky Music Stores*, 109 F.3d at 287). In sum, neither factor helps Plaintiffs meet their burden.

(2) Relatedness of goods and services; (5) Marketing channels used; and (8) Likelihood of Expansion of product lines

The District Court found that Pastor McGill conceded that these factors pointed toward a likelihood of confusion. (R. 70, Order pp. 19, 21, 22). Far from conceding anything, Pastor McGill argued that the application of these factors in the religious context is unhelpful and irrelevant. (R. 56, Response to Motion for Summary Judgment p. 17). It is unlikely that a situation would ever arise in which two religious parties engaged in litigation such as this would not have related goods or services or want to expand their “product lines.” The Seventh-day Adventist and Creation Seventh Day & Adventist Churches hold many of the same ideals and principles. In fact, the root of this litigation is the importance the parties place on “Seventh Day” and “Adventist.”

While Pastor McGill admitted in his Response to Plaintiffs’ summary judgment motion that the “goods or services” the two parties provide are undoubtedly related, this does not mean they offer the same kinds of goods, especially in the religious context. In *AMF, Inc. v. Sleekcraft Boats*, 599 F.2d 341, 348 (9th Cir. 1979),<sup>12</sup> the Ninth Circuit affirmed a district court’s conclusion that two boat manufacturers who produced sporty, fiberglass waterskiing boats of similar size and price were not in competition, because one was geared toward family recreation while the other was

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<sup>12</sup> *AMF* was abrogated on other grounds by *Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 810 n.19 (9th Cir. 2003).

geared to high speed recreation. The Circuit Court noted that it was a fine distinction but the evidence warranted such a conclusion. *Id.* In this case, like *AMF*, the parties produce similar goods in a broad sense. Unlike the ski boat industry, the disparity between the parties' goods in this case is as distinct as the difference between a ski boat and a canoe. The difference in horsepower between two ski boats may be a fine distinction but differing opinions on the idea of life without sin are not. (see R. 37-4, McGill Depo. p. 9). While the general public might find the goods similar, to the relevant public, the differences in the parties' goods greatly distinguish them.

This Court has noted that "the greater the number of identical or more or less similar trade-marks already in use on different kinds of goods, the less is the likelihood of confusion . . . ." *Homeowners Group*, 931 F.2d at 1108. (quoting comment g to the Restatement of Torts § 729 (1938)). Extensive third-party use of a mark denotes substantial weakness of a mark's strength. *Id.* at 1108. In this case, several groups use "Seventh Day" and "Adventist" to describe their churches. (R. 30-7, Eternal Gospel website; 56-6, Wikipedia Entry on Denominations pp. 19-20; 56-8, Reform Movement website; 56-14, Branch Davidian website). The District Court concluded that Pastor McGill provided no direct evidence that the public does not associate the mark with Plaintiffs. (R. 70, Order Granting Partial Summary Judgment p. 18). Plaintiffs evidence of use by the relevant public, other Adventist Christians,

suggests otherwise. Thus, given the degree of purchaser care, the lack of the defendant's intent to cause confusion, and the lack of actual confusion, these factors are really non-factors in this case and do not help Plaintiffs meet their burden.

This Court has previously noted that the purpose of the above factors is to “pierce the unreality of simple comparisons and reveal the operative facts of the real world.” *Homeowners Group*, 931 F.2d at 1106. In the real world, Adventist Christians, like most people of faith, exercise great care in selecting a church. And, although Pastor McGill practices Seventh Day Adventism, uses similar channels to recruit new members, and hopes to grow his congregation, the name of Pastor McGill's church is more likely to stand out to Adventist Christians than confuse them.<sup>13</sup> Viewed in the light most favorable to Pastor McGill, Plaintiffs have failed to show that no genuine issue of material fact exists that Pastor McGill's church is likely to cause confusion with Plaintiffs' church.

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<sup>13</sup> Diego Puig, *Note: To God What is God's and to Caesar What is Caesar's: Aesthetic Functionality as a Valve Between Trademark Rights and Religious Freedoms*, 9 J. TECH. L. & POL'Y 81, 101 (2004) (noting that “church ‘products’” come in such a tight bundle that any small difference in the performance of the religious rites as a whole, between the owner of the trademark and the potentially infringing party (such as the ministers' vestments, the liturgy, or the name of the church itself) is likely to clue the public into realizing that this church is not in association with the one it is so similar to, thus, making confusion as to source unlikely).

## CONCLUSION

This Court should find that a court cannot exercise subject matter jurisdiction over inter-church disputes involving religious use of intellectual religious property. In the alternative, this Court should hold that the established methods for resolving church property disputes may be inappropriate in cases involving intellectual religious property and should develop an exception to the approach.

In the alternative, the Court should find that Plaintiffs are estopped from arguing that Seventh Day Adventism describes a religion and that Plaintiffs' Complaint should be dismissed for failure to state a claim, or in the alternative, remanded to the District Court for a trial on whether the names are too similar.

In the alternative, the Court should find that genuine issues of material fact exist as to whether Plaintiffs' federal claims are barred by the Restoration Act, whether Plaintiffs' mark has become generic, and whether there is a likelihood of confusion between the parties' churches.

WHEREFORE, Pastor McGill asks this Court to dismiss Plaintiffs' case or remand it on one of the above grounds.

Respectfully submitted,

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### **CERTIFICATE OF COMPLIANCE**

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 11,828 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared using proportionally spaced typeface using Times New Roman in WordPerfect X3 with 14 point font.

s/Charles L. Holliday  
Counsel for Appellant

Date: August 17, 2009

**CERTIFICATE OF SERVICE**

In accordance with FRAP 25(d), the undersigned hereby certifies that on this 17th day of August, 2009, an electronic copy of the foregoing Brief of the Appellant was filed via CM/ECF. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt or their respective Counsel of record, namely:

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**DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS**

Pastor McGill, per 6th Cir. R. 30(b) and 30 (f)(1), hereby designates the following portions of the electronic record as an addendum pursuant to the aforementioned rules:

<b>Description of Record Entry</b>	<b>Record Entry Number</b>
Complaint	1
Answer	4
Amended Scheduling Order	26
Defendant's Motion to Dismiss	30
Defendant's Memorandum in Support of Motion to Dismiss	30-2
Affidavit of Walter McGill	30-3
The Marik case from 1987 to 1990	30-4
Opinion of Judge Mariana Pfaelzer, Kinship case	30-5
<i>Perez</i> Settlement Agreement	30-6
Eternal Gospel website homepage	30-7
Seventh-day Adventist Church homepage	30-8
<i>Benn</i> Motion	30-12
Response to Motion to Dismiss	36
Plaintiffs' Motion for Summary Judgment	37
Excerpts of McGill Deposition	37-4
O'Neill Declaration	37-11
Plaintiffs' Memorandum in Support of MSJ	37-15
Response to Motion for Summary Judgment	56
Response to Statement of Undisputed Facts	56-2
Affidavit of Walter McGill	56-3

Wikipedia entry on denominations	56-6
Seventh-Day Adventist Reform Movement website	56-8
Supplemental affidavit of Walter McGill	56-9
McGill Deposition excerpt	56-11
Branch Davidian Seventh Day Adventist webpage	56-14
Encyclopedia entries	56-15
Plaintiffs' Reply to Response to MSJ	59
Order Denying Motion to Dismiss	61
Order Reassigning Case	62
Minute Entry regarding Status Conference	66
Order Granting Partial Summary Judgment	70
Motion to Amend Pre-Trial Order	71
Order Denying Motion to Amend	74
Certificate of Counsel	82
Magistrate Judge's Report and Recommendation	94
Defendant's Exception to Report	95
Order Adopting Magistrate's Report	98
Notice of Appeal	99
Judgment	104