

**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, an Unincorporated Association,)

Plaintiffs,)

v.)

WALTER McGILL, d/b/a CREATION)
SEVENTH DAY ADVENTIST CHURCH,)
et al.,)

Defendants.)

Case No. 1:06-cv-01207

[PROPOSED] ORDER OF CONTEMPT AND SANCTIONS

(Submitted by counsel for the General Conference of SDA)

This matter is before the Court on Plaintiffs', General Conference Corporation of Seventh-day Adventists and General Conference of Seventh-day Adventists' ("Plaintiffs"), Renewed Motion and Memorandum for Order to Show Cause (D.E. No. 105) and the September 3, 2009 Order of Reference. (D.E. No. 106) Upon consideration of the Plaintiffs' Motion and Memoranda, and arguments of counsel at the hearing held by this Court on November 5, 2009, and the entire record in this matter, it appears to the Court that Plaintiffs' motion is well taken and should be GRANTED.

PROCEDURAL BACKGROUND

As a result of the Defendant's repeated refusal to participate in a Court ordered mediation conference, and in accordance with Rules 16(f) and 37(b)(2)(A)(ii) –(vii), Fed.R.Civ.P, Plaintiffs

filed a Motion for Sanctions and Permanent Injunctive Relief (“Motion for Sanctions”), requesting that this Court sanction Defendant for his actions, including the sanctions of the entry of default judgment as well as permanent injunctive relief against Defendant. (D.E. No. 85)

On April 16, 2009, a Report and Recommendation (the “R&R”) was entered recommending that Plaintiffs’ Motion for Sanctions be granted, and that a permanent injunction be issued. (D.E. No. 94) The Defendant filed an objection to the R&R, and the Plaintiffs filed a limited exception. After considering the parties’ positions, on May 28, 2009, this Court entered its Injunction Order, therein adopting the R&R in full, including its recommendation that a permanent injunction be issued against the Defendant. (D.E. No. 98)(the “Injunction Order”).

Defendant was duly notified of and served with a copy of the Injunction Order, evidenced by the fact that he filed a Notice of Appeal to the Sixth Circuit Court of Appeals (D.E. 99), as well as a Motion to Stay Injunction pending Defendant’s appeal. (D.E. No. 100)

On June 30, 2009, Plaintiffs filed a Motion for Order to Show Cause (D.E. No. 102) due to Defendant’s failure to comply with the Injunction entered by this Court on May 28, 2009 (D.E. No. 98). Due to the pendency of Defendant’s Motion to Stay Injunction Pending Appeal, the Court denied without prejudice the Plaintiffs’ Show Cause Motion. The Court noted, however, the seriousness of the assertions, that the Injunction Order must be complied with henceforth, and the consequences of continued non-compliance. (Order dated Aug. 5, 2009, D.E. No. 103)

In response to the Court’s Order of August 5, 2009, Plaintiffs’ counsel requested that the Defendant comply with the prohibitions and requirements placed upon him through the Court’s Orders and the Injunction. (*See* D.E. No. 105, Exhibit 1, 8/7/09 email from Galanter to Holliday). In that regard, among the other requirements of the Injunction, it was requested that

the Defendant promptly cease using numerous violative domain names and websites, that Defendant remove all violative signage and other promotional materials, and that the sworn compliance statement be filed within 20 days of the Court's August 5, 2009 Order. (Id.) Later that day, Defendant himself responded to that email. (Id., email from Defendant to Holliday) By that email, Defendant suggested that he would continue to violate the Injunction Order and August 5, 2009 Order and further suggested a belief that some of his activities and websites were beyond the Court's jurisdictional reach. (Id.)

In response, Plaintiffs subsequently filed their Renewed Motion and Memorandum for Order to Show Cause. (D.E. No. 105) By Docket Entry dated October 20, 2009 this Motion was set for hearing on November 5, 2009. Although Defendant had the opportunity to show cause as to why he should not be held in contempt of court for his failure to abide by the Court's Injunction by either a written response to the original or renewed motion, or by appearing at the hearing held on November 5, 2009, Defendant did not file any written response or appear at the hearing. Instead, Defendant's counsel appeared alone at this hearing, without his client, and offered a general objection to a finding of contempt.

ANALYSIS

A. Standard for Civil Contempt

A decision on a motion for contempt lies within the sound discretion of the court. *See Electrical Workers Pension Trust Fund of Local Union #58 v. Gary's Elec. Serv.*, 340 F.3d 373, 378 (6th Cir. 2003). The contempt power "is a necessary and integral part of the independence of the judiciary, and is absolutely essential to the performance of the duties imposed" by law. Id. (quoting Gompers v. Buck's Stove & Range Co., 221 U.S. 418, 450 (1911)). Contempt

proceedings are used to enforce the message that court orders are not to be taken lightly, but rather are to be complied with in a prompt manner. Id.

In civil contempt proceedings, judicial sanctions may be imposed for either or both of two purposes: (1) to coerce the defendant into compliance with the court's order; and (2) to compensate the movant for the losses sustained. Id. at 379 (*citing* United States v. United Mine Workers of America, 330 U.S. 258, 303-04 (1947)).

To establish a *prima facie* case of contempt, the movant must produce clear and convincing evidence to show a violation of a definite and specific order of which that party had knowledge, and which directed that party to perform or refrain from performing a particular act or acts. Id., (*citing* NLRB v. Cincinnati Bronze, Inc., 829 F.2d 585, 588 (6th Cir. 1987)). Once the movant establishes his *prima facie* case, the burden shifts to the contemnor to show why he is unable to comply with the court's order. Id. To meet this burden in the Sixth Circuit, the party charged with contempt must show "categorically and in detail" why they are unable to comply with the Court's order. Id. (quoting Rolex Watch U.S.A., Inc. v. Crowley, 74 F.3d 716, 720 (6th Cir. 1996)). The court must then consider whether the party charged with contempt took all reasonable steps within their power to comply with the court's order. Id., at 383.

B. Defendant Is In Contempt for His Failure to Comply with the Injunction Order

The Permanent Injunction entered by this Court on May 28, 2009, orders as follows:

Defendant and his agents, servants and employees, and all those persons in active concert or participation with them, should be 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 domain name, key words, metatags, links, and any other use for the purpose of directing Internet traffic, at any

locality in the United States. Subject to the foregoing, Defendant may use these terms in a non-trademark sense, such as oral or written use of the marks to refer to the Plaintiffs, or oral or written use of certain terms in a non-trademark descriptive sense, such as “this Church honors the Sabbath on the ‘seventh day,’” or “the members of this church believe in the ‘advent’ of Christ.”

As it pertains to all labels, signs, packages, wrappers, receptacles, and advertisements bearing the SEVENTH-DAY ADVENTIST mark, or bearing 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, and all plates, molds, matrices, and other means of making the same (collectively, “Defendant’s Infringing Articles”), Defendant shall either:” (1) deliver Defendant’s Infringing Articles to Plaintiffs’ attorney within twenty (20) days after issuance of the Order, to be impounded or permanently disposed of by Plaintiffs; or (2) permanently dispose of Defendant’s Infringing Articles himself within twenty (20) days of this Order, certifying in writing and under oath that he has personally complied with this Order.

Regardless of the manner of disposal of Defendant’s Infringing Articles, Defendant shall file with the Clerk of this Court and serve on Plaintiffs, within twenty (20) days after issuance of this Order, a report in writing, under oath, setting forth in detail the manner and form in which Defendant has complied with the forgoing injunction.

(D.E. No. 98, pp. 12-13)

It is undisputed that Defendant has knowledge of the existence and terms of the Injunction Order. It is also undisputed that Defendant has wholly failed to comply with the terms of the Injunction Order in that he has: (1) continued to use the mark SEVENTH-DAY ADVENTIST, including the use of the words SEVENTH-DAY and ADVENTIST, and the acronym SDA, either together, apart, or as part of, or in combination with other words, phrases, acronyms or designs, in the sale, offering for sale, distribution, promotion, provision or advertising of products and services, including on the Internet in domain names; (2) failed to either (i) deliver Defendant’s Infringing Articles to Plaintiffs’ attorney, or (ii) permanently dispose of Defendant’s Infringing Articles himself, and certify in writing and under oath that he

has personally complied with this order; and (3) failed to file with the Clerk of this Court and serve on Plaintiffs, a report in writing, under oath, setting forth in detail the manner and form in which Defendant has complied with the terms of the Permanent Injunction.

Defendant, however, has not stopped there. Since the entry of the injunction, Defendant has publicized his failure to comply on at least one of his websites, and has taken affirmative actions to violate the Injunction Order.

In this regard, Defendant has posted an “Update” on his <www.creationseventhdayadventistchurch.ca> website that states that:

Update 05/27/09: An injunction is issued by judge Daniel Breen enjoining the Church from using the names Seventh-day Adventist, Seventh-day, Adventist, or the acronym SDA with an order to submit a sworn notice of compliance to the Court by June 17, 2009. No compliance report was filed.

(*See*, D.E. 102, Exhibit 1, p. 9)

Additionally, it is uncontested that after it became apparent that Defendant was not going to comply with the Injunction Order, Plaintiffs, through counsel, began discussions with the website hosts and domain name registrars for Defendant’s numerous websites. In response to these efforts, several of Defendant’s websites were taken off of the Internet and the domain names were “locked” by the website hosts and domain name registrars. However, in response to this, Defendant actively began “redirecting” his prohibited domain names to other websites and domain names that had yet to be taken down and/or disabled by these third parties. (*See, Id.* Exhibit 2) By doing this, Defendant was actively violating the injunction.

In view of the foregoing, the Court finds by clear and convincing evidence that Defendant has and continues to willfully disobey a valid order of this Court and is therefore in Contempt of this Court.

C. Sanctions and Other Relief

1. Award of Attorneys' Fees and Costs

It is well established that upon a finding of contempt, a court has broad discretion in assessing sanctions to protect the sanctity of its decrees and the legal process, including allowing a movant to recover attorneys' fees and expenses incurred in prosecuting a contempt motion. *see, Board of Supervisors of The Louisiana State University v. Smack Apparel Co.*, 574 F.Supp.2d 601 (E.D.La. 2008); *See also, Premium Nutritional Products, Inc. v. DuCote*, 571 F.Supp.2d 1216, 1220 (D.Kan. 2008). Plaintiffs have incurred attorneys' fees and costs in the amount of \$35,567.00 seeking compliance with the Injunction Order and this Order of Contempt, for which they should be compensated. (*See*, D.E. No. 110, Notice of Filing Galanter Dec'1 in Support of Fee Request) Accordingly, as a sanction against Defendant, Plaintiffs are hereby awarded and Defendant is Ordered to pay to Plaintiffs \$35,567.00.

2. Remedies Related to Ongoing Internet Violations

Defendant continues to violate the injunction on the Internet through the use of domain names that violate the Injunction and/or websites that contain content that violates the Injunction. (*See* D.E. No. 105, Exhibit 1, 8/7/09 email from Galanter to Holliday) Further, Defendant has indicated that he intends to continue to violate the Injunction in this way. (*See Id.*, email from Defendant to Holliday)

Defendant has asserted that some of these domain names and websites may be registered, hosted, and or operated outside of the United States and are thus beyond its jurisdiction. While this Court's Jurisdiction beyond the territorial borders of the United States is certainly limited, its jurisdiction over the Defendant is not similarly restricted. "It is a familiar rule of Anglo-

American law that once a court has obtained personal jurisdiction over a defendant, the court has power to command the defendant to do or not to do acts outside the territorial jurisdiction of the court.” *McCarthy on Trademarks* §30:15 (*citing*, in pertinent part, *New Jersey v. New York*, 283 U.S. 473, 75 L. Ed. 1176, 51 S. Ct. 519 (1931)).

Additionally, at the hearing held on Plaintiffs’ Motion, Defendant’s counsel suggested that certain of the violative domain names and websites may be registered and/or operated by individuals other than the Defendant. In this event, it is likely that such individuals are also violating the terms of the Injunction Order as it expressly applies to “Defendant and his agents, servants and employees, and all those persons in active concert or participation with them[.]” (*See* D.E. No. 98 and Fed.R.Civ.P. 65(d)(2)).

Accordingly, the Plaintiffs requested at the hearing that they be allowed to conduct limited discovery in order to determine the extent of Defendant’s violation of the Injunction, including third party discovery to ascertain the identities of and/or the extent to which Defendant’s agents, servants, employees, and those persons in active concert or participation with them have assisted Defendant in violating the Permanent Injunction.

The scope of discovery is within the sound discretion of the trial court. *Chrysler Corp. v. Fedders Corp.*, 643 F.2d 1229, 1240 (6th Cir. 1981). Further, this Court’s authority to enforce its orders through the contempt process includes the authority to allow discovery of Defendant and those persons in active concert or participation with Defendant as it relates to continued violations of the Injunction Order. *See, Palmer v. Rice*, 231 F.R.D. 21 (D.D.C. 2005) (granting plaintiff’s request to take discovery in aid of enforcement of 10-year old permanent injunction); *see also, E. & J. Gallo Winery v. Andina Licores S.A.*, 2007 WL 333386 (E.D. Cal. 2007) (holding that court retained jurisdiction to implement and enforce permanent injunction,

including by way of post-judgment discovery related thereto, and allowing plaintiff to conduct post-judgment discovery directed to compliance with and enforcement of permanent injunction).

Accordingly, the Court finds that ascertaining the identities of those persons acting on behalf of or in concert with the Defendant, as well as the extent to which those persons have assisted Defendant, will help this Court with enforcement of its Injunction Order. Accordingly, this Court finds that limited discovery is appropriate and Plaintiffs shall be permitted to take reasonable discovery of Defendant and/or third parties concerning the identity of those acting in concert with Defendant and the extent and methods by which Defendant and those acting in concert with him are continuing to violate the terms of the Injunction Order.

Finally, it is uncontested that since the entry of the Injunction Order the creation and use of domain names and websites that are violative of the Injunction has proliferated. It is also not contested that such actions have been carried out by Defendant and/or individuals acting in concert with him. These domain names and the websites found at such domain names have been as identified as follows:

www.creationseventhdayadventistchurch.ca
www.csdadventistchurch.co.cc
www.csdachurch.co.cc/
www.csdachurch.0adz.com
www.creationsdadventistrelief.to
www.csda-adventistchurch.to
www.creationsdadventistrelief.to
www.adventistry.org
www.creationseventhdayadventist.org.rw
www.creationsdarelieff.0adz.com
www.seventhdayadventistsda-v-creation7thdayadventistcsda-uslawsuit.net
www.seventhdayadventism.org
www.7thdayadventism.org/
www.whypastorwaltermcgillisnotaffiliatedwithgcsdaadventistchurch.net
www.csdachurch.wordpress.com
www.csda-korea.org
www.creationseventhdayadventistreliefprojectsint.ltd.ug
www.seventhdayadventistchurchfoundwanting.us
www.home.comcast.net/~7thdayadventist
www.home.comcast.net/~csdachurch
www.home.comcast.net/~creationsda
www.home.comcast.net/~creation-adventist

www.binaryangel.net
www.thefourthangel.net
www.home.comcast.net/~creation-sabbath
www.home.comcast.net/~barbara_lim
www.home.comcast.net/~crmin

(See D.E. No. 105, Exhibit 1, 8/7/09 email from Galanter to Holliday)

Accordingly, in addition to the more general prohibitions contained in the Injunction Order, it is Ordered that these domain names and the websites found at the domain names are also violative of the Injunction Order and that all persons acting in concert with Defendant, including any website hosting companies and domain name registrars, are hereby enjoined from using or enabling the use of such domain names and websites.

3. Remedies Related to Defendant's Signage and other Promotional Material

It is also uncontested that Defendant has failed to either (i) deliver Defendant's Infringing Articles to Plaintiffs' attorney, or (ii) permanently dispose of Defendant's Infringing Articles himself, and certify in writing and under oath that he has personally complied with this order. Defendant has also failed to file a report in writing, under oath, setting forth in detail the manner and form in which Defendant has complied with the terms of the Permanent Injunction. Accordingly, due to Defendant's failure to act and to take down and/or dispose of signage and other promotional materials that are violative of the injunction, the Court hereby Orders that such materials be seized for destruction by the United States Marshal.¹ The United States Marshal of this District is directed to take all appropriate steps to ensure that this order is executed. *See*, 28 U.S.C. § 566(c) and 15 U.S.C. § 1118; *see also* Kabushiki Kaisha Hattori Seiko v. Star Mart, 1985 WL 1142 *2 (N.D.Ill. April 30, 1985)(directing United States Marshal to seize for

¹ This Order applies to signage and other promotional materials that contain words, phrases and or acronyms prohibited by the Injunction Order, and which may be found at 1162 Old Highway 45 South, Guys, Tennessee, which is the location of Defendant's "Creation Seventh Day Adventist Church," and 1321 Hwy 72 East, Suite #6, which is the location of Defendant's "Help 4-U" office. At the November 5, 2009 Hearing, Plaintiffs' counsel presented to the Court photographs taken on November 4, 2009, depicting, in part, the violative signage at these locations.

destruction pursuant to 15 U.S.C. § 1118, all labels, signs, prints, packages, wrappers, receptacles, brochures and advertisements, in the possession, custody or control of the Defendants, bearing the infringed trademark). In accordance with 28 U.S.C. § 566(c), the United States Marshal shall command all necessary assistance to execute this order and the costs of such services shall be presented to the Court for further Order directing their payment by Defendant. Plaintiffs' counsel shall accompany the United States Marshal in executing this Order in case questions arise during the execution. *See*, www.usmarshals.gov/process/attachment.htm. Additionally, at his discretion, Defendant's counsel may also accompany the United States Marshal in executing this Order.

4. **Civil Commitment**

Fed.R.Civ.P. 4.1(b) provides in relevant part that: "An order of civil commitment of a person held to be in contempt of a decree or injunction issued to enforce the laws of the United States may be served and enforced in any district." An order of civil commitment is entirely appropriate here. *See*, Federal Trade Commission v. Verity International, Ltd., 140 F.Supp.2d 313, 318-19 (S.D.N.Y. 2001)(holding individuals in contempt of court and sanctioning such individuals with an order of civil commitment with arrest to be carried out whenever contemnors returned to the United States and their incarceration pending their full and complete compliance with the Court's injunction). As in Verity International, the contempt of Defendant is deliberate, calculated and willful. Similarly, while Defendant, like the contemnors in Verity International, may be able to remain outside the country for a long period in order to avoid arrest, it is likely that this order will give Defendant an incentive to comply with the Court's order. *See*, Id. at 318, *see also* Electrical Workers Pension Trust Fund of Local Union #58 v. Gary's Elec. Serv., 340

F.3d 373, 379 (6th Cir. 2003) (holding that judicial sanctions may be imposed in civil contempt proceedings to coerce the defendant into compliance with the court's order).

Accordingly, the Court hereby Orders the arrest of Defendant, wherever he may be found within the jurisdiction of the United States, and his incarceration in this District pending his full and complete compliance with the Injunction Order. This Court will release him upon his full and complete compliance with the Injunction Order. The United States Marshal of this District is directed to take all appropriate steps to ensure that this order of arrest and civil commitment is executed wherever Defendant may be found within the United States or its territories, including appropriate notification of the United States Customs Service. *See, Id.* at 319 and 28 U.S.C. § 566(c).

IT IS SO ORDERED.

HON. EDWARD G. BRYANT
U.S. DISTRICT COURT MAGISTRATE JUDGE