

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

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

**MOTION AND MEMORANDUM FOR ORDER SETTING
EVIDENTIARY SHOW CAUSE HEARING**

Plaintiffs, General Conference Corporation of Seventh-day Adventists and General Conference of Seventh-day Adventists (collectively the “Plaintiffs”), respectfully move this Court for an Order Setting an Evidentiary Show Cause Hearing and ask the court to require that four individuals acting as agents, servants, and/or acting in concert with Defendant Walter McGill (the “Defendant”) attend such evidentiary hearing and show cause as to why they should not be held in contempt for willfully violating this Court’s orders.

INTRODUCTION

Four individuals acting as agents, servants, and/or acting in concert with Defendant have chosen to willfully disobey and violate the Court’s January 6, 2010 Order (the “January 2010 Order”) (D.E. No. 112) and/or the Injunction entered by this Court on May 28, 2009 (the “Injunction Order”) (D.E. No. 98). In February 2010, Plaintiffs’ agents carried out the January

2010 Order and removed the signs and other infringing materials in Guys, Tennessee. Among other potential violations of the orders of this Court, on or about March 8, 2010, the signs were repainted by Lucan Chartier and three others, thereby replacing the former infringing name of the church in direct willful violation of the Order and Injunction Order.

Accordingly, this Court should issue an order setting an evidentiary show cause hearing requiring these individuals to appear and show cause as to why they should not be held in contempt of court for violating the terms of the orders issued by this Court. Upon the conclusion of the evidentiary hearing, Plaintiffs respectfully request that the Court hold them in contempt, and enter any and all sanctions and remedies that the Court deems proper to coerce compliance with the Court's orders and to compensate Plaintiffs for the losses sustained.

PROCEDURAL BACKGROUND

A. The Court's Orders and Permanent Injunction

On May 28, 2009, this Court issued a permanent injunction against the Defendant. (D.E. No. 98). This Injunction Order expressly applies to "Defendant and his agents, servants and employees, and all those persons in active concert or participation with them[.]" (D.E. No. 98 and Fed. R. Civ. P. 65(d)(2)) (emphasis supplied).

In response to the Defendant's continued failure to obey the Injunction Order, Plaintiffs filed a 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. The Defendant neither responded to the motion nor appeared at the hearing. At the hearing, the Plaintiffs requested 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 Defendant have assisted Defendant in violating the Permanent Injunction. (D.E. No. 111, p. 9).

On December 14, 2009, a Report and Recommendation on Contempt and Sanctions (“R&R”) was entered recommending that Plaintiffs’ Motion for Sanctions be granted. (D.E. No. 111). On January 6, 2010, this Court entered an Order Adopting Report and Recommendation in full. (D.E. No. 112). Specifically, the January 2010 Order held:

Pursuant to the magistrate judge’s recommendation, the Court finds that limited discovery is appropriate for the purpose of permitting Plaintiffs to ascertain the identities of those who may have acted in concert with Defendant in this matter. Defendant is hereby ORDERED to cooperate fully with Plaintiffs in such limited discovery. . . .

The Court further holds that Plaintiffs or their agents should be and are permitted to remove and permanently dispose of Defendant’s signs and promotional materials that violate the Injunction Order, with the costs of such removal and disposal to be taxed to Defendant.

(D.E. No. 112, pp. 2-3) (emphasis supplied).

B. Removal of Infringing Materials and The Subsequent Replacement of Them in Willful Violation of the Court’s Orders and Permanent Injunction

On February 16, 2010, Plaintiffs’ agents carried out the Order and removed the signs and other infringing materials in Guys, Tennessee and Corinth, Mississippi.

On or about March 8, 2010, the signs were repainted and replaced by Lucan Chartier and others, displaying the former infringing name of the church in direct willful violation of the Order and Injunction Order. (See Exhibit 1, Jeff York, *Guys church defies court order*, Daily Corinthian, http://dailycorinthian.com/view/full_story/6699462/article-Guys-church-defies-court-order?instance=news_main; Exhibit 2, *Church Name Controversy Continues*, WBBJ-TV West Tennessee’s News Channel, March 3, 2010 <<http://www.wbbj.com/NewsStories/100310ChurchNameControversyContinues.html>>) (“We

took a bucket of paint. We got a ladder and we restored our signs,' said Lucan Chartier, a church member.”)

Upon information and belief, the following three individuals,¹ assisted Lucan Chartier in repainting and replacing the Defendant’s sign:

Keith Johnson
135 Hope Acres Lane
Selmer, Tennessee 38375

Dorothy Johnson
135 Hope Acres Lane
Selmer, Tennessee 38375

Crystle Martin
407 CR 1361
Burnsville, Mississippi 38833

On behalf of the church and its members, Lucan Chartier freely admits knowledge that their actions violate the Court’s January 2010 Order and Injunction Order. (*See* Exhibit 2) Moreover, on new websites recently created by and/or on behalf of the Defendant’s church, the Injunction Order and January 2010 Order are available for downloading in pdf format and once again violations of this Court’s orders are flaunted:

“Update 3/8/10: Signs are restored on the Church building via white paint. Pictures may be seen here and here.”

(*See* Exhibit 3, <www.loudcry.eu> website)

C. Lucan Chartier’s Refusal to Comply With Subpoena and Appear at Deposition

Additionally, Lucan Chartier failed to comply with discovery requests when he failed to appear at a scheduled deposition. On February 16, 2010, pursuant to Rule 45 Fed.R.Civ.P.,

¹ These three individuals were present on February 16, 2010 when the signs were removed. A neighbor notified the undersigned that they were each present on March 8, 2010 when the signs were repainted and replaced. Additionally, Mr. Chartier has publicly stated that others assisted him in repainting the signs.

Plaintiffs' counsel served a Subpoena to Testify at a Deposition in a Civil Action upon Lucan Chartier via personal service. (D.E. No. 115). Mr. Chartier's deposition was scheduled for March 18, 2010. (*Id.*)

On February 28, 2010, Mr. Chartier emailed Plaintiffs' counsel, indicating that he would not attend the scheduled deposition. (Exhibit 4, 2/28/10 email from Chartier to Galanter). On March 4, 2010, Plaintiffs' counsel responded to Mr. Chartier's email via letter, again requesting that Mr. Chartier attend his scheduled deposition. (Exhibit 5, 3/4/10 letter from Galanter to Chartier).

On March 11, 2010, Mr. Chartier sent a second email to Plaintiffs' counsel, again indicating his refusal to appear for the deposition. (Exhibit 6, 3/11/10 email from Chartier to Galanter).

On March 15, 2010, Mr. Chartier sent a third email to Plaintiffs' counsel, confirming that he would not appear at his scheduled deposition. (Exhibit 7, 3/15/10 email from Chartier to Galanter). Plaintiffs' counsel responded to Mr. Chartier, confirming Mr. Chartier's refusal to attend. (*Id.*, 3/15/10 email from Galanter to Chartier).

LAW AND ARGUMENT

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. A Nonparty May Be Held In Contempt

A nonparty may be held in civil contempt. *See, e.g., U.S. ex rel. Pogue v. Diabetes Treatment Centers of America, Inc.*, 444 F.3d 462, 469 (6th Cir. 2006); *Electrical Workers*, 340 F.3d at 383. Furthermore, an order can bind a nonparty with notice, including the parties' officers, agents, servants, employees, attorneys, and any other persons acting in concert or participation. Fed. R. Civ. P. 65(d). Rule 65(d) "is derived from the commonlaw doctrine that a decree of injunction not only binds the parties defendant but also those identified with them in

interest, in ‘privity’ with them, represented by them or subject to their control.” *Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 14 (1945). “To determine whether a person is one who acts in concert or is identified in interest with the enjoined party, the court must look to the actual relationship between the person enjoined and the person thought to be bound by the injunction.” *Blackard v. Memphis Area Medical Center for Women, Inc.*, 262 F.3d 568, 574 (6th Cir. 2001).

As previously held by this Court, its 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. (D.E. No. 111, p. 9) (emphasis added) (citing *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); *E. & J. Gallo Winery v. Andina Licores S.A.*, No. CV F 05-0101 AWI LJO, 2007 WL 333386 (E.D. Cal. Jan. 31, 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)). This Court has also stated, “The Magistrate Judge is of the opinion 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 with enforcement of the Court’s Injunction Order.” (D.E. No. 111, p. 10).

The four individuals named above have admitted to and/or been identified as being members of Defendant’s church responsible for repainting and replacing the signs at Defendant’s church in violation of this Court’s Orders. (*See e.g.* Exhibit 1, “Lucan Chartier, acting pastor of the church, said members of Creation Seventh Day Adventist would be willing to go to jail for their beliefs.” *See also* Exhibit 2, ““We took a bucket of paint. We got a ladder and we restored

our signs,' said Lucan Chartier, a church member.") It is thus beyond question that these individuals have been acting as agents, servants, and/or in concert with Defendant and are thus covered by and acting in violation of the injunction.

C. **The Four Individuals Acting In Concert With Defendant Are In Contempt For Their Failure To Comply With The Injunction And Subsequent Order**

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

Defendant and his agents, servants and employees, and all those persons in active concert or participation with them, are forever enjoined from using the mark SEVENTH-DAY ADVENTIST, including the use of the words SEVENTH-DAY or ADVENTIST, or the acronym SDA, either together, apart, or as part of, or in combination with any other words, phrases, acronyms or designs, or any mark similar thereto or likely to cause confusion therewith, in the sale, offering for sale, distribution, promotion, provision or advertising of any products and services, and including on the Internet, in any 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."

(D.E. No. 98, pp. 12-13) (emphasis supplied). On January 6, 2010, this Court also ordered:

Pursuant to the magistrate judge's recommendation, the Court finds that limited discovery is appropriate for the purpose of permitting Plaintiffs to ascertain the identities of those who may have acted in concert with Defendant in this matter. Defendant is hereby ORDERED to cooperate fully with Plaintiffs in such limited discovery. . . .

The Court further holds that Plaintiffs or their agents should be and are permitted to remove and permanently dispose of Defendant's signs and promotional materials that violate the Injunction Order, with the costs of such removal and disposal to be taxed to Defendant.

(D.E. No. 112, pp. 2-3) (emphasis supplied).

Pursuant to this Court's Orders, the violating signs and materials were removed by agents of the Plaintiffs. However, Lucan Charier and the other three individuals acting as agents,

servants, and/or in concert with Defendant took affirmative steps to violate this Court's Injunction Order by repainting and replacing the signs.

Separately, Lucan Chartier has personally violated the Order and Rule 45 Fed.R.Civ.P. by refusing to comply with a Subpoena to appear for a deposition. *See* Subpoena, D.E. No. 115, Rule 45(e) Fed.R.Civ.P. ("The issuing court may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena.")

The four individuals acting as agents, servants, and/or employees of Defendant and/or acting in concert with Defendant have admitted knowledge of the existence and terms of the Injunction Order and Order and know that their actions violate the orders. (*See*, Exhibit 2) ("A McNairy County church admitted to defying a federal court order Wednesday, and said members would rather go to prison than comply.") Members of the church have even asserted that they will "get back out and put [the signs] up once again" if the court removes the signs a second time. (*Id.*). Lucan Chartier also knows that his actions violate the orders and even anticipated this very motion for contempt: "You may . . . request the Court to command me to show why I should not be held in contempt." (Exhibit 4).

To the extent it were argued, it has been recognized by the courts in the Sixth Circuit that good faith is no defense for failure to comply with a court order enjoining certain conduct. *See*, *Peppers v. Barry*, 873 F.2d 967, 968-69 (6th Cir. 1989); *see also*, *T.W.N. Mfg. Co. v. Dura Corp.*, 722 F.2d 1261 (6th Cir.1983).

Accordingly, because the four individuals acting as agents, servants, and/or acting in concert with Defendant have and continue to willfully violate valid orders of this Court of which they had knowledge and in which they were directed to take certain acts and/or refrain from certain acts, this Court should issue an order requiring the individuals to appear at an evidentiary

hearing and to show cause why they should not be held in contempt for their willful disobedience, and upon hearing of the same, should hold the individuals in contempt for violation of this Court's Orders and enter all sanctions and remedies deemed proper.

D. Sanctions And Other Relief

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. *See, Board of Supervisors of The Louisiana State University v. Smack Apparel Co.*, 574 F.Supp.2d 601, 604 (E.D. La. 2008); *see also, Premium Nutritional Products, Inc. v. DuCote*, 571 F.Supp.2d 1216, 1217 (D. Kan. 2008). A court can also impose judicial sanctions on nonparties. *See, e.g., Pogue*, 444 F.3d at 471; *Electrical Workers*, 340 F.3d at 383.

Upon the conclusion of the evidentiary hearing and a finding of contempt, Plaintiffs seek any and all sanctions and remedies available under the law that the Court deems appropriate in accordance with its broad powers to coerce compliance with the Court's orders and to compensate Plaintiffs for the losses sustained.

CONCLUSION

It is respectfully requested that the Court: (1) issue an order directing the four individuals acting as agents, servants, and/or acting in concert with Defendant to appear at an evidentiary hearing and show cause why they should not be held in contempt of court for violating the orders issued by this Court; (2) upon hearing to be held as soon as practicable, hold the four individuals in contempt; and (3) award Plaintiffs any and all sanctions and remedies that the Court deems proper to coerce compliance with the Court's orders and to compensate Plaintiffs for the losses sustained.

Respectfully submitted,

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*Attorneys for Plaintiffs General Conference
Corporation of Seventh-day Adventists and
General Conference of Seventh-day
Adventists*

CERTIFICATE OF SERVICE

I hereby certify that on this the 24th day of March 2010, a copy of the foregoing document was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to Charles L. Holliday, 312 East Lafayette Street, P.O. Box 2004, Jackson, TN 38302. Parties may also access this filing through the Court's electronic filing system.

A copy of the foregoing document will also be served on this the 24th day of March 2010 by overnight courier and subsequent personal service upon the following:

Lucan Chartier
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Guys, Tennessee 38339-5216

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Selmer, Tennessee 38375

Dorothy Johnson
135 Hope Acres Lane
Selmer, Tennessee 38375

Crystle Martin
407 CR 1361
Burnsville, Mississippi 38833

/s/ Joel T. Galanter