

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

GENERAL CONFERENCE CORPORATION
OF SEVENTH-DAY ADVENTISTS, *et al.*,

Plaintiffs,

v.

No. 1:06-cv-01207-JDB-egb

WALTER MCGILL d/b/a CREATION
SEVENTH DAY ADVENTIST CHURCH, *et al.*,

Defendants.

**PLAINTIFFS' OBJECTIONS TO THE DISTRICT COURT OF MAGISTRATE
JUDGE'S ORDER ENTERED FEBRUARY 17, 2016**

Plaintiffs respectfully file their Objections to the Order entered by the Magistrate Judge on February 17, 2016, [D.E. 216], denying not only Plaintiff's Motion to Compel and for Extension to File Reply, but also denying Plaintiffs' underlying Motion to Add Further Specifics to the Court's Permanent Injunction [D.E. 195] in this matter, and for grounds state as follows:

1. Defendants filed their Objection to Plaintiffs' Motion to Add Further Specifics to the Court's Permanent Injunction [D.E. 205] ("Objection") on or about October 29, 2015 wherein Defendants, *inter alia*, denied involvement with the websites which were part of what Plaintiffs sought to specifically add to the Court's Permanent Injunction entered May 28, 2009, as further defined by Order entered January 6, 2010 (hereafter the "Injunction"). Defendants also challenged the Plaintiffs' need for any further specifics to the Injunction based upon changes in internet practices/technology since the date of entry of the Injunction.

2. Subsequent to the filing of Defendants' Objection, the Magistrate Judge, *sua sponte*, (see Setting Letter [D.E. 206]), requested that the Parties/Counsel appear for a status

conference with the Court, which occurred on or about November 3, 2015. During that conference, in response to Defendants' challenge to the need for further specifics, Plaintiffs' counsel made some mention of the push-back of some companies with regard to enforcement of the Injunction, and advised the Court and Defendant of Plaintiff's desire to take Mr. McGill's deposition and thereafter file a Reply to the Defendants' Objection in order to present the Court with information from said deposition and address arguments made by Defendants in their Response. The Magistrate Judge advised Plaintiffs' counsel to file a formal motion making that request.

3. On November 5, 2015, Plaintiffs filed a motion to be allowed to depose Mr. Walter McGill and to thereafter have three (3) weeks within which to get the transcript of the deposition and file Plaintiffs' Reply. [D.E. 211]. The Court granted that motion by Order on November 6, 2015. [D.E.212].

4. The Plaintiffs deposed Mr. McGill on the scheduled date of November 12, 2015, and the transcript of that deposition is some 115 pages in length. Therein, among other things, Mr. McGill identified uses of Plaintiffs' mark in some of the pictorial exhibits presented to him; and admitted that at least some of the websites Plaintiffs seek to specifically add to the Injunction were operated by his wife, Barbara McGill, or by Dr. David Aguilar; both persons who the historical record in this cause reflect were clearly connected with Mr. McGill. (*See* pp. 78–105 of the Deposition of Walter McGill, along with corresponding pictorial exhibits, attached hereto as collective **Exhibit 1**.)¹

5. As is set forth in Plaintiffs' Motion to Compel and for Extension of Time to File a Reply [D.E. 213], Plaintiffs sought to obtain some requested, late-filed exhibits to the deposition

¹ For references to Mr. McGill's wife, Barbara McGill, please see pp. 81, 82, 102. For references to Dr. David Aguilar, please see pp. 81-85, 87, 88, 104.

of Mr. McGill (which Plaintiffs requested of Mr. McGill during the deposition to provide) so that Plaintiffs could include those documents/information therefrom, along with other information and exhibits from the deposition, in support of Plaintiffs' position in their forthcoming Reply. Included was a list of some 100–300 names, e-mail addresses and/or distributees to whom Mr. McGill communicates, and to whom he testified that he sent copies of the Motion for Further Specifics to the Court's Permanent Injunction after having received it. Plaintiffs felt that the requested exhibits to the deposition were relevant and probative on the issues before the Court in the pending underlying Motion for Further Specifics, in that they would constitute evidence of "other persons who are in active concert or participation" with the Defendants and persons bound as set forth in Rule 65(d)(2)(B). This requested exhibit would provide specific names, domain names/websites, or other specific identifying information directly relevant to the specifics Plaintiffs seeks to add to the Injunction in order to effectuate the Injunction, and would therefore make Plaintiffs' forthcoming Reply more comprehensive.

6. The Order entered February 17, 2016 [D.E. 216] denied not only the Motion to Compel and for Extension, but also the pending underlying Motion for Further Specifics, without granting additional time within which the Plaintiffs could file their Reply without the denied exhibits, thereby denying Plaintiffs the ability to file any Reply.

7. On February 29, 2016, Plaintiffs filed a Motion for Leave a Reply, albeit without the denied exhibits [D. E. 217], seeking leave of the Court to be allowed to present the Court with information from the deposition that was scheduled and taken for the purpose of Plaintiffs being able to prepare and file a Reply. Without the Reply, the Court is without the information and arguments from the deposition of Mr. McGill, as well as Plaintiffs' response to Mr. McGill's claims for lack of need for more specifics to consider. Plaintiffs took the deposition dependent

upon the ability to file the Reply to present the Court with facts and testimony from the deposition, as well as to respond to Defendants' denials of the need for the underlying motion. As of the date and time of filing these Objections to the Magistrate Judge's Order, the Motion for Leave to file Reply has not been ruled upon, and given that March 2, 2016, is the deadline for filing Objections to the Magistrate Judge's Order of February 17, 2016, Plaintiffs have filed these Objections. Specifically, Plaintiffs object to the February 17, 2016, Order as follows, submitting to the District Court that each of the following rulings contained in the Order were "clearly erroneous or contrary to law." Fed. R. Civ. P. 72(a); 28 U.S.C. § 636(b)(1)(A):

A. The ruling denying Plaintiff's Motion to Compel and For Extension of Time to File Reply Brief [D.E. 213]. Objection is made to the denial of the Motion to Compel, and to the Denial of the Requested Extension of Time Within Which Plaintiffs May File Rtheir Reply, Even if the Court Denied the Motion to Compel.

The Motion to Compel

The late-filed exhibits, which were the subject of Plaintiffs' Motion to Compel, are relevant to Plaintiffs' pending Motion for More Specifics, and are specifically identified and described as follows:

1. In his deposition, Mr. McGill was asked if he discussed the Motion or sent it to anyone after being served with it (same being the pending Motion to Add Further Specifics to the Court's Permanent Injunction [D.E. No. 195]). Mr. McGill responded, "I sent it to everybody I know, probably". (Deposition of Walter McGill ("McGill Depo."), 54:13). He testified that he sent it to Mr. Aguilar, and that he sent it to everyone on his "mailing list," which included Mr. Aguilar. He identified the mailing list as being a written list which may be electronically stored, and in order to send a copy of the Motion, "all I do is hit the send button." (McGill Depo.,

55:10-11). He stated that the mailing list is “web-based” and contains a large number of peoples’ names, which he estimated to be between 100 and 300 people, and he believes that he probably sent copies of Plaintiff’s pending Motion to Add Further Specifics to everyone on the list. (McGill Depo. p. 56). He identified those persons on the list as friends and Seventh-Day Adventist members. (McGill Depo. p. 57). Mr. McGill confirmed that Mr. David Aguilar does have a website which is one of the subjects of Plaintiffs’ pending Motion to Add Further Specifics. (McGill Depo. p. 57). He also testified that he engaged in follow-up emails beyond simply his emailing copies of the Motion to his email list recipients, and he assumes that he possibly has copies of those email communications.. (McGill Depo. p. 58). Plaintiffs’ counsel requested a copy of the mailing list with email addresses and any other information contained on the list of the 100 to 300 people, to be identified as late-filed Exhibit 8. (McGill Depo. p. 58). When asked for the names of those persons on the list having some affiliation with the Creation Seventh Day Adventist Church or Creation Seventh Day Adventist religion, he stated that he did not feel comfortable giving names of people that are his friends and that may adhere to the Creation Seventh Day Adventist religion. (McGill Depo. p. 60). Mr. McGill also testified that he believes his mailing list (late-filed Exhibit 8) does contain the email addresses of the 100 to 300 people within the list. (McGill Depo. p. 66).

2. Mr. McGill testified that he had follow-up email communications with Dr. Aguilar regarding the Motion filed in the instant case, and Plaintiffs’ counsel requested copies of those follow-up communications, as late-filed Exhibit 22.

3. Plaintiffs’ counsel also requested as late-filed Exhibit 23 a list of the email addresses that Mr. McGill has used and those he currently uses, as well as a list of email

addresses that his wife has used and those she currently uses, as late-filed Exhibit 23. (McGill Depo. pp. 106-107).

4. Plaintiffs' counsel similarly requested copies of any follow-up communications with any of the people on the mailing list after he sent copies of Plaintiffs' pending Motion to Add Further Specifics to them, as late-filed Exhibit 24.

Plaintiffs respectfully submit that each of the foregoing late-filed Exhibits is clearly relevant to the issue of those persons who are in active participation with the Defendants, including Mr. McGill and others as set forth in Rule 65(d)(2). In their Motion for More Specifics, Plaintiffs have listed websites/domain names on which they have found infringing uses of Plaintiffs' mark. The Permanent Injunction Order entered January 6, 2010 signed by Judge Breen specifically stated that all persons acting in concert with Defendant--including any website hosting companies and domain name registrars-- are enjoined. Issues have been raised to Plaintiffs by domain name registrars and other services that Plaintiffs believe to be facilitating the infringing uses in violation of the Permanent Injunction, including registrar claims that they do not "do business for another person" or "act on behalf of" a domain name, resisting Plaintiffs' requests to take down infringing matter. Additionally, some have claimed that the Permanent Injunction does not expressly include them by name or a specific domain name. The identifying information Plaintiffs expect to find on Exhibit 8 should be probative on this issue.

Mr. McGill's admitted follow-up communications with persons on the list after having sent copies of Plaintiffs' Motion for More Specifics. These follow-up communications should likewise be probative, as should the email addresses he has used and his wife has used.

Plaintiffs submit that it was clearly erroneous and contrary to law for the Magistrate Judge to deny the Motion to compel this relevant discovery, which should have become part of Mr. McGill's deposition for use by Plaintiffs in their Reply.

The Motion for Extension of Time to file Reply

1. As stated hereinabove, during the status conference of November 3, 2015, Plaintiffs' counsel requested to take the deposition of Mr. McGill and to be allowed to file a Reply to the Defendants' Objection to Plaintiffs' Motion for More Specifics, which was followed by a formal written Motion with a Notice of Deposition for November 12, 2015 to the Defendants seeking same, which motion was granted by Order entered November 6, 2015 [D.E. 212]. Plaintiffs were granted an extension of through and including November 30, 2015, within which to file their Reply. Prior to the running of that deadline, Plaintiffs filed their Motion to Compel and for a second extension of time within which to file their Reply.

2. Plaintiffs respectfully submit that it was clearly erroneous and contrary to law for the Magistrate Judge's order of February 17, 2016, to deny the Plaintiffs an extension of time in which to file their Reply, even if the Court denied the Motion to Compel. The Court had previously granted Plaintiffs the right to take the deposition and file a Reply. Plaintiffs submit that they should not be denied the ability to file the Reply, even if it is without the late-filed Exhibits to the deposition, in order to, *inter alia*, present testimony from Mr. McGill's deposition and further address Defendants' assertions of Plaintiffs' lack of showing of the need for the further specifics as a result of changes in the way some companies now push back from doing internet "take-downs," and require further specific identifying information.

B. Objection is Made to the Ruling Denying Plaintiffs' Motion to Add Further Specifics to the Permanent Injunction.

First, the Plaintiffs respectfully object to this ruling on the grounds that it is pre-mature because it was made without benefit of the Plaintiffs Reply, whether the Plaintiffs got the use of the requested late filed Exhibits, or not. The Defendants raised their assertions of Plaintiffs' purported lack of a showing of need in Defendants' Opposition response to the Motion for More Specifics. The Plaintiffs had need of the ability to file a Reply to address Defendants' argument, to present arguments that included and were based upon some of Mr. McGill's November 12, 2015 deposition testimony, and to address Defendants' arguments as to lack of need of the further specifics. Thus, the Court's ruling was without benefit of a Reply from the Plaintiffs, and the Plaintiffs submit it was clearly erroneous and contrary to law, including the law of the case based upon the previous grant of leave to the Plaintiffs to file a Reply

Second, the February 17, 2016 Order recites that it appears to the Magistrate Judge, "that what the Plaintiffs are in essence seeking is a whole separate lawsuit than what was before the Court", and that, "Plaintiffs continue to seek to widen the dispute, beyond the parameters of the original lawsuit." [D.E. 216, at 2.] The Order also states, "The Court was hopeful that the parties might find common ground and resolve this ongoing dispute between them." [D.E. 216, at 2-3.] Plaintiffs are not seeking an entirely new lawsuit or to widen the parameters of the original lawsuit. Plaintiffs are seeking assistance of the Court with regard to the language in Rule 65 regarding who is bound by the Injunction; and specifically, the identity and web-based information of other persons who are in active concert or participation with anyone described in Rule 65(d)(2)(A) or (B), the parties, the parties officers, agents, servants, employees and attorneys.

Third, Plaintiffs also submit that it was clearly erroneous and contrary to the law cited in Plaintiff's Motion for More Specifics and Memorandum in Support for the Court to deny that

Motion by its Order of February 17, 2016. Here, the Plaintiffs incorporate by reference their Motion for More Specifics and Supporting Memorandum. Clearly, the websites/domain names Mr. McGill admitted in his deposition that were operated by his wife and/or Dr. Aguliar should be added to the list in the Injunction, as they were involved with Mr. McGill as evidenced by the historical record in the case and the additional specifics sought to be added have committed infringing conduct, and Plaintiffs need the further requested specifics to effectuate the Permanent Injunction.

WHEREFORE, pursuant to Fed. R. Civ. P 72 and the District Court's Order of Reference [D.E.215], Plaintiffs respectfully request that the District Court determine that the Order of February 17, 2016, should be reversed based upon the foregoing Objections, and that the Court, (1) enter an Order granting Plaintiffs' Motion to Compel ordering Mr. McGill to produce the late filed Exhibits to his deposition; and(2) -also Order that the Plaintiffs have an extension of ten (10) days from the date of receipt of the late filed Exhibits within which to file their Reply.

In the alternative, in the event the Court were to determine not to reverse the Magistrate Judge's ruling denying the Motion to Compel, Plaintiffs request that the Court reverse the denial of an extension to file a Reply without Plaintiffs having use of the late-filed Exhibits, and grant Plaintiffs ten (10) days from the date of entry of the Order within which to file and serve their Reply. And, for the reasons set forth hereinabove, Plaintiffs also request that the District Court to reverse the ruling in the February 17, 2016 Order denying Plaintiffs' Motion for More Specifics.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

Undersigned counsel for the Plaintiffs hereby certifies that a true and correct copy of the foregoing Motion has been sent via Electronic Mail and First Class Mail this 2nd day of March, 2016 to:

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/s/ Philip M. Kirkpatrick