

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
OWENSBORO DIVISION

FORBA HOLDINGS, LLC,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 4:08-cv-00137-JHM-ERG
)	
DEBBIE HAGAN,)	
)	
Defendant.)	

MEMORANDUM IN SUPPORT OF PLAINTIFF’S MOTION FOR SANCTIONS, TO ENFORCE CONSENT INJUNCTION, TO SHOW CAUSE AS TO WHY DEFENDANT SHOULD NOT BE HELD IN CONTEMPT, TO HOLD DEFENDANT IN CONTEMPT, FOR AWARD OF ATTORNEY’S FEES, THE IMPOSITION OF FINES AND OTHER RELIEF

The plaintiff, now known as Church Street Health Management, LLC (FORBA Holdings, LLC changed its name to Church Street Health Management, LLC effective December 31, 2010; hereinafter “Plaintiff” or “CSHM”), respectfully submits this memorandum in support of its contemporaneously filed Motion for Sanctions, to Enforce Consent Injunction, to Show Cause as to Why Defendant Should Not Be Held in Contempt, to Hold Defendant in Contempt, for Award of Attorney’s Fees, the Imposition of Fines and Other Relief.

I. SUMMARY

The defendant, Debbie Hagan (“Hagan”), is blatantly violating the Consent Injunction entered by this Court, which forbids her from publishing internal and/or confidential CSHM documents and information on the internet. Through her internet websites and blogs at dentistthemenace.com, which is redirected to blog.dentistthemenace.com, and dentistthemenace.wordpress.com, Hagan has pursued a campaign of harassment against Plaintiff and its Small Smiles dental clinics. In 2008, when Hagan published documents that were plainly

Plaintiff's trade secrets, this Court ordered her to remove those documents and enjoined her from publishing in the future any internal documents or information of Plaintiff. Indeed, Hagan consented to this injunction.

However, Hagan was undeterred by the Consent Injunction to which she agreed. Despite many attempts since 2008 by CSHM's counsel and management to resolve informally the continuing issue of Hagan's repeated violations of the Consent Injunction without this Court's intervention, Hagan continues to publish details of internal and confidential contracts, communications, and policies of Plaintiff, in clear violation of the Consent Injunction.

Accordingly, Plaintiff moves the Court to enforce the Consent Injunction, find Hagan in contempt of Court, require Hagan to remove all internal and/or confidential documents and information of Plaintiff from her website, sanction Hagan for her violations of the Consent Injunction by imposing a fine of \$10,000 for her past violations and each future violation of the Consent Injunction, award Plaintiff its attorney's fees and expenses incurred in connection with this motion, and disclose the source(s) of the internal and/or confidential information and documents of Plaintiff she has obtained so that CSHM may take appropriate measures to prevent further unauthorized disclosure of CSHM's internal and confidential information and documents.

II. BACKGROUND AND STATEMENT OF FACTS

Plaintiff filed this action because Hagan willfully, openly and maliciously misappropriated trade secrets and copyrighted information belonging to Plaintiff and posted such information on the internet at Hagan's web sites, <http://www.dentistthemenace.com>, which is redirected to <http://blog.dentistthemenace.com>, and <http://dentistthemenace.wordpress.com> (collectively, the "Hagan Blog"). Hagan agreed to a Consent Injunction filed on November 17, 2008, enjoining her from publishing FORBA's internal and/or confidential information or documents. [Docket Entry No. 11].

Plaintiff files this motion for sanctions due to numerous recent posts to the Hagan Blog detailing and publishing internal and confidential CSHM documents and information, of which Hagan admits having possession. As set forth below, Hagan agreed in the Consent Injunction not to publish this internal information at any location or in any manner or to make it available for access to others in any way. After repeated informal attempts to resolve Hagan's continuing breaches of the Consent Injunction to no avail, Plaintiff requests that the Court enforce the Consent Injunction, hold Hagan in contempt, fine Hagan for her past and any future violations of the Consent Injunction, award Plaintiff its attorney's fees and expenses incurred in obtaining compliance with the Consent Injunction, and order Hagan to disclose the source(s) of the internal information of Plaintiff that she has obtained and/or been provided.

Rather than contesting the allegations against her set forth in detail in the Complaint, Hagan agreed to permanent injunctive relief, with this Court ordering as follows on November 17, 2008:

As evidenced by the signature below of the defendant, Debbie Hagan ("Hagan"), Hagan has agreed to the entry of an injunction containing the terms set forth herein. Upon review of Hagan's consent to this injunction and a review of the Verified Complaint and exhibits thereto, the Court finds that Plaintiff's trade secrets and copyrighted information should be protected from misappropriation and infringement, respectively, and that, therefore, the following injunctive relief should be granted to the Plaintiff, as agreed to by Hagan.

Pursuant to Rule 65 of the Federal Rules of Civil Procedure, it is hereby ORDERED that:

A. Hagan, and Hagan's agents, servants, employees, attorneys, and all those persons in active concert or participation with them, are **preliminarily and permanently enjoined from, directly or indirectly, (1) publishing or posting** at the Internet web site maintained by her at the Internet address or URL (universal resource locator) <http://www.dentistthemenace.com>, which URL is redirected to Hagan's blog **at** <http://debbiehagan.blogspot.com/> **or any other location or in any**

other manner, or making available for access to others in any way, (a) any internal and/or copyrighted documents or other information of FORBA obtained, directly or indirectly, through access to the FORBA FTP Site, <ftp://ftp.forbainfo.com>¹ **and/or (b) any other internal** and/or confidential **FORBA documents or information**; and (2) using or disclosing any documents or information constituting trade secrets of FORBA, including FORBA's marketing materials, marketing strategy information, budgeting materials, recruitment strategy information, spreadsheets and facility information lists; ...

Consent Injunction [Docket Entry No. 11] (emphasis added).

Hagan subsequently filed a Consent Injunction Compliance Statement [Docket Entry No. 13] ("Compliance Statement"), in which she asserted that she was complying with the Consent Injunction and had specifically "deleted weblog (blog) comments that contained links to the documents listed in the Consent Injunction and deleted from dentistthemenace.com hosting server all documents as agreed upon first via email then upon my signing of the Consent Injunction." Compliance Statement, p. 2.

The Consent Injunction was made permanent by the Court's entry and filing on April 16, 2009, of an "Order Dismissing Action Without Prejudice, with Consent Injunction of November 18, 2008 (Docket No. 11) to Remain in Full Force and Effect" [Docket Entry No. 37].

Since at least as early as May 2008, Plaintiff has had in place a Confidential Information policy to which its employees are subject, pursuant to which Plaintiff's employees agree that

¹ These documents and information shall include, without limitation, the spreadsheet titled "2008 Advertising Budget" (trade secret), the document titled "National Network of Resident Treatment Programs" (trade secret), the spreadsheet titled "Master Center File" (trade secret), the PowerPoint Presentation titled "National Children's Dental Health Month" (copyrighted), the PowerPoint presentation titled "FORBA Final Report" dated October 2, 2007 (trade secret); the PowerPoint presentation titled "FORBA Recruitment Strategy" (trade secret), the memorandum titled "SEM/SEO Tactics" (trade secret), the document titled "Small Smiles August Direct Mail Results" (trade secret), the PowerPoint presentation titled "Direct Response Plan" (trade secret), the white paper titled "Preventative Resin Restorations" (copyrighted), the PowerPoint presentation titled "Guide to Dental Health Screenings" (copyrighted), the memorandum titled "Website Design & Development, Version 3.0" (trade secret) and all information gleaned from the named documents.

they will not, during and after their employment by Plaintiff, directly or indirectly, use, disseminate, or disclose any confidential information concerning the business or patients of Plaintiff. Declaration of Todd Cruse (“Cruse Decl.”) at ¶ 2, Mot. Ex. A. Under this Confidential Information policy, Plaintiff’s “Confidential Information means information disclosed to Employee, not generally known in the profession about Employer’s services or processes, including information relative to patient lists, patient names and addresses, patient records, pricing policies, financial information and Employer’s procedures, systems, and processes relating to its Medicaid practice. Employee agrees that Employer’s Confidential Information is in the nature of trade secrets and should not be made available to any other dentist or dental professional, or any present or potential competitor, including Employee, without regard to whether or not said Confidential Information may or may not be defined as a trade secret pursuant to the Uniform Trade Secrets Act. In the event Employee misappropriates any of Employer’s Confidential information, employer shall have all rights and remedies available to Employer pursuant to State law, including Uniform Trade Secrets Act.” Cruse Decl. at ¶ 2. In addition, since March 2009, Plaintiff has had an Internet Posting policy that prohibits its employees, applicants for employment, agents and contractors from engaging in communications that disclose any information that is confidential or proprietary to Plaintiff or its associated dental centers. Id.

Since the Consent Injunction was entered in this action on November 17, 2008, Plaintiff has continued to monitor the Hagan Blog. Id. at ¶ 3. Hagan has made several recent postings at her blog that: (a) blatantly violate the Consent Injunction’s prohibition on posting internal and/or confidential documents or information of Plaintiff; and/or (b) are otherwise highly offensive and demonstrate Hagan’s animus towards Plaintiff. Id. Plaintiff does not refer herein in detail to the substantive content of the subject entries, but will present the Hagan Blog posts for an *in camera*

review at any show cause hearing scheduled on this matter so the Court may view the subject entries, which may also be viewed online at <http://blog.dentistthemenace.com> (last visited July 2, 2011). The following entries, which are addressed in reverse chronological order, are proof of Hagan's continuing violations of the Consent Injunction.

Blog Entry #1 – June 26, 2011: Hagan posted a June 2011 bonus matrix document for CSHM staff that is clearly internal and confidential. Cruse Decl. at ¶ 4. The document is available as a separate link from the Hagan Blog as well. Hagan also referred by name to a particular section on compensation in CSHM's contract for new and current dentists. Id.

Blog Entry #2 – June 21, 2011: In a blog entry with the headline "I think Small Smiles Dental Centers and Church Street Health Management is on the verge of more sanctions," Hagan referred to hearing internal "chatter" about specific internal steps being taken by CSHM, and identifies those steps. Id. at ¶ 5.

Blog Entry #3 – June 18, 2011: Hagan invited former employees affiliated with competitor dental clinics Kool Smiles Dental, Ocean Dental, and Dental Dreams to contact her via email, stating "I would really like to hear from any of you." Id. at ¶ 6.

Blog Entry #4 – June 16, 2011: Hagan's headline and blog entry specifically requested internal information from one of CSHM's competitors: "Send me your Kool Smiles information or documentation its time they too stop torturing children and raping the Medicaid system in their illegal clinics." Id. at ¶ 7. Even though she was specifically requesting information on one of CSHM's competitors, Hagan shows she has no respect for any dental company's internal and confidential corporate information with this blatant solicitation: "If you are a former employee please contact me, send me what evidence you have, your identity is strictly confidential. I couldn't know all I know if I didn't keep my informants [sic] identity a secret. Heck, just send me some documents anonymously, that's fine too." (emphasis added) Id.

Blog Entry #5 – June 13, 2011: Hagan posted a list of treatments received by a particular patient on August 6, 2010, at a specific Small Smiles dental center. The information published by Hagan is from an internal CSHM daily patient log for the dental center. Id. at ¶ 8.

Blog Entry #6 – June 9, 2011: In perhaps her most inflammatory blog post, Hagan specifically lists the name of two of Plaintiff’s executives in the headline: “Michael G. Lindley and Al Smith of Church Street Health Management have let children die on his [*sic*] watch before.” Id. at ¶ 9. Hagan goes on to link to two articles about a business in which these executives were involved, then editorializes that “I doubt either are worried about your child dying....” Id. On June 11, 2011, Hagan revised the blog entry’s headline: “Michael G. Lindley, Al J. Smith, Brad Gardner, Rodney Cawood and Mike McCulla of Church Street Health Management/Small Smiles Dental Centers have let children die on their watch before it appears.” Hagan revised her editorial comment as well: “I doubt any of the hoodlums are worried about your child dying....” Id. Hagan also added that CSHM’s patient advocate previously worked at the same previous business as the executives: “[She] came from yet another house of death and horrors operated by Church Street Health Management’s Michael G. Lindley, Alfred (Al) J. Smiles, Brad Gardner and Rodney Cawood, Brad Williams and Mike McCulla.” Id. Although this very recent posting is not a violation of the Consent Injunction, it is indicative of the imbalanced, defamatory and highly offensive nature of the Hagan Blog.

Blog Entry #7 – June 2, 2011: Hagan posted the names of two lawyers hired by Plaintiff (only one of which has started work; the other has made no public statement regarding leaving her current firm) and directly quoted a sentence about the background of these lawyers taken from an internal CSHM email, which email Plaintiff sent only to its employees. Id. at ¶ 10. Hagan described the internal CSHM team the new counsel would join at Plaintiff and her start

date at CSHM. Id. While not necessarily damaging to Plaintiff, this posting demonstrates that Hagan has access to and is posting internal information of CSHM.

Blog Entry #8 – May 31, 2011: Hagan reported she is “being told” about steps CSHM management was taking in addressing a particular situation. Id. at ¶ 11. Hagan states “[o]ne person told me that during meetings of the Corporate Liaisons” certain responses were given in the meetings. In one of her most blatant violations of the Consent Injunction, Hagan reports “I actually have in my hands (well, in a safe keeping place) blank” internal CSHM medical forms. Id. She even brags about timeliness of the confidential documents she has obtained: “These forms are not two or three years old, they are weeks old!”, and includes details of an internal scoring system for medical forms. Id. (emphasis added). One of the headings in the entry is titled “Back to the retrospective internal investigation,” in which Hagan describes and even directly quotes from internal CSHM emails between dentists and employees. Id. She also provides a link to another blog entry describing confidential internal CSHM emails. Id. Hagan goes on to describe the level of detail included in reports to CSHM’s internal “Patient Advocate” and gives an exact percentage of parent complaints about a particular subject made to Plaintiff in August 2010. Id. The whole blog entry is categorized by Hagan as “internal” under the URL she uses for this posting, which is, <http://blog.dentistthemenace.com/2011/05/small-smiles-dental-centers-internally.html>. Id.

Blog Entry #9 – May 29, 2011: Hagan extensively detailed an internal email exchange between the dentist for a CSHM-associated treatment center and CSHM executives. Id. at ¶ 12. Hagan describes the substance of the communication as follows: “During an exchange of emails ... which were heated” and directly quotes some of the content of the emails. Id. She even provides running commentary on the substance and tone of the emails with comments such as, “That’s when it got ugly!” and how one participant “then removed the gloves and s**t hit the

fan.” Id. (This quotation is edited to remove Hagan’s typically offensive language; she frequently uses extremely coarse and offensive language in her blog postings.)

Blog Entry #10 – May 29, 2001: Hagan reported internal information about the level of CSHM-associated clinics’ Average Patient Charge for the quarter and for a particular geographic region. Id. at ¶ 13. She also reports on new patient recruitment and the revenue of a particular CSHM-associated clinic. Id.

Blog Entry #11 – May 29, 2011: Hagan quoted directly from an internal CSHM document describing dental center performance bonuses. Id. at ¶14. She also discloses that CSHM is beginning a “pilot program” regarding pay in a particular center, which is also internal information of Plaintiff regarding its business operations. Id.

Blog Entry #12 – May 29, 2011: Hagan attributed the substance of a blog entry of this date to Plaintiff’s former chief compliance officer and posts verbatim the contents of an internal CSHM document describing potential legal sanctions for violations of federal health care program requirements. Id. at ¶ 15.

Blog Entry #13 – May 5, 2011: Hagan listed three elements of a “reportable event” for CSHM compliance purposes, listing the three elements directly from an internal CSHM document. Id. at ¶ 16.

Blog Entry #14 – April 15, 2011: Hagan prompted readers to guess the author of an internal CSHM article regarding a particular patient treatment practice. Id. at ¶ 17.

Blog Entry #15 – April 14, 2011: Hagan reported that Plaintiff’s Chief Compliance Officer was no longer with the company. Id. at ¶ 18. This news was reported at that time through an internal CSHM company email. Id.

Blog Entry #16 – April 7, 2011: Hagan disclosed that CSHM is rolling out a particular new product for consumers and that recruiting had commenced at a particular dentistry clinic, which constitutes internal business information of Plaintiff. Id. at ¶ 19.

Blog Entry #17 – March 31, 2011: Hagan listed some of the cities in which Plaintiff has established clinics and an estimated income per week for all the listed clinics. Id. at ¶ 20. It appears Hagan derived the confidential income estimate from confidential information of Plaintiff. Id.

Blog Entry #18 – March 31, 2011: Hagan reported the appointment of a new senior vice president of operations for CSHM, which information was only reported through an internal CSHM email. Id. at ¶ 21. She also describes the duties to which the previous senior vice president was being reassigned. Id.

Blog Entry #19 – March 8, 2011: Hagan posted another highly inflammatory and false headline regarding a civil case filed against one of the dentists affiliated with Plaintiff in Oklahoma: “Child Waterboarded at Small Smiles Dental Clinic in Oklahoma City.” Id. at ¶ 22. With no factual basis, Hagan also accused this dentist of doing “other frightening things” to children including “locking them in a pitch black room.” Id. Hagan also included an unrelated news photograph of protestors simulating waterboarding and links to news stories of people accused of waterboarding children, all completely unrelated to the civil case filed against the Oklahoma dentist. Id.

Blog Entry #20 – March 13, 2010: In one of her most egregious blog postings, Hagan posted three separate internal and confidential CSHM documents: two pages of Small Smiles’ manual of policies and procedures, an October 12, 2007 email from CSHM management to dentists and office managers in CSHM’s central region, and a December 28, 2007 internal

CSHM memo to all office managers concerning bonuses, along with an October 2007 bonus matrix for staff in a Colorado Springs, Colorado clinic. Id. at ¶ 23.

Plaintiff has in the past attempted to reach out to Hagan and resolve disputes concerning the Consent Injunction without involving this Court. For example, on August 9, 2010, Plaintiff's counsel sent Hagan a letter complaining of two specific entries on the Hagan Blog that contained confidential and internal information. Cruse Decl., Ex. 1. Plaintiff advised it would pursue a motion for contempt if Hagan did not remove the blog entries, and the complaint letter was correctly described as "an attempt to address the above issues in as economical and nonprovocative a manner as possible." On August 19, 2010, this time to an attorney representing Hagan, counsel for Plaintiff sent another letter complaining of another entry on the Hagan Blog that included internal and confidential information of Plaintiff, and again advised that a motion for contempt would follow unless the material was removed. Cruse Decl., Ex. 2. On October 7, 2010, in a further step to address Hagan's continuing violations of the Consent Injunction, Plaintiff's Senior Vice President, Todd Cruse, personally met with Hagan at a Starbuck's coffee shop in Bowling Green, Kentucky to discuss her issues with Plaintiff and to persuade her to cease posting any internal and confidential information of Plaintiff on the Hagan Blog. Cruse Decl. at ¶ 26. Mr. Cruse also sent an email to Hagan on February 11, 2011 regarding the potentially libelous nature of recent posts on the Hagan Blog. Cruse Decl., Ex. 3. Unfortunately, Hagan's violations of the Consent Injunction continue and, indeed, recently have accelerated.

By continuously disclosing Plaintiff's internal and confidential information, despite repeated attempts by Plaintiff to dissuade her from doing so, Hagan has repeatedly violated – and continues to violate – the plain terms of the Consent Injunction to which she agreed and which the Court ordered. As such, Hagan should be sanctioned by the Court, the referenced information should be removed from the Hagan Blog, and the Court should enter other

appropriate relief to ensure that its orders are honored and obeyed by Hagan, including without limitation awarding Plaintiff its attorney's fees incurred as a result of Hagan's willful disobedience of the order and judgment of this Court embodied by the Consent Injunction, imposing a fine for her past, and any future, violations, and compelling Hagan to disclose the person(s) providing her with internal information of Plaintiff, which activity is unlawful under CSHM's Confidential Information policy.

III. ARGUMENT

Pursuant to Fed. R. Civ. P. 70 and well established case law, this Court has broad powers to enforce its orders and to hold a party in contempt.² Rule 70 specifically authorizes the Court to utilize contempt sanctions if a party fails to comply with a judgment requiring the party to take an action (or refrain from taking an action) and the party fails to do so.³ See also Maness v. Meyers, 419 U.S. 449, 458, 95 S. Ct. 584, 591 (1975) (“We begin with the basic proposition that all orders and judgments of courts must be complied with promptly.”). The Court's authority to sanction a party for violation of a court order is also statutory. 18 U.S.C. § 401 provides:

A court of the United States shall have power to punish by fine or imprisonment, or both, at its discretion, such contempt of its authority, and none other, as--

² This Court has the continuing authority to enforce the Consent Injunction, even though the underlying case was closed on April 16, 2009. Federal courts have inherent power to enforce an injunction via contempt proceedings, even if that injunction has ended the lawsuit. Shapo v. Engle, 463 F.3d 641, 643 (7th Cir. 2006). “A consent decree, because it is entered as an order of the court, receives court approval and is subject to the oversight attendant to the court's authority to enforce its orders....” Smyth v. Rivero, 282 F.3d 268, 281 (4th Cir. 2002). (The Consent Injunction constitutes a continuing order approved by the Court, and thus can be distinguished from a settlement agreement. “Private settlements are also distinguished from consent decrees in terms of enforcement ... any breach of the terms of a purely private settlement agreement gives rise to a claim for breach of contract, but not for contempt of court, as is available under a consent decree.” Doe v. Hogan, 421 F. Supp. 2d 1051, 1057 n.6 (S.D. Ohio 2006) (citation omitted).)

³ Rule 70 provides in pertinent part: “If a judgment directs a party ... to perform any other specific act and the party fails to comply within the time specified, ... [t]he court may also hold the disobedient party in contempt.”

...

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

18 U.S.C. § 401. Furthermore, the “power of courts to punish for contempts is a necessary and integral part of the independence of the judiciary, and is absolutely essential to the performance of the duties imposed on them by law.” N.L.R.B. v. Cincinnati Bronze, Inc., 829 F.2d 585, 590-91 (6th Cir. 1987) (quoting Gompers v. Buck’s Stove & Range Co., 221 U.S. 418, 450, 31 S. Ct. 492, 501, 55 L. Ed. 797 (1911)).

A. CONTEMPT

Civil contempt, in particular, “is a sanction to enforce compliance with an order of the court or to compensate for losses or damages sustained by reason of noncompliance.” McComb v. Jacksonville Paper Co., 336 U.S. 187, 191, 69 S. Ct. 497, 499 (1949). The objective of a contempt determination in the wake of a violation of a court order “is to enforce the message that court orders and judgments are to be taken seriously.” Electric Workers Pension Trust Fund of Local Union # 58, IBEW v. Gary’s Electric Serv. Co., 340 F.3d 373, 385 (6th Cir. 2003) (citing N.L.R.B., 829 F.2d at 590). In fashioning a remedy for violation of a Court order, it is irrelevant whether the offending party’s conduct was willful. See id. (“[I]t matters not with what intent the defendant did the prohibited act.”) (citing 2 High on Injunctions (4th ed., 1905) §§ 1416 et seq.); United States v. Universal Christian Church, 1985 WL 13480, at *3 (6th Cir. July 19, 1985) (“[C]ivil contempt may be imposed even though the party held in contempt did not act willfully.”). Additionally, because one of the purposes of the contempt sanction is to enforce compliance with orders of the court, a sanction is appropriate even absent actual damage to any party. See Glover v. Johnson, 199 F.3d 310, 313 (6th Cir. 1999) (characterizing as “misplaced”

the appellant's argument that the amount of a contempt sanction was inappropriate because it failed to match a demonstrated loss by the appellees).

Well established legal authority from the Sixth Circuit and other circuit courts of appeals supports the imposition of contempt sanctions for violations of court orders. For example, in the context of a trademark infringement action, the Sixth Circuit affirmed the district court's contempt sanctions when a defendant continued to infringe the plaintiff's trademark after a court order requiring such usage to cease. Rolex Watch U.S.A., Inc. v. Crowley, 74 F.3d 716 (6th Cir. 1996) (affirming district court's award of civil contempt sanctions, including attorney's fees, for ongoing trademark infringement in violation of the court's order). Similarly, the First, Third and Tenth Circuits have held that a defendant should be held in contempt of court for violating a consent judgment by continuing to use an infringing mark. See, e.g., John Zink Co. v. Zink, 241 F.3d 1256 (10th Cir. 2001) (defendant held in contempt for violating injunction against use of ZINK in commerce; attorneys' fees awarded to plaintiff); Harley-Davidson, Inc. v. Morris, 19 F.3d 142 (3d Cir. 1994) (consent decree found to be unambiguous and defendant held to be in contempt for use of marks); AMF, Inc. v. Jewett, 711 F.2d 1096 (1st Cir. 1983) (reversing district court in part for failing to hold defendant in contempt for ongoing use of mark after order). And in the context of an injunction to prohibit further dissemination of trade secrets, the Fifth Circuit has upheld two contempt orders against the same defendant for noncompliance with the injunction. See W. Water Mgmt., Inc. v. Brown, 40 F.3d 105, 108-09 (5th Cir. 1994). This same result is justified here, where Hagan unambiguously agreed in the Consent Injunction not to publish at any location or in any manner or to make available for access to others in any way any internal information of Plaintiff. This Court should find Hagan in contempt of the Consent Injunction.

B. ATTORNEY'S FEES

This Court should award Plaintiff its attorney's fees for Hagan's blatant violations of the Consent Injunction. Courts have broad discretion to award attorney's fees to make whole a successful movant in a contempt proceeding. See, e.g., Rolex Watch U.S.A., Inc. v. Crowley, 74 F.3d 716 (6th Cir. 1996) (affirming district court's award of attorney's fees for contempt proceedings when defendant was held in contempt for ongoing trademark infringement in violation of the court's order); Zink, 241 F.3d at 1261-62 (affirming award of attorney's fees for contempt when defendant continued to use mark in violation of court order, holding willfulness not required for award of fees). "Upon a finding of civil contempt, a court may award compensatory damages to the aggrieved party, as well as attorney's fees and costs to the aggrieved party's counsel." Northeast Women's Center, Inc. v. McMonagle, 1990 WL 191955, *3 (E.D. Pa. Nov. 30, 1990) (citing Hutto v. Finney, 437 U.S. 678, 689 n.14 (1978)); McDonald's Corp. v. Victory Invs., 727 F.2d 82, 87 (3d Cir. 1984); Quinter v. Volkswagen of Am., 676 F.2d 969, 975 (3d Cir. 1982); Signal Delivery Serv., Inc. v. Highway Truck Drivers, 68 F.R.D. 318 (E.D. Pa. 1975). "Reimbursement of costs and attorney's fees are routinely directed in contempt cases." Id. (citations omitted). For example, this Court awarded reasonable attorney's fees to the plaintiff where a defendant did not comply with a preliminary injunction entered by this Court. In Holley Performance Prods., Inc. v. Smith-CNC China Network Co., No. 1:06CV-165-JHM-ERG (W.D. Ky. Oct. 24, 2006) (McCarthy J.) ("Holley"), this Court's preliminary injunction required the defendants to return certain tooling parts to the plaintiff and prohibited the defendants from removing or attempting to remove other tooling parts. See Holley, Memorandum Opinion and Order entered November 9, 2006, Docket Entry No. 19 (copy attached). The defendants failed to comply with the injunction. See Order entered December 6, 2006, Docket Entry No. 31, at 1 (copy attached). As a result, the Court ordered that the individual defendant be incarcerated until the defendants complied with the injunction. See id.

Before entering the Order on the docket, the defendants complied, so the Court ultimately vacated the incarceration requirement. See id. However, the Court allowed the plaintiff “to recover its actual damages, plus reasonable attorney’s fees, costs and expenses incurred as a result of the [defendants’] compliance with the preliminary injunction.” Id. at 2. The Court ultimately awarded the plaintiff its actual damages (in an amount to be determined later), along with attorney’s fees, costs and expenses in the amount of \$37,661.90. See Holley, 2007 WL 2669346, at *4 (W.D. Ky. Sept. 7, 2007).

In the present action, as in Holley, Plaintiff should be awarded its attorney’s fees and expenses so that Hagan, the party violating the Court’s Consent Injunction order, bears the burden of the additional litigation and expenses caused by her violations – not Plaintiff, the aggrieved party. Accordingly, this Court should award Plaintiff its attorney’s fees and expenses incurred in connection with obtaining Hagan’s compliance with the Court’s Consent Injunction.

C. FINE

This Court should also order that Hagan be fined at least \$10,000 for her past violations of the Consent Injunction and that any future violations of the Consent Injunction will result in a fine of at least \$10,000 per occurrence in order to ensure Hagan’s future compliance with the Consent Injunction. In Holley, this Court ordered the defendant pay a \$10,000 fine every day the defendant failed to comply with the court’s order that he return the tooling, along with attorney’s fees and expenses as a result of noncompliance. See Order entered November 21, 2006, Docket Entry No. 29, at 1 (copy attached). This Court then amended the fine to account for the individual defendant’s financial resources under the precedent of the three factors outline by the U.S. Supreme Court in determining the amount of a contempt fine: “1) ‘the character and magnitude of the harm threatened by the continued contumacy,’ 2) ‘the probable effectiveness of any suggested sanction bringing about the desired result,’ 3) ‘the amount of a defendant’s

resources and the consequent seriousness of the burden to that particular defendant.” See Order entered December 6, 2006, Docket Entry No. 31, at 2 (quoting U.S. v. United Mine Workers, 330 U.S. 258, 303-304 (1947)). This Court ended up not fining the individual defendant in Holley because no monetary amount of a fine would have coerced compliance, only the threat of incarceration did that. Holley, 2007 WL 2669346, *2. See also Merkos L’Inyonei Chinuch, Inc. v. Otsar Sifrei Lubavitch, Inc., 2004 WL 2550313 (E.D.N.Y. Nov. 9, 2004) (court found defendant in contempt of preliminary injunction enjoining defendant from infringing on copyright and levied \$10,000 fine, warning “any future violation ... will likely produce higher penalties in an enhanced effort to further coerce compliance.”) Hagan has already willfully breached the Consent Injunction, and the threat of the higher penalty of a \$10,000 fine would greatly enhance the Court’s ability to coerce her into future compliance.⁴

D. IDENTIFICATION OF SOURCE(S) OF INTERNAL INFORMATION

It is apparent that Hagan is being provided internal documents and communications of Plaintiff from one or more employees or affiliates of Plaintiff, in violation of such persons’ obligations to Plaintiff. She repeatedly describes her “sources” at CSHM and details information that can only be found in internal CSHM documents. In a June 16, 2011 blog entry, Hagan

⁴ This Court could also order Hagan incarcerated for her repeated and open violations of the Consent Injunction. In Holley, this Court ordered the individual defendant be incarcerated until the injunction was complied with, see Dec. 6, 2006 Order at 1, but ultimately vacated the incarceration order after defendants complied with injunction. 2007 WL 2669346 at *1. Courts have both “an inherent and a statutory power to enforce compliance with its orders and may exercise that authority by ordering [defendant] incarcerated until he purges himself of his contempt.” U.S. Commodity Futures Trading Comm’n v. Capitalstreet Fin., LLC, 2010 WL 2131852, *3 (W.D.N.C. May 25, 2010) citing Shillitani v. U.S., 384 U.S. 364, 370 (1966); In re Runnels, 815 F.2d 969, 970-71 (4th Cir. 1987); 18 U.S.C. § 401(3). See also Commodity Futures Trading Comm’n ex rel. Kelley v. Skorupskas, 605 F. Supp. 923, 944 (D.C. Mich. 1985) (“[C]ivil contempt can be remedied by the imposition of both compensatory fines and coercive imprisonment.”); Diamond Heads, LLC v. Everingham, 2011 WL 833984 (M.D. Fla. March 3, 2011) (adopting magistrate judge’s recommendation that defendant violated permanent injunction regarding patent infringement, ordering (1) defendant incarcerated for 20 days, but suspended on the condition she take several remedial steps, (2) award of \$10,000 in liquidated damages (as provided in injunction) and attorney’s fees to plaintiff for pursuing motion to show cause).

(footnote continued on following page ...)

solicited internal information from the employees of one of CSHM's competitors, but her plea shows she has no respect for any dental company's internal and confidential information: "If you are a former employee please contact me, send me what evidence you have, your identity is strictly confidential. I couldn't know all I know if I didn't keep my informants [sic] identity a secret. Heck, just send me some documents anonymously, that's fine too." Hagan's behavior shows that, contrary to the assertion in her Answer that her blog was "merely a compilation of sources already on the World Wide Web" [Docket No. 15, p. 1], she is openly posting Plaintiff's internal information, bragging about her inside sources, and soliciting more internal information. Plaintiff demanded Hagan reveal the source of her confidential information in the discovery CSHM served on Hagan on November 25, 2008.⁵ Hagan objected to the discovery requests and

(... footnote continued from previous page)

⁵ "Describe in detail ...the identity of all persons with involvement in the formation and/or operation of the Hagan Web Site, the resources you have used to construct and operate the Hagan Web Site, the manner which you have gone about gathering data for placement on the Hagan Web Site...." Interrog. No. 2.

"Identify (by time, date, and all participating parties) all communications you have had with any and all employees and/or agents of FORBA and/or any dental practice(s) managed by FORBA (including, without limitation, Small Smiles) and for each such communication, state the substance of the communication in detail." Interrog. No. 3.

"Produce all documents (including, but not limited to, e-mail correspondence) you have received from any and all persons or entities whatsoever that reference or relate to FORBA, any dental practice(s) managed by FORBA (including, without limitation, Small Smiles), any officer, director or employee of FORBA, and/or any officer, director or employee of any dental practice(s) managed by FORBA." Req. for Produc. No. 2.

"Produce all documents (including, but not limited to, e-mail correspondence) that you have sent to any person or entity whatsoever that references or relates to FORBA, any dental practice(s) managed by FORBA (including, without limitation, Small Smiles), any officer, director or employee of FORBA, and/or any officer, director or employee of any dental practice(s) managed by FORBA." Req. for Produc. No. 3.

"Produce all correspondence (including, but not limited to e-mail correspondence) between you and any current officer, director, and/or employee of FORBA and/or any dental practice(s) managed by FORBA (including, without limitation, Small Smiles)." Req. for Produc. No. 11.

"Produce all correspondence (including, but not limited to e-mail correspondence) between you and any former officer, director, and/or employee of FORBA and/or any dental practice(s) managed by FORBA (including, without limitation, Small Smiles)." Req. for Produc. No. 12.

did not answer any of them or produce any of the requested documents, even responding to CSHM's requests for documents she had received or sent related to CSHM that she had "an obligation to a third party to maintain such information as Confidential." Def.'s Resp. to Pl.'s Req. for Produc. Nos. 2, 3, Mot. Ex. B. Accordingly, Plaintiff requests that the Court compel Hagan to disclose the identity of her source(s) of Plaintiff's internal information. Since Hagan has shown she will repeatedly violate the Consent Injunction by posting Plaintiff's internal information, it is necessary for Plaintiff to know the sources of this information so that Plaintiff can stop any unauthorized and unlawful disclosure of this internal information to Hagan.

IV. CONCLUSION

For all the foregoing reasons, Plaintiff respectfully requests that the Court (a) Hold Hagan in contempt of the Consent Injunction and sanction her for her violations of the Consent Injunction; (b) set a hearing at which Hagan shall show cause why she should not be held in contempt and sanctioned; (c) order that the blog entries identified in the Declaration of Todd Cruse be removed immediately; (d) impose a fine of at least \$10,000 for Hagan's violations of the Consent Injunction and at least \$10,000 for each future violation of the Consent Injunction; (e) award Plaintiff its attorney's fees and expenses incurred in connection with obtaining Hagan's compliance with the Consent Injunction; (f) compel Hagan to disclose any source(s) of CSHM's internal and/or confidential information she continues to receive and publish; and (g) award Plaintiff such further relief as the Court deems just and proper and as is necessary to coerce Hagan's obedience to its orders, including the Consent Injunction, and to fully compensate Plaintiff.

Respectfully submitted,

/s/ Thor Y. Urness

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Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion for Sanctions, to Enforce Consent Injunction, to Show Cause as to Why Defendant Should Not Be Held in Contempt, to Hold Defendant in Contempt, for Award of Attorney's Fees, the Imposition of Fines and Other Relief is being served, via U.S. Mail, first class postage prepaid, on this the 2nd day of July, 2011, on:

Debbie Hagan
4453 Strickland Drive
Owensboro, KY 42301-6519

/s/ Thor Y. Urness

Thor Y. Urness