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.	)	

PLAINTIFF'S MOTION FOR SANCTIONS DUE TO DEFENDANT'S VIOLATION OF CONSENT INJUNCTION

The plaintiff, FORBA Holdings, LLC ("FORBA"), respectfully moves this Court, pursuant to Fed. R. Civ. P. 70 and LR 7.1(a), to hold defendant, Debbie Hagan ("Hagan"), in contempt of the Consent Judgment entered by the Court on November 17, 2008 [Docket Entry No. 11]. As grounds for this motion, FORBA states as follows:

1. On November 17, 2008, Hagan signed the Consent Injunction, stipulating as follows:

> 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).

2. On December 15, 2008, Hagan filed a 35-page Answer [Docket Entry No. 15] to the 16-page Verified Complaint. Hagan attached Exhibits A through R to her Answer. Among these exhibits are the following four (4) documents, which are internal FORBA documents that Hagan 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: (1) Exhibit A, p. 3 (internal directory of FORBA); (2) Exhibit I (internal memorandum dated December 28, 2007, regarding bonus program); (3) Exhibit J, pp. 6-9 (internal memorandum dated November 8, 2007, regarding internal policies and procedures); and (4) Exhibit R (internal memorandum dated October 14, 2008, regarding press coverage). Answer, filed December 15, 2008 [Docket Entry No. 17,

[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.

Attachment Nos. 17-3, 17-11, 17-12, 17-20]. In addition, Hagan included information from the FORBA FTP Site in her Answer, which she agreed – and the Court ordered her – not to do.

3. In filing these documents, Hagan has violated the plain terms of the Consent Injunction to which she agreed and which the Court ordered. As such, she should be sanctioned by the Court, the referenced exhibits should be removed from the record and the Court should enter other appropriate relief to ensure that its orders are honored and obeyed by Hagan, including without limitation awarding FORBA its attorneys' fees incurred as a result of Hagan's willful disobedience of the order of this Court as embodied by the Consent Injunction.

4. In further support of this motion, FORBA submits herewith a supporting memorandum of law in accordance with LR 7.1(a) and a proposed order in accordance with LR 7.1(e).

WHEREFORE , FORBA prays that this Court:

A. Find Hagan in contempt of the Consent Injunction and/or set a hearing at which Hagan shall show cause why she should not be held in contempt and sanctioned;

B. Order that any future violation of the Court's Order by Hagan will result in a sanction of at least $10,000;

C. Remove the referenced exhibits and information from the record;

D. Award FORBA its attorney's fees and expenses incurred in connection with obtaining Hagan's compliance with the Consent Injunction; and

E. Award FORBA such further relief as it deems just and proper and as is necessary to coerce obedience for its Order and to fully compensate FORBA.

Respectfully submitted,

/s/ Jonathan D. Rose
Thor Y. Urness (admitted *pro hac vice*)
Jonathan D. Rose (Ky. Bar No. 88547)
BOULT, CUMMINGS, CONNERS & BERRY, PLC
1600 Division Street, Suite 700
P.O. Box 340025
Nashville, Tennessee 37203
(615) 252-2308

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Plaintiff's Motion for Sanctions Due to Defendant's Violation of Consent Injunction is being served via first class U.S. Mail, postage prepaid on this the 23rd day of December, 2008, to the following:

Debbie Hagan
4453 Strickland Drive
Owensboro, KY 42301-6519

/s/ Jonathan D. Rose
Jonathan D. Rose

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 DUE TO DEFENDANT'S VIOLATION OF CONSENT INJUNCTION

The plaintiff, FORBA Holdings, LLC ("FORBA"), through counsel, pursuant to LR 7.1(a), respectfully submits this memorandum in support of its contemporaneously filed motion for sanctions based on violations of the Consent Injunction committed by the defendant, Debbie Hagan ("Hagan").

I. SUMMARY

FORBA filed this action because Hagan willfully, openly and maliciously misappropriated trade secrets and copyrighted information belonging to FORBA and posted such information on the Internet at Hagan's web site, http://www.dentistthemenace.com, which is redirected to http://debbiehagan.blogspot.com (the "Hagan Web Site"). On December 20, 2008, FORBA filed a motion for partial summary judgment as to its entitlement to an award of attorneys' fees under the Kentucky Uniform Trade Secrets Act based on Hagan's misappropriation of trade secrets, to which she admitted in the Consent Injunction filed on November 17, 2008 [Docket Entry Nos. 18, 21].

FORBA now files this motion for sanctions based not on the Hagan Web Site, but based on Hagan's violation of the Consent Injunction by attaching to her Answer, filed on December

15, 2008 [Docket Entry No. 17], four (4) internal documents of FORBA and by including information from one document already identified as a FORBA trade secret in the text of the Answer itself. As set forth below, Hagan 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 such internal documents of FORBA.

II. STATEMENT OF FACTS

Rather than contesting the allegations against her, 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)**

[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

(footnote continued on following page …)

> **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.

On December 15, 2008, Hagan filed a 35-page Answer [Docket Entry No. 15] to the 16-page Verified Complaint. Hagan attached Exhibits A through R to her Answer. Among these exhibits are the following four (4) documents, which are internal FORBA documents that Hagan 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: (1) Exhibit A, p. 3 (internal directory of FORBA); (2) Exhibit I (internal memorandum dated December 28, 2007, regarding FORBA bonus program); (3) Exhibit J, pp. 6-9 (internal memorandum dated November 8, 2007, regarding FORBA internal policies and procedures); and (4) Exhibit R (internal memorandum dated October 14, 2008, regarding press coverage of FORBA). Answer, filed December 15, 2008 [Docket Entry No. 17, Attachment Nos. 17-3, 17-11, 17-12, 17-20]. Exhibit A, p. 3 is noteworthy because it is

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(… footnote continued from previous page)
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.

one of the documents that was on the FORBA FTP Site referenced in the injunction entered by this Court. In fact, the version of the internal directory found on the FORBA FTP Site during the relevant period (subtitled "Updated 08/05/08") is the very document Hagan attached to her Answer. Indeed, in the original copy provided to counsel for FORBA, and presumably to the Court, the document is plainly freshly printed in color from a data file. (FORBA will present the internal directory appearing on the FORBA FTP Site and the version produced by Hagan for *in camera* review at any show cause hearing scheduled on this matter so the Court may verify that the documents are identical.) Furthermore, Hagan has admitted that she downloaded what she herself refers to as "Internal Documents" from the FORBA FTP Site. See Answer, ¶¶ 5, 28.

Additionally, Hagan made additional information from the FORBA FTP Site available by copying it directly into her Answer to the Complaint. One of the documents the Court specifically enjoined Hagan from "directly or indirectly . . . making available for access to others in any way" is the Master Center File, which Hagan agreed not to disclose in any way through her signature on the Consent Injunction. See Consent Injunction, p 2 n.1, p. 3. In Paragraph 2 of Hagan's Answer, Hagan lists information that could only have been gleaned from the Master Center File. Indeed, Hagan copies the various "signage names" used on all FORBA's clinics in the United States directly from the Master Center File. (FORBA will present the Master Center File to the Court at any show cause hearing scheduled on this matter so the Court may verify that Hagan has merely copied information from the Master Center File in plain violation of the Consent Injunction.)

By filing these documents and including this information in her Answer, Hagan violated the plain terms of the Consent Injunction to which she agreed and which the Court ordered. As such, she should be sanctioned by the Court, the referenced exhibits and information should be removed from the record and the Court should enter other appropriate relief to ensure that its

orders are honored and obeyed by Hagan, including without limitation awarding FORBA its attorneys' fees incurred as a result of Hagan's willful disobedience of the order of this Court as embodied by the Consent Injunction.

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. 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.[2] 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--
>
> . . .
>
> (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)).

[2] Rule 70 provides in 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."

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 court order "is to enforce the message that court orders and judgments are to be taken seriously**."** Electrical Workers Pension Trust Fund of Local Union # 58, IBEW v. Gary's Electric Service 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]it matters not with what intent the defendant did the prohibited act.") (citing 2 High on Injunctions (4th ed., 1905) §§ 1416 et seq.); U.S. v. Universal Christian Church, 1985 WL 13480, at *3 (6th Cir. Jul 19, 1985) ("[C]ivil contempt may be imposed even though the party held in contempt did not act willfully.") (copy attached). 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 support 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 Mark 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 Western Water Management, 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 documents of FORBA.

This Court should award FORBA its attorneys fees for Hagan's blatant violation 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 attorneys' fees for contempt when defendant continued to use mark in violation of court order; holding willfulness not required for award of fees). For example, this Court recently 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 Products, Inc. v. Smith-CNC China Network Co., No. 1:06CV-165-M ("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, Docket Entry No. 19 (copy attached). The defendants failed to comply with the injunction. See Order entered December 6, 2006 ("Contempt Order," copy attached hereto), Docket Entry No 31, at 1. 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 (Sept. 7, 2007) (copy attached).

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

IV. CONCLUSION

For all the foregoing reasons, FORBA respectfully requests that the Court (a) find Hagan in contempt of the Consent Injunction and/or set a hearing at which Hagan shall show cause why she should not be held in contempt and sanctioned; (b) order that the referenced exhibits to and information in Hagan's Answer be removed from the record; (c) order that any future violation of the Court's Order by Hagan will result in a sanction of at least $10,000; (d) award FORBA its attorney's fees and expenses incurred in connection with obtaining Hagan's compliance with the

Consent Injunction; and (e) award FORBA such further relief as it deems just and proper and as is necessary to coerce obedience to its Order and to fully compensate FORBA.

Respectfully submitted,

/s/ Jonathan D. Rose
Thor Y. Urness (admitted *pro hac vice*)
Jonathan D. Rose (Ky. Bar No. 88547)
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1600 Division Street, Suite 700
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Nashville, Tennessee 37203
(615) 252-2308

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum in Support of Plaintiff's Motion for Sanctions Due to Defendant's Violation of Consent Injunction is being served via first class U.S. Mail, postage prepaid, on this the 23rd day of December, 2008, on the following:

Debbie Hagan
4453 Strickland Drive
Owensboro, KY 42301-6519

/s/ Jonathan D. Rose
Jonathan D. Rose

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.	)	

ORDER GRANTING MOTION FOR SANCTIONS DUE TO DEFENDANT'S VIOLATION OF CONSENT INJUNCTION

Before the Court is Plaintiff's Motion For Sanctions Due to Defendant's Violation of Consent Injunction. Upon review of the Motion, the response of the defendant, Debbie Hagan ("Hagan"), Hagan's Answer, particularly Paragraph 2 and Exhibits A, I, J, and R thereof, and an *in camera* review of documents housed on the FORBA FTP Site (as defined below), the Court finds that Hagan has violated the Consent Injunction entered by this Court on November 17, 2008 [Docket Entry No. 11].

This Court ordered in the Consent Injunction as follows:

> 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 (emphasis added). Despite the plain language of the Consent Injunction, Hagan filed the following four (4) documents, which plainly are internal FORBA documents that Hagan 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: (1) Exhibit A, p. 3 (internal directory of FORBA); (2) Exhibit I (internal memorandum dated December 28, 2007, regarding FORBA bonus program); (3) Exhibit J, pp. 6-9 (internal memorandum dated November 8, 2007, regarding FORBA internal policies and procedures); and (4) Exhibit R (internal memorandum dated October 14, 2008, regarding press coverage of FORBA). Additionally, Hagan cut information from the "Master Center File," which was one of the documents specifically identified in the Consent Injunction as containing FORBA trade secrets, and pasted it into Paragraph 2 of the Complaint. These actions by Hagan represent plain violations of the Consent Injunction.

As remedy for Hagan's violation, the Court finds it appropriate to order the Clerk to withdraw Page 3 and Exhibits A, I, J and R of Hagan's Answer. The Court also finds it

[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.

appropriate to award FORBA the reasonable attorney's fees it has expended as a result of Hagan's violation of the Consent Injunction. Furthermore, Defendant Hagan is hereby warned that any future violation of the Consent Injunction will result in a sanction of at least $10,000.

WHEREFORE, it is hereby ORDERED that:

1. The Clerk shall withdraw Page 3 of Hagan's Answer, along with Exhibits A, I, J and R of Hagan's Answer.

2. FORBA is entitled to recover the reasonable attorney's fees it has expended as a result of Hagan's violation of the Consent Injunction. Within twenty (20) days of the entry of this Order, FORBA shall submit evidence of its reasonable attorney's fees. Within twenty (20) days after FORBA's service of evidence of its reasonable attorney's fees, if Hagan considers any of the fees submitted by FORBA to be unreasonable, Hagan may file a response setting forth such argument.

3. Any future violation of the Consent Injunction by Hagan will result in a sanction of at least $10,000.

It is so ORDERED, this _____ day of _____, 2009.

_____
United States District Judge

SUBMITTED FOR APPROVAL AND ENTRY BY:

/s/ Jonathan D. Rose

Thor Y. Urness, Esq. (admitted *pro hac vice*)
Jonathan D. Rose, Esq. (Ky. Bar No. 88547)
BOULT, CUMMINGS, CONNERS & BERRY, PLC
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Attorneys for Plaintiff

NOTICE: THIS IS AN UNPUBLISHED OPINION.

(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. Use FI CTA6 Rule 28 and FI CTA6 IOP 206 for rules regarding the citation of unpublished opinions.)

United States Court of Appeals, Sixth Circuit.

UNITED STATES OF AMERICA, AND MICHAEL R. MURPHY, INTERNAL REVENUE AGENT, PLAINTIFF-APPELLEES,
v.
UNIVERSAL CHRISTIAN CHRUCH, ET AL., DEFENDANTS,
VINCENT M. COOMES, PASTOR, DEFENDANT-APPELLANT.

NO. 83-5039

7/19/85

W.D.Ky.

AFFIRMED

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY

BEFORE: KENNEDY and WELLFORD, Circuit Judges; and BROWN, Senior Circuit Judge.

PER CURIAM.

***1** The Internal Revenue Service ('IRS') seeks enforcement of a summons directing Vincent Coomes to produce various documents of the Universal Christian Church, for which he claims to be Pastor, Presiding Bishop, and Chairman of the Board of Directors.[FN1] After the district court sought to avoid finding Coomes in contempt for his failure to respond, including the appointment of an attorney to represent him and having a psychiatrist examine him, the government and Coomes' court appointed counsel entered a joint stipulation of dismissal. Coomes, however, moved to set aside the order of dismissal, so that he could assert his First Amendment rights and achieve another negotiated resolution of the case.

In 1979, the IRS commenced an investigation into the tax liability of Coomes' Universal Christian Church ('UCC'). Coomes' liability for 1976 through 1978 was under investigation, and his liability could be affected by the outcome of the UCC investigation. UCC is named as a party to this appeal but, in fact, there is no appeal by that entity, and it is not a party before this court.

Coomes had claimed charitable deductions for contributions made to UCC in prior years, and has unsuccessfully petitioned the Tax Court for redetermination of his tax liability on three occasions.See Coomes v. Commissioner, 42 T.C.M (CCH) 394 (1981); Coomes v. Commissioner, 37 T.C.M. (CCH) 1262 (1978), aff'd79-1 U.S.T.C. ¶9401 (May 16, 1979); Coomes v. Commissioner, 37 T.C.M. (CCH) 1262,aff'd572 F.2d 554 (6th Cir. 1978). In each case, the Tax Court found that Coomes failed to meet his burden of proof with respect to the claimed deductions because of his refusal on first amendment grounds to comply with subpoenas duces tecum to produce USS's by-laws, books, and financial records.

On December 19, 1979, the IRS issued a summons directing UCC and Coomes to appear before the IRS to give testimony and produce a number of records. When Coomes refused to produce the records sought, the IRS sought enforcement, and the district court directed Coomes to show cause why the summons should not be enforced.Coomes was ordered to appear before the court for a hearing, and the court ordered him to produce the documents or be held in contempt. Coomes filed a UCC Resolution (referred to in footnote 1), in which the Church resolved, inter alia:

That the Church nor the Most Reverend Mr. Coomes will intentionally flaunt the authority of the courts for the sake of flaunting the courts nor is it the position of the Church to hold the Court in contempt [sic!].

The district court then appointed an attorney to represent Coomes. After a hearing the court held Coomes in contempt, but directed that Dr. Green, a psychiatrist, examine Coomes to see if he had the capacity to understand the court's orders, and to see if he suffered from a delusion that 'because of his sincere religious

faith and beliefs he would suffer damnation or some other grievous injury should he comply with the orders of the court'. Based on Dr. Green's report, which indicated that Coomes is psychotic and suffering from paranoid delusions of long duration, Coomes' court appointed attorney moved to set aside the contempt order. A hearing on this motion was never held, however, because the government and Coomes' court appointed counsel filed a joint stipulation of dismissal. Coomes, however, moved to set aside the stipulated order of dismissal which he charged was 'the convoluted star-chamber dismissal of the . . . action.'

***2** In a carefully reasoned opinion, the district court granted Coomes' motion to set aside the order of dismissal noting:

the Court has examined the report of Dr. Lawrence P. Green dated July 16, 1980 concerning his examination of Rev. Coomes. That report indicates that, although the defendant suffers from a paranoid delusional system and is psychotic, and is a paranoid schizophrenic of long duration, he firmly believes that he would rather suffer the consequences of the law than to suffer the eternal damnation of God. The report also indicates that Dr. Green believes that Rev. Coomes has excellent comprehension of the orders of the Court and the implications of the orders if he should or should not comply.

In light of these findings by Dr. Green, and the Court's observation of the defendant, the Court must conclude that defendant has the mental ability to make a knowing and volunary decision to have set aside an order which had great material benefits for him, but which he wishes to have set aside because of his religious beliefs.

On December 10, 1982, the court held Coomes in contempt, but permitted him to remain at liberty after posting minimal bail, pending his appeal. Coomes' first notice of appeal was dismissed for want of prosecution. Later this court granted appellant's motion to reinstate his appeal.

I. Does the IRS have authority to summons church records?

The IRS's investigation in the instant suit is not primarily directed at determining whether the UCC should be granted IRC § 501(c)(3) exempt status, rather the IRS seeks to determine the UCC's proper tax liability and to determine the deductibility of Coomes' claimed of § 170 'contributions.' 'Coomes (also represented by counsel on appeal) first claims that the IRS cannot investigate the UCC unless the UCC claims tax exempt status. The IRS is authorized to investigate the tax liability of any 'person'.SeeIRC § 7601. The Code broadly defines 'person' as 'includ[ing] an individual, a trust, estate, partnership, association, company or corporation.'IRC § 7701(a)(1). Thus, if an entity such as the UCC has not been paying any taxes or is claimed by a taxpayer to be the object of charitable contributions, the IRS is empowered to investigate the status of the claimed charitable (or religious) entity, regardless of whether or not it claims to be tax exempt.See, e.g., Donaldson v. United States, 400 U.S. 517, 523-23 (1971) (IRS can subpoena third parties to determine the tax liability of a person under investigation); see also, United States v. Euge, 444 U.S. 707, 710-11 (1979) (IRS empowered to summon witnesses to produce evidence necessary for tax investigations).

In order to obtain compliance with their summonses, the IRS may seek enforcement in district court as long as its use of the summons is in 'good-faith pursuit' of the purposes authorized by Congress.IRC §§ 7402(b) and 7604(a); United States v. Powell, 379 U.S. 48, 58 (1964); United States v. LaSalle National Bank, 437 U.S. 298, 308 (1978). A good-faith showing may be made through submission of an affidavit by the agent who issued the summons.United States v. Kis, 658 F.2d 526, 535-36 (7th Cir. 1981). Indeed, the IRS need only make a minimal showing that the summons was issued for a proper purpose, that the material sought is relevant and not already in the government's possession, and that the proper administrative steps have been taken.United States v. Will, 671 F.2d 963, 966 (6th Cir. 1982). The affidavit sworn out by IRS agent Michael Murphy, who is investigating this case, meets these requirements.

***3** United States v. Dykema, 666 F.2d 1076 (7th Cir. 1981), appears on point. The district court had denied enforcement of an IRS summons directed to Dykema, pastor of the Christian Liberty Church. While it is unclear in Dykema whether the church concerned had initiated a request for tax-exempt status, among the objects of the broad IRS summons for church records was to determine whether it was a 'proper recipient

of deductible contributions' and whether there was unrelated and unsupported business income involved.666 F.2d at 1098. That court held clearly that 'records of other parties, including his employer, even though it be a church, may be examined if they are such as to throw light on his individual tax liability.'Id. at 1098,citing United States v. Grayson Co. State Bank, 656 F.2d 1070, 1976 (5th Cir. 1981).

Grayson Co. State Bank held that

[I]n enforcement of an IRS summons under Section 7602 when the summons authority is necessary for 'the effective performance of congressionally imposed responsibilities to enforce the tax code, that authority should be upheld absent express statutory prohibition or substantial countervailing policies.'

656 F.2d at 1073,quoting United States v. Euge, 444 U.S. 707, 711 (1980). The defense to enforcement of the summons in the Grayson Co. State Bank case was based upon religious objection to producing bank records of a church. Once the tests of good faith, relevant inquiry and proper administrative steps were met in the issuance of the summons 'to investigate the correct tax liability of the minister,' the Grayson court held that the first amendment did not preclude enforcement of a summons to obtain complete bank records relating to financial activities of the church.656 F.2d at 1073.

Accordingly, we hold that IRS here had ample authority to issue the summons in respect to a valid tax investigation, which was initiated in good faith; and that the summons should be enforced after proper administrative procedures had been followed. This authority under the Tax Code is upheld despite the first amendment defense raised by Coomes and despite the fact that the church itself did not instigate the IRS inquiry or investigation by seeking a tax exempt status certificate:

[a]llowing the IRS access to reformation to determine the correct tax liability of the taxpayer, the church's minister, does not restrict the church's freedom to espouse religious doctrine nor to solicit members or support.

United States v. Grayson Co. State Bank, 656 F.2d at 1074,citing United States v. Holmes, 614 F.2d 985, 989 (5th Cir. 1980).

II. Is the contempt order enforceable?

We now turn our attention to the question of whether the district court correctly held Coomes in contempt for his failure to comply with its enforcement order, notwithstanding Coomes' psychological problems. The district court, after a hearing, found that Coomes understands the consequences of his act. Since Coomes is not subject to criminal contempt[FN2] there is no intent element required, and in fact, civil contempt may be imposed even though the party held in contempt did not act willfully.McComb v. Jacksonville Paper Co., 336 U.S. 187 (1949); Aero Corp. v. Department of the Navy, 558 F. Supp. 404, 428 (1983). Whether Coomes's belief that he should resist turning over Church records is sincere or not, the finding of sufficient mental comprehension is not clearly erroneous. The finding that Coomes is capable of complying with the court's order and of understanding the consequences if he does not, is also not clearly erroneous.

***4** The inability of a contemnor to comply with a court's order is a defense to coercive imprisonment for contempt.See Shillitani v. United States, 384 U.S. 364, 371 (1966); Maggio v. Zeitz, 333 U.S. 56, 76 (1948). These cases, however, suggest only that physical inability is a defense, not an inaility due to fear of a greater punishment from an Authority above and beyond the courts. For example, a witness who refuses to testify in a RICO case for fear of reprisal by the Mafia still may be held in civil contempt.United States v. Romano, 684 F.2d 1057, 1065 n.7 (2d Cir. 1982), Cert. denied, 103 S. Ct. 375 (1982). We recognize the complicating factor in this controversy due to Coomes' diagnosed mental disorder, but the fact remains that the district court's ample opportunity to observe plaintiff together with the psychiatrist's opinion of his understanding about consequences of refusal to obey the court's order is an adequate basis to uphold the contempt order. Regardless then of Coomes' assertion of religious 'persecution', particularly in light of the paranoid mental state overtones, the enforcement of the summons is not a constitutional infringement. The court below did not abuse its discretion in holding Coomes in civil contempt for his persistent refusal to deliver records pursuant to a valid summons, or to file an appropriate response if he claims there are no such records in existence.

III. Was the summons too broad?

While we question Coomes' standing to challenge whether the summons issued to the church is overbroad, we doubt that IRS should properly inquire about 'applications for church membership.' Accordingly, the judgment of the district court is AFFIRMED. We hope that Mr. Coomes will comply with the court's order so that there will be no need for incarceration.

FN1. According to the affidavit of IRS agent Murphy, the 'only information' in response to the I.R.S. summons in this case was a resolution of the 'Board of Directors of the Universal Christian Church' convened pursuant to certain 'By-Laws' that, among other things:

1) 'the Church has not, and cannot make application for tax exempt status.'

2) 'the Church, by secular law, is tax exempt.'

3) 'Most Reverend Mr. Coomes, or any other person, is forbidden to give any documents or information to any governmental official or agency . . ..'

The 'resolution' was signed 'For the Universal Christian Church' by 'Most Reverend Vincent Coomes, President Bishop and Chairman, Board of Directors.'

FN2. The contempt in the instant case is civil in nature.See Shillitani v. United States, 384 U.S. 364 (1966) (conditional nature of sentences renders actions civil contempt); Gompers v. Buck's Stove & Range Co., 221 U.S. 418 (1911); DeParcq v. United States District Court, 235 F.2d 692, 699 (8th Cir. 1956), distinguishing civil and criminal contempt as follows:

(1) Refusal to do an act commanded is civil contempt, while doing a forbidden act is criminal contempt; (2) Punishment for criminal contempt is unconditional, while the judgment for civil contempt is conditional in nature and can be terminated if the contemnor purges himself of the contempt [civil contemnor carries the keys to his prison]; (3) Civil contempt proceedings are entitled as a part of the main cause, while criminal contempt actions are brought in the name of the United States; and (4) The notice in a criminal contempt proceeding must state that the proceeding is criminal in nature.

Clearly then Coomes is subject only to civil contempt in this proceeding. SeeFed. R. Civ. P. 45(f) (failure to obey a subpoena is civil contempt).

C.A.6, 1985
U.S. v. Universal Christian Church
770 F.2d 167, 1985 WL 13480 (C.A.6 (Ky.))

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
BOWLING GREEN DIVISION

CIVIL ACTION NO. 1:06CV-165-M

HOLLEY PERFORMANCE PRODUCTS, INC. **PLAINTIFF**

V.

SMITH-CNC CHINA NETWORK COMPANY, et. al. **DEFENDANTS**

MEMORANDUM OPINION

This matter is before the Court upon a motion by Plaintiff for a preliminary injunction.[1] Plaintiff seeks exigent relief through a preliminary injunction with respect to its claim that Defendant has unlawfully converted tooling purchased from Defendant by Plaintiff. A preliminary injunction hearing was held in this matter on November 7, 2006. Douglas R. Smith, Smith-CNC's President and CEO, testified. Fully briefed and argued, this matter is ripe for decision. For the reasons set forth below, the motion by Plaintiff for a preliminary injunction is **GRANTED**.

I. Facts

Plaintiff Holley Performance Products, Inc. ("Holley"), is a manufacturer of specialized automobile parts including high performance carburetors, superchargers, and throttle body fuel injection systems, which are specifically designed for racing applications. According to Holley, every race car in the NASCAR Nextel Cup and every race car driven by a NHRA Pro-Stock champion uses a carburetor manufactured by Holley. (Plaintiff's Complaint, ¶ 14).

In 2005, Holley began contractual negotiations with Defendant Smith-CNC China Networking

[1]The plaintiffs actually submitted a motion for a temporary restraining order. However, since notice was given to the Defendant, the Court has considered this as a motion for a preliminary injunction.

Company ("Smith-CNC"). Holley wanted Smith-CNC to facilitate the manufacturing of certain types of Holley component parts in China. Prior to the execution of a final agreement, Holley provided Smith-CNC with the documentation it needed to make the "toolings"- or molds - that were necessary to manufacture the component parts Holley planned to order. Subsequently, Smith-CNC arranged for a Chinese manufacturer to fabricate the tooling at issue in this case which was to be used in the manufacturing of component parts. In June 2005, Holley and Smith-CNC formally entered into a contract which provided that Smith-CNC would sell and deliver to Holley certain types of component parts that Smith-CNC would have manufactured in China. (Ex.A-2, Holley Performance Products Agreement).The Agreement specifically states that "all tooling used in the production of the Products ("Tooling") is owned by and is the property of Holley." (Agreement, p. 8, § L.).[2] Pursuant to this Agreement, Chinese manufacturers began to manufacture component parts for Holley.

On February 2, 2006, Holley terminated its contract with Smith-CNC, alleging that Smith-CNC had repeatedly failed to comply with its obligations under the contract. Following the termination of the agreement, Smith-CNC claimed that Holley owed it over $300,000.00 for component parts that it had supplied to Holley pursuant to their Agreement. Additionally, Smith-CNC claimed that Holley's employment of a new broker, Taurus International, and its continued use through Taurus, of the Chinese manufacturers whom Smith-CNC had first engaged, constituted a violation of the Agreement's exclusivity clause. The two companies entered into negotiations concerning the disputed claims, but failed to reach an agreement. On October 14, 2006, Smith-CNC removed the tooling at issue in this case from one of the Chinese manufacturers, thereby preventing the continued

[2] The Agreement also provided: "The respective rights and duties of the parties are to be determined, in accordance with the law of the State of Kentucky, USA, exclusive of any provisions related to conflict of laws. (Agreement, p.10, § Q).

manufacture of component parts for Holley. Thereupon, Holley filed this motion for a preliminary injunction to force Smith-CNC to return the tooling to the manufacturing facility and to refrain from taking any other tooling in use by Holley's Chinese suppliers.

II. Preliminary Injunction Standard

A preliminary injunction is an extraordinary remedy that is used to preserve the status quo between parties pending a final determination on the merits of the action. In determining whether to issue a preliminary injunction, the Court must consider four factors: (A) the likelihood of success on the merits; (B) the irreparable harm which could result to the movant without the relief requested; (C) the possibility of harm to others; and (D) the impact on the public interest. Schench v. City of Hudson, 114 F.3d 590, 593 (6th Cir. 1997). "It is important to recognize that the four considerations applicable to preliminary injunctions are factors to be balanced and not prerequisites that must be satisfied. These factors simply guide the discretion of the court; they are not meant to be rigid and unbending requirements." In re Eagle-Picher Industries, Inc., 963 F.2d 855, 859 (6th Cir. 1992)(citations omitted). A party is not required to prove its case in full at the preliminary injunction stage. Six Clinics Holding Corp., II v. Cafcomp Systems, Inc., 119 F.3d 393, 400 (6th Cir. 1997). Therefore, the findings of fact and conclusions of law of a district court are not binding at a trial on the merits. Id.

III. Discussion

A. Holley's Likelihood of Success on the Merits

The Kentucky Supreme Court has enumerated seven elements necessary to prove a conversion claim: (1) the plaintiff had legal title to the converted property; (2) the plaintiff had possession of the property or the right to possess it at the time of conversion; (3) the defendant exercised dominion over

the property in a manner which denied the plaintiff's right to use and enjoy the property and which was to the defendant's own use and beneficial enjoyment; (4) the defendant intended to interfere with the plaintiff's possession; (5) the plaintiff made some demand for the property's return which the defendant refused; (6) the defendant's act was the legal cause of the plaintiff's loss of property; and (7) the plaintiff suffered damage by the loss of the property. Kentucky Association of Counties All Lines Fund Trust v. McClendon, 157 S.W.3d. 626, 632 (Ky. 2005).

Smith-CNC does not dispute that Holley had legal title to the tooling at the time Smith-CNC removed it from the Chinese manufacturing facility. Both parties agree that the tooling at issue here became Holley's once Holley paid Smith-CNC for it. Smith-CNC does not dispute that Holley has fully paid Smith-CNC for the tooling.

Instead, Smith-CNC argues that Holley cannot prove the second element of conversion - namely, that Holley had possession of the property or the right to possess it at the time of the conversion. Smith-CNC claims that under Kentucky law, it has the right to possession of the tooling until Holley has fully paid it for the component parts manufactured with the tooling. KRS 376.435(3)(a) states: "A molder shall have a lien, dependent on possession, on all dies, molds, forms, or patterns in his hands and that belong to a customer, for the balance due him from the customer for any manufacturing or fabrication work, and in the value of all material related to the work. The molder may retain possession for the die, mold, form, or pattern until the charges are paid."

Based on the record thus far, the Court doubts the applicability of the statute to protect Smith-CNC's conduct here. First, Smith-CNC does not appear to be a "molder" as defined by the statute. KRS 376.435(1)(a) defines a "molder" as "any person who fabricates, casts, or otherwise makes or uses a die, mold, form, or pattern for the purpose of manufacturing, assembling, casting, fabricating,

or otherwise making a product for a customer." The facts indicate that while the Chinese manufacturers engaged by Smith-CNC to manufacture toolings and component parts for Holley are "molders" under the statute, Smith-CNC is nothing more than a broker facilitating the manufacture.

Further, even if Smith-CNC could be considered a "molder" as defined by the statute, it does not appear that Smith-CNC complied with the notice requirements of the statute before enforcing the lien. KRS §376.435(3)(b) provides: "Before enforcing a lien, a molder shall give notice in writing to the customer, whether delivered personally or sent by registered mail to the last known address of the customer. The notice shall state that a lien is claimed for the damages set forth in or attached to the writing for manufacturing or fabrication work contracted or performed for the customer. The notice shall also include a demand for payment." Smith-CNC has submitted no evidence into the record which would suggest that it complied with these statutory notice requirements. Accordingly, it seems to the Court that Holley, not Smith-CNC, will be able to prove that it had the right to possess the tooling at the time it was taken by Smith-CNC.

The third element of conversion requires that the plaintiff prove that the defendant exercised dominion over the property in a manner which denied the plaintiff's right to use and enjoy the property and which was to the defendant's own use and beneficial enjoyment. Both parties seem to agree that Smith-CNC's taking of the tooling has prevented the Chinese manufacturers from using that tooling to make component parts for Holley and has thus deprived Holley of its rights to use the tooling.

To establish conversion, the plaintiff must also prove that the defendant intended to interfere with the plaintiff's possession. Here, the only reason Smith-CNC removed the tooling from the manufacturing facility was to interfere with Holley's possession. By depriving Holley of its right to possess the tooling, Smith-CNC hoped Holley would be forced to pay Smith-CNC the disputed

contractual amount so that manufacturing of component parts would continue.

The fifth element of conversion requires the plaintiff prove that the plaintiff made some demand for the property's return which the defendant refused. Accordingly, Holley has submitted into evidence a letter sent by its counsel to Smith-CNC's counsel demanding the return of the removed tooling. (Exhibit B-2, Letter from Holley's Counsel to Smith-CNC's Counsel, October 17, 2006).

It also seems likely that the plaintiff will be able to prove the last two elements of conversion, specifically, that Smith-CNC's removal of the tooling from the Chinese manufacturing facility was the legal cause of Holley's loss of the tooling and that Holley was damaged by the loss of the tooling. According to Holley, without the component parts that were being produced in the Chinese facility from which the tooling was taken, Holley's American manufacturing facilities will not be able to function efficiently and Holley will not be able to supply its customers with its products. (Exhibit B, Tomlinson Affidavit, ¶, ¶ 8-9).

Thus, it seems likely that Holley will prevail on its conversion claim at a trial on the merits.

B. Irreparable Harm

A plaintiff's harm from the denial of a preliminary injunction is irreparable only if it is not fully compensable by monetary damages. Basicomputer Corp. V. Scott, 973 F.2d 507, 511 (6th Cir. 1992). The Sixth Circuit has held that an action which puts an injured party's reputation at risk may lead to "irreparable harm." Lorillard Tobacco Co. v. Amouri's Grand Foods, Inc., 453 F.3d 377, 381-382. (6th Cir. 2006). "An injury is not fully compensable by money damages if the nature of the plaintiff's loss would make damages difficult to calculate. In general, ...injury to reputation (is) difficult to calculate." United States v. Miami University, 294 F.3d 797, 819. (6th Cir. 2002)

Holley contends that it will suffer irreparable harm if the tooling is not returned because,

without the tooling, Holley will be unable to fulfill the orders of its longstanding customers, such as NASCAR. According to Holley, as of October 23, 2006, its current supply of the needed component parts would only last 45 days. (Ex. B, Tomlinson Affidavit, ¶ 8). Holley contends that if it is unable to supply its customers with products, Holley will suffer not only a financial loss, but its hard-earned reputation of trustworthiness and quality will be tarnished.

This Court concludes that Holley will suffer irreparable harm if the tooling removed from the Chinese facility by Smith-CNC is not returned.

C. Possibility of Harm to Others

Smith-CNC contends it will suffer "serious economic harm," if enjoined because the amount that Holley owes Smith-CNC constitutes a "substantial proportion of Smith-CNC's operating capital needs." Smith-CNC's potential financial injury can be fairly remedied by the judicial process. Here the potential harm to Holley's reputation outweighs the economic harm claimed by Smith-CNC.

D. Impact on the Public Interest

Finally, Holley contends that the public good will be preserved by ordering Smith-CNC to return the tooling because the 650 skilled laborers employed by Holley in North America rely on the components parts made from that tooling to manufacture finished products for Holley. The Court agrees.

IV. Conclusion

After weighing Holley's likelihood of success on the merits, the irreparable harm which Holley will suffer, the economic harm to Smith-CNC, and the impact on the public interest, the Court concludes that Holley's motion to force Smith-CNC to return the tooling to the manufacturing facility and to refrain from taking any other tooling in use by Holley's Chinese supplier should be granted.

Therefore, **IT IS HEREBY ORDERED** as follows:

1. The Defendants are ordered to immediately return to the Plaintiff, or its designated representative, the tooling which was removed from the Typical Foundry in China on October 14, 2006.

2. The Defendants are prohibited from removing, or attempting to remove, any other tooling in use by Holley and it's Chinese suppliers.

3. This Order is effective upon the date recited below and shall remain in effect until further Order of this Court.

4. Pursuant to Rule 65(c) of the Federal Rules of Civil Procedure, the Plaintiff shall post a bond in the amount of $25,000.00.

cc: counsel of record

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
BOWLING GREEN DIVISION

CIVIL ACTION NUMBER: 1:06CV-165-M

HOLLEY PERFORMANCE PRODUCTS, INC. **PLAINTIFF**

V.

SMITH-CNC CHINA NETWORKING CO., ET AL. **DEFENDANTS**

ORDER

This matter came before the Court on December 1, 2006, following Defendants' continued failure to comply with the preliminary injunction issued by the Court on November 9, 2006. At this civil contempt hearing, there appeared on behalf of Plaintiff, Mr. Todd Ohlms, Mr. Max Gu, and Ms. Rachel Atterberry; and on behalf of Defendant, Mr. Allen Holbrook. The Court's official reporter was Ms. Ruth Potami.

At the hearing, the Court heard testimony from Mr. Douglas Smith, principal of Smith-CNC, and argument by his Counsel, concerning his continued failure to comply with the Court's injunction. Thereafter, the Court concluded that Smith-CNC and Mr. Smith remained in contempt of Court and ordered the incarceration of Mr. Smith, effective at 11:00 AM CST on December 4, 2006, to continue until he purged himself of contempt. See, e.g., Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 442 (1911). However, Plaintiff's Counsel have confirmed that Mr. Smith and Smith-CNC complied with the Court's preliminary injunction before his scheduled incarceration. Accordingly, the Court finds that

Mr. Smith and Smith-CNC have purged themselves of contempt and, therefore, the order requiring Mr. Smith's incarceration is **vacated.**

Further, the Court **amends** its previous order, issued on November 21, 2006, which required Smith-CNC and Mr. Smith to pay Plaintiff $10,000 per day until they complied with the preliminary injunction. Upon reviewing the relevant law, the Court believes this order was in error. The Supreme Court has held that civil contempt sanctions may be employed for "either or both of two purposes: to coerce the defendant into compliance with court's order, and to compensate the complainant for losses sustained." United States v. United Mine Workers, 330 U.S. 258, 303-304 (1947). A coercive fine should be based upon "the character and magnitude of the harm threatened by the continued contumacy, and the probable effectiveness of any suggested sanction bringing about the result desired." Id. at 304. A court should also "consider the amount of defendant's financial resources and the consequent seriousness of the burden to that particular defendant." Id.; South Suburban Hous. Ctr. v. Berry, 186 F.3d 851, 854 (7th Cir. 1999); New York State NOW v. Terry, 886 F.2d 1339, 1353 (2nd Cir. 1989). Further, where a coercive fine is intended, the fine should be ordered payable into the court registry. In re Chase v. Sanborn Corp., 872 F.2d 397, 400 (11th Cir. 1989). On the other hand, where a civil contempt fine is intended as compensation to the complainant, the fine should be based upon the complainant's actual loss due to the Defendant's noncompliance and should be paid to the complainant. United Mine Workers, 330 U.S. at 304 (1947).

Thus, since the Court's intention was to coerce Mr. Smith into compliance with the

Court order, and not to compensate Holley for the losses they sustained by Mr. Smith's noncompliance, the Court should not have required the fine of $10,000 per day to be paid to Holley. Additionally, in fixing the amount of the above fine, the Court did not properly consider Mr. Smith's financial resources and the seriousness of that coercive burden to him. Therefore, the Court will allow Mr. Smith the opportunity to file a motion for a modification of the fine amount based upon these factors within thirty days of the date of entry of this order. Regular response and reply times shall govern.

As an additional sanction for Mr. Smith's contempt, the Court intends to allow Holley to recover its actual damages, plus reasonable attorney's fees, costs and expenses incurred as a result of the Mr. Smith's noncompliance with the preliminary injunction. Plaintiff Holley shall file a written application for the recovery of these items within thirty (30) days of the date of entry of this order . Response and reply times will be governed by local rule.

Finally, since there is no longer any need for coercive measures, the Defendants are hereby granted leave to re-file their counterclaim.

IT IS SO ORDERED.

Copies to: Counsel of record

HOnly the Westlaw citation is currently available.
United States District Court, W.D. Kentucky,
Bowling Green Division.
HOLLEY PERFORMANCE PRODUCTS, INC., Plaintiff
v.
SMITH-CNC CHINA NETWORKING CO., et al., Defendants.
Civil Action No. 1:06CV-165-M.

Sept. 7, 2007.

Elizabeth T. Friedlander, Rachel E.A. Atterberry, Todd J. Ohlms, Xin Max Gu, Freeborn & Peters LLP, Chicago, IL, Michael S. Vitale, Wyatt, Tarrant & Combs, LLP, Bowling Green, KY, for Plaintiff.
Daniel P. Harris, Harris & Moure, PLLC, Seattle, WA, Allen W. Holbrook, Sullivan, Mountjoy, Stainback & Miller, P.S.C., Owensboro, KY, for Defendants.

MEMORANDUM OPINION AND ORDER

JOSEPH H. **McKINLEY**, JR., United States District.
***1** These matters are before the Court upon a motion by Defendants, Smith-CNC China Networking Co., et al. ("Smith-CNC"), for modification of a **contempt** fine (DN 36); and upon a motion by the Plaintiff, Holley Performance Products, Inc. ("Holley"), to recover attorneys' fees, costs, and expenses, as well as actual damages, incurred as a result of Defendant's **contempt** (DN 42). Fully briefed, these matters are ripe for decision. For the following reasons, the Defendants' motion for modification of the **contempt** fine is **GRANTED;** and the Plaintiff's motion for attorneys' fees, costs, and expenses, and damages is **GRANTED in part** and **DENIED in part.**

I. FACTS

On November 9, 2006, the Court granted Plaintiff Holley's motion for a preliminary injunction and ordered Smith-CNC to return the tooling it had removed from a manufacturing facility in China. (DN 19). On November 15, 2006, following Smith-CNC's failure to comply with this order, Holley filed a motion to show cause. (DN 21). On November 21, 2006, the Court ordered Smith-CNC pay a ten thousand dollar ($10, 000) fine for each day he continued to fail to comply with the order and to pay attorneys' fees and expenses Holley incurred as result of the noncompliance. (DN 29). Then, following a hearing on December 1, 2006, the Court concluded that Smith-CNC remained in **contempt** of Court and ordered the incarceration of Mr. Smith if Smith-CNC did not comply with the order in thirty-six hours. (DN 31). Finally, on December 6, 2006, after Holley's attorneys confirmed that Smith-CNC had complied with the Court's preliminary injunction, the Court issued another order, vacating its previous order as to the requirement of Mr. Smith's incarceration, and amending it to allow a modification of Mr. Smith's **contempt** fine based on evidence of his financial resources. (*Id.*).

II. DISCUSSION

A. *The Contempt Fine*

The Supreme Court has held that the amount of **contempt** fine should be based on at least three factors: 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;" and 3) "the amount of a defendant's resources and the consequent seriousness of the burden to that particular defendant."*United States v. United Mine Workers,* 330 U.S. 258, 303-304 (1947). Upon considering each of these factors, and with the benefit of hindsight in this unusual situation, the Court concludes that no monetary amount would have coerced Defendant Smith into compliance with this Court's order. Rather, because of his financial situation, it was only the grave possibility of imprisonment that proved effective in bringing about Smith's compliance. Accordingly, while Smith's failure to return the tooling to Holley's manufacturer in China allegedly posed a costly, and even potentially irreparable harm to Holley, Mr. Smith's financial situation does not support the imposition of a fine. The fine was intended as a coercive measure, and because the threat of imprisonment achieved the desired result, the Court believes that a **contempt** fine at this point would only be punitive.

B. *Holley's Actual Damages*

***2** Holley also claims that it is entitled to be compensated for the actual damages it incurred as a result of Smith-CNC's **contempt**. Specifically, Holley seeks to recover air freight costs, (DN 52, Ex. C), costs related to the produc-

tion of new tooling (DN 42, Ex. H), and costs related to the work of two of Holley's salaried employees. As to the first, the Court finds that Holley is entitled to recover the costs it incurred to "catch up" its supply of throttle bodies. However, in this regard, Holley should only recover the cost of air freight minus the cost it would have incurred if the throttle bodies had been shipped via its standard, less expensive, overseas method. Accordingly, when Holley submits the necessary documentation showing how much it would have cost to ship the throttle bodies via its standard shipping method, the Court will issue an appropriate supplemental order regarding the amount to be paid by Smith-CNC. As to the costs related to the production of new tooling, the Court declines to allow Holley to recover because the receipt shows that this expense was incurred before Smith-CNC failed to comply with the Court's **contempt** order (DN 42, Ex. H).[FN1] Finally, the Court also declines to find that the time and work of two of Holley's salaried employees in relation to this contract dispute constitute actual damages suffered by Holley. Thus, based on the evidence submitted by Holley, the Court finds that Holley is entitled to recover actual damages in the amount of the cost of air freight less the cost of standard shipping.

> FN1. The invoice submitted by Holley in relation to these costs shows that hows that Holley ordered the production of new tooling on October 20, 2006-weeks before the Court had even issued the preliminary injunction.

C. *Holley's Attorneys' Fees, Costs, and Expenses*

The Court has also ordered that Smith-CNC reimburse Holley for the reasonable attorneys' fees, costs, and expenses that it incurred as a result of Smith-CNC's **contempt**. The Court must now determine what attorneys' fees, costs, and expenses are "reasonable." "The primary concern in an attorney fee case is that the fee awarded be reasonable."*Reed v. Rhodes*, 179 F.3d 453, 472 (6th Cir.1999). The starting point should be the determination of the fee applicant's "lodestar," which is the proven number of hours reasonably expended on the case by its attorneys, multiplied by their court-ascertained reasonable hourly rate. *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983); *Adcock-Ladd v. Secretary of Treasury*, 227 F.3d 343, 349 (6th Cir.2000). In calculating the "reasonable hourly rate" component of the lodestar computation, the trial court should assess the "prevailing market rate in the relevant community."*Adcock-Ladd*, 227 F.3d at 350 (quoting *Blum v. Stenson*, 465 U.S. 886, 896 (1984)). Further,

> the Sixth Circuit has resolved that, when a counselor has voluntarily agreed to represent a plaintiff in an out-of-town lawsuit, thereby necessitating litigation by that lawyer primarily in the alien locale of the court in which the case is pending, the court should deem the "relevant community" for fee purposes to constitute the legal community within that court's territorial jurisdiction; thus the "prevailing market rate" is that rate which lawyers of comparable skill and experience can reasonably expect to command within the venue of the court of record, rather than foreign counsel's typical charge for work performed within a geographical area wherein he maintains his office and/or normally practices, at least where the lawyer's reasonable "home" rate exceeds the reasonable "local" charge.

***3** *Id.* (citing *Hudson v. Reno*, 130 F.3d 1193, 1208 (6th Cir.1997), cert. denied, 525 U.S. 822, 142 L.Ed.2d 50, 119 S.Ct. 64 (1998).

After determining the appropriate "lodestar" rate, the Court may then adjust it, within limits, to reflect relevant considerations peculiar to the subject litigation. *Adcock-Ladd*, 227 F.3d at 349. The factors a court may consider in its adjustments are: 1) the time and labor required by a given case; 2) the novelty and difficulty of the questions presented; 3) the skill needed to perform the legal service properly; 4) the preclusion of employment by the attorney due to acceptance of the case; 5) the customary fee; 6) whether the fee is fixed or contingent; 7) time limitations imposed by the client or the circumstances; 8) the amount involved and the results obtained; 9) the experience, reputation, and ability of the attorneys; 10) the "undesirability" of the case; 11) the nature and length of the professional relationship with the clients; and 12) awards in similar cases. *Id* . at n. 8 (citing *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-719 (5th Cir.1974)).

Here, Holley has submitted an application for attorneys' fees totaling $52,555.00 and costs and expenses totaling $5,166.70. (DN 43). However, these fees are not reasonable in the community where this Court sits. In this case, the relevant community is the Western District of Kentucky, the venue where this action has been brought and which is mandated by the contract, drawn up by Holley, between Holley and Smith. This "community" includes cities such as Owensboro, Bowling Green, Paducah, and Louisville-the city where Holley's local counsel in this action, Mr. Vitale, practices. In this action, most of Hol-

ley's attorneys' fees have accrued from Holley's counsel at Freeborn and Peters, LLP, located in Chicago. They have charged Holley rates between $230 and $450/hour. (DN 43, Ex. C). Holley's local counsel, Mr. Vitale, a partner in a prestigious Kentucky law firm, on the other hand, has charged an hourly rate of $ 240. (DN 43, Ex. D). Thus, using the lodestar method, the Court finds that a reasonable hourly rate in this jurisdiction is no more than $240.

Further, while the Court accepts Holley's position as to some of the relevant *Johnson* factors, specifically the importance of Freeborn and Peters' China practice in the present case, which relates to its attorneys' experience, reputation, and ability, and the inability of Holley's attorneys to engage in other employment due to the time limitations involved in the matter at hand, the Court also accepts Smith-CNC's position as to other, mitigating *Johnson* factors. For example, the Court agrees that Holley's attorneys spent more time and labor than were reasonably necessary here and that the legal issues presented here were not especially novel or complex. Thus, after considering the relevant factors, the Court declines to adjust the lodestar rate from $240/hour. Accordingly, in its calculations, the Court accepts the normal rate of the two attorneys who billed out at $240/ hour or less-Mr. Vitale and Ms. Atterberry-and adjusts the normal rate of the attorneys who billed out at more than that rate-Mr. Ohlms, Ms. Friedlander, and Mr. Gu-to the lodestar rate of $240/hour. The Court accepts Mr. Zhang's total charge of $1,250.00.

***4** Further, the Court will only require Smith-CNC to pay Holley's attorneys' fees for their services between November 15, 2006-the date of the first pleading of noncompliance- and December 6, 2006-the date the Court confirmed Smith's compliance with the preliminary injunction. Thus, the amount of attorneys' fees Smith must pay to Holley is:

Attorney	Hours	Rate	Fees
Ohlms, Todd J.	60	$240	$14,400.00
Friedlander, Elizabeth T.	.4	$240	$96.00
Atterberry, Rachel	45.4	$230	$10,442.00
Gu, Xin “Max”	26.9	$240	$6,456.00
Vitale. Michael	4	$2406	$960.00
Zhang, Yangmin	NA	NA	$1,250.00
ATTORNEYS' FEES TOTAL:			$33,604.00

Finally, the Court will require Smith-CNC to pay all of the legal costs and expenses Holley incurred between November 15, 2006 and December 6, 2006, including attorney travel costs, legal research expenses, transcript fees, and photocopying costs. This amount totals $4,057.90. (DN 43, Ex. F).

Thus, the total amount Smith-CNC must pay Holley for its attorneys' fees ($33,604.00), costs, and expenses ($4,057.90), incurred as a result of Smith's noncompliance with the Court's November 9, 2006 preliminary injunction, is $ 37, 661.90.

III. CONCLUSION

For the foregoing reasons, Smith-CNC's motion to modify the **contempt** fine is **GRANTED** and Holley's motion to recover attorneys' fees, costs, expenses, and actual damages is **GRANTED in part and DENIED in part.**Smith-CNC shall pay Holley $ **37,661.90** for attorneys' fees, costs, and expenses. The Court will issue a subsequent order, regarding the additional amount Smith-CNC shall pay Holley for actual damages, after Holley has submitted the requisite documentation. **IT IS SO ORDERED.**

W.D.Ky.,2007.
Holley Performance Products, Inc. v. Smith-CNC China Networking Co.
Not Reported in F.Supp.2d, 2007 WL 2669346 (W.D.Ky.)

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