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

GENERAL CONFERENCE CORPORATION OF SEVENTH-DAY ADVENTISTS and GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS, an Unincorporated Association,	)	
Plaintiffs,	)	
v.	)	Case No. 1:06-cv-01207-JDB-egb
WALTER McGILL, d/b/a CREATION SEVENTH DAY ADVENTIST CHURCH, *et al.*,	)	
Defendants.	)	

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RELATED CASE:	)	
LUCAN CHARTIER	)	Case No. 1:11-mc-00003-JDB-egb

PLAINTIFFS' RESPONSE
TO DEFENDANT'S AND LUCAN CHARTIER'S OBJECTIONS
TO REPORT AND RECOMMENDATION

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Plaintiffs, General Conference Corporation of Seventh-day Adventists and General Conference of Seventh-day Adventists (collectively "Plaintiffs"), submit their Response to the Objections To Report And Recommendation filed by Defendant Walter McGill ("McGill") and his agent, Lucan Chartier ("Chartier") (collectively "Defendants"), respectfully stating as follows:

I. INTRODUCTION

For over 20 months, Defendants have committed numerous acts of contempt, and ignored multiple mandatory orders from this Court. As part of the ongoing efforts to enforce the orders of this Court, on December 23, 2010, Magistrate Judge Bryant issued a Report and Recommendation (the "December 2010 R&R"). (D.E. No. 160). In the December 2010 R&R Magistrate Judge Bryant recommended that Defendants should be held in civil contempt of this Court's orders. Magistrate Judge Bryant also recommended that: (1) both be fined $500; (2) McGill reimburse Plaintiffs for their attorneys' fees associated with the filing of their Notice of Additional Violations of Court Orders and Motion for Order Setting Evidentiary Show Cause Hearing, as well as with their appearance in Court on December 16, 2010; and (3) Defendants each be sentenced to serve 30 days in the custody of the U.S. Marshal Service, with 20 of those days of Chartier's sentence suspended pending his good behavior. (D.E. No. 160, p. 5).

Defendants have both filed Objections to the December 2010 R&R. (D.E. No. 162); (D.E. No. 1 / Docket No.: 11-MC-0003). McGill alleges that the December 2010 R&R is procedurally deficient for failing to comply with 28 U.S.C. § 636(e), the recommended contempt sanctions are criminal in nature and thus in violation of Fed. R. Crim. P. 42, and the proof of contempt was inadequate. (D.E. No. 162). Chartier alleges that the December 2010 R&R violates 42 U.S.C. § 2000bb (the Religious Freedom Restoration Act) ("RFRA"), the

recommended contempt sanctions are criminal in nature and thus in violation of Fed. R. Crim. P. 42, and the December 2010 R&R is procedurally deficient.

Defendants are wrong in every argument and objection. The procedure followed by Magistrate Judge Bryant in issuing the December 2010 R&R was proper and is not governed by 28 U.S.C. § 636(e). While certain aspects may warrant clarification, the sanctions recommended in the December 2010 R&R are meant to be civil, not criminal, so there is no violation of Fed. R. Crim. P. 42. Moreover, the sanctions are supported by clear and convincing evidence. Additionally, the Objections filed by Defendants are not procedurally proper, and both have waived any objections they may have to a finding of contempt. Furthermore, even if the law of the case doctrine did not preclude it, Chartier's RFRA defense would fail on the merits. Thus, this Court should reject the Objections of Defendants, and adopt the December 2010 R&R with the express technical clarification that Defendants may end their contempt and the resultant sanctions by agreeing to comply and thereafter complying with this Court's orders.

II. PROCEDURAL BACKGROUND

A. The Injunction Order

Due, in part, to McGill's refusal to comply with this Court's three mediation orders (D.E. Nos. 68, 74, and 80), the Plaintiffs filed a Motion for Sanctions and Permanent Injunctive Relief on November 12, 2008 (the "First Motion for Sanctions"). (D.E. No. 85).[1] McGill submitted a Response to the First Motion for Sanctions, where he acknowledged that his actions supported sanctions and the entry of a default judgment on the remaining claims at issue. (D.E. No. 89).

[1] On June 11, 2008, this Court entered an Order granting in part and denying in part Plaintiffs' Motion for Summary Judgment. (D.E. No. 70). Specifically, the Court granted summary judgment on Plaintiffs' trademark infringement and unfair competition claims based on the "SEVENTH-DAY ADVENTIST" mark, but found there were factual issues that prevented an award of summary judgment as to Plaintiffs' remaining claims. (D.E. No. 70, p. 28). Thus, injunctive relief sought in the First Motion for Sanctions was also based, in part, upon the merits of the trademark claims, i.e. the Court's prior award of partial summary judgment. (D.E. No. 85).

On April 16, 2009, Magistrate Judge Bryant entered a Report and Recommendation, where he recommended granting a default judgment against McGill, and recommended an injunction against McGill's infringing activities. (D.E. No. 94).

The April 16, 2009 Report and Recommendation by Magistrate Judge Bryant was adopted when, on May 28, 2009, this Court issued a permanent injunction against McGill (the "Injunction Order"). (D.E. No. 98).[2] The Injunction Order expressly applied to "Defendant and his *agents, servants and employees, and all those persons in active concert or participation with them*[.]" (D.E. No. 98, p. 12) (emphasis added); *see* Fed. R. Civ. P. 65(d)(2)). This Court noted that the sanctions were necessary due to "Defendant's willful failure to comply with the [mediation] scheduling order." (D.E. No. 98, p. 13).

B. The First Contempt Of The Injunction Order

The Injunction Order required McGill to cease the infringing activities within 20 days, and also to file with this Court a sworn oath detailing how McGill had complied with the Injunction Order. (D.E. No. 98, p. 13). McGill ignored this requirement, and ignored the Injunction Order, as he continued his infringing activity in all respects.

Consequently, Plaintiffs filed a Motion and Memorandum for Order to Show Cause (the "Second Motion for Sanctions"). (D.E. No. 102). On August 5, 2009, "based upon an optimistic presumption that Defendant will henceforth comply with this Court's order," this Court entered an Order denying Plaintiffs' Second Motion for Sanctions without prejudice. (D.E. No. 103, p. 9). Additionally, the Court warned McGill that if his willful noncompliance continued, he could

[2] This Court permanently enjoined Defendant from using the mark SEVENTH-DAY ADVENTIST, including the use of the words SEVENTH-DAY or ADVENTIST, or the acronym SDA, either together, apart, or as a part of, or in combination with any other words, phrases, acronyms or designs or any marks similar thereto or likely to cause confusion therewith, in the sale, offering for sale, distribution, promotion, provision or advertising of any products and services, and including on the Internet, in any domain name, key words, metatags, links, and any other use for the purpose of directing Internet traffic, at any locality in the United States. (D.E. No. 98).

be held liable for the Plaintiffs' costs and attorneys' fees incurred both before and after the issuance of the August 5, 2009 Order, as well as any other sanctions this Court deemed appropriate. (D.E. No. 103, p. 9). The next day, on August 6, 2009, the Court determined that in accordance with its Order partially granting summary judgment (D.E. No. 70), the Injunction Order (D.E. No. 98) and its August 5, 2009 Order (D.E. No. 103), all issues had been resolved and thus entered its Judgment. (D.E. No. 104).

C. The Second Contempt Of The Injunction Order

In response to the August 5, 2009 Order, Plaintiffs' counsel requested orally and in writing that McGill comply with the prohibitions and requirements placed upon him through this Court's Injunction Order. (*See* D.E. No. 105, Exhibit 1). By email, McGill indicated that he would continue to violate both the Injunction Order and the August 5, 2009 Order, and that he believed some of his activities and websites were beyond this Court's jurisdictional reach. (D.E. No. 105, Exhibit 1). Thereafter, McGill continued to violate the Injunction Order. As a result, Plaintiffs filed a Renewed Motion and Memorandum for Order to Show Cause (the "Third Motion for Sanctions"). (D.E. No. 105).

D. The January 2010 Order

A hearing on the Third Motion for Sanctions was set for November 5, 2009, but McGill never responded to the Third Motion for Sanctions or attended the hearing, though his counsel did and asserted a general objection for him. (D.E. 111, pp. 3-4). On December 14, 2009, Magistrate Judge Bryant entered a Report and Recommendation, wherein he recommended that the Plaintiffs' Third Motion for Sanctions be granted. (D.E. No. 111). Magistrate Judge Bryant noted that McGill knew about the Injunction Order, did not comply with it, and should be found in Contempt of Court. (D.E. No. 111, p. 6-7).

On January 6, 2010, this Court entered an Order Adopting Report and Recommendation (the "January 2010 Order"), adopting the sanctions recommended by Magistrate Judge Bryant in full, ordering McGill to "cooperate fully" with limited discovery by the Plaintiffs and further enjoining McGill and all persons acting in concert with him from using or enabling the use of numerous specifically listed domain names and websites. (D.E. No. 112, pp. 2-3). Additionally, the January 2010 Order held: "Plaintiffs or their agents should be and are permitted to remove and permanently dispose of Defendant's signs and promotional materials that violate the Injunction Order, with the costs of such removal and disposal to be taxed to Defendant." (Id.).

E. The Third Contempt Of The Injunction Order And First Contempt Of The January 2010 Order

Pursuant to the January 2010 Order, on January 22, 2010, Plaintiffs served a Notice of Deposition of McGill through his counsel. (D.E. No. 117, p. 2 and Exhibits 1 and 2). McGill, however, refused to appear for his deposition at any date. (Id.). Additionally, on February 4, 2010, Plaintiffs served narrowly drafted Discovery Requests to Defendant in Aid of Enforcement of Permanent Injunction. (D.E. No. 117, p. 2 and Exhibit 3). However, despite Plaintiffs' multiple attempts to obtain responses to such discovery requests, McGill refused to respond. (D.E. No. 117, pp. 2-3 and Exhibit 4).

On February 16, 2010, Plaintiffs' agents carried out the January 2010 Order and removed the signs and other infringing materials in Guys, Tennessee. (D.E. No. 116, p. 1-2).

On February 16, 2010, also pursuant to the January 2010 Order, Plaintiffs served a Subpoena to Testify at a Deposition in a Civil Action upon Chartier, the assistant Pastor for McGill's church, *via* personal service. (D.E. No. 115; D.E. No. 116, Exhibit 4, 5, 6). Chartier refused to comply with the Subpoena. (D.E. No. 116, Exhibit 4).

Around March 8, 2010, Plaintiffs learned that, in direct willful violation of the Injunction Order and the January 2010 Order, the signs had been repainted by Chartier and potentially others. (D.E. No. 116, p. 1-2). On March 11, 2010, Chartier sent an email to Plaintiffs' counsel, again indicating his refusal to appear for the deposition. (D.E. No. 116, Exhibit 6). On March 15, 2010, Chartier sent yet another email to Plaintiffs' counsel confirming he would not attend the deposition for which he had been subpoenaed. (D.E. No. 116, Exhibit 7).

As a result of these contemptuous acts of Defendants, plus continued violations through the prohibited websites and yet additional websites on the Internet, on March 24, 2010, Plaintiffs filed a Motion and Memorandum for Sanctions and Order Setting Show Cause Hearing, as well as a Motion and Memorandum for Order Setting Evidentiary Show Cause Hearing (collectively, the "Fourth Motions for Sanctions"). (D.E. Nos. 116 & 117).

F. The June 2010 R&R

On May 25, 2010, an evidentiary show cause hearing was held, where Chartier testified that he routinely is in contact with McGill and he repainted and replaced the signs following consultation with McGill. (D.E. No. 136, pp. 4-5). Additionally, Chartier testified that: (1) he would continue his "civil disobedience" if necessary to keep the infringing church signage in place; (2) he would continue maintaining the infringing website(s) and postings on other sites; and (3) he would not fully answer questions about others who were involved in activities in possible violation of the Injunction Order and January 2010 Order. (D.E. No. 136, pp. 4-5).

Consequently, on June 24, 2010, Magistrate Judge Bryant issued a Report and Recommendation recommending that Plaintiffs' Fourth Motions for Sanctions be granted, and that Defendants be found in willful contempt of the Court's Injunction and Order. (D.E. No. 136,

pp. 2 & 8) (the "June 2010 R&R"). Magistrate Judge Bryant also recommended that Defendants be sanctioned appropriately. (D.E. No. 136, p. 8).

Neither McGill nor Chartier filed an objection to the June 2010 R&R. The June 2010 R&R is currently pending before this Court.

G. The Sixth Circuit's Opinion And Judgment

On August 10, 2010, the Sixth Circuit Court of Appeals issued its Opinion and Judgment affirming this Court's orders and judgment in all respects. (D.E. No. 145). The Sixth Circuit held that this Court had subject matter jurisdiction over this case, held that this Court had properly construed the trademark rights of the Plaintiffs and the violations thereof by McGill, and held that this Court's award of partial summary judgment was proper on the merits of the trademark claims. (D.E. No. 145, pp. 9, 14-16, 20). Further, while the Plaintiffs restricted their argument on appeal solely to the correctness of this Court's ruling that McGill had waived RFRA as a defense, the Sixth Circuit did not find it necessary to address the waiver, as it instead addressed the applicability of RFRA to cases where the government is not a party, and determined that RFRA did not apply. (D.E. No. 145, p. 13).

H. The Fourth Contempt of the Injunction Order And Second Contempt Of The January 2010 Order

On October 6, 2010, Plaintiffs' agents enforced the January 2010 Order again and removed infringing signs and materials at the Guys, Tennessee property. (D.E. No. 148, p. 4). Chartier was present and stated his intent to repaint the signs. (D.E. No. 148, p. 4). On October 12, 2010, Plaintiffs discovered that signs and other infringing materials had been repainted and replaced yet again in direct willful violation of the January 2010 Order. (D.E. No. 148, p. 5).

As a result, on October 20, 2010, Plaintiffs filed a Notice of Additional Violations of Court Orders and Motion for Order Setting Evidentiary Show Cause Hearing (the "Fifth Motion

for Sanctions"). (D.E. No. 148).[3] By order dated October 21, 2010, this Court referred Plaintiffs' Fifth Motion for Sanctions to Magistrate Judge Bryant for determination and/or report and recommendation and for a hearing and order and/or report and recommendation as to sanctions. (D.E. No. 149). A Notice of Setting was issued, notifying Defendants that a hearing on the Fifth Motion for Sanctions would be held on December 16, 2010 before Magistrate Judge Bryant. (D.E. No. 152). Notice was provided to McGill's counsel and sent directly to McGill at the address he provided the Court, but that additional notice, like the Court's earlier communications, was returned as "undeliverable." (D.E. Nos. 153, 154 & 155).

At the hearing, McGill did not personally appear, but McGill's counsel and Chartier did. (D.E. No. 160, p. 2). Chartier testified that he had again replaced the signs prohibited by the Injunction Order and the January 2010 Order, and discussed these actions with McGill. (D.E. No. 160, p. 2). Chartier further testified that he continued to operate websites prohibited by the Injunction Order and January 2010 Order. (D.E. No. 160, p. 2). Chartier "readily conceded his actions were in violation of the District Court's Orders, and testified that he will continue to violate these Orders." (D.E. No. 160, p. 2).

I. The December 2010 R&R

Following the hearing, on December 23, 2010, Magistrate Judge Bryant issued the December 2010 R&R (D.E. No. 160), recommending that: (1) both Defendants be fined $500; (2) McGill reimburse Plaintiffs for their attorneys' fees associated with the filing of their Fifth Motion for Sanctions, as well as with their appearance in Court on December 16, 2010; and (3) Defendants each be sentenced to serve 30 days in the custody of the U.S. Marshal Service, with 20 of those days of Chartier's sentence suspended pending his good behavior. (D.E. No. 160,

[3] Contrary to Defendant's incorrect assertion that the Fifth Motion for Sanctions "did not allege contempt by the Defendant" (D.E. No. 162, p.3), that Motion plainly did. (D.E. No. 148, p.1) (giving "notice of additional violations by Defendant and/or individuals acting as agents, servants and/or in concert with Defendant[.]")

p.5). McGill filed his Objection to the December 2010 R&R on January 11, 2011 ("McGill's Objection"). (D.E. No. 162). Chartier also filed an Objection to the December 2010 R&R, which was placed under this Court's docket number 11-MC-0003 ("Chartier's Objection," collectively with McGill's Objection, the "Objections"). (D.E. No. 1 / Docket No.: 11-MC-0003).

III. ARGUMENT

A. The Procedure Of The December 2010 R&R Was Proper

McGill argues that the December 2010 R&R was procedurally deficient because it is governed by 28 U.S.C. § 636(e), but did not follow the prescriptions of that statute. McGill is incorrect. § 636(e)(6)(B) states that in any case or proceeding before a magistrate judge where an act is committed that may constitute civil contempt, the magistrate judge must certify facts to the district court judge, who is to then hold a hearing on the alleged contempt. *See* § 636(e)(6)(B). However, the procedure described in § 636(e) is for the commission of acts that constitute civil contempt *committed during a proceeding before a United States magistrate judge or against an order of a magistrate judge*. *See* United States v. Ivie, 2005 U.S. Dist. LEXIS 13592, *5 (W.D. Tenn. 2005) (stating "[c]ontempts committed in 'a proceeding before a magistrate judge' include not only contempts committed in the magistrate judge's presence, but also contempts related to proceedings before the magistrate judge) (attached to McGill's Objection); *see also* Taberer v. Armstrong World Industries, Inc., 954 F.2d 888, 901 n.17 (3rd Cir. 1992) (stating "we use the phrase 'contempts committed in proceedings before a magistrate judge' to encompass contempts committed in the magistrate judge's presence, as well as out-of-court contempts related to proceedings before a magistrate judge").

On the other hand, § 636(b)(1)(B) allows a district court judge to designate a magistrate judge to conduct hearings, including evidentiary hearings, and submit to the district court judge

proposed finding of facts and recommendations. The December 2010 R&R was the product of a December evidentiary show cause hearing, *i.e*. an evidentiary hearing under § 636(b)(1)(B). Magistrate Judge Bryant recommended sanctions for acts of contempt that occurred prior to the evidentiary show cause hearing against this Court's orders (i.e. the Injunction Order, D.E. No. 98 and the January 2010 Order, D.E. No. 112), *not for acts of contempt that occurred during the evidentiary show cause hearing or against the magistrate's orders*. (*See* D.E. No. 160).

As noted by one court:

> [I]n proceedings presided over by magistrates, the magistrates are not empowered to define, in the first instance, what conduct constitutes contempt, that responsibility being left to the district court. However, once the district court has entered an order prohibiting certain conduct, thus defining what conduct constitutes contempt, nothing in § 636(e) prohibits a magistrate from determining whether a person accused of having engaged in such conduct has, in fact, done so.

United States v. Pyle, 518 F. Supp. 139, 145 (E.D. Pa. 1981). The case of Scioto Constr., Inc. v. Morris is also instructive. 2007 U.S. Dist. LEXIS 41757, *1-3 (E.D. Tenn. 2007) (copies of unreported caselaw are attached hereto as Exhibit 1). In Scioto, the Magistrate Judge entered a report and recommendation that sanctions for contempt were warranted based on the defendant's *failure to comply with the district court's order*. Id. (emphasis added). The sanctions included a $100 fine per day, for fifteen days, or until the defendant complied with the district court's order. Id. After 15 days, the defendant was to be incarcerated until he agreed to comply with the district court's order and purge himself of the contempt. Id. Also, the defendant was ordered to pay the plaintiff's attorneys' fees. Id. The district court accepted and adopted the report and recommendation in full. Id.

Thus, Defendants' arguments based on § 636(e) are without merit, as the contempt involved in the December 2010 R&R is contempt of this Court's Injunction Order and January 2010 Order, not for contempt of any order of Magistrate Judge Bryant. Magistrate Judge Bryant

was empowered by this Court to determine whether this Court's January 2010 Order had been violated, and give a report and recommendation thereon. That is exactly what he did, just like the magistrate judge in Scioto. Defendants' arguments based on Ivie are also without merit, as Ivie involved an act of contempt committed against the magistrate judge's order, not the order of the district court. Ivie, 2005 U.S. Dist. LEXIS 13592 at *5. Hence, the December 2010 R&R was procedurally proper.

B. It Is Not Required That This Court Conduct A Hearing On Either The June 2010 R&R Or The December 2010 R&R Before Contempt Sanctions Can Be Imposed

Defendants argue that this Court must conduct a hearing on the December 2010 R&R before they can be found in contempt. This is erroneous. This Court may conduct a hearing if it desires, but it is not required, since the procedure for review of the June 2010 R&R and the December 2010 R&R are governed by 28 U.S.C. § 636(b)(1)(C).

The standard of review this Court must use when reviewing a report and recommendation filed by a magistrate judge depends on whether a party has objected to the report and recommendation. 28 U.S.C. § 636(b)(1)(C); *see* Hill v. The Duriron Co., 656 F.2d 1208, 1210-11 (6th Cir. 1981) (quoting § 636(b)(1)(C)).

1. Review When There Is No Objection To Report And Recommendation

Where a party has not objected to a report and recommendation, the U.S. Supreme Court has held that "[t]he statute [§ 636(b)(1)(C)] does not on its face require any review at all, by either the district court or the court of appeals, of any issue that is not the subject of an objection." Thomas v. Arn, 474 U.S. 140, 149 (U.S. 1985); see Spooner v. Jackson, 321 F.Supp.2d 867, 868 (E.D. Mich. 2004) (stating "[a]s to the parts of a report and recommendation to which no party has objected, the Court need not conduct a review by any standard"); 14-72 Moore's Federal Practice - Civil § 72.11 (2011) (stating "[i]f no objections to a magistrate

judge's recommended disposition are filed, de novo review by a district judge may not be required. The recommendation may be adopted without conducting any review or the district court may review the recommendation under any standard it deems appropriate") (citations omitted).

The petitioner in Thomas v. Arn argued that "a failure to object waives only de novo review, and that the district judge must still review the magistrate's report under some lesser standard," but the Court disagreed, noting "§ 636(b)(1)(C) simply does not provide for such review." 474 U.S. at 149. Here, Defendants did not file objections to the June 2010 R&R. Thus, the findings of the June 2010 R&R regarding (1) the sanctionable acts of contempt committed by both McGill and Chartier, and (2) that Chartier was McGill's agent, may simply be adopted without further review. ((*See* D.E. No. 1, p. 2 / Docket No.: 11-MC-0003).

2. Review When There Is An Objection To Report And Recommendation

Where a party has objected to a report and recommendation, a district court judge must make a de novo determination of those portions of the report and recommendation to which there is an objection. 28 U.S.C. § 636(b)(1). A de novo determination "is not intended to require the judge to actually conduct a new hearing on contested issues. Normally, the judge . . . will consider the record which has been developed before the magistrate and make his own determination on the basis of that record[.]" Hill, 656 F.2d at 1214 (quoting and discussing the legislative history to § 636(b)(1)); *see also* Spooner v. Jackson, 321 F.Supp.2d 867, 869 (E.D. Mich. 2004) (stating "[D]e novo review . . . entails at least a review of the evidence that faced the magistrate judge . . . Whether the court supplements the record by entertaining further evidence is a matter committed to the Court's discretion"); Lardie v. Birkett, 221 F.Supp.2d 806, 807 (E.D. Mich. 2002) (same). Thus, while the factual record is largely made up of

contemptuous acts that are merely repeats of some of the earlier contemptuous acts, with respect to the December 2010 R&R, the Court should make a de novo review of the record that was before Magistrate Judge Bryant.

C. Repeated Acts Of Contempt Have Been Proven By Clear And Convincing Evidence

McGill objects to the December 2010 R&R, asserting that Plaintiffs did not satisfy the "clear and convincing" evidentiary standard required to support a finding of civil contempt. This objection is without merit.

In a civil contempt proceeding, the party seeking the order of contempt need only establish by clear and convincing evidence that the respondent knew about a specific order of the court prohibiting the respondent from committing certain actions, and committed the actions anyway. *See* NLRB v. Cincinnati Bronze, Inc., 829 F.2d 585, 591 (6th Cir. 1987). "Once non-compliance is established, the burden shifts to the respondent to demonstrate his inability to comply with the court's order." Elec. Workers Pension Trust Fund of Local Union #58 v. Gary's Elec. Serv. Co., 340 F.3d 373, 379 (6th Cir. 2003).

Once the burden shifts to the defendant, the defendant must produce evidence showing that he is presently unable to comply with the court's order. Id. (citing United States v. Rylander, 460 U.S. 752, 757 (1983)). "To meet this production burden in [the Sixth Circuit] 'a defendant must show categorically and in detail why he or she is unable to comply with the court's order.'" Id. (quoting Rolex Watch U.S.A., Inc. v. Crowley, 74 F.3d 716, 720 (6th Cir. 1996)). "When evaluating a defendant's failure to comply with a court order, we also consider whether the defendant 'took all reasonable steps within [his] power to comply with the court's order.'" Id. (quoting Peppers v. Barry, 873 F.2d 967, 969 (6th Cir. 1989)).

Defendants have both admitted to knowing about and understanding the January 2010 Order and the Injunction Order, and both have freely admitted to violating the January 2010 Order and the Injunction Order. (*See* D.E. No. 105, Exhibit 1; D.E. 116, Exhibits 4-7, D.E. No. 136, pp. 4-5; D.E. No. 160). McGill has sent emails from afar stating that he would continue to defy the Injunction Order. (D.E. No. 105, Exhibit 1). Additionally, Chartier has explicitly told this Court that he will not comply with the January 2010 Order and the Injunction Order in the future. (*See* D.E. No.136, pp. 4-5; D.E. No. 160).

Defendants have not attempted to prove any inability to comply with the Injunction Order or the January 2010 Order, except for claiming that their beliefs prevent them from complying. (*See* D.E. No. 145; D.E. No. 1 / Docket No.: 11-MC-0003). However, (1) as explained in Section III.F.1.c., this argument has been waived in this case; (2) as explained in Section III.F.2., the Sixth Circuit's Opinion precludes this defense; and (3) as explained in Section III.G., Chartier's RFRA defense would fail on the merits. Therefore, it has been shown by clear and convincing evidence that for over 20 months and continuing to this day, both Defendants have on numerous occasions violated this Court's Injunction Order and January 2010 Order, and that showing has not been rebutted.

D. The Recommended Sanctions Were Meant To Be Civil And Not Criminal

Defendants argue that the December 2010 R&R recommended sanctions for criminal contempt, in violation of Fed. R. Crim. P. 42. Fed. R. Crim. P. 42(a) does not apply, as the rule only covers criminal contempt proceedings and the sanctions of the December 2010 R&R are meant to be civil. While this Court should slightly modify and clarify the December 2010 R&R to make the nature of the sanctions more clear, Defendants are in error.

"Criminal contempt is a crime in the ordinary sense," and results in a criminal punishment. Int'l Union v. Bagwell, 512 U.S. 821, 826 (1994). Conversely, civil contempt can be imposed during an ordinary civil proceeding if notice is given and an opportunity to be heard. Id. at 826-27. The U.S. Supreme Court has stated that the punishment for criminal contempt is punitive, to vindicate the authority of the court, whereas civil contempt is remedial, and the resulting punishments is for the benefit of the complainant. Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 442 (1911). Notably, "punishment by imprisonment may be remedial, as well as punitive, and many civil contempt proceedings have resulted not only in the imposition of a fine, payable to the complainant, but also in committing the defendant to prison." Id. However, imprisonment for civil contempt is not ordered lightly, as "imprisonment for civil contempt is ordered where the defendant has refused to do an affirmative act required by the provisions of an order which, either in form or substance, was mandatory in its character." Id. Where imprisonment for civil contempt is ordered, it is not to punish the contemnor, but "is intended to be remedial by coercing the defendant to do what he had refused to do. The decree in such cases is that the defendant stand committed unless and until he performs the affirmative act required by the court's order." Id.

The most notable difference between civil and criminal contempt is whether the contemnor can end the contempt, and the resulting punishment, by complying with the terms of the court's original order. *See* Int'l Union, 512 U.S. at 827; March v. Levine, 249 F.3d 462, 469-70 (6th Cir. 2001) (noting contempt orders were civil because the punishment at issue was avoidable by performance of the required acts). Thus, for civil contempt, the contemnor has the "keys of the prison in [his] own pocket." In re Nevitt, 117 F. 448, 461 (8th Cir. 1902).

Here, Defendants were both given notice of an evidentiary hearing on whether they were in contempt of this Court's January 2010 Order and the Injunction Order. (*See* D.E. No. 152). They were both given an opportunity to be heard. While McGill appeared through counsel, only Chartier personally attended the hearing. (*See* D.E. No. 160). At the hearing, Chartier confirmed that he would not take affirmative actions required by this Court's mandatory orders. (D.E. No. 160, p. 2). Moreover, based upon the totality of the evidence spanning over 20 months, which include McGill's acknowledgment of his contemptuous behavior and intent to continue it, Magistrate Judge Bryant correctly determined that McGill also refused to comply with this Court's mandatory orders. (D.E. No. 160, p. 2). Magistrate Judge Bryant noted that he could no longer tolerate Defendants' willful refusal to comply with this Court's orders, and so imposed civil contempt penalties intended to coerce compliance. (*See* D.E. No. 160, pp. 4-5).

In this regard, the civil contempt penalties were properly intended to compensate the Plaintiffs, who continue to incur expenses and legal fees related to Defendants' ongoing refusal to comply with this Court's Injunction Order and January 2010 Order. (See D.E. No. 148). Thus, the Plaintiffs were awarded their attorneys' fees. (D.E. No. 160, p. 5). Additionally, Magistrate Judge Bryant provided that Chartier's sentence would be shortened for "good behavior," which also appears designed to be remedial in nature. (D.E. No. 160, pp. 4-5).

Therefore, Defendants are wrong in their assertions that the sanctions recommended in the December 2010 R&R are criminal, and not civil. To make the civil nature of the sanctions more clear, however, the December 2010 R&R should be slightly modified to expressly state that Defendants may end their contempt and the sanctions ordered by agreeing to comply and thereafter complying with this Court's orders.

E. The Objections Filed By Defendants Are Not Procedurally Proper

McGill's Objection (attached as an exhibit to the objections filed by his counsel) fails to comply with Fed. R. Civ. P. 72(b). Chartier appears to have improperly used a ghostwriter for his Objection. Thus, both Objections are procedurally improper.

1. McGill's Objection Is Not Procedurally Proper Under Fed. R. Civ. P. 72(b)

Objections to a report and recommendation are governed by Fed. R. Civ. P. 72(b), which requires the objecting party to "serve and file *specific written objections* to the proposed findings and recommendations." (Emphasis added). Written objections are specific when they "enable[] the district judge to focus attention on those issues – factual and legal – that are at the heart of the parties dispute." Thomas, 474 U.S. at 147. "Conclusory objections that do not direct the reviewing court to the issues in controversy do not comply with Rule 72(b)." Velez-Padro v. Thermo King de P.R., Inc., 465 F.3d 31, 32 (1st Cir. 2006) (citing Howard v. Secretary of HHS, 932 F.2d 505, 508-9 (6th Cir. 1991)). When objections do not comply with the specificity requirement of Rule 72(b), they have the same effect as a failure to file any objection. *See* Howard, 932 F.2d at 509.

McGill is represented by counsel who has submitted objections on his behalf. (*See* D.E. 111, pp. 3-4; D.E. No. 162). Yet McGill still filed his own objections, and these objections do not meet the specificity burden of Fed. R. Civ. P. 72(b). Since McGill is not appearing pro se, the more liberal standards accorded to pro se litigants are inapplicable here.

McGill's objections are conclusory, rambling and unsupported by citation to the record. For example, McGill objects to the finding that Chartier has committed contempt against this Court's orders by arguing that Magistrate Judge Bryant's statements are additional evidence of his "imaginative inventions," and this Court "may discover truth with time and rational

investigation." (D.E. No. 162-1, p. 2). Defendants conclusory objections, however, avoid discussion of the fact that both he and Chartier willfully refused to answer or comply with Court ordered discovery. (*See* D.E. 116 and 117). Most importantly, McGill does not contest that he and Chartier committed contempt. (D.E. No. 162-1, p. 2). McGill's conclusory and unsupported allegations do not meet the specificity requirement of Rule 72(b) and should be rejected.

2. It Is Apparent That Chartier Used A Ghostwriter To Draft His Objection

The language used, legal analysis, and research involved in Chartier's objections make it appear highly likely that Chartier did not write his objections on his own, but rather had the assistance of an attorney. (*See* D.E. No. 1 / Docket No.: 11-MC-0003). This is known as having a ghostwriter. Kircher v. Township of Ypsilanti, 2007 U.S. Dist. LEXIS 93690, *9-11 (E.D. Mich. Dec. 21, 2007). "It is well-established that a litigant may not hold himself out as pro se if he is receiving help from attorneys in preparing his briefs." Gordon v. Dadante, 2009 U.S. Dist. LEXIS 54147, *95-96 (N.D. Ohio June 26, 2009) (citation omitted).

"Ghostwriting of legal documents by attorneys on behalf of litigants who state that they are proceeding pro se has been held to be inconsistent with the intent of procedural, ethical and substantive rules of the Court." Kircher, 2007 U.S. Dist. LEXIS 93690 at *9 (citation omitted). Ghostwriting violates numerous rules of conduct because it "unfairly skews the playing field because '[t]he pro se plaintiff enjoys the benefit of the legal counsel while also being subjected to the less stringent standard reserved for those proceeding without the benefit of counsel.'" Id. at *10; *see* Laremont-Lopez v. Southeastern Tidewater Opportunity Ctr., 968 F. Supp. 1075, 1078 (E.D. Va. 1997) (stating that ghostwriting places the opposing party at an unfair disadvantage, interferes with the efficient administration of justice, and constitutes a misrepresentation to the Court).

Some courts have held that ghostwriting violates Rule 11. *See* Kircher, 2007 U.S. Dist. LEXIS 93690 at *10-12; Laremont-Lopez, 968 F. Supp. at 1078. Others have simply stricken the ghostwritten pleading or motion. *See* Gordon, 2009 U.S. Dist. LEXIS 54147 at *95-97.

Chartier should not be allowed to enjoy the benefits of a pro se litigant while also enjoying the benefits of an attorney's assistance. Accordingly, Chartier should be required to declare under penalty of perjury whether he had a ghostwriter. Assuming that he did, the undisclosed attorney who drafted the Objection should be ordered to promptly file a notice of appearance and represent Chartier outright, or Chartier's Objection should be stricken in full.

F. Waiver And The Law Of The Case Doctrine

1. Waiver

a. Defendants Have Waived Any Objection To Being Held In Contempt Of The Injunction Order And January 2010 Order

In the June 2010 R&R, Magistrate Judge Bryant recommended that Defendants be found in willful contempt of this Court's Injunction Order and January 2010 Order. (D.E. No. 136). The actions of contempt by Defendants that led to the June 2010 R&R are the same as the later repeated actions that led to the December 2010 R&R. (*See* D.E. No. 136, pp. 4-5, 8; D.E. No. 160). Those actions were in violation of the Injunction Order and the January 2010 Order. (*See* D.E. No. 136, pp. 4-5, 8; D.E. No. 160). Neither filed an objection to the June 2010 Report and Recommendation or its findings. (*See* D.E. No. 1, p. 2 / Docket No.: 11-MC-0003).

The June 2010 Report and Recommendation clearly states that under 28 U.S.C. § 636(b)(1)(C) the failure to object to the Report and Recommendation within 14 days could result in waiver of any objection. (D.E. No. 136, p. 9). In the Sixth Circuit, "a party must file timely objections with the district court to avoid waiving appellate review. By operation of this supervisory rule, only those specific objections to the magistrate judge's report made to the

district court will be preserved for appellate review." Smith v. Detroit Federation of Teachers, Local 231, 829 F.2d 1370, 1373 (6th Cir. 1987).

Thus, Defendants have waived the right to challenge the finding in the June 2010 R&R that they were in contempt of the Injunction Order and January 2010 Order. Consequently, as the contemptuous acts addressed in the December 2010 R&R are merely repeats of some of the earlier contemptuous acts that led to the June 2010 R&R, Defendants have in effect already waived any objection to the finding in the December 2010 R&R that they be found in willful contempt of this Court's Injunction Order and January 2010 Order.

b. Defendants Have Waived The Right To Challenge The Finding That Chartier Is McGill's Agent

The Injunction Order entered by this Court expressly stated that it applies to "Defendant *and his agents, servants and employees, and all those persons in active concert or participation with them*[.]" (D.E. No. 98, p. 12) (emphasis added). Moreover, it is a fundamental tenet of law that a principal is liable for the acts of his agent where his agent had authority, either express or implied. *See* Jones v. Federated Fin. Reserve Corp., 144 F.3d 961, 965 (6th Cir. 1998).

McGill stated numerous times that he intended to continue the activities prohibited by the Injunction. (*See, e.g.*, D.E. No. 105, Exhibit 1). After infringing signs were replaced at the church, on May 25, 2010, an evidentiary show cause hearing was held, where Chartier testified that he is routinely in contact with McGill, knew about the Injunction Order, and he repainted and replaced the prohibited signs following consultation with McGill. (D.E. No. 136, pp. 4-5). Furthermore, Chartier is the assistant pastor of McGill's church, squarely positioning him as an agent, servant, employee, or person acting in active concert or participation with McGill. (D.E. No. 116, p. 1-2, Exhibit 4, 5, 6).

Additionally, both Chartier and McGill were aware of the Injunction Order issued by this Court. (D.E. No. 136, pp. 4-5). This Court had explicitly warned that the Injunction Order applied to agents of McGill, as well as McGill. Thus, McGill cannot properly argue that he should not be held in contempt for the actions of Chartier.

Importantly, Magistrate Judge Bryant also found that Chartier was working in concert with McGill as McGill's agent in his June 2010 Report and Recommendation, and Defendants did not object to this finding. (D.E. No. 136, pp. 4-5). Thus, as set forth in the previous section, even if the assertion was not patently false, it is too late for McGill or Chartier to dispute that Chartier is acting as an agent, servant, employee, and/or in active concert or participation with McGill.

c. RFRA Has Been Waived As A Defense In This Case

The Court properly found that McGill could not raise a RFRA defense because he did not plead it in his Answer, and his motion for leave to amend his answer to add a RFRA defense was also properly denied as untimely. (D.E. No. 61). Having already been found to have waived the defense, McGill is precluded from raising it now as it is the law of the case. (*See* Section III.F.2. below). Additionally, as an agent of McGill, Chartier should also be precluded from the defense in this action. Courts have found that an agent can be legally bound by the actions of his principal in other contexts. *See* Javitch v. First Union Sec., Inc., 315 F.3d 619, 629 (6th Cir. 2003) (stating that nonsignatories may be bound to an arbitration agreement under agency principles); Arnold v. Arnold Corp., 920 F.2d 1269, 1281 (6th Cir. 1990) (holding that nonsignatory defendants were also entitled to arbitration because they were agents of the defendant, the principal); *see also* Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 7 F.3d 1110, 1121 (3rd Cir. 1993) (holding an agent legally bound by the action of her principal in the

context of an ERISA action involving an arbitration agreement). Having been waived, both McGill and Chartier are precluded from attempting to raise any RFRA defense at this stage in the proceedings.

2. The Sixth Circuit's Opinion And Judgment Is The Law Of The Case

While the next section demonstrates that Chartier's arguments based upon his misinterpretation and misapplication of RFRA would fail on the merits, these mistaken arguments need not even be reached because they are precluded by the law of the case doctrine. "Under the law of the case doctrine, a court is ordinarily precluded from reexamining an issue previously decided by the same court, or a higher court in the same case." Bowling v. Pfizer, Inc., 132 F.3d 1147, 1150 (6th Cir. Ohio 1998) (quoting Consolidation Coal Co. v. McMahon, 77 F.3d 898, 905 (6th Cir. 1996)). The Sixth Circuit's August 10, 2010 Opinion and Judgment is the law of the case. (D.E. No. 145, 9-13). As the law of the case, the issues decided therein are precluded from reexamination and thus are not a proper basis for objection.

G. Chartier's Attempted Reliance Upon RFRA Fails On The Merits

Even if the Court were to consider Chartier's RFRA argument on the merits, it must still be rejected. It is essentially undisputed that Chartier is in willful contempt. Chartier admits that he has repeatedly violated the Court's Order and that he intends to continue to do so. Chartier's only excuse for his actions is based upon his misinterpretation and misapplication of RFRA.[4] Even if considered on the merits, Chartier's reliance upon RFRA fails because he cannot prove the *prima facie* case that is required in order for RFRA to apply.

[4] McGill's Objection to Report and Recommendation (D.E. No. 162) makes no mention of any objection based upon a RFRA defense. None of the three cases cited in that Objection (D.E. No. 162) address or even mention RFRA. Neither of the two cases attached as D.E. No. 162-2 and D.E. No. 162-3 address or mention RFRA. Even the purported *pro se* "Objections submitted for exhibit by Defendant McGill" (D.E. No. 162-1) fail to mention RFRA. To the extent that the religiously-tinged language contained in this *pro se* exhibit can be construed as an attempt to assert an objection based upon RFRA, the same analysis that is fatal to Chartier's objection is also fatal to McGill's. Further, to the extent that it is considered separately, McGill's objection fails for the additional reason that he bears the burden to prove the RFRA *prima facie* case and he offered no evidence whatsoever.

In order for a party asserting a RFRA claim or defense to make a *prima facie* case, that party must prove a "governmental action [that] must (1) substantially burden, (2) a religious belief rather than a philosophy or way of life, (3) which belief is sincerely held."[5] General Conference Corp. of Seventh-day Adventists v. McGill, 617 F.3d 402, 410 (6th Cir. 2010) (quoting United States v. Meyers, 95 F.3d 1475, 1482 (10th Cir. 1996)). Chartier fails to do this.

Chartier's objections essentially ignore his defective *prima facie* case and attempt to fault Magistrate Judge Bryant for making the very inquiries that were required to assess the evidence related to this *prima facie* case. The difference between inquiring into the *validity* (or truth) of a purported religious belief and the *sincerity* and *religious nature* of that purported belief is subtle but crucial. Chartier's objection is premised upon a failure to grasp this important and dispositive distinction.

As the Supreme Court "hasten[ed] to emphasize" in an oft-quoted passage from United States v. Seeger, "while the 'truth' of a belief is not open to question, there remains the significant question whether it is 'truly held.' This is the threshold question of sincerity which must be resolved in every case. It is, of course, a question of fact[.]" 380 U.S. 163, 185 (1965). Probing a claimant to determine whether the claimed belief is *truly held* is not the same as determining whether the belief is true. In this case, that probing revealed that Chartier's purported belief was not truly held.

Moreover, mere sincerity is not enough. In order to satisfy the *prima facie* case under RFRA, the sincerely-held belief at issue must be a *religious* belief rather than a philosophy or way of life. When a practice is not obviously based on religious belief, inquiry is entirely

[5] Magistrate Judge Bryant correctly noted that the relevant question is not whether the person is generally sincere in the sense that they are a good person, or making an "effort to good cause," but a much more specific question whether the claimed belief is protected "from a legal standpoint" of RFRA. (D.E. 170, December 6, 2010 Hearing Transcript ("Tr.") p. 40).

appropriate. *See* Seshadri v. Kasraian, 130 F.3d 798, 800 (7th Cir. 1997) ("[A] person who seeks to obtain a privileged legal status by virtue of his religion cannot preclude inquiry designed to determine whether he has in fact a religion"); Sidelinger v. Harbor Creek Sch. Dist., 2006 U.S. Dist. LEXIS 86703, *42 (W.D. Pa. Nov. 29, 2006) ("Where the claimed belief does not appear to be a recognizable religious belief or practice, the objector must expect that his employer will inquire into the religious basis of the belief"); E.E.O.C. v. Papin Enterprises, Inc., 2009 U.S. Dist. LEXIS 30391, *12 (M.D. Fla. 2009) (same). Merely inquiring into whether the claimed belief is of a *religious nature* is not the same as passing upon its validity. In this case, that inquiry disclosed that the purported belief at issue was not of a religious nature.

Only if Chartier proves the elements of this *prima facie* case does the burden shift to the opposing party to prove "that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." General Conference Corp. of Seventh-day Adventists, 617 F.3d at 409-10 (quoting 42 U.S.C. § 2000bb-1(b)). Even if the RFRA defense is considered, it fails on the merits because Chartier did not prove the elements necessary to trigger strict scrutiny under RFRA. Magistrate Judge Bryant properly so recommended, and this Court should so find.

Magistrate Judge Bryant made two factual findings, each of which independently negate Chartier's *prima facie* case and properly end the RFRA inquiry. First, Magistrate Judge Bryant found that the asserted belief was not sincerely held, but was merely an insincere "cover" for Chartier's true motive - a desire for "martyrdom." Second, Magistrate Judge Bryant found that, even if sincerely held, the asserted conviction was not a religious belief, but merely a personal philosophy or attitude. These findings are amply supported by the record, and should be adopted by this Court.

1. Chartier's "Belief" Is Not Sincerely Held

A religious belief must be sincerely held in order to satisfy the RFRA *prima facie* case. General Conference Corp. of Seventh-day Adventists, 617 F.3d at 409-10. The sincerity of religious beliefs under RFRA is an issue of fact. United States v. Quaintance, 608 F.3d 717, 721 (10th Cir. 2010); United States v. Meyers, 95 F.3d 1475, 1482 (10th Cir. 1996); Thiry v. Carlson, 78 F.3d 1491, 1495 (10th Cir. 1996); *see also* E.E.O.C. v. Union Independiente de la Autoridad de Acueductos y Alcantarillados de Puerto Rico, 279 F.3d 49, 56-57 (1st Cir. 2002) (stating that sincerity finding of fact in Title VII case); Iron Eyes v. Henry, 907 F.2d 810, 813 (8th Cir.1990) (stating that sincerity finding in free exercise case factual in nature); Smith v. Pyro Mining Co., 827 F.2d 1081, 1086 (6th Cir. 1987) (stating that sincerity is finding of fact in Title VII case). Magistrate Judge Bryant made the finding that Chartier's actions were not the result of a sincerely held belief, but due to his desire for martyrdom. This Court should adopt that finding. Although Magistrate Judge Bryant in his December 2010 R&R never explicitly stated, "I find Chartier's purported religious belief to be insincere", he clearly questioned the sincerity of Chartier's purported belief; Chartier admitted as much. (Tr. p. 31, lines 13-17). Magistrate Judge Bryant further demonstrated his finding to this effect by placing the word *believes* within quotes to indicate that he did not agree that *believes* was an accurate characterization of Chartier's claimed "belief." (D.E. 160, p. 4).

Magistrate Judge Bryant had the opportunity to observe Chartier's demeanor, body language, and tone of voice in order to assess his credibility. Further, Magistrate Judge Bryant directly confronted Chartier about his apparent insincerity and his true motive, stating "I get a sense here that you just want to create yourself into a martyr and would love nothing more than the court to punish you in some way that you can go on the Internet and pretend to be some sort

of religious martyr, which you're not." (Tr. p. 25, line 25 to p. 26, line 5). Despite ample opportunity, Chartier never denied this.

Magistrate Judge Bryant then repeated "And I think that all along that you wanted to be set up to be a martyr so you can go on the Internet somehow and become some sort of celebrity with what you're doing." (Tr. p. 28, line 6-9). Even after this second explicit challenge, Chartier again never denied this motive. Thus, Magistrate Judge Bryant in his Report found that "it appears [Chartier] seeks a passive confrontation with the Court" in an effort to achieve "a degree of 'martyrdom'[.]" (D.E. 160, p. 3).

Magistrate Judge Bryant, who was in a superior position to evaluate Chartier's credibility, simply saw through his insincere claims to his true motivation and did not believe his self-serving testimony. Whether Chartier's true motive is viewed as a misguided effort at self-effacement, or merely as self-promotion, neither is a sincerely held belief – let alone a sincerely held religious belief. Chartier's desire for conflict and punishment is just that - a want, a hope or a desire. It is not the same as a belief.

2. Chartier's "Belief" Is Not "Religious"

In order to satisfy the *prima facie* case, a belief must not only be sincere but also be a *religious* belief rather than a philosophy or way of life. General Conference Corp. of Seventh-day Adventists, 617 F.3d at 410. A personal philosophy, even if sincerely held, is not a religious belief.

The relevant question is whether the belief is a religious belief that is sincerely held as opposed to merely a personal preference. *See* Papin Enterprises, Inc., 2009 U.S. Dist. LEXIS 30391 at *11. Purely personal preferences are not protected, and whether the belief is of a religious nature is a fact issue. Vetter v. Farmland Indus., Inc., 120 F.3d 749, 752 (8th Cir.

1997). For example, in Papin Enterprises, a plaintiff claimed that a practice (wearing certain facial jewelry) was a religious belief and therefore protected, 2009 U.S. Dist. LEXIS 30391 at *11-13. In Vetter, a plaintiff's stated desire to live in a Jewish community was determined by a factfinder to be a personal preference rather than a religious belief, and the plaintiff's claim of protected status therefore failed, 120 F.3d at 752. Chartier's purported belief is much less religious in nature than the belief at issue in Vetter, and was properly rejected by Magistrate Judge Bryant.

Even if Chartier's purported belief were sincerely held – and it is not – it is not a religious belief, but is merely a personal philosophy or "attitude." (see Tr. p. 25, line 25). It is nothing more than a personal political philosophy regarding the separation of church and state. (See Tr. p. 33, line 22 to p. 34, line 1). Chartier's view is essentially nothing more than a political statement that could be argued by secular groups ranging from the American Civil Liberties Union to People for the American Way without any reference to religion. Regardless of the "truth" of Chartier's philosophy (i.e., whether such separation is or is not a "good" idea), it is not a religious belief but merely an unprotected personal philosophy.

Chartier's claimed personal philosophy is suspect under the circumstances of this case. Chartier claims he is entitled to disobey any court order and to refuse to cooperate with any attempt to interfere with his continued use of the name "Creation Seventh Day Adventist Church." This view is, by his own admission, based in part upon the Plaintiffs' "current trademark litigations with other groups." (See Tr. p. 31, lines 11-12). Chartier offers it as a basis to simply refuse to answer questions regarding McGill in this trademark litigation. (See Tr. p. 22, lines 11-12). This was noted by Magistrate Judge Bryant who pointedly omitted the word *religious* when he referred to Chartier's beliefs. (See Tr. p. 45, line 8). Chartier's personal

philosophy is ultimately nothing more than a litigation tactic, not a religious belief and therefore not entitled to protection under RFRA.

Magistrate Judge Bryant properly concluded on the record before him that Chartier failed to prove the *prima facie* case that is required under RFRA because he failed to prove a (1) sincerely held (2) religious (as opposed to personal, political or philosophical) belief. These factual findings by Magistrate Judge Bryant should be adopted by the Court as stated herein. Of course, when dealing with intangibles such as sincerity, belief, and religion, choice of language is sometimes difficult and inexact. Accordingly, should this Court be of the view that this issue must be reached on the merits and different language should be used, it should modify these findings as appropriate, or in the alternative, remand the matter to Magistrate Judge Bryant for clarification.

IV. CONCLUSION

The December 2010 R&R appropriately recommended that Defendants be found in willful contempt and sanctioned. Accordingly, this Court should accept and adopt the finding that both Defendants are in willful contempt of this Court's orders and the resultant sanctions recommended by Magistrate Judge Bryant. To make the civil nature of the sanctions more clear, the December 2010 R&R should be modified to expressly state that Defendants may end their contempt and the resultant sanctions by agreeing to comply and thereafter complying with this Court's orders.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this the 18th day of February 2011, a copy of the foregoing document was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to Charles L. Holliday, 312 East Lafayette Street, P.O. Box 2004, Jackson, TN 38302, and to Lucan Chartier, 1162 Old Highway 45 South, Guys, Tennessee 38339-5216 by U.S. Mail, postage pre-paid. Parties may also access this filing through the Court's electronic filing system.

A copy of the foregoing document will also be served by personal service upon Lucan Chartier, 1162 Old Highway 45 South, Guys, Tennessee 38339-5216.

/s/ Joel T. Galanter