

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

GENERAL CONFERENCE)
CORPORATION OF)
SEVENTH-DAY ADVENTISTS AND)
GENERAL CONFERENCE OF)
SEVENTH-DAY ADVENTISTS,)
)
PLAINTIFFS,)
)
v.)
)
)
WALTER MCGILL,)
)
)
DEFENDANT.)

NO: 1:06-cv-01207-JDB-egb

**REPORT AND RECOMMENDATION ON PLAINTIFFS' MOTION FOR SANCTIONS
AND PERMANENT INJUNCTIVE RELIEF**

Before the Court is Plaintiffs' Motion for Sanctions and Permanent Injunctive Relief (D.E. 85) ("Motion"). The Motion was referred to the United States Magistrate Judge for a Report and Recommendation (D.E. 91). Defendant has filed his Response, and Plaintiffs have replied. For the reasons that follow, the Magistrate Judge recommends that Plaintiffs' Motion be granted.

I. PROCEDURAL BACKGROUND

Because Defendant, in his Response, "admits that the factual summary of the procedural background is substantially correct," this Court adopts the procedural background set forth in Plaintiffs' Motion, which is as follows:

During a May 30, 2008 telephone status conference in the instant matter (the "May Status Conference"), this Court, pursuant to the agreement of the parties, ordered the parties to

participate in mediation. (See, D.E. 68). On that same date, the Court referred the matter to Magistrate Judge Diane Vescovo (“Magistrate Vescovo”) for mediation. By notice dated June 3, 2008, Magistrate Vescovo set the mediation conference to be heard on July 15, 2008. (D.E. 69).

On June 11, 2008, the Court entered an Order granting in part and denying in part Plaintiffs' Motion for Summary Judgment. (D.E. 70). Specifically, the Court granted summary judgment in Plaintiffs' favor as to their trademark infringement and unfair competition claims based on the “SEVENTH-DAY ADVENTIST” mark. However, the Court found there were factual issues remaining and therefore denied summary judgment as to Plaintiffs' trademark infringement and unfair competition claims premised on their “ADVENTIST” and “SDA” marks, as well as on Plaintiffs' remaining claims of cyberpiracy under 15 U.S.C. § 1125(d), and dilution claims brought under both 15 U.S.C. § 1125(c) and T.C.A. § 47-25-513.

Shortly before July 15, 2008, Defendant, through then current counsel Ronald Michael, Esq.¹ indicated he would not participate in the mediation conference, and on July 24, 2008, Defendant filed a Motion to Amend the Pretrial Order to delete the requirement of a mediation conference. (D.E. 71).

On July 25, 2008, through the Second Mediation Order, the Court denied Defendant's Motion to Amend the Pretrial Order, and directed the parties to confer with Magistrate Vescovo to reset the settlement conference for a time prior to the trial date, then set for October 6, 2008. In the Second Mediation Order, the Court warned the parties that failure to participate in the mediation conference in good faith could result in sanctions against the offending party, including dismissal of the lawsuit or entry of default judgment. (See Second Mediation Order, D.E. 74) (“Failure of any party to personally and in good faith participate in this mediation

¹ Ronald Michael, Esq. has since withdrawn as attorney of record for Defendant.

conference as the Court has directed may result in sanctions, including either dismissal of the lawsuit or default judgment against the offending party being entered”).

Pursuant to the Second Mediation Order, the parties conferred with Magistrate Vescovo's office and obtained several possible dates for mediation, and informed Magistrate Vescovo's office they would call back within the next few days to confirm the date for mediation, as well as the intent of the respective parties to attend mediation. However, shortly thereafter, Defendant's remaining counsel, Charles Holliday, indicated that Defendant would not attend, nor authorize counsel's participation on his behalf, in the mediation conference. In light of Defendant's stated intent not to attend the mediation, the parties informed Judge Vescovo's office by voice mail that they could not confirm a mediation date. Counsel for Defendant further advised counsel for Plaintiffs that he did not believe Defendant would appear for any trial conducted in this matter.² As a result, on August 15, 2008, Plaintiffs filed a motion to continue the trial and for a status conference. (D.E. 75).

Pursuant to the Plaintiffs' motion, on August 26, 2008, this Court held a status conference, during which this Court ordered the parties to contact Magistrate Vescovo's chambers regarding setting a date for mediation, and ordered the parties to certify with the Court, subsequent to the setting of the mediation conference, that their respective clients will be available and present for the mediation conference. (D.E. 80). Pursuant to the order given at the August 26, 2008 status conference (the “Third Mediation Order”), the parties contacted Magistrate Vescovo's office and agreed upon a date of October 2, 2008 for the mediation conference (the “October Mediation Conference”).

² Subsequent to the filing of his Answer, and while this litigation was ongoing, Defendant left the United States, and is currently, Plaintiffs believe, located somewhere in Africa. Defendant has refused to return to the United States for the mediation or trial, refuses to allow his Counsel to disclose to Plaintiffs or the Court his precise location in Africa, and refuses to give any indication as to when or if he will return to the United States from Africa.

In accordance with the Third Mediation Order, on September 4, 2008, Plaintiffs' counsel filed a Certification of Counsel, therein confirming Plaintiffs' intent to appear at and participate in good faith in the October Mediation Conference. (D.E. 83). On that same date, Defendant's counsel filed a Certification of Counsel, therein confirming that Defendant would **not** appear at or participate in the October Mediation Conference. (D.E. 82).

In response to Defendant's Certificate of Counsel, on September 29, 2008 Magistrate Vescovo held a telephone status conference, during which Defendant's counsel confirmed that Defendant would not attend the October Mediation Conference. Accordingly, Magistrate Vescovo cancelled the October Mediation Conference. (D.E. 84).

Plaintiffs have now filed the instant Motion seeking entry of default judgment as sanctions due to Defendant's willful disregard of the Court's orders.

II. ANALYSIS

Rule 16(f) of the Federal Rules of Civil Procedure addresses sanctions that the court may impose on parties and/or their attorneys who fail to obey pretrial orders. The Rule provides:

Sanctions

- (1) In General. On motion or on its own, the court may issue any just orders, including those authorized by Rule 37(b)(2)(A)(ii)-(vii), if a party or its attorney:
 - (A) fails to appear at a scheduling or other pretrial conference;
 - (B) is substantially unprepared to participate – or does not participate in good faith – in the conference; or
 - (C) fails to obey a scheduling or other pretrial order.

Under Rule 37(b)(2)(A)(ii) –(vii), upon a party's failure to comply with a court order, a court may issue further just orders, including rendering a default judgment against the disobedient party.

The imposition of sanctions, or the type of sanctions imposed, including the sanction of default judgment, is within the sound discretion of the court based on the facts of each particular case. *See National Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639, 96 S.Ct. 2778, 49 L.Ed.2d 747 (1976); *see also, Harmon v. CSX Transportation, Inc.*, 110 F.3d 363, 366-67 (6th Cir. 1997). The Sixth Circuit has articulated the following four factors that a court should consider in ruling on a motion for default judgment for failure to comply with court orders: (1) whether the party's failure to comply with the order is due to willfulness, bad faith, or fault; (2) whether the adversary was prejudiced by the party's failure to abide by court orders; (3) whether the party subject to the default was warned that failure to cooperate could lead to default; and (4) whether less dramatic sanctions were imposed or considered before default was ordered. *Regional Refuse Systems v. Inland Reclamation Co.*, 842 F.2d 150, 155 (6th Cir.1988).

In this case, after considering these four factors, the Court recommends granting Motion and entering default judgment against Defendant as sanctions. First, Defendant's conduct was willful and intentional. In his Response Defendant characterizes his refusal to mediate as an act of "civil disobedience." Accordingly, Defendant admits that his refusal to mediate was purposeful. He further indicates that he will not, in the future, comply with any Court Order to mediate; Defendant's Response states that participating in mediation would "compromise his faith."

Second, Plaintiffs are most certainly prejudiced by Defendant's actions in refusing to mediate, given the time and expense incurred in addressing Defendant's failure to follow Court orders. *See Schafer v. City of Defiance Police Dep't*, 529 F.3d 731, 737 (6th Cir. 2008) (a party is prejudiced by [opposing party's] conduct where the party "wasted time, money, and effort in pursuit of cooperation which the [opposing party] was legally obligated to provide").

Third, the Court has warned Defendant that failure to cooperate could result in default judgment against him. There is no question that Defendant understands that default judgment may result from his deliberate refusal to obey the Court's orders, as he states in his Response that he "acknowledges that his conduct may support sanctions and/or default judgment."

Finally, while less dramatic sanctions could be imposed, such as daily monetary fines until Defendant attends mediation in good faith, such sanctions are likely to be ineffective. Defendant has expressed publicly and through counsel that, though the mediation is court-mandated, he will not attend the mediation. *See, e.g.*, Plaintiffs' Exhibit A. He has further indicated through counsel that he will not participate should this matter go to trial. In addition to his knowing and willful disregard of court orders, Defendant also appears to have left the country and refuses to indicate when he will return. Given Defendant's conduct, the Court agrees with Plaintiffs that lesser sanctions would likely have no effect. For these reasons the Magistrate Judge finds that default judgment is appropriate and recommends that the Court grant Plaintiffs' Motion. *See Stamtec, Inc. v. Anson*, 195 Fed. Appx. 473 (6th Cir. 2006) (affirming district court's entry of default judgment against defendant due to defendant's repeated failure to comply with court orders); *see also Jean Marie Hansen, Attorney, P.C. v. Chachoua*, 2006 WL 2664431, *1 (E.D. Mich. Sep. 15, 2006) (affirming district court's entry of default judgment against defendant based upon defendant's dilatory tactics, manipulation of the judicial system, and disobedience of court orders during litigation); *U.S. v. Coon*, 2002 WL 31002885, *2 (W.D. Mich. July 25, 2002) (recommending entry of default judgment as a result of defendant's failure to participate in pretrial court proceedings).

Regarding the injunctive relief they seek, Plaintiffs have submitted proposed language for the permanent injunction in their Motion. The Court finds this language narrowly tailored to

achieve its intended purpose. The proposed permanent injunction expressly permits Defendant's use of the terms in a non-trademark sense. Accordingly, the Magistrate Judge recommends that Defendant's two-sentence opposition to the permanent injunctive relief on the grounds that it is overly broad and unduly restrictive, without any supporting authority or explanation, be rejected, and recommends that the Court grant Plaintiffs' Motion with respect to the permanent injunctive relief sought.

Respectfully submitted this 16th day of April, 2009.

s/ Edward G. Bryant
Edward G. Bryant
United States Magistrate Judge

NOTICE

ANY OBJECTIONS OR EXCEPTIONS TO THIS REPORT MUST BE FILED WITHIN TEN (10) DAYS AFTER BEING SERVED WITH A COPY OF THE REPORT. 28 U.S.C. § 636(b)(1)(c). FAILURE TO FILE THEM WITHIN TEN (10) DAYS MAY CONSTITUTE A WAIVER OF OBJECTIONS, EXCEPTIONS, AND FURTHER APPEAL.