ORIGINAL

IN THE SUPREME COURT OF OHIO

John Freshwater, **Appellant,** **v.** **Mount Vernon City School District Board of Education,** **Appellee.**	**Case No. 2012-0613** **(On Appeal From the Fifth Appellate District, Knox County)** **Appellate Case No. 2011 CA 000023**

BRIEF OF AMICI CURIAE STEPHEN AND JENIFER DENNIS IN SUPPORT OF APPELLEE MOUNT VERNON CITY SCHOOL DISTRICT BOARD OF EDUCATION

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INTRODUCTION

Just as he did during the 21-month-long administrative proceeding, the related federal-court proceedings, and in the courts below, John Freshwater continues to spin a story comprised largely of falsehoods and distortions. Having failed to convince the Referee or any lower court that he was wrongly terminated from his teaching position at Mount Vernon Middle School, Freshwater seeks not to argue the Propositions of Law on which the Court accepted jurisdiction, but instead to re-litigate the facts of this case in the hope of persuading the Court that he should not have been relieved of his teaching duties.[1] Although Freshwater claims he "did not engage in religious proselytization" (Appellant's Br. at 8), the voluminous record from the 38-day, 80-plus witness administrative hearing speaks otherwise.

Freshwater's proclamation that "[t]he record of this case is utterly devoid of any evidence that [his] academic discussions with students about alternative origins of life theories were used in any way to advance the creed of any religion" (Appelant's Br. at 17), simply reinforces the finding by a federal trial court in a related proceeding that Freshwater is "less than forthcoming" and that his testimony was "incredible" and "inconsistent." *See Doe v. Mt. Vernon City Sch. Dist. Bd. of Educ.*, S.D.Ohio No. 2:08-cv-575, 2010 WL 3036982, at *4, 6 (Aug. 2, 2010) (attached as Exhibit A); *see also* Opinion and Order, *Doe v. Mt. Vernon City Sch. Dist. Bd. of Educ.*, S.D.Ohio No. 2:08-cv-575, 2010 WL 2196452, at *10 (June 1, 2010) (finding that Freshwater failed to comply with the Court's discovery orders and imposing sanctions) (Board Ex. 101). For years now, Freshwater has done nothing but obfuscate the record.

[1] Curiously, Freshwater's brief puts forth three Propositions of Law, not one of which was presented to the Court as it considered whether to accept jurisdiction. (*See* Appellant's Br. at 6, 17, 19.) Freshwater should be precluded from broadening or altering his Propositions of Law and his arguments regarding these new propositions should be rejected. *See Westfield Ins. Co. v. Hunter*, 128 Ohio St. 3d 540, 2011-Ohio-1818, 948 N.E.2d 931, ¶ 46, fn. 3 (refusing to consider a proposition of law briefed by an appellant but not raised in its memorandum in support of jurisdiction because the appellant had "not properly preserved the issue").

To provide the Court with a complete and accurate account of the facts that led the Referee to recommend Freshwater's termination, Stephen and Jenifer Dennis file this amicus brief on behalf of themselves and their son Zach, who was a student in Freshwater's eighth grade science class, as well as a participant in the Fellowship of Christian Athletes ("FCA") during the 2007-2008 school year. This brief primarily addresses Freshwater's gross mischaracterization of the facts in Proposition of Law No. II on which the Court accepted jurisdiction, in which he alleges that his termination from his teaching position was based on "the mere presence of religious texts from the school's library and/or the display of a patriotic poster" in his classroom. Freshwater's suggestion that these are the only religious activities that took place in his classroom is entirely disingenuous and does not even begin to scratch the surface of Freshwater's unconstitutional activities during the 2007-2008 school year. Zach Dennis has first-hand knowledge of Freshwater's religious teachings and classroom displays, as well as of Freshwater's improper and dangerous use of a Tesla coil on his students, including Zach, who suffered a blistering burn on his arm in the shape of a cross. Given the overwhelming of evidence of Freshwater's improper religious teachings, there is no question that the lower courts acted properly in concluding that the Mount Vernon City School Board of Education ("School Board") had good and just cause for terminating Freshwater's teaching contract.

STATEMENT OF FACTS

Amici Stephen and Jenifer Dennis adopt the statement of facts presented in the brief of Appellee Mount Vernon City School Board of Education.

ARGUMENT

Proposition of Law No. 1: *A public school teacher's termination does not violate the First Amendment of the U.S. Constitution when there have been factual findings that the teacher either taught religion in the public school classroom, displayed religious materials on his classroom wall, led rather than monitored a student religious group, and used a high-voltage electric device to burn crosses onto the arms of his students.*

Freshwater omits nearly all evidence of his unconstitutional conduct in his brief, and he distorts the scant evidence he does include in an effort to downplay its impropriety. But the complete evidentiary record, including testimony from Zach and his classmates, as well as from Freshwater's colleagues, and in some instances, Freshwater's own statements, unequivocally demonstrates that Freshwater violated the Establishment Clause of the United States Constitution on multiple occasions by teaching religion to his public school students, by displaying numerous religious items in his classroom, by burning the shape of a cross onto some of his students' arms, and by abusing his position as a faculty monitor of the FCA. What follows is a non-exhaustive list of Freshwater's improper conduct during the 2007-2008 school year.

I. Freshwater's Teaching Methods Had Nothing To Do With "Fostering Critical Thinking" And Everything To Do With Impermissibly Foisting His Religious Views Upon His Students.

A. Freshwater Referenced His Bible During Classroom Discussions.

Contrary to Freshwater's claim that he "cannot fairly be said to have advanced or inhibited any particular religion" in his public school science classroom (Appellant's Br. at 7) (internal quotation marks omitted), the record is, in fact, replete with examples of Freshwater expressing his religious views and endorsing his religion during class time. For example, Freshwater did not just "ke[ep] a Bible on his desk" (Appellant's Br. at 1), but he drew from that Bible in teaching his eighth grade science students. During a lesson on volcanoes, for instance, Freshwater informed his students that "the earth is going to come to a fiery end . . . . I know this because I read the book," then lifted his Bible for the class to see. (Z. Dennis Test., Tr. at 346; *see also* Beach Test., Tr. at 962-63 (Mount Vernon Middle School teacher testifying that Freshwater told students that the "Big Bang" theory could not explain how such a complex world was created and suggested that students "look in the Bible" for an alternative explanation and that Freshwater "referenced that the Bible was his truth, the truth that he believed; that it was a

document that obviously has been supported for a few thousand years; that he believed that that's as far back as we can trace our earth and our planet, because it was from people forward").) This form of proselytizing hardly can be considered "encouraging students to think critically about scientific theories," as Freshwater alleges. (Appellant's Br. at 8.)

B. Freshwater Spent Class Time Talking About Religious Holidays.

In addition to direct biblical references, Freshwater unabashedly expressed his religious preferences in class-time discussions with students. During one class period, for example, Freshwater questioned Zach and his classmates about the meaning of Easter and Good Friday. Zach recalls Freshwater asking "what Good Friday was." (Z. Dennis Test., Tr. at 345.) After Zach answered the question, Freshwater informed the class that "it should be called the greatest Friday or the best Friday ever." (*Id.*) Freshwater also asked students about the meaning of Easter in connection with an assignment that required students to determine "when Easter would be due to the moon and the calendar," in an obvious attempt to have his students calculate the date based on a Judeo-Christian calendar. (*Id.*)

Although Freshwater has changed his story multiple times when asked about this incident, he cannot dispute that he talked about the meaning of Easter in Zach's class, nor can he recant his admission to then-Mount Vernon Middle School Principal William White that he talked about Easter and Good Friday during class time. (Freshwater Test., Tr. at 450-51; White Test., Tr. at 620 (White recalling that Freshwater told him, "Well, yeah, I probably did, I talked about Easter a little bit, talked about the resurrection, I talked about Good Friday").) Freshwater does not defend (or even mention) his decision to talk about Easter and Good Friday with his science students in his brief. Nor can he, because a religious discussion of this nature is indefensible and unconstitutional. *See, e.g.*, *Williams v. Vidmar*, 367 F. Supp. 2d 1265, 1274

(N.D.Cal. 2005) (denying a teacher's various "freedom of speech" claims when he sought to distribute an "Easter activity" sheet to students).

C. Freshwater Directed Students To A Christian Website To Conduct Research.

Equally improper was Freshwater's effort to introduce his religious views into the classroom by sending students to the "Answers in Genesis" website (www.answersingenesis.org) in conjunction with research on dinosaurs. (Z. Dennis Test., Tr. at 347) The Answers in Genesis website is not a neutral source of information. Rather, it is the electronic arm of "an apologetics (i.e., Christianity-defending) ministry, dedicated to enabling Christians to defend their faith and to proclaim the gospel of Jesus Christ effectively." Answersingenesis.org, *About Answers in Genesis*, http://www.answersingenesis.org/about (accessed Oct. 2, 2012). Freshwater initially admitted under oath that he had referred not only Zach, but also approximately a dozen other students to this website and that Freshwater himself visited the website during class. (Freshwater Test., Tr. at 455; 471-72.) But then during questioning by his attorney, Freshwater changed his testimony, claiming that it was Zach's idea to go to the website and that the dozen students were actually a dozen adults whom Freshwater took to the Answers in Genesis Museum in Kentucky, (Board Ex. 83 (Freshwater Dep.) at 278-79; Freshwater Test., Tr. at 4614-15.) Freshwater's revisionist history is implausible, if not completely untruthful.

D. Freshwater Showed A Video Promoting Intelligent Design During Class, And Encouraged Students To Watch An Intelligent Design Film For Extra Credit.

Adding to the list of unconstitutional religious teachings, Freshwater showed *The Watchmaker*, a video that endorses Intelligent Design, during science class (and at an FCA meeting). (Z. Dennis Test., Tr. at 343; 3128-29; *see also* Princehouse Test., Tr. at 1540-41 (expert testifying that *The Watchmaker* promotes intelligent design).) And while school officials were investigating complaints that Freshwater had been teaching religion in the classroom,

Freshwater committed yet another constitutional violation by handing out an extra credit assignment that instructed students to see *Expelled: No Intelligence Allowed*, a film promoting intelligent design. (Employee Ex. 43; *see also* Rissing Test., Tr. at 6153-54) (expert testifying that the film was not consistent with teaching the bias standard and that it would "not be appropriate in a science class").)

E. Freshwater Espoused Creationist Beliefs And Facilitated Debate On Creationism Versus Intelligent Design During Science Class.

Although Freshwater repeatedly denied during the proceedings below that he taught creationism and intelligent design in his public school classroom (Freshwater Test., Tr. 375-77, 4670), he now admits that his lessons included instruction on these theories (Appellant's Br. at 7-8, 12, 14-17). Despite that admission, Freshwater refuses to acknowledge that his teaching of creationism and intelligent design in a public school science classroom violated the Establishment Clause when faced with overwhelming case law to the contrary. *See, e.g.*, Appellant's Br. at 15 (Freshwater arguing that his teachings were "part of a secular program of education") (internal quotation marks omitted); *but see Kitzmiller v. Dover Area School District*, 400 F. Supp. 2d 707, 765 (M.D.Pa. 2005) (concluding that the teaching of "ID" violates the Establishment Clause because it is not science); *McLean v. Ark. Bd. of Educ.*, 529 F. Supp. 1255, 1266-67, 1273-74 (E.D.Ark. 1982) (enjoining the teaching of "creation science" because it is inherently religious and its teaching violates the Establishment Clause).

Freshwater's lessons on creationism and intelligent design hardly can be considered non-religious in nature. Zach testified that Freshwater suggested to his science students that "a higher being" was responsible for the creation of the universe, not the Big Bang Theory. (Z. Dennis Test., Tr. at 344-45). Zach also remembers Freshwater's discussion of the "hydrosphere" theory as an alternative explanation for, among other things, how dinosaurs became extinct. (*Id.* at 347-

48; *see also* Mahan Test., Tr. at 1002-03 (teacher testifying that Freshwater talked about the hydrosphere theory in class and stated that dinosaurs and humans lived at the same time); Board Ex. 83 (Freshwater Dep.) at 279-80 (Freshwater admitting that he taught the hydrosphere theory in his classroom.) Zach testified that the "hydrosphere" theory was an implicit reference to Noah's Flood. (Z. Dennis Test., Tr. at 348; *see also* Beach Test., Tr. at 965-67 (teacher testifying that Freshwater's discussion of the "hydrosphere" clearly was a reference to the Biblical story of Noah's Flood).) And Freshwater does not dispute that he held a debate in his science classes during the 2007-2008 school year pitting evolution against creationism. (Freshwater Test., Tr. at 460.) All of these incidents, like his reliance on the Bible and his discussion of religious holidays, squarely reflect Freshwater's unconstitutional attempts to impose his religious views on his students.

F. Freshwater Used The Word "Here" To Convey His Religious Beliefs And To Urge Students To Question Scientific Facts.

Freshwater misstates the evidence regarding the use of the code word "here" in his classroom, stating that he encouraged students to say "here" aloud to "communicate their identification" of instances "where scientific theories or estimates appeared . . . to be portrayed as indisputable." (Appellant's Br. at 9). The record instead reveals that Freshwater instructed his students to use the word "here" to attack the validity of evolution as a scientific theory. A number of witnesses, including Zach, offered testimony about Freshwater instructing students to exclaim "here" as a way of questioning the accuracy of facts in their science textbooks, particularly facts related to the methodology of scientific dating. (Z. Dennis Test., Tr. at 349; Beach Test., Tr. at 962.) Despite Freshwater's contention that the use of "here" "was consistent with the state's Academic Content Standards, which directed eighth-grade science teachers to 'explain why it is important to examine data objectively and not let bias affect observations'"

(Appellant's Br. at 9), the practice of saying "here" was nothing more than a covert way for Freshwater "to instruct his eighth grade students in such a way that they were examining evidence both for and against evolution." (Referee's Report at 4-5.)

G. Freshwater Shared His Beliefs About Homosexuality With Students.

Freshwater tries to discredit the testimony of substitute teacher Jim Stockdale by suggesting that Stockdale was not in Freshwater's classroom on the date that Stockdale heard Freshwater tell his students that "the Bible states that homosexuality is a sin, so anyone who chooses to be homosexual is a sinner[.]" (Appellant's Br. at 4; Stockdale Test., Tr. at 4153.) But Mr. Stockdale is not the only person who heard Freshwater express his views on homosexuality during science class. While discussing magnets with Zach's class, Freshwater told students that "opposites attract, and it should be the same with humans." (Z. Dennis Test., Tr. at 350). Contrary to Freshwater's contention that it was an abuse of discretion for the trial court to affirm the portion of the Referee's Report that was based on Stockdale's statement, even without Stockdale's testimony (and there is no reason to discount his testimony), the record contains ample evidence of Freshwater inappropriately offering his religious views on homosexuality to Zach and his classmates.[2]

II. Freshwater Improperly Displayed Numerous Religious Items In His Public School Classroom During the 2007-2008 School Year.

If Freshwater's only unconstitutional actions were those involving his instruction of students, those violations would have been sufficient grounds on which to affirm the School Board's decision to terminate him for good and just cause. But Freshwater's conduct ran afoul of the Establishment Clause in another significant way—his decision to place religious displays around his classroom.

[2] The "new" evidence on which Freshwater now relies concerning Mr. Stockdale's attendance was available to, but not used by, Freshwater during the administrative hearing, and thus, should not be considered now.

A. Freshwater Displayed A Poster Of George W. Bush Praying With His Cabinet.

In another attempt to diminish the extent to which he improperly mixed religion and science in his public school classroom, Freshwater's brief refers repeatedly to a "patriotic poster" or "patriotic Colin Powell poster" that he displayed in his classroom. (*See, e.g.*, Appellant's Br. at 4-5, 19-20, 22.) What Freshwater fails to mention is that the poster depicts Colin Powell, as well as President George W. Bush, Donald Rumsfeld, and several other Cabinet members *praying*. Freshwater also neglects to explain that prominently featured at the top of the poster is a quotation from the Bible, which reads, "The effectual fervent prayer of a righteous man availeth much." And he conveniently omits another key detail—that the caption at the bottom of the poster describes the photograph as "the Bush White House on the morning of the State of the Union Address," where, "as at every cabinet meeting, President George W. Bush . . . opens the discussions with a prayer." (Board Exs. 25, 46.) Freshwater does not dispute that this poster was hanging on his classroom bulletin board, and his transparent efforts to recast the poster as non-religious in nature should be rejected here just as they were by the Fifth District, the trial court, and the Referee below.

B. Freshwater Displayed Multiple Copies Of The Ten Commandments.

Not once in his brief does Freshwater mention the Ten Commandments, let alone concede that he posted multiple copies of them in his classroom. In prior sworn testimony, however, Freshwater admitted to displaying not one, but four copies of the Ten Commandments—three on the window next to his classroom door and at least one on his bulletin board, making them visible to students both inside and outside his classroom. (Board Ex. 83 (Freshwater Dep.) at 71-75.) Discussion of The Ten Commandments may be integrated into an appropriate social studies curriculum, but under no circumstances may a teacher constitutionally

display the Ten Commandments in a public school. *See Stone v. Graham*, 449 U.S. 39, 42-43, 101 S.Ct. 192; 66 L.Ed.2d 199 (1980) (per curiam).

C. Freshwater Displayed Other Religious Items In His Classroom.

Freshwater also put up additional religious posters on his classroom walls and cabinets. The cabinet doors in his classroom featured several posters, some of which contained Bible verses. (Mahan Test., Tr. at 3780-81; Ritchey Test., Tr. at 5950; Board Exs. 26, 106-08.) Freshwater posted two Cross Club (the predecessor organization to the FCA) banners on his bulletin board, as well as a flier advertising a Will Graham Celebration, an evangelical event. (Beach Test., Tr. at 969; Board Ex. 25.) But Freshwater's promotion of the Will Graham event did not stop at posting the flier; he shared information about the event with students before it occurred, then discussed his impressions of the event with students after it had taken place. (Beach Test., Tr. at 969-70; *see also* Short Test., Tr. at 6246-47 (Superintendent testifying that Freshwater served as "student ministries director" for the Will Graham Celebration).)

What is more, Freshwater kept several Bibles in a bag and a box in the back of his classroom, and told students, Zach among them, to give one of the Bibles to "someone who needs it." (Z. Dennis Test., Tr. at 354; 3036.) He also displayed his Bible on his desk, and in the spring of the 2007-2008 school year he checked out from the school library a second Bible and a book entitled *Jesus of Nazareth*, adding both books to his classroom collection, and placed them in plain view on his lab table. (Board Exs. 29, 27, 45; Board Ex. 83 (Freshwater Dep.) at 128-29 (Freshwater stating that he checked out the religious books to "[m]ake a point"); Freshwater Test., Tr. 447 (Freshwater admitting that he removed one Bible from his desk and replaced it with one that he checked out of the school library). When asked by investigators, who were looking into Freshwater's improper classroom conduct, whether he had checked out the two books to make a statement, Freshwater responded, "Yea." (Employee Ex. 148 at 45-46.) Again,

if Freshwater's constitutional misconduct had stopped here, it would have supplied more than adequate justification for the School Board to terminate him for good and just cause. But it did not stop here.

III. Freshwater's Inappropriate Use Of The Tesla Coil Reveals His Reckless Disregard For His Students' Well-Being And Highlights His Fanatical Religious Crusade.

The Dennises also would like to set the record straight regarding Freshwater's use of the Tesla coil on his students and the religious motivations for his irresponsible and inexcusable actions. Freshwater wants this Court to believe that his inappropriate use of the Tesla coil was a mere "isolated incident" or scientific "experiment." (Appellant's Br. at 1-2.) These characterizations are entirely untrue and ignore the fact that Freshwater literally branded his students with the mark of the cross.

First, it is undisputed that Freshwater—after conducting some legitimate experiments with the Tesla coil in the class—asked students if they would like to feel the device applied to them. A Tesla coil is an electrical device that emits up to 45,000 volts of electricity from its tip. It is also undisputed that Freshwater applied the Tesla coil to Zach's arm. The Referee, numerous students, and even Freshwater himself acknowledged that he used the Tesla coil on Zach. (*See* Board Ex. 83 (Freshwater Dep.) at 108-81.) And Zach was not the only recipient of Freshwater's dangerous "experiment" because, as another student testified, Freshwater applied the device to the arms of several other students that day as well. (Strack Test., Tr. at 3866.)

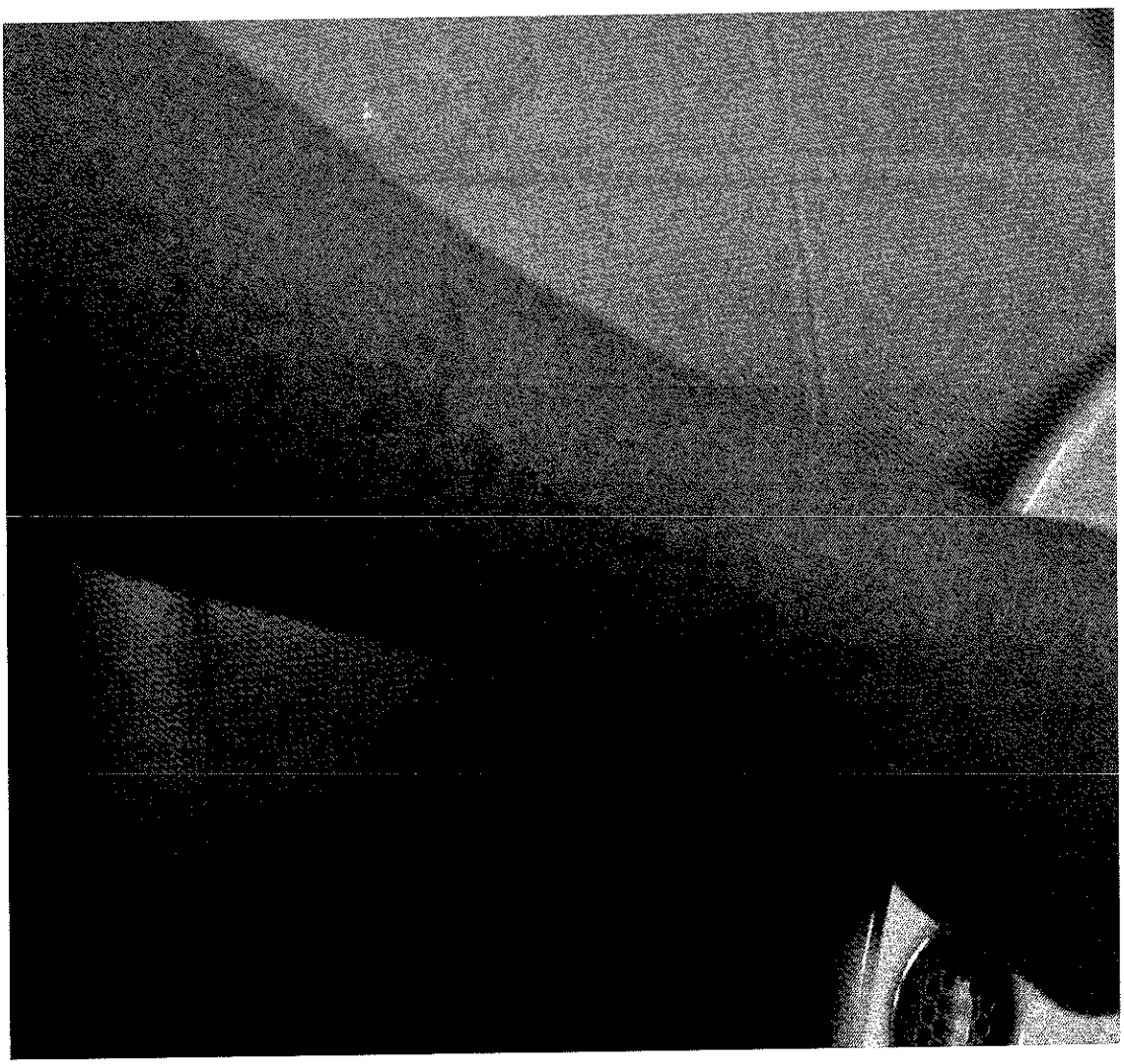
Second, the Tesla coil should not have been applied to anyone, let alone to the arms of underage middle school students. The manufacturer of the Tesla coil provides instructions stating that the device emits between 25,000 and 45,000 volts. (*See* Employee Ex. 116); *see also* Electro-Technic Products, Inc., *Model BD-10A/BD-10AS High Frequency Generator Product Number 11011/11031 Instructions*, http:// http://www.electrotechnicproduct.com/

get_technical/BD10BDASInstructions.pdf (accessed Oct. 2, 2012). And the instructions, which have been made available on the manufacturer's website since 2006, warn users to "[n]ever touch or come in contact with the high voltage output of this device, nor with any device it is energizing," and further instruct expectant mothers and those with pacemakers to consult a physician before even using the device. Electro-Technic Products, Inc., *Instructions*, at 3. Notably, Freshwater failed to inform his students that the device may carry serious—and potentially fatal—health implications if used improperly. Even if Freshwater recklessly neglected to read the available instructions, any science educator certified to teach in this State should know better than to apply to children's arms a device emitting a visible electrical arc while plugged into a 115 volt outlet.

Third, the Tesla coil injured Zach and other students, and Freshwater applied the device knowing it would do so. Despite dismissing Zach's injury as an "alleged mark," Freshwater ignores his own prior sworn statements that the Tesla coil had left slight red marks on students' arms, and that students often pulled their arms away when he applied the device to them because "it hurts." (Freshwater Test., Tr. at 399; 401.) Freshwater also ignores the fact that he warned students in Zach's class that the Tesla coil would leave a mark. (Redman Test., Tr. at 5140; Conkel Test., Tr. at 5229-30; Ruhl Test., Tr. at 5255; Grubaugh Test., Tr. at 5298; Morris Test., Tr. at 5334) Indeed, consistent with Freshwater's statement that the device would leave a mark, one student witness testified that the Tesla coil left marks on "more than one" kid's arm. (Baer Test., Tr. at 5093.)

Fourth, and perhaps most importantly for purposes of this appeal, Freshwater yet again violated the Establishment Clause by branding students in the shape of a cross. As Zach noted, Freshwater intentionally made this mark in the shape of a cross, instructing students that

application of the device would leave "a temporary tattoo" and that "those crosses are going to be there for a while." (Z. Dennis Test., Tr. at 339, 3086.) Freshwater's statements to the principal, Mr. White, corroborate Zach's testimony that Freshwater's classroom was not just a tattoo parlor—a disturbing concept in and of itself—but one led by a tattoo artist with a religious agenda. Freshwater told Mr. White that if students used the device to mark him, it had to be in the shape of a cross. (White Test., Tr. 494-95.) This testimony alone should suffice to prove that Freshwater tattooed his students in an act of religious zealotry. But if any doubt remains, the following photograph (one of many) of Zach's arm should forever dispel it:



(Board Ex. 8.) Freshwater could have chosen any shape with which to mark students' arms. He chose the cross to leave the students with a tangible reminder of his religious crusade.

Freshwater wants this Court to believe that Referee Shepherd shares Freshwater's misguided view of the Tesla coil incident as nothing more than "rumors and speculation." (Appelant's Br. at 2). But nowhere in the Report does the Referee condone or otherwise legitimize Freshwater's improper use of this device. Rather, after acknowledging that Freshwater used the Tesla coil on Zach, the Referee notes "the issue and incident was [already] dealt with by the [Mount Vernon City Schools] administration," and consequently, it is not something he need address in his recommendation. (Referee's Report at 2.)

IV. Freshwater Abused His FCA Monitor Position To Share His Religious Worldview.

Freshwater's brief completely ignores the Referee's finding that Freshwater's termination was supported by his repeated transgressions as a monitor of the Fellowship of Christian Athletes ("FCA"). The evidence firmly shows that Freshwater abused his position as faculty monitor by impermissibly indoctrinating students and that he controlled the activities of FCA, despite his acknowledgement that such actions would be unconstitutional. (*See* Board Ex. 83 (Freshwater Dep.) at 287:16-19 ("Q. [by Mr. Mansfield] And, in fact, it would violate the U.S. Constitution if you as a teacher monitor took an active role in the FCA meetings, correct? A. [by Mr. Freshwater] That would be my understanding, yes.").). Zach participated in some FCA functions during the 2007-2008 school year, but he and his parents soon realized that Freshwater inappropriately used the FCA as yet another forum to illegally spread his own religious beliefs. Indeed, Freshwater's FCA activities—leading meetings, contacting speakers, and directing prayer—each constitutes a direct violation of the Establishment Clause and other federal law. *Lemon v. Kurtzman*, 403 U.S. 602, 91 S. Ct. 2105, 29 L.Ed.2d 745 (1971) (interpreting the

Constitution to generally prohibit government endorsement of religion); 20 U.S.C. 4071(c)(3) (providing generally, under the Equal Access Act, that student groups must be student-led).

A. Freshwater Led FCA Meetings.

Crossing the line from passive monitor to active leader, Freshwater determined the content of and led FCA meetings. For example, during meetings, he selected and played religiously themed films, including *Obsession* and *The Watchmaker*. (Z. Dennis Test., at 350-56, 3128.) *Obsession*, a "fear-mongering and divisive" video has been rightfully decried as anti-Islamic propaganda. *See, e.g.*, John Robinson, *Why We Didn't Distribute "Obsession,"* Greensboro News & Record, Sept. 21, 2008, http://blog.news-record.com/staff/jrblog/2008/09/why_we_didnt_di.shtml (accessed Oct. 2, 2012). *The Watchmaker*, a film promoting the theory of a divine creator, has been a favorite tool of Intelligent Design advocates for years. Board Ex. 59; *see also* Eric Tanner, *The Watchmaker: Intelligent Design Video for Kids*, Ministry-to-Children.com, http://ministry-to-children.com/the-watchmaker-intelligent-design-video-for-kids/ (accessed Oct. 2, 2012). Beyond showing religious films, Freshwater also encouraged FCA students to call movie theaters to urge them to show the movie *Expelled: No Intelligence Allowed*—the very same film that formed the basis of Freshwater's extra credit assignment for his science students (Z. Dennis Test. at 356)—a so-called documentary purporting to "unmask people out there who want to keep science in a little box where it can't possibly touch God," Cornelia Dean, *Scientists Feel Miscast in Film on Life's Origin*, NY Times, Sept. 27, 2007, at A1, *available at* http://www.nytimes.com/2007/09/27/science/27expelled.html?_r=0.

B. Freshwater Contacted FCA Speakers.

Freshwater also did not hesitate to invite speakers to FCA events—a task reserved for FCA student participants and constitutionally proscribed for faculty monitors. He admitted this

fact without qualification on one occasion. (Board Ex. 83 (Freshwater Dep.) at 290: 2-4 "Q. [by Attorney Mansfield] And you would ask [speakers] to come speak at the FCA meeting. A. [by Freshwater] Yes.") And despite later attempts to cover up this admission, two witnesses, Reverend Dennis Turner and Father John Hammond, confirmed that Freshwater sought them out personally to speak to students at FCA. (Turner Test., Tr. at 1037; Hammond Test., Tr. at 6066-68.) In fact, Father Hammond went out of his way to emphasize that Freshwater had contacted him. (Hammond Test., Tr. at 6066-67.)

In addition to inviting speakers to FCA meetings, Freshwater also sought to ensure that FCA speakers shared his particular religious worldview. When teacher Marsha Orsborn asked Freshwater about bringing a Catholic priest in to speak, Freshwater said he would have to check his Bible regarding that proposal because "I'm not sure [Catholics are] Christian." (Orsborn Test., Tr. at 6011 ("And I said, what would you[r] bible say about a Catholic priest coming to FCA? He said, I'd have to check, because I'm not sure you're a Christian.").) Such statements emphasize Freshwater's outspoken efforts to unconstitutionally indoctrinate FCA students, rather than to serve as a passive faculty monitor.

C. Freshwater Directed and Actively Participated In FCA Prayers.

Freshwater also engaged in conduct well beyond the constitutional boundaries of an FCA monitor when it came to prayer activities at FCA meetings. Freshwater freely admits that he prayed at FCA meetings, but has hedged regarding the extent of his involvement. (Board Ex. 83 (Freshwater Dep.) at 291-94.) Several students clarified, however, that Freshwater initiated some prayers and actively participated in others. (Board Ex. 6 at 11; 68; 70). For example, Zach testified that at one meeting, Freshwater asked FCA students to pray for the guest speaker, Pastor Zirkle. (Z. Dennis Test., Tr. at 354.) Corroborating Zach's testimony, Freshwater admitted to participating in a group prayer over Pastor Zirkle, likely by raising his hands as part of the

prayer. (Ritchie Test., Tr. at 5945-46 (recalling Freshwater's statement that he "may have put [his] hands up"); *see also* Frady Test., Tr. at 5193 (stating that Freshwater may have asked students to pray for Pastor Zirkle when he was not feeling well).) Zach's testimony provides further detail regarding this incident, noting that Freshwater, in addition to raising his hands, said something to the effect of "Devil, you cannot take over this man, and, Lord, help protect him." (Z. Dennis Test., Tr. at 354.) This, among other incidents, improperly exposed public school students to Freshwater's misplaced zealotry. Freshwater's FCA involvement, his teaching of religion, and the religious displays in his classroom provide abundant grounds on which to terminate him for good and just cause.

CONCLUSION

Given the overwhelming evidence of Freshwater teaching religion, displaying religious items in a public school, branding students with religious symbols, and repeatedly crossing the line as an FCA monitor, Freshwater cannot credibly argue that the lower courts erred in concluding that the School Board had good and just cause for terminating him. Accordingly, the lower court did not abuse its discretion in upholding the School Board's decision to remove Freshwater from his teaching position.

Dated: October 4, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Brief of Amici Curiae was served by U.S. Mail this 4th day of October 2012 upon the following counsel:

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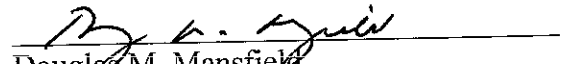

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

JOHN DOE, et al.,

Plaintiffs,

v.

MOUNT VERNON CITY SCHOOL DISTRICT BOARD OF EDUCATION, et al.,

Defendants.

Case No. 2:08-cv-575
JUDGE GREGORY L. FROST
Magistrate Judge Norah McCann King

OPINION AND ORDER

This matter is before the Court on the Motion Seeking Court's Reconsideration of Opinion and Order Issued June 1, 2010 ("Motion for Reconsideration") (Doc. # 107), Plaintiff's Memorandum in Opposition to the Motion for Reconsideration and Expedited Motion for Judgment or Evidentiary Inferences Based on Defendant's Continued Discovery Violations[1] (Doc. # 114), and Counsel's Reply to Plaintiff's Memorandum in Opposition to the Motion for Reconsideration (Doc. # 116). For the reasons that follow, the Court **DENIES** the Motion for Reconsideration.

I. Background

A. Written Order Compelling Production

On December 30, 2009, Plaintiffs in this action filed a motion to compel certain

[1]In their memorandum in opposition, Plaintiffs request judgement to be entered against Freshwater or for evidentiary inferences to be permitted against Freshwater at trial. That request, however, has been rendered moot by the settlement of this matter.

discovery from Defendant John Freshwater. (Doc. # 67.) Attorney R. Kelly Hamilton filed a memorandum in opposition to that motion on behalf of Freshwater (Doc. # 67) and Plaintiffs filed a reply memorandum in support of their motion (Doc. # 79). On April 12, 2010, Magistrate Judge King issued an order granting Plaintiffs' Motion to Compel and ordering Freshwater to produce certain discovery she found had been improperly withheld by Freshwater, stating: "Defendant Freshwater is **ORDERED** to produce all such documents within seven (7) days of the date of this *Order*." (Doc. # 83 at 3) (emphases in original). The Court shall refer to this order as the "Written Order Compelling Production."

B. Verbal Order Compelling Production

On April 19, 2010, the date the discovery ordered by Magistrate Judge King was due, Plaintiffs requested, and were granted, a telephone conference with this Court. Attorneys for Plaintiffs and Attorney Hamilton participated in telephonic conference held with this Court on April 21, 2010. During that conference, this Court ordered Freshwater and Attorney Hamilton to produce certain discovery that had not been produced in accordance with the Written Order Compelling Production. The Court specifically ordered Freshwater and Attorney Hamilton to provide written affidavits attesting to the fact that all materials subject to the Court's orders and Plaintiffs' discovery requests had been produced or why the material could not be produced. The Court shall refer to this order as the "Verbal Order Compelling Production."

C. Sanctions Order

On May 7, 2010, Plaintiffs filed a motion for sanctions contending that Freshwater and Attorney Hamilton had failed to comply with the Written Order Compelling Production and with the Verbal Order Compelling Production. (Doc. # 96.) Plaintiffs requested sanctions in the form

of attorney's fees and costs for the successful prosecution of their motion to compel, attorney's fees and costs for filing the motion for sanctions, and evidentiary inferences. On May 17, 2010, once briefing was complete on Plaintiffs' motion, the Court ordered an oral hearing on that motion to be held on May 26, 2010, at 9:00 a.m. (Doc. # 102.)

At the hearing on sanctions, Plaintiffs were represented by their counsel and Freshwater was represented by two attorneys who had only that morning made an appearance on Freshwater's behalf. Freshwater's counsel represented to the Court that they had received a call that morning from Attorney Hamilton indicating that he had two flat tires on his way to Court and was not going to be able to arrive by the 9 a.m. scheduled start of the hearing. No continuance was requested nor did Attorney Hamilton arrive during the hearing that lasted approximately one and one-half hours.

On June 1, 2010, the Court issued a Opinion and Order that granted Plaintiffs' motion for sanctions ("Sanctions Order"). (Doc. # 106.) In the Sanctions Order, the Court explained that Rule 37 of the Federal Rules of Civil Procedure governs requests for sanctions for the successful prosecution of a motion to compel and requests for sanctions for failure to obey a discovery order. Rule 37(a) provides that upon granting a motion to compel, "the court must, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees." Fed. R. Civ. P. 37(a)(5)(A). Rule 37(b) provides that upon a finding that a party did not comply with a discovery order, "the court must order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure[.]" Fed. R. Civ. P. 37(b)(2)(C).

Both subsection a and b of Rule 37 provide that the Court must order the payment of attorney's fees "unless the failure was substantially justified" or "other circumstances make an award of expenses unjust." Fed. R. Civ. P. 37(a)(5)(A)(ii), (iii) (subsection (i) also provides for an exception to the requirement of payment of attorney's fees in the circumstance when the movant filed the motion before attempting to obtain the discovery extrajudicially, which is not relevant here); Fed. R. Civ. P. 37(b)(2)(C).

In the Sanctions Order, the Court stated that it had relied upon "the testimony presented by the parties and their counsel in affidavits submitted to the Court and on oral argument made by counsel before this Court on May 26, 2010." *Id.* at 2 fn. 1. The Court concluded:

> In the instant action, Plaintiffs were successful in their Motion to Compel and the Court finds that Freshwater and Attorney Hamilton were given the opportunity to be heard, on brief and in court, Plaintiffs repeatedly attempted in good faith to obtain the discovery at issue without intervention by this Court, Freshwater and Hamilton's inadequate responses and failure to provide the discovery at issue was not substantially justified, nor are any other circumstances present that make an award of expenses unjust. Consequently, the Court must, and does, **ORDER** Freshwater and Attorney Hamilton to pay the reasonable attorneys' fees and costs that Plaintiffs incurred as a result of filing their Motion to Compel.

(Doc. # 106 at 16-17) (emphasis in original).

The Court further concluded that Freshwater and Attorney Hamilton failed to obey the Written Order Compelling Production and that they failed to obey the Verbal Order Compelling Production:

> The Court finds that Freshwater's and Attorney Hamilton's failure to comply with two of this Court's orders was not substantially justified nor do any other circumstances make an award unjust. Consequently, the Court must, and does, **ORDER** Freshwater and Attorney Hamilton to pay the reasonable attorney's fees and
> costs that Plaintiffs incurred as a result of Freshwater's and Attorney Hamilton's failure to comply with this Court's Written Order Compelling Production and this Court's Verbal Order Compelling Production.

Id. at 17 (emphasis in original).

The Court rejected Freshwater's testimony that Attorney Hamilton had provided the required affidavits to Plaintiffs' attorneys at Freshwater's termination hearing attached to an exhibit from that hearing. Those affidavits had been ordered to be provided to Plaintiffs at least three days before a scheduled deposition. That deposition had, however, been cancelled. Instead of mailing, faxing, emailing, or delivering in some way the affidavits on the day that was three days before the scheduled deposition, Freshwater testified that he and Attorney Hamilton decided to produce the affidavits to Plaintiffs on the Thursday following the cancelled deposition at Freshwater's termination hearing. Freshwater and Attorney Hamilton argued in their memorandum in opposition to Plaintiffs' motion for sanctions that Hamilton attached the affidavits to the termination hearing's Employee Exhibit 161 and handed that Exhibit to Plaintiffs' attorney Douglas M. Mansfield. In this regard, the Court concluded:

> In Plaintiffs' Reply, Plaintiffs' three attorneys all submitted affidavits stating that each one of them reviewed Employee Exhibit 161 in its entirety and that there were no affidavits attached to it. Further, Attorney Douglas M. Mansfield, the attorney to whom Hamilton personally handed Employee Exhibit 161, averred in his affidavit that he reviewed the exhibit and that the affidavits were not attached to it and that when Hamilton handed the Exhibit to Mansfield, Hamilton made no statement regarding anything attached to the Exhibit. These three attorneys appeared before this Court at the oral hearing and each reiterated to the Court that they had reviewed Employee Exhibit 161, that no other person had custody of the document but them, and that there were not affidavits attached to the Exhibit. Attorney Mansfield argued to the Court that Hamilton's affidavit testimony is less than believable, *i.e.*, Hamilton took documents ordered twice by this Court to be produced and stapled them inconspicuously to the back of an 18 page document, one of hundreds of exhibits in an administrative hearing in which none of Plaintiffs' attorneys are involved, without saying a single word about the attachment before handing it to Plaintiffs' counsel in this action. Plaintiffs also argue that Freshwater's affidavit dated April 22, 2010 and allegedly attached to Employee Exhibit 161 reads like a document structured specifically to respond to the arguments raised Plaintiffs' Motion for Sanctions filed on May 7, 2010, not like an independently drafted document.

Id. at 7.

Freshwater and Attorney Hamilton have now filed the Motion for Reconsideration, in which they request this Court to reconsider its Sanctions Order. Freshwater and Attorney Hamilton requested the opportunity to argue the Motion for Reconsideration before the Court and to present evidence on their behalf. The Court granted that request and on July 29, 2010, this Court held a hearing on the motion.

II. Standard

The United States Court of Appeals for the Sixth Circuit has set forth three circumstances under which "courts will find justification for reconsidering interlocutory orders": (1) when there is "an intervening change of controlling law; (2) new evidence available; or (3) a need to correct a clear error or prevent manifest injustice." *Louisville/Jefferson Co. Metro Gov't v. Hotels.com, L.P.*, 590 F.3d 381, 389 (6th Cir. 2009) (citation omitted).

III. Discussion

In the Motion for Reconsideration and at the July 29, 2010 hearing, Freshwater and Attorney Hamilton argued that the Court should grant their motion and withdraw the sanctions ordered against them because there is new evidence available and to prevent a manifest injustice. This Court disagrees.

A. New Evidence

A motion for reconsideration is "not intended to re-litigate issues previously considered by the Court or to present evidence that could have been raised earlier." *Ne. Ohio Coal. for Homeless v. Brunner*, 652 F. Supp.2d 871, 877 (S.D. Ohio 2009) (citation omitted). The evidence currently before the Court could have been, and in most cases was, already presented to

this Court or was available to be presented to this Court before it issued its Sanctions Order. That is, even if the Court accepts Attorney Hamilton's assertion that he suffered two flat tires on the way to the first hearing, that does not explain why no request for a continuance of the hearing was made. Nor does it explain why no post hearing brief was filed by Attorney Hamilton to submit the evidence that was available to be presented at the last hearing. Even if, however, the Court were to agree that Freshwater and Attorney Hamilton possess "new evidence," that evidence does nothing to persuade the Court that its previous decision was incorrect, as explained below.

1. Witness testimony

At the hearing, Plaintiffs appeared with counsel and Freshwater and Attorney Hamilton appeared. Attorney Hamilton called Freshwater as his only witness. Plaintiffs called Mount Vernon Superintendent Stephen Short and Attorney David J. Millstone as witnesses. The following are the Court's findings with regard to the credibility of the witnesses.

The Court finds that Freshwater's testimony, and the reasonable inferences drawn from his testimony, in several instances was incredible. For example, while on the witness stand Freshwater viewed his previous deposition testimony related to the Tesla coil that is at the heart of this case, which was read out loud to the Court by Attorney Mansfield. Freshwater clearly stated in that deposition testimony that he destroyed the Tesla coil by smashing it and then threw it in the trash. He speculated that the Tesla coil was in a garbage "landfill." Freshwater then went on to testify, however, that he actually did not throw the Tesla coil in the trash, but instead

gave it to Attorney Hamilton, whose wife in turn put it in the freezer.[2] Freshwater made no attempt to explain this inconsistent testimony. Freshwater's sworn testimony about the Tesla coil given on two separate occasions simply cannot both be true.

Another example of testimony that the Court found incredible was Freshwater's explanation of his initial testimony at the termination hearing regarding the "five armloads" of items he received from Superintendent Short. At the termination hearing, Freshwater was asked if he looked at the material he received from Short when he arrived at his home and Freshwater testified:

> To be quite honest with you, most of it got thrown into my garbage can there in my barn. So I was pretty upset at the time, and I remember vividly I just pitched it. I pitched it.

(Doc. # 161-1 at 2, ¶ 5 and Exhibit attached thereto at 5863.)

To explain why the items were later produced by Freshwater, Freshwater testified before this Court that his definition of "pitch" is not the act of throwing items away. Instead, Freshwater explained that "pitched" is a "term of art" he has used in "forestry fire-fighting." Freshwater further explained that "pitched simply means to move something." (*See also* Doc. # 161-1 at 2, ¶ 5.) Freshwater claims that he "pitched the stuff out of [his] way and got it out of [his] truck" but that the items that he "pitched into his garbage" were not actually taken out with his garbage, and instead, "[t]he stuff stayed in the garbage can until I gave it to [Attorney Hamilton]." *Id.* at 2, ¶ 5. The Court finds that Freshwater's explanation is untenable and that it taints the credibility of his entire testimony.

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[2]In response to a question by the Court, Attorney Hamilton explained that his wife mistakenly believed the Tesla coil was groceries and put it in the freezer at their home.

With regard to the testimony of Superintendent Short and Attorney Millstone, the Court found both witnesses forthcoming and believable. Short's testimony was completely consistent with his affidavit testimony regarding the same issues. (*See* Doc. # 114-3.) The Court has no uncertainty whatsoever as to the truthfulness of the testimony of these two witnesses.

2. Affidavits

Plaintiffs' three attorneys submitted affidavits that unequivocally provide the Court with a chain of custody of Employee Exhibit 161 and without question state that no affidavits were attached to the Exhibit when they received it from Attorney Hamilton.

Contrarily, Attorney Hamilton's affidavit does not state that he attached the affidavits to Exhibit 161 before producing it to Attorney Mansfield. Instead, Hamilton avers:

> Affiant verifies that Employee Exhibit 161 from the state administrative hearing is a copy of the original which has attached thereto at the end of the exhibit a copy of the original affidavits signed by affiant and John Freshwater in response to this Court's Order to produce an affidavit averring the contents therein.

(Doc. # 97-2 ¶ 6.) Only in the argument section of his brief, which is not evidence, does Attorney Hamilton contend that he attached the affidavits to Exhibit 161 before producing the Exhibit to Attorney Mansfield:

> [T]he undersigned, on April 30, 2010, after the state administrative hearing on that date, provided to Plaintiff's counsel John Freshwater's affidavit attached to and in conjunction with the delivery of Employee Exhibit 161 from the state administrative hearing. (Exhibit 3, Pages 1-19) Additionally attached to Employee Exhibit 161 was the undersigned's affidavit. (Exhibit 3, Pages 22-23).

(Doc. # 97 at 4-5.) Exhibit 3 to which Attorney Hamilton refers consists of the affidavits that were supposedly attached to Exhibit 161 and is not an affidavit supporting Attorney Hamilton's contention that he attached the affidavits to Exhibit 161. Thus, there is no evidence whatsoever before the Court indicating that the affidavits were attached to Exhibit 161. Freshwater testified

that he did not witness Attorney Hamilton provide Exhibit 161 to Attorney Mansfield. And, it appears to the Court that the language utilized in Attorney Hamilton's affidavit is carefully crafted to appear to state that he attached the affidavits to Exhibit 161 but does not actually state such. Moreover, although the affidavit does not state that Attorney Hamilton attached the affidavits to Exhibit 161, to the extent that the affidavit was meant to state such, the Court finds the testimony unbelievable.

The Court concludes that the evidence before it does nothing to render its Sanctions Order incorrect in any way.

B. Manifest Injustice

Based on all of the evidence and briefing before it, the Court concludes that granting the Motion for Reconsideration would not prevent a manifest injustice. Indeed, the opposite. Based on Freshwater's and Attorney Hamilton's less than forthcoming behavior, it would be a manifest injustice for Plaintiffs to be required to pay their attorneys for work necessitated only by Freshwater's and Hamilton's misconduct.

IV. Conclusion

Based on the foregoing, the Court **DENIES** the Motion for Reconsideration filed by Defendant John Freshwater and Attorney R. Kelly Hamilton. (Doc. # 107.)

IT IS SO ORDERED.

/s/ Gregory L. Frost
GREGORY L. FROST
UNITED STATES DISTRICT JUDGE