

**IN THE COURT OF APPEALS
FIFTH APPELLATE DISTRICT
KNOX COUNTY, OHIO**

John Freshwater,

Appellant,

v.

**Mount Vernon City School District Board
of Education,**

Appellee.

Case No. 11 CA 000023

BRIEF OF AMICUS CURIAE

Douglas M. Mansfield (0063443)
JONES DAY
325 John H. McConnell Blvd.
Suite 600
Columbus, OH 43215
Telephone: (614) 469-3939
Facsimile: (614) 461-4198

Attorney for Amicus Curiae
STEPHEN AND JENIFER DENNIS

TABLE OF CONTENTS

	Page
TABLE OF CASES	2
STATEMENTS OF THE ASSIGNMENTS OF ERROR, THE ISSUES PRESENTED, OF THE CASE, AND OF FACTS	3
I. STATEMENT OF INTEREST OF AMICUS CURIAE	4
II. ARGUMENT	5
A. Freshwater Impermissibly Injected Religion Into His Science Lessons And Into The Assignments That He Gave Students During The 2007-2008 School Year.....	5
B. Freshwater Improperly Displayed Numerous Religious Items In His Public School Classroom During the 2007-2008 School Year	9
C. Freshwater Abused His FCA Monitor Position To Share His Religious Worldview.....	11
D. Freshwater Cannot Credibly Downplay His Inappropriate Use Of The Tesla Coil.....	14
III. CONCLUSION.....	16

TABLE OF AUTHORITIES

	Page
CASES	
<i>Doe v. Mt. Vernon City Sch. Dist. Bd. of Educ.</i> , No. 2:08-cv-575, at 6-7 (S.D. Ohio Aug. 2, 2010)	2
<i>Lemon v. Kurtzman</i> , 403 U.S. 602 (1971).....	10
STATUTES	
20 U.S.C. § 4071(c)(3).....	10
R.C. 3319.16	15
OTHER AUTHORITIES	
Cornelia Dean, <i>Scientists Feel Miscast in Film on Life’s Origin</i> , NY Times, Sept. 27, 2007, at A1	11
Electro-Technic Products, Inc., <i>Model BD-10A/BD-10AS High Frequency Generator</i> <i>Product Number 11011/11031 Instructions</i>	13
Eric Tanner, <i>The Watchmaker: Intelligent Design Video for Kids</i> , Ministry-to- Children.com.....	10
John Robinson, <i>Why We Didn’t Distribute “Obsession,”</i> Greensboro News & Record, Sept. 21, 2008	10

**STATEMENTS OF THE ASSIGNMENTS OF ERROR, THE ISSUES
PRESENTED, OF THE CASE, AND OF FACTS**

Amicus curiae adopts the statements set forth by Appellee.

I. STATEMENT OF INTEREST OF AMICUS CURIAE

From the very first page of his brief, John Freshwater continues his crusade to distort the truth about what happened in his public school classroom at the Mount Vernon Middle School. He takes great pains to downplay the role that his religious beliefs played in the lesson plans he developed, the homework he assigned, and the school environment he created. But the truth is that religion permeated every aspect of Freshwater's classroom instruction—from his lectures to his instructional handouts to the displays on his classroom walls.

Freshwater's account of his actions is misleading, if not utterly inaccurate. That Freshwater could proclaim, when confronted with thousands of pages of sworn witness testimony to the contrary, there exists merely "trace evidence of [his] religious faith which allegedly appeared in the classroom" and that he exhibited "neutrality toward religion" during his tenure at Mount Vernon Middle School (Freshwater Br. at 1; 10) simply reinforces the finding by the trial court in a related federal proceeding that Freshwater is "less than forthcoming" and that his testimony was "incredible" and "inconsistent." *See* Opinion and Order, *Doe v. Mt. Vernon City Sch. Dist. Bd. of Educ.*, No. 2:08-cv-575, at 6-7, 10 (S.D. Ohio Aug. 2, 2010) (Attached as Ex. A).

To provide this Court with a complete and accurate picture of the facts that underlie the Referee's recommendation that Freshwater be terminated from his teaching position, Stephen and Jenifer Dennis file this amicus brief on behalf of themselves and their son, Zach, who was a student in Freshwater's eighth period science class and a participant in the Fellowship of Christian Athletes ("FCA") during the 2007-2008 school year. Zach has first-hand knowledge of Freshwater's unconstitutional religious teachings, 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 abundance of evidence of Freshwater's improper

religious teachings, there is no question that the lower court 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.

II. ARGUMENT

Freshwater’s brief curiously glosses over almost all of the evidence of his unconstitutional conduct adduced during a 38-day, 80-plus witness administrative hearing that was conducted over a 21-month period. Perhaps his decision to ignore this evidence stems from the fact that it unequivocally demonstrates that Freshwater violated the Establishment Clause of the United States Constitution by teaching religion to his public school students, by displaying numerous religious items in his classroom, and by abusing his position as a faculty monitor of FCA. Contrary to Freshwater’s contentions in his brief, this case has nothing to do with a teacher “affording access to discussion, debate and a diversity of ideas.” (Freshwater Br. at 12.) It is about Freshwater repeatedly and methodically interjecting his own religious beliefs into his classroom instruction—something that blatantly violates the Constitution. Indeed, detailed below is but a sampling of Freshwater’s constitutional violations that Zach witnessed and experienced. Additionally, this brief seeks to correct Freshwater’s misleading statements regarding his use of the Tesla coil on his students, including Zach.

A. Freshwater Impermissibly Injected Religion Into His Science Lessons And Into The Assignments That He Gave Students During The 2007-2008 School Year.

1. Freshwater Referenced His Bible During Classroom Discussions.

Rather than sticking to district-approved textbooks, Freshwater drew from his Bible in teaching his eighth grade science students. During a lesson on volcanoes, for example, 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 Testimony, at 346;

see also Beach Testimony, at 962-63 (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 the “secular program of education” that Freshwater claims he carried out in his science classroom. (Freshwater Br. at 14.)

2. Freshwater Spent Class Time Talking About Religious Holidays.

During one class period, Freshwater questioned Zach and his classmates about the meaning of Easter and Good Friday. Zach recalls Freshwater asking “what Good Friday was.” (Z. Dennis Testimony, 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 occur “due to the moon and the calendar.” (*Id.*)

Although Freshwater has changed his story multiple times when asked about this incident, the bottom line is that he admitted to then-Mount Vernon Middle School Principal William White that he talked about Easter and Good Friday during class time, and he expressly recalled talking about the meaning of Easter in Zach’s class. (Freshwater Testimony, at 450-51; White Testimony, 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. Nor can he, because a religious discussion of this nature is indefensible and unconstitutional.

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

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 Testimony, 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 Testimony, 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).) Zach testified that the “hydrosphere” theory was an implicit reference to Noah’s Flood. (Z. Dennis Testimony, at 348; *see also* Beach Testimony, 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. 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.

4. Freshwater Used The Word “Here” To Convey His Religious Beliefs And To Urge Students To Question Scientific Facts.

A number of witnesses, including Zach, offered testimony about Freshwater instructing his 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 Testimony, at 349; Beach Testimony, at 962.) Despite Freshwater’s contention that the use of “here” was his way of encouraging students to “independently” question scientific theories, (Freshwater Br. at 11), this 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.)

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

During the administrative hearing, Zach testified that Freshwater sent him to the “Answers in Genesis” website (www.answersingenesis.org) in conjunction with research on dinosaurs. (Z. Dennis Testimony, at 347.) Freshwater initially admitted under oath that he had referred not only Zach, but approximately a dozen other students, as well, to this website and that Freshwater himself visited the website during class, (Freshwater Testimony, at 455; 471-72), then later changed his tune and recanted this testimony during subsequent questioning by his attorney, 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 Testimony, at 4614-15.) Yet again, Freshwater’s revisionist history is implausible, if not completely untruthful.

6. Freshwater Shared His Beliefs About Homosexuality With Students.

Freshwater tries to discredit the testimony of 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.” (Freshwater Br. at 4-5, 15-16; Stockdale Testimony, 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 Testimony, 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 (which the Dennises argue should not be discounted), the record contains more than ample

evidence of Freshwater inappropriately offering his religious views on homosexuality to Zach and his classmates.¹

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

Zach testified that Freshwater showed *The Watchmaker*, a video that endorses Intelligent Design, during science class (and at a meeting FCA). (Z. Dennis Testimony, at 343; 3128-29; see also Princehouse Testimony, 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 an additional constitutional violation by handing out an extra credit assignment that instructed students to see *Expelled: No Intelligence Allowed*, another film that promotes intelligent design. (Employee Ex. 43; see also Rissing Testimony, 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”).)

B. 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 erect religious displays in his classroom.

¹ The “new” evidence Freshwater now attempts to introduce concerning Mr. Stockdale’s attendance was, of course, available to Freshwater during the administrative hearing and thus cannot be considered now. There also is no record here that his “new” evidence is complete in any event.

1. 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 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 at 71-75.)

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

In another attempt to diminish the evidence that he improperly mixed religion and science in his public school classroom, Freshwater refers repeatedly in his brief to a “patriotic poster of Colin Powell” that he displayed in his classroom. 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 Referee below.

3. Freshwater Displayed Other Religious Items In His Classroom.

Freshwater also put up additional religious posters on his classroom walls and cabinets. The cabinet doors featured several posters, some of which contained Bible verses. (Mahan

Testimony, at 3780-81; Ritchey Testimony, 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 Testimony, 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 Testimony, at 969-70; *see also* Short Testimony, 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 Testimony, at 354; 3036.) He also displayed his Bible on his desk, and in the spring of the 2007-2008 school year, he added a second Bible and a book entitled *Jesus of Nazareth* to the classroom collection, placing both in plain view on his lab table. (Board Exs. 29, 45, 27). 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.

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

In his brief, Freshwater completely ignores the fact that the referee below found that Freshwater's repeated transgressions as a monitor of the FCA student organization also supported his termination. But the evidence also firmly showed that Freshwater sought to impermissibly indoctrinate students in his position as faculty monitor for the FCA. In this position, he controlled the activities of FCA, despite his own acknowledgement that such actions would be unconstitutional. (*See* Board Ex. 83 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 (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).

1. 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 Testimony, 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 (last visited Jan. 9, 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/> (last visited Jan. 5, 2012). Beyond showing religious films, Freshwater also encouraged FCA students to call movie theaters in support of the movie *Expelled: No Intelligence Allowed*—the very same film that formed the basis of Freshwater’s extra credit

assignment for his science students—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.” (Z. Dennis Testimony at 356); *see also* 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>.

2. Freshwater Contacted FCA Speakers.

Freshwater also did not hesitate to invite speakers to FCA events—a task reserved for FCA student participants and prohibited to be done by faculty monitors. He admitted this fact without qualification on one occasion. (Board Ex. 83 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 Testimony, at 1037; Hammond Testimony, at 6066-68.) In fact, Father Hammond went out of his way to emphasize that Freshwater, not another student as Freshwater alleges, had contacted him. (Hammond Testimony, 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 Testimony, 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.

3. 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. at 291-94.) Several students clarified, however, that Freshwater initiated some prayers and actively participated in others. (Board Ex. 6 at p. 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 Testimony, 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 Testimony, at 5945-46 (recalling Freshwater's statement that he "may have put [his] hands up"); *see also* Frady Testimony, 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 Testimony, 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. Consequently, the lower court did not abuse its discretion in upholding the School Board's decision to remove Freshwater from his teaching position.

D. Freshwater Cannot Credibly Downplay His Inappropriate Use Of The Tesla Coil.

The Dennises also would like to set the record straight regarding Freshwater's use of the Tesla coil on his students. Freshwater wants this Court to believe that the Tesla coil incident "was a common classroom science experiment . . . performed safely by Freshwater and other

teachers for over 20 years” that “allegedly produced a mark on one student’s arm.” (Freshwater Br. at 1.) This characterization is entirely untrue.

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 over 50,000 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 at 181.) 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 Testimony, 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://www.electrotechnicproduct.com/get_technical/BD10BDASInstructions.pdf (last visited Jan. 9, 2012). Moreover, 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 failed 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 Testimony, 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 Testimony, at 5140; Conkel Testimony, at 5229-30; Ruhl Testimony, at 5255; Grubaugh Testimony, at 5298; Morris Testimony, 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 Testimony, at 5093.) And, as Zach noted, Freshwater intentionally made this mark in the shape of a cross—a further sign of Freshwater's religious crusade. (Z. Dennis Testimony, at 339.)

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." Freshwater Br. at 2. But nowhere in the Report does the Referee condone or otherwise legitimize Freshwater's improper use of this device. Rather, the Referee explicitly acknowledges that Freshwater used the Tesla coil on Zach, but notes that because "the issue was [already] dealt with by the [Mount Vernon City Schools] administration," and the "case was closed," the resolution to terminate Freshwater should not include this issue. (Referee's Report at 2.)

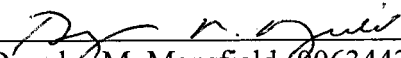
III. CONCLUSION

Given the overwhelming evidence of Freshwater teaching religion and displaying religious items in a public school, Freshwater cannot credibly argue that the lower court abused

its discretion in concluding that the School Board had good and just cause for removing him from his teaching post. Freshwater, of course, does not really address this standard—only concluding that because the trial court did not hold another evidentiary hearing that somehow constitutes an abuse of discretion. That flatly ignores the statute at issue (R.C. 3319.16), which simply requires the trial court to “hold such additional hearings as it considers advisable[.]” And the trial court rightly concluded no additional hearings were necessary given the number of days and witnesses and exhibits already considered by the referee. Indeed, the Dennises submit that it would have been an abuse of discretion if the Court had *not* concluded that the School Board had good and just cause for terminating Freshwater’s contract. Because the lower court acted well within its discretion, its decision to uphold Freshwater’s termination should be affirmed.

Dated: January 10, 2012

Respectfully submitted,



Douglas M. Mansfield (0063443)
JONES DAY
325 John H. McConnell Blvd.
Suite 600
Columbus, OH 43215
Telephone: (614) 469-3939
Facsimile: (614) 461-4198

Counsel for Amicus Curiae
STEPHEN AND JENIFER DENNIS

EXHIBIT A

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

JOHN DOE, et al.,

Plaintiffs,

v.

Case No. 2:08-cv-575

JUDGE GREGORY L. FROST

Magistrate Judge Norah McCann King

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

Defendants.

OPINION AND ORDER

This matter is before the Court on Plaintiffs' Response in Opposition to Defendant's Motion for Continuance and Motion for Sanctions for Defendant's Failure to Comply with this Court's Discovery Orders ("Plaintiffs' Motion for Sanctions") (Doc. # 96), Defendant John Freshwater's Reply to Document 96 - Reply to Plaintiffs' Motion for Sanctions ("Freshwater's Memorandum in Opposition") (Doc. # 97), and Plaintiffs' Reply in Support of their Motion for Sanctions ("Plaintiffs' Reply") (Doc. # 101). For the reasons set forth below, the Court **GRANTS in part and DENIES in part** Plaintiffs' Motion for Sanctions.

I. Background

On April 12, 2010, Magistrate Judge King issued an order (Doc. # 83) on Plaintiffs' Motion to Compel (Doc. # 67), stating:

In their Motion to Compel, plaintiffs seek production of documents not produced during the course of discovery in this action, but which were allegedly utilized by defendant Freshwater in certain state administrative proceedings. Plaintiffs specifically seek production of such documents as defendant Freshwater's personal notes and affidavits and certain educational and religious materials utilized by him.

(Doc. # 83 at 1.) Magistrate Judge King granted Plaintiffs' Motion to Compel ("Written Order Compelling Production"): "Defendant Freshwater is **ORDERED** to produce all such documents within seven (7) days of the date of this *Order*." *Id.* at 3 (emphases in original). The Written Order Compelling Production was issued on April 12, 2010.

On April 19, 2010, Plaintiffs received some of the documents that were ordered to be produced in the Written Order Compelling Production.¹ Dissatisfied with what Plaintiffs believed was Freshwater's violation of the Written Order Compelling Production, Plaintiffs requested a telephone conference with this Court.

On April 21, 2010, the Court held a telephone conference to discuss Plaintiffs' contention that Freshwater failed to produce the documents pursuant to the Written Order Compelling Production. At that conference, this Court verbally ordered: (1) Freshwater to produce, in accordance the Written Order Compelling Production, all relevant materials subject to the Court's orders and Plaintiffs' discovery requests, including, but not limited to, handwritten notes, textbooks, religious materials from Freshwater's classroom, materials copied at Freshwater's church, and other materials removed by Freshwater from Mount Vernon Middle School during the summer of 2008; (2) Freshwater and his attorney R. Kelly 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; (3) Attorney Hamilton to provide Plaintiffs, at least three days before Freshwater's rescheduled deposition, his billing records for anything relevant to the drafting or preparation of Freshwater's affidavits; (4) Freshwater to provide his personal copy of

¹In this decision, the Court relies on 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.

Finding Common Ground by April 22, 2010 and for Plaintiffs to return the textbook by April 23, 2010; and (5) Freshwater to produce complete, legible copies or originals of materials already produced but unreadable (including the President Bush poster). (“Verbal Order Compelling Production.”)

On April 22, 2010, Plaintiffs received from Freshwater some documents and the book *Finding Common Ground*. Plaintiffs’ counsel sent a letter to Freshwater’s counsel, R. Kelly Hamilton, on that same day indicating that the production was incomplete and some of the delivered documents were illegible.

On May 7, 2010, Plaintiffs filed Plaintiffs’ Motion for Sanctions. Plaintiffs’ motion was filed in conjunction with a response in opposition to Freshwater’s motion to continue the trial date based on the fact that two of his attorney’s were permitted to withdraw.

On May 11, 2010, this Court granted Freshwater’s request for a continuance and held in abeyance Plaintiffs’ request for sanctions for discovery violations. (Doc. # 98.) This Court rescheduled the trial in this matter for July 26, 2010.

Attorney R. Kelly Hamilton filed on Freshwater’s behalf Freshwater’s Memorandum in Opposition. (Doc. # 97.) On May 17, 2010, once briefing was complete on Plaintiff’s Motion for Sanctions, the Court ordered an oral hearing on that motion to be held on May 26, 2010, at 9:00 a.m. (Doc. # 102.)

On May 26, 2010, at 8:00 a.m. attorneys Stephen Charles Findley and Sandra R. McIntosh filed a notice of substitution of counsel indicating that they were substituting themselves as counsel in place of R. Kelly Hamilton. Attorneys Findley and McIntosh appeared before this Court at the 9:00 a.m. hearing on Plaintiffs’ Motion for Sanctions. Counsel

represented to the Court that Attorney Hamilton had contacted them and informed them that he had two flat tires and would be late to the hearing. The hearing lasted nearly one and one half hours. Hamilton failed to appear at the hearing.

II. Standard

Federal Rule of Civil Procedure 37 provides for attorneys' fees and costs to be paid to the movant of a successful motion to compel:

[(a)](5) Payment of Expenses

(A) If the Motion Is Granted (or Disclosure or Discovery Is Provided After Filing). If the motion is granted--or if the disclosure or requested discovery is provided after the motion was filed--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. But the court must not order this payment if:

- (i) the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action;
- (ii) the opposing party's nondisclosure, response, or objection was substantially justified; or
- (iii) other circumstances make an award of expenses unjust.

Fed. R. Civ. P. 37(a)(5)(A).

Rule 37 also provides for attorneys' fees and costs as a sanction against a party and/or his counsel for failure to obey a discovery order:

(b) Failure to Comply with a Court Order.

. . . .

(2) Sanctions in the District Where the Action Is Pending.

(A) For Not Obeying a Discovery Order. If a party . . . fails to obey an order to provide or permit discovery, including an order under Rule 26(f), 35, or 37(a), the court where the action is pending may issue further just orders.

They may include the following:

- (i) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims;
- (ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;
- (iii) striking pleadings in whole or in part;
- (iv) staying further proceedings until the order is obeyed;
- (v) dismissing the action or proceeding in whole or in part;
- (vi) rendering a default judgment against the disobedient party; or
- (vii) treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination.

....
(C) Payment of Expenses. Instead of or in addition to the orders above, 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, unless the failure was substantially justified or other circumstances make an award of expenses unjust.

Fed. R. Civ. P. 37(b)(2).

III. Discussion

Plaintiffs request that this Court impose sanctions upon Freshwater in the form of attorneys' fees and costs associated with their Motion for Sanctions and their Motion to Compel and request that the Court impose additional sanctions in the form of evidentiary inferences. The Court finds Plaintiffs' request for attorneys fees and costs well taken but will not, at this juncture, impose any evidentiary inferences.

The Court will address each category of documents that are in dispute. By this Opinion and Order, the Court disposes of all remaining issues related to discovery and memorialize any

rulings made from the bench at the May 26, 2010 hearing on sanctions.

A. Discovery

1. Billing Statements

Plaintiffs sought electronic copies of 15 affidavits made by Freshwater because they were responsive to Plaintiffs' discovery requests. Plaintiffs requested electronic copies so that the metadata would show when the affidavits had been prepared because Plaintiffs had reason to believe that the affidavits were not executed on the dates they indicated. In correspondence, and during the April 21, 2010 telephone conference with the Court, Attorney Hamilton contended that those electronic files no longer exist because his computer was destroyed by a water pipe break and he threw the computer away in the trash. Thus, this Court ordered Hamilton to produce, at least three days before Freshwater's rescheduled deposition, his billing records for anything relevant to the drafting or preparation of the affidavits. Freshwater's deposition was scheduled for Friday, May 7, 2010, which means the billing records should have been produced on or before Tuesday, May 4, 2010.

In Plaintiffs' Motion for Sanctions, Plaintiffs claim that these records were not produced by Tuesday, May 4, 2010, and that they had not yet been produced.

In Freshwater's Memorandum in Opposition, Attorney Hamilton attached an affidavit he executed that states that on April 30, 2010, after a portion was of Freshwater's termination hearing was held, he provided to Plaintiffs' counsel John Freshwater's affidavit and his own affidavit that address the billing records. Hamilton avers that the affidavits were attached to "Employee Exhibit 16" from Freshwater's termination hearing. Hamilton also attached the affidavits to the affidavit he submitted in support of Freshwater's Memorandum in Opposition.

In Plaintiffs' Reply, Plaintiffs' three attorneys all submitted affidavits stating that each one of them reviewed Employee Exhibit 16 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 16, 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 16, that no other person had custody of the document but them, and that there were no 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 16 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.

In summary, Attorney Hamilton represents to this Court that he was unable to comply with an order from it to provide relevant documents properly requested in discovery because his computer was destroyed by water when a pipe broke at his office and he threw it away. Next, Hamilton was ordered to turn over his billing records for anything relevant to the drafting or preparation of the affidavits. Hamilton insists that he complied with this order by attaching the

affidavits to the back of Employee Exhibit 16, but the evidence before the Court wholly contradicts him. Then Hamilton, again the victim of a notable lack of luck, failed to appear at the hearing to explain himself because he suffered not one but two flat tires on the drive to the courthouse.

The Court concludes that, based on the evidence before it, Freshwater and Attorney Hamilton failed to produce the billing records by Tuesday, March 4, 2010, in violation of both the Written Order Compelling Production and the Verbal Order Compelling Production. Moreover, the affidavit that was attached to Freshwater's Memorandum in Opposition does not comply with this Court's orders. That is, in the affidavit Hamilton avers:

Affiant states he does not have any computer file containing any metadata related to any billing records for a client named John Freshwater depicting any information concerning affidavits signed by John Freshwater in May 2008.

(Doc. # 97-3 at 21.) This statement does not satisfy the Court's order. Thus, the Court **ORDERS** R. Kelly Hamilton to turn over his billing records for anything relevant to the drafting or preparation of the affidavits at issue by June 16, 2010.

2. Handwritten Notes

In the Written Order Compelling Production, Freshwater was ordered to produce his handwritten notes. As of April 19, 2010, Plaintiffs had received only the handwritten notes that Freshwater introduced at the termination hearing as Employee Exhibits 130-137, but found this production inadequate because Freshwater twice admitted to the existence of other handwritten notes in his termination hearing.

Q. Do Employee Exhibits 130 through 137 represent all of the notes that you made?

A. No. There's one in February that I'm aware of. You would have to ask Kelly

[Hamilton] about that one. Because I started in February, the end of February, I think. I think it was around the 22nd, I do believe. So you would have to talk to my counsel on that one.

(Doc. # 96-7 at 4881-4882.)

Q. All right. We know that you removed your notes from the classroom and had those copied. That, you have a specific recollection of.

A. Yes.

Q. And we have copies of some of them in the record but not all. Correct?

A. That's correct.

Id. at 4907.

Further, Attorney Hamilton noted in a April 19, 2010 letter to Freshwater's previous counsel that he provided only handwritten notes "from the time period of March 4, 2008 through April 22, 2008," despite Freshwater's admission that he began taking notes in February of 2008. (Doc. # 96-4 at 1.) The Court and parties discussed the handwritten notes during the April 21, 2010 telephone conference, and, despite his client's explicit testimony to the contrary, Attorney Hamilton stated that no other handwritten notes existed. In response, the Court ordered Freshwater and Hamilton to look back through all of their materials and produce any responsive documents that had not yet been produced and to provide affidavits attesting to the fact that all materials subject to the Court's orders and Plaintiffs' discovery requests had been produced. No additional handwritten notes, nor the two required affidavits, were produced.

At the May 26, 2010 hearing, Freshwater represented to the Court that he had no other handwritten notes and in Freshwater's Memorandum in Opposition, Attorney Hamilton attached Freshwater's affidavit attesting to the fact that all materials subject to this Court's orders had been produced. This affidavit, Hamilton claims, was attached to Employee Exhibit 161, along

with Hamilton's affidavit, and was given to Attorney Mansfield on April 30, 2010 after the portion of Freshwater's termination hearing held that day. As this Court concluded above, based on the evidence before it, the Court finds that there were no affidavits attached to Employee Exhibit 161. Thus, Freshwater and Attorney Hamilton failed to produce affidavits attesting to the fact that all handwritten notes subject to this Court's orders had been produced by Tuesday, March 4, 2010, in violation of both the Written Order Compelling Production and the Verbal Order Compelling Production.

3. 10 Commandment Book Cover and President Bush Inspirational Poster

Plaintiffs' Motion to Compel specifically requested religious materials including "the Ten Commandments book covers or posters displayed in Freshwater's classroom or replicates thereof." (Doc. # 67 at 4.) Freshwater did not produce any religious materials, including copies of the Ten Commandment book covers and the "inspirational poster" of former President George W. Bush's cabinet, as required on April 19, 2010.

These issues were discussed at length during the April 21, 2010 conference call, including the fact that none of the religious postings from Freshwater's classroom cupboards and bulletin boards have been produced. Attorney Hamilton explained that the only Ten Commandments poster he possessed was not an original from Freshwater's classroom, but he admitted that he had produced a similar poster (long after the Plaintiffs' original discovery requests) at Freshwater's termination hearing. Hamilton also explained that a copy of the President Bush poster had been produced as part of the April 19, 2010 disclosures, but that it was, admittedly, illegible.

The Court ordered Freshwater and Attorney Hamilton to provide Plaintiffs with a legible

copy of the President Bush poster by April 22, 2010. The Court also ordered Freshwater and Hamilton to produce affidavits attesting to the full disclosure of all relevant materials.

After the telephone conference, Attorney Hamilton delivered to Plaintiffs an improved copy of the President Bush poster but the text of and citation to a Biblical verse featured on the poster had been cropped out. Plaintiffs notified Freshwater of the deficiency with the President Bush poster April 22, 2010 and offered to make their own copy of the poster if Freshwater would provide them with the poster to copy. By the date Plaintiffs filed Plaintiffs' Motion for Sanctions, Plaintiffs had not received a response to their letter, had not received the Ten Commandments book cover, had not received a complete copy of the President Bush poster, and had not received any of the required affidavits.

In Freshwater's Memorandum in Opposition, Freshwater attached a complete copy of the President Bush poster and the affidavits that had allegedly been attached to Employee Exhibit 161. However, Freshwater failed to submit the Ten Commandments book cover.

The Court concludes that Freshwater and Attorney Hamilton failed to comply with the Written Order Compelling Production and the Verbal Order Compelling Production of the Ten Commandments book cover, the President Bush Poster, and the appropriate affidavits by Tuesday, March 4, 2010. Currently, the book cover has not been produced. During the May 26, 2010 hearing, this Court **ORDERED** from the bench that the book cover be produced to Plaintiffs by May 28, 2010.

4. Materials Removed from Freshwater's Classroom

Freshwater testified that he removed approximately "five armloads" of material from his classroom during the summer of 2008 and also took certain material from his classroom to be

copied at his church. In the Written Order Compelling Production and the Verbal Order Compelling Production, the Court ordered this material produced or the production of affidavits explaining why the material cannot be produced.

Freshwater produced a few documents and also three trash bags full of science materials, such as animal skeletons, that were part of the five armloads of materials. Plaintiffs contacted Freshwater and Attorney Hamilton and indicated that the production was inadequate because there was no affidavit and the material was not complete based upon Freshwater's testimony at the termination hearing. For example, Freshwater testified that he removed textbooks, notes, and worksheets from his classroom and copied them at his church:

Q. All right. You testified earlier this month and also yesterday that you took items out of the room to copy after April 16th to the church and Mr. Hamilton. Is that correct?

A. That's correct.

Q. Can you tell us, in addition to the notes, what else you took out of the room to have copied?

A. Textbooks.

Q. Okay. Anything else?

A. You mentioned notes. I think I took over some worksheets.

Q. Okay. Do you know what worksheets you took over?

A. Stuff that Kelly [Hamilton] said, you know, gather and bring over.

Q. Do you have copies of those still?

A. Whatever -- you're going to have to ask Kelly on that.

Q. So you turned those over to your attorney?

A. That is correct.

Q. Anything other than worksheets and notes? And I mean anything other than what you've already testified to.

A. What has been testified to then?

Q. You testified to notes. You testified to the textbooks and worksheets. Anything else?

A. It was returned. I returned it back to the school. That's what I recall at this time.

Q. Okay. Did you do this over a period of time or did you do it all on one occasion?

A. It wasn't one specific day. In May.

Q. So you made multiple trips in May with materials?

A. Yes.

Q. "Multiple" being more than one.

A. Yes.

(Doc. # 96-7 at 4892-93.)

None of these materials was produced. The testimony before the Court is conflicting, at a minimum. That is, at his termination hearing, Freshwater testified that he threw away "most of" these materials:

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. # 96-7 at 4898.) Yet, in Freshwater's affidavit attached to Freshwater's Memorandum in Opposition, Freshwater now avers that he produced all of the contents of the five armloads and only threw away "about 20-30 letters written to [him] from Chinese people." (Doc. # 97-3 at 19.) As to those letters, Freshwater states:

The bundle of letters got wet and were stuck together and I threw them in the trash. I did not throw anything from my room in the trash but those letters.

Id.

With regard to the copying of the material that was done at his church, Freshwater indicated to the Court at the May 26, 2010 hearing, that he was unsure of exactly what had been copied because Attorney Hamilton did much of the copying. Hamilton failed to appear at the hearing to provide further testimony regarding this material.

The Court concludes that Freshwater and Attorney Hamilton failed to comply with the Written Order Compelling Production and the Verbal Order Compelling Production of the materials copied at Freshwater's church and the appropriate affidavits by Tuesday, March 4, 2010. The Court **ORDERS** Freshwater and Attorney Hamilton to provide to Plaintiffs copies of all of the materials they copied at Freshwater's church and affidavits, if necessary, to explain why these documents cannot be produced by June 16, 2010.

5. Textbooks

Freshwater also has failed to produce various textbooks and educational materials subject to the Written Order Compelling Production. On April 19, 2010, Freshwater produced only 20 copied pages from *Finding Common Ground* and another 5 copied pages from the textbook *Cells, Heredity, and Classification*. These copies were incomplete and many pages were illegible. During the April 21, 2010 telephone conference, the Court specifically ordered Freshwater to produce his personal copy of *Finding Common Ground* to the Plaintiffs by April 22, 2010. Freshwater complied, and that book was promptly returned to him by Plaintiffs.

Freshwater has failed to produce any other textbooks or copies of textbooks with Freshwater's notes that were made in the margins of the books. At the termination hearing on

December 10, 2009, Freshwater introduced Employee Exhibit 114, *Cells, Heredity and Classification*, in his own defense. (Doc. # 96-11 at 4322.) The few pages produced on April 19, 2010, do not provide Plaintiffs with the complete *Cells, Heredity and Classification* textbook. What is more, most of the pages actually produced are illegible. Further, Freshwater has failed to produce the following books or other materials that were on a shelf in his classroom during the 2007-2008 school year: (1) *Refuting Evolution*; (2) *Lies in the Textbooks* [Video Tape with the text "Part A 487" and "*10 Lies of Evolution*"]; (3) *Evolution of a Creationist*; (4) *The Real Meaning of the Zodiac*; and (5) *Icons of Evolution*. The Court concludes that Freshwater is in violation of both the Written Order Compelling Production and the Verbal Order Compelling Production. The Court **ORDERS** Freshwater to produce these books and video tape by June 16, 2010.

B. Appropriate Sanctions

Initially, the Court notes that its Local Rules and Rule 37 of the Federal Rules of Civil Procedure require the party moving for sanctions to engage in extrajudicial means to obtain the discovery at issue. *See* S. D. Ohio Civ. R. 37.1; Fed. R. Civ. P. 37(a)(5)(A). This Court concludes that Plaintiffs have easily met this burden.

Plaintiffs ask the Court to enter an inference that all unproduced materials from Freshwater's classroom were religious items, with no secular purpose, displayed by Freshwater on his classroom walls, windows, cupboards, and book shelves during the 2007-08 school year in contravention of the Establishment Clause of the United States Constitution. These items, which are detailed *supra*, include the Ten Commandments book covers, the President Bush poster, the postings on the cupboards, books such as *Refuting Evolution*, *Evolution of a*

Creationist, The Real Meaning of the Zodiac, and Icons of Evolution, and a *Lies in the Textbooks* videotape. Plaintiffs further request that the Court enter an evidentiary inference that the 15 Freshwater affidavits, based on Freshwater's failure to produce the billing records, were not prepared or executed in May 2008, as Freshwater contends, but at some later date.

The Court currently is not inclined to grant Plaintiffs' requests for evidentiary inferences. However, Freshwater is put on notice that if he does not comply in full with this Opinion and Order, the Court will revisit this request and grant any portion of it that is appropriate.

In addition to evidentiary inferences, Plaintiffs also seek costs and attorneys' fees associated with all discovery pleadings since late December 2009, *i.e.*, Plaintiffs' Motion to Compel and their Motion for Sanctions.

Federal Rule of Civil Procedure 37(a)(5) requires this Court to order Freshwater and Attorney Hamilton to pay Plaintiffs' reasonable attorneys' fees for their successful Motion to Compel, stating that 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. . . . [unless] the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action[,], the opposing party's nondisclosure, response, or objection was substantially justified[, or] other circumstances make an award of expenses unjust." 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.

With regard to the violation of this Court's orders, Federal Rule of Civil Procedure 37(b)(2)(C) requires this Court to order payment of attorneys' fees and costs by a party and/or his attorney for failure to comply with a court order, stating that 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, unless the failure was substantially justified or other circumstances make an award of expenses unjust." 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.

Plaintiffs' shall provide to Freshwater and Attorney Hamilton their billing records showing their fees and costs associated with Plaintiffs' Motion to Compel and their Motion for Sanctions by June 11, 2010. Freshwater and Attorney Hamilton shall be given until June 25, 2010, to submit payment to Plaintiffs.

IV. Conclusion

Based on the foregoing, the Court **GRANTS in part and DENIES** in part Plaintiffs'

Motion for Sanctions (Doc. # 96) and makes certain orders regarding the discovery that is the subject of that motion. Specifically, the Court:

1. **ORDERS** Attorney R. Kelly Hamilton to turn over his billing records for anything relevant to the drafting or preparation of the 15 affidavits at issue by June 16, 2010.
2. **ORDERS** Freshwater and/or Attorney R. Kelly Hamilton to produce the Ten Commandments book cover by May 28, 2010.
3. **ORDERS** Freshwater and/or Attorney R. Kelly Hamilton to produce any other discovery previously ordered to be produced, including any handwritten notes, religious materials, and textbooks, and if the discovery cannot be produced to submit affidavits attesting to why the discovery cannot be produced.
4. **ORDERS** Freshwater and Attorney R. Kelly Hamilton to provide to Plaintiffs copies of all of the materials they copied at Freshwater's church and affidavits, if necessary, to explain why these documents cannot be produced by June 16, 2010.
5. **DENIES** Plaintiffs' request for evidentiary inferences; however, puts Freshwater on notice that if he does not comply in full with this Opinion and Order, the Court will revisit this request and grant any portion of it that is appropriate at that time.
6. **GRANTS** Plaintiffs' request for attorneys' fees and costs. The Court **ORDERS** Freshwater and Attorney R. Kelly Hamilton to pay the reasonable attorneys' 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 and **ORDERS** Freshwater and Attorney R. Kelly Hamilton to pay the reasonable attorneys' fees and costs that Plaintiffs incurred as a result of filing their Motion to Compel.

Payment shall be made in accordance with this Opinion and Order.

IT IS SO ORDERED.

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