IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

THE NATIONAL SPIRITUAL ASSEMBLY OF THE BAHÁ'ÍS OF THE UNITED STATES OF AMERICA UNDER THE HEREDITARY GUARDIANSHIP, INC.	)	
Counter-Defendant,	)	**Civil Action No. 64 C 1878**
v.	)	
	)	**The Honorable Amy J. St Eve**
THE NATIONAL SPIRITUAL ASSEMBLY OF THE BAHÁ'ÍS OF THE UNITED STATES OF AMERICA, INC.	)	
Counterclaimant.	)	

MEMORANDUM IN SUPPORT OF RESPONSE AND AFFIRMATIVE DEFENSES TO NSA'S MOTION FOR RULE TO SHOW CAUSE FILED BY ORTHODOX BAHÁ'Í FAITH RESPONDENTS

This Memorandum is submitted in support of the Response and Affirmative Defenses of Joel B. Marangella, Franklin D. Schlatter, and The Provisional National Bahá'í Council of the United States ("PNBC"), who are the Orthodox Bahá'í Faith ("OBF") Respondents, to the Motion for Rule to Show Cause ("Motion") filed by the National Spiritual Assembly of the Bahá'ís of the United States ("NSA"). This Response is also supported by the Declarations Under Penalty of Perjury submitted by Joel Bray Marangella ("Marangella Decl."), Franklin Daniel Schlatter ("Schlatter Decl."), Jeffrey Alan Goldberg ("Goldberg Decl.") and Marilyn Kay Meyer ("Meyer Decl.").

I. Introduction

The NSA attempts to enforce a forty year old judgment, entered June 28, 1966 and attached as Exhibit A to the NSA's Motion (the Judgment) against the OBF Respondents, who were not parties, not related to the parties, and not bound by the Judgment. If the NSA has a claim against the OBF Respondents, why does it not file a lawsuit directly against them? This Motion instead seeks to circumvent the OBF Respondent's due process rights.

The NSA claims the Respondents' alleged use of its trademarks on their web sites causes it irreparable harm because of supposedly deceptive, misleading or damaging statements. Lumping together the OBF Respondents with the respondents who call themselves Bahá'ís Under the Provisions of the Covenant ("BUPC"), the NSA attempts to use the statements and

actions of the BUPC against the OBF by making collective reference to them under the misnomer of “Remeyites.” The BUPC web sites are not owned or controlled by the OBF Respondents (Meyer Decl., Para. 10-11). The BUPC is a completely separate organization from the OBF (Schlatter Decl., Para 20). There are no facts in any of the exhibits and declarations submitted with the NSA’s Motion to support the allegation that the OBF’s web sites are deceptive, misleading, or causing unlawful harm to the NSA.

The Judgment was entered in favor of an unincorporated voluntary religious association bearing a name similar to current Movant (Judgment, Findings Para. 3) but the NSA is really a different entity, an Illinois not for profit corporation organized on October 14, 1994 (Goldberg Decl.., Para. 58). The Judgment was entered against a New Mexico corporation, The National Spiritual Assembly of the Bahá’ís of the United States of America under the Hereditary Guardianship, Inc. (“Remey NSA”). The Remey NSA was dissolved shortly after entry of the Judgment, on December 22, 1966 (Schlatter Decl., Para. 8). Thus, none of the parties now before the Court were the same parties before the Court at the time the Judgment was entered.

To help the Court properly understand the status of the parties, a brief summary is in order of the history of the split over religious authority between the NSA and the Remey NSA. All Bahá’ís believe that Bahá’u’lláh was the Divine Author of the Bahá’í Revelation. All believe that Bahá’u’lláh appointed as His successor, His eldest son ‘Abdu’l-Bahá, the Center of the Covenant, that ‘Abdu’l-Bahá’s Will and Testament (the “W&T”) is a divinely-conceived, sacred and immutable Document that creates the Office of the Guardianship and provides it be occupied by an uninterrupted line of Guardians, authorized interpreters, each appointed by his predecessor in Office and that these Guardians are to preside for life as the permanent and irreplaceable "sacred head" of the highest legislative organ of the Faith, the Universal House of Justice, for as long as the Dispensation of Bahá’u’lláh endures. The W&T appoints Shoghi Effendi as the first Guardian (Goldberg Decl., Para. 16; Marangella, Decl., Para. 4). Shoghi Effendi appointed “Hands of the Cause” to assist him as Guardian. Upon his death in 1957, the Hands decided that Shoghi Effendi had not appointed a successor and the Guardianship established by the W&T had come to an end with his passing. In it place, the Custodians, formed from among the Hands, then took over as a collegiate head of the Faith from 1957 to 1963, (Judgment, Findings Para. 8; Goldberg Decl., Para. 22, 44, and Exhibits 9 and 10) and called for the election of the Universal House of Justice that would function without the Guardian presiding as its "sacred head" as

stipulated in the W&T, and would thus become the sole supreme authority in the Faith (Goldberg Decl., Para. 17). In 1960, Charles Mason Remey, proclaimed that he was the second Guardian on the basis that Shoghi Effendi had named him as the President of the International Bahá'í Council, an embryonic Universal House of Justice; the head of the Universal House of Justice being synonymous with the Guardian. (Marangella Decl., Para. 10; Goldberg Decl., Para. 44). The Custodians rejected Remey's explanation as to the manner of his appointment and expelled him from the Faith (Goldberg Decl., Para. 22). During the ministry of the Custodians, and then from the time their Universal House of Justice was elected in 1963 to the present, the NSA has attempted to silence anyone who believed in the continuing Guardianship by expulsion, labeling them as "Covenant-breakers" and ordering all other believers to shun them entirely (having no contact at all) or else they themselves will face ex-communication. By these tactics, the NSA has sought over the years to keep their members from hearing any dissenting views (Goldberg Decl., Para. 22, and 26-34).

After the Judgment was entered, the Remey NSA was dissolved. The Remey organization ceased to function in the United States after December, 1966 (Schlatter Decl., Para. 8, 10, and 18). However, Mason Remey continued to lead his faithful followers from his residence in Florence, Italy until his death in 1974 (Marangella Decl., Para11; Schlatter Decl., Para 10-11).

On November 12, 1969, Joel B. Marangella proclaimed that he was the third Guardian, duly appointed in writing by Mason Remey (Marangella Decl., Para. 12; Schlatter Decl., Para. 11), although Remey was then still alive at the age of 94 years. Marangella claimed Remey had abdicated the Guardianship when he told Marangella to activate the second IBC with Marangella as its President (Marangella Decl., Para. 11). Remey later attempted to retract his appointment of Marangella by requesting that Marangella return the records of the Second IBC, and by appointing someone else, Donald Harvey as the third Guardian. Marangella refused to honor Remey's request because Marangella considered himself to already have acceded to the Guardianship. Remey and the remnants of the Remey NSA's organization did not follow Marangella, but continued to obey Mason Remey until his death in 1974, when they followed Harvey as the third Guardian, and today they follow their fourth Guardian, Jacques Soghomonian.

Remey and Marangella had competing claims to the Guardianship. Some of Remey's followers remained with him, while others followed Marangella, including Respondent Franklin

D. Schlatter. Certainly those who follow Marangella are not successors of the Remey NSA. If anyone at all is its successor, it would have to be the remnants of the Remey NSA who followed Remey until his death.

The OBF have been using the word "Bahá'í" in their name for the past thirty-six years (Schlatter Decl. Para. 23-36). Their web sites have been operating with the knowledge of the NSA for nearly ten years (Marangella Decl., Para. 19; Goldberg Decl., Para. 19-22; Meyer Decl., Para. 9-10). The NSA now seeks to shut down the web sites and domains of the OBF, even though two of the domains are owned personally by one of the OBF believers who never was a so-called Remeyite (Goldberg Decl., Para. 7-9).

II. THIS COURT DOES NOT HAVE PERSONAL JURISDICTION OVER THE OBF RESPONDENTS

A. There was no service of process upon Respondent PNBC.

There has been no service of process on the PNBC, a New Mexico corporation. Marilyn Meyer is the Registered Agent, and the NSA has her correct address, yet the PNBC still has not been served (Meyer Decl., Para. 7.) This Court therefore does not have jurisdiction over the PNBC and it should be dismissed from the NSA's Motion. *Troxell v. Fedders of North America*, 160 F.3d 381 (7th Cir. 1998).The NSA will argue that FRCP Rule 65(d) requires merely notice of the proceedings. However, the PNBC was not a party to this case. It was organized in 1978, and it has a diverse membership and leadership not at all restricted to the remnants of the Remey NSA (Meyer Decl., Para. 8, 13-15; Schlatter Decl., Para. 37; Goldberg Decl., Para. 10).

B. The Court does not have personal jurisdiction over Respondents Joel B. Marangella and PNBC because they had no contacts with the forum.

The Respondent Joel B. Marangella was included in the NSA's Motion because it asserts that he was a "prominent member," "primary supporter," and "driving force" behind Remey, but fails to explain why then Marangella never was made a party to this lawsuit in the first place. The only facts to suggest any connection at all between Marangella and this lawsuit is a letter it attached as Exhibit I to the Motion, dated March 22, 1966 from Franklin D. Schlatter that purports to show copies sent to Marangella, yet he never was a leader or member of Remey's organization in the United States (Marangella Decl., Para. 15-16). Indeed, Marangella continuously (except for 4 months in 1954) and permanently resided outside of the United States from June, 1950 (Marangella Decl., Para. 5, 12-14, and 18) to the present and never directed or

had anything to do with this litigation (Marangella Decl., Para. 17; Schlatter Decl., Para. 7). The NSA knew or should have known that Marangella was not in the United States or a part of the Remey NSA since its own records would show that Marangella was not a believer in its organization in the United States since 1950, and that he was the President of France's NSA at the time he was expelled in 1960 (Marangella Decl., Para. 8).

Marangella was not subject to the jurisdiction of this Court when this case was pending, nor at any time thereafter, as he permanently resided in Europe until he moved to his present residence in Western Australia (Marangella Decl., Para. 18). Under the minimum contacts analysis of *International Shoe Co. v. State of Washington*, 326 U.S. 310 (1945), it is a denial of due process to subject a defendant to a lawsuit or a judgment when he has not had minimal contacts with the territory of the forum. There is no evidence proffered that Marangella acted anywhere within the United States, at the time of entry of the Judgment, or any time thereafter, or that he took any action to aid or abet, or act in concert with anyone in the United States to violate the Judgment. The NSA's entire case against Marangella is that he once was a supporter of Mason Remey and somehow that made him affiliated with the Remey NSA. Constitutional due process requires more than that.

The PNBC is named as a Respondent as the national governing body of the OBF in the United States. It did not exist at the time of the Judgment's entry, it was not a successor or continuation of the Remey NSA, and it had no contacts with this forum (Meyer Decl., Para. 8, 13-15). Therefore, there is no personal jurisdiction over the PNBC. *Central States v. Phencorp Reinsurance Co.*, 440 F.3d 870 (7th Cir. 2006). The Motion should be dismissed as against Marangella and the PNBC.

C. Respondents Joel B. Marangella and PNBC were not parties, successors to the parties, nor did they aid or abet, or act in active concert or participation with a party or successor.

The Court can have no personal jurisdiction over Respondents Joel B. Marangella and PNBC because they have had no contacts with this forum unless it can be shown under FRCP 65(d) that they were successors of the Remey NSA or they otherwise aided, abetted or acted in concert with the Remey NSA to carry out the proscribed conduct. *Rockwell Graphics Systems, Inc. v. Dev Industries, Inc.*, 91 F.3d 914 (7th Cir. 1996).

All of the cases cited by the NSA regarding successors involved parties engaged in commerce rather than religious organizations, none of them involved enforcement of a Judgment

so remote in time as in this case, and none of the situations involved parties that existed wholly independent of the original party, as is the case of the OBF Respondents.

The first case cited is *Chicago Tribune Co. v. U.S. Dept. of Health and Human Services*, 1999 WL 299875 (N.D.Ill.,1999). The Tribune sought disclosure of documents under the Freedom of Information Act that were in the custody of the government's contractor. Using the functional relationship test, the Court found that the interests of the contractor were so closely aligned with the interests of the defendant that it would be bound by the judgment even though it could not have been made a party. In *Indianapolis Colts, Inc. v. Metropolitan Baltimore Football Club LP*, 34 F.3d 410 (7th Cir 1994), the NFL and Indianopolis Colts obtained judgment against Canadian Football League and its new Baltimore Colts franchise, created specifically to replace the NFL Colts team that had moved to Indianapolis. The Court found the place of injury was Indiana because there were cable broadcasts into Indiana, and the Plaintiff's use of the trademark was almost exclusively in Indiana. These cases lend little support that the OBF Respondents are properly before this Court. The OBF has no contractual privity or relationship, nor was an injury alleged to have occurred in this District.

The NSA also cites *Tice v. American Airlines, Inc.*, 162 F.3d 966 (7th Cir. 1998), a dispute over whether retiring pilots could take a flight officer position. The airline had already litigated the issue against new hires who were refused the position because they were ineligible to train as pilots. The pilots argued they were in a different position from the new hires and they should have their own day in court. American argued claim preclusion. The functional relationship analysis used by the Court found that the nonparty pilots were not precluded because their claims were not litigated or represented by the prior litigants:

> "[I]n Anglo-American jurisprudence . . . one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process. This rule is part of our deep-rooted historic tradition that everyone should have his own day in court. As a consequence, a judgment or decree among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to those proceedings."

162 F.3d at 972 quoting *Richards v. Jefferson County*, 517 U.S. 793, 798 116 S.Ct. 1761, 135 L.Ed.2d 76 (1996).

The findings of the 1966 Judgment have little relevance to the OBF Respondents. The actions of the OBF Respondents are completely different from the actions of the Remey NSA,

and none of the Judgment's factual findings apply to them. There is no functional relationship between the Remey NSA and the OBF Respondents.

The NSA argues that the Remey NSA's dissolution long ago does not protect the OBF Respondents from liability under the Judgment under the Supreme Court decision in *Walling v. James V. Reuter, Inc*. 64 S. Ct. 826, 321 U.S. 671 (1944). An injunction restraining Fair Labor Standards Act violations was entered against a corporate family business. The defendant corporation was dissolved and then the business continued on as before by individual members of the family. Of course, mere dissolution of the defendant did not prevent the Court from enforcing the judgment against the family members who once acted under the defendant corporation. In this case, the facts are the OBF is not the same "business" as the Remey NSA: one followed Remey, the other followed Marangella with different leaders and members.

The NSA posits a number of cases involving business persons engaged in various schemes to try to circumvent court orders by acting through successor entities, and then carrying out the exact same conduct enjoined by the order: *Hexacomb Corp. v. GTW Enterprises, Inc*. 1994 WL 171533 (N.D.Ill.,1994) (nonparty took over defendant's entire machine operation, utilizing the same parts and hiring the same employees the defendant used); *Panther Pumps & Equipment Co. v. Hydrocraft, Inc.*, 566 F.2d 8, 12 (7th Cir.1977). *cert. denied*, 435 U.S. 1013 (1978) (principal behind defendant created a new corporation, transferred assets, and worked with the new corporation as part of a scheme to violate the injunction with impunity); *Rockwell Graphics Systems, Inc. v. Dev Industries, Inc.*, 91 F.3d 914 (7th Cir. 1996) (scheme by president of the defendant to form a new corporation, have that corporation purchase the assets of the defendant at a bankruptcy auction, hire the same employees, and basically resume the defendant's business); *Chanel Indus. v. Pierre Marche, Inc.*, 199 F. Supp. 748 (E.D. Mo. 1961) (a new corporation, including the officers and employees of defendant went into business 7 days after the judgment was entered to do exactly what the injunction had prohibited the former corporation from doing); *Interstate Commerce Commission v. Rio Grande Growers Cooperative*, 564 F.2d 848 (9th Cir. 1977) (president of defendant used a different corporation with identical corporate charter to carry out exact acts prohibited by the judgment).

The NSA simply fails to show how these cases relate to the OBF Respondents. The Remey NSA obeyed the court injunction and let its religious organization simply die. (Schlatter Decl., Para. 8-10). Years later, the OBF Respondents began practicing their religion, an

organization with a competing claim against the remnants of the Remey NSA, a wholly independent organization, with a different leader and approach, carrying out its affairs differently than the Remey NSA, with no transfer of assets from the Remey NSA (Meyer Decl., Para. 13-18). Indeed the Remey NSA and many of its members never did accept Marangella's claim to the Guardianship (Marangella Decl., Para. 17). There was no scheme to avoid the injunction. The OBF's membership and leadership came from diverse sources and not just the Remey NSA. (Meyer Decl., Para. 13-14 and 18; Schlatter Decl, Para. 37).

Under the cases formulating the functional relationship test for whether a person or entity is a successor, the key question is whether the OBF Respondents are independent of the Remey NSA. In order to be deemed a successor, there must be a "substantial continuity of identity in the business enterprise" or in the identity of the work force. *Howard Johnson Co. v. Detroit Local Joint Executive Bd.*, 417 U.S. 249, 263-64 (1974). A successor continues to carry on the predecessor business "without interruption or substantial changes in method of operation, employee complement, or supervisory personnel." *Golden State Bottling Co.v N.L.R.B.*, 414 U.S. 168, 182 (1973). In the instant case, the OBF Respondents were acting independent of the Remey NSA, with a different operation and leader, with different conduct, so that it would be unjust to hold the OBF Respondents to the Judgment: "Rule 65(d) does not grant a court power so broad 'as to make punishable the conduct of persons who act independently and whose rights have not been adjudged according to law.' *Heyman v. Kline*, 444 F.2d 65 at 66-67 (2d Cir. 1971) quoting *Regal Knitwear Co. v. NLRB*, 324 U.S. 9 at 13 (1945). The OBF is an organization controlled worldwide by Joel B. Marangella, and in the United States by the PNBC (Marangella Decl., Para. 14; Meyer Decl., Para. 5). Except for a few beliefs held in common, the OBF has no ties with the Remey NSA, which was of course controlled by Mason Remey, in opposition for a time to Marangella's claim to the Guardianship.

By reviewing the findings and conclusions in the Judgment that the NSA seeks to enforce against the OBF Respondents, it becomes clear how the OBF Respondents are complete strangers to this case: the Judgment's Findings of Fact, at Paragraph 22, state the Remey NSA embarked upon a program to imitate the structure of the NSA, including using "National Spiritual Assembly of the Bahá'ís of the United States" in its name. The OBF does not. (Meyer Decl., Para. 16-18). The Judgment findings state, at Paragraph 24, that the Remey NSA circulated a publication to the NSA's members, using the NSA's lists, that appeared as if it had

come from the NSA. The OBF has never done this. Even as the NSA's own affidavit attests, the OBF web sites distinguish themselves from the NSA's sites (Declaration of Christopher Dolan, Exhibit C to the NSA's Motion, Para. 21, 24; See also Goldberg Decl., Para. 37-42, Meyer Decl., Para. 16-17).

The Judgment finds, at Paragraph 27, the Remey NSA used letterhead to imply it was the NSA, using the qualifier words "Under the Hereditary Guardianship" in smaller type. The Judgment further finds, at Paragraph 29, that an affiliate of the Remey NSA published advertisements with the image of its House of Worship implying that it was a Spiritual Assembly under the NSA, and at Paragraph 30 of the findings, that the Remey NSA published telephone directory listings which implied that its Spiritual Assemblies were affiliated with the NSA. The OBF advertisements and telephone listings clearly identify the OBF as an entity separate from the NSA (Schlatter, Decl., Para. 26-33); (Meyer Decl., Para. 16-17, 21).

Paragraphs 31 and 32 of the Judgment's findings of fact state that Remey NSA's affiliates placed an advertisement regarding Mason Remey's predictions for an impending world catastrophe and this was picked up by newspapers that reported the NSA as taking steps to prepare for this catastrophe. At Paragraph 34, it finds there were several cases of actual confusion by newspaper media between the NSA and the Remey NSA. The NSA proffers no facts to implicate the OBF in these types of confusion, or any confusion at all.

None of the factual findings predicating entry of the Judgment against the Remey NSA have any application whatsoever to the web sites operated by the OBF and its members. If the NSA believes it has a cause of action against the OBF because of the content of OBF web sites, the NSA is free to bring an appropriate lawsuit in the appropriate forum and allow the OBF to have its day in court.

D. This Court has no jurisdiction over Respondent Franklin D. Schlatter, although he was an officer of the Remey NSA, because the NSA has not shown he was acting on behalf of the Remey NSA or its successors.

There are no facts proffered by the NSA to show that Franklin D. Schlatter has acted on behalf of the Remey NSA since the end of 1966. It points out merely that Schlatter was an officer of the Remey NSA. Schlatter split with Remey and its organization when he accepted Marangella. Schlatter is not now part of the PNBC leadership (Schlatter Decl., Para. 16; Meyer Decl., Para. 12). Although he is the author of a number of the articles on the PNBC's web site,

control over the content of the PNBC rests exclusively with the PNBC, the majority of whose directors were not affiliated at all with the Remey NSA (Meyer Decl., Para. 13). There is no evidence that Schlatter has engaged in any actions directed to this District that would otherwise subject him to the jurisdiction of the Court. Since there is no evidence he acted on behalf of the Remey NSA or its successors, there is no basis for this Court to exercise jurisdiction over him. *People v. Operation Rescue National,* 80 F.3D 64 (2d Cir. 1996) (a court cannot lawfully enjoin the world at large; a person who ceases to act in a designated capacity is no longer bound by order).

III. Even if the Court has jurisdiction, the Judgment is not enforceable against the OBF Respondents.

A. <u>The Judgment violates the Establishment Clause of the First Amendment to the extent that it purports to decide a religious controversy as opposed to a neutral determination of property rights</u>.

In 1969, after entry of the Judgment in this case, the U.S. Supreme Court decided the case of *Presbyterian Church v Hull Church*, 393 U.S. 440, 89 S. Ct. 601, 21 L.Ed.2d 658 (1969) which established that the Courts may not determine property disputes by deciding the question of whether a party has properly followed church doctrine:

> "In this country the full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property, and which does not infringe personal rights, is conceded to all. The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect. . . .

Presbyterian Church v Hull Church, 393 U.S. 440 at 446 (1969) quoting *Watson v. Jones*, 13 Wall. 679 at 728-729 (1872).

Under existing law, the following portions of the Judgment may not be enforced or put into effect: 1) Paragraph 6 of the Findings of Fact stating the Bahá'í Faith has no separate denominations; 2) Paragraph 8 of the Findings of Fact declaring Shoghi Effendi was the only Guardian of the Faith, that there is no longer a Guardian, that the procedures followed by the Custodians and the succession of authority from Shoghi Effendi to the Universal House of Justice was in full accordance with the controlling documents and sacred writings and teachings of the Faith; 3) Paragraph 21 of the Findings of Fact declaring Mason Remey's claim to the

Guardianship as “unilateral”; and 4) Paragraph 12 of the Conclusions of Law asserting “there is only one Bahá’í Faith.”

The Court did not need to decide these questions of religious doctrine in order to reach the neutral result of deciding the property rights between the NSA and the Remey NSA. See *The Second International Baha'i Council v. Chase*, 326 Mont. 41, 106 P.3d 1168 (2005). Certainly, the OBF Respondents cannot be constitutionally bound to findings and conclusions of law which run contrary to their religious belief.

B. Enforcement of the Judgment violates the Free Exercise Clause and Free Speech Clause of the First Amendment if it stifles legitimate expression of opinion or religious practices.

The OBF Respondent’s web sites set forth teachings of their third Guardian, Joel B. Marangella. In addition, they contain criticism of the NSA and its organization, and explain the OBF’s viewpoint of the historical facts and conclusions surrounding the transfer of authority after the death of Shoghi Effendi (Goldberg Decl., Para. 22, 41-42; See also, Declaration of Christopher Nolan, Exhibit C to the NSA's Motion at Para. 24). Without setting forth any facts to demonstrate a likelihood of confusion with the OBF's web sites, for the Court to order their closure would stifle the OBF's right to express their opinions and views about the NSA and the Bahá’í Revelation. It would also interfere with the OBF Respondent’s religious practices, such as an order preventing them from using the sacred symbols and letters of the Greatest Name (Schlatter Decl., Para. 41-42; Goldberg Decl., Para. 50-53), something akin to ordering a Christian Church from using the Cross symbol. The Court cannot enforce this. *Church of Lukumi Babalu Aye, Inc v. City of Hialeah*, 508 U.S. 520, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993).

C. The NSA may not equitably enforce the Judgment against the OBF Respondents because the doctrines of laches and acquiescence preclude relief.

The NSA has been aware that the OBF used "Bahá’í" in its name since 1970 (Schlatter Decl., Para. 23-34). Yet the NSA took no action directly or to enforce the Judgment until now and the OBF Respondents relied upon the NSA's inaction for a period of 36 years (Schlatter Decl. Para.22-25). The NSA has circulated a document entitled "Mason Remey and Those Who Followed Him", indicating the NSA knew of the Orthodox Bahá’í's advertisements using its alleged Bahá’í trademarks as early as 1997 and probably sooner (Schlatter Decl., Para. 34). In as early as January, 1997, the NSA or its representatives attempted to get the Yahoo! Directory to de-list OBF web sites from its directory of Bahá’í sites (Schlatter Decl., Para. 39-40). The NSA

also has a web site that invites the public to use its image of the Greatest Name on web sites (Goldberg Decl., Para53). While the NSA stood by, the OBF taught its Faith to others and the vast majority of its members joined during that period. Thus, their delay acted to the OBF's detriment.

The equitable doctrine of laches states that those who sleep on their rights lose their rights. Where there has been an unreasonable lack of diligence by a party and prejudice to another arising from the delay, laches will defeat the claim. *Hot Wax, Inc. v. Turtle Wax, Inc*., 191 F.3d 813, (7th Cir. 1999) (approximately 15 year delay); *Lewis Invisible Stitch Mach Co. v Popper*, 33 F. Supp. 812 (E.D.N.Y. 1940)(4 year delay). A similar doctrine, acquiescence, provides that when a trademark owner has been found to have conveyed its implied consent, by affirmative word or deed, to an alleged infringement, the trademark owner is deprived of its remedy. *TMT North America, Inc. v. Magic Touch GmbH*, 124 F.3d 876 (7th Cir. 1997). The NSA knew about the conduct that it now complains about for a period of at thirty-six years before it sought to enforce the Judgment but allowed it. (Schlatter Decl., Para. 23-35). Relief is now barred by laches and acquiescence.

D. The NSA may not enforce the Judgment against the OBF Respondents because the content of the OBF Respondents' web sites is allowable under the doctrine of fair use.

The OBF web sites teach its religion to the public, with a significant portion of its writings devoted to criticism of the NSA and comparisons between the OBF and NSA's organization and structure. There is no effort made to confuse the public about the origin of the web sites, and such confusion is unlikely because of the sharp criticism the OBF levels against the NSA's organization for what OBF considers a usurpation of religious authority by the leadership of that organization (Goldberg Decl., Para. 41-42).

The fair use doctrine asserts the contested term or mark is used in a generic or nominative sense (using the word most reasonably available to describe a particular good or service) rather than as a trademark to identify the source of a good or service. *Playboy Enterprises, Inc. v. Terri Welles, Inc.*, 78 F. Supp. 2d 1066 (S.D. Cal. 1999), *aff'd*, 279 F.3d 796 (9th Cir. 2002) (truthful identification of Terri Welles as 1981 Playmate of the Year was fair use); *Brach van Houten Holding v. Save Brach's Coalition*, 856 F. Supp. 472 (ND Ill 1994) (use of company name, but not its logo, in materials critical of Brach's management does not create confusion that the source of the materials is from Brach's).

The OBF Respondents respectfully submit that the term "Bahá'í" used in its name and writings, use of the sacred image and variations of the "Greatest Name" in a non-commercial manner (Meyer Decl., Para. 19-20), and the use of the terms in criticism and comments on its web sites, are generic to describe a set of religious beliefs and not any one particular organization. The NSA argues that it is the one and only Bahá'í Faith and there can not be any other organization of Bahá'ís. Although it is undeniable that the NSA represents by far the largest organization of Bahá'ís, there are at least nine organizations now existing and operating at some level that practice a denomination of the "Bahá'í" religion (Goldberg Decl., Para. 51; Schlatter Decl., Para. 18-21). One is not a Bahá'í because of which denomination one belongs to, one is a Bahá'í because of the system of set of beliefs and doctrines one holds. The NSA's own web site defines a Bahá'í in this manner (Schlatter Decl., Para. 43).

This is not the first time a major organization of believers has attempted to prevent dissenters from establishing a separate denomination. Holding that even an incontestable trademark is subject to the fair use defense that a term is generic or descriptive, the Court in *General Conference Corp. v. Seventh-Day Adventist Congregational Church*, 887 F.2d 228 (9th Cir.1989) stated that a generic term tells you what the product is rather than the source from which it came. See also *McDaniel v. Sohrab*, 27 N.Y.S.2d 525 (1941), *aff'd* 262 A.D. 838, 29 N.Y.S.2d 509 (App.Div.1941), another case brought by the NSA's members, in which the Court held:

> The plaintiffs [members of the NSA] have no right to a monopoly of the name of a religion. The defendants, who purport to be members of the same religion, have an equal right to use the name of the religion in connection with their own meetings, lectures, classes and other activities. No facts are alleged in the complaint to indicate that the defendants have been guilty of any act intended or calculated to deceive the public into believing that their meetings, lectures or book shop are identified with or affiliated with the meetings, lectures, etc., and book shop of the plaintiffs. Defendants have the absolute right to practice Baha'ism [Sic], to conduct meetings, collect funds and sell literature in connection therewith, and to conduct a book shop under the title 'Bahai [Sic] Book Shop.'

27 N.Y.S. 2d at 527.

The case closest to the situation between the NSA and the OBF Respondents is found in *Christian Science Board of Directors of First Church of Christ v. Evans*, 520 A.2d 1347, 105 N.J. 297 (1987). The Board of Directors of Mother Church, founded by Christian Scientist founder Mary Baker Eddy, sued a branch church that was formerly associated with the Mother

Church to enjoin it from using the words "Christian Science," alleging trademark infringement. The Evans Court ruled:

> The fact that defendants seek here to use the name "Christian Science Church" now, after plaintiffs have used the phrase with little competition for a long period, makes no difference. Plaintiffs simply cannot appropriate, from the public domain, the common name of a religion and somehow gain an exclusive right to its use and the right to prevent others from using it. This principle is fundamental to the law of trademarks, the body of law under which plaintiffs seek relief.
>
> Generic names are regarded by the law as free for all to use. They are in the public domain. To grant an exclusive right to one firm of use of the generic name of a product would be equivalent to creating a monopoly in that particular product, something that the trademark laws were never intended to accomplish.

105 N.J. 297 at 306[1]. See also, *Cebu Association of California v. Santo Nino de Cebu USA*, 95 Cal.App.3d 129, 157 Cal. Rptr. 102 (1st Dist. 1979).

Not only are the OBF Respondents using Bahá'í, and other variants of the Greatest Name, in a generic sense, but they are also using it for comparative advertising purposes, another fair use because it is unlikely that criticism and comparisons would cause confusion. *Smith v. Chanel*, 402 F.2d 562 (9th Cir.1968). Thus, enforcement of the Judgment is subject to the OBF Respondents' fair use defense.

F. The NSA may not equitably enforce the Judgment against the OBF Respondents because the NSA is guilty of unclean hands with respect to its Motion for Rule to Show Cause.

Where a party seeking equitable relief is guilty of conduct involving fraud, deceit, unconscionability, or bad faith related to the matter at issue and to the detriment of the other party, the doctrine of unclean hands precludes relief. *Estate of John Lennon v. Screen Creations, Ltd*., 939 F. Supp. 287 (S.D.N.Y. 1996). The NSA's effort to enforce a dormant judgment in order to shut down web sites belonging to persons not directly named or otherwise before this Court, and to preclude them from practicing their religion, is just the latest attempt by the NSA to harass its critics in an effort to silence them (Goldberg Decl., Para. 23-34) and to keep their own members ignorant of the positions espoused by the NSA's critics. The doctrine of unclean

[1] The Evans Court specifically distinguished the Judgment entered in this case because the Remey NSA threatened the good will of the NSA by using confusingly similar marks. 105 N.J. at 304-305. That is something the OBF Respondents have not done because they use "Councils" instead of "Spiritual Assemblies and they use "Orthodox" in their name.

hands compels the Court to decline the NSA's request that it participate in further acts against critics of the NSA.

IV Conclusion

The OBF Respondents wish to simply practice and teach their religion on their web sites and publications. They use their name, "Orthodox Bahá'í Faith", and other variants of the sacred "Greatest Name" strictly in the generic sense to identify, compare, and practice their denomination and teachings, a fair use under applicable law. The Judgment, long dormant, does not apply to the OBF Respondents or their conduct as none of its findings of fact have the remotest applicability to the activities of the OBF Respondents. There has been no service of process upon the PNBC. Joel B. Marangella, has been outside of the jurisdiction of this Court since 1950. None of the OBF Respondents have a functional relationship with the Remey NSA, the defunct corporation that is the only party against whom the Judgment was entered. Thus, the OBF Respondents are independent, most of its believers have had nothing to do with the NSA or the Remey NSA, and so there is no personal jurisdiction over them. Even if the Court had jurisdiction, the First Amendment limits it from enforcing the Judgment if it would have the effect of deciding purely religious controversies, or would inhibit the free exercise of the Respondents' religion. Having knowingly failed to enforce the Judgment for 36 years, and having embarked upon a campaign to silence critics, the NSA acquiesced to the uses and the doctrines of laches and unclean hands preclude relief. Even if the Judgment were enforceable against the Respondents, their use of the alleged trademarks is fair use under the law, as the terms generically describe their denomination of religious beliefs and to compare their beliefs with the NSA organization's beliefs, so that the NSA's Motion for Rule to Show Cause should be denied.

Respectfully submitted,
/s/ Jeffrey A. Goldberg
Goldberg Law Firm
Attorney for OBF Respondents
PO Box 254
Albuquerque, NM 87103-0254
Tel: 505-247-9988 Fax: 505-247-2784

Marshall N. Dickler and James Slowikowski,
Local Counsel for OBF Respondents
Dickler, Kahn, Slowikowski & Zavell, Ltd.
85 West Algonquin Road, Suite 420
Arlington Heights, IL 60005
Tel: 847-593-5595 Fax: 847-593-5632