

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

JOHN DOE, et al.,

Plaintiffs,

v.

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

Defendants.

Case No. 2:08 CV 575

Judge Frost

Magistrate Judge King

**PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR
RECONSIDERATION OF OPINION AND ORDER ISSUED JUNE 1, 2010 AND
EXPEDITED MOTION FOR JUDGMENT OR EVIDENTIARY INFERENCES BASED
ON DEFENDANT'S CONTINUED DISCOVERY VIOLATIONS**

I. INTRODUCTION

In asking this Court to grant his Motion for Reconsideration, Mr. Hamilton ultimately ends up proving what he seeks to refute—that sanctions were and continue to be appropriate in this case. Not only does Mr. Hamilton fail to provide any legitimate basis for granting his Motion, but he instead presents evidence that, even when faced with sanctions for their improper conduct, he and Mr. Freshwater have continued to blatantly disregard the discovery rules, the Court's discovery orders, and the Court's order that they pay the Dennises' discovery-related attorney fees and costs. Among the continuing violations are the following:

1. Mr. Hamilton's failure to turn over his billing records, which he claims were destroyed in a flood. This assertion is patently false, despite Mr. Hamilton's sworn statement to the contrary.

2. Mr. Freshwater's continued failure to produce materials displayed in his classroom during the 2007-2008 school year, including the vast majority of the five armloads of materials that he received from Superintendent Stephen Short, as well as other materials that he himself took from the classroom.
3. Mr. Freshwater's failure to produce additional materials about which the Dennises just learned, including various audio recordings that Mr. Freshwater made (in some instances, without the knowledge of the party being recorded) and relevant emails written by Mr. Freshwater and Mr. Hamilton.
4. Mr. Hamilton's and Mr. Freshwater's failure to pay the Dennises' attorney fees and costs associated with discovery violations as ordered by the Court on June 1, 2010. Although Mr. Freshwater attempted to convey an interest in his farm as payment, the instrument by which he sought to make the conveyance is invalid and even if it were legally binding, his property is already subject to claims by prior creditors. For his part, Mr. Hamilton has made no effort to help his client comply with the Court's order or to pay any of the fees and costs himself.

Because the orders and monetary sanctions the Court has imposed have not deterred Mr. Hamilton and Mr. Freshwater, the Dennises respectfully request that the Court enter additional sanctions in the form of judgment in the Dennises' favor or, in the alternative, evidentiary inferences that all materials that Mr. Freshwater took from his classroom after the 2007-2008 school year that he has not produced to the Dennises be deemed religious items with no secular purpose and that Mr. Freshwater's May 2008 affidavits were not prepared in May 2008 as Mr. Freshwater and Mr. Hamilton contend.

II. ARGUMENT

The Sixth Circuit has set forth three circumstances under which courts may reconsider interlocutory orders: (1) when there is an “intervening change of controlling law; (2) new evidence available; or (3) a need to correct a clear error or prevent manifest injustice.”

Louisville/Jefferson Co. Metro Gov’t v. Hotels.com, L.P., 590 F.3d 381, 389 (6th Cir. 2009) (internal quotation marks omitted). A motion for reconsideration is “not intended to re-litigate issues previously considered by the Court or to present evidence that could have been raised earlier.” *Ne. Ohio Coal. for Homeless v. Brunner*, 652 F. Supp. 2d 871, 877 (S.D. Ohio 2009). Mr. Hamilton does not identify which of these three circumstances he believes should serve as the basis for his Motion, nor can he, because none of them exists in this case.

A. Mr. Hamilton Has Not Enumerated Any Legitimate Reason For Granting His Motion For Reconsideration.

Mr. Hamilton does not argue that a change of law has occurred, thus rendering the first circumstance for entertaining a motion for reconsideration inapplicable here. He also does not explicitly argue that new evidence has become available, but to the extent that he relies on this justification in bringing his Motion, that reliance is misplaced. The Home Depot and Best Buy receipts that Mr. Hamilton asserts prove that a flood ravaged his office, leaving a “water soaked computer” in its wake, are dated January 1, April 17, and February 3, 2009. (*See* Def.’s Mot. for Recons. (Doc. No. 107), Ex. 7 ¶¶ 4, 7-8 (Hamilton June 15, 2010 Aff.) (hereinafter “Hamilton June 15, 2010 Aff.”); *id.*, Exs. 2 & 3 (Home Depot receipts).) Mr. Hamilton therefore had more than ample opportunity to present these receipts to the Court—receipts which, even if timely offered in defense of their actions, nevertheless fail to explain Mr. Hamilton’s and Mr. Freshwater’s noncompliance with the discovery rules. The fact that Mr. Hamilton decided to wait until after the Court imposed sanctions to bring these receipts to light does not somehow

transform these documents into “new evidence” that can form the basis of a motion for reconsideration.

And even if the Walmart invoice and receipt and the photograph of the nail that Mr. Hamilton has attached as exhibits to his Motion somehow amount to new evidence (which they do not), they only amount to new evidence of Mr. Hamilton’s excuse for not showing up at the Court’s sanctions hearing on May 26, 2010, not new evidence related in any way to Mr. Hamilton’s and Mr. Freshwater’s discovery violations. (*See* Def.’s Mot. for Recons., Exs. 4 & 5 (Walmart receipts); *id.*, Ex. 6 (picture of nail).) Mr. Hamilton therefore, without new evidence, cannot rely on the second circumstance to save his Motion for reconsideration from defeat.

The third circumstance in which a motion for reconsideration is proper similarly does not help Mr. Hamilton and Mr. Freshwater. First, Mr. Hamilton points to no clear error in the Court’s Opinion and Order that would require correction. Second, he cannot credibly argue that the sanctions against him and Mr. Freshwater constitute a manifest injustice while simultaneously continuing to violate the discovery rules.

B. Mr. Freshwater And His Former Counsel Continue To Violate The Discovery Rules And This Court’s Orders By Refusing To Produce Responsive Documents.

1. Mr. Hamilton’s Assertions About His Billing Records Do Not Add Up.

In the affidavit attached as an exhibit to his Motion, Mr. Hamilton maintains that the “only evidence of billing records or anything relevant to the drafting or preparation” of Mr. Freshwater’s 15 affidavits “is limited because the gray colored Toshiba laptop computer used by affiant to . . . work on John Freshwater’s affidavits was completely destroyed by a water pipe burst that occurred at affiant’s office sometime between January 13, 2009 and January 16, 2009.” (Hamilton June 15, 2010 Aff. ¶¶ 3, 8) The proof that he billed Mr. Freshwater for assisting in

the preparation of these affidavits, Mr. Hamilton claims, is Mr. Freshwater's payment of \$10,000 on November 12 and 13, 2008. (*Id.* ¶¶ 2, 8)

But when Mr. Hamilton swore to these facts in his affidavit, he neglected to mention that he produced all of his billing records from April 17, 2008 through February 22, 2009 to counsel for the Mount Vernon City School Board of Education on *March 17, 2009*—*two months* after the alleged flood in his office occurred. (*See* Billing Records of R. Kelly Hamilton (filed under seal as "Exhibit A") (cover email dated March 17, 2009).) The bills he produced to the School Board *two months* after the flood were for all periods *before* the flood, for the period *after* the flood but *before* he bought his new computer on February 3, 2009 (*see* Hamilton June 15, 2010 Aff. ¶ 7),¹ and for the period *after* he claims to have the new computer in place. What is more, he produced these records to the School Board electronically, complete with what appear to be computer-generated redactions, supplying further evidence that these records survived the flood.

Even if Mr. Hamilton failed to retain copies of these billing records after he sent them to the School Board, he could have contacted his internet provider to try to retrieve the electronic copy that he sent to the Board, he could have requested that the Board make copies of the records he had provided, or he could have asked the Board to supply copies to the Dennises. He opted to do none of these things, choosing instead to insist that the records no longer exist, and forcing the Dennises to subpoena the records from the School Board and seek the Court's permission to have the Board release the records. (*See* Pls.' Expedited Mot. to Permit the Disclosure of R. Kelly Hamilton's Billing Records Related to the Representation of Freshwater (Doc. No. 109);

¹ Mr. Hamilton issued a bill for services rendered between January 3, 2009 and January 28, 2009 on February 2, 2009. The billing statement contains a clear typographical error, however, in that it says "February 2, 2008" at the top, when it should say "February 2, 2009."

Order Permitting the Disclosure of R. Kelly Hamilton's Billing Records Related to the Representation of Freshwater (Doc. No. 110).)

The billing records, moreover, confirm the Dennises' longstanding suspicions that Mr. Freshwater's 15 affidavits were not executed between May 23 to May 25, 2008, as Mr. Hamilton maintains. In fact, no entries involving affidavits or anything approximating affidavit-related activities appear in Mr. Hamilton's billing records during the entire month of May 2008. (*See* Billing Records of R. Kelly Hamilton.) Given Mr. Hamilton's refusal to turn over his billing records and his untruthful representations about the existence of those records, the Court should not reconsider its decision to impose sanctions. Rather, the Court should impose further sanctions as set forth below.

2. Mr. Freshwater Has Not Been Forthcoming When It Comes To The "Five Armloads" Of Materials He Should Have Produced To The Dennises.

Mr. Freshwater continues to flatly ignore his discovery obligations. Recently uncovered information regarding the "five armloads" of materials highlights Mr. Freshwater's discovery gamesmanship. Having told varying tales in the past about the five armloads, Mr. Freshwater's current version of the story is that he threw away just a handful of letters from the five armloads of classroom materials given to him by Superintendent Stephen Short in the summer of 2008. (Op. and Order Granting Pls.' Mot. for Sanctions (Doc. No. 106) at 13; Freshwater May 28, 2010 Aff. ¶ 8 (attached as "Exhibit B).) Other than that handful of pitched letters, Mr. Freshwater claims that he gave "all" of the five armloads of material to his counsel so the Dennises could review them. (Freshwater May 28, 2010 Aff. ¶ 8.)

This statement, which appears in Mr. Freshwater's sworn affidavit required by this Court's Order, distorts the truth. For instance, Superintendent Short recently testified at Mr. Freshwater's termination hearing that most of the materials that Mr. Freshwater produced to the

Dennises' counsel as the five armloads do not match Mr. Short's recollection or written inventory of the five armloads of materials that he gave Mr. Freshwater in August 2008. (Decl. of Stephen Short ¶¶ 3-5 (attached as "Exhibit C").)² For instance, Mr. Freshwater represented to the Court and to the Dennises that the poster depicting former President George W. Bush praying with his cabinet, as well as various skulls, and a large piece of wood, were included in the five armloads of materials he received from Mr. Short, but Mr. Short's inventory and his recollection of what he provided to Mr. Freshwater show otherwise. (*Id.* ¶ 4.) If these items were not among the five armloads, then Mr. Freshwater's claim in his affidavit that he took "all of the items back to Mount Vernon Middle School, retaining nothing" for himself rings hollow. (Freshwater May 28, 2010 Aff. ¶ 9.) If Mr. Short did not provide Mr. Freshwater with, for example, the Bush poster, then Mr. Freshwater himself likely took and kept it, and possibly other responsive items (including the other religious posters), from his classroom.

As for the items actually contained in the five armloads from Mr. Short, Mr. Freshwater has yet to produce most of what is contained in Mr. Short's inventory, including, among other things, the Bible called "God's Game Plan—Athlete's Bible," the Bible Mr. Freshwater kept on his classroom desk, and a booklet entitled *Anabolic Outlaw*. (*See* Decl. of Stephen Short, Ex. A (inventory).) Interestingly, despite failing to produce "God's Game Plan – Athlete's Bible" to the Dennises for two years, despite this Court's explicit order to produce all relevant materials in his possession (Op. and Order Granting Pls.' Mot. for Sanctions at 18), and despite Mr. Freshwater's affidavit avowing that he had produced all materials to the Dennises (Freshwater May 28, 2010 Aff. ¶¶ 7-9), Mr. Freshwater brought what appears to be this very Bible with him to the termination hearing on June 22, 2010 (Decl. of Stephen Short ¶ 6).

² The Court reporter from the state termination hearing was unable to transcribe Mr. Short's recent testimony by today's date and thus Mr. Short has executed the attached declaration.

3. Mr. Freshwater Has Failed To Produce Relevant Audio Recordings.

The Dennises also recently learned of the existence of other items that Mr. Freshwater should have produced to them during the discovery process. For example, during the termination hearing on June 4, 2010, Mr. Hamilton introduced an audio-recording and written transcript of taped conversations Mr. Freshwater had with Steve Hughes, a former Board Member of the Mount Vernon City School District, who was unaware that his conversation with Mr. Freshwater was being recorded. (*In the Matter of the Termination of Employment of John Freshwater*, John Freshwater Test., 06/04/2010, at 5670, 5808-10 (attached as “Exhibit D”).) Mr. Freshwater made these clandestine recordings sometime in January 2010, and despite their direct responsiveness to the Dennises’ standing discovery requests (*see* Pls.’ Mot. to Compel (Doc. No. 67) at 2) and this Court’s orders enforcing those requests (*see* Op. and Order Granting Pls.’ Mot. for Sanctions), they were never produced.

The Dennises have received the transcript of Mr. Freshwater’s conversation with Mr. Hughes from attorney Sandra Macintosh, but still do not have the actual audio recordings. And Mr. Hamilton now has admitted to the existence of some number of additional audiotapes relevant to this case. (*Freshwater v. Mount Vernon City Sch. Dist. Bd. of Educ.*, No. 2:09-cv-464 (Doc. No. 56), Ex. 3 (Moore Declaration) (attorney Sarah Moore, representative of several members of the Mount Vernon City School District Board of Education, declaring that Mr. Hamilton explained on June 21, 2010 “that he had some of the audio recordings requested in his possession, but not all of them”).) The Dennises have no way of knowing how many audio recordings still have not been produced, who Mr. Freshwater and/or Mr. Hamilton recorded, when the recordings were made, or the substance of the recordings. With trial less than a month away, Mr. Freshwater’s hide-the-ball tactics are wholly improper.

4. Mr. Freshwater Has Not Produced Responsive Emails.

Also contrary to his affidavit attesting to the fact that he has produced all responsive documents in his possession, Mr. Freshwater has failed to turn over various emails. Based on information and belief from conversations with counsel for several members of the Mount Vernon City School District Board of Education, counsel for the Dennises understand that after a motion to compel was filed in the parallel case of *Freshwater v. Mount Vernon City Sch. Dist. Bd. of Educ.*, No. 2:09-cv-464, Mr. Hamilton produced to the School Board defendants several emails that are directly relevant to the instant case. The Dennises, through counsel, issued a public records request for these documents but have not received them to date. (*See* June 29, 2010 Email to Sarah Moore (attached at “Exhibit E”).) These emails, based on information and belief, include exchanges, relevant to this case between Mr. Freshwater and Evy Oxenford, between Mr. Freshwater and Darcy Miller, and between Mr. Hamilton and Dr. Patrick Johnston. (*See id.*) Mr. Freshwater and Mr. Hamilton should not be permitted to escape sanctions for these continued cat-and-mouse discovery games.

C. Neither Mr. Freshwater Nor Mr. Hamilton Paid The Monetary Sanctions That This Court Ordered.

To date, Mr. Freshwater and Mr. Hamilton have not paid the reasonable attorney’s fees and costs incurred by the Dennises for “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.” (Op. and Order Granting Pls.’ Mot. for Sanctions at 17.) The Court ordered on June 1, 2010, that Mr. Freshwater and Mr. Hamilton were to pay the Dennises’ fees and costs by June 25, 2010. (*Id.*) The Dennises, via counsel, submitted their billing to Mr. Hamilton on June 11, 2010. (*See* June 11, 2010 Letter to R. Kelly Hamilton and John Freshwater (attached as “Exhibit F”).)

On the evening of June 25, 2010, Mr. Freshwater sent via an email from Mr. Hamilton to the Dennises' counsel what purports to be payment in full in the form of an "Affidavit For Lien" against Mr. Freshwater's real property at 1160 New Delaware Road, Knox County, Ohio. (Hamilton June 25, 2010 Email and attached Freshwater "Affidavit For Lien" (attached as "Exhibit G").) Under Ohio law, however, judgment liens only take effect when a certificate of judgment is filed with the clerk of the court of common pleas in the county in which the property is located, Ohio Rev. Code § 2329.02, or when the property is seized in execution of the lien, Ohio Rev. Code § 2329.03. Neither Mr. Hamilton, who himself did not pay or attempt to pay any of the Dennises' fees and costs despite the Court's clear directive that "Freshwater *and* Attorney R. Kelly Hamilton" were responsible for payment, (*see* Op. and Order Granting Pls.' Mot. for Sanctions at 18), nor Mr. Freshwater took the steps required by law to perfect the lien—they did not ask the Court to enter judgment on a lien and made no effort to validate a real property transfer.

In any event, this purported payment is invalid because prior creditors already have claim to the property in question. *See* Knox County, Ohio, John B. Lybarger, Recorder, <http://www.recorder.co.knox.oh.us/index/default.asp> (search by last name "Freshwater"). With no legitimate payment made, Mr. Hamilton and Mr. Freshwater remain in violation of the Court's Opinion and Order regarding monetary sanctions. Their request that the Court reconsider the very sanctions with which they have failed to comply should be denied.³

³ Mr. Hamilton argues in his Motion that the fee amount is somehow unreasonable, but counsel for the Dennises affirms that some time was already written off of the bill submitted and thus, in any event, on a blended basis, the hourly rate for the time submitted is less than the \$275/hour Mr. Hamilton contends is reasonable. The amount is thus more than reasonable for the amount of work the Dennises' counsel had to do to attempt to gain Mr. Freshwater's and Mr. Hamilton's compliance.

D. The Dennises Should Receive Judgment In Their Favor, Or In The Alternative, The Entry of Evidentiary Inferences.

Mr. Freshwater should face the ultimate sanction for his noncompliance with this Court's discovery and sanctions orders—judgment on the claims against him. The Dennises have made good faith efforts to resolve the numerous discovery disputes, and this Court has intervened with everything from patient discovery orders to serious sanctions, but nothing has stopped Mr. Freshwater's discovery gamesmanship. Mr. Freshwater and Mr. Hamilton have refused to turn over billing records and have been untruthful about their existence, have withheld responsive documents, and have failed to pay the ordered monetary sanctions. These repeated transgressions warrant a default judgment against Mr. Freshwater on the Dennises' claims against him. In the alternative, this Court should deem certain facts as established against Mr. Freshwater.

1. This Court Should Enter Judgment Against Mr. Freshwater.

Because other sanctions did not motivate compliance, Mr. Freshwater should now pay the price of a default judgment. Courts consider four factors in determining whether a default judgment may be imposed for failure to cooperate in discovery under Federal Rule of Civil Procedure 37. The factors are: (1) whether the party's failure to cooperate is due to willfulness, bad faith or fault; (2) whether the adversary was prejudiced by the party's failure to cooperate in discovery; (3) whether the party was warned that failure to cooperate would lead to the sanction and (4) whether less dramatic sanctions were first imposed or considered. *Bank One of Cleveland, N.A. v. Abbe*, 916 F.2d 1067, 1073 (6th Cir. 1990). Each of those factors is satisfied here.

As to the first factor, Mr. Freshwater displayed repeated willfulness, bad faith and fault—the most important considerations for an entry of default judgment. *Ndabishuriye v. Albert*

Schweitzer Society, USA, Inc., 136 Fed. App'x 795, 800 (6th Cir. 2005). Mr. Freshwater now bears the burden of “establish[ing] that a failure to comply with court orders is *due to inability and not willfulness.*” *Dominic’s Rest. of Dayton, Inc. v. Mantia*, No. 3:09-cv-131, 2010 WL 1258111, at *3 (S.D. Ohio March 25, 2010) (emphasis added) (finding the defendant failed to meet his burden of demonstrating that he was unable to comply with a discovery order). This he cannot do. Mr. Freshwater and Mr. Hamilton *chose* not to submit billing records, *chose* to withhold materials and *chose* to forego payment of monetary sanctions. Inability cannot excuse these actions, especially when Mr. Freshwater and Mr. Hamilton coupled willful noncompliance with deceit.

Mr. Freshwater likewise prejudiced the Dennises’ case by withholding critical information, satisfying the second factor. *Grange Mut. Cas. Co. v. Mack*, 270 Fed. App'x 372 at 376 (“Inability to secure critical information can constitute prejudice.”); *see also Ndabishuriye*, 136 Fed. App'x at 801 (finding prejudice when, 30 days before trial, a plaintiff was trying to “obtain information that rightfully should have been produced a year earlier”). Not only has Mr. Freshwater repeatedly hidden the ball regarding relevant and requested materials, but now, just a few weeks before trial, he continues to withhold critical information that should have been voluntarily produced to the Dennises months or years ago.

As to the third factor, there is no question that Mr. Freshwater “was clearly warned about possible default liability” by the Court. *Grange Mut. Cas. Co.*, 270 Fed. App'x at 377. For instance, the Court quoted directly from Rule 37(a) in its Order regarding sanctions, stating that it may impose the sanction of “rendering a default judgment against the disobedient party.” (Op. and Order Granting Pls.’ Mot. for Sanctions at 5.) Further, after mention of the Dennises’ request for significant evidentiary inferences, the Court specifically put “Freshwater on notice”

of his need to “comply in full with [its] Opinion and Order.” (*Id.* at 18.) Beyond the Opinion and Order regarding sanctions, the Court warned Mr. Freshwater about the potential consequences of his noncompliance on four other occasions including the Opinion and Order granting Plaintiffs’ Motion to Compel (Doc No. 83), the pre-trial conference on April 13, 2010, the oral phone conference regarding noncompliance on April 21, 2010, and the oral conference regarding sanctions on May 26, 2010. Even if the Court finds that these clear warnings will not suffice as firm and definite notices of default, “prior warning is not indispensable” for an entry of judgment. *Pharmacy Records v. Nassar*, No. 08-1607, 2010 WL 2294538, at *2 (6th Cir. June 7, 2010) (quotations and citations omitted); *United States v. Reyes*, 307 F.3d 451, 458 (6th Cir. 2002) (finding plaintiff’s motion to strike provided sufficient warning under the third factor).

Finally, as to the fourth factor, the Court already considered and imposed less dramatic sanctions on prior occasions. Those sanctions did not produce the necessary compliance by Mr. Freshwater, and at this point, the Court need not consider lesser sanctions because they have been and will continue to be futile. *See Bank One of Cleveland*, 916 F.2d at 1079 (noting that consideration of lesser sanctions may not be required when they would be futile).

Mr. Freshwater cannot hide behind his counsel’s misdeeds because violation of the factors can be the responsibility of the party, his attorney, or both. *See Grange Mut.*, 270 Fed. App’x At 376 (6th Cir. 2008) (noting that a court can enter judgment for a party’s misconduct or when the misconduct “is solely the fault of the attorney”). Even if the attorney bears sole responsibility for the violations, the sins of that attorney may still rest upon the client because he has chosen his own attorney and is bound by the “acts or omissions of that freely selected agent.” *Harmon v. CSX Transp., Inc.*, 110 F.3d 364, 368 (6th Cir. 1997) (quoting *Link v. Wabash R.R.*

Co., 370 U.S. 626, 633-34(1962) (affirming the entry of judgment for a counsel's failure to appear at a pretrial conference)).

In this case, the lines of responsibility blur when it comes to the violations of this Court's orders. Mr. Hamilton was to produce his billing records, but Mr. Freshwater did not ensure that his attorney complied. Mr. Freshwater and Mr. Hamilton were to turn over all relevant materials, but both failed to do so. Mr. Freshwater and Hamilton were to pay monetary sanctions, but neither delivered. While Mr. Freshwater may try to point the finger at Mr. Hamilton, he made his own bed in selecting Mr. Hamilton to represent him and should now be ordered to lie in it.

2. In The Alternative, This Court Should Designate That Certain Facts Be Taken As Established.

In the alternative to default judgment, the Dennises ask this Court to impose sanctions in the form of adverse evidentiary inferences against Mr. Freshwater. *See* Fed. R. Civ. P. 37(b)(2)(A)(i) (permitting courts to determine "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"). This Court previously imposed lesser sanctions against Mr. Freshwater to little avail, and at that time specifically warned Mr. Freshwater that greater sanctions, including adverse inferences, may result from noncompliance. (Op. and Order Granting Pls.' Mot. for Sanctions at 16.) Despite this stern warning, Mr. Hamilton and Mr. Freshwater refused to produce billing records, withheld an untold number of other documents, and failed to pay monetary sanctions.

Although the Dennises contend that judgment should be entered on their behalf at this juncture, absent that relief, the Court should enter the evidentiary inferences the Dennises previously requested:

1. that Mr. Freshwater's 15 affidavits were not prepared on May 2008 as Mr. Freshwater contends; and
2. that materials Mr. Freshwater acknowledges were in his classroom during the 2007-2008 school year but has not produced were religious items that served no secular purpose. These items, which may have been removed by Mr. Freshwater with the five armloads of materials in August 2008 or at other times with the President Bush poster or the copies of materials made at his church, include posters featuring Biblical quotes displayed on his classroom cupboards and books such as *Refuting Evolution*, *Evolution of a Creationist*, *The Real Meaning of the Zodiac*, and *Icons of Evolution*, and the "Lies in the Textbooks" videotape with the text "Part A 487" and "10 Lies of Evolution" displayed in his classroom. (*See* Pls.' Mot. for Sanctions (Doc. No. 96) at 11-12.)

III. CONCLUSION

For these reasons, Defendant's Motion for Reconsideration should be denied and the Court should enter judgment in the Dennises' favor, or in the alternative, should enter the requested evidentiary inferences.

Respectfully submitted,

s/ Douglas M. Mansfield
Douglas M. Mansfield (0063443)
(Trial Attorney)
dmansfield@jonesday.com
JONES DAY
325 John H. McConnell Blvd. Ste. 600
Columbus, OH 43215

(614) 469-3939 (telephone)
(614) 461-4198 (fax)

Mailing Address:
JONES DAY
P.O. Box 165017
Columbus, OH 43215-2673

Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on July 2, 2010, I electronically filed the foregoing Memorandum in Opposition and Expedited Motion with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following at their e-mail addresses on file with the Court:

Stephen C. Findley
Sandra R. McIntosh
Freund, Freeze & Arnold
Capital Square Office Building
65 East State Street, Suite 800
Columbus, Ohio 43215

Counsel for Defendant John Freshwater

R. Kelly Hamilton
4030 Broadway
P. O. Box 824
Grove City, OH 43123

Former Counsel for Defendant John Freshwater

s/ Douglas M. Mansfield _____
Douglas M. Mansfield