UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
2:08-CV-53-WOB

ANSWERS IN GENESIS OF KENTUCKY, INC. a Kentucky Non-Profit Company,	)	
Petitioner,	)	
v.	)	**MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION**
CREATION MINISTRIES INTERNATIONAL LTD, an Australian Company,	)	
Respondent.	)	

Petitioner Answers in Genesis ("AiG") is a Christian ministry that petitions the Court to enjoin Respondent from progressing a foreign lawsuit against Petitioner, enforce the parties' arbitration agreement, and compel Respondent to engage in binding Christian arbitration. Since Respondent represents itself as a Christian ministry as well, one would assume they share AiG's desire to handle the disputes between the ministries in a private, Christian forum in accordance with Christian scripture and the parties' agreements. To the contrary, Respondent refused binding arbitration and filed a lawsuit in Australia instead. The current leadership of Respondent rebelled against and forced out its prior, long-standing board of directors and now simply refuses to honor the ministry's prior agreements.

Contrary to proceeding charitably or with any semblance of grace, Respondent engages in a harmful, public defamation campaign against Petitioner, over the Internet, about the underlying dispute, about the character and leadership of AiG's officers and directors, and even about the efforts to negotiate a settlement between the parties. Respondent's activities breach a written agreement with Respondent's current leadership to keep the settlement efforts

confidential. Petitioner also asks that Respondent be compelled to answer at arbitration for these acts of defamation and willful breaches of its confidentiality obligations.

I. STATEMENT OF FACTS

Answers in Genesis of Kentucky, Inc. ("AiG") is a non-profit corporation organized under the laws of the Commonwealth of Kentucky. Creation Ministries International Ltd ("CMI") is an Australian non-profit corporation. CMI used to go by the name Answers in Genesis, Ltd. ("AiG-Australia"), but changed its name in 2005 for reasons explained below. AiG and CMI/AiG-Australia have been distinct, independent organizations from their inception, but, until the recent past, they worked together on a cooperative and voluntary basis. Ken Ham co-founded the Australian ministry. When the Hams left for the United States, he ultimately left the Australian ministry in the hands of his friend, Carl Wieland, a medical doctor.[1] After Mr. Ham co-founded the current U.S. ministry with two American colleagues, they and the appointed board of directors ultimately developed and adopted the name "Answers in Genesis." Thereafter, the Australian ministry adopted the same name. At the time, the ministries shared the same objectives and values and worked closely together.

For well over a decade, the ministries in Australia and the United States conferred with each other and participated in numerous joint efforts to create content and accomplish common objectives. The parties were prolific and worked together to author and edit articles for magazines that AiG-Australia published and sold under the title *Creation*.[2] For years, AiG purchased each issue of *Creation* magazine from AiG-Australia and distributed the magazine to its supporters and subscribers in the United States. AiG grew and soon surpassed AiG-Australia

[1] Mr. Ham initially left the ministry in the hands of its other co-founder, John Mackay.
[2] The magazines were published under a series of titles, to include *Creation, Creation Ex Nihilo, Creation Ex Nihilo Technical Journal,* and *TJ*. For ease of reference, they are collectively referred to herein as simply *Creation*.

in size and number of supporters. As the popularity of the Internet grew, AiG began hosting a website at the URL www.answersingenesis.org. A large percentage of the content on the website consisted of articles that were also published in *Creation* magazine, and many were authored by staff members of AiG-Australia. AiG promoted AiG-Australia on the website, and AiG-Australia used that website as its "home page" as well. In addition to magazine and Internet articles, the ministries authored numerous books, a number of them jointly authored between staff members of the ministries. The parties hosted dozens of speaker presentations and conferences each year throughout the United States and Australia. Many of the presentations were recorded and later sold on DVDs. Regardless of whether recorded presentations were conducted jointly or by only one ministry, the parties agreed to allow each other to use and even to sell the content generated by the other. The parties conducted all of this cooperative effort by agreement, a few in written documents, exchanges of correspondence, verbal agreements and agreed-upon practices. (*See* Pence Aff. ¶¶3-8; Thallon Decl. ¶¶7, 8, 11.)[3]

The message of the ministries was well received throughout the United States and Australia, and the ministries flourished. Through a jointly owned corporation, Answers in Genesis International Ltd ("AiG-Int'l"), the U.S. and Australian ministries started and jointly oversaw ministry operations in the United Kingdom, Canada, New Zealand, and South Africa. AiG-Int'l licensed each foreign ministry to operate under the "Answers in Genesis" name, and sold and distributed content authored primarily by the U.S. and Australian ministries. All of the ministries used the website of AiG, www.answersingenesis.org, as their Internet pages. AiG did not charge the ministries for the design or use of the site. AiG was always very generous

[3] The affidavits and declarations cited herein are filed under a separate Notice of filing made contemporaneously herewith.

financially to AiG-Australia, routinely selling them materials at cost, bearing expenses, and promoting their publications. (*See* Thallon Decl. ¶¶7, 8, 11; Landis Decl. ¶12.)

With success came new challenges and opportunities. For many of these issues, Mr. Ham and Dr. Wieland held different visions and ideas. By 2002, relations between Mr. Ham and Dr. Wieland, and in turn between their respective ministries, began to strain. It was more than miles that separated these former friends. Mr. Ham envisioned a global network of loosely affiliated, autonomous "Answers in Genesis" ministries working cooperatively. In contrast, Dr. Wieland advocated for a more strictly hierarchical structure, with AiG-Int'l governing and ultimately controlling the affairs and resources of subordinate, national ministries. The men had different priorities and emphases in their approach to ministry apologetics. By 2004, it became increasingly clear that Mr. Ham and Dr. Wieland did not agree on the structure or direction of the international ministry and on an increasing array of other issues, to include Mr. Ham's vision for a "Creation Museum" to be built in the United States. (*See* Pence Aff. ¶9; Thallon Decl. ¶9.)

In a series of exchanges in the latter half of 2004 through early 2005, the dispute dramatically escalated. Dr. Wieland commenced repeated accusations against the management style, leadership abilities, and even the character of Mr. Ham. Dr. Wieland petitioned Mr. Ham directly, advising him that, as a "friend," he did not believe Mr. Ham was competent to lead the ministry he founded.[4] Dr. Wieland's efforts culminated in his direct petition to the Board of Directors of AiG ("US-BOD") to remove Mr. Ham as CEO of the U.S. ministry. At the same time and unbeknownst to any of the U.S. leadership, Dr. Wieland conspired with and coordinated with a senior executive officer in the U.S. ministry for the officer to make the same suggestion to the U.S. Board with the intent to replace Mr. Ham. Dr. Wieland advocated that Mr. Ham be

[4] Dr. Wieland recorded his telephone conversation with his "friend," unbeknownst to Mr. Ham, and has since made it available to others. Dr. Wieland's characterizations, unsolicited psychological diagnoses, and admonitions demonstrate neither friendly affection nor charity.

relegated to a respected figurehead within AiG, that AiG-Int'l be given authority over all AiG ministries worldwide – to include AiG, and that Dr. Wieland be appointed as the CEO of AiG-Int'l. He assured the U.S.-BOD that he could then fix all that he claimed was wrong with their operations. (*See* Pence Aff. ¶¶10-14; Thallon Decl. ¶10; Landis Decl. ¶¶5,6.)

The U.S. board of directors deliberately and prayerfully examined and investigated Dr. Wieland's allegations, the related allegations of their own executive officer, and that officer's back-door liaisons with Dr. Wieland. Consisting entirely of experienced and accomplished business professionals and pastors, the US-BOD uniformly determined that the allegations against Mr. Ham were unfounded and entirely improper. They concluded that Mr. Ham was doing superb work setting the vision for and managing the affairs of the ministry. They flatly rejected Dr. Wieland's structural reform proposal.[5] Once they learned of the allegations, the remaining executive leadership and management of the U.S. ministry were outraged at what had occurred and at the claims made against Mr. Ham. (*See* Pence Aff. ¶10; Thallon Decl. ¶10.)

Not surprisingly, the relationship between the two heads of the ministries and between the ministries themselves further deteriorated. By early 2005, the Board of Directors of AiG-Australia (Australia-BOD) began to realize that Dr. Wieland's efforts aimed at AiG were causing significant and lasting damage to the relations between the ministries. At the same time, the Australia-BOD grew increasingly displeased Dr. Wieland's performance as CEO of the Australian ministry and discussed removing him as an officer. (*See* Thallon Decl. ¶¶11-14, 26.)

By mid-2005, the Australia-BOD decided that an effort should be made to salvage the relationship. The Australia-BOD stepped up communications with their American counterparts

[5] The US-BOD properly saw the "reform" proposal as a request that they surrender autonomy and control of the U.S. ministry and its resources to the control of the affiliated the AiG ministries worldwide. These other ministries collectively possessed a fraction of the experience, staff, supporters, and resources that the U.S. enjoyed.

and began working through a framework for salvaging the relations between the Australian and the U.S ministries. Because they thought he would only continue to make matters worse and also out of growing dissatisfaction with his performance as CEO, the Australia-BOD did not directly involve Dr. Wieland in these discussions with AiG.[6] By the fall of 2005, with the parameters of an agreement reached between the boards, the Australia-BOD met with the US-BOD at the home of AiG in Petersburg, Kentucky. Neither Mr. Ham nor Dr. Wieland was on either BOD at that time, and Dr. Wieland did not make the trip. (*See* Thallon Decl. ¶15.)

The meeting between the boards of each ministry went well. The boards each unanimously agreed that the ministries should continue working together. They further agreed that they should enter into some written agreements to formalize and protect several of their working relations and also to plan for contingencies in the event the ministries ultimately decided to conduct their affairs at a more arm's length distance. To resolve the impasse over international structure, the boards essentially divided the ownership. The US-BOD assigned AiG's 50% stock ownership in AiG-Int'l to AiG-Australia, thus giving Australia ownership and control over the international ministries. In return, Australia assigned the "Answer in Genesis" trademark rights in the UK to AiG. The boards also attempted to formalize ownership and license rights in their joint content generated from and for the website and magazine and agreed to pay each other for future hosting and article generation services. The overall agreement and its further details are set forth in the parties' Memorandum of Agreement ("MOA"). The Australian licensing rights to the U.S. are set forth in a separate Deed of Copyright License ("DOCL"). AiG-Australia also promised to assign to AiG its rights in the ANSWERS IN GENESIS trademark if, where, and when AiG-Australia or AiG-Int'l changed names. Finally,

[6] Given Dr. Wieland's strong personality, ready opinion, and proficiency with email, the Australia-BOD understood Dr. Wieland's perspective on matters pertaining to AiG.

the parties agreed that in the event of a future disagreement over what they agreed upon in Kentucky or over any related agreements between the ministries, they would submit the matter to Christian mediation, and should they fail to therein resolve the dispute, they would submit the matter to binding Christian arbitration. These agreements were formalized into writing and signed by both boards while still in Kentucky in October 2005. (Ver. Pet. To Compel Arb. [D.1] ¶¶6,7 & Exs. A, C; Pence Aff. ¶¶15-27; Landis Decl. ¶¶6,7; Thallon Decl. ¶16.]

Upon completion of the conference, the Australia-BOD was pleased with the parties' accomplishments. The Board maintained a beneficial relationship with the U.S. and secured ownership of the AiG ministries in four of the six English language countries, exclusive ownership of AiG-Int'l, and continued access to and use of AiG's website. AiG agreed to pay AiG-Australia for articles published on the website. More importantly, much of the trust and goodwill between the ministries had been repaired during this time of fellowship. Their enthusiasm was quickly dashed. (D.1 Ex. A; Thallon Decl. ¶¶17-19, 23-24.)

Upon the Board's return to Australia, Dr. Wieland angrily rejected his Board's accomplishments. He expressed regret that they had entered into binding agreements with AiG that he had not approved. The agreements split ownership of the international ministry he had planned to oversee. Instead of being content with being involved with overseeing the ministry in four of the six countries, he rebelled against his Board. He misrepresented to AiG-Australia staff and supporters that their board had illegally handed control of the Australian ministry to the U.S. He characterized the licenses that formalized permission to use articles, as had been done for years, as illegal and immoral. In the face of such contempt, the Australian board suspended Dr. Wieland as CEO in November 2005. (Thallon Decl. ¶¶25-27; Pence Aff. ¶¶28-30.)

Dr. Wieland did not back down. Instead, he rallied senior staff and key financial backers to his side, relying on gross misrepresentations of the agreements with AiG, and also on exploiting the prominent role he played and reputation he established through running the Australian ministry and being one of its best known public speakers. In quick order, the Australian ministry was being torn asunder by a rapidly escalating struggle between the Board and its former long-standing chief executive officer and popular public lecturer. Someone had to yield or the Australian ministry would be destroyed. Believing they repaired and safeguarded the relations between AiG-Australia and AiG, and knowing that their relationship with Dr. Wieland and with his closest associates were ruined, the Australia-BOD resigned en masse. In perhaps a misplaced gesture of goodwill, the Australian Board consented not only to Dr. Wieland's return as an executive officer but also to allowing him to sit on the Board and appoint their replacements, which he forthrightly did. (Thallon Decl. ¶¶29-30; Pence Aff. ¶¶31-33.)

With a self-appointed Board, Dr. Wieland set out to separate the Australian ministry from its American counterpart, to refuse to honor the Australian's obligations under the MOA and DOCL, and to disparage the former Australian directors. He quickly rebranded the Australian ministry to its current name, Creation Ministries International. Despite accepting full control and ownership of AiG-Int'l and also rebranding its licensees, he repudiated the written licensing arrangements and all other obligations the Australians had under the MOA and DOCL. (Pence Aff. ¶¶34, 43, 46 & Ex. 6.)

AiG was aware of the traumatic change in leadership that occurred in Australia . AiG soon learned that Dr. Wieland was rebranding both the Australian ministry and AiG-Int'l and intended to separate those ministries from AiG. During the same period, the next issue of *Creation* magazine was due for publication. Concerned about Dr. Wieland's plans, the US

leadership requested to see the entire issue of the next *Creation* magazine before agreeing to purchase it for distribution in the United States. Dr. Wieland steadfastly refused to provide an advanced copy of the magazine without first receiving AiG's payment of approximately $70,000. With Dr. Wieland's unexpected refusal to allow a preview of the magazine prior to purchase, the Americans scrambled over the next several months at great cost and inconvenience to produce their own magazine for their supporters and subscribers. They also discontinued purchasing *Creation*. As suspected, the next issue of *Creation* introduced the readers to CMI[7] and encouraged readers and subscribers to contact CMI directly for subscriptions or renewals and to submit their addresses to CMI in exchange for a free book. (Pence Aff. ¶¶35-41 & Ex. 4.)

In August 2006, counsel for CMI told AiG that CMI refused to honor the MOA and DOCL due to unspecified "uncertainty" in its terms, refused to transfer the "Answers in Genesis" trademarks to AiG, accused AiG of violating CMI's Australian trademark rights in the "Answers in Genesis" name, and gave "notice of termination" of the aforementioned copyright licenses. At the same time, CMI's new board wrote AiG with an offer to engage in binding arbitration for purposes of renegotiating the MOA and DOCL. CMI had already taken control of AiG-Int'l and rebranded itself and the foreign ministries, making this an unfair offer. Further, CMI demanded that the arbitration take place before Australian attorneys only, under Australian law, and Queensland, Australia would be the exclusive forum for enforcement of such proceedings. AiG declined that offer. (Pence Aff. ¶¶42-46 & Exs. 5-8.)

Over the next several months, relations between the ministries deteriorated yet further. When a staff member of AiG went to speak to Australian churches to discuss the mission and message of AiG as had been routinely done over the past decade, CMI sent cease and desist

[7] Dr. Wieland changed the AiG-Int'l ministries to CMI in all the countries he controlled, to include Australia, New Zealand, Canada, and South Africa.

letters to the churches advising them not to use the Answers in Genesis name at their location, subject to threats of legal action.[8] CMI and Dr. Wieland refused to transfer ownership of the Answers in Genesis name to AiG but instead spread false and misleading statements about AiG, its leadership, and the agreements reached in Petersburg, Kentucky. AiG requested mediation and arbitration pursuant to the MOA, but CMI refused such demands and only agreed to arbitrate subject to unacceptable and unilateral terms. (D.1 ¶16; Pence Aff. ¶¶44-45 & Exs. 7-10.)

Finally, in late March 2007, AiG initiated a demand for Christian mediation and binding arbitration with the Institute of Christian Conciliation ("ICC"), a division of Peacemaker Ministries. CMI refused to participate, and Peacemaker will not proceed absent a court order directing the matter to arbitration before Peacemaker. (D.1 ¶¶10-12 & Ex. E; Pence Aff. ¶¶55-61 & Exs. 11-14.)

In May 2007, CMI filed a lawsuit in Queensland, Australia, asserting various claims.[9] CMI's primary claims are as follows:

- A claim for tort and/or breach of contract arising out of the decision of AiG to discontinue distribution of *Creation* and the other magazines, the refusal of AiG to turn over its subscription lists, and alleged diversion of subscribers by switching their subscriptions to AiG's replacement magazine by means of a hyperlink on its website;

- During the course of a tour of Australia in August of 2007, an AiG representative allegedly breached AiG-Australia/CMI's trademark rights by using the name "Answers in Genesis" and by selling merchandise in Australia under the trademark "Answers in Genesis";

- That AiG allegedly has violated AiG-Australia/CMI's copyrights with respect to republishing articles;

- Ken Ham allegedly used his position with AiG-Australia/CMI and/or owed

[8] CMI's hostility to these churches was particularly unfortunate since AiG was not actually sponsoring the visit. Another ministry had planned the event years in advance as a conference and reunion for people who had been involved in missionary outreach at the Sydney Olympics.

[9] CMI informed AiG via facsimile of the lawsuit on the eve of AiG's ribbon cutting ceremony for its new Creation Museum.

> AiG-Australia/CMI a fiduciary obligation which he allegedly abused by misusing unspecified information of AiG-Australia/CMI.

(D.1 ¶13; Pence Aff. ¶62 & Ex. 15.)

Contemporaneous with filing its lawsuit, CMI published on its website lengthy documents known as the "Briese Reports," written by CMI's member and advisor Clarrie Briese. The documents contain numerous false and defamatory statements regarding Ken Ham, AiG, and about the nature, legality, and morality of the MOA and DOCL. Despite AiG's protests, CMI continues to publish this defamation worldwide over the Internet. Further, to this day, CMI uses its website to publish falsehoods about AiG and the parties' legal disputes. (D.1 ¶15; Pence Aff. ¶63 & Exs. 16, 20; Landis Decl. ¶¶10-15; Looy Aff. ¶¶4-8.)

In August 2007, in accordance with the MOA provision to submit their disputes to Christian mediation prior to arbitration, the parties conducted a mediated settlement conference in Hawaii. The parties used a mediator certified from ICC and executed another agreement, the *Mediation Agreement*, governing the mediation and planned subsequent efforts to set up binding arbitration. As part of the written *Mediation Agreement*, CMI agreed that if the parties were unable to agree on a settlement, they would negotiate mutually acceptable arbitration terms, procedures, and regime before terminating the process. In the *Mediation Agreement*, and in the material terms of settlement, the parties promised to keep the settlement negotiations and their process confidential. After two intense days of mediation, as key individuals (to include CMI's attorney) were literally walking out the door for flights, the parties reached an agreement in principle on material terms of settlement. Realizing much remained to be done, the parties promised that should they fail to finalize the settlement within sixty days, they would return in

person to Hawaii to complete the process. The parties subsequently failed to agree on the final, written terms.[10] (D.1 ¶¶ 8C, 18 & Ex. C; Pence Aff. ¶¶64-68 & Ex.17.)

CMI now refuses to complete the process, refuses to meet again in Hawaii, refuses to negotiate mutually acceptable arbitration terms, and refuses to participate in the pending ICC arbitration proceeding. Further, even before the settlement efforts fell apart, CMI began making public announcements, to include Internet publications and a press interview about the settlement, in direct violation of the confidentiality agreement. Currently, CMI publishes half-truths and blatant misrepresentations about the settlement negotiations as part of its public Internet defamation campaign against AiG. Regarding arbitration, CMI will now only agree to be a claimant (thus refusing to respond to AiG's claims in arbitration) and refuses any application of U.S. law to the dispute. When AiG responded that such demands are not fair or customary, CMI directed AiG to proceed with defending the lawsuit in Queensland, Australia. That civil litigation now progresses forward. (Pence Aff. ¶¶69-78 & Exs.18, 19, 21-23.)

II. ARGUMENT

A. The Preliminary Injunction Standard

In considering a motion for preliminary injunctive relief, the Court must balance: "(1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury without the injunction; (3) whether issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuance of the injunction." *Tumblebus Inc. v Cranmer* 399 F.3d 754, 760 (6th Cir. 2005). Parties should not be penalized in their efforts to obtain preliminary injunctive relief where they first attempted to use other avenues to resolve their dispute. *Moltan Co. v. Eagle-Picher Ind.*, 55

[10] CMI attempted to add to and vary the terms of the agreement that was reached in mediation and abruptly broke-off settlement communications when AiG tried to work through the myriad issues.

F.3d 1171, 1176 (6th Cir. 1995). Courts grant preliminary injunctions for purposes of enforcing arbitration agreements. *See, e.g., American Postal Workers Union, AFL-CIO v. U.S.P.S.*, 372 F. Supp. 2d 83 (D.D.C. 2005) (granting preliminary injunction requiring expedited arbitration); *Northwest Airlines v. R&S Co. S.A.*, 176 F. Supp. 2d 935 (D. Minn. 2001) (preliminary injunction compelling arbitration and issuing foreign anti-suit injunction).

B. The Laws of Kentucky and the FAA Govern the Parties' Arbitration Agreement

The parties' arbitration agreement is found in paragraph 8 of the MOA. (D.1 Ex. A) The MOA contains no choice of law provision. Kentucky's Supreme Court adopted the Restatement's "most significant relationship test" for contractual claims. *Advanced Solutions, Inc. v. Chamberlin*, 2007 WL 4215654, *3 (W.D. Ky. 2007) (citing *Breeding v. Massachusetts Indemnity and Life Ins. Co.,* 633 S.W.2d 717, 719 (Ky.1982)); *see Restatement of Laws (Second) Conflict of Laws* § 188. This approach provides:

> (1) The rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties under the principles stated in § 6.
>
> (2) In the absence of an effective choice of law by the parties (see § 187 [regarding when the parties include a choice-of-law provision]), the contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:
>
> (a) the place of contracting,
>
> (b) the place of negotiation of the contract,
>
> (c) the place of performance,
>
> (d) the location of the subject matter of the contract, and
>
> (e) the domicile, residence, nationality, place of incorporation and place of business of the parties.
>
> These contacts are to be evaluated according to their relative importance with respect to the particular issue.
>
> (3) If the place of negotiating the contract and the place of performance are in the same state, the local law of this state will usually be applied, except as otherwise provided in

> §§ 189-99 [regarding particular types of contracts, capacity to contract, and contract formalities] and 203 [regarding usury].

Advanced Solutions, Inc., 2007 WL 4215654, *3.

In this instance, both parties negotiated, drafted, and executed the MOA in Kentucky. The place of negotiation and contracting is Kentucky. In the MOA and DOCL, the parties exchanged certain intangible property rights and obligations. AiG transferred its ownership interests in AIG-Int'l to CMI and CMI transferred certain trademarks and the domain name registration in the AiG website to AiG. That exchange of took place at the time of execution in Kentucky. Further, in the MOA and DOCL, CMI licensed AiG to continue using particular content on the website of AiG. AiG controls and operates that website from Kentucky. Finally, AiG is domiciled and incorporated in Kentucky. Based on these facts, the laws of Kentucky should control the MOA and its arbitration provision.

Independent of Kentucky's choice of law analysis, the Federal Arbitration Act, 9 U.S.C. §§ 1 et seq. ("FAA"), governs the scope and enforceability of the arbitration clause. Section 2 of the FAA makes arbitration agreements enforceable: "A written provision in … a contract evidencing a transaction involving commerce to settle by arbitration a controversy … shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." Under the FAA, "commerce" includes commerce with foreign nations. *Id*. § 1. Both AiG's assignment of stock shares and contract to provide web services to CMI and CMI's license for content and assignment trademarks to AiG are transactions involving commerce in the United States. Accordingly, the FAA governs the parties' arbitration clause.

C. The Parties' Arbitration Agreement Is Enforceable and Covers the Current Disputes Between the Parties.

"The FAA manifests 'a liberal federal policy favoring arbitration agreements.'" *Watson Wyatt & Co. v. SBC Holdings, Inc.*, 513 F.3d 646, 649 (6th Cir. 2008) (*quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)). Before compelling an unwilling party to arbitrate, the court must conduct a limited review to assure that there exists a valid agreement to arbitrate between the parties and that the dispute falls within the substantive scope of the agreement. *Id*.

An arbitration agreement that calls for "Christian arbitration" is enforceable for seeking an order compelling arbitration. *See, e.g., Encore Productions, Inc. v. Promise Keepers,* 53 F. Supp. 2d 1101 (D. Colo. 1999).[11] An arbitration agreement that does not identify an arbitrator or arbitration administrator is enforceable. The FAA requires the court to designate and appoint an arbitrator when the arbitration agreement is silent on this topic. 9 U.S.C. § 5. Courts apply this statute literally, and appoint arbitrators where the agreement is silent or one party has refused to cooperate to select a mutually agreeable arbitrator. *See, e.g*., *CAE Indus. Ltd. v. Aerospace Holdings Co.,* 741 F. Supp. 388 (S.D.N.Y. 1989); *Nat'l American Ins. Co. v. Transamerica Occidental Life Ins. Co.,* 328 F.3d 462, 464-65 (8th Cir. 2003).

In a Seventh Circuit case, the arbitration clause read in its entirety, "ALL DISPUTES UNDER THIS TRANSACTION SHALL BE ARBITRATED IN THE USUAL MANNER." *Schulze and Burch Biscuit Co. v. Tree Top, Inc*., 831 F.2d 709, 715 (7th Cir. 1987). Despite not providing for who the arbitrators would be, where it would take place, or what procedures would

[11] For a general introduction to Christian ADR mechanisms, see Glenn G. Waddell et al., Christian Conciliation: An Alternative To "Ordinary" ADR, 29 Cumb. L. Rev. 583 (1999). Even those who find fault with this method of ADR concede that courts routinely compel this form of arbitration and enforce the awards. Note, Is This Arbitration?: Religious Tribunals, Judicial Review, and Due Process, 107 Col. L. Rev. 169, 171, 191 (2007). The Note concludes that religious tribunals should not be removed from the scope of the FAA. *Id.*

govern, the court held that the provision was not too vague to be enforced and that the district court had the power to supply those details. When the court so appoints an arbitrator, such arbitrator has the full degree of authority as if designated by the contract. The court affirmed the district court's receipt of testimony from the draftsperson of this clause as to who would arbitrate the controversy and under what rules. *Id.; accord Blinco v. Green Tree Servicing LLC*, 400 F.3d 1308, 1313 (11th Cir. 2005) (arbitration clause enforced despite fact that it did not specify the identity of the arbitrator, forum, location, or allocation of costs from the arbitration); *Ansonia Copper & Brass, Inc. v. Ampco Metal SA*, 419 F.Supp.2d 186 (D. Conn. 2006).

Since courts encourage arbitration, they find disputes to be arbitrable if possible. In a recent Sixth Circuit case, the court again noted the Supreme Court's repeated encouragement of arbitration and emphasis upon the federal policy in favor of arbitration. *Nestle Waters North America, Inc. v. Bollman*, 505 F.3d 498, 503-04 (6th Cir. 2007). The Supreme Court interprets the FAA

> "as establishing that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. … Moreover, [i]n the absence of any express provision excluding a particular grievance from arbitration ... only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail." … . [The Sixth Circuit] has stated even more forcefully that "any doubts are to be resolved in favor of arbitration 'unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.'"

Id. (internal citations omitted). Further, "only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail" absent an express provision excluding a particular grievance. *Id.* (same). Of course, a party will not be compelled to arbitrate where the clear intent of the parties or plain text of the contract dictate against arbitration. *Id.*

Before a court compels a claim to be heard in arbitration, the court must confirm that the claim falls within the scope of the agreed upon arbitration. Often arbitration clauses agree to

cover disputes that arise under the agreement in which the arbitration provision is found. In those cases, courts must analyze whether the disputes before it fall within the scope of that agreement. *See, e.g. NCR Corp. v. Korala Associates, Inc*., 512 F.3d 807 (6th Cir. 2008) (controversy fell within scope of arbitration clause where plaintiff sued for copyright infringement and the governing agreement was relevant to determine whether defendant's use was permitted). Each separate claim must be evaluated to determine whether it falls within the scope of the arbitration clause. Where the parties agree to arbitrate matters beyond the scope of the immediate agreement, the arbitration provisions are broadly construed. "[W]here as here, an arbitration clause is broadly written 'only an express provision excluding a specific dispute, or the most forceful evidence of a purpose to exclude the claim from arbitration,' will remove the dispute from consideration by the arbitrators." *SBC Holdings, Inc,* 513 F.3d 646, 650 (internal quotations omitted). A district court must, given the directives of the Supreme Court and the Sixth Circuit, "give a general presumption of arbitrability and … resolve any doubts in favor of arbitration unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *Id* (same).

In this case, the parties agreed to a broad scope of arbitration. Specifically, the parties promised each other:

> In the event of a disagreement of the parties regarding the meaning or application of any provision of this Agreement or any related agreements, the parties agree to submit such matter to Christian mediation … . In the event such matter is not resolved by mediation, then the parties will submit the matter to Christian arbitration to a Christian arbitrator agreed upon by them, and the decision of the arbitrator shall be final.

(D.1 Ex. A ¶8.) The parties agreed to submit any disagreements regarding the MOA *or any related agreements* to binding Christian arbitration. The DOCL is a related agreement in that it covers licensing obligations regarding the *Creation* articles as discussed in the MOA and in that

the parties executed the DOCL at the same time and place as the MOA. The *Mediation Agreement* that the parties entered into in Hawaii is also a related agreement since that was executed in furtherance of the parties conducting the Christian mediation, as referenced in the MOA arbitration clause itself. Further, the mediation was for purposes of attempting to resolve the differences between the parties resulting largely from CMI's refusal to honor the MOA. The MOA and DOCL were executed at the same time and both directly address publication and licensing rights for articles that were authored for *Creation* magazine. The DOCL specifically addresses and incorporates the publication rights relevant to the articles in the print magazine. (*See id*. Ex.C at ¶¶A-F.) Accordingly, the parties' Distribution Agreement for *Creation* relates to the MOA and DOCL and falls within the scope of the arbitration clause. Finally, all agreements between the parties relating to the "Answers in Genesis" trademark or to the publishing, distribution, or intellectual property relevant to *Creation*, to include publications over the Internet, would be related agreements. All of the disputes for which AiG seeks to compel CMI to arbitrate relate directly to the parties' rights and obligations under these agreements.

1. CMI should be compelled to participate in the pending ICC proceeding.

In March 2007, AiG initiated a binding arbitration proceeding against CMI with ICC. In that pending proceeding, AiG requests ICC to address the validity, binding nature and enforceability of the parties MOA and DOCL. AiG also requests ICC to rule that CMI must transfer to AiG all rights in the "Answers in Genesis" name in Australia, New Zealand, South Africa, and Canada, pursuant to the terms of the MOA. These disputes all pertain directly to the MOA and are within the scope of arbitration.

In the ICC arbitration, AiG also requests a ruling that it owns the *Creation* mailing list it created, prepared, and controlled for purposes of distributing *Creation* magazine to its supporters

and subscribers in the United States. The ownership of the distribution mailing list falls squarely within the meaning and application of the Distribution Agreement, which governs the parties' rights and obligations regarding distribution.[12] Since the Distribution Agreement is a "related agreement," the disputes over termination of the Distribution Agreement and ownership rights in the US mailing list are within the scope of arbitration.

2. CMI's civil lawsuit allegations should be submitted to binding arbitration.

The lawsuit CMI pursues in Australia is based entirely on agreements between the parties related to the MOA, DOCL, and Distribution Agreement. CMI's claims set forth the MOA, the DOCL, the parties' agreement to distribute *Creation* (and alleged termination thereof), as well as some form of an agency agreement regarding *Creation* and its articles. (*See* Pence Aff.. Ex. 15, Stmt of Claim ¶¶13, 14, 15, 16, 17, 33, 34 and 50(g-j)). CMI bases its legal claims on the distribution and licensing rights and obligations pertinent to *Creation* and its content, AiG's right to terminate the distribution agreement, the parties' ownership rights in the "Answers in Genesis" trademark, particularly in Australia; and the rights to reproduce articles on the www.answersingenesis.org website. These are precisely the issues addressed in the parties' MOA, DOCL and Distribution Agreement. As each of these agreements fall within the scope of the parties' arbitration clause, the Court should order CMI to cease advancing its civil claims until they are adjudicated in binding arbitration.

3. CMI's serial defamation, to include its "Briese Reports," should be ordered to arbitration.

The Court should compel CMI to submit to arbitration with respect to AiG's defamation claims arising out of CMI's Briese Reports and related publications. The Briese Reports consist

[12] The Distribution Agreement refers to the subscriptions as belonging to AiG. (*See* D.1 Ex. B ("Price will *include* … from Australia to your Kentucky office for the quantity needed to service ***your*** subscriptions." (emphasis added).)

of two papers. The first paper is a "committee report" where a group of individuals associated with CMI purported to conduct an investigation and *ex parte* examination of CMI's evidence against AiG. This "committee" published limited, cursory findings adverse to AiG. Specifically, they concluded that the MOA and DOCL improperly claimed that authors for *Creation* articles had given away their rights in the articles to AiG. The report stated "this is Biblically and ethically wrong." The report also asserted that the manner in which AiG discontinued distributing *Creation* was "ethically wrong." These statements and characterizations are themselves false, the result of a partisan and deeply flawed process, and they damage the reputation of AiG.

The errant committee report is tepid when compared to its oversized appendage, a so called "Chairman's Report" purportedly authored by CMI member and advisor Clarrie Briese. (*See* Pence Aff. ¶¶50,51; Thallon Decl. ¶29.) This Chairman's Report, running at approximately forty pages, is a rambling defamatory diatribe against AiG and Ken Ham. It is an aggregation of accusations, serial adverse inferences and convenient factoids suitably overstated all to achieve rhetorical impact and loosely arranged to suggest some form of an analysis. This Chairman's Report, taking off from the Committee Report, characterizes the MOA and DOCL as well as AiG's decision to discontinue distribution of *Creation* as "unbiblical/unethical/unlawful." The report states that the former Australian Board was effectively tricked into signing the MOA/DOCL agreements, that AiG forced AiG-Australia/CMI to change its name, and that the MOA/DOCL documents "virtually gave control of [AiG- Australia /CMI] to [AiG] and Ken Ham." From this and the surrounding circumstances, the report extrapolates that AiG and Ken Ham engage in a common pattern of "destroying" opponents while ignoring Biblical and ethical considerations in the process. The allegations, both direct and implied, are egregiously false.

Such allegations would be damaging against any organization; they are particularly harmful when levied against a Christian ministry. CMI also publishes additional defamatory content on its website, and as of the time of this filing continues to file new false and damaging accusations against AiG in an overt public relations smear campaign against AiG. (*See* Pence Aff. ¶¶63, 76 & Exs. 16, 20; Looy Aff ¶¶4-8; Landis Decl. ¶¶10-15.) CMI's defamation also falls within the scope of the arbitration clause.

A number of CMI's accusations in the reports relate to the making, the meaning, and the fairness of the MOA. (*See* Pence Aff. Ex. 16.) Thus, literally, AiG's defamation claim involves a dispute or disagreement regarding the meaning and application of the MOA, which is expressly within the scope of the arbitration clause. Further, the purpose of the MOA was to continue the working relationship of the two entities, albeit on a more defined and business-like basis. An implied term of most contracts is good faith and fair dealing. In addition, the various specific terms of the MOA, such as maintaining websites, would require trust and cooperation. The publication of the Briese Chairman's Report is a substantial breach of any such implied terms and the spirit of the MOA, as it eviscerates any working relationship based on cooperation and trust. Third, the Briese Chairman's Report itself was a form of unilateral mediation/arbitration that was intended to preempt the sort of mediation/arbitration provided for in the MOA. Ultimately, the assorted Briese allegations are premised in the meaning of and obligations found in the parties' MOA, DOCL, and Distribution Agreement, as well as in the circumstances surrounding the formation and motivations for entering into these agreements and for AiG's discontinuing the Distribution Agreement. Accordingly, the defamation analysis relates to the MOA and falls squarely within the scope of the parties' arbitration provision.

4. CMI's serial (and defamatory) publications about the settlement negotiations should be submitted to arbitration.

Unfortunately, CMI's shocking Internet defamation campaign is not limited to the Briese Reports. CMI publishes lies and half-truths about the parties' efforts to resolve the dispute. In an effort to portray AiG as hostile and forcing AiG-Australia/CMI to file a lawsuit and while refusing to appear in the ICC proceeding, CMI routinely misinforms the public that AiG refuses to engage in binding Christian arbitration. Most egregiously, CMI engages in a public relations smear campaign regarding the efforts to settle the dispute at mediation last year. (*See* Pence Aff. ¶76 & Ex. 20.)

CMI's defamatory statements about the parties' settlement efforts relate to and directly implicate the arbitration agreement. The parties' mediation and efforts to settle were pursuant to the requirement in the arbitration clause that the parties engage in Christian mediation prior to Christian arbitration. (*See* D.1 Ex. A ¶8.) Thus, CMI's statements relate directly to the arbitration clause.

As part of the mediation, the parties agreed they would protect the confidentiality of the settlement process and would not discuss those matters. Both parties signed the agreement, to include CMI's current leadership, in the aforementioned Mediation Agreement. (*Id.* Ex. D ¶3.) CMI's defamatory statements about settlement also breach the Mediation Agreement. The Mediation Agreement was entered into in furtherance of the Christian mediation requirement that is part of the arbitration clause, and thus, as stated, that agreement is related to the arbitration clause. Accordingly, CMI's breach of its confidentiality obligations in the Mediation Agreement is also subject to arbitration.

D. Equity Requires that CMI's Claims Against Ken Ham Fall Within the Scope of the Arbitration Agreement with AiG.

CMI should also be compelled to arbitrate their civil claims against Mr. Ham and related issues, despite his being a non-signatory to the MOA. Precedent recognizes five bases upon which a non-signatory can either be required to arbitrate or force a signatory to arbitrate: "1) incorporation by reference; 2) assumption; 3) agency; 4) veil piercing/alter ego; and 5) estoppel." *Javitch v. First Union Securities, Inc.*, 315 F.3d 619, 629 (6th Cir. 2003). The basis most applicable to this dispute is estoppel, which courts apply in two situations:

> First, equitable estoppel applies when the signatory to a written agreement containing an arbitration clause "must rely on the terms of the written agreement in asserting [its] claims" against the non-signatory. When each of a signatory's claims against a non-signatory "makes reference to" or "presumes the existence of" the written agreement, the signatory's claims "arise[] out of and relate [] directly to the [written] agreement," and arbitration is appropriate. Second**,** "application of equitable estoppel is warranted ... when the signatory [to the contract containing the arbitration clause] raises allegations of ... substantially interdependent and concerted misconduct by both the non-signatory and one or more of the signatories to the contract." Otherwise, "the arbitration proceedings [between the two signatories] would be rendered meaningless and the federal policy in favor of arbitration effectively thwarted.

Orcutt v. Kettering Radiologists, Inc., 199 F. Supp. 2d 746, 752-53 (S.D. Oh. 2002); *see also J.J. Ryan & Sons v. Rhone Poulenc Textile, S.A.,* 863 F.2d 315, 320-21 (4th Cir.1988) (applying first theory of equitable estoppel); *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*,10 F.3d 753, 757 (11th Cir.1993) (same). The first type of estoppel applies where a party relies on a contract with an arbitration provision as a basis for its claims.

The second type of estoppel arises when the signatory to the written agreement raises allegations of substantially *interdependent* and *concerted* misconduct by both the non-signatory and one or more of the signatories to the contract. *Brantley v. Republic Mortgage Ins. Co.*, 424 F.3d 392, 396 (4th Cir. 2005) (doctrine recognized but found inapplicable); *accord, Merrill Lynch*

Inv. Managers, v. Optibase, Ltd., 337 F.3d 125, 131 (2nd Cir. 2003). The doctrine was well summarized in the case of *MAG Portfolio Consult, Gmbh v. Merlin Biomed Group LLC*, 268 F.3d 58 (2nd Cir. 1995):

> Under this theory, a court will estop a signatory from avoiding arbitration with a non-signatory when the issues the non-signatory is seeking to resolve in arbitration are intertwined with the agreement that the estopped party has signed, and the signatory and non-signatory parties share a close relationship. Thus, for example, parties [may be] estopped from avoiding arbitration because they had entered into written arbitration agreements, albeit with the affiliates of [the non-signatory] parties asserting the arbitration and not the parties themselves.

Id. at 62 (internal quotations and citations omitted). In an Eleventh Circuit case, the plaintiff alleged that the non-signatory defendant conspired with the signatory defendant to insert an unconscionable provision in the contract containing the arbitration agreement. *MS Dealer Service Corp. v. Franklin,* 177 F.3d 942, 947-48 (11th Cir. 1999). The court held that the non-signatory defendant could compel arbitration. *Id.* at 947-48. The Sixth Circuit allows non-signatory agents and employees of a signatory to an arbitration agreement to compel arbitration where the plaintiff signatory alleges that the agents conspired with their employer to perpetrate a fraud. *Arnold v. Arnold Corp.-Printed Communications for Business,* 920 F.2d 1269, 1281-82 (6th Cir. 1990). The court was quite clear that ordering the entire dispute to proceed to arbitration was an appropriate extension of the strong federal policy favoring arbitration. Following *Arnold,* several decisions from District Courts in the Sixth Circuit have permitted non-signatory parties to compel arbitration against signatory plaintiffs or have otherwise recognized the doctrine of estoppel. *Orcutt v. Kettering Radiologists, Inc.*, 199 F. Supp. 2d 746, 752-53 (S.D. Oh. 2002); *Higgs v. Warranty Group*, 2007 WL 2034376 n.5 (S.D. Oh. 2007); *General Power Products LLC v. MTD Products, Inc.*, 2007 WL 901522, **2-3 (S.D. Oh. 2007).

Ken Ham is the Chief Executive Officer of AiG, and has been its Chief Executive and responsible for its day to day operations since the inception of the ministry. Indeed, CMI's Statement of Claim filed in Queensland states that "[at] all material times" Mr. Ham held office as the President and Chief Executive Officer of AiG. (Pence Aff. Ex. 15 Stmt of Cl. ¶6.)The claims against him are based on his alleged conduct as an Executive Officer of AiG. There is not even a hint of an allegation in CMI's pleadings against Mr. Ham for actions he took individually, outside the scope of his employment with and duties to AiG. CMI should not be permitted to end-run its arbitration agreement with AiG by suing the constituent members of AiG for the actions they took behalf of AiG. The claims against Mr. Ham involve the same facts and claims that comprise CMI's allegations against AiG. (See *id.* Ex.15.) AiG should be able to protect the integrity of its arbitration agreement by having CMI's claims against it and the same claims that CMI brings against AiG officers resolved in the same arbitration.

E. The Court Should Enjoin CMI from Proceeding with Its Australian Lawsuit Until CMI Completes Binding Arbitration with AiG.

"It is well settled that American courts have the power to control the conduct of persons subject to their jurisdiction to the extent of forbidding them from suing in foreign jurisdictions." *Gau Shan Company, Ltd. v. Bankers Trust Co.*, 956 F.2d 1349, 1352 (6th Cir. 1992) (internal quotation omitted). In the *Gau Shan Company* opinion, the Sixth Circuit addressed the circuit split with regard to how liberally anti-suit injunctions should be permitted. After considering the more permissive view taken by the Ninth and Fifth Circuits, the panel adopted the more conservative approach used by the Second and DC Circuits.[13] The Sixth Circuit, thus,

[13] Since the Sixth Circuit adopted the conservative approach, the First, Third, and Eighth Circuits have also adopted this approach. *See Goss Intern. Corp. v. Man Roland Druckmaschinen Aktiengesellschaft*, 491 F.3d 355 (8th Cir. 2007); *Quaak v. Klynveld Peal Marwick Goerdeler Bedrijfsrevisoren*, 361 F.3d 11 (1st Cir. 2004); *Stonington Partners, Inc. v. Lernout & Hauspie Speech Prods.*, 310 F.3d 118 (3rd Cir. 2002).

considered only two factors in determining whether an anti-suit injunction should be entered: whether the forum court's jurisdiction is threatened by a foreign action and whether the forum court's important public policies may be evaded through the foreign action. *Id.* at 1355. The court held that the district court abused its discretion by enjoining the defendant from proceeding in foreign court when neither the district court's jurisdiction nor public policies were threatened by the proceeding. The Sixth Circuit has not further addressed what constitutes a sufficient public policy interest. Other courts have since held that the strong federal public policy in favor of enforcing arbitration agreements warrants a foreign anti-suit injunction when the U.S. policy in favor of enforcing arbitration provisions is being threatened or circumvented.

Considering the Sixth Circuit's adoption of the Second and DC Circuits approach, authority from those circuits should be strongly persuasive in analyzing a particular request for an anti-suit injunction. Last year, the Second Circuit considered a request for an anti-suit injunction in a case precisely on point with the issue *sub judice*. *Ibeto Petrochemical Industries Ltd. v. M/T Beffen*, 475 F.3d 56 (2nd Cir. 2007). Ibeto received a ruined shipment of oil in Nigeria from New Jersey. The Bill of Lading for the shipment incorporated, through a chain of other agreements, language requiring arbitration in London. Ibeto filed suit in Nigeria over the shipment. During settlement negotiations, Ibeto filed both an arbitration proceeding in London and suit in New York. In the New York action, the defendants counterclaimed seeking an order requiring arbitration in London and enjoining further proceedings inconsistent with the agreement to arbitrate. The district court found the federal policy favoring arbitration might be frustrated by the foreign litigation and compelled arbitration and enjoined proceeding in any other action. On appeal, the Second Circuit affirmed the district court's injunction and noted that there is an especially strong general federal policy of promoting arbitration.

The Second Circuit considered a similar situation in *Paramedics Electromedicina Commercial, Ltd. v. GE Medical Systems information Technologies, Inc.*, 369 F.3d 645 (2nd Cir. 2004). The foreign distributor in that case obtained an order compelling arbitration and enjoining the foreign lawsuit over the same dispute. The Second Circuit affirmed the anti-suit injunction, agreeing that federal policy strongly favors enforcement of arbitration agreements. *Id.* at 653; *see also Northwest Airlines v. R&S Co. S.A.*, 176 F. Supp. 2d 935 (D. Minn. 2001) (issuing foreign anti-suit injunction at preliminary injunction stage to compel arbitration).

Since the Sixth and Second Circuits apply the same conservative approach to anti-suit injunction requests, it seems highly likely that the Sixth Circuit would treat requests in a similar manner as the Second Circuit. This court should find that enforcement of the arbitration agreement between the parties constitutes a sufficient policy interest to justify enjoining CMI from proceeding with its Australian or any related lawsuit until arbitration is completed.

F. The Court Should Order Arbitration to Occur Under ICC in this Judicial District.

The ICC is a highly regarded dispute resolution organization whose arbitration judgments are routinely recognized and enforced by U.S. courts. *See, e.g., Prescott v. Northlake Christian School*, 141 Fed. Appx. 263 (5th Cir. 2005) (affirming enforcement of ICC arbitration award); *Graves v. George Fox Univ.*, 2007 WL 2363372 (D. Id. Aug. 16, 2007) (granting motion to compel arbitration before ICC); *Encore Productions, Inc. v. Promise Keepers,* 53 F. Supp. 2d 1101 (D. Colo. 1999). Further, some deference should be given to the fact a significant portion of the parties' dispute is already before the ICC. *Cf. Ore & Chemical Corp. v. Stinnes Interoil, Inc.*, 611 F. Supp. 237, 241 (D.C.N.Y. 1985) (previously appointed arbitrator selected again to preside over related arbitration). In fact, the proceeding was filed months before CMI initiated its civil lawsuit. Finally, CMI cannot claim that ICC is not appropriate. CMI agreed to and

participated in mediation with AiG before a Christian conciliator certified through ICC. (D.1 Ex.D.) As part of the Mediation Agreement, CMI also agreed to submit disputes with ICC or Peter Reynolds to binding arbitration in accordance with ICC rules. (*Id.*)

For several reasons the court should also order the arbitration to proceed in the Eastern District of Kentucky.[14] Foremost, the FAA requires that when a court orders a matter to arbitration, the arbitration hearing and proceeding shall be in the same judicial district in which the arbitration agreement is being enforced. 9 U.S.C. § 4. Kentucky law also dictates that the matter should be addressed here. In Kentucky, the venue statute, entitled "Where Tort or Contract Action Against a Corporation *Must* be Brought," states that an action against a corporation which has an office or place of business in Kentucky must be brought in the county in which such office is situated. Ky. Rev. Stat. Ann. § 452.450 (emphasis added). For contract claims, the claim must be brought where the contract was made or to be performed. *Id.*

CMI would not be unfairly prejudiced by attending arbitration in this judicial district. For years, members of CMI, to include its board, traveled to Kentucky to visit and interact with members of AiG. Before the dispute, Dr. Wieland regularly visited AiG's place of business in Kentucky and also traveled to Hawaii to participate in the mediation talks. The arbitration agreement was negotiated and executed in Kentucky. Further, CMI has a licensee in USA and (upon information and belief) has an ownership interest in a publishing company here. CMI's members still regularly visit the USA.

[14] The fact that CMI is an Australian entity does not militate against obtaining an order compelling arbitration. Although AiG believes that this is not an international dispute, the considerations would be the same regardless. In fact, "[t]he presumption in favor of arbitration carries 'special force' when international commerce is involved" since the United States is a signatory to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("CREFAA"). *Sandvik AB v. Advent Intern. Corp.,* 220 F.3d 99, 104-05 (3rd Cir. 2000) (citing *Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc.,* 473 U.S. 614, 631 (1985)). Signatory states to the CREFAA must direct courts to refer parties to arbitration when the parties have agreed to arbitrate disputes. *See* CREFAA Art. II; 9 U.S.C. §201.

Finally, the chairman of the board for AiG, Pastor Don Landis, has been involved with the issues surrounding the parties' disputes since they arose in 2004. He has been and remains a key decision maker and leader for AiG. He also has a severe phobia of flying and a recent history of heart failure. Pastor Landis is a necessary witness and decision maker for AiG in this dispute. Holding the arbitration in this district would enable him to participate. (*See* Landis Decl. ¶¶18, 19 & Ex. A.)

G. CMI'S Illegal Activities Cause Ongoing Irreparable Harm to AiG and Warrant an Order for Expedited Arbitration.

In certain cases, expedited arbitration is warranted. *See, e.g., American Postal Workers Union, AFL-CIO v. U.S.P.S.*, 372 F. Supp. 2d 83 (D.D.C. 2005). In the *U.S.P.S.* case, the court found that the union would suffer irreparable harm without expedited arbitration and accordingly ordered arbitration on an expedited basis. *Id.* at 90-91. AiG has and will continue to suffer irreparable harm until this dispute is resolved.

If statements are defamatory or libelous per se, harm to a person's reputation is presumed. *Marcus & Millichap Real Estate Investment Brokerage Co. v. Skeeters*, 395 F. Supp. 2d 541, 554 (W.D. Ky. 2005). Statements constitute a per se offense if the statements expose the target "to public hatred, ridicule, contempt or disgrace, or to induce an evil opinion of him in the minds of right-thinking people and to deprive him of their friendship, intercourse and society" or to otherwise "injure one in his reputation …." *Id.* (quoting *Courier Journal v. Noble*, 251 Ky. 527, 65 S.W.2d 703 (1933)). CMI has made numerous defamatory statements regarding both AiG and Ken Ham, the founder of both AiG and AiG-Australia and current president of AiG. CMI's statements, as described already above, include that actions by AiG and Mr. Ham were "unbiblical/unethical/ unlawful," that AiG-Australia was tricked into signing agreements with AiG, and that AiG forced AiG-Australia/CMI to change its name. While these false allegations

would be damaging against any organization, they are particularly harmful when charging a Christian ministry with such actions. AiG has labored arduously and with the highest degree of ethics over the years to build a strong reputation. (Looy Aff. ¶¶2, 3.) CMI's statements damage AiG's hard earned reputation, in fact, appear to be designed specifically to injure the reputations of AiG and Mr. Ham. (*See id* ¶¶4-8.) This ongoing attack upon AiG's reputation must be ceased as expeditiously as possible.

Further, in trademark cases, irreparable harm is presumed. *See, e.g., Amyotrophic Lateral Sclerosis Ass'n v. Amyotrophic Lateral Sclerosis of Michigan, Inc.*, 2006 WL 2594462, *10 (E.D. Mich. 2006). The "Answers in Genesis" trademark is, as explained in detail above, one of the main points of dispute between the parties. (*See also* D.1 ¶¶16,17.) In the MOA agreement, AiG-Australia/CMI promised to assign any rights it still retained in the "Answers in Genesis" mark should it change its own name. (*Id.* Ex. A ¶7.) Although the company ceased using the mark and changed its name, AiG-Australia/CMI refused to assign its rights as promised. Further, CMI demanded that representatives of AiG be prevented from using the "Answers in Genesis" mark in Australia and has filed suit against AiG in Australia for trademark infringement. (*See* Pence Aff. Ex. 15.) In reality, it is AiG's trademark rights that are being harmed as CMI obstructs AiG's ability to use its own name and trademark. Such harm is presumptively irreparable. Considering the imminent harm AiG faces with regard to defamation and trademark issues, the parties should be ordered to participate in expedited arbitration.

H. Public Policy, Precedent, and the Intention of the Parties Weigh in Favor of Liberally Enforcing the Parties' Arbitration Agreement

The FAA manifests a liberal federal policy favoring arbitration, where doubts are resolved in favor of arbitration unless it can be shown with certainty that the clause cannot be construed in a manner that covers the asserted dispute. *SBC Holdings, Inc*, 513 F.3d at 650. The

parties to the agreement intended the arbitration clause to have a broad scope and that the reference to related agreements should be broadly interpreted to include all agreements, past, present, and future. (Pence Aff. ¶26; Landis Decl. ¶7; Thallon Dec. ¶23.) The draftsman of that clause, Mr. John Pence, intended that all agreements between the parties related to the matters now in dispute fall within the scope of arbitration. (Pence Aff. ¶26.) The architect of the MOA on the Australian side, Mr. John Thallon, intended the parties' agreement to prevent and preempt any future litigation. (Thallon Decl. ¶26.) The underlying purpose of the MOA was to recast the relationship between the ministries and put them on a more business-like and arms length basis.

Further, in the Mediation Agreement, CMI agreed that if the parties were not able to resolve all their disputes at mediation, the parties would continue working together to resolve the matters at arbitration. (D.1 Ex. D ¶1.) While CMI's idea of working together was an overreaching ultimatum on arbitration, the Mediation Agreement reflects CMI's understanding that these matters should be resolved at arbitration. The Court should find that the scope of the parties' arbitration clause is broad enough to encompass all the legal disputes discussed herein.

Finally, arbitration, and Christian arbitration in particular, furthers important values for both parties. Each entity is a Christian ministry that professes strict adherence to the teachings of Christian scripture. That scripture, particularly the sixth chapter in the Apostle Paul's first book to the church in Corinth, admonishes against Christians filing lawsuits against each other and directs Christians to appoint judges within the church to resolve their disputes. *See* 1 Corinthians 6:1-8; s*ee also* Matthew 18. Given the expressed intent of the parties that executed the MOA as well as the nature of these entities, the arbitration clause should be broadly construed and the reference to related agreements should be broadly interpreted to include all agreements then in existence to include the distribution agreement and the mediation agreement. All legal matters

presently in dispute between the parties should be ordered into binding, Christian arbitration on an expedited basis.

IV. CONCLUSION

For these reasons, AiG requests that its motion for a preliminary injunction be granted.

Respectfully submitted, this the 1st day of April 2008.

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CERTIFICATE OF SERVICE

I certify that on this 1st day of April 2008 the foregoing **MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION** is being submitted to Process Forwarding International to accomplish hand delivery to the following:

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