

No. 2008-2306

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**UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT**

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THE NATIONAL SPIRITUAL ASSEMBLY OF THE BAHÁ'IS OF THE UNITED STATES OF AMERICA UNDER THE HEREDITARY GUARDIANSHIP, INCORPORATED,

Plaintiff

v.

NATIONAL SPIRITUAL ASSEMBLY OF THE BAHÁ'IS OF THE UNITED STATES OF AMERICA, INCORPORATED,

Defendant-Appellant

v.

FRANKLIN D. SCHLATTER, JOEL B. MARANGELLA, PROVISIONAL NATIONAL BAHÁ'I COUNCIL OF THE UNITED STATES, et. al.,

Respondents-Appellees

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Appeal From The United States District Court  
For The Northern District of Illinois  
Case No. 64-CV-1878

The Honorable Judge Amy J. St. Eve

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**COMBINED PETITION FOR PANEL REHEARING  
AND REHEARING EN BANC**

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**CIRCUIT RULE 26.1 DISCLOSURE STATEMENT**

Counsel for Defendant-Appellant, National Spiritual Assembly of the Baha'is of the United States, pursuant to Rule 26.1 of the Rules of this Court, certifies the following:

**[ ] PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED**

- (1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure statement required by Fed. R. App. P. 26.1 by completing the item #3):

**National Spiritual Assembly of the Baha'is of the United States**

- (2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or

before an administrative agency) or are expected to appear for the party in this court:

**Brinks Hofer Gilson & Lione**

- (3) If the party of amicus is a corporation:
- i. Identify all its parent corporations, if any; and  
**National Spiritual Assembly of the Baha'is of the United States has no parent corporation.**
  - ii. List any publicly held company that owns 10% or more of the party's or amicus' stock:  
**The corporate party does not issue stock.**

December 7, 2010

/s/Christopher M. Dolan/

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## STATEMENT OF COUNSEL UNDER RULE 35(b)(1)

Based on my professional judgment, I believe that this proceeding involves a question of exceptional importance:

The panel's decision, which adopts legal identity as a basis for privity for the first time in this Court, holds that legal identity between an individual and an enjoined corporation requires "a high degree of similarity between the activities of the old organization and the new." (Op. at 33, Nov. 23, 2010). This formulation of the similarity prong of legal identity conflicts with the similarity prong set forth in other circuit decisions, including *G. & C. Merriam Co. v. Webster Dictionary Co.*, 639 F.2d 29 (1st Cir. 1980) and *Additive Controls & Measurement Sys., Inc., v. Flowdata, Inc.*, 154 F.3d 1345 (Fed. Cir. 1998), which instead look to the similarity of the *alleged contemnor's* activities in the old and new organizations. The panel's misapprehension of this aspect of legal identity allows an individual, who would otherwise be legally identified with an enjoined corporation, and thus subject to an injunction, to commit the enjoined activity yet evade contempt through the use of different corporate forms.

/s/Christopher M. Dolan/  
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*Counsel for National Spiritual Assembly  
of the Baha'is of the United States*

I. **INTRODUCTION TO THE POINTS OF LAW AND FACT MISAPPREHENDED OR OVERLOOKED BY THE PANEL**

Defendant-Appellant National Spiritual Assembly of the Baha'is of the United States ("NSA") seeks a limited rehearing of the panel's November 23, 2010 decision. Specifically, NSA seeks rehearing of the panel's holding that neither Franklin Schlatter nor Joel Marangella is legally identified with the enjoined party, National Spiritual Assembly of the Baha'is of the United States of America under the Hereditary Guardianship, Inc. ("UHG"), and therefore not in privity with UHG nor bound by the 1966 Injunction.

The panel's holding that neither Schlatter nor Marangella is legally identified with UHG turns on one aspect of the legal identity analysis, the similarity prong. According to the panel, this prong requires "a high degree of similarity between the activities of the old organization and the new." (Op. at 33.) However, when assessing legal identity of an individual (as opposed to a corporation), other courts have consistently looked to the similarity of the *individual's* activities in the enjoined and new corporations. NSA argued that Schlatter and Marangella are legally identified with UHG as individuals, and thus, the legal identity analysis should look to the similarity of the activities of Schlatter and Marangella in UHG and the Provisional National Baha'i Council ("PNBC"). Misapprehending the similarity inquiry of the legal identity analysis caused the panel to overlook facts establishing a high degree of similarity between the activities of Schlatter and Marangella in connection with UHG and PNBC.

Additionally, the panel's holding of no legal identity between Schlatter, Marangella, and UHG turns not on an analysis of the similarities in the activities of UHG and PNBC, the analysis required by the opinion (Op. at 33), but rather on differences between UHG and PNBC based on an alleged doctrinal divide. (Op. at 35.) By focusing on organizational differences, the panel overlooked the high degree of similarity between the activities of UHG and PNBC.

Underlying the panel's holding of no privity is a misapprehension of the effect of *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969) on the inquiry. (Op. at 13-15.) The panel seemingly overlooked the procedural posture of the present case when it went to trial in 1966. Although the panel recites that UHG sued NSA for all properties in the NSA's possession and that the NSA counterclaimed for trademark infringement, it omits reference to the fact that UHG's claims, including those regarding religious succession, were dismissed prior to trial. (Op. at 5-7, A104-114.) Specifically, UHG's original complaint, as amended, was dismissed on March 23, 1965 and UHG's separate complaint, in Civil Action No. 65 C 1647, was dismissed on March 8, 1965. (A200-201.) Neither dismissal was on the merits and no appeals were taken. (A201.) Accordingly, only NSA's trademark-related counterclaims, which contained no claims relating to religious succession or doctrine, and focused solely on secular and neutral trademark property claims, were before the court for decision. (A200-01, 218; *NSA Answer and Countercl.*, Civ. No. 64 C 1878, Dec. 23, 1964.)

Although a religious organization, petitioner is entitled to the protection of the laws pertaining to unfair competition, trademark infringement and the enforceability of injunctions to the same extent as a non-religious litigant. NSA obtained an injunction in 1966, after a trial on the merits where witness testimony was heard and over one-hundred exhibits supporting trademark validity and infringement were accepted into evidence. UHG used a trade name bearing near identity to NSA's trade name, caused actual confusion among the public, caused reputational harm with damaging world catastrophe predictions and competed unfairly for adherents. (A218-224.) Religious organizations frequently face such issues and the courts routinely decide such matters according to neutral property law principles, as did Judge Austin. Nevertheless, despite finding legal error and that Schlatter and Marangella occupied key positions in UHG and participated in the underlying litigation (Op. at 34), the panel declined to find legal identity and dispensed with a remand. By misapprehending the effect of *Presbyterian Church*, the panel may in effect deny a religious organization equal protection of the laws.

## II. STATEMENT OF THE CASE

This matter arises out of NSA's effort to obtain effective relief regarding the unauthorized confusing use of its trademarks and unfair competition by alleged contemnors of a 1966 permanent injunction, including those at issue here, Franklin Schlatter and Joel Marangella.

### **A. Course of Proceedings**

The present appeal arose from a civil contempt proceeding alleging violations of a permanent injunction entered in 1966. As explained above, the underlying suit was filed by UHG, on behalf of its adherents, against NSA. (*Supra* at 3, Op. at 6, A200-01, A105.) NSA counterclaimed for trademark infringement, dilution, unfair competition and injury to reputation. (Op. at 6, A200.) UHG's claims were dismissed prior to trial, and the court found for NSA on its trademark-related claims, specifically finding that UHG's actions had caused actual confusion among the public. (Op. at 6, A200-201.) The court thereupon entered an injunction barring UHG's unauthorized confusing uses of NSA's trademarks and its unfair competition with NSA. (A218-224.)

Alleged contemnors Schlatter and Marangella were extensively involved with UHG, the public confusion it caused, its unfair competition with NSA, and the underlying litigation that led to the injunction against UHG. (*Infra* at 8-9, 11.) In violation of that injunction, Schlatter and Marangella recently resumed their unfair competition and attempts to cause confusion with highly public use of marks bearing confusing similarity to NSA's marks. (A665-677.)

To protect its reputation and goodwill, on November 3, 2006, NSA filed a Motion For Rule To Show Cause as to why Alleged Contemnors Franklin Schlatter and Joel Marangella, among others not at issue here, are not in violation of the 1966 Injunction entered against UHG. (*R.1*, Blue Br. at 5). On April 23, 2008, the district

court issued its ruling that the injunction does not bind the Alleged Contemnors, because, as a matter of law, none are privies of UHG. (A1-32.) In reaching this decision, the district court, noting the lack of precedent in this Court, rejected legal identity as a basis for privity. (A13-21.) This appeal followed.

## **B. Panel Decision**

The panel agreed with NSA that the district court committed legal error in rejecting legal identity as a basis for privity, and set new precedent in the Seventh Circuit by holding one legally identified with an enjoined organization is a privy. Specifically, the panel holds that, in accordance with due process, privity based on legal identity requires:

an extremely close identification and will be satisfied only when the nonparty ‘key employee’ against whom contempt sanctions are sought had substantial discretion, control, and influence over the enjoined organization—both in general and with respect to its participation in the underlying litigation—*and* there is a high degree of similarity between the activities of the old organization and the new.

(Op. at 33 (emphasis original.)) The panel’s holding that neither Schlatter nor Marangella are legally identified with UHG, and thus are not in privity nor bound by the 1966 injunction, turns on a finding of doctrinal differences (*e.g.* membership and organizational purpose) between UHG and PNBC, which:

make it clear as a matter of law that the Provisional National Council and its principals [*e.g.* Schlatter and Marangella] cannot be considered ‘legally identified’ with the Hereditary Guardianship.

(Op. at 35.)

### III. POINTS OF LAW AND FACT MISAPPREHENDED OR OVERLOOKED BY THE PANEL

#### A. The Similarity Prong of the Panel's Legal Identity Test Conflicts with that Prong in the Test of Other Circuits

By this petition, NSA requests that the en banc Court, or the panel, address one misapprehended aspect of the legal identity analysis, the similarity prong as applied to individuals alleged to be legally identified with an enjoined corporation. The panel's similarity prong of the legal identity test requires "a high degree of similarity between the activities of the old organization and the new." (Op. at 33.)

In contrast, the similarity prong in decisions of other circuits focuses on the *alleged contemnor's* activities in the old and new organizations, rather than the differences between the activities of the organizations themselves when determining whether an individual is legally identified with an enjoined organization. Specifically, in *Merriam*, in considering whether George Hoskins was legally identified with the enjoined company, the First Circuit remanded to the district court with instructions to consider whether the facts demonstrate that:

**this is a case of the same person continuing to do essentially the same thing with the same high degree of practical control, discretion and responsibility, before and after the injunction**, with knowledge of the injunction, and after participating in the enjoined firm's corporate decisionmaking regarding its position in the injunction proceedings.

*Merriam*, 639 F.2d at 38 (emphases added); Op. at 27-28.

In finding an individual, Cotton, legally identified with an enjoined corporation, *Additive Controls* holds "the following factors [ ] may be pertinent to the *Merriam* inquiry: '[t]he officer's position and responsibilities in the enjoined

corporation, his participation in the litigation that preceded the entry of the injunction, and the degree of similarity between his activities in the old and new businesses." 154 F.3d at 1352 (emphasis added); Op. at 33.

Indeed, a standard focused on the similar activities of an alleged contemnor in an enjoined and new organization, as set forth in *Merriam* and *Additive Controls*, properly prevents an alleged contemnor and his privies from circumventing "a court's injunction against *the activities* they had effectuated before the injunction, through one legal entity, by the creation of another entity through which they or some of them continue essentially the same activity." *Merriam*, 639 F.2d at 40 (emphasis added) citing *U.S. v. Miller*, 588 F.2d 1256, 1261-62 (9th Cir. 1978), *ICC v. Rio Grande Growers Cooperative*, 564 F.2d 848, 849 (9th Cir. 1977), and *Broderick & Bascom Rope Co. v. Manoff*, 41 F.2d 353 (6th Cir. 1930).

- 1. Misapprehending the similarity prong of the legal identity test caused the panel to overlook facts establishing similarities in Marangella's and Schlatter's activities in UHG and PNBC**

Misapprehension of the similarity prong of the legal identity analysis, as applied to an individual, caused the panel to overlook admissions, uncontested documentary evidence, and factual findings, establishing that the activities of Franklin Schlatter and Joel Marangella varied little from UHG to PNBC, evidence that *Merriam* and *Additive Controls* hold relevant to the legal identity inquiry.

For example, the overlooked admissions, evidence and findings establish that Schlatter's activities common to UHG and PNBC<sup>1</sup> include: participation in the formation and incorporation of both entities, (Blue Br. at 13, A530-31 at ¶¶45, 56-57, A68-69), serving as Secretary for each, (Blue Br. at 24, A6, A325, A531 ¶¶61-62), using each organization to teach and promote the same principles and to recruit adherents, (A473 at 28-29, A477-78 at 49-50, A667-70), authoring publications relating to the hereditary guardianship principle for both entities, (Blue Br. at 30, A501 at 19-20, A667-70, A48), competing unfairly with NSA and making confusing uses of NSA's marks in both organizations, (A211-17, A667, Reply at 39-40), and coordinating with and reporting to Marangella on these activities for both organizations, (A226, A37-41, A162-63, A530-31 ¶¶48, 57, 61). The overlooked admissions, evidence and findings also establish that Marangella's activities common to UHG and PNBC include: acting as second in-command of UHG with decision-making authority regarding the affairs of the group, (A145, A192-93, A195), and acting in-command of PNBC with decision making authority regarding the affairs of the group, (A531 at ¶¶57-59), serving as designated successor of Mason Remey in UHG, (A145, A192-93, A195), and claiming to be Mason Remey's successor in PNBC, (A297-99, A665), using each organization to teach and promote

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<sup>1</sup> Evidence referring to "National Bureau" or "Mother Baha'i Council" refers to PNBC because these are indisputably the legal predecessors to PNBC. (A13, n. 7.)

the same principles and to recruit adherents, (A473 at 28-29, A477-78 at 49-50, A665-66), authoring publications for both entities relating to the hereditary guardianship principles, (A665-69, A49), and competing unfairly with and making confusing uses of NSA's marks, (A211-17, A665-67, Reply at 39-40). This is a case of Schlatter and Marangella continuing to do essentially the same thing with the same high degree of practical control, discretion and responsibility, before the injunction with UHG and after the injunction, with PNBC.

**2. The panel also overlooked the high degree of similarity between the activities of UHG and PNBC**

Under the panel's holding, legal identity requires a "high degree of similarity between the activities of the old organization and the new." (Op. at 33.) Yet, the panel overlooked admissions and uncontroverted documentary evidence establishing a high degree of similarity in the activities of UHG and PNBC:

- UHG promoted the living guardianship principle. (Blue Br. at 11, 30; A47-57, A104-14, A210-11, A214-217, A500-01, A665-67.)
- PNBC promotes the living guardianship principle. (A326-29, A665-670, A730-31.)
- UHG promoted Mason Remey as the Second Guardian. (A473 at 28-29, A71-72.)
- PNBC advertises Mason Remey as the Second Guardian. (A478 at 50:11-19.)
- UHG's by-laws state its purpose is to administer the affairs of the faith as applied by Mason Remey and successors. (Blue Br. at p. 11-12, 26; A71-72.)
- PNBC's by-laws state that Marangella is the Third Guardian and successor to Mason Remey, the Second Guardian, and its functions are to administer the affairs of the faith. (A326, A328-29.)

- UHG attempted to divert NSA’s adherents to the UHG through unfair competition and confusing uses of NSA’s marks. (Blue Br. at 26, A218-224.)
- PNBC attempts to divert NSA adherents to PNBC through unfair competition and confusing uses of NSA’s marks. (Reply at 39-40, A667-71.)
- UHG caused public confusion by publishing materials about catastrophes. (A215-17.)
- PNBC publishes materials about catastrophes including quotes from materials published by UHG. (A671-77.)

Thus, not only did Schlatter and Marangella engage in similar activities on behalf of UHG and PNBC, but UHG and PNBC also engaged in similar activities.

**3. The panel’s misapprehension of the similarity prong caused it to overlook other evidence demonstrating Schlatter, Marangella, and UHG are legally identified**

In addition to the similarity prong, the panel’s legal identity analysis requires evidence that a “nonparty ‘key employee’ . . . had substantial discretion, control, and influence over the enjoined organization-both in general and with respect to its participation in the underlying litigation.” (Op. at 33.) NSA presented substantial evidence demonstrating that Schlatter and Marangella were “key officers” in UHG and PNBC, with substantial influence over the underlying injunction proceedings. (See Blue Br. at 13-16, 18-27, 50-52 and Reply at 11-15.) The panel overlooked this evidence because it found the organizational dissimilarity defeats the claim of legal identity between Schlatter, Marangella and UHG. (Op. at 34, *infra* at 11-15.)

**B. Relying on Findings of Organizational Differences Between UHG and PNBC, the Panel Misapprehended the Similarity Analysis Required by its Legal Identity Test and Overlooked Clear Errors of Fact and Law Underlying These Findings**

Despite holding that legal identity requires a high degree of similarity in the *activities* of the old and new organization, Op. at 33, the panel fails to identify any activities of either UHG or PNBC supporting its holding of no legal identity between UHG, Schlatter, and Marangella. Instead, the panel’s holding relies on the district court’s findings and conclusions relating to organizational differences between UHG and PNBC: (1) “that [PNBC] was not formed for the purpose of escaping the confines of the injunction;” (2) that PNBC’s membership “did not in fact encompass all of the same individuals that comprised [UHG];” and (3) that “on a “defining point of organizational purpose, there existed a robust doctrinal divide” between UHG and PNBC. (Op. at 34-35.) Misapprehended or overlooked clear errors of law and fact underlie these findings and conclusions.

**1. The panel misapprehended the relevance of lack of intent to violate an injunction to organizational purpose and legal identity**

When the evidence demonstrates that a successor corporation is formed “essentially for the purpose of carrying on the enjoined activity” it may be bound by an injunction as a nonparty privy under a successorship theory. *Rockwell Graphic Sys. v. DEV Indus.*, 91 F.3d 914, 919-20 (7th Cir. 1996). However, a finding that an individual alleged contemnor’s subsequent organization was not formed to violate

an injunction fails to establish whether that individual is legally identified with the enjoined corporation and therefore its privy.

**2. The panel overlooked that complete continuity of membership between UHG and PNBC need not be proven to find Schlatter and Marangella legally identified with UHG**

The district court's finding that there is not complete identity of membership between UHG and PNBC, Op. at 34-35, is not determinative of Schlatter and Marangella's legal identity with UHG. Indisputably, Schlatter and Marangella had significant associations with both UHG and PNBC, including serving in leadership roles in both. (*Supra* at 8-10, Blue Br. at 13-16, 18-27, 50-52, Reply at 11-15.) Indeed, it is unclear how similarity of membership informs the legal identity analysis regarding individual alleged contemnors under the standard adopted by the panel, which looks not to identity of membership but to a "high degree of similarity between the *activities* of the old organization and the new." (Op. at 33.)

**3. The panel overlooks errors in the district court's finding of a doctrinal divide between UHG and PNBC**

In adopting the district court's finding that a "doctrinal divide" existed between UHG and PNBC, (A24, Op. at 35), the panel overlooked sworn testimony and uncontroverted extrinsic evidence demonstrating symmetry of organizational purpose between UHG and PNBC. For example, sworn testimony of a board member of both UHG and PNBC states that UHG's goals were to administer the affairs of the group and to teach the hereditary guardianship principle, (A473 at 28-

29), and that PNBC's goals are to administer the affairs of the group and teach the premise of the hereditary guardianship. (A478-79 at 49-50.) Indeed, contrary to the panel's statement that Marangella "broke with Remey on matters of successorship, doctrine, and governance," (Op. at 34) the articles of incorporation and by-laws for PNBC and UHG, which were apparently overlooked by the panel, demonstrate similarities in matters of successorship, doctrine and governance between UHG and PNBC. (*Compare* A71-72 (Article II) *with* A328-29 (Article II, ¶¶ 7, 8) (successorship); A71-72 (Article II) *with* A326-29 (Articles I and II) (doctrine); and A69, A76-77 (Articles X, XI, XIII, XVI, and XIX) *with* A329-30 (Articles III, IV, VI, VII, and VIII) (governance).) The evidence overlooked by the panel also established a high degree of similarity in the activities of UHG and PNBC. (*Supra* at 10-11.)

The "doctrinal divide" identified by the district court, and relied on by the panel, related to whether *after the injunction* a believer would follow Mason Remey, who served as Guardian in connection with UHG, or follow Joel Marangella, who serves as Guardian of PNBC. (Op. at 34.) The fact that Mason Remey served as Second Guardian in connection with UHG, but did not join the membership of PNBC is a difference between UHG and PNBC, but it does not establish a determinative doctrinal divide. Indeed, the panel overlooked evidence establishing that while serving with UHG, Remey named Marangella his successor, (A145, A192-93), and that Marangella leads PNBC based on his claim to be Third Guardian and successor to Remey. (A297-99, A302, A329.)

Moreover, implicit in the district court's finding of a doctrinal divide is a conclusion that Mason Remey and UHG were synonymous and that by breaking with Remey, a follower also broke with UHG, the enjoined party. However, that finding overlooks uncontroverted extrinsic evidence establishing that UHG and Remey were far from synonymous. UHG, through its board and legal committee (Schlatter and Marangella participated in both, Blue Br. at 13-16, 18-27, 50-52, Reply at 11-15), acted independently of Mason Remey, including with regard to the suit against NSA that ultimately led to the injunction against UHG. For example, UHG resolved to file the suit without being instructed to do so by Remey, and UHG proceeded with the suit as it thought best. (A89; *see also* Reply at 15; A127-28.) UHG even denied Remey's request of October 12, 1965, that UHG drop its suit against NSA, and proceeded despite his wishes. (Blue Br. at 15; A166, 170.)

Hence, under the analyses set forth in *Merriam* and *Additive Controls*, and the panel's holding in this case, these overlooked but undisputed facts, established by admission, documents and factual findings, demonstrate that Schlatter and Marangella should be bound by the injunction as legally identified with the enjoined party, UHG. Or at the very least, this case should be remanded to the district court for further factual determinations consistent with those outlined in *Merriam* and *Additive Controls*.

IV. CONCLUSION

For the foregoing reasons, Defendant-Appellant NSA respectfully requests that this Court grant rehearing en banc or a panel rehearing on these issues.

Dated: December 7, 2010

Respectfully submitted,

/s/Christopher M. Dolan/

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## CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of December 2010, two bound copies of the foregoing COMBINED PETITION FOR PANEL REHEARING AND REHEARING EN BANC, and a digital version containing the Combined Petition for Panel Rehearing and Rehearing En Banc were served via FedEx, overnight delivery, to:

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I also hereby certify that on this 7th day of December 2010, thirty bound copies of the foregoing COMBINED PETITION FOR PANEL REHEARING AND REHEARING EN BANC and a digital version containing the Combined Petition for Panel Rehearing and Rehearing En Banc were filed via FedEx, overnight delivery, to:

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