UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

Three Angels Broadcasting Network, Inc.,
an Illinois non-profit corporation, and
Danny Lee Shelton, individually,

Case No. 07-40098-FDS

Plaintiffs,

v.

Gailon Arthur Joy and Robert Pickle,

Defendants.

PLAINTIFFS' OPPOSITION TO DEFENDANT ROBERT PICKLE'S MOTION TO COMPEL, INCLUDING REQUEST FOR ORAL ARGUMENT

INTRODUCTION

Fishing for evidence of wrongdoing by the Plaintiffs well beyond the pleadings, Defendant Robert Pickle has demanded virtually every imaginable record – financial, corporate and personal – ever generated or obtained by the Plaintiffs. Beginning with a request for all minutes "and other documents" of the 3ABN Board for its entire existence "and on an ongoing basis" [Doc. 63-20 at p. 9], Pickle's document requests go downhill from there. Many of the requests were absurdly overbroad – e.g., "All types of phone records or other documents enumerating phone calls made by 3ABN officers from January 1, 2003 onward…." [Doc. 63-21 at p. 14], while others were incomprehensible – "All minutes and other documents of all executive committee(s) of 3ABN… that pertain to concerns, discussions, investigations, actions, or decisions regarding any Plaintiff-related Issues, whatever is not included in Request No. 1"

[Doc. 63-21 at p. 10], and some were overly broad *and* incomprehensible – "All documents … summarizing or memorializing any … communication with any person or entity concerning the subject matter of the instant dispute, the current litigation, or any Plaintiff-related Issue." [Doc. 63-21 at p. 15].

Plaintiffs Three Angels Broadcasting, Inc. ("3ABN") and Danny Lee Shelton ("Shelton") had produced over 12,000 pages of documents before the Court's Confidentiality and Protective Order issued on April 17, 2008, and are working diligently to produce a truly staggering number of documents that were previously withheld pending entry of that order, which Plaintiffs will produce after they have been screened for responsiveness and privilege, redacted to remove private donor data and stamped as confidential pursuant to the Court's order. In response to Pickle's out-of-the-blue motion to compel brought without even a nod to Local Rule 37.1, Plaintiffs have proposed a timetable for completion of their response to Pickle's requests for documents, after which a motion to compel will become either moot or ripe. At present, the motion should be denied without prejudice to Pickle's ability to bring a new motion to compel, which is in compliance with Local Rule 37.1, at such time as one is ripe.

FACTS

The Court is already familiar with the nature of the case, beginning with Plaintiffs' April 6, 2007 Complaint against Defendants alleging defamation, trademark infringement, trademark dilution and intentional interference with advantageous economic relations. The claims arise from the Defendants' establishment, operation and maintenance of websites for the purpose of publishing disparaging remarks about Plaintiffs.

Pickle's memorandum in support of his motion to compel attaches some 500 pages of exhibits, consisting largely of internet regurgitation of the rumors and innuendo that Defendants

have helped to spread through postings on the World Wide Web. The relevance of these exhibits to a motion to compel, except for a few relating to Pickles' requests for production of documents, is not immediately apparent. Pickle appears to believe the case is about the "multiplicity of allegations" against the Plaintiffs, regardless of who made them or upon what questionable factual basis they may have been made. In reality, the defamation claim is based upon a fairly short list of statements made by the Defendants that Plaintiffs allege were false. (*See* Complaint ¶¶ 46-50 [Doc. 1]). Plaintiffs 3ABN and Shelton will therefore limit their recitation of the relevant facts to those necessary to decide the pending discovery motion, and will not address the disparaging, but fundamentally irrelevant exhibits appended to Pickle's motion.

On August 3, 2008, Plaintiffs timely served their Rule 26(a)(1) disclosures, identifying categories of documents that relate to allegations in the complaint and the defenses raised in the answers. (Affidavit of Jerrie M. Hayes at Paragraph 2) (hereafter "Hayes Aff. ¶___"). On March 28, 2008, following informal requests from Defendants, Plaintiffs produced approximately 12,575 pages of documents that had been identified in Plaintiffs' Rule 26(a)(1) disclosures, but which were not deemed confidential or privileged. (Hayes Aff. ¶ 23). Following the issuance of Magistrate Judge Hillman's Confidentiality and Protective Order on April 17, 2008, Plaintiffs produced an additional 2,500 pages of materials on April 25, 2008, and a second set of 26(a)(1) documents consisting of some 200 pages of additional materials containing confidential, proprietary or trade secret information on May 10, 2008. (Hayes Aff. ¶¶ 23 and 25).

On December 4, 2007, counsel for the Plaintiffs received Pickles' formal document requests directed to 3ABN. (Hayes Aff. ¶ 3). On December 12, 2007, counsel received Pickles' requests directed to Shelton. (*Id.*). Detecting an apparent error in the certificate of service, on

December 20, 2007, counsel for the Plaintiffs, Jerrie Hayes, emailed Pickle regarding her understanding of when service had been accomplished, and stated her intention to serve responses on January 4, 2008 and January 12, 2008, respectively. (Hayes Aff. ¶ 3). Pickle did not object or respond. (*Id.*). However, on January 4, 2008, Pickle sent correspondence to Plaintiffs' Massachusetts local counsel, inquiring as to the status of 3ABN's responses to the document requests. (Hayes Aff. ¶ 8). Hayes was out of the office taking her Holiday vacation that week, but had prepared written responses as to the requests directed to 3ABN for service on January 4, 2008. (Hayes Aff. ¶ 7). She had left instructions with her office that the written responses were to be served in her absence, by January 4, 2008. (Hayes Aff. ¶ 7).

On Hayes' return to the office on Monday, January 7, 2008, she found that Pickle had made contact by email to discuss the status of the document request responses, and therefore sent him a letter on that date proposing a discovery conference, to occur on January 10, to address her objections to the discovery requests. (Hayes Aff. ¶¶ 9-10). That same day, Pickle sent an email agreeing to the January 10 discovery conference, in which he said, "[o]ne thing that would be quite helpful in preparation for the discovery conference would be the expeditious sending my way of plaintiff 3ABN's response." It was then that Hayes realized that the written discovery responses had mistakenly not been served in her absence, making them late. (Hayes Aff. ¶ 11). Pickle asked that the January 10 discovery conference be expanded to include Shelton's responses to the document requests, too, though they were not yet due, and agreed to accept service of both the 3ABN and Shelton responses so long as they were both sent in advance of the discovery teleconference. (Hayes Aff. ¶ 11). Hayes agreed to Pickle's request, and served both 3ABN and Shelton's written responses to Pickle's document requests by fax and mail on January 9, 2008. (Hayes Aff. ¶ 12-13).

On January 10, 2008, the parties held their discovery conference by telephone, for more than four hours. (Hayes Aff. ¶ 14). The issues discussed included the scope of the document requests and how to narrow them in a manner acceptable to both sides; how to treat confidential material; and how to treat material identifying 3ABN donors. (Hayes Aff. ¶¶ 14-17). During that conference, neither Defendant suggested in any fashion that they believed Plaintiffs had waived or abandoned their rights to object to Pickle's Requests for Production of Documents for any reason, including an alleged "tardy" service of the responses. (Hayes Aff. ¶ 17). In fact, Plaintiffs' various relevance, privilege and confidentiality objections—and how they might be mutually resolved by the parties—were the primary topic of the exhaustive conversation. (Hayes Aff. ¶ 17). The Hayes Affidavit explains in detail the Plaintiffs' concerns regarding disclosure of that information, the gist of which is that 3ABN does not want a group of people who are single-mindedly dedicated to its destruction (and who post everything they learn in this litigation on the internet, along with blatant mischaracterizations, rampant speculation and wild innuendo) to learn the identities of its financial supporters. (Hayes Aff. ¶ 6).

The parties reached a number of agreements regarding clarification of definitions in Pickle's discovery requests, narrowing of overly broad requests and the treatment of sensitive information. (Hayes Aff. ¶¶ 15-17). The upshot of the January 10 conference was an understanding that Pickle would serve amended document requests in the near future, which has not yet occurred. (Hayes Aff. ¶ 18). There were no subsequent communications regarding Plaintiffs' relevance-based objections prior to the pending motion. (Hayes Aff. ¶¶ 22-24).

In the period that followed, the parties attempted to work out a confidentiality agreement for the treatment of sensitive information. The outcome of that was dueling submissions to this Court, the result of which was its Confidentiality and Protective Order issued on April 17, 2008.

[Doc.# 60]. Since receipt of the confidentiality order, 3ABN has been working diligently to assemble the requested documents, to determine whether they contain sensitive information, to figure out how to redact the sensitive information while leaving enough information to satisfy any legitimate need Pickle may have for it, all while conducting the myriad of other discovery activities presently ongoing, including challenges to third party subpoenas issued by Pickle in Minnesota and Michigan. (Hayes Aff. ¶ 29).

At the May 7, 2008 status conference in this case, Hayes advised the Court that the parties had neither reached an agreement nor an impasse regarding what would be produced pursuant to Pickle's document requests, and that discussions of Plaintiffs' relevance objections had been dormant for the past few months. (Hayes Aff. ¶ 26). Pickle was in attendance via teleconference, but did not challenge or correct Hayes' statement. (Hayes Aff. ¶ 26). Pickle also did not challenge or correct Hayes' subsequent statement to the Court that, while good faith dialogue concerning the relevance objections would be pursued by Plaintiffs, they were not optimistic about resolving the dispute and anticipated the filing of a Motion for Protective Order to limit the scope of discovery, though Plaintiffs did not believe the filing of such a Motion to be so certain as to require a change in the Court's scheduling order. (Hayes Aff. ¶ 26). Without further communication, and apparently to "preempt" Plaintiffs' anticipated Motion for Protective Order, Pickle served the present motion.

Following receipt of the present motion to compel, 3ABN sent a letter to Pickle advising of the schedule by which Plaintiffs intend to produce documents pursuant to the protective order. (Hayes Aff. ¶ 31). Pickle has not yet responded to the letter, which may moot some or all of the present motion. (Hayes Aff. ¶. 31).

ARGUMENT

I. PICKLE'S MOTION MUST BE DISMISSED FOR FAILURE TO COMPLY WITH LOCAL RULE 37.1.

Local Rule 37.1(a) provides:

> Before filing any discovery motion, including any motion for sanctions or for a protective order, counsel for each of the parties shall confer in good faith to narrow the areas of disagreement to the greatest possible extent. *It shall be the responsibility of counsel for the moving party to arrange for the conference.*

Local Rule 37.1 (emphasis added). Rule 37.1(b) imposes procedural requirement for the filing of a discovery motion, one of which is that a memorandum must be filed detailing "with particularity" the following:

> (1) If a discovery conference was not held, the reasons why it was not;
> (2) If a discovery conference was held, the time, date, location and duration of the conference; who was present for each party; the matters on which the parties reached agreement; and the issues remaining to be decided by the court;
> (3) The nature of the case and the facts relevant to the discovery matters to be decided;
> (4) Each interrogatory, deposition question, request for production, request for admission or other discovery matter raising an issue to be decided by the court, and the response thereto; and
> (5) A statement of the moving party's position as to each contested issue, with supporting legal authority, which statement shall be set forth separately immediately following each contested item.

Local Rule 37.1.

Pickle's failure to comply with Rule 37.1 is as total as it could possibly be, save for a conclusory statement at the end of the motion that "Defendants have complied with the requirements of Local Rule 37.1 by having, in good faith, through counsel and without success, conferred and attempted to confer with Plaintiffs to narrow the areas of disagreement to the greatest extent possible." [Doc. 61 at p. 3]. (Since Defendants were *pro se* at the time of the discovery conference on January 10, this language appears to have been borrowed from another

pleading). Nor has Pickle complied with Rule 37.1's directive that the memorandum identify each specific discovery request at issue, and his position with respect to it.

The Affidavit of Jerrie Hayes establishes that the parties had begun the process of narrowing the document requests, but that the process was not completed at the time this motion was filed. The Court should deny the motion without prejudice to refile it following full compliance with Rule 37.1.

II. PLAINTIFFS DID NOT WAIVE THEIR OBJECTIONS TO THE SCOPE OF DISCOVERY.

Pickle argues that Plaintiffs waived any objections to the scope of his document requests by failing to respond within 30 days. On the contrary, Plaintiffs responded promptly that there was an apparent error in the certificate of service, and that Plaintiffs would assume that the due date for the written response as to 3ABN was January 4, 2008, and as to Shelton was January 10, 2008. That understanding was superseded by the parties' agreement to hold a discovery conference on January 10, 2008, and Pickle's concurrent agreement to accept service of Plaintiff's written responses at any time prior to that date. In reliance on Pickle's statement that he would deem service timely if made before the discovery conference, Plaintiffs served written responses to the document requests on January 9, 2008.

Finally, even if good cause were needed to excuse an untimely response to discovery, the facts supply it. A good cause showing requires only the demonstration of "good faith….and some reasonable basis for non-compliance within the time specified." Broitman v. Kirkland, 86 F.3d 172, 175 (10th Cir. 1996). Here, attorney Hayes made a good faith effort to arrange for timely service despite her vacation absence and had, in her understanding of Pickle's agreement to accept both sets of discovery responses as timely so long as they were served in advance of the January 10, 2008 discovery conference, a reasonable basis for "non-compliance."

If any waiver occurred here, it was a waiver by Pickle of any right to object to the timeliness of Plaintiffs' response by (1) failing to object to Plaintiffs' original dates for service of their Responses; (2) inducing Hayes to believe that receipt of a written response prior to the January 10 discovery conference would be acceptable; (3) failing to claim or allege waiver had occurred during the January 10 discovery conference or in any other communication with Plaintiffs' prior to the filing of the instant motion; and (4) failing to engage in a good faith effort to resolve the dispute concerning waiver before filing the present motion. Pickle's motion should be denied to the extent it is based on a theory of waiver.

III. PICKLE'S MOTION SHOULD BE DENIED BECAUSE HIS REQUESTS SEEK INFORMATION THAT IS NOT DISCOVERABLE.

With some trepidation, Plaintiffs will here attempt to set forth their position that Pickles' discovery requests are overly broad and seek information that is not properly subject to discovery. Plaintiff's trepidation stems from Pickle's failure to comply with Rule 37.1, which contemplates that the moving party will first identify the specific requests for which discovery is sought, his position as to each and any agreements reached to make the request less objectionable. Since Pickle has not complied with this requirement, Plaintiffs can only guess at what documents Pickle's confusing requests seek and the reasons Pickle believes them relevant.

By addressing the substance of Pickle's motion before Pickle himself has, Plaintiffs do not by any means wish to invite the Court to issue an order compelling discovery as to some topics and limiting it as to others. To do so in the absence of a full record following full compliance by the parties with the procedures contemplated by Rule 37.1 would waste judicial resources, be unfair to 3ABN to the extent it compels disclosure of documents that 3ABN intended to produce and would suffer from the infirmities of *any* ruling which would have to be made in vacuum as a result of Pickle's failure to set forth each request for production raising an

issue to be decided by this Court, as well as a statement of his position as to each contested request, with supporting authority. Plaintiffs' exercise is merely an attempt to illustrate the excessively broad and unduly burdensome nature of Pickle's requests and why Plaintiffs cannot respond until the requests are narrowed to seek *relevant* information or information that is reasonably calculated to lead to the discovery of admissible evidence.

For example, Pickle's Requests seek virtually all of 3ABN's financial, accounting, bookkeeping and auditing records from 1997 to the present, a request that implicates hundreds of thousands of pages of documents. He also seeks Plaintiff Shelton's personal banking records going back 10 years. Yet, based upon the defamatory statements set forth in Plaintiffs' Complaint, only the following financial and administrative documents are relevant and subject to (albeit confidential) production:

1. Correspondence, Board or other documents evidencing that moral, ethical and financial allegations against Plaintiffs were brought to Plaintiffs' attention and were ignored, buried or otherwise improperly disregarded by them. [Complaint, ¶ 46(a)].
2. Documents evidencing or related to the following financial transactions and operations by 3ABN:
    a. The purchase and sale of any vans [Complaint, ¶ 46(b)];
    b. the purchase of furniture with 3ABN funds and the subsequent sale of that furniture [Complaint ¶¶ 46(c) and 46(d)];
    c. 3ABN donations to Cherie Peters' ministry and records of any orders issued by 3ABN's Board prohibiting such donations [Complaint ¶ 46(f)];

d. Book royalties earned by and paid to 3ABN or erroneously or improperly paid to Danny Shelton [Complaint ¶ 46(h)];

e. Use of the corporate plane [Complaint ¶ 46(j)];

3. Documents evidencing or relating to the governance and oversight of 3ABN's financial affairs (budgeting, expenditures and financial filings) [Complaint ¶¶ 46(e) and 46(k)] and administrative activities [Complaint ¶ 48(c), 48(a), 50(d), 50(f), 50(h)] by its Board of directors, such as Corporate by-laws, Board agendas, Board Meeting Minutes, Employment handbooks and job descriptions;

4. The public record in Danny Shelton's divorce proceedings [Complaint ¶¶ 46(h), 46(i), 50(c), 50(e), 50(i)]

5. Documents related to negotiations governing the occurrence, rules and procedures for the proposed dispute-resolution process involving Adventist-Laymen Services, Inc. (ASI) [Complaint ¶¶ 48(d), 50(a), and 50(b)]; and

6. Formal IRS or Department of Justice findings and determinations related to Plaintiffs' compliance with the Internal Revenue Code, Formal EEOC or Department of Labor findings and determinations related to Plaintiff's compliance with state and federal employment laws, criminal convictions for state or federal tax law or employment law violations, civil judgments for tax-law or employment-law related torts, and documents evidencing direct or indirect payments by 3ABN to its Board Members [Complaint ¶¶ 48(b), 48(g)],

and the single defamatory statement remotely related to Danny Shelton's personal finances would make relevant only the title, purchase documents and payment information for a Toyota Sequoia automobile [Complaint ¶ 50(g)]. Moreover, no affirmative defenses or counterclaims

raised by Defendants in their Answer would expand the scope of relevance beyond that circumscribed by the Complaint as set forth *supra*.

The abusive overbreadth of Pickle's Requests for Production highlights why Defendants' failure to fully meet and confer on the relevance and scope objections is so troublesome: adherence to the requirements of the rules could have *substantially* narrowed Pickle's considerably overbroad and far-reaching Requests. Pickle's Requests for Production seek irrelevant documents far beyond the scope of dispute in this case and his motion to compel is not ripe for consideration and should be denied.

VI. PICKLE'S MOTION FOR AN INSPECTION UNDER RULE 34(a)(2) SHOULD BE DENIED.

Pickle moves in the alternative for an order allowing him entry into the Plaintiffs' property to gather and copy responsive documents, apparently as a sanction for failure to produce the requested documents. But the rule Pickle relies on, Fed. R. Civ. P. 34(a)(2), merely authorizes a party to request access to property to inspect it. It does not by its terms permit inspection of documents, which subject is covered by Rule 34(a)(1). Nor does the rule authorize the Court to convert a request for documents into a request to inspect property as a sanction. Pickle's motion to be allowed unfettered access to Plaintiffs' records, including, apparently, its litigation files, must be denied.

VII. PICKLE'S REQUEST FOR HIS EXPENSES MUST BE DENIED.

Finally, Pickle moves for an award of his expenses pursuant to Fed. R. Civ. P. 37(a)(5)(A). But the latter rule applies only if the motion is granted. As discussed above, the motion should be denied. Further, the rule contemplates an award of expenses against the deponent "whose conduct necessitated the motion," and it expressly *prohibits* an award of expenses if (1) "the movant filed the motion before attempting in good faith to obtain the

disclosure or discovery without court action;" (2) the opposing party's nondisclosure, response or objection was substantially justified;" or (3) "other circumstances make an award of expenses unjust." Fed. R. Civ. P. 37(a)(5)(A). Here, expenses must not be awarded because Pickle brought the motion in true "sandbag" style, knowing that Plaintiffs intended to produce documents and expected to engage in further discovery conference.

REQUEST FOR ORAL ARGUMENT

Plaintiffs believe that oral argument may assist the Court in evaluating the facts and issues under dispute in the instant motion and therefore request, Pursuant to Rule 7.1 of the Local Rules of the United States District Court for the District of Massachusetts, that the Court grant and schedule oral argument on the instant motion.

CONCLUSION

For the reasons stated herein, Plaintiffs request that, after hearing, Pickle's motion to compel be denied.

Respectfully Submitted:

Dated: May 29, 2008

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CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system, along with any affidavits and/or attachments filed herewith, will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF), and paper copies will be sent to those indicated as non-registered participants.

Dated: May 29, 2008

/s/ J. Lizette Richards

J. Lizette Richards