

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.)	
_____)	

**DEFENDANTS’ MEMORANDUM IN OPPOSITION TO
PLAINTIFFS’ MOTION FOR VOLUNTARY DISMISSAL**

INTRODUCTION

The Plaintiffs and their counsel file this motion as an attempt to further obstruct discovery, evade disclosure of wrongdoing at trial, dodge misuse of process and malicious prosecution counterclaims by the Defendants, and avoid an adverse result. The explanations of Three Angels Broadcasting Network, Inc. (hereafter “3ABN”) for seeking dismissal without prejudice are unconvincing. The motion does not meet accepted standards for granting dismissal without prejudice, or granting dismissal at all. Danny Lee Shelton (hereafter “Shelton”), individually, fails to explain why his claims should be dismissed. Plaintiffs filed their motion just six days after Plaintiffs’ counsel assured Defendant Pickle that no such motion would be filed.

FACTS

Plaintiffs’ Initial Motives for the Instant Suit

When the Plaintiffs filed their case on April 6, 2007, they were not “seeking monetary

benefit,” stated 3ABN Board chairman Walter Thompson (hereafter “Thompson”) on October 13, 2007. (Affidavit of Robert Pickle (hereafter “Pickle Aff.”) Ex. A p. 1; cf. Doc. 121 p. 3).

Thompson gave as reasons for filing the instant suit (a) Defendant Pickle’s concerns about the cover up by Danny Lee Shelton (hereafter “Shelton”) of the child molestation allegations against Tommy Shelton, and (b) the Defendants’ alleged refusal to “cooperate with ASI attempts to develop a procedure for examining the facts on both sides” regarding Shelton’s divorce and remarriage. (Pickle Aff. ¶ 1, Ex. A. p. 1). Adventist-laymen’s Services and Industries (hereafter “ASI”) surprisingly announced on January 5, 2007, that they had pulled out of negotiations the night before. (Pickle Aff. ¶ 2, Ex. B). D. Michael Riva’s letter to Community Church of God trustees threatening litigation over the allegations against Tommy Shelton is also dated January 5, 2007. (Doc. 63-17). ¶ 48(d) and 50(a)–(b) of the Plaintiffs’ complaint refer to issue (b). (Doc. 1). These issues underlying the instant case remain entirely unresolved.

Finally, a Settlement Proposal

On October 17, 2008, Plaintiffs’ counsel telephoned Defendant Pickle, and for the first time during this litigation that Defendant Pickle can recall, explicitly made a settlement proposal to him, based on the need to save expenses associated with *discovery*. (Pickle Aff. ¶¶ 3–5). The proposal was not made in writing. In that telephone conversation, Plaintiffs’ counsel explicitly stated that he would not be filing a motion to dismiss. (Pickle Aff. ¶¶ 6–7). When asked, Defendant Pickle stated that he was interested in settling. (Pickle Aff. ¶ 8).

There have been no subsequent oral or written communications between Plaintiffs’ counsel and Defendant Pickle regarding settlement. (Pickle Aff. ¶ 10, Ex. C pp. 6–7). Plaintiffs’ counsel did not confer with Defendant Joy. (Pickle Aff. ¶¶ 11–12, Ex. C pp. 4–5).

Defendants Were Preparing a Motion to Ask Leave to Subpoena EEOC Investigative Files

The Court will have noticed the Plaintiffs’ motion to enforce protective order that was

later withdrawn. (Doc. 112; Doc. 119). This motion concerned key documents produced by 3ABN that were to be used in connection with a motion by the Defendants seeking the investigative files for the complaints of Ervin Thomsen (hereafter “Thomsen”) and Kathy Bottomley (hereafter “Bottomley”) filed with the Equal Employment Opportunity Commission (hereafter “EEOC”) and the California Department of Fair Employment and Housing (hereafter “DFEH”). Plaintiffs’ counsel represented that he did not oppose the motion.

The Defendants wanted to verify that certain key documents were disclosed by 3ABN to the EEOC and DFEH, since failure to do so could taint the investigation and affect the findings. The Defendants can document similar examples of selective disclosure on the part of the Plaintiffs in both 3ABN’s property tax case and the instant suit.

Plaintiffs’ counsel took the position that if the Defendants stated in an unsealed memorandum that a sealed confidential document was evidence that 3ABN management purposely terminated whistleblowers over allegations against Leonard Westphal (hereafter “Westphal”), allegations that 3ABN management knew were true (the essence of the complaints filed with the EEOC), that would be a violation of the confidentiality order. Plaintiffs’ counsel stated that nothing could be said regarding a confidential document in an unsealed memorandum that “helps your argument or casts my clients in a bad light,” or that “permit[s] anybody to draw negative inferences against my clients.” (Pickle Aff. Ex. D). However, Plaintiffs’ counsel had explicitly told this Court in the hearing of March 7, 2008, that their December 18, 2007, motion for a protective order was seeking protection of only “financial and business records.”

... now we’re not talking about other information. We’re not talking about employment related information, ministry related information, theological information. We’re simply talking about this very narrow window of financial bookkeeping and accounting and auditing documents.

(Doc. 89 pp. 24–25).

Defendants Now Have a Basis for Counterclaims

In opposing the appeal of Remnant Publications, Inc. (hereafter “Remnant”), the Defendants filed evidence that Shelton received kickbacks from Remnant pertaining to sales to 3ABN, as well as enormous royalties. (Doc. 96-9 p. 3–4; Doc. 96-11 p. 54). After losing this appeal on September 8, 2008, Remnant decided against appealing further, and produced the documents by September 22, 2008. After reviewing these documents, the Defendants believe them to be key to their defense.

Attorney Gerald Duffy (hereafter “Duffy”) asserts that Plaintiffs’ counsel did a thorough review of all of the Plaintiffs’ records. (Doc. 96-2). Thompson states that the law firm representing the Plaintiffs thoroughly investigated the Plaintiffs’ financial records prior to taking on the instant case. (Pickle Aff. Ex. E). Plaintiffs’ counsel therefore knew of evidence of Shelton’s kickbacks and substantial royalties attributable to his 3ABN activities, and that Shelton had failed to report all his income and assets on his July 2006 financial affidavit. This lawsuit was therefore without basis, yet the Plaintiffs and their counsel prosecuted this case anyway.

Simpson falsely claims that Defendant Joy revealed confidential information that is “not generally known or readily available to the public,” and is “proprietary information, confidential business or commercial information, and/or trade secrets relating to its business.” (Doc. 121 pp. 7–8; Doc. 60 p. 2). No information within the confidential documents was disclosed.

Simpson misconstrues the second quotation, which was in answer to “anyman’s” assertion that the Remnant documents had been produced under seal to Magistrate Judge Hillman. (Doc. 121 p. 8; Pickle Aff. Ex. F p. 3, Ex. C pp. 1, 4). “anyman” is believed to be the son of Thompson. (Pickle Aff. ¶ 16). Thus, Plaintiffs’ counsel may not have informed the Plaintiffs that the Defendants were now in possession of the key evidence from Remnant, and Defendant Joy’s posts put the Plaintiffs and their counsel on notice that the Defendants now have

a basis for counterclaims of misuse of process and malicious prosecution. (Pickle Aff. Ex. F).

ARGUMENT

I. THE PLAINTIFFS VIOLATED LOCAL RULE 7.1(a)(2)

The instant motion for voluntary dismissal came as a complete surprise, since Simpson had told Defendant Pickle on October 17, 2008, that he would not be filing such a motion, and had not conferred further. (Pickle Aff. ¶¶ 6–7, 10, Ex. C pp. 6–7). Defendant Pickle had made it clear that he was interested in settling on proper terms. (Pickle Aff. ¶ 8). Simpson did not confer with Defendant Joy regarding voluntary dismissal. (Pickle Aff. Ex. C pp. 1, 4–6). Because the vast issues to consider in such a motion have not been narrowed, the Defendants have been prejudiced regarding their attempt to respond. The motion should be denied on that basis.

Given the falsity of Simpson’s Local Rule 7.1 certification attached to his motion, and the apparent attempt of Simpson to avoid liability for malicious prosecution and misuse of process, Simpson’s conduct could be considered evidence of conflict of interest.

II. DISMISSAL MUST NOT PREJUDICE DEFENDANTS

“Voluntary dismissal without prejudice [pursuant to Rule 41(a)(2)] is ... not a matter of right.” *Zagano v. Fordham Univ.*, 900 F.2d 12, 14 (2d Cir. 1990). The purpose of Fed. R. Civ. P. 41(a)(2) is to prevent dismissals that prejudice the defendants and to permit the court to impose curative conditions it deems necessary. *Mobil Oil Corp. v. Advanced Env’tl Recycling Techs., Inc.*, 203 F.R.D. 156, 158 (D. Del. 2001). A noted treatise observes:

Legal prejudice is shown when actual legal rights are threatened or when monetary or other burdens appear to be extreme or unreasonable. . . .

[T]he factors most commonly considered on a motion for a voluntary dismissal are: (1) the extent to which the suit has progressed, including the defendant’s effort and expense in preparing for trial, (2) the plaintiffs diligence in prosecuting the action or in bringing the motion, (3) the duplicative expense of relitigation, and (4) the adequacy of plaintiff’s explanation for the

need to dismiss. Other factors that have been cited include whether the motion is made after the defendant has made a dispositive motion or at some other critical juncture in the case and any vexatious conduct or bad faith on plaintiff's part.

8 *Moore's Federal Practice* § 41.40[6], pp. 41-140 – 41-142 (3d ed. 2003).¹ This list of considerations is not exhaustive. *Id.* at p. 41-141. A voluntary dismissal that strips a defendant of a defense that would otherwise be available may be sufficiently prejudicial to justify denial. *Ikospentakis v. Thalassic Steamship Agency*, 915 F.2d 176, 177 (5th Cir. 1990); *Phillips v. Illinois Cent. Gulf R.R.*, 874 F.2d 984, 987 (5th Cir. 1989).

Dismissal without prejudice ought to be limited to a fairly short period after commencement of the action. *Grover*, 33 F.3d at 719 (“At the point when the law clearly dictates a result for the defendant, it is unfair to subject him to continued exposure to potential liability by dismissing the case without prejudice.”); *also Chodorow v. Roswick*, 160 F.R.D. 522, 524 (E.D. Penn. 1995) (when plaintiff's sole motive is his “realization that his case has been weakened by events and his corresponding hope that the passage of time will somehow improve things for him” court should grant plaintiff's motion to dismiss with prejudice); *Millsap v. Jane Lamb Mem'l Hosp.*, 111 F.R.D. 481, 483-84 (S.D. Iowa 1986) (defendant demonstrated adequate prejudice to support dismissal with prejudice, when suit was pending for three years and plaintiffs could not find credible expert opinion evidence).

None of these factors or considerations support the Plaintiffs' motion in this instance.

A. Vexatious Conduct or Bad Faith on Plaintiff's Part

Vexatious conduct has been found where a plaintiff has filed frivolous actions, committed

¹ See *Zagano*, 900 F.2d at 14; *Grover By Grover v. Eli Lilly and Co.*, 33 F.3d 716, 718 (6th Cir. 1994); *Catanzano v. Wing*, 277 F.3d 99, 110 (2nd Cir. 2001); *Ellett Bros. Ins. v. U.S. Fidelity & Guar. Co.*, 275 F.3d 384, 388 (4th Cir. 2001); *Paulucci v. City of Duluth*, 826 F.2d 780, 783 (8th Cir. 1987); *Pace v. Southern Express Co.*, 409 F.2d 331, 334 (7th Cir. 1969); *Ferguson v. Eakle*, 492 F.2d 26, 29 (3d Cir.1974); *Scallen v. Minnesota Vikings Football Club*, 574 F. Supp. 278, 280 (D. Minn 1983) (plaintiff's rule 41(a)(2) motion denied due to prejudice caused by expense of defendant's discovery and motion preparation, plus likelihood plaintiff would bring another lawsuit and future anti-trust claims).

perjury, or entered or maintained an action in bad faith. *Blue v. United States Dep't of Army*, 914 F.2d 525, 532 (4th Cir. 1990).

Despite the fact that the Plaintiffs had stated in public advertising, and in sworn testimony and legal briefs in a case under appeal until March 31, 2008, that 3ABN's programming is not copyrighted, Duffy accused the Defendants of copyright infringement in his letter of January 30, 2007. (Doc. 63-18 p. 2; Pickle Aff. ¶17, Ex. G, H p. 8, I p. 24, J–K). The Plaintiffs prepared to litigate over copyright infringement by registering for the first time ever a broadcast with the U.S. Copyright Office on February 8, 2007. That broadcast was the one containing the tribute to alleged pedophile Tommy Shelton. (Pickle Aff. ¶ 18, Ex. L–M). Though the Plaintiffs included a copyright infringement allegation in their complaint (Doc. 1 ¶ 30), they failed to include such as a count since they knew they could not prevail.

Though the only allegedly defamatory statements Duffy referred to in his letter concerned child molestation allegations against Tommy Shelton, no such allegations are explicitly mentioned in the Plaintiffs' complaint, though they do fall under ¶¶ 48(a) and 48(c). (Doc. 63-18 p. 2; Doc. 1). Again, the Plaintiffs knew they could not prevail over these issues. (Pickle Aff. ¶ 19, Ex. N–R).

Duffy's letter also accused the Defendants of trademark infringement and dilution. (Doc. 63-18 pp. 1–2). Duffy claimed non-existent common law copyright in an attempt to cover up Shelton's use of Duffy to silence concerns about child molestation allegations, while claiming that the Defendants' claim that Shelton used lawyers to that end was defamatory. (*Id.*). The Defendants therefore published the letter with commentary in order to let the public know that Shelton was indeed doing what Duffy claimed he was not doing. (Doc. 8-2 pp. 2–12). The attached commentary cited Sixth and Ninth Circuit cases which demonstrated the fallaciousness of the Plaintiffs' trademark claims. (Doc. 8-2 pp. 6–7). While the Plaintiffs included trademark

issues in their complaint and called for a permanent injunction against the Defendants in their prayer for relief, they have failed to move the Court for a preliminary injunction since they knew they could not prevail.

The Court should note that Simpson's out-of-context citations of Defendant Joy in his memorandum are used to bolster Simpson's contention that Defendant Joy is disclosing confidential information when he discloses "wrongdoing" on the part of the Plaintiffs. (Doc. 121 pp. 7-8). A perusal of the record demonstrates that this has been the driving force behind the Plaintiffs' litigation efforts. Rather than to prove that there has been no wrongdoing, the Plaintiffs filed and prosecuted this suit in order to muzzle and intimidate the Defendants, and prevent further disclosures of the Plaintiffs' improprieties, whether financial, ethical, or moral. This, therefore, was the driving force behind the efforts to permanently impound the instant case, to impose an overbroad confidentiality order, and to limit the scope of discovery, as well as to protract out the litigation as long as possible. (Doc. 2; Doc. 10; Doc. 40; Doc. 74).

While the parties served their initial disclosures on or about August 3, 2007, the Plaintiffs did not move for a confidentiality order to protect their Rule 26(a)(1) materials until December 18, 2007. (Doc. 37-2 pp. 2-7; Doc. 40). Though reserving relevancy concerns in that motion, the Plaintiffs did not move for an order limiting the scope of discovery until June 25, 2008. (Doc. 41 p. 3; Doc. 74). While the Plaintiffs explicitly stated that they weren't seeking a confidentiality order to cover employment matters, they subsequently invoked the confidentiality order to hide the egregious misconduct of Westphal which led to the termination of the 3ABN Trust Services whistleblowers. (Doc. 89 p. 25; Doc. 112; Pickle Aff. ¶ 20, Ex. S-BB).

Regarding why the Plaintiffs weren't producing their Rule 26(a)(1) materials, Plaintiffs' counsel stated in the hearing of March 7, 2008:

Again, we're not making a purposeful delay here. We genuinely want to show that 3ABN is an upright, financially proper ministry,

but we don't want to turn those documents over that are proprietary, confidential, trade secret.

(Doc. 89 p. 16). Yet after all that purposeful delay, all the allegedly proprietary, confidential, and trade secret documents the Plaintiffs ended up producing amounted to but 207 pages: 72 pages of the publicly available 2006 issue of *Catch the Vision*, 74 pages of seven editions of corporate bylaws, at least the first and last of which are part of public record, 39 pages of the 2005 employee handbook, part of which the Defendants had already used as an exhibit, and 22 pages consisting of eight other documents, none of which establish that "3ABN is an upright, financially proper ministry." (Doc. 81 ¶¶ 14, Table 4).

The Plaintiffs objected to every one of Defendant Pickle's Requests to Produce on the basis that everything sought was confidential, privileged, or irrelevant. (Doc. 62 p. 8; Doc. 68 ¶ 6). This Court ordered the Plaintiffs to respond by October 27, 2008, to revised requests, and to evade that order the Plaintiffs filed the instant motion, claiming to the Defendants that they didn't have to comply until this motion is heard. (Doc. 107 p. 4; Pickle Aff. Ex. CC).

The Plaintiffs filed motions to quash the Defendants' subpoenas *duces tecum* of MidCountry Bank (hereafter "MidCountry") and Gray hunter Stenn LLP (hereafter "GHS"), and encouraged GHS and Remnant to resist compliance. (Doc. 76-3 pp. 18-19; Doc. 75 p. 4; Doc 114-26 ¶ 7). Finally, after the Defendants are close to getting access to the records of MidCountry and GHS, the Plaintiffs through the instant motion seek to prohibit that access.

The Plaintiffs invoked the automatic stay of Defendant Joy's bankruptcy case in order to sideline him in the instant case, only to then go after his hard drives. (Pickle Aff. ¶ 22, Ex. DD; Doc. 29). After obtaining an order from this Court allowing them to copy his hard drives, Plaintiffs' counsel then sought to violate that order. (Doc. 108 p. 3). The grievous violation of an automatic stay that the Plaintiffs themselves invoked resulted in Defendant Joy filing adversary proceedings against them and their counsel. (*Joy v. Shelton, et al*, D.Ma. No. 4:08-cv-40090).

The Plaintiffs acknowledge that they released Defendant Joy from all their claims against him way back on November 21, 2007, when the automatic stay was lifted. (Doc. 122-2 p. 1). Yet as late as September 23, 2008, 3ABN still claimed to be a creditor of Defendant Joy, filing its *sixth* motion to Extend Time to Object to Discharge or to Determine Dischargeability of a Debt. (Pickle Aff. Ex. EE).

As already stated, Simpson indicated on October 17, 2007, that the Plaintiffs' wish to settle was motivated by a desire to avoid *discovery* expenses over the next three months. (Pickle Aff. ¶ 5). This coincides with sources that have indicated that donations are way down and that 3ABN is in deficit mode. (Pickle Aff. ¶ 24). Yet the Plaintiffs justify the instant motion on the mere hearsay that donations are now back at the levels they were prior to the Defendants issuing their investigative reports. (Doc. 123 ¶ 8).

In the hearing of March 7, 2008, Plaintiffs' counsel stated:

The vast bulk of our allegations in the complaint, and if you review the pinpoint allegations of the complaint concerning the specific statements of defamation that we have alleged, those individual statements primarily deal with various specific financial transactions that Mr. Pickle or Mr. Joy or both on the various websites have stated were improper for whatever reason.

(Doc. 89 p. 10). “[T]he specific statements of defamation that [the Plaintiffs] have alleged” may be found under ¶¶ 46(a)–(k), 48(a)–(d), 50(a)–(i). (Doc. 1). On their face, ¶¶ 48(a)–(d) and 50(a)–(i) do not have anything to do with financial transactions. In a recent conversation, Plaintiffs' counsel admitted that they have tried to keep Shelton's divorce out of the lawsuit. (Pickle Aff. ¶ 25). Yet that is what ¶ 50 is supposed to be all about! The Plaintiffs have good reason to avoid the allegations under ¶ 50. (Pickle Aff. ¶¶ 26–27, Ex. FF).

The Honorable Magistrate Judge Philip Frazier in the hearing of October 22, 2008, told Plaintiffs' counsel that ¶ 46(g) of the complaint was quite broad, and yet Plaintiffs' counsel has continually asserted that the complaint's allegations are “specific” or “pinpoint.” (Pickle Aff. ¶

28; Doc. 89 p. 10). At the very least, ¶¶ 46(a), (e), 48(a), and (c) are also quite broad.

As already stated, Plaintiffs' counsel knew that the financial allegations against the Defendants were frivolous, and yet they filed and prosecuted this case anyway. (*supra* p. 4). Plaintiffs' counsel must have known about evidence for Shelton's double dipping book deals whereby he received both royalty and sales revenue from 3ABN's purchases of his books via at least four publishing companies, including kickbacks ranging from 10% to 32%.

In the hearing of March 7, 2008, Plaintiffs' counsel stated:

[Mr. Pickle and Joy] may easily change their mind as has been shown on their conduct in the various websites which has now been expanded after the bankruptcy matter to include at least seven other save 3ABN based websites where they are posting this exact same information.

(Doc. 89 p. 30). Regarding these 15 or 16 other sites which were in operation before the Plaintiffs purchased and transferred the domain names Save3ABN.com and Save3ABN.org (Pickle Aff. ¶ 29), the Plaintiffs now wish to pretend that these other sites do not exist in order to extricate themselves from a lawsuit they know they cannot win, evade counterclaims of misuse of process and malicious prosecution, and avoid discovery yet again.

Because of the Plaintiffs' vexatious conduct and bad faith, their motion for voluntary dismissal should be denied.

B. Plaintiffs' Diligence in Prosecuting the Action

By no stretch of the imagination have the Plaintiffs been diligent in prosecuting this action, and their motion should be denied on that basis.

The Plaintiffs have never pursued their alleged claims pertaining to Shelton's cover up of the child molestation allegations against Tommy Shelton, failed to include copyright infringement as a count, and failed to seek a preliminary injunction. Long ago they ceased prosecuting any claims pertaining to Shelton's divorce, without amending their complaint, even

though a large portion of their defamation claims pertain to that divorce.

The Plaintiffs have served no written discovery requests in this action upon the Defendants since August 20, 2007, other than a request for documents the Defendants received from two subpoenas *duces tecum*. (Pickle Aff. ¶ 30). The Defendants have maintained that the Plaintiffs must produce substantive documents prior to the Defendants scheduling depositions, preventing them from so scheduling. Yet the Plaintiffs are not so encumbered since the Defendants produced thousands of documents to the Plaintiffs around August and September 2007. Other than subpoenas *duces tecum* to obtain the identities of anonymous posters on two internet forums, of dubious relevance (Doc. 80 pp. 6–7), and a deposition of Linda Shelton that never took place, the Plaintiffs have confined their efforts in this litigation to covering up their own wrongdoing through protective orders, and to obstructing the Defendants' discovery efforts.

Shelton as an individual, though a party to this lawsuit, has apparently thus far refused to cooperate with discovery, not having produced any documents identifiable as coming from him rather than from 3ABN. (Pickle Aff. ¶ 31).

C. Plaintiffs' Diligence in Bringing the Motion

The Plaintiffs bring their motion more than 18 months after the commencement of this action, and, according to a probable typographical error in the electronic order of June 27, 2008, after the current end of discovery. (“The motion to extend all deadlines for discovery by 90 days is GRANTED. ... Discovery to be completed by 9/9/2008.”).

Perhaps ¶ 46(g) was intended to refer to allegations pertaining to Shelton's lucrative book deals, though it is broad enough to cover a host of wrongdoing. After being served with the Plaintiffs' complaint on April 30, 2007, since the allegation was broad, the Defendants researched and published stories by July 2007 pertaining to Shelton's reporting on his 2003 IRS Schedule A of a donation of horse(s) as \$20,000 cash, without filing the required Form 8283 and

appraisal(s), along with documentation showing that the reported donation(s) may have been inflated by a factor of 4 to 40. (Pickle Aff. ¶ 32, Ex. GG–HH). The Defendants also published stories documenting Shelton’s receiving from 3ABN of a section 4958 excess benefit transaction in 1998, and his denial under penalty of perjury on IRS Form 990 that any such transaction took place. (Doc. 81-8 pp. 45–54; Pickle Aff. ¶ 33, Ex. II–JJ). Thus by July 2007 the Plaintiffs knew that their case was in jeopardy, but they did not file for voluntary dismissal.

In the fall of 2007 when the Defendants published their exposé concerning royalties Shelton received from Remnant, the Plaintiffs knew that the Defendants had the public documents necessary to make a case for subpoenaing documents from Remnant. (Doc. 81-7 pp. 22–29). Even after purchasing Save3ABN.com and Save3ABN.org in February 2008, the Plaintiffs still did not file for voluntary dismissal. After Magistrate Judge Carmody ruled on June 20, 2008, that Remnant would have to produce documents to the Defendants, after she denied Remnant’s motion to amend on July 28, 2008, after Judge Richard Alan Enslin denied Remnant’s appeal on September 8, 2008, the Plaintiffs still did not file for voluntary dismissal. (Pickle Aff. Ex. KK–MM). Only after Remnant caved and produced the incriminating documents, and the Defendants put the Plaintiffs on alert that the Defendants knew that they now had a basis for counterclaims of misuse of process and malicious prosecution, only then did the Plaintiffs finally, after so long delay, file their motion. The motion should therefore be denied.

D. Defendants’ Efforts and Expense in Preparing for Trial

The Defendants have thus far carried on a four-front war in the Districts of Massachusetts and Minnesota, the Western District of Michigan, and the Southern District of Illinois, due to the obstructionism of the Plaintiffs and their allies regarding the Defendants’ discovery efforts.

The Plaintiffs by the use of their Exhibit 2 for the instant motion acknowledge that Defendant Pickle has devoted his normal work hours to preparing his defense, resulting in

substantial loss of income. (Doc. 122-2 p. 4). The resulting, necessary frugality has been to the educational and orthodontic detriment of Defendant Pickle's dependents. (Pickle Aff. ¶ 35).

The Plaintiffs seek the dismissal of their case without prejudice. By referencing the permissibility of dismissal even with the prospect of a second suit or a tactical advantage, the Plaintiffs leave open the possibility of their refile, perhaps in another jurisdiction. (Doc. 121 p. 5). The only way that Defendant Pickle can match the immense resources of the Plaintiffs is to defend himself *pro se*, and live extremely frugally until the end of the conflict. Yet intense, 18-month conflicts separated by voluntary dismissals without prejudice will exhaust his resources and prejudice his ability to defend himself, even *pro se*. (Pickle Aff. ¶ 36).

Thousands of dollars have been spent by the Defendants, four experts have been retained, and thousands of miles have been traveled in preparing their defense. (Pickle Aff. ¶¶ 37–39). Considering their resources, the Defendants have made a relatively large investment of time, money, and effort, and are nearing the point where they can prove beyond a reasonable doubt the fallacious nature of all of the Plaintiffs' claims. The Defendants would be prejudiced by such a late voluntary dismissal without prejudice.

E. Motion Made at a Critical Juncture in the Case, and Progress of Case

Having obtained documents from Remnant, in possession of Duffy and Thompson's admissions that the law firm thoroughly reviewed the Plaintiffs' financial records, and now with admissions on the record by the Plaintiffs that they have sought the cover up of wrongdoing during this suit rather than an award of monetary damages, the Defendants are at the point where they have a solid basis for counterclaims of misuse of process and malicious prosecution.

If the Court grants a voluntary dismissal, the Defendants will be forced to separately file their counterclaims against the Plaintiffs and their counsel. The Defendants would intend to file those counterclaims in the same venue as the instant case. If the Plaintiffs challenge venue or

jurisdiction, the Defendants will be prejudiced by the additional expense and effort necessary to overcome those obstacles. If the Plaintiffs do not so challenge, they gain little by dismissal.

That the instant motion comes on the eve of seeking leave to serve subpoenas upon the DFEH and the EEOC in order to determine whether 3ABN tainted the investigations through selective disclosure is also suspicious, but is not out of character for Plaintiffs that are so paranoid about discovery.

F. Duplicative Expense of Relitigation

We note:

[A] voluntary dismissal should not be denied when the work product in the dismissed action will not be wasted but may be utilized in subsequent or continuing litigation.

Moore's § 41.40[7][a], p. 41-146 (citing *inter alia Puerto Rico Mar. Shipping Auth. v. Leith*, 668 F.2d 46, 50 (1st Cir. 1981)). By including in their motion a request for an order to return all documents from Remnant, MidCountry, and the Plaintiffs, the Plaintiffs ensure that there will be substantial duplication of expense, especially given the long, protracted war over discovery they have shown themselves prone to fight.

The Defendants believe that MidCountry did not stamp its records confidential. The Defendants also believe that Remnant was the designating party for its records. It is questionable whether the Plaintiffs even have standing to request the return of non-confidential documents on the behalf of MidCountry, or the return of confidential documents on behalf of Remnant.

Given the circumstances, the Defendants do not seek dismissal, but if the Court grants dismissal, the Court should order that all work product and discovery from this case may be utilized in the separate action the Defendants would intend to file, or in any future action over the same or similar claims that the Plaintiffs file against the Defendants. Otherwise, the Plaintiffs' motion should be denied.

G. Adequacy of Plaintiffs' Explanation for the Need to Dismiss

Danny Lee Shelton, individually, gives no reasons whatsoever for the dismissal of his personal claims in the suit. 3ABN fails to establish a need for dismissal, much less give an adequate explanation.

The Plaintiffs pretend that the objectives of their suit have already been achieved (Doc. 123 ¶ 3), and yet only ¶ 5 of the 11 paragraphs of their prayer for relief can be claimed as being partly accomplished. But the Plaintiffs are estopped from asserting that 3ABN's facetious purchase of the domain names Save3ABN.com and Save3ABN.org (as well as Defendant Joy's alleged pre-petition claims against Shelton as an individual) is evidence of an achieved objective. (*supra* p. 11). There are at least 16 times as many Save 3ABN websites now than when the Plaintiffs filed suit. (Pickle Aff. ¶ 29). The Plaintiffs have accomplished nothing if they do not obtain the permanent injunctions they seek in ¶¶ 3–4 of their prayer for relief.

The hearing of March 7, 2008, is not the only time the Plaintiffs have made clear their interest in the other Save 3ABN domain names. The Court will recall our previous reference to the September 9, 2008, Rule 2004 examination of Defendant Joy which included questions concerning matters pertaining to this case, one being the new Save 3ABN domain names. (Doc. 109 ¶ 1–5). Simpson therefore misleads when he states that no depositions have yet been taken (Doc. 121 p. 6), for the Rule 2004 examination was in part a deposition for the instant case. Atop the list of document requests in Exhibit A of the subpoena served for that examination is that which seeks information concerning domain names, including Save 3ABN domain names obtained after Defendant Joy's filing for bankruptcy. (Pickle Aff. Ex. NN).

The Plaintiffs intend for this Court to find as fact that the IRS has vindicated 3ABN, solely on the hearsay testimony of the repeatedly factually challenged Thompson regarding the unsupported assertions of unnamed attorneys. (Doc. 123 ¶ 4–5). Thompson claims that the IRS

“conducted a thorough review of 3ABN and Mr. Shelton.” Though both he and Shelton made similar claims regarding the state of Illinois to deflect questions concerning 2006 book royalties and the 1998 real estate deal, Administrative Law Judge Barbara Rowe noted in her denial of 3ABN’s petition for a rehearing that 3ABN had refused to produce even their 2000 and 2001 Form 990’s when requested by the intervenors! (Doc. 81-4 p. 48; Pickle Aff. Ex. OO, Ex. PP pp. 3–4).

The Plaintiffs intend for this Court to find as fact that the EEOC has vindicated 3ABN by dismissing Thomsen and Bottomley’s complaints on the grounds of insufficient evidence. (Doc. 123 ¶ 6). Yet, given what has gone on in this case, it is not difficult to imagine that selective disclosure on the part of 3ABN hid the true, incriminating facts from these investigative agencies.

The Plaintiffs wish this Court to find as fact that donations are back up since 3ABN’s reputation has been restored, solely on Thompson’s hearsay testimony. If they are indeed up, is it because of donations from the general public, or from insiders like 3ABN Board members or ASI officers? Is it because the public believes that Shelton has been replaced as president by Jim Gilley (hereafter “Gilley”), even though public filings after Gilley took over still report Shelton as being president? (Pickle Aff. ¶ 43, Ex. QQ–RR). Or is Thompson’s claim a bald faced lie?

Gilley is reported to be recuperating from triple bypass and heart valve replacement surgery. Finances are so much on his mind that still in the hospital on October 8, 2008, he asked folks, perhaps jokingly, to send in \$5 million by October 17. (Pickle Aff. ¶ 44, Ex. SS). \$5 million is more than 25% of all of 3ABN’s reported expenses for the year 2006. (Doc. 49-2 p. 17 at ln. 17). It is possible that 3ABN’s financial picture is not as rosy as what Thompson wants the Court to believe.

G. Defendants Will Lose Favorable Rulings and Defenses Otherwise Available

Truth is an absolute defense against claims of defamation, and for claims of defamation *per se*, the burden of proof is shifted to a degree upon the Defendant.

The Plaintiffs have encouraged the invocation of accountant-client privilege to prevent discovery by the Defendants of the Plaintiffs' auditor's records. (Doc. 114-26 ¶ 7). Massachusetts has no accountant-client privilege. If the Plaintiffs refile their case in a venue that has such a privilege, they would likely try to invoke this privilege again. Depriving the Defendants of discovery of the auditor's records would severely prejudice the Defendants by depriving them of a way of challenging the Plaintiffs' tax filings, financial statements, and other accounting records, and would make it much more difficult for the Defendants to prepare a truth defense.

We have previously referenced Nicholas Miller's allegation of document fraud concerning billing records, and an anonymous source within 3ABN that alleged that documents have been destroyed prior to the year 2000. (Doc. 63-33 p. 16; Doc. 81-5 p. 33). That source identified 3ABN CFO Larry Ewing (hereafter "Ewing") as the individual involved in that document destruction. (Pickle Aff. ¶ 45). With this filing we provide a document alleging that Ewing was involved in crafting special annuity contracts to circumvent the laws of the state of Washington after 3ABN had already being fined for writing Charitable Gift Annuities without authorization. Then, after circumstances changed, Ewing is alleged to have ordered the destruction of paperwork associated with those contracts. (Pickle Aff. Ex. W at p. 3). Dismissal without prejudice would give the Plaintiffs further opportunity to destroy or alter evidence.

A number of witnesses on the Defendants' witness list are aged or in ill health. (Pickle Aff. ¶ 46). Upon information and belief, 3ABN Board members May Chung and Merlin Fjarli are respectively afflicted with Alzheimer's Disease and incapacitated by a stroke. (*Id.*). The longer the issues in the suit are unresolved, the greater the odds that key witnesses will die, become senile, or become incapacitated before trial.

Since Ewing was until recently the CFO of 3ABN, he is a key witness. However, 3ABN has recently replaced him (Pickle Aff. Ex. RR), and Ewing has returned to Canada, making it more difficult and expensive to subpoena him for testimony and to appear at trial. Postponement of a resolution of the issues in the instant case would give the Plaintiffs additional time to replace and make unavailable other key witnesses.

The Plaintiffs have sought to obtain images of the Defendants' hard drives, to permanently impound the entire case, to impose confidentiality upon even materials the Defendants produced in the Defendants' Rule 26(a)(1) disclosures, and to limit the scope of discovery. The Defendants believe that the rulings on those issues were favorable to the Defendants, as was the decision in the District of Minnesota that MidCountry must produce its records, and as was the decision in the Western District of Michigan that Remnant must produce the requested documents. The Defendants would be prejudiced if they lost these substantial, favorable rulings by dismissal of the instant case without prejudice, especially since these decisions required so much time and effort to obtain.

CONCLUSION

The Defendants believe that the above considerations are a sufficient basis for the Court to outright deny the instant motion without abusing discretion.

If the Court instead decides to grant the motion, the Defendants pray the Court to impose conditions that would alleviate the prejudice resulting to the Defendants, including but not limited to ordering the transfer of work product and discovery to future actions filed by the Defendants or Plaintiffs, the imposition of all costs and fees pertaining to work product and discovery that cannot be so transferred, and the dismissal of this case with prejudice. The Defendants pray the Court to evaluate the motion for each Plaintiff separately to the extent that the Defendants are less prejudiced thereby.

If the Court dismisses the case with prejudice, the Defendants pray the Court to give notice of that intention to the Plaintiffs, to give the Plaintiffs an opportunity to be heard, and to give the Plaintiffs an opportunity to withdraw their motion for voluntary dismissal and proceed with litigation. *United States v. One Tract*, 95 F.3d 422, 425 (6th Cir. 1996).

If the Court is inclined to dismiss the case without prejudice due to the dubious reasons the Plaintiffs have given for dismissal, the Defendants pray the Court to schedule an evidentiary hearing in order to find as fact (a) what donation levels really were for the years 2002 to present, (b) what months true donations dropped and rose, (c) why donation levels rose and fell, (d) whether any current increased level of donations is due to insiders such as 3ABN Board members or ASI officers rather than to a restoration of 3ABN's reputation, (e) whether or not the IRS criminal investigation vindicated the Plaintiffs by determining that there was nothing wrong with a number of different transactions, and (f) whether 3ABN did not produce certain documents to the EEOC, thus tainting that investigation.

If the Court grants such an evidentiary hearing, the Defendants pray the Court to order the parties to provide a list to the Court of documents and witnesses believed necessary to establish the facts asserted by the Plaintiffs as explanations for their need for dismissal.

The Defendants also pray for whatever further relief the Court deems just and fair.

Respectfully submitted,

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