Ex. C

No. 08-2457

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

THREE ANGELS BROADCASTING NETWORK, INC.,
an Illinois Non-Profit Corporation;
DANNY LEE SHELTON,

Appellees,

v.

GAILON ARTHUR JOY and ROBERT PICKLE,

Appellants.

On Appeal from the United States District Court
For the District of Massachusetts
Case No. 07-40098

BRIEF OF THE APPELLEES

M. Gregory Simpson
Wm. Christopher Penwell
Siegel, Brill, Greupner, Duffy
& Foster, P.A.
100 Washington Ave. S. Suite 1300
Minneapolis, MN 55401
(612) 337-6100

John P. Pucci
Lizette M. Richards
Fierst, Pucci & Kane, LLP
64 Gothic St. Suite 4
Northhampton, MA 01060
(413) 584-8067

RESPONSE TO STANDARD OF REVIEW

Standard of Review for Order Granting Voluntary Dismissal. The granting of a motion for voluntary dismissal is reviewable only for abuse of discretion. *Puerto Rico Maritime Shipping Authority v. Leith*, 668 F.2d 46, 49 (1st Cir. 1981).

Standard of Review for Order to Return Confidential Documents. The district court has "broad discretion" to decide when a protective order is appropriate and what degree of protection is required. *Poliquin v. Garden Way, Inc.*, 989 F.2d 527, 532 (1st Cir. 1993). Great deference is shown to the district court in framing and administering such orders. *Id.* Contrary to the contentions of the appellants, no First Amendment concerns are implicated by an order enforcing a protective order against litigants who obtained access to information for litigation purposes.

RESPONSE TO ARGUMENT

I. APPELLANTS' COMPLAINTS ABOUT PROCEDURE ARE BASELESS.

Pickle and Joy begin their argument section with a series of baseless attacks on the district court and its handling of the motion to dismiss. None of appellants' arguments establish an abuse of the district court's discretion. Before responding to the individual arguments, a brief recital of the law regarding voluntary dismissals may be helpful.

3ABN and Shelton's argument against an award of fees and costs in the motion now pending before Judge Saylor, in a nutshell, is that the only costs that Pickle and Joy could possibly have recovered in the event of a successful outcome for them at trial would be the limited costs available under 28 U.S.C. § 1920 and Fed. R. Civ. P. 54 for a prevailing party. The substantive law did not give them a right to their attorneys fees or other litigation costs. Therefore, an award of anything more than the costs authorized in 28 U.S.C. § 1920 would not be a term necessary to cure prejudice from the dismissal, but would amount to a windfall that they could not hope to achieve if the case went forward.

Judicial precedent in which fees were imposed as a condition of dismissal generally involve duplicative litigation, in which the plaintiffs are seeking to dismiss in order to commence or maintain existing litigation somewhere else. Courts sometimes find that an award of fees may be appropriate in those cases in order to avoid prejudice, despite the "American Rule" holding that each side must generally pay its own way. But Judge Saylor addressed the risk of duplicative litigation by ordering 3ABN and Shelton to recommence the litigation only in his courtroom, if they chose to do so at all.

To the extent the issue of costs and fees is taken up by this Court prior to being decided by the district court, 3ABN and Shelton incorporate their opposition

brief here. (ECF Doc. 140). The district court did not abuse its discretion in denying the dismissal terms now sought by the appellants.

E. The District Court Did Not Err by Imposing Terms on Defendants.

Pickle and Joy argue that the district court's order that they return confidential documents pursuant to the terms of the Protective Order is an impermissible "condition of dismissal." But they fail to appreciate that 3ABN's motion sought return of the confidential documents on the authority of the Protective Order itself, not under Rule 41(a)(2). (JA0299, JA0307-JA0310). The district court has "broad discretion" to decide when a protective order is appropriate and what degree of protection is required. *Poliquin v. Garden Way, Inc.*, 989 F.2d 527, 532 (1st Cir. 1993). Great deference is shown to the district court in framing and administering such orders. *Id.* There being no continuing need for the confidential records, Judge Saylor did not abuse his discretion in enforcing the Protective Order as written.

V. APPELLANTS' COMPLAINTS ABOUT THE CONFIDENTIALITY ORDER ARE BASELESS.

A. The District Court Did Not Err by Ordering Return of Confidential Documents per the Protective Order.

Pickle and Joy contend that the district court's order that they return materials which they had obtained under the protective order is error. Both Judge Saylor's ruling from the bench and the Electronic Clerk's Notes reflect the district

had proceeded to trial has no bearing on the validity and enforcement of the protective order. Appellants' first amendment arguments should also be denied.

CONCLUSION

Pickle and Joy do not have a right to be sued to the point of a decision on the merits when circumstances change such that meaningful relief can no longer be achieved. They do, however, have a right to have dismissal conditioned on terms that the district court concludes are necessary to protect them from legal prejudice. The district court in this case properly considered Pickle and Joy's claims of prejudice and imposed only one condition, that any future suit by the appellees be brought in the same court so as to discourage forum shopping. The district court reserved the issue of costs and fees, and a motion on that subject remains pending that precludes full review by this Court of the decision below.

For the reasons stated in this brief, the appeal should be dismissed.

Respectfully submitted:

Dated: March 26, 2009

SIEGEL, BRILL, GREUPNER,
DUFFY & FOSTER, P.A.

s/ M. Gregory Simpson

M. Gregory Simpson
Wm. Christopher Penwell
100 Washington Avenue South
Suite 1300
Minneapolis, MN 55401
(612) 337-6100
(612) 339-6591 – Facsimile

-and-

FIERST, PUCCI & KANE, LLP
John P. Pucci, Esq., BBO #407560
J. Lizette Richards, BBO #649413
64 Gothic Street
Northampton, MA 01060
Telephone: 413-584-8067

Attorneys for Appellees Three Angels Broadcasting Network, Inc. and Danny Shelton

CERTIFICATE OF SERVICE

I Amy Ditty, hereby certify that on March 23, 2009, I served a copy of this brief on the following by First Class U.S. Mail, postage prepaid:

Mr. Robert Pickle
1354 County Highway 21
Halstad, MN 56548

Gailon Arthur Joy
P.O. Box 37
Sterling, MA 01564

I also hereby certify that I served 10 paper copies and one CD copy of this brief on the Clerk of Court of the U.S. Court of Appeals for the First Circuit by way of First Class U.S. Mail, postage prepaid.

Dated: March 23, 2009

s/ Amy Ditty
Amy Ditty