

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS**

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Three Angels Broadcasting Network, an )  
Illinois non-profit corporation, )  
and )  
Danny Lee Shelton, individually, )  
Plaintiffs )  
vs. ) C.A. No. 07-40098-RCL  
Gailon Arthur Joy )  
and )  
Robert Pickle )  
Defendants )  
)

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**ORDER GOVERNING PRODUCTION OF  
ELECTRONICALLY STORED INFORMATION**

The above-entitled matter came on for hearing before the Honorable Timothy S. Hillman on Thursday, August 9, 2007 in consideration of the parties' dispute concerning the form of production for electronic and electronically-stored information. Based upon the files, records and proceedings herein, as well as the submissions of the parties and the testimony of expert witnesses taken at the hearing, this Court issues the following Order Governing Production of Electronically Stored Information:

**ORDER**

1. Definitions

- a. An Archival Copy is that made at a certain date, following the filing of this litigation by the plaintiffs or the receipt of the service of the Complaint by the defendants, containing all relevant data materials or the entire electronic record of

the party, as the case may be.

- b. Data Files are those documents which are stored in electronic form and which are retrievable individually to satisfy a discovery request. A Data File is readable when it is placed on a medium which a computer device can access, interpret, and transform into a displayed or printed document.
- c. An Edited Copy is electronic information in the same format as a Search Copy but with the information removed, as with redaction, which the producing party claims should not be disclosed to the requesting party. This removal will maintain the format as that of a Search Copy and is contemplated as the replacing of the non-disclosed data by zeros and corresponding elimination of a reference in the electronic directories of data files and other device data structures.
- d. Electronically Stored Information includes, but is not limited to, those documents which are kept in a computer, magnetic media such as disc or tape, solid state memory device, optical storage medium, or any other form which is typically not readable by an unaided human eye but must be made accessible or printed through the use of an electronically powered device. This information includes electronic messages, web pages, word processing files, databases and aural or video records.
- e. The Examiner is a person with expertise in electronic data information retrieval who it is contemplated will apply his expertise to obtain from a Search Copy the information responsive to a discovery request applicable to electronically filed information while omitting that information which the producing party claims should not be disclosed to the requesting party.

- f. A Search Copy is a copy of electronically filed information from an electronic device which the parties intend to be used for information retrieval by an Examiner.
  - g. The Search Terms are the patterns contained within the electronically filed information which are to be used by the Examiner to obtain information from the Search Copy which is responsive to the discovery request.
2. Parties may make discovery requests which include information ordinarily stored in an electronic form. Electronic copies made in a customary manner which copy the data files onto generally readable media, such as on CD or DVD, are deemed the normal response.
  3. If a party makes the extraordinary claim that the response to a discovery request is not responsive and that the means to acquire an accurate response to the discovery request is by making direct copies of the electronic devices on which the Data Files are stored, the party may supplement the discovery request by specifying:
    - a. The data which are required to satisfy the discovery request
    - b. The electronic access which is contemplated.
  4. The responding party will then specify the locations of the electronic information which the Data Files are situated on, if this location is an Archival Copy, and if there are privileged materials associated with the electronic devices at this location.
    - a. If there are privileged data associated with or stored on electronic devices which a party is requesting, the responding party may, within 30 days, submit an Edited Copy of the respective electronic data, with the privileged information removed, to the Court for in camera review.

- b. This Edited Copy will be in the format specified for electronic access or in the 'dd' format specified by the plaintiffs' expert during the hearing.
  - c. A summary of the information that has been removed will be prepared for the use of the Court in its *in camera* review.
  - d. The information that has been removed will be provided to the Court in a form which a skilled technician would be able to use to recreate an Archival Copy should the Court not uphold the claims of privilege.
  - e. After the Court decides what claims of privilege are to be upheld, and if any are not upheld, the responding party will prepare an Edited Copy containing the information requested and any other information as to which privilege is ruled not to apply.
5. A party claiming privilege or a party desiring to resolve any other dispute may make application to the Court to resolve the issue.
6. A party making a discovery request that involves access to electronic data other than produced to the requesting party, when agreed by the parties or ordered by the Court, may designate an examiner to make copies of the electronic data storage devices which are in the custody, control or possession of the responding party
- a. This examiner may not be an expert used by the requesting party for interpretation of electronic data or employed by the party, whether through counsel or otherwise. Should a dispute arise as to the qualifications and neutrality of the examiner the parties may appoint experts who will agree on a neutral examiner, and discovery

may be had on the issue.

- b. The parties may agree on a time and place for the copying of the electronic data, but in no case will the electronic device(s) or media be removed from the location specified for the copying, unless the parties agree on the extra costs involved for the responding party and appropriate payment is made.
- c. A Search Copy will be made by a computer forensic examiner whose qualifications are acceptable to the parties or the Court. This examiner may create a duplicate image of the entire device, which shall constitute an accurate representation of the device as accessible to the system for Data File retrieval.
- d. The examiner shall not alter, rewrite or otherwise harm or change the data on the device.
- e. The parties shall provide to the examiner a list of mutually agreeable Search Terms by which relevant, responsive information may be obtained from the electronic data thus obtained, as well as a list of Search Terms by which privileged, protected information can be isolated from any information made available to the requesting party. These terms are to be agreed by the parties before the examiner is allowed any access to the electronic device or medium to make his Search Copy from.
- f. For each such Search Copy created, the Examiner will provide the producing (not requesting) party a copy of the information obtained, including the directory listings with information about every file on the device, such as its file name, parent directory name, dates of creation, access and modification, and other information as available, as well as any information obtained by the application of the Search

Terms to the Search Copy.

- g. Should the party responding to the discovery request find that the information provided them in part f. above contains confidential information, that party will propose modifications to the search terms which, upon agreement of the requesting party, will be reapplied by the Examiner who will consequently provide a revised copy of the information obtained to the producing party, as in part f. above, who will then review the same as described in this part g., and so on.
- h. The general directory listing of all Data Files on the computer device will not be made available to the requesting party without prior review by the party producing the information. A listing of "each relevant e-mail, pooled from the first log, with the e-mail's sender, recipients, date and time of creation, subject line and the names of any attached files" similarly will not be made available without prior review. However, a party may request and obtain such a listing of electronic messages whose existence is already known, together with the contents of the messages, by making a relevant request, no matter how detailed, in a form which may be processed as Search Terms upon the data as described above in 6. e. and following.
- i. The examiner shall also provide the producing (not requesting) party with a copy of all documents as described in 6. f. above from the device for examination as to privilege and work-product and shall provide those documents within 30 days of making the respective Search Copy.
- j. Counsel for the producing party, or the party if unrepresented may designate to the examiner those documents that should be withheld from production due to privilege

or work-product protection or for other reasons including confidentiality. This designation will be made within 10 days of receiving the documents, but should the number of documents or pages to be produced exceed 10,000, at the end of every ten days following receipt the party may alternatively designate 10,000 documents or pages which have been reviewed and whether or not reasons exist for them to be withheld from the requesting party.

- k. Within 15 days of receiving the producing party's privilege designation, the examiner shall provide to the requesting party a copy of the responsive documents not designated as to be withheld by the producing party, together with file system information such as directory listings about those data files so designated, but not the contents of the data files themselves.
7. Any inadvertent disclosure of privileged or protected electronically stored information by a producing party is to be governed by the following protocol:
  - a. The party claiming inadvertent disclosure must timely serve upon the requesting/receiving party a written Notice of Inadvertent Disclosure, which Notice shall contain the following information:
    - i. A description of the disclosed information (e.g. letter, electronic message or data file, memorandum, etc.);
    - ii. The grounds upon which the party claims the information is protected from disclosure (e.g., attorney-client privilege, attorney work product, etc.); and

- iii. Relevant, specific information identifying the document or material disclosed (e.g., Bates number, document date, date of production, etc.).
- b. A party receiving a Notice of Inadvertent Disclosure shall locate, assemble and sequester the disclosed information within 3 business days of receipt of the Notice.
- c. Should a party dispute the Notice of Inadvertant Disclosure for any reason, the parties or counsel shall confer after the sequestration described in part b. above. Within 10 business days of receipt of a Notice of Inadvertent Disclosure, the requesting party must either return the inadvertently disclosed information to the producing party, including all copies thereof, or must serve upon the producing party a written challenge to the assertion of privilege, in writing or by electronic or facsimile transmission.
- d. If the parties are unable to resolve their inadvertent disclosure dispute, the party seeking to assert the privilege shall arrange for the disclosure dispute to be heard as a discovery dispute by the Court, stipulated to be before the Magistrate Judge to whom to the matter has been referred. Should the producing party require, all copies of the disputed disclosure will be submitted under seal to the Court.
- e. If a challenge to the assertion of privilege is made, the disclosed information will remain sequestered until a determination has been made by the Court concerning the privilege and disclosure dispute. During the period of sequestration, no copies shall be made of the information, no person or persons

shall be provided with access to the information other than counsel for the parties and for no other purpose than to resolve the Notice of Inadvertant Disclosure and there shall be no dissemination or publication of the information.

So ordered.

**Dated:** \_\_\_\_\_

Timothy S. Hillman,

United States Magistrate Judge

**CERTIFICATE OF SERVICE**

I, Laird J. Heal, do certify that I am over the age of 18 years of age and on this day I have caused service of the within-enclosed proposed Order regarding Discovery by mailing, first-class postage prepaid, to their attorney of record, or the party if unrepresented, unless acceptance of service by electronic means has been verified by the Electronic Case Filing System of the District of Massachusetts, including the following

John P. Pucci, Fierst, Pucci & Kane, LLC 64 Gothic Street Northampton, MA 01060	Representing the Plaintiffs
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/s/ Laird J. Heal \_\_\_\_\_

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