
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 PICKLE'S
MOTION TO COMPEL PRODUCTION AND FOR SANCTIONS**

INTRODUCTION

Plaintiffs Three Angels Broadcasting, Inc. ("3ABN") and Danny Lee Shelton ("Shelton") hereby oppose Defendant Robert Pickle's Motion to Compel Plaintiffs to Produce Rule 26(a)(1) Documents and for Sanctions. Plaintiffs object to producing documents and materials identified in their 26(a)(1) Initial Disclosures in the absence of a confidentiality agreement between the parties or an order for protection from the Court. Plaintiffs oppose Defendant Pickle's request for sanctions on the grounds that sanctions are unwarranted by the facts, unsupported by applicable law and are being sought for the sole purpose of harassing and annoying Plaintiffs.

FACTS

On August 3, 2007, Plaintiffs timely filed their joint Rule 26(a)(1) Initial Disclosures in the above-entitled matter. [*See* Affidavit of Robert Pickle, dated December 10, 2007, at Exhibit A (hereinafter "Pickle Aff., Ex. ___")]. Pursuant to Rule 26(a)(1)(B), Plaintiffs provided

Defendants with the description of eleven categories of documents that Plaintiffs believed they may use to support their claims or defenses in the above-entitled action. Though no formal objection was filed with the Court by either Defendant to the form or content of Plaintiffs' Initial Disclosures, by letter dated August 7, 2007, Attorney Laird Heal, who at the time was representing both Defendant Pickle and Defendant Gailon Joy, suggested that Plaintiffs' Initial Disclosures were "deficient" because they had filed a single, joint disclosure, instead of filing separate 26(a)(1) disclosures. [Pickle Aff., Ex. B]. Attorney Heal also suggested, citing an unpublished case from the eastern district of Louisiana, that the documents properly identified by category in Plaintiffs' 26(a)(1) Initial Disclosures should be made available for inspection and copying. Id. Attorney Heal's August 7 correspondence reflects that his opinion on this issue was not shared by one of his clients, Mr. Joy, and that he had apparently not consulted with his other client, Mr. Pickle, in making his rather unconventional request. Id.

On August 8, 2007, Plaintiffs' Counsel responded to Attorney Heal's letter by pointing out that the language of the Federal Rules concerning Initial Disclosures does not require the disclosing party to actually produce documents described by category and location, and by stating that Plaintiffs would not be making the documents identified in their disclosures available for inspection and copying. [Pickle Aff., Ex. C]. Attorney Heal appropriately ceased his efforts on behalf of the Defendants to inspect and copy the materials. [Affidavit of Jerrie Hayes, dated December 26, 2007, at ¶ 2 (hereinafter "Hayes Aff., ¶ ____)].

The next time Plaintiffs' Rule 26(a)(1) Initial Disclosures were discussed with Plaintiffs' counsel was in a series of electronic and U.S. mail communication between Defendant Robert Pickle, now appearing *pro se*, and Attorney Jerrie Hayes of Siegel, Brill, Greupner, Duffy & Foster. The e-mail exchanges reflect an attempt by Mr. Pickle to informally arrange for various

discovery in the case, including the depositions of Plaintiffs 3ABN and Shelton and various 3ABN Board members, as well as the production of documents identified and described in Plaintiffs' 26(a)(1) Initial Disclosures (referred to by Mr. Pickle as "auto-discovery"). [Hayes Aff., ¶ 3 and Exs. A through M]. During this time, neither Defendant served any formal discovery requests.

Plaintiffs' counsel, understanding that Mr. Pickle was appearing *pro se*, made every effort to reasonably accommodate Mr. Pickle's informal discovery requests. [Id.]. However, when Plaintiffs refused to schedule the deposition of 3ABN board members at 3ABN's January 2008 Board Meeting, all efforts to informally schedule those depositions ended. [Hayes Aff., ¶ 4 and Exs. A, D, I, J, K, M, N and O]. Further, when Plaintiffs informed Mr. Pickle that they would not produce highly sensitive trade secret, financial and business documents and information without a mutually negotiated confidentiality agreement to safeguard the confidentiality of the information, Defendant Pickle refused to negotiate such an agreement and instead suggested that Plaintiffs were required to produce the materials because Plaintiffs' (despite no formal discovery requests having been made) had failed to file a motion for a protective order. [Hayes Aff., ¶ 5 and Exs. D through M].

Defendant Pickle served formal Requests for Production of Documents on Plaintiff 3ABN on December 4, 2007 and served formal Requests for Production of Documents on Plaintiff Danny Shelton on December 12, 2007.¹ [Hayes Aff., ¶ 6]. In response, Plaintiffs filed a Motion for Protective Order on December 18, 2007 seeking to maintain the confidentiality of proprietary trade secret and other highly sensitive financial and business information.

¹ Although Pickle's Requests for Production of Documents to 3ABN are dated November 29, 2007, the Certificate of Service is not notarized and they were not received in the mail by Plaintiffs' Counsel until December 4, 2007. Similarly, though Pickle's Requests for Production of Documents to Shelton are dated December 7, 2007, the

ARGUMENT

I. DEFENDANT’S MOTION TO COMPEL MUST BE DENIED.

A. Rule 26(a)(1) Does Not Compel Production of Described Documents.

In making their initial disclosures, parties are given the choice of providing either:

a copy of, or a description by category and location of, all documents, electronically stored information, and tangible things that are in the possession, custody, or control of the party and that the disclosing party may use to support its claims or defenses, unless solely for impeachment... .

Fed.R.Civ.P. 26(a)(1)(B). This language, which permits the disclosing party to merely describe potentially relevant documents by category, is in obvious contrast to the language of subsequent sections 26(a)(1)(C) and 26(a)(1)(D), which mandate that damage computation and insurance documents be provided or made available for inspection and copying simultaneous with the Rule 26(a)(1) disclosures. *See* Fed.R.Civ.P. 26(a)(1). The 1993 Advisory Committee Note to Rule 26(a) makes it clear that the extremely preliminary Initial Disclosures were intended for the exchange of very basic information. *See generally*, Advisory Committee Note of 1993 to Rule 26, Paragraph 1. The Advisory Committee Note to the Rule also makes clear that 26(a)(1) initial disclosures are not intended to be an exhaustive substitute for the traditional discovery mechanisms of requests for production of documents, interrogatories, depositions and requests for admissions. The Note states,

Subparagraph (B) is included as a substitute for the inquiry routinely made about the existence and location of documents and other tangible things in the possession, custody, or control of the disclosing party. Although, unlike subdivision (a)(3)(C), an itemized listing of each exhibit is not required, the disclosure should describe and categorize, to the extent identified during the initial investigation, the nature and location of potentially relevant documents and records...sufficiently to enable opposing parties (1) to make an informed decision concerning which documents might need to be examined, at least initially, and (2)

Certificate of Service is not notarized and they were not received in the mail by Plaintiffs’ counsel until December 12, 2007. [Hayes Aff., ¶ 6].

to frame their document requests in a manner likely to avoid squabbles resulting from the wording of requests.

Unlike subparagraphs (C) and (D), subparagraph **(B) does not require production of any documents**. Of course, in cases involving few documents a disclosing party may prefer to provide copies of the documents, rather than describe them, and the rule is written to afford this option to the disclosing party. **If, as will be more typical, only the description is provided, the other parties are expected to obtain the documents desired by proceeding under Rule 34 or through informal requests. The disclosing party does not, by describing documents under subparagraph (B), waive its right to object to production** on the basis of privilege or work product protection, or to assert that the documents are not sufficiently relevant to justify the burden or expense of production.

1993 Advisory Committee Note to Rule 26(a)(emphasis added).

Thus, it is anticipated that the disclosure requirements of Rule 26(a)(1) do not mandate the production of identified and/or described documents. This is particularly so since the 26(a)(1) description need not refer to specific documents or materials that have been investigated and procured by the disclosing party, but only to the broad categories of documents that the disclosing party may find beneficial in the presentation of their claims or defenses. The rule fully contemplates that production of documents falling within the identified categories will be made in response to subsequent requests and will be limited to those documents the production of which is not challenged on relevance, privilege or other grounds.

Defendant Pickle's efforts to obtain documents to date do not warrant an order compelling production. At first, Plaintiffs, though they had identified broad categories of potentially relevant materials, had not investigated and did not have in their possession specific documents that could be produced for copying and inspection and they made this fact known to Defendants in their letter to Attorney Heal of August 8, 2007. [Pickle Aff. at Ex. C, p. 2]. By the time Mr. Pickle began making informal requests for the production of documents described in Plaintiffs' 26(a)(1) Initial Disclosures in mid-November of 2007, Plaintiffs had assembled the

specific, relevant material. However, the vast majority of this material that is not already available to (and likely in the possession of) Defendant Pickle is proprietary trade secret information that Plaintiffs refused to informally disclose without a mutually agreeable confidentiality order in place. [Hayes Aff., ¶ 5 and Exs. D through M]. When Mr. Pickle served formal requests for production of documents and things, Plaintiffs responded by timely filing a Motion for Protective Order governing document confidentiality.

There is no dispute as to the completeness or adequacy of Plaintiffs' Rule 26(a)(1) Initial Disclosures and there is no dispute that Plaintiffs' decision to describe, by category and location, the documents they might rely upon in prosecuting their claims and mounting their defenses was entirely appropriate given the language of Rule 26. Thus, Defendant Pickle's Motion to Compel cannot properly be based upon Rule 37(a)(2)(A) of the Federal Rules.

B. Rule 37 Does Not Authorize an Order Compelling Responses to Informal Discovery.

Because Plaintiffs' Rule 26(a) Initial Disclosures are proper and complete, Defendant Pickle's Motion to Compel is presumably based on Rule 37(a)(2)(B), which allows a party to make a motion to compel discovery or disclosures sought pursuant to Rules 30, 31, 33 or 34 of the Federal Rules. Rule 37(a)(2)(B) reads, in relevant part:

[I]f a party, in response to a request for inspection [of documents or things] submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order...compelling inspection in accordance with the request. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make the discovery on an effort to secure the information or material without court action.

Yet not once in his Motion, Memorandum in Support of Motion or Affidavit in Support of Motion does Defendant Pickle claim that his motion to compel is based upon a Request for Production of Documents properly promulgated and served under Rule 34. Instead, his motion is

apparently based on 3ABN, Shelton and Defendant Pickle's ultimate inability to agree upon informal discovery prior to his service of formal Rule 34 Requests for Production in early December.

Even if Pickle's motion to compel could be characterized as somehow authorized by Rule 37(a)(2)(B), Pickle has failed to provide the requisite certificate that he made a good faith effort to obtain the information without court action. As can be seen from the various correspondence, Plaintiffs' primary objection to Pickle's informal inspection of the relevant documents is the highly sensitive, confidential nature of most of the materials. However, Defendant Pickle has refused outright to confer, negotiate or otherwise attempt to mutually craft a proposed confidentiality agreement with Plaintiffs.

There is nothing in Rule 37 contemplating that a party can be forced to respond to a motion to compel production based solely on a failed effort at informal discovery, and Pickle has cited no rule provision or case authority in support of such a notion.² Thus, there are simply no grounds for Pickle's Motion to Compel under either Rule 37(a)(2)(A) or 37(a)(2)(B) and his Motion should be denied in its entirety.

II. DEFENDANT'S MOTION FOR SANCTIONS MUST BE DENIED.

Rule 37 governs the awarding of sanctions in discovery disputes. It provides that if the motion is granted, the party whose conduct necessitated the motion must pay the reasonable expenses incurred in making the motion, "unless the court finds that the motion was filed without the movant's first making a good faith effort to obtain the disclosure or discovery without court

² The specter of being forced to defend oneself against a motion to compel, in the event informal discovery efforts prove unsuccessful, would have a substantial and extremely undesirable chilling effect on informal and negotiated discovery efforts.

action, or that the opposing party's nondisclosure, response, or objection was substantially justified, or that other circumstances make an award of expenses unjust." Rule 37(a)(4)(A).

Here, as has previously been set forth, there are no grounds under the Federal Rules and no facts in the record to warrant the granting of Defendant Pickle's Motion to Compel. As has also been discussed, Defendant Pickle has failed to provide the Court with the necessary certificate of good faith effort to resolve the dispute prior to making the Motion and involving the Court. Finally, nothing in Plaintiff-Respondents' conduct necessitated Pickle's Motion and Plaintiffs' objection to producing the Rule 26(a)(1) Initial Disclosures absent a confidentiality order is substantially justified. Plaintiffs engaged in numerous correspondence with Pickle in an effort to schedule and accommodate his informal discovery requests, all of which were to no avail when Pickle refused to agree to any restrictions on the disclosure and publishing of Plaintiffs' extremely sensitive business information. When Pickle did finally serve formal requests for inspection/production of documents, Plaintiffs filed a timely and narrowly-tailored Motion for Protective Order, which is currently pending before the Court.

Plaintiffs were at all times reasonable and accommodating to Pickle, provided explanations and rationale for their various positions and acted in good faith to facilitate the informal exchange of information, all of which, in light of the Defendants' obstreperous conduct in this case, was extremely cooperative. When informal discovery efforts proved unsuccessful, all Pickle had to do was serve formal Requests for Inspection/Production, which he has done. Pickle has simply failed to cite to a single fact in the record that could even suggest that Plaintiffs have acted in bad faith or that any act by Plaintiffs in the parties' course of dealing necessitated his Motion. When viewed in relation to his unsubstantiated and legally meritless Motion to

Compel, it is clear that Pickle's Motion for Sanctions was gratuitously added by the Defendant in order to harass and annoy the Plaintiffs.

CONCLUSION

There is simply no factual or legal grounds for this Court to grant Defendant Pickle's Motion. Plaintiffs therefore pray that this Honorable Court deny Defendant Robert Pickle's Motion to Compel Plaintiffs to Produce Rule 26(a)(1) Documents and for Sanctions in its entirety and award Plaintiffs the reasonable costs and expenses incurred by them in opposing the Motion, pursuant to Rule 37(a)(4)(B) of the Federal Rules of Civil Procedure.

Respectfully Submitted:

Dated: December 28, 2007

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Certificate of Service

I hereby certify that this document filed through the ECF system 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 on December 28, 2007.

Dated: December 28, 2007

/s/ J. Lizette Richards

J. Lizette Richards