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**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.

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**PLAINTIFFS' MEMORANDUM IN RESPONSE TO  
DEFENDANTS' MOTION TO EXTEND DEADLINES**

**ORAL ARGUMENT IS REQUESTED**

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**INTRODUCTION**

Plaintiffs Three Angels Broadcasting Network, Inc. ("3ABN") and Danny Lee Shelton submit this response ("joinder" might be more accurate) to Defendants' motion to extend all deadlines for discovery [Doc. # 69]. A week or so before Defendants filed their motion, the parties agreed they would jointly submit a stipulated order to the Court seeking a 90-day extension of the unexpired scheduling order deadlines. Plaintiffs' counsel prepared and sent a stipulated order to Defendants for their signatures. For reasons that have not been shared, Defendants filed this motion instead. Plaintiffs' counsel immediately sent a letter to Defendants asking them to withdraw their motion and submit the stipulated order, and advising that Plaintiffs would seek sanctions if it was necessary for Plaintiffs to respond to Defendants' motion. Defendants refused to withdraw their motion.

Accordingly, Plaintiffs request that the Defendants' motion be GRANTED and that the unexpired deadlines in the scheduling order be extended by 90 days. However, Plaintiffs further request that Defendants be ordered to pay \$500 to partially defray the fees incurred by Plaintiffs in preparing this memorandum for the reasons set forth below.

### **FACTS**

Plaintiffs have previously submitted the Affidavit of Jerrie M. Hayes in connection with Defendants' motion to compel [Doc.# 61] to explain the history of the parties' negotiations regarding document discovery. That affidavit is incorporated by reference herein. [Doc.# 68]. Many of the factual representations in Defendant Robert Pickle's memorandum in support of his motion to extend deadlines [Doc.#70] fall into the category of "sound and fury, signifying nothing." For example, the accusation of delay in Plaintiffs' production of the documents identified in Plaintiffs' Rule 26(a)(1) disclosures is an old one, and ignores: (1) that Plaintiffs fully performed their obligations under rule 26(a)(1) by identifying responsive documents and were under no obligation per that rule to produce the documents themselves, but nevertheless did so when asked; (2) that, in any case, the lawsuit was stayed for several months due to Defendant Joy's bankruptcy filing; and (3) that document exchange was on hold for several additional months while the Court considered the matter of what manner of confidentiality order should be entered in this case.

Defendants also renew their complaint that Plaintiffs have not produced all of the documents they want. This particular issue is the subject of other motions and need not be addressed here other than to invite the Court to review the document requests that Defendant Pickle served on Plaintiffs [Doc.#63-20] to fully appreciate the difficulties Plaintiffs face in locating documents that are largely described subjectively, rather than by objective criteria (e.g.,

“all email, correspondence, [etc.] that support or do not support the claim that how Seventh-day Adventist church leaders view 3ABN has been negatively impacted by the Defendants....”). Plaintiffs have tried to secure Pickle’s agreement to better define and narrow the scope of his requests to material that is at least arguably discoverable, but that process has reached an impasse. The Pickle Affidavit [Doc.# 71] attaches correspondence illustrating the difficulties Plaintiffs have had in negotiating with Defendants regarding discovery. Notably, Plaintiffs refer the Court to the May 9 email from Jerrie Hayes discussing the Defendants’ internet posting of material regarding Ms. Hayes’ *own divorce*. [Pickle Aff. Ex. B – Doc.#71]. As a result of these difficulties, Plaintiffs have determined to produce the documents they agree should be disclosed and to seek the Court’s protection as to the rest.

Moreover, any implication that Plaintiffs have been unduly stingy with their document production is rebutted by the facts set forth in the Hayes affidavit, including that Plaintiffs produced the following pursuant to Rule 26(a)(1):

- on March 28, 2008, 12,575 pages of non-confidential material;
- on April 25, 2008, 2,500 additional pages marked confidential under the newly issued protective order;
- on May 10, 2008, 200 more pages of confidential, proprietary or trade secret information.

At the May 7, 2008 status conference in this case, counsel for the Plaintiffs, Jerrie 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 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 at that time. (Hayes Aff. ¶ 26).

Following the status conference but before completing the "meet and confer" process required by local rules, Defendants brought their motion to compel Plaintiffs to produce documents [Doc.# 61], which motion remains pending. Following the filing of that motion, Plaintiffs sent Defendants a letter dated May 27, 2008, proposing a timetable for production of documents that Plaintiffs did not intend to withhold. (Affidavit of M. Gregory Simpson Ex. A). The parties met by telephone on June 4 and June 5, 2008, to discuss outstanding discovery issues. During that meeting, which was attended by both Defendants, all parties agreed that: (1) Plaintiffs would produce documents pursuant to the schedule set forth in their May 27 letter; (2) Defendant Pickle would withdraw his motion to compel [Doc.# 61], without prejudice to refile after receipt and review of Plaintiffs' production; and (3) the parties would submit a stipulated order to the Court asking to extend all unexpired deadlines in the scheduling order by 90 days. (Simpson Aff. ¶ 4).

Counsel for Plaintiffs, Greg Simpson, agreed to draft a proposed order and send it to the Defendants by "close of business" on Friday, June 6, 2008. (*Id.* ¶ 5). Before 5 P.M. on Friday, Simpson drafted and sent by fax and U.S. Mail a proposed stipulated order that reflected the parties' agreement. (Simpson Aff. ¶ 5 and Ex. B). Subsequent investigation reveals that the fax number used for Defendants may have been incorrect because an old fax transmittal sheet was

used; nevertheless, copies were also deposited in the mail, postage prepaid, and correctly addressed to both of the Defendants. At 4:56 P.M. on that same Friday, Defendant Pickle called Simpson and asked if the stipulated order was on the way. Simpson told him it was in the fax machine as they spoke, which was true. (Simpson Aff. ¶ 6).

Without further communication, on June 10, 2008, Pickle filed the present motion to extend the scheduling order dates. Simpson became aware of the motion on June 11, 2008. (Simpson Aff. ¶ 7). That day he sent a letter to Pickle setting forth his position that the motion was not filed in good faith; that Pickle had misrepresented facts to the Court in stating that he had not received the stipulated order; and that if Pickle did not withdraw the motion and submit the stipulated order for approval, he would seek an award of Plaintiffs' attorneys fees incurred to respond to a motion for an order to which the Plaintiffs had agreed. (Simpson Aff. Ex. C). Pickle sent a response denying he had previously received the stipulated order and explaining that his failure to call and ask why it had not arrived after being told it was in the fax machine was the result of his becoming "weary of hounding adverse lawyers to make sure they get their job done," and voicing his suspicion that, "if it ever was in your fax machine, someone never pushed the start button." (Simpson Aff. Ex. D). While Pickle's response acknowledges his receipt of the stipulated order on June 13, he *still* has not withdrawn his motion.

Despite Defendants' apparent repudiation of the agreement reached at the meet-and-confer on June 4-5, 2008, Plaintiffs have adhered to the production schedule set forth in the May 27 letter. On June 13, 2008, Plaintiffs produced an additional 199 pages of non-confidential documents responsive to Pickle's document requests. (Simpson Aff. ¶ 9). On June 20, 2008, Plaintiffs produced 1,603 pages of confidential materials responsive to those requests. (*Id.* ¶ 9). The next round of production, to take place on June 27, will be the largest, consisting of

documents from which confidential information – mainly donor identification – has been redacted. (*Id.* ¶ 9). At this writing, Plaintiffs have nearly completed a comprehensive motion intended to address the scope and relevancy of discovery requests served by Defendants, including both the document requests served on Plaintiffs and the third party discovery served in other jurisdictions. The motion will be on file this week. (*Id.* ¶ 10).

### ARGUMENT

A pretrial scheduling order may be amended for good cause. Fed. R. Civ. P. 16(b)(4). Plaintiffs agree that good cause exists to extend the unexpired schedule deadlines by 90 days, but do not agree with the Defendants' allegations that the good cause for doing so is attributable to the Plaintiffs. The record shows that Plaintiffs have made extraordinary efforts to comply with the confusing, contradictory and frequently incomprehensible demands for records from Defendant Pickle. (Joy never served any discovery requests of his own). There have been delays in the progress of the case, including Joy's bankruptcy, but none that can be attributed to the Plaintiffs. The discovery deadline has approached due to no fault of the Plaintiffs, but significant discovery remains to be done by both sides. For this reason, Plaintiffs join in Defendants' request to extend the unexpired scheduling order deadlines by 90 days.

Because Plaintiffs stipulated to this extension, however, Defendants' motion was entirely unnecessary. For that reason, compounded by Defendant Pickle's misrepresentation of facts to the Court in his Affidavit (specifically that he had not received the stipulated order prepared by Plaintiffs' counsel), an award of sanctions against Pickle in the amount of \$500 is appropriate. The cost to Plaintiffs in attorney fees caused by this motion will exceed that sum. (*Simpson Aff.* ¶ 11).

**REQUEST FOR ORAL ARGUMENT**

There are or will soon be several motions related to discovery pending before the Court, including this one and the motion to compel. Rather than handling them piecemeal, Plaintiffs believe that a single hearing on all outstanding motions would assist the Court in managing the case and deciding the pending motions. Plaintiffs 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 Pickle's motion to extend deadlines be granted and that he be ordered to pay \$500 to Plaintiffs as a sanction for bringing an unnecessary motion.

Respectfully Submitted:

Dated: June 24, 2008

FIERST, PUCCI & KANE, LLP

/s/ J. Lizette Richards

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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: June 24, 2008

/s/ J. Lizette Richards

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J. Lizette Richards