UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

Three Angels Broadcasting Network, Inc., an Illinois non-profit corporation, and Danny Lee Shelton, individually,

Plaintiffs,

v.

Gailon Arthur Joy and Robert Pickle,

Defendants.

Case No. 07-40098-FDS

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR VOLUNTARY DISMISSAL

INTRODUCTION

Plaintiffs Three Angels Broadcasting, Inc. ("3ABN") and Danny Lee Shelton ("Shelton") submit this memorandum in support of their Motion for Voluntary Dismissal pursuant to Fed. R. Civ. P. 41(a)(2). Plaintiffs believe they have obtained all the tangible relief that could be obtained in this lawsuit by other means, and that the lawsuit cannot achieve additional meaningful relief for the Plaintiffs.

FACTS

Plaintiffs commenced the above-captioned lawsuit on or about April 5, 2007. The case is in the document discovery phase. (Affidavit of M. Gregory Simpson, filed and served herewith, ¶ 2). No depositions have been taken, nor have any dispositive motions

been filed or served. (*Id.*). The parties recently stipulated to an order extending discovery and unexpired deadlines by 90 days. (*Id.*).

A review of the Complaint (ECF Doc. 1) shows that it contains four counts: Count I states a claim for infringement of trademark under 15 U.S.C. § 1114 arising out of the Defendants alleged use of Plaintiff 3ABN's marks and registered domain names called "save3ABN.com" and "save3ABN.org." Count II of the Complaint states a claim for dilution of trademark under 15 U.S.C. § 1125(c) arising out of the operation and maintenance of the same websites. Count III of the Complaint states a claim for defamation arising out of specific statements published on the internet at the website www.save3ABN.com, which contained false accusations of the commission of crimes by both Plaintiffs. Finally, Count IV of the Complaint states a claim for intentional interference with economic relations, arising out of the conduct that was the subject of the defamation count, which had the impact of interfering with 3ABN's relationships with its donors.

After the commencement of the lawsuit, certain developments occurred that have made much of the relief sought in the Complaint either moot or unnecessary. (*See* Affidavit of Dr. Walt Thompson, filed and served herewith). Count I and Count II sought an order shutting down two internet web sites owned and operated by the Defendants. The registered owner of the web sites was Defendant Joy. (*Id.* ¶ 3). Mr. Joy filed for bankruptcy protection on August 14, 2007. (The automatic stay on collection activity was subsequently lifted). On February 12, 2008, 3ABN purchased the infringing website domain names from the bankruptcy trustee. (*Id.*). The websites immediately ceased

operations. (*Id.*) Therefore, the relief sought in the complaint with respect to Counts I and II was obtained in the course of the bankruptcy proceeding.

Although monetary relief for Defendants' violation of federal trademark laws and common law claims is sought in the Complaint, it is not likely that Plaintiffs would recover any monetary relief no matter what the final outcome of the lawsuit might be. As to Mr. Joy, the bankruptcy court order lifting the automatic stay required 3ABN to give up its right to seek damages against Mr. Joy. (Affidavit of M. Gregory Simpson ¶ 3 and Ex. 1). Therefore, as to Counts I and II there is no tangible relief that could be afforded against Mr. Joy. As to Mr. Pickle, it is the assessment of 3ABN's counsel based on Court filings by Mr. Pickle which indicate that he is a man of modest means, that he would be unable to pay any substantial award of damages. (Simpson Aff. ¶ 4 and Ex. 2). In any case, the prospect of an award of monetary damages was never a significant motivation for the Plaintiffs in bringing this lawsuit, and they are not interested in continuing it merely because of a theoretical possibility of receiving some compensation from one of the defendants.

The Plaintiffs were, however, motivated by a desire for a judicial determination that certain public statements by the Defendants were false. These concerns have also abated in recent months. While the lawsuit was ongoing, the Internal Revenue Service conducted an investigation into 3ABN and Danny Shelton. (Thompson Aff. ¶ 4). The audit took more than a year and encompassed over 100,000 financial records. (*Id.* ¶ 5). At its conclusion last July, the IRS contacted counsel for Plaintiffs and inquired as to whether the file materials should be destroyed or returned. (*Id.*). Plaintiffs were advised

that this is what the IRS does when it concludes an investigation without finding sufficient evidence to warrant prosecution. (*Id.*). The Board of 3ABN deems this action by the IRS to be sufficient public assurance that 3ABN's financial accounting and tax reporting are in order and in full compliance with the law. (*Id.*). Certainly, there can be no greater assurance to 3ABN's public that its filings comply with the law than the fact that the IRS reviewed them and found nothing that warranted even a revised return, let alone criminal prosecution. Thus, the objective of the lawsuit to obtain a finding that its tax filings were not in violation of the law was met by means other than this lawsuit.

Also during the lawsuit, several additional allegations made by the Defendants involving the treatment of certain employees of 3ABN's wills and trusts department were investigated by a California state agency and the U.S. Equal Employment Opportunity Commission. (Thompson Aff. ¶ 6). In March of 2008, Plaintiffs were advised that the complaints had been dismissed for insufficient evidence. (*Id.*). This also served as a vindication of 3ABN with respect to the Defendants' statements with respect to that issue. (*Id.*).

As might be expected following official governmental actions implicitly rejecting the most serious of Defendants' damaging statements, the public's confidence in the Plaintiffs appears to have been restored. Last week the 3ABN Board recently reviewed figures indicating that donation levels have been restored to the levels they enjoyed before the Defendants began their campaign of disparagement. (Thompson Aff. ¶ 8). This indicated to the Board that the public's confidence in 3ABN has been restored. As 3ABN's Board Chairman, Dr. Walt Thompson, states:

> When the Board came to the conclusion that 3ABN's reputation was no longer being significantly harmed by the Defendants' activities and that continuation of the lawsuit could not achieve more than what we had already achieved by other means, it was time to shut the lawsuit down.

(Thompson Aff. ¶ 8).

Although Plaintiffs believe that they would ultimately achieve a ruling in this case that the Defendants' statements were false and defamatory, the need to obtain such a ruling is much less than it was when the lawsuit began and no longer justifies the expense and distraction that are inherent in litigation.

ARGUMENT

I. DISMISSAL SHOULD BE GRANTED.

The purpose of Rule 41(a)(2) is to permit a plaintiff, with approval of the court, to voluntarily dismiss an action "so long as no other party will be prejudiced." *Puerto Rico Maritime Shipping Authority v. Leith*, 668 F.2d 46, 50 (1st Cir. 1981). Generally, dismissal of an action under Rule 41(a)(2) is committed to the discretion of the court. *See Doe v. Urohealth Systems, Inc.*, 216 F.3d 157, 160 (1st Cir. 2000). Neither the prospect of a second suit nor a technical advantage should bar dismissal. *See Puerto Rico Maritime Authority*, 668 F.2d at 50. Dismissal should in most cases be granted, unless the result would be to legally harm the defendant. *See Century Mfg. Co. v. Central Transport Int'l, Inc.*, 209 F.R.D. 647, 648 (D. Mass. 2002). Dismissal under the rule is without prejudice unless the Court specifies otherwise. *See* Fed. R. Civ. P. 41(a)(2). In exercising its discretion, the court may consider such factors under Rule 41(a)(2) as the defendant's effort and expense of preparation for trial, the plaintiff's diligence in

prosecuting the action, and the plaintiff's explanation for seeking dismissal. *See Doe*, 216 F.3d at 160. Rule 41(a)(2) authorizes the Court to condition the dismissal on "terms that the court considers proper." Fed. R. Civ. P. 41(a)(2).

Here, voluntary dismissal should be granted because Plaintiffs are seeking dismissal at an early stage of the litigation, no counterclaims or dispositive motions are on file, and no legal prejudice to the Defendants can be shown. Document discovery is underway, but no depositions have yet been taken. The parties have cooperated to extend deadlines when necessary. The Plaintiffs have been diligent in prosecuting the action, as a review of the lengthy ECF Docket sheet will attest. In addition to what is shown on the Court Docket, Plaintiffs served document requests and interrogatories on the Defendants, to which responses have been received, and in addition conducted third party discovery. There can be no argument that either side lacked diligence.

Dismissal should be without prejudice because the Defendants will not suffer a *legal* disadvantage from such a dismissal. They will be in the same legal position that they occupied before the suit commenced. Thus, no conditions are necessary to protect the Defendants against prejudice.

II. CONFIDENTIAL INFORMATION SHOULD BE RETURNED.

Plaintiffs also request that the Court order the return of confidential information provided to the Defendants pursuant to the Confidentiality and Protective Order issued in this case on April 17, 2008 (ECF Doc 60), including but not limited to the records of MidCountry Bank which were delivered under seal to, and remain in the custody of, Magistrate Judge Hillman. All parties submitted proposed orders to Magistrate Judge

Hillman that required return of the confidential information at the conclusion of the litigation. (*See* Proposed Order submitted by Defendant Pickle, Doc. 57, at p. 11; Defendant Joy's Proposed Order, Doc. 59 at p. 10; Plaintiffs' Proposed Confidentiality Order, Doc. 58 at p. 12).

Consistent with the parties' requests, the Confidentiality and Protective Order expressly provides that material produced under it "Shall be used for no other purpose than this litigation." (Doc. 60 at pp. 1-2). The Order has an Exhibit A that recipients of Confidential material must sign, which states: "Upon the earlier of: (i) demand of counsel of record of the party who supplied the Confidential Information to me or (ii) within 30 days after the final termination of instant litigation, including appeal, I will return all Confidential Information and all copies thereof, including notes, abstracts, summaries and memoranda relating thereto which contain any of the substance thereof, to the person or party from whom I received the Confidential Information." (Doc. 60 page 8 of 8). Thus, the Order contemplates return of all Confidential Information produced during the litigation.

Since receiving information designated as "Confidential" under the Order issued in this case, Defendant Joy has published several statements on internet blogs that appear to refer to material he has received under the confidentiality order, which state or at least imply that the material proves wrongdoing on the part of the Plaintiffs. An example is the following statement published shortly after Mr. Joy received material pursuant to a third party subpoena issued to Remnant Publications, which produced records clearly marked as "confidential" under the order issued in this case:

> The message was carefully considered and designed to get a very specific Response. It has fulfilled it's purpose, but, *with the evidence we now Have, not simply sources, but real, hard, supportive evidence that demonstrates the sources were woefully under-reporting the scope of the abuses*, I MUST STAND FIRMLY ON THAT STATEMENT.

(Simpson Aff. Ex. 3A) (italics supplied). On another occasion, also shortly after receipt of the Remnant documents, Mr. Joy wrote:

> Those documents, and all other documents, are not subject to any "seal" per order of the court. YUP, old boy, they came right to my desk and are still at my right hand until they are prepared for the "experts". Those and the bank statements and now the audit of the auditor will all be in the hands of experts in time!!!

(*Id.* Ex. 3B) Thus, the threat that the Defendants may reveal the contents of confidential information is not merely an idle possibility. Mr. Joy is doing it already.

Plaintiffs therefore request an order compelling Defendants to retrieve from their consultants and deliver to Plaintiffs all materials, and all copies of materials, which were produced under the Confidentiality and Protective Order issued in this case, and to sign an affidavit or otherwise swear on oath that they have retained no confidential material or copies of confidential material. This order should extend to:

1. All documents produced to Defendants by the Plaintiffs that were stamped as "Confidential" under the Court's confidentiality order;
2. All documents produced by Remnant Publications pursuant to the subpoena issued in this case out of the U.S. District Court for the Eastern District of Michigan; and

3. The documents delivered under seal to Magistrate Judge Hillman by MidCountry Bank pursuant to the subpoena issued in this case out of the U.S. District Court for the District of Minnesota.

III. THIRD PARTY SUBPOENAS SHOULD BE DISMISSED.

Although the issue is now largely moot, Defendants should be directed to dismiss or cancel any outstanding subpoenas issued in this case, wherever such subpoenas may have been served. Rule 45 authorizes the use of subpoenas on non-parties to obtain information needed for a *pending* lawsuit. *See* Fed. R. Civ. P. 45(a)(1)(A)(ii). Once the lawsuit is no longer pending, the subpoena ceases to be valid under Rule 45, and must be dismissed.

IV. DISCOVERY OBLIGATIONS SHOULD BE STAYED PENDING RESOLUTION OF THIS MOTION.

Finally, Plaintiffs request that this Court stay discovery obligations pending resolution of this motion to dismiss. Plaintiffs are currently under an obligation to respond to requests for production of documents served by the Defendants. In addition, Plaintiffs have served Notices of Deposition upon the Defendants in order to comply with current scheduling order deadlines. The benefit of dismissing the action would be lost if the parties were required to conduct discovery and comply with other scheduling order deadlines while this motion is pending. Therefore, Plaintiffs request that this Court stay discovery obligations while this motion is pending.

CONCLUSION

For the reasons stated above, Plaintiffs seek an order voluntarily dismissing this lawsuit without prejudice, ordering the return of confidential information, dismissing third party subpoenas and staying discovery pending resolution of this motion.

Respectfully Submitted:

Dated: October 23, 2008

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

s/ M. Gregory Simpson

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Certificate of Service

I, M. Gregory Simpson, 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 October 23, 2008.

Dated: October 23, 2008 /s/ M. Gregory Simpson
M. Gregory Simpson