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UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

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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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**DEFENDANTS’ MEMORANDUM IN SUPPORT OF DEFENDANTS’ MOTION TO  
IMPOSE COSTS UPON THE PLAINTIFFS**

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“When considering a dismissal without prejudice, the court should keep in mind the interests of the defendant, for it is his position which should be protected.” *LeCompte v. Mr. Chip, Inc.*, 528 F.2d 601 (5th Cir. 1976).

“A district court may reasonably impose attorney’s fees and costs as a condition for dismissal where, at plaintiff’s instance, the litigation will not result in a merits resolution.” *Radiant Tech. Corp. v. Electrovert USA Corp.*, 122 F.R.D. 201, 204 (N.D. Tex. 1988).

The Defendants have invested a significant amount of time, effort, and money in preparing their defense for the instant case, including litigation in other districts in order to obtain discovery. The granting of the Plaintiffs’ motion for voluntary dismissal has resulted in substantial prejudice to the Defendants due to the current impossibility to reuse most discovery in future litigation, the likely future spoliation of evidence by the Plaintiffs, the risk of the incapacitation, death, or removal of key witnesses, and other factors. (Doc. 126 pp. 5–19).

This Court on October 30, 2008, sought to protect the Defendants by requiring litigation to be resumed in this district in order to prevent the plain legal prejudice that could result from a change of forum. Upon further reflection, the Defendants are uncertain that their contemplated suit for abuse of process against the Plaintiffs and their counsel (Doc. 126 pp. 14–15) would qualify for diversity jurisdiction, given the Defendants' current residence in the same states as the law firms at issue. Thus, the Defendants could be required to file such an action in state court, and thus jeopardize the decisions won in this Court at such great time, expense, and effort.

That is, the Defendants would lack federal jurisdiction unless they can properly plead a federal question such as a civil RICO claim. Yet that would be a daunting task given the need to prove that the requisite predicate acts of mail fraud, wire fraud, tampering with a witness, victim, or informant, and the like represented a pattern of criminal activity and were the proximate cause of damage to the Defendants' property or business.

The imposing upon the Plaintiffs of the costs incurred by the Defendants in preparing their defense would alleviate to a degree the substantial prejudice caused by the voluntary dismissal. The costs known to date can be broken down into five categories:

1. Lawsuit-related mileage from two fact-finding trips conducted by Defendant Pickle, calculated at **\$993.62** by using the applicable IRS standard mileage rate. (Affidavit of Robert Pickle (hereafter "Pickle Aff.") ¶ 1, Table 1).
2. Various miscellaneous expenditures paid by Defendant Pickle over the course of this litigation amounting to **\$4,614.90**, including more than \$3,500 paid to MidCountry Bank for certain of its records, records which were never received by the Defendants. (Pickle Aff. ¶ 2, Table 2).
3. Costs for copies made by Defendant Pickle for filings in the Western District of Michigan and the Southern District of Illinois, where ECF filing was not

permitted. These costs total **\$206.70** using a per copy charge of 10¢. (Pickle Aff. ¶ 3, Table 3). The special, high-speed equipment purchased by Defendant Pickle in order to process at the Defendants' expense the records of Gray Hunter Stenn LLP, the auditor of Three Angels Broadcasting Network, Inc., and the toner and drum purchased for that machine, total \$522.66, considerably more than the above copy cost figure. (Pickle Aff. ¶ 3). This equipment was used to make these copies.

4. Given the enormous resources of the Plaintiffs, the only way Defendant Pickle could come out at the other end of this litigation without being bankrupt was to do much of the legal work himself. While he did not record all his hours, he has prepared a table containing the hours he did record. Using the figure of \$25 an hour which he charges for work he does in his vicinity, these hours amount to **\$30,114.75**. (Pickle Aff. ¶ 4, Table 4).

5. Lynette Rhodes, CPA, CFE, one of the experts the Defendants retained, has invoiced Defendant Pickle for the sum of **\$20,342.32**. (Pickle Aff. ¶ 5, Ex. A).

6. Attorney Laird Heal has invoiced Defendant Joy for **\$666.69**, and Defendant Pickle for **\$53,600.25**. (Pickle Aff. ¶ 6, Ex. B–C). The itemization on the latter invoice appears incomplete since it stops more than a month before Defendant Pickle filed his notice of appearance *pro se*. (Doc. 31).

The Defendants seek the imposing of some or all of the above costs, expenses, and fees upon the Plaintiffs in order to alleviate to a degree the substantial prejudice upon the Defendants resulting from the granting of the Plaintiffs' motion for voluntary dismissal without prejudice.

Respectfully submitted,

Dated: November 13, 2008

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