IN THE UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

ALBERT SNYDER, Plaintiff v. FRED W. PHELPS, SR., JOHN DOEs, JANE DOEs, and WESTBORO BAPTIST CHURCH, INC. Defendants	Civil Action No. 06-CV-1389 RDB

PLAINTIFF'S MEMORANDUM OF LAW IN REPLY TO DEFENDANTS' OPPOSITION FOR AN AWARD OF COSTS AND FEES

I. PROCEDURAL HISTORY

On August 29, 2006, the plaintiff requested fees and costs pursuant to Fed. R. Civ. P. 4(d), based upon the defendants' failure to waive service, and on September 15, 2006, the defendants opposed the same. This reply brief is in response to the defendants opposition.[1]

II. BRIEF FACTUAL HISTORY

After the defendants' attorneys learned that the complaint was filed against the defendants, they (the defendants' attorneys) notified plaintiff's counsel that the defendants were represented by counsel. Specifically, defense counsel stated, "We represent Westboro Baptist Church (WBC) and her members." Def's Motion Ex. A, pg. 2 of 9. The defendants, by and through counsel, were requested to waive service, and on June 22, 2006, the defendants were sent the requisite forms, by and through counsel, to waive service.

[1] It took five hours to complete and prepare the within reply brief (and associated research) offered pursuant to the Fed. R. Civ. P., for a total of $950 (i.e., 5 times $190 an hour = $950).

III. ARGUMENT

A. Summary of defendants' argument.

First, the defendants allege that the plaintiff requested that the defendants' attorneys *accept* service. Next, and as the first fallback position, the defendants evidently attempt to argue that the waiver was not addressed to the defendants and Md. RPC 4.2 does not apply to waiver of service and Fed. R. Civ. P. 4(d). The defendants, assuming the first two arguments fail, advance yet a third novel alternative – the defendants' attorneys (Phelps and Hockenbarger) did not represent the defendants *in this matter*. Next, and curiously, the defendants suggest that the plaintiff was confused about who to serve.

According to the defendants, the standard waiver form does not specifically identify that the defendants will be required to pay attorney fees if they fail to fulfill their duty of waiving service. For some reason, the defendants believe that the request to waive service did not include a self-addressed stamped envelope – as if that is justification for their failure to waive service. As yet another fallback position, the defendants request that the Court limit the attorney fee request, or more specifically, the defendants request the attorney fees associated with the Motion for Alternative Service be denied. Not surprisingly, the defendants do not discuss that it was their actions that caused and precipitated the need for the Motion for Alternative Service.

And finally, as the final fallback position, acting under the assumption that all of their arguments fail, the defendants suggest that the attorney fee request is not reasonable.

B. The defendants concede some important facts.

Most notably, the defendants do not even attempt to argue that they have demonstrated "good cause," excusing their failure to waive service – tacitly admitting there is no excuse for their actions. Attorneys Phelps and Hockenbarger, officers of the Court, received the requests

for waiver of service *after* notifying the plaintiff that they represent the defendants. Significantly, Phelps and Hockenbarger did not return the requests for a waiver indicating that they no longer represented the defendants or did not represent the defendants in the above-captioned matter. The defendants fail to address the fact that practically all adult Phelps family members are attorneys, and presumably, aware of their duty to waive service after being requested to waive service. Even if they were not aware of their duty to waive service, they were specifically told of that duty and that attorney fees would be sought if they chose to continue to avoid service. Motion Ex. A.

The plaintiff's motion for costs and fees included an affidavit supporting the time preparing the motion and accompanying legal memorandum. Now, the defendants appear to partially challenge the reasonableness of those fees. The defendants do not dispute the hourly rate, i.e., $190 per hour, but apparently believe the hours spent preparing the two motions were not reasonable. Interestingly, the defendants do not offer an amount of hours they believe to be reasonable or the amount of hours their counsel exhausted preparing a response. Stated differently, the plaintiff offered evidence of reasonable attorney fees and the defendants provided no evidence, absolutely none, to contradict that evidence.

Interestingly, after evading service on *numerous* occasions, the defendants have proclaimed that they will challenge this Honorable Court's Order authorizing alternative service, *see Def's Opposition Br.* at 13, by means of a motion to dismiss. In the Motion to Dismiss, *see Def's Br.* at 14, the defendants incorporate by reference the supposed argument made in the brief in opposition to attorney fees, pursuant to Fed. R. Civ. P. 4. The defendants, for some unknown reason, suggest that attorneys Phelps and Hockenbarger were not authorized to *accept* service.

However, this argument misses the point. The attorneys were only served, along with their clients, as an additional safeguard to ensure adequate notice was received.

The defendants' superficial arguments will be addressed in the order that they are presented in the defendants' brief. Some of the plaintiff's replies will be consolidated because the defendants are essentially arguing the same issue but attempting to say the same thing in different ways.

C. The defendants were properly requested to waive service by and through their attorneys.

Again, the plaintiff took defendants' counsel at their word and believed the attorneys meant what they said: "We represent Westboro Baptist Church (WBC) and her members." Def's Motion Ex. A, pg. 2 of 9. The plaintiff did not ask that the defense counsel accept service but rather asked the defendants (their clients) to waive service. For example, the waiver of service forms were already filled in with the defendants' identities. "TO: (A) Abigail R. Phelps as (B) Registered Agent of (C) Westboro Baptist Church, Inc." The standard form to defendant Phelps was similar. "To: (A) Fred W. Phelps, Sr. . .." Motion Ex. A. Even the cover letter stated "the defendants have a duty to waive service." Motion Ex. A.

Having received the requests for waiver, if the defense counsel *genuinely* did not represent the defendants, they certainly could have returned the requests for waiver of service or responded by indicating that they did not represent the defendants. Or, at least, the defendants' attorneys could have told the plaintiff to contact the defendants directly and not through counsel.[2] The after-the-fact interpretation of their own letter suggesting that they did not represent the defendants contradicts the plain meaning of their own words.

[2] Regardless of this motion, the plaintiff's counsel are extremely cautious and concerned about the defendants' actions thus far. On the same day the complaint was filed, the defendants' relative filed an ethics complaint against the undersigned. Significantly, the ethics complaint was summarily disposed of because of its obvious underlying

The defendants reliance on *Lewis v. ACB Bus. Servs.*, 1994 U.S. Dist. LEXIS 21318, *slip op.* (S.D. Ohio 1994),[3] at least to support their position, is misplaced. For example, the defendants in our case argue that the plaintiff should disregard the prohibition concerning communications with represented parties – not to mention professional courtesy – and contact the defendants directly, knowing they were represented by counsel. In *Lewis*, the defendant argued "that Lewis should have sent the relevant documents to its present counsel rather than its president." *Id.* at 6-7. The court dismissed this argument by stating, "First, it does not automatically follow that because ACB is represented by counsel in other, unrelated litigation that it would be represented by the same counsel in newly initiated litigation." *Id. at 7.* Where, as here, the defendants' attorneys specifically stated that they represent the defendants, there can be no doubt concerning representation.

D. The plaintiff served the correct defendants.

The defendants claim that the "Plaintiff should not be heard to complain about knowing who to serve on behalf of WBC." *Def's Br.* at 9. According to the defendants, the plaintiff ultimately served the appropriate defendants so it is difficult to understand this argument. Nevertheless, the plaintiff served Abigail Phelps – despite her numerous attempts to evade service. This red herring deserves no further comment.

E. The standard waiver form provides adequate notice.

Regardless of the standard form, the defendants were represented by legal counsel at all relevant times. And, if that is not enough, the defendants were specifically told that costs and fees would be sought if they failed and refused to waive service. The plaintiff will "request that

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motivation. If the Court follows the defendants' logic, counsel will be in the unfortunate position of choosing to fulfill ethical obligations versus attempting to save the cost of serving a defendant, which would ultimately result in following ethical obligations and unfortunately defeating the sound policy behind waiving service.

[3] This unreported opinion is attached as Ex. A for the Court's convenience.

your clients pay the costs and *attorney fees* associated with the same." Motion Ex. A. (Emphasis added.)

In *Lewis* (a case heavily relied upon by the defendants), the same nonsensical argument was advanced.

> "ACB's first challenge to the present Motion is that the forms he sent to its president were deficient. The Court is not persuaded by this argument. . . . The forms which Lewis sent to ACB's president are identical to those contained in the Appendix of Forms which were promulgated as a part of the overhaul of Rule 4. The forms contained in the Appendix of Forms are sufficient under the Rules and are intended to indicate the simplicity and brevity of statement which the Rules contemplate." *Lewis* at 6.

It is hard to fathom that any defendant would receive more notice than these defendants concerning the consequences of refusing and failing to waive service – besides, ignorance of the law is no excuse.

F. The standard waiver forms included a self-addressed stamped envelope.

Not that this argument has any merit - even if it were true - the waiver forms included a self-addressed stamped envelope.[4]

G. The motion for alternative service was caused by the defendants' evasion of service.

As the defendants concede, Fed. R. Civ. P. 4(d)(G) specifically provides for reasonable attorney's fees for "*any motion* required to collect the cost of service" for failure to waive service. (Emphasis added.) It follows that the defendants must actually be served before a motion for costs and fees may be filed based upon the defendants' failure to waive service. After all, the sound policy behind the waiver of service is:

> "According to the Rule's legislative history, "[t]he purpose of this provision is to encourage the prompt return of the form so that the action can move forward without unnecessary delay," and "[f]airness requires that a person who causes

[4] If this issue is of any consequence to the Court, the plaintiff would certainly supplement the record concerning this trivial matter. A self-addressed prepaid envelope was included with the standard waiver forms.

> another additional and unnecessary expense in effecting service ought to reimburse the party who was forced to bear the additional expense." *Premier Bank, Nat. Ass'n v. Ward*, 129 F.R.D. 500, 502 (M.D. La. 1990), quoting H.R. 7154, 97th Cong., 2d Sess., Section 2 at 8." *Double "S" Truck Line, Inc. v. Frozen Food Express d/b/a FFE*, 171 F.R.D. 251, 253 (D.Minn. 1997).

If this Honorable Court does not award fees for the motion for alternative service, the defendants will be rewarded for their evasion of service, defeating the sound policy behind waiver of service. Indeed, the defendants (and other defendants) will be rewarded if fees are not assessed and the defendants will be encouraged to engage in future tactics. Importantly, defendant Phelps was an attorney and has been represented by attorneys throughout this proceeding. In other words, the defendants knew the consequences of not waiving service, and armed with that knowledge, the defendants knowingly and actively dodged the process server.

H. The plaintiff's fee request is reasonable.

Based upon the assumption that all of their arguments fail, and as their final fallback position, the defendants claim the fee request is unreasonable. Notably, the defendants do not challenge the hourly rate, and presumably concede that it is reasonable.[5]

The plaintiff drafted a thorough motion and memorandum of law. Quite obviously, there is research associated with the drafting of those documents. Indeed, the defendants were unable to dispute or distinguish one – not even one – case cited by the plaintiff. The memorandum of law was required by Local Rule 105.1.

The motion, and accompanying memorandum, required some research because this is not your "everyday" type of issue. More specifically, defendants do not usually evade service on twenty-seven times, ultimately requiring the plaintiff to seek the Court's assistance in service –

[5] Although not previously stated, the undersigned's hourly rate is less than any other plaintiff's attorney of record. In other words, the plaintiff's counsel has minimized fees as much as possible.

especially when they are represented by counsel. Stated differently, the defendants are responsible for causing the fees associated with service – all of the fees.

As evidenced by the plaintiff's brief and defendants' brief, the case law researched by both parties was from multiple jurisdictions, which added some additional time to the research requirements.

The only evidence before this Honorable Court concerning "reasonableness" is the plaintiff's affidavit attached as Motion Ex. D.[6] What may have been helpful – assuming it were true – is if the defendants attached their own affidavit (or at least argued some amount of time was reasonable), which stated that a "reasonable" amount of time was something different than what the plaintiff offered as evidence. Having offered no evidence of their own, this Honorable Court's only competent evidence is that offered by the plaintiff.

IV. CONCLUSION

For the foregoing reasons, the plaintiff respectfully requests that this Honorable Court grant the plaintiff's motion for costs and fees for the defendants' refusal and failure to waive service. The defendants have not demonstrated "good cause" that would excuse their conduct.

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[6] If the Court would like, the plaintiff's counsel tracks time by tenths of an hour and can provide time records. Of course, the records would have unrelated redactions so the attorney-client privilege is not violated. That is precisely the reason that detailed records are routinely *not* submitted for attorney fee requests.