UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND
Baltimore Division

ALBERT SNYDER,	:	
	:	
Plaintiff	:	Civ. No. 1:06-cv-01389-RDB
	:	
FRED PHELPS, et al,	:	
	:	
Defendant.	:	

DEFENDANTS FRED PHELPS AND WESTBROOK BAPTIST'S OPPOSITION TO PLAINTIFF'S MOTION FOR EXTENSION OF TIME

Defendants Fred W. Phelps, Sr. ("Phelps") and Westboro Baptist Church, Inc. ("Westboro") (collectively, "Defendants"), through undersigned counsel, respectfully oppose Plaintiff's Motion for extension of time, for the following grounds:

RELEVANT PROCEDURAL BACKGROUND

On November 28, 2006, all counsel to this civil action participated in a telephone scheduling conference with the Court. This was the only time to date that opposing counsel have ever spoken.

Only two rounds of communications between opposing counsel followed the November 28 scheduling conference. *First*, Plaintiff's counsel Sean Summers sent undersigned counsel an e-mail (attached hereto as Exhibit 1 with undersigned counsel's response preceding it and interspersed within it in capital letters). Nowhere in said e-mail did Mr. Summers mention any

reason for not having served discovery requests yet, nor any expectation to seek to alter any Scheduling Order deadlines.

Second, on December 21, 2006, Mr. Summers sent undersigned counsel an e-mail (attached hereto as Exhibit 1, preceded by undersigned counsel's response).[1] Once again, Mr. Summers did not state any reason for not having served discovery requests yet; the first time he gave any reason was in Plaintiff's pending Motion for an extension, which was filed the next day.

ARGUMENT

The Scheduling Order for this civil action confirms that the Order will not be changed except for good cause. Because Plaintiff's Motion seeks to change the Scheduling Order's January 5, 2007, deadline for moving to amend the pleadings, the proper analysis of Plaintiff's Motion is to review both Fed. R. Civ. P. 15(a) (amendment of pleadings) and 16(b) (good cause requirement for changing scheduling order deadlines). *Stewart v. Coyne Textile Servs.*, 212 F.R.D. 494, 495 (SD WV 2003).

As of early 2003, at least: "Although neither the United States Supreme Court nor the Fourth Circuit Court of Appeals has addressed this situation in a publicized opinion, several other courts, including courts of this district, have developed a two-

[1] In said e-mail, undersigned counsel confirms that his only clients concerning this litigation are Fred Phelps and WBC. Undersigned counsel has been hired only for this litigation, and is not a WBC-affiliated lawyer.

step analysis that utilizes the standards from both Rules 15(a) and 16(b)" for reviewing motions to amend the pleadings beyond the scheduling order's deadline for making such a motion. *Stewart v. Coyne Textile Servs.*, 212 F.R.D. at 495. *Stewart* proceeds to list about eight federal cases that support the foregoing proposition. *Id.* at 496 n.1.

Concerning the first step of the foregoing two-step analysis, the terms of the scheduling order "must be firmly and fairly enforced by the district judge if it is to serve the purpose of pretrial management designed 'to secure the just, speedy, and inexpensive determination of every action.' Fed. R. Civ. P. 1." *Barwick v. Celotex Corp.,* 736 F.2d 946, 955 (4th Cir. 1984). Here, one is left to look in vain for good cause for Plaintiff's motion to extend by a full thirty days the deadline to move to amend the pleadings, let alone Plaintiff's seeking a blanket windfall order permitting an amendment of the pleadings both as to parties whom Plaintiffs have not yet named and as to issues that Plaintiffs have not described whatsoever.

All counsel to this civil action were present during the November 28, 2006, conference call with the Court, during which call undersigned counsel recalls the Court's setting a January 5, 2007, deadline to move to amend the pleadings, to which nobody stated a problem. Although Plaintiff's subsequent Motion

speaks of Mr. Summers's being out of town between said conference call through December 2, Plaintiff's Motion is silent about why an additional twenty days passed for Plaintiff to serve discovery requests (which requests undersigned counsel still awaits in the mail, as they were not faxed or e-mailed) and why the remaining three Plaintiff's attorneys were not asked to draft and serve discovery requests in time to have Defendants' discovery answers sent in time to meet the January 5, 2007, deadline for filing a motion for leave to amend the pleadings.[2]

While it is the neighboring Eastern District of Virginia that is known as the "'rocket docket'" -- *Samsung Elecs. Co. v. Rambus Inc.*, 386 F. Supp. 2d 708, 724 (E.D. Va. 2005) –- in all courts, scheduling orders help provide administrative efficiency for the Court, better anticipation for the parties about scheduling their calendars and expectations, and greater certainty to the public. Where, as here, Plaintiff was the sole cause of the circumstances leading to the filing of its Motion, and has made no better explanation for delaying twenty-four days

[2] It is regrettable that Plaintiff has chosen to take unnecessary jabs at Defendants in the course of a motion to forgive Plaintiff's counsel's sole weeks-long delay in serving discovery requests. It is also regrettable that Plaintiff's Motion does not seem to separate undersigned counsel from some of those jabs. Undersigned counsel takes seriously his obligations zealously to represent his clients within the bounds of law and governing rules, and has had many years to familiarize himself with proper practice and procedure before this Court, to which he has been admitted to practice since 1990 and before which he has appeared for several other civil actions.

after the telephone scheduling conference to send initial discovery requests to Defendants, Defendants oppose Plaintiff's Motion. *Sosa v. Airprint Sys.,* 133 F.3d 1417, 1419 (11th Cir. 1998) ("[i]n light of Sosa's lack of diligence in protecting her rights, Sosa's attempt to add a defendant outside the time frame prescribed by the scheduling order was not supported by good cause").

Assuming, *arguendo*, that the Court determines that Plaintiff has cleared the hurdle of Rule 16(b), the remainder of the analysis is whether Plaintiff has cleared the hurdle of Rule 15(a). *Stewart v. Coyne Textile Servs*., 212 F.R.D. 494, 495. In arguing about Rule 15(a), Plaintiff cites to *Johnson v. Oroweat Foods Co.,* 785 F.2d 503 (4th Cir. 1986), which deals not with a motion to add a party to a complaint, but to add a new count.

In any event, *Johnson* said that: "The Fourth Circuit has held, as have a number of other circuits, that delay alone is not sufficient reason to deny leave to amend. The delay must be accompanied by prejudice, bad faith, or futility." *Id.* At 510-11. Plaintiff's twenty-four day delay in serving discovery requests amounts to bad faith. Moreover, Defendants are prejudiced by the fact that Plaintiff's Motion does not even name the parties he wishes to add to the Complaint, nor the issues that Plaintiff may wish to add. Due process and fairness

are not served by giving Plaintiff a blanket order to add unnamed defendants and unspecified issues to the Complaint.

WHEREFORE, Defendants oppose Plaintiff's Motion for extension of time, and oppose Plaintiff's proposal for an order giving blanket leave to amend the Complaint without naming the parties he wishes to add to the Complaint, nor the issues that Plaintiff may wish to add.

Respectfully submitted

MARKS & KATZ, L.L.C.

_/s/ Jonathan L. Katz_____
Jonathan L. Katz
D.Md. Bar No. 07007
1400 Spring St., Suite 410
Silver Spring, MD 20910
Ph: (301) 495-4300
Fax: (301) 495-8815
jon@markskatz.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Motion for Stay Pending Appeal was served by the CM/ECF filing system on December 21, 2006, to:

Paul W. Minnich, Esquire
Rees Griffiths, Esquire
Craig T. Trebilcock, Esquire
Sean E. Summers, Esquire

___/s/ Jonathan L. Katz_____
Jonathan L. Katz