Ex. A

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-RWZ

DEFENDANTS' OBJECTIONS TO MAGISTRATE JUDGE'S ORDERS

Defendants hereby object to the January 29, 2010, electronic order denying Defendants' December 9, 2009, motion (Doc. 204) to forward copies of bank statements subpoenaed from and produced by MidCountry Bank ("MidCountry") ("MidCountry records")[1] to the court of appeals as part of the record on appeal in Defendants' pending appeals. Defendants also hereby object to the January 29, 2010, electronic order denying Defendants' December 18, 2009, motion (Doc. 210) to (a) compel Plaintiffs' counsel to return the MidCountry records to the Court, and to (b) stay during Defendants' pending appeals the yet-unexecuted October 30, 2008, order requiring that the MidCountry records be returned to MidCountry.

Since Defendants' motions were not pretrial *and* non-dispositive, and thus were not referred to the magistrate judge pursuant to Fed.R.Civ.P. 72(a), Defendants hereby request a *de novo* review by this Court of Defendants' motions and their dispositions.

However, the December 18, 2009, electronic order referring Defendants' motions to the

[1] Defendants paid $3,534.59 for these records, a considerable sum given their resources.

magistrate judge requested *rulings*, not a *report* and *recommendation*, as if Defendants' motions were pretrial matters. But the parties' consent was not obtained, and the electronic order did not state that the reference was made under Rule 53 as required by Rule 53(h).[2] This uncertainty as to the magistrate judge's authority raises questions as to the appropriate standard of review.

Defendants hereby incorporate the facts and arguments of their previous submissions (Doc. 205; Doc. 211; Doc. 213; Doc. 223), and emphasize the following points:

A. Brevity of the January 29, 2010, Orders Raises Question of Recusal

Defendants filed complaints of judicial misconduct and misconduct by court staff pertaining to, *inter alia*, the mishandling of the MidCountry records. (Affidavit of Robert Pickle ("Pickle Aff.") ¶¶ 1–4). On January 15, 2010, the district judge assigned to the instant case recused himself, stating that his "impartiality might reasonably be questioned by an objective observer," and publicly disclosing that Defendants had filed a complaint. (Doc. 226).

The magistrate judge's January 29, 2010, orders were extremely brief, without comment, explanation, findings of fact, or conclusions of law.[3] These orders were issued just two weeks after the district judge's recusal, and thus during misconduct investigations that of necessity involve questioning the magistrate judge and his staff.

Defendants have seen no clear, trustworthy evidence[4] implicating the magistrate judge in the mishandling of the MidCountry records, but do not know what the outcome of the misconduct investigations will be. Yet the extreme brevity of the January 29 orders, which disposed of such serious matters (*infra* 3–5), leads one to suspect that, rather than ruling on the

[2] The referral might have been made under Fed.R.Civ.P. 53(a)(1)(C) and 28 U.S.C. § 636(b)(2): the former permits a special master to consider posttrial matters, and the latter permits a magistrate judge to fill that role. But Rule 53(h) precludes that possibility in this instance.

[3] The magistrate judge rapidly and simultaneously was removed from the case, with no apparent order by a district judge so requiring.

[4] Mere assertions by Plaintiffs' counsel do not qualify. (Doc. 213 p. 5). While the magistrate judge's courtroom clerk entered the December 16, 2008, receipt on December 23, who actually gave the MidCountry records to Plaintiffs' counsel's employee is not apparent.

motions, the magistrate judge should have also recused himself pursuant to 28 U.S.C. § 455(a).

B. Authority for Referral Might Not Permit Issuance of Rulings

It was contrary to law for the magistrate judge to issue the January 29, 2010, orders if he was without authority to issue rulings (rather than a report and recommendation) without the clear and unambiguous consent of the parties.

C. Plaintiffs' Counsel Cannot Retain What They Unlawfully Obtained

Plaintiffs' counsel unlawfully obtained the 11 to 12 pounds of sealed MidCountry records in violation of the Court's order that those records be returned to MidCountry. (Doc. 141 p. 13; Doc. 211). The Court cannot sanction that act after the fact by altering that order (or the confidentiality order) during Defendants' pending appeals. (Doc. 213 pp. 6–8; Doc. 223 p. 7). Plaintiffs thus far fail to cite any legal authority to justify Plaintiffs' counsel's retention of the unlawfully obtained MidCountry records. Therefore, the denial of Defendants' motion to compel Plaintiffs' counsel to return the MidCountry records to the Court was contrary to law.

D. A Stay Must Be Issued to Prevent Irreparable Harm

The October 30, 2008, order to return the MidCountry records to MidCountry has never been executed, and should be stayed if it is not already stayed or otherwise ineffective. (Doc. 211 pp. 9–10; Doc. 213 pp. 4–5). Irreparable harm would thus be prevented.

If Defendants need these records to defeat an anti-SLAPP motion in future litigation for abuse of process and malicious prosecution, Defendants could not easily reacquire the MidCountry records at that time because such a motion halts discovery.

Plaintiffs asserted that if the MidCountry records are returned to MidCountry, those records would be destroyed. (Doc. 216 p. 16). Evidence would thus forever be lost, for any alterations made to these records by Plaintiffs' counsel, and any markings placed on these records by the Court or its staff, could never be reproduced by MidCountry.

E. The MidCountry Records Must Be Forwarded As Part of the Record on Appeal

On December 4, 2009, the court of appeals ruled that documents produced by Remnant Publications, Inc. were properly part of the record on appeal even though they were never allowed to be filed in the district court. (Doc. 212-2). Defendants therefore concluded that the MidCountry records were also properly part of the record on appeal, and then filed their motions concerning these records. (Doc. 211 p. 8).

Defendants hereby incorporate all the arguments Defendants have advanced thus far concerning why the MidCountry records are part of the record on appeal (Doc. 205 pp. 5–12; Doc. 211 pp. 7–9; Doc. 213 pp. 8–10; Doc. 223 pp. 8–9), and highlight here the following:

On November 11, 2008, Plaintiffs' counsel threateningly asserted that the MidCountry records could not be returned without Defendants' consent. (Doc. 162-6). This could not have been true if the October 30, 2008, order was a valid order, and if the MidCountry records were not part of the record on appeal.

The record on appeal for Defendants' first appeal was declared complete on December 9, 2008, and Defendants served their designation of appendix and issues for review on December 23. (Doc. 206-8; Doc. 214-5). Plaintiffs' counsel's employee unlawfully obtained the MidCountry records on December 16, and the ambiguous receipt and accompanying ambiguous docket text were not entered until December 23, 2008. (Doc. 212-3; Doc. 160 and accompanying docket text). It is as if Plaintiffs' counsel and court staff believed the MidCountry records to be part of the record on appeal, and didn't want Defendants *pro se* to catch on until it was too late.

In Defendants' second appeal, Defendants shall seek review by the court of appeals of the district court's mishandling of the MidCountry records. This makes these records, if for no other reason, part of the record on appeal. Defendants have, in their submissions here, referred to various facets of this mishandling, including the Court's withholding of evidence from

Defendants. (Doc. 211 pp. 5–**8**, 10–11; Doc. 213 pp. 4, **10**–12; Doc. 223 pp. 2, 9–11).

F. The *De Facto* Expropriation of Defendants' Property Was Unconstitutional

Defendants paid $3,534.59 for the MidCountry records, as ordered by a court. (Doc. 63-36 p. 2; Doc. 149 p. 19). Though these records were ordered to be returned to MidCountry, the Court instead surrendered them to Plaintiffs' counsel, without requiring Plaintiffs to reimburse Defendants. (Doc. 141 p. 13; Doc. 160; Doc. 212-3; Doc. 166). This profound expropriation of Defendants' property without due process would be partly cured if Defendants' motion was granted by ordering Plaintiffs' counsel to return the unlawfully obtained MidCountry records to the Court's custody. Defendants presently await the final resolution of their motions before deciding whether to file a claim in the U.S. Court of Federal Claims. (Pickle Aff. ¶ 5).

WHEREFORE, Defendants pray the Court (1) to sustain Defendants' objections to the magistrate judge's January 29, 2010, orders, (2) to review *de novo* Defendants' motions and their dispositions, and (3) to GRANT Defendants' motions by (a) compelling Plaintiffs' counsel to return the MidCountry records to this Court, properly certified pursuant to the Federal Rules of Evidence, (b) forwarding a copy of those records to the First Circuit Court of Appeals, and (c) staying the October 30, 2008, order requiring the return of those records to MidCountry, if such a stay is required to prevent that return during Defendants' pending appeals.

Respectfully submitted,

Dated: February 3, 2010

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AFFIDAVIT OF SERVICE

Under penalty of perjury, I, Bob Pickle, hereby certify that this document, with accompanying affidavit, filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF).

Dated: February 3, 2010

/s/ Bob Pickle
Bob Pickle