No. 08-2457

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

THREE ANGELS BROADCASTING NETWORK, INC.,
an Illinois Non-Profit Corporation;
DANNY LEE SHELTON,

Plaintiffs-Appellees,

v.

GAILON ARTHUR JOY; ROBERT PICKLE,

Defendants-Appellants.

On Appeal from the United States District Court
for the District of Massachusetts
Case No. 07-40098

BRIEF OF DEFENDANTS-APPELLANTS, GAILON ARTHUR JOY AND ROBERT PICKLE

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JURISDICTIONAL STATEMENT

Three Angels Broadcasting Network, Inc. ("3ABN") and Danny Lee Shelton ("Shelton") (collectively "Plaintiffs") of Illinois assert that the district court has (a) original subject matter jurisdiction pursuant to 15 U.S.C. §1121 and 28 U.S.C. §1338 due to Plaintiffs' allegations of trademark and copyright infringement, and (b) subject matter jurisdiction pursuant to 28 U.S.C. §1332 due to the controversy being between citizens of different states with an amount in question exceeding $75,000. (Joint Appendix ("JA") 26).

The order(s) being appealed granted in its several parts a motion for voluntary dismissal without prejudice. The First Circuit reviews orders granting voluntary dismissal. *Doe v. Urohealth Systems, Inc.* 216 F.3d 157 (1st Cir. 2000). Most circuits hold that voluntary dismissals are appealable final orders. *John's Insulation, Inc. v. L. Addison & Assocs. Inc.*, 156 F.3d 101, 107 (1st Cir. 1998).

The order(s) in question of October 30 were entered on October 31 and/or November 3, 2008. Gailon Arthur Joy ("Joy") and Robert Pickle ("Pickle") (collectively "Defendants") timely filed a notice of appeal on November 13, 2008.

STATEMENT OF THE ISSUES

Whether the district court failed to exercise its discretion, abused its discretion, violated Defendants' due process rights, and/or failed to safeguard Defendants' rights of freedom of speech and press by granting in its several parts Plaintiffs' motion for voluntary dismissal.

STATEMENT OF THE CASE

On April 6, 2007, Plaintiffs filed suit in the District of Massachusetts ("*3ABN v. Joy*") accusing Joy and Pickle of copyright infringement, trademark infringement, trademark dilution, defamation, defamation *per se*, and intentional interference with prospective economic business advantage. (JA 25, 32, 43).

Throughout the proceedings, Plaintiffs endeavored through impoundment and protective orders to prevent Defendants' and the public's access to documents pertaining to questions Plaintiffs put at issue in the case. (JA 1–3, 7–10, 12–15, 17–19). Plaintiffs endeavored to prevent Defendants from obtaining substantive discovery documents by refusing to produce their Rule 26(a)(1) materials, refusing to produce documents responsive to Pickle's requests to produce, blocking discovery through related litigation in Michigan, Minnesota, and Illinois,[1] attempting to limit the scope of discovery, and filing the motion for voluntary dismissal. (*infra* 18–22, 45, 49–50). Plaintiffs abusively designated documents as confidential. (*infra* 24–26).

Defendants vigorously prepared their defense as evidenced by lengthy docket sheets from and voluminous documentation filed in all four districts, and Defendants were successfully overcoming Plaintiffs' obstruction of discovery. (*infra* 18, 23–24). After Remnant Publications, Inc. ("Remnant") produced documents on September 22, 2008, Defendants had *prima facie* evidence against

[1] W.D.Mi. 1:08-mc-00003; D.Mn. 0:08-mc-00007; S.D.Ill. 4:08-mc-00016.

Plaintiffs' counsel of abuse of process and malicious prosecution. (JA 326; *infra* 24). To avoid counterclaims, remove from Defendants the evidence of Plaintiffs' abuse of process, and alter on the sly the terms of the April 17, 2008, confidentiality order entered in the case ("Confidentiality Order"), Plaintiffs and their counsel filed their motion to dismiss. (JA 299; *infra* 24, 29, 52–53, 58). The sole condition imposed on Plaintiffs was that they could only refile their claims in the Central Division of the District of Massachusetts. (Defendants' Addendum ("DA") 1–2, 13–14).

Just before filing their notice of appeal, Defendants filed a motion to impose costs, expenses, and fees as invited by the district court. (Record on Appeal Doc. ("RA") 130; DA 16–18). Subsequently, Plaintiffs objected to paying even 1¢ of Defendants' costs, expenses, and fees, including $3,534.59[2] Defendants paid for MidCountry Bank ("MidCountry") records Plaintiffs by their motion to dismiss sought to be given to themselves. (*3ABN v. Joy* Doc. 139; JA 21, 355, 299).

Also subsequent to filing the notice of appeal, correspondence from Plaintiffs' counsel was filed demonstrating that Plaintiffs intend to litigate over any information Defendants publish that can be traced to a "confidential" document, even though Defendants got that information or document collaterally from other sources. (*3ABN v. Joy* Doc. 152-8, 152-9; Exhibits for Appendix ("EX") 245).

[2] After $147.91 refund.

STATEMENT OF FACTS[3]

Creating the Controversy

Many and varied allegations have been leveled for years against Shelton, founder of 3ABN. Not until after Shelton's 2004 divorce from and 3ABN's firing of Linda Shelton did the general public begin to become aware of these allegations.

Dr. Arild Abrahamsen

In early 2004, Nathan Moore, son of Linda Shelton, sought treatment for drug addiction from Dr. Arild Abrahamsen ("Abrahamsen") in Norway. (EX 623). From February 2 to 6, 2004, Linda Shelton and Brenda Walsh ("Walsh") visited Nathan Moore in Norway. (EX 623, 655–656).

Shelton started accusing Linda Shelton of infidelity around March 8, 2004. (EX 624). Shelton claimed that Linda Shelton talked negative about him to Abrahamsen, and that Abrahamsen had determined him to be "physcotic" and "out to lunch"; Shelton stated that he could monitor every telephone call Abrahamsen made or received. (EX 625).

Shelton accused Linda Shelton of spiritual adultery, defined by an article Shelton cited as telling someone something you should tell your husband first, believed by Shelton to be we than physical adultery. (EX 434, 459, 666–667, 722–

[3] Exhibits filed under seal in *3ABN v. Joy* to keep Shelton's tax returns off PACER (not to keep the information confidential), or because of Plaintiffs' confidentiality designation, are bound separately and marked "Sealed," and are referred to in the same manner as in the district court.

723, 726; DA 43). Shelton later tried to claim that he never accused Linda Shelton of spiritual adultery. (EX 669–670, 716).

Hiding Shelton's Guns the Final Straw

Linda Shelton's sister and brother-in-law, Cher and Dick Bethune, counseled Linda Shelton to hide Shelton's guns. She hid one, and consequently, from April 27 to 29, 2004, Shelton announced that their marriage was over, indicated that 3ABN would fire Linda Shelton, and offered to buy her half of their house. (EX 720–730).

On June 25, 2004, Shelton filed for and obtained a quickie divorce in Guam. (EX 575–576). 3ABN Board chairman Walter Thompson, M.D. ("Thompson") falsely claimed that Shelton did not initiate the divorce. (EX 697).

Significant negative criticism of Plaintiffs in internet forums began about the time of the divorce and lasted for months, peaking again in November 2005 and resuming in February 2006. (EX 125; JA 153).

Evidence of Adultery Against Linda Shelton

Shelton recorded a conversation of Linda Shelton using a voice-activated tape recorder. (EX 503–505, 516, 696; JA 237). It is a felony in Illinois to record a conversation without permission, and to disclose the contents of such recordings as 3ABN staff have done. 720 ILCS 5/14. (DA 41, 74–75).

Shelton claimed to have AT&T phone card phone records (AT&T doesn't provide such records without a court order), alleged by Shelton's pastor, John Lomacang, to document hundreds of hours of phone calls between Linda Shelton

and Abrahamsen. (JA 136–137; EX 459, 722, 434, 93–100).

On April 21, 2004, Shelton invited Abrahamsen to come to the United States to meet with the 3ABN Board. (EX 625). Abrahamsen and Johann Thorvaldsson ("Thorvaldsson") arrived around Wednesday, May 26. (EX 502). Shelton had private investigators in three cars follow Abrahamsen, Thorvaldsson, and Linda Shelton, obtaining video of Linda Shelton and Abrahamsen, without Thorvaldsson. (*Id.*). 3ABN Board member Ken Denslow said he had seen such video. (JA 237).

Linda Shelton wrote Abrahamsen on May 6, 2004, warning him that she was going to plant a pregnancy test as a joke the next day, since Shelton was searching her car. (EX 648). Shelton found the pregnancy test on May 7, and he, Thompson, Tommy Shelton, and Walsh claimed it to be evidence of physical adultery, even though Linda Shelton had not seen Abrahamsen since February 6. (EX 644, 507, 510, 696, 515, 649–659; JA 267).

Shelton later claimed that Linda Shelton vacationed with Abrahamsen while she was still married to Shelton, and that this is what led to their divorce. (EX 641, 696, 706, 716).

August 13–15, 2006: Defendants Launch Investigations

On July 7, 2006, Alyssa Moore accused Shelton in writing of sexual assault. (EX 126). On August 10, 2006, Shelton orchestrated a broadcast in which his followers likened him to Moses and John the Baptist, declared it wrong to disagree with him, placed him beyond reach of human correction, and, through innuendo,

publicly accused Alyssa Moore of lying, despite saying they wouldn't defend themselves. This outrageousness prompted Pickle to launch his investigation of Plaintiffs on August 13, 2006. (EX 482–484, 566).

On May 14, 2003, Glenn Dryden ("Dryden") wrote Thompson to tell him that Shelton's brother Tommy Shelton had molested six boys; 3ABN attorney Michael Riva replied, threatening suit if Dryden didn't shut up, since the statute of limitations had run out. (RA 81-2 pp. 1–3, 9–10). This correspondence, discovered on August 14, 2006, led to Joy launching his investigation the next day. (EX 566).

That Shelton would replace alleged spiritual adulteress Linda Shelton with alleged pedophile Tommy Shelton, and intentionally have Tommy Shelton work with children, was irreconcilable with the idea that Shelton was a morally upright, spiritual leader. (EX 492–494, 128).

Tommy Shelton Issue Explodes

On November 24 and 27, 2006, Thompson admitted that he never contacted Tommy Shelton's alleged victims or their families as Dryden invited him to do in 2003, but instead relied upon Shelton's assertion that the allegations were all 30 years old. (RA 81-2 pp. 50, 60–61). However, since the attachment to Dryden's 2003 letter asked Tommy Shelton to apologize for deceit and inappropriate behavior to the Community Church of God where Tommy Shelton pastored from 1995 to 2000, the allegations were as recent as three years old in 2003, and Shelton must have lied. (RA 81-2 pp. 3, 8, 75).

About December 5–6, 2006, Joy and Pickle published reports on Shelton's cover up of these pedophilia allegations. (EX 127–130; RA 81-2 pp. 1–17, 36–91). This revelation sickened 3ABN supporters. (JA 235; EX 480).

Simultaneously, new allegations against Tommy Shelton surfaced in Virginia; Shelton threatened legal action, and retaliated with a special, televised tribute to Tommy Shelton on December 31, 2006. (EX 131, 490–499). Joy then launched Save3ABN.com to expose Shelton's gross misconduct and departure from Seventh-day Adventist principles. (EX 61–62). Save3ABN.com initially concentrated on the pedophilia allegations against Tommy Shelton, and people involved provided statements and documents. (EX 455–456, 488–489, 774–786).

Plaintiffs' counsel Gerald Duffy ("Duffy") sent a cease and desist letter on January 30, 2007, alleging copyright infringement, trademark infringement, and defamation *per se*. (EX 134–136). Duffy's five examples of defamation related to the pedophilia allegations, including attorneys allegedly using "intimidation tactics" to silence concerned individuals. (EX 135). To prevent the public from reading his unprincipled letter, Duffy claimed non-existent common law copyright protection for it. *Wheaton v. Peters*, 33 U.S. 591 (1834); 17 U.S.C. §301. (EX 134; DA 46–47).

Duffy's letter was *prima facie* evidence of such intimidation tactics. It was therefore published, along with citations to *Taubman Company v. Webfeats*, 319 F.3d 770 (6th Cir. 2003) and *Bosley Medical v. Kremer*, 403 F.3d 672 (9th Cir.

2005), cases demonstrating that the Lanham Act doesn't bar Defendants' use of the domain name Save3ABN.com. (EX 20–30).

When Plaintiffs commenced litigation, Plaintiffs showed bad faith by filing Defendants' articles with key pages missing, hiding the fallacious nature of Plaintiffs' claims. Gone from Defendants' article on Duffy's letter were Defendants' commentary, and references to *Taubman*, *Bosley Medical*, and the pedophilia allegations. (EX 1–2, 20–30). Portions of Shelton's July 2006 financial affidavit were missing where Shelton failed to report publishing assets and hundreds of thousands of dollars in royalty/kickback income. (EX 3–4, 31–50, *infra* 14–15). Gone from another article were references to the missing asset, DLS Publishing, Inc. ("DLS").[4] (EX 5–7, 403–406).

Plaintiffs' Fallacious Claims

Copyright Infringement

Plaintiffs asserted that their broadcasted tribute to alleged pedophile Tommy Shelton, which Defendants posted on the internet, was copyrighted. (JA 32; EX 455). Yet Plaintiffs argued in court and widely advertised that no programming produced by Plaintiffs is copyrighted; thus Plaintiffs fraudulently registered that broadcast with the U.S. Copyright Office in preparation for this litigation. (EX 760–773).

Defamation Claims

[4] Shelton is the sole owner, director, and shareholder of DLS. (EX 259).

Plaintiffs knew before filing suit that the defamation claims of ¶¶ 46–50 of their complaint were false. From the record:

¶ 46(a). Growing number of serious allegations in recent years: This extremely broad allegation, a quotation from Save-3ABN.com's home page, is amply supported by thousands of pages of webpage printouts found among Plaintiffs' Rule 26(a)(1) materials. (EX 51–52; RA 63-2 through 63-13; JA 226–231).

¶ 46(g). Board members have personally enriched themselves ... : Shelton is a party in *3ABN v. Joy* as an individual, not as president, making his expenses therein personal.(JA 25, 121–122; DA 35). 3ABN is paying Shelton's expenses. (EX 436–437). This isn't the first time 3ABN has done this. (EX 374; Sealed Exhibits ("SE") 31–33).

3ABN purchased Shelton's booklets, published by Pacific Press Publishing Association ("PPPA"), from Shelton and Remnant; 3ABN could have purchased them directly from PPPA for 10% to 32% less, and neither Shelton nor Remnant stocked those booklets. (EX 563–565, 570–574, 583–587, 215; SE 3–4, 12–13, 23–24). Therefore, Shelton must have received kickbacks from Remnant on purchases by 3ABN of Shelton's booklets from Remnant. (RA 96-9 p. 3).

3ABN paid for Linda Shelton and Walsh's personal vacation travel. (EX 627–629; DA 43).

Shelton bought a house from 3ABN on September 25, 1998, for $6,139, and

sold it one week later for $135,000. (EX 116–118).

¶ 46(g). ... in violation of the Internal Revenue Code: 3ABN didn't report the 1998 house deal as compensation to Shelton, and Shelton, under penalty of perjury, falsely told the IRS that no section 4958 excess benefit transaction had taken place. (EX 844–860; DA 38, 50–55).

Shelton donated horse(s) to charity in 2003. Shelton did not file the required Form 8283 and appraisal(s), and reported the horses as cash donations on his Schedule A, probably inflating their value; Shelton tried to corruptly persuade Linda Shelton to do the same for the 2004 tax year. (EX 829–843, 368–369, 391–396, 401; SE 2, 11, 15–17, 22; DA 56–61).

¶ 46(j). Shelton's personal use of corporate plane: Shelton, individually, used 3ABN's jet to obtain marriage counseling, work with Duffy's law firm on *3ABN v. Joy*, and transport himself and his attorneys to the May 10, 2007, hearing in that case. (EX 374, 433–434).

¶ 48(b). Firing whistleblowers: In April 2006, four Trust Services Department employees reported to 3ABN management the incompetence and misconduct of Leonard Westphal ("Westphal"), including sexual harassment, racism, padded expense reports, falsified timesheet(s), rage, screaming at staff, non-staff, and potential clients, poor job performance, and private inurement. (EX 787–815). The four whistleblowers were fired, and Westphal was rewarded with a cover story in the June 2006 issue of *3ABN World*. (EX 807, 814–818). Allegations

against Westphal of rage, racism, sexual harassment, professional misconduct, and spousal battery go back at least to 1992. (JA 347; EX 819–822).

¶¶ 46(e), 48(c). Lack of board oversight: In 2003, Thompson failed to speak with Tommy Shelton's alleged victims or their families when invited to, taking Shelton's word for everything during his investigation, thus exposing 3ABN to extreme liability by his gross negligence. (*supra* 7).

¶ 48(d). Plaintiffs' refusal to allow ASI to investigate all issues: In September 2006, Mark Finley and other General Conference of Seventh-day Adventists employees believed that Adventist-laymen's Services and Industries ("ASI") would investigate everything, including the pedophilia allegations against Tommy Shelton. (JA 235; EX 476–479). In December 2006, ASI informed Defendants that the 3ABN Board had voted to limit the investigation to Shelton's "legal and moral right to remarry." (EX 461–464, 468–470).

¶ 50. Divorce and firing of Linda Shelton without grounds: Plaintiffs assert that Linda Shelton's adultery was such grounds. (JA 292; EX 689). However, Thompson claimed he never had evidence of adultery, and Shelton failed to produce even one supporting document in response to Pickle's requests to produce. (EX 693–695, 718–719, 155, 159–160; JA 350).

Walsh, a key witness against Linda Shelton, claimed Linda Shelton bought plane tickets against Walsh's wishes for a trip to Florida to rendezvous with Abrahamsen, and that Linda Shelton did go to Florida as planned. (EX 506, 625,

637; JA 266). But Walsh lied, for Walsh is the one who reserved the tickets for travel from April 4 to 9, 2004, requesting 3ABN to pay for them, and Shelton's email of April 7 indicates that Linda Shelton wasn't with Abrahamsen on April 6. (EX 627–629, 664; DA 43).

¶ 50(e). Shelton's preparing for divorce in 2003: For the 2001 tax year, both 3ABN and Shelton reported that D & L Publishing ("D&L") (short for Danny & Linda Publishing) was jointly owned by Shelton and Linda Shelton. (DA 39; SE 3–10). For the 2002 and 2003 tax years, Shelton reported D&L as if it were a sole proprietorship, and testified to that effect under oath in February 2008. (SE 12–14, 18, 23–26; EX 259). Shelton's conversion of D&L from a partnership to a sole proprietorship by the time he filed his 2002 tax return in 2003 demonstrates that he was making plans to divorce Linda Shelton by 2003.

¶ 50(f). Shelton's relationship with Brandy Elswick Murray ("Murray"), and Board members' concern: On September 12, 2005, Linda Shelton accused Shelton of having "sold out God's worldwide network for sex," specifically "OS" (oral sex); Shelton didn't deny the allegation. (EX 827–828). About the same time, 3ABN attorney and board member Nicholas Miller ("Miller") was forced to resign after refusing to cave to Shelton's threats. Beginning in January 2005, Miller became "deeply concerned" about Shelton's personal affairs, including Shelton's funneling 3ABN money to Murray through a third-party non-profit. (EX 254; JA 349; SE 34).

¶ 50(g). Title to Linda Shelton's Toyota Sequoia: On October 8, 2006, Shelton claimed that it was fine for him to enter Linda Shelton's 2003 Toyota Sequoia without permission, since he had proof that the car was titled in his name too. (EX 519, 395). But the title as faxed from the lending bank shows only Linda Shelton's name on it since being issued on February 11, 2003. (EX 316–318).

Table 1: from Remnant's Form 990's (DA 42): estimated payments to DLS: total royalty payments in pre-DLS years[5] subtracted from those of 2005 and 2006

Year	Royalties	– 2000	– 2001	– 2002	– 2003	– 2004
2000	$6,542					
2001	$17,652					
2002	$12,438					
2003	$16,226					
2004	$26,178					
2005	$116,556	$110,014	$98,904	$104,118	$100,330	$90,378
2006	$508,767	$502,225	$491,115	$496,329	$492,541	$482,589
Totals		**$612,239**	**$590,019**	**$600,447**	**$592,871**	**$572,967**

¶¶ 46(h), 50(i). Shelton's perjury, refusal to disclose royalties in divorce-related proceedings: Shelton's July 2006 affidavit filed in his division of marital property case failed to report any royalty or kickback income attributable to *Mending Broken People* ("*MBP*")[6], *Antichrist Agenda*, *Ten Commandments Twice Removed* ("*TCTR*"), and Shelton's PPPA booklets, and failed to report these books and DLS as assets. (EX 31–50, 397–406, 570–572, 578–579). These omissions

[5] In 2005, 3ABN started buying Shelton's PPPA booklets through Remnant rather than through D&L or DLS. (EX 574, 583–587, 372; DA 39–40).

[6] That royalties for pre-divorce *MBP* were funneled through post-divorce DLS is also problematic. (EX 575–582).

were particularly egregious since Shelton had made an estimated $482,589 to $502,225 during 2006 in royalties/kickbacks from Remnant, not counting royalty payments he received from PPPA. (*supra* Table 1; EX 603–612, 327–333).

Donations Declined in 2006

As of the end of 2006, 3ABN's only reported decline in annual donation levels occurred in 2003, attributed by a January 2004 *Adventist Today* article to public dissatisfaction with Shelton's use of a corporate jet. (EX 105–114; Table 2).

Table 2: Analysis of 3ABN's Form 990's (RA 49-2 pp. 1, 3–8, 10–11)

Year	Donations	Total Rev.	Total Exp.	Gain/(Loss)
1998	$7,557,624	$8,577,065	$6,759,968	$1,817,097
1999	$9,999,808	$11,817,931	$8,819,958	$2,997,973
2000	$10,891,966	$11,399,767	$10,231,520	$1,168,247
2001	$12,323,162	$13,450,381	$11,469,091	$1,981,290
2002	$14,057,326	$15,264,211	$12,275,863	$2,988,348
2003	$10,902,656	$11,481,779	$13,561,929	($2,080,150)
2004	$13,581,898	$13,975,137	$14,820,727	($845,590)
2005	$14,060,275	$14,956,597	$15,439,090	($482,493)
2006	$15,075,120	$16,602,282	$19,598,298	($2,996,016)

After the January 2004 property tax case decision, 3ABN started reporting sales of Shelton's books as items given away in exchange for donations, thus concealing Shelton's profiting and artificially increasing donation levels. (JA 150; EX 115, 340–351, 238–239; DA 40).

Plaintiffs engaged in a massive promotional drive for *TCTR* in the first half

of 2006, which boosted "donation" levels. After the drive ended, "donation" levels naturally fell. 3ABN's being dropped from SkyAngel in April 2006, Shelton's controversial remarriage in March 2006, and the actions and criticisms of people other than the Defendants would have their impact too. (RA 80 p. 4).

Still, 3ABN ended 2006 with a reported $1,014,845 increase in donations over 2005, but the $2,982,794 of Shelton's books 3ABN purchased put 3ABN in the red by $2,996,016. (DA 40; *supra* Table 2).

If donations declined in 2006 because of Defendants' reporting, it was due to the reporting of the pedophilia allegations against Tommy Shelton. (*supra* 7–8).

Plaintiffs showed bad faith in asserting that Defendants caused donations to decline in June or July 2006 when Defendants weren't involved until August 13–15, 2006, in failing to attribute the increase in "donations" in early 2006 to the *TCTR* campaign, and in insisting that allegations against Tommy Shelton are irrelevant.[7] (JA 95, 100–102; EX 566; DA 33–34).

Defendants' Discovery Efforts

After Plaintiffs sought to disqualify Pickle's counsel, Pickle's notice of appearance *pro se* was filed on November 10, 2007. (EX 66–67; DA 36; RA 31). Defendants' discovery efforts then commenced in earnest.

Beginning on November 14, 2007, Pickle sought to inspect and copy

[7] Plaintiffs' third-party subpoenas seeking information pertaining to Tommy Shelton belie Plaintiffs' argument. (EX 449, 452).

Plaintiffs' Rule 26(a)(1) materials, pointing out that Defendants had already produced to Plaintiffs more than 3.3 GB of material, including more than 4,500 emails. (EX 86–87). The emails were actually more than 5,500, with documents totaling perhaps 7,000. (JA 262, 269; cf. DA 35).

From November 28 to December 6, 2007, the District of Massachusetts issued subpoenas *duces tecum* for Defendants for Remnant, Gray Hunter Stenn LLP ("GHS"), Century Bank & Trust, and MidCountry. (EX 101–104). Later, subpoenas *duces tecum* were issued from the proper districts and served upon Remnant, GHS, and MidCountry, and upon Kathy Bottomley ("Bottomley") and Dryden. (RA 76-2 pp. 39–43; RA 76-3 pp. 5–7, 12–17).

Pickle used Plaintiffs' requests to produce, including instructions and definitions, as a model for his own requests to produce which were served upon Plaintiffs on November 29 and December 7, 2007. (JA 283; EX 141–160).

Defendants sought to differentiate true donations from sales revenue, and the identification of donors who had lessened or ceased giving as well as their reasons for doing so. (DA 37).

Defendants believed it vital to obtain the documents already requested before serving interrogatories, additional requests to produce, requests to admit, and notices of depositions. (JA 219–220, 334, 383–384; RA 70 p. 3; RA 101 p. 1).

Plaintiffs' Obstruction of Discovery

Plaintiffs' Game Plan

In stark contrast to Defendants' providing thousands of documents as part of their initial disclosures, Plaintiffs never intended to produce anything; Plaintiffs maintained that Defendants should not have reported anything they couldn't already prove in court. (JA 361). But imposing the Federal Rules of Evidence upon the press is an unconstitutional attack on freedom of the press.

Plaintiffs therefore continually blocked Defendants' attempts to acquire anything substantive, dragging out the discovery process in the hopes that discovery would close before Defendants obtained anything, and that the district court would tire of the squabbling.

Rule 26(a)(1) Materials

Though Plaintiffs made their initial disclosures on August 3, 2007, they refused to produce any Rule 26(a)(1) materials, claiming that a confidentiality order was needed first. (EX 90–91). Pickle therefore filed a motion to compel on December 14, which was granted in part on March 10, 2008. (RA 35; JA 9).

Plaintiffs' Motion for Confidentiality Order

In the status conference of December 14, 2007, Plaintiffs asked for a stay of discovery until their contemplated motion for a confidentiality order was filed and ruled upon. (JA 362). The district court said that there would be no stay, and that any proposed order must be narrowly tailored. (JA 370).

On December 18, 2007, Plaintiffs filed their motion, seeking to ban discovery of donor-identifying information, and reserving questions of relevancy

and scope. (RA 40 p. 2; RA 41 p. 3). The motion sought an order allowing Plaintiffs to designate as confidential even third-party materials Defendants had received prior to the filing of the suit, and requiring their surrender to Plaintiffs after the conclusion of the case. (JA 138–141).

3ABN corporation secretary Mollie Steenson gave perjured testimony in favor of Plaintiffs' motion when she testified that 3ABN does not allow access to its audited financial statements; 3ABN's audited financial statements are required by statute to be open to public inspection. (JA 145–146; *infra* 26).

Plaintiffs never scheduled a hearing on their motion, and used it to stall discovery pertaining to Pickle's document requests and the third-party subpoenas, in violation of the district court's order. (JA 196–197, 214–215, 370; RA 63-27 pp. 2, 5; EX 376).

Plaintiffs perpetrated fraud upon the court by arguing that Defendants' subpoena was an end run around waiting for Plaintiffs' motion to be heard, and around moving to compel Plaintiffs to respond to Pickle's requests to produce, when the subpoena was issued prior to Plaintiffs' filing their motion and serving their objections to Pickle's requests. (RA 63-27 p. 8; RA 63-28 p. 11; EX 104; RA 76-3 p. 12).

After the Confidentiality Order was issued on April 17, 2008, which declined to ban discovery of donor-identifying information, Plaintiffs announced on May 7, 2008, that they would now seek an order limiting the scope of discovery.

(DA 22–29; JA 213).

Pickle's Requests to Produce

Plaintiffs refused to produce a single document in response to Pickle's requests to produce, claiming that every requested document was either privileged, confidential, or irrelevant. (JA 199–200; EX 162–203). To illustrate, Shelton objected on the basis of relevancy and the marital privilege to a request for evidence of Linda Shelton's adultery, even though Shelton had put that question at issue in Plaintiffs' complaint. (EX 201; JA 38).

On May 15, 2008, since the June 11 deadline for written discovery was looming, Pickle filed his motions to compel Plaintiffs to produce documents responsive to his requests to produce. (JA 205–206; RA 61). Since Plaintiffs had never specified which specific documents they felt were irrelevant, Pickle was handicapped in preparing this motion. (JA 205–206; RA 71-3; RA 61 p. 2; RA 62 pp. 11–12).

On May 27, 2008, Plaintiffs belatedly served a production schedule for responding to Pickle's document requests; no documents would be produced until after the June 11 deadline, and the question of relevancy would be left open until July 11. (EX 269–270). Plaintiffs asked for a response to this production schedule by May 30, received one by fax on May 28, and testified falsely on May 29 that they had not yet received the response. (EX 270, 438–440; JA 122, 203).

Non-substantive, and Lots of It

Plaintiffs produced 583 non-confidential Rule 26(a)(1) documents in three unindexed PDF files, respectively containing 11,422, 1,153, and 250 pages. (JA 225). Of these many pages, 1,385 were duplicative, 6 had to be returned, about 25 or less were not publicly available or already in Defendants' possession, and none seemed substantive. (JA 226–227, 232).

Regarding the 250 pages, Plaintiffs falsely and repeatedly stated that that file contained 2,500 pages. (JA 201, 227, 234; EX 527).

Documents belatedly produced in June 2008 in response to Pickle's requests to produce were hardly better. They were totally unindexed, leaving Pickle to identify them and guess as to their relevancy. (JA 269). Out of a total of 3,585 pages, 691 were duplicative. Five copies of 3ABN's termination letter to Ervin Thomsen were produced. 1676 to 1985 pages pertained to invoices for printing and office supplies, inventory, fixed assets, and the terminated whistleblowers. (JA 270). Defendants identified 84 categories of missing documents, Plaintiffs' cover letters indicated that only 14 of 44 requests had been responded to, and a significant number of documents were illegible. (JA 270–278, 233; EX 319–322, 525–528).

Plaintiffs' Motion to Limit Scope and Methods of Discovery

Plaintiffs didn't file their motion to limit the scope of discovery until June 25. In defiance of the district court's December 14, 2007, order that discovery would not be stayed until a motion for a protective order was heard, Plaintiffs used

their yet unfiled motion to stall discovery in Illinois, and attempted to do so in Michigan after it was filed. (JA 370, 206; EX 731–732, 542–543).

Plaintiffs asked yet again for a prohibition on discovery of donor-identifying information.[8] (DA 32). Plaintiffs' opposition to Pickle's second motion to compel and Plaintiffs' motion to limit scope of discovery (DA 30–34) indicate that Plaintiffs sought to prohibit discovery of the following issues:

- Pedophilia allegations against Tommy Shelton.
- Names of church leaders that Thompson said Defendants negatively influenced against Plaintiffs. (EX 152, 487).
- Linda Shelton's alleged adultery.
- Shelton's *TCTR* royalties.[9]
- Anything but findings and determinations of IRS and EEOC.[10]
- Shelton's private inurement.
- 3ABN funds channeled to Murray through third-party non-profit.[11]

District Court Resolves Several Issues

[8] Regarding Garwin McNeilus' giving pattern, Defendants, not an *in camera* review, would recognize the significance. (JA 287–289; EX 674–677, 684; RA 108 p. 8; RA 109-5 through RA 109-11).

[9] Plaintiffs sought to put this off limits by misstating the issue as being royalties that should have been paid to 3ABN, which is not what Defendants alleged. (EX 403–404).

[10] Such a restriction regarding the IRS criminal investigation would impose Fifth Amendment restrictions upon a civil case.

[11] Plaintiffs garbled this issue of prohibited payments to Murray into prohibited donations to Cherie Peters. (EX 325).

On September 11, 2008, the district court ordered Defendants to serve revised requests to produce by September 26, and Plaintiffs to respond within 30 days thereafter (by Monday, October 27). (JA 284–285). The district court found that Defendants' discovery requests needed narrowing, that Plaintiffs were "taking much too narrow a view" on the issue of relevancy, and that Plaintiffs were at fault for not indexing documents. (JA 282–284).

Plaintiffs' motion to limit scope of discovery was denied except for their request to require Defendants to obtain leave before issuing third-party subpoenas. The court imposed that requirement upon all parties, including Plaintiffs. (JA 285). Given Defendants' ability to document their assertions and Plaintiffs' inability to do likewise, this provision gave Defendants a distinct and considerable advantage, as well as curbed Plaintiffs' abuse of discovery.[12]

Defendants' Third-Party Subpoenas

On March 28, 2008, the District of Minnesota ordered MidCountry to comply with Defendants' subpoena, which they were going to do anyway. However, since Plaintiffs' motion for a protective order was pending, the court ordered MidCountry's records to be produced under seal to the magistrate judge in Massachusetts, to ensure that the documents complied with whatever confidentiality order was issued. (EX 262–264; RA 63-27 p. 5).

[12] Plaintiffs sought from third parties "all" website access logs, and identifying information for anonymous posters, of dubious relevance. (EX 445, 448; JA 234; RA 80 pp. 6–7).

In July and October, 2008, Defendants successfully responded to an order to show cause in the Southern District of Illinois, an order issued in response to Plaintiffs' untimely motion to quash that Defendants had not had opportunity to respond to. (RA 85 p. 2; JA 233, 321–322).

On June 20, 2008, Defendants won their motion to compel Remnant in the Western District of Michigan; Remnant lost its appeal on September 8, 2008. (EX 861–866). Remnant produced the subpoenaed documents on September 22, 2008, documents Defendants argued would demonstrate that Shelton funneled hundreds of thousands of dollars from 3ABN into his own pockets in the form of kickbacks and/or royalties through DLS. (JA 326; RA 96-9 pp. 2–4, 7; EX 612). Since Duffy and Thompson asserted that Plaintiffs' counsel had done a thorough review of Plaintiffs' finances (EX 551–552, 752), the Remnant documents constituted *prima facie* evidence of abuse of process and malicious prosecution. Defendants now had a basis for counterclaims against Plaintiffs' counsel.

Abuse of Confidentiality Order

Plaintiffs excused their reluctant, tardy production of Rule 26(a)(1) materials upon the assertion that these less than 500 pages consisted of "extremely sensitive and confidential business information." (EX 90–91; RA 89 p. 11, 29). Plaintiffs claimed:

> Again, we're not making a purposeful delay here. We genuinely want to show that 3ABN is an upright, financially proper ministry, but we don't want to turn those documents over that

> are proprietary, confidential, trade secret.

(JA 244).

On March 9, 2008, the district court warned that "improper designation of documents as privileged or confidential could result in the imposition of sanctions." (JA 10).

On April 11, the Confidentiality Order was issued, which allowed the designation of documents as confidential if they were deemed in good faith to be:

> ... not generally known or readily available to the public, and that such party deems to constitute proprietary information, confidential business or commercial information, and/or trade secrets relating to its business ....

(DA 23).

On May 14, 2008, Plaintiffs produced the long-awaited "confidential" Rule 26(a)(1) materials, totaling but 207 pages. These included:

- 72 pages: a magazine freely downloadable from 3ABN's website.
- 74 pages: seven editions of 3ABN's corporate bylaws, some being public record.
- 39 pages: 3ABN's employee handbook, part of which Defendants already filed as an exhibit in February 2008.

(JA 232; EX 216–217). This "confidential" production also included a copy of *TCTR*, of which millions are in print. (EX 268, 588–602).

The productions of June 20 and 25 were equally abusive as Plaintiffs

designated as confidential 3ABN's audited financial statements, Form 990's, Form AG990-IL's, and Form CT-12F's, all of which are public record and/or required to be open to public inspection. 26 U.S.C. §6104(d)(1); 225 ILCS 460/2(f), 4(a); ORS 128.670(1), (6), 192.005(5) 192.420(1). (EX 525; DA 48–49, 72–73, 76–77). Also designated confidential were purchase orders and invoices for purchases of pens, sticky notes, and office chairs from Smith & Butterfield, and illegible documents. (EX 525, 529–537).

Plaintiffs told the district court that they weren't going to designate "employment related information" confidential, but did so anyway. (JA 251, 296–298).

On July 18, 2008, Plaintiffs filed as an unredacted exhibit not under seal Pickle's June 25 letter which referred to invoices for pens, sticky notes, and office chairs which Plaintiffs designated confidential. (EX 525). Thus, Plaintiffs tacitly acknowledged that such purchases are not confidential. Plaintiffs' sole concern in using the confidentiality order is the cover up of wrongdoing, not the protection of business information or trade secrets, and Plaintiffs complain to that effect even if no actual information is disclosed. (JA 308–309).

The June 11 Deadline

Written discovery was to be served by May 28, 2008. In the May 7 status conference, Plaintiffs' counsel said the discovery schedule was "still very workable," but Pickle couldn't meet that deadline when Plaintiffs hadn't yet

produced documents responsive to his first set of document requests. To let some pressure off, the May 28 deadline was extended to June 11. (JA 214, 219–221).

Later, Plaintiffs in bad faith agreed to stipulate to an extension of all discovery deadlines. Defendants did not receive the draft stipulation as promised, the draft did not extend the June 11 deadline for written discovery, and Plaintiffs' counsel demanded that Defendants withdraw their June 10 motion to extend the time after the June 11 deadline had already passed. (JA 206–207, 279, 377; EX 274, 672–673). Thus Plaintiffs tried to end written discovery by stealth before Defendants received a single responsive document.

Joy's Bankruptcy

Plaintiffs Invoke, Then Breach, Automatic Stay

On September 13, 2007, Plaintiffs used Joy's August 14 bankruptcy filing[13] to prohibit him from further participation in *3ABN v. Joy* by invoking an automatic stay, just days before the deadline to add parties, claims, and defenses expired. (EX 66; DA 35). Plaintiffs then breached the automatic stay by obtaining leave to copy Joy's hard drives under pretense that the bankruptcy trustee might sell Joy's computers, though Joy had claimed exemption for those computers under 11 U.S.C. §522(d)(5). (DA 36–37).

The district court authorized making one sealed copy in Defendants' presence, and all parties present during copying were to sign the seal. (JA 123–

[13] Bankr.D.Mass. Petition No. 07-43128.

124). Plaintiffs then contacted Joy, who told Plaintiffs' counsel they had breached the automatic stay. (EX 70). Plaintiffs' counsel proceeded to persuade Joy to ship his computers to Minnesota where three copies of his hard drives would be made, two copies "sealed" by a contract signed only by Plaintiffs' expert. (EX 71–72).

Plaintiffs Surrender Prepetition Claims

After Plaintiffs subsequently moved the bankruptcy court to lift the automatic stay, Joy filed an adversary proceeding against them. (JA 331; EX 73–75). On November 21, 2007, for the express purpose of Plaintiffs' seeking injunctive relief in *3ABN v. Joy*, the automatic stay was lifted on condition that Plaintiffs relinquish their prepetition claims against Joy. (EX 733).

Even without prepetition claims, Plaintiffs continued to claim to be Joy's creditors, filing in bankruptcy court on September 23, 2008, their *sixth* motion to extend the time to object to Joy's discharge, requesting an extension to October 27.[14] (Ex 824–826). Conceivably, Plaintiffs sought these extensions to make it difficult for Joy to pursue counterclaims.

Save 3ABN Domain Names & Websites Multiply

Though Plaintiffs never moved for injunctive relief against Defendants, they did proceed to buy the domain names Save3ABN.com and Save3ABN.org from Joy's bankruptcy estate about February 12, 2008. (JA 318). To defeat Plaintiffs' end

[14] Granted on October 7, 2008, the order of the bankruptcy court, filed in that case as entry #89, stated, "No further extensions will be granted absent extraordinary circumstances."

run around having to prove their claims against Defendants, 16 additional domain names were purchased on or about December 25, 2007, and January 12, 19, and 20, 2008, well before Save3ABN.com and Save3ABN.org began to be transferred to 3ABN on February 28 and March 3, 2008. (JA 349–350).

Beginning about February 25, 2008, Defendants repeatedly referred to or filed articles from Save-3ABN.com (and four of its 15 siblings). (EX 212, 217, 219–236, 455, 484, 500, 603–621, 649–659, 829–860; JA 227, 232, 235, 268). These additional post-bankruptcy-petition domain names are of deep concern to Plaintiffs, as demonstrated by Plaintiffs' counsels' remarks in the hearing of March 7, 2008. (JA 254).

The "Deposition"

On March 3, 2008, Plaintiffs obtained permission to do a Rule 2004 examination of Joy. (DA 44). The subpoena of July 28 and the actual examination of September 9, 2008, sought documents and information pertaining to Save-3ABN.com and its siblings, as well as who had reported Plaintiffs to the IRS, and who Joy's sources were within 3ABN, thus converting the Rule 2004 examination into a deposition for *3ABN v. Joy*. (EX 867–868; JA 286–287).

Motion to Dismiss

Plaintiffs' Dire Predicament

On October 27, 2008, Plaintiffs had to respond to Pickle's revised document requests, and the final extension of a deadline in Joy's bankruptcy would expire.

(*supra* 23, 28). The Remnant documents produced on September 22, 2008, gave Defendants a solid basis for counterclaims. (*supra* 24). *3ABN v. Joy* had thus reached a critical juncture, and had become a potato too hot to handle.

While Defendants expressed approval with the Confidentiality Order, Plaintiffs apparently never did. (JA 215, 341). Plaintiffs unsuccessfully requested that parties be required to return to the designating party all documents designated confidential. (JA 141). Instead, the Confidentiality Order wisely allowed post-case challenges to confidentiality designations, and imposed a return requirement only upon non-parties. (DA 22–29).

Despite Plaintiffs' assurance on October 17 that they would not move to dismiss, Plaintiffs had already decided to do so. (JA 344, 319-320). Simultaneously, Plaintiffs sought to alter the Confidentiality Order by stealth by imposing a return requirement upon parties which effectively eliminates the possibility of post-case challenges. (JA 299).

IRS Criminal Investigation

Lacking the character to admit their wrongs, Plaintiffs concocted a tale of exoneration out of what they had originally denied.

On September 6, 2007, Shelton publicly declared that Christians who say that the IRS is investigating him are enemies of the gospel. (JA 152). On March 7, 2008, Plaintiffs' counsel told the district court that there had been no criminal investigation, even though her proposed confidentiality order referred to documents

produced in a Department of Justice investigation. (JA 257, 260, 139).

On March 9, 2008, Thompson's son publicly acknowledged the IRS investigation. (EX 265–266).

On July 25, 2008, Duffy issued a letter acknowledging the IRS criminal investigation and claiming vindication, stating that Plaintiffs had ordered the IRS to destroy all documents Plaintiffs produced to them, documents ranging from the years 2000 to 2006. (EX 551–552).

On September 6, 2008, Shelton claimed the IRS investigation had lasted nearly a year, and that Plaintiffs had ordered documents to be destroyed. (EX 685).

Revealingly, Plaintiffs opposed Defendants' attempt to verify Plaintiffs' bogus claims of vindication. (RA 94; RA 95 pp. 1–3; RA 97 pp. 3–6; RA 108 pp. 1–8).

On October 22, 2008, Thompson claimed the IRS investigation vindicated 3ABN; on October 17, Plaintiffs' counsel admitted that since the investigation went back only to 2000, the 1998 house deal was not considered. (JA 319, 344–345, 551).

More Evidence of Bad Faith

In connection with their motion, Plaintiffs falsely claimed to have stipulated to Defendants' second motion to extend discovery deadlines, having in reality opposed it. (JA 303, 314; EX 671). Plaintiffs deceptively asserted that they had not conducted any depositions. (*supra* 29; JA 302, 307, 313–314).

In the October 30, 2008, status conference, Plaintiffs falsely claimed that "the three years statute of limitations for defamation [had] expired as to some ..., if not all, of the original statements that they've made." (DA 9–10). Neither Defendant was involved before August 13, 2006, Plaintiffs earlier asserted that their troubles began in June or July 2006, and Save3ABN.com wasn't launched until January 2007. (EX 566; JA 95, 100, 102).

SUMMARY OF THE ARGUMENT

The district court failed to exercise its discretion when it decided the motion to dismiss while unfamiliar with relevant facets of the case, and without reading Defendants' opposition brief or considering the arguments it contained. Plaintiffs' failure to follow D.Mass.Loc.R. 7.1(a)(2) and not allowing for a normal briefing schedule prejudiced Defendants' being able to prepare an adequate response.

The reasons given for 3ABN's need to dismiss are based solely on the hearsay affidavit of Thompson, a proven liar who admitted to disseminating slanderous hearsay. Thompson's reasons contradict evidence in the record. An evidentiary hearing should therefore have been scheduled.

Shelton failed to give any reasons for dismissal. The district court erred when it granted the motion despite the insufficiency of 3ABN's reasons, Plaintiffs' bad faith, vexatiousness, and lack of diligence, the motion being a ploy to evade discovery, the tremendous effort and expense invested in the case by Defendants, and the motion coming so late and at a critical juncture in the case.

The district court erred in imposing terms of dismissal the sole purpose of which were to shield Plaintiffs and their counsel from liability, and which did not adequately protect Defendants.

The order as reflected in the clerk's notes of the status conference does not match the order from the bench, and this error results in the apparent revocation of certain terms of the Confidentiality Order without notice or other due process, and in imposing dismissal terms upon the Defendants. Besides depriving Defendants of property without due process, Defendants' free speech and free press rights are therefore in jeopardy.

ARGUMENT

Standard of Review

Rule 41(a)(2) voluntary dismissals are reviewed for abuse of discretion. *Puerto Rico Maritime Shipping Auth. v. Leith*, 668 F.2d 46, 49 (1st Cir. 1981). An abuse of discretion may arise from a mistake of law, a clearly erroneous finding of fact, or a failure to exercise discretion. *Baella-Silva v. Hulsey*, 454 F.3d 5, 11 (1st Cir. 2006); *Alamance Indus., Inc., v. Filene's*, 291 F.2d 142, 146 (1st Cir. 1961).

In cases raising First Amendment issues, an appellate court must "make an independent examination of the whole record" to ensure that there is no "forbidden intrusion on the field of free expression." *Bose Corp. v. Consumers Union*, 466 U.S. 485, 499 (1984) (internal quotation marks omitted). For protective orders under Fed.R.Civ.P. 26(c), when there has been no finding of good cause, an

independent determination of whether good cause exists is required. *Jepson v. Makita Elec. Works Ltd.*, 30 F.3d 854, 859 (7th Cir. 1994).

Discussion of the Issues

I. Issues Pertaining More or Less to Procedure

A. The District Court Erred by Granting the Motion Without Becoming Familiar with Relevant Facets of the Case

Since the unsealing of the case on June 21, 2007, the magistrate judge had handled almost everything. (JA 3–20).

During the status conference of September 11, 2008, the district judge said that he did not have "a handle really on where matters stand," and, "I am not immersed in the ins and outs of the disputes." (JA 376, 383). The record reveals no reasons or opportunities between September 11 and the October 23 filing of the motion to dismiss for the district judge to familiarize himself with the case.

Plaintiffs exploited this situation by filing their motion to dismiss just one week before the scheduled status conference of October 30. One week wasn't enough time for the court to become familiar with the relevant issues.

In granting the motion while unfamiliar with the case, and without scheduling a hearing on the motion, reading Defendants' opposition brief, and giving Defendants adequate opportunity to be heard during the status conference, the district court erred. *Puerto Rico*, 668 F.2d at 51.

B. The District Court Erred by Granting the Motion Without Reading Defendants' Opposition Brief

Just in case the court might consider clearing its docket[15] by ruling on the motion during the October 30 status conference, Defendants hurriedly prepared an opposition memorandum and an affidavit with 45 exhibits, filing them on October 30 at 1:55 and 2:23 pm respectively. (JA 323–353; EX 741–877; DA 45).

During the status conference, Defendants informed the court that they had filed a "quite exhaustive" opposition memorandum, with affidavit and exhibits. The court initially represented that it was unaware of Defendants' filings, and thus had not read them. (DA 6–7). Defendants informed the court that the motion to dismiss was yet another ploy by Plaintiffs to avoid discovery, that the motion should be denied, and that Defendants' memorandum "outlined eight different factors" that ought to be considered. (DA 6, 11).

Scheduled to begin at 3 pm, the status conference concluded at 3:33 pm. (JA 380; DA 20). Roughly halfway through the conference, the court granted the motion (DA 13), having heard but a small fraction of the facts, case law, and arguments Defendants' memorandum contained.[16] The district court therefore failed to exercise the judicial discretion required by a motion under Rule 41(a)(2). *Alamance*, 291 F.2d at 146.

[15] Clearing the docket by dismissing the case might be a convenience to the court, but such a consideration is secondary. *Alamance*, 291 F.2d at 146.

[16] At that point in the status conference, Plaintiffs' counsel had spoken 1,090 words, Joy 242 words, and Pickle 226 words. (DA 5–13).

C. Given the Complexity of the Case, the District Court Erred by Not Allowing for a Normal Briefing Schedule

Given the complexity of the case, with allegations ranging from copyright infringement to extramarital affairs, trademark infringement to unbiblical divorce, undisclosed book royalties to corporate jet travel for personal purposes, and whistleblower firings to metatag search engine manipulation (JA 31-32, 37–41), a normal briefing schedule should have been allowed.

Defendants would have been greatly prejudiced if they had not responded at all to Plaintiffs' motion by the October 30 status conference, if the motion had still been granted. In hindsight, having only one week to respond was prejudicial to Defendants because that was not enough time for either Defendants or the court to recognize that Plaintiffs' motion was a devious ploy to alter the Confidentiality Order. (*infra* 30, 56, 58, 61).

Plaintiffs never disclosed that they were attempting to so alter that order, or that they would use that alteration to restrict Defendants' First Amendment free speech and free press rights. (*supra* 3; *infra* 60–62).

Under Rule 41(a)(2), "the most important consideration" is "the interests of the defendant." *Shepard v. Egan*, 767 F.Supp. 1158, 1165 (D.Ma. 1990). One week wasn't enough time for Defendants to fully understand what interests they needed to draw the court's attention to, or for the court to adequately consider those interests.

D. The District Court Erred by Granting the Motion Because Plaintiffs Failed to Comply with D.Mass.Loc.R. 7.1(a)(2).

D.Mass.Loc.R. 7.1(a)(2) states, "No motion shall be filed unless counsel certify that they have conferred and have attempted in good faith to resolve or narrow the issue." (DA 81).

On October 17, 2008, Plaintiffs' counsel approached Pickle with an oral offer to settle. When asked, Plaintiffs' counsel explicitly stated that he would not file a motion to dismiss if Defendants disagreed with the proposed settlement terms. (JA 344–345). Plaintiffs' counsel never conferred with Joy regarding his settlement proposal. (JA 345, EX 745–748).

Therefore, counsel never conferred regarding an imminent motion for voluntary dismissal, or possible terms for such a dismissal. By not first conferring in an attempt to narrow the issues, Defendants were prejudiced by having to address so many issues in their hastily prepared opposition memorandum.

D.Mass.Loc.R. 7.1(a)(2) requires good faith. Plaintiffs assert that the 3ABN Board voted during the week of October 12 to have the attorneys dismiss the suit. (JA 319–320). Thus on October 17 Plaintiffs' counsel manifested bad faith when, while making his settlement proposal to Pickle, he denied he would file a motion to dismiss.

Plaintiffs should not have been rewarded for their bad faith and violation of D.Mass.Loc.R. 7.1(a)(2) by granting them a dismissal without prejudice.

II. Issues Pertaining More or Less to Evidence and Testimony

A. The District Court Erred by Relying upon Walt Thompson's Uncorroborated, Hearsay Testimony

3ABN's sole evidence for its need of dismissal is found in Thompson's hearsay affidavit, and consists of hearsay assertions by unidentified individuals that the IRS found no evidence of wrongdoing against Plaintiffs, California state authorities and the EEOC found insufficient evidence of wrongdoing, and 3ABN's donations are back up to what they used to be. (JA 317–320).

The reliance upon Thompson's uncorroborated, hearsay testimony in granting a voluntary dismissal is particularly egregious in light of the fact that, according to the record, Thompson is a proven liar.

Thompson claimed that he never had evidence of adultery against Linda Shelton (EX 695, 718). Thompson also claimed that he had "ample evidence," "extensive evidence," and "hard evidence" of adultery against Linda Shelton, since Shelton met the "biblical and church manual" requirements for remarriage. (EX 508, 689, 691).

Thompson claimed that 3ABN had evidence that Linda Shelton really did travel to Florida to rendezvous with Abrahamsen. (EX 507). Elsewhere Thompson claimed that 3ABN has no proof that the trip really took place. (EX 663).

Why are Thompson's claims so erratically contradictory? As Thompson explained after stating that he had "made no effort to determine exact dates" of the

alleged Florida trip or the later finding of the pregnancy test kit, "I am reporting only what I believe I was told." (EX 660). This was Thompson's problem regarding the pedophilia allegations against Tommy Shelton. (*supra* 7).

Thompson falsely claimed that Shelton did not initiate his divorce. (*supra* 5).

Thompson claimed that the instant lawsuit "has only one purpose," "to expose the truth," and that "the law suit does nothing to hide truth," for "[w]e have nothing to hide." (EX 690–691). Either Plaintiffs' counsel acted without authorization in obstructing discovery, seeking permanent impoundment of the case, and abusing the Confidentiality Order, or Thompson lied again.

Evidence on a motion may be presented in affidavits. Fed.R.Civ.P. 43(c). Yet hearsay is inadmissible. Fed.R.Evid. 802. Relying solely on inadmissible "evidence" in the hearsay affidavit of a proven liar for the reasons for the need to dismiss is an abuse of discretion.

B. The District Court Erred by Relying upon Deceptive and/or False Testimony

There are other problems with Thompson's affidavit.

Thompson falsely asserted that the lawsuit's objectives have already been achieved when ¶¶ 1–4, 6–11 of Plaintiffs' prayer for relief clearly haven't been. (JA 44–45).

Regarding the objective of ¶ 5, Thompson deceptively asserted that the allegedly infringing domain names had already been obtained in Joy's bankruptcy

proceedings. (JA 318). Yet on March 7, 2008, Plaintiffs' counsel complained about Defendants launching "at least seven other save 3ABN based websites" "***after*** the bankruptcy matter" which contain "this exact same information," and Plaintiffs sought documents and testimony pertaining to these new domain names as recently as September 9, 2008. (JA 254 (emphasis added), 286–287; EX 867–868). There are now 16 times as many Save 3ABN websites than when the suit was filed, each using a domain name containing the characters "3ABN." (JA 349–350).

Thompson asserted that the IRS "conducted a thorough review of 3ABN and Mr. Shelton." (JA 318). To deflect questions concerning 2006 book royalties and the 1998 real estate deal, Thompson and Shelton also asserted that the state of Illinois did a thorough review, yet the denial of 3ABN's petition for a rehearing in its property tax case noted that 3ABN had refused to produce even its 2000 and 2001 Form 990's when requested by the intervenors! (EX 355–356, 869, 871–872). Thus Thompson's assertion of a thorough review is unreliable.

Thompson falsely asserted that the hearsay resolution of the IRS criminal investigation vindicates Plaintiffs of wrongdoing. (JA 318–319). The IRS could not have concluded that there was nothing unethical, illegal, or improper about the 1998 house deal, the 2003 horse donation(s), the Remnant book deals, Shelton's personal use of the 3ABN jet, and 3ABN's payment for personal legal expenses and vacation travel. (*supra* 10–11).

Certainly the IRS did not restore 3ABN's reputation by determining that

Linda Shelton committed adultery, Shelton did not commit adultery, and Tommy Shelton did not molest boys. (JA 38–39; *supra* 7–8).

Given Plaintiffs' characteristically reluctant, selective disclosure of documents, no wonder the EEOC might find insufficient evidence of wrongdoing regarding the fired whistleblowers. (JA 319; *supra* 11–12). But let the EEOC have the "Thompson memo," and it will not likely arrive at that conclusion. (JA 296–298).

When America's economy is falling apart, Thompson's hearsay affidavit asserts without evidence that donations are back up because 3ABN's reputation is restored. (JA 319). Yet 3ABN's alleged president Jim Gilley ("Gilley") around October 8, 2008, asked for $5 million in donations (more than 25% of 3ABN's reported expenses for 2006) to be sent in by October 17. (EX 877; *supra* Table 2).

On October 17, 2007, Plaintiffs' counsel stated that Plaintiffs wished to settle in order to avoid discovery expenses over the next three months, and sources indicated that donations were way down and that 3ABN was in deficit mode. (JA 344, 348).

Where have any increases in donations come from? Increased donations from insiders such as 3ABN Board members says nothing about 3ABN's reputation.

While the public believes that Shelton has been replaced as president by Gilley, public filings after Gilley took over still report Shelton as president. (JA

352; EX 874–876, 258). Thus, any restoration of reputation that has occurred may have been fraudulently obtained.

C. The District Court Erred by Failing to Schedule an Evidentiary Hearing

Thompson is a liar, and his testimony is unreliable. Since the reasons for dismissal were based entirely on his testimony, the district court erred by not scheduling an evidentiary hearing.

The district court decided not to make findings of any sort as to the merits of any claims or defenses. However, since Plaintiffs' reasons for dismissal were dependent upon the truth of their claims, dismissing the case solely on Plaintiffs' representations was a quasi-finding in favor of Plaintiffs' claims.

An evidentiary hearing would have equitably addressed some of these concerns by taking testimony and evidence as to what true, historical, monthly donation levels really were, why donation levels rose and fell, whether any current increased level of donations is due to insiders, whether the IRS criminal investigation determined that there was nothing wrong with certain transactions, and whether 3ABN tainted the EEOC investigation by not producing certain documents. (*supra* 10–12, 15–16, 41).

If there are "issues of fact that cannot be resolved on the papers submitted," an evidentiary hearing should be held. *McLaughlin v. Cheshire,* 676 F.2d 855, 857 (D.C.Cir. 1982).

III. Issues Pertaining More or Less to Relevant Factors That Should Have Been Considered

In determining whether defendants will suffer *legal prejudice* by granting a voluntary dismissal, courts consider the following non-exclusive factors: the extent to which the suit has progressed, including defendants' effort and expense in preparation for trial, plaintiffs' excessive delay and lack of diligence in prosecuting the action, insufficient explanation for the need to dismiss, plaintiff's diligence in bringing the motion, any undue vexatiousness on Plaintiff's part, and the duplicative expense of relitigation. *Urohealth*, 216 F.3d at 160; *Piedmont Resolution L.L.C. v. Johnston, Rivlin & Foley*, 178 F.R.D. 328, 331 (D.D.C. 1998); *Catanzano v. Wing*, 277 F.3d 99, 110 (2d Cir. 2001).

A. The District Court Erred by Granting the Motion Despite the Insufficiency and Falsity of 3ABN's Reasons for the Need to Dismiss

The falsity of 3ABN's reasons for dismissal has already been discussed. (*supra* 39–42). That Plaintiffs don't think they can obtain a "substantial award of damages" isn't a sufficient reason for dismissal, since Plaintiffs admit that such "was never a significant motivation" for their lawsuit. (JA 304). Because of the insufficiency and falsity of 3ABN's reasons for dismissal, the district court's order should be reversed.

B. The District Court Erred by Dismissing Both Plaintiffs When Shelton Gave No Reasons Whatsoever for His Need to Dismiss

Rule 41(a)(2) dismissals are not a matter of right, and reasons must be given

for the need to dismiss. *Beavers v. Bretherick*, 227 Fed.Appx. 518, 522 (8th Cir. 2007). Thompson on 3ABN's behalf offered reasons, but Shelton, individually, remained silent and gave no reasons whatsoever. The district court erred by not considering this fact. (JA 338).

The 3ABN Board has no authority to decide on Shelton's behalf to dismiss the claims of Shelton, individually.

C. The District Court Erred by Granting the Motion Despite Plaintiffs' Bad Faith and Vexatiousness

"A finding of good faith on the part of plaintiffs is relevant in evaluating whether defendant has or will suffer substantial prejudice." *Read Corp. v. Bibco Equip. Co.*, 145 F.R.D. 288, 291 (D.N.H.1993).

Many have criticized Plaintiffs since at least 2004 (*supra* 5, 10, 15), but Plaintiffs only sued Defendants. Why? Plaintiffs' lone example of a "donor" negatively influenced by Defendants was a trustor concerned about Defendants' documentation. (EX 54). Therefore, Defendants' contribution to the raging controversy was convincing documentation and proof, and Defendants were a greater threat than others.

Plaintiffs admit that they sued Defendants to stop Defendants' reporting. (JA 317–318). Plaintiffs' ill-motive is further evidence of their vexatiousness. *Jewelers Vigilance Comm., Inc. v. Vitale Inc.*, 1997 U.S. Dist. LEXIS 14386, at *7 (S.D.N.Y. 1997).

Plaintiffs "never had any intention of providing discovery," but sought "the advantage of filing [their claims] without having to support them"; this constitutes undue vexatiousness. *S.E.C. v. Oakford Corp.*, 181 F.R.D. 269, 271 (S.D.N.Y. 1998). (JA 361; *supra* 17–23).

If Plaintiffs thought their claims had merit, they would have sought injunctive relief. To the many examples of bad faith, false statements under oath, and vexatiously multiplied proceedings already given, a few more follow.

Plaintiffs' June 25, 2008, motion to limit scope of discovery sought to evade responding to Pickle's November 29 and December 7, 2007, requests to produce. Such a motion should have been filed no later than the expiration of Rule 34's 30-day time limit. *Burlington N. &. Santa Fe Ry. Co. v. District Court*, 408 F.3d 1142, 1149 (9th Cir. 2005).

Plaintiffs admitted that they encouraged GHS and Remnant to resist compliance with Defendants' subpoenas. (EX 732; RA 75 p. 4).

Plaintiffs contended that "the vast bulk of our allegations in the complaint," "pinpoint allegations of the complaint" concerning defamation "primarily deal with various specific financial transactions." (JA 241). Yet on their face, ¶¶ 48(a)–(d) and 50(a)–(i) of Plaintiffs' complaint have nothing to do with financial transactions. (JA 38–39). Rather than "specific" or "pinpoint," the district court in southern Illinois on October 22, 2008, declared that ¶ 46(g) of the complaint was quite broad. (JA 349). At the very least, ¶¶ 46(a), (e), 48(a), and (c) are also quite

broad.

In opposing Defendants' motion to serve subpoenas upon Delta Airlines and a port director to determine whether Linda Shelton rendezvoused with Abrahamsen in Florida in April 2004 or at other times and places, Plaintiffs astonished both friend and foe by a drastic denial or reversal of their long-held position. Plaintiffs declared that "[n]one of this information is relevant to Plaintiffs' claims," that "[t]he alleged trip to Florida" never "constitute[d] a factual basis supporting any claims set forth in Plaintiffs' complaint," and that "Plaintiffs do not care whether Linda actually went to Florida or not," or whether Abrahamsen was there or not. (DA 44; RA 113 pp. 4–6; EX 688, 696, 699–702, 704–707, 710–718).

Thompson's son asserted publicly that the Remnant documents had been produced under seal to the magistrate judge, not to Defendants; Joy corrected him, stating that they were not under seal and were in Defendants' possession. (EX 756–757). Joy also referred to other unspecified documents, and stated that Defendants' sources, not 3ABN, were exonerated. (Ex 757). Plaintiffs' counsel construed these and similar comments into disclosure of confidential information from the Remnant documents, even though Plaintiffs' counsel had conferred with Joy and knew this to be false. (JA 308–309; EX 744).

D. The District Court Erred by Granting the Motion Despite Plaintiffs' Lack of Diligence to Litigate the Case

The record is replete with evidence of Plaintiffs' lack of diligence:

- Claims pertaining to Shelton's cover up of pedophilia allegations never pursued. (EX 135; DA 33–34).
- Claims pertaining to Shelton's divorce unofficially abandoned. (JA 348; EX 201).
- No count of copyright infringement in the complaint. (JA 40–44).
- Preliminary injunction never sought. (JA 1–23).
- No injunctive relief sought after automatic stay lifted. (JA 6–23).
- No written discovery requests served upon Defendants since August 20, 2007, except a rude demand for documents Defendants received in response to two subpoenas. (JA 350).
- Promised motion to compel disclosure of Defendants' sources never filed. (JA 213).
- No official depositions conducted. (JA 302, 307, 313–314).
- Shelton's refusal to produce any documents in discovery. (JA 350).
- 3ABN's refusal to knowingly produce anything substantive. (EX 567; JA 232, 269–270).

Other than subpoenas *duces tecum* seeking identities of anonymous posters on two internet forums, of dubious relevance (*supra* 23), and a deposition of Linda Shelton that never took place (JA 334), Plaintiffs confined their efforts to covering up their own wrongdoing through protective orders, obstructing Defendants'

discovery efforts, and breaching the automatic stay to obtain copies of Joy's hard drives. (*supra* 17–28).

E. The District Court Erred by Granting the Motion Despite Plaintiffs' Lack of Diligence to Bring the Motion

Though Plaintiffs purchased the domain names Save3ABN.com and Save3ABN.org in February 2008, and Shelton's brother Ron Shelton publicized an alleged vindication by the IRS in June 2008, Plaintiffs did not move to dismiss.[17] (JA 318; EX 554–555).

Without amending their complaint, Plaintiffs tried to narrow their case to only financial issues, apparently hoping that Defendants wouldn't fare as well as on other issues such as Linda Shelton's alleged adultery. However:

- By July 2007: Defendants published articles about Shelton's tax evasion via horse donations, and Shelton's private inurement via the 1998 house deal. (EX 829–847; JA 350–351).
- About September 2007: Defendants published how Shelton denied under penalty of perjury in a tax filing that the 1998 house deal was a section 4958 excess benefit transaction. (EX 848–860; JA 350–351).
- Fall of 2007: Defendants published about Shelton's Remnant royalties, demonstrating that Defendants had the necessary documents to justify subpoenaing documents from Remnant. (EX 603–621; JA 335).

[17] The EEOC issued its notice of dismissal on March 20, 2008, but 3ABN apparently never publicized it.

- June 20, 2008: Remnant was ordered to produce documents to Defendants. (EX 861–862).
- July 28, 2008: Remnant's motion to amend the order compel production was denied. (EX 863–864).
- September 8, 2008: Remnant lost its appeal. (EX 865–866).

Plaintiffs thus knew or should have known from July 2007 onward that their case was doomed, but did not move to dismiss. Only after Remnant caved and produced the incriminating documents on September 22, 2008, and Defendants subsequently put Plaintiffs on alert that Defendants now had a basis for counterclaims of misuse of process and malicious prosecution, only then did Plaintiffs finally, after so long delay, file their motion. (*supra* 24; EX 754).

F. The District Court Erred by Granting a Motion Which Was a Ploy to Evade Discovery

Plaintiffs' counsel represented to Pickle on October 17, 2008, that it was necessary to settle now in order to avoid discovery. (JA 344). Plaintiffs admitted that a benefit of dismissal would be lost if they were "required to conduct discovery." (JA 310).

Pending their motion to dismiss being heard, Plaintiffs sought to stay discovery, specifically mentioning "the pending obligation to respond to document requests"; the court-ordered deadline for that was October 27. (JA 300, 284). Without a stay being granted, Plaintiffs refused to comply with that court-ordered

deadline. (EX 823). Rather than being rewarded with a dismissal without prejudice for their contempt of court, Plaintiffs should have been sanctioned under Fed.R.Civ.P. 37(b)(2).

A Rule 41(a)(2) dismissal cannot be used to thwart discovery deadlines or as a thinly-veiled attempt to avoid discovery. *Greguski v. Long Island*, 163 F.R.D. 221, 224 (S.D.N.Y. 1995); *In re Exxon Valdez*, 102 F.3d 429, 432 (9th Cir. 1996).

G. The District Court Erred by Granting the Motion Despite Defendants' Tremendous Effort and Expense in the Case

Within the First Circuit, a docket sheet of eleven pages with eighty-five entries demonstrated sufficient effort and expense on the part of Defendants that a Rule 41(a)(2) dismissal without prejudice was denied. *Boyd v. Rhode Island Dep't of Corrections*, 206 F.R.D. 36, 37 (D.R.I. 2001). In comparison, *3ABN v. Joy* at the time of dismissal had a docket sheet comprising 128 entries, printed out on 20 pages. (JA 1–20).

Similarly, the extensive litigation in the related cases in Illinois, Michigan, and Minnesota[1] involved filing hundreds of pages and more than 170 exhibits. (RA 63-28 through 63-33, 81-2 p. 121 through 81-9, 96-9 through 96-11).

Plaintiffs' obstructionism forced Defendants to file two motions to compel in the District of Massachusetts, and two motions seeking leave to serve four subpoenas *duces tecum*. (JA 6, 10–11, 15–18).

In the District of Massachusetts through November 13, 2008, Defendants

had filed about 384 exhibits (counting subparts), while Plaintiffs filed about 117.[18]

Defendants are not made of money, and do not have millions of dollars at their disposal like Plaintiffs do. Defendants cannot maintain extended, time-consuming, expensive, and exhausting 18-month legal battles with Plaintiffs, fighting to obtain any and every document requested, only to have Plaintiffs dismiss without prejudice.

Since Plaintiffs' suit didn't accomplish any of their objectives, and Plaintiffs' motion to dismiss was motivated by a desire to evade liability and to remove incriminating evidence from Defendants, there is little hope that Plaintiffs won't file suit again. But by seeking to remove discovery from Defendants, Plaintiffs endeavor to guarantee that all of Defendants' expenses and efforts thus far are wasted.

H. The District Court Erred by Granting the Motion So Late in the Case, and at a Critical Juncture in the Case

In requesting dismissal without prejudice, Plaintiffs hypocritically asserted that the case was still in its early stages, when Plaintiffs' own obstructionism kept the case from advancing more rapidly. (JA 307; DA 7–8; *supra* 17–23). Given the extreme difficulty in getting documents from Plaintiffs and their allies, obtaining such documents constitutes a major portion of the time and effort needing to be

[18] The number 117 does not give a fair picture of the situation, for about 30 had already been filed previously, and about 52 were correspondence between Plaintiffs' counsel and Defendants. Proportionately, Defendants' exhibits were far less of this nature.

expended in the case. Thus, it was late in the case.

Plaintiffs brought their motion more than 18 months after the filing of their action, and, according to a probable typographical error in the electronic order of June 27, 2008, after the end of discovery on September 9. (JA 1, 19, 12).

3ABN v. Joy had reached a critical juncture in three different ways:

- The Remnant documents produced on September 22, 2008, gave Defendants a solid basis for counterclaims.
- Plaintiffs had to produce documents by October 27.
- Plaintiffs' sixth and final extension of the deadline to object to Joy's bankruptcy discharge would expire on October 27.

(*supra* 23–24, 28).

In moving to dismiss, Plaintiffs admitted that they had sought the cover up of wrongdoing during the suit rather than an award of monetary damages, making it crystal clear that the suit was frivolous. (JA 308–309, 304; cf. EX 741).

IV. Issues Pertaining More or Less to the Terms of Dismissal

A. The District Court Erred by Imposing Terms That Protected Plaintiffs and Their Counsel Instead of Defendants

When the court asked why the dismissal should not be with prejudice, Plaintiffs' counsel responded that otherwise Defendants would have an element of the tort of malicious prosecution. (DA 7–9).

Plaintiffs' counsel falsely argued that Defendants, rather than being

prejudiced, were now better off because the statute of limitations for defamation had run out, when it most certainly has not. (*supra* 32).

Plaintiffs counsel then argued that the dismissal needed to be without prejudice in order to "keep [Defendants] in check" so that Defendants "would have to think twice" before Defendants "sue us for malicious prosecution," since Plaintiffs would have "a prospect of raising affirmative claims against them." (DA 10–11). By "sue us" Plaintiffs' counsel meant the two law firms and seven attorneys representing Plaintiffs, located in Minnesota and Massachusetts, Defendants' states of residence, not just the Plaintiffs from Illinois. Plaintiffs' counsel's comments regarding diversity jurisdiction make this clear:

> I think that if -- if the plaintiffs -- I mean the defendants here, Mr. Pickle and Mr. Joy, were to bring a separate lawsuit for malicious prosecution, it probably would have to be brought in state court, because they wouldn't meet -- well, I'm just thinking they wouldn't have diversity or jurisdiction.

(DA 12–13).

Thus, the dismissal was without prejudice solely to insulate Plaintiffs and their counsel from the liability they incurred by filing and prosecuting this action against Defendants, and for that specific reason "no finding of any kind" was made "as to the merits or lack of merits of any of the claims or factual defenses set forth in the pleadings." (DA 13). Yet it is Defendants' position, not Plaintiffs' position, that is to be protected under a Rule 41(a)(2) dismissal. *LeCompte v. Mr. Chip, Inc.*, 528 F.2d 601, 604 (5th Cir. 1976).

Dismissing the case without prejudice solely to deprive Defendants of their legal right to sue Plaintiffs and their counsel for malicious prosecution constitutes plain legal prejudice. *Selas Corp. v. Wilshire Oil Co.*, 57 F.R.D. 3, 6 (E.D.Pa.1972); *Kappa Publishing Group, Inc. v. Poltrack*, 1996 U.S. Dist. LEXIS 3844, at *4 (E.D.Pa. 1996); *In re Sizzler Restaurants International Inc.*, 262 B.R. 811, 821 (Bankr.C.D.Cal. 2000). Whether or not Plaintiffs and their counsel might be sued for malicious prosecution isn't

> ... a factor which ought seriously to influence our decision here, both because the possibility of injustice seems remote and because it is not entirely relevant under the standards for deciding a motion for voluntary dismissal.

Selas, 57 F.R.D. at 5 n.2; *In re Sizzler,* 262 B.R. at 823.

Plaintiffs should either dismiss their complaint with prejudice, or compensate Defendants for their reasonable costs, expenses, and fees; Plaintiffs should not have it both ways. *Kappa*, *supra*, at *6. Dismissal with prejudice would preserve Defendants' legal rights, and avoid irremediable injustice. *Selas*, 57 F.R.D. at 7.

B. The District Court's Only Condition Imposed upon Plaintiffs May Not Be Enforcible

To ensure that Plaintiffs did not obtain some sort of tactical advantage, the court imposed but one condition upon Plaintiffs in granting the motion:

> ... any claims brought by the plaintiffs, based on the same facts and circumstances or ... nucleus of operative events may only be brought in the Central Division of Massachusetts.

(DA 10, 12–13).

However, Plaintiffs' counsel had just alluded to the fact that Defendants would be forced to file suit against Plaintiffs and their counsel in state court, being unable to obtain diversity jurisdiction. (DA 12–13). Under this scenario, Plaintiffs' counsel stated, "we couldn't guarantee that it would be in the same court" (DA 13), since they would be forced to raise in state court the affirmative claims they preserved for that purpose by obtaining a dismissal without prejudice. The district court later stated, "We'll have to wait and see how that plays out and in what court." (DA 17).

To the extent that Plaintiffs can file their claims in another court anyway, the dismissal is left without any curative conditions to lessen the prejudice against Defendants, and thus constitutes an abuse of discretion.

Defendants obtained substantial, favorable rulings regarding case impoundment, obtaining copies of hard drives, confidentiality, motions to compel, and scope of discovery (JA 341), and all of these are at risk of being lost if the issues of *3ABN v. Joy* are relitigated in another forum.

C. The District Court Erred by Failing to Impose Terms That Preserve Evidence from Spoliation

Miller alleged that Shelton ordered the fraudulent alteration of Miller's billing records in order to force Miller to resign from the 3ABN Board, and Defendants filed this communication on February 25, 2008, in Minnesota, and on

May 15, 2008, in Massachusetts. (EX 254, 212, 216–217). Bottomley alleged that 3ABN CFO Larry Ewing ("Ewing") ordered the destruction of evidence of violations of Washington state law regarding the issuance of charitable gift annuities. (EX 798). Yet another source alleged that Ewing was involved in destroying financial records dated earlier than the year 2000, and Plaintiffs incorporated this source's information into Plaintiffs' Rule 26(f) conference report on July 20, 2007. (EX 374; JA 352, 114).

Corroborating these reports, Shelton and Duffy both asserted that Plaintiffs, around June or July 2008, ordered the destruction of documents pertaining to the IRS criminal investigation. (EX 551–552, 685–686). Thompson's affidavit apparently was supposed to make the same admission. (JA 304, 318–319). These documents ordered destroyed were arguably relevant to questions Plaintiffs put at issue in their complaint. (JA 36–39).

Thus, if the dismissal is conditioned upon the return of all confidential documents (including documents wrongfully so designated), something not required under the Confidentiality Order, key evidence of Plaintiffs' abuse of process and abuse of the Confidentiality Order is at risk of spoliation, and that prejudices Defendants.

D. The District Court Erred by Not Imposing Terms That Adequately Protect Defendants

Curative conditions that would have helped protect Defendants include:

- Requiring Plaintiffs' consent that discovery from *3ABN v. Joy* may be used in subsequent actions between the parties. *Lopez v. Ross Stores, Inc.*, 2006 U.S. Dist. LEXIS 83069, at *9 (S.D.Tex. 2006); *Bready v. Geist*, 85 F.R.D. 36, 38 (E.D.Pa. 1979).
- Dismissing with prejudice. (*supra* 54).
- Requiring Plaintiffs' consent in future litigation to rulings in *3ABN v. Joy* regarding case impoundment, form of electronic discovery, confidentiality, and scope of discovery. *LeBlang Motors, Ltd. v. Subaru of Am. Inc*., 148 F.3d 680, 686 (7th Cir. 1998); *Lopez, supra*, at *3–4, 9.
- As typically done, requiring Plaintiffs to pay Defendants their expenses, including attorney fees.[19] *Marlow v. Winston & Strawn*, 19 F.3d 300, 303 (7th Cir. 1994).

Besides avoiding evidence spoliation and ensuring that Defendants' claims of malicious prosecution be heard, such conditions would have protected Defendants from duplicative expense and exhaustion of their limited resources.

E. The District Court Erred by Imposing Terms upon Defendants

The Electronic Clerk's Notes of October 31, 2008, incorrectly summarize the order from the bench of October 30, and consequently appear to impose upon

[19] Whether the district court would have granted Defendants' motion to impose costs as "a further condition" of dismissal could not have been known prior to 30 days after the entry of the order to dismiss, and thus prior to timely filing the notice of appeal. (JA 16–18).

Defendants the return of confidential documents as a condition of dismissal. (*infra* 58–59).

However, "[t]he court may not impose conditions on the non-moving party to protect the plaintiff from the consequences of the dismissal." 8 *Moore's Federal Practice* §41.40[10][b] (Matthew Bender 3d ed.). There simply is no authority to do so. *Cross Westchester Dev. Corp. v. Chiulli,* 887 F.2d 431, 432 (2d Cir. 1989).

V. Issues Pertaining More or Less to the Confidentiality Order

A. The District Court Erred by Revoking, Without Due Process, Terms of the Confidentiality Order of April 17, 2008

Plaintiffs tried to deceive the district court into altering the Confidentiality Order by imposing non-party return requirements upon parties and by removing the ability to challenge confidentiality designations after the conclusion of the litigation. (DA 28–29; JA 307–308). Nevertheless, the district court's carefully worded October 30 order from the bench required the return of confidential documents or destruction of copies only to the extent that the Confidentiality Order so requires, which it does not require of parties. (DA 14, 16–17, 22–27).

However, the Electronic Clerk's Notes of October 31 omitted the requirement that return of documents be pursuant to the Confidentiality Order. (DA 1). Thus, without due process, notice to Defendants, or opportunity to be heard, the Confidentiality Order to appearances was altered to the prejudice of Defendants. But the district judge's order takes precedence over the clerk's notes.

Plaintiffs never appealed the Confidentiality Order issued by the magistrate judge, either within 10 days of issuance, or within 30 days after dismissal. They cannot now seek its alteration by way of Defendants' appeal.

B. The District Court Erred by Depriving Defendants of Property Without Due Process

Defendants paid $3,534.59 for MidCountry's records which, because of Plaintiffs' obstructionism, were ordered to be produced under seal to the district magistrate for review to ensure that they complied with his yet unissued Confidentiality Order. (JA 263–264). Defendants to date have never seen these bank statements.

The records belong to MidCountry, not Plaintiffs. *United States v. Miller,* 425 U.S. 435, 440 (1976). MidCountry never objected to their production. (RA 63-27 p. 5). These records fully comply with the terms of the Confidentiality Order, since that order did not prohibit discovery of such records. (DA 22–27).

These subpoenaed records do not include copies of deposit slips or checks (DA 41), and thus can't disclose sensitive matters such as the purchase of medical services. Plaintiffs' paranoia over Defendants' seeing these bank statements can only be explained if these records disclose large transfers from 3ABN to Shelton, or evidence of a $10,000 "love gift" from 3ABN to Tommy Shelton, a transaction Shelton and Tommy Shelton denied ever occurred. (EX 127, 138, 514).

Both Plaintiffs lack standing to designate as confidential, or request the

return of, MidCountry (and Remnant) records pertaining to DLS Publishing, Inc. Counsel for DLS, MidCountry, and Remnant have never entered an appearance in *3ABN v. Joy.*

Depriving Defendants of $3,534.59 without requiring reimbursement by Plaintiffs, without a hearing, without reading Defendants' brief, and without giving Defendants adequate opportunity to be heard, constitutes loss of property without due process. Due process is required under the Fifth Amendment.

C. The District Court Erred by Imposing Terms That Threaten the Defendants' First Amendment Freedoms of Speech and Press

If good cause is shown, information obtained in discovery by the press that isn't yet part of the public court record may be covered by protective orders that prohibit disclosure, provided the press can disseminate the same information if obtained by other means. *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33–34, 37 (1984). Such orders are constitutional since liberal discovery may uncover irrelevant information that would damage reputation and privacy if publicly released, and the government has a substantial interest in preventing such abuse. *Id.* at 35. The protective order in *Seattle Times*, not the parties, identified in detail the information covered, information Rhinehart hadn't put at issue in his complaint. *Id.* at 27 fn.8, 23.

In contrast, Plaintiffs put Shelton's royalties and private inurement, and 3ABN's firing of the whistleblowers at issue in their complaint. (JA 37–39). The

Remnant documents and "Thompson Memo" would certainly have become public record at trial.

Under Fed.R.Civ.P. 26(c)(1), protective orders require that good cause be shown. *Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 789–790 (1st Cir.1988). Litigants have a constitutionally protected right to disseminate discovery information absent a valid protective order. *Id.* at 780–781.

The Confidentiality Order left the matter of designating documents as confidential to the good faith of the parties, and did not make a finding of good cause; the order clearly protected non-public business and commercial information, trade secrets, and nothing more. (DA 22–23).

The government has a substantial interest in preventing a party's abuse of protective orders when that abuse restricts free speech and press rights. The Confidentiality Order's refusal to impose a return requirement upon parties in *3ABN v. Joy*, and the post-case challenge provisions of ¶ 7 of that order wisely provide a way to avoid such abuse.

Plaintiffs never demonstrated good cause for any specific documents, whether they be the book *TCTR*, Remnant documents pertaining to payments to DLS, invoices for sticky notes, the Thompson Memo, or any other documents. The burden of proof for continued protection of any of these documents is upon Plaintiffs, and absent that showing, these documents should not receive judicial protection. *In re Agent Orange Product Liability Litigation*, 821 F.2d 139, 145-47

(2d Cir. 1987).

Federal and state laws require charities like 3ABN to be accountable to the public from which they obtain their support. (*supra* 26). For obvious reasons, Plaintiffs wish to evade such accountability and operate in secrecy.

Plaintiffs intend to harass Defendants if Defendants disclose anything found in confidential documents, even if Defendants obtain the same information from other sources. (*supra* 3). Invoking ¶ 7 of the Confidentiality Order minimizes that harassment, and requires Plaintiffs to show good cause as required by Fed.R.Civ.P. 26(c)(1).

Therefore, the parties must not be forced to return documents when the Confidentiality Order doesn't so require, and must be free to invoke ¶ 7 of that order.

CONCLUSION

For the reasons and facts outlined above, Joy and Pickle hereby seek the reversal of the order(s) granting 3ABN and Shelton's motion for voluntary dismissal. By such reversal Joy and Pickle seek the outright denial of that motion as to one or both Plaintiffs, and, to the extent that dismissal is not denied, that dismissal be with prejudice and include curative conditions that preserve evidence, protect Defendants, prevent exhaustion of Defendants' resources, do not revoke ¶ 7 of the Confidentiality Order, and do not impose the Confidentiality Order's non-party return requirements upon parties.

Respectfully submitted,

Dated: February 18, 2009

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,995 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using OpenOffice 3.0.0 in 14pt Times.

Dated: February 18, 2009

/s/ Bob Pickle
Bob Pickle

CERTIFICATE OF SERVICE

I, Bob Pickle, hereby certify that on February 18, 2009, I served a copy of this brief and addendum, with accompanying appendix and appendix exhibits on the following represented parties by way of First Class U.S. Mail, postage paid:

John P. Pucci
Attorney for Danny Lee Shelton, individually,
and Three Angels Broadcasting Network, Inc.
Fierst, Pucci & Kane, LLP
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Northampton, MA 01060

I also hereby certify that I served nine paper copies and one CD copy of this brief and addendum, with five paper copies of the accompanying appendix and appendix exhibits, on the Clerk of the Court of Appeals by way of First Class U.S. Mail, postage paid.

Dated: February 18, 2009

/s/ Bob Pickle
Bob Pickle

No. 08-2457

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

THREE ANGELS BROADCASTING NETWORK, INC.,
an Illinois Non-Profit Corporation;
DANNY LEE SHELTON,

plaintiffs-Appellees,

v.

GAILON ARTHUR JOY; ROBERT PICKLE,

defendants-Appellants.

On Appeal from the United States District Court
for the District of Massachusetts
Case No. 07-40098

DEFENDANTS' ADDENDUM — PAGES DA0001–DA0082

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DEFENDANTS' ADDENDUM
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Subject: Activity in Case 4:07-cv-40098-FDS Three Angels Broadcasting v Joy, et al., Order on Motion to Dismiss
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United States District Court

District of Massachusetts

Notice of Electronic Filing

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Case Name:	Three Angels Broadcasting v Joy, et al.,
Case Number:	4:07-cv-40098
Filer:	
Document Number:	No document attached

Docket Text:
Electronic Clerk's Notes for proceedings held before Judge F. Dennis Saylor, IV: Status Conference held on 10/30/2008. Case called, Counsel and dft's pro-se appear for status conference, Court hears arguments of counsel re: motion to dismiss, Court rules granting [120] Motion to Dismiss without prejudice; The Court orders dismissal with conditions stated on the record, Any renewed claims brought by plaintiff shall be brought in this division in the District of MA. as ordered on the record, Court orders all confidential documents returned, All subpoenas are ordered moot, Records in possession of Mag. Judge will be returned, Court orders any motion for costs to be filed by 11/21/08. Order of dismissal to issue, (Court Reporter: M. Kusa-Ryll.)(Attorneys present: Simpson,Pucci/Dft's Joy and Pickle - Pro se) (Castles, Martin)

4:07-cv-40098 Notice has been electronically mailed to:

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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Three Angels Broadcasting, et al.,
Plaintiffs,

V.

Gailon Arthur Joy and Robert Pickle,
Defendants,

CIVIL ACTION

NO. 07-40098-FDS

ORDER OF DISMISSAL

Saylor, D. J.

In accordance with the Court's Order on 10/30/08 , granting the plaintiff's motion to dismiss, it is hereby ORDERED that the above-entitled action be and hereby is dismissed without prejudice.

By the Court,

11/3/08
Date

/s/ Martin Castles
Deputy Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Three Angels Broadcasting Network, Inc., and Danny Lee Shelton, Plaintiffs,	)	
vs.	)	Case No. 07cv40098-FDS
Gailon Arthur Joy, and Robert Pickle, Defendants.	)	

BEFORE: The Honorable F. Dennis Saylor, IV

Status conference/Motion for Voluntary Dismissal

United States District Court
Courtroom No. 2
595 Main Street
Worcester, Massachusetts
October 30, 2008

Marianne Kusa-Ryll, RDR, CRR
Official Court Reporter
United States District Court
595 Main Street, Room 514A
Worcester, MA 01608-2093
508-929-3399
Mechanical Steno - Transcript by Computer

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P R O C E E D I N G S

THE CLERK: Case No. 07-40098, Three Angels Broadcasting versus Joy.

Counsel and defendants, please identify yourself for the record.

MR. SIMPSON: This is M. Gregory Simpson, on behalf of the plaintiffs, Three Angels Broadcasting Network and Danny Lee Shelton.

MR. PUCCI: And John Pucci here in chambers, on behalf of the same parties.

THE COURT: Good afternoon.

MR. JOY: Gailon Arthur Joy, pro se.

THE COURT: Good afternoon.

MR. PICKLE: And Bob Pickle, pro se.

THE COURT: All right. Good afternoon.

All right. This is -- it was originally scheduled as a status conference in this case. I now have pending a motion for a voluntary dismissal.

Do the defendants wish to be heard on that? I've read the papers.

Mr. Pickle and Mr. Joy?

MR. JOY: Yes, sir.

THE COURT: Who -- who's this?

MR. JOY: I'm sorry. This is Mr. Joy, sir.

THE COURT: Yes.

MR. JOY: Your Honor, I think you'll find that we have filed an opposition, including a memorandum and affidavits along with exhibits.

THE COURT: When was that filed?

MR. JOY: It was --

THE COURT: Oh, I'm sorry. Yes, I did see it. I'm sorry. Yes.

MR. JOY: I'm sorry.

THE COURT: Yes. Okay.

MR. JOY: In summary, the difficulty here is that this is really just another maneuver on the part of the plaintiffs to very simply avoid their duty of discovery, and they're doing it at a point in the case where, frankly, we should have been close to a completion, which the case law clearly indicates is an inappropriate situation and prejudices the defendants' scenario, particularly reserve the right to relitigate at a future point.

So, for that reason, we feel it's imperative that the -- that the -- obviously, the dismissal be denied to preserve our rights, obviously, and to prevent the -- the great prejudice that has incurred to us, if this had to be relitigated in the future, which frankly we believe it's going to have to be.

THE COURT: All right. Anything else?

MR. SIMPSON: This is Mr. Simpson --

THE COURT: Well, before I --

MR. SIMPSON: Sure.

THE COURT: Anything else from the defendants?

MR. JOY: Yes.

THE COURT: Okay.

MR. JOY: I think -- you know, I think we've outlined specifically our basis for that in the memorandum, in support -- or pardon me -- in our opposition, and it's quite exhaustive. I'm sure you don't want us to go through that, but in any event, I think it pretty well outlines the case law as well as the basis for the case law applying in this particular case where it's already over 18 months in, and we're getting ready for trial.

THE COURT: All right. Mr. Simpson, why should this not be with prejudice, if I dismiss it?

MR. SIMPSON: Well, let me just begin by saying that the -- that I think that is the issue whether it should be with or without prejudice. If this is -- to my reading of the case law, it's a factor of the test, so it's within the discretion of the court to determine whether it should be with or without prejudice.

The case looks a lot older than it really is, because it was filed in May of '07, and you had us submit interrogatories and some documents exchanged and mandatory

discovery exchange; and then Mr. Joy filed for bankruptcy, and there was a stay in effect until almost December; and then there was a four-month period where we were working on getting that confidentiality order out. When that was finally signed, and, in fact, it was already April, and then there has been a period of document discovery since then, and depositions were scheduled, and they were canceled, because there was -- because the document exchange had not been completed.

So, it's not as old as -- as the date of filing would indicate. We're actually at the preliminary stages in terms of discovery. The factor test, if you run through it, and I'm sure you will, would indicate that it should be, I think, without prejudice. If it's with prejudice, I don't think the litigation ends, because there has been repeated threats, including in the brief that was just filed today by Mr. Pickle and Mr. Joy, that there will be a malicious prosecution counterclaim or a new lawsuit filed raising that issue, Judge; and so if the case is dismissed without prejudice, there would -- the elements of that tort would not be present, because one of the elements of a malicious prosecution tort is dismissal of the underlying -- there's a favorable resolution of the underlying lawsuit.

So, if the lawsuit is resolved with prejudice, that could give them one of the elements necessary to continue this -- this dispute, and the dispute would not end.

The question, I believe, for the court is a legal matter; and so, that would be a strategic or a tactical reason why the case would not end. There would still be litigation if the case were not dismissed without prejudice.

As a legal matter, Rule 41 is concerned with alleviating any prejudice to the defendants, and the Court is empowered to impose such terms and conditions as it feels will alleviate any prejudice that results from a dismissal. So, the question really is whether dismissal with prejudice is necessary to alleviate any prejudice.

And the cases say that in talking about prejudice, we're not talking about -- we're not talking about the prospect of a second lawsuit. That's not the kind of prejudice that the rule is concerned with, nor is it concerned with a technical advantage to the plaintiff. That should not bar dismissal. That's not the kind of prejudice we're talking about in legal prejudice; that is, are they worse off as a legal matter if it's dismissed with prejudice versus without prejudice. In other words, is it necessary to dismiss it with prejudice in order to alleviate them from legal prejudice, and the answer to that is just simply no. They are no worse off than they were before the lawsuit began. They're in exactly the same legal position whether -- in fact, they're in a better position legally than when the case began, because the three years statute of limitations for defamation has expired as to some of

the, if not all, of the original statements that they've made.

So, there is no legal prejudice, which is what the rule is concerned about, if the case were to be dismissed without prejudice.

THE COURT: Well, my concern, obviously, is I -- I strongly encourage both sides to, if that's what they want to do, to walk away from this dispute in whole or in part. My concern, obviously, is I don't know, and I'm just -- I'm not stating this because I -- I mean this in a pejorative way, or I don't -- I have any particular reason to distrust you, but I'm concerned that the same claim or -- or -- or a similar claim could simply be brought in some other forum, and that's the most obvious danger to me is that there's, you know, the possibility of some tactical issue going on here where plaintiffs decide they'd rather be in a different court.

MR. PICKLE: Your Honor, could I address that?

THE COURT: Well, let me hear from Mr. Simpson first.

MR. SIMPSON: Well, I -- I can assure you that that's not the concern. The only concern is that these gentlemen have indicated throughout and in the most recent filing that they intend to sue us for malicious prosecution, and they said that they were going to file counterclaims in this lawsuit, and they said then they were going to -- now, they said they're going to commence a separate lawsuit, but if we don't have at least a prospect of raising affirmative claims against them, I think

that would keep them in check. Maybe it would keep them in check. They would have to think twice about filing a lawsuit. I can tell you that there is no forum shopping going on, and I think Rule 41 also has some -- something to say about that.

The costs -- if we bring a second lawsuit after dismissing the first one, costs would ordinarily be imposed. We would have to reimburse them for all of that that occurred in the first lawsuit. So, there's -- so, there's mechanisms for dealing with that, and I think we would have quite a bit of explaining to do to a subsequent court if we were -- if we were to pull -- pull a fast one, and I can just tell you that that's not -- that's not the intent.

THE COURT: All right. I'm sorry. Do one of the defendants wish to be heard?

MR. PICKLE: Yes, your Honor. This is Bob Pickle.

THE COURT: Yes.

MR. PICKLE: In our memorandum, we've outlined eight different factors, I believe, that are supposed to be taken into consideration regarding legal prejudice or that different circuits have taken into consideration. One of those is adequacy of the plaintiffs' explanation for the need to dismiss; and one of the explanations they gave is that they've achieved one of the goals of their -- their suit. That is just one -- one aspect that we bring out in the memorandum. And they say that through the bankruptcy, they bought the domain

names, save3abn.com and save3abn.org. What they don't tell the Court is that there are at least 16 times as many save3abn websites now than when the plaintiffs filed suit, and these other websites were in operation prior to their purchase of save3abn.com.

And so I do have definite concern of a dismissal of this case without prejudice, and their referencing, well, you know, they say that, you know, a technical -- if they gain a technical advantage, that shouldn't be an obstacle. You know, that just raises red flags to me. And what you express about them raising the same claims in another forum, I really don't want to face that. I'd like to have the -- these issues resolved once and for all.

MR. SIMPSON: May I just say, your Honor --

THE COURT: Yes.

MR. SIMPSON: -- I wouldn't oppose the court imposing a restriction that if we were to bring an affirmative claim arising out of the same events that it would have to be brought in the same court. That would be -- that would seem perfectly fine and appropriate as a remedy as a -- to make sure we don't do that. I think that if -- if the plaintiffs -- I mean the defendants here, Mr. Pickle and Mr. Joy, were to bring a separate lawsuit for malicious prosecution, it probably would have to be brought in state court, because they wouldn't meet -- well, I'm just thinking they wouldn't have diversity or

jurisdiction. Maybe they would be able to get jurisdiction in the federal court. So, it's not -- it's not -- if we were -- if the plaintiffs were to want to raise their defamation claims by way of a counterclaim, as a defensive matter, we couldn't guarantee that it would be in the same court. It would be in your court, but I think if we -- I think the court could impose a restriction on dismissal that if we were to refile the same claims or any claims arising out of the same operative set of facts, it would have to be brought in the same court. I think that would be appropriate.

THE COURT: All right. Here's what I'm going to do. I'm going to grant the motion. I'm going to dismiss it without prejudice and with some conditions, which include the condition that any claims brought by the plaintiffs, based on the same facts and circumstances or -- or -- or nucleus of operative events may only be brought in the Central Division of Massachusetts, but let me be more formal about that.

The motion for voluntary dismissal is granted. I order that this lawsuit be dismissed without prejudice. I make no finding of any kind as to the merits or lack of merits of any of the claims or factual defenses set forth in the pleadings, and I'm dismissing the claim principally based on the representation by the plaintiff that there is no longer any purpose for the litigation, because plaintiffs do not believe that they can accomplish -- or achieve any meaningful relief

based on the facts and circumstances as they now exist, including, but not limited to, the bankruptcy of one of the defendants.

I am imposing this dismissal with the condition that any claim or claims brought by plaintiffs based on the same or similar facts and circumstances may only be brought in the Central Division of the District of Massachusetts, so that if this lawsuit in some ways comes back to life, it will be in front of me, and I'll have all the facts and circumstances at my disposal at that point and can make such orders as I think are just under the circumstances.

I will order that all materials produced in discovery that were designated as confidential under the confidentiality and protective order issued in this case on April 17th will be returned, as set forth in that order.

Destruction of the documents will only be permitted if consistent with the terms of the order; and similarly, any photocopying or other copying of any such materials will only be permitted if permitted under that order.

Any pending third-party subpoenas are deemed moot, and the party will -- any party having issued such a third-party subpoena will take reasonable steps to notify the recipient of the subpoena that the lawsuit has been dismissed, and the subpoenas are no longer in effect.

MR. PICKLE: Your Honor, could I -- could I --

THE COURT: Let me -- let me just finish. And any records that were delivered under seal and that are in the custody of the magistrate judge shall be returned to the party that produced those documents.

Yes, sir. Is this Mr. Pickle?

MR. PICKLE: Yes, it is.

THE COURT: Yes.

MR. PICKLE: Your Honor, one of the concerns that the case law brings up is that -- see -- a voluntarily dismissal without prejudice, one of the questions is well, will there be plain legal prejudice to the defendants, and one of the things that is, like, undue expense.

We've had -- and one of the factors they look at is amount of time and effort and expense the defendants have expended. We bring this out in our memorandum. Okay. What the -- what the plaintiffs are doing -- see, our basis for counterclaim --

THE COURT: Hold on. Hold on, Mr. Pickle. There's no counterclaim filed, as I understand; is that right?

MR. PUCCI: Right.

THE COURT: In this case.

MR. PICKLE: That is correct, your Honor.

THE COURT: You know, and -- and, you know, whether you have some future claim against the plaintiffs, I make no comment on of any kind whatsoever.

MR. PICKLE: It is --

THE COURT: In terms of -- just let -- let me, if I can. Just in terms of your costs and expense and attorney's fees, my understanding is that but for a brief appearance by Mr. Heal, I think, at the beginning of the litigation, you've been proceeding pro se; and let me add as a further condition that I will at least permit defendants to seek recovery of reasonable costs, fees, expenses -- reasonable cost of attorney's fees or expenses, if they file something within 21 days of the date of this order. I'm not promising that I will allow those to be paid, and I'll permit plaintiffs to oppose it, but I will give you the opportunity to make that argument formally and with a specific itemized detailing of your costs and expenses.

MR. PICKLE: Okay. Your Honor, if the discovery in this case and work product is not transferable to -- to the other -- the future actions, either by the plaintiff or ourselves, that would prejudice the defendants.

THE COURT: Well, it's -- it is transferable, unless it's subject to the confidentiality order. If it's subject to the confidentiality order, you have to return it, or do whatever the order says you're supposed to do with it; and, you know, you have gained presumably a certain amount of information. You're not required to erase it from your brain, and you can use it consistent with the terms of the order

as -- as may be permitted by that order, but that's --

MR. PICKLE: That would mean, your Honor, that we would have to spend months and months litigating again to get the documents from Remnant, for example.

THE COURT: There is going to be no lawsuit pending. You'll have -- we'll have to wait and see how that plays out and in what court.

MR. PICKLE: And the one other thing, your Honor, is that the MidCountry Bank records, as far as I know, they were never designated confidential by MidCountry Bank, and it cost us $3,500 to get those.

THE COURT: Again, I'm giving you 21 days to file something with me setting forth what you believe are your reasonable costs, expenses, and attorney's fees incurred in this litigation.

Again, I'm not promising I'm going to pay any of them, or permit them to be paid, but I will entertain any filing you wish to make.

MR. JOY: Your Honor, are you looking for -- this is now Gailon Joy again.

Are you looking for our motion's total cost or --

THE COURT: Please characterize it as a motion, so that it -- under the computer system, it -- it's flagged as something requiring my action.

MR. JOY: Thank you.

THE COURT: But you can, you know, designate it however you wish or think it's appropriate, and I'll permit plaintiffs to oppose whatever it is you file, and I'll make whatever decision I think is right under the circumstances. I'll simply give you that opportunity is all I'm doing at this point. Okay?

And if I do award -- decide to award any kind of costs or expenses or fees, it will obviously be a further condition of the order of voluntary dismissal, but we'll -- we'll take that up as it comes.

MR. SIMPSON: Thank you, your Honor.

THE COURT: And I'll retain jurisdiction for that purpose.

Okay. All right. If there's nothing further, then we'll stand in recess.

MR. SIMPSON: Nothing further from the plaintiffs.

THE COURT: Okay.

MR. JOY: Your Honor, I do have another question. I was noticing this week, I think it was, that there are three items on the docket that aren't visible on Pacer. Nos. -- I think it's Nos. 22, 28, and 88, and at some point are those unsealed?

THE COURT: Not unless someone -- if they're sealed, they're not going to be unsealed, unless someone moves to unseal them.

MR. JOY: Thank you, your Honor.

MR. PICKLE: And, your Honor, this is Bob Pickle again.

Attorney Simpson told me on Friday, the 17th -- well, he called me up and made a settlement proposal, and one thing he said was that if we didn't agree, you know, to settle, that one thing that the plaintiffs could do is to file a motion to dismiss, and it would be just kind of automatic, and there wouldn't be anything further we could do about it. So, I point blank asked him, Are you going to file a -- a motion to dismiss? And he told me no. And then six days later, he went ahead and filed it, and it just took us by surprise.

In our opinion, he didn't follow -- and he never talked to Mr. Joy about it at all. In our opinion, he did not comply with local Rule 7.1.

MR. SIMPSON: May I address that, your Honor?

THE COURT: Very -- very briefly, yes.

MR. SIMPSON: Just, it's a certain Alice in Wonderland quality to this whole litigation and hearing my conversations with Mr. Pickle translated back to you, your Honor, that's not at all what the conversation was like.

I read the rule to Mr. Pickle, Rule 41, including the terms and conditions, and we discussed whether there was any possible -- possible basis on which they would agree to the dismissal of the lawsuit. He said that he would speak with Mr.

Joy over the weekend, get back to me on Monday, if there was an interest; and he didn't get back to me and continued to move forward with the lawsuit.

THE COURT: All right. All right.

MR. SIMPSON: So that's -- that's all I want to say.

THE COURT: Okay. I've heard enough. My order will issue. It will be an electronic order, as indicated, and we'll stand in recess.

Thank you.

MR. SIMPSON: Thank you, Judge.

MR. JOY: Thank you.

MR. SIMPSON: Bye-bye.

(At 3:33 p.m., Court was adjourned.)

C E R T I F I C A T E

I, Marianne Kusa-Ryll, RDR, CRR, Official Court Reporter, do hereby certify that the foregoing transcript, consisting of 18 pages, is a true and accurate transcription of my stenographic notes in Case No. 07cv40098-FDS, Three Angels Broadcasting Network, Inc., and Danny Lee Shelton versus Gailon Arthur Joy and Robert Pickle, before F. Dennis Saylor, IV, on October 30, 2008, to the best of my skill, knowledge, and ability.

/s/ Marianne Kusa-Ryll

Marianne Kusa-Ryll, RDR, CRR

Official Court Reporter

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

THREE ANGELS BROADCASTING NETWORK, INC., DANNY LEE SHELTON,
Plaintiff

v.

GAILON ARTHUR JOY
ROBERT PICKLE,
Defendants

CIVIL ACTION NO. 07-40098-FDS

CONFIDENTIALITY AND PROTECTIVE ORDER

THE ABOVE ENTITLED MATTER came before me for hearing on March 7, 2008 upon Plaintiffs Three Angels Broadcasting Network, Inc. and Danny Lee Shelton's Motion for Protective Order (Document #40). On March 10, 2008, I invited both parties to submit a proposed Confidentiality Order. Based upon the pleadings, the written and oral submissions of the parties, the proceedings before the Court, and the file and record in this matter, this Court hereby ORDERS that, pursuant to Rule 26(c) of the Federal Rules of Civil Procedure, the following protections, directives, and procedures shall govern the discovery and production of documents, information and materials by any person or entity in relation to this case.

This Order governs all documents and information produced, or to be produced by any party or third party in connection with this litigation, including documents and things produced or to be produced, any answers to interrogatories, responses to requests for admissions, and deposition and other testimony disclosed through discovery in this case (the "Subject Discovery Materials"). The Subject Discovery Materials will be used for no other purpose than this

litigation. "Confidential Information" as used herein means any type or classification of information in any of the Subject Discovery Materials which is designated as **"CONFIDENTIAL"** by one of the parties, or a third party (the "designating party"), in accordance with this Order.

Confidential Designation

1. Whenever the designating party determines that a disclosure of the Subject Discovery Materials will reveal matters that such party believes in good faith are not generally known or readily available to the public, and that such party deems to constitute proprietary information, confidential business or commercial information, and/or trade secrets relating to its business, such party has the right to designate such information as confidential. In the case of written information, this designation must be made by marking the page or pages where such Confidential Information is contained, **"CONFIDENTIAL"**, either prior to its disclosure to the other party (the "receiving party"), or at the time a copy(ies) of such written information is provided to the receiving party.

Any party wishing to designate a document as Confidential Information shall first discuss with the requesting party whether the production of the requested information in redacted form would be satisfactory, or if some other accommodation regarding the document(s) can be reached. If after consultation, the parties are unable to come to agreement regarding the production in redacted, or other form, they shall confer per Local Rule 37.1. Thereafter, the requesting party may move to compel the production of the document(s) at issue and the

responding party shall file the documents at issue with the court under seal per the provisions of Local Rule 7.2. as part of their opposition to the motion to compel.

Depositions

2. In the case of a deposition or other testimony, testimony containing Confidential Information shall be designated **"CONFIDENTIAL"** either at the time of testimony or within two weeks of receipt of the written transcript. Until such designations are made, the transcript must not be disclosed by the non-designating party to persons other than those persons named or approved according to Paragraph 4 herein.

At any time during the taking of a deposition on oral examination, counsel for the designating party may state that a particular line of questioning should be treated as **"CONFIDENTIAL"** as in the case of written disclosures of information covered by Paragraph 1 above. Counsel for the parties shall then determine whether the line of questioning should not be carried out at that particular time, or whether it should be carried out with the following conditions:

a. The reporter may be instructed to transcribe the questions and answers separate from the transcript for the remainder of the deposition, which pages shall be marked as **"CONFIDENTIAL"**.

b. During any time that the line of questioning involving Confidential Information is being followed, any and all representatives of the receiving party other than counsel, parties, and outside experts subject to the terms of this Agreement as evidenced by the signing of a document in the form of **Exhibit A** attached hereto and served on opposing

counsel prior to disclosure of such Confidential Information may be excluded from the deposition.

c. Any other conditions mutually agreeable to the parties to protect the confidential status of the information.

Use of Confidential Information

3. If any non-designating party or their counsel intends to use at trial, or for the purpose of any motion filed with the Court, any documents, interrogatory answers, deposition testimony, or other discovery responses which have been designated as Confidential Information, he/she shall so advise designating party's counsel seven (7) days prior to such use, and counsel for all parties shall confer in an effort to agree upon a procedure to maintain the confidentiality of such Confidential Information. If no agreement is reached, the matter shall be submitted to the Court by the party opposing the use of Confidential Information by motion with the material at issue filed under seal per the provisions of Local Rule 7.2.

Use of Information Designated "Confidential"

4. All Subject Discovery Materials that are received by either party pursuant to pretrial discovery in this action that have been designated by the other party as containing or comprising Confidential Information must be retained by the receiving party and must not be furnished, shown or disclosed to any other person, except that, and solely for the purposes of this action, any such Confidential Information may be disclosed by counsel to "Qualified Persons." Qualified Persons as used herein means:

i. the Board of Directors, officers or internal experts of receiving party, on a strict need-to-know basis;

ii. legal counsel involved in the present action, including in-house counsel for each party;

iii. any litigation assistant or paralegal employed by and assisting such counsel, and stenographic, secretarial or clerical personnel employed by and assisting such counsel in this action;

iv. any court reporter or typist recording or transcribing testimony given in this action; and

v. outside experts subject to the terms of this Agreement as evidenced by the signing of a document in the form of **Exhibit A** attached hereto and served on opposing counsel prior to such disclosure of Confidential Information.

5. In the event that counsel for the receiving party finds it necessary to make a disclosure of Confidential Information pursuant to Paragraph 3 above to a person other than a Qualified Person, including designated experts who are assisting counsel in the prosecution or defense of this action and who shall not otherwise be employed by or be a consultant to the receiving party, counsel for such party must, no less than ten (10) days in advance of such disclosure, notify the producing party's outside trial counsel in writing of:

i. the Confidential Information to be disclosed; and

ii. the person(s) to whom such disclosure is to be made.

The producing party or their outside trial counsel has ten (10) days after receipt of the written notice within which to object in writing to the disclosure and, in the event objection is made, no disclosure will be made without Court Order. If no objection is made or if an Order of Court permits the disclosure, counsel for the receiving party must, prior to the disclosure, inform the individual to whom the Confidential Information is to be disclosed as to the terms of this

Agreement, and have the individual acknowledge this in writing by signing a document in the form of **Exhibit A** attached hereto, the executed document to be served on the producing party within ten (10) days of the signing, acknowledging that he/she is fully conversant with the terms of this Agreement and agrees to comply with it and be bound by it.

6. If a producing party inadvertently produces to a receiving party any document that it deems confidential without designating it as Confidential Information, upon discovery of such inadvertent disclosure, the producing party must promptly inform the receiving party in writing, and the receiving party shall thereafter treat the document as Confidential Information under this Stipulation.

7. Neither party is obligated to challenge the propriety of any Subject Discovery Materials designated as Confidential Information, and a failure to do so in this action does not preclude a subsequent attack on the propriety of the designation.

8. This Agreement shall not preclude any party from using or disclosing any of its own documents or materials for any lawful purpose.

/s/Timothy S. Hillman
TIMOTHY S. HILLMAN
MAGISTRATE JUDGE

April 17, 2008

EXHIBIT A

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

*, Plaintiff v. *, Defendant	CIVIL ACTION NO.

I, _____, hereby declare under penalty of perjury that:

I confirm that I have read the Stipulation of Confidentiality and Protective Order (the "Stipulation") entered in this case.

I hereby confirm that:

a. I will maintain the confidentiality of the Confidential Information in accordance with the Stipulation, and will use, store and maintain such documents in accordance with the Stipulation so as to prevent the disclosure of such Confidential Information to any unauthorized person.

b. I will use any Confidential Information imparted to me solely for the purpose of the above litigation, and I will make no commercial use or any other litigation or non-litigation use of any part of such Confidential Information and shall not assist or permit any other person to do so.

c. Upon the earlier of: (i) demand of counsel of record for 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 all 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.

I agree to be fully bound by the Stipulation and I hereby submit to the jurisdiction of the United States District Court for the District of Massachusetts, for purposes of enforcement of the Stipulation and this undertaking.

Dated: _____

_____
Signature

Address:

issue to be decided by this Court, as well as a statement of his position as to each contested request, with supporting authority. Plaintiffs' exercise is merely an attempt to illustrate the excessively broad and unduly burdensome nature of Pickle's requests and why Plaintiffs cannot respond until the requests are narrowed to seek *relevant* information or information that is reasonably calculated to lead to the discovery of admissible evidence.

For example, Pickle's Requests seek virtually all of 3ABN's financial, accounting, bookkeeping and auditing records from 1997 to the present, a request that implicates hundreds of thousands of pages of documents. He also seeks Plaintiff Shelton's personal banking records going back 10 years. Yet, based upon the defamatory statements set forth in Plaintiffs' Complaint, only the following financial and administrative documents are relevant and subject to (albeit confidential) production:

1. Correspondence, Board or other documents evidencing that moral, ethical and financial allegations against Plaintiffs were brought to Plaintiffs' attention and were ignored, buried or otherwise improperly disregarded by them. [Complaint, ¶ 46(a)].
2. Documents evidencing or related to the following financial transactions and operations by 3ABN:
    a. The purchase and sale of any vans [Complaint, ¶ 46(b)];
    b. the purchase of furniture with 3ABN funds and the subsequent sale of that furniture [Complaint ¶¶ 46(c) and 46(d)];
    c. 3ABN donations to Cherie Peters' ministry and records of any orders issued by 3ABN's Board prohibiting such donations [Complaint ¶ 46(f)];

d. Book royalties earned by and paid to 3ABN or erroneously or improperly paid to Danny Shelton [Complaint ¶ 46(h)];

e. Use of the corporate plane [Complaint ¶ 46(j)];

3. Documents evidencing or relating to the governance and oversight of 3ABN's financial affairs (budgeting, expenditures and financial filings) [Complaint ¶¶ 46(e) and 46(k)] and administrative activities [Complaint ¶ 48(c), 48(a), 50(d), 50(f), 50(h)] by its Board of directors, such as Corporate by-laws, Board agendas, Board Meeting Minutes, Employment handbooks and job descriptions;

4. The public record in Danny Shelton's divorce proceedings [Complaint ¶¶ 46(h), 46(i), 50(c), 50(e), 50(i)]

5. Documents related to negotiations governing the occurrence, rules and procedures for the proposed dispute-resolution process involving Adventist-Laymen Services, Inc. (ASI) [Complaint ¶¶ 48(d), 50(a), and 50(b)]; and

6. Formal IRS or Department of Justice findings and determinations related to Plaintiffs' compliance with the Internal Revenue Code, Formal EEOC or Department of Labor findings and determinations related to Plaintiff's compliance with state and federal employment laws, criminal convictions for state or federal tax law or employment law violations, civil judgments for tax-law or employment-law related torts, and documents evidencing direct or indirect payments by 3ABN to its Board Members [Complaint ¶¶ 48(b), 48(g)],

and the single defamatory statement remotely related to Danny Shelton's personal finances would make relevant only the title, purchase documents and payment information for a Toyota Sequoia automobile [Complaint ¶ 50(g)]. Moreover, no affirmative defenses or counterclaims

MOTION

Plaintiffs Three Angels Broadcasting Network, Inc. and Danny Shelton hereby move the Court for an Order as follows:

1. Limiting the scope of discovery to relevant subject matters according to the claims and defenses of the parties;

2. Denying all discovery requests that are overbroad, or that seek discovery that is irrelevant, privileged, unreasonably cumulative or duplicative, that can be obtained from other sources that is more convenient, less burdensome or less expensive, or where the burden or expense of the proposed discovery outweigh its likely benefit;

3. Directing that all future discovery requests identify with particularity the transactions and events of which Defendants seek discovery, including the approximate date, the individuals involved in that transaction, and the assets / items / persons affected by that transaction or event, and that when such specificity is not possible, that Defendants' requests be narrowed to a relevant and reasonable time-frame of January 2001 through January 2007;

4. Denying Defendants' requests for identifying information of donors and church leaders;

5. Directing both parties to submit proposals to Magistrate Hillman for review to facilitate a discovery plan that will allow discovery to proceed while removing irrelevant donor and church leader identifying information;

something helpful will turn up," *Mack*, 871 F.2d at 187, and Defendants' fishing excursion here should likewise not be allowed. In the absence of relevance, permissible discovery in this case should be restricted to the 24 subject areas that Plaintiffs have put in issue. Anything more would be an abuse of the discovery process.

To rectify the irrelevant subject matters contained in Defendants' discovery requests, Plaintiffs respectfully request that the Court order that

1. Defendants' Discovery Requests for irrelevant or privileged information are denied.

2. That all future discovery requests identify with particularity the transactions and events of which Defendants seek discovery, including the approximate date, the individuals involved in that transaction, and the assets / items / persons affected by that transaction or event; and

3. That when such specificity is not possible, that Defendants' requests be narrowed to a relevant and reasonable time-frame– e.g., January 2001 through January 2007.

B. "Plaintiff-related Issues."

Contributing to the overbreadth and/or irrelevance of information sought by the subject Requests, is Defendants' definition of "***Plaintiff-related Issues,***" which contains 32 subject matters (numbered paragraphs 16 (a) through (ff) in Pickle's definitions contained in his First Set of Document Requests). By referring to irrelevant subject matters within this definition and issuing discovery requests that refer to these so-called "Plaintiff-related issues," Defendants seek to gain access to a multitude of topics that have no relevance to the claims and defenses in this action. Such irrelevant subject matters include

- Allegations of sexual conduct by Tommy Shelton (¶¶ 16(k)-(m)),
- Internal "damage control" undertaken by 3ABN in response to Defendants' activities (¶¶ 16(p)-(r)),
- Use of the 3ABN Sound Center and 3ABN music issues (¶¶ 16(y)-(z)),
- Governmental investigation issues to the degree and breadth defined by Defendants (¶¶ 16(aa)), and
- Any "administration, board and theological issues" (¶¶ 16(bb)-(ff)).

All of the above subject matters step far beyond what is alleged in Plaintiffs' complaint, and implicates, at a minimum, Document Requests 2-4, 6, 21, 26, 29, 31, 34 and 44.

To rectify the Defendants' definition of "Plaintiff-related Issues," Plaintiffs respectfully request the Court to order that:

1. Defendants' Discovery Requests pertaining to "Plaintiff-related Issues" be denied; or
2. In the alternative, that Defendants remove irrelevant subject matters from this definition and any similar definition in Defendants' subpoenas,

C. Overbroad and Overly Burdensome Requests.

Federal Rule of Civil Procedure 26(b)(2) directs that "discovery shall be limited by the court if it determines that (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; . . . (iii) the burden or expense of the proposed discovery outweighs its likely benefit . . . ." There are three manners in which Defendants' Discovery Responses are overly broad and/or burdensome.

[Excerpt for Addendum: from Plaintiffs' civil cover sheet.]

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* * * * *

JS 44 (Rev. 11/04)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I. (a) PLAINTIFFS	DEFENDANTS
Three Angels Broadcasting Network, Inc. an Illinois non-profit corp. & Danny Lee Shelton, individually	Gailon Arthur Joy and Robert Rickle
(b) County of Residence of First Listed Plaintiff Franklin, IL	County of Residence of First Listed Defendant Worcester, MA

* * * * *

[Excerpt for Addendum: from original scheduling order.]

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* * * * *

2. **Amendments to Pleadings.** Except for good cause shown, no motions seeking leave to add new parties or to amend the pleadings to assert new claims or defenses may be filed after 9/15/07 .

* * * * *

[Excerpt for Addendum: from Joy's memorandum accompanying his proposed order on form of electronic discovery.]

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* * * * *

transfer from hard disk to CD or DVD. Defendants have completed self discovery by providing a complete transfer of all hard copy documents, electronic documents and e-mails to the plaintiffs. Plaintiffs have not provided any electronic autodiscovery to defendants pursuant to 26(a).

* * * * *

[Excerpt for Addendum: from Plaintiffs' motion for a status conference.]

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* * * * *

4. To the extent such electronic equipment includes Defendant Joy's computers, as it almost certainly does, there is a very real possibility that the computer equipment, if determined non-exempt by the bankruptcy court, will be seized and sold by the Trustee in satisfaction of Mr. Joy's obligations. It is thus imperative that Plaintiffs' counsel be granted authorization to image the computer hard-drives in question as soon as can be arranged.

* * * * *

6. Defendant Joy's bankruptcy proceedings raise an additional issue regarding a potential conflict of interest. While Defendant Joy is proceeding *pro se* in this matter, he is represented by Attorney Laird Heal in the bankruptcy proceedings. Attorney Heal represents co-defendant Robert Pickle in the instant matter. Plaintiffs' counsel has contacted Attorney Heal regarding the issue of a conflict of interest arising from the fact that his client in bankruptcy, Defendant Joy, seeks to discharge any and all liability to Plaintiffs, which would have the effect of shifting full liability for damages onto his other client, Defendant Pickle. Attorney Heal has

* * * * *

[Excerpts for Addendum: from Joy's bankruptcy filing, which was filed as an exhibit for Plaintiffs' motion for a status conference.]

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* * * * *

SCHEDULE B. PERSONAL PROPERTY
(Continuation Sheet)

Type of Property	NONE	Description and Location of Property	Husband, Wife, Joint, or Community	Current Value of Debtor's Interest in Property, without Deducting any Secured Claim or Exemption

* * * * *

28. Office equipment, furnishings, and supplies.	**Desks, Chairs, Electronic equipment**	-	**2,500.00**

* * * * *

Sub-Total > (Total of this page)	**2,500.00**
Total >	**2,502.00**

Sheet 2 of 2 continuation sheets attached

* * * * *

* * * * *

Description of Property	Specify Law Providing Each Exemption	Value of Claimed Exemption	Current Value of Property Without Deducting Exemption
Office Equipment, Furnishings and Supplies			
Desks, Chairs, Electronic equipment	**11 U.S.C. § 522(d)(5)**	**2,500.00**	**2,500.00**
Other Exemptions			
Office equipment and furniture	**Mass. Gen. Laws c.235, § 34(2)**	**Unknown**	**Unknown**

* * * * *

[Excerpt for Addendum: from Pickle's opposition to Plaintiffs' motion for protective order.]

* * * * *

In order for the Defendants to prepare their defense, they must conduct adequate discovery to a) differentiate donations from gross sales revenue and shipping charges, b) identify

the reasons why donors have ceased giving since January 1, 2003, and c) verify that donors have ceased donating due to the actions of the Defendants rather than the actions of the Plaintiffs. Otherwise, one of the basic elements of the instant case will not be able to be tried.

* * * * *

[Excerpt for Addendum: from 3ABN's 1998 Form 990: section 4958 excess benefit transaction, Shelton's compensation, acknowledging house sold at loss.]

* * * * *

89a *501(c)(3) organizations.*—Enter: Amount of tax imposed on the organization during the year under section 4911 ▶_____ ; section 4912 ▶_____ ; section 4955 ▶_____

b *501(c)(3) and 501(c)(4) organizations.*—Did the organization engage in any section 4958 excess benefit transaction during the year? If "Yes," attach a statement explaining each transaction . . . . . disqualified persons during the year under

89b		X

* * * * *

* * * * *

Please Sign Here	Under penalties of perjury, I declare that I have examined this return, including accompanying schedules and statements, and to the best of my knowledge and belief, it is true, correct, and complete. Declaration of preparer (other than officer) is based on all information of which preparer has any knowledge. (See General Instruction U, on page 12.)	
	Signature of officer	Date
	Danny Shelton, President Type or print name and title.	

* * * * *

* * * * *

Item	Book Value	Gross Sale	Gain (loss)
Downlink	47,619.57	$250,000.00	$202,380.43
House	52,781.05	6,129.00	(46,652.05)
Piano	0.00	2,000.00	2,000.00

* * * * *

* * * * *

Danny Shelton	President	49,862.66

* * * * *

Linda Shelton	Vice-President	44,334.10

* * * * *

[Excerpt for Addendum: Note 14 (Related Party Transactions) showing 3ABN purchases of Shelton's books from 3ABN's financial statements for 2001 to 2006.]

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* * * * *

The Organization purchases a portion of their inventory from an entity that is owned by two Board members. Purchases from this entity totaled $75,000.00 for the year ending December 31, 2001.

* * * * *

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* * * * *

parties. Following is a summary of related party transactions for the year ending December 31, 2002:

	Purchases From	Contributions From	Contributions To
D & L Publishing	$130,612.50	$ -	$ -

* * * * *

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* * * * *

parties. Following is a summary of related party transactions for the year ending December 31, 2003:

	Purchases From	Contributions From	Contributions To
D & L Publishing	$ 73,112.50	$ -	$ -

* * * * *

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* * * * *

parties. Following is a summary of related party transactions for the year ending December 31, 2004:

	Due From	Sales To	Due To	Purchases From	Contributions To	Contributions From
Employee accounts	$ 11,135.56	$ -	$ -	$ -	$ -	$ -
DLS Publishing, Inc.	-	-	9,724.38	44,724.38	-	-
D & L Publishing	-	-	-	35,000.00	-	-

* * * * *

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* * * * *

The Organization periodically purchases books which are authored by a member of management. The books are purchased from the publisher for giveaway or for a suggested

donation. For the year ending December 31, 2005, purchases of these books totaled $82,712.43. Royalties are paid by the publisher to the author.

* * * * *

* * * * *

The Organization periodically purchases books which are authored by a member of management. The books are purchased from the publisher for giveaway or for a suggested donation. For the year ending December 31, 2006, purchases of these books totaled $2,982,793.71. Royalties are paid by the publisher to the author.

* * * * *

[Excerpt for Addendum: Part of detail from 3ABN's financial statements for 2003 and 2004, showing change of accounting for sales of Shelton's books.]

* * * * *

	Unrestricted	Temporarily Restricted	Total
Revenues and Other Support			
Contributions	$ 7,432,304.34	$ 1,846,535.01	$ 9,278,839.35
Charitable gift annuities (Note 11)	1,623,816.34	-	1,623,816.34
Airtime and production fees	882,653.67	-	882,653.67
Sales of satellite equipment	991,604.39	-	991,604.39
Other sales	399,341.21	-	399,341.21
Rental income	20,762.56	-	20,762.56

* * * * *

* * * * *

Cost of goods sold and given away - Satellite equipment	887,536.04
Cost of goods sold and given away - Other	154,165.62

* * * * *

	Unrestricted	Temporarily Restricted	Total
Revenues and Other Support			
Contributions	$ 9,455,115.40	$ 2,633,222.89	$12,088,338.29
Charitable gift annuities (Note 11)	1,493,559.53	-	1,493,559.53
Airtime and production fees	1,106,556.00	-	1,106,556.00
Sales of satellite equipment	713,725.32	-	713,725.32
Rental income	33,173.44	-	33,173.44

* * * * *

* * * * *

Cost of goods sold and given away - Satellite equipment	584,019.94
Cost of goods given away - Other	330,242.46

* * * * *

[Excerpt for Addendum: part of subpoena served upon MidCountry, filed by Plaintiffs as an exhibit with Plaintiffs' motion for a protective order.]

EXHIBIT A

YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified:

- All monthly statements from January 1, 1998, onward to the present, for any account of any type owned by, held in trust for, or for whom any of the following were signatories, for whatever months or parts thereof such was true: Danny Lee Shelton (or Danny Shelton) of West Frankfort or Thompsonville, Illinois, D & L Publishing (probably a DBA), DLS Publishing (incorporated in Nov. 2004), or Crossbridge Music, Inc. (incorporated in Nov. 2002).

[Excerpt for Addendum: part of Pickle's December 20, 2006, email to Shelton, posted on Maritime-SDA-Online.org, filed as an exhibit with Defendants' opposition to Plaintiffs' motion for a protective order.]

* * * * *

On August 3 or 4 (most likely 4), 2006, at the ASI Convention, I had opportunity to privately ask Hal Steenson a few questions without anyone overhearing us. One of those questions was simply when your daughter Melody got married. Hal diverted the conversation to that of you and Linda, a topic I wasn't even going to touch, and gave me as proof of Linda's guilt three things:

- Since the only Bible grounds for divorce and remarriage is fornication, and since you got remarried, Linda has to be guilty.
- Since the board is composed of godly people and they went along with it, Linda has to be guilty.
- There is a recording that is so bad, conference presidents have listened to it and after 30 seconds they say, "Turn it off," it is that convincing.

As of late October, your conference president had not yet heard it. Thus,

[Excerpt for Addendum: Remnant's total royalty payments from Remnant's Form 990's for 2000 through 2006**]**

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* * * * *

[2000 Form 990:**]** ROYALTY 6,542.

* * * * *

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* * * * *

[2001 Form 990:**]** ROYALTY 17,652.

* * * * *

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* * * * *

[2002 Form 990:**]** d Royalty | 43d | 12,438|

* * * * *

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* * * * *

[2003 Form 990:**]** e Royalty | 43e | 16,226|

* * * * *

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* * * * *

[2004 Form 990:**]** d Royalty | 43d | 26,178|

* * * * *

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* * * * *

[2005 Form 990:**]** d Royalty expense | 43d | 116,556|

* * * * *

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* * * * *

[2006 Form 990:**]** d Royalty expense | 43d | 508.767|

* * * * *

[Excerpt for Addendum: from affidavit for Defendants' motion seeking leave to serve subpoenas upon a port director and upon Delta Airlines.**]**

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* * * * *

4. On March 4, 2004, Walsh wrote Dee Hilderbrand, a 3ABN employee, informing Ms. Hilderbrand that Walsh had made reservations with Delta Airlines for tickets to Florida, that

* * * * *

Atlanta, Georgia, on April 4, 2004, and returning on April 9, 2004. The receipts were printed out on March 8, 2004, from a computer account attributed to Mollie Steenson, according to the URL printed at the bottom of each receipt. These receipts are attached hereto as **Exhibits D–E.**

* * * * *

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* * * * *

22. On April 14, 2004, Shelton wrote Abrahamsen, accusing him of committing "spiritual adultery," a term foreign to the theology of Seventh-day Adventists. That email is attached hereto as **Exhibit R.** Shelton included a link to a web page describing "spiritual adultery" (http://jmm.aaa.net.au/articles/8207.htm), which defined the term by a quotation from a book entitled *Why Some Christians Commit Adultery.* That web page is attached hereto as **Exhibit S.** The quotation on the web page defined spiritual adultery as occurring when "married

* * * * *

[Excerpt for Addendum: from Plaintiffs' opposition to Defendants' motion seeking leave to serve subpoenas upon a port director and upon Delta Airlines.**]**

* * * * *

None of this information is relevant to Plaintiffs' claims. It is therefore also irrelevant to Defendants' defenses. The alleged trip to Florida was never considered by Plaintiffs to constitute a factual basis supporting any claims set forth in Plaintiffs' complaint. In the end, Plaintiffs do not care whether Linda actually went to Florida or not. Defendants will prove nothing with the information they seek – whether Linda Shelton traveled to Dr. Abrahamsen's condo or not, and whether Dr. Abrahamsen was present at that time or not.

* * * * *

[Excerpt for Addendum: from order allowing Plaintiffs to conduct a Rule 2004 examination of Joy, filed as an exhibit with Defendants' opposition to Plaintiffs' motion to dismiss.**]**

* * * * *

MOTION OF THREE ANGELS BROADCASTING NETWORK, INC. FOR AN ORDER AUTHORIZING AND COMPELLING EXAMINATION OF GAILON ARTHUR JOY UNDER FEDERAL RULE OF BANKRUPTCY PROCEDURE 2004

* * * * *

3/3/2008 ALLOWED. NO OBJECTIONS FILED.

Joel B. Rosenthal

* * * * *

United States District Court

District of Massachusetts

Notice of Electronic Filing

The following transaction was entered on 10/30/2008 at 1:55 PM EDT and filed on 10/30/2008

Case Name: Three Angels Broadcasting v Joy, et al.,
Case Number: 4:07-cv-40098
Filer: Gailon Arthur Joy
Robert Pickle
Document Number: 126

Docket Text:
MEMORANDUM in Opposition re [120] MOTION to Dismiss *voluntary* filed by Gailon Arthur Joy, Robert Pickle. (Pickle, Robert)

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United States District Court

District of Massachusetts

Notice of Electronic Filing

The following transaction was entered on 10/30/2008 at 2:23 PM EDT and filed on 10/30/2008

Case Name: Three Angels Broadcasting v Joy, et al.,
Case Number: 4:07-cv-40098
Filer: Gailon Arthur Joy
Robert Pickle
Document Number: 127

Docket Text:
AFFIDAVIT in Opposition re [120] MOTION to Dismiss *voluntary* filed by Gailon Arthur Joy, Robert Pickle. (Attachments: # (1) Exhibit, # (2) Exhibit B, # (3) Exhibit C, # (4) Exhibit D, # (5) Exhibit E, # (6) Exhibit F, # (7) Exhibit G, # (8) Exhibit H, # (9) Exhibit I, # (10) Exhibit J, # (11) Exhibit K, # (12) Exhibit L, # (13) Exhibit M, # (14) Exhibit N, # (15) Exhibit O, # (16) Exhibit P, # (17) Exhibit Q, # (18) Exhibit R, # (19) Exhibit S, # (20) Exhibit T, # (21) Exhibit U, # (22) Exhibit V, # (23) Exhibit W, # (24) Exhibit X, # (25) Exhibit Y, # (26) Exhibit Z, # (27) Exhibit AA, # (28) Exhibit BB, # (29) Exhibit CC, # (30) Exhibit DD, # (31) Exhibit EE, # (32) Exhibit FF, # (33) Exhibit GG, # (34) Exhibit HH, # (35) Exhibit II, # (36) Exhibit JJ, # (37) Exhibit KK, # (38) Exhibit LL, # (39) Exhibit MM, # (40) Exhibit NN, # (41) Exhibit OO, # (42) Exhibit PP, # (43) Exhibit QQ, # (44) Exhibit RR, # (45) Exhibit SS)(Pickle, Robert)

* * * * *

Copyright | Copyright Law - Chapter 3

Copyright Law of the United States of America

and Related Laws Contained in Title 17 of the *United States Code*

Circular 92

Chapter 3[1]

Duration of Copyright

§ 301. Preemption with respect to other laws[2]

(a) On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.

(b) Nothing in this title annuls or limits any rights or remedies under the common law or statutes of any State with respect to —

(1) subject matter that does not come within the subject matter of copyright as specified by sections 102 and 103, including works of authorship not fixed in any tangible medium of expression; or

(2) any cause of action arising from undertakings commenced before January 1, 1978;

(3) activities violating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106; or

(4) State and local landmarks, historic preservation, zoning, or building codes, relating to architectural works protected under section 102(a)(8).

(c) With respect to sound recordings fixed before February 15, 1972, any rights or remedies under the common law or statutes of any State shall not be annulled or limited by this title until February 15, 2067. The preemptive provisions of subsection (a) shall apply to any such rights and remedies pertaining to any cause of action arising from undertakings commenced on and after February 15, 2067. Notwithstanding the provisions of section 303,

no sound recording fixed before February 15, 1972, shall be subject to copyright under this title before, on, or after February 15, 2067.

(d) Nothing in this title annuls or limits any rights or remedies under any other Federal statute.

(e) The scope of Federal preemption under this section is not affected by the adherence of the United States to the Berne Convention or the satisfaction of obligations of the United States thereunder.

(f)(1) On or after the effective date set forth in section 610(a) of the Visual Artists Rights Act of 1990, all legal or equitable rights that are equivalent to any of the rights conferred by section 106A with respect to works of visual art to which the rights conferred by section 106A apply are governed exclusively by section 106A and section 113(d) and the provisions of this title relating to such sections. Thereafter, no person is entitled to any such right or equivalent right in any work of visual art under the common law or statutes of any State.[3]

(2) Nothing in paragraph (1) annuls or limits any rights or remedies under the common law or statutes of any State with respect to —

(A) any cause of action from undertakings commenced before the effective date set forth in section 610(a) of the Visual Artists Rights Act of 1990;

(B) activities violating legal or equitable rights that are not equivalent to any of the rights conferred by section 106A with respect to works of visual art; or

(C) activities violating legal or equitable rights which extend beyond the life of the author.

TITLE 26 - INTERNAL REVENUE CODE

Subtitle F - Procedure and Administration
CHAPTER 61 - INFORMATION AND RETURNS
Subchapter B - Miscellaneous Provisions

§ 6104. Publicity of information required from certain exempt organizations and certain trusts

* * * * *

(d) Public inspection of certain annual returns, reports, applications for exemption, and notices of status

(1) In general

In the case of an organization described in subsection (c) or (d) of section 501 and exempt from taxation under section 501 (a) or an organization exempt from taxation under section 527 (a)—

(A) a copy of—

(i) the annual return filed under section 6033 (relating to returns by exempt organizations) by such organization,

(ii) any annual return filed under section 6011 which relates to any tax imposed by section 511 (relating to imposition of tax on unrelated business income of charitable, etc., organizations) by such organization, but only if such organization is described in section 501 (c)(3),

(iii) if the organization filed an application for recognition of exemption under section 501 or notice of status under section 527 (i), the exempt status application materials or any notice materials of such organization, and

(iv) the reports filed under section 527 (j) (relating to required disclosure of expenditures and contributions) by such organization,

shall be made available by such organization for inspection during regular business hours by any individual at the principal office of such organization and, if such organization regularly maintains 1 or more regional or district offices having 3 or more employees, at each such regional or district office, and

(B) upon request of an individual made at such principal office or such a regional or district office, a copy of such annual return, reports, and exempt status application materials or such notice materials shall be provided to such individual without charge other than a reasonable fee for any reproduction and mailing costs.

The request described in subparagraph (B) must be made in person or in writing. If such request is made in person, such copy shall be provided immediately and, if made in writing, shall be provided within 30 days.

1998

Department of the Treasury
Internal Revenue Service

Instructions for Form 990 and Form 990-EZ

Return of Organization Exempt From Income Tax and Short Form Return of Organization Exempt From Income Tax

Under Section 501(c) of the Internal Revenue Code (except black lung benefit trust or private foundation) or section 4947(a)(1) nonexempt charitable trust
Note: *Form 990-EZ is for use by organizations with gross receipts of less than $100,000* ***and*** *total assets of less than $250,000 at the end of the year.*
Section references are to the Internal Revenue Code unless otherwise noted.

Paperwork Reduction Act Notice. We ask for the information on this form to carry out the Internal Revenue laws of the United States. You are required to give us the information. We need it to ensure that you are complying with these laws.

The organization is not required to provide the information requested on a form that is subject to the Paperwork Reduction Act unless the form displays a valid OMB control number. Books or records relating to a form or its instructions must be retained as long as their contents may become material in the administration of any Internal Revenue law. The rules governing the confidentiality of the Form 990, and Form 990-EZ, are covered in Code section 6104.

The time needed to complete and file this form and related schedules will vary depending on individual circumstances. The estimated average times are:

Form	Recordkeeping	Learning about the law or the form	Preparing the form	Copying, assembling, and sending the form to the IRS
990	96 hr., 23 min.	16 hr., 48 min.	21 hr., 55 min.	48 min.
990-EZ	28 hr., 28 min.	9 hr., 12 min.	11 hr., 1 min.	16 min.
Schedule A (Form 990)	50 hr., 13 min.	9 hr., 26 min.	10 hr., 40 min.	–0–

If you have comments concerning the accuracy of these time estimates or suggestions for making these forms simpler, we would be happy to hear from you. You can write to the Tax Forms Committee, Western Area Distribution Center, Rancho Cordova, CA 95743-0001. **DO NOT** send the form to this address. Instead, see **When and Where To File.**

Contents **Page**

Changes To Note

- Proposed regulations, published in 1998-34 I.R.B. 9, provide guidance pending the issuance of final regulations under section 4958. See General Instruction P, Taxes on Excess Benefit Transactions.
- In the heading of both the Form 990 and Form 990-EZ, Item E, **Telephone number,** replaces a required entry in prior years for a state registration number. Organizations must enter a telephone number in Item E that members of the public and government regulators may use during normal business hours to obtain information about the organization's finances and activities. If the organization does not have a telephone number, enter the telephone number of an organization official who can provide such information.
- For purposes of section 501(c)(12), the term "gross income" means gross receipts without reduction for any cost of goods sold. The instructions for Line 87 were amended.
- When completing Column (A) of Part VII, Analysis of Income-Producing Activities, use the new six-digit Codes for Unrelated Business Activity given in the 1998 Instructions for Form 990-T.
- Notice 98-25, 1998-18, I.R.B. 11, provides guidance to a section 4947(a)(1) nonexempt charitable trust for electing continued treatment as a U.S. trust even though the trust would be considered a foreign trust under the tests of section 7701(a)(30)(E).

Purpose of Form

- Form 990 and Form 990-EZ are used by tax-exempt organizations and nonexempt charitable trusts to provide the IRS with the information required by section 6033.
- An organization's completed Form 990, or Form 990-EZ (except for the schedule of contributors) is available for public inspection as required by section 6104.
- Some members of the public rely on Form 990, or Form 990-EZ, as the primary or sole source of information about a particular organization. How the public perceives an organization in such cases may be determined by the information presented on its return. Therefore, please make sure the return is complete and accurate and fully describes the organization's programs and accomplishments.
- Use the Form 990, and Form 990-EZ, to send a required election to the IRS, such as the election to capitalize costs under section 266.

provisions. However, Congress, in the legislative history of TBOR2, indicated that organizations would comply voluntarily with the public inspection provisions prior to the issuance of such regulations.

N. Disclosures Regarding Certain Information and Services Furnished

A section 501(c) organization that offers to sell or solicits money for specific information or a routine service for any individual that could be obtained by such individual from a Federal government agency free or for a nominal charge must disclose that fact conspicuously when making such offer or solicitation. Any organization that intentionally disregards this requirement will be subject to a penalty for each day on which the offers or solicitations are made. The penalty imposed for a particular day is the greater of $1,000 or 50% of the total cost of the offers and solicitations made on that day that lacked the required disclosure (section 6711).

O. Disclosures Regarding Certain Transactions and Relationships

In their annual returns on Schedule A (Form 990), section 501(c)(3) organizations must disclose information regarding their direct or indirect transfers to, and other direct or indirect relationships with, other section 501(c) organizations (except other section 501(c)(3) organizations) or section 527 political organizations (section 6033(b)(9)). This provision helps prevent the diversion or expenditure of a section 501(c)(3) organization's funds for purposes not intended by section 501(c)(3). All section 501(c)(3) organizations must maintain records regarding all such transfers, transactions, and relationships. See also General Instruction K regarding penalties.

P. Taxes on Excess Benefit Transactions

Section 4958 was added to the Code by the Taxpayer Bill of Rights 2 (TBOR2) on July 30, 1996.

The section 4958 excise taxes generally apply to excess benefit transactions occurring on or after September 14, 1995.

An excess benefit transaction subject to tax under section 4958 is any transaction in which an economic benefit provided by an applicable tax-exempt organization to, or for the use of, any disqualified person exceeds the value of consideration received by the organization in exchange for the benefit.

An excess benefit transaction also includes certain revenue-sharing transactions.

An applicable tax-exempt organization is any organization described in section 501(c)(3) (except private foundations) or section 501(c)(4) at the time of the excess benefit transaction or at any time during the 5-year period ending on the date of the transaction.

There are three taxes under section 4958. Disqualified persons are liable for the first two taxes. Certain organization managers are liable for the third tax.

Proposed regulations, published in 1998-34 I.R.B. 9, proposed new and amended regulations under section 4958.

The information in these proposed regulations is required for an applicable tax-exempt organization to avail itself of a rebuttable presumption that payments under a compensation arrangement between the organization and a disqualified person are reasonable, or a transfer of property, right to use property, or any other benefit or privilege between the organization and a disqualified person is at fair market value.

This information will be used by the organization's governing body, or committee thereof, to document the basis for its determination that compensation was reasonable or any other benefit was at fair market value.

Taxpayers may rely on these proposed regulations for guidance pending the issuance of final regulations. If, and to the extent, future guidance is more restrictive than the guidance in these proposed regulations, the future guidance will be applied without retroactive effect.

Taxes on excess benefit transactions. The proposed regulations describe the three taxes imposed under section 4958 on excess benefit transactions between an applicable tax-exempt organization and a disqualified person.

Two of the taxes are paid by certain disqualified persons who benefit economically from a transaction, and the other tax is paid by certain organization managers who participate in the transaction knowingly, willfully, and without reasonable cause.

Tax on disqualified persons. A disqualified person who receives an excess benefit from a transaction is liable for a tax equal to 25% of the excess benefit. If the excess benefit is not corrected within the taxable period, that disqualified person is then liable for a tax of 200% of the excess benefit.

"Taxable period" is defined as the period beginning on the date the transaction occurs and ending on the earlier of the date of mailing a notice of deficiency for the 25% tax or the date on which the 25% tax is assessed.

"Correction" is defined as undoing the excess benefit to the extent possible, and taking any additional measures necessary to place the organization in a financial position not worse than that in which it would be if the disqualified person had been dealing under the highest fiduciary standards.

If the excess benefit transaction consists of the payment of compensation for services under a contract that has not been completed, termination of the employment or independent contractor relationship between the organization and the disqualified person is not required in order to correct. However, the terms of any ongoing compensation arrangement may need to be modified to avoid future excess benefit transactions.

If the excess benefit is corrected within the correction period, then under the rules of section 4961, the 200% tax under section 4958(b) is not assessed. If the excess benefit is corrected within the correction period, and it is established to the satisfaction of the Secretary that the excess benefit transaction was due to reasonable cause and not to willful neglect, then, under the rules of section 4962, the 25% tax under section 4958(a)(1) will be abated.

Tax on organization managers. Each organization manager who participated in the excess benefit transaction, knowing that it was such a transaction, unless such participation was not willful and was due to reasonable cause, is liable for a tax equal to 10% of the excess benefit, not to exceed an aggregate amount of $10,000 with respect to any one excess benefit transaction.

An organization manager is, with respect to any applicable tax-exempt organization, any officer, director, or trustee of such organization, or any individual having powers or responsibilities similar to those of officers, directors, or trustees of the organization.

An individual who is not an officer, director, or trustee, yet serves on a committee of the governing body of an applicable tax-exempt organization that is invoking the rebuttable presumption of reasonableness based on the committee's action, however, is an organization manager for purposes of the 10% tax.

The definitions provided in the proposed regulations for the terms, "participation," "knowing," "willful," and "due to reasonable cause," with respect to organization managers for section 4958 purposes parallel the definitions of those terms used with respect to foundation managers in the section 4941 regulations.

Joint and several liability. With respect to any specific excess benefit transaction, if more than one person is liable for any of the taxes imposed by section 4958, all persons with respect to whom a particular tax is imposed are jointly and severally liable for that tax. For instance, if more than one disqualified person benefits from the same transaction, all the benefiting disqualified persons are jointly and severally liable for the respective section 4958(a)(1) or (b) taxes on that transaction.

Where an organization manager also receives an excess benefit from an excess benefit transaction, the manager may be liable for both taxes imposed by section 4958(a).

Except as otherwise provided in the proposed regulations, a transaction occurs on the date on which a disqualified person receives an economic benefit from the applicable tax-exempt organization for Federal income tax purposes. In the case of payment of deferred compensation, the transaction occurs on the date the deferred compensation is earned and vested.

The proposed regulations provide that the taxes imposed on excess benefit transactions apply to transactions occurring on or after September 14, 1995. However, these taxes do not apply to a transaction pursuant to a written contract that was binding on September 13, 1995, and at all times thereafter before the transaction occurred.

A written binding contract that is terminable or subject to cancellation by the applicable tax-exempt organization without the disqualified person's consent is treated as a new contract as of the date that any such termination or cancellation, if made, would be effective.

If a binding written contract is materially modified (including situations in which the contract is amended to extend its term or to increase the amount of compensation payable to the disqualified person), it is treated as a new contract entered into as of the date of the material modification.

Applicable tax-exempt organization. The proposed regulations generally define an applicable tax-exempt organization as any organization that, without regard to any excess benefit, is or would have been described in sections 501(c)(3) or (4) and exempt from tax under section 501(a) at any time during a 5-year period ending on the date of an excess benefit transaction (the lookback period).

To be described in section 501(c)(3) for purposes of section 4958, an organization must meet the requirements of section 508 (subject to any applicable exceptions provided by that section).

A private foundation as defined in section 509(a) is not an applicable tax-exempt organization for section 4958 purposes. An organization that has applied for and received recognition of exemption as an organization described in section 501(c)(4) is an applicable tax-exempt organization for section 4958 purposes.

A foreign organization that receives substantially all of its support from sources outside of the United States is not an

applicable tax-exempt organization for section 4958 purposes.

Disqualified person. The proposed regulations define a disqualified person as a person who, with respect to any transaction with an applicable tax-exempt organization, at any time during a 5-year period beginning after September 13, 1995, and ending on the date of such transaction, was in a position to exercise substantial influence over the affairs of the organization.

Certain persons are statutorily defined to be disqualified persons under section 4958(f), including certain family members of disqualified persons (spouse, brothers or sisters (by whole or half blood), spouses of brothers or sisters (by whole or half blood), ancestors, children, grandchildren, great grandchildren, and spouses of children, grandchildren, and great grandchildren), and 35%-controlled entities (a corporation in which a disqualified person owns more than 35% of the combined voting power; a partnership in which a disqualified person owns more than 35% of the profits interest; or a trust or estate in which a disqualified person owns more than 35% of the beneficial interest).

The proposed regulations specifically identify certain persons that have substantial influence over the affairs of an applicable tax-exempt organization.

These specified persons include:

1. Any individual who serves as a voting member on the governing body of the organization;

2. Any individual or individuals who have the power or responsibilities of the president, chief executive officer or chief operating officer of an organization;

3. Any individual or individuals who have the power or responsibilities of treasurer or chief financial officer of an organization; and

4. Any person who has a material financial interest in certain provider-sponsored organizations in which a hospital that is an applicable tax-exempt organization participates.

The proposed regulations establish two categories of persons that do not have substantial influence over the affairs of an applicable tax-exempt organization:

1. Other applicable tax-exempt organizations described in section 501(c)(3), and

2. Any employee who:

a. Receives economic benefits, directly or indirectly from the organization, of less than the amount of compensation referenced for a highly compensated employee in section 414(q)(1)(B)(i) (for the taxable year in which the benefits are provided),

b. Is not a statutorily defined disqualified person,

c. Is not specifically identified by the regulations as having substantial influence, and

d. Is not a substantial contributor to the organization within the meaning of section 507(d)(2).

The proposed regulations provide that except as specified in the categories set forth in section 4958(f) or in the proposed regulation, as outlined above, the determination of whether a person has substantial influence over the affairs of an organization is based on all relevant facts and circumstances.

A person who has managerial control over a discrete segment of an organization may nonetheless be in a position to exercise substantial influence over the affairs of the entire organization.

Facts and circumstances tending to show that a person has substantial influence over the affairs of an organization include, but are not limited to, the following:

1. The person founded the organization;

2. The person is a substantial contributor (within the meaning of section 507(d)(2)) to the organization

3. The person's compensation is based on revenues derived from activities of the organization that the person controls;

4. The person has authority to control or determine a significant portion of the organization's capital expenditures, operating budget, or compensation for employees;

5. The person has managerial authority or serves as a key advisor to a person with managerial authority; or

6. The person owns a controlling interest in a corporation, partnership, or trust that is a disqualified person.

Facts and circumstances tending to show that a person does not have substantial influence over the affairs of an organization include, but are not limited to, the following:

1. The person has taken a *bona fide* vow of poverty as an employee, agent, or on behalf of a religious organization;

2. The person is an independent contractor, such as an attorney, accountant, or investment manager or advisor, acting in that capacity, unless the person is acting in that capacity with respect to a transaction from which the person might economically benefit either directly or indirectly (aside from fees received for the professional services rendered); and

3. Any preferential treatment a person receives based on the size of that person's donation is also offered to any other donor making a comparable contribution as part of a solicitation intended to attract a substantial number of contributions.

In the case of multiple organizations affiliated by common control or governing documents, the determination of whether a person does or does not have substantial influence will be made separately for each applicable tax-exempt organization.

Excess benefit transaction. The proposed regulations state that an excess benefit transaction is any transaction in which an economic benefit is provided by an applicable tax-exempt organization directly or indirectly to, or for the use of, any disqualified person if the value of the economic benefit provided exceeds the value of the consideration (including the performance of services) received for providing such benefit.

An excess benefit transaction also includes certain revenue-sharing transactions (described later). A benefit can be provided indirectly if it is provided through one or more entities controlled by or affiliated with the applicable tax-exempt organization.

Certain economic benefits provided by an applicable tax-exempt organization to a disqualified person are disregarded for purposes of section 4958. These include:

1. Paying reasonable expenses for members of the governing body of an applicable tax-exempt organization to attend meetings of the governing body of the organization, not including expenses for luxury travel or spousal travel;

2. An economic benefit provided to a disqualified person that the disqualified person receives solely as a member of, or volunteer for, the organization, if the benefit is provided to members of the public in exchange for a membership fee of $75 or less per year; and

3. An economic benefit provided to a disqualified person that the disqualified person receives solely as a member of a charitable class the applicable tax-exempt organization intends to benefit.

The proposed regulations provide that if the amount of the economic benefit provided by the applicable tax-exempt organization exceeds the fair market value of the consideration, the excess is the excess benefit on which tax is imposed by section 4958.

The fair market value of property is the price at which property or the right to use property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy, sell, or transfer property or the right to use property, and both having reasonable knowledge of relevant facts.

Compensation. Compensation for the performance of services is reasonable only if it is an amount that would ordinarily be paid for like services by like enterprises under like circumstances.

Generally, the circumstances to be taken into consideration are those existing at the date when the contract for services was made. However, where reasonableness of compensation cannot be determined based on circumstances existing at the date when the contract for services was made, then that determination is made based on all facts and circumstances, up to and including circumstances as of the date of payment.

In no event shall circumstances existing at the date when the contract is questioned be considered in making a determination of the reasonableness of compensation.

Compensation for purposes of section 4958 includes all items of compensation provided by an applicable tax-exempt organization in exchange for the performance of services by a disqualified person.

These items of compensation include, but are not limited to, all forms of cash and noncash compensation, including salary, fees, bonuses, and severance payments paid, and all forms of deferred compensation that is earned and vested, whether or not funded, and whether or not paid under a deferred compensation plan that is a qualified plan under section 401(a).

Compensation also includes:

1. The amount of premiums paid for liability or any other insurance coverage, as well as any payment or reimbursement by the organization of charges, expenses, fees, or taxes not covered ultimately by the insurance coverage;

2. All other benefits, whether or not included in income for tax purposes, including payments to welfare benefit plans on behalf of the disqualified persons, such as plans providing medical, dental, life insurance, severance pay, and disability benefits, and both taxable and nontaxable fringe benefits (other than working condition fringe benefits described in section 132(d) and *de minimis* fringe benefits described in section 132(e)), including expense allowances or reimbursements or foregone interest on loans that the recipient must report as income on his separate income tax return; and any economic benefit provided by the applicable tax-exempt organization directly or indirectly through another entity, owned, controlled by or affiliated with the applicable tax-exempt organization, whether such other entity is taxable or tax-exempt.

An applicable tax-exempt organization will be treated as having intended to provide an economic benefit as compensation for services only if it provides clear and convincing evidence of having that intent when the benefit was paid.

An applicable tax-exempt organization can provide clear and convincing evidence of such intent by reporting the economic benefit as compensation on original or amended Federal tax information returns with respect to the payment (e.g., Form W-2 or 1099) or with respect to the organization (e.g., Form 990), filed before the commencement of an IRS examination in which the reporting of the benefit is questioned.

Transaction in which amount of economic benefit determined in whole or in part by the revenues of one or more activities of the organization. The proposed regulations apply a facts and circumstances test to assess whether a transaction in which the amount of an economic benefit provided by an applicable tax-exempt organization to or for the use of a disqualified person is determined in whole or in part by the revenues of one or more activities of the applicable tax-exempt organization (revenue-sharing transaction) results in inurement, and therefore constitutes an excess benefit transaction.

A revenue-sharing transaction may constitute an excess benefit transaction regardless of whether the economic benefit provided to the disqualified person exceeds the fair market value of the consideration provided in return if, at any point, it permits a disqualified person to receive additional compensation without providing proportional benefits that contribute to the organization's accomplishment of its exempt purpose.

If the economic benefit is provided as compensation for services, relevant facts and circumstances include, but are not limited to, the relationship between the size of the benefit provided and the quality and quantity of the services provided, as well as the ability of the party receiving the compensation to control the activities generating the revenues on which the compensation is based.

The type of revenue-sharing transaction described in the proposed regulations constitutes an excess benefit transaction if it occurs on or after the date of publication of final regulations. The excess benefit in such a transaction consists of the entire economic benefit provided.

Any revenue-sharing transaction occurring after September 13, 1995, may still constitute an excess benefit transaction if the economic benefit provided to the disqualified person exceeds the fair market value of the consideration provided in return.

Before the date of publication of final regulations, however, the excess benefit shall consist only of that portion of the economic benefit that exceeds the fair market value of the consideration provided in return.

Rebuttable presumption that transaction is not an excess benefit transaction. The proposed regulations provide that a compensation arrangement between an applicable tax-exempt organization and a disqualified person is presumed to be reasonable, and a transfer of property, a right to use property, or any other benefit or privilege between an applicable tax-exempt organization and a disqualified person is presumed to be at fair market value, if three requirements are satisfied.

The three requirements are as follows:

- **First requirement—**The compensation arrangement or terms of transfer are approved by the organization's governing body or a committee of the governing body composed entirely of individuals who do not have a conflict of interest with respect to the arrangement or transaction;
- **Second requirement—**The governing body, or committee thereof, obtained and relied upon appropriate data as to comparability prior to making its determination; and
- **Third requirement—**The governing body or committee adequately documented the basis for its determination concurrently with making that determination.

The presumption established by satisfying these three requirements may be rebutted by additional information showing that the compensation was not reasonable or that the transfer was not at fair market value.

First requirement. With respect to the first requirement, the proposed regulations provide that the governing body is the board of directors, board of trustees, or equivalent controlling body of the applicable tax-exempt organization.

However, any members of such a committee who are not members of the governing body are deemed to be organization managers for purposes of the tax imposed by section 4958(a)(2) if the organization is invoking the rebuttable presumption based on the actions of the committee.

The proposed regulations provide that a member of the governing body, or committee thereof, does not have a conflict of interest with respect to a compensation arrangement or transaction if the member:

1. Is not the disqualified person, and

2. Is not related to any disqualified person participating in or economically benefiting from the compensation arrangement or transaction;

3. Is not in an employment relationship subject to the direction or control of any disqualified person participating in or economically benefiting from the compensation arrangement or transaction;

4. Is not receiving compensation or other payments subject to approval by any disqualified person participating in or economically benefiting from the compensation arrangement or transaction;

5. Has no material financial interest affected by the compensation arrangement or transaction; and

6. Does not approve a transaction providing economic benefits to any disqualified person participating in the compensation arrangement or transaction, who in turn has approved or will approve a transaction providing economic benefits to the member.

An arrangement or transaction has not been approved by a committee of a governing body if, under the governing documents of the organization or state law, the committee's decision must be ratified by the full governing body in order to become effective.

Second requirement. With respect to the second requirement for the rebuttable presumption of reasonableness, the proposed regulations provide that a governing body or committee has appropriate data on comparability if, given the knowledge and expertise of its members, it has information sufficient to determine whether a compensation arrangement will result in the payment of reasonable compensation or a transaction will be for fair market value.

Relevant information includes, but is not limited to:

1. Compensation levels paid by similarly situated organizations, both taxable and tax-exempt, for functionally comparable positions;

2. The availability of similar services in the geographic area of the applicable tax-exempt organization; independent compensation surveys compiled by independent firms;

3. Actual written offers from similar institutions competing for the services of the disqualified person; and

4. Independent appraisals of the value of property that the applicable tax-exempt organization intends to purchase from, or sell or provide to the disqualified person.

A special rule is provided for organizations with annual gross receipts of less than $1 million. Under this rule, when the governing body reviews compensation arrangements, it will be considered to have appropriate data as to comparability if it has data on compensation paid by five comparable organizations in the same or similar communities for similar services. No inference is intended with respect to whether circumstances falling outside this safe harbor will meet the requirements with respect to the collection of appropriate data.

Third requirement. For purposes of the third requirement of the rebuttable presumption of reasonableness under the proposed regulations, to be documented adequately, the written or electronic records of the governing body or committee must note:

1. The terms of the transaction that was approved and the date it was approved;

2. The members of the governing body or committee who were present during debate on the transaction or arrangement that was approved and those who voted on it;

3. The comparability data obtained and relied upon by the committee and how the data was obtained; and

4. The actions taken with respect to consideration of the transaction by anyone who is otherwise a member of the governing body or committee but who had a conflict of interest with respect to the transaction or arrangement.

If the governing body or committee determines that reasonable compensation for a specific arrangement or fair market value in a specific transaction is higher or lower than the range of comparable data obtained, the governing body or committee must record the basis for its determination.

If reasonableness of the compensation cannot be determined based on circumstances existing at the date when a contract for services was made, then the rebuttable presumption cannot arise until circumstances exist so that reasonableness of compensation can be determined, and the three requirements for the presumption subsequently are satisfied.

The fact that a transaction between an applicable tax-exempt organization and a disqualified person is not subject to the presumption described in this section shall not create any inference that the transaction is an excess benefit transaction.

The rebuttable presumption applies to all payments made or transactions completed in accordance with a contract provided that the three requirements of the rebuttable presumption were met at the time the contract was agreed upon.

Special rules. The proposed regulations provide that the excise taxes imposed by section 4958 do not affect the substantive statutory standards for tax exemption under sections 501(c)(3) or (4). Organizations are described in those sections only if no part of their net earnings inure to the benefit of any private shareholder or individual.

The proposed regulations provide that the procedures of section 7611 will be used in initiating and conducting any inquiry or examination into whether an excess benefit transaction has occurred between a church and a disqualified person.

For purposes of this rule, the reasonable belief required to initiate a church tax inquiry is satisfied if there is a reasonable belief that a section 4958 tax is due from a disqualified person with respect to a transaction involving a church.

Persons liable for the section 4958 taxes must file Form 4720 to report and pay the tax. See the instructions for line 89 of Form 990, and line 40 of Form 990-EZ, which discuss the required reporting of both the excess benefit transactions and the excise taxes imposed.

Q. Erroneous Backup Withholding

Recipients of dividend or interest payments generally must certify their correct taxpayer identification number to the bank or other payer on **Form W-9,** Request for Taxpayer Identification Number and Certification. If the payer does not get this information, it must withhold part of the payments as "backup withholding." If the organization was subject to erroneous backup withholding because the payer did not realize it was an exempt organization and not subject to this withholding, it can claim credit on Form 990-T for the amount withheld. See the Instructions for Form 990-T. Claims for refund must be filed within 3 years after the date the original return was due; 3 years after the date the organization filed it; or 2 years after the date the tax was paid, whichever is later.

R. Group Return

If a parent organization wants to file a group return for two or more of its subsidiaries, it must use Form 990. The parent organization cannot use a Form 990-EZ for the group return.

A central, parent, or "like" organization can file a group return on Form 990 for two or more local organizations that are:

1. Affiliated with the central organization at the time its annual accounting period ends,

2. Subject to the central organization's general supervision or control,

3. Exempt from tax under a group exemption letter that is still in effect, and

4. Have the same accounting period as the central organization.

If the parent organization is required to file a return for itself, it must file a separate return and may not be included in the group return. See General Instruction B for a list of organizations not required to file.

Every year, each local organization must authorize the central organization in writing to include it in the group return and must declare, under penalty of perjury, that the authorization and the information it submits to be included in the group return are true and complete.

If the central organization prepares a group return for its affiliated organizations, check the "Yes" box in item H(a), in the heading of Form 990, and indicate the number of organizations for which the group return is filed in item H(b). Attach either **(1)** a schedule showing the name, address, and employer identification number (EIN) of each affiliated organization included, or **(2)** a statement indicating that the group return includes all affiliated organizations covered by the group ruling. In item I, indicate the group exemption number (GEN). When preparing the return, be sure not to confuse the four-digit GEN number in item I with the nine-digit EIN number in item D of the form's heading.

The central organization should send the annual information required to maintain a group exemption letter to the Ogden Service Center, Ogden, UT 84201-0027.

An affiliated organization covered by a group ruling may file a separate return instead of being included in the group return. In such case, check the "Yes" box in item H(c), in the heading of Form 990, and enter the GEN number in item I.

Parts IV-A and IV-B of Form 990 do not have to be completed on group returns.

S. Organizations in Foreign Countries and U.S. Possessions

Refer to General Instruction B for the filing exemption for foreign organizations with $25,000 or less in gross receipts from U.S. sources.

Report amounts in U.S. dollars and state what conversion rate you use. Combine amounts from within and outside the United States and report the total for each item. All information must be written in English.

T. Public Interest Law Firms

A public interest law firm exempt under section 501(c)(3) or 501(c)(4) must attach a statement that lists the cases in litigation, or that have been litigated during the year. For each case, describe the matter in dispute and explain how the litigation will benefit the public generally. Also attach a report of all fees sought and recovered in each case. See Rev. Proc. 92-59, 1992-2 C.B. 411.

U. Requirements for a Properly Completed Form 990 or Form 990-EZ

Public Inspection. All information the organization reports on or with its Form 990, or Form 990-EZ, including attachments, will be available for public inspection, except the schedule of contributors required for line 1, Part I, of either form. Please make sure the forms and attachments are clear enough to photocopy legibly.

Signature. To make the return complete, an officer of the organization authorized to sign it must sign in the space provided. For a corporation, or association, this officer may be the president, vice president, treasurer, assistant treasurer, chief accounting officer, or other corporate, or association officer, such as a tax officer. A receiver, trustee, or assignee must sign any return he or she files for a corporation or association. For a trust, the authorized trustee(s) must sign.

Generally, anyone who is paid to prepare the return must sign it in the Paid Preparer's Use Only area.

The paid preparer must:

- Sign the return, by hand, in the space provided for the preparer's signature (signature stamps and labels are not acceptable).
- Enter the preparer's social security number (SSN), or employer identification number (EIN), only if the Form 990, or Form 990-EZ, is for a section 4947(a)(1) nonexempt charitable trust that is not filing Form 1041.
- Complete the required preparer information.
- Give a copy of the return to the organization.

Leave the paid preparer's space blank if the return was prepared by a regular employee of the filing organization.

Recordkeeping. The organization's records should be kept for as long as they may be needed for the administration of any provision of the Internal Revenue Code. Usually, records that support an item of income, deduction, or credit must be kept for 3 years from the date the return is due or filed, whichever is later. Keep records that verify the organization's basis in property for as long as they are needed to figure the basis of the original or replacement property.

The organization should also keep copies of any returns it has filed. They help in preparing future returns and in making computations when filing an amended return.

Rounding Off to Whole Dollars. You may show money items as whole-dollar amounts. Drop any amount less than 50 cents and increase any amount from 50 through 99 cents to the next higher dollar.

Completing All Lines. Unless the organization is permitted to use certain DOL forms or Form 5500 series returns as partial substitutes for Form 990, or Form 990-EZ (see General Instruction F), do not leave any applicable lines blank or attach any other forms or schedules instead of entering the required information on the appropriate line on Form 990 or Form 990-EZ.

Assembling Form 990 or Form 990-EZ. Before filing the Form 990, or Form 990-EZ, assemble the package of forms and attachments in the following order:

- Form 990 or Form 990-EZ
- Schedule A (Form 990). The requirement to attach Schedule A (Form 990) applies to ALL section 501(c)(3) organizations and ALL section 4947(a)(1) nonexempt charitable trusts that file Form 990 or Form 990-EZ.
- Attachments to Form 990 or Form 990-EZ
- Attachments to Schedule A (Form 990)

Attachments. Use the schedules on the official form unless you need more space. If you use attachments, they must:

1. Show the form number and tax year;

2. Show the organization's name and EIN;

3. Identify clearly the Part or line(s) to which the attachments relate;

4. Include the information required by the form and use the same format as the form;

5. Follow the same Part and line sequence as the form; and

6. Be on the same size paper as the form.

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Line 87—Section 501(c)(12) organizations

One of the requirements that an organization must meet to qualify under section 501(c)(12) is that at least 85% of its gross income consists of amounts collected from members for the sole purpose of meeting losses and expenses. For purposes of section 501(c)(12), the term "gross income" means gross receipts without reduction for any cost of goods sold.

For a mutual or cooperative electric or telephone company, "gross income" does not include amounts received or accrued as "qualified pole rentals."

For a mutual or cooperative telephone company, "gross income" also does not include amounts received or accrued either from another telephone company for completing long distance calls to or from or between the telephone company's members, or from the sale of display listings in a directory furnished to the telephone company's members.

Line 89a—Section 501(c)(3) organizations: Disclosure of excise taxes imposed under section 4911, 4912, or 4955

Section 501(c)(3) organizations must disclose any excise tax imposed during the year under section 4911 (excess lobbying expenditures), 4912 (disqualifying lobbying expenditures), or, unless abated, 4955 (political expenditures). See sections 4962 and 6033(b).

Line 89b—Section 501(c)(3) and 501(c)(4) organizations: Disclosure of section 4958 excess benefit transactions and excise taxes

Sections 6033(b) and 6033(f) require section 501(c)(3) and section 501(c)(4) organizations to report the amount of taxes imposed under section 4958 (excess benefit transactions) involving the organization, unless abated, as well as any other information the Secretary may require concerning those transactions. See General Instruction P for a discussion of excess benefit transactions.

Attach a statement describing any excess benefit transaction, the disqualified person or persons involved, and whether or not the excess benefit transaction was corrected.

Line 89c—Taxes imposed on organization managers or disqualified persons

For line 89c, enter the amount of taxes imposed on organization managers or disqualified persons under sections 4912, 4955, and 4958, unless abated.

Line 89d—Taxes reimbursed by the organization

For line 89d, enter the amount of tax in line 89c that was reimbursed by the organization. Any reimbursement of the excise tax liability of a disqualified person or organization manager will be treated as an excess benefit unless **(1)** the organization treats the reimbursement as compensation during the year the reimbursement is made, and **(2)** the total compensation to that person, including the reimbursement, is reasonable.

Line 90a—List of states

List each state with which the organization is filing a copy of this return in full or partial satisfaction of state filing requirements.

Line 90b—Number of employees

Enter the number of employees on your payroll during the pay period including March 12, 1998, as shown on your **Form 941,** Employer's Quarterly Federal Tax Return, or **Form 943,** Employer's Annual Tax Return for Agricultural Employees, (January-March calendar quarter return only). Do not include household employees, persons who received no pay during the pay period, pensioners, or members of the Armed Forces.

Line 92—Section 4947(a)(1) nonexempt charitable trusts

Section 4947(a)(1) nonexempt charitable trusts that file Form 990 instead of Form 1041 must complete this line. The trust should include exempt-interest dividends received from a mutual fund or other regulated investment company as well as tax-exempt interest received directly.

Part VII—Analysis of Income-Producing Activities

An organization is exempt from income taxes only if its primary purpose is to engage in the type of activity for which it claims exemption.

An exempt organization is subject to a tax on unrelated business taxable income if such income is from a trade or business that is regularly carried on by the organization and is not substantially related to the organization's performance of its exempt purpose or function. Generally, a tax-exempt organization with gross income of $1,000 or more for the year from an unrelated trade or business must file Form 990-T and pay any tax due.

In Part VII, show whether revenue, also reportable on lines 2 through 11 of Part I, was received from activities related to the organization's purpose or activities unrelated to its exempt purpose. Enter gross amounts unless indicated otherwise. Show also any revenue excludable from the definition of unrelated business taxable income.

The sum of amounts entered in columns (B), (D), and (E) for lines 93 through 103 of Part VII should match amounts entered for correlating lines 2 through 11 of Part I. Use the following table to verify the relationship of Part VII with Part I. Note that contributions that are reportable on lines 1a through 1d of Part I are **not** reportable in Part VII.

Amounts in Part VII on Line	Correspond to Amounts in Part I on Line
93(a) through (g)	2
94	3
95	4
96	5
97 and 98	6c
99	7
100	8d
101	9c
102	10c
103(a) through (e)	11
105 (plus line 1d, Part I)	12

Completing Part VII

Column (A)

In column (A), identify any unrelated business taxable income reportable in column (B) by selecting a business code from the Codes for Unrelated Business Activity in the 1998 Instructions for Form 990-T.

Note: *The codes for unrelated business activity have been revised. Use the codes shown in the 1998 Instructions for Form 990-T.*

Column (B)

In column (B), enter any revenue received from activities unrelated to the exempt purpose of the organization. See the Instructions for Form 990-T and Pub. 598 for a discussion of what is unrelated business taxable income. If you enter an amount in column (B), then you must enter a business code in column (A).

Column (C)

In column (C), enter an exclusion code from the Exclusion Codes list on the last page of the Specific Instructions for Form 990 to identify any revenue excludable from unrelated business taxable income. If more than one exclusion code applies to a particular revenue item, use the lowest numbered exclusion code that applies. If nontaxable revenues from several sources are reportable on the same line in column (D), use the exclusion code that applies to the largest revenue source. If the list of exclusion codes does not include an item of revenue that is excludable from unrelated business taxable income, enter that item in column (E) and see the instruction for column (E).

Column (D)

For column (D), identify any revenue received that is excludable from unrelated business taxable income. If you enter an amount in column (D), you must enter an exclusion code in column (C).

Column (E)

For column (E), report any revenue from activities related to the organization's exempt purpose; (i.e., income received from activities that form the basis of the organization's exemption from taxation). Also report here any revenue that is excludable from gross income other than by Code section 512, 513, or 514, such as interest on state and local bonds that is excluded from tax by section 103. Explain in Part VIII how any amount reported in column (E) related to the accomplishment of the organization's exempt purposes.

Lines 93(a) through (f)—Program service revenue

List the organization's revenue-producing program service activities on these lines. Program service activities are primarily those that form the basis of an organization's exemption from tax. Enter, in the appropriate columns, gross revenue from each program service activity and the business and exclusion codes that identify this revenue. See the explanation of program service revenue in the instructions for Part I, line 2.

Line 93(g)—Fees and contracts from government agencies

In the appropriate columns, enter gross revenue earned from fees and contract payments by government agencies for a service, facility, or product that benefited the government agency primarily, either economically or physically. Do not include government grants that enabled your organization to benefit the public directly and primarily. See Part I, line 1c instructions for the distinction between government grants that represent contributions and payments from government agencies for a service, product, or facility that primarily benefited the government agencies.

Report on line 2 of Part I (program service revenue) the sum of the entries in columns (B), (D), and (E) for lines 93(a) through (g).

Lines 94 through 96—Dues, assessments, interest, and dividends

In the appropriate columns, report the revenue received for these line items. General instructions for lines 94 through 96 are given in the instructions for Part I, lines 3 through 5.

Lines 97 and 98—Rental income (loss)

Report net rental income from investment property on these lines. Also report here rental income from unaffiliated exempt organizations.

Department of the Treasury
Internal Revenue Service

2003 Instructions for Schedules A & B (Form 1040)

Instructions for Schedule A, Itemized Deductions

Use Schedule A (Form 1040) to figure your itemized deductions. In most cases, your Federal income tax will be less if you take the **larger** of your itemized deductions or your standard deduction.

If you itemize, you may deduct a part of your medical and dental expenses and unreimbursed employee business expenses, and amounts you paid for certain taxes, interest, contributions, and miscellaneous expenses. You may also deduct certain casualty and theft losses.

CAUTION **Do not** include on Schedule A items deducted elsewhere, such as on Form 1040 or Schedule C, C-EZ, E, or F.

Medical and Dental Expenses

You may deduct only the part of your medical and dental expenses that exceeds 7.5% of the amount on Form 1040, line 35.

Pub. 502 discusses the types of expenses that you may and may not deduct. It also explains when you may deduct capital expenses and special care expenses for disabled persons.

CAUTION If you received a distribution from an MSA in 2003, see **Pub. 969** to figure your deduction.

Examples of Medical and Dental Payments You May Deduct

To the extent you were **not reimbursed,** you may deduct what you paid for:

- Insurance premiums for medical and dental care, including premiums for qualified long-term care contracts as defined in Pub. 502. But see **Limit on Long-Term Care Premiums You May Deduct** on this page. Reduce the insurance premiums by any self-employed health insurance deduction you claimed on Form 1040, line 29.

Note. If, during 2003, you were an eligible trade adjustment assistance (TAA) recipient, alternative TAA recipient, or Pension Benefit Guaranty Corporation pension recipient, you must reduce your insurance premiums by any amounts used to figure the health coverage tax credit. See the instructions for line 1 on page A-2.

CAUTION You **cannot** deduct insurance premiums paid with pretax dollars because the premiums are not included in box 1 of your Form(s) W-2.

- Prescription medicines or insulin.
- Acupuncturists, chiropractors, dentists, eye doctors, medical doctors, occupational therapists, osteopathic doctors, physical therapists, podiatrists, psychiatrists, psychoanalysts (medical care only), and psychologists.
- Medical examinations, X-ray and laboratory services, insulin treatment, and whirlpool baths your doctor ordered.
- Nursing help (including your share of the employment taxes paid). If you paid someone to do both nursing and housework, you may deduct only the cost of the nursing help.
- Hospital care (including meals and lodging), clinic costs, and lab fees.
- Qualified long-term care services (see Pub. 502).
- The supplemental part of Medicare insurance (Medicare B).
- A program to stop smoking and for prescription medicines to alleviate nicotine withdrawal.
- A weight-loss program as treatment for a specific disease (including obesity) diagnosed by a doctor.
- Medical treatment at a center for drug or alcohol addiction.
- Medical aids such as eyeglasses, contact lenses, hearing aids, braces, crutches, wheelchairs, and guide dogs, including the cost of maintaining them.
- Surgery to improve defective vision, such as laser eye surgery or radial keratotomy.
- Lodging expenses (but not meals) while away from home to receive medical care in a hospital or a medical care facility related to a hospital, provided there was no significant element of personal pleasure, recreation, or vacation in the travel. **Do not** deduct more than $50 a night for each eligible person.
- Ambulance service and other travel costs to get medical care. If you used your own car, you may claim what you spent for gas and oil to go to and from the place you received the care; or you may claim **12 cents a mile.** Add parking and tolls to the amount you claim under either method.

Note. Certain medical expenses paid out of a deceased taxpayer's estate may be claimed on the deceased taxpayer's final return. See Pub. 502 for details.

Limit on Long-Term Care Premiums You May Deduct. The amount you may deduct for qualified long-term care contracts (as defined in Pub. 502) depends on the age, at the end of 2003, of the person for whom the premiums were paid. See the following chart for details.

IF the person was, at the end of 2003, age . . .	THEN the most you may deduct is . . .
40 or under	$ 250
41–50	$ 470
51–60	$ 940
61–70	$ 2,510
71 or older	$ 3,130

Cat. No. 24328L

DA0056

Line 15

Gifts by Cash or Check

Enter the total contributions you made in cash or by check (including out-of-pocket expenses).

Line 16

Other Than by Cash or Check

Enter your contributions of property. If you gave used items, such as clothing or furniture, deduct their fair market value at the time you gave them. Fair market value is what a willing buyer would pay a willing seller when neither has to buy or sell and both are aware of the conditions of the sale. For more details on determining the value of donated property, see **Pub. 561.**

If the amount of your deduction is more than $500, you must complete and attach **Form 8283.** For this purpose, the "amount of your deduction" means your deduction **before** applying any income limits that could result in a carryover of contributions. If your total deduction is over $5,000, you may also have to get appraisals of the values of the donated property. See Form 8283 and its instructions for details.

Recordkeeping. If you gave property, you should keep a receipt or written statement from the organization you gave the property to, or a reliable written record, that shows the organization's name and address, the date and location of the gift, and a description of the property. For each gift of property, you should also keep reliable written records that include:

- How you figured the property's value at the time you gave it. If the value was determined by an appraisal, keep a signed copy of the appraisal.
- The cost or other basis of the property if you must reduce it by any ordinary income or capital gain that would have resulted if the property had been sold at its fair market value.
- How you figured your deduction if you chose to reduce your deduction for gifts of capital gain property.
- Any conditions attached to the gift.

Note. If your total deduction for gifts of property is over $500, you gave less than your entire interest in the property, or you made a "qualified conservation contribution," your records should contain additional information. See Pub. 526 for details.

Line 17

Carryover From Prior Year

Enter any carryover of contributions that you could not deduct in an earlier year because they exceeded your adjusted gross income limit. See Pub. 526 for details.

Casualty and Theft Losses

Line 19

Complete and attach **Form 4684** to figure the amount of your loss to enter on line 19.

You may be able to deduct part or all of each loss caused by theft, vandalism, fire, storm, or similar causes, and car, boat, and other accidents. You may also be able to deduct money you had in a financial institution but lost because of the insolvency or bankruptcy of the institution.

You may deduct nonbusiness casualty or theft losses only to the extent that—

- The amount of **each** separate casualty or theft loss is more than $100 and
- The total amount of **all** losses during the year is more than 10% of the amount on Form 1040, line 35.

Special rules apply if you had both gains and losses from nonbusiness casualties or thefts. See Form 4684 and its instructions for details.

Use line 22 of Schedule A to deduct the costs of proving that you had a property loss. Examples of these costs are appraisal fees and photographs used to establish the amount of your loss.

For information on Federal disaster area losses, see **Pub. 547.**

Job Expenses and Most Other Miscellaneous Deductions

You may deduct only the part of these expenses that exceeds 2% of the amount on Form 1040, line 35.

Pub. 529 discusses the types of expenses that may and may not be deducted.

Examples of Expenses You May Not Deduct

- Political contributions.
- Personal legal expenses.
- Lost or misplaced cash or property.
- Expenses for meals during regular or extra work hours.
- The cost of entertaining friends.
- Commuting expenses. See Pub. 529 for the definition of commuting.
- Travel expenses for employment away from home if that period of employment exceeds 1 year. See Pub. 529 for an exception for certain Federal employees.
- Travel as a form of education.
- Expenses of attending a seminar, convention, or similar meeting unless it is related to your employment.
- Club dues. See Pub. 529 for exceptions.
- Expenses of adopting a child. But you may be able to take a credit for adoption expenses. See **Form 8839** for details.
- Fines and penalties.
- Expenses of producing tax-exempt income.

Line 20

Unreimbursed Employee Expenses

Enter the total ordinary and necessary job expenses you paid for which you were not reimbursed. (Amounts your employer included in box 1 of your Form W-2 are not considered reimbursements.)

An ordinary expense is one that is common and accepted in your field of trade, business, or profession. A necessary expense is one that is helpful and appropriate for your business. An expense does not have to be required to be considered necessary.

But you **must** fill in and attach **Form 2106** if **either 1** or **2** next applies.

1. You claim any travel, transportation, meal, or entertainment expenses for your job.

2. Your employer paid you for any of your job expenses reportable on line 20.

If you used your own vehicle and item **2** does not apply, you may be able to file **Form 2106-EZ** instead.

If you do not have to file Form 2106 or 2106-EZ, list the type and amount of each expense on the dotted lines next to line 20. If you need more space, attach a statement showing the type and amount of each expense. Enter one total on line 20.

Do not include on line 20 any educator expenses you deducted on Form 1040, line 23.

Examples of other expenses to include on line 20 are:

- Safety equipment, small tools, and supplies needed for your job.
- Uniforms required by your employer that are not suitable for ordinary wear.
- Protective clothing required in your work, such as hard hats, safety shoes, and glasses.
- Physical examinations required by your employer.
- Dues to professional organizations and chambers of commerce.
- Subscriptions to professional journals.
- Fees to employment agencies and other costs to look for a new job in your present occupation, even if you do not get a new job.
- Certain business use of part of your home. For details, including limits that apply, use TeleTax topic 509 (see page 11 of

Instructions for Form 8283

(Revised October 1998)

Noncash Charitable Contributions

Department of the Treasury
Internal Revenue Service

Section references are to the Internal Revenue Code unless otherwise noted.

General Instructions

Purpose of Form

Use Form 8283 to report information about noncash charitable contributions.

Do not use Form 8283 to report out-of-pocket expenses for volunteer work or amounts you gave by check or credit card. Treat these items as cash contributions. Also, **do not** use Form 8283 to figure your charitable contribution deduction. For details on how to figure the amount of the deduction, see your tax return instructions.

Additional Information

You may want to see **Pub. 526,** Charitable Contributions (for individuals), and **Pub. 561,** Determining the Value of Donated Property. If you contributed depreciable property, see **Pub. 544,** Sales and Other Dispositions of Assets.

Who Must File

You must file Form 8283 if the amount of your deduction for all noncash gifts is more than $500. For this purpose, "amount of your deduction" means your deduction **before** applying any income limits that could result in a carryover. The carryover rules are explained in Pub. 526. Make any required reductions to fair market value (FMV) before you determine if you must file Form 8283. See **Fair Market Value (FMV)** on page 2.

Form 8283 is filed by individuals, partnerships, and corporations.

Note: *C corporations, other than personal service corporations and closely held corporations, must file Form 8283 only if the amount claimed as a deduction is over $5,000.*

Partnerships and S corporations. A partnership or S corporation that claims a deduction for noncash gifts over $500 must file Form 8283 with Form 1065, 1065-B, or 1120S. If the total deduction of any item or group of similar items exceeds $5,000, the partnership or S corporation must complete Section B of Form 8283 even if the amount allocated to each partner or shareholder does not exceed $5,000.

The partnership or S corporation must give a completed copy of Form 8283 to each partner or shareholder receiving an allocation of the contribution deduction shown in Section B of the partnership's or S corporation's Form 8283.

Partners and shareholders. The partnership or S corporation will provide information about your share of the contribution on your Schedule K-1 (Form 1065 or 1120S).

In some cases, the partnership or S corporation must give you a copy of its Form 8283. If you received a copy of Form 8283 from the partnership or S corporation, attach a copy to your tax return. Deduct the amount shown on your Schedule K-1, not the amount shown on the Form 8283.

If the partnership or S corporation is not required to give you a copy of its Form 8283, combine the amount of noncash contributions shown on your Schedule K-1 with your other noncash contributions to see if you must file Form 8283. If you need to file Form 8283, you do not have to complete all the information requested in Section A for your share of the partnership's or S corporation's contributions. Complete only column (g) of line 1 with your share of the contribution and enter "From Schedule K-1 (Form 1065 or 1120S)" across columns (c)–(f).

When To File

File Form 8283 with your tax return for the year you contribute the property and first claim a deduction.

Which Sections To Complete

If you must file Form 8283, you may need to complete Section A, Section B, or both, depending on the type of property donated and the amount claimed as a deduction.

Section A. Include in Section A only items (or groups of similar items as defined on this page) for which you claimed a deduction of $5,000 or less per item (or group of similar items). Also, include the following publicly traded securities even if the deduction is more than $5,000.

- Securities listed on an exchange in which quotations are published daily,
- Securities regularly traded in national or regional over-the-counter markets for which published quotations are available, or
- Securities that are shares of a mutual fund for which quotations are published on a daily basis in a newspaper of general circulation throughout the United States.

Section B. Include in Section B only items (or groups of similar items) for which you claimed a deduction of more than $5,000 (omit publicly traded securities reportable in Section A). With certain exceptions, items reported in Section B will require information based on a written appraisal by a qualified appraiser.

Similar Items of Property

Similar items of property are items of the same generic category or type, such as stamp collections, coin collections, lithographs, paintings, books, nonpublicly traded stock, land, or buildings.

Example. You claimed a deduction of $400 for clothing, $7,000 for publicly traded securities (quotations published daily), and $6,000 for a collection of 15 books ($400 each). Report the clothing and securities in Section A and the books (a group of similar items) in Section B.

Special Rule for Certain C Corporations

A special rule applies for deductions taken by certain C corporations under section 170(e)(3) or (4) for contributions of inventory or scientific equipment.

To determine if you must file Form 8283 or which section to complete, use the difference between the amount you claimed as a deduction and the amount you would have claimed as cost of goods sold (COGS) had you sold the property instead. This rule is **only** for purposes of Form 8283. It does not change the amount or method of figuring your contribution deduction.

If you do not have to file Form 8283 because of this rule, you must attach a statement to your tax return (similar to the one in the example below). Also, attach a statement if you must complete Section A, instead of Section B, because of this rule.

Example. You donated clothing from your inventory for the care of the needy. The clothing cost you $5,000 and your claimed charitable deduction is $8,000. Complete Section A instead of Section B because the difference between the amount you claimed as a charitable deduction and the amount that would have been your COGS deduction is $3,000 ($8,000 – $5,000). Attach a statement to Form 8283 similar to the following:

Form 8283—Inventory

Contribution deduction	$8,000
COGS (if sold, not donated)	– 5,000
For Form 8283 filing purposes	=$3,000

Fair Market Value (FMV)

Although the **amount** of your deduction determines if you have to file Form 8283, you also need to have information about the **value** of your contribution to complete the form.

FMV is the price a willing, knowledgeable buyer would pay a willing, knowledgeable seller when neither has to buy or sell.

You may not always be able to deduct the FMV of your contribution. Depending on the type of property donated, you may have to reduce the FMV to get to the deductible amount, as explained next.

Reductions to FMV. The amount of the reduction (if any) depends on whether the property is ordinary income property or capital gain property. Attach a statement to your tax return showing how you figured the reduction.

Ordinary income property is property that would result in ordinary income or short-term capital gain if it were sold at its FMV on the date it was contributed. Examples of ordinary income property are inventory, works of art created by the donor, and capital assets held for 1 year or less. The deduction for a gift of ordinary income property is limited to the FMV minus the amount that would be ordinary income or short-term capital gain if the property were sold.

Capital gain property is property that would result in long-term capital gain if it were sold at its FMV on the date it was contributed. It includes certain real property and depreciable property used in your trade or business, and generally held for more than 1 year. You usually may deduct gifts of capital gain property at their FMV. However, you must reduce the FMV by the amount of any appreciation if any of the following apply.

- The capital gain property is contributed to certain private nonoperating foundations. This rule does not apply to qualified appreciated stock.
- You choose the 50% limit instead of the special 30% limit.
- The contributed property is tangible personal property that is put to an **unrelated use** (as defined in Pub. 526) by the charity.

Qualified conservation contribution. If your donation qualifies as a "qualified conservation contribution" under section 170(h), attach a statement showing the FMV of the underlying property before and after the gift and the conservation purpose furthered by the gift. See Pub. 561 for more details.

Specific Instructions

Identifying number. Individuals must enter their social security number or individual taxpayer identification number. All other filers should enter their employer identification number.

Section A

Part I, Information on Donated Property

Line 1

Column (b). Describe the property in sufficient detail. The greater the value, the more detail you need. For example, a car should be described in more detail than pots and pans.

For securities, include the following:

- Name of the issuer,
- Kind of security,
- Whether a share of a mutual fund, and
- Whether regularly traded on a stock exchange or in an over-the-counter market.

Note: *If the amount you claimed as a deduction for the item is $500 or less, you do not have to complete columns (d), (e), and (f).*

Column (d). Enter the approximate date you acquired the property. If it was created, produced, or manufactured by or for you, enter the date it was substantially completed.

Column (e). State how you acquired the property (i.e., by purchase, gift, inheritance, or exchange).

Column (f). Do not complete this column for publicly traded securities or property held 12 months or more. Keep records on cost or other basis.

Note: *If you have reasonable cause for not providing the information in columns (d) and (f), attach an explanation.*

Column (g). Enter the FMV of the property on the date you donated it. If you were required to reduce the FMV of your deduction or you gave a qualified conservation contribution, you must attach a statement. See **Fair Market Value (FMV)** on this page for the type of statement to attach.

Column (h). Enter the method(s) you used to determine the FMV. The FMV of used household goods and clothing is usually much lower than when new. A good measure of value might be the price that buyers of these used items actually pay in consignment or thrift shops.

Examples of entries to make include "Appraisal," "Thrift shop value" (for clothing or household goods), "Catalog" (for stamp or coin collections), or "Comparable sales" (for real estate and other kinds of assets). See Pub. 561.

Part II, Other Information

If Part II applies to more than one property, attach a separate statement. Give the required information for

each property separately. Identify which property listed in Part I the information relates to.

Lines 2a Through 2e

Complete lines 2a–2e only if you contributed less than the entire interest in the donated property during the tax year. On line 2b, enter the amount claimed as a deduction for this tax year and in any prior tax years for gifts of a partial interest in the same property.

Lines 3a Through 3c

Complete lines 3a–3c only if you attached restrictions to the right to the income, use, or disposition of the donated property. An example of a "restricted use" is furniture that you gave only to be used in the reading room of an organization's library. Attach a statement explaining **(1)** the terms of any agreement or understanding regarding the restriction, and **(2)** whether the property is designated for a particular use.

Section B

Part I, Information on Donated Property

You must have a written appraisal from a qualified appraiser that supports the information in Part I. However, see the **Exceptions** below.

Use Part I to summarize your appraisal(s). Generally, you do not need to attach the appraisals but you should keep them for your records. But see **Art valued at $20,000 or more** below.

Exceptions. You do not need a written appraisal if the property is:

- Nonpublicly traded stock of $10,000 or less,
- Certain securities considered to have market quotations readily available (see Regulations section 1.170A-13(c)(7)(xi)(B)),
- A donation by a C corporation (other than a closely held corporation or personal service corporation), or
- Inventory and other property donated by a closely held corporation or a personal service corporation that are "qualified contributions" for the care of the ill, the needy, or infants, within the meaning of section 170(e)(3)(A).

Although a written appraisal is not required for the types of property listed above, you must provide certain information in Part I of Section B (see Regulations section 1.170A-13(c)(4)(iv)) and have the donee organization complete Part IV.

Art valued at $20,000 or more. If your total deduction for art is $20,000 or more, you must attach a complete copy of the signed appraisal. For individual objects valued at $20,000 or more, a photograph must be provided upon request. The photograph must be of sufficient quality and size (preferably an 8 x 10 inch color photograph or a color transparency no smaller than 4 x 5 inches) to fully show the object.

Appraisal Requirements

The appraisal must be made not earlier than 60 days before the date you contribute the property. You must receive the appraisal before the due date (including extensions) of the return on which you first claim a deduction for the property. For a deduction first claimed on an amended return, the appraisal must be received before the date the amended return was filed.

A separate qualified appraisal and a separate Form 8283 are required for each item of property except for an item that is part of a group of similar items. Only one appraisal is required for a group of similar items contributed in the same tax year, if it includes all the required information for each item. The appraiser may group similar items with a collective value appraised at $100 or less.

If you gave similar items to more than one donee for which you claimed a total deduction of more than $5,000, you must attach a separate form for each donee.

Example. You claimed a deduction of $2,000 for books given to College A, $2,500 for books given to College B, and $900 for books given to a public library. You must attach a separate Form 8283 for each donee.

See Regulations section 1.170A-13(c)(3)(i)–(ii) for the definition of a "qualified appraisal" and information to be included in the appraisal.

Line 5

Note: *You **must** complete at least column (a) of line 5 (and column (b) if applicable) before submitting Form 8283 to the donee. You may then complete the remaining columns.*

Column (a). Provide enough detail so a person unfamiliar with the property could identify it in the appraisal.

Column (c). Include the FMV from the appraisal. If you were not required to get an appraisal, include the FMV you determine to be correct.

Columns (d)–(f). If you have reasonable cause for not providing the information in columns (d), (e), or (f), attach an explanation so your deduction will not automatically be disallowed.

Column (g). A bargain sale is a transfer of property that is in part a sale or exchange and in part a contribution. Enter the amount received for bargain sales.

Column (h). Complete column (h) only if you were not required to get an appraisal, as explained earlier.

Column (i). Complete column (i) only if you donated securities for which market quotations are considered to be readily available because the issue satisfies the five requirements described in Regulations section 1.170A-13(c)(7)(xi)(B).

Part II, Taxpayer (Donor) Statement

Complete Part II for each item included in Part I that has an appraised value of $500 or less. Because you do not have to show the value of these items in Part I of the donee's copy of Form 8283, clearly identify them for the donee in Part II. Then, the donee does not have to file **Form 8282,** Donee Information Return, for items valued at $500 or less. See the **Note** on page 4 for more details about filing Form 8282.

The amount of information you give in Part II depends on the description of the donated property you enter in Part I. If you show a single item as "Property A" in Part I and that item is appraised at $500 or less, then the entry "Property A" in Part II is enough. However, if "Property A" consists of several items and the total appraised value is over $500, list in Part II any item(s) you gave that is valued at $500 or less.

All shares of nonpublicly traded stock or items in a set are considered one item. For example, a book collection by the same author, components of a stereo system, or six place settings of a pattern of silverware are one item

for the $500 test.

Example. You donated books valued at $6,000. The appraisal states that one of the items, a collection of books by author "X," is worth $400. On the Form 8283 that you are required to give the donee, you decide not to show the appraised value of all of the books. But you also do not want the donee to have to file Form 8282 if the collection of books is sold. If your description of Property A on line 5 includes all the books, then specify in Part II the "collection of books by X included in Property A." But if your Property A description is "collection of books by X," the only required entry in Part II is "Property A."

In the above example, you may have chosen instead to give a completed copy of Form 8283 to the donee. The donee would then be aware of the value. If you include all the books as Property A on line 5, and enter $6,000 in column (c), you may still want to describe the specific collection in Part II so the donee can sell it without filing Form 8282.

Part III, Declaration of Appraiser

If you had to get an appraisal, the appraiser **must** complete Part III to be considered qualified. See Regulations section 1.170A-13(c)(5) for a definition of a qualified appraiser.

Persons who cannot be qualified appraisers are listed in the Declaration of Appraiser. Usually, a party to the transaction will not qualify to sign the declaration. But a person who sold, exchanged, or gave the property to you may sign the declaration if the property was donated within 2 months of the date you acquired it and the property's appraised value did not exceed its acquisition price.

An appraiser may not be considered qualified if you had knowledge of facts that would cause a reasonable person to expect the appraiser to falsely overstate the value of the property. An example of this is an agreement between you and the appraiser about the property value when you know that the appraised amount exceeds the actual FMV.

Usually, appraisal fees cannot be based on a percentage of the appraised value unless the fees were paid to certain not-for-profit associations. See Regulations section 1.170A-13(c)(6)(ii).

Part IV, Donee Acknowledgment

The donee organization that received the property described in Part I of Section B must complete Part IV. Before submitting page 2 of Form 8283 to the donee for acknowledgment, complete at least your name, identifying number, and description of the donated property (line 5, column (a)). If tangible property is donated, also describe its physical condition (line 5, column (b)) at the time of the gift. Complete Part II, if applicable, before submitting the form to the donee. See the instructions for Part II.

The person acknowledging the gift must be an official authorized to sign the tax returns of the organization, or a person specifically designated to sign Form 8283. After completing Part IV, the organization must return Form 8283 to you, the donor. You must give a copy of Section B of this form to the donee organization. You may then complete any remaining information required in Part I. Also, Part III may be completed at this time by the qualified appraiser.

In some cases, it may be impossible to get the donee's signature on the Appraisal Summary. The deduction will not be disallowed for that reason if you attach a detailed explanation why it was impossible.

Note: *If the donee (or a successor donee) organization disposes of the property within 2 years after the date the original donee received it, the organization must file* ***Form 8282,*** *Donee Information Return, with the IRS and send a copy to the donor. An exception applies to items having a value of $500 or less if the donor identified the items and signed the statement in Part II (Section B) of Form 8283. See the instructions for Part II.*

Failure To File Form 8283, Section B

If you fail to attach Form 8283 to your return for donated property that is required to be reported in Section B, your deduction will be disallowed unless your failure was due to a good-faith omission. If the IRS asks you to submit the form, you have 90 days to send a completed Section B of Form 8283 before your deduction is disallowed.

Paperwork Reduction Act Notice. We ask for the information on this form to carry out the Internal Revenue laws of the United States. You are required to give us the information. We need it to ensure that you are complying with these laws and to allow us to figure and collect the right amount of tax.

You are not required to provide the information requested on a form that is subject to the Paperwork Reduction Act unless the form displays a valid OMB control number. Books or records relating to a form or its instructions must be retained as long as their contents may become material in the administration of any Internal Revenue law. Generally, tax returns and return information are confidential, as required by section 6103.

The time needed to complete and file this form will vary depending on individual circumstances. The estimated average time is: **Recordkeeping,** 20 min.; **Learning about the law or the form,** 29 min.; **Preparing the form,** 37 min.; **Copying, assembling, and sending the form to the IRS,** 35 min.

If you have comments concerning the accuracy of these time estimates or suggestions for making this form simpler, we would be happy to hear from you. See the instructions for the tax return with which this form is filed.

2004

Department of the Treasury
Internal Revenue Service

Instructions for Form 990 and Form 990-EZ

Return of Organization Exempt From Income Tax and Short Form Return of Organization Exempt From Income Tax

Under Section 501(c), 527, or 4947(a)(1) of the Internal Revenue Code (except black lung benefit trust or private foundation)

Caution: Form 990-EZ is for use by organizations with gross receipts of less than $100,000 and total assets of less than $250,000 at the end of the year.

Section references are to the Internal Revenue Code unless otherwise noted.

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What's New

- The IRS has established a new, subscription-based email service for tax professionals and representatives of tax-exempt organizations. Subscribers will receive periodic updates from the IRS regarding exempt organization tax law and regulations, available services, and other information. To subscribe, visit *www.irs.gov/eo.*
- Form 990 and Form 990-EZ can be electronically filed. Visit *www.irs.gov* or call 1-800-555-4477 for more information. Also see Form 8453-EO, Exempt Organization Declaration and Signature for Electronic Filing, and Form 8879-EO, IRS *e-file* Signature Authorization for an Exempt Organization.
- Section 882 of the American Jobs Creation Act of 2004 requires certain charities to file a new Form 8899, *Notice of Income from Donated Intellectual Property,* to report income from qualified intellectual property.

As previously required, donees should report all income from donated qualified intellectual property as income other than contributions (for example, royalty income from a patent). Charities are not required to report as contributions any of the additional deductions claimed by donors under the new section 170(m)(1). Likewise, these additional deductions are not required to be reported on Schedule B (Form 990-PF) and donees are not required to comply with the substantiation requirements of section 170(f)(8) with regard to any donor's additional deductions.

- Special rules apply to charitable contributions after 2004 of used motor vehicles, boats, or airplanes with a claimed value of more than $500. See section 170(f)(12).
- Generally, for tax years beginning after December 31, 2003, Section 206 of the Pension Funding Equity Act of 2004 (Public Law 108-218) changed the statutory income basis for exemption pertaining to small insurance companies exempt under section 501(c)(15). A stock organization must now meet the following test to qualify for exemption:

1. Gross receipts for the year may not exceed $600,000, and

2. Premiums must total more than 50% of the organization's total gross receipts.

Mutual companies must either meet the above test, or an alternative test as stated below:

1. Gross receipts may not exceed $150,000, and

2. Premiums must equal more than 35% of the organization's total gross receipts.

See pages 2 and 19.

Purpose of Form

Form 990 and Form 990-EZ are used by tax-exempt organizations, nonexempt charitable trusts, and section 527 political organizations to provide the IRS with the information required by section 6033.

An organization's completed Form 990, or Form 990-EZ, is available for public inspection as required by section 6104. Schedule B (Form 990, 990-EZ, or 990-PF), Schedule of Contributors, is open for public inspection for section 527 organizations filing Form 990 or Form 990-EZ. For other organizations that file Form 990 or Form 990-EZ, parts of Schedule B may be open to public inspection. See the instructions to Schedule B for more details.

Some members of the public rely on Form 990, or Form 990-EZ, as the primary or sole source of information about a particular organization. How the public perceives an

accordance with SFAS 117 will be acceptable to IRS.

Organizations that follow SFAS 117. If the organization follows SFAS 117, check the box above line 67. Classify and report net assets in three groups—unrestricted, temporarily restricted, and permanently restricted—based on the existence or absence of donor-imposed restrictions and the nature of those restrictions. Show the sum of the three classes of net assets on line 73. On line 74, add the amounts on lines 66 and 73 to show total liabilities and net assets. This figure should be the same as the figure for Total assets on line 59.

Line 67—Unrestricted

Enter the balances per books of the unrestricted class of net assets. Unrestricted net assets are neither permanently restricted nor temporarily restricted by donor-imposed stipulations. All funds without donor-imposed restrictions must be classified as unrestricted, regardless of the existence of any board designations or appropriations.

Line 68—Temporarily restricted

Enter the balance per books for the temporarily restricted class of net assets. Donors' temporary restrictions may require that resources be used in a later period or after a specified date (time restrictions), or that resources be used for a specified purpose (purpose restrictions), or both.

Line 69—Permanently restricted

Enter the total of the balances for the permanently restricted class of net assets. Permanently restricted net assets are (a) assets, such as land or works of art, donated with stipulations that they be used for a specified purpose, be preserved, and not be sold or (b) assets donated with stipulations that they be invested to provide a permanent source of income. The latter result from gifts and bequests that create permanent endowment funds.

Organizations that do not follow SFAS 117. If the organization does not follow SFAS 117, check the box above line 70 and report account balances on lines 70 through 72. Report net assets or fund balances on line 73. Complete line 74 to report the sum of the total liabilities and net assets.

Some states that accept Form 990, or Form 990-EZ, as their basic reporting form may require a separate statement of changes in net assets/fund balances. See *General Instruction E.*

Line 70—Capital stock, trust principal, or current funds

For corporations, enter the balance per books for capital stock accounts. Show par or stated value (or for stock with no par or stated value, total amount received upon issuance) of all classes of stock issued and, as yet, uncancelled. For trusts, enter the amount in the trust principal or corpus account. For organizations continuing to use the fund method of accounting, enter the fund balances for the organization's current restricted and unrestricted funds.

Line 71—Paid-in or capital surplus, or land, bldg., and equipment fund

Enter the balance per books for all paid-in capital in excess of par or stated value for all stock issued and uncancelled. If stockholders or others gave donations that the organization records as paid-in capital, include them here. Report any current-year donations you included on line 71 in Part I, line 1. Enter the fund balance for the land, building, and equipment fund on this line.

Line 72—Retained earnings or accumulated income, endowment, or other funds

For corporations, enter the balance in the retained earnings, or similar account, minus the cost of any corporate treasury stock. For trusts, enter the balance per books in the accumulated income or similar account. For those organizations using fund accounting, enter the total of the fund balances for the permanent and term endowment funds as well as balances of any other funds not reported on lines 70 and 71.

Line 73—Total net assets or fund balances

For organizations that follow SFAS 117, enter the total of lines 67 through 69. For all other organizations, enter the total of lines 70 through 72. Enter the beginning-of-the-year figure on line 73, column (A), in Part I, line 19. The end-of-the-year figure on line 73, column (B) must agree with the figure on line 21 of Part I.

Line 74—Total liabilities and net assets/fund balances

Enter the total of lines 66 and 73. This amount must equal the amount for total assets reported on line 59 for both the beginning and end of the year.

Parts IV-A and IV-B—Reconciliation Statements

Use these reconciliation statements to reconcile the differences between the revenue and expenses shown on the organization's audited financial statements prepared in accordance with SFAS 117 and the revenue and expenses shown on the organization's Form 990.

If the organization did not receive an audited financial statement for 2004 (or the fiscal year for which it is completing this Form 990) and prepared the return in accordance with SFAS 117, it does not need to complete Parts IV-A or IV-B and should instead enter "N/A" on line a of each Part.

These two Parts do not have to be completed on group returns.

On line d(1) of Parts IV-A and IV-B, include only those investment expenses netted against investment income in the revenue portion of the organization's audited financial statements. Do not include program-related investment expenses or other expenses reported as program service expenses in the audited statement of activities.

Part V—List of Officers, Directors, Trustees, and Key Employees

List each person who was an officer, director, trustee, or key employee (defined below) of the organization or disregarded entity described in Regulations sections 301.7701-1 through 301.7701-3 at any time during the year even if they did not receive any compensation from the organization.

Enter a zero in columns (B), (C), (D), or (E) if no hours were entered in column (B) and no compensation, contributions, expenses and other allowances were paid during the reporting year, or deferred for payment to a future accounting period.

Aid in the processing of your return by grouping together, preferably at the end of your list, those who received no compensation. Be careful not to repeat names.

Give the preferred address at which officers, etc., want the Internal Revenue Service to contact them.

Use an attachment if there are more persons to list in Part V.

Show all forms of cash and noncash compensation received by each listed officer, etc., whether paid currently or deferred.

If you pay any other person, such as a management services company, for the services provided by any of your officers, directors, trustees, or key employees, report the compensation and other items in Part V as if you had paid the officers, etc., directly.

A failure to fully complete Part V can subject both the organization and the individuals responsible for such failure to penalties for filing an incomplete return. See *General Instruction K.* In particular, entering the phrase on Part V, "Information available upon request," or a similar phrase, is not acceptable.

The organization may also provide an attachment to explain the entire 2004 compensation package for any person listed in Part V.

Each person listed in Part V should report the listed compensation on his or her income tax return unless the Code specifically excludes any of the payments from income tax. See Pub. 525 for details.

A "key employee" is any person having responsibilities or powers similar to those of officers, directors, or trustees. The term includes the chief management and administrative officials of an organization (such as an executive director or chancellor) but does not include the heads of separate departments or smaller units within an organization.

A chief financial officer and the officer in charge of administration or program operations are both key employees if they have the authority to control the organization's activities, its finances, or both. The "heads of separate departments" reference applies to persons such as the head of the radiology department or coronary care unit of a hospital or the head of the chemistry, history, or English department at a college. These persons are managers within their specific areas but not for the organization as a whole and, therefore, are not key employees.

Column (B)

In column (B), a numerical estimate of the average hours per week devoted to the position is required for a complete answer. Statements such as "as needed," "as required," or "40+" are unacceptable.

Column (C)

For each person listed, report salary, fees, bonuses, and severance payments paid. Include current-year payments of amounts reported or reportable as deferred compensation in any prior year.

Column (D)

Include in this column all forms of deferred compensation and future severance payments (whether or not funded; whether or not vested; and whether or not the deferred compensation plan is a qualified plan under section 401(a)). Include also payments to welfare benefit plans on behalf of the officers, etc. Such plans provide benefits such as medical, dental, life insurance, severance pay, disability, etc. Reasonable estimates may be used if precise cost figures are not readily available.

Unless the amounts were reported in column (C), report, as deferred compensation

2005

Department of the Treasury
Internal Revenue Service

Instructions for Form 990 and Form 990-EZ

Return of Organization Exempt From Income Tax and Short Form Return of Organization Exempt From Income Tax

Under Section 501(c), 527, or 4947(a)(1) of the Internal Revenue Code (except black lung benefit trust or private foundation)

Caution: Form 990-EZ is for use by organizations with gross receipts of less than $100,000 and total assets of less than $250,000 at the end of the year.

Section references are to the Internal Revenue Code unless otherwise noted.

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What's New

Several changes were made to Form 990 and Form 990-EZ for 2005. These changes include:

- New checkboxes for foreign grants in Part III-*Statement of Program Service Accomplishments* for Forms 990 and 990-EZ.
- The previous Part V of Form 990 is now Part V-A. Three new questions were added concerning relationships with other entities and control of the organization.
- New Part V-B has been added to Form 990. It requests information about compensation or other benefits that former officers, directors, trustees, and key employees received from the organization.
- New line 91b has been added to Form 990 (line 42b on Form 990-EZ). These lines ask whether the organization had an interest in or signature authority over any foreign financial accounts, and if so, to list the countries where the accounts are located.
- New line 91c has been added to Form 990 (line 42c on Form 990-EZ). These lines ask whether organizations have offices in foreign countries and if so, to list the countries where the offices are located.

Purpose of Form

Form 990 and Form 990-EZ are used by tax-exempt organizations, nonexempt charitable trusts, and section 527 political organizations to provide the IRS with the information required by section 6033.

An organization's completed Form 990, or Form 990-EZ, is available for public inspection as required by section 6104. Schedule B (Form 990, 990-EZ, or 990-PF), Schedule of Contributors, is open for public inspection for section 527 organizations filing Form 990 or Form 990-EZ. For other organizations that file Form 990 or Form 990-EZ, parts of Schedule B may be open to public inspection. See the *Instructions for Schedule B* for more details.

Some members of the public rely on Form 990, or Form 990-EZ, as the primary or sole source of information about a particular organization. How the public perceives an organization in such cases may be determined by the information presented on its return. Therefore, the return must be complete, accurate, and fully describe the organization's programs and accomplishments.

Use Form 990 or Form 990-EZ, to send a required election to the IRS, such as the election to capitalize costs under section 266.

Phone Help

If you have questions and/or need help completing Form 990, or Form 990-EZ, please call 1-877-829-5500. This toll-free telephone service is available Monday through Friday.

Email Subscription

The IRS has established a new subscription-based email service for tax professionals and representatives of tax-exempt organizations. Subscribers will receive periodic updates from the IRS regarding exempt organization tax law and regulations, available services, and other information. To subscribe, visit *www.irs.gov/eo*.

Line 63. Loans From Officers, Directors, Trustees, and Key Employees

Enter the unpaid balance of loans received from current and former officers, directors, trustees, and key employees. See the instructions for Part V-A for the definition of key employee. For loans outstanding at the end of the year, attach a schedule that shows, for each loan, the name and title of the lender and the information specified in items 2 through 10 of the instructions for line 50.

Line 64a. Tax-Exempt Bond Liabilities

Enter the amount of tax-exempt bonds (or other obligations) issued by the organization on behalf of a state or local governmental unit, or by a state or local governmental unit on behalf of the organization, and for which the organization has a direct or indirect liability. Tax-exempt bonds include state or local bonds and any obligations, including direct borrowing from a lender, or certificates of participation, the interest on which is excluded from the income of the recipient for federal income tax purposes under section 103.

For all such bonds and obligations outstanding at any time during the year, attach a schedule showing for each separate issue: (a) the purpose of the issue; (b) the amount of the issue outstanding; and (c) the unexpended bond proceeds, if any. Also indicate whether any portion of any bond-financed facility was used by a third party (other than a governmental unit or section 501(c)(3) organization), and, if so, state the percentage of space used by the third party.

If the tax-exempt bond or obligation is in the form of a mortgage, include the amount of the mortgage on line 64a, and not on line 64b. For such mortgage, include in the above listing, the maturity date of the debt, repayment terms, interest rate, and any security provided by the organization.

Line 64a does not, however, refer to situations where the organization only has a contingent liability, as it would if it were a guarantor of tax-exempt bonds issued by a related entity. Contingent liabilities, such as those that arise from guarantees, should be included as an entry in the separately attached schedule required for line 64a.

Line 64b. Mortgages and Other Notes Payable

Enter the amount of mortgages and other notes payable at the beginning and end of the year. Attach a schedule showing, as of the end of the year, the total amount of all mortgages payable and, for each nonmortgage note payable, the name of the lender and the other information specified in items 2 through 10 of the instructions for line 50. The schedule should also identify the relationship of the lender to any officer, director, trustee, or key employee of the organization.

Line 65. Other Liabilities

List and show the amount of each liability not reportable on lines 60 through 65. Attach a separate schedule if more space is needed.

Lines 67 through 69. Net Assets

The Financial Accounting Standards Board issued *Financial Statements of Not-for-Profit Organizations* (SFAS 117). SFAS 117 provides standards for external financial statements certified by an independent accountant for certain types of nonprofit organizations. SFAS 117 does not apply to credit unions, voluntary employees' beneficiary associations, supplemental unemployment benefit trusts, section 501(c)(12) cooperatives, and other member benefit or mutual benefit organizations.

While some states may require reporting in accordance with SFAS 117, the IRS does not (see *General Instruction E*). However, a Form 990, or Form 990-EZ, return prepared in accordance with SFAS 117 will be acceptable to the IRS.

Organizations that follow SFAS 117. If the organization follows SFAS 117, check the box above line 67. Classify and report net assets in three groups — unrestricted, temporarily restricted, and permanently restricted — based on the existence or absence of donor-imposed restrictions and the nature of those restrictions. Show the sum of the three classes of net assets on line 73. On line 74, add the amounts on lines 66 and 73 to show total liabilities and net assets. This figure should be the same as the figure for *Total assets* on line 59.

Line 67. Unrestricted

Enter the balances per books of the unrestricted class of net assets. Unrestricted net assets are neither permanently restricted nor temporarily restricted by donor-imposed stipulations. All funds without donor-imposed restrictions must be classified as unrestricted, regardless of the existence of any board designations or appropriations.

Line 68. Temporarily Restricted

Enter the balance per books for the temporarily restricted class of net assets. Donors' temporary restrictions may require that resources be used in a later period or after a specified date (time restrictions), or that resources be used for a specified purpose (purpose restrictions), or both.

Line 69. Permanently Restricted

Enter the total of the balances for the permanently restricted class of net assets. Permanently restricted net assets are (a) assets, such as land or works of art, donated with stipulations that they be used for a specified purpose, be preserved, and not be sold or (b) assets donated with stipulations that they be invested to provide a permanent source of income. The latter result from gifts and bequests that create permanent endowment funds.

Organizations that do not follow SFAS 117. If the organization does not follow SFAS 117, check the box above line 70 and report account balances on lines 70 through 72. Report net assets or fund balances on line 73. Complete line 74 to report the sum of the total liabilities and net assets.

Some states that accept Form 990, or Form 990-EZ, as their basic reporting form may require a separate statement of changes in net assets/fund balances. See *General Instruction E.*

Line 70. Capital Stock, Trust Principal, or Current Funds

For corporations, enter the balance per books for capital stock accounts. Show par or stated value (or for stock with no par or stated value, total amount received upon issuance) of all classes of stock issued and, as yet, uncancelled. For trusts, enter the amount in the trust principal or corpus account. For organizations continuing to use the fund method of accounting, enter the fund balances for the organization's current restricted and unrestricted funds.

Line 71. Paid-In or Capital Surplus, or Land, Bldg., and Equipment Fund

Enter the balance per books for all paid-in capital in excess of par or stated value for all stock issued and uncancelled. If stockholders or others gave donations that the organization records as paid-in capital, include them here. Report any current-year donations you included on line 71 in Part I, line 1. Enter the fund balance for the land, building, and equipment fund on this line.

Line 72. Retained Earnings or Accumulated Income, Endowment, or Other Funds

For corporations, enter the balance in the retained earnings, or similar account, minus the cost of any corporate treasury stock. For trusts, enter the balance per books in the accumulated income or similar account. For those organizations using fund accounting, enter the total of the fund balances for the permanent and term endowment funds as well as balances of any other funds not reported on lines 70 and 71.

Line 73. Total Net Assets or Fund Balances

For organizations that follow SFAS 117, enter the total of lines 67 through 69. For all other organizations, enter the total of lines 70 through 72. Enter the beginning-of-the-year figure on line 73, column (A), in Part I, line 19. The end-of-the-year figure on line 73, column (B) must agree with the figure on line 21 of Part I.

Line 74. Total Liabilities and Net Assets/Fund Balances

Enter the total of lines 66 and 73. This amount must equal the amount for total assets reported on line 59 for both the beginning and end of the year.

Parts IV-A and IV-B — Reconciliation Statements

Use these reconciliation statements to reconcile the differences between the revenue and expenses shown on the organization's audited financial statements prepared in accordance with SFAS 117 and the revenue and expenses shown on the organization's Form 990.

If the organization did not receive an audited financial statement for 2005 (or the fiscal year for which it is completing this Form 990) and prepared the return in accordance with SFAS 117, it does not need to complete Parts IV-A or IV-B and should instead enter "N/A" on line a of each Part.

These two Parts do not have to be completed on group returns.

On line d1 of Parts IV-A and IV-B, include only those investment expenses netted against investment income in the revenue portion of the organization's audited financial statements. Do not include program-related investment expenses or other expenses reported as program service expenses in the audited statement of activities.

Part V-A — Current Officers, Directors, Trustees, and Key Employees

List each person who was a current officer, director, trustee, or key employee (defined below) of the organization or disregarded entity described in Regulations sections 301.7701-1 through 301.7701-3 at any time during the year even if they did not receive any compensation from the organization.

Enter a zero in columns (B), (C), (D), or (E) if no hours were entered in column (B) and no compensation, contributions, expenses and other allowances were paid during the

2006

Department of the Treasury
Internal Revenue Service

Instructions for Form 990 and Form 990-EZ

Return of Organization Exempt From Income Tax and Short Form Return of Organization Exempt From Income Tax

Under Section 501(c), 527, or 4947(a)(1) of the Internal Revenue Code (except black lung benefit trust or private foundation)

Caution: Form 990-EZ is for use by organizations other than sponsoring organizations and controlling organizations defined in section 512(b)(13), with gross receipts of less than $100,000 and total assets of less than $250,000 at the end of the year.

Section references are to the Internal Revenue Code unless otherwise noted.

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What's New

The following items reflect changes made by the Pension Protection Act of 2006.

- Item K has been revised to reflect the requirement that a section 509(a)(3) supporting organization must generally file Form 990 (or Form 990-EZ, if applicable), even if its gross receipts are normally $25,000 or less.
- Sponsoring organizations and controlling organizations as defined in section 512(b)(13) cannot file Form 990-EZ. These organizations must file their return on Form 990.
- The definitions for disqualified persons and excess benefit transactions have been revised. See *General Instruction P*.
- New lines 1a and 22a were added to Form 990 to show the total contributions to, and grants made from, donor advised funds for the year. The change reflects section 6033(k) requirements for sponsoring organizations (defined in section 4966(d)(1)). Prior year's lines 1a–1d were renumbered 1b–1e.
- New lines 25a, 25b, and 25c replace the prior year's line 25 on Form 990. New lines 25a and 25b reflect compensation of current and former officers, directors, trustees, and key employees and line 25c reflects compensation and distributions to certain disqualified and other persons. Also, the descriptions for lines 26 through 28 were clarified to reflect the changes to line 25.
- New line 50b was added to Form 990 to reflect the amount of receivables from certain disqualified and other persons.
- New lines 54a and 54b were added to Form 990 to separate investments in publicly traded securities from investments in other securities. See the instructions for lines 54a and 54b for more information.
- New line 88b and new Part XI were added to reflect section 6033(h) which requires controlling organizations, within the meaning of section 512(b)(13), filing Form 990 after August 17, 2006, to report the information requested.
- New line 89f was added to Form 990 to ask if the organization acquired a direct or indirect interest in an applicable insurance contract after August 17, 2006.
- New line 89g was added to Form 990 to ask if supporting organizations and sponsoring organizations maintaining donor advised funds had any excess business holdings at any time during the tax year.
- Section 501(c)(3) organizations that file Form 990-T after August 17, 2006, to report unrelated business income must make that Form 990-T available for public inspection under section 6104(d)(1)(A)(ii).

The following item reflects changes made by Act section 516 of the Taxpayer Increase Prevention and Reconciliation Act of 2005.

- Form 990, line 89e and Form 990-EZ, line 40e have been added to ask if the organization was a party to any prohibited tax shelter transactions. See new *General Instruction W* for more information.

The following changes were also made to the instructions.

- For 2006, an exempt organization must file its return electronically if it files at least 250 returns during the calendar year and has total assets of $10 million or more at the end of the tax year. See *General Instruction H* for more information.
- The discussion for determining whether a non-life insurance company qualifies as a tax-exempt organization under section 501(c)(15) was revised to reflect the meaning of gross receipts for purposes of section 501(c)(15)(A). See *General Instruction A* for more information.

documents of other tax-exempt organizations, on a World Wide Web page established and maintained by another entity. The document will be considered widely available only if:

- The World Wide Web page through which it is available clearly informs readers that the document is available and provides instructions for downloading it;
- The document is posted in a format that, when accessed, downloaded, viewed and printed in hard copy, exactly reproduces the image of the application for tax exemption or annual information return as it was originally filed with the IRS, except for any information permitted by statute to be withheld from public disclosure; and
- Any individual with access to the Internet can access, download, view and print the document without special computer hardware or software required for that format (other than software that is readily available to members of the public without payment of any fee) and without payment of a fee to the tax-exempt organization or to another entity maintaining the World Wide Web page.

Reliability and accuracy. In order for the document to be widely available through an Internet posting, the entity maintaining the World Wide Web page must have procedures for ensuring the reliability and accuracy of the document that it posts on the page and must take reasonable precautions to prevent alteration, destruction or accidental loss of the document when posted on its page. In the event that a posted document is altered, destroyed or lost, the entity must correct or replace the document.

Notice requirement. If a tax-exempt organization has made its application for tax exemption and/or an annual information return widely available, it must notify any individual requesting a copy where the documents are available (including the address on the World Wide Web, if applicable). If the request is made in person, the organization must provide such notice to the individual immediately. If the request is made in writing, the notice must be provided within 7 days of receiving the request.

Tax-exempt organization subject to harassment campaign. If the Director EO Examination (or designee) determines that the organization is being harassed, a tax-exempt organization is not required to comply with any request for copies that it reasonably believes is part of a harassment campaign.

Whether a group of requests constitutes a harassment campaign depends on the relevant facts and circumstances such as:

A sudden increase in requests; an extraordinary number of requests by form letters or similarly worded correspondence; hostile requests; evidence showing bad faith or deterrence of the organization's exempt purpose; prior provision of the requested documents to the purported harassing group; and a demonstration that the organization routinely provides copies of its documents upon request.

A tax-exempt organization may disregard any request for copies of all or part of any document beyond the first two received within any 30-day period or the first four received within any 1-year period from the same individual or the same address, regardless of whether the Director EO Examination (or designee) has determined that the organization is subject to a harassment campaign.

A tax-exempt organization may apply for a determination that it is the subject of a harassment campaign and that compliance with requests that are part of the campaign would not be in the public interest by submitting a signed application to the Director EO Examination (or designee) for the area where the organization's principal office is located.

In addition, the organization may suspend compliance with any request it reasonably believes to be part of the harassment campaign until it receives a response to its application for a harassment campaign determination. However, if the Director EO Examination (or designee) determines that the organization did not have a reasonable basis for requesting a determination that it was subject to a harassment campaign or reasonable belief that a request was part of the campaign, the officer, director, trustee, employee, or other responsible individual of the organization remains liable for any penalties for not providing the copies in a timely fashion. See Regulations section 301.6104(d)-3.

N. Disclosures Regarding Certain Information and Services Furnished

A section 501(c) organization that offers to sell or solicits money for specific information or for a routine service for any individual that could be obtained by such individual from a federal government agency free or for a nominal charge, must disclose that fact conspicuously when making such offer or solicitation. Any organization that intentionally disregards this requirement will be subject to a penalty for each day on which the offers or solicitations are made. The penalty imposed for a particular day is the greater of $1,000 or 50% of the total cost of the offers and solicitations made on that day that lacked the required disclosure (section 6711).

O. Disclosures Regarding Certain Transactions and Relationships

In their annual returns on Schedule A (Form 990 or 990-EZ), section 501(c)(3) organizations must disclose information regarding their direct or indirect transfers to, and other direct or indirect relationships with, other section 501(c) organizations (except other section 501(c)(3) organizations) or section 527 political organizations (section 6033(b)(9)). This provision helps prevent the diversion or expenditure of a section 501(c)(3) organization's funds for purposes not intended by section 501(c)(3). All section 501(c)(3) organizations must maintain records regarding all such transfers, transactions, and relationships. See also *General Instruction K* regarding penalties.

P. Intermediate Sanction Regulations—Excess Benefit Transactions

The intermediate sanction regulations are important to the exempt organization community as a whole, and for ensuring compliance in this area. The rules provide a roadmap by which an organization may steer clear of situations that may give rise to inurement.

Under section 4958, any disqualified person who benefits from an excess benefit transaction with an applicable tax-exempt organization is liable for a 25% tax on the excess benefit. The disqualified person is also liable for a 200% tax on the excess benefit if the excess benefit is not corrected by a certain date. Also, organization managers who participate in an excess benefit transaction knowingly, willfully, and without reasonable cause are liable for a 10% tax on the excess benefit, not to exceed $10,000 ($20,000 for tax years beginning after August 17, 2006) for all participating managers on each transaction.

Applicable Tax-Exempt Organization

These rules only apply to certain applicable section 501(c)(3) and 501(c)(4) organizations. An *applicable tax-exempt organization* is a section 501(c)(3) or a section 501(c)(4) organization that is tax-exempt under section 501(a), or was such an organization at any time during a 5-year period ending on the day of the excess benefit transaction.

An applicable tax-exempt organization does not include:

- A private foundation as defined in section 509(a).
- A governmental entity that is exempt from (or not subject to) taxation without regard to section 501(a) or relieved from filing an annual return under Regulations section 1.6033-2(g)(6).
- Certain foreign organizations.

An organization is not treated as a section 501(c)(3) or 501(c)(4) organization for any period covered by a final determination that the organization was not tax-exempt under section 501(a), so long as the determination was not based on private inurement or one or more excess benefit transactions.

Disqualified Person

The vast majority of section 501(c)(3) or 501(c)(4) organization employees and contractors will not be affected by these rules. Only the few influential persons within these organizations are covered by these rules when they receive benefits, such as compensation, fringe benefits, or contract payments. The IRS calls this class of covered individuals disqualified persons.

A *disqualified person*, regarding any transaction, is any person who was in a position to exercise substantial influence over the affairs of the applicable tax-exempt organization at any time during a 5-year period ending on the date of the transaction. Persons who hold certain powers, responsibilities, or interests are among those who are in a position to exercise substantial influence over the affairs of the

organization. This would include, for example, voting members of the governing body, and persons holding the power of:
- Presidents, chief executive officers, or chief operating officers.
- Treasurers and chief financial officers.

A *disqualified person* also includes certain family members of a disqualified person, and 35% controlled entities of a disqualified person.

For transactions occurring after August 17, 2006, the following persons will be considered disqualified persons along with certain family members and 35% controlled entities associated with them:
- Donors of donor advised funds,
- Investment advisors of sponsoring organizations, and
- The disqualified persons of a section 509(a)(3) supporting organization for the organizations that organization supports.

For transactions occurring after July 25, 2006, substantial contributors to supporting organizations also will be considered disqualified persons along with their family members and 35% controlled entities.

See the Instructions for Form 4720, Schedule I for more information regarding these disqualified persons.

Who is not a disqualified person? The rules also clarify which persons are not considered to be in a position to exercise substantial influence over the affairs of an organization. They include:
- An employee who receives benefits that total less than the highly compensated amount ($100,000 in 2006) and who does not hold the executive or voting powers just mentioned; is not a family member of a disqualified person; and is not a substantial contributor;
- Tax-exempt organizations described in section 501(c)(3); and
- Section 501(c)(4) organizations with respect to transactions engaged in with other section 501(c)(4) organizations.

Who else may be considered a disqualified person? Other persons not described above can also be considered disqualified persons, depending on all the relevant facts and circumstances.

Facts and circumstances tending to show substantial influence:
- The person founded the organization.
- The person is a substantial contributor to the organization under the section 507(d)(2)(A) definition, only taking into account contributions to the organization for the past 5 years.
- The person's compensation is primarily based on revenues derived from activities of the organization that the person controls.
- The person has or shares authority to control or determine a substantial portion of the organization's capital expenditures, operating budget, or compensation for employees.
- The person manages a discrete segment or activity of the organization that represents a substantial portion of the activities, assets, income, or expenses of the organization, as compared to the organization as a whole.
- The person owns a controlling interest (measured by either vote or value) in a corporation, partnership, or trust that is a disqualified person.
- The person is a nonstock organization controlled directly or indirectly by one or more disqualified persons.

Facts and circumstances tending to show no substantial influence:
- The person is an independent contractor whose sole relationship to the organization is providing professional advice (without having decision-making authority) with respect to transactions from which the independent contractor will not economically benefit.
- The person has taken a vow of poverty.
- Any preferential treatment the person receives based on the size of the person's donation is also offered to others making comparable widely solicited donations.
- The direct supervisor of the person is not a disqualified person.
- The person does not participate in any management decisions affecting the organization as a whole or a discrete segment of the organization that represents a substantial portion of the activities, assets, income, or expenses of the organization, as compared to the organization as a whole.

What about persons who staff affiliated organizations? In the case of multiple affiliated organizations, the determination of whether a person has substantial influence is made separately for each applicable tax-exempt organization. A person may be a disqualified person with respect to transactions with more than one organization.

Excess Benefit Transaction

An *excess benefit transaction* is a transaction in which an economic benefit is provided by an applicable tax-exempt organization, directly or indirectly, to or for the use of any disqualified person, and the value of the economic benefit provided by the organization exceeds the value of the consideration (including the performance of services) received for providing such benefit. An excess benefit transaction also can occur when a disqualified person embezzles from the exempt organization.

To determine whether an excess benefit transaction has occurred, all consideration and benefits exchanged between a disqualified person and the applicable tax-exempt organization, and all entities it controls, are taken into account.

For purposes of determining the value of economic benefits, the value of property, including the right to use property, is the fair market value. Fair market value is the price at which property, or the right to use property, would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy, sell or transfer property or the right to use property, and both having reasonable knowledge of relevant facts.

Donor advised funds.

The following discussion applies to transactions occurring after August 17, 2006.

For a donor advised fund, an excess benefit transaction includes a grant, loan, compensation, or similar payment from the fund to a:
- Donor or donor advisor,
- Family member of a donor, or donor advisor, or
- 35% controlled entity of a donor, or donor advisor
- 35% controlled entity of a family member of a donor, or donor advisor

The excess benefit in this transaction is the amount of the grant, loan, compensation, or similar payment. For additional information see the Instructions for Form 4720.

Supporting organizations.

The following discussion applies to transactions occurring after July 25, 2006.

For any supporting organization, defined in section 509(a)(3), an excess benefit transaction includes grants, loans, compensation, or similar payment provided by the supporting organization to a:
- Substantial contributor,
- Family member of a substantial contributor, or
- 35% controlled entity of a substantial contributor, or
- 35% controlled entity of a family member of a substantial contributor.

Additionally, an excess benefit transaction includes any loans provided by the supporting organization to a disqualified person (other than an organization described in section 509(a)(1), (2), or (4).)

The excess benefit for substantial contributors and parties related to those contributors includes the amount of the grant, loan, compensation, or similar payment. For additional information see the Instructions for Form 4720.

When does an excess benefit transaction usually occur? An excess benefit transaction occurs on the date the disqualified person receives the economic benefit from the organization for federal income tax purposes. However, when a single contractual arrangement provides for a series of compensation payments or other payments to a disqualified person during the disqualified person's tax year, any excess benefit transaction with respect to these payments occurs on the last day of the taxpayer's tax year.

In the case of the transfer of property subject to a substantial risk of forfeiture, or in the case of rights to future compensation or property, the transaction occurs on the date the property, or the rights to future compensation or property, is not subject to a substantial risk of forfeiture. Where the disqualified person elects to include an amount in gross income in the tax year of transfer under section 83(b), the excess benefit transaction occurs on the date the disqualified person receives the economic benefit for federal income tax purposes.

Section 4958 applies only to post-September 1995 transactions. Section 4958 applies to excess benefit transactions occurring on or after September 14, 1995. Section 4958 does not apply to any transaction occurring pursuant to a written contract that was binding on September 13, 1995, and at all times thereafter before the transaction occurs.

What is reasonable compensation? *Reasonable compensation* is the valuation standard that is used to determine if there is an excess benefit in the exchange of a

Line 68. Temporarily Restricted

Enter the balance per books for the temporarily restricted class of net assets. Donors' temporary restrictions may require that resources be used in a later period or after a specified date (time restrictions), or that resources be used for a specified purpose (purpose restrictions), or both.

Line 69. Permanently Restricted

Enter the total of the balances for the permanently restricted class of net assets. Permanently restricted net assets are (a) assets, such as land or works of art, donated with stipulations that they be used for a specified purpose, be preserved, and not be sold or (b) assets donated with stipulations that they be invested to provide a permanent source of income. The latter result from gifts and bequests that create permanent endowment funds.

Organizations that do not follow SFAS 117. If the organization does not follow SFAS 117, check the box above line 70 and report account balances on lines 70 through 72. Report net assets or fund balances on line 73. Complete line 74 to report the sum of the total liabilities and net assets.

Some states that accept Form 990, or Form 990-EZ, as their basic reporting form may require a separate statement of changes in net assets/fund balances. See *General Instruction E.*

Line 70. Capital Stock, Trust Principal, or Current Funds

For corporations, enter the balance per books for capital stock accounts. Show par or stated value (or for stock with no par or stated value, total amount received upon issuance) of all classes of stock issued and, as yet, uncancelled. For trusts, enter the amount in the trust principal or corpus account. For organizations continuing to use the fund method of accounting, enter the fund balances for the organization's current restricted and unrestricted funds.

Line 71. Paid-In or Capital Surplus, or Land, Bldg., and Equipment Fund

Enter the balance per books for all paid-in capital in excess of par or stated value for all stock issued and uncancelled. If stockholders or others gave donations that the organization records as paid-in capital, include them here. Report any current-year donations the organization included on line 71 in Part I, line 1. Enter the fund balance for the land, building, and equipment fund on this line.

Line 72. Retained Earnings or Accumulated Income, Endowment, or Other Funds

For corporations, enter the balance in the retained earnings, or similar account, minus the cost of any corporate treasury stock. For trusts, enter the balance per books in the accumulated income or similar account. For those organizations using fund accounting, enter the total of the fund balances for the permanent and term endowment funds as well as balances of any other funds not reported on lines 70 and 71.

Line 73. Total Net Assets or Fund Balances

For organizations that follow SFAS 117, enter the total of lines 67 through 69. For all other organizations, enter the total of lines 70 through 72. Enter the beginning-of-the-year figure on line 73, column (A), in Part I, line 19. The end-of-the-year figure on line 73, column (B) must agree with the figure on line 21 of Part I.

Line 74. Total Liabilities and Net Assets/Fund Balances

Enter the total of lines 66 and 73. This amount must equal the amount for total assets reported on line 59 for both the beginning and end of the year.

Parts IV-A and IV-B— Reconciliation Statements

Use these reconciliation statements to reconcile the differences between the revenue and expenses shown on the organization's audited financial statements prepared in accordance with SFAS 117 and the revenue and expenses shown on the organization's Form 990.

If the organization did not receive an audited financial statement for 2006 (or the fiscal year for which it is completing this Form 990) and prepared the return in accordance with SFAS 117, it does not need to complete Parts IV-A or IV-B and should instead enter "N/A" on line **a** of each Part.

These two Parts do not have to be completed on group returns.

On line **d1** of Parts IV-A and IV-B, include only those investment expenses netted against investment income in the revenue portion of the organization's audited financial statements. Do not include program-related investment expenses or other expenses reported as program service expenses in the audited statement of activities.

Part V-A — Current Officers, Directors, Trustees, and Key Employees

List each person who was a current officer, director, trustee, or key employee (defined below) of the organization or disregarded entity described in Regulations sections 301.7701-1 through 301.7701-3 at any time during the year even if they did not receive any compensation from the organization.

For purposes of reporting all amounts in columns (B) through (E) in Part V-A, either use the organizations tax year, or the calendar year ending within such tax year.

Enter a zero in columns (B), (C), (D), or (E) if no hours were entered in column (B) and no compensation, contributions, expenses and other allowances were paid during the reporting period, or deferred for payment to a future reporting period.

Aid in the processing of the organization's return by grouping together, preferably at the end of its list, those who received no compensation. Be careful not to repeat names.

Give the preferred address at which officers, directors, etc., want the Internal Revenue Service to contact them.

Use an attachment if there are more persons to list in Part V-A.

Show all forms of cash and noncash compensation received by each listed officer, directors, etc., whether paid currently or deferred.

If the organization pays any other person, such as a management services company, for the services provided by any of its officers, directors, trustees, or key employees, report the compensation and other items in Part V-A as if the organization had paid the officers, directors, etc., directly. Also see Ann. 2001-33, 2001-17 I.R.B. 1137.

A failure to fully complete Part V-A can subject both the organization and the individuals responsible for such failure to penalties for filing an incomplete return. See *General Instruction K.* In particular, entering the phrase on Part V-A, "Information available upon request," or a similar phrase, is not acceptable.

The organization may also provide an attachment to explain the entire 2006 compensation package for any person listed in Part V-A.

Each person listed in Part V-A should report the listed compensation on his or her income tax return unless the Code specifically excludes any of the payments from income tax. See Pub. 525 for details.

Key employee. A *key employee* is any person having responsibilities, powers, or influence similar to those of officers, directors, or trustees. The term includes the chief management and administrative officials of an organization (such as an executive director or chancellor).

A chief financial officer and the officer in charge of the administration or program operations are both key employees if they have the authority to control the organization's activities, its finances, or both.

Column (A)

Report the name and address of each person who was a current officer, director, trustee, or key employee (defined above), during the tax year or, if using the calendar year, at any time during the calendar year or tax year.

Column (B)

In column (B), a numerical estimate of the average hours per week devoted to the position is required for a complete answer. Statements such as "as needed," "as required," or "40+" are unacceptable.

Column (C)

For each person listed, report salary, fees, bonuses, and severance payments paid. Include current-year payments of amounts reported or reportable as deferred compensation in any prior reporting period.

Column (D)

Include in this column all forms of deferred compensation and future severance payments (whether or not funded; whether or not vested; and whether or not the deferred compensation plan is a qualified plan under section 401(a)). Include also

payments to welfare benefit plans on behalf of the officers, directors, etc. Such plans provide benefits such as medical, dental, life insurance, severance pay, disability, etc. Reasonable estimates may be used if precise cost figures are not readily available.

Unless the amounts were reported in column (C), report, as deferred compensation in column (D), salaries and other compensation earned during the reporting period, but not yet paid by the date the organization files its return.

Column (E)

Enter both taxable and nontaxable fringe benefits (other than *de minimis* fringe benefits described in section 132(e)). Include expense allowances or reimbursements that the recipients must report as income on their separate income tax returns. Examples include amounts for which the recipient did not account to the organization or allowances that were more than the payee spent on serving the organization. Include payments made under indemnification arrangements, the value of the personal use of housing, automobiles, or other assets owned or leased by the organization (or provided for the organization's use without charge), as well as any other taxable and nontaxable fringe benefits. See Pub. 525 for more information.

Line 75b. Business Relationships

For a definition of *family and business relationships*, see line 51 of these instructions.

Line 75c. Compensation from Related Organizations

Answer "Yes," to this question if any of the organization's listed officers, directors, trustees, key employees, highest compensated employees, or highest compensated professional or other independent contractors received aggregate compensation amounts of $50,000 or more from the organization and all related organizations (as defined below). For this purpose, compensation includes any amount that would be reportable in columns (C), (D), and (E) of Form 990, Part V-A, if provided by the organization.

Required attachment. If the organization answered "Yes," it must attach a schedule that lists, for each officer, director, trustee, key employee, highest compensated employee, or highest compensated professional or other independent contractor, the information requested in 1 and 2, below.

1. For Relationships 1 through 6, provide:

a. The name of the officer, director, etc., receiving compensation from a related organization or organizations;

b. The name and EIN of each related organization that provided the compensation;

c. A description of the relationship between the organization and the related organization(s); and

d. The amount of compensation each related organization provided. Use the same format as required by columns (C) through (E) of Part V-A.

2. If the organizations are related only by *Relationship 7* and/or *Relationship 8*, or if the *Volunteer exception* to *Relationship 2* applies, report the following information, but do not report compensation paid by the related organization(s).

a. The name of the officer, director, etc., receiving compensation from a related organization(s);

b. The name and EIN of each related organization that provided such compensation; and

c. A description of the relationship between the organization and the related organization(s).

Reporting compensation. Report compensation paid by a related organization for only that time period during which a relationship existed between the organization and the related organization. Report compensation paid by a related organization in the same period (either calendar or fiscal year) as the organization reports compensation it paid.

Definition of related organization. Organizations may be related in several ways; the relationships are not mutually exclusive. *Related organizations* are tax-exempt or taxable organizations related to the tax-exempt organization in one or more of the following ways.

- ***Relationship 1.*** One organization owns or controls the other organization.
- ***Relationship 2.*** The same person(s) owns or controls both organizations.
- ***Relationship 3.*** The organizations have a relationship as supporting and supported organizations under section 509(a)(3) (see *Example 1*, later).
- ***Relationship 4.*** The organizations use a common paymaster. For a definition of common paymaster and illustrated examples, see Regulations section 31.3121(s)-1(b).
- ***Relationship 5.*** The other organization pays part of the compensation that the organization would otherwise be contractually obligated to pay (see *Example 2*, later).
- ***Relationship 6.*** The organizations are partners in a partnership or members in an LLC or other joint venture (other than a publicly traded partnership as defined in section 7704(b)).
- ***Relationship 7.*** The organizations conduct joint programs or share facilities or employees.
- ***Relationship 8.*** One or more persons exercise substantial influence over both organizations (see *Example 3*, later). For purposes of this relationship, to determine if a person exercises substantial influence over an organization, use the rules stated in section 4958(f)(1) and Regulations section 53.4958-3 (treating the organization as though it were an applicable tax-exempt organization under section 4958(e)).

Substantial influence. The following persons are considered to exercise substantial influence over the organization:

1. The organization's directors, trustees, chief executive officer, and chief financial officer (see Regulations section 53.4958-3(c)),

2. Certain family members (defined as disqualified persons under section 4958(f)(1)(B)) of disqualified individuals, and

3. Certain 35% controlled entities (defined as disqualified persons under section 4958(f)(1)(C)).

Ownership. The term ownership is holding (directly or indirectly) 50% or more of the voting power in a corporation, profits interest in a partnership, or beneficial interest in a trust.

Control. The term control is having 50% or more of the voting power in a governing body, or the power to appoint 50% or more of an organization's governing body, or the power to approve an organization's budgets or expenditures (an effective veto power over the organization's budgets and expenditures). Also, control can be indirect by owning or controlling another organization with such power.

The term governing body is defined by the relevant state law. Generally, the governing body of a corporation is its board of directors and the governing body of a trust is its board of trustees.

Reporting exceptions. The following exceptions apply:

- ***Bank or financial institution trustee exception.*** If the organization and the other organization are related only because they are both controlled or substantially influenced by a common trustee that is a bank or financial institution, the organization does not need to report either the relationship or the trustee's compensation from the related organization.
- ***Common independent contractor exception.*** If an independent contractor listed in Schedule A, Part II-A or II-B does not exercise substantial influence, as defined above, over either the organization or the related organization, the organization does not need to report either the relationship or the independent contractor's compensation from the related organization. However, this exception does not apply to a management services company that performs for the organization functions similar to those of president, chief executive officer, chief operating officer, treasurer or chief financial officer. Compensation paid by a related organization to such a management company must be reported by the organization unless another exception applies. See *Examples 5* and *6* later.
- ***Volunteer exception.*** If *Relationship 2* is met only because the same individuals control both the tax-exempt organization and a for-profit organization that is not owned or controlled directly or indirectly by one or more tax-exempt organizations, and none of the Relationships described in 1 or 3 through 6 are met, then the tax-exempt organization does not have to report the compensation from the for-profit organization of any persons serving the tax-exempt organization as a volunteer without compensation (see *Example 4*, later).

TIP *Providing information on compensation received from related organizations does not violate the disclosure provisions of section 7216(a). See also section 6033(a)(1).*

Examples illustrating relationships.

Example 1. X, a hospital auxiliary, raises funds for Hospital Y. Z, another hospital auxiliary, coordinates the efforts of Hospital Y's volunteer staff. Both X and Z

are supporting organizations of Hospital Y and are considered related organizations to Hospital Y. Hospital Y is also considered a supported organization of the auxiliaries.

Hospital Y must report (in an attachment to line 75c) the compensation, if any, paid by each of the auxiliaries to the officers, directors, trustees, or key employees listed in the hospital's Form 990, Part V-A, or highest-compensated employees listed in the hospital's Schedule A, Part I, or highest-compensated professional or other independent contractors listed in the hospital's Schedule A, Part II-A or II-B. Both X and Z must report (in an attachment to line 75c) the compensation, if any, paid by Hospital Y to an officer, director, etc., of the auxiliary.

Example 2. Bob, a key employee of Organization B, a 501(c)(4) social welfare organization, conducts fundraising among Organization B's members, with the proceeds going to Organization A, a 501(c)(3) public charity, to carry out disaster relief. The Chief Executive Officers (CEOs) of Organizations A and B agree that Organization A will pay a portion of Bob's salary for a period of time in recognition of Bob's role in the fundraising assistance of Organization B. Because Organization A is paying to Bob a portion of Bob's compensation that Organization B would otherwise be contractually committed to pay, Organizations A and B are related organizations for Form 990 reporting purposes. Organization B must report the payment from Organization A to Bob in an attachment to line 75c.

Example 3. Tom is a trustee of Organization A, a tax-exempt organization, and the CEO of Organization B, a for-profit taxable organization wholly owned by Tom. Tom is considered to exercise substantial influence over both organizations. So, *Relationship 8* is met. If no other relationship is met, then Tom's compensation from Organization B is not reported in an attachment to line 75c of Organization A's Form 990, however Organization A is required to report the name and EIN of Organization B, and a description of the relationship between the two organizations in the line 75c attachment.

Example 4. The facts are the same as in *Example 3*, except that Tom is the sole trustee of both organizations. So, Organizations A and B are related under *Relationship 2* because they are controlled by the same person. In this situation, Tom's compensation from Organization B (as well as the name and EIN of Organization B, and a description of the relationship between the two organizations) is reported in an attachment to line 75c of Organization A's Form 990.

However, if Tom serves Organization A without compensation and none of the other relationships described in 1 or 3 through 6 are met, then because of the *Volunteer exception*, Tom's compensation from Organization B is not reported by Organization A. However, the relationship between Organization A and Organization B must be reported.

Example 5. Organization A is filing its Form 990. Organization B is a taxable subsidiary of Organization A; so, Organizations A and B are related under *Relationship 1* because A controls B.

Organization A contracts with Company Y for janitorial services. Company Y is listed as one of Organization A's highest-compensated independent contractors. Organization B also contracts with Company Y for janitorial services. Company Y is not a 35% controlled entity of a disqualified person for organization A or Organization B. So, Company Y is listed in Organization A's Schedule A, Part II-B, and Company Y also receives compensation from Organization B, which is related to Organization A.

However, Company Y meets the requirements of the *Common independent contractor exception*, earlier. Company Y is not considered to exercise substantial influence over either Organization A or Organization B if they were applicable tax-exempt organizations within the meaning of section 4958(e). Because of the *Common independent contractor exception* earlier, the relationship between Company Y and Organization B, and Company Y's compensation from Organization B for such janitorial services is not reported by Organization A.

None of Organization A's officers, directors, etc., receive compensation from Organization B. In conclusion, Organization A does not report its relationship with Organization B in an attachment to line 75c, and Organization A answers "No" on line 75c.

Example 6. The facts are the same as in *Example 5*, except that one of Organization A's officers, Sue, receives compensation from Organization B. Organization A must report in an attachment to line 75c its relationship with Organization B, and Sue's compensation from Organization B for services provided to Organization B. Even though Organization A must report Sue's compensation from Organization B, Organization A does not report Company Y's compensation from Organization B because of the *Common independent contractor exception*.

Part V-B. Former Officers, Directors, Trustees, and Key Employees That Received Compensation or Other Benefits

List each former officer, director, trustee, and key employee (as defined in Part V-A) of the organization or disregarded entity described in Regulations sections 301.7701-1 through 301.7701-3 that received compensation or other benefits during the reporting year.

For purposes of reporting all amounts in columns (B) through (E) in Part V-B, either use the organization's tax year, or the calendar year ending within such tax year.

Give the preferred address at which these former officers, directors, etc., want the Internal Revenue Service to contact them.

Use an attachment if there are more persons to list in Part V-B.

Show all forms of cash and noncash compensation or benefits received by each listed former officer, director, etc., whether paid currently or deferred.

If the organization pays any other person, such as a management services company, for the services provided by any of its former officers, directors, trustees, or key employees, report the compensation and other items in Part V-A as if the organization had paid the former officers, directors, etc., directly.

A failure to fully complete Part V-B can subject both the organization and the individuals responsible for such failure to penalties for filing an incomplete return. See *General Instruction K*. In particular, entering the phrase on Part V-B, "Information available upon request," or a similar phrase, is not acceptable.

The organization may also provide an attachment to explain the entire 2006 compensation package for any person listed in Part V-B.

Each person listed in Part V-B should report the listed compensation on his or her income tax return unless the Code specifically excludes any of the payments from income tax. See Pub. 525 for details.

Column (A)

Report the name and address of each person who was a former officer, director, trustee, or key employee (defined in *Part V-A*) at any time during the calendar year.

Column (B)

In column (B), report all secured and unsecured loans and salary advances to former officers, directors, trustees and key employees.

Column (C)

For each person listed, report salary, fees, bonuses, and severance payments paid. Include current-year payments of amounts reported or reportable as deferred compensation in any prior year.

Column (D)

Include in this column all forms of deferred compensation and future severance payments (whether or not funded; whether or not vested; and whether or not the deferred compensation plan is a qualified plan under section 401(a)). Include also payments to welfare benefit plans on behalf of the officers, directors, etc. Such plans provide benefits such as medical, dental, life insurance, severance pay, disability, etc. Reasonable estimates may be used if precise cost figures are not readily available.

Unless the amounts were reported in column (C), report, as deferred compensation in column (D), salaries and other compensation earned during the period covered by the return, but not yet paid by the date the organization files its return.

Column (E)

Enter both taxable and nontaxable fringe benefits (other than *de minimis* fringe benefits described in section 132(e)). Include expense allowances or reimbursements that the recipients must report as income on their separate income tax returns. Examples include amounts for which the recipient did not account to the organization or allowances that were more than the payee spent on serving the

PROFESSIONS AND OCCUPATIONS
(225 ILCS 460/) Solicitation for Charity Act.

* * * * *

(225 ILCS 460/2) (from Ch. 23, par. 5102)

Sec. 2. Registration; rules; penalties.

* * * * *

(f) Subject to reasonable rules and regulations adopted by the Attorney General, the register, registration statements, annual reports, financial statements, professional fund raisers' contracts, bonds, applications for registration and re-registration, and other documents required to be filed with the Attorney General shall be open to public inspection.

* * * * *

(Source: P.A. 90-469, eff. 8-17-97; 91-444, eff. 8-6-99.)

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(225 ILCS 460/4) (from Ch. 23, par. 5104)

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Sec. 4. (a) Every charitable organization registered pursuant to Section 2 of this Act which shall receive in any 12 month period ending upon its established fiscal or calendar year contributions in excess of $150,000 and every charitable organization whose fund raising functions are not carried on solely by staff employees or persons who are unpaid for such services, if the organization shall receive in any 12 month period ending upon its established fiscal or calendar year contributions in excess of $25,000, shall file a written report with the Attorney General upon forms prescribed by him, on or before June 30 of each year if its books are kept on a calendar basis, or within 6 months after the close of its fiscal year if its books are kept on a fiscal year basis, which written report shall include a financial statement covering the immediately preceding 12 month period of operation. Such financial statement shall include a balance sheet and statement of income and expense, and shall be consistent with forms furnished by the Attorney General clearly setting forth the following: gross receipts and gross income from all sources, broken down into total receipts and income from each separate solicitation project or source; cost of administration; cost of solicitation; cost of programs designed to inform or educate the public; funds or properties transferred out of this State, with explanation as to recipient and purpose; cost of fundraising;

compensation paid to trustees; and total net amount disbursed or dedicated for each major purpose, charitable or otherwise. Such report shall also include a statement of any changes in the information required to be contained in the registration form filed on behalf of such organization. The report shall be signed by the president or other authorized officer and the chief fiscal officer of the organization who shall certify that the statements therein are true and correct to the best of their knowledge, and shall be accompanied by an opinion signed by an independent certified public accountant that the financial statement therein fairly represents the financial operations of the organization in sufficient detail to permit public evaluation of its operations. Said opinion may be relied upon by the Attorney General.

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(Source: P.A. 90-469, eff. 8-17-97; 91-444, eff. 8-6-99.)

CRIMINAL OFFENSES
(720 ILCS 5/) Criminal Code of 1961.

ARTICLE 14. EAVESDROPPING

(720 ILCS 5/14-1) (from Ch. 38, par. 14-1)

Sec. 14-1. Definition.

(a) Eavesdropping device.

An eavesdropping device is any device capable of being used to hear or record oral conversation or intercept, retain, or transcribe electronic communications whether such conversation or electronic communication is conducted in person, by telephone, or by any other means; Provided, however, that this definition shall not include devices used for the restoration of the deaf or hard-of-hearing to normal or partial hearing.

(b) Eavesdropper.

An eavesdropper is any person, including law enforcement officers, who is a principal, as defined in this Article, or who operates or participates in the operation of any eavesdropping device contrary to the provisions of this Article.

(c) Principal.

A principal is any person who:

(1) Knowingly employs another who illegally uses an eavesdropping device in the course of such employment; or

(2) Knowingly derives any benefit or information from the illegal use of an eavesdropping device by another; or

(3) Directs another to use an eavesdropping device illegally on his behalf.

(d) Conversation.

For the purposes of this Article, the term conversation means any oral communication between 2 or more persons regardless of whether one or more of the parties intended their communication to be of a private nature under circumstances justifying that expectation.

* * * * *

(Source: P.A. 91-657, eff. 1-1-00.)

(720 ILCS 5/14-2) (from Ch. 38, par. 14-2)

Sec. 14-2. Elements of the offense; affirmative defense.

(a) A person commits eavesdropping when he:

(1) Knowingly and intentionally uses an eavesdropping device for the purpose of hearing or recording all or any part of any conversation or intercepts, retains, or transcribes electronic communication unless he does so (A) with the consent of all of the parties to such conversation or electronic communication or (B) in accordance with Article 108A or Article 108B of the "Code of Criminal Procedure of 1963", approved August 14, 1963, as amended; or

* * * * *

(3) Uses or divulges, except as authorized by this Article or by Article 108A or 108B of the "Code of Criminal Procedure of 1963", approved August 14, 1963, as amended, any information which he knows or reasonably should know was obtained through the use of an eavesdropping device.

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(Source: P.A. 91-657, eff. 1-1-00.)

* * * * *

(720 ILCS 5/14-4) (from Ch. 38, par. 14-4)

Sec. 14-4. Sentence.

(a) Eavesdropping, for a first offense, is a Class 4 felony and, for a second or subsequent offense, is a Class 3 felony.

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(Source: P.A. 91-357, eff. 7-29-99; 91-657, eff. 1-1-00.)

Oregon Revised Statutes

Chapter 128 — Trusts; Charitable Activities

2007 EDITION

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CHARITABLE TRUST AND CORPORATION ACT

* * * * *

128.670 Filing of reports; rules; fees; authority of Attorney General relating to reports; civil penalty. (1) Except as otherwise provided, every charitable organization subject to ORS 128.610 to 128.750 shall, in addition to filing copies of the instruments previously required, file with the Attorney General periodic written reports setting forth information as to the nature of the assets held for charitable purposes and the administration thereof by the corporation or trustee.

* * * * *

(6) The Attorney General shall make rules as to the time for filing reports, the contents thereof, and the manner of executing and filing them. The Attorney General may make additional rules and amend existing rules as necessary for the proper administration of the Charitable Trust and Corporation Act.

* * * * *

[1963 c.583 §8; 1971 c.589 §7; 1973 c.506 §40; 1973 c.775 §4; 1975 c.388 §5; 1981 c.593 §7; 1985 c.730 §9; 1991 c.734 §7; 2007 c.571 §1]

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Oregon Revised Statutes

Chapter 192 — Records; Public Reports and Meetings

2007 EDITION

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ARCHIVING OF PUBLIC RECORDS

192.005 Definitions for ORS 192.005 to 192.170. As used in ORS 192.005 to 192.170, unless the context requires otherwise:

* * * * *

(5) "Public record" includes, but is not limited to, a document, book, paper, photograph, file, sound recording or machine readable electronic record, regardless of physical form or characteristics, made, received, filed or recorded in pursuance of law or in connection with the transaction of public business, whether or not confidential or restricted in use. * * * * *

* * * * *

[1961 c.160 §2; 1965 c.302 §1; 1983 c.620 §11; 1989 c.16 §1; 1999 c.55 §1; 1999 c.140 §1]

* * * * *

192.420 Right to inspect public records; notice to public body attorney. (1) Every person has a right to inspect any public record of a public body in this state, except as otherwise expressly provided by ORS 192.501 to 192.505.

* * * * *

Federal Rule of Civil Procedure 26(c)(1)

Rule 26. Duty to Disclose; General Provisions Governing Discovery

* * * * *

(c) Protective Orders.

(1) In General.

A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending — or as an alternative on matters relating to a deposition, in the court for the district where the deposition will be taken. The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(A) forbidding the disclosure or discovery;

(B) specifying terms, including time and place, for the disclosure or discovery;

(C) prescribing a discovery method other than the one selected by the party seeking discovery;

(D) forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters;

(E) designating the persons who may be present while the discovery is conducted;

(F) requiring that a deposition be sealed and opened only on court order;

(G) requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way; and

(H) requiring that the parties simultaneously file specified documents or information in sealed envelopes, to be opened as the court directs.

Federal Rule of Civil Procedure 37(b)(2)(A)

Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

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(b) Failure to Comply with a Court Order.

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(2) Sanctions in the District Where the Action Is Pending.

(A) For Not Obeying a Discovery Order. If a party or a party's officer, director, or managing agent — or a witness designated under Rule 30(b)(6) or 31(a)(4) — fails to obey an order to provide or permit discovery, including an order under Rule 26(f), 35, or 37(a), the court where the action is pending may issue further just orders. They may include the following:

(i) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims;

(ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;

(iii) striking pleadings in whole or in part;

(iv) staying further proceedings until the order is obeyed;

(v) dismissing the action or proceeding in whole or in part;

(vi) rendering a default judgment against the disobedient party; or

(vii) treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination.

Federal Rule of Civil Procedure 41(a)(2)

Rule 41. Dismissal of Actions

(a) Voluntary Dismissal.

* * * * *

(2) By Court Order; Effect.

Except as provided in Rule 41(a)(1), an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper. If a defendant has pleaded a counterclaim before being served with the plaintiff's motion to dismiss, the action may be dismissed over the defendant's objection only if the counterclaim can remain pending for independent adjudication. Unless the order states otherwise, a dismissal under this paragraph (2) is without prejudice.

Federal Rule of Civil Procedure 43(c)

Rule 43. Taking Testimony

(c) Evidence on a Motion.

When a motion relies on facts outside the record, the court may hear the matter on affidavits or may hear it wholly or partly on oral testimony or on depositions.

DISTRICT OF MASSACHUSETTS LOCAL RULES

RULE 7.1 MOTION PRACTICE

(a) Control of Motion Practice.

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(2) *Motion Practice.* No motion shall be filed unless counsel certify that they have conferred and have attempted in good faith to resolve or narrow the issue.

RULE 26.5 UNIFORM DEFINITIONS IN DISCOVERY REQUESTS

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(c) Definitions. The following definitions apply to all discovery requests:

* * * * *

(5) *Parties.* The terms "plaintiff" and "defendant" as well as a party's full or abbreviated name or a pronoun referring to a party mean the party and, where applicable, its officers, directors, employees, partners, corporate parent, subsidiaries, or affiliates. This definition is not intended to impose a discovery obligation on any person who is not a party to the litigation.

Commonwealth Act No. 473, Act to Provide for the Acquisition of Philippine Citizenship by Naturalization, and to Repeal Acts Numbered Twenty-Nine Hundred Twenty-Seven and Thirty-Four Hundred and Forty-Eight (as amended)

Section 1 Title of Act

This Act shall be known and may be citied as the "Revised Naturalization Law".

Section 2 Qualifications.

Subject to section four of this Act, any person having the following qualifications may become a citizen of the Philippines by naturalization;

First. He must not be less than twenty-one years of age on the day of the hearing of the petition;

Second. He must have resided in the Philippines for a continuous period of not less than ten years;

Third. He must be of good moral character and believe in the principles underlying the Philippine Constitution, and must have conducted himself in a proper and irreproachable manner during the entire period of his residence in the Philippines in his relation with the constituted government as well as with the community in which he is living;

Fourth. He must own real estate in the Philippines worth not less than five thousand pesos, Philippine currency, or must have some known lucrative trade, profession, or lawful occupation;

Fifth. He must be able to speak and write English or Spanish and any one of the principal Philippine language; and

Sixth. He must have enrolled his minor children of school age, in any of the public or private schools recognized by the Bureau of Private Schools of the Philippines, where Philippine history, government and civics are taught or prescribed as part of the school curriculum, during the entire period of the residence in the Philippines required to him prior to the hearing of his petition for naturalization as Philippine citizen.