

1 UNITED STATES DISTRICT COURT
2 FOR THE SOUTHERN DISTRICT OF ILLINOIS

3 THREE ANGELS BROADCASTING,) Docket No. 08-MC-00016
4 NETWORK,))
5 Plaintiff,) Benton, Illinois
6 vs.) October 22, 2008
7 GAILON ARTHUR JOY, ROBERT)
8 PICKLE,))
9 Defendants.)

10 TELEPHONIC MOTION HEARING
11 BEFORE THE HONORABLE PHILIP M. FRAZIER
12 UNITED STATES DISTRICT COURT MAGISTRATE JUDGE

13 APPEARANCES:

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1 THE COURT: Hello. This is Judge Frazier.

2 MR. SIMPSON: Hello. This is Greg Simpson, the
3 lawyer for the plaintiffs.

4 THE COURT: All right.

5 MS. LITZENBURG: Morning, Judge. This is Deanna
6 Litzenburg for Gray Hunter Stenn.

7 THE COURT: All right.

8 MS. WHITE: Jennifer White, local counsel for the
9 plaintiff.

10 THE COURT: All right.

11 MR. JOY: Good morning, Your Honor. This is Gailon
12 Arthur Joy, defendant.

13 THE COURT: Okay.

14 MR. PICKLE: Good morning, Your Honor. This is Bob
15 Pickle, defendant.

16 THE COURT: Now, we have some subpoenas at issue
17 here, correct?

18 MR. SIMPSON: That's correct, Judge.

19 THE COURT: We have a court reporter taking this
20 down so when you speak, please, if you haven't been otherwise
21 identified, let me know or let us know, and we can have you
22 recognized on the record.

23 So the subpoena was served on March the 17th, 2008,
24 and because we're making a record here and this is
25 plaintiff's motion, Mr. Simpson, do you want to go ahead.

1 Lay out the background. And I guess, too, as long as we're
2 making a record here, just give us a short tutorial on the
3 nature of the case, the litigation and then what brought us
4 here and then what your motion is. All right?

5 MR. SIMPSON: Very well. This is a case that's --
6 the underlying case is pending in the United States District
7 Court for the District of Massachusetts, and it's basically a
8 case alleging the defendants violated federal trademark laws
9 and also common law torts of defamation, and it interferes
10 with prospective economic relations.

11 And the substance of the case is that the
12 defendants are alleged to have started and operated a website
13 that uses the Three Angels Broadcasting Network moniker 3ABN
14 as their logo to attract visitors to their website and then
15 disseminating disparaging information, some of which we say
16 is defamatory and otherwise false. That is kind of the guts
17 of the case.

18 The lawsuit that was pending, percolating along in
19 Massachusetts, the defendants have served some third-party
20 subpoenas, and that's where this action, miscellaneous action
21 in the Southern District of Illinois comes in. One of the --
22 some of the allegations in the underlying case in
23 Massachusetts involve allegations by the defendants that the
24 plaintiffs, Three Angel Broadcasting Network and Danny Lee
25 Shelton, who was the cofounder and past president, engaged in

1 basically, tax fraud and financial misdealings and improper
2 accounting for certain transactions. And there's a lot of
3 other stuff in there, too, but that's where the accounting
4 records that are sought in the third party subpoena relate.

5 THE COURT: And what would that have to do with the
6 lawsuit that Three Angels has brought?

7 MR. SIMPSON: Three Angels, the plaintiffs, are
8 alleging that the statements made by these defendants are
9 defamatory. In other words, they did not commit any tax law
10 violations, did not commit any financial improprieties, and
11 that the allegations, to the contrary, by these defendants
12 are defamatory. So the defendants would like to obtain
13 access to the third-party records of Three Angels
14 Broadcasting Network's accountants, which is the Gray Hunter
15 Stenn accountancy firm here in Illinois.

16 THE COURT: Truth being a perfect defense to a
17 defamation action.

18 MR. SIMPSON: Exactly. What we are saying, they
19 are entitled to the actual tax returns because that's what
20 they say is fraudulent, but if they want to determine the
21 underlying merits of the returns and whether they properly
22 account for transactions, they need to get the information
23 from my client, which is a matter that's pending in the
24 Massachusetts District Court, and that's what -- that's --
25 they can get that information, but the Massachusetts judge

1 should be there to referee on that issue and determine what
2 they're entitled to or what they are not.

3 So they made these sweeping allegations, but the
4 core of them are a few specific allegations that they say are
5 properly accounted for. And what we're saying is they
6 shouldn't get the accountant's work product because it's not
7 like it will lead to discovery of admissible evidence. And
8 we paid the accountants for that, and the accountants have
9 their own independent privilege under Illinois law, which is
10 a subject Ms. Litzenburg may wish to address. They are not
11 entitled to have us do the work for them. If they want to
12 prove these tax returns are fraudulent, they need to get
13 their underlying records and prove it themselves.

14 THE COURT: Is there a key question here? And I
15 understand that that is the entire purpose of work product is
16 to avoid the situation where one party does all the work and
17 the other party swoops in at the last second and gets the
18 work product. The problem is whether or not the parties
19 seeking the information can get the same information without
20 undue burden, and that will be the question.

21 How specifically identified is this work product
22 information that you seek to shield?

23 MR. SIMPSON: They want everything. And that is
24 the ultimate issue. If they could identify the -- there's 24
25 allegations that we say are defamatory, and some of them are

1 broader than others, but they have made these allegations,
2 sweeping allegations, of financial mismanagement, but the
3 core of it seems to be a couple transactions that they
4 suspect or know or believe to be suspicious. And they have
5 identified those or are willing to give them records about
6 those court transactions, but what they are asking for here
7 in the subpoena --

8 THE COURT: Hang on a second. One of the
9 defendants has been dropped from the conference call.

10 MR. SIMPSON: Which one?

11 THE COURT: Joy. All right.

12 MR. PICKLE: Your Honor, Bob Pickle. I could give
13 a different number that wouldn't get dropped.

14 MR. SIMPSON: What's that?

15 MR. PICKLE: 508-281-7250. It will be a land line
16 rather than a --

17 MR. SIMPSON: 508-281 --

18 MR. PICKLE: 6250 (sic).

19 MR. SIMPSON: I am going to put you on hold and go
20 over and track down the conference coordinator. I will be
21 right back.

22 THE COURT: We will go back on the record while
23 Mr. Pickle is coming back on.

24 MR. SIMPSON: This is Greg Simpson, again. In
25 answer to your question which I think I was in the process of

1 answering it before I got too long-winded about it, the
2 answer is they've asked for everything without any
3 exceptions. They want every scrap of paper that the law
4 firm, that the accountancy firm has for the entire history.
5 I'm not sure. Is there a date restricter in there,
6 Mr. Pickle? I don't think there is.

7 MR. PICKLE: Yes, there is.

8 MS. LITZENBURG: Anything after January 1, 1998.
9 This is Deanna Litzenburg. I am reading from their Exhibit 8
10 of the subpoena.

11 MR. SIMPSON: That's my main problem with it is
12 that there are specific transactions that they're alleging is
13 the basis for their statements that we say are defamatory,
14 but -- and they've tried to tell us what they are, and they
15 could have records if it's tailored to that specific issue,
16 but they want everything.

17 THE COURT: Well, of course, they want everything.
18 I mean, I would. Wouldn't you want everything? Who knows
19 what else they might be able to find. You know, if they're
20 looking around, they may -- if you're going to go try to get
21 records, get records. But, Mr. Pickle, what exactly is it
22 that you're getting sued for? What statements do they say
23 that you have made? I'm not going to ask you whether you've
24 made those statements or not, necessarily.

25 I mean this isn't a criminal action, so somebody's

1 going to ask you eventually under oath on the record. But
2 what is it that they are pointing at that you and Mr. Joy
3 have supposedly done which has defamed them?

4 MR. PICKLE: This lawsuit -- I'll make this really
5 brief. This lawsuit was conceived as we believe as
6 retaliation for us blowing the whistle on Dan Shelton's
7 coverup on child molestation allegations. By the time they
8 filed this suit, there was too much evidence regarding that
9 so they tried to stay away from that, and they did spend a
10 bit of time talking about the dealing with the financial
11 allegations.

12 You know, one thing that the complaint says is that
13 we have lied by saying that the officers and directors of
14 3ABN have privately enriched themselves in violation of the
15 Internal Revenue Code.

16 THE COURT: Did you make those statements?

17 MR. PICKLE: I would be hard pressed, Your Honor,
18 to find anything that said, that stated that way.

19 THE COURT: Well, let me ask you this: Those are
20 pretty broad. Are the allegations -- let me go back here to
21 Mr. Simpson. Does your complaint state it that broadly, that
22 there were just general allegations of financial impropriety?

23 MR. SIMPSON: I'm looking for the one that says
24 that. They say Dashawn (phonetic) purchase. I'm reading
25 from the complaint. It's the paragraphs 46 and 48 of the



1 complaint are where the specific allegations are of
2 defamation. I think that that should be an attachment to
3 something that you've received.



4 There are some that are broad, and there are some
5 that are narrow, Judge. And they've made these allegations
6 broadly, and then we've asked them for what exactly are they
7 talking about. You know, personally enrich themselves as
8 officers and directors. That is an allegation, the one he



9 just quoted. Violation of the Internal Revenue Code, and
10 they had something in mind when they said that, and it's
11 probably like in subparagraph (d). That Danny Shelton
12 purchased a three-year old van using 3ABN funds. Then sold
13 the van to a member of his family for just \$10. Things like
14 that. Specifically, allegations that they then make sweeping
15 allegations based on a specific allegation.

16 And so what they're hoping for -- I don't think I'm
17 guessing at this -- is, I mean it's a fishing expedition, and
18 you know the old fashioned sense of the word, that they want
19 to find something they didn't know about. If they made these
20 allegations, these sweeping allegations, made on matters that
21 are trivial and are not accurate and have been investigated
22 by the IRS, even, and have all been determined to be proper.
23 And they want to, and what they want is to find something
24 else, something that can justify the DMD, the defamatory
25 statements that they made that they didn't previously know

1 about.

2 THE COURT: I don't doubt that there is something
3 to that, but that seems to happen in a lot of lawsuits. You
4 know, I don't blame them for trying to do that either. I
5 would in their position. But it seems to me that if you are
6 going to be successful in proving these, in proving
7 defamation, you are going to have to narrow it down to some
8 specific statements. Instead, you just can't go in at a
9 trial, for example, and say, "Well, they generally implied
10 that we were benefiting personally in violation of IRS
11 rules." That's not going to get to a jury. You're going to
12 have to come up with specifics.

13 Mr. Pickle.

14 MR. PICKLE: Yes, sir.

15 THE COURT: Have you consulted a lawyer on any of
16 this?

17 MR. PICKLE: A little bit. I was represented by
18 counsel for --

19 THE COURT: Why don't you have a lawyer now?

20 MR. PICKLE: Well, Your Honor, frankly, I don't
21 have the millions at my disposal that the plaintiffs do.

22 THE COURT: That's true. They got you there.
23 That's true.

24 MR. PICKLE: And I'm trying not to end up at the
25 end of this bankrupt.

1 THE COURT: But the thing of it is that you might.
2 And let me suggest something to you here. All right? You
3 need to concentrate your resources, time, and monetary. And
4 the way you need to do this, instead of sending out one of
5 these blanket kind of subpoenas for all this information,
6 which you understand they're going to resist because, number
7 one, they have lawyers and that's what lawyers do. All
8 right? And number two is that they don't want you to have
9 all this information.

10 I don't know what's in there. Maybe there's
11 nothing. Maybe there's something, but, I mean, but that's
12 the way that this game is played, is that people ask for
13 information and those who are, from whom it is requested,
14 resist it as much as possible. Whether it contains anything
15 that's harmful or not, they'll resist it unless the cost of
16 producing it is less than the cost of resisting it. It's
17 just that simple.

18 What you need to do is force them to narrow exactly
19 what statements and when they were made and how they were
20 made that they believe to be defamatory. They cannot be
21 successful in their case just by generally alleging that you
22 and Mr. Joy made some generalized statements or implications
23 about the folks at Three Angels Broadcasting in retaliation
24 for you supposedly blowing the whistle on some family
25 problems that Mr. Shelton had that this was defamatory.

1 All right. Just because they -- I mean I can say,
2 well, generally speaking, I believe that so and so cheats on
3 his taxes. Well, there's going to have to be a little bit
4 more than that. Okay?

5 Now, obviously, they're trying to back you down for
6 some reason. I don't know to whom these statements were made
7 or how wide. How widely are these statements circulated?

8 MR. SIMPSON: Judge, may I interrupt? Is Mr. Joy
9 back on the line?

10 MR. JOY: I am.

11 THE COURT: How widely were these statements
12 circulated?

13 MR. JOY: Whatever statements we have made are on
14 our website and all the world can read. And --

15 THE COURT: What statements, exactly, have you
16 made? This might narrow things down considerably.

17 MR. JOY: Yeah, one series of statements we made
18 regarding the 1998 house deal whereby Danny Shelton bought a
19 house from Three Angels for \$139,000 and then turned around
20 and sold it one week later for 135,000. And he's the one who
21 signed in 1998 Form 990. And the question that was asked was
22 there any Section 4958 excess benefit transactions? He
23 checked that. That says, no, there were none. And yet
24 the -- and this would, in my opinion, qualify for a Section
25 4958 transaction.

1 Then in the attachment to that 990, they list a
2 house having been sold for \$6,129. They had a book value
3 that says over 50,000, and so it was over a \$40,000 loss.
4 So, basically, that attachment is admitting that there was a
5 house sold below fair market value. We know from the deeds
6 from the Franklin County courthouse that Danny Shelton was
7 the one who bought the house.

8 THE COURT: Now and those are the basis of the
9 statements you've made?

10 MR. JOY: That would be one of the statements we
11 made about that particular issue. There have been so many
12 allegations of wrongdoing about Shelton it would take a long
13 time to go through all of them, and it would take a bit of
14 preparation to go through and catalog all of them.

15 THE COURT: Does Mr. Shelton qualify as a public
16 figure?

17 MR. SIMPSON: Yes, Your Honor, he is the face of
18 Adventism of 3ABN.

19 THE COURT: The what?

20 MR. SIMPSON: He is considered to be the face of
21 Adventism, Seventh-Day Adventism, on Three Angels
22 Broadcasting Network. Three Angels Broadcasting Network is
23 the conservative broadcaster of the unique message to the
24 Seventh-Day Adventist Church, and he's been the founder. He
25 is a constant programmer, interviewer, and has been the

1 president of 3ABN since its inception back in the 1980s.

2 THE COURT: So he probably is -- I know right where
3 it is. I used to live in Marion, but --

4 MR. SIMPSON: They were such a big public figures
5 they were concerned enough to move their divorce to Guam.

6 THE COURT: But it's going to make a difference,
7 obviously, down the road if he is considered a public figure
8 or not for defamation purposes.

9 MR. SIMPSON: I understand that.

10 THE COURT: You know -- who is speaking here?

11 MR. JOY: Gailon Arthur Joy. The important thing
12 for the Court to consider is that we need very specific
13 allegations based on very specific documentation that we had
14 at the time that indicated that this man was actually, if you
15 will, putting his finger in the offering plate. And the
16 bottom line is that has been demonstrated by the process of
17 documentation as we've gone forward here. That's come from a
18 combination of third parties who, frankly, offered additional
19 documentation as well as some that's been discovered, a
20 limited amount that's been discovered.

21 To defeat the defamation claim, we have a very
22 simple strategy and that is to use a combination of auditors
23 and forensic accountants to review the documentation related
24 to the transactions that have occurred between Three Angels
25 Broadcasting system, its publishing unit and PPPI, Pacific

1 Press Publishing or publishing -- I'm sorry -- publishing
2 contract with the Pacific Press Publishing Association, PPPA,
3 and Renner (phonetic) Publications.

4 And they had an interesting little three-way deal
5 going there where PPPA pays to 3ABN not only book royalties
6 to the authors, but also a separate residual by contract that
7 amounted to a combination of 15 percent. Mr. Shelton came up
8 with a unique way to put his finger in the pie by having 3ABN
9 actually process invoices through Renner Publications, who
10 would allow for a drop ship from PPPA to 3ABN. And then he
11 would pick up a very sizeable portion, approximately 70
12 percent, of the additional overcharges being made by Renner
13 Publications as his own personal income.

14 This was never disclosed to the board of directors.
15 We had that from directors. They told us that was never
16 disclosed. And, in fact, he personally inured himself as
17 early as 19 -- pardon me -- 2006 and 2007 to the tune of
18 about \$1,000,000 that's never been disclosed on any 990.

19 Now, you know, I don't know. We don't have the tax
20 returns from Mr. Shelton for those years. We did have tax
21 returns from prior years, and we could tell what he was and
22 was not disclosing, but the fact is that what we feel is that
23 he can put together a combination of data showing the
24 contracting inurement from the Renner Publications in concert
25 with the bank statements that demonstrate the amounts of

1 money coming into his personal account.

2 In addition to that, obviously, the auditors'
3 statements regarding the audits, which the auditor covers
4 both Danny Lee Shelton's personal returns as well as Three
5 Angels Broadcasting Network. And we believe that that
6 together, in concert, would represent enough of a picture so
7 that between the two auditors and -- the two auditors, the
8 forensic accountant that we're using, that we can demonstrate
9 beyond a reasonable doubt that it was clearly private
10 inurement, and that it clearly violated the Internal Revenue
11 Code.

12 THE COURT: Well, you're not going to have to show
13 beyond a reasonable doubt or anything.

14 MR. JOY: I understand that, but I think we could
15 meet that test.

16 MR. SIMPSON: I can speak to that.

17 THE COURT: All right.

18 MR. SIMPSON: I would just say that you have heard,
19 in answer to your original question of did the defendants
20 make these statements, I think you just heard a whole bunch
21 of them. And what I would say, without getting into the
22 merits of the allegations that you just heard, that it's an
23 explanation as to why these defendants would be entitled to
24 some information about specific transactions that they think
25 are illegal or improper.

1 But what the subpoena is, is a wholesale request
2 for everything. And they need to narrow it. This is exactly
3 what's happened in the Massachusetts district court where we
4 brought a similar motion for a discovery that had been served
5 on us where they asked for everything, and the judge there
6 said -- struck, basically struck the docket request. Said
7 research them with, you know, more narrowly crafted to the
8 defamatory issues, with regard to defamatory issues in the
9 case.

10 It can't be wholesale, you know, asking for
11 everything. You need to craft them so they relate to issues
12 in the case. So that's one issue, only one reason why we are
13 resisting the subpoenas, is because if it's not crafted to
14 the issues in the case.

15 Another issue -- let's have Ms. Litzenburg address
16 this -- is that there's an accountancy privilege in Illinois.
17 The accountant doesn't have to give up work product, and it's
18 privileged that belongs to the accountant.

19 THE COURT: Well, the accountant is going to be
20 objecting in this case for two reasons or three, maybe if
21 they feel it's the right thing to do, but that would be one.
22 And then I'm certain that Three Angels Broadcasting does a
23 substantial amount of business with Gray Hunter Stenn so they
24 would have some business reasons for wanting to -- let's just
25 say they have a rooting interest in this. And they probably

1 don't want to get sued themselves for giving up information
2 they shouldn't be giving up.

3 But in any event --

4 MS. LITZENBURG: It's a privilege issue, Your
5 Honor. This is Deanna Litzenburg for Gray Hunter Stenn. We
6 have invoked the accountant-client privilege that exists
7 under Illinois law. We believe the defendants take issue
8 with the privilege and say that it doesn't apply. It is our
9 position in a diversity case and that when the subpoenas are
10 issued from the Southern District of Illinois court, that the
11 Illinois privilege law applies.

12 THE COURT: Well, probably in a case like this, to
13 the extent such a privilege would exist, it's probably been
14 waived, at least partially, by the fact of these allegations.
15 I mean when Three Angels made the decision to bring this
16 lawsuit over these allegations, then, you know, they have
17 very smart lawyers who know that the truth of the
18 statements -- I mean if the statements are on their websites,
19 I'm sure that there's no doubt as to what the statements are,
20 so that places the defendants in the position of having to
21 demonstrate the truth of what they're saying. And the only
22 way they are going to do that is, well, by getting into these
23 records.

24 MS. LITZENBURG: But, Your Honor, I think the
25 privilege belongs to the accountants, and in this case we are

1 claiming that it's the work papers that the accountant has
2 performed that are privileged, not the financial statements,
3 not the tax returns. Those are different issues. But the
4 work papers that were actually produced and prepared by Gray
5 Hunter Stenn in performing the audit, do we claim that that
6 privilege still attaches to those documents.

7 THE COURT: For what purpose, though? This isn't
8 like, I mean they exist. That means they can be discovered
9 with a subpoena.

10 MR. JOY: Your Honor, this is Mr. Joy again.

11 THE COURT: Yes.

12 MR. JOY: I would point out that in our rebuttal,
13 we gave specific case law both in Illinois as well as at the
14 federal level clearly demonstrating that no such privilege
15 attached here. And that they are out of line in either
16 raising the accountancy privilege given the federal questions
17 in the federal district court, and so that was the first
18 thing.

19 The other thing that they allege, of course, is the
20 cost of producing and, frankly, we went to great pains to
21 reduce that cost of producing down to just simply them making
22 space available for a team of accountants who had come in
23 with us and reviewed those documents, let us know what was
24 specifically required for them to give their expertise. And
25 at the same time, we would have a team that would go through

1 the process of taking those documents and then, obviously,
2 digitally saving them, saving the accountant any cost
3 whatsoever with regard to reproduction of the documents.

4 MS. LITZENBURG: I take issue with that, Your
5 Honor. We had not worked out that issue. We were still
6 arguing how the documents were going to be copied and
7 reproduced because Mr. Joy and Mr. Pickle were adamant they
8 did not want to incur any copy costs.

9 THE COURT: Well, I tell you what. Maybe this will
10 give you some incentive, I guess. What is the rule on
11 subpoenas, complying with subpoenas? I've got to say I'm not
12 really sure. Where was this subpoena to be produced? I mean
13 where were the results of the subpoena? Where was it to be
14 produced?

15 MS. LITZENBURG: Here in Southern Illinois, Your
16 Honor.

17 THE COURT: But was there a demand on it as to
18 where the information was to be delivered?

19 MS. LITZENBURG: Yes. They had a law office in
20 West Frankfort, I believe, Sam Mitchell's office.

21 THE COURT: Okay.

22 MR. PICKLE: Your Honor, this is Bob Pickle. We
23 had worked it out on June 24th we would, Gray Hunter Stenn
24 was going to make a room available at their office, and we
25 bring our own equipment. And Deanna Litzenburg, the way we

1 worked it out, they would provide somebody to physically
2 operate our copier so we would not receive the copy until
3 after the watermark had already been put on. She and I went
4 back and forth and worked out a procedure.

5 MS. LITZENBURG: And the cost of that person was
6 never resolved either, Bob. So to represent to the Court we
7 had resolved that is unfair.

8 THE COURT: Well, resolutions are frequently in the
9 eye of the beholder so we don't need to get into that.

10 MR. PICKLE: I would like --

11 THE COURT: Who is this?

12 MR. PICKLE: This is Bob Pickle.

13 THE COURT: You have to remember to say who you
14 are.

15 MR. PICKLE: The plaintiffs have represented that
16 they intend to use the financial statements and 990s and the
17 auditor at trial. And we need to be able to challenge the
18 figures that are in those financial statements and 990s as
19 well as the information that the auditor would disclose at
20 trial.

21 THE COURT: I have no doubt that you are entitled
22 to a large amount of the financial information that pertains
23 to Three Angels Broadcasting, and it's -- anything concerning
24 these transactions that were referred to surrounding the
25 supposed defamatory statements. And, you know, there's just

1 no easy or cheap way to do this.

2 You know, I kind of think Three Angels probably
3 should have thought this through a little bit. My guess is
4 that Three Angels probably thought that these guys had
5 probably backed down pretty quick when this defamation
6 lawsuit was filed. And that I understand that organizations
7 like Three Angels operate a lot of their fiscal viability --
8 not physical, Jane. It's fiscal, F-I-S-C-A-L -- depends upon
9 regular contributions from people who are frequent listeners
10 and watchers, and these kinds of little nasty bits such as of
11 the revelation involving Mr. Shelton's brother tend to or any
12 impropriety on behalf of Mr. Shelton himself would probably
13 tend to erode some of those. And so a nice public way of
14 refuting those statements is by filing a defamation action,
15 and, you know, saying it ain't so, Joe.

16 But the problem is, is now Three Angels has opened
17 up a very large can of worms here. And it's a very large can
18 of worms. And there are a lot of different ways that
19 financial impropriety could be disguised by clever
20 bookkeeping. There are a lot of -- I'm not saying that
21 that's happened here. Don't anybody get all flustered. I'm
22 just saying that, you know, at this stage of the proceedings,
23 we have to presume that anything is possible. Anything is
24 provable. And there are a number of other transactions,
25 changes in accounting methods, any number of these that might

1 be relevant to prove that on a particular day that something
2 happened.

3 Let me get off track one second and ask this
4 question. On these particular allegations that concern like
5 these house transactions, those are just straightforward
6 deals, right? There's no doubt about the accounting on
7 those?

8 MR. PICKLE: I'm not sure of that because we don't
9 know how they were accounted for on the other side. In fact
10 the representation has been made by the chairman of the board
11 of the Three Angels Broadcasting Network that they had
12 cleared those through counsel from a fellow who came out of
13 the state of Oregon. I believe in the northwest. And at the
14 time it was obviously the accounting firm was, as we
15 understand it, based on the representation of the chairman,
16 we do not believe that the accounting firm before the fact
17 addressed these issues, although we're not sure.

18 THE COURT: Has Three Angels designated its
19 forensic expert on these accounting matters yet for the
20 Massachusetts proceeding?

21 MR. SIMPSON: This is Greg Simpson. The time to do
22 that has not yet occurred under the scheduling order so, no.

23 THE COURT: And what is your experience, Greg, with
24 this Massachusetts court, the judge in particular? I know,
25 for instance, in our district we have some judges who are in

1 more of a hurry than others to get these to trial. How much
2 time do we have on this?

3 MR. SIMPSON: They don't appear to be in any
4 over -- we're not on a fast track, and the parties have
5 recently submitted a stipulated order to extend the discovery
6 and unexpired deadlines out another 90 days to permit
7 discovery to occur. There were some delays in the case
8 including a three or four-month delay when we were waiting
9 for the confidentiality order before the discovery issue
10 could take place and Mr. Joy filed for bankruptcy which
11 caused a temporary stay in the proceedings until the
12 automatic stay was lifted.

13 And for other reasons the cases, in the discovery
14 phrase and the document exchange phase. So there has been an
15 exchange of written requests for documents and exchange of
16 documents, as well.

17 We got an order back from Magistrate Judge Hillman
18 recently, basically, ordering Mr. Pickle to reserve document
19 requests that were more narrowly tailored to issues in the
20 case, and that would then permit the issues to become more
21 narrowly defined with the idea if Mr. Pickle and Mr. Joy and
22 I cannot work out our differences about what's discoverable,
23 that it would definitely write for submission to the Court.

24 THE COURT: Well, let me do this: Have you even
25 made your Rule 26 disclosure concerning your accounting

1 expert?

2 MR. SIMPSON: Well, we've made the Rule 26, the
3 mandatory disclosures.

4 THE COURT: Have you filed a report yet concerning
5 your expert?

6 MR. SIMPSON: No.

7 THE COURT: Because, Mr. Joy and Mr. Pickle, here's
8 what we're going to do. All right? I'm trying to figure out
9 what is going to be the best way to permit you folks to
10 examine the information you need to examine, but doing so in
11 a way that is going to be efficient for all concerned. All
12 right?

13 Gray Hunter Stenn has a business to operate, and
14 they -- you know, forcing them to just open up a wing of
15 their office for you guys to come in and go through
16 mountains -- I'm sure there are literally mountains of
17 paperwork on this. Is that correct, Ms. Litzenburg?

18 MS. LITZENBURG: Yes, there are quite a few, Your
19 Honor.

20 THE COURT: And so 95 percent of it is going to be
21 useless in terms of even leading to the discovery of relevant
22 information. That doesn't mean that you probably aren't
23 going to have a right to look at a lot of it. And my
24 practice is always to err on the side of disclosure in these
25 things. But we do have, we do have a big, big undertaking

1 here. And I don't know how much money you guys, Mr. Joy and
2 Mr. Pickle -- my goodness, you know, somebody is helping you
3 out with this financially because, you know, this is, I mean
4 this is like David and Goliath only David doesn't even have a
5 rock for his sling in terms of fighting this thing out.

6 Here's what I want to do. For right now I want to
7 continue the subpoena. Not going to do anything with it.
8 Okay? And what we need to do is wait until there has been a
9 disclosure in Massachusetts of their expert on exactly what
10 is the nature of this defamatory statement.

11 Now they don't have to disprove the fact. They
12 don't have to come in and disprove that Mr. Shelton was a
13 crook, for example. Okay? You guys have to prove that he
14 was a crook or that, at least, you had some information along
15 those lines. And I think after that's been a little bit
16 more -- and I'm trying to work this out in conjunction with
17 what Judge Hillman is doing, as well, because you just don't
18 want two people stirring this thing from different
19 directions.

20 MR. JOY: Your Honor --

21 THE COURT: Yes.

22 MR. JOY: -- this is Gailon Arthur Joy, again. One
23 of the things that you need to understand is that the judge
24 has already ruled on their motion for scope and relevance
25 essentially denying everything they asked for. The only

1 issue outstanding was that he wanted the actual request to
2 produce to be narrowly covered so they would fit into the
3 specifics about the allegations.

4 THE COURT: And this is in your Rule 34 request?

5 MR. JOY: I'm sorry. What was that again?

6 THE COURT: Is this regarding your Rule 34 request
7 to produce?

8 MR. JOY: The plaintiffs, after the confidentiality
9 order was finally ruled on and we started moving back toward
10 the discovery files, they promptly moved and brought forward
11 a new motion to limit scope and relevance. And the bottom
12 line is that issue was heard and the Court in Massachusetts
13 via the judge magistrate simply struck all of their requests,
14 and, in fact, ironically imposed a rather unusual request on
15 counsel.

16 They had wanted the -- our subpoenas to be reviewed
17 by the Court before they would be issued, and we really
18 didn't impose that. We didn't have any problem with it. And
19 frankly and ironically, the magistrate ordered that even
20 counsel for the other side would have to have their subpoenas
21 reviewed prior to issuing them.

22 So we've already struck out or carved out a very
23 clear statement from this Court on the issue of scope and
24 relevance. The bottom line is, you know, the plaintiffs here
25 just continue to dodge the production of documentation that

1 we need that's essential for the preparation of the trial,
2 particularly for the, you know, particularly for the experts.

3 Because you're right. There are mountains of
4 information to go through. That's why, one of the reasons
5 why the system that we had picked out for bringing them there
6 and having them review the documents and determine what
7 wasn't relevant and what they wanted copied seemed to make
8 sense and is the least expensive situation for Gray Hunter
9 Stenn as well as for ourselves since we were bringing our own
10 copy equipment.

11 THE COURT: When is it that you are to have
12 narrowed your requests out in Massachusetts?

13 MR. JOY: Those are already done, Your Honor.

14 THE COURT: Those are done. And has Three Angels
15 received those?

16 MR. SIMPSON: This is Greg Simpson.

17 MR. JOY: They have.

18 MR. SIMPSON: This is Greg Simpson. Yes, Your
19 Honor. Let me clarify what Mr. Joy has said. The order from
20 Judge Hillman, unfortunately, is in the record so you can
21 look for yourself and see what he did, but he basically
22 struck the document request that they had issued previously
23 and ordered them to produce, to serve more narrowly crafted
24 ones, which they did. And Mr. Pickle and I have been in
25 negotiations talking at kind of a pre -- before we respond to

1 it formally and then our response is due in the very near
2 future to their document requests. At which point if we
3 can't reach an agreement, we are going to go through the meet
4 and confer process which was really part of the problem the
5 first time around. That we hadn't gone through it because
6 the motion was filed before, to compel was filed before this
7 process was undergone.

8 THE COURT: You know what I'm thinking of doing
9 here, just -- I don't know. I may want to talk to Judge
10 Hillman. One of the options I have is to transfer this
11 dispute to Massachusetts, as well.

12 MR. SIMPSON: I would be in favor of that. I think
13 Judge Hillman understands. And I don't mean to disparage the
14 Court in any way. It's just that he understands first hand
15 what the issues in the case are because he's had his head
16 into it for a longer period of time and I think --

17 THE COURT: These are not really exotic issues.
18 The difficulty that I foresee or would like to head off is
19 that I'm very reluctant to start issuing orders that may be
20 at odds with Judge Hillman's work up-to-date that may be
21 absolutely consistent. I don't know, but I don't want to
22 start -- I don't want to even invite the possibility of
23 inconsistent rulings.

24 MR. PICKLE: Your Honor, this is Bob Pickle. The
25 Western District of Michigan ordered that -- we filed a

1 motion to compel Renner Publications, and we won that mostly,
2 and they asked for reconsideration. They lost that. They
3 appealed from the magistrate to the judge and they lost that,
4 and then they decided they would comply. And the documents
5 we have gotten from there have been quite helpful. That was
6 ordered even before Magistrate Judge Hillman ruled on the
7 motion to limit the scope of discovery.

8 THE COURT: I'm just saying that Judge Hillman is
9 going to have the -- he has the laboring more on this in
10 terms of how discovery is going to proceed and what is going
11 to be fair game.

12 Now, the Western District of Michigan, yes, they
13 were operating fully within their rights. I don't know what
14 was at issue. It sounds to me, though, that the information
15 which is requested here in this subpoena is at the core of
16 what is presently being wrangled out in front of Judge
17 Hillman in Massachusetts. This is all of the financial
18 information that matters, isn't it?

19 MR. SIMPSON: This is Greg Simpson. Some of it is.
20 And I would say, also, that it exists in two places because
21 the accountants didn't create the information. The
22 information came from 3ABN through a short cut to get the
23 accountants' work product so they don't have to go through
24 that process themselves. They could ask for the source
25 documents that the accountants used to compile their reports

1 and their schedules and whatever they used to create their
2 tax return, the final product, that goes out with the filing.
3 This is what they are looking for is a short cut. They could
4 go back and ask for the underlying documents. And, in fact,
5 they've done that, and that's what's pending before Judge
6 Hillman. They asked for the core documents that relate to
7 all these transactions, and Judge Hillman is saying, okay,
8 you can have them if you can narrowly tailor it to the issues
9 in the case.

10 THE COURT: Let me ask you a question here. Would
11 it be relevant or at least interesting to you if you were on
12 the other side of this case, Mr. Simpson, if it turns out
13 that the documents that the accountant has are different from
14 the documents that actually exist or maintained by Three
15 Angels Broadcasting, that perhaps if Three Angels
16 Broadcasting was selective about the documents they turn over
17 to their accountants?

18 MR. SIMPSON: If it related -- well, how is that --
19 I would certainly want the information for the reasons that
20 you said. I'd be hoping that there was some discrepancies,
21 in particular, that I didn't know about. I would like to
22 find some more ammunition to justify the wholesale assault on
23 3ABN that we've seen. That would make it -- it doesn't make
24 it relevant to the issues of -- that the defamatory
25 statements that they have made, they have something in mind.

1 They had some information about certain transactions, and
2 he's told you about some of them. And they're entitled to
3 discovery on those issues, but they're not entitled to get
4 every scrap of paper to see if there's something else they
5 are looking for.

6 THE COURT: Mr. Shelton, though -- here's the
7 problem. Mr. Shelton is not some disgruntled clerk who is
8 stealing out of the small, you know, cubby that may be
9 relegated to a particular file clerk or something. You know,
10 Mr. Shelton has access to the whole piggy bank. And I'm not
11 saying, obviously, that he is or was doing anything, but what
12 I'm saying is that if a person who has access to everything
13 were to be using it for private gain, then it is not
14 unreasonable to believe that perhaps other instances might
15 exist where the corporate entity was used improperly for
16 private gain, and that would tend to, even if it had nothing
17 to do.

18 Let's just say for argument sake that further
19 investigation into this were to disclose that on a different
20 date in a different year that Mr. Shelton stole a hundred
21 thousand dollars from Three Angels Broadcasting using a
22 completely different means than -- that would be relevant to
23 the defamation action now, wouldn't it?

24 MR. SIMPSON: Let me say first there's been no
25 allegation that anything --

1 THE COURT: No. No. No. No. You don't need to
2 go into. We don't need a spin on this. I'm just saying and
3 I would have no idea. Hopefully, it doesn't exist, but if it
4 did, wouldn't that be some relevant information to put out in
5 front of a fact finder at a trial?

6 MR. SIMPSON: Let me go back to where you were
7 originally going. What's going to happen now is that these
8 defendants are going to get a subset of the financial
9 records, and what subset they get is going to be determined
10 based on how they craft these second set of document
11 requests, and which and how Judge Hillman narrows them if we
12 can't agree how they should be interpreted. And what they're
13 asking you to do is to, basically, circumvent that by giving
14 them everything, but in the guise of giving them the account
15 file.

16 THE COURT: Which is what I'm not going to do right
17 now for the simple reason I'm not going to undermine Judge
18 Hillman's efforts on this. We may turn out to be going
19 exactly the same direction. However, Judge Hillman already
20 has his hands on this. He has an idea where he wants this to
21 go, and I'm not going to start doing things on this end that
22 might be messing that up.

23 However, you know, I will say this: Has Three
24 Angels and Gray Hunter Stenn, have you provided the
25 defendants any and all accounting records that would pertain


1 to the transactions that are detailed in the complaint and
2 for the time periods? I would think at a minimum you're
3 going to need to start off with that.

4 MS. LITZENBURG: This is Deanna Litzenburg. Gray
5 Hunter Stenn hasn't produced anything.


6 THE COURT: Well, that's right. You wouldn't have.

7 MS. LITZENBURG: They reviewed this blanket
8 subpoena asking for everything.

9 THE COURT: I hear you. Gray Hunter wouldn't. Has
10 Three Angels provided that information?

11 MR. SIMPSON: We've provided them with thousands of
12 pages of documents. And we are not yet, the time to respond
 13 to their narrow document request has not yet expired, but in
14 the next --

15 THE COURT: In that case --

16 MR. SIMPSON: -- in the next production we will
17 either identify where we've already produced it or produce
 18 additional records that pertain to the specific transactions
19 that they identified.

20 THE COURT: In that case here's what I'm going to
21 do then. I can see where this is going now because this is
22 just --

23 MR. PICKLE: Your Honor, can I speak to the issue
24 of complete production?

25 THE COURT: No. No, we don't need to get there

1 right now. All we're dealing with here, because the
2 production issue is clearly not before me.

3 MR. PICKLE: Could I --

4 THE COURT: No. No. No. We're done here. I have
5 one of two options here. And I could either go ahead and
6 quash this subpoena and with the understanding that the
7 defendants could reserve the subpoena on Gray Hunter Stenn at
8 a later date when this scope of discovery has been narrowed
9 by Judge Hillman in Massachusetts. That would --

10 MR. PICKLE: Your Honor --

11 THE COURT: No. No. No. You have had your time
12 to talk. Now is mine.

13 MR. PICKLE: Okay.

14 THE COURT: I don't know what that would really
15 accomplish, so what I'm going to do is this: We're going to
16 do nothing on this. We're just going to leave this subpoena
17 open for right now. And I will direct that Gray Hunter Stenn
18 and Three Angels take every effort to preserve any documents
19 of any kind, documents or records of any kind, electronic or
20 otherwise, which might be produced under the subpoena. And
21 I'm going to then order right now that any further litigation
22 concerning the subpoena which has been issued to Gray Hunter
23 Stenn be transferred to the district of Massachusetts and
24 Judge Hillman because it is so closely and completely
25 intertwined with matters before him at this time. And I fear

1 that anything which might be done here might lead to
2 inconsistent rulings, and that will be that.

3 So the subpoena is open. Gray Hunter Stenn and
4 Three Angels are ordered to preserve any records of any kind,
5 electronic or otherwise, which might satisfy the subpoena.
6 The matter then will be transferred to Judge Hillman for any
7 further action. And waiting until the scope of discovery is
8 resolved is going to be a good way to do that.

9 And we have made a transcript of these proceedings.
10 Anybody who desires to have a transcript may contact Jane
11 McCorkle and arrange for the transcript. And that will be
12 that. Actually, you're going to have this electronically so
13 I guess Judge Hillman could pull this up if he wanted to if
14 somebody orders it. Right. And that will be that.

15 MR. SIMPSON: Thank you, Judge Frazier.

16 THE COURT: All right. Thanks, everybody.

17 (End of hearing.)

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REPORTER'S CERTIFICATE

I, Jane McCorkle, Official Court Reporter for the United States District Court for the Southern District of Illinois, do hereby certify that the above and foregoing is a true and correct transcript of the proceedings of Telephonic Motion Hearing had in this cause as same appears from my stenotype notes made personally during the progress of said proceedings.

DATE: 11/17/08

s/s Jane McCorkle

JANE McCORKLE