UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

Three Angels Broadcasting Network, Inc., an Illinois non-profit corporation, and Danny Lee Shelton, individually, Plaintiffs, v. Gailon Arthur Joy and Robert Pickle, Defendants.	Case No.: 07-40098-FDS

DEFENDANTS' MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO FORWARD PART OF THE RECORD

INTRODUCTION

On September 12, 2008, documents produced by MidCountry Bank ("MidCountry") ("MidCountry documents") were delivered by DHL International, Ltd. ("DHL") to the federal courthouse in Worcester, Massachusetts, and were signed for by a clerk of court. (Affidavit of Robert Pickle ("Pickle Aff.") ¶¶ 1–2, Ex. A). The MidCountry documents were therefore filed with this Court and constitute part of the record of the instant case. Since the docket does not reflect the forwarding of these documents to the First Circuit as part of the record on appeal, Defendants hereby request this Court to so forward a copy of these documents.

RELEVANT FACTS

A subpoena was issued from the District of Massachusetts on December 6, 2007, and was served upon a branch of MidCountry in Minnesota. (Doc. 76-3 p. 10). Since MidCountry objected to the improper district of issuance, a second subpoena was issued from the District of

Minnesota on December 12, 2007, and was served upon MidCountry on January 16, 2008. (Doc. 76-3 p. 12; Doc. 103-4).

Both subpoenas sought MidCountry's monthly statements for accounts owned by Danny Lee Shelton ("Shelton"), D & L Publishing, and DLS Publishing Inc. ("DLS"), or accounts for which Shelton was a signatory, back to January 1, 1998, since a clear cut instance of private inurement had taken place in 1998. (Doc. 76-3 pp. 10–13; Doc. 63-28 pp. 4–5, 10, 12).

Since MidCountry was going to produce the subpoenaed documents to Defendants (Doc. 63-27 p. 5), Shelton filed a motion to quash that subpoena on February 6, 2008, in the District of Minnesota.[1] (Doc. 76-3 pp. 18–19). Magistrate Judge Boylan, who conducted the hearing on that motion, noted that Shelton lacked standing to object to Defendants obtaining MidCountry records pertaining to DLS. (Doc. 185 ¶ 16).

Previously, on December 18, 2007, Plaintiffs had filed a motion for a confidentiality order in the District of Massachusetts. (Doc. 40). On March 28, 2008, Magistrate Judge Boylan issued an order from the District of Minnesota which stated:

> MidCountry Bank shall not provide copies of the documents to any party herein absent further order of the court. ...
>
> This Court has been advised by the parties that Plaintiffs' Motion for a Protective Order has been taken under advisement by Magistrate Judge Hillman in the District of Massachusetts. Once the Protective Order is entered by the court, the documents produced under seal by MidCountry Bank in response to Defendant Pickle's subpoena in this district may be reviewed by Magistrate Judge Hillman for compliance with the approved Protective Order.

(Doc. 63-36 pp. 2–3).

On April 17, 2008, Magistrate Judge Hillman issued a confidentiality order in response to Plaintiffs' December 18, 2008, motion. (Doc. 60). Nothing in that order prohibited the discovery of MidCountry's records or similar records, and thus the subpoenaed documents when produced

[1] Three Angels Broadcasting Network, Inc. ("3ABN") did not join in Shelton's motion.

would be fully in compliance with that protective order. This would not have been accidental, for in the motion hearing of July 24, 2008, in response to Plaintiffs' discussion about the MidCountry documents, Magistrate Judge Hillman said, "When this first landed, we communicated." By these words Magistrate Judge Hillman referred to Magistrate Judge Boylan and his conferring together on the matter earlier that year. (Pickle Aff. ¶ 3).

On May 21, 2008, MidCountry faxed Defendant Pickle a final estimate of costs for the subpoenaed documents. (Pickle Aff. ¶ 5, Ex. C). On May 28, 2008, Defendant Pickle ordered the MidCountry documents by fax, and his $3,682.50 check for payment of those documents is also dated May 28, 2008. (Pickle Aff. ¶ 4–5, Ex. B at pp. 3–4, Ex. D).

On June 25, 2008, Plaintiffs filed a motion seeking to limit the methods and scope of discovery. (Doc. 74). The accompanying memorandum requested, *inter alia*, the following relief:

> Plaintiffs seek two forms of relief from Defendants' third party discovery practice: (A) that Defendants be required to seek leave of court prior to the issuance of any future subpoenas ...; (B) that Magistrate Judge Hillman or some other third party be appointed to review *in camera* those documents produced to Magistrate Judge Hillman pursuant to the orders governing the MidCountry Bank ... subpoena[], prior to production to Defendants.

(Doc. 75 pp. 16–17).

On September 11, 2008, Magistrate Judge Hillman rendered a decision on that motion, which stated:

> Plaintiff's Motion for Protective Order (Docket No. 74), allowed. No party is to issue subpoenas to any non-party under Fed.R.Civ.P. 45 without leave of the court. In all other respects, the Plaintiff's motion is denied.

(Doc. 107 p. 5). Thus, Magistrate Judge Hillman denied Plaintiffs' request to conduct an *in camera* review of the MidCountry documents, removing Plaintiffs' last obstacle to Defendants' obtaining those documents.

On September 8, 2008, MidCountry shipped the MidCountry documents from Minnetonka, Minnesota, to Magistrate Judge Hillman via DHL. (Pickle Aff. Ex. E at p. 2). These

documents arrived at the federal courthouse in Worcester, Massachusetts, on September 12, 2008, and were signed for by one of the clerks of court serving in that courthouse. (Pickle Aff. Ex. A). DHL provided an image of that clerk's signature. (*Id.* at p. 5).

It should be noted that for some unknown reason, MidCountry's September 8, 2008, production occurred 14 weeks 5 days after Defendants had ordered the documents on May 28. This was 8 weeks 5 days longer than the 6-week production timeline MidCountry had originally given. (Doc. 63-30 p. 6).

Upon being informed that the MidCountry documents had been shipped, Defendants unsuccessfully endeavored to trace the whereabouts of the package of documents. (Pickle Aff. ¶¶ 7–9). Those at the courthouse whom Defendants spoke with said that they could not locate the package's whereabouts. (*Id.*).

With some difficulty, Defendants obtained the DHL tracking number for the package of MidCountry documents. (Pickle Aff. ¶ 10). This enabled Defendants to confirm that the MidCountry documents had indeed arrived at the federal courthouse in Worcester, Massachusetts, and had been signed for by a clerk of court. (Pickle Aff. Ex. A). Yet Defendants still could not confirm that anyone in the courthouse knew where the documents were, and never received notice otherwise. (Pickle Aff. ¶ 11). Further complicating the matter is that the docket contains no entry acknowledging this Court's reception of the documents.

Plaintiffs' counsel, M. Gregory Simpson, even contacted Defendants on October 1, 2008, by telephone, trying to confirm that Defendants did not have the MidCountry documents.[2] (Pickle Aff. ¶ 12, Ex. F). Thus, Simpson led Defendants to believe that Simpson could not locate the whereabouts of the MidCountry documents either.

[2] Simpson's concern that Defendants might have the MidCountry documents strongly suggests that there must be something in those documents that Shelton is trying hard to hide. Thus, the MidCountry documents, like the documents produced by Remnant Publications, Inc., likely give further evidence of the frivolous nature of the entire case.

In retrospect, Simpson may have located them by November 11, 2008, as suggested by a quotation of his letter of that date that appears in one of Defendants' submissions:

> ... during the interchange with the Defendants that led up to the Defendants' filing of their notice of appeal, Plaintiffs' counsel on November 11, 2008, wrote:
>
> > I will be filing a motion to require you both to return all confidential materials, and to consent to the return of the MidCountry Bank records that are currently in the possession of Magistrate Judge Hillman.
>
> (Pickle Aff. Ex. E). Plaintiffs' counsel hereby threatened use of the Court's power to compel the Defendants to *consent* to the return of the MidCountry Bank records, which aren't even in the Defendants' possession. This is *prima facie* evidence that Plaintiffs' counsel believed that neither the confidentiality order of April 17 nor the terms of the order of October 30 were sufficient to keep these records away from the Defendants who had paid more than $3,500 for them.

(Doc. 161 p. 6). But since Defendants never received notice that the Court had located the MidCountry documents (Pickle Aff. ¶ 11), Defendants are uncertain whether Simpson's letter should be taken that way.

However, the MidCountry documents must have been found by December 16, 2008, for a receipt was filed on that date, and was entered on the docket on December 23, 2008. (Doc. 160). Curiously, the record on appeal was declared complete on December 9, 2008, just seven days before the date of that receipt. (Pickle Aff. Ex. G).

ARGUMENT

I. MIDCOUNTRY DOCUMENTS ARE PART OF THE RECORD BECAUSE THEY ARE ORIGINAL PAPERS OF THIS CASE

Fed. R. App. P. 10(a) states that the composition of the record on appeal includes "the original papers and exhibits filed in the district court." In particular, original papers and exhibits that were "presented" to the district court (and filed) are part of the record. *In re Arthur Andersen & Co*, 621 F2d 37, 39 (1st Cir. 1980). Since the MidCountry documents, subpoenaed, ordered,

and paid for by Defendants, were presented to this Court for possible review as ordered by Magistrate Judge Boylan (Doc. 63-36 pp. 2–3), they are part of the record of this case.

II. MIDCOUNTRY DOCUMENTS ARE PART OF THE RECORD BECAUSE THEY WERE FILED WITH THE COURT

"A paper is filed by delivering it: (A) to the clerk; ...." Fed. R. Civ. P. 5(d)(2). Since the MidCountry records were delivered to the clerk on September 12, 2008 (Pickle Aff. Ex. A), they were filed with the Court on that date.

The decisive question is whether the MidCountry documents were received by the clerk, not whether the clerk actually filed them after they were received. *Hernandez v. C Aldridge III*, 902 F.2d 386, 388 (5th Cir. 1990). It is indisputable that the MidCountry documents were received by the clerk, since the DHL tracking information even includes an image of the signature of the clerk that signed for the documents. (Pickle Aff. Ex. A at p. 5). Therefore, the MidCountry documents must be part of the record because they were filed with the Court.

III. MIDCOUNTRY DOCUMENTS ARE RELEVANT TO PLEADINGS OF ALL PARTIES

Plaintiffs may argue that the MidCountry documents are not part of the record on appeal because they are not relevant to the instant case. This assertion would be false.

Plaintiffs' complaint charged Defendants with defamation *per se* in an attempt to roll the burden of proof upon Defendants, and accused Defendants of making the following allegedly false and defamatory statements:

> g. 3ABN Board members have personally enriched themselves as officers and directors of 3ABN in violation of the Internal Revenue Code.
>
> h. Danny Shelton wrongfully withheld book royalties from 3ABN and refused to disclose those royalties in proceedings before a court of law related to the distribution of marital assets.
>
> ...

> i. Danny Shelton perjured himself through the course of court proceedings relating to his divorce from Linda Shelton.

(Doc. 1 pp. 13, 15).

An examination of the MidCountry documents by Defendants would have been necessary to determine, *inter alia*, whether Shelton perjuriously omitted and misreported income, bank accounts, and bank account balances on his July 2006 financial affidavit (Doc. 8-2 pp. 15–16, 21, 24–25, 30, 35, 37; Doc. 81-7 pp. 8–10, 13), and whether there were transfers of funds between 3ABN's bank accounts and Shelton's bank accounts that cannot be attributed to Shelton's salary from 3ABN.

Defendants' answer to Plaintiffs' complaint stated:

> ... Defendants have, upon information and belief, sufficient information to believe that 3ABN may actually be controlled by Plaintiff Danny Lee Shelton and that Plaintiff treats the corporation as his own asset and purposefully profits from the same.

(Doc. 9 p. 5).

> Upon information and belief, ... Plaintiff Danny Lee Shelton ... has conducted himself in such a way as to ... prey upon the financial soundness of the entity 3ABN and to inappropriately redirect large sums to his personal benefit with and without properly constituted corporate authority.

(Doc. 9 pp. 8–9). Thus, Defendants' answer echoed the same issues found in Plaintiffs' complaint.

Yet on February 7, 2008, Shelton lied to the district court in the District of Minnesota when he falsely stated in connection with his motion to quash Defendants' subpoena upon MidCountry:

> Second, the Subpoena requests Shelton's personal bank account statements, when Plaintiff Shelton's personal financial condition is not at issue in the underlying litigation, ... and when Defendants have done nothing to prove Shelton's personal financial affairs relevant to either the trademark or defamation claims.

(Doc. 63-27 p. 9).

IV. MIDCOUNTRY DOCUMENTS ARE PART OF RECORD ON APPEAL IN BOTH APPEALS

A. Date of Filing Makes MidCountry Documents Part of Record on Appeal in Both Appeals

Since the MidCountry documents were filed with this Court on September 12, 2008 (Pickle Aff. Ex. A), and since that date is prior to the dismissal order of November 3, 2008 (Doc. 129), and since Defendants' first notice of appeal was filed on November 13, 2008 (Doc. 133), the MidCountry documents are part of the record on appeal for both of Defendants' appeals.

B. MidCountry Documents Speak to Issues in Both Appeals

Plaintiffs may argue that the MidCountry documents are not part of the record on appeal because they do not speak to issues under review in Defendants' appeals. This assertion would be false. The MidCountry documents and their contents speak to issues involved in Plaintiffs' motion to dismiss, Defendants' motion for costs, Defendants' motions for reconsideration and to amend findings, and Defendants' motion for sanctions.

For one thing, the MidCountry documents are evidence of the frivolous nature of Plaintiffs' complaint since they further document Shelton's private inurement and the perjurious nature of Shelton's divorce-related financial affidavit. This explains why Plaintiffs have repeatedly obstructed the discovery of these documents. Defendants have repeatedly put at issue in connection with the orders under appeal the topics of malicious prosecution and abuse of process. (Doc. 126 pp. 1, 4–5, 11, 13–14; Doc. 149 p. 3; Doc. 161 pp. 2, 16; Doc. 170 pp. 3–4, 13–18; Doc. 177 pp. 2, 9; Doc. 182 pp. 4, 11; Doc. 190 p. 9). This Court's April 13, 2009, order put these topics at issue as well. (Doc. 166 pp. 3–4).

Also, Defendants sought sanctions against Plaintiffs and their counsel for Plaintiffs' mischaracterization of proceedings concerning Shelton's motion to quash which Shelton filed in

the District of Minnesota. (Doc. 184 p. 12; Doc. 190 p. 10).

Quotations from Defendants' submissions follow, which demonstrate that the MidCountry documents are at issue in Defendants' appeals, and should therefore be available for review by the First Circuit. (The list that follows is not intended to be exhaustive.)

1. The ploy of the voluntary dismissal

> Finally, after the Defendants are close to getting access to the records of MidCountry and GHS, the Plaintiffs through the instant motion seek to prohibit that access.

(Doc. 126 p. 9).

The presence of incriminating information in the MidCountry documents would further confirm that Plaintiffs' motion to dismiss was but a ploy to that end.

2. Plaintiffs' sought to duplicate Defendants' litigation expenses

> By including in their motion a request for an order to return all documents from Remnant, MidCountry, and the Plaintiffs, the Plaintiffs ensure that there will be substantial duplication of expense, especially given the long, protracted war over discovery they have shown themselves prone to fight.

(Doc. 126 p. 15).

> Only after Defendants had obtained the damning Remnant documents did Plaintiffs file their motion to dismiss. In doing so, Plaintiffs sought the following:
>
> ...
>
> - Return of MidCountry's records, necessitating duplicative discovery expense in future litigation, even though the confidentiality order does not so require. (*Id.*).

(Doc. 170 p. 15).

The presence of incriminating information in the MidCountry documents would give more weight to Defendants' argument, and would make more necessary the duplicative expense of Defendants' acquiring these documents in future litigation.

> A noted treatise observes: "Legal prejudice is shown when actual legal

> rights are threatened or when monetary or other burdens appear to be extreme or unreasonable." 8 *Moore's Federal Practice* § 41.40[6] (3d ed. 2003). As a clear example, it is an unreasonable monetary burden to deprive Defendants of the MidCountry records without compensation given that the confidentiality order did not order such, Magistrate Judge Hillman refused Plaintiffs' request to conduct an *in camera* review of those records, they contain no checks or deposit slips which could reveal health care information, and neither Plaintiff had standing to object to Defendants receiving MidCountry records pertaining to DLS.

(Doc. 177 pp. 10–11).

Thus, depriving Defendants of both the MidCountry documents and the funds paid to produce those documents constitutes an arbitrary imposition of legal prejudice upon Defendants, an argument made more weighty by the presence of incriminating information in those documents.

3. Shelton lacked standing to object on behalf of DLS

Plaintiffs contended that no court agreed with Defendants' positions, yet Magistrate Judge Boylan explicitly did, a topic put at issue in Defendants' motion for sanctions.

> On March 4, 2008, Magistrate Judge Boylan agreed that Danny Lee Shelton ("Shelton") lacked standing to object to Defendants' acquiring documents from MidCountry Bank ("MidCountry") pertaining to DLS Publishing, Inc. ("DLS").

(Doc. 177 p. 3).

> Magistrate Judge Boylan agreed with Defendants that Shelton did not have standing to object to Defendants' subpoena of MidCountry documents pertaining to DLS Publishing, Inc. (Doc. 155 ¶ 3; Pickle Aff. ¶¶ 14–16, Ex. K).

(Doc. 184 p. 12).

> Contrary to Plaintiffs' assertion (Doc. 188 p. 19), four magistrate judges most certainly did find "Plaintiffs' position to lack a legal or factual basis":
>
> - Magistrate Judge Boylan: Shelton had no legal basis for his position that Shelton had standing to object to Defendants' subpoena of MidCountry documents pertaining to DLS Publishing, Inc. (Doc. 155 ¶ 3; Doc. 185 ¶¶ 14–16, Doc. 185-12 p. 3).

(Doc. 190 p. 10).

Demonstrating that MidCountry produced documents pertaining to accounts owned by DLS rather than by Shelton lends more weight to this argument.

4. Defendants should be reimbursed for the MidCountry documents, or should receive the MidCountry documents, or both

> Further, the Court has now declined to require Plaintiffs to reimburse Defendants for any of Defendants' costs, including MidCountry's records, even though Defendants paid considerably for these records and have not yet seen them. (Doc. 166). Defendants should be reimbursed for these records, or Defendants should be allowed to possess what they paid for, or both.

(Doc. 170 p. 16).

> MidCountry's records are relevant to questions of private inurement and perjury put at issue in Plaintiffs' complaint. (JA 36–37, 39; DB 14–15). Thus, they are also relevant to Defendants' claims of malicious prosecution and abuse of process, since these records would further prove Plaintiffs' allegations to be baseless. Therefore, there is no legitimate reason to surrender MidCountry's records to a party who neither produced nor paid for them.

(Doc. 178-2 p. 36 (an argument submitted to this Court to the extent that the order of dismissal was not a final, appealable order)).

This argument depends in part on the frivolous nature of Plaintiffs' complaint, and whether Plaintiffs engaged in abuse of the discovery process, and the contents of the MidCountry documents speak to that issue.

5. Plaintiffs' last legal obstacle removed on September 11, 2008

Plaintiffs' last legal roadblock to Defendants' obtaining the MidCountry documents was removed on September 11, 2008, 7 weeks prior to the case's dismissal:

> Magistrate Judge Hillman's order of September 11, 2008, also denied the Plaintiffs' request to conduct *in camera* review of the records of MidCountry Bank (hereafter "MidCountry"), Gray Hunter Stenn LLP (hereafter "GHS"), Remnant Publications, Inc. (hereafter "Remnant"), and all other third parties, thus opening the way for the Defendants to obtain these documents. (Doc. 74 ¶ 7; Doc. 75 pp. 16–17; Doc. 107 p. 5).

(Doc. 149 p. 2).

> Also on September 11, Magistrate Judge Hillman refused to limit the scope of discovery, and refused to order an *in camera* review of the MidCountry and Remnant documents. (Doc. 107 p. 5; Doc. 74 ¶ 7; Doc. 75 pp. 16–17).

(Doc. 177 p. 4).

> Magistrate Judge Hillman denied Plaintiffs' requests (a) to limit the scope of discovery as to subject matter or time frame, (b) to prohibit discovery of donor information, and (c) for *in camera* review of the MidCountry, Remnant, and GHS documents. (Doc. 107; Doc. 74 pp. 2–3; Doc. 75 pp. 16–17).

(Doc. 184 p. 14).

A review of the MidCountry documents should confirm that there was nothing in the documents themselves left to bar Defendants from obtaining those documents.

CONCLUSION

The MidCountry documents filed with this Court on September 12, 2008, are part of the record on appeal for both of Defendants' appeals, and speak to a number of the issues in those appeals. They should be forwarded to the First Circuit Court of Appeals as a supplemental record.

Respectfully submitted,

Dated: December 9, 2009

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