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' REPLY TO PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO COMPEL PLAINTIFFS' COUNSEL TO RETURN THE MIDCOUNTRY RECORDS

INTRODUCTION

Plaintiffs Three Angels Broadcasting Network, Inc. ("3ABN") and Danny Lee Shelton ("Shelton") admit that Plaintiffs' response to the instant motion repeats to a large extent the facts and arguments of Plaintiffs' response to Defendants' motion to forward part of the record. (Doc. 216 pp. 1–2; Doc. 204). Therefore, Defendants hereby incorporate Defendants' rebuttal and refutation of those facts and arguments found in Defendants' reply to Plaintiffs' response to that other motion. (Doc. 213). Defendants use this reply to emphasize certain relevant points and to address Plaintiffs' facts and arguments not found also in Plaintiffs' previous response.

In Plaintiffs' present response, Plaintiffs give no explanation as to why Plaintiffs never sought reconsideration or appeal of the April 17, 2008, confidentiality order, which doesn't require parties to return any documents, or the October 30, 2008, order, which ordered that the copies of bank statements Defendants subpoenaed from MidCountry Bank ("MidCountry")

("MidCountry records") be returned to MidCountry. (Doc. 60; Doc. 141 p. 13).

Plaintiffs do not explicitly oppose Defendants' motion that the October 30, 2008, order be stayed if a stay is required to prevent the return of the MidCountry records to MidCountry. (Doc. 210 p. 2; Doc. 211 pp. 1, 9–10). Therefore, if such a stay is required, Defendants' motion for a stay should be granted.

Given the propensity of Plaintiffs and their counsel to prevaricate, Defendants object to accepting any unverified or unsupported factual assertions made by Plaintiffs and their counsel.

REPLY TO PLAINTIFFS' INTRODUCTION

"Since their relevancy was now a moot issue, this Court agreed and ordered their return." *(Doc. 216 p. 2)*

To the contrary, the only reason for ordering the return of the MidCountry records to MidCountry, gleaned from the transcript of the status conference, is the shielding of Plaintiffs and their counsel from liability for filing and litigating an utterly frivolous case. (Doc. 141 pp. 6–8, 10–11). Plaintiffs' counsel stated that such shielding was his "only concern." (*Id.* at p. 8).

The relevancy issue was already decided by September 11, 2008, when this Court denied Plaintiffs' motion to conduct an "*in camera* review" of the MidCountry records "for relevance." (Doc. 74 ¶ 7; Doc. 75 pp. 16–17; Doc. 107 p. 5). There was therefore no remaining relevancy issue pertaining to the MidCountry records on October 30, 2008.

REPLY TO PLAINTIFFS' ARGUMENTS

I. THE OCTOBER 30, 2008, ORDER AND THE APRIL 17, 2008 CONFIDENTIALITY ORDER

A. The Explicitly Clear October 30, 2008, Order Needs No Interpretation

On October 30, 2008, this Court ordered:

> 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.*

(Doc. 141 p. 13, italics added). While Plaintiffs audaciously suggest that Defendants merely "interpret" or "construe[]" this order to require the ***return*** of these records to ***MidCountry,*** the order itself explicitly and clearly so states. (Doc. 216 pp. 7, 13). Plaintiffs admit that MidCountry, not Plaintiffs, was the party that produced the MidCountry records. (Doc. 216 p. 14). Plaintiffs therefore know that they unlawfully obtained the MidCountry records, and must return them to this Court.

B. Plaintiffs' Counsel Repeatedly Violates Mass. R. Prof. C. 3.3(a)

Massachusetts Rule of Professional Conduct 3.3(a) states in relevant part:

> **Rule 3.3 Candor Toward the Tribunal**
> (a) A lawyer shall not knowingly:
> (1) make a false statement of material fact or law to a tribunal; ....

Plaintiffs' counsel falsely asserted in his response that "this Court later ordered [the MidCountry records] to be turned over to Plaintiffs' counsel." (Doc. 216 p. 1). Whether the October 30, 2008, order calls for those records to be returned to MidCountry or to be instead "turned over to Plaintiffs' counsel" is material both factually and legally to the issue at bar.

Repeatedly, Plaintiffs' counsel uses the word "return," but pretends that "return" means the giving up of the MidCountry records to Plaintiffs. (Doc. 216 pp. 2–3, 6–10, 13–17). Yet the counselor cites no authority to support his contrived, fallacious definition of the word "return." (*Id.*). Defendants highly doubt that the counselor is instead violating Mass. R. Prof. C. 1.1 by being ignorant as to the correct and material meaning of the English word "return."

C. Plaintiffs Knew Confidentiality Order Didn't Require Parties to Return Documents

Plaintiffs deny attempting to deceive the Court into thinking that the confidentiality order required parties to return documents, and assert that they instead were giving their "interpretation" of that order as so requiring. (Doc. 216 pp. 14, 6). By this assertion Plaintiffs' counsel again gives evidence of violating either Mass. R. Prof. C. 1.1 or 3.3(a).

The confidentiality order nowhere requires parties to return documents, only requires certain non-parties to sign Exhibit A of that order, only requires certain non-parties to return confidential documents, and only requires that return to be made to "the person or party" that provided the documents. (Doc. 60). Such return by non-parties must be made:

> 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 ....

(Doc. 60 p. 8). Therefore, since Defendants and this Court never signed Exhibit A, since MidCountry's attorney never demanded anyone to return the MidCountry records, since "the final termination of the instant litigation, including appeal," has not occurred, and since Plaintiffs are not "the person or party" that produced those records, Plaintiffs' counsel has always known that the confidentiality order gives him no legal basis to obtain the MidCountry records from this Court in violation of this Court's own order, and that he therefore must return those records.

> 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.

(Doc. 60 p. 6). No competent attorney can read ¶ 7 of the confidentiality order and conclude that that order "contemplat[ed]" the return by parties of confidential information merely because the same order restricts the use of such information to the instant litigation, against which restriction Defendants may and will launch "a subsequent attack."

The confidentiality order is clear that the restriction of use of discovery materials to the instant litigation concerns **ALL** discovery, whether confidential or not. (Doc. 60 pp. 1–2).

D. Dire Financial Straits Why Plaintiffs Don't Move for Return of Documents

Plaintiffs try to explain why they haven't yet filed a motion seeking the return of allegedly confidential documents. (Doc. 216 p. 8 n.2). If Plaintiffs really believed that either the April 17, 2008, confidentiality order or this Court's October 30, 2008, order really required

parties to return any documents, surely Plaintiffs' counsel would long ago have filed such a motion as he promised on November 13, 2008, to do. (Doc. 162-7 pp. 1, 6).

Without providing any substantiating evidence or sources, 3ABN Board chairman Walter Thompson ("Thompson") testified on October 22, 2008:

> Last week, the Board reviewed figures showing that 3ABN's donation levels have returned to the level they enjoyed before the attack on our reputation began. We think this shows that the public's confidence in 3ABN has been restored.

(Doc. 123 p. 3). Larry Ewing ("Ewing") and Molly Steenson ("Steenson") testified on May 9, 2007, that the attack on 3ABN's reputation began in June or July of 2006,[1] and that donations declined thereafter. (Doc. 10-3 ¶ 4; Doc. 10-5 ¶¶ 3–8). Therefore, Thompson was testifying that by October 22, 2008, donation levels had returned to pre-June or pre-July 2006 levels.

3ABN delayed filing its 2008 IRS Form 990 till long past normal deadlines, not signing it until January 5, 2010. (Affidavit of Robert Pickle ("Pickle Aff.") Ex. D at p. 1). What is readily apparent from that filing is that donation levels from the public in 2008 were about $1.2 million less than in 2006, and almost $300,000 less than in 2007. (Pickle Aff. ¶ 13, Table 2).[2] Using the methods the IRS employs to determine total public support, 3ABN's public support in 2008 was over $1.5 million less than in 2006. (Pickle Aff. ¶ 15, Table 4). But if figures for 2006 taken from 3ABN's 2007 filing are used instead,[3] public support in 2008 drops to over $3.1 million less than in 2006. (Pickle Aff. ¶ 17). These simple facts lead one to suspect that Thompson's October 22, 2008, testimony which 3ABN's motion to dismiss was based upon was perjured.

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[1] Defendants have already conclusively demonstrated that the dates given by Ewing and Steenson were fallacious. (Doc. 49 ¶ 15; Doc. 49-2 p. 45). But an analysis of Thompson's assertion requires the use of Plaintiffs' dates.

[2] While it is likely that 3ABN inordinately delayed filing its 2008 Form 990 in order to hide this information from Defendants and this Court, there are other possible reasons for the long delay that are also troubling. (Pickle Aff. ¶¶ 4–9, Ex. E–G).

[3] A number of discrepancies suggest that a forensic audit is required before accepting any figures 3ABN provides. (Pickle Aff. ¶¶ 16, 18, Table 5).

Therefore, Plaintiffs' real reason for not filing more motions must be 3ABN's dire financial straits, as well as Shelton's aversion to paying such personal expenses with his own money. (Doc. 81-5 p. 21; Doc. 171-3 p. 16; Doc. 93 pp. 33–35 (Ex. O at Ex. HHH at pp. 2–4)).

This point is driven home all the more by four facts: (a) The gap between 3ABN's annuity and trust related liabilities and assets grew from –$936,307 in 2005 to –$1,921,212 in 2006, and to –$3,453,320 in 2007. (Pickle Aff. ¶ 19, Table 6). That gap declined to either –$2,306,216 or –$3,309,016 in 2008. (*Id.*). (b) Just eight days after the 3ABN Board's probable visit with the criminal division of the IRS on November 27, 2007, 3ABN internally assigned its company owned buildings and real estate to its annuity asset account. (Pickle Aff. ¶ 20, Ex. H p. 12 at Note 11). (c) 3ABN sold two television stations in 2008 for $1,150,000 (but failed to report the cost of those assets when figuring the gain from those sales). (Pickle Aff. Ex. D p. 1 at ln. 10; Ex. D, Part VIII, lns. 7a–7d; Ex. H p. 14 at Note 17). (d) 3ABN's legal expenses in 2007 and 2008 have surpassed those of 2005 and 2006 by $1,584,227. (Pickle Aff. ¶ 22, Table 7).

E. Plaintiffs' Position Mandates Ongoing Litigation

Plaintiffs feign wanting litigation to end while simultaneously making clear that they intend to continue harassing Defendants. (Doc. 216 p. 8 n.2). Defendants sought to clarify Plaintiffs' meaning in Plaintiffs' footnote 2 on January 5, 2010: Have Plaintiffs abandoned their attempted confidentiality designation for materials that do not qualify for such protection, such as materials statutorily open to public inspection or otherwise available to the public, or materials Defendants also obtained from collateral sources[4]? (Pickle Aff. Ex. I). Plaintiffs' counsel replied:

> No. If you publish the substance of anything we designated as confidential under the Protective Order, we will seek to have you held in contempt of court, in addition to any other remedies available to us.

(Pickle Aff. ¶ 23, Ex. J).

[4] The confidentiality order explicitly protects Defendants' right to publish material obtained outside of the instant litigation. (Doc. 60 ¶ 8).

Defendants refuse to waive their First Amendment freedoms of speech, press, and religion. Since Plaintiffs and their counsel make clear that they are bound and determined to infringe upon these rights and refuse to negotiate, Defendants will defend these rights until Plaintiffs' threats are judicially neutralized, regardless of the time, effort, and expense required.

Plaintiffs and their counsel should be held in contempt for their flagrant and repeated disregard of the just and wise provisions of the confidentiality order. (cf. Doc. 161 pp. 7–8).

II. COURT WITHOUT JURISDICTION TO ALTER ORDERS DURING APPEALS

Plaintiffs and Defendants all agree that this Court cannot alter or reverse its orders during Defendants' pending appeals. (Doc. 213 pp. 6–8; Doc. 216 pp. 8–10). Thus, for this Court to sanction the surrender of the MidCountry records to Plaintiffs despite this Court's order to the contrary, an order that is the subject of pending appeals, would unquestionably be unlawful. But this Court does retain authority to stay the order to return the MidCountry records to MidCountry, if a stay is required to prevent that return. Fed. R. App. P. 8(a)(1).

III. SHELTON'S ARGUMENT DESTROYS HIS CASE

Defendants have repeatedly and conclusively demonstrated that Shelton lined his pockets with 3ABN money.[5] Shelton treated 3ABN, a 501(c)(3) non-profit corporation, as if it were his personal piggy bank. Plaintiffs appear to agree with Defendants on this point since they continue to argue, without legal authority,[6] that Shelton has a privacy interest in bank statements owned by MidCountry that would prevent their disclosure to Defendants. (Doc. 216 p. 2–3, 14). Plaintiffs argue that Shelton's privacy interest extends even to bank statements for bank accounts owned by 3ABN (and DLS Publishing, Inc. ("DLS")), not by Shelton, *as if 3ABN were Shelton's DBA.*

[5] Most recently, Defendants submitted the extremely damaging documents produced by Remnant Publications, Inc. ("Remnant documents") to the First Circuit, along with an affidavit drawing attention to the many incriminating facts within those documents. (Pickle Aff. Ex. K, Ex. L at pp. 2–3, 7 (pp. 3–4, 8 of the resulting court document)).

[6] Defendants have repeatedly cited legal authority to the contrary. (Doc. 211 pp. 2, 10; Doc. 213 pp. 2–3; Doc. 63-28 pp. 8–10; Doc. 185 pp. 2–3).

Defendants subpoenaed bank statements for ten different accounts, of which Shelton *only owned four.* (Doc. 63-30 p. 5). Of the 548 bank statements produced in response to Defendants subpoena (463 + 85), *only 241 concerned Shelton's accounts* (190 + 51). (*Id.*). Of the remainder, 24 (4 + 20) concerned an account owned by DLS, and 283 (269 + 14) concerned five accounts owned by 3ABN. (*Id.*).

Almost two years ago, Shelton alone filed a motion to quash in the District of Minnesota. (Doc. 76-3 pp. 18–19). Defendants cannot identify when DLS or 3ABN ever objected to Defendants' obtaining bank statements from MidCountry pertaining to DLS's and 3ABN's bank accounts. Thus, DLS and 3ABN long ago waived all objections thereto, even as MidCountry did.

IV. THE MIDCOUNTRY RECORDS ARE PART OF RECORD ON APPEAL

Even if Defendants are incorrect on this issue, the instant motion is not entirely disposed of. But the following reasons make the MidCountry records part of the record on appeal:

The court of appeals has already determined that the Remnant documents are part of the record on appeal, though never filed with this Court. (Doc. 212-2). Thus, filing in the district court is not an absolute prerequisite for being part of the record on appeal.

Plaintiffs sought by motion to have this Court conduct an *in camera* review for relevance of the MidCountry records. (Doc. 74 ¶ 7; Doc. 75 pp. 16–17). The District of Minnesota ordered these disputed records to be sent under seal to this Court, analogous to a provision in § 1 of the confidentiality order which results in the filing of the disputed information. (Doc. 60). Thus, the MidCountry records should be considered filed.

The MidCountry records were mysteriously lost by the courthouse, mysteriously found, and surrendered to Plaintiffs in violation of this Court's order 7 days after the record on appeal was declared complete, with the docketing of the receipt for such surrender being delayed until the very day Defendants served their designation of appendix and issues for review. (Doc. 213

pp. 10–11). All this leads one to suspect that Plaintiffs' counsel and this Court believed these records to be part of the record on appeal, and that the loss of and failure to docket the Court's reception of these records were errors. Fed. R. App. P. 10(e) may be used to correct such errors.

Given the presiding judge's rich pre-judicial background and the subsequent history of this case, he must have at least inferred what was in the MidCountry records, and thus may very well have taken into consideration their contents when issuing the orders now under appeal. (Doc. 213 pp. 10–12). Beyond such probable inferences by the Court, only if the original seal upon the MidCountry records remains unbroken can it be proven that this Court never physically reviewed those records. (*infra* 11).

Defendants objected to this Court's ordering the return of the MidCountry records, and specifically requested that discovery be transferable in order to avoid duplicative costs. (Doc. 141 pp. 13–15; Doc. 126 p. 15). Defendants shall seek appellate review of this Court's handling of the MidCountry records.

V. THE EXPROPRIATION OF DEFENDANT'S PROPERTY

A. Bank Records vs. Copies of Bank Records

Plaintiffs quibble over Defendants' claim that the surrender of the MidCountry records is an expropriation of Defendants' property. (Doc. 216 p. 16). By the term "MidCountry records," Defendants always intended to be understood *copies* of MidCountry's records, not MidCountry's records themselves. Nevertheless, Defendants paid over $3,500 for the MidCountry records, and still have nothing to show for that expense. Why is that? Because the MidCountry records were surrendered to Plaintiffs in violation of this Court's own order, when no legal obstacle remained to prevent Defendants' access to those records, and when Defendants were denied reimbursement for those records. This constituted a *de facto* expropriation of Defendants' property.

B. Plaintiffs Were Never Authorized to View the MidCountry Records

Plaintiffs assert, "Moreover, Pickle and Joy have not even been authorized to view the records." (Doc. 216 p. 16). But Plaintiffs know that the same order that forbade MidCountry to give copies of the MidCountry records to Defendants also forbade MidCountry to give copies to Plaintiffs. (Doc. 63-36 p. 2). Plaintiffs therefore cannot equitably invoke this argument here, having obtained possession of the MidCountry records without authorization.

The difference between the rights of Defendants and Plaintiffs is simply this: When this Court denied Plaintiffs' motion requesting *in camera* review of the MidCountry records, no legal obstacle remained to prevent Defendants' obtaining the MidCountry records pursuant to Fed. R. Civ. P. 45(a)(1)(D), 34(c), and 26(b)(1).[7] (Doc. 107 p. 5; Doc. 74 ¶ 7; Doc. 75 pp. 16–17). Plaintiffs then had a right to receive a copy of the same records from Defendants pursuant to Fed. R. Civ. P. 26(e)(1).

C. Defendants' Attempted Diligence Regarding the MidCountry Records

Plaintiffs assert that Defendants never sought to have Magistrate Judge Hillman release the MidCountry records to Defendants. (Doc. 216 pp. 2, 6, 17). This assertion is incorrect since Defendants repeatedly contacted the courthouse in order to obtain the release of those records, only to be told that no one could find them. (Doc. 206 ¶¶ 4–11; Pickle Aff. ¶ 25).

Between the arrival of the MidCountry records at this Court on September 12, 2008, and the filing of Plaintiffs' motion to dismiss on October 23, the Remnant documents were produced and analyzed, a hearing was requested by Defendants and held in the Southern District of Illinois, two replies to Plaintiffs' oppositions to Defendants' discovery motions were prepared and filed, and yet another discovery motion was being prepared. (Doc. 155-2; Pickle Aff. Ex. M–N; Doc. 152-6; Doc. 108; Doc. 109; Doc. 113 to Doc. 115; Doc. 126 pp. 2–3). Defendants could not even prove that the MidCountry records had arrived at the courthouse until October 8, 2008.

[7] Plaintiffs acknowledged as much when they asserted that the MidCountry records had already been "supplied to Defendants." (Doc. 120 p. 1).

(Doc. 206-6; Doc. 206 ¶ 10).

As far as Plaintiffs' quibble that Defendants should have noticed earlier the address under the signature of Doc. 160 (Doc. 216 p. 15), despite the ambiguity of both the docket text and the text of the receipt (Doc. 211 p. 5; Pickle Aff. ¶ 28, Ex. O), Defendants' late discovery does not legitimize Plaintiffs' theft.

VI. DEFENDANTS' ONGOING EVIDENTIARY CONCERNS

A. Plaintiffs Refuse to Clarify the Location of the MidCountry Records

Plaintiffs' counsel previously, vaguely asserted that the MidCountry records are now at "our offices." (Doc. 208 ¶ 8). Defendants asked Plaintiffs' counsel to clarify whether the MidCountry records had been unsealed, copied, and distributed to any or all of the offices of Siegel Brill, Fierst, Pucci & Kane, Meagher & Geer, 3ABN, and Shelton. (Pickle Aff. Ex. P, Ex. R). Plaintiffs' counsel refused to answer this question in their replies. (Pickle Aff. Ex. Q, Ex. S).

Now Plaintiffs' counsel asserts:

> Nor do Pickle and Joy have any credible basis for complaining that Plaintiff Shelton is in possession of his own personal and confidential financial information.

(Doc. 216 p. 14). If Shelton is in possession of the MidCountry records as claimed, then the MidCountry records have indeed been unsealed and distributed to multiple offices.

Given all the instances of actual and attempted spoliation of evidence brought to light in this litigation, any notes left upon the MidCountry records by this Court during the three months they were in this Court's custody could have been removed by Plaintiffs or their counsel. Based on the above statement by Plaintiffs, whether this Court ever opened the package may now be impossible to prove by examination of the package itself. Yet, in light of Plaintiffs' assertion that this Court never reviewed the MidCountry records, the question of whether this Court opened the package and looked at its contents is extremely relevant to Defendants' appeals.

B. Plaintiffs' Counsel's Mere Assurances Are Worthless

Plaintiffs' counsel twice refers to his assurance that the MidCountry records are and will be safe. (Doc. 216 pp. 8, 16). But this is the same counselor who promised on October 17, 2008, that he would not file a motion to dismiss, led the court in the Southern District of Illinois on October 22 to believe that dismissal was anything but imminent, and then filed a motion to dismiss on October 23, 2008. (Doc. 127 ¶ 7; Doc. 152-6 p. 35; Doc. 120).

CONCLUSION

The facts are the facts: The October 30, 2008, order calling for the return of the MidCountry records has never yet been executed. Plaintiffs and their counsel obtained these records unlawfully, and have no legal basis for refusing to return them to this Court. Defendants paid more than $3,500 for the copies comprising these records, and there was never a legal basis for depriving Defendants of their property, much less for expropriating that property by giving the MidCountry records to Plaintiffs in violation of this Court's own order.

The MidCountry records must be returned to this Court, and must be properly certified pursuant to the Federal Rules of Evidence.

Respectfully submitted,

Dated: January 11, 2010

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