

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

THREE ANGELS BROADCASTING . CIVIL ACTION NO. 07-40098-FDS
Plaintiff .
 .
V. . BOSTON, MASSACHUSETTS
 . MARCH 7, 2008
GAILON ARTHUR JOY, et al .
Defendants .
.

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE TIMOTHY S. HILLMAN
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

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P R O C E E D I N G S

COURT CALLED INTO SESSION

THE CLERK: The Honorable Timothy S. Hillman presiding. Today's date is March 7, 2008 in the case of Three Angels Broadcasting Network v. Gailon Arthur Joy, et al, Civil Action No. 07-40098-FDS. Counsel please identify yourselves for the record.

THE COURT: Three Angels go ahead, please.

MS. HAYES: Yes, Your Honor. Jerrie Hayes with Siegel, Brill, Greupner, Duffy & Foster here on behalf of Three Angels Broadcasting and Danny Shelton.

THE COURT: Good afternoon.

MS. RICHARDS: Good afternoon, Judge, Lizette Richards from Fierst, Pucci & Kane also appearing on behalf of the plaintiffs, Three Angels Broadcasting Network and Danny Shelton.

THE COURT: Good afternoon. Mr. Joy, please.

MR. JOY: Gailon Arthur Joy, pro se.

THE COURT: Good afternoon.

MR. JOY: Thank you.

THE COURT: Mr. Pickle?

MR. PICKLE: Yes, Robert Pickle here.

THE COURT: Mr. Pickle, I'm going to ask you to keep your voice up. Can you hear me okay?

MR. PICKLE: I can hear you okay.

1 THE COURT: Good. We're having a little trouble
2 getting you, hearing you clearly, although I can hear you so if
3 I ask you to speak up it's because of that reason. I'm going
4 to start with, Mr. Pickle, I'm going to start with your motion
5 to compel plaintiffs to produce Rule 26(a)(1) documents and for
6 sanctions. And then when you finish your pitch I'm going to
7 hear from either Ms. Hayes or Ms. Richards with their
8 opposition to that. So why don't you go ahead please.

9 MR. PICKLE: Well initial disclosures were made on
10 August 3rd and Attorney Heal made an attempt to secure the
11 documents and was not able to. And then in November after I
12 made my appearance, I negotiated with Attorney Hayes about how
13 much notice they needed before I could inspect and copy those
14 documents. And I was told one week would be adequate for
15 coming by the, her law office and two weeks for coming by 3ABN.
16 And so then I did give her notice and then was told that I
17 could not see those documents without entering into a
18 confidentiality agreement. And it just doesn't make any sense
19 to me to say that every last document in those initial
20 disclosures is confidential.

21 THE COURT: Well with respect to, and I have no idea
22 exactly what documents are being referred to but assuming for
23 the moment there may be some documents that have a confidential
24 quality to them, what is the situation with respect to a -
25 what's your position with respect to a confidentiality

1 agreement to those documents?

2 MR. PICKLE: I had since negotiated with Attorney
3 Hayes regarding, Judge Saylor had indicated that
4 confidentiality agreement or protective order need to be
5 narrowly tailored and so I did negotiate with Attorney Hayes
6 regarding the collection of donor, donor information,
7 information that could identify a particular donor which could
8 potentially raise privacy concerns. And so I suggested to her
9 that the donor information that we need, the donation
10 information that we need could have the donor names, the
11 identifying information that would identify the particular
12 donor redacted out with an accompanying confidential list and
13 that would tie the codes, the donor codes with the donor
14 information. And that would enable us to verify their claims
15 regarding the decline of donations and the reasons why the
16 donations have declined. And then the donor information, the
17 donor identity, you know, would not be disclosed unless the
18 donors themselves didn't mind that. And I feel that's a
19 reasonable proposal but plaintiff's counsel did not, and
20 plaintiffs I assume, did not want to do that.

21 So I'm willing to consider the possibility that some
22 things should not be out there for public consumption and I
23 think I'm willing to be reasonable about it.

24 THE COURT: All right. Let me hear from
25 Ms. Hayes - is it Ms. Hayes, are you the one that's going to--

1 MS. HAYES: Yes, Your Honor.

2 THE COURT: --speak to this issue, Ms. Hayes?

3 MS. HAYES: Yes, yes.

4 THE COURT: All right, let me hear from Ms. Hayes,
5 Mr. Pickle and then, Mr. Joy, do you want to be heard on this
6 at all?

7 MR. JOY: Yes, Your Honor.

8 THE COURT: Okay. Let me hear from Ms. Hayes and
9 then I'll hear from Mr. Joy and then I'll hear, I may hear back
10 from you Mr. Pickle. Ms. Hayes, please.

11 MS. HAYES: Yes, Your Honor. First of all--

12 THE COURT: And speak up, please, so that we can--

13 MS. HAYES: I will do best. Thank you. This is a
14 huge room and I'll try to project. I have just one preliminary
15 matter that goes to this issue and that being, well actually
16 two. The first of all being a standing issue related to
17 Mr. Joy's discussion here or any participation by him in these
18 motions. Not only did Mr. Joy not join in Mr. Pickle's motions
19 or in his objection to our motion for a protective order
20 despite the fact that he participated in some of those good
21 faith telephone conversations that we had about a potential
22 protective order, but he also has not sought leave of the Court
23 to participate or to submit any sort of information to the
24 Court either orally or by written submission. Failing to
25 participate in the briefing or in any of the dialogue that has

1 gone on concerning these motions, while he's certainly a party
2 and is willing to sit and observe, I would strongly request
3 that the Court deny him an opportunity to present an oral brief
4 to the Court at this time since plaintiff has had absolutely no
5 opportunity to review or prepare any sort of a response or
6 counteraction to whatever Mr. Joy may or may not have to say
7 about this. That's a preliminary matter.

8 The second preliminary matter is the issue of the
9 tardy briefing. I'm not going to belabor that. Suffice it to
10 say, we believe that that tardy briefing should be stricken not
11 so much because it adds anything new, there's no more case law
12 in that brief than there was in the initial briefing but
13 because the additional attachment of so many exhibits that are
14 not relevant to this, particularly the attachment of blatant
15 hearsay exhibits, warns that the affidavit and the memorandum
16 that it accompanied be stricken not just for time reasons but
17 because of relevance.

18 Second of all, Mr. Pickle's sort of belated request
19 to this Court that he be granted leave I think indicates sort
20 of a failure to adhere to the rules particularly in light of
21 the fact that I don't blame the Court for the scheduling of
22 this motion but the briefing on this matter was completed in
23 December. The fact that we are here in March is a scheduling
24 issue with the Court has nothing to do with the briefing
25 issues. Mr. Pickle has had ample opportunity to provide this

1 Court both with a request to supplement and then that
2 supplemental information has failed to do so until basically a
3 week before this hearing, Your Honor, which we believe is tardy
4 and--

5 THE COURT: Are you referring to Mr.--

6 MS. HAYES: Yes.

7 THE COURT: --Pickle's--

8 MS. HAYES: Supplement on the motion to--

9 THE COURT: Yeah, but that's in response to your
10 motion for a protective order, right?

11 MS. HAYES: Yes, Your Honor, but I wanted to bring it
12 up at this point because there are some issues that are going
13 to be discussed in the motion to compel that are going to be
14 related to that, particularly these exhibits that we're talking
15 about.

16 THE COURT: Uh-huh.

17 MS. HAYES: On the motion to compel, Your Honor, the
18 first issue, I'm going to briefly touch on what Mr. Pickle had
19 to say. First of all, the issue of the initial disclosures, it
20 is not accurate that Mr. Heal made an effort to obtain those
21 26(a)(1) materials. In fact, Mr. Heal's challenge at that time
22 in August and early September was that our disclosures had been
23 insufficient because we hadn't provided documentation. We
24 provided to Mr. Heal all the case law and legal authority for
25 the proposition that we are not required at that point during

1 the 26(a)(1) disclosures to actually produce the documents but
2 are merely required to supply a list. Mr. Heal backed off from
3 his position, realized in fact that we had in fact provided an
4 exhaustive categorized list of the documents that were at issue
5 and never made a formal request for those documents as the
6 rules require despite the fact that he promised that a request
7 for production of documents, interrogatories and other formal
8 written discovery was impending. It was on its way. We never
9 saw it. We never saw it. We never saw it.

10 The next thing we hear about the 26(a)(1) disclosures
11 follows Mr. Pickle who's now pro se and follows his filing of
12 the initial request for production of documents and
13 interrogatories in this matter. We responded immediately. We
14 objected to those interrogatories and requests for production
15 of documents, many of which sought the 26(a)(1) initial
16 disclosure of documents, and we subsequently filed as soon as
17 we were able to prepare the memorandum, the motion for a
18 protective order which you'll hear later.

19 So Mr. Heal in his capacity as counsel for Pickle and
20 Joy did not make a request for those documents and we were in
21 fact led to believe that a formal request was going to be made
22 as part of discovery and it eventually was when Mr. Pickle
23 served his RPD's and interrogatories.

24 The second issue that Mr. Pickle raises particularly
25 is that he tried to negotiate on the terms of the donor. There

1 was an exhaustive three week period where Mr. Pickle, Mr. Joy
2 and myself exchanged emails, participated in telephone
3 conversations, tried to resolve the issue of the motion for the
4 protective order. The reason that that didn't get resolved was
5 because after the plaintiffs produced not only one but then a
6 second version of a proposed protective order, neither of which
7 met with Mr. Pickle or Mr. Joy's approval, we then said we
8 can't go any further. We don't know what you want. We need to
9 see something that you would agree to.

10 THE COURT: What was the protective - what documents
11 or classes of documents was the protective order addressing?

12 MS. HAYES: The protective order, Your Honor, again,
13 and I'll get to more detail later if you'd like, but the
14 protective order, the motion for a protective order is designed
15 basically narrowly tailored to address a specific kind of
16 document, that being the proprietary trade secret, confidential
17 financial information of 3ABN as a company and Mr. Danny
18 Shelton's personal and private financial information.

19 The vast bulk of our allegations in the complaint,
20 and if you review the pinpoint allegations of the complaint
21 concerning the specific statements of defamation that we have
22 alleged, those individual statements primarily deal with
23 various specific financial transactions that Mr. Pickle or Mr.
24 Joy or both on the various websites have stated were improper
25 for whatever reason. It took money from the donors or we

1 bought property that was under market value using donor funds
2 inappropriately, but we very specifically identified unique,
3 individual transactions that the defendants had complained
4 about in their web postings. In response to that we realized,
5 having to support our burden of proof on those claims, that the
6 bulk of the material that we were going to have to produce, the
7 stuff that we felt in our 26(a)(1) disclosures was relevant to
8 the claims at least at that point that we had made and no
9 counterclaims were made in the defendant, in either of the
10 defendants' answer. We felt that the material that we had in
11 hand which was primarily financial, audit, accounting and
12 bookkeeping information that proved up the propriety and
13 appropriateness of those specific transactions.

14 So almost everything that we had to produce other
15 than the actual web postings themselves, which certainly
16 Mr. Pickle and Mr. Joy had in their own possession, was this
17 kind of financial information either relating to donors, donors
18 who had written us and said we're not going to give you money
19 anymore because of what we're reading on the internet about
20 you. Donors who sent us emails with those same kind of
21 comments.

22 When we reached an impasse over the issue of a
23 protective order and trying to carve one out, I suggested that
24 we provide to the defendants all of the information that we had
25 to show that any donor to our ministry dropped their donations

1 specifically because of the activity by Mr. Pickle and Mr.
2 Joy. We know we carried the burden of proof. We further know
3 that information related to other reasons that donors may have
4 stopped giving, they ran out of money, tough economic times,
5 they don't like Danny Shelton's haircut and that actually
6 happened, those aren't relevant because we're not making
7 complaints and claims about those.

8 We intend to prove up our damages, specifically being
9 lost donations related to people who stopped giving and told us
10 they stopped giving because of these allegations. It is not
11 necessary to obtain every donor's information and to conduct
12 this national or international survey about why everybody else
13 stopped donating. We're not making claims about those people.
14 We are however willing to provide the emails that show that
15 donations, why the donations dropped, number one. And we are
16 also willing to tie those emails to both the dollar amount of
17 the previous donation and the date at which the donation
18 stopped coming in, whether it was a living trust that got
19 revoked or checks that stopped--

20 THE COURT: Are you claiming that there's a privacy
21 in those emails?

22 MS. HAYES: In the emails, Your Honor, well, not in
23 the content of the emails but we are claiming there is a
24 privacy in the fact that the email contains information that
25 would identify that donor. And again, we're willing to provide

1 information, we're willing to provide the text of the email
2 with the person's email and name redacted. And then if for
3 some reason Mr. Pickle and Mr. Joy feel that they need to tie
4 that email to a specific donation and a specific date we will
5 provide that information too using either a number or letter
6 code that links the email to the donation and the date.

7 We feel very strongly that our donors give to this
8 ministry on the condition that their donation remains
9 confidential for a couple of reasons. First of all because of
10 what I would consider a somewhat more frivolous reason which is
11 that we're now in the day and age of telemarketers, spam email,
12 people don't want their personal, private information
13 disclosed.

14 THE COURT: You can move on from that.

15 MS. HAYES: Okay. And so our efforts to negotiate
16 the protective order or some mutually agreeable protective
17 order before resorting to the Court basically broke down when
18 Mr. Pickle and Mr. Joy refused to provide us with a proposed
19 protective order that we could take to our client and have them
20 look at and see is this something you could agree to? Could
21 you live with this? Certainly the donor issue was a sticking
22 point but we felt that we had provided a very reasonable
23 solution to that.

24 THE COURT: What other categories of - and I don't
25 really need to hear your explanation--

1 MS. HAYES: Sure.

2 THE COURT: --at the moment. I might sometime but
3 what other categories of documents are you claiming the
4 confidentiality agreement would pertain to?

5 MS. HAYES: Again, we're talking about bookkeeping--

6 THE COURT: Yep.

7 MS. HAYES: --accounting and auditing records. The
8 only exception to that would be those materials that have to be
9 open to the public.

10 THE COURT: So financial records and donor--

11 MS. HAYES: Yeah.

12 THE COURT: And donor.

13 MS. HAYES: Financial records, both commercial for
14 3ABN and also private ones for Danny Shelton.

15 One of the matters, and I've been asked specifically
16 by the magistrate judge in the District of Minnesota to raise
17 this to the Court's attention, but Mr. Pickle caused to issue a
18 subpoena in the District of Minnesota seeking bank records,
19 personal bank records for Danny Shelton. We objected to that
20 subpoena on the grounds that it sought information that was not
21 relevant to the claims in this litigation. We also made a
22 motion simultaneous with the motion to quash enforcement of
23 that subpoena asking that the court in the District of
24 Minnesota, that that Honorable magistrate judge stay the
25 enforcement and remit the matter to this Honorable Court for

1 consideration, this Court which has had jurisdiction over a
2 number of discovery related disputes in this matter and who is
3 certainly more familiar with the case. That Honorable
4 magistrate judge is waiting to hear what happens with the
5 motion for a protective order and the motion to compel.

6 THE COURT: What's the magistrate judge's name?

7 MS. HAYES: The magistrate judge is Judge Arthur
8 Boylan, Your Honor. And Magistrate Boylan as I said has taken
9 that matter under advisement, sort of staying the stay, if you
10 will, in order to sort of see what happens here because the
11 arguments that we've made in the motion to quash, again, are
12 very relevant to the issues of the confidentiality, the donor
13 information, the financial information that needs to be, we
14 believe, kept confidential.

15 The motion to compel, Your Honor, we--

16 THE COURT: No, I'm not there yet.

17 MS. HAYES: Oh, I'm sorry.

18 THE COURT: I want to do these one at a time.

19 MS. HAYES: Absolutely. The motion to compel--

20 THE COURT: No, I'm not ready yet.

21 MS. HAYES: Okay.

22 THE COURT: Thank you.

23 MS. HAYES: Not the motion for the protective order.
24 The motion to compel.

25 THE COURT: Oh, I'm sorry. I am on the motion to--

1 MS. HAYES: Okay. I just don't want to - I
2 apologize if I misspoke.

3 THE COURT: I apologize.

4 MS. HAYES: We, contrary to the briefing that
5 Mr. Pickle has submitted to this Court, we never agreed to
6 produced the 26(a)(1) disclosures at any point without a
7 protective order being in place, either a mutually agreed upon
8 one or at least having had the opportunity to come to this
9 Court and seek a protective order governing those financial
10 documents.

11 As to the, I'll quickly go into my own little issues
12 here. As to the motion for sanctions, we have already
13 indicated that we will produce whatever documents are relevant
14 and subject to production without cost to Mr. Pickle and
15 Mr. Joy as far as the 26(a)(1) disclosures are concerned. Any
16 other costs, Your Honor, we would believe to be punitive and
17 unwarranted under the facts of this. Again, we're not making a
18 purposeful delay here. We genuinely want to show that 3ABN is
19 an upright, financially proper ministry, but we don't want to
20 turn those documents over that are proprietary, confidential,
21 trade secret. And Mr. Pickle hasn't challenged that those
22 documents are proprietary and trade secret materials. And I'll
23 talk about that a little more on the issue of the motion for a
24 protective order.

25 THE COURT: Do you have a copy of the latest proposed

1 confidentiality agreement?

2 MS. HAYES: I believe so, Your Honor.

3 THE COURT: Was it in the materials?

4 MS. HAYES: Yes. We did attach a copy of the current
5 proposed version of the protective order to our notice of
6 motion and motion for a protective order.

7 THE COURT: Okay. Then I've got it.

8 MS. HAYES: So that you have that.

9 THE COURT: All right, thank you.

10 MS. HAYES: Thank you, Your Honor.

11 THE COURT: Mr. Joy, let me start with why, with Ms.
12 Hayes' position that you really have no standing since you have
13 not adjoined into the fray with respect to Mr. Pickle's motion
14 to compel them to produce documents.

15 MR. JOY: Well, my thoughts on that are that, number
16 one, the protective order came out as a direct result of the
17 motion to quash. I mean, pardon me; I beg your pardon, Your
18 Honor, the subpoenas, okay. The subpoenas were clearly done
19 for both parties. No particular--

20 THE COURT: Which subpoenas are we talking about?
21 The ones that--

22 MR. JOY: The underlying--

23 THE COURT: --were referenced? The ones out in
24 Minnesota?

25 MR. JOY: Well, no, there were a series of - there

1 are a series of subpoenas that were issued to get third party
2 documents to prove our case. The plaintiffs have argued that
3 we are obviously purportedly guilty of defamation per se. And
4 we are prepared to get the documents that are necessary,
5 obviously even if it takes third party documents. And I
6 understand that some of the documents they're talking about
7 they've claimed to either have been destroyed or have been, you
8 know, the parties don't have them.

9 THE COURT: And I understand--

10 MR. JOY: So we went to the third parties to get
11 them.

12 THE COURT: Let me interrupt you. Before we get to
13 that--

14 MR. JOY: Right.

15 THE COURT: --there's a threshold question of whether
16 you get to address the Court--

17 MR. JOY: Okay.

18 THE COURT: --on this motion only because you didn't
19 weigh in--

20 MR. JOY: Well the fact is--

21 THE COURT: --either in writing or any other way.

22 MR. JOY: Well, we really have weighed in, Your
23 Honor. We were--

24 THE COURT: We is the plural and you are named as an
25 individual so that's--

1 MR. JOY: Absolutely.

2 THE COURT: --that's what I need to flush through
3 before we go too much farther.

4 MR. JOY: I am named as an individual and in fact
5 while I'm named as an individual I was a party to the subpoena.
6 I have participated as she already stated in much of the
7 discussion relating to the protective order. I didn't feel it
8 was necessary for us to duplicate our efforts. We worked
9 together on all of the information that Mr. Pickle has put in,
10 did much of the research together. Frankly, he has ECF, it was
11 much easier for him to file everything therefore it was easier
12 to do it under his name.

13 The frank fact is that, you know, you come down the
14 question of who's representing who on the other side? Who's
15 representing 3BN? Who's representing Shelton? The subpoenas
16 in Minnesota, for example, okay, they're only representing Mr.
17 Shelton. They haven't represented his private corporation.
18 That was brought up in the discussion. They're clearly not
19 representing 3ABN, okay. And yet they issued a blanket motion
20 to quash those subpoenas. So I don't believe that we have a
21 problem with the issue of standing here. I believe--

22 THE COURT: Well, we do. But let me just cut to the
23 chase. What you need to do in the future, and I'm going to
24 listen very briefly to what you have to say cause it's
25 duplicitous of what your partner's, Mr. Pickle's saying, but

1 what you all need to do in the future when you file a pleading
2 you should put both names on it so that--

3 MR. JOY: Yes, Your Honor.

4 THE COURT: --we don't have this issue.

5 MR. JOY: Okay. Yes, Your Honor.

6 THE COURT: Now--

7 MR. JOY: It's my error.

8 THE COURT: --what I'm going to do, one of the rules
9 that we have is that we party gets to speak on behalf of
10 everybody. So even though Mr. Pickle has already kind of
11 crystallized your position, I will hear a few minutes from you
12 but I want to keep moving as well. So if you wanted to go to
13 the merits of this, why wouldn't, and I'm going to ask Mr.
14 Pickle the same question, why wouldn't their financial
15 situation be subject to a confidentiality agreement?

16 MR. JOY: The key reason that the financial
17 information shouldn't be subject to their blanket protective
18 order, and that's the problem with this particular case, three
19 times now they have tried the blanket approach to trying to
20 get, number one, get the case impounded. Number two, they
21 approached the issue of a protective during the course of the
22 26(f) hearing that we had before Judge Saylor. And then number
23 three, once again the issue came up before Judge Saylor in the
24 status conference on December the 14th before, three days before
25 they filed their motion.

1 Judge Saylor made it very clear in every single one
2 of those cases that these people were to provide a narrowly
3 tailored order. Furthermore, this Court has already spoken on
4 the issue of some of the financial documents they're talking
5 about. For example, accounting records, there is a case that
6 went from this court under Judge Saylor to the First District
7 Court of Appeals and was upheld that very clearly says that the
8 accounting records are not privilege. And we--

9 THE COURT: Well, I'm going to, we're to get to that
10 in a minute. What about their donor list?

11 MR. JOY: Well, Your Honor, if there are donors in
12 there who have clearly said they're not interested in donating
13 anymore for whatever purpose, and so far we've only seen one,
14 okay, which by the way that donor contacted us directly all
15 right, and told us what the real story was. We can't see where
16 anybody who has said they're not going to contribute to these
17 people would ever be confidential. They clearly have a
18 position. There would be no reason why they would be
19 confidential. We have the right to examine those people under
20 the rules and it's critical to our case of defamation per se.
21 And the fact is that a big part of this issue is the whole
22 question of did we or did we not make allegations that were in
23 fact, that would in fact carry the test of whether or not there
24 was defamation per se. In other words were the accounting
25 processes that occurred and were the transfer of real estates

1 that actually occurred, did they pass the smell test? Were
2 they acceptable under the generally acceptable accounting
3 principles?

4 THE COURT: Well the point is that that--

5 MR. JOY: And the fact is we're prepared to prove
6 that they're not.

7 THE COURT: That may, you may be - that stuff, not
8 may, probably is subject to discovery, however don't the
9 plaintiffs have an interest in it not being disseminated to the
10 world at large without a further court order? What they're
11 saying is you get to look at it subject to a confidentiality
12 agreement that, you know, you can negotiate and then if you
13 wanted to apply to the Court for an order that it would be
14 further divulged upon a showing of good cause, that's usually
15 the way those things work.

16 MR. JOY: But you see, Your Honor, the problem with
17 that premise is that it violates the premise that this Court
18 has laid out in Rule 7.2(e). It should not be on us to prove
19 that these documents are not privileged or not confidential.
20 It should be on them to prove that those documents are
21 confidential and privileged.

22 THE COURT: I agree with that.

23 MR. JOY: Okay.

24 THE COURT: And we're going to get to that. Okay.
25 Thank you. That helps. All right, now here's what we're going

1 to do. I'm going to go to the plaintiff's motion for a
2 protective order and, Mr. Joy and/or Mr. Pickle, I'm going to
3 let one of you respond. So you guys can think about who's
4 going to do that. And Ms. Hayes is this you or is it Ms.
5 Richards?

6 MS. HAYES: This is mine, Your Honor.

7 THE COURT: I'll hear you.

8 MS. HAYES: Thank you. Your Honor, let me begin by
9 talking about Local Rule 7.2(e). The rule governs the issues
10 of filed documents and whether or not the court case as a whole
11 and the filed pleadings in that case are going to be subject to
12 impoundment, meaning that the filed materials are not going to
13 be disclosed to the public and are going to be instead kept
14 under seal. 7.2 does not address the issue of discovery, what
15 is or isn't kept confidential as part of discovery, and we
16 would argue that aside from this being a very common custom and
17 practice, when issues of confidential or sensitive material is
18 involved having the parties come together with a mutually
19 agreeable protective order. Since we were unable to do that
20 the motion for a protective order had to be brought to this
21 Court and there are strong rationale in favor of having one
22 here. We made the motion specifically seeking to protect from
23 disclosure or dissemination the trade secret donor and
24 confidential commercial and private financial information.
25 That was made in specific response to requests for production

1 of documents that were served on us by Mr. Pickle, both on
2 3ABN and on Mr. Shelton. It was also served in response to
3 informal, to the informal request for the 26(a)(1) disclosures
4 that Mr. Pickle had made and it was also made in response to
5 these four subpoenas that Mr. Pickle, not Pickle and Joy,
6 caused issue from various courts.

7 The only subpoena of those four that has survived,
8 Your Honor, is one which was issued from the District of
9 Minnesota as I've discussed earlier, that it was where a motion
10 to quash was heard before the Honorable Magistrate Judge Boylan
11 where that subpoena was issued from the proper jurisdiction,
12 had the proper scope and had a proper amount of time. The
13 other subpoenas have all been objected to by the third party
14 recipients and the issue of whether or not first of all that
15 provides standing to Mr. Joy is another matter. But second of
16 all, the motion for a protective order was never brought to
17 this Court as this blanket request that everything in the case
18 be either impounded or subject to seal. Instead it was brought
19 in specific response to very particular discovery requests that
20 had been made of us for material we felt we could not in good
21 conscious allow to be distributed to the public or to third
22 parties.

23 Second of all, the idea is to seek a proactive
24 solution. The reason that we have included the entire category
25 of financial and business records is because we believe that if

1 we don't have at least that category, now we're not talking
2 about other information. We're not talking about employment
3 related information, ministry related information, theological
4 information. We're simply talking about this very narrow
5 window of financial bookkeeping and accounting and auditing
6 documents. And the reason that we're talking about that
7 category instead of individual documents is because we'd be
8 here 700 times before the trial. It makes more sense to have a
9 single protective order that the parties can work with, having
10 a living document that governs the entire scope of discovery
11 rather than being back on this court step five, 10, 15, 20
12 times every time a new request for production of document, a
13 new deposition is taken or there's some additional discovery
14 request that is made that would get to these exact same kinds
15 of materials.

16 In perfect--

17 THE COURT: What is the protocol that the, and I
18 apologize, I read this material on it and I missed it. What is
19 the protocol that your proposed protective order employs for
20 the identification of confidential documents as opposed to non?

21 MS. HAYES: Your Honor, we have followed the
22 federally sanctioned IBM Microsoft protocol for the
23 confidentiality of materials. What will happen is if the
24 document is a, it is part of that category of financial
25 auditing, accounting or bookkeeping documents it is not subject

1 to one of the exceptions we've already carved out for them in
2 the protective order but it falls within this narrow range of
3 documents, we would then ascribe each document as being
4 confidential prior to production. That's if the document comes
5 from us. Once the document is received by the defendants, if
6 they take umbrage with our classification as confidential
7 they're entitled to come to the court and seek relief as they
8 would be with any protective order even one that was mutually
9 agreed upon by the parties.

10 THE COURT: And what are their, what uses can they
11 make of the document and to whom can they share it?

12 MS. HAYES: Absolutely again, per IBM--

13 THE COURT: With whom can they share it?

14 MS. HAYES: I understand. Per IBM Microsoft
15 protocol, Your Honor, they are allowed to share the document.
16 As long as the recipient has signed a similar confidentiality
17 agreement, they are allowed to share it with expert witnesses,
18 with deposition witnesses and with other consultants that they
19 use in order to prepare for trial. That's all set out in the
20 protective order and we again have carved that out for their
21 use.

22 Now in alignment with the purposes we did narrowly
23 re-tailor the request. And there are voluminous fields of
24 documents that we didn't address. It is only related to these
25 varied, pardon the pun, sacrosanct business and commercial

1 financial records that are at issue. It only contains one
2 outright prohibition on disclosure, that being related to the
3 donor identifying information. If donors want to walk up to
4 Mr. Joy's house, knock on the door and say I donated to 3ABN
5 and I don't want to do it anymore, that's their prerogative.
6 But it's not coming from 3ABN. We believe very strongly that
7 our donors give to our ministry with the assumption of
8 confidentiality.

9 THE COURT: And so are you proposing a redaction on
10 those or what's the proposal on donors?

11 MS. HAYES: Yes, Your Honor. As - in the reply brief
12 that was filed, Mr. Pickle claims - there are three claims,
13 three defenses that they want to be able to prove with the
14 donor information. The first, these are the only three
15 justifications mind you that Mr. Pickle provides this Court
16 with why a protective order shouldn't be imposed here. The
17 first one being that they want to be able to segregate income
18 that 3ABN received from donors first as income 3ABN received
19 from product sales and speaking engagements and that sort of
20 thing. That can readily be done without having to disclose the
21 individual financial donor information.

22 The second issue that Mr. Pickle claims that they
23 need to be able to prove and so have to have this specific
24 donor identifying information is that they have to identify the
25 reasons that the donors have stopped donating. Again, this

1 goes back to the issue of the scope of this case. The only
2 claims that 3ABN and Danny Shelton are making are that we have
3 lost money because donors specifically stopped donating in
4 response to Mr. Pickle and Mr. Joy's web and other defamatory
5 activity. We don't intend to claim damages for people who
6 stopped donating for other reasons. And for every donation
7 that we claim came as a result of Mr. Pickle and Mr. Joy's
8 defamatory conduct we know we bear the burden of proof to show
9 both the drop in donation and causality. We intend to do that.
10 That information does not have to identify the individual
11 donors in order to be relevant.

12 Last but not least, he says that they need it in
13 order to verify that donors have ceased donations due to their
14 conduct as opposed to our conduct. Again, that's basically a
15 reiteration of the second point which is we need to know why
16 people stopped donating. I don't care why most of these other
17 people stopped donating. I care about the people who stopped
18 donating because they were misled onto Mr. Pickle and Mr. Joy's
19 website with a trademark confusing URL and why they stopped
20 donating because of negative statements about our ministry
21 which were patently false that were made by these two
22 defendants.

23 Those are the only legal rationale that Mr. Pickle
24 has provided with this Court in order to block the imposition
25 of the protective order. Your Honor, the burden of proof on a

1 motion for a protective order rides first with the moving
2 party. We have to show a good cause showing that the
3 information at issue is either trade secret, unduly burdensome,
4 confidential, extremely sensitive. We believe we've made that
5 case and nowhere in Mr. Pickle's briefing does he ever dispute
6 that. The only arguable dispute he makes to that is sort of a
7 justification by saying, well I'm not saying this stuff isn't
8 trade secret but the cat's been let out of the bag because one
9 disgruntled former employee named Darren Mundel went to work
10 for your opposition.

11 Well, the fact that one employee voluntarily
12 disclosed information that we made efforts to conceal does not
13 render 3ABN's financial, marketing and other proprietary trade
14 secret information subject to public disclosure. It does not
15 dispute the sensitivity of this information and it does not at
16 all refute that we have made the requisite element one good
17 faith showing.

18 The second element shifts the burden of proof to the
19 defendant to show that it is necessary and needed that the
20 document be produced without the protection. Now, it should be
21 noted and I can't stress it enough that we're not saying that
22 relevant information won't be disclosed to the defendants and
23 the protective order provides them with more than ample
24 opportunity to utilize and use that information in whatever
25 fashion they see fit for the mounting of their defense. What

1 we take umbrage with is the publication of this material
2 particularly given the history of these defendants, their
3 posting of publications, information, affidavits and court
4 documents on the internet, the publication of information which
5 could not have come from any source other than either a former
6 counsel of 3ABN, which is a problem in and of itself, or Linda
7 Shelton who is subject to an agreement that she won't disclose
8 information about the company.

9 Mr. Pickle argues we have lots of information that's
10 sensitive that we haven't disclosed. We have good judgment and
11 we're not going to release that stuff. Your Honor, the only
12 reason that they haven't released that information is, again,
13 because if they show that they have that in possession it's
14 going to put a couple of people in trouble. The issue of the
15 motion for the protective order breaks down in a couple of
16 other ways as well. Mr. Pickle argues that without intent to
17 publish or disseminate the information there's no reason that
18 we have to preclude its disclosure. Whether or not Mr. Pickle
19 and Joy in this instance intend to publish all this information
20 is not relevant. They may easily change their mind as has been
21 shown on their conduct in the various websites which has now
22 been expanded after the bankruptcy matter to include at least
23 seven other save 3ABN based websites where they are posting
24 this exact same information.

25 Now, Mr. Pickle claims that counsel didn't confer in

1 good faith before bringing the motion. That's patently
2 untrue. The history that Mr. Pickle attaches to his own
3 affidavit shows that we had email and telephone exchanges about
4 this very thing. Second of all, Mr. Pickle claims this is a
5 blanket order in violation of 7.2(e). It patently is not.
6 First of all, it doesn't speak to the issue of the filings that
7 have to be made with the Court. And the plaintiffs understand
8 that if a matter is attached to a summary judgment motion or to
9 some dispositive motion in the future we will make a motion for
10 protective order or motion to seal in terms of the filing of
11 those materials. But a protective order governing discovery is
12 separate, it's distinct and it's a very relevant and very
13 common practice in civil litigation.

14 Mr. Pickle claims that state and federal law mandate
15 the disclosure of the information at issue. Untrue. The only
16 information that law requires us to file, and it doesn't mean
17 that we have to publish it all over the internet, it simply
18 means we have to have it available or send it to a government
19 agency is our 990's and our annual financial statement. And
20 that's an Illinois charitable contributions law. That
21 information is in our view confidential, although it does have
22 to be published and filed, that's fine. Interestingly enough,
23 however, as far as the Rule 26(a)(1) disclosures are concerned
24 those documents were not part of the documents that we wanted
25 subject to the protective order. So it's really, the issue of

1 those mandatory public documents is not really relevant here.
2 Mr. Pickle claims that disclosure is in the public interest.
3 Now there is no longer authority for this proposition.
4 Frankly, no legal authority throughout Mr. Pickle's briefing or
5 any legal analysis as to why this information is not subject to
6 the protection that has been granted in other cases that we
7 cite in our briefing. His claim that the information that is
8 filed with authorities is incorrect. If the documents, the
9 990's, the financial statements that we file with public
10 authorities contains an error, mathematical or otherwise, then
11 the public is entitled to access all the source documents that
12 made up that public filing. Again, aside from the fact that
13 there's no legal authority for this proposition whatsoever even
14 if the reasoning held true, there's absolutely no reason to
15 believe the information is false.

16 The only "evidentiary" example that Mr. Pickle brings
17 forward is this lot 6 land sale. Mr. Pickle's affidavit is
18 full of hearsay evidence. I would ask the Court that it be
19 disregarded pursuant to our motion to strike but also because
20 of the nature of the evidence. But second of all, the only
21 documentary evidence that has been offered to this Court
22 related to lot 6 is a warranty deed. And if the Court looks at
23 the one page warranty deed it will find that all Mr. Shelton
24 was purchasing from 3ABN was a remainder interest in the
25 property. He already had a life estate to the property and was

1 only buying out the remainder of 3ABN, the company's interest
2 in the land.

3 There is absolutely no reason to believe that this
4 transaction was incorrect or improperly reported to the IRS.
5 There's been no finding by the IRS. There's been no criminal
6 investigation, no complaint. There's been absolutely no
7 finding by any determinative body from the Illinois Attorney
8 General to the Department of Revenue that any of these
9 documents contain any errors of fact whatsoever. If anybody
10 could walk up and make broad allegations that it might be the
11 case that they probably possibly committed a factual error,
12 everyone's books would be turned inside out upon the whim of
13 individuals eager to have a look at the inside books of various
14 companies.

15 Related to this Mr. Pickle claims that broadly, again
16 without any authority, the public has a right to know how the
17 donations at 3ABN are being used. But this is not a publicly
18 traded corporation, Your Honor. This is not a company with
19 shareholder investors who are waiting for their money back plus
20 a gain. These are people who have made a gift. If donors are
21 concerned about what their money is used for they are entitled
22 to earmark their donations and under Illinois charitable law we
23 are required to adhere to that request. If donors are further
24 concerned about the use of their donations, they can stop
25 donating and as this lawsuit alleges they have indeed done so.

1 The idea that it's a gift that donors who have a concern about
2 the money that they give takes away this idea that the public
3 at large is entitled to know all of this information. The
4 government has already determined what the public is entitled
5 to know. The publicly filed records are enough.

6 Mr. Pickle also complains that the protections that
7 we seek in our motion for protective order somehow implicate
8 his First Amendment--

9 THE COURT: Counsel, how much longer do you have?

10 MS. HAYES: I have just one more. Implicate his
11 First Amendment Rights. Again, no legal authority. Mr. Pickle
12 suggests that he might want to give the documents to Senator
13 Charles Grassley who's investigating various ministries. Mr.
14 Grassley, the Honorable Senator, is more than capable of
15 subpoenaing these records for himself if he actually believes
16 that the ministry has financial issues.

17 Last but not least, Mr. Pickle claims that he's
18 entitled to defend his reputation. First of all, there is no
19 counterclaim of defamation in this case. There have been no
20 allegations that we have made any defamatory statements about
21 Mr. Pickle or Mr. Joy or the defendants in general on any
22 resource. Mr. Pickle's affidavit which mentions one quotation
23 in a broadcast by Mr. Shelton is frankly insufficient to show
24 that we've somehow engaged in this campaign of defamation
25 against the defendants. Frankly, Your Honor, we're of the

1 opinion that the defendants' postings on the internet more
2 than adequately speak for the character and reputation of the
3 defendants and it's not necessary for us to do anything more.
4 Mr. Pickle is certainly entitled to defend his reputation. But
5 how 3ABN's private financial records go, to forward that is
6 frankly beyond me and has not been proved up causally in Mr.
7 Pickle's briefing.

8 Your Honor, we believe that the protective order we
9 have submitted to the Court with the safeguards that it
10 presents narrowly tailored to cover those financial records of
11 the company and Mr. Shelton individually as it does is a more
12 than reasonable and adequate measure to maintain the
13 confidentiality of very proprietary and trade secret
14 information. We have provided the defendants with ample
15 opportunity to use those materials once disclosed. And the
16 only absolute prohibition that we're seeking is identifying
17 specific information related to our donors. Information which
18 I've already explained to the Court does not satisfy the three
19 legal criteria that Mr. Pickle cites for including the
20 information. With all of that, Your Honor, we would request
21 that this Court grant our motion for a protective order either
22 in the form that it's in already or in a form that this Court
23 would deem just and reasonable.

24 THE COURT: Mr. Pickle?

25 MR. PICKLE: Your Honor, did you say Mr. Pickle?

1 THE COURT: I did.

2 MR. PICKLE: Okay. I would ask leave of the Court
3 to, I think I can be briefer than Ms. Hayes, I'd like to add
4 because we can't exchange notes back and forth obviously, Mr.
5 Joy and myself, I'd like to ask leave of the Court if I am not
6 too long if he could speak as well?

7 THE COURT: No, I'm going to let one of you speak
8 because that's the rule.

9 MR. PICKLE: Okay.

10 THE COURT: And, frankly, I shouldn't let Mr. Joy
11 speak but I appreciate that your pleading was intended to be on
12 behalf of both even though legally it is not. So I'll let you
13 speak or Mr. Joy, and in the future if either of you wants to
14 speak you're going to have to both be on the pleading.

15 MR. PICKLE: Okay. Well, I'll see if I can go down
16 from my notes here. The plaintiff's complaint covers a lot
17 more issues than - it does cover issues other than just
18 financial. It covered any board to be married. It covered, it
19 referred to moral, ethical and financial allegations. And
20 that's a pretty broad sweep. It's a 501(c)3 organization
21 that's listing donations from the public and so the public -
22 that's why the government, the IRS requires organizations such
23 as 3ABN to file 990's is that it can be subject a certain
24 degree of public scrutiny.

25 I--

1 THE COURT: But public scrutiny doesn't necessarily
2 mean that their financial information is available to the
3 public. It's available to the IRS and whatever appropriate
4 Illinois tax authority looks at their status.

5 MR. PICKLE: Well, I understand that not every single
6 thing needs to be available. You've got the 990's. Then you
7 have the audited financial statements which Illinois statute
8 requires be open to public inspection. Oregon does as well.
9 I've got a printout that I received from the Oregon Department
10 of Justice with documents that 3ABN has been sending its
11 financial, audited financial statements to the Department of
12 Justice there in Oregon from '96 onward, 1996 onward and
13 they're required to be open to public inspection.

14 Now in discussions I've had with Attorney Hayes, I
15 have, you know, the source documents I had acknowledged that
16 the public doesn't necessarily need to have access to the
17 source document. But, you know, what you're going to have in
18 this broad briefing protective order, proposed protective order
19 is that even the conclusions that - okay like what is the true
20 donation that came in in a particular year? Since 2004 sales
21 revenue has been lumped in with donations. So what were really
22 the donations for 2004, 2005, 2006? If the IRS, if the
23 legislature had determined that the public has a right to know
24 how much donations have come in, then I don't see why that
25 figure, what the figure ought to have been can't be disclosed.

1 THE COURT: Well, they're not saying--

2 MR. PICKLE: But the underlying source documents I
3 don't have--

4 THE COURT: They're not, Mr. Pickle, they're not
5 saying that it can't be disclosed to you. They agree that it
6 should be disclosed to you. They just don't want you turning
7 around and making it public without a court order.

8 MR. PICKLE: If the public has a right to know how
9 much donations, the gross figure of donations that a ministry
10 brought in and their gross sales revenue minus cost of goods
11 sold, those are figures on the 990, then the public has a right
12 to know those figures is my position.

13 Now as far as this lot 6 goes, on the 1998 990 3ABN
14 reported the sale of that house to the IRS at a loss. And so
15 it wasn't just like Attorney Hayes is trying to say that it
16 wasn't just the purchasing of a remainder of interest in a life
17 estate. There was an actual transfer of an asset from 3ABN to
18 plaintiff Shelton that he did not pay full consideration for.
19 And the publicly available documents bear that out.

20 Attorney Hayes said that there's no IRS criminal
21 investigation going on. That's simply not true. There's been
22 an IRS criminal investigation going on for more than a year.
23 Attorney Nick Miller I guess is the - back in September, around
24 mid-September, he was a board member for ABN at one time and he
25 told me personally that the IRS had contacted him. Now when we

1 bring up Attorney Nick Miller's name, former board member, he
2 became concerned beginning of January 2005 with some of the
3 things that were going on at 3ABN, and so he's tried to bring,
4 put into place some reforms that would provide some
5 accountability for plaintiff Shelton. And he worked with a few
6 other board members to that end and plaintiff Shelton ended up
7 threatening him, figured out who was behind it, ended up
8 threatening him and said we're going, if you don't back off I'm
9 going to investigate your, the legal representation will be
10 investigated. And Attorney Miller said, well he's not that
11 kind of an attorney. He didn't back off. And what Attorney
12 Miller said is that his, that plaintiff Shelton's first wife,
13 which would be his wife before Linda that passed away, first
14 wife's brother altered Nick Miller's billing records without
15 his knowledge and then sent those billing records out to all
16 the board members and made him look kind of shady. And the end
17 result was that he was forced to resign from his position in
18 the board.

19 Well, that's not the only allegation we have of
20 document fraud. And so whatever documents 3ABN does produce,
21 that plaintiff Shelton does produce for us we need to be able
22 to adequately challenge those documents that they are genuine.
23 And for any, and that I guess would go for any information. So
24 if they tell us that, well they had these donors and they quit
25 for this reason or that reason, we really do need to verify

1 that that really was the case.

2 This protective order, proposed protective order, I
3 believe Ms. Hayes said that it was not a blanket protective
4 order. My understanding is that by definition a blanket
5 protective order is one in which the counsel for the parties
6 can determine themselves what's going to be confidential or
7 not. And this protective order does do that. It allows either
8 the parties, their counsel to declare anything they want, not
9 just financial information, but anything that they want to be
10 trade secret, they consider trade secret confidential, and then
11 it is immediately under seal and requires a court order to
12 reverse that designation. If it was - Judge Saylor said on
13 December 14th that any protective order would have to be
14 narrowly tailored. And I don't think we would have such a big
15 issue if this thing was really narrowly tailored, was confined
16 to specific documents, specific types of documents but it
17 allows them - even things that we received from third parties
18 prior to the filing of this suit that we've turned over to them
19 thousands and thousands and thousands of documents. Mr. Joy
20 feels that the conglomerate of documents between the two of us
21 is around 7,000, and I think that's a realistic figure. Even
22 those documents could be declared to be confidential by the
23 plaintiff and we'd have to turn them over to them upon the
24 completion of this case even though, you know, people freely
25 gave these things before this suit was even filed.

1 I have seen some cases where it's given me the
2 impression that the plaintiff should provide a privilege log,
3 you know, describing in detail the documents that they want to
4 have declared confidential or under seal. And I think that's
5 something, if that is the case, if something like that is
6 necessary or advisable that's something that we don't have in
7 this situation.

8 I would beg to differ with Ms. Hayes saying that we
9 never agreed. I asked her, as far as the producing the initial
10 disclosures, I asked her how much notice she needs and she said
11 seven days. She did not say in that letter that there needed
12 to be a confidentiality agreement. That didn't come up until I
13 gave her the notice of, the seven days notice.

14 Another issue, Judge Saylor explicitly said in our
15 December 14th status conference that there would be no stay of
16 discovery until this motion for a protective order was heard.
17 Attorney Hayes had asked for a stay of discovery and he
18 explicitly denied that request. And so I think it highly
19 inappropriate that plaintiff Shelton and his counsel asked the
20 District of Minnesota to stay their subpoena until this motion
21 that we're considering right now was heard, especially since
22 the plaintiff never requested a hearing for this. Defendant
23 Joy had to ask for the hearing in order for this hearing to be
24 scheduled, and it didn't take so long to get it scheduled. It
25 was immediately scheduled.

1 Let's see.

2 PAUSE

3 MR. PICKLE: But I do believe that I can be
4 reasonable about this and there are certain things that, yeah,
5 shouldn't be out there for public consumption and I'm willing
6 to consider that, but I do believe that we need to prepare an
7 adequate defense and that involves identifying donors that have
8 actually quit donating. And there are cases out there where we
9 could have one individual writing under multiple aliases and
10 complaining to 3ABN about what's going on and saying they quit
11 giving. But we actually need to identify the person. Is that
12 person, you know, each email is that coming from a distinct
13 individual? We need to verify the identity.

14 I think maybe that covers the gist of my concern.

15 THE COURT: Great. All right, thank you everybody.
16 Under advisement.

17 MS. HAYES: Thank you, Your Honor.

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CERTIFICATION

I, Maryann V. Young, court approved transcriber, certify that the foregoing is a correct transcript from the official digital sound recording of the proceedings in the above-entitled matter.

/s/ Maryann V. Young

July 14, 2008

MARYANN V. YOUNG
Certified Court Transcriber
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