UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF ILLINOIS

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.: 4:08-mc-16-JPG

DEFENDANT ROBERT PICKLE'S MOTION TO COMPEL ALAN LOVEJOY AND GRAY HUNTER STENN LLP

Defendants Gailon Arthur Joy and Robert Pickle seek documents relevant to the underlying suit from Alan Lovejoy (hereafter "Lovejoy") and Gray Hunter Stenn LLP (hereafter "GHS") via a subpoena served on March 17, 2008.

To avoid a motion to compel, Lovejoy/GHS was going to belatedly comply, but they have now joined the Plaintiffs' untimely motion to quash. Defendant Pickle therefore brings this motion to compel before the Court, the accompanying memorandum for which also serves as his response to this Court's order to show cause why the subpoena should not be quashed.

1. The Plaintiffs' motion to quash filed on June 16, 2008, was untimely by 60 days regarding objections falling under Fed. R. Civ. P. 45(c)(3)(A).

2. GHS/Lovejoy's letter of April 3, 2008, was untimely, and the objections it contained are therefore waived.

3. The Defendants made it clear that they would copy the requested documents on their own equipment, thus minimizing GHS's expenses. Lovejoy asserted that the auditor's work

papers are in binders, and his counsel asserted that the requested documents are in ten boxes. There thus is no undue burden.

4. Neither the Plaintiffs nor GHS/Lovejoy have asserted that the requested documents contain trade secrets.

5. The Plaintiffs on December 18, 2007, already sought by motion a protective order from the District of Massachusetts prohibiting the discovery of trade secret information, which prohibition was declined.

6. The same motion allowed for the discovery of confidential commercial information if a confidentiality order was in place, which order was granted. GHS/Lovejoy had already invoked that protection.

7. Federal and state statutes mandate that the tax returns of Three Angels Broadcasting Network, Inc. (hereafter "3ABN") be open to public inspection since it is a 501(c)(3) corporation. They are therefore not confidential.

8. The Plaintiffs have put at issue in the underlying controversy the question of whether 3ABN and Danny Lee Shelton (hereafter "Shelton") have violated the Internal Revenue Code. This requires access to Shelton's tax returns and the underlying data for the figures on those returns. Shelton has claimed to have falsified an entry on his 2003 federal return, and has claimed that he would do the same on his 2004 and 2005 returns.

9. The Plaintiffs have put at issue their finances in a number of other ways, including by maintaining that 3ABN has been financially conscientious for more than two decades, and by raising the question of whether Shelton's 2006 financial affidavit is accurate. The latter requires discovery pertaining to Shelton's royalties, publishing company assets, and mortgage payments.

10. Yet another way Shelton's finances are put at issue is the question of when he started preparing for divorce, as evidenced by his change of treatment of D & L Publishing

profits on his 2002 federal tax return.

11. 3ABN's financial statements are audited by GHS/Lovejoy, and the Plaintiffs have declared that they may use these financial statements and auditor's reports to support their claims and defenses. But the veracity of the figures in those statements is in doubt, and requires analysis of the underlying work papers by our audit and forensic accounting experts.

12. The contention that discovery must commence with a date of 2001 instead of 1998 is a fraud upon the court that has been successfully rebutted in the District of Minnesota.

13. Pursuant to the Federal Rules of Evidence, the Defendants intend to document the flow of funds, purchased services, and assets from 3ABN to Shelton from at least 1998 onward, and have provided a more than ample basis for doing so.

14. Allegations against the Plaintiffs of document fraud and document destruction necessitate adequate discovery to verify whatever documents the Plaintiffs belatedly produce.

15. The Defendants do not presently believe that the Plaintiffs are in possession of the auditor's work papers, which arguably constitute the bulk of the requested documents.

16. GHS/Lovejoy's untimely letter of April 3, 2008, did not assert accountant privilege, and Rule 45(c)(2)(B) objections must all be raised at once.

17. Illinois statutory accountant privilege does not protect tax returns or the work papers used in their preparation.

18. The Plaintiffs' chosen venue of Massachusetts has no accountant-client privilege.

19. Federal privilege law, not state privilege law, applies in the underlying case since it is based on the federal question of trademark disparagement. There is no accountant-client privilege in federal common law, and there is no federal statutory accountant-client privilege for a case of this sort.

WHEREFORE, Defendant Pickle prays the Court to compel GHS/Lovejoy to fully

comply with the Defendants' subpoena, to award the Defendants' reasonable expenses of filing this motion pursuant to Fed. R. Civ. P. 37(a)(5)(A), to award the Defendants' reasonable expenses of answering the untimely and grossly out of order objections raised by the Plaintiffs in their motion to quash, including reasonable travel expenses if a hearing is still deemed necessary, and to award whatever further relief to the Defendants that the Court deems just.

Respectfully submitted,

Dated: July 3, 2008

Bob Pickle, pro se

Robert Pickle, *pro se*
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FED. R. CIV. P. 37(a)(1) CERTIFICATION

I certify that the Defendants have extensively conferred with GHS/Lovejoy's counsel in good faith in an effort to obtain discovery without court action.

Dated: July 3, 2008

Bob Pickle

Bob Pickle

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on July 3, 2008, he served this **MOTION TO COMPEL** with accompanying **MEMORANDUM, AFFIDAVIT,** and **EXHIBITS,** which memorandum, affidavit, and exhibits also serve as his **RESPONSE TO ORDER TO SHOW CAUSE,** upon the following counsel of record, via U.S. Mail, postage pre-paid, and addressed as follows:

Jennifer E. White
131 S. Dearborn
30th Floor
Chicago, IL 60603
Attorney for the Plaintiffs

M. Gregory Simpson
Siegel, Brill, et al
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Attorney for the Plaintiffs

Deanna L. Litzenburg
Mathis, Marifian, Richter & Grandy, Ltd.
23 Public Square, Suite 300
P.O. Box 307
Belleville, IL 62220
Attorney for Gray, Hunter, Stenn, LLP

and upon Gailon Arthur Joy via email.

Dated: July 3, 2008

Bob Pickle

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF ILLINOIS

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.: 4:08-mc-16-JPG

DEFENDANT ROBERT PICKLE'S MEMORANDUM IN SUPPORT OF HIS MOTION TO COMPEL AND HIS RESPONSE TO THE COURT'S ORDER TO SHOW CAUSE

I. THE COURT SHOULD ENFORCE RATHER THAN QUASH THE SUBPOENA BECAUSE OBJECTIONS BASED ON UNDUE BURDEN WERE UNTIMELY

A. Plaintiffs' Motion to Quash Was Untimely

While Plaintiffs' counsel repeatedly cited Fed. R. Civ. P. 45(c)(3)(A) as a basis for their motion, they omitted the words, "on timely motion" (Doc. 3 pp. 5, 7–8).

Courts have generally read "timely" to mean within the time set in the subpoena for compliance. *See United States ex. rel. Pogue v. Diabetes Treatment Centers of Am., Inc.*, 238 F.Supp.2d 270, 278 (D.D.C. 2002); *Innomed Labs, LLC v. Alza Corp.*, 211 F.R.D. 237, 240 (S.D.N.Y. 2002); *Merch. Antitrust Litig.*, 186 F.R.D. 344, 350 (W.D. Va. 1999).

The date for compliance on the subpoena served on behalf of both Defendants was April 17, 2008, and Alan Lovejoy (hereafter "Lovejoy")/Gray Hunter Stenn LLP (hereafter "GHS") did not show up at the date, time, and place specified. (Doc. 3-2 p. 5, Affidavit of Robert Pickle

(hereafter "Pickle Aff.") ¶ 1, Ex. A). Plaintiffs' Motion to Quash was not filed until June 16, 2008, a full sixty days after April 17. The Court should therefore not quash the subpoena on the basis of Rule 45(c)(3)(A) because the motion was untimely.

B. GHS/Lovejoy's Objections Were Waived Because They Were Untimely

The objection of undue burden (and the derivative objections of overbreadth and irrelevance) had to be timely made by GHS/Lovejoy, not the Plaintiffs. *See* 9 James Wm. Moore, et al., *Moore's Federal Practice* § 45.50[3]; 9A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2459 (2d. 1994); *Linder v. Department of Defense*, 133 F.3d 17, 24 (D.C. Cir. 1998). *See also Brown v. Braddick*, 595 F.2d 961, 967 (5th Cir. 1979) (citing *Vogue Instrument Corp. v. LEM Instruments Corp.*, 41 F.R.D. 346, 348 (S.D.N.Y. 1967); *Shepherd v. Castle*, 20 F.R.D. 184, 188 (W.D. Mo. 1957)); *Thomas v. Marina Assocs.*, 202 F.R.D. 433, 434 (D. Pa. 2001) (citing *Windsor v. Martindale*, 175 F.R.D. 665, 668 (D. Colo. 1997).

Mr. Simpson testifies under oath that "Gray Hunter advises that they timely objected to the subpoena." (Doc. 3-2 p. 2). Yet GHS's objections, not served until April 3, 2008, should have been served by March 31 in order to be timely. (Doc. 9-4; Pickle Aff. ¶¶ 2–3, Ex. B–C). *See* Fed. R. Civ. P. 45(c)(2)(B). When Defendant Pickle asked Ms. Litzenburg who lied when GHS's objections were thus called timely, she or Plaintiffs' counsel, she informed him that she had not told Plaintiffs' counsel that GHS's objections were timely. (Pickle Aff. ¶ 4).

Various courts have held that failure to serve written objections within the fourteen-day limit prescribed by Rule 45(c)(2)(B) generally results in waiver. *See Nat'l Paint & Coatings Ass'n v. City of Chicago*, 147 F.R.D. 184, 185 (N.D. Ill. 1993) (court implied that a non-party may waive its right to object where it does not serve written objections within the fourteen-day period specified in Rule 45(c)(2)(B)); *Brogren v. Pohlad*, 1994 WL 654917, at *1 (N.D. Ill. Nov. 14, 1994); *United States v. TRW, Inc.*, 211 F.R.D. 388, 392 (C.D. Cal. 2002) (the court noted that

"failure to serve objections within time provided in Rule 45(c)(2)(B) waives all grounds for objection, including privilege"); *McCoy v. Southwest Airlines Co.*, 211 F.R.D. 381, 385 (C.D. Cal. 2002) (a non-party's failure to timely object to a Rule 45 subpoena *duces tecum* generally requires the court to find that all objections are waived).

Neither the Plaintiffs nor GHS have cited any constitutional concerns that would mandate that the Court overlook the untimeliness of GHS's objections.

II. THE COURT SHOULD ENFORCE RATHER THAN QUASH THE SUBPOENA BECAUSE THERE IS NO UNDUE BURDEN

In their joint cover letter for the instant subpoena, the Defendants told GHS that they would make copies of all desired materials on their own equipment at their own expense. (Doc. 3-4 p. 21). On April 3, 2008, GHS untimely countered that it was still overly burdensome to assemble all the requested documents. (Doc. 9-4 p. 2). The Defendants replied that Lovejoy had already asserted that the auditor's work papers (arguably composing the vast majority of the requested documents since they could amount to over 2,400 sheets per year) were already in binders. (Pickle Aff. ¶¶ 5–6, Ex. C at p. 1). GHS's counsel later told the Defendants that the requested documents were in ten banker's boxes. (Pickle Aff. ¶ 7). By no stretch of the imagination is it overly burdensome to a third party to transfer ten boxes to a conference room for inspection and copying.

Fed. R. Civ. P. 26(b)(2)(C)(iii) allows the weighing of the burdens of discovery against such factors as the amount in controversy. Inasmuch as 3ABN reported a loss of nearly $3 million for the year 2006 (Pickle Aff. ¶ 42, Ex. CCC at ln. 18), the Defendants are more than justified in inspecting documents within ten boxes, and copying at their own expense those documents they need for their defense.

Based on 3ABN's audited financial statements, records held by the Secretary of State and Attorney General of Illinois, news releases, 3ABN's own websites, and an affidavit by Shelton,

the Plaintiffs have a number of assumed names and related entities. (Pickle Aff. Ex. E–I at nt. 14, J–P, Q at ¶¶ 3, 5). These names or entities may fall within the definition of Parties found in the District of Massachusetts's Uniform Definitions in Discovery Requests, Local Rule 26.5(c)(5):

> (5) *Parties.* The terms "plaintiff" and "defendant" as well as a party's full or abbreviated name or a pronoun referring to a party mean the party and, where applicable, its officers, directors, employees, partners, corporate parent, subsidiaries, or affiliates.

Further evidence of the appropriateness of including these related entities in the subpoena is the degree of control 3ABN exercises over the memberships of the boards of some of these entities (Pickle Aff. Ex. R), and royalties presumably attributable to work by Shelton that have instead been paid to DLS Publishing (Pickle Aff. Ex. S at p. 2).

While GHS/Lovejoy's counsel objected that the Defendants' subpoena required GHS/Lovejoy to speculate as to what names or entities to include in the subpoena, the Defendants correctly replied that the wording of the subpoena explicitly avoided requiring any such speculation. (Doc. 9-4 p. 3; Pickle Aff. Ex. C).

III. THE COURT SHOULD ENFORCE RATHER THAN QUASH THE SUBPOENA BECAUSE NO TRADE SECRET CLAIM HAS BEEN ASSERTED, THE COURT WHERE THE UNDERLYING CASE IS PENDING HAS DECLINED TO PROHIBIT DISCOVERY OF TRADE SECRETS, AND THE PROTECTION SOUGHT BY THE PLAINTIFFS FOR CONFIDENTIAL COMMERCIAL INFORMATION HAS ALREADY BEEN GRANTED

While the protection of "privileged or other protected matter, if no exception or waiver applies," under Fed. R. Civ. P. 45(c)(3)(A) requires a timely motion, the protection of Rule 45(c)(3)(B) for "trade secret or other confidential ... commercial information" is not so limited. Under that rule the issuing court is permitted rather than required to quash or modify a subpoena.

Neither the Plaintiffs nor GHS/Lovejoy have asserted a trade secret claim in their filings. Even if they had, the Plaintiffs already sought for a prohibition of discovery of alleged trade secrets by their motion of December 18, 2007, in the District of Massachusetts, and that court

declined to prohibit such discovery. (Pickle Aff. Ex. T at p. 2; Doc. 3-4 at pp. 12–19).

Regarding the discovery of allegedly confidential commercial information, the Plaintiffs knew that the Defendants were seeking documents from GHS/Lovejoy at the time of their December 18, 2007, motion for a protective order. (Pickle Aff. Ex. U at ¶ 7 and Ex. U's Ex. D). That motion allowed for such discovery but sought protection of it by way of a confidentiality order. (Pickle Aff. Ex. T at p. 2). The request for such protection was granted. (Doc. 3-4 at pp. 12–19). GHS invoked the protection of this confidentiality order. (Doc. 3 p. 5).

The propriety of the Plaintiffs' reversal of their position six months later and now objecting to the discovery of confidential commercial information at this late date is suspect.

IV. THE COURT SHOULD ENFORCE RATHER THAN QUASH THE SUBPOENA BECAUSE 3ABN'S TAX RECORDS ARE NOT CONFIDENTIAL

In calling 3ABN's tax returns "private and confidential" (Doc. 3 p. 9), the Plaintiffs and their counsel perpetrate a most glaring fraud upon the court, since 3ABN is a 501(c)(3) corporation, and these tax returns must be *open to public inspection! See* 26 USC § 6104(d)(1). The State of Illinois also requires these returns and 3ABN's audited financial statements to be open to public inspection. *See* 225 ILCS 460 § 2(f), § 4(a). The Defendants raised this issue in court filings long ago. (Pickle Aff. ¶ 18, Ex. V at pp. 2, 5).

By declaring 3ABN's tax returns to be private and personal instead of open to public inspection, the Plaintiffs make it clear in their Memorandum that they have no intention of abiding by the rule of law, even though they have been the subject of a criminal investigation by the Internal Revenue Service. (Pickle Aff. ¶ 19, Ex. W–X).

V. THE COURT SHOULD ENFORCE RATHER THAN QUASH THE SUBPOENA BECAUSE THESE DOCUMENTS DIRECTLY ADDRESS THAT WHICH THE PLAINTIFFS HAVE PUT AT ISSUE

GHS/Lovejoy never made an objection based on relevance. (Doc. 9-4).

A. Compliance with the Internal Revenue Code Is Put at Issue

The Plaintiffs have put a broad array of allegations at issue in their complaint, many of which the subpoenaed documents are relevant to. (Pickle Aff. ¶¶ 20–21). As a major example, the Plaintiffs raise the general question of whether Shelton has personally enriched himself in violation of the Internal Revenue Code, and the Defendants' answer echoes that sentiment. (Doc. 3-2 p. 21 at ¶ 46g; 3-3 pp. 9–10). This question is then used as a foundation for the allegation of defamation *per se*, transferring the burden of proof to the Defendants. (Doc. 3-2 p. 27 at ¶ 75).

The question of whether Shelton has violated the Internal Revenue Code requires access to Shelton's tax returns and to the underlying data upon which the figures on those returns were based. This is all the more pertinent given Shelton's own claims that he falsified an entry on his 2003 tax return pertaining to a donation of property, and the Defendants need access to Shelton's 2004 and 2005 tax returns to verify that he falsified entries on those returns as he claimed that he would.(Pickle Aff. ¶¶ 22–24, Ex. Y–GG). Documenting such blatant violations goes to the question of Shelton's veracity when Shelton maintains that he has not done anything legally wrong, and that 3ABN has been financially responsible and conscientious for more than two decades. (Pickle Aff. Ex. HH; Doc. 3-2 pp. 14–26 at ¶¶ 22, 31, 34, 66).

B. The Plaintiffs' Finances Are Put at Issue

Besides putting at issue whether 3ABN has been financially conscientious for more than two decades, the Plaintiffs put at issue whether Shelton perjured himself in his divorce proceedings (3-2 p. 23 at ¶ 50i). The latter at least concerns Shelton's failure to properly report royalty income, DLS Publishing as an asset, and his mortgage from the Fjarli Foundation on his financial affidavit of July 2006. (Pickle Aff. ¶¶ 26–27, Ex. II–NN). This allegation is also the basis of a claim of defamation *per se* (Doc. 3-2 p. 27 at ¶ 75), and requires discovery of Shelton's publishing companies' assets, his book deal income, and his mortgage payments in order to determine whether the mortgage and all income and assets were properly reported.

Another area in which Shelton's personal finances are relevant is the question the Plaintiffs put at issue regarding whether Shelton began preparing for divorce in 2003. (Doc. 3-2 p. 23 at ¶ 50e). Shelton reported the income of D & L Publishing (hereafter "D&L") in 2001 as if it were a partnership with his then wife Linda Shelton, but in 2002 and 2003 as if it were a sole proprietorship. (Pickle Aff. ¶ 28, Ex. EE–GG). This suggests that by the time he filed his 2002 return in 2003 he was already planning for divorce, and further discovery is necessary to determine the extent to which Shelton altered his finances in 2003 or earlier.

C. 3ABN's Financial Statements and Auditor's Reports Put at Issue

The parties made their initial disclosures on August 3, 2007. The Defendants turned over thousands of Rule 26(a)(1) documents, but the Plaintiffs refused to turn over a single document until compelled by the court after a motion by Defendant Pickle filed on December 14, 2007. In the initial Rule 26(a)(1) documents served by the Plaintiffs on March 28, 2008, 3ABN's audited financial statements with accompanying auditor's reports are found for five years, indicating that the Plaintiffs intend to use these documents in the underlying litigation. (Pickle Aff. ¶ 29). The Defendants therefore need access to the work papers upon which those reports are based to verify the veracity of the financial statements and the auditor's reports.

GHS's auditing services are often cited by the Plaintiffs as evidence that the allegations against them must be false. (Pickle Aff. Ex. OO). Lovejoy as 3ABN's auditor was a key witness for 3ABN in its property tax case hearing of September 2002. (Pickle Aff. ¶¶ 31–33). Certain aspects of Lovejoy's testimony raise the question of whether Lovejoy assisted Shelton in concealing his profits, necessitating greater discovery to verify the veracity of the auditor's reports. (Pickle Aff. ¶ 34). 3ABN's attorney in the tax case hearing asserted that he imagined that the auditor's work papers could "come to the court," suggesting that there should be no objection to the discovery of those work papers. (Pickle Aff. Ex. QQ at p. 482).

Judge Rowe's decision of January 2004 in the property tax case determined that 3ABN operates as a Shelton family business with a view to profit, and that it had no records of items given away. (Pickle Aff. ¶ 31, Ex. PP). 3ABN's accounting methods then changed in dramatic ways, which greatly complicates discovery. From 2004 onward, 3ABN's sales of Shelton's books were now treated as items given away in exchange for donations instead of as sales of inventory offset by cost of goods sold. (Pickle Aff. Ex F (revenue of "Other sales" on p. 4, expense of "Cost of goods sold or given away - Other" on p. 12); Ex. G, (no revenue attributable to "Other sales" on p. 4, expense of "Cost of goods given away - Other" on p. 12)).

The Plaintiffs assert that the Defendants caused a decline in donations, a critical element of their case, and yet the figures on their financial statements for donations, which include sales revenue, are unreliable. Additional discovery must ascertain what the figures really should be.

VI. THE COURT SHOULD ENFORCE RATHER THAN QUASH THE SUBPOENA BECAUSE 1998 IS AN APPROPRIATE COMMENCMENT DATE

While the "burden of proving that a subpoena is oppressive is on the party moving to quash" (*see Northrop Corp. v. McDonnell Douglas Corp.*, 751 F.2d 395, 399 n. 5 (D.C.Cir. 1984)), the Plaintiffs instead claim that the subpoena is overly broad on its face because it seeks records going back to 1998 rather than to 2001, even though their complaint contains factual allegations going back more than two decades and nowhere limits issues to just 2001 onwards. (Doc. 3 p. 8; 3-2 pp. 9-29). But such a contention that documents from 1998 are irrelevant is a glaring and brazen fraud upon the court, since this assertion has already been successfully rebutted in the District of Minnesota. (Pickle Aff. Ex. UU).

Rather than engaging in a fishing expedition, the Defendants intend to document pursuant to the Federal Rules of Evidence a pattern of instances where 3ABN's funds, purchased services, and assets flowed from 3ABN to Shelton or his relatives since at least 1998. They have more than an ample basis for doing so pursuant to Fed. R. Civ. P. 26(b)(1). Besides what has already

been mentioned, there is a lucrative real estate deal in 1998, the cheap sale of a donated grand piano in 1998, a $10,000 check allegedly sent to Tommy Shelton in 1999, a van allegedly sold to a Shelton relative in 1999 or 2000, 3ABN's purchase of nearly $3.5 million of Shelton's books from 2001 through 2006 from D&L, DLS Publishing, and Remnant Publications, Shelton's personal use of 3ABN's corporate jet in 2004 and 2007, and 3ABN's payment of Shelton's personal legal expenses in 2004 and the underlying suit. (Pickle Aff. ¶¶ 37–46, Ex. VV–III).

VII. THE COURT SHOULD ENFORCE RATHER THAN QUASH THE SUBPOENA BECAUSE THE DISCOVERY IS NOT UNREASONABLY CUMULATIVE OR DUPLICATIVE

Former 3ABN Board member and general counsel Nicholas Miller alleges the fraudulent alteration of financial records by the Plaintiffs, necessitating the challenging of whatever financial documents the Plaintiffs belatedly produce. (Pickle Aff. Ex. JJJ).

Upon information and belief, 3ABN has destroyed financial documents prior to the year 2000, requiring that these documents be obtained from other sources (Pickle Aff. ¶ 48).

While documents in GHS's possession will provide clues as to whether the Plaintiffs are omitting or altering key documents in their belated and unwilling production, the Defendants do not believe that the auditor's work papers, arguably the vast majority of materials in GHS's possession, are also found in the Plaintiffs' custody. (Pickle Aff. ¶¶ 49, 6). Defendant Pickle did not ask the Plaintiffs for these work papers in his Requests to Produce. (*Id.*).

VII. THE COURT SHOULD ENFORCE RATHER THAN QUASH THE SUBPOENA BECAUSE ILLINOIS ACCOUNTANT PRIVILEGE IS INAPPLICABLE

The Illinois accountant privilege neither considers confidential nor protects a client's tax returns and the accountant's work papers used to prepare those returns. *See In re October 1985 Grand Jury No. 746*, 154 Ill. App. 3d 288, 107 Ill. Dec. 342, 507 N.E.2d 6 (1988); *In re October 1985 Grand Jury No. 746*, 124 Ill. 2d 466, 125 Ill. Dec. 295, 530 N.E.2d 453 (1988).

The underlying case is, at the choice of the Plaintiffs, venued in Massachusetts instead of

Illinois, and Massachusetts has no accountant-client privilege. *See* 112 MGL § 87E. Defendant Joy is a resident of Massachusetts, the Plaintiffs' claims against him arise from alleged actions that took place in Massachusetts, and the case is to be tried in Massachusetts. Therefore, the privilege law (or lack thereof) of the Plaintiffs' chosen venue must take precedence.

However, federal privilege law, not state privilege law, applies in the underlying suit, for the basis for federal jurisdiction is the federal question of trademark infringement and dilution, and the claim of trademark dilution is based on the claim of trademark disparagement. (Pickle Aff. ¶ 50, Ex. KKK, Doc. 3-2 p. 26 at ¶ 68). Federal privilege law applies to federal questions, including discovery proceedings, and the only accountant-client privilege in federal privilege law does not apply to the underlying case. *See* Fed. R. Ev. 501, 1101(c); *FDIC v. Mercantile National Bank of Chicago*, 84 F.R.D. 345, 349 (N.D.Ill.1979); 26 U.S.C. § 7525(a)(2).

The Defendants in their joint cover letter for the instant subpoena alluded to the statutory difficulties of asserting an accountant privilege. (Doc. 3-4 p. 22). Accordingly, GHS's counsel did not assert this privilege in her untimely letter of April 3, 2008, though she now falsely claims that she did. (Doc. 9-4; Doc. 9 ¶ 13). GHS cannot raise this objection now since all Rule 45(c)(2)(B) objections must be raised at the same time. *See In re DG Acquisition Corp.*, 151 F.3d 75, 81 (2d Cir. 1998).

CONCLUSION

The Court should enforce rather than quash the instant subpoena for the reasons given above.

Respectfully submitted,

Dated: July 3, 2008

Bob Pickle, pro se

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF ILLINOIS

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AFFIDAVIT OF ROBERT PICKLE

NOW COMES Robert Pickle of Halstad Township, Norman County, Minnesota, who deposes and testifies to the following under pain and penalty of perjury:

1. On behalf of both Defendants, Alan Lovejoy (hereafter "Lovejoy") of Gray Hunter Stenn LLP (hereafter "GHS") was served the instant subpoena *duces tecum* bearing a date of compliance of April 17, 2008. GHS/Lovejoy did not show up at the date, time, and place shown on the subpoena. An affidavit to this effect is attached hereto as **Exhibit A.**

2. The subpoena was served on March 17, 2008, and the proof of service is attached hereto as **Exhibit B.** Objections should therefore have been served by March 31, 2008.

3. GHS/Lovejoy's counsel (Deanna Litzenburg (hereafter "Litzenburg")) served untimely objections on April 3, 2008, objections that did not include an assertion of accountant-client privilege. (Doc. 9-4).

4. After the Plaintiffs filed their motion to quash with the assertion that GHS had

advised that their objections were timely, I called up Litzenburg and asked her whether she or Plaintiffs' counsel had lied about her objections being timely. She replied that she had not told Plaintiffs' counsel that her objections had been timely.

5. My reply to Litzenburg's objections of April 3, 2008, is attached hereto as **Exhibit C.** The reference to Lovejoy's statement that the documents were already in binders refers to his claim to me by telephone that the auditor's work papers are in binders that amount to perhaps a foot thick of paper per year.

6. Since there would be more than 200 sheets of paper to an inch, a year's worth of auditor's work papers could easily amount to well over 2,400 sheets per year.

7. Litzenburg informed me by telephone that the ten years of subpoenaed records were in ten banker's boxes.

8. Attached hereto as **Exhibits D–I** are relevant pages of 3ABN's audited financial statements. These help document 3ABN's purchases of Shelton's books from D & L Publishing (D[anny] & L[inda] Publishing, hereafter "D & L") and DLS Publishing (D[anny]L[ee]S[helton] Publishing, hereafter "DLS"), show the change of accounting for sales of these books in 2004, and list a number of organizations related to 3ABN in Canada, Brazil, Peru, the Philippines, and Russia.

9. Attached hereto as **Exhibits J–K** are web pages from the Illinois Secretary of State's website documenting the use of the names Broadcast Communications Service, Inc., Three Angels Broadcasting, Inc., and Three Angels Enterprises, LLC.

10. Attached hereto as **Exhibit L** is a web page from the Illinois Attorney General's website documenting the possible use of the name Three Angles Broadcasting Network, Inc.

11. Attached hereto as **Exhibit M** is a news release from Southern Gospel News announcing 3ABN's formation of Crossbridge Music.

12. Attached hereto as **Exhibits N–P** are pages from websites controlled by 3ABN documenting 3ABN's use of the names 3ABN Radio, 3ABN Music, and 3ABN Books.

13. Attached hereto as **Exhibit Q** is an affidavit filed by Shelton in the District of Minnesota, documenting his connection to D & L and DLS.

14. Attached under seal hereto as **Exhibit R** are minutes of a 2004 3ABN Executive Committee meeting, declared confidential by the Plaintiffs.

15. Attached under seal hereto as **Exhibit S** is a contract signed in 2005, declared confidential by the Plaintiffs.

16. Attached hereto as **Exhibit T** is the Plaintiffs' December 18, 2007, motion for a protective order, which sought a prohibition of discovery of trade secret information. (p. 2 at ¶ 1). Discovery of confidential commercial information was deemed acceptable in this motion if protected by a confidentiality order. (p. 2 at ¶ 2).

17. Attached hereto as **Exhibit U** are relevant pages of an affidavit filed by Plaintiffs' counsel with their December 18, 2007, motion for a protective order, with its Exhibit D, which documents that the Plaintiffs knew that the Defendants were seeking documents from GHS/Lovejoy at the time they filed their motion which allowed for the discovery of confidential commercial information if it was protected by a confidentiality order.

18. Relevant pages of my opposition to the Plaintiffs' December 18, 2007, motion for a protective order are attached hereto as **Exhibit V,** documenting that the Plaintiffs know that 3ABN's tax returns (known as Form 990's) and financial statements are required to be open to public inspection, since 3ABN is a 501(c)(3) corporation. (pp. 2, 5). This opposition was filed on January 2, 2008.

19. A number of the individuals that the Defendants have interviewed have reported that the IRS has been conducting a criminal investigation of the Plaintiffs. In September 2007,

former 3ABN Board member and general counsel Nicholas Miller told me that the IRS had contacted him. Attached hereto as **Exhibit W** is a letter of concern regarding personally observed accounting practices at 3ABN, written by a CPA and CFE to the 3ABN Board, and referencing this investigation. The redactions were in the copy received. An internet post by Greg Thompson under the user name "fallible humanbeing" also references this investigation, and is attached hereto as **Exhibit X.** Greg is the son of 3ABN Board chairman Walter Thompson.

20. The complaint contains "factual allegations" extending back "over two decades" to 3ABN's "inception." (Doc. 3-2 pp. 9–28 at ¶¶ 9, 12, 31, 34). The Plaintiffs by their complaint have put at issue a broad variety of allegations, including the following, *inter alia*:

- 3ABN's "reputation, goodwill and character.," and whether 3ABN is "a dedicated, principled ... ministry." (*Id.* at ¶¶ 14, 31, 34, 52, 60, 63, 66–68, 76–78).
- Whether 3ABN is funded by any specific church or organization. (*Id.* at ¶ 10).
- Whether 3ABN is "operationally sound, and financially conscientious," and whether the Plaintiffs have "committed financial" or "administrative and operational improprieties." (*Id.* at ¶¶ 46, 48, 14, 66).
- The donations received by 3ABN, whether those donations have declined, and for what reasons. (*Id.* at ¶¶ 14, 78, 81, 83).
- The purported sale of "3ABN-produced inspirational books and music recordings" generated by "the 3ABN website" even though no sales of such materials have been reported on 3ABN's financial statements since 2003. (*Id.* at ¶ 23, Ex. E–I where "Other sales" or "Video and other sales" is missing on p. 4 from 2004 through 2006).
- Whether 3ABN's directors or officers engaged in private inurement, and whether Plaintiff Shelton or his relatives have personally benefited from items purchased with 3ABN funds. (*Id.* at ¶¶ 46b–46d, 46g).

- "Allegations of criminal conduct" against "both Plaintiffs." (*Id.* at ¶¶ 27, 75).
- The "growing number of moral, ethical, and financial allegations" that have beset the Plaintiffs "for the last several years." (*Id.* at ¶ 46a).
- Whether Plaintiff Shelton funneled money or assets to inappropriate beneficiaries through third parties. (*Id.* at ¶ 46f).
- Plaintiff Shelton's book deals and royalties. (*Id.* at ¶¶ 46h–46i).
- When Plaintiff Shelton began preparing to divorce Linda Shelton. (*Id.* at ¶ 50e).
- Plaintiff Shelton's personal finances as compared to his financial affidavit(s) filed in connection with his divorce proceedings. (*Id.* at ¶¶ 46i, 48d, 50, 50a, 50e, 50i).
- The usage of 3ABN's corporate jets. (*Id.* at ¶ 46j).
- The terms of purchase for a radio station 3ABN bought, the fair market value of that station, and whether the 3ABN Board approved that purchase. (*Id.* at ¶ 46k).
- Whether preference has been given to Plaintiff Shelton's relatives in matters of hiring and firing. (*Id.* at ¶ 48a).

21. Since ¶¶ 46, 48, and 50 of the complaint incorporate the phrase *inter alia*, the complaint allows for the litigation in this case of anything ever alleged by the Defendants regarding administrative, operational, or financial improprieties by the Plaintiffs. To support their claims and defenses, the Plaintiffs have declared that they may use more than 150 different investigative reports, letters, and documents authored and/or published by the Defendants.

22. In April 2005, Shelton tried to convince his ex-wife to accept drastically overvalued cash donation receipts of $20,000 per horse for donations of two horses for the tax year 2004, rather than obtaining the required appraisals and filing the required IRS Form 8283. He stated that there was no guarantee what the horses would appraise for, that there was nothing wrong with doing this, that he had also done this for the 2003 tax year to the tune of a $20,000

deduction, and that he planned to do it again for the 2005 tax year. His correspondence to this effect is attached hereto as **Exhibits Y–AA.**

23. Shelton valued his horses prior to and after this correspondence, and his own valuations indicate that his horses were worth between but $500 and $5,000. Relevant pages of the documents containing these valuations are attached hereto as **Exhibits BB–DD.**

24. Attached hereto under seal as **Exhibits EE–GG** are relevant pages of Shelton's 2001 through 2003 tax returns as faxed by GHS at Linda Shelton's request. A comparison of the Schedule A's for these three years, as well as the Form 8283 for 2002 and p. 6 of Ex. DD, demonstrates that Shelton did indeed report an excess of about $20,000 in cash donations in 2003, affirming his claim in his April 2005 email that he had treated a donation of a horse or horses as a donation of $20,000 in cash on that 2003 return.

25. Attached hereto as **Exhibit HH** is an email by Shelton.

26. Attached hereto as **Exhibits II–JJ** are investigative reports that raise questions as to Shelton's missing royalties and assets on his 2006 financial affidavit (Ex. DD), and the incorrect reporting of his mortgage from the Fjarli Foundation. The former report was used by the Plaintiffs as an exhibit in one of their filings in the underlying case.

27. Attached hereto as **Exhibit KK** is a page from Shelton's $200,000 mortgage from the Fjarli Foundation, which he incorrectly reported on his affidavit as being from Merlin Fjarli, a 3ABN Board member. Attached hereto as **Exhibits LL–NN** are relevant pages from the Fjarli Foundation's Forms 990-PF for the years 2004 though 2006. They document that Shelton's mortgage was between $0 and $150,000 at the time he claimed on his affidavit that it was $200,000. (ln. 7).

28. For the 2001 tax year, Shelton took the income for D & L on his Sch. C and split it evenly with Linda Shelton, like a partnership, and filed separate Sch. SE's for both of them.

For 2002 and 2003, he treated all the income from the Sch. C as being his. While Linda Shelton's name no longer appeared with Shelton's on the Sch. C and Form 8829 as it had in 2001, it still appeared on the Form 4562 as it had before. (Ex. EE–GG).

29. Initial disclosures were made on August 3, 2007. The Plaintiffs did not serve any Rule 26(a)(1) documents until compelled by the court after I filed a motion to compel on December 14, 2007. Five years of financial statements were found on CD #2 in the initial production which was served on March 28, 2008.

30. An email from 3ABN Board chairman Walt Thompson attached hereto as **Exhibit OO** uses the fact that GHS audits 3ABN as evidence that nothing is wrong with 3ABN's finances.

31. On January 28, 2004, Administrative Law Judge Barbara Rowe issued her decision denying 3ABN's property tax exemption except for two rooms and an accompanying amount of land. Relevant pages of this decision are attached hereto as **Exhibit PP.** Rowe stated:

> Applicant failed to produce any evidence that this is not a closely held business with profits inuring to the family. ...
>
> I must conclude from the evidence of record, that applicant is controlled by Danny and Linda Shelton, and all final decisions are made by them and not by a disinterested impartial board of directors.

(pp. 35–36).

32. 3ABN appealed this decision to the Circuit Court of Franklin County, and when it lost that appeal, it appealed it yet again. The Appellate Court of Illinois, Fifth District, filed its decision affirming the previous decisions on March 31, 2008.

33. At the original hearing of September 23–25, 2002, Lovejoy was a key witness, testifying that 3ABN operated appropriately as a non-profit organization. His testimony is attached hereto as **Exhibits QQ–RR.** For the hearing he prepared one-page analyses of 3ABN's

sales in 2000 and 2001, analyses based upon his auditor's work papers, which are attached hereto as **Exhibits SS–TT.** 3ABN's attorney stated in the hearing that he imagined that "the underlying work papers" could "come to the court." (Ex. QQ p. 482).

34. Lovejoy's one-page analyses had a column titled "Video and Other" sales. Since the only inventory-related expense in that column was purchases of "Literature," one could conclude that these sales must have been predominately book sales rather than video sales, and that Lovejoy, by mislabeling that category, may have assisted Shelton in concealing his personal book sales to 3ABN. Also, Lovejoy placed 100% of the "Newsletter" advertising expense under "Video and Other" sales even though sales from "Satellite Sales" were many times larger in value, perhaps artificially reducing the profits attributable to Shelton's books. (Ex. LL–MM).

35. After Judge Rowe's decision, 3ABN started purchasing Shelton's books from Remnant Publications, Inc. of Coldwater, Michigan (hereafter "Remnant"), rather than from Shelton's publishing companies, which lessened the appearance of self-dealing.

36. Relevant pages of my memorandum filed in the District of Minnesota on February 25, 2008, are attached hereto as **Exhibit UU.**

37. Shelton bought a house from 3ABN in 1998 for $6,139 and sold it one week later for $135,000. Courthouse records documenting this transaction that I filed in the Districts of Massachusetts and Minnesota on January 2, 2007, and February 25, 2008, respectively are attached hereto as **Exhibits VV–WW.** An investigative report published a year ago is attached hereto as **Exhibit XX.** An email to Plaintiffs' counsel on November 30, 2007, referencing this transaction is attached hereto as **Exhibit YY.** My opposition to the Plaintiffs' December 18, 2007, motion for a protective order explicitly referred to this transaction. (Ex. V pp. 5–6). Thus Plaintiffs and their counsel know that 1998 is an acceptable commencement date for discovery.

38. Attached hereto as **Exhibit ZZ** are relevant pages from 3ABN's 1998 Form 990

which further documents Shelton's 1998 real estate deal as well as his false denial that a section 4958 excess benefit transaction had taken place (attachment; ln. 89b). The same Form 990 also documents the sale of a donated grand piano for $2,000 (attachment), which upon information and belief is the piano bought by Tommy Shelton, Shelton's oldest brother, and used by him in his church at Dunn Loring, Virginia.

39. Credible sources have told the Defendants that a check for $10,000 was sent by 3ABN to Tommy Shelton in 1999, and that a van was sold to a Shelton family member by 3ABN at below fair market value in 1999 or 2000. The Plaintiffs put the latter transaction at issue in ¶ 46b of their complaint.

40. Table 1 lists the purchases attributable to Plaintiff Shelton's books or products for the years 2001 through 2006 as derived from 3ABN's financial statements. (Ex. D–I at nt. 14). None of these purchases were similarly disclosed on 3ABN's Form 990's. The two board members referred to for 2001 would be Shelton and his then-wife Linda Shelton. When such transactions began is presently unknown.

TABLE 1: 3ABN's Purchases of Shelton's Products
(Data from Note 14 of 3ABN's Financial Statements)

Year	Vendor	Reported Total
2001	Owned by Two Board Members	$75,000
2002	D & L	$130,612.50
2003	D & L	$73,112.50
2004	D & L	$35,000
2004	DLS	$44,724.38
2005	Unspecified	$82,712.43
2006	Unspecified	$2,982,793.71
Total Purchases		**$3,423,955.52**

41. Attached hereto as **Exhibit AAA** is an email from former 3ABN Board member

and general counsel Nicholas Miller, in which he says that he is certain that Shelton earned several hundred thousand dollars in royalties from *Ten Commandments Twice Removed* (hereafter "*TCTR*"), a book published for Shelton by Remnant.

42. Relevant pages of 3ABN and Remnant's publicly available 2005 and 2006 Form 990's are attached hereto as **Exhibits BBB–EEE.** Tables 2 and 3 give figures from these returns from which may be derived approximate figures for the royalties Plaintiff Shelton received for the 2006 *TCTR* campaign, the cost to 3ABN for the 4.8 million *TCTR* books it purchased, 3ABN's resulting loss for the year, and Remnant's resulting gain.

TABLE 2: 3ABN: Comparison Between 2005 and 2006
(Data from Form 990, Lns. 1, 12, Statement 2)

	2005	2006	Inc (Dec)
Cost of Goods	$605,744	$3,167,235	$2,561,491
Contributions	$14,060,275	$15,075,120	$1,014,845
Total Revenue	$14,956,597	$16,602,282	$1,645,685
Net Gain (Loss)	($482,493)	($2,996,016)	($2,513,523)

TABLE 3: Remnant: Comparison Between 2005 and 2006
(Data from Form 990, Lns. 35, 38, 43, 93)

	2005	2006	Inc (Dec)
Literature Sales	$1,228,662	$4,316,011	$3,087,349
Royalties Paid	$116,556	$508,767	$392,211
Printing	$445,558	$1,680,814	$1,235,256
Shipping	$112,769	$394,640	$281,871
Net Gain (Loss)	($162,212)	$601,501	$763,713

43. A careful analysis of tables 2 and 3 takes note that a) the figures by which 3ABN's cost of goods and Remnant's sales of literature increased are roughly the same, b) the approximate amount of royalties Plaintiff Shelton earned are represented by the increase in

Remnant's royalty expense, and c) 3ABN's losses in 2006 may have been attributable to the pricing structure for *TCTR*, 3ABN's payments to Remnant, and Remnant's royalty payments to Plaintiff Shelton instead of a decline of donations due to Defendants' investigative reporting.

44. Attached hereto as **Exhibit FFF** is a table containing part of the flight history of 3ABN's corporate jet. The flights include Shelton's April 15, 2004, trip to Wichita, Kansas, for marriage counseling, referred to in his email attached hereto as **Exhibit GGG,** and trips to Saint Paul, Minnesota, and Massachusetts which upon information and belief are associated at least in part with Shelton's involvement in the underlying suit as an individual.

45. Attached hereto under seal as **Exhibit HHH** is a document stating that 3ABN retained legal services to handle Shelton's personal affairs. The Plaintiffs have classified this document as confidential.

46. An email by Walt Thompson attesting to the fact that 3ABN does not have a separate fund for Shelton's personal legal expenses associated with the underlying suit is attached hereto as **Exhibit III.** Shelton is a plaintiff in the underlying suit as an individual, not in his capacity as an officer, director, or employee of 3ABN.

47. Attached hereto as **Exhibit JJJ** is an email by former 3ABN Board member and general counsel Nicholas Miller alleging the fraudulent alteration of certain 3ABN financial records.

48. A credible source has informed the Defendants that 3ABN has destroyed financial records dated prior to the year 2000.

49. I have received no information indicating that the Plaintiffs are in possession of the auditor's work papers, and my requests to produce did not explicitly ask the Plaintiffs for them.

50. Attached hereto as **Exhibit KKK** is the Plaintiffs' civil cover sheet for the

underlying suit, documenting that the suit's "Basis of Jurisdiction" is the "Federal Question" of "Trademark infringement and dilution." The trademark dilution is based on disparagement, according to ¶ 68 of the complaint. (Doc. 3-2 p. 26).

FURTHER DEPONENT TESTIFIES NOT.

Signed and sealed this 3rd day of July, 2008.

Bob Pickle
Halstad, MN 56548
Tel: (218) 456-2568

Subscribed and sworn to me
this 3rd day of July, 2008.

Notary Public

DEANNA M. ZIMMERMAN
NOTARY PUBLIC—MINNESOTA
My Commission Expires JAN. 31, 2010