Ex. 5

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

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

DEFENDANTS' MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO COMPEL PLAINTIFFS' COUNSEL TO RETURN THE MIDCOUNTRY RECORDS

INTRODUCTION

Pursuant to Fed. R. App. P. 11(a) and the court's inherent power, Defendants seek an order compelling Plaintiffs' counsel to return bank records produced by MidCountry Bank ("MidCountry") ("MidCountry records"), which Defendants subpoenaed and paid dearly for. On December 16, 2008, Plaintiffs' counsel obtained the only copy of these sealed records from the federal courthouse in Worcester, Massachusetts, in violation of this Court's order issued on October 30, 2008.

Defendants also seek a stay of the order of October 30, 2008, to the extent that such a stay is necessary to prevent the return of the MidCountry records to MidCountry.

RELEVANT FACTS

Defendants hereby incorporate as though fully set forth herein the Relevant Facts section of Defendants' Memorandum in Support of Defendants' Motion to Forward Part of the Record.

(Doc. 205 pp. 1–5).

The Hearing in Minnesota Before Magistrate Judge Boylan

In response to the motion to quash filed by Danny Lee Shelton ("Shelton") in the District of Minnesota, Defendant Pickle argued that Shelton had no standing to challenge a third party subpoena of records owned not by Shelton but by MidCountry. "Since MidCountry is the owner of the business records in question, it is MidCountry that should challenge the subpoena, not Plaintiff Shelton." (Doc. 63-28 pp. 9–10, citing *United States v. Miller,* 425 U.S. 435, 445 (1976); *Clayton Brokerage Co. v. Clement*, 87 F.R.D. 569, 571 (D. Md. 1980); *Rotoworks International v. Grassworks USA*, No. 07-05009, order issued on Apr. 25, 2007 (W.D. Ar.)).

In the March 4, 2008, hearing on Shelton's motion to quash, a recording of which is labeled in this Court's record as Ex. L of Doc. 185, it was readily apparent that Magistrate Judge Boylan found this reasoning persuasive. Repeatedly, he asked Plaintiffs' counsel how Shelton had any standing whatsoever to challenge the subpoena of MidCountry, and particularly noted that Shelton had no standing at all to challenge the subpoena of MidCountry's records pertaining to DLS Publishing, Inc. (Pickle Aff. ¶¶ 2–4; Doc. 185 ¶ 16).

Magistrate Judge Boylan's Order: Documents Must Not Be Given to Plaintiffs

On March 28, 2008, Magistrate Judge Boylan issued an order from the District of Minnesota which stated in relevant part:

> 1. Defendant Robert Pickle shall pay MidCountry Bank's reasonable costs in responding to the subpoena; and
>
> 2. Upon payment of its costs by Defendant Robert Pickle, MidCountry Bank shall send all documents falling within the scope of the subpoena, **under seal** directly to:
>
> U.S. Magistrate Judge Timothy S. Hillman
> United States District Court
> District of Massachusetts
> Donohue Federal Building & U.S. Courthouse
> 595 Main Street

Worcester, MA 01608

> 3. MidCountry Bank shall not provide copies of the documents to *any party* herein absent further order of the court.

(Doc. 63-36 p. 2, italics added). ¶ 3 specifically prohibited Plaintiffs from obtaining copies of the MidCountry records from MidCountry "absent further order of the court." No court order has yet authorized Plaintiffs or Plaintiffs' counsel to obtain copies of the MidCountry records. It is therefore clear that this Court received the MidCountry records directly from MidCountry, not from Plaintiffs.

In his accompanying memorandum, Magistrate Judge Boylan explained why the MidCountry records were to be produced under seal to Magistrate Judge Hillman:

> This Court has been advised by the parties that Plaintiffs' Motion for a Protective Order has been taken under advisement by Magistrate Judge Hillman in the District of Massachusetts. Once the Protective Order is entered by the court, the documents produced under seal by MidCountry Bank in response to Defendant Pickle's subpoena in this district may be reviewed by Magistrate Judge Hillman for compliance with the approved Protective Order.

(Doc. 63-36 pp. 2–3). Clearly, the MidCountry records are fully in compliance with Magistrate Judge Hillman's April 17, 2008, confidentiality order, since the latter order does not prohibit the discovery of those records, or, for that matter, any other records. (Doc. 60 pp. 1–6).

Plaintiffs Request* In Camera *Review of MidCoutnry Records

Because the confidentiality order provided no impediment to Defendants receiving the MidCountry records, Plaintiffs filed a second motion for a protective order, asking Magistrate Judge Hillman to conduct an *in camera* review of the MidCountry records before those records were given to Defendants. (Doc. 75 pp. 16–17). Magistrate Judge Hillman denied that request, leaving no further legal impediment to Defendants obtaining those records. (Doc. 107 p. 5).

Plaintiffs' Deceitful Request to Obtain the MidCountry Records Not Granted

Six days after Plaintiffs' counsel denied that he would be filing a motion to dismiss, and

one day after misleading the court in the Southern District of Illinois to believe that dismissal was not imminent, Plaintiffs moved to dismiss the instant case. (Doc. 127 ¶ 7; Doc. 152-6 p. 35; Doc. 120). In that motion Plaintiffs sought a court order:

> Ordering return to Plaintiffs of all materials supplied to Defendants that Plaintiffs designated as Confidential under the Confidentiality and Protective Order issued in this case on April 17, 2008 (ECF Doc 60), including but not limited to the records of MidCountry Bank which were delivered under under [*sic*.] seal to, and remain in the custody of, Magistrate Judge Hillman ....

(Doc. 120 p. 1). Since the MidCountry records were produced by MidCountry, not Plaintiffs, the MidCountry records could not be "returned" to Plaintiffs. Therefore, Plaintiffs' use of the word "return" was deceitful.

However, this Court wisely worded its October 30, 2008, order as follows:

> THE COURT: Let me -- let me just finish. And any records that were delivered under seal and that are in the custody of the magistrate judge shall be returned to the party that produced those documents.

(Doc. 141 p. 13). Therefore, since MidCountry was the producing party, this Court's order required the return of the MidCountry records to MidCountry, not the surrender of those records to Plaintiffs. The Electronic Clerk's Notes entered on October 31, 2008, summarize that order by saying, "Records in possession of Mag. Judge will be returned." The word "returned" clearly indicates that this Court had ordered the records to be returned to MidCountry, not to be surrendered to Plaintiffs.

Plaintiffs' memorandum[1] in support of Plaintiffs' motion to dismiss also sought to deceive this Court by requesting the "return" of the MidCountry records pursuant to the April 17, 2008, confidentiality order issued in this case.[2] (Doc. 121 pp. 6–7). But that confidentiality order does

[1] The same memorandum admits that the MidCountry records constituted "confidential information provided *to the Defendants*." (Doc. 121 p. 6, italics added). Thus, Plaintiffs admit that the copies Defendants paid more than $3,500 for rightfully belong to Defendants. (Doc. 149 p. 19).

[2] Plaintiffs' "Brief of the Appellees," facetiously asserted that the ordered return of

not require parties to return any documents, confidential or otherwise. (Doc. 60 pp. 1–6). Plaintiffs were well aware of that fact, as evidenced by the actions of Plaintiffs' co-conspirator, Remnant Publications, Inc. ("Remnant"), on May 19 and September 22, 2008. (Doc. 161 p. 6).

Courthouse Can't Locate MidCountry Records

Though the MidCountry records were delivered to this Court on September 12, 2008, Defendants were repeatedly told by clerk(s) of court that the MidCountry records could not be found, and even Plaintiffs' counsel led Defendants to believe that he could not verify that they were at the courthouse. (Doc. 206 ¶¶ 7–12; Doc. 206-7). Thus, the following ambiguous docket entry entered on December 23, 2008, naturally suggested to Defendants that the courthouse had finally located the MidCountry records, and was acknowledging receipt of those records: "Receipt for Documents for In Camera Review. (Roland, Lisa) (Entered: 12/23/2008)." (Pickle Aff. ¶ 5).

The receipt itself[3] is similarly ambiguously worded:

> Received of the Clerk, U.S. District Court, the following documents and/or exhibits in the above-entitled case: All documents from MidCountry Bank for In Camera review.

(Doc. 160). The receipt would have been more clear if it had said, "Received *by* the Clerk," or "Received *from* the Clerk," instead of "Received *of* the Clerk." Given that this was the first acknowledgement in the docket of the reception by the Court of the MidCountry records, Defendants believed this receipt to be a receipt for that reception, and have thought all this time that these records were still in the custody of this Court during Defendants' pending appeals. (Pickle Aff. ¶ 6).

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documents was but an enforcement of "the Protective Order as written." (Doc. 178-4 p. 4). Thus, Plaintiffs wanted this Court to believe that the confidentiality order required parties to return documents when it nowhere does.

[3] The receipt form is dated "09/96." A more current form may be more explicitly worded.

Serious Security Breach at Courthouse

But having looked at the receipt again and having scrolled down further, Defendants now notice that the address Christine Parizo gave under her signature was that of "Fierst, Pucci & Kane." (Pickle Aff. ¶ 8). Thus, it is the address on the receipt alone which makes clear that the receipt is not a receipt stating that the clerk of court had both received and finally located the MidCountry records.

Thus, a serious security breach at the federal courthouse in Worcester, Massachusetts, occurred on December 16, 2008: Without any authorization by this Court, a servant of Plaintiffs' counsel (Pickle Aff. Ex. B) walked into the courthouse and walked out with 11 or 12 pounds (Doc. 206-2 p. 1) of sealed documents, documents which cost Defendants more than $3,500. (Doc. 149 p. 19). In the process, the courthouse did not retain any copies, raising serious and expensive evidentiary concerns as to custody and control. Given Plaintiffs' counsel's prestigious career and honors, such conduct is unacceptable. (Pickle Aff. Ex. C).

No Legal Basis for His Actions

Since the transcript containing the October 30, 2008, order was docketed on November 28, 2008, Plaintiffs' counsel knew or should have known that his actions on December 16, 2008, had no legal basis. (Doc. 141 p. 13). The lack of legal authority is also suggested by the November 11, 2008, letter to Defendants written by another of Plaintiffs' counsel, which stated:

> I will be filing a motion to require you both to return all confidential materials, and to consent to the return of the MidCountry Bank records that are currently in the possession of Magistrate Judge Hillman.

(Doc. 162-6). Thus, despite this Court's order of October 30, 2008, Plaintiffs' counsel still believed that the MidCountry records could not be "returned" without Defendants' "consent." Defendants have never given such consent. (Pickle Aff. ¶ 10).

Courthouse and Plaintiffs' Counsel's Admissions

After Defendants filed their motion to forward part of the record (Doc. 204), Defendants called the federal courthouse in Worcester, Massachusetts, on December 10, 2009, to see if anyone knew where the MidCountry records were. Defendants were told by a clerk of court that they were trying to determine whether those records had already been forwarded to the Court of Appeals. (Pickle Aff. ¶ 11).

On December 15, 2009, Defendants inquired a second time and were told that the records had not been forwarded, but had been returned to MidCountry or the Plaintiffs, whatever the receipt entered on the docket showed. (Pickle Aff. ¶ 12). The same day Defendants wrote Plaintiffs' counsel in an attempt to stipulate to a return of the MidCountry records to the courthouse, absent which Defendants would seek an order to compel. (Pickle Aff. Ex. D). The same day Plaintiffs' counsel responded, acknowledging possession of the MidCountry records but refusing to return them absent a court order. (Pickle Aff. Ex. E).

ARGUMENT

I. THE BURDEN RESTS ON DEFENDANTS TO SEEK A REMEDY

Fed. R. App. P. 11(a) states:

> **Appellant's Duty.** An appellant filing a notice of appeal must comply with Rule 10(b) and must do whatever else is necessary to enable the clerk to assemble and forward the record.

Plaintiffs' counsel refuses to return the MidCountry records to the courthouse. (Pickle Aff. Ex. E). It is therefore Defendants' responsibility to file this motion seeking the return of those records so that the clerk can forward them to the Court of Appeals.

II. AS PART OF THE RECORD ON APPEAL, PLAINTIFFS' COUNSEL MUST RETURN MIDCOUNTRY RECORDS

In Defendants' pending appeals, Defendants seek review of, *inter alia*, the order to return the MidCountry records to MidCountry, the order denying Defendants reimbursement of their

costs to obtain those records, and the effect of the withholding of evidence from Defendants upon this Court's orders.

In its order of December 4, 2009, the Court of Appeals made clear that documents produced by Remnant are part of the record on appeal for Defendants' second appeal, since Defendants offered them to this Court prior to Defendants' filing their second notice of appeal, and since Defendants are appealing the denial of Defendants' motion to file those documents under seal. (Pickle Aff. Ex. A).

Similarly, the MidCountry records are part of the record on appeal since they constitute part of the proceedings before this Court at issue in Defendants' pending appeals. According to the record:

- On September 12, 2008, the MidCountry records were received and signed for by a clerk of court. (Doc. 206-2).
- On October 23, 2008, Plaintiffs stated that the MidCountry records "were delivered under seal to, and remain in the custody of" this Court. (Doc 120 p. 1; Doc. 121 p. 6)
- On October 30, 2008, Plaintiffs stated that MidCountry had produced the documents under seal to this Court in "September of 2008." (Doc. 152-8 p. 1).
- On October 30, 2008, this Court referred to "records that were delivered under seal and that are in the custody" of this Court. (Doc. 141 p. 13).
- A receipt, signed and filed on December 16, 2008, acknowledges that the MidCountry records were in the custody of "the Clerk, U.S. District Court" on that date, and that they had been delivered to this Court for "In Camera review." (Doc. 160).

Defendants filed their first notice of appeal on November 13, 2008. (Doc. 133). The Court retains jurisdiction during a pending appeal to deal with matters pertaining to the record. However, the Court is without authority to eliminate material from the record on appeal. 20

Moore's Federal Practice §310.40[2]. "... the Federal Rules do not permit the district court to prevent parties from including in the record any part of the occurrences below which they wish thus included." *Belt v. Holton*, 197 F.2d 579, 581 (D.C. Cir. 1952). No clerk of court, therefore, had authority to surrender the only copies of the MidCountry records to Plaintiffs' counsel on December 16, 2008, and the Court should therefore order Plaintiffs' counsel to return those records to this Court.

When Plaintiffs' counsel returns the MidCountry records, he/they should certify that those records do not differ in quantity or content from that which he/they received.

III. ORDER OF OCTOBER 30, 2008, NOT YET EXECUTED

Since the MidCountry records have never yet been returned to MidCountry, the Court's order of October 30, 2008, has not yet been executed. That order explicitly stated that the MidCountry records were to be returned to the party to that produced them, which was MidCountry, not Plaintiffs. (Doc. 141 p. 13). Plaintiffs' counsel's excuse that he was simply carrying out this Court's order is thus utterly unavailing. (Pickle Aff. Ex. E). In reality, Plaintiffs' counsel violated that same order. The MidCountry records must therefore be returned to this Court.

During Defendants' pending appeals, this Court has no jurisdiction to alter the order of October 30, 2008, to permit the surrender of the MidCountry records to Plaintiffs.

IV. STAYING THE ORDER OF OCTOBER 30, 2008

Plaintiffs' contention that Defendants did not seek a stay of the order of October 30, 2008, regarding the MidCountry records (*Id.*) is irrelevant to the question at hand, since that order has not yet been executed.

Plaintiffs sought the surrender to themselves of the MidCountry records pursuant to the April 17, 2008, confidentiality order entered in this case. (Doc. 121 pp. 6–7; Doc. 178-4 p. 4). To

the extent that this Court's order of October 30, 2008, concerning the MidCountry records was pursuant to that confidentiality order, no stay was ever required, since the confidentiality order does not require parties or court personnel to return any documents, confidential or otherwise. (Doc. 60 pp. 1–6).

Plaintiffs believed that the order of October 30, 2008, was ineffective without Defendants' consent, consent which has never been given. (Doc. 162-6; Pickle Aff. ¶ 10). To the extent Plaintiffs' belief was true, no stay was ever required in order to prevent the return of the MidCountry records.

To the extent that this Court's order of October 30, 2008, concerning the MidCountry records was not pursuant to that confidentiality order or subject to Defendants' consent, it should be stayed now until the termination of all appeals, and Defendants hereby seek such a stay.[4]

V. THE COURT'S EXPROPRIATION OF DEFENDANTS' PROPERTY TO PLAINTIFFS IS INEQUITABLE AND UNCONSTITUTIONAL

Plaintiffs do not own the bank statements comprising the MidCountry records. *United States v. Miller,* 425 U.S. at 440; *Clayton Brokerage Co. v. Clement*, 87 F.R.D. at 571.

MidCountry produced its records directly to this Court on order of Magistrate Judge Boylan, who expressly forbade Plaintiffs to receive a copy from MidCountry. (Doc. 63-36 p. 2). Since Plaintiffs never were in possession of the MidCountry records, these records could never be "returned" to Plaintiffs.

Defendants, not Plaintiffs, paid MidCountry to produce these records. Plaintiffs admitted that the MidCountry records rightfully belonged to Defendants. (*supra* 4 n. 1).

The courthouse surrendered the MidCountry records to Plaintiffs who never had standing to object to Defendants' subpoena of MidCountry (*supra* 2), instead of returning those records

[4] Since a district court is without authority to remove material from the record during a pending appeal (*supra* 8–9), an order to eliminate material from the record might be automatically stayed upon the filing of a notice of appeal.

either to the bank or to Defendants who had paid for them. This surrender took place without the Court altering its order of October 30, 2008, an alteration the Court lacked jurisdiction to perform during Defendants' pending appeals.

This constitutes a profound and inequitable expropriation of Defendants' property without due process by the Court, violating the Fifth Amendment of the United States Constitution. The MidCountry records must be returned to this Court.

CONCLUSION

The irregularity of the courthouse's surrendering the only copies of 11 or 12 pounds of sealed documents to Plaintiffs in violation of this Court's explicit order raises many equitable and legal concerns. Regardless of the ultimate resolution of all such concerns, Plaintiffs' counsel should be ordered to promptly return the MidCountry records to this Court, and the order of October 30, 2008, should be stayed until the termination of all appeals, if a stay is necessary to prevent the return of the MidCountry records to MidCountry. The return of the MidCountry records to this Court will facilitate the forwarding of a copy of these records to the Court of Appeals. Such return should be accompanied by Plaintiffs' counsel's certification that the returned records do not differ in quantity or content from that which Plaintiffs' counsel received.

Respectfully submitted,

Dated: December 18, 2009

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