

**IN THE UNITED STATES DISTRICT COURT FOR  
THE SOUTHERN DISTRICT OF ILLINOIS**

|                           |   |                                |
|---------------------------|---|--------------------------------|
| ALEX WALKER,              | ) |                                |
|                           | ) |                                |
| Plaintiff,                | ) | No. 12-114-DRH/SCW             |
| v.                        | ) |                                |
|                           | ) | Chief Judge David R. Herndon   |
| THREE ANGELS BROADCASTING | ) |                                |
| NETWORK, INC., and TOMMY  | ) | Magistrate Stephen C. Williams |
| SHELTON,                  | ) |                                |
|                           | ) |                                |
| Defendants.               | ) |                                |

**3ABN’S OPPOSITION TO PLAINTIFF’S MOTION  
TO EXCLUDE 3ABN’S DECLARATIONS**

Three Angels Broadcasting Network, Inc. (“3ABN”) submits this opposition to plaintiff Alex Walker’s “Motion to Exclude Defendant [3ABN’s] Declarations and Incorporated Memorandum of Law.” (Doc.44). The party alleging federal jurisdiction has the burden of proof on that issue. Instead of meeting that burden by presenting the Court with evidence from which it could conclude that it has jurisdiction, Plaintiff seeks to exclude 3ABN’s evidence showing the contrary. The motion should be denied because submission of evidence extrinsic to the pleadings is proper in connection with motions to dismiss under Fed. R. Civ. P. 12(b)(1) alleging lack of subject matter jurisdiction *in fact*. The challenged declarations show that the true character of Plaintiff’s factual assertions do not invoke federal subject matter jurisdiction, and are admissible for that limited purpose.

**INTRODUCTION**

The Court will recall that the only basis for federal jurisdiction alleged in this case is Count IV, a civil Mann Act claim against defendant Tommy Shelton. Without that claim, federal subject matter jurisdiction is lacking and the entire case must be dismissed. 3ABN has moved to dismiss the case on the basis that Plaintiff does not allege – in fact or on the face of his complaint

– facts which if proven would amount to a violation of the Mann Act’s civil remedy provisions. Specifically, he does not say he was subjected to skin-to-skin contact with his genitals.

3ABN’s argument that the Complaint does not *facially* allege conduct violative of the Mann Act does not depend on the declarations the Plaintiff seeks to exclude – it relies on inspection of the Complaint alone. But in support of its position that Plaintiff does not allege skin-to-skin genital contact *in fact*, 3ABN submitted declarations showing that Plaintiff has gone on record with the authorities of Illinois and Virginia denying skin-to-skin contact with his genitals. This evidence was submitted to show the true nature of Plaintiff’s allegations, because the Complaint was carefully wordsmithed to stop just short of alleging skin-to-skin contact with Plaintiff’s genitals, while at the same time purporting to state a claim under the Mann Act that requires precisely that allegation. Instead of submitting evidence explaining away his prior characterizations of his factual allegations, or contradicting them by expressly alleging skin-to-skin contact, Plaintiff now moves to exclude his prior descriptions of his alleged abuse from evidence.

Plaintiff’s motion should be denied because (1) 3ABN’s motion seeks dismissal pursuant to Rule 12(b)(1); (2) in connection with Rule 12(b)(1) motions, the Court may consider matters outside the pleadings that bear on federal subject matter jurisdiction; and (3) the declarations submitted by 3ABN demonstrate the absence of federal subject matter jurisdiction because they clarify Plaintiff’s otherwise ambiguous factual allegations, and clearly show the absence of a cognizable Mann Act claim.

### **FACTS**

The facts relating to the motion are set forth in 3ABN’s Brief Supporting its Motion to Dismiss. (Doc.30). The Declarations at issue are: (1) Declaration of Chad Pusey (Doc.12-1);

and (2) Declaration of M. Gregory Simpson (Doc.12-2). The motion does not appear to be directed at the Declaration of James Gilley (Doc.12-3), which pertained to venue issues and is not relevant to the pending motion to dismiss.

## **ARGUMENT**

### **I. Standard of Review.**

A motion under Fed. R. Civ. P. 12(b)(1) alleging that subject matter jurisdiction is absent in fact may rely on materials outside the pleadings. Apex Digital, Inc. v. Sears, Roebuck & Co., 572 F.3d 440, 443-44 (7th Cir. 2009); Sapperstein v. Hager, 188 F.3d 852, 855-56 (7th Cir. 1999); Commodity Trend Serv. V. Commodity Futures Trading Comm'n, 149 F.3d 679, 685 (7th Cir. 1998); see also Hay v. Ind. State Bd. of Tax Comm'rs, 312 F.3d 876, 879-80 (7th Cir. 2002) (concluding that “the district court had not only the right, but the duty to look beyond the allegations of the complaint to determine that it had jurisdiction”).

“When a motion relies on facts outside the record, the court may hear the matter on affidavits . . . .” Fed. R. Civ. P. 43(c). Per 28 U.S.C. § 1746, declarations are deemed the evidentiary equivalent of affidavits. “All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.” Fed. R. Evid. 402. Relevant evidence is “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Fed. R. Evid. 401. A district court's decision to admit or exclude evidence is reviewed for an abuse of discretion. United States v. Rogers, 587 F.3d 816, 819 (7th Cir.2009).

### **II. The Pusey and Simpson Declarations Are Properly Before the Court.**

**A. Evidence Outside the Pleadings is Admissible in a Rule 12(b)(1) Motion.**

The authorities cited above establish beyond debate that evidence outside the pleadings is admissible in a motion under Fed. R. Civ. P. 12(b)(1) to determine federal subject matter jurisdiction. To circumvent these authorities, Plaintiff begins with a false premise: That 3ABN's motion to dismiss is in substance a motion for failure to state a claim under Fed. R. Civ. P. 12(b)(6), and that in connection with such motions only the pleadings themselves, and materials necessarily referenced in them, may be considered. The argument fails because 3ABN's motion is based on Fed. R. Civ. P. 12(b)(1) – lack of subject matter jurisdiction.

3ABN's motion gives two reasons why the Court lacks subject matter jurisdiction: (1) the Complaint does not *on its face* allege facts which trigger federal jurisdiction (because the civil Mann Act claim is not properly plead and is time-barred); and (2) Plaintiff does not *in fact* (i.e., outside his Complaint) allege acts which constitute a Mann Act claim because he doesn't really say that Tommy Shelton's alleged abuse of him included skin-to-skin touching of his genitals. The Simpson and Pusey declarations were submitted only in connection with the second argument, because they provide the detail that was conspicuous by its absence from Plaintiff's Complaint.

Plaintiff argues that Rule 12(b)(1) motions which challenge the merits of the claim are in substance motions for failure to state a claim under Rule 12(b)(6), such that evidence extrinsic to the Complaint may not be considered. Again, the argument fails at its premise: Contrary to Plaintiff's assertions, the declarations were not submitted to "refute" or "attack" the merits of Plaintiff's claims. They were supplied to assist the Court in determining *what those claims are* so that the Court can decide whether it has subject matter jurisdiction over this case. The declarations were necessary because the Complaint is silent on the facts that would trigger

federal subject matter jurisdiction, specifically the critical issue of whether Plaintiff alleges skin-to-skin contact with his genitals. The declarations do not contradict anything Plaintiff has said on that topic in his pleadings for the simple reason that he hasn't *said* anything on that topic in his pleadings.

**B. The Simpson and Pusey Declarations Contain Relevant Evidence.**

Since evidence outside the Complaint is admissible in connection with a Rule 12(b)(1) motion to show facts related to federal subject matter jurisdiction, the only remaining issue is whether the Simpson and Pusey declarations contain such evidence. Clearly, they do. They show that Plaintiff has told the authorities of Illinois and Virginia that Tommy Shelton's alleged abuse did not include skin-to-skin touching of his genitals. It is for this limited purpose that the declarations should be considered by the Court. Again, on this point, the declarations do not contradict anything in the Complaint because the Complaint is silent on the subject of skin-to-skin touching. The declarations thus supply the only evidence in the record on a matter of critical importance to whether this Court has subject matter jurisdiction.

**C. Exclusion is Not the Appropriate Remedy.**

Finally, as Plaintiff's brief appears to acknowledge, even if the motion could be recast as one under Fed. R. Civ. P. 12(b)(6), the consequence of including matter outside the pleadings would simply be to convert the motion to one seeking summary judgment under Fed. R. Civ. P. 56. According to Fed. R. Civ. P. 12(d), if a party on a 12(b)(6) motion submits documents "outside the pleadings . . . [that are] not excluded by the court, the motion must be treated as one for summary judgment under Rule 56." If the Court is inclined to allow Plaintiff to "mend the hold" by re-pleading his case, he should also be required to submit evidence sufficient to defeat a motion for summary judgment on the Mann Act claim, Count IV of his Complaint.

**Conclusion**

3ABN respectfully asks that the Court deny plaintiff's motion to exclude because Seventh Circuit precedent permits consideration of materials outside the pleadings where a party questions whether there is subject matter jurisdiction in fact.

Respectfully submitted,

Dated: April 23, 2012

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Dated: April 23, 2012

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**CERTIFICATE OF SERVICE**

I hereby certify that on April 23, 2012, I electronically filed the foregoing document with the clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day to all parties on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those parties who are not authorized to received electronically Notices of Electronic Filing.

s/ M. Gregory Simpson

**SERVICE LIST**

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NETWORK, INC. and TOMMY SHELTON  
United States District Court, Southern District of Illinois**

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