UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

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

DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION FOR LEAVE TO CAUSE SUBPOENA TO BE SERVED UPON U.S. ATTORNEY COURTNEY COX, AND IN SUPPORT OF DEFENDANTS' MOTION FOR LEAVE TO CAUSE SUBPOENA TO BE SERVED UPON THE FJARLI FOUNDATION

PLAINTIFFS' OBJECTIONS REFUTED

I. PLAINTIFFS' GENERAL OBJECTIONS

A. "... overbroad, unduly burdensome and expensive such that it outweighs the value to Defendants in *this* litigation ...." "... Defendants' pattern for seeking overbroad, harassing, embarrassing, unduly burdensome ... information."

The Plaintiffs make these assertions with unclean hands, having conducted discovery of this sort as recently as September 9, 2008, as a "creditor" in Mr. Joy's bankruptcy proceedings, even though the Plaintiffs had previously waived all their pre-petition claims against Mr. Joy (Affidavit of Robert Pickle (hereafter "Pickle Aff.") ¶¶ 1–6).

A Rule 2004 examination is limited in the following way:

> The examination of an entity under this rule or of the debtor under § 343 of the Code may relate only to the acts, conduct, or property or to the liabilities and financial condition of the debtor, or to any matter which may affect the administration of the debtor's estate, or to the debtor's right to a discharge.

(Fed. R. Bankr. P. 2004). The Plaintiffs' asking Mr. Joy to identify who pays for Mr. Joy's groceries and who puts gas in the borrowed car that Mrs. Joy drives could be considered harassing and embarrassing. (Pickle Aff. ¶ 5). The Plaintiffs' on site conversion of the Rule 2004 examination into a deposition consisting of questions pertaining to both Mr Joy's adversarial proceeding and the instant case went well beyond Mr. Joy's bankruptcy proceedings and the Plaintiffs' subpoena. (Pickle Aff. ¶¶ 3–5). And the use of that examination to try to identify the names of informants to the IRS, and whistleblowers within Three Angels Broadcasting Network, Inc. (hereafter "3ABN"), went beyond the needs of even this litigation, as well as propriety. (Pickle Aff. ¶ 5).

If expense was really a concern of the Plaintiffs, they would not be spending so much money fighting the Defendants' discovery efforts, and Merlin Fjarli would not as a 3ABN Board member support the continued litigation against the Defendants. The Plaintiffs also would not be ordering the IRS to destroy documents that the Defendants might also need. (Doc. 96-2).

B. "... Plaintiffs respectfully request that the Court order Defendants to submit copies of the actual subpoenas they intend to cause to issue, prior to this Court granting leave."

As *pro se* litigants, the Defendants are required by Fed. R. Civ. P. 45(a) to have their subpoenas "signed but otherwise in blank" by a clerk from the district where the production or deposition is to be had. If submission of "copies of the actual subpoenas" requires a clerk to sign a subpoena that is not blank, then such a procedure would violate Rule 45(a)(3).

The Defendants have in essence already done what the Plaintiffs are asking for by providing the wording they intend to use on the subpoenas. Still, to avoid any possible contention over this issue, the Defendants have now filed sample subpoenas. (Pickle Aff. ¶ 7, A–B).

C. "If the Court does not undertake this step in evaluating a motion seeking leave, the opportunity will be created for Defendants to misinterpret the Court's orders or differently from what is intended."

The record does not reflect the Defendants misinterpreting this Court's orders, but it does reflect the Plaintiffs doing so. Docket Entry #30 ordered Defendant Joy to permit (a) an image of each hard drive he possessed to be made (b) preferably upon his premises, (c) the process being witnessed by the defendants and/or their experts. It also ordered that the (d) images be immediately sealed, (e) with the signatures of the parties or their representatives who had witnessed the imaging and sealing process being placed on the seal.

Docket Entry #42 at page 53 demonstrates that Plaintiffs' counsel then attempted on November 8, 2007, to convince Defendant Joy to permit (a) three copies rather than one copy to be made of his hard drive (b) in or near Minneapolis (rather than on his premises) (c) where he could not witness the process, with a computer forensics expert (e) signing an agreement pertaining to the confidentiality of the image rather than the parties signing a physical seal placed upon the device containing the image. (*see also* Pickle Aff. ¶ 8, Ex. C).

D. "Defendants' motion be denied in its entirety pending this Court's disposition of Plaintiffs' Motion for Protective Order Limiting the Scope of Discovery."

The Plaintiffs thus make it crystal clear that their filing of that motion was intended to hinder or halt discovery.

E. "Oral Argument Requested."

Inasmuch as the Plaintiffs have failed to file an affidavit or exhibits, or to cite any authority other than in their footnote 2, and inasmuch as the Defendants filed exhibits with the instant motion totaling 119 pages, it is difficult to see why oral arguments are necessary, much less helpful to the Plaintiffs' case, unless the goal be to further delay discovery and increase the expense of this litigation.

II. PLAINTIFFS' OBJECTIONS TO SUBPOENAING DOCUMENTS FROM U.S. ATTORNEY COX

A. "... simply another avenue to get the same [donor-identifying] information they have sought but not been allowed to obtain directly from 3ABN."

This Court has twice declined prohibiting the discovery of donor-identifying information. The Defendants must be able to verify that donations have indeed declined, and have declined for the reasons the Plaintiffs allege. This matter is complicated by various factors, including 3ABN's reported sales revenue in 2004 and onward as donations.

To further illustrate the complexity of the problem, consider philanthropist and, as of 2007, 3ABN Board member Garwin McNeilus (hereafter "McNeilus"). His foundation is called the Garmar Foundation (hereafter "Garmar"), named after himself and his wife Marilee. (Pickle Aff. ¶ 9, Ex. D at pp. 2–3). According to Garmar's 990-PF's, which are required by law to be open to public inspection, Garmar's grants to 3ABN declined by over 93% ($404,197) over six years. (Pickle Aff. ¶ 9, Table 1, Ex. D–J). Garmar's grants had already declined more than 86% prior to the Defendants launching their investigations. (Pickle Aff. Table 1, ¶ 10). Further, McNeilus filed a lawsuit similar to this one in 1991 after *Corporate Report Minnesota* published an article accusing him of various allegations, including a few that sound like those Danny Lee Shelton (hereafter "Shelton") has been accused of, and McNeilus used the same law firm and attorney in that lawsuit that Shelton is using in this one. (Pickle Aff. ¶ 11, Ex. K–M). Shelton has also claimed that McNeilus would bankroll the Plaintiffs' legal expenses if there was litigation. (Pickle Aff. Ex. N at p. 7). It can thus hardly be claimed that the Defendants have influenced Garmar to lessen its giving to 3ABN.

The above example taken from the public record illustrates the fact that identifying donors is critical to verifying or disproving the Plaintiffs' claims.

B. "Plaintiffs are dubious that such discovery requests of the IRS and/or U.S. Government are even legally permissible ...."

A simple solution to avoid this possible difficulty is found in a December 20, 2005 order in *Hansen Manufacturing Co., Inc., v. Jamie E. Frank*, No. 99-cv-08097 (E.D.N.Y.): This Court can order the Plaintiffs to provide the Defendants with signed Form 4506's and/or Form 8821's

to authorize the Defendants to obtain the information sought for. By placing at issue in this case the question of whether 3ABN's directors have violated the Internal Revenue Code, the Plaintiffs have already assented to whatever discovery is required to verify or disprove such an allegation.

C. "Plaintiffs intend to support any motion to quash filed by the subpoena recipients, and expressly do not consent to disclosure of the information sought herein."

Why? The Plaintiffs and their allies have widely published that they have been fully exonerated by the IRS, without producing one shred of evidence to that effect. (Doc. 96-2 through 96-5; Pickle Aff. Ex. O–P). Shelton himself used this assertion to publicly insinuate that the Defendants are "false accusers" with an "agenda of pride, holding a grudge, selfishness." (Pickle Aff. Ex. O). 3ABN president Jim Gilley spoke with Amazing Facts president Doug Batchelor (hereafter "Batchelor"), one of the more popular Seventh-day Adventist preachers today, after which Batchelor issued a widely scattered statement claiming that the IRS investigation had been closed, and that not one single infraction or discrepancy had been found and not one fine paid. (Pickle Aff. Ex. P). Batchelor also called the expression of concerns about Shelton's conduct a "smear campaign." (*Id.*).

If the Plaintiffs are truly exonerated, if the IRS investigation is truly closed, if the Plaintiffs have truly not paid any fines or payments, why are the Plaintiffs so terribly afraid of allowing the evidence to be produced that would prove their assertions true? On the other hand, if these claims of total exoneration are false, the veracity of the Plaintiffs is called in question, and the Defendants have a possible defamation claim against the Plaintiffs.

D. "... the IRS concluded its investigation of 3ABN by determining that no further action will be taken. An inference may be drawn from this that no violations occurred."

The Plaintiffs offer no evidence that the IRS has in fact concluded its investigation, an assertion that the Defendants are by no means convinced of. All that has been produced thus far

is the letter of Gerald Duffy (hereafter "Duffy") giving his interpretation of the question allegedly asked by the investigating agencies, "Do you want these documents returned or destroyed?" (Doc. 96-2). Duffy is the same individual that wrote the only cease and desist letter either Defendant ever received, a letter that invoked common law copyright protection. (Doc. 63-18). Yet common law copyright protection was abolished on January 1, 1978, by the Copyright Act of 1976. It is therefore unrealistic to determine that the IRS criminal investigation of 3ABN and Shelton has either concluded or resulted in exoneration solely on Duffy's interpretation of the question, "What do you want done with these documents?" Thus, the proposed subpoena *duces tecum* must be issued.

E. "... Defendants lack the foundation and expertise to rehash, doublecheck, challenge or call into question the IRS's determination."

If all of the Plaintiffs' assertions be true, the Defendants (and their four experts consisting of CPA's, auditors, and a Certified Fraud Examiner) certainly do not lack the necessary foundation and expertise after all.

The Plaintiffs in essence contend that the IRS has probably determined that Shelton's reporting of a donation of property as $20,000 in cash in 2003 (without getting the required appraisals or filing the required Form 8283, and possibly reporting an inflated value) is not a violation. (Doc. 81-6 ¶ 24; Doc. 81-7 pp. 1–12). The Plaintiffs also in essence contend that the IRS has probably determined that Shelton's purchase of a house from 3ABN in 1998 for $6,139, one week before he sold it for $135,000, and Shelton's denial under penalty of perjury that a section 4958 excess benefit transaction had occurred, is not a violation. (Doc. 49-2 pp. 35–37; Doc. 81-9 p. 2 at ln. 89b, pp. 3, 5). The Defendants are confident that, perchance the IRS did determine that such were not violations, they can easily demonstrate before a jury that the IRS's determination is in error.

In reality, the Plaintiffs' suggestion that the IRS determined that such transactions were

not violations is preposterous and an utter insult to the capabilities and training of the men and women who serve in the IRS.

F. "The information sought by Defendants can be requested of Plaintiffs and in fact has already been produced to Defendants."

In November and December 2007, Defendant Pickle served requests to produce upon the Plaintiffs which included the IRS investigation as a Plaintiff-related Issue under definition 16(aa). (Doc. 63-19; Doc. 63-20). No identifiable documents pertaining to the IRS investigation have yet been produced to the Defendants. (Pickle Aff. ¶ 14). The Plaintiffs have not produced "copies of interviews, notes, signed statements, reports, correspondence, stipulations, agreements, findings of fact, information sheets, and lists of available evidence" pertaining to the IRS investigation, and could not possibly be in possession of all these things.

G. "Defendants are certainly not entitled to "all" or anything from U.S. Attorney Cox."

First of all, the interrogatories and requests to produce served upon the Defendants by the Plaintiffs on August 20, 2007, used "all" a total of 23 times. The logic was clear and sensible: If a party doesn't ask for "all," the responding party might omit a critical answer or document. Thus the Defendants followed the Plaintiffs' example and asked for "all" at times in their discovery requests.

Second, the proposed wording for the subpoena in question never uses the word "all."

H. "Defendants should be required to specify which Board Members partook of which specific instances of private enrichment, and which specific instances of private enrichment Danny Shelton partook, and only seek that information related to those specific transactions."

The Plaintiffs' complaint is not so limited in person or transaction, but instead broadly asserts that the Defendants have accused "3ABN Board members" of "personally enrich[ing] themselves as officers and directors of 3ABN in violation of the Internal Revenue Code." If the

Plaintiffs believe their complaint to be thus overbroad, they should amend it and narrow it.

The September 11, 2008, order of this Court disposed of this argument. (Doc. 107 p. 2).

I. "... Defendants are not entitled to any other of the alleged 100,000 pages of documents in the IRS's possession."

Since this statement asserts that the 100,000 pages have not been destroyed, the Defendants believe this statement to be a tacit admission by the Plaintiffs that Duffy and Shelton prevaricated when they asserted that the IRS investigation is closed and that these 100,000 pages have all been destroyed. Duffy and Shelton's assertions are the only "evidence" thus far offered by the Plaintiffs that the Defendants have defamed the Plaintiffs regarding tax issues. Thus, the subpoena must be issued in order to determine whether this "evidence" is really true.

Additionally, the Defendants never asked the Court to grant leave to issue a subpoena *duces tecum* to obtain these 100,000 pages.

J. "... command service of documents from U.S. Attorney Cox to chambers of Magistrate Judge Hillman or an appointed special master for *in camera* review and redaction irrelevant identifying donor information."

While Magistrate Judge Hillman is a competent jurist, it is unreasonable to expect him to be so conversant with Seventh-day Adventist membership and politics that he will recognize the potential bearing that the name of this donor or that donor has upon the questions at bar. For example, would Magistrate Judge Hillman have known the significance or lack thereof of the donor "Garmar Foundation"? We think not.

The Defendants are not so naïve as to think that the Plaintiffs will assist Magistrate Judge Hillman or a special master in recognizing the potential bearing of a particular donor name, and in determining that a particular donor ceased or lessened giving due to other causes than the activities of the Defendants.

II. PLAINTIFFS' OBJECTIONS TO SUBPOENAING DOCUMENTS FROM THE FJARLI FOUNDATION

A. "Plaintiffs are of the opinion that Defendants seek to obtain information through this litigation to assist Linda Shelton in a pending / upcoming property settlement proceeding against Danny Shelton."

The Plaintiffs fail to recall that the Confidentiality Order of April 17, 2008, states, "The Subject Discovery Materials will be used for no other purpose than this litigation." (Doc. 60 pp. 1–2).

The Plaintiffs can only be genuinely concerned if the information could in fact assist Linda Shelton. The Defendants believe that the Plaintiffs have thus tacitly admitted that Shelton did indeed perjure himself in his marital property proceedings by failing to properly disclose his assets, liabilities, income, and/or expenses. (Doc. 1 ¶ 50i).

Since the Plaintiffs have put at issue in this case the Sheltons' marital property proceedings, any attempt by the Defendants to defend themselves against allegations in the Plaintiffs' complaint concerning those proceedings can be construed as an attempt to assist Linda Shelton. If the Plaintiffs' reasoning carries the day, any party can conceivably thwart discovery in a case in which they have put at issue another proceeding.

B. "... an undue burden upon the Fjarli third parties."

While the Fjarli Foundation is arguably a third party, Merlin Fjarli is not as far as discovery requests go. 3ABN has reported on its 2004 Form 990 onward that Merlin Fjarli is a director of 3ABN (Doc. 63-32 pp. 7, 16, 25), and as such, pursuant to Local Rule 26.5(c)(5), the terms "Plaintiff" and "3ABN" "mean the party and ... its directors," including Merlin Fjarli.

Since the Fjarli Foundation is arguably a third party, and since the mortgage was granted in the name of the Fjarli Foundation, the issuance of a subpoena *duces tecum* appears to be the appropriate method of obtaining the discovery sought for.

C. "Defendants Seek Irrelevant Information to Claims Made in [¶] 46(h)."

If Shelton's mortgage was paid in part or in full by Remnant using either royalties or

proceeds from sales of Shelton's book, then the requested documents are relevant because they will help demonstrate the various ways Shelton hid his book-related income from the 3ABN Board and in his division of marital property proceedings.

D. "Defendants Seek Irrelevant Information to Claims Made in [¶] 50(i)."

To the contrary, if the requested documents demonstrate that Shelton never was going to have to pay back the loan he had obtained from the Fjarli Foundation, then Shelton certainly must have known that when he signed his July 2006 affidavit stating that he had a $200,000 mortgage loan liability from Merlin Fjarli.

Alternatively, if the remaining balance of $150,000 was paid off in 2006 with royalties from Remnant, Shelton must have known that fact when he signed his July 2006 affidavit, an affidavit which reported no royalties whatsoever.

E. "The burden and expense of the proposed discovery on Fjarli far outweighs its likely benefit to Defendants."

How many pages would be produced by the Fjarli Foundation in response to the proposed subpoena *duces tecum*? 50 pages? 100 pages? The Plaintiffs decline to testify.

Shelton reported the mortgage in question on his July 2006 financial affidavit as having a monthly payment of "ann. Interest." (Doc. 81-7 p. 12). That mortgage was paid off in two years, probably either in two or four payments (probably either four payments of $50,000, or one payment of $50,000 and one payment of $150,000 (Doc. 81-7 pp. 32 and 34 at ln. 7; Doc. 81-8 p. 2 at ln. 7). Thus, the sought for payment history and proof of payment amounts to but few pages.

3ABN ended 2006 about $3 million in the red, and they have claimed treble damages in their complaint. (Doc. 49-2 p. 11 at ln. 18; Doc. 1 ¶ 62). Assertions of undue burden and expense in copying a total of perhaps 100 pages, when $9 million or more could be at issue, is a blatant and glaring fraud upon the court.

F. "Defendants' requests of Fjarli is overbroad."

The sought for documents pertain only to the mortgage reported on Shelton's financial affidavit that was filed in proceedings put at issue in this lawsuit by the Plaintiffs. Therefore, the proposed subpoena cannot possibly be overbroad. The Defendants' proposed wording uses "all" only in reference to the few checks and/or wire transfers involved with the mortgage in question, and in reference to "documents pertaining to the disposition of the debt," i.e. whether the mortgage was paid off or forgiven. Therefore, "all" does not make the proposed request overbroad.

G. "Defendants seek to undertake an unguided fishing expedition."

Litigation requires the development of theories, and discovery is designed to allow parties to find evidence in support of those theories. The requested documents are calculated to assist in providing an evidentiary trail to support one or more of the three bulleted theories suggested by the Defendants in their memorandum, or to disprove all three of them.

The fact that the Plaintiffs resist the discovery of a small number of pages that could potentially exonerate them suggests that they have something to hide.

H. "The real issue in this litigation is the information that Defendants knew at the time they made their false statements ...."

The Plaintiffs have not removed their allegation of defamation *per se* by amending their complaint. They have asked the Defendants to prove the truth of the Defendants' allegations according to the high standards of the Federal Rules of Evidence, not the standards of journalism. The Plaintiffs are therefore estopped from asserting this argument.

CONCLUSION

The proposed subpoenas *duces tecum* are reasonable and relevant, and the Court should grant leave to the Defendants to cause these subpoenas to be issued.

To alleviate possible statutory difficulties arising from 26 U.S.C. § 6103, the Plaintiffs should be ordered to provide the Defendants with whatever signed authorizations the U.S.

Attorney requires before releasing the sought for documents, whether Form 4506, Form 8821, or some similar or equivalent document.

Respectfully submitted,

Dated: September 16, 2008

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AFFIDAVIT OF SERVICE

Under penalty of perjury, I, Bob Pickle, hereby certify that this document, with accompanying affidavit and exhibits, filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF).

Dated: September 16, 2008

/s/ Bob Pickle
Bob Pickle