Ex. H

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IN RE: OUT OF DISTRICT SUBPOENA, ROBERT PICKLE, PETITIONER GAILON ARTHUR JOY, PETITIONER v REMNANT PUBLICATIONS, INC., RESPONDENT	Hon. Richard Alan Enslen Hon. Ellen S. Carmody Case No.: 1:08-mc-03

PETITIONERS' MEMORANDUM IN OPPOSITION TO REMNANT PUBLICATIONS, INC.'S APPEAL FROM MAGISTRATE'S ORDER

The Petitioners are defendants (hereafter "Defendants") in the underlying case, *Three Angels Broadcasting Network, Inc. and Danny Lee Shelton v. Gailon Arthur Joy and Robert Pickle* (Case No. 07-40098-FDS), filed in the District of Massachusetts. The Defendants seek documents by subpoena from Remnant Publications, Inc. (hereafter "Remnant") relative to the claims and defenses of Three Angels Broadcasting Network, Inc. (hereafter "3ABN"), Danny Lee Shelton (hereafter "Shelton"), and the Defendants. To further obstruct the Defendants' discovery efforts, Remnant filed the instant appeal.

STATEMENT OF RELEVANT FACTS

Shelton's Publishing Activities, D&L, and DLS

In 2001 and 2002, Shelton signed three contracts with Pacific Press Publishing Association (hereafter "PPPA") whereby PPPA published Shelton's booklets *The Forgotten*

Commandment, *Can We Eat Everything?*, and *Does God Love Sinners Forever?* (Affidavit of Robert Pickle (hereafter "Pickle Aff.") Ex. A–C). Each contract identifies 3ABN as co-publisher with PPPA of these three titles, and Shelton was to be paid royalties on all sales. (*Id.* at ¶¶ 8–9).

Between 2001 and 2004, 3ABN reported purchases of $313,725 from D & L Publishing (hereafter "D&L"), and $44,724 from DLS Publishing, Inc. (hereafter "DLS"), though 3ABN regularly and routinely purchases directly from PPPA. (Doc. 3 at Table 1; Pickle Aff. ¶¶ 2–3, Ex. D). The plaintiffs in the underlying case (hereafter "Plaintiffs") have thus far produced only one invoice pertaining to these purchases, dated December 13, 2001, documenting the purchase of 100,000 of *The Forgotten Commandment* from D&L instead of from PPPA. (Pickle Aff. Ex. E). Since Shelton used these "publishing" companies as middlemen for 3ABN's purchases of his booklets, Shelton made profits from these sales as well as royalties from PPPA. Shelton reported the royalties earned from 2001 through 2003 as income attributable to D&L. (Pickle Aff. ¶ 5).

Since PPPA and 3ABN were the co-publishers of the aforementioned three titles, it is patently clear that Shelton's personal "publishing" companies did not actually publish these titles. D&L and DLS's primary purpose therefore appears to have been the serving as a conduit through which Shelton personally profited from his 3ABN activities via royalties and sales revenue, even though 3ABN is supposed to be a 501(c)3 non-profit organization.

On January 28, 2004, Administrative Law Judge Barbara Rowe issued her adverse decision in 3ABN's property tax case, which made apparent that Shelton's earning royalties or profits from his 3ABN activities could pose problems for 3ABN's later appeals of her decision. (Doc. 3-17). Shelton's Guam divorce of Linda Shelton on June 25, 2004, provided another motive for Shelton to hide his profits and royalties. (Doc. 3-34 p. 2; Pickle Aff. ¶ 6, Ex. I).

On November 30, 2004, Shelton incorporated DLS (Pickle Aff. Ex. J), raising the question as to whether DLS absorbed the assets of D&L. On January 6, 2005, Shelton on behalf

of 3ABN, author Kay Kuzma (hereafter "Kuzma"), and PPPA signed a contract whereby PPPA agreed to publish Kuzma's *Mending Broken People*. (Pickle Aff. Ex. K). On this book, Kuzma earns a 7% royalty, DLS earns a 3% royalty "for contributions to the development of the Work," and 3ABN earns a 6% royalty. 3ABN can purchase the books at a 60% discount. (*Id.* at ¶¶ 15, 9).

3ABN's financial statements and IRS Form 990's do not identify any revenue as royalties. (Doc. 3-12 through 3-16; Pickle Aff. ¶ 9). Upon information and belief, the 6% royalty earned by 3ABN is really an advertising and distribution fee paid to 3ABN, not a royalty *per se*.

Kuzma claims to have been "putting the finishing touches on the last few chapters" of her book by May 2004 (Pickle Aff. Ex. L at p. 366), a month before Shelton's divorce. DLS Publishing did not exist before November 30, 2004 (Pickle Aff. Ex. J). Therefore, royalties DLS receives from PPPA for Kuzma's book must pertain to Shelton's pre-divorce activities.

Remnant Becomes the Middleman Instead of D&L or DLS

By 2005, Remnant served as the middleman for Shelton's booklet orders, selling them to 3ABN at about the same price that D&L had. (Pickle Aff. Ex. E, M–Q). At least twice, Remnant had PPPA drop ship the booklets to 3ABN (Pickle Aff. Ex. M–N), raising the question of why 3ABN didn't order them directly from PPPA if Remnant did not have adequate stock. 3ABN could likely have purchased the booklets from PPPA at 10% to 32% less than what Remnant charged 3ABN. (Pickle Aff. ¶¶ 11–12). That 3ABN was paying a higher price strongly suggests that Shelton was still profiting from the sales of his booklets through a kickback scheme.

Remnant also handled the printing for Shelton's book, *The Antichrist Agenda*, around late 2004, from which an excerpt became *The Ten Commandments Twice Removed* (hereafter "TCTR") in 2006. (Pickle Aff. ¶ 13, Ex. R). Within the first four months of 2006, 3ABN purchased about 4.8 million of TCTR for about $3 million. (Pickle Aff. Ex. S–GG).

On July 13, 2006, Shelton filed a Financial Affidavit in connection with his still unsettled

marital property division case in which he fraudulently failed to disclose any royalties or profits attributable to his publishing activities, D&L, or DLS. (Doc. 3-9 at p. 3).

Brief History of Defendants' Investigations and Subsequent Litigation

In mid-August 2006, ecclesiastical journalists Gailon Arthur Joy and Robert Pickle launched independent investigations into Shelton's conduct due to the mishandling of Alyssa Moore's sexual assault allegations against Shelton, and the child molestation allegations against Tommy Shelton. (Pickle Aff. ¶¶ 14–15).

On September 19, 2006, former 3ABN counsel and board member Nicholas Miller wrote:

> I am quite certain that Danny received royalties on [*The Ten Commandments Twice Removed* book], probably to the tune of several hundred thousand dollars, although he is refusing to disclose the amount to his own board members. This is a gross conflict of interest and also an improper personal inurement that could cause the ministry to lose its tax exempt status if it came to light. It is the kind of thing that led to my leaving the board.

(Doc 3-29). Credible sources confirmed Miller's allegations, and by early 2007 the Defendants received information regarding Remnant's president Dwight Hall colluding with Shelton to hide Shelton's royalties from the 3ABN Board and Linda Shelton. (Doc. 3 at p. 7; Doc. 3-34). This information was deemed even more credible since it also contained allegations that Remnant was making large payments to Hall-controlled companies, and all these allegations were affirmed by Remnant's Form 990 filings, and by websites operated by the state of Michigan, Branch County, Michigan, and Millennium Enterprise LLC. (Doc. 3 at Table 4; Pickle Aff. ¶ 16, Ex. HH–JJ).

The Defendants published an investigative report about Dwight Hall's alleged collusion with Shelton. (Pickle Aff. Ex. KK). Remnant's counsel expressed familiarity with that report some time prior to the Defendants filing in this Court their motion to compel. (Pickle Aff. ¶ 17).

The Defendants in their motion to compel cited the underlying complaint (hereafter "Complaint") in regards to its references or allusions to a) defamation *per se* (transferring to

some extent the burden of proof to the Defendants), b) allegations that 3ABN's directors had enriched themselves in violation of the Internal Revenue Code, and c) Shelton's alleged failure to disclose his royalties earned from Remnant in his divorce proceedings and to the 3ABN Board. (Doc. 3 at p. 3). The Defendants in their answer to the Complaint specifically charged that Shelton "treats [3ABN] as his own asset and purposely profits from the same," and that he "inappropriately redirect[s] large sums to his personal benefit with and without properly constituted corporate authority." (Pickle Aff. Ex. LL at pp. 2-4).

Remnant refused to produce any documents in response to the Defendants' subpoena which was served on March 31, 2008. Remnant took the position that not even documents pertaining to Shelton's royalties were relevant. The Defendants therefore filed their motion to compel on May 5. Remnant's response to that motion contained no affidavits or exhibits, and no denials of the basic allegations the Defendants had uncovered and reported upon. (Doc. 6, 7).

Magistrate Judge Ellen Carmody issued her order regarding the motion to compel on June 20, 2008. Remnant then filed a motion to amend order on June 27, 2008, "pursuant to Fed. R. Civ. P. 59(e)." (Doc. 25). Because Remnant's motion was a motion to reconsider, the Defendants were prohibited by Local Rule 7.4(b) from responding. Magistrate Judge Carmody issued her order denying Remnant's motion to amend order on July 28, 2008. On August 8, 2008, Remnant filed the instant Notice of Appeal without conferring with or notifying the Defendants.

ARGUMENT

I. REMNANT'S APPEAL AS FILED IS INCOMPLETE

Remnant states in its brief filed with its Notice of Appeal:

> From the bench, Magistrate Carmody also ordered that the documents be submitted for *in camera* review to the Massachusetts District Court for a determination of relevancy.

(Doc. 34 p. 2). Local Civil Rule 72.3(a) specifically states in relevant part:

> In any case in which the decision of the magistrate judge is reflected only in an oral opinion on the record, the appealing party shall provide the district judge with a transcript of the oral opinion, ...

Neither Magistrate Judge Carmody's written order of June 20 nor her order of July 28 states that she ordered from the bench that the documents be submitted for *in camera* review to the Massachusetts District Court for a determination of relevancy. Remnant should therefore have filed a transcript of the June 16 hearing, which it has failed to do. The order of July 28, 2008, must therefore be affirmed because Remnant's appeal as filed is incomplete.

II. STANDARD OF REVIEW DICTATES THAT ORDER OF JULY 28 BE ADOPTED

A. Remnant Did Not Appeal the Order of June 20, 2008

Rather than appeal the original order of June 20, 2008, Remnant instead filed a motion on June 27 to amend that order "pursuant to Fed. R. Civ. P. 59(e)." (Doc. 25). Remnant now appeals the order of July 28 on that Rule 59 motion to reconsider. Since any appeal from the order of June 20 would now be untimely, the Court is limited by the standard of review applicable to motions to reconsider.

B. Remnant's Motion Fails Under Proper Standard of Review

Under Rule 59, motions to reconsider may be granted if there is a clear error of law; newly discovered evidence not previously available; an intervening change in controlling law; or to prevent manifest injustice. *See Gencorp, Inc. v. American International Underwriters*, 178 F. 3d 804, 834 (6 Cir. 1999). Additionally, Local Rule 7.4(a) states:

> Grounds - Generally, and without restricting the discretion of the Court, motions for reconsideration which merely present the same issues ruled upon by the Court shall not be granted. The movant shall not only demonstrate a palpable defect by which the Court and the parties have been misled, but also show that a different disposition of the case must result from a correction thereof.

Clearly, Remnant's contention that the documents sought are irrelevant is but the same issue

already ruled upon by this Court. Remnant's contention that the Defendants will be allowed "access to documents that may later be prohibited" is also not new, since Remnant's counsel informed the Court in the hearing of June 16, 2008, that the Plaintiffs' June 25 motion pertaining to the question of relevancy would be filed within days in the District of Massachusetts.

Remnant presents no clear error of law, no newly discovered evidence not available by June 16, no intervening change in controlling law, no evidence of manifest injustice, and no palpable defect by which the Court or the parties have been misled. The order of July 28, 2008, must therefore be affirmed.

III. DEFENDANTS BETTER MEET GROUNDS FOR MOTION TO RECONSIDER

A. Newly Discovered Evidence Not Previously Available

Invoices, contracts, and other documents produced by the Plaintiffs demonstrate that Remnant replaced D&L as the middleman for 3ABN's purchases of Shelton's booklets. The only conceivable reason why 3ABN did not purchase the booklets directly from PPPA in order to obtain a cheaper price is so that Shelton could still line his pockets with 3ABN monies, using Remnant as the conduit instead of D&L. Also, while the Defendants have known that Shelton attributed his royalties to D&L, not until the Plaintiffs produced the *Mending Broken People* contract did the Defendants have proof that royalties were paid to DLS rather than to Shelton, royalties attributable to Shelton's pre-divorce activities. Since the Plaintiffs produced these documents on June 20, 2008, none of this evidence was available to the Defendants when they filed their motion to compel, or at the hearing of June 16, 2008.

B. Remnant Seeks to Mislead This Court

Remnant's counsel insisted that the Defendants had "produced no documents that support" the claims of their sources. (Doc. 7 at p. 5). To the contrary, not only did the Defendants demonstrate from 3ABN and Remnant's Form 990's that the sources' claims were correct (Doc.

3 at Tables 2–3), but the Defendants' investigative report, with which both Remnant and its counsel were familiar, documented ownership of aircraft by and Remnant's lease of a building from Hall-controlled companies, details revealed to the Defendants by their sources. (Doc. 3 at p. 7; Pickle Aff. ¶¶ 16–17, Ex. KK). The insistence that the Defendants had not produced any documents to substantiate the claims of their sources therefore constituted a fraud upon the court.

A second and most glaring fraud upon the court perpetrated by Remnant, even in the instant appeal, is Remnant's ongoing claim that not even documents pertaining to Shelton's royalties received from Remnant are relevant, simply because the word "Remnant" is not found in the Complaint! The Supreme Court has held that "discovery is not limited to issues raised by the pleadings, for discovery itself is designed to help define and clarify the issues," nor is it "limited to the merits of a case, for a variety of fact-oriented issues may arise during litigation that are not related to the merits." *See Oppenheimer Fund Inc. v. Sanders*, 427 U.S. At 351. Thus, the mere omission of the word "Remnant" from the Complaint cannot overrule the voluminous documentation that all points to Remnant's serving as a conduit for the channeling of monies from 3ABN into Shelton's pockets. The requested documents are clearly relevant to allegations against Shelton of private inurement and the hiding of assets and income, and are discoverable.

IV. REMNANTS' ARGUMENTS FURTHER REFUTED

A. The Subpoenaed Documents Are Relevant to the Underlying Case

Voluminous documents submitted to this Court with the motion to compel clearly proved relevance, and the additional evidence discovered since the hearing of June 16, 2008, makes it increasingly clear that Magistrate Judge Carmody correctly ruled on that question.

B. Defendants' Third-Party Subpoenas Neither a Delay Tactic Nor Overbroad

The Plaintiffs and their ally Dwight Hall are the ones who have utilized delaying tactics, not the Defendants, delaying discovery by months and requiring additional litigation. (Pickle Aff.

¶ 20, Ex. MM at p. 2, Ex. NN at ¶ 1). Of six non-parties subpoenaed, all but Remnant were going to comply, and none but Remnant claimed that the subpoenaed documents were irrelevant, for they certainly knew better. (Pickle Aff. ¶¶ 21, Ex. MM at pp. 7–9, Ex. NN at ¶¶ 17–18).

Since Shelton hid his royalties from 3ABN, 3ABN would not have record of them, and thus the Defendants cannot get such records from 3ABN. But the Defendants have consistently maintained that any documents the Plaintiffs belatedly produce may need to be challenged because of Nicholas Miller's allegation of the fraudulent alteration of financial documents by 3ABN. (Pickle Aff. ¶ 22, Ex. OO). Thus some duplication is required, particularly since the amount in controversy could easily be $3 million. (Pickle Aff. Ex. MM at pp. 10–11).

C. Access to Documents That May Later Be Prohibited: A Moot Concern

While it is true that the U.S. District Court in Massachusetts has the ultimate say as to the scope of discovery in the underlying case, it is also true that the Western District of Michigan has already ruled that "the relevance of the documents [subpoenaed from Remnant] seems clear." (Doc. 24). It is highly unlikely that the District of Massachusetts will declare to be irrelevant what the Western District of Michigan has already declared to be relevant.

Remnant's filed opposition to the Defendants' motion to compel did not request *in camera* review by the District of Massachusetts, but it did request the following:

> Therefore, even if this Court determines that [the documents] are discoverable, they should be kept confidential by a protective order pursuant to Fed. R. Civ. P. 26(c) ....

(Doc. 7 at p. 4, Doc. 6 at p. 2). In her June 20, 2008, order, Magistrate Judge Carmody correctly noted that "there is already a protective order in the Massachusetts case," which was issued on April 17, 2008. She therefore ordered that Remnant produce responsive documents "subject to the Protective Order already entered in the underlying case." Remnant therefore obtained the legal protection it had sought for and requested, protection it already had available to it more

than two weeks prior to the Defendants' filing their motion to compel.

The legal protections of the confidentiality order of April 17, 2008, therefore moot the confidentiality concerns underlying this portion of Remnant's argument.

CONCLUSION

The order of July 28, 2008, denying Remnant's Rule 59(e) motion to amend order should be affirmed as that motion fails to survive the appropriate standard of review. The documents subpoenaed from Remnant are relevant to the claims and defenses of both sides of the underlying controversy. The Defendants' third-party subpoenas are not abusive.

In the June 16, 2008, hearing, Magistrate Judge Carmody thought that there wasn't evidence in the record concerning entities other than 3ABN and Shelton, but she allowed the Defendants to later seek documents from Remnant pertaining to those other entities. In actuality, note 14 of Doc. 3-12 through Doc. 3-14 documented that, *inter alia*, D&L and DLS were indeed organizations related to 3ABN. Given the further evidence discovered since the June 16, 2008, hearing pertaining to the critical role of payments to Shelton through DLS, the Defendants seek a clarification of the July 20 order that documents concerning direct or indirect payments from or to Shelton by definition include indirect payments to him through D&L and DLS. Remnant's counsel represented that he did not oppose such production once Remnant's appeals are exhausted, though he was not authorized by Remnant to commit. (Pickle Aff. ¶ 23, Ex. PP–QQ).

Respectfully submitted,

Dated: August 20, 2008

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