UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

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.08-MC-7 (RHK/AJB)

PLAINTIFF DANNY SHELTON'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO AMEND ORDER

INTRODUCTION

Plaintiff Danny Shelton opposes Defendant Robert Pickle's Motion to Amend the Order of this Court issued on March 28, 2008 [ECF Doc. 28], which ordered that the response to Pickle's third-party subpoena served on MidCountry Bank, N.A., be produced **under seal** to the Massachusetts court in which the underlying case is venued. Pickle wants to receive the documents directly, thereby frustrating the Court's intention to allow the Massachusetts court to review the documents first and to figure out which ones should be seen by the Defendants.

Pickle's motion "to amend" is in substance a motion to reconsider governed by D. Minn. LR 7.1(g), and as such should be denied because (1) he failed to obtain leave of the Court per the procedure under that rule; and (2) there are no

"compelling circumstances" that would justify modifying this Court's March 28 Order.

FACTS

The background facts are set forth in Plaintiff's original motion papers [ECF Docs. 1-4] and will not be repeated here, except to say in summary that the underlying lawsuit has a defamation count arising out of statements made by the Defendants about the Plaintiffs on their various internet forums, and that by no stretch of logic could the statements that underlie the defamation claims make *all* of Plaintiff Shelton's bank records since 1998 relevant. It is within the Defendants' power to say which transactions they based their allegedly defamatory remarks on, in which case those records could be readily identified and produced for inspection. Instead, Defendants have turned the litigation into a fact-finding spree to investigate *all* of Plaintiffs' financial transactions, apparently hoping to find something embarrassing or at least hard to explain.

The Court is aware that Plaintiffs had filed a Motion for Protective Order on December 18, 2007, seeking to preclude discovery of Plaintiffs' confidential donor information and seeking to preclude the disclosure, dissemination or publication of the parties' confidential or proprietary financial, business and operational information to third-parties. [ECF Doc. 40, Hayes Aff., Ex. H]. Ultimately the Massachusetts court issued a "Confidentiality and Protective Order" on April 17, 2008 that did not address the scope of discovery issue. (*See* Exhibit A to the Affidavit of Robert Pickle [ECF Doc. 31]). Instead, it merely

created a procedure for the parties to follow to designate materials produced by parties and non-parties as confidential.

The Massachusetts Judge, F. Dennis Saylor, then called a status conference. (Affidavit of M. Gregory Simpson, Ex. A – Affidavit of Jerrie M. Hayes at ¶ 26). At the conference on May 7, 2008, the parties discussed the fact that they were negotiating regarding the permitted scope of discovery, and that those negotiations had not yet reached an impasse or an agreement. (*Id.*). Then-counsel for the Plaintiffs, Jerrie Hayes, informed the Court that she anticipated the filing of a Motion for Protective Order to limit the scope of discovery. (*Id.*) Defendants, who were both in attendance, made no objection to these characterizations and did not claim they had satisfied the good faith requirements of the discovery rules concerning the relevance objections. (*Id.*). Plaintiffs contemplate they will file a motion in the Massachusetts court to limit the scope of discovery, which will address the MidCountry documents at issue here, within one week of this filing. (Simpson Aff. ¶ 3).

ARGUMENT

PICKLE'S MOTION SHOULD BE DISMISSED AS AN IMPROPER MOTION TO RECONSIDER.

As a threshold matter, Defendant Pickle's motion should be rejected as an improper motion to reconsider. Local Rule 7.1(g) states:

> Motions to reconsider are prohibited except by express permission of the Court, which will be granted only upon a showing of compelling circumstances. Requests to make such a motion, and responses to such requests, shall be made

> by letter to the Court of no more than two pages in length, a copy of which must be sent to opposing counsel.

D.Minn.LR 7.1(g). The Court will grant motions to reconsider "only upon a showing of compelling circumstances." *Transclean Corp. v. Bridgewood Servs., Inc.,*134 F. Supp. 2d 1049, 1060 (D. Minn. 2001). A motion to reconsider under LR 7.1(g) is the functional equivalent of a motion to alter or amend the judgment under Rule 59(e), Fed. R. Civ. P. *DuBose v. Kelly,* 187 F. 3d 999, 1002 (8th Cir. 1999). The Court allows such motions to "afford an opportunity for relief in extraordinary circumstances," not to relitigate old issues. *Dale & Selby Superette & Deli v. United States Dep't of Agric.,* 838 F. Supp. 1346, 1348 (D. Minn. 1993). Motions for reconsideration therefore serve a limited function:

> to correct manifest errors of law or fact or to present newly discovered evidence. Such motions cannot in any case be employed as a vehicle to introduce new evidence that could have been adduced during pendency of the summary judgment motion. The nonmovant has an affirmative duty to come forward to meet a properly supported motion for summary judgment. . . . Nor should a motion for reconsideration serve as the occasion to tender new legal theories for the first time.

Hagerman v. Yukon Energy Corp., 839 F.2d 407, 414 (8th Cir. 1988).

As a threshold matter, Pickle's motion should be denied due to his failure to obtain "express permission of the Court" by means of a letter to the Court, as required by Rule 7.1(g). Pickle made no effort to comply with the rule, his motion is procedurally deficient, and his motion should be denied without reaching the merits.

If the Court were to reach the merits of Pickle's motion, the narrow issue would be whether the Massachusetts court's issuance of a protective order on April 17, 2008, is a "compelling circumstance" that justifies reconsideration of the Court's March 28 Order. It is hard to see how an event that this Court contemplated in its ruling could be a compelling reason to revise the very same ruling. This Court's memorandum states:

> 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. This Order shall not preclude the parties from seeking relief from Magistrate Judge Hillman as to the disclosure of the documents produced pursuant to the MidCountry Bank subpoena.

[ECF Doc. 28 at p. 3]. Because the Court knew that Judge Hillman would at some point address the issues of relevancy and confidentiality, it deferred those issues to Judge Hillman. The Court contemplated the Protective Order that issued in Massachusetts, and it therefore does not constitute "compelling circumstances" such as would justify revisiting the Court's Order. Pickle's motion should be denied on this basis as well.

CONCLUSION

Defendant Pickle's motion to amend is a motion for reconsideration governed by D.Minn.LR 7.1(g), and as such fails due to Pickle's failure to obtain

leave of the Court to file the motion and because no "compelling circumstances" exist to revisit the Court's March 28 Order. Plaintiffs respectfully request that Pickle's motion be denied.

Dated: June 18, 2008.

By: s/M. Gregory Simpson

Gerald S. Duffy (# 24703)
M. Gregory Simpson (#204560)
Wm. Christopher Penwell (#161847)
Kristin L. Kingsbury (#346664)
Siegel, Brill, Greupner, Duffy & Foster, P.A.
1300 Washington Square
100 Washington Avenue South
Minneapolis, MN 55401
(612) 337-6100
(612) 339-6591 – Facsimile

Attorneys for Three Angels Broadcasting, Inc. and Danny Shelton