UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF ILLINOIS

Three Angels Broadcasting Network, Inc.,
an Illinois non-profit corporation, and
Danny Lee Shelton, individually,

Case No. 08-MC-16

Plaintiffs,

v.

Gailon Arthur Joy and Robert Pickle,

Defendants.

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION TO QUASH, MODIFY OR STAY SUBPOENA *DUCES TECUM*

INTRODUCTION

Plaintiffs Three Angels Broadcasting Network, Inc ("3ABN") and Danny Lee Shelton bring this motion to quash, modify or stay the subpoena *duces tecum* issued by this Court on December 28, 2007 and served by *pro se* Defendants Robert Pickle and Gailon Joy upon "Alan Lovejoy or Keeper of the Records at Gray Hunter Stenn LLP" ("Gray Hunter"). This motion is brought in the Court from which the subpoena issued because Fed. R. Civ. P. 45 (c)(3) contemplates that motions to quash subpoenas be brought before the "issuing" court. *See also* Fed. R. Civ. P. 37(a)(2) (motion for an order to a nonparty is made in the court where discovery is or will be taken).

The issues raised herein will also be brought before the Court in which the case is pending, in Massachusetts, as part of a broader motion to control and curtail third party discovery activities and restrict the scope of permissible discovery to issues in the case.

Plaintiffs request that the Court quash the subpoena or, in the alternative, order that Gray Hunter's response to the subpoena be deferred until the Massachusetts court has an opportunity to consider the matter.

INTRODUCTION

The subpoena was apparently served on March 17, 2008. Lovejoy is 3ABN's outside accountant, and Gray Hunter is his firm. The subpoena seeks all of Gray Hunter's records regarding 3ABN and Danny Shelton from 1998 to present. It was issued in connection with litigation pending in the United States District Court for the District of Massachusetts captioned *Three Angels Broadcasting Network, Inc. and Danny Lee Shelton v. Gailon Arthur Joy and Robert Pickle* (No. 07-40098-FDS (D. Mass.)). Gray Hunter had initially objected to the subpoena and refused to comply, but now advises that it will produce all responsive documents because it does not wish to incur the expense of defending against a motion to enforce the subpoena.

Defendants' cover letter explaining the purpose of the subpoena indicates that the requested information is necessary for two reasons: (1) to respond to discovery requests served by Plaintiffs on Defendants; and (2) to defend against three factual allegations contained in Paragraph 46 of the Complaint involving several specific financial transactions. Manifestly, these reasons do not support the scope of the requests, which extend to every financial record of 3ABN and Danny Shelton since 1998. Plaintiffs submit that Defendants seek this information as part of a wide-ranging fishing expedition for unknown misdeeds by the Plaintiffs, which nobody has reason to believe occurred, and not for any purpose related to the litigation at hand.

STATEMENT OF RELEVANT FACTS

On April 6, 2007, Plaintiffs Three Angels Broadcasting Network and its founder, Danny Lee Shelton, filed a lawsuit in the United States District Court for the District of Massachusetts against Gailon Joy and Robert Pickle (collectively "Defendants"). (*See* Exhibit B to the Affidavit of M. Gregory Simpson, (hereafter "Simpson Aff."), attached as Exhibit 1 to this memorandum). The Complaint alleges that, by registering, operating and maintaining internet websites that improperly incorporate Three Angel's trademarked moniker "3ABN" in the websites' domain names, URL's, metatags, and promotional materials, Defendants Pickle and Joy have violated the Lanham Act and caused Plaintiffs damages. *Id*. The Complaint also claims that Defendants have used their infringing websites, as well as other mediums, to engage in a campaign of disparagement and defamation of the Plaintiffs, which activity by Defendants has damaged Plaintiffs' reputations, goodwill, and economic donor relations. Defendants answered by denying the allegations of the Complaint and made no counterclaims or third-party complaints. (Ex. C to Simpson Aff.).

On April 17, 2008, the Massachusetts Court issued a "Confidentiality and Protective Order" establishing a procedure for designating as Confidential all documents produced in discovery in this case, including documents produced by third parties. (Ex. D to Simpson Aff.). The court's order does not address the topic of what scope of discovery should be permitted, but merely provides a procedure for designating material that is produced as confidential.

The instant Subpoena was signed and issued by the Clerk of this Court on December 28, 2007 to "Alan Lovejoy or Keeper of the Records at Gray Hunter Stenn

LLP", a non-party to the underlying litigation. (Ex. A to Simpson Aff.). The subpoena seeks every imaginable record obtained or generated by Gray Hunter in connection with its accountancy services for 3ABN and Danny Shelton dating back to 1998. For example, it seeks "All contracts, agreements, work papers, engagement letters, management letters, management representation letters, and/or other documents arising from any auditing services rendered to 3ABN, as defined herein." Another request seeks every tax record of 3ABN. Identical requests seek the same information for Danny Shelton. No effort is made to restrict the requests to matters raised in the Complaint and Answer.

A cover letter accompanying the subpoena explains Defendants' theory as to why the documents are necessary for the litigation. (Ex. E to Simpson Aff.). The letter quotes three subparagraphs from the complaint, as follows:

> 46. Gailon Joy and Robert Pickle have published numerous untrue statements that 3ABN and its President Danny Shelton have committed financial improprieties with donated ministry funds. Among those untrue statements made by Joy and Pickle are, *inter alia,* that:
>
> * * *
>
> e. The 3ABN Board of Directors has failed in its responsibilities to oversee and manage 3ABN's financial assets….
>
> g. 3ABN Board members have personally enriched themselves as officers and directors of 3ABN in violation of the Internal Revenue Code.
>
> h. Danny Shelton wrongfully withheld book royalties from 3ABN and refused to disclose those royalties in proceedings before a court of law related to the distribution of marital assets.

Defendants' cover letter then posits two reasons for the subpoena:

> We have also been asked to describe under oath what "accounting process" we "conclude 3ABN failed to set up" "to account for sums gifted."
>
> In preparing our defense against these and other allegations, we need to examine various financial documents concerning Danny Shelton, 3ABN, their DBA's, and the corporations they have jointly or separately controlled….

Gray Hunter Stenn's counsel confirmed their receipt of the subpoena on March 17, 2008. (Simpson Aff. ¶ 6). Gray Hunter timely objected to the subpoena on a number of bases, but recently withdrew their objections and have advised that on June 24, 2008, they intend to comply with the subpoena with no restrictions, other than that all documents produced will be designated as "Confidential" under the Protective Order issued by the court in Massachusetts. (Simpson Aff. ¶ 6).

The subpoena seeks the same information as has been requested in Defendant Pickle's Requests for Production of Documents, request numbers 9, 10, 11 and 12, 21, 22, 25, and 26, except that those requests were more narrowly tailored. (Ex. F to Simpson Aff.).

A motion to restrict the scope of permissible discovery, including the third party discovery at issue in this motion, is being prepared at this moment. Plaintiffs expect that the motion will be on file in the Massachusetts court in which this case is pending by the time the present motion is heard. (Simpson Aff. ¶ 8).

ARGUMENT

I. THE SUBPOENA SHOULD BE QUASHED OR MODIFIED.

Under the Federal Rules, a court *must* quash or modify a subpoena if it "subjects a person to undue burden." Fed. R. Civ. P. 45(c)(3)(A). A court *may* quash or modify a subpoena "to protect a person subject to or affected by the subpoena" if it requires

disclosing a trade secret or other confidential commercial information. Fed. R. Civ. P. 45(c)(3)(B). A subpoena of third party accounting records must request records that exhibit a nexus to the issues in the complaint. *See Federal Deposit Ins. Corp. v. Mercantile Nat'l Bank of Chicago*, 84 F.R.D. 345, 350 (N. D. Ill. 1979) (ordering plaintiff to modify subpoena of accounting records and submit to court for approval). Accordingly, the Court should quash the Subpoena or enter a protective order prohibiting or limiting the discovery or disclosure sought therein.

A. Plaintiffs Have Standing to Object to the Subpoena

The Subpoena demands production of Plaintiffs tax and accounting records retained by an outside accounting firm. When a party has "a personal right or privilege with respect to the subject matter being requested in the subpoena," that party has standing to dispute the enforceability of the subpoena. *QC Holdings, Inc. v. Diedrich*, No. 01-2338-KHV, 2002 WL 324281, at *1 (D. Kan. Feb. 21, 2002). A party has a clear privacy interest in its own financial and banking affairs that gives it standing to make a motion to quash a subpoena served on a non-party financial institution. *Arias-Zeballos v. Tan*, No. 06-1268-GEL, 2007 WL 210112, at *1 (S.D.N.Y. Jan. 25, 2007); *see also Schmulovich v. 1161 Rt. 9 LLC*, No. 07-597-FLW, 2007 WL 2362598, at *2 (D.N.J. Aug. 15, 2007)(holding that personal rights claimed with respect to bank accounts gave standing to challenge a non-party subpoena served upon a financial institution). 3ABN and Danny Shelton clearly have a right with respect to their own financial records retained by their accounting firm; thus, Plaintiffs have standing to object to the Subpoena.

B. The Subpoena is Unduly Burdensome and Must be Quashed

1. The Subpoena Seeks Information from a Non-Party that Could and Should be Sought from a Party.

Federal Rule of Civil Procedure 45(c)(3)(A) requires a court to quash or modify a subpoena if it causes a person undue burden. When a court evaluates the necessity for a subpoena, it must give special weight to any burden placed upon a non-party to the litigation. *See Cusamano v. Microsoft Corp.*, 162 F.3d 708, 717 (1st Cir. 1998)(citing *Haworth, Inc. v. Herman Miller, Inc.*, 998 F.2d 975, 978 (Fed. Cir. 1993)). It is well settled that the discovery process should not seek to burden non-parties without a showing that the material requested was wholly unavailable from the party in the main litigation. *Haworth*, 998 F.2d at 977.

Both Defendant Pickle's Requests for Production of Documents and the instant Subpoena seek the exact same financial records for 3ABN and Danny Shelton, except that the Subpoena makes no pretense of limiting its scope to relevant material. By failing to first exhaust their efforts to obtain the materials through party-discovery, and instead seeking the documents and information from Gray Hunter, Defendants are forcing a third party to undertake discovery activities for them, and are placing unnecessary responsibility for party-discovery on a non-party. This creates an unreasonable and undue burden for a non-party. Defendants should be required to exhaust all means of obtaining such information from Plaintiffs before resorting to third party discovery. The Subpoena is unduly burdensome and, according to Federal Rule 45, must be quashed, leaving the issues of confidentiality and relevance to be heard in their proper discovery forum.

2. The Subpoena Is Overly Broad

The Federal Rules permit discovery of non-privileged material "relevant to any party's claim or defense." Fed. R. Civ. P. 26(b). The scope of discovery under a subpoena is the same as the scope under Rule 26(b). *See 9A Wright and Miller, Federal Practice and Procedure, § 2459 (2d ed. 1995).* Thus, in making a determination as to whether a subpoena subjects a person to undue burden under Rule 45(c)(3)(A), a court must examine whether a subpoena is overly broad or contains a request for irrelevant information. *See id.* In addition to breadth and relevance, an evaluation of undue burden should include the court's consideration of the party's need for the documents, the time period covered by the request, and the particularity with which the documents are described. *Moon v. SCP Pool Corp.*, 232 F.R.D. 633, 637 (C.D.Cal. 2005). The instant Subpoena is unduly burdensome because it is overly broad on its face and because it subjects Plaintiffs to an invasion of privacy.

A Subpoena that is facially overbroad is unduly burdensome. *See Linder v. Calero-Portocarrero,* 180 F.R.D. 168, 174 (D.D.C. 1998); *see also Mattel, Inc. v. Walking Mountain Productions,* 353 F.3d 792, 813-14 (quashing a non-party subpoena that was "way too broad" and included no "attempt to tailor the information request to the immediate needs of the case."). The Subpoena at issue is overly broad on its face and amounts to nothing more than a shot into darkness, aimed at finding some financial 'skeleton' with which Defendants might embarrass, harass and further impugn Plaintiffs.

First, the Subpoena requests accounting records dating back to 1998 when, in fact, the earliest occurrence of any event that might arguably be considered relevant to the Plaintiffs' claims is 2001. [*See* underlying Complaint and Answer, and Exs. A and B to

Simpson Aff.]. The Subpoena is overly broad on its face by seeking financial records from *years* before the facts giving rise the underlying litigation took place.

Second, the Subpoena requests 3ABN's and Shelton's personal accounting information and tax returns, when the financial condition of the Plaintiffs is not at issue in the underlying litigation, when Plaintiff Shelton is not claiming to have suffered personal financial damages, and when Defendants have done nothing to prove 3ABN's or Shelton's financial affairs are relevant to either the trademark or defamation claims. Production of Plaintiffs' private and confidential accounting and tax records serves no purpose other than to embarrass, oppress and invade their privacy.

Finally, no attempt was made, in causing the Subpoena to issue, to tailor the information and document requests to any specific needs relating to the underlying litigation. By his blanket subpoena exhibit seeking all accounting and tax records of the Plaintiffs, Defendants have failed to describe the documents sought with particularity or to even specify the information requested by category. Both Rules 45(c) and 26(b) prohibit such an abuse of the discovery process.

The Defendants' stated reasons for seeking the accounting records, from their cover letter (Ex. E to Simpson Aff.), are manifestly inadequate. First, Defendants state they need the records to respond to discovery served *on them*. Parties responding to discovery are only required to produce what is in their custody or control, and the notion that a party who lacks information sought in discovery can use Rule 45 to get the information from others is novel, but not supportable. Obviously, records of a third party are not required to respond to discovery requests seeking information in the possession of a party.

The second reason Defendants suggest as a justification for the accounting records is that they relate to paragraph 46 of the Complaint, in which Plaintiffs allege that Defendants' accusations of financial self-dealing are defamatory. There are a limited number of transactions that Defendants allege to have been improper, and Defendants' cover letter (Ex. E to Simpson Aff.) states that Defendants already have documentation of them from 1998 onward. Defendants are entitled to evidence reasonably calculated to help them prove the truth of their remarks regarding those specific transactions, but review of *all* of the Plaintiffs' financial records is manifestly not necessary for that purpose. What Defendants are in fact hoping for is to discover some previously unknown financial impropriety – an obviously improper purpose.

The Subpoena is unduly burdensome because it is overly broad on its face and fails to describe, by category or document, the information sought. The Subpoena is unduly burdensome to Plaintiffs because it subjects them to an invasion of their privacy that is unwarranted by the claims in the underlying action. Pursuant to Rule 45, the Subpoena must be quashed.

II. THE COURT SHOULD STAY AND REMIT ENFORCEMENT OF THE SUBPOENA TO THE UNITED STATES DISTRICT COURT IN MASSACHUSETTS

A. The Court has Discretion to Stay and Remit Enforcement of the Subpoena

The Court from which the instant Subpoena issued has jurisdiction to resolve Plaintiffs' motion to quash. *See* Fed. R. Civ. P. 45(c)(3); Fed. R. Civ. P. 37(a)(2). This Court also has the ability to stay enforcement of the Subpoena and to remit the discovery dispute to the District of Massachusetts, which has jurisdiction over the underlying

litigation. *See Floorgraphics, Inc. v. News American Marketing In-Store Services, Inc.*, No. 07-27 (PJS/RLE), 2007 WL 1544572, at *2 (D. Minn.).

"In the context of Rule 45, 'remit' does not denote a literal transference of a Motion, but rather, a deferral of a ruling until the Court responsible for the underlying action has an occasion to address the issue." *Id.* (citing *In re Sealed Case*, 141 F.3d 337 (Fed. Cir. 1998)); *see also In re Digital Equipment Corp.*, 949 F.2d 228, 231 (8th Cir. 1991)(stating that the court with initial jurisdiction over an objection may, in its discretion, remit the matter to the court where the action is pending); *In re Orthopedic Bone Screw Products Liability Litigation*, 79 F.3d 46, 48 (7th Cir. 1996)(rejecting the "transfer" of discovery disputes but advocating stays in courts where discovery is being conducted with the filing of motions for protective orders in the court where the underlying litigation is pending). Because Plaintiffs are seeking a ruling on the permissible scope of third party discovery in the District of Massachusetts that is directly related to its objections to the instant Subpoena, deferring to that court's resolution of the discovery dispute is soundly within this Court's discretion.

B. Deferral to the Massachusetts Court is Appropriate

Although Federal Rule of Civil Procedure 45 requires the court that issued the subpoena to govern its enforcement, the "concept that the district court in which an action is pending has the right and responsibility to control the broad outline of discovery" remains unchanged. *Static Control Components, Inc. v. Darkprint Imaging*, 201 F.R.D. 431, 434 (M.D.N.C. 2001)(citing *Fincher v. Keller Industries, Inc.*, 129 F.R.D. 123, 125 (M.D.N.C. 1990)). A party's discovery rights in one district should reach no further than they do in the district having jurisdiction over the action. *Id.*

In accordance with the above authority, an Order staying enforcement of the Subpoena and remitting the discovery dispute to the District of Massachusetts will help to ensure uniformity. One or both Defendants have caused at least five subpoenas to be served upon non-parties in various districts to date. Given these numerous and extensive demands, a failure to stay and remit would likely result in the creation of inconsistent parameters for Defendants' discovery from other non-parties.

Remitting the discovery dispute to the court having jurisdiction over the underlying action promotes judicial efficiency by allowing this Court to avoid having to learn a record that is already well-known in another District. That court "is more familiar with the factual and legal issues underlying [the] cause of action and is in a better position to rule on the relevancy, undue burden and confidentiality of the [discovery] requests within the totality of the circumstances surrounding [the] litigation." *In re Schneider Nat'l Bulk Carriers*, 918 F. Supp. 272, 274 (E.D. Wis. 1996)). The District of Massachusetts is quite familiar with the parties and discovery in the litigation underlying this Subpoena. A decision by this Court not to defer to the District of Massachusetts' expertise in this particular action would waste judicial time and resources.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court issue an order quashing Defendants' December 28, 2007 subpoena *duces tecum* or, in the alternative, order the response to the subpoena be deferred until the Massachusetts court in which the underlying action is pending has an opportunity to rule upon the matter.

Dated: June 16, 2008.

Respectfully Submitted,

Three Angels Broadcasting Network, Inc.,
and Danny Lee Shelton

By: _/s/ Jennifer E. White_____
One of Their Attorneys

Charles L. Philbrick (ARDC #6198405)
Jennifer E. White (ARDC #6275527)
Holland & Knight, LLP
131 S. Dearborn
30th Floor
Chicago, IL 60603
Telephone: (312) 263-3600
Facsimile: (312) 578-6666
Email: jennifer.white@hklaw.com

-and-

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

CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that on June 16, 2008, she served this **MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION TO QUASH, MODIFY OR STAY SUBPOENA *DUCES TECUM*** upon all counsel of record, via U.S. Mail, postage pre-paid, and addressed as follows:

Mr. Robert Pickle
1354 County Highway 21
Halstad, MN 56548
***Pro Se* Defendant**

Gailon Arthur Joy
P.O. Box 1425
Sterling, MA 01564-1425
***Pro Se* Defendant**

Deanna L. Litzenburg
Mathis, Marifian, Richter & Grandy, Ltd.
23 Public Square, Suite 300
P.O. Box 307
Belleville, IL 62220
Attorneys for Gray, Hunter, Stenn, LLP

/s/ Jennifer E. White
Jennifer E. White
Attorney for Plaintiffs

5408920_v1