UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

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

Case No. 0:08-mc-7

Plaintiffs,

v.

Gailon Arthur Joy and Robert Pickle,

Defendants.

**PLAINTIFF DANNY SHELTON'S MEMORANDUM IN OPPOSITION TO DEFENDANT PICKLE'S MOTION TO DISMISS**

## INTRODUCTION

Instead of simply responding to Plaintiff Shelton's Motions to Quash and to Stay and Remit, Defendant Pickle ("Pickle") seeks a rather unconventional use of Rule 12[1] to dismiss Plaintiff's motions altogether. The primary rationale for Pickle's Motion to Dismiss, an assertion that Plaintiff Shelton lacks standing to challenge the subpoena *duces tecum* (the "Subpoena") issued to non-party MidCountry Bank ("MidCountry"), is simply incorrect. The Subpoena seeks the production of Plaintiff Shelton's personal bank records and those of two other non-party entities under Shelton's control, facts which, as will be discussed, are sufficient to grant Plaintiff standing to challenge the subpoena. More importantly, Pickle has failed to

[1] In light of Pickle's failure to cite to any Federal Rule or other authority providing him procedural grounds for the instant motion, it is assumed that Pickle meant to assert a "lack of standing" defense under Federal Rule of Civil Procedure 12.

provide any applicable legal authority warranting dismissal of Plaintiff's motions. Accordingly, Defendant Pickle's unorthodox Motion to Dismiss must be denied.

## ARGUMENT

Though unstructured and somewhat convoluted, Pickle's memorandum appears to make two arguments in support of dismissing Plaintiff's Motions to Quash and to Stay and Remit. First, Pickle appears to argue that because Plaintiff Shelton has not asserted a claim of privilege in relation to the information sought by the subpoena, there is no legal limitation upon Pickle's discovery of that information. Second, Pickle argues that because the records at issue belong to the bank, and because Shelton has not claimed any privilege in relation to the documents, Shelton lacks standing to challenge the instant subpoena.

In fact, however, Plaintiff Shelton's personal right and interest in the financial records at issue is sufficient to convey him standing to challenge the instant subpoena, even though a claim of legal privilege has not been made. Second, contrary to Pickle's implications otherwise, legal privilege is not the only limitation upon discovery, and it is precisely because the discovery at issue runs afoul of two other important limitations—relevance and undue burden—that Plaintiff Shelton's Motion to Quash should not be dismissed and, instead, Pickle's Motion to Dismiss should be denied.

### I. PLAINTIFF SHELTON HAS LEGAL STANDING TO CHALLENGE THE SUBPOENA AT ISSUE.

#### A. Shelton Need Only Assert a Personal Right to the Materials Subpoenaed to Have Standing to Challenge the Subpoena.

Though Pickle is correct that, *in general*, a party does not have standing to quash a subpoena served on a third party, he self-servingly cites only half of the well-established

exception to the general rule. When a party claims either a privilege ***or*** a personal right with respect to the subject matter requested, that party has standing to challenge the subpoena. *See, e.g. Stevenson v. Stanley Bostitch, Inc.,* 201 F.R.D. 551, 555 (N.D.Ga. 2001); *Transcor, Inc. v. Furney Charters, Inc.*, 212 F.R.D. 588, 590 (D. Kan. 2003); *United States v. Nachamie*, 91 F.Supp.2d 552, 558 (S.D.N.Y. 2000); *Windsor v. Martindale,* 175 F.R.D. 665, 668 (D.Colo. 1997); *Schmulovich v. 1161 Rt. 9 LLC,* No. 07-597 (FLW), 2007 WL 2362598 (D.N.J. 2007). In fact, this Court has recently acknowledged that a party who asserts a personal right relating to documents sought in a subpoena has sufficient standing to challenge the subpoena. *Floorgraphics, Inc. v. News American Marketing In-Store Services, Inc.*, No. 07-27 (PJS/RLE), 2007 WL 1544572, at *3 (D.Minn. 2007).

Plaintiff has standing to challenge the Subpoena because he has asserted a personal right to the records sought therein. The Subpoena seeks Plaintiff's personal financial records as well as the records of DLS Publishing and D&L Publishing, non-party entities under Plaintiff's sole control. The federal courts have found that an interest in one's financial affairs is sufficient to grant standing for a motion to quash a subpoena issued to a non-party financial institution. *See Arias-Zeballos v. Tan,* No. 06 Civ. 1268, 2007 WL 210112, at *1 (S.D.N.Y. 2007) (collecting cases). Accordingly, Plaintiff has asserted a personal right, including an interest in nondisclosure of irrelevant personal matters, with respect to the records sought in the Subpoena. Pickle attacks Plaintiff's motion to quash for failing to cite a legal privilege. But, in accordance with the aforementioned law, Plaintiff is not required to assert a legal privilege. The fact that he asserts a personal right to the materials subpoenaed is enough to afford him standing to challenge the Subpoena.

Pickle also cites *United States v. Miller*, 425 U.S. 435 (1976) in support of the assertion that, absent a claim of privilege, a party has no standing to challenge a subpoena upon a non-party. Pickle's reliance on that authority, however, is misplaced. *Miller* involved a criminal defendant's invocation of the Fourth Amendment as a shield to a government subpoena for his bank records. *Id.* In citing to *Miller*, Pickle failed to demonstrate its relevance to a civil lawsuit and chose to avoid discussing the fundamental rule upon which the *Miller* decision was based, which is that the "Fourth Amendment does not prohibit the obtaining of information revealed to a third party *and conveyed by him to government authorities*…." *Id*. at 443 (emphasis added).

Here, Plaintiff Shelton has not relied upon his Fourth Amendment rights because Defendant Pickle is not a governmental actor, but merely an adversary in a civil proceeding who is inappropriately seeking access to Plaintiff's personal and confidential financial records. *Miller* is simply not an appropriate authority for determining whether Plaintiff has standing to challenge the instant Subpoena.

Pickle also relies upon *Clayton Brokerage Co. v. Clement* 87 F.R.D. 569 (D. Md. 1980) for the assertion that a party has no standing to challenge a subpoena to a nonparty without a claim of privilege. [Def.'s Mem. at p. 2]. At first blush, quotes from *Clayton Brokerage* taken out of context, as they are in Pickle's memorandum, do appear to stand for this proposition. In fact, the *Clayton Brokerage* court never actually held that a claim of privilege is required but, instead, cited an out-of-date version of secondary authority *Wright & Miller*, which asserted that proposition. *See Clayton Brokerage*, 87 F.R.D. at 571. However, *Wright & Miller* has since been updated[2] to include the rule that standing exists upon *either* a claim of privilege *or* a personal right to the documents sought. *See* 9 *Wright & Miller, Federal Practice & Procedure* § 2459.

[2] It should be noted that *Clayton Brokerage* was decided in 1980, prior to the 1991 amendments to Rule 45, when the rule for challenging a non-party subpoena was in flux.

Ironically, the defendant in *Clayton Brokerage* was actually held to lack standing because he "failed to identify a *personal right* on which a challenge to the subpoena may be based." *Clayton Brokerage*, 87 F.R.D. at 571 (emphasis added).

Pickle's cited authorities fail to supply a basis upon which to dismiss Shelton's Motion to Quash for lack of standing. Plaintiff is not a criminal defendant, Defendant is not a governmental actor, and the Fourth Amendment has not been relied upon in Shelton's Motions to Quash and to Stay and Remit the Subpoena. *Miller* is inapposite to a determination of the issues at hand. In addition, Pickle has grossly misapplied the holding in *Clayton Brokerage* by essentially cherry-picking quotes that support his arguments, without regard to the court's decision as a whole or, more importantly, to the current state of the law.

**B. Plaintiff Shelton Is The Proper Party to Challenge the Subpoena.**

Pickle also claims that either DLS Publishing, a non-party mentioned in the Subpoena, or MidCountry, not Plaintiff Danny Shelton, should be the ones filing motions to challenge the instant subpoena. Yet Pickle fails to acknowledge the undisputed fact that DLS Publishing is under the sole control of Plaintiff Shelton and, as such, Plaintiff (and Plaintiff alone) has standing to address the confidentiality and irrelevance of materials sought by Pickle pertaining to DLS Publishing. Pickle also misunderstands the protection offered by Fed. R. Civ. P. 45 to innocent third parties unduly burdened by a subpoena. MidCountry has "no dog in this discovery fight," and, as such, made the understandable decision not to expend resources objecting to the subpoena under Rule 45(c)(2)(B) or bringing a motion to quash. Contrary to Pickle's implications, however, Shelton's standing to challenge the subpoena is in no fashion diminished by MidCountry's refusal to mount a legal challenge to the subpoena.

The law is clear that, though Plaintiff Shelton might not assert a claim of legal privilege concerning the information sought by Pickle's subpoena *duces tecum*, he nonetheless has standing to challenge the subpoena if he has a personal right in the information at issue. The undisputed facts are clear that Shelton has a personal right and interest in his private financial information and in the confidential financial information of DLS Publishing that give him proper standing to challenge the instant subpoena. Pickle's motion to dismiss, which is neither procedurally appropriate nor legally supported, must be denied.

## II. PRIVILEGE IS NOT THE ONLY LIMITATION UPON DISCOVERY IMPOSED BY THE FEDERAL RULES OF CIVIL PROCEDURE.

Pickle also argues that, in the absence of privilege, Fed. R. Civ. P. 26(b) does not limit the discovery of confidential or private information. [Defendant's Memorandum in Support of Motion To Dismiss at p. 2]. This is incorrect. There are at least two additional limitations on discovery imposed by the Federal Rules of Civil Procedure, both of which are threatened by the instant subpoena.

As Pickle himself acknowledges by quoting from Rule 26(b)(1), the scope of discovery is also limited by the relevance of the information sought. "Parties may obtain discovery regarding any nonprivileged matter ***that is relevant*** to any party's claim or defense…." (emphasis added). Fed.R.Civ.P. 26(b)(1). In fact, relevancy is the touchstone of any discovery request. *EEOC v. Univ. of Penn.,* 850 F.2d 969, 979 (3rd Cir. 1988) (citing 8 *Wright & Miller, Federal Practice & Procedure* § 2008). Confidential information that does not establish a constitutionally protected privacy interest is nevertheless entitled to relevancy protection against unwarranted public disclosure resulting from discovery in federal civil litigation. *See Syposs v. United States*, 181 F.R.D. 224, 227 (W.D.N.Y. 1998).

In this case, Shelton's Motion to Quash is based, in part, on the argument that the information sought by Pickle's subpoena *duces tecum* is simply not relevant to the claims in Plaintiff's Complaint and that Pickle has failed to demonstrate that the Subpoena seeks production of information relevant to his defenses in the underlying litigation. Pickle failed to wait for resolution of Plaintiff's Motion for Protective Order, pending in the District of Massachusetts, before subpoenaing the documents from a third-party. And, as the Motion to Quash also argues, Pickle failed to tailor the subpoena to any identifiable and immediate need related to the underlying litigation and, instead, made an overly broad demand for MidCountry to produce documents from an irrelevant period of time, from irrelevant parties that have no interest in the litigation, and related to Plaintiff's personal financial matters that have no relevant bearing on the underlying trademark infringement and defamation claims.

The discovery of confidential or private information is also limited by the burdensomeness of the information sought. Under Rule 26(c), discovery that would subject a party to "annoyance, embarrassment, oppression or undue burden or expense" is prohibited. It is undisputed that disclosure of Shelton's private, confidential financial records (and those of his closely-held corporation), would impose an undue burden on Shelton in the form of embarrassment, harassment and annoyance. It is also undisputed that the production of Shelton's financial records by MidCountry would impose a substantial burden on an institution that has no interest in the underlying litigation or its outcome.

Contrary to Pickle's assertions, privilege is not the only grounds upon which discovery may be limited, and Shelton's Motion to Quash, which seeks to enforce the relevance and burdensomeness limitations on discovery that are imposed by the Federal Rules, should not be dismissed.

## CONCLUSION

Defendant Pickle has failed to demonstrate any basis upon which to dismiss Plaintiff's Motions to Quash and to Stay and Remit for lack of standing. Plaintiff therefore prays that this Honorable Court deny Defendant Pickle's Motion to Dismiss and award Plaintiff Shelton the reasonable costs and expenses incurred in opposing the motion, pursuant to Rule 37(a)(4)(B) of the Federal Rules of Civil Procedure.

Dated: February 25, 2008.

Respectfully Submitted,

**Attorneys for Plaintiffs Three Angels Broadcasting Network, Inc. and Danny Shelton**

**SIEGEL, BRILL, GREUPNER, DUFFY & FOSTER, P.A.**

/s/ Jerrie M. Hayes

Gerald S. Duffy (# 24703)
Wm. Christopher Penwell (#161847)
Jerrie M. Hayes (#282340)
Kristin L. Kingsbury (#346664)
1300 Washington Square
100 Washington Avenue South
Minneapolis, MN 55401
(612) 337-6100
(612) 339-6591 - Facsimile