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. 0:08-mc-7

PLAINTIFF DANNY SHELTON'S MEMORANDUM IN SUPPORT OF MOTION TO QUASH SUBPOENA *DUCES TECUM* OR, IN THE ALTERNATIVE, FOR PROTECTIVE ORDER, AND IN SUPPORT OF MOTION TO STAY AND REMIT ENFORCEMENT OF SUBPOENA *DUCES TECUM* OR, IN THE ALTERNATIVE, TO APPOINT A SPECIAL MASTER

INTRODUCTION

Plaintiff Danny Shelton ("Shelton") objects herein to the subpoena *duces tecum* ("Subpoena") dated December 12, 2007, which Defendant Robert Pickle caused to issue and served upon MidCountry Bank, N.A. ("MidCountry"). The Subpoena was issued by this Honorable Court, but is pursuant to ongoing litigation 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.)). The Subpoena is unduly burdensome and should be quashed because it seeks information that could be obtained from—and should more properly be sought from—a named party in the underlying suit, and because it seeks information that is overly broad and not relevant to the claims and defenses in the underlying litigation. In

the alternative, any information produced in response to the Subpoena should be governed by a protective order that maintains the confidentiality of the information sought.

Additionally, in light of the fact that a closely-related Motion for Protective Order is currently pending in the underlying litigation before the Federal District Court for the District of Massachusetts, and in light of the fact that the Massachusetts Federal Court has already heard other discovery disputes in this matter and is well versed in the facts of this complex and somewhat unusual case, enforcement of the subject Subpoena should be stayed and remitted to the Federal District Court for the District of Massachusetts. In the alternative, this Court should appoint the presiding Magistrate in the underlying action as a Special Master in the instant dispute.

STATEMENT OF RELEVANT FACTS

On April 6, 2007, Plaintiffs Three Angels Broadcasting Network and its founder, Danny Lee Shelton, filed a complaint in the United States District Court for the District of Massachusetts against Gailon Arthur Joy and Robert Pickle (collectively "Defendants"). [*See* Exhibit A to the Affidavit of Jerrie M. Hayes, hereafter "Hayes Aff., Ex.___"]. Broadly paraphrased, 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, individually and in conspiracy, 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. [Hayes Aff., ¶ 3]. Defendants answered by denying the allegations of the Complaint and made no counterclaims or third-party complaints. [Hayes Aff., Ex. B].

Two matters related to confidentiality and discovery have already been heard by the Massachusetts Court in this matter, including a motion for impoundment heard on May 10, 2007 and June 21, 2007 and a motion concerning production of electronically-stored information (e-discovery motion) heard on August 9, 2007. [Hayes Aff., ¶ 5].

On November 29, 2007 and December 7, 2007, Defendant Pickle served written Requests for Production of Documents upon 3ABN and Danny Shelton, respectively. Defendants' written Requests for Production specifically included the following demand:

> **Request No. 38**: From January 1, 1998, onward, for Plaintiff Shelton, D&L Publishing, DLS Publishing, or any DBA or corporation over which you have exercised control (other than 3ABN), all financial statements and accounting records, all bank statements or records (including without limitation statements or records for any investment accounts, savings accounts, or insurance accounts, or any other accounts which give such detail as amount(s) deposited or withdrawn, or an ongoing statement of value), and all credit or charge account statements or record (including without limitation statements or records for any credit cards, charge cards, loans, mortgages, or collateral arrangements, or any other statements or records which give such detail as amount(s) withdrawn, purchase(s) or payment(s) made, or an ongoing statement of amount owed).

[Hayes Aff., Ex. C]. Around this same time,[1] Defendant Pickle caused to issue four, third-party subpoenas, all of which sought, in whole or in part, Plaintiffs' sensitive, confidential or proprietary business, financial and operational records. [Hayes Aff., Exs. D, E, F and G].

[1] The various subpoenas were dated November 28, 2007 (Remnant Publications, Inc.), November 30, 2007 (accounting firm Gray, Hunter, Stenn, LLP), and December 6, 2007 (Century Bank & Trust and MidCountry Bank, N.A.).

In direct response to defendant Pickle's discovery efforts, Plaintiffs filed a Motion for Protective Order on December 18, 2007, seeking to preclude discovery of 3ABN's 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. [Hayes Aff., Ex. H]. Additionally, on January 9, 2008, Plaintiff Shelton served his responses to Pickle's Requests for Production and specifically objected to Request No. 38 on the grounds that it sought information neither temporally nor substantively relevant to the underlying dispute and not reasonably calculated to lead to the discovery of admissible evidence, that it sought highly confidential, personal financial information, and that it was unduly burdensome, harassing and embarrassing. [Hayes Aff., Ex. I]. Plaintiff Shelton refused to produce the temporally and substantively irrelevant documents sought by Pickle and would agree to produce relevant, non-privileged documents only upon the parties' execution of a mutual confidentiality agreement or the Court's issuance of a protective order. Id. Though the parties have engaged in discussions concerning that discovery dispute, the matter has not been heard by the Court in the underlying action, nor has the issue of the relevance or confidentiality of Plaintiff Shelton's personal financial records been resolved. [Hayes Aff., ¶ 10].

The instant Subpoena was signed and issued by the Clerk of this Court on December 12, 2007 to MidCountry Bank, a non-party to the underlying litigation. [Hayes Aff., Ex. J]. MidCountry confirmed that it received the subpoena on January 18, 2008. [Hayes Aff., ¶ 12]. The Subpoena, in an Exhibit A attachment strikingly similar to Defendant Pickle's Request for Production No. 38, demands that MidCountry produce to Defendant Pickle, by February 10, 2008, bank statements from 1998 onward for accounts

owned by Shelton, D&L Publishing, and DLS Publishing. [Hayes Aff., Ex. J]. MidCountry has not timely objected to the instant subpoena and apparently intends to comply therewith. [Hayes Aff., ¶ 12].

Plaintiff Shelton submits this memorandum in support of his motion to quash or, in the alternative, for a protective order prohibiting discovery of the information requested in the Subpoena, because of its overbreadth and the irrelevance of the documents sought to the underlying litigation. Further, Plaintiff submits this memorandum in support of his motion to stay and remit enforcement of the subject Subpoena to the District of Massachusetts, where a directly-related motion for protective order is pending or, in the alternative, to appoint a Special Master from that District to oversee this motion to quash.

ARGUMENT

I. THE SUBPOENA MUST BE QUASHED OR, IN THE ALTERNATIVE, SUBJECT TO A PROTECTIVE ORDER

Under the Federal Rules, a court must quash a subpoena if it "subjects a person to undue burden." Fed. R. Civ. P. 45(c)(3)(A). In addition, a court may, for good cause, issue an order "forbidding…disclosure or discovery" to protect a party from "annoyance, embarrassment, oppression, or undue burden or expense." Fed. R. Civ. P. 26(c)(1). The factors listed in both Rules are presented by the Subpoena at issue. Accordingly, the Court should quash the Subpoena or enter a protective order prohibiting or limiting the discovery or disclosure sought therein.

A. Plaintiff Has Standing to Object to the Subpoena

The Subpoena first demands production of Plaintiff Shelton's personal banking records. 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). Individuals have a privacy interest in their own personal financial and banking affairs that gives them 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). Shelton clearly has a personal right with respect to his own banking records; thus, Plaintiff has standing to object to the Subpoena.

Plaintiff also has standing to object to the subpoena to the extent it seeks records from D&L Publishing and DLS Publishing, Inc. D&L Publishing was an unregistered D.B.A. used by Plaintiff Shelton, during the time of his marriage to ex-wife, Linda Shelton, as a sole proprietorship to manage his publishing rights and interests. [Shelton Aff., ¶ 3]. Though the D.B.A. has been inactive since 2004, as its sole owner, Plaintiff Shelton has a personal interest in the financial, banking and administrative records of D&L Publishing. [Shelton Aff., ¶ 4]. DLS Publishing was incorporated by Shelton in November of 2004, after the dissolution of his marriage to Linda Shelton, to carry on the function of managing his publishing rights and interests. [Shelton Aff., Ex. K]. As the sole director and sole shareholder of that corporation, again the sole purpose of which is to manage Danny Shelton's personal publishing interests, Plaintiff Shelton has a personal interest in that corporation's banking and financial records. [Shelton Aff., ¶ 5]. Plaintiff

Shelton's position as an owner of both closely-held entities provides him the personal interest in the entities' banking and financial information to give him further standing to move to quash the instant 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.

It is clear on their face that both Defendant Pickle's Requests for Production of Documents and the instant Subpoena seek the exact same personal financial and banking records for Danny Shelton, D&L Publishing and DLS Publishing, Inc. By failing to first exhaust his efforts to obtain the materials through party-discovery, and instead seeking the documents and information from MidCountry, Defendant Pickle is attempting to force an innocent third party to undertake his discovery activities for him, and placing unnecessary responsibility for party-discovery on MidCountry. This creates an unreasonable and undue burden for a non-party. Defendant Pickle should be required to conduct his own discovery and to exhaust all means of obtaining such information from Plaintiff Shelton prior to burdening uninvolved third-parties with federal subpoenas.

Defendant Pickle's Subpoena also represents an obvious attempt to avoid the many objections Plaintiff Shelton has already made to the production of the information sought by the Subpoena, and to do an end-run around the Court's customary discovery dispute resolution process. Instead of waiting for the pending Motion for Protective Order to be heard by the Massachusetts Court, Pickle has attempted to get the information from MidCounty free and clear of any confidentiality obligations. And instead of bringing a proper motion to compel regarding Request for Production No. 38, which would allow the Massachusetts Court to determine that Danny Shelton's personal financial and banking records are irrelevant to the Plaintiffs' claims of Trademark infringement and defamation, Pickle caused the instant Subpoena to issue upon a party with no knowledge of, or involvement with, the underlying action. At best, the instant Subpoena represents a gross misunderstanding of the discovery process and, at worst, a deceitful abuse of subpoena power. 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 Plaintiff Shelton 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 desperate shot into irrelevant darkness, aimed at finding some financial 'skeleton' with which Defendants might embarrass, harass and further impugn Plaintiff Shelton.

First, the Subpoena requests bank statements 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, Hayes Aff., Exs. A and B]. 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 Shelton's personal bank account statements, when Plaintiff Shelton's personal financial condition 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 Shelton's personal financial affairs relevant to either the trademark or defamation claims. Production of Shelton's private and

confidential banking records, which are not accessible to 3ABN or other third parties, serves no purpose other than to embarrass, oppress and subject Shelton to an undue burden in the form of an invasion of privacy. [Shelton Aff., ¶ 2].

Third, the instant Subpoena requests the bank account records of entities who are not even parties to the underlying litigation. Neither D&L Publishing nor DLS Publishing, Inc. is a named party to the Federal action in Massachusetts and no effort has been made by either Defendant to make them parties. Neither entity has any stake whatever in Plaintiffs' trademark infringement claims, nor do any of the defamatory statements made by Defendants, as set forth in Plaintiffs' Complaint, mention or involve either entity. As both entities were used by Plaintiff Shelton solely to manage his personal publishing rights and interests, the subpoena is even more firmly established as an undue burden in the form of an invasion of Shelton's privacy. Just as Defendant Pickle seeks to do with Shelton's private banking information, Pickle's has caused the instant Subpoena to issue upon two closely-held entities owned by Shelton for the purpose of finding personal financial information with which Defendants can continue to malign Shelton's character, reputation and goodwill.

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 records," Defendant Pickle has 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 Subpoena *duces tecum* is unduly burdensome to MidCounty 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 Plaintiff Shelton because it subjects him to an invasion of his privacy that is unwarranted by the claims in the underlying action. Pursuant to Rule 45, the Subpoena must be quashed.

C. In the Alternative, MidCountry's Production Should be Governed By a Protective Order that Maintains the Confidentiality of the Requested Financial Information.

As has already been set forth, the issue of the confidentiality of Plaintiffs' private financial and business records is already before the Federal Court for the District of Massachusetts in the form of a Motion for Protective Order. To the extent it is determined both that the records and information requested by the instant Subpoena are not unduly burdensome and that the information is directly relevant to the underlying action, Plaintiffs would ask that any production of subpoenaed documents by MidCountry be governed by the Protective Order that Plaintiffs have proposed in connection with their Motion for Protective Order in the underlying action, which would preclude disclosure, dissemination or publication of the financial information to any non-party.

II. THE COURT SHOULD STAY AND REMIT ENFORCEMENT OF THE SUBPOENA TO THE UNITED STATES DISTRICT COURT IN MASSACHUSETTS OR APPOINT A SPECIAL MASTER FROM THAT COURT

Again, a Motion for Protective Order is pending in the District of Massachusetts, which has jurisdiction over the litigation underlying the instant Subpoena. Accordingly, it would best serve judicial economy for this Court to stay its decision on the above motion to quash and defer to that District's resolution of the discovery dispute or, in the

alternative and for purposes of efficiency, to appoint a Special Master from that District to oversee the instant motion to quash.

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. 37(a)(2). As such, 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 have already filed a Motion for Protective Order in the District of Massachusetts that is directly related to its objections to the instant Subpoena, and because the District of Massachusetts would be the forum to hear any motion to compel that might be brought by Defendant Pickle in regards to his written discovery requests (specifically Request No. 38), an Order staying and remitting

enforcement of the Subpoena, or deferring to that court's resolution of the discovery dispute, is soundly within this Court's discretion.

B. Deferral to, or Involvement of, the Court having Jurisdiction over the Underlying Action 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. Defendant Pickle has 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 has become acutely 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 be a great waste of time and resources.

As an alternative to a stay, it is within this Court's discretion to request that the magistrate judge from the underlying litigation in the District of Massachusetts accept appointment as a Special Master. *See* 9 *Moore's Federal Practice 3D,* § 45.03[3] (3d. ed. 2000). For purposes of consistency, to prohibit "judge shopping," and to "centralize judicial responsibility," it is preferable to have the same judge who is overseeing the underlying litigation and supervising discovery be the one to rule on the motion to quash. *Id. See also* Fed. R. Civ. P. 53(a)(1)(C) (permitting a court to appoint a special master to address pretrial matters that cannot be effectively addressed by the district court).

Based upon the above authority, judicial economy and efficiency is best served by staying enforcement of the motion to quash and remitting the discovery dispute to the District of Massachusetts or, in the alternative, appointing a judge from that District to serve as a Special Master.

CONCLUSION

For all the foregoing reasons, Plaintiffs respectfully request that the Court issue an order quashing Defendant Pickle's December 12, 2007 subpoena *duces tecum* or, in the alternative, that the Court issue a protective order governing production responsive to the instant subpoena that is the same in language as the Protective Order proposed by Plaintiffs in their Motion for Protective Order pending before the Federal District Court of Massachusetts. Further, Plaintiffs request that the Court issue an order staying

enforcement of the Subpoena and remitting the discovery dispute to the United States District Court for the District of Massachusetts or, in the alternative, that the Court appoint a Special Master from the Federal District Court for the District of Massachusetts to oversee Plaintiffs' Motion to Quash.

Dated: February 7, 2008. By: s/Jerrie M. Hayes

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