UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

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

Case No. 07-40098-FDS

Plaintiffs,

v.

Gailon Arthur Joy and Robert Pickle,

Defendants.

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR LEAVE TO CAUSE ISSUANCE OF SUBPOENAS ON U.S. ATTORNEY COURTNEY COX AND THE FJARLI FOUNDATION

ORAL ARGUMENT IS REQUESTED

INTRODUCTION

Plaintiffs Three Angels Broadcasting Network, Inc. and Danny Lee Shelton appreciate that Defendants sought leave of court prior to causing issuance of subpoenas *duces tecum* on U.S. Attorney Courtney Cox and Merlin Fjarli / the Fjarli Foundation. The scope of permissible third party discovery is a matter now pending before Magistrate Judge Hillman pursuant to Plaintiffs' motion for a protective order [ECF Doc. 74]. However, Plaintiffs object to the proposed subpoenas for the very reasons they moved to curtail third party discovery in the first place. Specifically, Plaintiffs object to Defendants' requests for information that is not reasonably calculated to lead to the

discovery of admissible evidence (e.g., requests for irrelevant information), Defendants' attempts to seek discovery that once again is overbroad, unduly burdensome and expensive such that it outweighs the value to Defendants in *this* litigation, and because Defendants' requests fail to propose any methods for avoiding the irrelevant and harassing disclosure of identifying information of 3ABN's donors. Simply put, it is simply another avenue to get the same information they have sought but not been allowed to obtain directly from 3ABN. Plaintiffs expressly do not waive any rights to maintain the confidentiality and prevent disclosure of the information sought by the Defendants.

For the foregoing reasons, Plaintiffs respectfully request that the Honorable Court order that Defendants' motion seeking leave be denied or narrowed as set forth herein.

ARGUMENT

I. DEFENDANTS' MOTION SHOULD BE DENIED BECAUSE THEY HAVE NEGLECTED TO SUBMIT COPIES OF THEIR PROPOSED SUPBOENAS FOR THIS COURT'S REVIEW.

Currently under advisement is a motion by Plaintiffs that Defendants be required to seek leave of the Court prior to causing issuance of further third party subpoenas in this matter. The reason Plaintiffs sought this relief was to ensure that the future discovery sought by Defendants be narrowly tailored to elicit production of relevant information, and to circumvent Defendants' pattern for seeking overbroad, harassing, embarrassing, unduly burdensome and expensive, cumulative and duplicative information.

Because of Defendants' history of serving indecipherable requests that are grossly overbroad, the only way to truly evaluate whether leave should be granted to Defendants to cause issuance of additional subpoenas, is for the Court to evaluate Defendants' actual

proposed subpoenas and grant or deny each line item requested for compliance with the Federal Rules of Civil Procedure and the orders of this Court. If the Court does *not* undertake this step in evaluating a motion seeking leave, the opportunity will be created for Defendants to misinterpret the Court's orders or differently from what is intended. Such inevitable "confusion" will undoubtedly increase the parties' motion practice rather than corralling it.

Thus, Plaintiffs submit for the court's consideration that the only way to accomplish guaranteed compliance with this Court's pending orders on Defendants' present motion, is to order Defendants to submit for review Defendants' proposed subpoenas and accompanying document requests that they intend to serve - for the two subpoenas subject to Defendants' present motion and all future ones. For that reason, Plaintiffs respectfully request that the Court order Defendants to submit copies of the actual subpoenas they intend to cause to issue, prior to this Court granting leave. Granting this request completely disposes of Defendants' present motion and leaves other concerns raised in this opposition motion for another day.

II. ASIDE FROM PLAINTIFF'S OBJECTION TO DEFENDANTS' NEGLECT TO PRODUCE THE SUBJECT SUBPOENA TO THIS COURT FOR REVIEW, PLAINTIFFS OBJECT TO THE SCOPE OF DISCOVERY SOUGHT FROM U.S. ATTORNEY COURTNEY COX AND DEFENDANTS' REQUEST SHOULD THEREFORE BE DENIED OR NARROWED.

Defendants seek to obtain from the U.S. Government:

> [c]opies of interviews, notes, signed statements, reports, correspondence, stipulations, agreements, findings of fact, information sheets, and lists of available evidence pertaining to Three Angels Broadcasting Network, Inc., Danny Lee

> Shelton (hereafter "Shelton"), and Shelton's publishing companies, D & L Publishing and DLS Publishing.[1]

Defendants argue that this information is relevant to their defense against Plaintiffs' claim that the following statements were defamatory, as set forth in Plaintiffs' Complaint **Paragraph 46(g)** "3ABN Board members have personally enriched themselves as officers and directors of 3ABN in violation of the Internal Revenue Code."

Plaintiffs are dubious that such discovery requests of the IRS and/or U.S. Government are even legally permissible under the applicable tax code provisions.[2] Presumably, the subpoena recipients will move to quash the subpoenas on the grounds that they seek information that may not be obtained by members of the public. Plaintiffs intend to support any motion to quash filed by the subpoena recipients, and expressly do not consent to disclosure of the information sought herein.

That aside, Plaintiffs *also* object to the scope of information sought from U.S. Attorney Courtney Cox, in accordance with the objections raised in Plaintiffs' pending motion to limit scope of discovery, presently under advisement before the Honorable Magistrate Judge Hillman. Plaintiffs thus incorporate its pending Motion to Limit Scope of Discovery (ECF Doc. No. 74-75].with the following specific objections:

(1) **Defendants' Requests of U.S. Attorney Cox to Prove Plaintiffs Violated the Internal Revenue Code is Likely Moot.** After a thorough review of all of 3ABN's financial and business records, the IRS concluded its investigation of 3ABN by determining that no further action will be taken. An inference may be drawn from this that no violations occurred. As a practical matter, Plaintiffs submit

[1] Defendants' Memorandum in Support of Motion for Leave [ECF Doc. No. 95] pp. 2-3.
[2] *See generally* 26 U.S.C. § 6103. *See also* Internal Revenue Manual §9.3.1.11.1 available at http://www.irs.gov/irm/part9/ch03s02.html#d0e9021 and § 34.9.1.3 subp. 4 available at http://www.irs.gov/irm/part34/ch09s01.html (both links last reviewed on September 8, 2008).

that Defendants lack the foundation and expertise to rehash, double-check, challenge or call into question the IRS's determination.

(2) **Defendants' Requests of U.S. Attorney Cox Imposes an Undue Burden That Outweighs Its Value.**
The information sought by Defendants can be requested of Plaintiffs and in fact has already been produced to Defendants. Plaintiffs, after all, were the source of all documents produced to the IRS.

(3) **Defendants' Requests of U.S. Attorney Cox is Overbroad.**
Defendants' requests of U.S. Attorney Courtney Cox should be limited to those documents that relate to specific transactions that Defendants believe / believed were violations of the Internal Revenue Code when they made their defamatory statements claimed in Paragraph 46(g). Defendants are certainly not entitled to "all" or anything from U.S. Attorney Cox. Defendants should be required to specify which Board Members partook of which specific instances of private enrichment, and which specific instances of private enrichment Danny Shelton partook, and only seek that information related to those specific transactions.

(4) **Defendants Seek Irrelevant Information to Claims Made in Paragraph 46(g).** If Defendants are seeking merely to prove private enrichment (despite the IRS's lack of finding of the same), Defendants are not entitled to any other of the alleged 100,000 pages of documents in the IRS's possession. Because Defendants' proposed request on U.S. Attorney Cox is overbroad, it also seeks information that bears no relevance on the issue of alleged private enrichment.

(5) **Defendants' Request Might Yield Discovery of Irrelevant Donor Information.**
Because Defendants' request is so overbroad, if successful, it could lead to the discovery of identifying information of 3ABN's donors. 3ABN insists that such information is irrelevant to this case, and that the historical volumes of donations, diminished donations, and reasons behind diminished donations can be discovered without the disclosure of donor identifications. This information must be protected through *in camera* review and redaction, if allowed at all.

(6) **Defendants Seek to Undertake an Unguided Fishing Expedition.**
The overbreadth of information that Defendants request evidences their hope that they will find more red herrings to chase. Defendants must not be permitted to undertake their proposed aimless search for after-the-fact information that has no bearing on the statements they made

> and the rationale that supported their defamatory misstatements in the past.

Based on the above objections and in order to bring Defendants' requests into compliance with the Federal Rules of Civil Procedure (set forth in Plaintiff's Motion to Limit Scope of Discovery currently under advisement), Plaintiffs respectfully request an order by the Court that if Defendants are ultimately allowed to cause issuance of a subpoena on U.S. Attorney Cox, that:

- Defendants be denied issuance of any subpoena upon U.S. Attorney Cox until Defendants first verify whether such information was already searched for and produced by Plaintiffs in this litigation;

- Defendants be required to narrow their requests to only those specific transactions that pertain to the instances of private enrichment Defendants insist have occurred; and

- Defendants command service of all documents obtained from U.S. Attorney Cox to chambers of Magistrate Judge Hillman or an appointed special master for *in camera* review and redaction of irrelevant identifying donor information.

III. IN ADDITION, DEFENDANTS' REQUEST FOR LEAVE TO CAUSE ISSUANCE OF A SUBPOENA ON MERLIN FJARLI AND/OR THE FJARLI FOUNDATION SHOULD BE DENIED.

Defendants seek leave to cause service of a subpoena on Merlin Fjarli and/or the Fjarli Foundation (hereinafter "Fjarli") for

> [c]opies of the mortgage note, deed, amortization schedule, payment schedule, and payment history (including source of payment); copies of the fronts and backs of all checks dispersed and received for account; copies of all wire transfers (including wire transfer instructions) dispersed or received for account; and all documents pertaining to the disposition of the debt.[3]

[3] ECF Doc. No. 95, p. 3.

Defendants argue that this information is relevant to their defense against Plaintiffs' claim that the following statements were defamatory, as set forth in Plaintiffs' Complaint:

> **Paragraph 46(h),** which sets forth Defendants' defamatory statement that "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;" and
>
> **Paragraph 50(i)**, which sets forth Defendants' defamatory statement that "Danny Shelton perjured himself through the course of court proceedings relating to his divorce from Linda Shelton."

Defendants are not entitled to the information they purport to seek from Fjarli. On the most basic level – Plaintiffs believe that Defendants have not been fully forthcoming about their real agenda. Plaintiffs are of the opinion that Defendants seek to obtain information through ***this*** litigation to assist Linda Shelton in a pending / upcoming property settlement proceeding against Danny Shelton. This is an impermissible objective under the Rules and should be considered harassment of and an undue burden upon the Fjarli third parties.

In addition, Plaintiffs incorporate the arguments set forth in their Motion to Limit Scope of Discovery, and hereby object to Defendants' proposed discovery on the following bases:

(1) **Defendants Seek Irrelevant Information to Claims Made in Paragraph 46(h).** The information sought by Defendants' proposed subpoenas on Fjarli bears no relevance on the issue of whether Danny Shelton "wrongfully withheld book royalties during his divorce";

(2) **Defendants Seek Irrelevant Information to Claims Made in Paragraph 50(i).** The information sought by Defendants' proposed subpoenas on Fjarli bears no relevance on the issue of what knowledge Danny Shelton had when he made his allegedly perjured testimony;

(3) **Defendants' Requests of Fjarli Imposes an Undue Burden That Outweighs Its Value.**
Defendants request is overly burdensome, unreasonably cumulative or duplicative, and is obtainable from some another source that is more convenient, less burdensome, or less expensive - ***the Plaintiffs.*** The burden and expense of the proposed discovery on Fjarli far outweighs its likely benefit to Defendants.

(4) Defendants' Requests of Fjarli is Overbroad.
To defend against Plaintiffs' claim that Defendants falsely accused Danny Shelton of perjuring himself in Court, they do not need the breadth of documents sought from Fjarli, and the documents sought must be narrowed.

(5) **Defendants Seek to Undertake an Unguided Fishing Expedition.**
Page 4 of Defendants' Motion Seeking Leave [ECF No. 95] sets forth three bullet points where Defendants query over Danny Shelton's possible "ideas" behind doing whatever it is that Defendants think Danny Shelton did. At best, these ruminations are not factual-based inquiries, but idle curiosity that defendants seek to satisfy through this litigation. At worst, they seek "evidence" to use for Linda Shelton's benefit in another proceeding, which should be flatly prohibited by this Court.

The real issue in this litigation is the information that Defendants knew at the time they made their false statements, *not* whether they can find new information *today* to spin more falsehoods.

Thus, for the reasons set forth above, Plaintiffs respectfully request that the Court deny Defendants' request for leave to cause to issue a Subpoena on Merlin Fjarli and/or the Fjarli Foundation, in its entirety.

ORAL ARGUMENT REQUESTED:

Plaintiffs' Motion for Protective Order to Limit Scope of Discovery is under advisement before the Honorable Magistrate Judge Hillman. Pursuant to Rule 7.1 of the Local Rules of the United States District Court for the District of Massachusetts, Plaintiffs request that Defendants' Motion Requesting Leave to Cause Issuance of Subpoenas on U.S. Attorney Cox and Merlin Fjarli and/or Fjarli Foundation be referred

to Magistrate Judge Hillman for oral argument if his ruling on Plaintiffs' Motion for Protective Order to Limit Scope of Discovery does not dispose of Defendants' present motion.

CONCLUSION

For the reasons set forth herein, Plaintiffs respectfully request the Court to order that:

(1) Defendants' motion be denied in its entirety pending this Court's disposition of Plaintiffs' Motion for Protective Order Limiting the Scope of Discovery.

(2) Defendants' motion be denied in its entirety, pending Defendants' submittal of any actual subpoenas Defendants propose they cause to issue for review by the Court, both for two subject subpoenas now before the Court and for all future subpoenas proposed by Defendants;

(3) With respect to Defendants' motion to seek leave to cause issuance of a subpoena on U.S. Attorney Cox, that:

a. Defendants be denied issuance of any subpoena upon U.S. Attorney Cox until Defendants first verify whether such information was already searched for and produced by Plaintiffs in this litigation;

b. Defendants be required to narrow their proposed requests to only those specific transactions that pertain to the instances of private enrichment Defendants insist have occurred; and

c. Defendants be required to command service of documents from U.S. Attorney Cox to chambers of Magistrate Judge Hillman or an appointed special master for *in camera* review and redaction irrelevant identifying donor information.

(4) With respect to Defendants' motion to seek leave to cause issuance of a

subpoena on Merlin Fjarli and/or the Fjarli Foundation, Defendants' motion be denied in its entirety.

Accordingly, an order along these parameters should be entered.

Respectfully Submitted:

Attorneys for Plaintiffs

Dated: September 8, 2008

FIERST, PUCCI & KANE, LLP
John P. Pucci, Esq., BBO #407560
J. Lizette Richards, BBO #649413
64 Gothic Street
Northampton, MA 01060
Telephone: 413-584-8067

and

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

s/ Kristin L. Kingsbury
Gerald S. Duffy (MNReg. #24703)
M. Gregory Simpson (MN Reg. #204560)
Kristin L. Kingsbury (MNReg. #346664)
100 Washington Avenue South
Suite 1300
Minneapolis, MN 55401
Tel:(612) 337-6100 / Fax (612) 339-6591

Certificate of Service

I, Kristin L. Kingsbury, hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on September 8, 2008.

Dated: September 8, 2008

s/ Kristin L. Kingsbury
Kristin L. Kingsbury