UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

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. 07-40098-FDS

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR PROTECTIVE ORDER

ORAL ARGUMENT IS REQUESTED

INTRODUCTION

Plaintiffs seek the Court's direction and protection to ensure that discovery in this litigation remains relevant to its subject matters and is not unduly burdensome to Plaintiffs, Defendants or third parties. By way of example, the most fact-intensive claim in this action – defamation – will require Plaintiffs to gather information proving that Defendants were the originators of certain false statements of fact, and that Defendants lacked a sufficient factual basis at the time such statements were made. Defendants,[1] on the other hand, should seek information to establish the purported *truth* of these statements, assuming their pleadings even raise that defense.

[1] Note – Although only Defendant Robert Pickle has served discovery requests in this action so far, Plaintiffs use the term "Defendants" in this brief to refer to either or both defendants, for ease of reference and because Plaintiffs seek both retroactive and proactive protection from both defendants.

But Defendants' discovery requests do not seek this. In addition, Defendants seek ALL INFORMATION even remotely relating to the Plaintiffs and for the duration of their existence – and this "discovery" is sought from both Plaintiffs and a growing number of third parties. Contrary to Defendants' aim, satisfying idle curiosity and engaging in unguided fishing expeditions are not permissible uses of the discovery process.

Because Plaintiffs' informal attempts to seek Defendants' clarification of their discovery requests have yielded no results, and because the sky clearly cannot be the limit, Plaintiffs seek the Court's assistance and guidance in (a) limiting the scope of discovery sought in this case; and (b) governing the methods by which Defendants conduct third party discovery.

FACTS

A. PROCEDURAL HISTORY OF LITIGATION.

On April 6, 2007, Plaintiffs 3ABN and Shelton (collectively "Plaintiffs") filed a complaint alleging defamation by Defendants intentional interference with Plaintiffs' advantageous economic relations with donors, and trademark infringement and dilution, arising out of Defendant's use of various Internet sites. [*See* Complaint, ECF # 1].

Plaintiffs' Complaint sets forth 24 specific untrue statements that have been published by the Defendants concerning one or both Plaintiffs, as set forth in Paragraphs 46 (a)-(k), 48(a)-(d), and 50 (a)-(i) of the Complaint. [*See id.*]. Generally, Plaintiffs' claims center on the following three subject matters:

(A) that "3ABN and its President Danny Shelton have committed financial improprieties with donated ministry funds";

(B) that "3ABN and its President Danny Shelton have committed administrative and operational improprieties at 3ABN and that the organization is not properly or competently managed by its managers, officers, and directors"; and that

(C) "3ABN and its President Danny Shelton acted without grounds in removing Linda Shelton from the 3ABN Board of Directors, that Danny Shelton had no grounds for divorcing Linda Shelton, that 3ABN and Danny Shelton conspired to hide evidence and information concerning the removal and divorce, and that 3ABN and Danny Shelton have lied and made otherwise purposeful misstatements concerning the Sheltons' divorce and Danny Shelton's remarriage." [*Id.*].

B. **DEFENDANTS SERVE DOCUMENT REQUESTS ON PLAINTIFFS.**

Defendant Pickle served written Requests for Production of Documents upon 3ABN and Danny Shelton and November 29, 2007 and December 7, 2007, respectively. [Exhibits 1-2, attached to the Affidavit of Kristin L. Kingsbury at ¶¶ 2-3 (hereinafter "Kingsbury Aff. Ex. ___")]. Both sets of written discovery are identical, although the Request served on Shelton contain additional requests. [*See id*.] Both requests ("Requests") seek information that (1) is not relevant to the parties' claims or defenses and/or is privileged; and/or (2) is overly broad, burdensome, expensive, and/or intended to harass and embarrass the recipient and/or Plaintiff(s).

C. **DEFENDANTS SERVE SUBPOENAS ON SIX NON-PARTIES.**

Defendants have caused at least six non-party subpoenas to issue in this litigation, all of which seek similarly irrelevant and overly broad classes of information. [Kingsbury Aff. Exs. 3 through 8]. Specifically, Defendants have served the following:

NON-PARTY	DATED	VENUE
Remnant Publications	11/28/2007 01/11/2008	W.D. Mich.
Gray Hunter Stenn LLP	11/30/2007 12/28/2007	S. D. Illinois
MidCountry Bank	12/06/2007 12/12/2007	D. Minn.
Century Bank & Trust	12/06/2007	C.D. Mass.
Kathi Bottomley	03/10/2008	C.D. Cal.
Glenn Dryden	05/07/2008	W.Va.

[*Id.*]. Each subpoena has an attached Exhibit A, which sets forth the subpoenaed documents. [*Id.*].

Plaintiffs contacted third parties set forth above and/or their attorneys to advise them of Plaintiffs' objections to Defendants' subpoenas. [ECF # 68, Hayes Aff. at ¶ 29]. In one instance, Plaintiffs filed a Motion to Quash in the District Court in Minnesota. [Kingsbury Aff. Ex. 9]. There, the Honorable Magistrate Judge Arthur Boylan ordered production of the subpoenaed documents to Magistrate Judge Hillman for review. [*Id.* Ex. 10].[2] At least two other subpoenaed non-parties, Remnant Publications and Gray Hunter Stenn, objected to their respective subpoenas on the ground(s) that the information sought was overbroad in scope, overly burdensome and expensive, irrelevant, and/or that the subpoenas called for the disclosure of confidential financial business records of a proprietary nature. [*Id.* Exs. 13-14]. The Southern District Court of Illinois ordered production of the Gray Hunter Stenn documents, under seal, to the

[2] Defendant Pickle has since filed a "motion to amend" the Order of Magistrate Judge Boylan to seek production of documents directly to Defendant Pickle instead of to Magistrate Judge Hillman. Plaintiffs responded to Mr. Pickle's improper motion to reconsider and put the Magistrate Judge Boylan on notice that Plaintiffs would seek this Court's intervention by the present Motion. [*See* Motions, Kingsbury Aff. Ex. 11-12].

Honorable Magistrate Judge Hillman appointed to this matter. [*Id*. Ex. 15], while the Western District Court of Michigan ordered production of the Remnant Publications documents directly to Defendant Pickle on June 20, 2008. [*Id*. Ex. 16]. Plaintiffs will seek a Motion to Reconsider the Order in the Western District Court of Michigan, following the present Motion, and intend to send a copy of this Motion and its supporting documents to counsel for Remnant Publications. [*Id*. ¶ 18]. Counsel for Plaintiffs believe that documents produced by Kathi Bottomley and Glenn Dryden were already delivered to Defendant(s), although Plaintiffs have not seen these productions and do not know whether they contained Confidential Information. [*Id*. ¶ 19].

D. THE SCOPE OF DEFENDANTS' REQUESTS AND THIRD PARTY SUBPOENAS AND THE BASIS FOR THIS MOTION.

Defendants have publicly acknowledged that their goal is nothing less than "a full scale and public effort to indict Danny [Shelton] in the public eye and to put pressure on 3ABN," [*id.* **Ex. 20**]. Defendants have also admitted their strategy for carrying out this mission to reach beyond the Complaint and to obtain information wholly irrelevant to the claims and defenses at dispute in this case [*id.* **Ex. 21**, where Defendant Joy states "[u]nfortunately, because of the very narrow charges pressed by 3ABN and Danny Lee Shelton, we must *substantially expand the case to bring the most damaging and certain-to-sway-the-jury* details."].

Plaintiffs challenge Defendants' document requests and subpoenas ("Discovery Requests") because they are conducted for purposes prohibited by the Federal Rules of Civil Procedure. In general: (1) Defendants' Discovery Requests seek information

relating to irrelevant subject matters; (2) Defendants' definition of "Plaintiff-related issues" is overbroad and includes irrelevant subject matters; (3) Defendants blatantly seek privileged information; (4) Defendants' requests are overbroad and seek "all" documents of very broad categories of information where a narrower tailoring should be required; (5) Defendants seek documents that can be obtained through more convenient sources than Plaintiffs; and (6) Defendants seek unredacted documents and identifying information of donors and others, which is irrelevant to prove Defendants' claims, and outweighed by the undue burden, harassment, embarrassment, annoyance and oppression of Plaintiffs and their donors. In addition to setting forth these general observations in this memorandum, Plaintiffs set forth each Discovery Request and Plaintiffs' Rule 26 objections under Exhibit 19 to the Kingsbury Affidavit, for the Court's easy reference.

E. ADDITIONAL HISTORY RELEVANT TO THIS MOTION.

From the time that Defendant Robert Pickle served his Discovery Requests in December 2007, to the present, Plaintiffs (a) engaged in conference calls with Defendants in various attempts to negotiate the scope of discovery sought by Defendants, including a four-hour conference on January 10, 2008 [ECF # 68 ¶¶ 14, 19] (and other occasions detailed later); (b) attempted negotiation of a Stipulated Protective Order [*id.*]; (c) produced thousands of pages of documents [*see id*. ¶¶ 23, 25 and 28; ECF # 73 ¶ 9]; (d) argued to the Court in favor of a Protective Order governing confidential information on or around March 7, 2008 [*see* ECF # 60]; (e) received the Court's entered Confidentiality and Protective Order on or around April 17, 2008 [*id.*], and (f) responded in varying forms to the six subpoenas served by Defendants. [ECF # 68 ¶ 29].

On May 7, 2008, the parties engaged in a scheduling conference before The Honorable Judge Saylor. [ECF # 68 ¶ 26]. During this conference, counsel for Plaintiffs represented their intent to file a Motion to Limit Discovery on the basis of relevancy, referring to this present motion. [*Id*.]. Defendants made no objection to Plaintiffs' representation of the upcoming motion practice and there was no secret what Plaintiffs intended to do. [*Id*.]. Before this present motion could be filed, however, several intervening events occurred.

First, Defendant Robert Pickle filed a Motion to Compel Production of Documents on May 15, 2008. [ECF # 61]. Plaintiffs filed their response on May 29, 2008 [ECF # 67], but also sent Defendants a letter dated May 27, 2008, proposing a timetable for production of documents that Plaintiffs did not intend to withhold. [ECF # 73 ¶ 3]. On June 4-5, 2008, the parties met by telephone to discuss outstanding discovery issues and agreed that Plaintiffs would produce documents pursuant to the schedule set forth in their May 27 letter in an effort to resolve the issues stated in Mr. Pickle's Motion to Compel, and that Defendants would withdraw the pending Motion to Compel. [Simpson Aff. ¶ 4, ECF #73]. Despite Defendants' failure to withdraw the pending motion, Plaintiffs continue to undertake the production schedule. [*Id*. ¶¶ 9-10].[3]

A second intervening event was Ms. Hayes' making arrangements to leave her employment with Siegel, Brill, Greupner, Duffy & Foster, P.A. to take effect in June, which required new attorneys to review the file and assume Ms. Hayes' role. [*Id*. ¶ 3].

[3] Regardless of Mr. Pickle's apparent objection, Plaintiffs will continue to produce documents under that schedule. [ECF # 73 ¶ 9-10].

Generally speaking, Plaintiffs seek the Court's direction and guidance in limiting the scope of discovery to that allowed by the Federal Rules of Civil Procedure, so to (a) limit the scope of discovery to only those matters that are relevant to the claims and defenses in this matter, and to (b) place some limitations on unnecessary and expensive third party subpoena practice that has gotten out of control.

ARGUMENT

I. STANDARD FOR PROTECTIVE ORDER.

Federal Rule of Civil Procedure 26(b) permits a party to obtain discovery "regarding any nonprivileged matter that is *relevant* to any party's claim or defense…." "reasonably calculated to lead to….."(emphasis added). The courts have broad discretion in "shaping the parameters of pretrial discovery." *Aponte-Torres v. Univ. of Puerto Rico*, 445 F.3d 50, 59 (1st Cir. 2006). Besides the explicit exclusion of privileged or irrelevant matters, a court must also limit the scope of discovery if "the discovery sought is unreasonably cumulative or duplicative," or "can be obtained from other sources that is more convenient, less burdensome or less expensive," or "the burden or expense of the proposed discovery outweighs its likely benefit…." FED. R. CIV. P. 26(b)(2)(C).

Even if a discovery request is relevant, Rule 26(c) expressly gives courts the discretion to control the extent of discovery by making any order required by justice "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including . . . (A) forbidding the disclosure or discovery; . . . (C) prescribing a discovery method other than the one selected by the party seeking discovery; or (D) forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to

certain matters…." Thus, Rule 26(c) confers broad powers on the courts to regulate or prevent discovery that is outside the scope of 26(b) in order to prevent abuse of the process. *Santiago v. Fenton*, 891 F.2d 373, 379 (1st Cir. 1989) (citations omitted).

II. PLAINTIFFS ARE ENTITLED TO AN ORDER LIMITING DISCOVERY TO MATTERS RELEVANT TO THE CLAIMS OR DEFENSES OF THE PARTIES.

With regard to the scope of discovery, Plaintiffs recognize that the standard of relevance in the context of discovery is broader than the context of admissibility. Despite a broader construction, though, "discovery is not a fishing expedition, [and] parties must disclose some relevant factual basis for their claim before requested discovery will be allowed." *Milazzo v. Sentry Ins.*, 856 F.2d 321, 322 (1st Cir. 1988). Courts have increasingly addressed the problem of "over-discovery," and the Federal Rules of Civil Procedure have undergone amendments to increase the district courts' power to supervise discovery and curb excesses. *Mack v. Great Atlantic and Pacific Tea Co., Inc.*, 871 F.2d 179, 187 (1st Cir. 1989). Courts have construed these amendments in specific reference to over-discovery, stating that litigants "ought not be permitted to use broadswords where scalpels will suffice, nor to undertake wholly exploratory operations in the vague hope that something helpful will turn up." *Id.*

While the Rules do provide some specific measures of recourse for discovery limitation (e.g., motions to quash and sanctions levied for discovery abuses), courts have found that other methods of limitation are also possible, shaped "by the needs of the situation and the ingenuity of court and counsel." *Bruno & Stillman, Inc. v. Globe Newspaper, Co.*, 633 F.2d 583, 598 (1st Cir. 1980) (quoting 8 MILLER & WRIGHT,

FEDERAL PRAC. AND PROC. § 2043 at 307 (1970)). Central to the decision to limit scope of discovery is the Court's balancing of the seeking party's right to know against the protesting party's right to be free from unwarranted intrusions. *Mack*, 871 F.2d at 187.

Thus far, Defendants' discovery attempts to conduct the most thorough investigation into all aspects Plaintiffs *to the most mundane detail*. While Defendants are entitled to discovery necessary to support their defenses, none of Defendants' discovery requests – whether those served on Plaintiffs or on non-parties – have been narrowly tailored to elicit relevant information. To illustrate, one request seeks "all types of phone records or other documents enumerating phone calls made by 3ABN officers from January 1, 2003, onward . . ." [Kingsbury Aff. Ex. 1-2, Requests 27]. This request, like many of Defendants' requests, clearly seeks information of no discernible relevance to the allegations claimed in this lawsuit. Courts do not tolerate such irrelevant or overbroad excursions. *See e.g.,* Eastern District of Arkansas opinion *McArthur v. Robinson,* 98 F.R.D. 672, 674 (E.D. Ark. 1983) (questioning "how can telephone records, even arguably, show whether there was a loss of income?" and noting "however, defendants are entitled to discovery, through properly limited discovery the books and records of the plaintiff which are necessary to show whether he did, in fact, lose income because of the alleged actions of defendants").

There are four manners in which Plaintiffs seek the Court's assistance in tailoring Defendant's discovery requests to circumvent over-discovery of irrelevant information: (a) by excluding information Defendants seek that is outside the scope of the claims asserted by Plaintiffs and any conceivable defense by Defendants; (b) by narrowing

Defendants' definition of "Plaintiff-related Issues" to exclude irrelevant subject matters; (c) by narrowing Defendants' overbroad requests to a more reasonable scope, both in terms of necessity and time frame (e.g., 2001 through January 2007, unless Defendants pinpoint specific transactions or events); and (d) by crafting a means for Defendants to discover relevant information about donations and contributions, without disclosing irrelevant identifying information of donors by name, etc. Plaintiffs set forth these four generalized classes of irrelevant information below, along with proposed solutions, and each challenged Discovery Request, in full, on Exhibit 19 to the Kingsbury Affidavit.

A. Irrelevant Subject Matters.

While limits on discovery are best set on a case-by-case basis, all parties have a duty to tailor their discovery requests to coincide with the specific issues of the litigation. *See Mack,* 871 F.2d at 187. For information to be relevant and therefore subject to discovery, it must be sought for the bearing that it might have on issues in the case. *Oppenheimer Fund, Inc., v. Sanders*, 437 U.S. 340, 352-53 (1978) (stating that a court is not required to blind itself to the purpose for which a party seeks information, and that discovery should be properly denied when a party's aim is to embarrass or harass the person from who he seeks discovery).

The scope of discovery is thus guided by the claims and defenses of the parties, and not Defendants' personal agendas. Defendants cast a *much* wider net. Perhaps Defendants hope to find an elusive needle in the haystack that, while not relevant, will at least create the illusion that Defendants' attacks on Plaintiffs were convolutedly justified. But courts do not allow such "exploratory operations" by entertaining mere "hope[s] that

something helpful will turn up," *Mack*, 871 F.2d at 187, and Defendants' fishing excursion here should likewise not be allowed. In the absence of relevance, permissible discovery in this case should be restricted to the 24 subject areas that Plaintiffs have put in issue. Anything more would be an abuse of the discovery process.

To rectify the irrelevant subject matters contained in Defendants' discovery requests, Plaintiffs respectfully request that the Court order that

1. Defendants' Discovery Requests for irrelevant or privileged information are denied.

2. That all future discovery requests identify with particularity the transactions and events of which Defendants seek discovery, including the approximate date, the individuals involved in that transaction, and the assets / items / persons affected by that transaction or event; and

3. That when such specificity is not possible, that Defendants' requests be narrowed to a relevant and reasonable time-frame– e.g., January 2001 through January 2007.

B. "Plaintiff-related Issues."

Contributing to the overbreadth and/or irrelevance of information sought by the subject Requests, is Defendants' definition of "***Plaintiff-related Issues,***" which contains 32 subject matters (numbered paragraphs 16 (a) through (ff) in Pickle's definitions contained in his First Set of Document Requests). By referring to irrelevant subject matters within this definition and issuing discovery requests that refer to these so-called "Plaintiff-related issues," Defendants seek to gain access to a multitude of topics that have no relevance to the claims and defenses in this action. Such irrelevant subject matters include

- Allegations of sexual conduct by Tommy Shelton (¶¶ 16(k)-(m)),
- Internal "damage control" undertaken by 3ABN in response to Defendants' activities (¶¶ 16(p)-(r)),
- Use of the 3ABN Sound Center and 3ABN music issues (¶¶ 16(y)-(z)),
- Governmental investigation issues to the degree and breadth defined by Defendants (¶¶ 16(aa)), and
- Any "administration, board and theological issues" (¶¶ 16(bb)-(ff)).

All of the above subject matters step far beyond what is alleged in Plaintiffs' complaint, and implicates, at a minimum, Document Requests 2-4, 6, 21, 26, 29, 31, 34 and 44.

To rectify the Defendants' definition of "Plaintiff-related Issues," Plaintiffs respectfully request the Court to order that:

1. Defendants' Discovery Requests pertaining to "Plaintiff-related Issues" be denied; or

2. In the alternative, that Defendants remove irrelevant subject matters from this definition and any similar definition in Defendants' subpoenas,

C. Overbroad and Overly Burdensome Requests.

Federal Rule of Civil Procedure 26(b)(2) directs that "discovery shall be limited by the court if it determines that (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; . . . (iii) the burden or expense of the proposed discovery outweighs its likely benefit . . . ." There are three manners in which Defendants' Discovery Responses are overly broad and/or burdensome.

First, the sheer volume of documents Defendants seek outweigh their need and encroach upon areas of utter irrelevance. Defendants *do not* need disclosure of "all" documents pertaining to the kitchen sink. Without limitation, there appears to be no need for (and no limit to) the following types of Requests:

- "All" documents, revisions, and issues of specified items under Requests 1-8, 22;
- "All" documents pertaining to "all" foreign companies affiliated with 3ABN under Request No. 5;
- "All" documents detailing grants, contributions, or payments ; and documents/invoices relating to payments made/received to/from Gray Hunter Stenn or other auditors (Request 10);
- "All" documents relating to "all" open accounts, including payroll accounts, health accounts, etc. under Request 12;
- "All" documents associated with the building of the school, gymnasium, and Angel Lane under Request 19;
- All invoices or other documents concerning purchases of books or items sold, manufactured, authored, produced, patented, inventoried, or copyrighted by any person who worked with or for 3ABN or his/her relatives, under Request 22.

Second, Defendants seek discovery that can be obtained through more convenient sources, for instance:

- Trial documents that are of public record, under Request 4;
- 3ABN publications that can be special ordered and/or downloaded from 3ABN's website, *see* Requests 8, 22.

Third, Defendants seek information that will harass, embarrass, annoy and oppress its recipients and 3ABN, for instance:

- Identifying information of certain church leaders, under Req. 15; and
- Information relating to the health status of Danny Shelton, or his family members, under Request 24 .

The cumulative effect of such overbreadth is (a) facilitation of groundless irrelevant discovery, and (b) the overburdening and expense to Plaintiffs and non-parties that far outweigh any evidentiary benefit to Defendants. To rectify such overbreadth, and outweighing overburden, expense and harassment, Plaintiffs respectfully request that:

1. Defendants' overbroad or overly burdensome requests be denied; and

2. That all future requests be narrowed to only those subject matters that are at issue, for instance, by narrowing the reach of the term "all" and removing classes of documents that are not necessary for Defendants to prove their defenses; removing requests for information Defendants can seek from more convenient sources or that they already have in their possession; removing requests where the harassment, embarrassment, oppression or annoyance outweighs their benefit; and

3. That all future discovery requests comport with Plaintiffs' request for relief set forth in Section II.A.2 – II.A.3.

D. Donor Information.

Plaintiffs' interests far outweigh Defendants' need for the identifying information of 3ABN's donors. The allegations in this lawsuit involve two Defendants who admittedly post their statements on the Internet for all to see. This exposure will most certainly harass, embarrass, annoy and oppress the non-party donors, as well as Plaintiffs, and would undoubtedly cause 3ABN a loss of support from these and other contributors. Defendants, on the other hand, do not need these individuals' identities to obtain relevant information for the case. In fact, these individuals' identities are irrelevant. *See Oppenheimer Fund, Inc., v. Sanders*, 437 U.S. 340, 352-53 (1978) (finding that class

members' names and addresses were not relevant under the discovery rules because the information had no bearing on issues in the case).

There are numerous manners in which Defendants could obtain the information they need relating to *donations* without gaining the identification of the *donors*. One proposal Plaintiff has explored is the assignment of a number to each donor, which would becomes that donor's "identity" throughout discovery and trial. This way, Plaintiffs could still produce relevant documents pertaining to the donations with only partial redactions of individuals' names and identifiers.

To rectify Defendants' seeking of irrelevant donor information, Plaintiffs respectfully request that the Court order

1. That Defendants requests for identifying information of donors and church leaders are denied; and

2. Directing both parties to submit proposals to Magistrate Hillman for his review to facilitate a discovery plan that will allow discovery to proceed while removing irrelevant donor and church leader identifying information.

See e.g., state court opinion *In the Matter of the Enforcement of a Subpoena,* 436 Mass. 784, 767 N.E.2d 566, 577 n. 9 (2002) (listing various alternatives to preserve interests).

III. Plaintiffs Are Entitled to an Order Governing The Manner and Means in which Defendants Seek and Obtain Non-Party Discovery.

Plaintiffs seek two forms of relief from Defendants' third party discovery practice: (A) that Defendants be required to seek leave of court prior to the issuance of any future subpoenas, to assure compliance with scope, relevance and confidentiality and to weigh the need for such discovery against the countervailing burden and expense to additional non-parties; and (B) that Magistrate Judge Hillman or some other third party be

appointed to review *in camera* those documents produced to Magistrate Judge Hillman pursuant to the orders governing the MidCountry Bank, Gray Hunter Stenn and Remnant Publications subpoenas, prior to production to Defendants.

A. Plaintiffs Request Leave of Court For Future Subpoenas.

Rules 26(b) and 26(c) contain specific limitations to prevent over-discovery in the event of undue burden. *Ameristar Jet Charter, Inc. v. Signal Composites, Inc.*, 244 F.3d at 192 (1st Cir. 2001) (citing *Mack*, 871 F.2d at 186 (1st Cir. 1989)). Protective orders are especially appropriate when discovery is intended to harass or annoy. *Digital Equip. Corp. v. System Indus., Inc.*, 108 F.R.D. 742, 744 (D. Mass. 1986).

Defendants caused to issue six non-party subpoenas that seek irrelevant and overbroad discovery, in spite of Defendants' awareness that Plaintiffs objected to the scope of Defendants' discovery. Both Plaintiffs and/or the subpoenaed non-parties had to expend time and resources objecting or responding to Defendants' overreaching subpoenas. The additional motion practice churned by Defendants' subpoenas evidences the confusion and burden placed upon the subpoenaed non-parties and the Plaintiffs, as well as a burden on affected Federal District Courts. In addition, Defendants have made no secret of their intent to "expand the case," and their subpoenas not only reflect this intent, but also annoy, embarrass and oppress the recipients.

To alleviate the inefficient and uneconomical effect of subpoenas undergoing independent review in each jurisdiction, as well as the undue burden and expense upon Plaintiffs and non-parties to respond to and challenge such subpoenas, Plaintiffs respectfully request that Defendants be required to seek leave of Court prior to issuance

of any future subpoenas. This mechanism will allow the Court to manage scope of discovery *before* third parties and other District Courts are unnecessarily brought in.

B. In Camera Review by Appointed Third Party.

In camera review is available to district courts in controlling the scope of discovery. *Bruno,* 633 F.2d at 598. In camera review is suited where there are interests in obtaining materials, avoiding excessive disclosure, or preserving confidentiality of information while permitting a reasoned determination of the discovery dispute. *U.S. v. LaRouche Campaign*, 841 F.2d 1176, 1183 (1st Cir. 1988); *see also* unreported decision *Lovejoy v. Town of Foxborough*, No. Civ.A.00-11470-GAO, 2001 WL 1756750, at *1 (D.Mass. Aug. 2, 2001). Considering the wide discretion granted district courts to manage discovery and scope, *Mack*, 871 F.2d at 186, the nature of this case, its parties, and Defendants' discovery practices provide sufficient considerations to warrant an order granting in camera inspection of third party documents, prior to disclosure to Defendants.

The appointment of impartial third parties to review disputed information pre-disclosure is also available to courts for purposes of limiting discovery. *Bruno*, 633 F.2d at 598). Special masters may be appointed when an "exceptional condition" justifies the referral. *Stauble v. Warrob, Inc.,* 977 F.2d 690, 693-94 (1st Cir. 1992) (quoting FED. R. CIV. P. 53(a)(1)(B)(i)). Courts have found the requisite "exceptional condition" satisfied where discovery is contentious.[4] At least one court has also implied that the exceptional

[4] *See* unreported opinion *Harmston v. City and County of San Francisco*, No. C07-01186 SI, WL 3306526 *9 (N.D.Cal. Nov. 6, 2007) (appointing special discovery master after plaintiffs issued improper non-party subpoenas, violated a protective order, and engaged in unprofessional conduct at a deposition).

condition will be found where *pro se* litigants have exacerbated the discovery process.[5] Special masters can be appointed for tasks such as overseeing discovery, reviewing discovery documents for privilege, and determining the scope of subpoenas. *Id.* at 693-94; FED. R. CIV. P. 53; 9 MOORE'S FEDERAL PRACTICE § 53.02 [5] (3d ed. 2000).

Thus, to address the documents that have been served to the Chambers of the Honorable Magistrate Judge Hillman, Plaintiffs respectfully request the appointment of Magistrate Judge Hillman, a Special Master, or another third party to be appointed to review *in camera* all documents produced by third parties to ensure compliance with all discovery orders, and for relevance, confidentiality and privilege.

ORAL ARGUMENT REQUESTED:

There are several motions related to discovery pending before the Court, including this one, Defendant's Motion to Compel, and the motions regarding the scheduling order. Plaintiffs believe that a single hearing on all outstanding motions would assist the Court in managing the case and deciding the pending motions. Plaintiffs therefore request, Pursuant to Rule 7.1 of the Local Rules of the United States District Court for the District of Massachusetts, that the Court grant and schedule oral argument on the instant motion.

CONCLUSION

Defendants are *pro se* litigants that have fallen into a pattern of overreaching and abusing the discovery process. For the foregoing reasons, Plaintiffs request a protective order to

[5] *See* unreported opinion *Johnson v. Grays Harbor Comm'ty Hosp.,* No. C06-5502FDB, WL 1474590 * 1 (W.D. Wash. May 21, 2007).

(1) Limit the scope of discovery to relevant subject matters according to the claims and defenses of the parties;

(2) Require Defendants to seek leave of court prior to conducting further subpoena services, and to

(3) Appoint Magistrate Judge Hillman or a special master or a neutral third party to conduct in camera review of non-party documents produced to date to Magistrate Judge Hillman's chambers.

Accordingly, a protective order along these parameters should be entered.

Respectfully Submitted:

Dated: June 25, 2008

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Certificate of Service

I, M. Gregory Simpson, 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 June 25, 2008.

Dated: June 25, 2008

/s/ M. Gregory Simpson
M. Gregory Simpson