

No. 08-2457

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IN THE  
**UNITED STATES COURT OF APPEALS**  
FOR THE FIRST CIRCUIT

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**THREE ANGELS BROADCASTING NETWORK, INC.,**  
**an Illinois Non-Profit Corporation;**  
**DANNY LEE SHELTON,**

*Plaintiffs-Appellees,*

v.

**GAILON ARTHUR JOY; ROBERT PICKLE,**

*Defendants-Appellants.*

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On Appeal from the United States District Court  
for the District of Massachusetts  
Case No. 07-40098

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**DEFENDANTS' FIRST STATUS REPORT RE:  
MOTIONS IN DISTRICT COURT  
TO RECONSIDER AND TO AMEND FINDINGS**

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Defendants file this status report pursuant to this Court's August 19, 2009, order directing Defendants to file such reports every 60 days, since Defendants' motions to reconsider and to amend findings are pending in the district court.

### **INTRODUCTION**

Seven days prior to the scheduled status conference of October 30, 2008, for the underlying case, Plaintiffs filed a motion for voluntary dismissal. Just in case the district court would take up that motion on October 30 rather than allow for a regular briefing schedule, Defendants hurriedly prepared an opposition to that motion, filing it just before the status conference was scheduled to begin.

With that opposition Defendants sought to file documents produced on September 22, 2008, by Remnant Publications, Inc. ("Remnant") ("Remnant documents"). However, since Plaintiffs allegedly<sup>1</sup> designated these documents as confidential, Defendants could not file them by October 30. *infra* 7. Therefore, Defendants asked the district court to schedule an evidentiary hearing. Defendants intended to present to the court at such a hearing, *inter alia*, (a) the Remnant documents and (b) documents produced by Plaintiffs pertaining to whether Plaintiffs believed to be true the allegations of the terminated Trust Services

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<sup>1</sup> Defendants use the word "allegedly" because Defendants were not informed by Plaintiffs that Plaintiffs were the designator until after Defendants sought permission from Remnant to file the Remnant documents.

Also, since both Plaintiffs lack standing to designate as confidential those Remnant documents which pertain to payments to DLS Publishing, Inc. ("DLS"), documents concerning such payments cannot be confidential.

whistleblowers against Trust Services Director Leonard Westphal.

The district court did not read Defendants' opposition, and thus did not consider Defendants' request for an evidentiary hearing before dismissing the case without prejudice. The sole dismissal condition was that Plaintiffs could only refile their claims in the Central Division of the District of Massachusetts. However, the district court did state that Defendants could file a motion for costs, expenses, and fees, which, if imposed, would serve as an additional condition for dismissal.

Immediately after the dismissal, Defendants continued to receive threatening and harassing communications from Plaintiffs' counsel. This harassment was one factor leading toward Defendants' filing their notice of appeal on November 13, 2008, just a little after Defendants had filed their motion for costs.

### **MOTION FOR COSTS, EXPENSES, AND FEES**

Defendants' memorandum in support of their motion for costs was uncharacteristically short. Plaintiffs' response on November 26, 2008, asserted that the only authority under which costs could be imposed was Fed.R.Civ.P. 41(a)(2), and that such authority was limited by 28 U.S.C. § 1920 and the American Rule. Plaintiffs laid out a case for Plaintiffs not having engaged in abuse of process and malicious prosecution, reasserted the grounds upon which Plaintiffs had sought the voluntary dismissal, and opposed paying 1¢ of Defendants' costs.

Defendants' reply on December 8, 2008, delineated multiple lines of authority under which costs, fees, and expenses could be imposed. Defendants also

sought to file the Remnant documents under seal since these documents, as Defendants had already asserted in their opposition to Plaintiffs' motion to dismiss, constitute *prima facie* evidence of abuse of process and malicious prosecution.

On December 22, 2008, Plaintiffs opposed the filing of the Remnant documents under seal, declaring them to be irrelevant. Defendants replied on December 29, 2008.

**THE ORDER OF APRIL 13, 2009, WHICH  
DENIED DEFENDANT'S MOTION FOR COSTS**

Defendants originally were scheduled to file their reply brief in their appeal by April 9, 2009, but this Court extended that date to April 30 because of serious flooding in the Red River Valley in northwest Minnesota.

Four days after Defendants were originally scheduled to have completed their briefing on appeal, on April 13, 2009, the district court denied Defendants' motion for costs. The written order stated:

... the Court addressed any potential legal prejudice when the dismissal was conditioned upon the fact that any renewed claims brought by plaintiff shall be brought in this Court. ...

There is nothing in the record to suggest that the plaintiffs filed this suit simply to harass, embarrass, or abuse the defendants or that they sought to increase their costs ....

This order was transmitted to this Court on April 14, 2009, as a supplemental record on appeal. Defendants inquired of the district court as to whether the papers filed by the parties which pertained to Defendants' motion for costs would also be

transmitted to this Court. Those papers were then transferred on April 15, 2009, as an additional supplemental record on appeal.

**THE ORDER OF APRIL 15, 2009, WHICH  
DENIED DEFENDANT'S MOTION TO FILE UNDER SEAL**

Though Defendants' motion for costs depended in part on Defendants' motion to file under seal, the motion to file under seal had not yet been ruled upon when the order denying the motion for costs was filed. Defendants therefore inquired as to the status of the motion to file under seal.

An electronic order was subsequently entered by the district judge on April 15, 2009, denying the motion to file under seal. That order stated:

The documents do not appear to be relevant and were not considered by the Court in connection with the underlying dispute.

**MOTIONS TO RECONSIDER AND TO AMEND FINDINGS**

On April 27, 2009, Defendants timely filed motions to reconsider the orders of April 13 and 15 pursuant to Fed.R.Civ.P. 59(e), and a motion to amend the findings of these orders pursuant to Fed.R.Civ.P. 52(b). Defendants thereby sought to file the Remnant documents under seal, payment of some or all of their costs, expenses, and fees, and correction of the portions of the orders which stated or implied, *inter alia*, that (a) the district court had already adequately addressed Defendants' potential legal prejudice, (b) nothing in the record suggested that Plaintiffs had engaged in malicious prosecution or abuse of process, and (c) the

Remnant documents were not relevant.

**A. Motions for Reconsideration**

Defendants sought reconsideration of their motions for costs and to file under seal on the basis of (a) clear error, (b) manifest injustice, (c) Plaintiffs' fraud, misrepresentation, or misconduct, (d) mistake, inadvertence, surprise, or excusable neglect, and (e) newly discovered evidence. Defendants requested oral arguments.

**B. Addressing Potential Legal Prejudice**

Plaintiffs' counsel had requested that the dismissal be without prejudice in order to shield Plaintiffs and their counsel from liability for malicious prosecution. Plaintiffs' counsel had also told the district judge that he could not guarantee that Plaintiffs would refile their claims in his court if Defendants were forced to file their claims in state court due to lack of diversity jurisdiction. These issues called into question the correctness of the district judge's April 13, 2009, finding that the sole dismissal condition was adequately curative.

**C. Plaintiffs' Suit and Litigation Thereof**

Defendants had cited the voluminous district court record when arguing on appeal that Plaintiffs had engaged in abuse of process and malicious prosecution. Plaintiffs responded by stating on appeal that there was nothing in the record which they could cite to rebut Defendants' contention. These facts and others call into question the district court's finding that there is nothing in the record that even "suggest[s]" that Plaintiffs engaged in abuse of process and malicious prosecution.

**D. Relevancy of Remnant Documents**

A magistrate judge had already found that the Remnant documents were relevant to the underlying case. The order of April 15 set aside that finding without explanation when it found that these documents were irrelevant.

The underlying complaint put at issue whether the July 2006 financial affidavit of Danny Lee Shelton (“Shelton”) reported all his income, and whether Shelton lined his pockets with money from Three Angels Broadcasting Network, Inc. (“3ABN”). Also, the district judge’s April 13, 2009, order is based in part on Plaintiffs’ motives for filing suit. Since the Remnant documents speak to all these issues, the correctness of the district court’s finding that the Remnant documents are not relevant is called into question.

Defendants did not receive the Remnant documents until after September 22, 2008. Defendants were hindered from filing these documents earlier by (a) Plaintiffs’ alleged confidentiality designation of those documents, (b) Plaintiffs’ slow response to Defendants’ inquiry regarding the possible filing of those documents, (c) Local Rule 7.2(e), (d) the shortness of time between Plaintiffs’ filing their motion to dismiss on October 23 and the status conference of October 30, and (e) the district court’s failure to schedule an evidentiary hearing prior to dismissal as Defendants had requested.

**E. Conditional Incorporation of Defendants’ Appellant Briefs**

Plaintiffs had argued on appeal that the district court’s dismissal order filed

on November 3, 2008, was not a final decision. Though Defendants disagree, in order to cover all jurisdictional bases, Defendants incorporated the facts, arguments, request for relief, and replies of their appellant briefs if and only if Plaintiffs were correct on this jurisdictional question.

**F. Another Motion to File Under Seal**

In connection with their motions to reconsider and amend findings, Defendants sought to file six additional documents under seal.

As part of their argument for their motions, Defendants presented newly discovered evidence which partly depended on when the magazine *3ABN World* arrived back from the printer, the timing of which could be derived from invoices for such printing. Since Plaintiffs had designated such invoices as confidential, Defendants sought to file two such invoices under seal.

Defendants also argued that Plaintiffs had fraudulently misled the EEOC in its investigation of 3ABN's firing of the Trust Services whistleblowers. Plaintiffs had used the EEOC determination to support their motion for voluntary dismissal and to oppose Defendants' motion for costs. Defendants sought to support Defendants' allegation of misrepresentation by seeking to file under seal two documents produced by Plaintiffs which Defendants would have presented to the district court if an evidentiary hearing had been conducted for the motion to dismiss. These documents speak to the question of whether Plaintiffs believed the allegations of the whistleblowers to be true at the time they were terminated.



In order not to disclose the contents of these documents designated confidential by Plaintiffs, Defendants sought to file an additional document briefly drawing attention to key points in the above documents.

Defendants' analyses of documents produced by Plaintiffs had hitherto been unchallenged by Plaintiffs, their counsel, and any court, and thus, due to Fed. R. Civ. P. 5(d)(1), Defendants had no reason to file Plaintiffs' documents en masse. Those analyses had demonstrated abuse of process on the part of Plaintiffs, and the district magistrate judge had incorporated one aspect of those analyses in his order of September 11, 2008.

The district court's order of April 13, 2009, by saying that there was nothing in the record to suggest that Plaintiffs had tried to increase Defendants' costs, rejected Defendants' unchallenged analyses and set aside *sua sponte* the finding of September 11, 2008. In order to demonstrate that Defendants' unchallenged analyses were accurate, Defendants filed Plaintiffs' non-confidential productions on a DVD with Defendants' motions to reconsider and amend findings, and sought to file under seal Plaintiffs' confidential productions on a CD or DVD<sup>2</sup>.

### **MOTION FOR SANCTIONS**

Attorney Gregory Simpson ("Simpson"), counsel for Plaintiffs, responded to

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<sup>2</sup> Since Defendants intend to invoke ¶ 7 of the confidentiality order of the underlying case, challenging the confidentiality designation of a considerable number of these documents, the filing under seal of such would also facilitate court review for that purpose.

Defendants' motions to reconsider and to amend findings, and Defendants' motion to file under seal on May 11, 2009. Defendants replied to these responses on May 20, 2009, notifying the district court that they would seek sanctions under Fed.R.Civ.P. 11(c)(2) and the court's inherent powers for the misrepresentations in Plaintiffs' responses.

Defendants served their motion for sanctions upon Simpson on May 28, 2009, and filed it with the Court on June 24, 2009, requesting oral arguments. Defendants' memorandum outlined 16 statements in Simpson's memoranda believed to lack a basis in law, fact, or evidence, including the mischaracterization of evidence of kickbacks as being "perfectly proper royalty payments."

Plaintiffs filed a response to Defendants' motion for sanctions on July 8, 2009. Among other things, that response asserted for the first time that Remnant had become the publisher of Shelton's Pacific Press Publishing Association ("PPPA") booklets in 2005, evading the allegation that payments by Remnant to Shelton for sales of Shelton's PPPA booklets to 3ABN constituted kickbacks. Plaintiffs also argued that the January 30, 2007, letter of Attorney Gerald Duffy ("Duffy") was protected by state common law copyright because of a 1964 Massachusetts decision and a 2009 New York decision.

Defendants filed a reply on July 17, 2009, pointing out, *inter alia*, that Plaintiffs' response to the motion for sanctions contained new Rule 11 violations: (a) Plaintiffs' contention that Remnant had become the publisher of Shelton's

PPPA booklets in 2005 was devoid of evidentiary support. (b) The Copyright Act of 1976 abolished state common law copyright as of January 1, 1978, exempting pre-1972 audio recordings from such abolishment until 2067. The 1964 Massachusetts decision was rendered prior to 1978, and the 2009 New York decision concerned audio recordings made in the 1930's. Defendants have thus far not filed a motion for sanctions concerning these new violations.

**SINCE THIS COURT'S ORDER OF AUGUST 19, 2009**

After Defendants received notice that the First Circuit had vacated its submission notice for Defendants' appeal, and was holding in abeyance that appeal until after the district court ruled on Defendants' pending motions to reconsider and to amend findings, Defendants promptly contacted the district court to inquire about scheduling a hearing on the pending motions. Defendants were told that the district judge's courtroom clerk was out until Monday, August 24, 2009.

On August 24, Defendants spoke with the district judge's courtroom clerk about the pending motions, and inquired whether a hearing was going to be scheduled. The courtroom clerk said that the district judge would not be back until the following week, and that he would not be able to schedule a hearing without authorization from the district judge. He did not know whether the district judge would schedule a hearing before ruling on the pending motions.

Since August 24, Defendants have not received notice of a scheduled hearing, and have not received notice of a ruling on the pending motions.

Respectfully submitted,

Dated: October 2, 2009

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## CERTIFICATE OF SERVICE

I, Bob Pickle, hereby certify that on October 2, 2009, I served a copy of this status report on the following parties and the Clerk of the Court of Appeals by way of U.S. mail:

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Dated: October 2, 2009

/s/ Bob Pickle

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