

No. 08-2457

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

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

Plaintiffs-Appellees,

v.

GAILON ARTHUR JOY; ROBERT PICKLE,

Defendants-Appellants.

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

**DEFENDANTS' REPLY TO PLAINTIFFS'
RESPONSE TO (a) DEFENDANTS' MOTION TO
ENLARGE THE RECORD, AND (b) DEFENDANTS'
MOTION TO FILE UNDER SEAL**

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INTRODUCTION

Defendants' Motions at issue here ("DM") seek enlargement of the record to include under seal documents produced by Plaintiffs' co-conspirator Remnant Publications, Inc. ("Remnant") ("Remnant documents"), and documents pertaining to allegations against Leonard Westphal ("Westphal") ("Westphal documents").¹

In Plaintiffs' Response ("PR") to these motions, Plaintiffs Danny Lee Shelton ("Shelton") and Three Angels Broadcasting Network, Inc. ("3ABN") fail to dispute key points raised by Defendants, and fail to demonstrate any legal basis for their opposition. Plaintiffs' arguments are unconvincing and not dispositive. Plaintiffs continue their pattern of intentional, material misrepresentations.

PLAINTIFFS' RESPONSE REBUTTED

I. VITAL PARTS OF DEFENDANTS' MOTIONS UNDISPUTED

A. Necessary Elements for Relief Undisputed

Plaintiffs' response to Defendants' motions fails to dispute the following:

- The court's equitable powers permit enlarging the record. (DM 5–8).
- Extraordinary circumstances justify doing so here. (DM 7, 3–5).
- The Remnant and Westphal documents decisively determine key issues in the instant appeal. (DM 9–14).

Similarly, Plaintiffs did not dispute Defendants' basis for sealing and desired duration of sealing order, and Defendants' suggestions why continued protection

¹ Includes what Plaintiffs called the "Thompson memo." (RA 115 p. 2).

for these documents is questionable at best. (DM pp. 17–19).

B. Elements of Extraordinary Circumstances Undisputed

Plaintiffs’ response fails to dispute Defendants’ description of extraordinary circumstances, a description Defendants supported by citations to the record:

- Plaintiffs’ confidentiality designation prevented Defendants from filing the Remnant and Westphal documents prior to the October 30, 2008, status conference, in response to Plaintiffs’ motion to dismiss. (DM 2–3).
- Defendants commenced negotiations in order to try to file the Remnant and Westphal documents by October 30, 2008. (DM 3).
- Defendants requested an evidentiary hearing in order to, *inter alia*, present the Remnant and Westphal documents to the court. (DM 3–4).
- Both Plaintiffs lacked standing to obstruct Defendants’ filing of Remnant documents pertaining to DLS Publishing, Inc. (“DLS”). (DM 18, 3).

C. Incriminating Facts in Documents Undisputed

In the lower court, the parties had previously pointed out key questions surrounding Remnant’s book-related payments to Shelton: (a) Did Shelton omit his 2006 Remnant income from his July 2006 financial affidavit? (Record on Appeal Docket Entry (“RA”) 81-2 p. 123). (b) How did Shelton only list bank accounts totaling \$2,500 on that financial affidavit if he earned so much in royalties in 2006? (81-7 p. 18). (c) Did Remnant pay kickbacks to Shelton? (RA 96-9 p. 3; RA 126 p. 4). (d) Did Shelton line his pockets with 3ABN money? (RA 63-28 p. 12). (e) Is

DLS a normal publisher with an inventory, and shipping and advertising expenses, or is DLS a sham corporation intended to conceal assets and income? (RA 63-28 pp. 6–7; RA 96-9 pp. 2, 7). (f) Was the fact that 3ABN was the source of Remnant’s payments to Shelton ever disguised? (RA 149 p. 3). (g) Were any of these payments, unlike “proper royalty payments,” similar to the profits a publisher or wholesaler might make? (RA 184 p. 3). (h) Were all of these payments properly reported² to the IRS? (RA 158 p. 4).

Key questions about the firing of the Trust services whistleblowers include:

- (a) Did 3ABN leadership believe that the allegations against Westphal were true?
- (b) Was Mollie Steenson really supposed to investigate those allegations?
- (c) Were the Trust Services whistleblowers terminated because they had made allegations against Westphal? (DM 1).

As the Affidavit of Robert Pickle filed with the instant motions (“Pickle Affidavit”) makes clear, the Remnant and Westphal documents unequivocally give answers to such questions. Since Plaintiffs failed to dispute the answers found within the Remnant and Westphal documents, there seems little reason to remand.

II. PLAINTIFFS’ ARGUMENTS UNCONVINCING, NOT DISPOSITIVE

A. Fed.R.App.P. 10(e) (PR 5–8, 10)

Defendants pointed out that while a few circuits might use Rule 10(e) in this instance, other circuits might instead use the court’s inherent equitable powers.

² Proper reporting includes reporting the true amount in the true year earned.

(DM 5–8). Since Defendants weren't positive which precedent this circuit follows, Defendants invoked both possibilities in their motion.

Plaintiffs failed to dispute that this Court may in this instance exercise its inherent equitable powers in the interests of justice to enlarge the record.

We rarely supplement the record to include material that was not before the district court, but we have the equitable power to do so if it is in the interests of justice.

Schwartz v. Millon Air Inc., 341 F.3d 1220, 1225 n.4 (11th Cir. 2003); *see also United States v. Kennedy*, 225 F.3d 1187, 1192 (10th Cir. 2000).

B. Which Appeal to Seek the Requested Relief In (PR 1, 7–8, 10, 12)

The Remnant and Westphal documents are pertinent to the instant appeal, being explicitly referenced multiple times in Defendants' brief. (Brief of the Defendants-Appellants ("DB") pp. 24, 30, 41, 46, 52, 60–61). Defendants therefore assert their right to seek the requested relief in the instant appeal.

C. "... Pickle and Joy ignore the district court's orders ..." (PR 1)

Plaintiffs specifically highlight where the district court's October 26, 2009, order uncritically adopts Plaintiffs' suggested, clearly erroneous finding that the confidentiality order of the underlying case requires (a) parties to return documents (b) to Plaintiffs (c) before the termination of appeals. (PR 5; RA 193 p. 3; RA 174 pp. 3–4). The confidentiality order states no such thing. (*infra* 8–9). Defendants repeatedly pointed this out to the district court. (RA 161 pp. 5–8; RA 170 p. 15; RA 182 pp. 2–3, 10–11; RA 184 pp. 14–15; RA 190 p. 11). Apparently, the district

court reads only Plaintiffs' submissions, not Defendants'. Why?

For a more thorough review of the post-dismissal orders in question, see RA 170 and Defendants' brief to be filed in 1st Cir. Case No. 09-2615.

D. “... to make factual findings concerning their relevance ...” (PR 1)

The instant motion concerns the instant appeal, not post-dismissal orders. As of the October 30, 2008, dismissal, the Remnant documents had been found to be clearly relevant. (RA 127-38; RA 185-13 pp. 7, 12, 14, 20–23). That finding need not be disturbed in this appeal. Not until April 15, 2009, does the water become murky when the district court supplemented the record with a supplemental finding. (Electronic Order of April 15, 2009). Without looking at the documents as Defendants requested, the district court ignored without explanation the earlier finding of relevance, uncritically adopted Plaintiffs' proffered contrary conclusion, and issued contradictory orders two days apart. (RA 158 p. 2; RA 170 p. 13).

E. Standard of Review: Abuse of Discretion vs. *De Novo* (PR 1, 9–10)

Plaintiffs contend that the correct standard of review is abuse of discretion, not *de novo*, an issue Defendants never raised in the instant motions. An abuse of discretion standard of review, with varying degrees of scrutiny, allows findings of fact to be set aside if clearly erroneous. Courts have expanded the record to include documents not considered by the lower court even when the standard of review was abuse of discretion. *Dakota Indus., Inc. v. Dakota Sportswear Inc.*, 988 F.2d 61, 63-64 (8th Cir. 1993); *Schwartz v. Millon Air Inc.*, 341 F.3d at 1225, n.4.

F. Plaintiffs' Citations Irrelevant or Not Controlling (PR 9–10)

Unlike the government in *Sovereign News Co. v. United States*, 690 F.2d 569, 571 (6th Cir. 1982), Defendants in the lower court raised the issue of the contents of the Remnant and Westphal documents prior to dismissal, and that issue does appear in the record. (RA 126 pp. 3–5, 13–15, 17, 20). Unlike in *Crawford v. Runyon*, 79 F.3d 743, 744 (8th Cir. 1996), the issue was brought up below, and the documents in question are not for impeachment only.³ (*Id.*; DM 11–12, 14).

Plaintiffs prematurely cite *Nyer v. Winterthur Int'l* regarding the standard of review for appeals of decisions regarding sanctions, thus revealing Plaintiffs' counsel's concern about his intentional, material, and deceptive misrepresentations about the Remnant documents, a topic in Defendants' new appeal.

Unlike in *Davignon v. Hodgson*, 524 F.3d 91, 112 (1st Cir. 2008), the instant motion is not about the admissibility of evidence. Rather, it is about Plaintiffs' use of confidentiality designations and D.Mass.Loc.R. 7.2(e) to keep Defendants from filing decisive, relevant material in opposition to Plaintiffs' motion to dismiss, and the district court's failure to schedule an evidentiary hearing since it had not read the request for such in Defendants' opposition to Plaintiffs' motion to dismiss.

G. Curing D.Mass.Loc.R. 7.2(e)'s Due Process Defect (PR 10 n. 3)

Plaintiffs' confidentiality designations coupled with D.Mass.Loc.R. 7.2(e)

³ Also, *Crawford* cites as authority *Dakota Indus., Inc.* In the latter case the record was expanded due to the opposing party being “less than forthcoming with the court.” 988 F.2d at 63. Plaintiffs have definitely been less than forthcoming.

violated Defendants' due process rights by depriving Defendants of the ability to explicitly describe the information in the documents to the district court. 1st Cir.Loc.R. 11(c)(2) permits what D.Mass.Loc.R. 7.2(e) prohibits. (DM 15–16).

H. Which Facts Defendants Requested Judicial Notice Of (PR 11)

Defendants requested this Court to take judicial notice of “the incriminating facts in the Remnant and Westphal documents,” not the facts within the Pickle Affidavit. (DM pp. 1, 8, 14). That affidavit draws this Court’s attention to specific incriminating facts of interest within those documents. A good forensic accountant, if given the questions at *supra* 2–3, would not need the Pickle Affidavit.

I. Limiting Fed.R.Evid. 201 (PR 2, 11–12)

Plaintiffs fail to cite authority for limiting the number of facts or documents a court may take judicial notice of. (*Id.*). Plaintiffs express concern about taking judicial notice of “factual conclusions that will undoubtedly be disputed by the opposing side,” yet fail to dispute any of the incriminating facts found within the Remnant and Westphal documents. (PR 11; *supra* 2–3).

But Plaintiffs would not logically oppose taking judicial notice that certain purchase orders, invoices, checks, check stubs, transaction lists, and contracts produced by co-conspirator Remnant exist, and that these contain specific information such as particular dates, signatures, dollar figures, royalty or payment calculations, and terms. Neither would Plaintiffs logically oppose taking judicial notice that Thompson’s email and notes and Steenson’s notes exist, and that these

specific documents contain Thompson's and Steenson's accounts of a particular meeting held on a particular date, and of the approach 3ABN administration decided to take regarding the complaints of the Trust Services whistleblowers.

These specific details encompass the incriminating facts Defendants seek judicial notice of. The mere fact that these documents exist and contain certain details is beyond reasonable dispute by all parties. The statements the documents contain are not hearsay. Fed.R.Evid. 801(d)(2)(C)–(E).

J. No Bates Numbers in December 2008 Motion (PR 3, 8 n. 2)

If Plaintiffs had objected to this alleged deficiency in their opposition to Defendants' December 8, 2008, motion to file under seal (RA 158), Defendants could have provided such a list in Defendants' reply. (RA 161). It is inequitable for Plaintiffs to raise this issue at this late date, having never raised it before.

More importantly, Plaintiffs failed to comply with D.Mass.Loc.R. 7.1(a)(2) to seek to narrow the issues in Plaintiffs' motion to dismiss, and Defendants were further prejudiced by having to respond in 7 calendar days rather than 14 days. (DB 36–37). Thus, Defendants could not reasonably be expected to file a list of Bates numbers with the district court by the October 30, 2008, dismissal.

III. PLAINTIFFS' CONTINUED MISREPRESENTATIONS

A. "... documents ... should have already been returned to 3ABN under the confidentiality order." (PR 12)

The confidentiality order nowhere requires parties to return confidential

documents, and *non-parties* return such documents *to whom they got them from*. (RA 60 pp. 5–6, 8). *Defendants*, therefore, cannot legally be required to return anything. *Non-parties* who received such documents from Remnant would return them to *Remnant* “30 days after the final termination of instant litigation, *including appeal*,” unless *Remnant*, not 3ABN, requests otherwise. (RA 60 p. 8).

B. “The Pickle Affidavit is ... entirely new and was never submitted to the district court.” (PR 5)

Besides 1st Cir.Loc.R. 11(c)(2) allowing for such an affidavit in connection with a motion to file under seal, Defendants twice offered such an affidavit to the district court for the same purpose. (RA 153; RA 173 p. 2; RA 179 pp. 11–12).

C. “Pickle and Joy controlled no other websites ...” (PR 2)

Plaintiffs never conducted enough discovery to substantiate this assertion. The record even suggests a contrary conclusion. (RA 190 p. 8, citing RA 132 Table 1, Doc. 152 p. 9, Doc. 96-11 p. 46). Since Plaintiffs’ complaint charged Joy, not Pickle, with control of Save3ABN.com, and instead connected Pickle to four websites not controlled by Defendants (RA 1 pp. 11, 2), the issues cannot be narrowed to simply what websites Pickle does or does not control.

D. “... they were defendants with no counterclaims.” (PR 2–3)

Once Remnant finally produced the Remnant documents, Defendants had a basis for counterclaims against Plaintiffs’ counsel, which counterclaims Plaintiffs evaded by dropping the suit. (RA 126 pp. 1, 4–5, 11, 13–14; RA 141 pp. 6, 8, 13).

Plaintiffs defrauded Defendants of bank records Defendants paid for, contrary to the confidentiality order's terms, and, the day before filing the motion to dismiss, continued obstructing Defendants' obtaining Plaintiffs' auditor's records. (RA 161 pp. 5–6; DB 59–60; RA 170 pp. 15, 3; RA 80 pp. 3–4; RA 152-6 pp. 1, 16–17, 22–24, 32). Otherwise, Defendants' foundation for claims against Plaintiffs and their counsel would likely have expanded, a foundation conveniently “voided” by the error of the district courts' dismissal of Plaintiffs' claims without prejudice.

CONCLUSION

The general rule that “appellate courts confine themselves to the issues raised below ... should not be applied where the obvious result would be a plain miscarriage of justice.” *Hormel v. Helvering*, 312 U.S. 552, 558 (1941). Similarly, in the interest of justice, the record should be enlarged to include the Remnant and Westphal documents in this instance. “Rules of practice and procedure are devised to promote the ends of justice, not to defeat them.” *Id.*, 312 U.S. at 557.

Respectfully submitted,

Dated: December 3, 2009

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CERTIFICATE OF SERVICE

I, Bob Pickle, hereby certify that on December 3, 2009, I served copies of this reply, filed through the ECF system, on the following parties by way of U.S. mail:

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