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,

Appellees,

v.

GAILON ARTHUR JOY and ROBERT PICKLE,

Appellants.

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

BRIEF OF THE APPELLEES

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Appellee Three Angels Broadcasting Network, Inc., through its undersigned attorney, hereby states in accordance with Fed. R. App. P. 26.1 that it has no parent corporation and no publicly held corporation owns 10% or more of its stock.

s/ M. Gregory Simpson
M. Gregory Simpson

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REASONS WHY ORAL ARGUMENT SHOULD BE HEARD

Appellees Three Angels Broadcasting Network, Inc. and Danny Lee Shelton respectfully request that oral argument be granted in this appeal *only if* the Court determines not to resolve the appeal on jurisdictional grounds. The jurisdictional argument, which arises from the fact that the district court is currently considering whether to impose an award of costs or fees as an additional condition of dismissal, would not merit oral argument on its own because the law and facts are clear. If the Court determines to go beyond the jurisdictional issue and consider the merits of the appeal, the Court would likely find oral argument helpful.

RESPONSE TO JURISDICTIONAL STATEMENT

Appellees, Three Angels Broadcasting Network, Inc. and Danny Lee Shelton (collectively referred to herein as "3ABN"), disagree with appellants' contention that this Court has appellate jurisdiction over this case. Appellants filed their notice of appeal before a "final decision" within the meaning of 28 U.S.C. § 1291, which vests this Court with appellate jurisdiction, was issued. Specifically, at the time the appeal was filed, and as of this writing, the district court continues its consideration of whether to impose an award of fees and costs under Fed. R. Civ. P. 41(a)(2) as an additional condition of dismissal. Until that motion is decided, the issue on appeal, whether the district court abused its discretion by not imposing all the terms that the appellants would have liked in dismissing the case, is not finally decided and therefore not reviewable.

This Court has jurisdiction over appeals from all "final decisions" of the district court. 28 U.S.C. § 1291. A final decision for purposes of § 1291 is one that "ends the litigation on the merits and leaves nothing for the courts to do but execute the judgment." *Catlin v. United States*, 324 U.S. 229, 233, 65 S. Ct. 631, 89 L. Ed. 911 (1945). Collateral matters that remain pending, such as motions for costs or fees under Fed. R. Civ. P. 54, do not affect the finality of an order. But an award of costs and fees under Rule 41(a)(2) is a term that may be imposed to protect the defendant from prejudice. *Puerto Rico Maritime Shipping Authority v.*

Leith, 668 F.2d 46, 51 (1st Cir. 1981). A motion for fees and costs made to determine the conditions of a voluntary dismissal under Rule 41(a)(2) is therefore part and parcel of the "merits" of an order for voluntary dismissal, and is not a collateral issue in the context of this appeal.

At the hearing on the motion to voluntarily dismiss, Judge Saylor said:

> let me add as a further condition that I will at least permit defendants to seek recovery of reasonable costs, fees, expenses … if they file something within 21 days of the date of this order. I'm not promising that I will allow those to be paid, and I'll permit plaintiffs to oppose it, but I will give you the opportunity to make that argument formally and with a specific itemized detailing of your costs and expenses.

(Addendum DA0016). Judge Saylor added: "And if I do … decide to award any kind of costs or expenses or fees, it will obviously be a further condition of the order of voluntary dismissal…. And I'll retain jurisdiction for that purpose." (Addendum DA0018). Thus, Judge Saylor did not intend his order granting dismissal to be final – he reserved the issue of costs, and imposed a briefing schedule.

Consistent with Judge Saylor's statements at the hearing, the Electronic Clerk's Notes of the hearing reflect that the dismissal was conditioned on the anticipated motion for costs, by stating "The Court orders dismissal with conditions stated on the record...Court orders any motion for costs to be filed by 11/21/08. Order of dismissal to issue." (Addendum DA0001).

Appellants filed their motion for costs on November 13, 2008. (District Court Doc. 130, Joint Appendix JA0020). Without waiting for Judge Saylor's decision on their motion for costs, Appellants then filed their notice of appeal on the same day. (JA0020). The motion for costs remains pending at this moment.

The matter of costs and fees is not collateral to the merits of the dismissal because the only legal basis for an award of costs and fees is the authority granted the district court by Fed. R. Civ. P. 41(a)(2) to condition a voluntary dismissal "upon such terms that the court considers proper." Whether dismissal should be conditioned on payment of costs and fees is not collateral to the merits of a motion for voluntary dismissal – it *is* the merits. Until the district court decides all the conditions of dismissal, the decision is not final, and this Court has only part of the district court's decision before it. This appeal must therefore be dismissed as premature.

RESPONSE TO STATEMENT OF THE ISSUES

Appellants' statement of issues misidentifies sub-arguments as issues. Only two distinct appellate issues are before the Court:

1. Whether the district court abused its discretion by granting 3ABN's motion for voluntary dismissal under Fed. R. Civ. P. 41(a)(2), subject to the condition that any future suit involving the same facts and

circumstances be brought before the same district court and the possible further condition of payment of an award of costs; and

2. Whether the district court abused its discretion by ordering appellants to return documents obtained by them during discovery and designated as confidential pursuant to the protective order entered in the case.

RESPONSE TO STATEMENT OF THE CASE

Appellants' statement of the case is a slanted selection of disputed arguments that either were not presented to, were rejected by, or were properly disregarded by the district court, which is intended to convey the impression that 3ABN and Shelton brought the original lawsuit in bad faith and engaged in vexatious discovery conduct during the litigation. (Appellants' Brief at pp. 2-3). No motion raising these claims was ever made or decided below, and this Court would be acting as a fact-finding court rather than a reviewing one were it to wade into the swamp within the appellants' brief.

The appellants' allegations of improper conduct are easily answered. For example, they state "Plaintiffs *abusively* designated documents as confidential" (Brief at p. 2), but cite to their own brief which contains no citations to any finding remotely supportive of the assertion. In fact, appellants alleged bad faith on the part of 3ABN and Shelton (and their counsel) in literally every verbal and written submission to the district court, but the district court never – not once – agreed. To

repeat, there has been no finding of bad faith or improper conduct on the part of 3ABN, Shelton or their counsel in this litigation, appellants' toxic statement of the case and factual recitation notwithstanding.

Appellants' assertions of bad faith are not only unfounded, they are also irrelevant to this appeal. While courts will sometimes consider the litigation conduct of the dismissing party in connection with awarding attorneys fees as a condition of dismissal, the district court here made no finding of any such conduct, and moreover, has not yet ruled on appellants' motion for an award of costs. Although these appellants are seemingly incapable of making an argument that does not include an allegation of bad faith on the part of those who disagree with them, their allegations of bad faith need not be considered in this appeal because they are irrelevant to the district court's decisions.

In contrast, 3ABN and Shelton urge that a proper statement of the case would be limited to the verifiable procedural history of the case, as follows. Appellees 3ABN and Shelton brought suit seeking to stop the Appellants Pickle and Joy from using a website that incorporated the "3ABN" logo to lure potential donors and then disseminate defamatory information about 3ABN and Shelton to them. (*See generally* Complaint JA0025-JA0045; Thompson Aff. ¶¶ 3, 7, JA0318-JA0319)). The suit alleged that several specific statements were defamatory, including statements that certain accounting transactions violated the Internal

Revenue Code and certain personnel decisions constituted unlawful harassment. (Thompson Aff. ¶¶ 4-6, JA0318-JA0319). 3ABN believed that these activities were interfering with 3ABN's ability to raise funds in support of its religiously-motivated mission. (JA0097). The suit alleged theories of defamation, tortious interference with prospective business relations, and violation of trademark laws.

The parties engaged in document discovery which, contrary to the contentions of Pickle and Joy, was not unduly protracted given the intervening delays caused by Joy filing for bankruptcy and subsequent pretrial proceedings in which the parties sought and obtained a protective order to preserve the confidentiality of the documents produced in the case and to limit the scope of discovery. (DA0008 "We're actually at the preliminary stages in terms of discovery."; JA0307 "Here, voluntary dismissal should be granted because Plaintiffs are seeking dismissal at an early stage of the litigation, no counterclaims or dispositive motions are on file, and no legal prejudice to the Defendants can be shown."; JA313-314 "The case is in the document discovery phase. No depositions have been taken, nor have any dispositive motions been filed or served. The parties recently stipulated to an order extending discovery and unexpired deadlines by 90 days.").

After the automatic stay resulting from Joy's bankruptcy filing was lifted, the parties engaged in negotiations for a confidentiality order, and ultimately

submitted the matter to the district court, which referred it to the magistrate judge. (*See* JA0307-JA0308). All parties filed proposed confidentiality orders. (*Id.*). Magistrate Judge Hillman ultimately issued a Protective Order on April 17, 2008. (DA0022).

What followed was a period of motion practice regarding the appellants' efforts to obtain 3ABN's and Shelton's financial information directly from third parties located outside of Massachusetts, and regarding the permitted scope of discovery. Pickle and Joy regarded every effort to limit their asserted right to unrestricted access to 3ABN and Shelton's private information as bad faith stonewalling on the part of 3ABN, Shelton and their counsel. On the other hand, 3ABN and Shelton argued that Pickle and Joy, who proclaimed themselves to be "ecclesiastical journalists," intended to post on the internet private documents that they obtained about 3ABN and Shelton during the course of the litigation, and for that reason sought to limit discovery to the topics raised by the pleadings.

Before the confidentiality and scope-of-discovery issues were resolved, Pickle and Joy began serving third party subpoenas seeking the very information that 3ABN and Shelton were asking the district court to protect from public disclosure. Pickle and Joy sought documents from 3ABN's and Shelton's banks, a publishing house and an accounting firm by use of subpoenas issued from federal district courts in Minnesota, Michigan, Illinois and California. (Copies of these

subpoenas are attached as Exhibits 3-8 to the June 25, 2008 Affidavit of Kristin L. Kingsbury, hereinafter ECF Doc. No. 76). 3ABN and Shelton resisted these efforts as an end run around the protective order which was under consideration, and which eventually issued, from the Massachusetts district court.

3ABN and Shelton ultimately prevailed as to all three subpoenas, in that all the requested information was ultimately ordered to be produced, if at all, subject to the Massachusetts protective order. Specifically, the Minnesota court ordered that the subpoenaed information be produced under seal to the Massachusetts court, subject to the Massachusetts confidentiality order. (*See* ECF Doc. No. 92, Exhibit 31: Order on Defendant's Request for Reconsideration, Case No. 08-MC-7 (RHK/AJB) (D. Minn. July 1, 2008, Boylan, J.) ("Said production was to be made under seal to Magistrate Judge Timothy S. Hillman in the District of Massachusetts to accommodate the pending protective order Magistrate Judge Hillman was to issue."). The Illinois court ordered that the matter be transferred to the Massachusetts district court for the sake of consistency with the Protective Order issued by Magistrate Judge Hillman. (Order, Case No. 08-MC-16 (S.D. Ill. Oct. 22, 2008, Gilbert, J.) ("Issues presently before this court overlap extensively with matters currently under decision in Massachusetts. The potential for inconsistent and conflicting rulings is obvious. For that reason, this matter is TRANSFERRED to the District of Massachusetts…."). And the Michigan court ordered disclosure

of confidential records directly to the Defendants, but stipulated that they would be subject to the protective order issued by the Massachusetts district court. (Order, Case No. 1:08-mc-00003 (W.D. Mich., S. Div. July 28, 2008, Carmody, Mag. J.) ("the production was ordered to be subject to an extant Protective Order in the Massachusetts case.").

In other words, 3ABN's position that appellants' third party discovery should be regulated by the Massachusetts court prevailed in every case. In every case, appellants' blanket assertions of stonewalling and other vexatious pretrial conduct are belied by the rulings of the courts that actually considered the appellants' arguments first-hand.

Additional delays occurred because 3ABN and the appellants were unable to agree on the scope of permissible document discovery, which led to the filing of cross-motions on that topic. Pickle and Joy sought virtually every financial and business record of 3ABN and Shelton dating back to the inception of 3ABN in the mid-1980s, whereas 3ABN and Shelton contended that discovery could be limited to a handful of specific statements, made within the preceding several years, that were identified in the Complaint as defamatory.

On September 11, 2008, Magistrate Judge Hillman denied appellants' motion to compel and granted 3ABN's motion for a protective order. (*See* Amended Order, D. Mass., Hillman, M.J., at JA0285 ("It is ordered

that…Defendant Robert Pickle's Motion to Compel…is denied without prejudice. * * * Plaintiff's Motion for Protective Order (Docket No. 74), allowed."). Magistrate Judge Hillman struck the document requests that had been served by Pickle and ordered that a new set be served. Thus, the only discovery requests served by Pickle and Joy in the entire case were ultimately stricken, and the case was dismissed before any further discovery responses came due.

As these events were unfolding, positive developments were occurring that ultimately led to 3ABN's decision to terminate the lawsuit. Specifically, in February of 2008, 3ABN purchased the offending web sites from Joy's bankruptcy trustee, and promptly shut them down. (JA0318). In March of 2008, the governmental agencies in California responsible for investigating the charges of discrimination against 3ABN concluded with findings of no probable cause. (JA0319). In July of 2008, the IRS completed an investigation of 3ABN and Shelton and closed its files with no finding of wrongdoing. (JA0318). Finally, in October of 2008, 3ABN's board of directors examined donation levels and concluded that they had been restored to levels that existed before the appellants began their campaign of disparagement. (JA0139).

In view of the fact that the appellees' activities were no longer disrupting 3ABN's mission and in view of the fact that neither Joy nor Pickle had the means to pay a monetary judgment, 3ABN concluded that nothing positive could be

accomplished by way of further litigation and instructed its attorneys to terminate the lawsuit. (JA0319-JA0320; JA0314).

Pickle and Joy were unwilling to agree to dismissal. (DA0019-DA0020; JA0301). 3ABN and Shelton therefore moved for voluntary dismissal on October 23, 2008 (JA0299). Pickle and Joy filed their opposition to the motion on October 30, 2008. (JA0323).

On October 30, 2008, Judge Saylor considered the motion to dismiss at a previously scheduled status conference. Without objection from the defendants, Judge Saylor took up the motion to dismiss. (DA0005). After hearing the arguments of the parties, the court granted the motion for voluntary dismissal, without prejudice, subject to the condition that any claims by the plaintiffs involving the same or similar facts and circumstances must be commenced in Judge Saylor's court, a condition that had been proposed by 3ABN in answer to the concern that 3ABN might be planning to commence similar litigation in another forum. (DA0014). The district court further conditioned dismissal on payment of costs that the court indicated might be imposed following briefing by the parties. (DA0016-17). Judge Saylor further granted 3ABN's motion for return of all documents designated as confidential, pursuant to the confidentiality order. (DA0014).

On October 31, 2008, an Electronic Clerk's Notes of the hearing issued that summarized Judge Saylor's rulings, but incorporated the verbal ruling by reference. (DA0001). On November 3, 2008, an Order of Dismissal issued. (DA0002).

Following the Order of Dismissal, in accordance with Judge Saylor's instructions, Pickle and Joy filed a motion for costs on November 13, 2008. (JA0354). 3ABN and Shelton filed an opposition, and the matter remains pending in the district court as of this writing.

RESPONSE TO STATEMENT OF FACTS

The facts necessary to review the district court's order are much narrower than the 28-page recitation in appellants' brief. Appellants have used their fact section to regurgitate many of the unfounded and unproven allegations of wrongdoing against 3ABN and Shelton that gave rise to the lawsuit in the first place, to which they add a litany of complaints about vexatious litigation conduct, all of which were rejected by the district court (to the extent they were raised at all).

But in granting the motion to dismiss, Judge Saylor explicitly stated what facts he considered relevant and proven. He said:

> I make no finding of any kind as to the merits or lack of merits of any of the claims or factual defenses set forth in the pleadings, and *I'm dismissing the case principally based on the representation by the plaintiff that there is no longer any*

> *purpose for the litigation, because plaintiffs do not believe that they can accomplish – or achieve any meaningful relief based on the facts and circumstances as they now exist, including, but not limited to, the bankruptcy of one of the defendants.*

(DA0013-DA0014) (emphasis added). Thus, Judge Saylor accepted the evidence offered by 3ABN and Shelton in support of their motion to dismiss as true. This evidence consisted of affidavits from Dr. Walt Thompson, 3ABN's Board President (JA0317-JA0320) and the undersigned counsel for 3ABN and Shelton. (JA0313-0314).

The appellants did not seriously attempt to rebut these affidavits, instead spinning an elaborate web of speculation and conjecture leading them to conclude that 3ABN's and Shelton's stated reasons for dismissing the lawsuit were "unconvincing" (JA0323) and suggesting that the real reason for dismissing the lawsuit was to "obstruct discovery, evade disclosure of wrongdoing at trial, dodge misuse of process and malicious prosecution counterclaims by the Defendant, and avoid an adverse result." (JA0323).

Although Pickle and Joy may not have been convinced, Judge Saylor was. As quoted above, he said he was dismissing the case "principally based on the representation of the plaintiff that there is no longer any purpose," indicating that he rejected Pickle and Joy's alternative theories about the reasons for the dismissal. Thus, Judge Saylor accepted as true 3ABN's explanation for the dismissal, and rejected the alternative theories offered by Pickle and Joy. Since Pickle and Joy

offered nothing by way of proof beyond ill-tempered speculation and innuendo, Judge Saylor's findings cannot be faulted.

The affidavits in support of the motion to dismiss established the following. 3ABN and Shelton commenced the lawsuit on or about April 5, 2007. At the time dismissal was sought, the case was in the document discovery phase. (JA0313, ¶ 2). No depositions had been taken, nor had any dispositive motions been filed or served. (*Id.*). The parties had recently stipulated to an order extending discovery and unexpired deadlines by 90 days. (*Id.*).

The Complaint (ECF Doc. 1) contained four counts: Count I stated a claim for infringement of trademark under 15 U.S.C. § 1114 arising out of Pickle's and Joy's alleged use of 3ABN's marks and registered domain names called "save3ABN.com" and "save3ABN.org." Count II stated a claim for dilution of trademark under 15 U.S.C. § 1125(c) arising out of the operation and maintenance of the same websites. Count III stated a claim for defamation arising out of specific statements published on the internet at the website www.save3ABN.com, which contained false accusations of the commission of crimes by 3ABN and Shelton. Finally, Count IV of the Complaint stated a claim for intentional interference with economic relations, arising out of the conduct that was the subject of the defamation count, which had the impact of interfering with 3ABN's relationships with its donors.

After the commencement of the lawsuit, developments occurred that made much of the relief sought in the Complaint either moot or unnecessary. (*See* Affidavit of Dr. Walt Thompson, JA0317). Count I and Count II had sought an order shutting down two internet web sites owned and operated by Pickle and Joy. The registered owner of the web sites was Joy. (JA0318, ¶ 3). Joy filed for bankruptcy protection on August 14, 2007. (The automatic stay on collection activity was subsequently lifted). On February 12, 2008, 3ABN purchased the infringing website domain names from the bankruptcy trustee, and immediately shut them down. (*Id.*). Therefore, the relief sought in the complaint with respect to Counts I and II was obtained in the course of the bankruptcy proceeding.

Although monetary relief for Pickle's and Joy's violation of federal trademark laws and common law claims was sought in the Complaint, it was discovered to be unlikely that 3ABN and Shelton would recover any monetary relief no matter what the final outcome of the lawsuit might be. As to Joy, the bankruptcy court order that lifted the automatic stay had required 3ABN to give up its right to seek damages against Joy. (JA0314; *see* Order [on] Motion for Relief from the Automatic Stay, No. 07-43128-JBR (Bankruptcy Court D. Mass., Rosenthal, J. "[3ABN and Shelton] are hereby granted relief from the automatic stay so that they may continue to prosecute the Civil Action…Provided, however,

neither 3ABN or Shelton shall seek damages in the Civil Action on account of any prepetition claim.").

Therefore, tangible relief could not be obtained against Joy. As to Pickle, it was the assessment of 3ABN's counsel based on affidavits that Pickle had filed to establish his lack of resources, that he would be unable to pay any substantial award of damages. (JA0314). In any case, the prospect of an award of monetary damages had never been a significant motivation for the lawsuit, and 3ABN and Shelton were not interested in continuing it merely to obtain an uncollectible monetary award.

3ABN and Shelton were, however, motivated by a desire for a judicial determination that the statements by Pickle and Joy were false. By October of 2008, however, these concerns had abated. While the lawsuit was ongoing, the Internal Revenue Service conducted an investigation of 3ABN and Shelton. (JA0318). The audit took more than a year and encompassed over 100,000 financial records. (*Id.* ¶ 5).

At its conclusion last July, the IRS contacted counsel for 3ABN and Shelton and inquired as to whether the file materials should be destroyed or returned. (*Id.*). 3ABN and Shelton were advised that this is what the IRS does when it concludes an investigation without finding sufficient evidence to warrant prosecution. (*Id.*). The Board of 3ABN deemed this action by the IRS to be sufficient assurance that

3ABN's financial accounting and tax reporting are in order and in full compliance with the law. (*Id.*). Certainly, there could be no greater assurance to 3ABN's public that its filings comply with the law than the fact that the IRS reviewed them and found nothing that warranted even a revised return, let alone criminal prosecution. Thus, the objective of the lawsuit to obtain a finding that its tax filings were not in violation of the law was met by means other than this lawsuit.

Also during the lawsuit, several additional allegations made by Pickle and Joy involving the treatment of certain employees of 3ABN's wills and trusts department were investigated by a California state agency and the U.S. Equal Employment Opportunity Commission. (JA0319). In March of 2008, 3ABN and Shelton were advised that the complaints had been dismissed for insufficient evidence. (*Id.*). This also served as a vindication of 3ABN with respect to Pickle and Joy's statements with respect to that issue. (*Id.*).

As might be expected following official governmental actions rejecting the most serious of Pickle and Joy's damaging statements, the public's confidence in 3ABN and Shelton appeared to have been restored. In the week preceding its filing of the motion to dismiss, 3ABN reviewed figures indicating that donation levels had been restored to the levels they enjoyed before Pickle and Joy began their campaign of disparagement. (JA0319-JA0320). This indicated to the Board

that the public's confidence in 3ABN has been restored. As 3ABN's Board Chairman, Dr. Walt Thompson, stated:

> When the Board came to the conclusion that 3ABN's reputation was no longer being significantly harmed by the Defendants' activities and that continuation of the lawsuit could not achieve more than what we had already achieved by other means, it was time to shut the lawsuit down.

(*Id.*).

Although 3ABN and Shelton continued to believe that they would have ultimately achieved a ruling in this case that the statements by Pickle and Joy were false and defamatory, the intervening developments reduced the need to obtain a ruling on the merits to the point that the expense and distraction inherent in litigation were no longer justified. (JA0306).

Thus, the "facts" recounted in appellants' brief were not accepted by the district court as true or relevant. If this Court were to consider any of them in reaching its decision it would be finding facts contrary to those found by the district court. It should also be noted that there was never an occasion for 3ABN and Shelton to submit evidence in support of the merits of their claims to the district court, and therefore there is nothing available in the district court record from which 3ABN and Shelton can respond to the web of innuendo and speculation that infests the appellants' brief.

Judge Saylor declined Pickle and Joy's invitation to reach the merits of the case, stating "I make no finding of any kind as to the merits or lack of merits of any of the claims or factual defenses set forth in the pleadings…." (DA0013). Thus, this Court is spared the necessity of considering appellants' disputed statement of facts and may confine its review to the facts accepted by the district court as true and relevant. Those facts are stated above.

RESPONSE TO SUMMARY OF ARGUMENT.

Appellants argue that the district court's order for dismissal pursuant to Fed. R. Civ. P. 41(a)(2) was improper, by raising numerous complaints that are unsupported by the record or irrelevant to a determination to dismiss a lawsuit pursuant to Rule 41(a)(2). The district court did not abuse its discretion by dismissing the lawsuit without prejudice where (1) the dismissal was at an early stage of the litigation; (2) no counterclaims were pending; (3) circumstances including the bankruptcy of one of the defendants rendered an award of monetary relief uncollectible; (4) non-monetary relief had been obtained by means outside the litigation; and (5) the district court imposed terms requiring the plaintiffs to recommence litigation only in the same forum and took the issue of an award of costs under advisement. The district court also acted within its discretion in ordering the return to plaintiffs of all documents obtained by the defendants under the protective order issued in the case.

RESPONSE TO STANDARD OF REVIEW

Standard of Review for Order Granting Voluntary Dismissal. The granting of a motion for voluntary dismissal is reviewable only for abuse of discretion. *Puerto Rico Maritime Shipping Authority v. Leith*, 668 F.2d 46, 49 (1st Cir. 1981).

Standard of Review for Order to Return Confidential Documents. The district court has "broad discretion" to decide when a protective order is appropriate and what degree of protection is required. *Poliquin v. Garden Way, Inc.*, 989 F.2d 527, 532 (1st Cir. 1993). Great deference is shown to the district court in framing and administering such orders. *Id.* Contrary to the contentions of the appellants, no First Amendment concerns are implicated by an order enforcing a protective order against litigants who obtained access to information for litigation purposes.

RESPONSE TO ARGUMENT

I. APPELLANTS' COMPLAINTS ABOUT PROCEDURE ARE BASELESS.

Pickle and Joy begin their argument section with a series of baseless attacks on the district court and its handling of the motion to dismiss. None of appellants' arguments establish an abuse of the district court's discretion. Before responding to the individual arguments, a brief recital of the law regarding voluntary dismissals may be helpful.

The purpose of Rule 41(a)(2) is to permit a plaintiff, with approval of the court, to voluntarily dismiss an action "so long as no other party will be prejudiced." *Puerto Rico Maritime Shipping Authority*, 668 F.2d at 50 ("the basic purpose of Rule 41(a)(2) is to freely permit the plaintiff, with court approval, to voluntarily dismiss an action so long as no other party will be prejudiced."). Generally, dismissal of an action under Rule 41(a)(2) is committed to the discretion of the court. *See Doe v. Urohealth Systems, Inc.*, 216 F.3d 157, 160 (1st Cir. 2000). Neither the prospect of a second suit nor a technical advantage should bar dismissal. *Puerto Rico Maritime Shipping Authority*, 668 F.2d at 50.

Dismissal should in most cases be granted, unless the result would be to legally harm the defendant. *See Century Mfg. Co. v. Central Transport Int'l, Inc.*, 209 F.R.D. 647, 648 (D. Mass. 2002). Dismissal under the rule is without prejudice unless the court specifies otherwise. *See* Fed. R. Civ. P. 41(a)(2). In exercising its discretion, the court may consider such factors under Rule 41(a)(2) as the defendant's effort and expense of preparation for trial, the plaintiff's diligence in prosecuting the action, and the plaintiff's explanation for seeking dismissal. *See Doe*, 216 F.3d at 160. Rule 41(a)(2) authorizes the Court to condition the dismissal on "terms that the court considers proper." Fed. R. Civ. P. 41(a)(2). The district court in this case properly applied these standards in granting dismissal of the case.

A. The District Court Was Familiar With the Case.

Pickle and Joy's lead-off argument is that the district court was not sufficiently familiar with the case to dismiss it. They misleadingly quote a passage from one of the six status conferences in which Judge Saylor appeared to say he did not have a "handle" on the case and was not immersed in the "ins and outs of the disputes." (Appellants' brief at p. 34). But a fuller review of the transcript reveals that Judge Saylor was referring only to the cross-motions on permissible scope of discovery that he had recently referred to Magistrate Judge Hillman for resolution, and was unsure whether the discovery schedule should be extended based on Judge Hillman's resolution of those motions. (JA0376). He was not confessing to an overall lack of familiarity with the case, which by the time he granted the motion to dismiss he had seen through six status conferences (held on June 21, 2007, July 23, 2007, December 14, 2007, May 7, 2008, September 11, 2008 and October 30, 2008), and a motion hearing on May 10, 2007.

Judge Saylor was obviously sufficiently familiar with the case to decide whether and on what terms it should be dismissed. If there was anything specific that he needed to know, it was incumbent on the parties to advise him about it in their briefs and at oral argument. Having submitted both a brief and oral argument in opposition to the motion to dismiss, Pickle and Joy cannot now complain that the district court lacked relevant information.

B. The District Court Read Pickle and Joy's Brief.

Pickle and Joy next complain that the district court did not read their brief. Secondary sources and other circuits have observed that "Rule 41(a)(2) does not require that the plaintiff's request for dismissal take any specific form; it requires only that the court approve such a request for dismissal." *See* 8 *Moore's Federal Practice*, 3d § 41.40[4] (Matthew Bender 3d ed.). Even dismissals *sua sponte* have been upheld. *See* 8 *Moore's Federal Practice*, 3d § 41.40[4][a] (Matthew Bender 3d ed.) (citations omitted).

Moreover, Appellants' argument implies their belief that Judge Saylor was not being truthful when he stated "I've read the papers" (DA0005, lines 20-21) and, in reference to the brief, "Yes, I did see it." (DA0006, line 7). Pickle and Joy do not offer any evidence that Judge Saylor did not read their brief. In fact, Judge Saylor gave them an opportunity to present their arguments orally, which appellants did. There is no basis to conclude that Judge Saylor was not sufficiently apprised of Pickle and Joy's position when he decided the motion.

C. The District Court Did Not Err by Failing to Allow a Normal Briefing Schedule.

Pickle and Joy next complain that the district court should have allowed for a normal briefing schedule because the case was complex. This argument suffers from the defect that Pickle and Joy *did* file a brief, and were not entitled to a

second one under the local rules. A "normal" briefing schedule would therefore not have netted them another opportunity to express their views.

The argument also fails because Pickle and Joy did not make it known to the district court that they wanted a "normal" briefing schedule. On the contrary, the motion was heard at the status conference by express consent of all parties. At the beginning of the hearing, Judge Saylor asked Pickle and Joy if they wished to be heard on the pending motion for voluntary dismissal. (DA0005, lines 20-21). Joy responded "Yes, sir." (*Id.*). Pickle, who appeared by telephone, either did not respond or it was not captured by the court reporter. Joy went on to summarize the brief that he and Pickle had filed. Counsel for 3ABN and Shelton went next, responding to Joy's arguments. Judge Saylor then asked "Do one of the defendants wish to be heard?" (DA0011, lines 13-14). Pickle then responded "Yes, your honor." (*Id.* line 15). He then launched into another summary of the brief as well. After a brief reply by counsel for 3ABN and Shelton, Judge Saylor indicated he would grant the motion, and the discussion turned to what terms would be imposed as conditions for the dismissal. Both Pickle and Joy were heard on that subject, and Judge Saylor imposed the conditions mentioned above.

Until their appeal, neither Pickle nor Joy expressed any desire for a normal briefing schedule or to defer decision on the motion for voluntary dismissal to

another day. In other words, they were happy to have the motion heard on an expedited basis until after they learned how Judge Saylor was going to rule.

So long as the court is familiar with the relevant issues, it need not schedule a hearing at all. *Puerto Rico Maritime Shipping Authority*, 668 F.2d at 51. Thus, the district court did not abuse its discretion by hearing and deciding the motion for voluntary dismissal without a "normal" briefing schedule.

D. The District Court Did Not Err by Granting The Motion Despite Alleged Noncompliance with the Local "Meet and Confer" Rule.

Pickle and Joy next complain that the district court erred by granting the motion to dismiss in the absence of compliance with D.Mass.Loc.R. 7.1(a)(2), which states that "counsel must certify that they have conferred and have attempted in good faith to resolve or narrow the issue." But the certification of counsel for 3ABN and Shelton is in the record for all to see, attached to the Motion for Voluntary Dismissal. (JA0301). When Pickle and Joy made the same contention at the hearing on the motion to dismiss, counsel for 3ABN and Shelton responded by affirming compliance with Rule 7.1. (DA0019-DA0020). Judge Saylor said "I've heard enough" and ended the hearing without revisiting his decision. Given Pickle and Joy's extreme position in the district court and on appeal that they have a right to be sued to a final judgment whether 3ABN wants to sue them or not, it is clear that more out-of-court dialogue would not have

narrowed the issues raised in the motion. Judge Saylor did not abuse his discretion in concluding that Rule 7.1 had been satisfied.

II. APPELLANTS' COMPLAINTS ABOUT EVIDENCE AND TESTIMONY ARE BASELESS.

Pickle and Joy next offer a litany of complaints about the evidence offered in support of the motion for voluntary dismissal. None has merit.

A. The District Court Did Not Err in Relying on Walt Thompson's Testimony.

Pickle and Joy contend that the district court erred in accepting 3ABN's evidence as to its reasons for dismissing the case. Specifically, they call 3ABN's Board Chairman a "proven liar" which, believe it or not, is restrained prose for these appellants. But Dr. Thompson is not a "proven liar," and since Pickle and Joy did not seriously challenge his credibility in the district court, the district court cannot be said to have erred in relying on Thompson's affidavit testimony. Most of what Thompson said is objectively verifiable anyway, so his credibility was not material to the motion.

Absent extraordinary circumstances, courts of appeal do not consider points which were not advanced before the district court. *Clauson v. Smith,* 823 F.2d 660, 666 (1st Cir. 1987). Pickle and Joy did not offer any evidence that Thompson was not a credible source of information about 3ABN's motives for dismissing the lawsuit. In fact, their brief quotes Thompson saying that 3ABN did not bring the

lawsuit for monetary damages, which is consistent with his affidavit. (JA0323-JA-324). Although they relied on his credibility when it suited them, later in the brief they called him "factually challenged" but did not supply any reasons for the epithet. (JA0338). In short, the evidence purporting to show that Thompson lacks credibility was not offered to the district court, and this Court should disregard it.

The district court is expressly authorized to decide motions based on affidavit testimony. Fed. R. Civ. P. 43(c). Where there are conflicting affidavits and a credibility determination is necessary to decide the motion, it may be an abuse of discretion for the district court to decline to allow cross examination of the witnesses. *Boit v. Gar-Tec Products, Inc.* 967 F.2d 671, 676 (1st Cir. 1992). But here, no competing affidavit or evidence was offered to the district court, so there was no credibility contest. Pickle and Joy did not even request to cross-examine the affiant. Therefore, the district court did not abuse its discretion in relying on Thompson's affidavit.

For the foregoing reasons it is not necessary to examine in detail the appellants' arguments and purported evidence that Thompson is not credible. But were the Court to consider Pickle and Joy's offerings, the evidence does not support their argument. In the first place, the evidence was gleaned from affidavits that Pickle and Joy had submitted to the district court in connection with unrelated motions. It was rank hearsay and lacked foundation to begin with. The district

court never mentioned any of it in any rulings or in open court, and certainly never accepted it as reliable or true in any of the orders that issued below. This Court would be acting as a fact-finding court rather than a reviewing one, were it to consider this argument or any of the evidence offered in support of it.

Appellants also argue that Thompson's affidavit contains hearsay. Manifestly, it does not. Thompson, as Chairman of 3ABN's Board, is in the best position to explain of his own personal knowledge 3ABN's reasons for dismissing the lawsuit, i.e., that 3ABN had obtained the relief sought in the litigation through other means and nothing positive could come from the lawsuit to justify the expense and distraction it posed.

B. The District Court Did Not Err in Relying on Supposedly False Testimony.

Pickle and Joy next argue that the district court erred by relying on false and deceptive testimony. Again, these arguments were not advanced before the district court and should not be considered for the first time here. Were they to be considered, they are easily answered. Pickle and Joy argue that the some of the relief sought in the Complaint was not achieved, namely the paragraphs that seek a judgment on the merits of the various claims in 3ABN's favor. Appellants miss the point. The need for judicial validation of 3ABN's right to protect its intellectual property and to be free from defamatory statements was eliminated by the developments outlined in the Thompson affidavit.

Pickle and Joy then argue that Thompson "deceptively asserted that the allegedly infringing domain names had already been obtained in Joy's bankruptcy proceedings." (Appellants' Brief pp. 39-40). But there was nothing deceptive about this assertion. The fact that 3ABN purchased the infringing web sites is objectively verifiable simply by reviewing the file in Joy's bankruptcy proceeding. (U.S. Bankruptcy Court, D. Mass., No. 07-43128-JBR). The file contains an Order on Motion for Authority to Sell Estate Property Free and Clear of Liens and Encumbrances, dated January 31, 2008, which states that the domain names "save3abn.com" and "save3abn.org" may be sold to 3ABN. On March 7, 2008, the trustee filed a "Trustees Report of Sale" indicating that the sale had been completed in accordance with the order.

These bankruptcy court documents are not in the appellate court record because Pickle and Joy did not make these arguments below. They could easily have been added had the district court seen a need for Thompson's affidavit to be corroborated. As it happened, Thompson's affidavit was essentially unrebutted. In any case, everything in Thompson's affidavit can be independently verified, and the attacks on his credibility are nothing but gossamer.

Having just advanced a deceptive argument themselves, Pickle and Joy next accuse Thompson of being "unreliable" in stating that the IRS conducted a "thorough review" of 3ABN's and Shelton's finances and found nothing out of

order. But they offer no contrary evidence; their argument is again based on nothing but bad temper.

Next Pickle and Joy suggest that Thompson's assertion that 3ABN donation levels are restored is "hearsay" and "without evidence." But Thompson's affidavit *is* evidence, and he expressly states at the outset that he has personal knowledge of the matters in it. (JA0317). Pickle and Joy again offer nothing to contradict the affidavit.

C. The District Court Did Not Err by Failing to Schedule an Evidentiary Hearing.

Pickle and Joy argue that the district court was required to schedule an evidentiary hearing. To the contrary, Fed. R. Civ. P. 43(c) expressly permits the district court to decide motions on affidavit testimony. As discussed above, where there are conflicting affidavits and a credibility determination is necessary to decide the motion, it may be an abuse of discretion for the district court to decline to allow cross examination of the witnesses. *Boit v. Gar-Tec Products, Inc.* 967 F.2d 671, 676 (1st Cir. 1992). But here there were no conflicting affidavits, and no credibility conflicts to resolve. Pickle and Joy introduced *no* evidence in the district court that contradicted the reasons stated by 3ABN for dismissal of the suit. Because no material facts were in dispute, Judge Saylor acted within a district court's discretion in deciding the motion without an evidentiary hearing.

III. APPELLANTS' COMPLAINTS ABOUT "RELEVANT FACTORS THAT SHOULD HAVE BEEN CONSIDERED" ARE BASELESS.

Pickle and Joy's brief next contains a series of complaints about the merits of Judge Saylor's decision, contending that he did not consider factors that they feel were relevant. These complaints are unfounded.

A. The District Court Did Not Err by Granting the Motion Despite Appellants' Contentions that 3ABN's Reasons were Insufficient.

Pickle and Joy incorporate by reference their arguments that 3ABN's reasons for dismissal were inadequate. 3ABN and Shelton incorporate their responses to those arguments.

B. The District Court Did Not Err by Dismissing Both Plaintiffs.

Pickle and Joy argue that the district court lacked a factual basis to dismiss Shelton because he did not submit his own affidavit. But his claims in the suit were identical to 3ABN's. There is no requirement in Fed. R. Civ. P. 41(a)(2) that each moving party supply a separate factual basis for the dismissal, where the same factual basis applies to both moving parties. The reasons 3ABN could not achieve meaningful relief through continuation of the litigation applied equally to Shelton, who was a founder and longtime board member of 3ABN.

C. The District Court Did Not Err by Granting the Motion Despite Pickle and Joy's Contentions About Bad Faith and Vexatious Conduct.

Pickle and Joy contend that the district court should have agreed with their contentions that 3ABN and Shelton engaged in bad faith and vexatious conduct. Judge Saylor did not abuse his discretion in granting dismissal without expressly ruling on Pickle and Joy's allegations of vexatious conduct for several reasons. First, the evidence did not support such a finding. Pickle and Joy primarily contend that 3ABN and Shelton acted in bad faith by suing them in the first place, and argue strenuously, citing hearsay contained in dozens of foundationless exhibits that were submitted along the way in connection with other motions, that the suit lacked merit. But the actual record demonstrates no bad faith or vexatious conduct on the part of 3ABN and Shelton. *See Puerto Rico Maritime*, 668 F.2d at 50 (upholding dismissal where defendants asserted suit was brought to harass, but where record indicated ample grounds to find plaintiffs' good faith). And contrary to appellants' assertions, the district court was quite familiar with the case (having held six status conferences and one motion hearing) and understood quite well that Pickle and Joy were quick off the mark when it came to accusing people of bad faith and vexatiousness.

Second, the allegations of vexatious conduct specified by appellants are irrelevant to whether the case should have been dismissed. Pickle and Joy

complain that Judge Saylor should have considered supposedly vexatious conduct that occurred throughout the litigation. But the factors to be considered in determining whether to grant dismissal are the defendant's efforts and expense of preparation for trial, the plaintiff's diligence in prosecuting the action, and the plaintiff's explanation for seeking dismissal. *See Doe,* 216 F.3d at 160. While vexatious litigation conduct may be relevant to a motion for costs and fees, it is not among the factors necessary to determine whether voluntary dismissal should be granted in the first place. Therefore, the district court properly ignored the bulk of Pickle and Joy's arguments against dismissal, and this Court should too.

Moreover, the point of dismissing a case before reaching the merits is to end the case before reaching the merits, and Rule 41(a)(2) expressly allows the plaintiff to seek this relief. If the merits were among the factors to be considered in granting a motion to dismiss, there would be no point to it. The record in this case contains little or no evidence relating to the merits of the case because the only motions filed to this point were procedural ones in which the merits were not at issue. For that reason, the merits continue to be irrelevant, even here on appeal.

Finally, at the bottom of Pickle and Joy's arguments about vexatious litigation conduct is their belief that any effort to restrict discovery to relevant materials, and any disagreement with them regarding what constitutes relevant materials, is vexatious and unreasonable. However, as the account of the litigation

history set forth above in the "Response to Statement of the Case" shows, these claims were all handled and disposed of by the district court without a finding that either side acted in bad faith. The district court never imposed sanctions against either side, and ultimately agreed with 3ABN and Shelton on every important point. For example, it granted the motion for a Protective Order and later struck the set of document requests that Pickle had served because they were hopelessly overbroad. (JA0285).

In short, the district court did not agree with 3ABN and Shelton on every point, but ruled in their favor on the major points. The district court never once said that the positions 3ABN and Shelton had taken were unreasonable, let alone in bad faith. Pickle and Joy's argument that Judge Saylor should have considered "bad faith and vexatiousness" is legally and factually baseless.

D. The District Court Did Not Err by Granting the Motion Despite Pickle and Joy's Contentions About Lack of Diligence.

Pickle and Joy next argue that the district court did not sufficiently consider the supposed lack of diligence of the plaintiffs in prosecuting the case. They acknowledge, however, that 3ABN and Shelton served written discovery on them and served subpoenas on third parties. (Brief p. 47).

3ABN and Shelton submitted evidence to Judge Saylor, in the form of an affidavit of counsel, detailing the development of the case, and recounting the fact that the case was in the "document discovery phase," that "no depositions have

been taken," and that "the parties recently stipulated to an order extending discovery and unexpired deadlines by 90 days." (JA0313-JA0314). The affidavit also recounts the lengthy delays caused by Joy's bankruptcy and wrangling over the protective order and scope of discovery.

Pickle and Joy's contention of lack of diligence is shown to be false merely by these facts. More importantly, Judge Saylor had conducted six status conferences, and was well apprised of the progress of the case. He never showed any dissatisfaction with its progress. There is simply no evidence or argument offered by appellants to support their contention that the district court abused its discretion – it did consider the diligence of the parties and the progress of the case, and therefore properly exercised its discretion. This Court is not in a position to second guess the district court on the progress of this case.

E. The District Court Did Not Err by Granting the Motion Despite Pickle and Joy's Contention that the Motion was Not Brought Diligently.

Pickle and Joy argue that the district court erred by granting the motion despite their argument that dismissal was not sought sooner than it was. This argument fails factually and legally. As a factual matter, dismissal was sought within a week of the 3ABN board reviewing its finances and concluding that donation levels were restored to normal. (JA0319-JA0320). Other significant developments leading to the motion to dismiss, including the favorable rulings by

the EEOC and the IRS, occurred in March and July – only months before the motion to dismiss was filed in October. As a legal or as a factual matter, the motion need not have been filed sooner.

F. The District Court Did Not Err by Granting the Motion Despite Pickle and Joy's Contentions That it Was a "Ploy to Evade Discovery."

Pickle and Joy argue that the district court abused its discretion in dismissing the case where they think dismissal was sought to evade discovery. At the heart of this argument is Pickle and Joy's desire to use the litigation to obtain 3ABN and Shelton's private financial information for non-litigation purposes. The short answer is that Pickle and Joy have no right to obtain discovery where the lawsuit has ended.

G. The District Court Did Not Err by Granting the Motion Despite Pickle and Joy's Claimed Effort and Expense.

Pickle and Joy next argue that the district court erred by granting the motion despite their claimed effort and expense. The district court ordered that this assertion be handled in the context of a motion for an award of costs and fees, which has been briefed and remains pending. In a nutshell, Pickle and Joy used the discovery tools available to them under the Rules of Civil Procedure to seek information that had nothing to do with the litigation. They wanted the information for their "journalistic" purposes, and not because it would help them prove the proof of their defamatory statements about 3ABN and Shelton. The

effort and expense they claim to have incurred were largely not necessary to the defense of the case. However, because the district court has not completed its decision on this issue, it would be premature for this Court to review a decision that has not yet been made. For the present, the most that can be said is that the district court has not abused its discretion, nor has it had a full opportunity to do so.

H. The District Court Did Not Err by Granting the Motion Despite Pickle and Joy's Contention that the Case Was at a Critical Juncture.

Pickle and Joy argue that the district court erred by granting the motion to dismiss "late in the case" and "at a critical juncture." The district court was well aware that the case was virtually just beginning, having been stalled by Joy's bankruptcy, debate over a protective order and disagreement over the permitted scope of discovery, which was resolved with an order striking Pickle's document requests and ordering him to serve new ones. No depositions had been taken and no substantive motions had been filed. Even cases in their latest stages have been dismissed without prejudice and with no award of costs under Rule 41 and the dismissal upheld. *Puerto Rico Maritime Shipping Auth.*, 668 F.2d at 50 (affirming district court's grant of motion for voluntary dismissal instead of considering defendants' pending motion for summary judgment on a laches defense); 8 *Moore's Federal Practice*, 3d § 41.40[7][a] (Matthew Bender 3d ed.).

The district court did not abuse its discretion by dismissing the case where the motion was brought before 3ABN and Shelton were even under an obligation to respond to Pickle's document requests.

IV. APPELLANTS' COMPLAINTS ABOUT THE TERMS OF DISMISSAL ARE BASELESS.

A. The District Court Did Not Err by Dismissing Without Prejudice.

Pickle and Joy contend that the district court erred by dismissing the case without prejudice. Whether to allow a Rule 41(a)(2) dismissal with or without prejudice is discretionary with the court. *See Read Corp. v. Bibco Equip. Co.*, 145 F.R.D. 288, 289-90 (D.N.H. 1993). Rule 41(a)(2) directs that a voluntary dismissal by the court is without prejudice unless otherwise specified in the order. Fed. R. Civ. P. 41(a)(2); *Puerto Rico Maritime Shipping Auth.*, 668 F.2d at 49-50 (finding that in absence of the court's order addressing whether the dismissal was with or without prejudice, the Rule provides the dismissal is without prejudice). Thus, in the absence of a court exercising its discretion, the Federal Rules of Civil Procedure provide the default ruling that the dismissal be *without prejudice.*

First Circuit authority additionally holds that "dismissal without prejudice should be permitted unless the court finds that the defendant(s) will suffer legal prejudice." *Puerto Rico Maritime Shipping Auth.*, 668 F.2d at 50. Nevertheless, neither the prospect of a second suit nor a technical advantage to the plaintiff

should bar dismissal. *Id.* (citing *Hoffmann v. Alside, Inc.,* 596 F.2d 822, 823 (8th Cir. 1979); *LeCompte v. Mr. Chip Inc.*, 528 F.2d 601, 604 (5th Cir. 1976); *In re Internat'l Airport Inn Partnership*, 517 F.2d 510, 512 (9th Cir. 1975); *Stern v. Barnett*, 452 F.2d 211, 213 (7th Cir. 1971); 9 Wright & Miller, Federal Practice and Procedure § 2363 at 165 (1971)).

Pickle and Joy argue that the district court improperly dismissed the case without prejudice to protect the Plaintiffs from a secondary suit for malicious prosecution. The district court did nothing of the kind. As this Court has said:

> Dismissal without prejudice should be permitted under the rule unless the court finds that the defendant will suffer legal prejudice. Neither the prospect of a second suit nor a technical advantage to the plaintiff should bar the dismissal.

Puerto Rico Maritime Authority, 668 F.2d at 50. Rule 41(a)(2) presumes dismissal is presumptively without prejudice. Fed. R. Civ. P. 41(a)(2)("Unless the order states otherwise, a dismissal under this paragraph (2) is without prejudice."). The issue is therefore whether the district court found, or abused its discretion by failing to find, that defendants would suffer legal prejudice absent a dismissal with prejudice.

The district court here properly found that Pickle and Joy would not suffer legal prejudice if the case was dismissed without prejudice. None of the arguments Pickle and Joy had advanced were of a type that amounted to legal prejudice, i.e., in which their *legal* position would be worsened because of dismissal. Their

arguments were all related to tactical concerns should a future lawsuit be commenced involving the same issues. But the mere prospect of a second lawsuit following a voluntary dismissal without prejudice does not constitute plain legal prejudice. *Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212, 217, 67 S.Ct. 752, 91 L.3d. 849 (1947). The rule is concerned with *legal* prejudice, which is distinguished from technical advantage. In any case, Judge Saylor answered these concerns by directing that any future lawsuit involving the same issues be commenced in his court. The district court did not abuse its discretion in directing that dismissal be without prejudice.

Pickle and Joy quote argument from counsel for 3ABN and Shelton regarding the effect of dismissal without prejudice on a suit for malicious prosecution, and leap to the conclusion that the district court imposed dismissal without prejudice in order to protect the plaintiffs from prejudice.

But arguments of counsel are not the same as findings by the district court. There is no indication that the district court accepted or relied upon the arguments of counsel that Pickle and Joy cite. What Judge Saylor *said* was that he was dismissing the case "principally on the representation of the plaintiff that there is no longer any purpose for the litigation, because plaintiffs do not believe that they can accomplish – or achieve any meaningful relief based on the facts and circumstances as they now exist, including, but not limited to, the bankruptcy of

one of the defendants." (DA0014). This finding was manifestly correct, and far from an abuse of discretion.

B. The District Court Did Not Err by Imposing a Supposedly Unenforceable Condition.

Pickle and Joy complain that the district court erred by imposing as a condition of dismissal a requirement that 3ABN and Shelton can only affirmatively bring claims arising out of the same subject matter in the U.S. District Court for the District of Massachusetts. The transcript of the hearing indicates that Judge Saylor imposed this requirement at the suggestion of counsel for 3ABN and Shelton, to alleviate the court's concern that the dismissal might result in forum shopping or other tactical advantage. (DA0012).

Rule 41(a)(2) grants discretion to the district court to impose terms and conditions on dismissal to protect the defendants from prejudice. Accordingly, the district court may impose conditions requiring refiling in a particular forum. 8 *Moore's Federal Practice,* § 41.40[10][e][ix] (Matthew Bender 3d ed.) (citing *Ahler v. City of New York*, 93 Civ. 0056, 1993 U.S. Dist. LEXIS 12680, at *3 (S.D.N.Y. Sept. 13, 1993)). The district court did not abuse its discretion in imposing this term.

C. The District Court Did Not Err by Not Imposing Terms that Preserve Evidence From Spoliation.

Pickle and Joy argue that the district court should have imposed terms that preserve evidence from spoliation. The arguments they advance to support their claim that spoliation is a danger are unfounded. First, they cite hearsay regarding a billing dispute with 3ABN's former corporate counsel, Nick Miller, in which Miller apparently claimed that his bills had been altered by 3ABN. That matter was not before the district court in this case, or any other case, and has never been adjudicated.

Second, they cite statements from Shelton and one of his current attorneys, Gerry Duffy, that they ordered destruction of "documents pertaining to the IRS criminal investigation." In fact, the statements were to the effect that the IRS had obtained *copies* of pretty much every financial record of 3ABN and Shelton for the audit period, and at the conclusion of the IRS investigation the IRS closed its file and asked whether 3ABN and Shelton wanted the records back or would prefer that they be destroyed. 3ABN and Shelton did not need a second set of these incredibly voluminous records, and has not destroyed the originals.

Throughout the litigation, Pickle and Joy threatened to counterclaim for malicious prosecution, but they allowed the deadline for amending pleadings to expire without making such claims. When Pickle indicated at the hearing on the motion to dismiss that they intended to file a counterclaim, Judge Saylor cut him

off, saying "Hold on. Hold on, Mr. Pickle. There's no counterclaim filed, as I understand; is that right?" (DA0015). Pickle acknowledged this was true. Judge Saylor then said "…whether you have some future claim against the plaintiffs, I make no comment on of any kind whatsoever." Judge Saylor thus determined that no litigation would exist between the parties once this case was dismissed.

Case law has rejected objections to a voluntary dismissal where defendants argued that a counterclaim was pending unless the counterclaim was interposed prior to the service of plaintiff's motion to dismiss. *See e.g.,* 8 *Moore's Federal Practice*, 3d § 41.40[8][b] (Matthew Bender 3d ed.) (citations omitted). In light of the fact that Pickle and Joy had not made any legal claims of their own, and there was therefore no present evidentiary need for any of the documents in the case, the district court did not abuse its discretion in declining to impose terms guarding against spoliation.

D. The District Court Did Not Err by Dismissing Without Imposing Additional Terms.

Pickle and Joy next argue for additional terms that they say were necessary to protect them from prejudice. The first argument is that the district court should have required 3ABN and Shelton to consent to the use of discovery taken in this case in an undefined future case, threatened to be commenced by Pickle and Joy, involving unspecified claims. This request was not made to the district court but, if it had, would have been properly been rejected. Without knowing what the

issues in the future case would be, it would have been impossible for the district court to predict whether any or all of the evidence obtained in *this* suit would be relevant in an undefined future suit.

The second argument, that dismissal should have been with prejudice, has been addressed above.

The third argument, that plaintiffs should have been required to consent to use of the pretrial rulings in this case in future litigation, was also not advanced below. Had it been advanced, it would have been properly rejected because Judge Saylor was not in a position to know whether pretrial rulings in this case would be appropriate in an undefined future case involving unknown issues and seeking unknown relief.

Pickle and Joy's fourth argument, that the district court should have ordered payment of their costs and fees, is pending before the district court right now, and is not reviewable in this appeal. However, the district court would be within its discretion were it to award no costs or fees. Costs or fees may be awarded under Rule 41(a)(2) where necessary to protect a defendant. *See Puerto Rico Maritime Shipping Authority,* 668 F.2d at 51. Here, there is no finding that such an award is necessary to protect Pickle and Joy from prejudice. Nor could there be, given the condition imposed by Judge Saylor that 3ABN and Shelton recommence any same or similar litigation in his courtroom.

3ABN and Shelton's argument against an award of fees and costs in the motion now pending before Judge Saylor, in a nutshell, is that the only costs that Pickle and Joy could possibly have recovered in the event of a successful outcome for them at trial would be the limited costs available under 28 U.S.C. § 1920 and Fed. R. Civ. P. 54 for a prevailing party. The substantive law did not give them a right to their attorneys fees or other litigation costs. Therefore, an award of anything more than the costs authorized in 28 U.S.C. § 1920 would not be a term necessary to cure prejudice from the dismissal, but would amount to a windfall that they could not hope to achieve if the case went forward.

Judicial precedent in which fees were imposed as a condition of dismissal generally involve duplicative litigation, in which the plaintiffs are seeking to dismiss in order to commence or maintain existing litigation somewhere else. Courts sometimes find that an award of fees may be appropriate in those cases in order to avoid prejudice, despite the "American Rule" holding that each side must generally pay its own way. But Judge Saylor addressed the risk of duplicative litigation by ordering 3ABN and Shelton to recommence the litigation only in his courtroom, if they chose to do so at all.

To the extent the issue of costs and fees is taken up by this Court prior to being decided by the district court, 3ABN and Shelton incorporate their opposition

brief here. (ECF Doc. 140). The district court did not abuse its discretion in denying the dismissal terms now sought by the appellants.

E. The District Court Did Not Err by Imposing Terms on Defendants.

Pickle and Joy argue that the district court's order that they return confidential documents pursuant to the terms of the Protective Order is an impermissible "condition of dismissal." But they fail to appreciate that 3ABN's motion sought return of the confidential documents on the authority of the Protective Order itself, not under Rule 41(a)(2). (JA0299, JA0307-JA0310). The district court has "broad discretion" to decide when a protective order is appropriate and what degree of protection is required. *Poliquin v. Garden Way, Inc.*, 989 F.2d 527, 532 (1st Cir. 1993). Great deference is shown to the district court in framing and administering such orders. *Id.* There being no continuing need for the confidential records, Judge Saylor did not abuse his discretion in enforcing the Protective Order as written.

V. APPELLANTS' COMPLAINTS ABOUT THE CONFIDENTIALITY ORDER ARE BASELESS.

A. The District Court Did Not Err by Ordering Return of Confidential Documents per the Protective Order.

Pickle and Joy contend that the district court's order that they return materials which they had obtained under the protective order is error. Both Judge Saylor's ruling from the bench and the Electronic Clerk's Notes reflect the district

court's intention that anything produced to Pickle and Joy under the protective order be returned. Pickle and Joy have not yet returned anything. Pending this appeal, 3ABN and Shelton have not yet moved to enforce the order.

Pickle and Joy contend that there is a conflict between the ruling from the bench and the Electronic Clerk's Notes. There is no conflict. Judge Saylor said "I will order that the materials produced in discovery that were designated as confidential under the confidentiality and protective order issued in this case on April 17th will be returned, as set forth in that order." (DA0014). The order had provided that material produced under it "Shall be used for no other purpose than this litigation." (DA0022-DA0023). Recipients were required to sign an Exhibit requiring return of the documents at the conclusion of the case. (DA0029).

When Pickle and Joy complained at the hearing that they wanted to keep the confidential documents to spare them the expense of getting them again in the future, Judge Saylor said "There is going to be no lawsuit pending. You'll have – we'll have to wait and see how that plays out and in what court." (DA0017). In short, Judge Saylor considered and rejected these arguments. There was no abuse of discretion in doing so.

B. The District Court Did Not Deprive Pickle and Joy of Property without Due Process.

Pickle and Joy contend that the district court's order to return the MidCountry bank records amounts to a deprivation of the $3,534 that they were

required to pay MidCountry for copying costs. These were records subpoenaed in Minnesota, which the Minnesota court ordered be produced under seal to Magistrate Judge Hillman in Massachusetts. The records were produced and sent to Judge Hillman. Pickle and Joy argue that Judge Saylor's order to return those documents amounts to a deprivation of property without due process.

As a threshold matter, 3ABN and Shelton's motion clearly identified as a separate motion their position that return of the MidCountry bank records should be ordered. (JA0299). Pickle and Joy submitted a brief in opposition to the motion. (JA0323). They addressed the subject at oral argument. (DA0017). In view of the lack of any legitimate reason for Pickle and Joy to have Shelton's personal bank records following the end of lawsuit, Judge Saylor was within his discretion in administering the protective order, and ordering return of the records. In addition, the very entering of a confidentiality order indicates the court's acknowledgment that documents obtained through discovery is not to be considered the property of the recipient. If appellants are requesting reimbursement of their litigation costs, the proper remedy is their motion for costs, which is presently pending before the district court.

C. The District Court Did Not Err by Imposing Terms that Threaten Defendants' First Amendment Freedoms.

Citing to *Seattle Times Co. v. Rhinehart,* 467 U.S. 20 (1984), Pickle and Joy contend that the order to return documents they obtained under the protective order violates their first amendment rights.

As a threshold matter, the supreme court in *Rhinehart* held that "where. . . a protective order is entered on a showing of good cause as required by Rule 26(c), is limited to the context of pretrial civil discovery, and does not restrict the dissemination of the information if gained from other sources, it does not offend the First Amendment." 467 U.S. at 37. Here, the protective order only restricts appellants' dissemination of documents and information obtained through the course of pretrial civil discovery in the subject litigation. (*See* ECF Doc. 60). Thus, no first amendment violation is present within Judge Saylor's order that all documents produced in this lawsuit be returned, pursuant to the protective order's terms.

If appellants are arguing that Judge Saylor's order violates the first amendment because of his requirement that subpoenaed documents be returned, this argument is incorrect. The protective order pertains to *all* discovery in this matter, including information obtained through third party subpoena practice. Even *Rhinehart* observed protective orders govern third party discovery, stating that

> [a]s in this case, such a protective order prevents a party from disseminating only that information obtained through use of the discovery process. Thus, the party may disseminate the identical information covered by the protective order as long as the information is gained through means independent of the court's processes. In sum, judicial limitations on a party's ability to disseminate information discovered in advance of trial implicates the First Amendment rights of the restricted party to a far lesser extent than would restraints on dissemination of information in a different context. * * *

467 U.S. at 34. Because all documents produced to appellants via subpoena were obtained directly pursuant to the civil discovery processes of the subject litigation, such discovery does not constitute "information gained from other sources" as contemplated by *Rhinehart.* Thus, Judge Saylor's order for the return of all such documents and information did not violate appellants' first amendment rights.

Appellants also argue that the protective order violated their first amendment rights because 3ABN failed to show good cause. (Def. Brief p. 61). But appellees argued by motion that good cause existed under Rule 26(c) to support an order governing 3ABN and Shelton's sensitive and confidential commercial, financial and audit information, to list a few. In particular, appellants highlighted Pickle and Joy's "history of publishing—typically with mischaracterizing and innuendo-laden commentary—court documents and litigation-related information in this case provides a compelling additional reason for the court to issue the requested protective order." (ECF Doc. No. 41, p. 15). Specifically, appellees had argued that

> [b]ecause liberal discovery is permitted for the sole purpose of helping the parties prepare for trial or for the settlement of litigated disputes, a party generally cannot use discovery for a purpose not related to the pending litigation. …[Specifically,] liberal discovery has significant potential for abuse when litigants seek information that is not only irrelevant, but potentially damaging to reputation and privacy.

Id. (citing 6 *Moore's Federal Practice*, § 26.101[1][a] (Matthew Bender 3rd Edition) (citing *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 34-35 (1984) and *Jennings v. Peters*, 162 F.R.D. 120, 122 (N.D.Ill. 1995)).

After considering appellees' arguments and appellants' opposition, both written and oral, the Magistrate Judge issued a protective order that stated

> [b]ased upon the pleadings, written and oral submissions of the parties, the proceedings before the Court, and the file and record in this matter, the Court hereby ORDERS that, pursuant to Rule 26(c) of the Federal Rules of Civil Procedure, the following protections, directives and procedures shall govern the discovery and production of documents, information and materials ***by any person*** or entity in relation to this case: . . ."

(ECF Doc. No. 60, p. 1) (emphasis added). Because the district court issued the order "pursuant to Rule 26(c)" and considered the arguments of the parties, it found good cause. As indicated above, the district court has broad discretion in fashioning and administering protective orders. Pickle and Joy would not have obtained the information absent a protective order. Now that the litigation is over, they have no legitimate need for it. Judge Saylor expressly stated that Pickle and Joy are only required to return materials that are subject to the order. (DA0016). He did not limit Pickle and Joy from disseminating information that they learned

from sources outside of the court's discovery processes. No first amendment concerns are implicated and the district court did not abuse its discretion in issuing the protective order governing this matter.

Finally, appellants point to certain subject matters that 3ABN and Shelton "put at issue" in their complaint, and further seem to suggest that some of the documents designated confidential "would certainly have become public record at trial." (Def. Brief p. 60). This argument is speculative, it is moot because the litigation was dismissed, and it further has no bearing on first amendment rights, under *Rhinehart*. In fact, in anticipation of appellants' first amendment arguments on their motion for a protective order, 3ABN and Shelton pointed out to the district court that no presumption of public access exists as to information and materials unearthed in discovery, noting secondary source authority that

> [c]ivil cases in federal courts between private persons are largely private matters. The materials produced in discovery, although produced in a regimen of court rules in a dispute that will be tried in a public courtroom are nonetheless private. There is, for example, no right under the First Amendment to publish materials produced in discovery and a protective order is not a prior restraint of free expression.

(ECF Doc. No. 41, p. 15) (citing 6 *Moore's Federal Practice*, § 26.101[1][a] (Matthew Bender 3d ed.)(citing *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 29 (1984))). Appellants' arguments today of what "could have been" if this matter

had proceeded to trial has no bearing on the validity and enforcement of the protective order. Appellants' first amendment arguments should also be denied.

CONCLUSION

Pickle and Joy do not have a right to be sued to the point of a decision on the merits when circumstances change such that meaningful relief can no longer be achieved. They do, however, have a right to have dismissal conditioned on terms that the district court concludes are necessary to protect them from legal prejudice. The district court in this case properly considered Pickle and Joy's claims of prejudice and imposed only one condition, that any future suit by the appellees be brought in the same court so as to discourage forum shopping. The district court reserved the issue of costs and fees, and a motion on that subject remains pending that precludes full review by this Court of the decision below.

For the reasons stated in this brief, the appeal should be dismissed.

Respectfully submitted:

Dated: March 26, 2009

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This brief complies with the type-volume limitation of Fed. R. App. 32(a)(7)(B) because it contains 12,516 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Dated: March 23, 2009

s/ M. Gregory Simpson
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CERTIFICATE OF SERVICE

I Amy Ditty, hereby certify that on March 23, 2009, I served a copy of this brief on the following by First Class U.S. Mail, postage prepaid:

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I also hereby certify that I served 10 paper copies and one CD copy of this brief on the Clerk of Court of the U.S. Court of Appeals for the First Circuit by way of First Class U.S. Mail, postage prepaid.

Dated: March 23, 2009

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