No. 09-2615

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 DEFENDANTS' MOTION TO FILE UNDER SEAL

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Defendants hereby reply to Plaintiffs' response ("PR") to Defendants' Motion to File Under Seal ("DM").

Plaintiffs' response covertly requests this Court to reject documents that were indisputably filed below as well as filed in two other federal districts.

Additionally, Plaintiffs (a) ignore the clear wording of this Court's December 4, 2009, order, (b) miscite Defendants' certification of compliance, and (c) fail to cite a single case contradicting *Chicago & Eastern Illinois R. Co. v. Southern Ry. Co.*, 261 F.2d 394, 402 (7th Cir. 1958); *Texas and Pacific Railway Company v. Buckles*, 232 F.2d 257, 261 (5th Cir. 1956).

More importantly, Plaintiffs fail to address a primary issue in Defendants' motion: why any of the documents in question should be sealed rather than become part of the public record.

REPLY TO PLAINTIFFS' RESPONSE TO DEFENDANTS' FACTS

A. "The New Exhibits."

1. SE 1–33.

Sealed Exhibits for Supplemental Appendix pp. ("SE") 1–33 were filed below on July 21, 2008, as part of Record on Appeal Docket Entry ("RA") 93. The table of contents for SE explicitly notes that SE 1–33 consist of Ex. O (Ex. EE–GG) and Ex. O (HHH), which were all filed earlier in the Southern District of Illinois. This asserted filing in Illinois is amply supported by the record, dated at

soon after July 3, 2008. (RA 124 pp. 1–2; RA 81-5 pp. 23, 28, 33–34; RA 81-7 pp. 14–16; RA 81-9 p. 17). Parts of Ex. O (Ex. EE–GG) were also filed as Exhibits F–H in the Western District of Michigan soon after August 18, 2008. (RA 96-10 pp. 1–2, 7; RA 96-11 pp. 6–8).

Using Plaintiffs' own criteria, SE 1–33 are part of the district court record.

2. SE 34–153, 156–158.

SE 34–153 are a selection of documents produced on September 22, 2008, by Remnant Publications, Inc. ("Remnant") ("Remnant documents"). SE 156–158 were produced by Plaintiffs and pertain to Plaintiffs' wrongful termination of Trust Services employees who blew the whistle regarding misconduct by Leonard Westphal ("Westphal documents"). Defendants explicitly proffered these documents below in Defendants' motions to file under seal. (RA 153; RA 173).

In 1st Cir. Case No. 08-2457, Defendants moved on November 19, 2009, to enlarge the record on appeal to include these specific documents, along with additional Remnant documents. On December 4, 2009, this Court ordered:

> Appellants move to enlarge the record in this appeal (Appeal No. 08-2457) to include certain documents. As *those documents were submitted to the district court* after the filing of the notice of appeal, they are not properly considered as part of the record in this appeal and, accordingly, the motion to enlarge the record on appeal is denied.
>
> We note that, in any event, appellants filed a subsequent notice of appeal from the district court's refusal to accept the proffered documents. This new appeal has been docketed in this court as Three Angels Broadcasting Network, Inc. v. Joy, No. 09-2615,

> and *the documents in question are part of the record on appeal in this subsequent appeal.* To the extent that appellants intend to argue that the district court erred in refusing to accept the documents in question, that issue may be raised in Appeal No. 09-2615.

(RA 212-2, italics added). Therefore, this Court has already determined that the documents in question "were submitted to the district court," and "are part of the record on appeal" in 1st Cir. Case No. 09-2615.

3. SE 154–155, 159.

Plaintiffs admit that these purchase orders for printing of *3ABN World* by Smith and Butterfield, and this CD of Plaintiffs' confidential productions, were proffered below. (PR p. 3–4). Defendants appealed the district court's refusal to accept the proffered documents. (RA 196).

B. "The Pickle Affidavit."

Among the various issues of the instant appeal is the denial of Defendants' motions to file under seal below, RA 153 and RA 173. RA 153 sought to file under seal the Remnant documents "with an accompanying affidavit." (RA 153 p. 1). RA 173 sought to file under seal "[a]n affidavit that succinctly draws attention to the facts or admissions in" the Westphal documents. (RA 173 p. 2). Plaintiffs explicitly admitted that Defendants made this request. (RA 174 pp. 1, 6). Defendants made this request at Plaintiffs' behest:

> Consider this as a rule of thumb: If you want to say something about the document because it helps your argument or casts my clients in a bad light, it needs to be said in a document that is

> under seal. ...
>
> Another rule of thumb: ... There shouldn't be enough information revealed publicly to permit anybody to draw negative inferences against my clients.

(RA 127-5).

Defendants appealed the district court's refusal to accept the proffered document. (RA 196).

As permitted by 1st Cir. Loc. R. 11(c)(2), Defendants filed an affidavit with their November 19, 2009, motion to enlarge the record, which drew attention to the facts or admissions in the Remnant and Westphal documents, making it functionally equivalent to the affidavit proffered below, and any additional affidavit redundant. That affidavit remains filed with this Court in Case No. 08-2457.

Defendants' cited one explanatory fact[1] from that affidavit on page 1[2] of their Supplemental Brief in this case, and thus needed to ensure that that affidavit was part of this case's record too. The clerk advised that, unlike the Remnant and Westphal documents, the affidavit would have to be resubmitted in this case in order to be part of the record of this case. (Affidavit of Robert Pickle ("Pickle Aff.") p. 1). If Defendants' motion to enlarge had been filed a little later so that it

[1]Clearly, by its very nature, the clarifying fact in question could not have been filed below until the motion to file under seal was granted, and thus could only appear in the affidavit proffered below.

[2]The page numbers cited from the instant motion and Defendants' primary and supplemental briefs refer to the pagination of those documents, not the page numbers generated by ECF.

could be filed in both appeals, resubmission would not have been necessary.

C. Whether the Documents Should Have Already Been Returned.

The lower court explicitly stated on October 30, 2008, regarding the confidentiality order:

> ... any photocopying or other copying of any such materials will only be permitted if permitted under that order. ...
>
> If it's subject to the confidentiality order, you have to return it, or do whatever the order says you're supposed to do with it ....

(RA 141 pp. 12, 14). Nothing in the confidentiality order requires parties to sign that order's Exhibit A or to ever return any documents, and non-parties must return confidential documents within 30 days *after* all appeals. (RA 60 pp. 1–6, 8).

REPLY TO PLAINTIFFS' ARGUMENT

I. Whether the Exhibits and Pickle Affidavit Should Be Filed Under Seal.

In their argument section, Plaintiffs' sole grounds for asking this Court to deny Defendants' motion to file the exhibits and affidavit, whether under seal or not, is Fed.R.App. P. 10(a). (PR p. 5). Yet Plaintiffs acknowledge the existence of Fed.R.App.P. 10(e), which permits this Court to settle issues as to form and content of the record on appeal. (*Id.*). This Court's December 4, 2009, order already settled the issue as to whether documents proffered below are part of the record on appeal when the denial below to accept those documents is appealed from.

Plaintiffs do not explain the relevancy of their citation of Fed.R.App.P.10(e)(1). (*Id.*). That rule applies only if "a difference arises about whether the record

truly discloses what occurred in the district court." No difference has arisen as to whether Defendants proffered the exhibits and affidavit below.

Plaintiffs do not dispute the accuracy of the copies of the exhibits. (*Id.*).

II. Whether Defendants' Supplemental Brief Should Be Filed Under Seal.

Plaintiffs' assert that Defendants' Supplemental Brief must be rejected because, according to Defendants' certificate of compliance, all but the first 18 words exceed the 14,000 word limit. (PR p. 6). Yet Defendants' certificate stated:

> This brief complies with the type-volume limitation of Fed. R. App. P. 32(a) (7)(B) because *this brief and the supplemental sealed brief contain a total of 13,982 words*, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

(Brief of Defendants-Appellants p. 64,[2] italics added). Therefore, the two briefs *combined* total 13,982 words.[3]

Plaintiffs argue that sealed supplemental briefs cannot cite sealed exhibits, citing for authority 1st Cir. Loc. R. 28.1, which requires "a specific and timely motion in compliance with Local Rule 11.0(c)(2) and (3) asking the court to seal a brief or supplemental brief." (PR pp. 5–6). The citation is inapplicable to the argument, and Plaintiffs fail to explain how Defendants' motion to file under seal was neither specific nor timely.[4]

In Plaintiffs' subsection on sanctions, Plaintiffs assert:

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[3]Technically, the count is actually lower, since OpenOffice 3.2.1 counts bullet characters and footnote numbers as additional words.

[4]Upon inquiry, the clerk advised Defendants that service of the instant motion at the time the principal brief was due was timely. (Pickle Aff. p. 1).

> Moreover, instead of asking permission to file the confidential materials, appellants have already cited to and discussed the existence of these materials in their appellate brief.

(PR p. 7). Yet Defendants' motion unquestionably did ask for such permission.

III. Relevance of Documents, and This Court's Scope of Review.

Plaintiffs apparently include two arguments in their introduction and fact section not also in their argument section: Plaintiffs assert that (a) "the proffered exhibits are completely irrelevant to the issues on appeal," and (b) this Court is prohibited from reviewing the documents themselves. (PR pp. 2–3).

Defendants appealed from the orders denying Defendants' motions to file under seal. (RA 196). It is therefore impossible for the proffered documents to be completely irrelevant to the issues on appeal.

In the instant motion, Defendants cited two cases referenced in 20 *Moore's Federal Practice* § 310.10[2][a], [c] which show that not forwarding excluded evidence to this Court precludes review. (DM p. 3,[2] citing *Chicago & Eastern Illinois R. Co.*, 261 F.2d at 402; *Texas and Pacific Railway Company*, 232 F.2d at 261). Plaintiffs cited no authority in rebuttal.

Preclusion of review when excluded evidence is not forwarded to this Court makes sense: (a) The Court would then have no way to determine whether the exclusion was harmless. (b) If the exclusion of evidence is reversed, the Court has no way to consider that evidence when considering whether to reverse the orders affected by the exclusion of that evidence.

IV. Plaintiffs' Failure to Show Cause for Protection

Defendants' motion seeks a sealing order with a duration expiring when the materials are deemed not to qualify for protection, and, for materials that do qualify for protection, after whatever length of time is customary. (DM pp. 4–5). Defendants filed the instant motion because Plaintiffs' abusive confidentiality designations forced them to do so, or be at risk of being held in contempt of court. (DM p. 4). As Defendants clearly stated:

> A blanket confidentiality order was entered in the underlying case. (RA 60). That order permitted parties to designate as confidential non-public, confidential business or trade secret information. (RA 60 p. 1). Plaintiffs abused this order by designating as confidential, *inter alia*, purchase orders for sticky notes and pens, a book with over 5 million copies in print, and publicly available magazines and government filings (financial statements, IRS Form 990's, Illinois Form AG990-IL's, and Oregon Form CT-12F). (RA 92 p. 7; RA 68-2 p. 3; RA 162-8; RA 81 p. 8).

(DM p. 1).

Yet Plaintiffs in their response make no attempt to show cause why any of the proffered materials should be protected by being filed under seal. Statutorily, it is the responsibility of Plaintiffs, not Defendants or this Court, to show such cause. *In re Agent Orange Product Liability Litigation*, 821 F.2d 139, 145–147 (2d Cir. 1987). Therefore, by default, a sealing order should issue which promptly expires, and the proffered materials should become part of the public record.

Defendants are not adverse to continued protection of Danny Lee Shelton's

("Shelton") tax returns. Yet even if Shelton had not waived such protection by putting his personal tax violations and perjuriously hidden royalty payments at issue in his complaint (RA 1 pp. 13, 15), the prohibitions of 26 U.S.C. § 7213(a)(3) would not apply since Defendants lawfully obtained these unpublished joint tax returns at Linda Shelton's request. (RA 81-5 p. 28).

Both Remnant and Three Angels Broadcasting Network, Inc. ("3ABN") are 501(c)(3) organizations that are required to annually file IRS Form 990's, which are then statutorily required to be open to public inspection. 26 U.S.C. §6104(d)(1); 225 ILCS 460/2(f), 4(a); ORS 128.670(1), (6), 192.005(5) 192.420(1). 3ABN's assets, income, expenses, and other information are therefore already public record, as are Remnant's estimated royalty payments to Shelton. (RA 63-31 pp. 35–48; RA 63-32 pp. 1–26; RA 154 p. 3). Nevertheless, Defendants are not adverse to continued protection of 3ABN's bank statements, if this Court deems that best.

Plaintiffs long ago admitted that a major purpose behind their confidentiality designations was to hide anything that "casts [Plaintiffs] in a bad light" in order not "to permit anybody to draw negative inferences against [Plaintiffs]." (RA 127-5). But Plaintiffs were never granted a confidentiality order on such grounds. Neither were Plaintiffs granted a confidentiality order so that Plaintiffs could prevent Defendants from filing substantive documents relevant to the claims and defenses all parties put at issue in the litigation. Under these circumstances, continued protection is questionable at best. *Jepson v. Makita Elec. Works Ltd.*, 30 F.3d 854,

860 (7th Cir. 1994).

CONCLUSION

This Court already determined that materials proffered below prior to November 23, 2009, are part of the record on appeal in the instant appeal. Thus, Plaintiffs' principal argument for denying the instant motion is unavailing.

Plaintiffs failed to show any cause why any of the materials at issue should be protected by being filed under seal. The burden to do so was Plaintiffs, not Defendants' or this Court's. Therefore, a sealing order should issue which promptly expires, and the proffered materials should become part of the public record.

If this Court deems that some materials must be protected and some must not, Defendants repeat their earlier request that they be permitted to file the proper number of supplemental volumes in order to segregate the materials that qualify for protection from those that do not. (DM p. 8).

Respectfully submitted,

Dated: December 31, 2010

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CERTIFICATE OF SERVICE

I, Bob Pickle, hereby certify that on December 31, 2010, I served copies of this reply with accompanying affidavit (which affidavit simultaneously accompanies Defendants' response and motion) on the following registered parties via the ECF system:

John P. Pucci, J. Lizette Richards
Attorneys for Danny Lee Shelton
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Dated: December 31, 2010

s/ Bob Pickle
Bob Pickle