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' RESPONSE TO PLAINTIFFS' MOTION FOR SANCTIONS, AND DEFENDANTS' MOTION FOR SANCTIONS

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Defendants hereby respond to Plaintiffs' frivolous and harassing motion for sanctions against Defendants, and, pursuant to 1st Cir. Loc. R. 38.0, 28 U.S.C. § 1927, and the court's inherent powers, move this Court to sanction Plaintiffs and their counsel for filing their frivolous, harassing, and otherwise improper response and motion ("PR").

Plaintiffs' filing is frivolous because it obviously lacks merit. It is harassing because it is part of an ongoing campaign to intimidate Defendants into silence. It is otherwise improper because it covertly seeks the preclusion of review of issues on appeal, defies this Court's December 4, 2009, order, and is part of an ongoing campaign to abuse the confidentiality order issued in the underlying case.

RESPONSE TO PLAINTIFFS' FACTS (BORROWED FROM DEFENDANTS' REPLY TO PLAINTIFFS' RESPONSE)

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

C. Whether the Documents Should Have Already Been Returned.

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[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 Defendants' motion to file under seal, designation of appendix, and primary and supplemental briefs refer to the pagination of those documents, not the page numbers generated by ECF.

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).

ADDITIONAL RESPONSE TO PLAINTIFFS' FACTS, AND OTHER RELEVANT FACTS

A. Plaintiffs' Counsel Knew SE 1–33 Was Filed Below.

Plaintiffs' designation of additional parts of the record to be included in the appendix explicitly stated:

> This designation expressly *excludes* any materials filed in the District Court under seal or that should have been filed under seal because they were produced under the Protective Order issued by the District Court in this case.

(Affidavit of Robert Pickle dated December 3, 2010 ("12/3/10 Aff."), at p. 2 of Ex. B). The only document filed under seal below is RA 93, of which SE 1–33 is clearly a part, and which Defendants gave notice to Plaintiffs of intending to include in the appendix. (Defendants' Designation of Appendix p. 7[2]).

Therefore, Plaintiffs are intentionally trying to exclude filed material from the record on appeal.

B. Plaintiffs' Counsel Knew What the December 4, 2009, Order Stated.

Plaintiffs' response and motion quoted more than once from this Court's December 4, 2009, order. (PR pp. 2, 4). On November 17, 2010, Defendants informed Plaintiffs' counsel regarding the purchase orders for printing:

> More importantly, the First Circuit ruled a year ago that the Remnant documents, by virtue of being offered to the lower court, were part of the record on appeal. Therefore, the two documents in question are also part of the record on appeal since we offered them to the lower court.

(12/3/10 Aff. at p. 4 of Ex. A).

On February 18, 2010, regarding the instant appeal, Plaintiffs' counsel admitted that the December 4, 2009, order "stated that the [Remnant and Westphal documents] would be part of the record on that appeal." (RA 231 pp. 8–9).

Therefore, Plaintiffs are intentionally trying to exclude material from the record on appeal that this Court has already determined is part of the record on appeal in the instant appeal.

C. Defendants Manifested Due Diligence in Complying with Court's Order.

This Court's December 4, 2009, order stated that proffered material is part of the record on appeal when the denial to accept that material is appealed from. When Defendants realized that what they were intending to submit on the CD identified as SE 159 was not quite what they had proffered in RA 171 p. 7, they adjusted their intentions even though they believed that meant they had to abandon the plans and labor of months. (Pickle Aff. pp. 1–3).

D. Plaintiffs' Counsel Was Given Notice That Not Forwarding Excluded Evidence Precludes Review.

On November 17, 2010, Defendants informed Plaintiffs' counsel, "As to FRAP 10, the admissibility of excluded evidence cannot be reviewed if that evidence is not included in the record on appeal." (12/3/10 Aff. at p. 2 of Ex. A).

The counselor responded, "I think you are using me as a source of legal advice because you suspect I may be right," and asserted that this Court could not view the documents themselves on appeal. (*Id.* at p. 1 of Ex. A).

Defendants replied:

> I am not using you as a source of legal advice. You are either misinformed, or are once again attempting to commit extrinsic fraud.
>
> Consult *Moore's Federal Practice* § 310 if you are in doubt. The case law is clear.

(*Id.*). Defendants then cited in their motion to file under seal ("DM") two supporting cases from 20 *Moore's Federal Practice* § 310.10[2][a], [c]: *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). (DM p. 3[2]).

E. Plaintiffs' Ongoing Campaign of Harassment and Concealment.

On January 30, 2007, one of Plaintiffs' counsel sent Defendants an intimidating letter, asserting that Defendants had defamed Plaintiffs when Defendants stated that Plaintiffs' prior counsel used "'intimidation tactics to cover

up allegations of child molestation.'" (RA 63-18 p. 2). That counselor tried to hide his own intimidation tactics by invoking non-existent common law copyright protection for his letter. (RA 63-18 p. 1).

On October 30, 2008, after dismissal, the Plaintiffs' counsel at issue in this response and motion sought the first time to declare as confidential ***all*** documents Defendants received in response to third-party subpoenas, threatening more litigation if Defendants revealed anything. (RA 152-8; RA 152 p. 4). Many of these third-party documents pertained to allegations against admitted pedophile Tommy Shelton ("Tommy"). (RA 76-3 pp. 16–17). Tommy's abuse of children in multiple states isn't a trade secret of Three Angels Broadcasting Network, Inc. ("3ABN"), and thus these documents clearly don't qualify for protection. (RA 60 p. 2).

On January 4, 2010, Plaintiffs bemoaned the fact that litigation was still ongoing. (RA 216 p. 8 n. 2). Defendants then inquired:

> Have the plaintiffs abandoned their attempted confidentiality designation of material that does not fit the qualifications of the confidentiality order, such as, *inter alia*, IRS Form 990's, IL Form AG990-IL's, OR Form CT-12, 3ABN's financial statements and bylaws, flight information, material not designated confidential before the case was dismissed, material we also obtained from collateral sources, and material pertaining to the child molestation allegations against Tommy Shelton?

(RA 224-11). Plaintiffs' counsel replied:

> No. If you publish the substance of anything we designated as confidential under the Protective Order, we will seek to have you held in contempt of court, in addition to any other remedies

> available to us.

(*Id.*).

Plaintiffs' stated concern in obstructing discovery was that Defendants might discover "new incidents of wrongdoing." (RA 220 p. 20). Plaintiffs objected to a public filing referencing Danny Lee Shelton's ("Shelton") kickbacks from Remnant, while simultaneously opposing the filing of incriminating material under seal. (RA 158 pp. 3, 1).

Plaintiffs, not Defendants, filed Defendants' letter protesting Plaintiffs' abusive confidentiality designation of purchase orders for sticky notes and pens, and government filings open to public inspection. (RA 92 p. 7). Plaintiffs filed a 13-page listing of Plaintiffs' June 2008 productions, all but two lines of which concern "confidential" materials. (RA 92 pp. 17–29). Plaintiffs filed an email which states that the Remnant documents prove that Shelton's book deals "net a good deal more than $300,000." (RA 159-2 p. 11). Yet Plaintiffs now seek sanctions because Defendants "discussed the existence of these materials in their appellate brief"! (PR p. 7).

Plaintiffs repeatedly threatened sanctions if Defendants included in their appendix mere purchase orders for printing, sealed or not. (12/3/10 Aff. at pp. 4–5 of Ex. A, p. 2 of Ex. B). It's just more of the same: Cover up wrongdoing, prevent Defendants from reporting anything incriminating in the public sphere, including in court, and obstruct the review of substantive, relevant documents by the courts,

even under seal.

RESPONSE TO PLAINTIFFS' ARGUMENT

I. Defendants Should Not Be Sanctioned.

A. Plaintiffs Present No Legal Basis for Sanctions.

Plaintiffs base their requests for sanctions on 1st Cir. Loc. R. 38.0, which allows for sanctions when a party or attorney "files a motion, brief, or other document that is frivolous or interposed for an improper purpose, such as to harass or to cause unnecessary delay, or unreasonably or vexatiously increases litigation costs." (PR p. 6). But Plaintiffs fail to explain how Defendants' motion to file under seal was actually frivolous, harassing, delaying, unreasonable, or vexatious.

Plaintiffs feign that this Court's December 4, 2009, order excluded the proffered material from the record on appeal in this appeal (PR pp. 6–7), but admitted otherwise in the lower court. (RA 231 pp. 8–9).

Plaintiffs complain that the excluded material being part of the record on appeal in the instant appeal "circumvent[s]" the lower court's order denying Defendants' motions to file under seal below. (PR p. 7). But that order is under appeal, and it is established precedent that "[e]xhibits offered to but excluded by the district court are part of the record on appeal," despite the fact that "excluded evidence is by definition not considered by the district court in its decision." 20 *Moore's* § 310.10[2][c]; *Waldorf v. Shuta*, 142 F.3d 601, 620 (3rd Cir. 1998).

Plaintiffs assert as a basis for sanctions that Defendants in their appellate

brief "have already cited to and discussed the existence of" the documents not allowed to be filed under seal. (PR p. 7). But Plaintiffs themselves made public a good bit of information about these documents. (RA 92 pp. 7, 17–29; RA 159-2 p. 11). Their existence is no secret.

Anyone reading Defendants' appellate briefs should be able to tell when and where Defendants "cited to" the documents in question. But suppose Defendants' briefs "relied on but did not identify the excluded evidence." Though "inappropriate," this hypothetical scenario is not "vexatious," and does not warrant sanctions under 1st Cir. Loc. R. 38.0. *Jasty v. Wright Medical Technology, Inc.*, 528 F.3d 28, 34 (1st Cir. 2008).

Plaintiffs' counsel asserts as a basis for sanctions that he personally told Defendants not to include the purchase orders for printing in the appendix. (PR p. 7). Yet appellants must include in the appendix whatever appellees demand. Fed.R.App.P. 30(b)(1). Therefore, there is no authority for appellees to exclude from the appendix what appellants choose to include.

B. Defendants Exercised Due Diligence.

Rather than attempting to circumvent this Court's December 4, 2009, order, Defendants exercised due diligence in complying with that order, even when they believed that doing so meant abandoning the plans and labor of months. (Pickle Aff. pp. 1–3). The results of their obvious efforts to comply with this Court's order are hardly sanctionable, and those efforts do nothing to enlarge the record on

appeal as Plaintiffs falsely assert. (PR p. 7).

C. Defendants Are *Pro Se*.

Courts are reluctant to sanction *pro se* litigants. *Wood v. McEwen*, 644 F.2d 797, 802 (9th Cir. 1981). But since Plaintiffs have provided no sound legal basis for their request for sanctions, there seems no reason to make this point.

OTHER ARGUMENT

I. Plaintiffs and Their Counsel Should Be Sanctioned

The questions now are: Did Plaintiffs and their counsel themselves violate 1st Cir. Loc. R. 38.0 and 28 U.S.C. § 1927, and should they be sanctioned? Was Plaintiffs' response and motion frivolous, obviously without merit? Was it unreasonable or vexatious? Was it interposed for an improper purpose?

When considering these questions, this circuit applies an objective standard. A finding of subjective bad faith is not required. Rather, the court determines whether the conduct was harassing or annoying, "regardless of whether it is intended to be so," and whether it displayed a "serious and studied disregard for the orderly process of justice." *Cruz v. Savage*, 896 F.2d 626, 631–632 (1st Cir.1990) (internal quotation marks and citation omitted).

A. Plaintiffs' Response and Motion Were Frivolous.

Plaintiffs gave no legal basis whatsoever for excluding SE 1–33 (documents indisputably filed in the lower court as part of RA 93) from the record on appeal, or for demanding that appellants exclude material from the appendix that appellees

wanted excluded. Plaintiffs' filing ignored the clear ruling in this Court's short, December 4, 2009, order. Plaintiffs cited not one single case for doing so, or in support of any of their contentions, or to undermine the established precedent that failure to forward excluded evidence precludes review.

Plaintiffs cited Fed.R.App.P. 10(e)(1) (PR p. 5), even though no difference has arisen as to whether Defendants proffered the exhibits below.

Plaintiffs asserted, "The rules of this Court do not authorize a supplemental brief relating specifically to exhibits filed under seal." (PR p. 6). Yet 1st Cir. Loc. R. 11(c)(3) explicitly requests litigants to "consider whether argument relating to sealed materials may be contained in [a] separate [sealed] supplemental brief." Plaintiffs asserted that Defendants' certificate of compliance gave a word count of 13,982 for just Defendants' principal brief (*Id.*), when that certificate clearly stated that that word count included the words in Defendants' supplemental brief. (Brief of Defendants-Appellants p. 64[2]).

Plaintiffs asserted as a basis for sanctions that Defendants discussed the mere existence of "confidential" documents. (PR p. 7). Yet Plaintiffs themselves made public a lot of information about these documents. (RA 92 pp. 7, 17–29; RA 159-2 p. 11). Plaintiffs failed to explain how any of Defendants' actions fell under the purview of 1st Cir. Loc. R. 38.0.

Plaintiffs' quibble that the "Pickle Affidavit" was never proffered to the lower court because it was filed in this Court (PR p. 4) comes the closest to not

obviously lacking merit. But even there, Plaintiffs on the record admitted that Defendants had proffered just such an affidavit below. (RA 174 pp. 1, 6).

B. Plaintiffs' Response and Motion Were Vexatious and Interposed for an Improper Purpose.

Plaintiffs and their counsel's conduct displays a "serious and studied disregard for the orderly process of justice." *Cruz* , 896 F.2d at 632.

Plaintiffs intentionally tried to exclude RA 93 from this court's review, knowing full well that it was indisputably filed below. (12/3/10 Aff. at p. 2 of Ex. B). Plaintiffs' counsel knew this Court's December 4, 2009, order "stated that the [Remnant and Westphal documents] would be part of the record on that appeal." (RA 231 pp. 8–9). Plaintiffs knew that the "Pickle Affidavit" was proffered below (RA 174 pp. 1, 6), as well as all the exhibits in question. Yet Plaintiffs intentionally sought to exclude all these documents from this Court's review, in defiance of this Court's December 4, 2009, order. (PR pp. 5–6).

Defendants gave Plaintiffs' counsel the section in *Moore's* that shows that failure to forward excluded evidence precludes review, and then cited for him two supporting cases. (12/3/10 Aff. at pp. 1–2 of Ex. A; DM p. 3). Yet Plaintiffs' counsel still argued otherwise, without citing any authority. (PR p. 4).

Plaintiffs sought and obtained a confidentiality order to protect confidential commercial and business information, and trade secrets, and denied seeking protection for "employment related information." (RA 60 p. 2; RA 89 p. 25). Yet

Plaintiffs then designated as confidential "employment related information" and documents that clearly don't qualify for protection (RA 116 pp. 1–2; RA 92 p. 7; RA 103 p. 2; RA 81 pp. 7–8; RA 68-2 p. 3; RA 162-8), since the objective was really to conceal everything that "casts my clients in a bad light." (RA 127-5).

If Plaintiffs' professed intentions had been genuine, Plaintiffs would have argued below and here regarding the duration of sealing orders, rather than oppose in totality the filing of documents Plaintiffs designated "confidential." Instead, Plaintiffs simultaneously objected to public filing of references to Shelton's kickbacks, and the filing under seal of proof of the same. (RA 158 pp. 3, 1).

Plaintiffs demanded that Defendants file mere purchase orders for printing under seal in this Court, simultaneously threatening Defendants with sanctions if Defendants attempted to file them under seal. (12/3/10 Aff. at pp. 2–5 of Ex. A). To infer that Plaintiffs' motion for sanctions is anything other than an ongoing campaign of harassment of Defendants, and concealment from the public and the courts in litigation that Plaintiffs themselves initiated, seems utterly impossible.

While a finding of bad faith is not required for sanctions under 1st Cir. Loc. R. 38.0 and 28 U.S.C. § 1927 in this circuit, Defendants believe they have made such a showing.

C. Plaintiffs Are Not Pro Se; "Highest Possible Distinction."

Courts are less reluctant to sanction litigants that are not *pro se*. *Wood*, 644 F.2d at 802. Moreover, Plaintiffs' counsel's public advertisement stated:

> **ACHIEVEMENTS/PROFESSIONAL DISTINCTION**
>
> Rated as "AV" lawyer by Martindale Hubbell's peer rating process for legal ability and ethical standards —highest possible distinction.
>
> Hennepin County Bar Association Ethics Committee, 1997 – 2003, 2004-present.

(RA 185-2). Given these professed achievements and their relation to the issues at bar, Plaintiffs cannot plead in defense "negligence, inadvertence, or incompetence" (*Cruz*, 896 F.2d at 632), and this Court should have little reluctance to sanction.

II. Various Sanctions Considered.

A. Counsel Prohibited from Billing Clients.

1st Cir. Loc. R. 38.0 allows this court to "impose appropriate sanctions." An appropriate sanction suggested by 28 U.S.C. § 1927 is that Plaintiffs' counsel personally bear the cost of drafting and filing his frivolous response and motion. But in reality, the contents and relative brevity of the offending filing indicate that the pecuniary loss to counsel would probably not be much.

B. Payment of Attorney's Fees.

When speaking of monetary sanctions such as payment of attorney's fees (or the value of opportunities lost by a litigant due to time expended), provisions for such sanctions often (but not always) preclude such payments to *pro se* attorneys. But such fees may be awarded under the court's inherent power. "Failure to do so ... would place a *pro se* litigant at the mercy of an opponent who might engage

in otherwise sanctionable conduct, but not be liable for attorney fees to a *pro se* party." *Pickholtz v. Rainbow Techs., Inc.*, 284 F.3d 1365, 1377 (Fed. Cir. 2002).

The same logic applies to *pro se* litigants whether they be attorneys or not, but Defendants are unclear whether there is presently any legal authority to ignore that distinction. If that distinction may be ignored, which it should be if abuses are to be properly deterred, "*Chambers* thus permits, indeed requires, the court to separately consider" a request for fees or opportunity costs under the court's inherent power. *Id.*, citing *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991).

But lost opportunity costs for drafting Defendants' reply and Defendants' response and motion, at $25 an hour (RA 132 p. 3), is a mere pittance and not much deterrence, given the huge amounts 3ABN spent on legal fees associated with the underlying case in 2007 and 2008 alone (RA 162-13 pp. 2, 8; RA 224-5 p. 10), even with 3ABN's public donations still being down. (RA 224 pp. 3–5).

C. Permitting the Documents in Question to Become Public Record.

Page 8 of Defendants' reply to Plaintiffs' response stated:

> 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.

Permitting this request as a sanction has a number of positive qualities. It has a

close nexus to the misconduct. It does not correspond to the dismissal or merits resolution of the claims in Plaintiffs' complaint. It can hardly be considered severe. It effectively deters similar abuse of confidentiality orders to preclude substantive evidence from judicial review. And such conduct unquestionably constitutes abuse. *Jepson v. Makita Elec. Works Ltd.*, 30 F.3d 854, 860 (7th Cir. 1994).

Additionally, current and future litigation is greatly simplified. If Plaintiffs can no longer improperly use the confidentiality order to attempt to silence Defendants' reporting of information that Defendants obtain from other sources (RA 224-11), a major impediment to potential settlement is removed.

What documents designated "confidential" by Plaintiffs would then be left to threaten Defendants about? Not much at all. There would be the employment-related documents produced by wrongfully terminated whistleblower Kathy Bottomley, "declared" "confidential" by Plaintiffs after the case was dismissed. (RA 76-3 pp. 14–15; RA 152-8; RA 152 p. 4). But at least many of those documents are already filed or are also found in Plaintiffs' own productions at issue in Defendants' motion to file under seal.

Also left would be the third-party documents pertaining to admitted pedophile Tommy, also "declared" "confidential" after dismissal and unquestionably not protected by the confidentiality order. (RA 76-3 pp. 16–17; RA 152-8; RA 152 p. 4; RA 60 p. 2). But with (a) Tommy's July 2010 guilty plea, (b) the judge rejecting that plea in November because it didn't allow for jail time, (c)

Tommy scheduled for trial in March, (d) the *Washington Post* and WUSA Channel 9 covering the developing story, (e) documented attempted and actual witness tampering by Plaintiffs and/or their co-conspirators, (f) Tommy's victims retaining counsel with extensive experience pursuing cases of clergy sexual abuse, (g) 3ABN receiving a demand letter in consequence in September, and (h) the victims now preparing to file suit, Plaintiffs' toothless threats over Defendants' reporting on Plaintiffs' cover up of Tommy's pedophilia seems to be soon, or now, effectively neutralized.

Having said all this, and while seeking this sanction, Defendants repeat here what they said on pages 8–9 of their reply to Plaintiffs' response: Defendants are not adverse to continued protection of whatever this Court deems to qualify for such protection. However, it has always been Plaintiffs' responsibility, not this Court's or Defendants', to make that showing. Plaintiffs have never fulfilled that responsibility because protecting trade secrets was never the real purpose behind Plaintiffs obtaining a confidentiality order, a fact discerned by Defendants around January 2008. (RA 243 p. 2).

CONCLUSION

Plaintiffs provide no legal basis for sanctioning Defendants, and Defendants should not be sanctioned for complying with this Court's December 4, 2009, order and this Court's rules.

Plaintiffs' response and motion for sanctions was frivolous, harassing, and

vexatious. It was part of an ongoing campaign to keep the courts from reviewing substantive, incriminating evidence, even documents indisputably filed below, and represents continued abuse of the confidentiality order entered in the underlying case. Plaintiffs and their counsel should be appropriately sanctioned. Defendants prefer that that sanction be or include the issuing of a sealing order that promptly expires for the materials at issue in Defendants' motion to file under seal, allowing those materials to become part of the public record.

PRAYER FOR RELIEF

WHEREFORE, Defendants pray the Court to sanction Plaintiffs for their frivolous and vexatious filing by ordering that the materials at issue in Defendants' motion to file under seal be made a part of the public record, and for whatever further relief this Court deems equitable and just.

Respectfully submitted,

Dated: December 31, 2010

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and

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CERTIFICATE OF SERVICE

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

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Dated: December 31, 2010

s/ Bob Pickle
Bob Pickle