In The
United States Court of Appeals
For The First Circuit

No. 09-2615

Three Angels Broadcasting Network, Inc.,
an Illinois Non-Profit Corporation;
Danny Lee Shelton,

Appellees,

v.

Gailon Arthur Joy and Robert Pickle,

Appellants.

RESPONSE OF THE APPELLEES TO DEFENDANTS'-APPELLANTS' MOTION FOR SANCTIONS

M. Gregory Simpson
Meagher & Geer P.L.L.P.
33 South Sixth Street #4400
Minneapolis, MN 55402
Telephone: (612) 338-0661

John P. Pucci
J. Lizette Richards
Fierst, Pucci & Kane, LLP
64 Gothic Street
Northhampton, MA 01060

Attorneys for Appellees

INTRODUCTION

Appellees Three Angels Broadcasting Network, Inc. and Danny Lee Shelton ("Appellees") submit this Response to Defendants'-Appellants' Motion for Sanctions (Doc. 5515545). The underlying motion by Appellants Bob Pickle and Gailon Joy is at least their fourth attempt to insert these extraneous materials – raw discovery documents produced under the protective order entered below that were never used by the district court to decide the issues on appeal – into the record of this case. The district court denied Appellants permission to file these documents *twice*. The district court also ordered – twice – that Appellants return these documents to Appellees because they had been obtained under the terms of the protective order, and the case was now concluded save the appeal. Appellants have flouted the district court's orders, as they have flouted *this* Court's December 4, 2009 order in the first appeal of this case denying them leave to file these very same documents.

The apparent motive for Appellants' extraordinary efforts to add these irrelevant documents to the record is to create a permanent repository of discovery materials that Appellants have been ordered to return to the Appellees. Appellants fancy themselves internet "ecclesiastical journalists," and used their status as defendants in this litigation to obtain documents for extra-litigation purposes. Having won a limited right to see these materials, they don't want to give them up

merely because the lawsuit ended.

Appellees therefore opposed the latest effort by the Appellants to sneak these documents into the record, and made a request for their attorneys' fees because, after three failed attempts, Appellants should have known better than to try again. Appellants respond that it is the *Appellees'* position that is so frivolous that it merits an award of sanctions. Appellants' motion for sanctions should be denied.

REPLY TO FACT SECTION

Appellees demonstrated in their fact section that the exhibits that are subject to the motion have been rejected for filing twice in the district court and once in this Court. Appellants respond that 33 pages were previously filed under seal as part of another exhibit relating to a matter that is not challenged on appeal, but appear to concede that the rest are not found in the record.

A. Sealed Exhibits 1 – 33.

Appellants originally described all of the exhibits they wished to file under seal as documents that were "offered to the lower court," but not actually filed, in connection with electronic docket entries 153 and 173. (*See* Defendants' Motion to File Under Seal, p. 1). It is a matter of record that the district court denied Appellants' motions to file those documents, so they never became part of the district court record. (*See* Electronic Order by Judge Saylor dated 4/15/2009 and

Doc. 193).

Now, however, Appellants have changed their tune. They claim that 33 pages (of the thousand-plus pages that they move to file under seal) happened to be part of an exhibit that was filed under seal with the district court in connection with a motion. (Brief p. 1). Specifically, they say that Sealed Exhibits 1-33, were filed in the district court on July 21, 2008 as part of a different filing under seal in the district court, Docket No. 93. Appellants say that because these 33 pages were filed in the district court under seal in connection with an order (which is not challenged on appeal), they ought to be allowed to file the same documents under seal now.

Upon investigation, Appellants are correct in their assertion that the 33 pages designated as Sealed Exhibits 1-33 were in fact part of a larger exhibit that was filed under seal in the district court as Doc. 93. Doc. 93 was filed as part of Appellants' opposition to a motion that the Appellees' had filed seeking protection from Appellants' abusive discovery requests. (*See* Doc. 74). The magistrate judge granted Appellees' motion and struck Appellants' discovery requests in their entirety. (Doc. 106). Appellants did not contest this order below and have not designated it as part of their appeal; thus, Doc. 93 is not relevant to the appeal and the 33 pages of it that Appellants wish to file again should not be allowed simply because they were coincidentally filed in the district court in connection with a

controversy that is no longer live.

B. Sealed Exhibits 34-153, 156-158.

Appellants next offer a set of records that they characterize as pertaining to "Plaintiffs' wrongful termination of Trust Services employees who blew the whistle regarding misconduct…" (Brief p. 2). Deceptive statements like this contaminate much of the Appellants' writings. The Court should be aware that the only evidence in the record regarding the terminated Trust Services employees is that they filed charges of wrongful termination with California authorities and the U.S. Equal Employment Opportunity Commission; the charges were investigated and dismissed for insufficient evidence to believe that wrongdoing had occurred. (Doc. 123 – Affidavit of Dr. Walt Thompson at ¶ 6). No contrary evidence was ever offered or received below.

Appellants admit that these documents – Sealed Exhibits 34-153 and 156-158, were merely *proferred* to the district court in connection with a motion to file under seal. They were not actually filed with the district court. (Brief p. 2). Thus, the Appellants seek in substance to enlarge the appellate record to include 121 pages that are found nowhere else in the district court record.

Having been told several times that they may not file these documents, Appellants try to re-interpret this Court's order of December 4, 2009 denying them leave to supplement the appellate record as instead *inviting* them to file these

documents. (Brief p. 2). The tortured analysis is based on language in the Court's December 4 order indicating that this Court mistakenly believed that the documents had been "submitted" to the district court after the original Notice of Appeal, and were therefore not part of the record for the first appeal but would be part of the record for the second appeal. In fact, the documents were offered but not filed with the district court because local rules require that leave be sought and granted prior to filing anything under seal. (U.S. District Court, Dist. of Mass., Local Rule 7.2(d)). Thus, in the district court the Appellants did not file the actual documents themselves, and the dicta indicating that the records would be part of the record for the second appeal was in error.

Instead of correcting this Court's misunderstanding that these documents had already been filed in the district court, Appellants now exploit it. They pretend that the Court's order denying them permission to file these documents in the first appeal is an invitation to file them now because "this Court has already determined that the documents in question … 'are part of the record on appeal.'" (Brief p. 3). This absurd analysis fails to account for the fact that this Court denied leave to enlarge the record to include these records. Merely saying that these documents are in the record does not make it so.

C. Sealed Exhibits 154-155, 159.

Appellants appear to concede that Sealed Exhibits 154-155 and the CD

containing more than a thousand pages of raw discovery materials labeled as Sealed Exhibit 159 have not been previously filed with the district court of this Court. (Brief p. 3). These documents are also not presently in the record.

D. "The Pickle Affidavit."

Finally, Appellants concede that the Pickle Affidavit filed in connection with the motion to file under seal is not found elsewhere in the record, except in connection with the denied motion made in this Court to file under seal. (Brief p. 3). This document is claimed to be the affidavit that Appellants wanted to file in the district court to explain the relevancy of the excluded exhibits, but which the district court denied them leave to file. In other words, it is something outside the district court record that did not form the basis for the issues now on appeal.

Appellants quote email correspondence with the undersigned in which the undersigned cautioned them against referring in their public court filings (and incessant internet chatter) to discovery materials produced under the protective order. (Brief p. 3). Appellants pretend that this correspondence shows that Appellees *wanted* these documents to be filed under seal. In fact, all it shows is that Appellees wanted Appellants to stop referring publicly to information that was subject to the protective order.

RESPONSE TO "ADDITIONAL RESPONSE TO PLAINTIFFS' FACTS AND OTHER RELEVANT FACTS."

Appellants include a number of additional assertions in their brief beginning at p. 5, which will be briefly answered.

A. Appellants' Contention that "Plaintiff's Counsel Knew SE 1-33 Was Filed Below."

First, Appellants assert that the undersigned "knew SE 1-33 was filed below" and is therefore guilty of "intentionally trying to exclude filed material from the record on appeal." (p. 5). This is an exceptionally silly contention on its face because the record on appeal is determined by Fed. R. App. P. 10, not by counsel for the parties. Appellants' contention appears to amount to this: The undersigned should have figured out on his own that SE 1-33 were the same pages that were filed in the sealed exhibit designated as Doc. 93, even though Appellants were apparently unaware of that fact and characterized these pages as documents that the district court had excluded from the district court record.

Appellants do not explain why it should have been obvious that SE 1-33 was already in the district court record. Their moving brief did not mention that fact, and in fact stated that the records were part of exhibits that had been rejected for filing. Further, Appellants did not designate Doc. 93 either in their appendix or their addendum, nor did they appeal the decision that Doc. 93 related to. Clearly it was not obvious to Appellants either that SE 1-33 was already in the record as part

of Doc. 93, or they would have simply designated Doc. 93 for inclusion in the appendix rather than bringing a motion to file documents that they believed were not presently in the record.

B. Appellants' Contention that "Plaintiffs' Counsel Knew What the December 4, 2009, Order Stated."

Appellants go to the unnecessary trouble of quoting from a brief authored by the undersigned to prove that he knew what the Court's December 4, 2009 order said. (Brief at p. 6). The Court may be assured that the undersigned does in fact read orders issued in this case. This concession does not mean, however, that this Court's order denying Appellants leave to enlarge the record is in fact an order to enlarge the record.

C. Appellants' Assertion That They "Manifested Due Diligence."

Appellants then offer an utterly impenetrable explanation (supported by an equally cognitively challenging affidavit) for their failure to "comply with the court's order," which to them means their failure to file the documents that they were expressly forbidden from filing until the present motion. (Brief p. 6). Recall that in the topsy-turvy world of the Appellants, this Court's December 4 order denying them leave to file documents under seal in the first appeal means that they *should* file the documents in the second appeal. Whether Appellants lacked diligence is beside the point: they filed documents that they were ordered not to file.

D. Appellants' Assertion That "Plaintiff's Counsel was Given Notice."

Appellants next quote themselves in an exchange of email correspondence with the undersigned in which they purported to cite authorities indicating that "the admissibility of excluded evidence cannot be reviewed if that evidence is not included in the record on appeal." (Brief p. 7). They apparently think that providing notice to the undersigned of their incorrect legal position supports their claim for sanctions.

But, as they have been told before, Appellants misconstrue the cases they cite. For example, in *Chicago & Eastern Illinois R.R. Co. v. Southern Ry. Co.*, 261 F.2d 394, 402 (7th Cir. 1958), a party challenged the district court's exclusion of an exhibit from evidence during a trial. The court of appeals said that because the proferring party had not included the exhibit in the appellate record, the decision as to its admissibility could not be reviewed. In other words, at some point the evidence was before the district court, but the appellant had not taken steps to preserve it and present it to the appellate court. The other case cited by the Appellants, *Texas & Pacific Ry. Co. v. Buckles*, 232 F.2d 257, 261 (5th Cir. 1956), is substantially similar – the appellate court could not review the admissibility of a trial exhibit because it was not presented on appeal. There was no suggestion in either case that the exhibit was never part of the district court record.

Here, by contrast, the Appellants are trying to submit to this Court evidence

that was never in the district court record, i.e., evidence that the district court itself did not see and did not rely upon in making the rulings challenged on appeal. To review evidence that the district court never saw would make this Court one of original jurisdiction, rather than a reviewing court. It is axiomatic that the record on appeal is what the district court had before it when it made the rulings challenged on appeal. Fed. R. App. P. 10(a); *see also Commonwealth v. United States Veterans Admin.*, 541 F.2d 119, 123 n. 5 (1st Cir. 1976) (striking portions of appendix that were not part of district court record.). Appellants have been educated about this concept any number of times, including by this Court in the December 4 order, but persist in trying to file these documents.

E. Appellants' Assertions of "Plaintiffs' Ongoing Campaign of Harassment and Concealment."

Finally, Appellants complain that they have been subjected to a "campaign of harassment and concealment." (Brief p. 7). They were not. The evidence of supposed harassment is the original cease and desist letter issued several years ago, before suit began, in which former counsel for the Appellees demanded that Appellants stop defaming them. Appellants say they found this letter "intimidating." Clearly it was not intimidating enough. Appellants have not been subjected to harassment beyond the inconvenience inherent in litigation.

Appellants' evidence of a supposed "campaign to conceal" is the Appellees' designation of its business records as confidential and subject to the protective

order issued in the case, and some of the correspondence issued to the Appellants to caution them against publicizing, in their various internet forums, the contents of records that had been designated confidential when it appeared that they were violating the protective order.

The protective order in force in this case included procedures for challenging the other party's designation of confidential records, but Appellants did not avail themselves of those procedures. When the case ended, Appellees moved for the return of all documents designated as confidential under the protective order, and the district court granted the motion. (Electronic Clerk's Notes of 10/30/2008). Thus, Appellants' contention that Appellees' designation of discovery materials as confidential is improper amounts to a collateral attack – advanced for the first time after the case was dismissed and while it was on appeal – on the district court's order that these materials be returned to Appellees. The issue has already been litigated and decided against Appellants. They are not free to re-cast the Appellees' efforts to preserve the confidentiality of their business records as a "campaign of concealment."

ARGUMENT

Appellants argue that their motion to file under seal is not vexatious because this Court's December 4 order, in their view, constitutes "established precedent" that the records are already part of the record on appeal. (Brief p. 10). Obviously

that is not true, or there would be no need to enlarge the record on appeal to include these documents. The argument is childish. The prior ruling was that these documents could *not* be added to the record on appeal. Appellants' efforts to construe that ruling to mean the opposite is clearly vexatious.

Appellants persist in arguing that this Court must review the excluded exhibits in order to determine whether they were properly excluded. Again, Appellants authorities for that proposition deal with evidence excluded from admission during a trial, not evidence that was never filed with the district court at all. Per Fed. R. App. 10(a), this Court will review the district court's rulings using the same evidence that the district court had available to it: Namely, the description of the evidence in the Appellants' motion to file the documents under seal. That description was sufficient for the district court to conclude that the evidence was irrelevant. This Court will review that decision on an abuse of discretion basis, using the same evidence available to the district court. In other words, this Court's review will not include the excluded documents themselves, because the district court did not rely on the excluded documents themselves for the ruling under review.

This is at least the fourth time that Appellees have fought to prevent Appellants from indiscriminately filing with the Court raw discovery material consisting of their business and tax records. Appellees successfully opposed the

admission of these records at least twice in the district court. (*See* Doc. 158 and 174). The district court ordered Appellants not to file these documents. (*See* Electronic Order by Judge Saylor dated 4/15/2009 and Doc. 193). When Appellants made a motion in the prior appeal of this matter to enlarge the record to include these documents, Appellees' for a third time successfully opposed the motion. (*See* Appellees' Response to Appellants' Motion to Enlarge the Record and to File Under Seal, Doc. ID 5396410 (filed in Case No. 08-2457 on 11/27/2009)). This Court denied Appellees' motion, thus keeping the documents out of the record. (Order of Court Entered 12/4/2009 (Case No. 08-2457, Entry ID No. 5398481).

The context of this motion -- easily forgotten amidst the impenetrable ranting of these Appellants -- is that Appellants have appealed the voluntary dismissal of a lawsuit against them in which they had made no affirmative claims of any kind. Failing to appreciate the distinction between an appellate court and a district court, Appellants filed, simultaneously with their principal brief, a motion to expand the appellate record to include evidence they obtained under a protective order which supposedly shows that the original claims against them lacked substantive merit, but which in fact shows no such thing and in any case was never presented to the district court and formed no basis for the district court's orders here under review. Now, Appellants seek sanctions against Appellees for opposing

their motion to expand the appellate record and seeking sanctions because the motion is vexatious.

The timing of this extraneous litigation is not accidental: It occurs during the 30-day period for preparation of Appellees' principal brief. Although they admit knowing in advance that they wanted to file the documents under seal and that Appellees disputed their right to do so (*see* Pickle Aff. [12/30/2010] ¶ 1; Pickle Aff. [12/16/2010] ¶ 2), Appellants did not move for leave to do so until the date their principal brief was due. When Appellees predictably opposed the motion, Appellants filed the current 21-page motion and four-page affidavit, along with a 10-page reply brief, just *four days* later. Thus, they evidently planned this skirmish in order to divert Appellees' focus from the primary brief.

CONCLUSION

Appellants' motion for sanctions is even more vexatious and unreasonable than the underlying motion to admit documents, which have thrice been excluded from the record. Appellants' abuse of the litigation process will not stop until this Court requires them to bear the financial burden of their frivolous litigation conduct. If ever there was a case for sanctions under 1st Cir. Loc. R. 38.0 for vexatiously increasing litigation costs, this is it.

Respectfully submitted,

Dated:

By s/ M. Gregory Simpson

M. Gregory Simpson
Meagher & Geer, P.L.L.P.
33 South Sixth Street, Suite 4400
Minneapolis, MN 55402
Telephone: (612) 338-0661

John P. Pucci, BBO #407560
J. Lizette Richards, BBO #649413
Fierst, Pucci & Kane, LLP
64 Gothic Street
Northampton, MA 01060
(413) 584-8067

Attorneys for Appellees
Three Angels Broadcasting Network
and Danny Lee Shelton

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