No. 08-2457

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

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

Plaintiffs-Appellees,

v.

GAILON ARTHUR JOY; ROBERT PICKLE,

Defendants-Appellants.

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

DEFENDANTS' MOTION TO ENLARGE THE RECORD, AND DEFENDANTS' MOTION TO FILE UNDER SEAL

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INTRODUCTION

Pursuant to Fed.R.App.P. 10(e) or the court's equitable powers, Defendants move the Court to enlarge the record to include the following materials, and request the Court to take judicial notice of the incriminating facts within these materials; pursuant to Fed.R.App.P. 11(c)(2), Defendants move the Court to permit the filing of the following materials under seal:

(a) Selected documents produced by Plaintiffs' co-conspirator, Remnant Publications, Inc. ("Remnant") ("Remnant documents"), pertaining to private inurement, and royalties and kickbacks paid to Danny Lee Shelton ("Shelton"). This income was not reported in Shelton's divorce-related proceedings, and was not acknowledged on the 2006 IRS Form 990 filed by Three Angels Broadcasting Network, Inc. ("3ABN"). (Record on Appeal Docket Entry ("RA") 81-3 pp. 14–15; RA 161 pp. 17–18; RA 63-32 p. 19 at ln. 75c, p. 21).

(b) Selected documents produced by 3ABN pertaining to allegations against Leonard Westphal ("Westphal") ("Westphal documents"). These documents demonstrate whether 3ABN's administration believed that the allegations against Westphal were true, whether the investigation thereof by Mollie Steenson ("Steenson") was a sham, and whether the trust services whistleblowers were wrongfully terminated.

These documents decisively resolve key issues in the instant appeal.

Pursuant to Fed.R.App.P. 11(c)(2), Defendants request that the above

materials, "Expanded Record" ("XR"), be provisionally filed under seal, along with the Affidavit of Robert Pickle ("Pickle Aff.") which accompanies this motion, and which explicitly describes the above materials.

Plaintiffs allegedly designated these materials confidential. Due to D.Mass.Loc.R. 7.2, which prohibits filing under seal without first obtaining an order of the court, Defendants have repeatedly been prevented from bringing the information in these materials before the district court.

RELEVANT FACTS

Plaintiffs' complaint puts at issue, *inter alia*, Shelton's royalties, Shelton's private inurement, Shelton's divorce, Linda Shelton's termination, Shelton's extra-marital relationships, Shelton's perjury in his divorce-related proceedings, the termination of the Trust Services whistleblowers, and Plaintiffs' non-compliance with IRS regulations and anti-discrimination legislation. (RA 1 pp. 12–15).

On October 23, 2008, 3ABN filed a motion seeking dismissal based on the unsupported hearsay assertions that 3ABN had received favorable rulings from the IRS and the EEOC on a small subset of the allegations in Plaintiffs' complaint. (RA 123 pp. 2–3). Defendants believe these assertions to be fallacious, as demonstrated by, *inter alia,* the Remnant and Westphal documents.

The confidentiality order in the underlying case requires giving 7-days notice to the designating party before using confidential material in court proceedings. (RA 60 p. 4). Fed.R.Civ.P. 6 would seem to require adding 3 days if

service is not made in person, and at least 2 days to exclude intervening Saturdays and Sundays. But there were only 7 calendar days between October 23 and the status conference of October 30, at which the underlying case was dismissed.

Still, Defendants promptly commenced negotiations by emailing Remnant's counsel on October 23, 2008, but did not hear back by U.S. mail until October 27, in which letter Remnant informed Defendants that Remnant was not the designating party. (RA 171 p. 8; RA 171-24; RA 155-3). Also on October 27, a letter was received from Plaintiffs' counsel stating that Plaintiffs were the designating party and that negotiations would have to be commenced with Plaintiffs. (RA 171 p. 8; RA 162-9). With but three days to go before the status conference, and with 255 pages of material to draft, organize, and/or assemble (RA 126 to RA 127-46), there was no time to begin negotiations anew.

Rather than violate the court ordered confidentiality order by disclosing the Remnant and Westphal documents, Defendants instead requested an evidentiary hearing in their opposition to the motion to dismiss, at which Defendants intended to present this critical material to the district court. (RA 126 pp. 20, 4). But the underlying case was dismissed without the requested evidentiary hearing.

The record explicitly demonstrates that Defendants were endeavoring to enter the Westphal documents into the record. Defendants were preparing a motion for leave to issue a subpoena in order to verify whether Plaintiffs had produced two documents authored by Walter Thompson ("Thompson") to the EEOC. (RA 126

pp. 2–3, 15; RA 152 p. 2). Conferring with Plaintiffs' counsel about the use of the Westphal documents as exhibits connected with that motion resulted in Plaintiffs' counsel filing a motion on September 30, 2008. (RA 112). Since Defendants could not complete their own motion before Plaintiffs filed their motion to dismiss, Defendants made as clear as possible in their opposition, without disclosing the information in the Westphal documents, that Defendants wanted to bring this information before the district court at an evidentiary hearing. (RA 126 pp. 17, 20).

On October 29, 2007, Thompson asserted:

> Before our attorneys agreed to represent us in suit, they had a thorough review of the ministry, including the finance department, and gave us a clean bill of health.

(RA 127-6 p. 1). Attorney Gerald Duffy echoed that sentiment on July 25, 2008. (RA 96-2). Thus, the Remnant documents are *prima facie* evidence of abuse of process and malicious prosecution by Plaintiffs' counsel: Counsel knew or should have known about the financial issues revealed in the Remnant documents[1] before commencing the underlying litigation. (RA 126 p. 4; RA 149 p. 3).

In Plaintiffs' response to Defendants' motion for costs, Plaintiffs laid out a case for having not committed abuse of process and malicious prosecution, and used that as a reason for the district court's denial of Defendants' motion. (RA 140). To rebut these arguments, Defendants sought a second time to present the

[1] Many of the Remnant documents are invoices to 3ABN and records of payments to Shelton. Thus, a thorough review of Plaintiffs' finances would have revealed the problems.

Remnant documents to the district court by seeking leave to file them under seal in connection with their reply memorandum. (RA 153).

On April 13, 2009, the district court ruled on the motion for costs two days before ruling on the motion to file under seal, suggesting that the district court had not considered Defendants' reply memorandum. (RA 166; Electronic Order of April 15, 2009). Defendants therefore sought reconsideration of the motion to file the Remnant documents under seal, and amendment of the district court's finding that the Remnant documents were not relevant, which set aside an earlier finding that the Remnant documents were clearly relevant. (RA 169; RA 170 p. 13).

Defendants also sought to file under seal the Westphal documents on the grounds of mistake, inadvertence, surprise, excusable neglect, and due process. (RA 173; RA 170 pp. 17–18). (The other documents Defendants sought to file under seal at that time might more appropriately be the topic of a future appeal.) But on October 26, 2009, the motions to reconsider and amend findings, and the new motion to file under seal were denied.

ARGUMENT

I. THIS COURT MAY ENLARGE THE RECORD

A. Under Fed.R.App.P. 10(e) or the Court's Equitable Powers

Appellate courts are ordinarily reviewing courts, but they may resolve issues not passed on below, such as where the proper resolution is beyond any doubt, or injustice might otherwise result. *Singleton v. Wulff*, 428 U.S. 106, 121 (1976).

Belber v. Lipson suggests that under Fed.R.App.P. 10(e), this Court may expand the record "to consider documents that the district court had an opportunity to examine." 905 F.2d 549, 551 n.1 (1st Cir. 1990). The district court had three opportunities to examine the Remnant documents, and two opportunities to examine the Westphal documents, and declined each time. (*supra* 3–5). Since the first opportunities for each category of documents was in connection with Plaintiffs' motion to dismiss, the documents are certainly relevant to the instant appeal. The last opportunity for each was declined on October 26, 2009, and Defendants seek the relief sought in this motion soon after. (Pickle Aff. p. 1 at ¶ 1).

Regarding under what authority an appellate court may supplement the record with material not considered by the lower court, the circuits are divided. The 2nd and 3rd Circuits have cited Rule 10(e). *United States v. Aulet*, 618 F.2d 182, 187 (2nd Cir. 1980); *Castle v. Cohen*, 840 F.2d 173, 180 n. 12 (3d Cir.1988). Other circuits have instead cited the court's inherent equitable powers. *Schwartz v. Millon Air Inc.*, 341 F.3d 1220, 1225 n.4 (11th Cir. 2003); *Thompson v. Bell*, 373 F.3d 688, 690-691 (6th Cir. 2004) (citing *United States v. Kennedy*, 225 F.3d 1187, 1192 (10th Cir. 2000); *Gibson v. Blackburn*, 744 F.2d 403, 405 n. 3 (5th Cir.1984); *Turk v. United States*, 429 F.2d 1327, 1329 (8th Cir.1970); *Gatewood v. United States*, 209 F.2d 789, 792-93 & n. 5 (D.C. Cir.1953)).

In the interests of justice, the record has been supplemented when a party has been less than forthcoming with the court. *Dakota Indus., Inc. v. Dakota*

Sportswear Inc., 988 F.2d 61, 63-64 (8th Cir. 1993). Plaintiffs falsely asserted that the Remnant documents have "no relevance to the underlying lawsuit" (RA 158 p. 2), an utter impossibility. (RA 161 p. 11). Even if the Remnant documents didn't reveal payments to Shelton, they would still be relevant to the question of Shelton's truthfulness when reporting his income in his divorce-related proceeding. (RA 190 p. 10). But smoking guns found among the Remnant and Westphal documents (Pickle Aff. pp. 7–9, 18–21) conclusively demonstrate that Plaintiffs' unsupported assertions of exoneration by the IRS and the EEOC as a basis for voluntary dismissal were certainly less than forthcoming, if not outright deceptive.

The First Circuit may consider enlarging the record when extraordinary circumstances are present. *United States v. Muriel-Cruz*, 412 F.3d 9, 12 (1st Cir. 2005). In this instance, documents which decisively determine issues in this appeal were omitted from the record even though Defendants repeatedly sought to have them included. (*infra* 9–14; *supra* 3–5).

Factors that have been considered by the 11th Circuit when considering supplementing the record include whether (a) the proffered material would establish beyond any doubt the proper resolution of the pending issues, (b) remanding the case for the sole purpose of reviewing the additional facts would be contrary to the interests of justice and judicial economy, (c) an evidentiary hearing is unneeded, and (d) opposing counsel knew of the existence of the documents in question. *Dickerson v. State of Alabama*, 667 F.2d 1364, 1367–1368 (11th Cir.

1982); *Cabalceta v. Standard Fruit Co.*, 883 F.2d 1553, 1555 (11th Cir.1989).

However, such factors are only guidelines, and "all of the factors, issues, and circumstances of each request" to expand the record should be evaluated. *Cabalceta v. Standard Fruit Co.*, 883 F.2d at 1555. "Even when the added material will not conclusively resolve an issue on appeal, we may allow supplementation in the aid of making an informed decision." *Schwartz v. Millon Air Inc.*, 341 F.3d 1220, 1225 n.4 (11th Cir. 2003).

Defendants did not fail to provide complete evidence to the lower court, and thus enlargement of the record is not barred on such grounds. *Brown v. Home Ins. Co.*, 176 F.3d 1102, 1104–1105 n.2 (8th Cir. 1999).

B. By Way of Judicial Notice

This Court at any stage of a proceeding may take judicial notice of adjudicative facts that are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed.R.Evid. 201.

Since the Remnant and Westphal documents were produced by Plaintiffs and their co-conspirator themselves, the accuracy of incriminating facts in those documents cannot reasonably be questioned. Given Plaintiffs and their co-conspirator's propensity to conceal evidence of wrongdoing, they would not have falsified the evidence of wrongdoing comprised of the incriminating facts in these documents. Thus, this Court may take judicial notice of such incriminating facts.

Judicial notice by an appellate court has been deemed inappropriate when a

party deliberately withholds the evidence in question from the lower court. *Tamari v. Bache & Co. S.A.L.*, 838 F2d 904, 907 (7th Cir. 1988). Such is certainly not the case here. (*supra* 3–5).

II. THESE DOCUMENTS DECISIVELY RESOLVE KEY ISSUES IN THE APPEAL

A Rule 41(a)(2) dismissal is not one of right, and thus Plaintiffs must give reasons for such. Plaintiffs' reasons for voluntary dismissal were based solely on Thompson's hearsay affidavit. (RA 123). Thompson asserted, without evidence, that the IRS criminal investigation and the EEOC investigation of Plaintiffs had both terminated favorably. (*Id.* pp. 2–3). The Remnant and Westphal documents demonstrate the fallacious nature of the reasons for dismissal, and thus decisively address issues in the instant appeal.

A. District Court's Ruling on Motion for Sanctions Raises Doubts About Plaintiffs' Stated Reasons

Defendants moved the district court for sanctions against Plaintiffs for Plaintiffs' May 11, 2009, response memoranda which were "riddled with misstatements of fact that have no evidentiary support," some misstatements being "demonstrably intentional." (RA 183 p. 1). On October 26, the district court found:

> ... that all of the disputed assertions fall within the bounds of permissible zealous advocacy, and none are sufficiently problematic to warrant the imposition of sanctions.

(RA 193 p. 3). While a future appeal would examine whether or not the assertions stayed within the bounds of permissible zealous advocacy, the point to note is that

the district court found that some or all of the assertions were problematic, though not "sufficiently problematic" to warrant sanctions.

In connection with Defendants' April 27, 2009, motions to reconsider, Defendants outlined examples of Plaintiffs' fraud and misrepresentation in several filings. (RA 170 pp. 7–10). In Plaintiffs' May 11, 2009, response, Plaintiffs asserted, "... every one of which is said to demonstrate fraud, but every one of which is demonstrably accurate." (RA 175 p. 9). Defendants dispute this assertion. (RA 184 pp. 7). Therefore, if Plaintiffs' disputed assertion of May 11 is problematic, then the examples of fraud and misrepresentation Defendants gave on April 27, which Plaintiffs were referring to in their assertion, are also problematic.

Many of the examples of fraud and misrepresentation Defendants gave on April 27 were taken from Plaintiffs' November 26, 2008, opposition to Defendants' motion for costs. (RA 170 pp. 7–9). And one of those examples was Plaintiffs' statement that Plaintiffs obtained "favorable rulings from the governmental agencies that had been investigating the Plaintiffs' conduct," and that this justified Plaintiffs' motion to dismiss. (RA 140 p. 6; RA 170 p. 9).

Thus, the district court's finding that disputed May 11 assertions were problematic also calls into question Plaintiffs' assertions regarding the outcomes of the IRS and EEOC investigations. These latter assertions, made in connection with Plaintiffs' motion to dismiss, are crucial issues in the instant appeal. (Brief of the Defendants-Appellants ("DB") pp. 30–31, 38, 40–42). The Remnant and Westphal

documents decisively address these matters, and therefore prove the insufficiency of Plaintiffs' reasons for dismissal.

B. The Remnant Documents vs. Exoneration by the IRS

Shelton specifically asserted that the IRS had investigated his "publishers" as well as himself, and that the entire IRS investigation resulted in complete exoneration of accusations against him of "financial mismanagement" and "personal inurement." (RA 109-16). But Plaintiffs have never provided any verifiable evidence of exoneration, or that the IRS investigation has ended.

On the other hand, Defendants have provided evidence that: (a) Shelton made between $749,706 and $808,614 from 2005 to 2007 from his book deals, largely from purchases by 3ABN, and (b) any payments from Remnant to Shelton for sales of his PPPA booklets to 3ABN constituted kickbacks which, according to Shelton's tax returns, could amount to 27% to 32% of the price 3ABN paid. (RA 96-9 p. 3; RA 96-10 p. 3–4; RA 96-11 p. 54; RA 154 p. 3). Besides Shelton's violations of IRS regulations regarding the 1998 house deal and 2003 horse(s) donation (DB 10–11), Defendants have also pointed out that Shelton failed to acknowledge his royalty and kickback income via DLS on 3ABN's 2006 IRS Form 990. (RA 161 pp. 17–18; RA 63-32 p. 19 at ln. 75c, p. 21). All this calls into question Plaintiffs' unsupported assertion of exoneration by the IRS.

The Remnant documents decisively address the issue of the possibility of IRS exoneration, since they prove conclusively that Shelton received kickbacks and

sought to conceal his income. One detail in particular would be of special interest to the IRS, destroying any chance of exoneration. (Pickle Aff. pp. 7–9 at ¶¶ 29, 32).

C. The Westphal Documents vs. Exoneration by the EEOC

The pre-dismissal record contains documents describing allegations raised by the Trust Services whistleblowers, Trenton Frost, Oriana Frost, Ervin Thomsen, and Kathy Bottomley, and former employee Hope LeBrun. These allegations include "rage, screaming at staff, non-staff, and potential clients, sexual harassment [including indecent jokes], racism (including in employment matters), poor job performance, padding his expense reports, falsifying timesheet(s), and private inurement." (RA 127 p. 5; RA 127-20 to RA 127-27). Also in the record is the 1992 police report when Westphal was arrested for felonious spousal battery after allegedly fracturing his then wife's foot. (RA 127-29; RA 127 p. 5).

Since some of these allegations fall outside the interests of the EEOC, an alleged determination of insufficient evidence would not exonerate Plaintiffs' handling of all of the allegations against Westphal. Even so, Defendants maintain that the Westphal documents demonstrate probable cause of a conspiracy to wrongfully terminate the whistleblowers over issues the EEOC does concern itself with, and that Plaintiffs must have purposely failed to produce these documents to the EEOC. (Pickle Aff. pp. 18–21). And thus, even when the issues are narrowed to Plaintiffs' liking, the Westphal documents decisively demonstrate the fallacious nature of one of the key reasons Plaintiffs gave for dismissal.

D. Thompson's Veracity Called into Question

Two of the Westphal documents were authored by Thompson, and their meaning is clear. (XR 176–177). Thus Thompson, in his affidavit in support of the motion to dismiss, came to the district court with unclean hands, and was less than forthcoming as to the termination of the whistleblowers. For many years Thompson has been Shelton's co-conspirator, and a principal obstacle to necessary reforms at 3ABN. The Westphal documents impeach Thompson's testimony. (cf. DB 38–39).

But both the Remnant and Westphal documents impeach Thompson in yet another way, indirectly. On July 8, 2007, Thompson wrote:

> We have nothing to hide. We want truth to be known. The law suit does nothing to hide truth. ... This is NOT about hiding truth, and ALL about exposing it as rendered under oath.

(RA 114 p. 2). On July 16, 2007, Thompson wrote:

> The law suit has only one purpose, i.e., to expose the truth at a time when false accusations are spreading around the world against 3abn in ways that are seriously affecting our ability to fulfill the mission we have been called to do.

(RA 115 p. 1).

If Plaintiffs attempt yet again to hide the truth by opposing the instant motions, Plaintiffs will again demonstrate Thompson's lack of veracity by giving evidence that his assertions of July 2007 were lies. (cf. RA 154 pp. 3–4). Thompson's affidavit in support of the motion to dismiss would therefore be unreliable, if for no other reason than Thompson's propensity to prevaricate.

E. The Necessity of an Evidentiary Hearing

Taking judicial notice of the incriminating facts in the Remnant and Westphal documents calls into question Thompson's veracity and Thompson's assertions of exoneration by the IRS and EEOC. (*supra* 11–13). This in turn decisively establishes that an evidentiary hearing before granting Plaintiffs' motion to dismiss was necessary, another crucial issue in the instant appeal. (DB 42).

F. Spoliation of Evidence

Defendants have put at issue in the instant appeal Defendants' concerns regarding potential spoliation of evidence by Plaintiffs. (DB 55–56). Defendants have documented allegations of document fraud, destruction of evidence, and alteration of accounting methods. (*Id.*; DB 15; RA 177 p. 7; RA 178 pp. 2–6). The Remnant and Westphal documents conclusively demonstrate that Defendants' concerns are definitely warranted. (Pickle Aff. pp. 7–10, 13–14, 19–21).

III. PLAINTIFFS NEED NOT REBUT THESE DOCUMENTS

General rules "should not be applied where [their] underlying justifications are absent." *Singleton v. Wulff*, 428 U.S. at 114. Based on the factors given in *Dickerson* and *Cabalceta* (*supra* 7–8), one of the justifications for the general rule that appellate courts only consider the record extant at the time of the lower court's decision is that opposing parties must have opportunity to rebut the proffered evidence. But in this instance, the Remnant documents were produced by Remnant, Plaintiffs' co-conspirator, Plaintiffs had the Remnant documents by September 24,

2008, and the Westphal documents were produced by Plaintiffs themselves. (RA 155-2; RA 178-17; RA 81-2 p. 120). Plaintiffs have never disputed the authenticity of the information in either set of documents.

Defendants first raised the issue of Shelton's kickbacks from Remnant on August 20, 2008. (RA 96-9 pp. 3, 10). Plaintiffs belatedly explained on July 8, 2009, without evidentiary support, that Remnant had become the new publisher of Shelton's PPPA booklets in 2005, and that thus the payments in question were royalties, not kickbacks. (RA 188 pp. 5–6). But this assertion is contradicted by the fact that PPPA published Spanish editions of two of the PPPA booklets in 2005, along with a fourth title by Shelton that same year, and by the fact that a website owned by PPPA still claims that PPPA is the publisher of these booklets. (RA 191-5 pp. 3–15, 19).

Since the documents' authenticity is undisputed, and no plausible explanation for the information from Plaintiffs has been forthcoming, it would be an unnecessary use of judicial resources to remand the case in order for Plaintiffs to rebut these documents in the trial court, with or without an evidentiary hearing.

IV. ENLARGEMENT WILL REMEDY DUE PROCESS DEFECT

D.Mass.Loc.R. 7.2 provides no process by which a party may disclose "confidential" information to the district court without first convincing the court to allow it to. Defendants cannot convince the court to that effect without being explicit, but are prohibited from being explicit unless they first convince the court.

However, 1st Cir.Loc.R. 11(c)(2) permits the provisional filing of an affidavit or declaration under seal, allowing a party to explicitly state why the "confidential" information should be included. This might be necessary if a court is disinclined to take a party seriously, or if a confidentiality order is being used to perpetrate a miscarriage of justice. Rule 11(c)(2) thus supplies the due process ingredient that D.Mass.Loc.R. 7.2 lacks. Therefore, this Court by including the documents in question may cure the deprivation of Defendants' due process rights, potentially simplifying the appeal process.

V. ENLARGEMENT REMEDIES IN PART PREJUDICIAL EFFECT OF DISTRICT COURT'S SUPPLEMENTAL FINDINGS

Defendants take note that the district court supplemented the record on appeal with its orders of April 13 and 15, and October 26, 2009. (RA 167; RA 168; RA 194). While Defendants' right to appeal these orders has been noted by this Court (Order entered on Aug. 19, 2009), the disputed and prejudicial supplemental findings within those orders are already a part of the record on appeal.

The district court's electronic order of April 15, 2009, found that the Remnant documents are not relevant without the district court ever reviewing them as requested, even though these documents had already been found to be clearly relevant. (RA 127-38). The order of April 13 found that there was nothing in the record that *suggests* abuse of process and malicious prosecution, when Defendants had on the record, *inter alia*, asserted that the Remnant documents constituted

evidence of such. (RA 166 pp. 3–4; RA 126 pp. 4–5, 13–14). Especially in light of the utter impossibility of the Remnant documents being irrelevant (RA 161 p. 11; RA 190 p. 10), these findings appear to be plainly unreasonable.

If this Court is inclined to give the findings of these orders any deference in the instant appeal, then enlarging the record to include the Remnant and Westphal documents will help to offset the prejudicial effect to Defendants.

VI. REQUIRED INFORMATION FOR 1ST CIR.LOC.R. 11(c)(2)

A. Basis for Sealing

Plaintiffs designated the documents in question as confidential, and Defendants are therefore required to file them under seal.

B. Desired Duration of Sealing Order

The duration of the sealing order should extend until a court, be it this Court or another, determines that the materials do not qualify for such protection pursuant to ¶ 1 of the confidentiality order issued in the underlying case (RA 60 p. 2), or no longer should have that protection. At that point in time the materials should become part of the public record.

To qualify for protection under the confidentiality order, a document must contain "proprietary information, confidential business or commercial information, and/or trade secrets relating to [the designating party's] business," information "not generally known or readily available to the public." (*Id.*).

On October 24, 2008, Remnant denied being the designator of

confidentiality for the Remnant documents, and Plaintiffs claimed to be the designators. (RA 155-3; RA 162-9). However, DLS, a separate legal entity not a party to the underlying litigation, has never objected to the filing of any Remnant documents, whether sealed or unsealed. (RA 154 p. 2). 3ABN and Shelton, individually, both lack standing to so object. (*Id.*). Plaintiffs tacitly acknowledged this legal difficulty when Plaintiffs later contradictorily asserted that Remnant had been the designator after all. (RA 158 p. 2). But neither DLS nor Remnant has remedied this defect since it was pointed out. There is therefore no legal barrier to the immediate unsealing of Remnant documents pertaining to DLS.

Most of the information within the Remnant and Westphal documents is more or less publicly available: (a) 3ABN annually files with the Illinois Attorney General the total amount of money it spends on Shelton's books. 225 ILCS 460/4. (RA 63-31 pp. 15, 19, 23, 28, 33). (b) Remnant's royalty payments to Shelton can be derived from Remnant's IRS Form 990's. (RA 154 p. 3). (c) Remnant's contracts are fairly standard, worded quite similar to PPPA's contracts which are already part of the public record. (XR 109–114, 120–122; RA 96-11 pp. 1–3, 12–13). (d) That Remnant did fulfillment for the *TCTR* books was freely admitted by 3ABN at the time. (cf. RA 81-2 p. 135; RA 185-13 p. 3). (e) The cover of *TCTR* was revised in order to advertise the fact that over 5 million were in print. (RA 162-8). (f) Plaintiffs have already admitted that Shelton received payments from Remnant for sales of Shelton's PPPA booklets. (RA 188 5–6). (g) The allegations

against Westphal, and questions about Steenson's investigation thereof, are already public record. (RA 127-20 to RA 127-27; RA 127-29; RA 127 p. 5).

Plaintiffs accused Defendants of defamation *per se*, and put at issue Shelton's royalties from Remnant and 3ABN's wrongful termination of the Trust Services whistleblowers. (RA 1 pp. 13–15). Plaintiffs therefore never had a legitimate expectation of confidentiality for the documents in question.

The Westphal documents contain nothing scandalous or embarrassing about the whistleblowers. (XR 176–178).

Defendants see no difficulty in the sealing order lasting only as long as this Court needs to determine whether the materials in question should or should not become public record. Defendants do not believe that Plaintiffs can object to this approach without again demonstrating Thompson's lack of veracity. (*supra* 13).

PRAYER FOR RELIEF

WHEREFORE, pursuant to Fed.R.App.P. 10(e) or the court's equitable powers, and 1st Cir.Loc.R. 11(c)(2), Gailon Arthur Joy and Robert Pickle pray the Court to enlarge the record to include the Remnant documents and the Westphal documents, to permit the filing of these documents and the accompanying affidavit under seal, to accept these documents and the accompanying affidavit provisionally under seal, to take judicial notice of the specific facts within these documents highlighted by the accompanying affidavit, and to grant whatever further relief this Court deems just and equitable.

Respectfully submitted,

Dated: November 17, 2009

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CERTIFICATE OF SERVICE

I, Bob Pickle, hereby certify that on November 17, 2009, I served copies of this motion, accompanying affidavit, and "Expanded Record" on the following parties and the Clerk of the Court of Appeals by way of U.S. mail:

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